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 JUSTICE SIR DAVID STEEL, JUSTICE SIR RICHARD FIELD AND H.E. JUSTICE OMAR AL MUHAIRI

BETWEEN

(1) RAFED ABDEL MOHSEN BADER AL KHORAFI

(2) AMRAH ALI ABDEL LATIF AL HAMAD

(3) ALIA MOHAMED SULAIMAN AL RIFAI

Claimants/Respondents

and

(1) BANK SARASIN-ALPEN (ME) LIMITED

(2) BANK J. SAFRA SARASIN LIMITED (formerly BANK SARASIN & CO. LTD)

Defendants/Appellants

Hearing: **27-30 September 2015 and 1 October 2015**

Counsel: Michael Brindle QC and Chloe Carpenter instructed by Al Tamimi & Co for the First Appellant

Hodge Malek QC and Yash Bheeroo instructed by Clifford Chance for the Second Appellant

Richard Hill QC and Sharif Shivji instructed by Hamdan Al Shamsi Lawyers and Legal Consultants for the Respondents

Judgment: **3 March 2016**

JUDGMENT

Summary of Judgment

This is an appeal against the judgment of the Deputy Chief Justice ("the judge") at the Court of First Instance.

The parties

The Claimants were Kuwaiti nationals, resident in Kuwait. They are referred to by their individual names or collectively as "the Claimants". The First Defendant, Bank Sarasin-Alpen (ME) Limited ("Sarasin-Alpen"), is a company incorporated in the Dubai International Financial Centre ("the DIFC") and regulated by the Dubai Financial Services Authority ("the DFSA"). The Second Defendant, Bank Sarasin & Co ("Bank Sarasin"), is a company incorporated in Switzerland - they are referred to collectively as the "Appellants."

Background

In the course of 2007 and early 2008, on the introduction of Sarasin-Alpen, the Respondents purchased structured financial products ("the Notes") from Sarasin-Alpen. The purchases were funded by loans made to the Respondents, in part by Al Ahli Bank Kuwait ("ABK") and in part by Bank Sarasin. The total amount expended by the Respondents in those purchases was very substantial - some US$200 million. In November 2008, Sarasin-Alpen made margin calls under the Notes which the Respondents did not meet. Bank Sarasin accordingly closed out the Notes with the consequence that the Respondents claimed to have sustained substantial losses. These proceedings were brought with the object of recovering those losses.

The Appeal

The Appellants made a myriad of complaints about the judge's conduct of the trial, his approach to his findings of fact and his alleged delay in finalising the judgment. The primary thrust of the appeal was an assertion that the judge failed to adopt the correct and conventional approach to analysing the witness evidence in respect of events which had occurred some years earlier. The complaint was that the judge failed to test the witness evidence against the contemporary documents, the probabilities and the motives of those concerned: in particular, in respect of the following:

Mr Walia's Evidence

Supplementing this complaint, the Appellants asserted that the judge made "excessive and unbalanced interventions during Mr Walia's evidence." This "serious procedural irregularity" was said to have undermined the judge's approach to the evidence.

In the Court of Appeal's judgment, the judge's occasional terse and somewhat impatient interventions were not unfair; nor did they betray bias or a closed mind. Rather, they reflected careful attention to the questions asked and answers given and demonstrated the judge's grasp of the issues.

The judge clearly formed the view that Mr Walia's evidence tended to be evasive and speculative and, in due course, so found. The judge's interventions, far from being "excessive, pejorative and unbalanced" were necessary and not unfair.

The thrust of any complaint that the judge did not assess the evidence of Mr Walia against the contemporary documents was somewhat bizarre. There were none - at least none focused directly on the meetings which led to the purchase of the Notes.

The Appellants' threshold ground of appeal that the judge wrongly rejected the evidence of Mr Walia failed. It equally followed that he was fully entitled to accept the evidence of the Respondents as to what was said at the relevant meetings and telephone conversations. Accordingly, the Court of Appeal concluded that the judge's findings as to what the Respondents identified as their investment objectives were unchallengeable: namely products which would guarantee 100% return on maturity of the capital invested, service of the loan on the borrowings from ABK and some surplus income.

The Claimants as Clients

As regards the Appellants' complaint that: "The Judge's decision that the First Defendant did not determine that any of the Claimants were clients within the meaning of COB (Conduct of Business) 3.2.2 was infected by errors of law and/or findings of fact that were perverse and/or against the weight of the evidence," the Court of Appeal found that the whole purpose of the AGBC (Additional General Business Conditions, Dubai International Financial Centre) forms was to enable Sarasin-Alpen to comply with the rules so that it could determine whether any or all of the Respondents were Clients. In reality none of the representations, warranties or confirmations were made (or confirmed) by the Respondents. This was, as the judge found, a deliberate failure to comply with the rules by Sarasin-Alpen. Like the judge, the Court of Appeal rejected the submission that by signing the AGBCs the Respondents were declaring that they fell within the definition of Client. Absent ticking a box, no declarations were made. Once the AGBCs fell away there was precious little if any material to allow Sarasin-Alpen to conclude that the Respondents were Clients properly so called in the lead up to the June meeting. Equally, the judge was right to reject the submission that on a proper analysis the Respondents were in fact Clients. In particular it was not arguable that they had experience and understanding of structured financial products.

The judge was also correct to reject the proposition that, because the Respondents had signed the form containing the Clause 7 declaration of consent to being treated as a client, such was sufficient to constitute the signatories as Clients. Quite apart from the regulatory need on the part of the Appellants to make a determination, the consent was meaningless in the absence of both a selection of Box 1 in Annex 1 claiming status as a Client as an individual in the specified respects, together with the associated requirement for a completed Annex 1A *"Individual Client Analysis"*. A blank form was devoid of effect.

Moreover, as the judge held (at paragraph 325) it is not permissible to contract out of the rules in the sense that a retail customer who does not meet the conditions required for acceptance as a client cannot agree to be treated as one.

Causation

As regards the question of causation and the Appellants' assertion that the Respondents would in fact have qualified as Clients if properly assessed - the first requirement of $1 million liquid assets was easy to deal with. The judge found that the First and Second Appellants passed this threshold requirement but the third Appellant did not. There was no reason to conclude that the judge was clearly wrong. As regards the question whether the person concerned *"had sufficient experience and understanding to participate in financial markets in a wholesale jurisdiction.",* an important threshold issue was the relevant experience and understanding that was called for. Was it financial markets generally or in the market for the kind of investments which were in fact sold? The Court of Appeal accepted the Respondents' submission that mere experience in financial markets was not enough. First, it had to be experience in financial markets in a wholesale jurisdiction such as the DIFC. Apart from the Second Respondent's purchase of investment fund units through Credit Suisse there was little evidence of any participation in a wholesale market. Second, COB rule 3.2.4 made it clear that for the purpose of assessing sufficient financial experience and understanding, the analysis must include consideration of the knowledge and understanding of the *"relevant financial market, types of investment and of the risks involved."* There was no evidence available to the judge that the Respondents had any experience of the types of investment being offered in the present case let alone the risks involved.

Against that background the Court of Appeal rejected the Appellants' challenge to the finding that the Respondents were retail customers and that accordingly the Appellants were not authorised to conduct investment business for them.

Suitability

The threshold point was the Appellants' submission that they had limited any obligation to consider the suitability of any investments by notice pursuant to COB rule 6.2.1(2). The relevant exclusion was to be found in the paragraph preceding the signature on the AGBCs.

Given the Court of Appeal's conclusion on the appeal against the factual findings in regard to the content and outcome of the various meetings in 2007, it was not open to the Appellants to challenge the finding that the proviso to this exclusion clause was made out. The Appellants had identified their requirements and specifically requested that they be taken into account for the purpose of the advice and recommendation by Sarasin-Alpen.

The second point taken was that the advice tendered was generic advice within the meaning of COB 2.11.1(3) C. Again, given the findings as to the manner of selling of these products it was not possible to conclude that the advice was only generic. The advice advanced by Sarasin-Alpen went beyond being likely to influence a buyer and constituted advice on the merits.

It followed that suitability was a requirement not merely for any discretionary execution but also in respect of advice and recommendations. As regards actual suitability, the judge's findings were not seriously open to challenge as being *"perverse or against the weight of the evidence"*. Once the Respondents' requirements were identified it was not arguable that the products met those requirements and were thus suitable. The challenge to the finding that the products were unsuitable for the Respondents' objectives was rejected.

Article 94 of the DIFC Regulatory Law - The finding that the breach in respect of the false and improper designation of the Respondents as Clients was deliberate was not open to serious challenge given both that the forms were effectively forgeries created by Sarasin-Alpen and they contained false information.

Likewise the finding that the breach in respect of suitability was reckless was well within the range of proper conclusions on the judge's part. Given that Sarasin-Alpen purported to have taken the view that it was only affording generic advice or alternatively had (or at least claimed to have had) a false appreciation of the Respondents' requirements, it followed that no consideration was ever given to the question of suitability. Furthermore, Sarasin-Alpen either gave no consideration to the risks associated with the products that they recommended or having appreciated the risks chose not to reveal them. A particularly outrageous consequence of the second tranche was to put the Respondents in breach of their obligations to AGK.

The judge was fully entitled to conclude that, absent the recommendations made by Sarasin-Alpen, the Respondents would not have purchased similar products elsewhere. The challenge to that conclusion fell away given the rejection of the appeal on the content and outcome of the meetings. As the Respondents asserted, there was no possibility let alone likelihood that products meeting the Respondents' requirements could be met from another source.

In sum, the Court of Appeal dismissed the First Appellants' appeal and did not deal with the alternative ground of appeal as regards liability in contract were the Respondents to be properly classified as Clients.

Appeal by Bank Sarasin

As regards the appeal brought by the Second Appellants - the judge had held that, contrary to the Financial Services Prohibition contained in Article 41 of the DIFC Regulatory Law, Bank Sarasin had carried on Financial Service activities "in or from the DIFC" when it was not authorised by the DFSA to do so. The judge then went on to hold that, pursuant to Article 65 (2) (b) of the Regulatory Law the Respondents were entitled to an order for compensation.

In reaching these conclusions, the judge had first considered whether Bank Sarasin had carried on a Financial Service *quoad* the Respondents and having concluded that it had, had gone on to consider whether it had done so "in or from" the DIFC.

The Court of Appeal upheld the judge's finding that Bank Sarasin conducted its banking relationship with the Respondents in

the DIFC through Sarasin-Alpen. That finding having been made: to the extent that Mr Blonde and Mr Walia carried out Financial Service activities in the course of carrying on Bank Sarasin's banker/client relationship with the Respondents, these were activities imputable to Bank Sarasin and were done "in or from" the DIFC.

Nor did the judge's decision attributing the acts of Mr Blonde and other personnel employed by Sarasin-Alpen to Bank Sarasin fall foul of Lord Hoffmann's primary and general attribution principles propounded in ***Meridian Global Funds Management Asia Ltd v Securities Commission*** [1995] 2 AC 500. What in substance the judge had found was that the employees of Sarasin-Alpen were implicitly authorised by Bank Sarasin to conduct on its behalf its banker/client relationship with the Respondents short of having authority to enter into contracts binding on the bank. The fact that the persons in question were employees of Sarasin-Alpen and not Bank Sarasin was not fatal to the judge's finding. Nor was it fatal that there was no express conferment of authority on the Sarasin-Alpen personnel or on Sarasin-Alpen itself. It was the substance, not the form, of what was happening that mattered.

Although the judge did not say in terms that he was awarding compensation against Bank Sarasin under Article 65 of the DIFC Regulatory Law on the basis that each of the purchases of the three tranches of Notes involved a breach of the Financial Services Prohibition, the Court of Appeal held that it was implicit that this was the basis on which he proceeded.

Bank Sarasin's costs order appeal

The Court of Appeal found that in the exercise of the wide discretion the judge had in ruling on the question of costs he had not departed from the margin of appreciation allowable to him. Bank Sarasin's appeal against the costs order made against it therefore failed.

The Respondents' Notice and Cross Appeal

Given that the Court of Appeal upheld the main regulatory claims against Bank Sarasin in respect of dealing in investments and advising on investment products and credit, they made no decision on the Respondents' Notice.

They took the same approach to the Respondents' Cross Appeal by which the Respondents sought to appeal the judge's findings that: (i) Bank Sarasin was not vicariously liable for Sarasin-Alpen's negligence because the duty of care of care in negligence owed by Sarasin-Alpen was governed by the law of Kuwait; and (ii) the claim in misrepresentation against Bank Sarasin was not established. They did so because they were quite satisfied that success on either or both of these grounds of appeal would not add to the compensation to which the Respondents were entitled against Bank Sarasin under Article 65 of the DIFC Regulatory Law.

Bank Sarasin's appeal was dismissed, save in respect of the judge's findings that it engaged in the activities of Arranging Credit or Deals in Investments and Arranging Custody in or from the DIFC. The setting aside of those findings, however, was no reason for modifying the judge's order in favour of the Respondents under Article 65 of the DIFC Regulatory Law. That was bearing in mind the judge's findings (that the Court of Appeal upheld) that in respect of all three tranches of the Notes, Bank Sarasin carried on the Financial Service activities of Dealing in Investments and Advising on Investment Products and Credit "in or from the DIFC" in breach of Article 41 of the DIFC Regulatory Law.

No order was made on the Respondents' Notice or on the Claimants' Cross Appeal.

This summary is not part of the Judgment and should not be cited as such

ORDER

UPON hearing Counsel for the First Appellant, Counsel for the Second Appellant and Counsel for the Respondents on 27-30 September 2015 and 1 October 2015

AND UPON reading the submissions and evidence filed and recorded on the Court file

IT IS HEREBY ORDERED THAT:

1. The Second Appellant's appeal is dismissed, save in respect of the judge's findings that it engaged in the activities of Arranging Credit or Deals in Investments and Arranging Custody in or from the DIFC.

2. There be no order on the Respondents' Notice or on the Claimants' Cross Appeal.

Issued by:

Mark Beer

Registrar

Date of Issue: 3 March 2016

At: 10am

JUSTICE SIR DAVID STEEL

This is the judgment of the Court.

Introduction

1. To call these proceedings an appeal is something of an understatement. The judgment below of the Deputy Chief Justice arises from litigation on a grand and costly scale. It dealt in detail with wide ranging issues of law and fact over

some 430 paragraphs. Yet almost every single conclusion of law and finding of fact on controversial matters is challenged by the Appellants.

2. The task thus facing the Court was a heavy one. The parties' legal advisers in making preparations for the appeal provided written submissions covering hundreds of pages, together with numerous schedules. Depressingly, their scale was even greater than the written submissions provided to the trial judge. Although no doubt prepared with the best of intentions, these written arguments imposed an extremely heavy burden on the Court which we regret to say was out of proportion to the benefit derived. Quite apart from the cost of their preparation, their impact unfortunately tended to divert the attention of the Court from the essential focus of the parties' cases on this appeal leading to significant delay in the preparation of this judgment. This is the more ironic given that one of the grounds of appeal relates to the alleged undue delay by the trial judge in preparing his judgment.

3.	We would like to re-iterate the postscript to Justice Sir David Steel's judgment in *Taaleem v. NBC and Deyaar* CF1 014/2010 at paragraphs 109 to 112. Skeletons should not take the form of footnoted briefs. They should provide a summary of the main arguments that will be developed orally.	The resulting brevity will not only be more useful to the Court but probably be more convincing. Hopefully the DIFC Courts's Practice Direction No. 2 of 2016 will do much to assist in this respect for the future.

The nature of the dispute

4. The broad background to these proceedings is set out in paragraphs 1 to 70 of the judgment of the Deputy Chief Justice ("the judge"). These introduced a number of the important documents in the case, including the contractual arrangements, and identified the relevant parts of the regulatory framework. The contents are largely uncontroversial. We accordingly adopt it in revised summary form.

5. The Claimants were Kuwaiti nationals, resident in Kuwait. They are referred to herein by their individual names or collectively as "the Claimants". The First Defendant, Bank Sarasin-Alpen (ME) Limited ("Sarasin-Alpen"), is a company incorporated in the Dubai International Financial Centre ("the DIFC") and regulated by the Dubai Financial Services Authority ("the DFSA"). The Second Defendant, Bank Sarasin & Co ("Bank Sarasin"), is a company incorporated in Switzerland. They are referred to collectively herein as the "Appellants".

6. In the course of 2007 and early 2008, on the introduction of Sarasin-Alpen, the Respondents purchased structured financial products ("the Notes") from Bank Sarasin The purchases were funded by loans made to the Respondents, in part by Al Ahli Bank Kuwait ("ABK") and in part by Bank Sarasin. The total amount expended by the Respondents in those purchases was very substantial - some US$200 million. In October 2008 Bank Sarasin made margin calls under the Notes which the Respondents did not meet. Bank Sarasin accordingly closed out the Notes with the consequence that the Respondents claimed to have sustained substantial losses. These proceedings are brought with the object of recovering those losses.

7. The principal claims in the proceedings were summarised by the judge as follows. As against the First Appellant, Sarasin-Alpen, it was contended that:

> (1) Sarasin-Alpen acted in breach of the DFSA Regulations under which it was authorised to offer financial services: in particular (i) that it conducted investment business on behalf of the Respondents without regulatory authority to do so; and (ii) that it advised the Respondents in relation to structured financial products (the Notes) which were not suitable for them;
>
> (2) Sarasin-Alpen acted in breach of contract, in that it was negligent in giving such advice; alternatively, that, in misrepresenting that the Notes were suitable products to meet the Respondents' investment objectives, it was in breach of duties of care. It was said that, but for those regulatory breaches, breaches of contract and breaches of duties of care, the Respondents could not and would not have purchased the Notes from Bank Sarasin as and when they did and would not have suffered the losses which they seek to recover.
>
> (3) The claims against Sarasin-Alpen were said to arise under Article 94 of the DIFC Regulatory Law (DIFC Law No. 1 of 2004) ("the Regulatory Law") and under the general law applicable in the DIFC.

8. As against the Second Defendant, Bank Sarasin, it was contended that:

> (1) Bank Sarasin acted in breach of the DIFC Regulatory Law (DIFC Law No 1 of 2004) in carrying on an unauthorised financial services business within the DIFC;
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> (2) Bank Sarasin acted in breach of contract, in that (pursuant to Article 32 of the Swiss Code of Obligations) the acts and omissions of Sarasin-Alpen and its employees in giving advice as to the structured financial products which it sold to the Claimants are to be attributed to Bank Sarasin; and
>
> (3) Bank Sarasin was vicariously liable under DIFC law for the misrepresentation and negligence claims made against Sarasin-Alpen.

9. Again, it was said that, but for those regulatory breaches, breaches of contract and breaches of duties of care, the Respondents could not and would not have purchased the Notes from Bank Sarasin as and when they did and would not have suffered the losses which they seek to recover. The claims against Bank Sarasin were said to arise under Article 65 of the DIFC Regulatory Law, under the Swiss Code of Obligations and under the general law applicable in the DIFC.

10. Those claims are rejected by the Appellants. It is said on behalf of Sarasin-Alpen that:

> (1) in its relations with the Respondents, it acted in compliance with its regulatory and other obligations;
>
> (2) if (which is denied) it was in breach of any regulatory or other obligation, that breach was not the cause of any loss sustained by the Respondents; in that (i) even if Sarasin-Alpen had not conducted investment business on behalf of the Respondents or Sarasin-Alpen had given different advice the Claimants would, nevertheless, have purchased the same or similar structured financial products, (ii) the Notes were not inherently loss-making (the cause of the losses suffered by the Respondents being a subsequent fall in the markets and the failure on the part of the Respondents to pay the margin calls).

11. On behalf of Bank Sarasin:

> (1) it was denied that Bank Sarasin was carrying on any financial service business in the DIFC; and thus denied that it was subject to the DIFC Regulatory Regime;
>
> (2) it was said that, in the light of the expert evidence as to Swiss Law and on a proper understanding of Article 32 of the Swiss Code of Obligations, the claims made against Bank Sarasin under that article must fail; and
>
> (3) it was said that, even if claims in respect of negligence and misrepresentation could be maintained against Sarasin-Alpen under DIFC Law (which is denied), there is no basis on which Bank Sarasin could be held vicariously liable for the acts and omissions alleged.

12. The judge concluded that Sarasin-Alpen was liable to pay compensation to the Respondents under Article 94 (2) of the Regulatory Law. Having concluded that the Respondents were retail customers and not clients within the meaning of the Regulatory Law it followed that no contractual claim arose. He dismissed the claim against Sarasin-Alpen in tort. The judge further held that Bank Sarasin was liable to pay compensation to the Respondents under Article 65(2)(b) of the Regulatory Law.

The parties

13. The first respondent, Rafed Al Khorafi ("Mr Al Khorafi"), is a member of a wealthy Kuwaiti family. On the death of his father, Abdul Mohsen Bader Al Khorafi, he inherited control of the family assets. The second respondent, Amrah Al Hamad ("Mrs Al Hamad") is the mother of Mr Al Khorafi. She, too, inherited significant wealth from her own family and from her late husband. The third respondent, Alia Al Rifai ("Mrs Al Rifai") is Mr Al Khorafi's wife. Again, she inherited significant wealth from her own family.

14. The Second Appellant, Bank Sarasin, is a long established Swiss bank. At the material time it was a subsidiary of Rabobank NV. Bank Sarasin provided a full range of banking and investment services. It was not, and never had been, authorised to conduct financial service activities in the DIFC. Since the commencement of these proceedings Bank Sarasin has been taken over and is now Bank J. Safra Sarasin Ltd.

15. Sarasin-Alpen was incorporated in the DIFC on 23 February 2005. It was a joint venture between Bank Sarasin, which owns 60% of its shares, and Alpen Corporation Limited ("Alpen"), a company incorporated in Jersey, which owns the remaining 40% of its shares.

16. Sarasin-Alpen was at all material times licensed and regulated by the DFSA as an Authorised Firm pursuant to the DIFC Regulatory Law of 2004. It was authorised to carry out the following Financial Services in and from the DIFC: (i) arranging credit or dealings in investments, (ii) advising on financial products or credit; and (iii) arranging custody. Notwithstanding that its name might suggest otherwise, Sarasin-Alpen was not a bank; and did not carry on business as such.

The Alpen/Bank Sarasin shareholders' agreement

17. Prior to the incorporation of Sarasin-Alpen, Bank Sarasin and Alpen had entered into a shareholders' agreement on 9 December 2004 (updated on 29 June 2006). That shareholders' agreement provided that the business of Sarasin-Alpen was to be the marketing of the various private banking and asset management products and related services that Bank Sarasin, its subsidiaries and associated partners were licensed to offer ("Products"). Under the shareholders' agreement, Sarasin-Alpen was to be given the exclusive right (along with other Sarasin Group companies) to market Sarasin private banking products in the Middle East region and the Asian sub-continent.

18. Bank Sarasin undertook the following (amongst other) obligations: (i) to serve customers introduced by Sarasin-Alpen with Products and services offered by Bank Sarasin; (ii) to provide comprehensive ongoing Product and technical knowledge and expertise to Sarasin-Alpen,, including updates and support to facilitate the marketing and promotion of the Products in the Middle East region; (iii) to share costs and revenues with Sarasin-Alpen; (iv) to second one or more employees to Sarasin-Alpen from time to time; (iv) to maintain, in so far as within its power to do so, such regulatory and/or state registration and licensing in respect of the Products and services; and (v) to grant Sarasin-Alpen a non-exclusive royalty free license to use the name "Bank Sarasin" in connection with its business in the Middle East Region. All revenue in respect of Products sold by Bank Sarasin to purchasers on the introduction of Sarasin-Alpen was payable by Bank Sarasin to Sarasin-Alpen.

The Bank Sarasin/Sarasin-Alpen delegation agreement

19. Sarasin-Alpen was appointed as agent for Bank Sarasin in respect of the latter's account opening procedures. In particular, under the terms of an Intra Group Delegation Agreement made on 18 April 2005 between Bank Sarasin and Sarasin-Alpen, Bank Sarasin delegated to Sarasin-Alpen the task of identifying clients and investigating their background; and it was acknowledged that Sarasin-Alpen's role was to introduce clients to Bank Sarasin and that "*to facilitate the opening of an account with [Bank Sarasin] in compliance with Swiss regulation, [Bank Sarasin] appoints [Sarasin-Alpen] as Delegate*". The Delegation Agreement also provided that Sarasin-Alpen was authorised to verify the client's identity; and that Sarasin-Alpen's role was to establish the beneficial owner and to carry out any additional background investigations on the client and the origin of the funds being deposited with Bank Sarasin. The tasks assumed by Sarasin-Alpen included:

> "The provision of background information on the client with the aim of being able to judge whether and to what extent the client relationship carries a higher risk" and "The investigations into the client's background and the origin of the funds to be deposited with [Bank Sarasin] undertaken by [Sarasin-Alpen] must be documented using the `Client Profile' form provided by [Bank Sarasin]. The client profile must be signed by the employee of [Sarasin-Alpen] who has compiled the profile".

Mr Blonde and Mr Walia

20. It was common ground that, during the material period, Mr Blonde[1] (an employee of Sarasin-Alpen) and Mr Rohit Walia (Chief Executive Officer of Sarasin-Alpen) acted as the link between Sarasin-Alpen and Bank Sarasin on the one hand and the Claimants on the other hand. It was common ground, also, (i) that, although Mr Blonde and Mr Walia each met Mr Al Khorafi, neither Mr Blonde nor Mr Walia (nor any other employee of Sarasin-Alpen) ever met or spoke to Mrs Al Ahmad or to Mrs Al Rifai and (ii) that no employee of Bank Sarasin ever met or spoke to any of the Claimants.

Summary of the transactions with Bank Sarasin

21. Mr Al Khorafi was introduced to Mr Walia and Mr Blonde in 2007, following discussions between an accountant, Alaa Taha, employed by Mr Al Khorafi and ABK, in the course of which ABK had indicated to Mr Taha that it was willing to lend a total of US$80 million to Mr Al Khorafi and his mother, Mrs Al Hamad, for the purpose of enabling them to make investments in capital guaranteed products outside Kuwait.

22. That introduction led to the purchase by the Claimants of the Notes from Bank Sarasin. The Notes were purchased in three tranches. First, in June 2007, Mr Al Khorafi and Mrs Al Hamad invested US$30 million and US$50 million respectively, financed by lending from ABK. Second, in July 2007, Mrs Al Hamad invested a further US$100 million, financed by lending from Bank Sarasin. Third, in February 2008, Mrs Al Rifai invested US$10 million, financed by lending from both ABK and Bank Sarasin. In April 2008 Mrs Al Rifai invested a further USD 10 million in a fiduciary deposit.

23. On or about 6 June 2007 - before, but in anticipation of, their purchases of the first tranche of the Notes - Mr Al Khorafi and Mrs Al Hamad each signed (i) client agreements with Sarasin-Alpen, described as Additional General Business Conditions Dubai International Financial Centre ("AGBCs"); (ii) application forms for opening current and custody accounts with Bank Sarasin; and (iii) deeds of pledge in favour of Bank Sarasin.

24. At or about the same date Mr Al Khorafi signed a Confirmation of Investment, attaching an Indicative Termsheet dated 16 May 2007 (also signed) in respect of 8% (p.a.) Capital Protected Notes on the REIT Bskt VIII quanto in USD. The document confirmed his investment of an amount of US$30 million in that product. A similar Confirmation of Investment was prepared for signature by Mrs Al Hamad in respect of her investment of an amount of US$50 million in "REIT Bskt". Although there is no record that she signed that document, nevertheless, attached to the Confirmation of Investment were Indicative Termsheets dated 16 May 2007 which did bear her signature in respect of 10% (p.a.) Capital Protected Notes on the REIT Bskt VIII quanto in USD.

25. On 23 June 2007 Mr Al Khorafi countersigned a credit facility agreement (set out in a letter from Bank Sarasin dated 21 June 2007) in respect of a credit facility of up to US$21,660,000 for use in respect of overdrafts, fixed advances, guarantees and "*options and futures transactions subject to margin requirements, as well as structured products"*. The facility was expressed to be secured by assets held in his name by Bank Sarasin in accordance with the deed of pledge.

26. On 25 June 2007 Mrs Al Hamad signed an irrevocable payment order (the "Irrevocable Payment Order" or "IPO") instructing Bank Sarasin (i) to invest US$50 million in "The Product" (defined as 10% p.a. Capital Protected Notes on the REIT Basket VII quanto in USD, duration 3 years, from an issuer with a rating of at least Aa or AA), (ii) to transfer the redemption amount of The Product to a specified account ("The Account") in her name at ABK, (iii) to transfer the coupon payments of The Product to The Account and (iv) to declare to ABK that the instructions were irrevocably accepted by Bank Sarasin in the sense of Article 468 of the Swiss Federal Code of Obligations, under the condition that the amount of US$50 million was transferred from the Account to her account with Bank Sarasin.

27. On 26 June 2007 Bank Sarasin opened current and custody accounts in the names of Mr Al Khorafi and of Mrs Al Hamad. This first tranche of investments was booked to Mr Al Khorafi's and Mrs Al Hamad's accounts on 28 June 2007 for value on 2 July 2007. On 2 July 2007 the REIT Notes were purchased using the monies advanced to Mr Al Khorafi and Mrs Al Hamad by ABK.

28. On 11 July 2007 Mrs Al Hamad signed a power of attorney in favour of Mr Al Khorafi authorising him to represent her, without restriction, in all dealings with Bank Sarasin in connection with her current and custody accounts.

29. 17 July 2007 Mrs Al Hamad (by Mr Al Khorafi as her attorney) signed Confirmation of Investments in anticipation of her purchase of the second tranche of the Notes. Attached to those documents were, respectively, Indicative Termsheets, each dated 17 July 2007) in respect of (i) 8% (p.a.) SaraFloor on the Special Materials Basket quanto in USD, (ii) 8% (p.a.) SaraFloor on the Energy Basket quanto in USD and (iii) 8% (p.a.) SaraFloor on the Financial Services Basket quanto in USD. The amounts of those products to be purchased (as appears from the Confirmations of Investment) were, respectively US$30 million, US$30 million and US$40 million: a total investment of US$100 million.

30. On 23 July 2007 Mrs Al Hamad signed a further deed of pledge in favour of Bank Sarasin. That was in the same terms as the former deed (signed on or about 6 June 2007). On the same day she countersigned a credit facility agreement (set out in a letter from Bank Sarasin dated 20 July 2007) in respect of a credit facility of up to US$100 million, for use in respect of overdrafts, fixed advances, guarantees and *"options and futures transactions subject to margin requirements, as well as structured products"*. The facility was expressed to be secured by assets held in her name by Bank Sarasin in accordance with the deed of pledge.

31. On 24 July 2007, the second tranche of investments were booked to Mrs Al Hamad's account with Bank Sarasin. Definitive Termsheets for the investments purchased were not issued until much later (9 October 2007); and were then reissued for the Special Materials basket on 9 January 2008. The purchase was funded by a loan from Bank Sarasin under her credit facility.

32. On 26 July 2007 Mr Al Khorafi signed a further deed of pledge in favour of Bank Sarasin. That, too, was in the same terms as the deed which he had signed on or about 6 June 2007 save that it stood as security for the bank's claims not only against Mr Al Khorafi but also for the bank's claims against Mrs Al Hamad. On the same day (26 July 2007) Mrs Al Hamad countersigned a second credit facility agreement (set out in a letter from Bank Sarasin of the same date) which replaced the earlier agreement and increased the amount of the facility to US$135 million. The new facility letter was also signed by Mr Al Khorafi; and the facility was expressed to be secured on assets held in her name and on assets held in his name in accordance with their respective deeds of pledge.

33. On or about 5 September 2007 Mr Al Khorafi countersigned a second credit facility agreement (set out in a letter from Bank Sarasin of that date) which replaced the earlier agreement and increased the amount of the facility by US$30 million, from US$21,660,000 to US$51,660,000 for use in respect of overdrafts, fixed advances, guarantees and "*options and futures transactions subject to margin requirements, as well as structured products"*. The facility was expressed to be secured by assets held in his name by Bank Sarasin in accordance with the deed of pledge.

34. On 10 September 2007 Mr Al Khorafi signed a Confirmation of Investment confirming his purchase of a Product described as "1-month Non Callable Witch Hat Note on the USD 3 M Libor in USD".

35. On 7 January 2008 Mr Al Khorafi countersigned a third credit facility agreement (set out in a letter from Bank Sarasin of 20 December 2007) which replaced the second credit facility agreement and increased the amount of the facility to US$202 million, again for use in respect of overdrafts, fixed advances, guarantees and "*options and futures transactions subject to margin requirements, as well as structured products"*. The facility was expressed to be secured by a guarantee to be issued by ABK in the amount of US$27,500,000 and by assets held in his name by Bank Sarasin in accordance with his deed of pledge.

36. On 17 January 2008, in anticipation of her purchase of the third tranche of the Notes, Mrs Al Rifai signed (i) a client agreement (in the AGBC form); (ii) an application form for opening current and custody accounts with Bank Sarasin; (iii) a deed of pledge in favour of Bank Sarasin; and (iv) a power of attorney in favour of Mr Al Khorafi.

37. On 22 January 2008 ABK issued a guarantee in the sum of US$27,500,000 to Bank Sarasin. ABK's potential liability under the guarantee was secured by collateral (in the form of a plot of land in Kuwait) which Mr Al Khorafi had provided to ABK.

38. On or about 12 February 2008 Mrs Al Rifai countersigned a credit facility agreement (set out in a letter from Bank Sarasin of that date) in respect of a credit facility of up to US$60 million for use in respect of overdrafts, fixed advances, guarantees and "*options and futures transactions subject to margin requirements, as well as structured products*". The facility was expressed to be secured by a guarantee to be issued by ABK in the amount of US$27,500,000 and by assets held in the name of Mrs Al Hamad by Bank Sarasin in accordance with her deed of pledge.

39. Also on 12 February 2008 Bank Sarasin wrote to Mr Al Khorafi to advise him that the credit facility of up to US$202 million, granted in the letter of 20 December 2007, had been cancelled "*as this increase is no longer needed, and that the facility had been reduced to US$51,660,000* "as per credit facility letter of 5 September 2007".

40. On the same day (12 February 2008) Bank Sarasin issued Definitive Termsheets in respect of (i) 8% (p.a.) SaraFloor on a Agri & Coal Basket II in USD (Asian Style) Notes and (ii) 8% (p.a.) SaraFloor on the JPMorgan Efficiente Index in USD Notes. There is no record that Mrs Al Rifai signed those Definitive Termsheets; or that she signed Confirmations of Investment in respect her investment in the purchase of those Notes. Nevertheless it is common ground that purchases of those Notes (in the amounts of US$5 million each) were booked to her account on 12 February 2008.

41. On or about 5 April 2008 Mrs Al Rifai signed a further deed of pledge in favour of Bank Sarasin, expressed to cover not only the claims which the Bank had or might have in the future against her as Pledger but also claims against Mr Al Khorafi and Mrs Al Hamad. That deed was countersigned by Mr Al Khorafi, for himself and as attorney for Mrs Al Hamad.

42. On 8 June 2008 ABK released Bank Sarasin from its obligations under the Irrevocable Payment Order of 25 June 2007. The consideration for that release was the payment to ABK of US$20 million drawn against Mrs Al Rifai's credit facility at Bank Sarasin.

43. On 29 September 2008 Bank Sarasin made margin calls against the accounts of Mrs Al Hamad and Mrs Al Rifai in the sums of US$5,077,977 and US$3,423,353 respectively. Those sums were not paid. Further calls were made on 7 October 2008; which, again, were not met.

44. On 8 October 2008 Bank Sarasin terminated the facilities extended to Mrs Al Hamad and Mrs Al Rifai. On the same date Bank Sarasin closed out all of the Notes held on behalf of the Claimants (including Mr Al Khorafi). That resulted in significant losses on the portfolios; and left Mr Al Khorafi and Mrs Al Hamad with outstanding balances on their loans from ABK.

The Notes

45. As explained the Notes were purchased in three tranches: (1) In June 2007 Mr Al Khorafi and Mrs Al Hamad purchased 8% (p.a.) and 10% (p.a.) Capital Protected Notes on the REIT Bskt VIII ("the REIT Notes"). (2) In July 2007 Mrs Al Hamad purchased (i) 8% (p.a.) SaraFloor Notes on the Special Materials Basket, (ii) 8% (p.a.) SaraFloor Notes on the Energy Basket and (iii) 8% (p.a.) SaraFloor Notes on the Financial Services Basket (together "the July 2007 SaraFloor Notes"). (3) In February 2008 Mrs Al Rifai purchased (i) 8% (p.a.) SaraFloor Notes on a Agri & Coal Basket II and (ii) 8% (p.a.) SaraFloor Notes on the JPMorgan Efficiente Index (together "the February 2008 SaraFloor Notes").

46. The REIT Notes were described in Indicative Termsheets dated 16 May 2007. The termsheet in respect of the 8% Notes contained the following introductory paragraph by way of general description:

> "Capital Protection Notes on a REIT Basket VIII quanto in USD allow a participation in the positive performance of the Underlying. Simultaneously they enable to protect the invested capital at 76.00% (USD 38,000.00) of the nominal amount and pay interest of 24.00% (USD 12,000.00, 8.00% p.a.) The indicative participation in the Underlying performance at the Final Fixing Date is 88% with unlimited profit capabilities."
>
> The general description in the Termsheet in respect of the 10% Notes was in the same terms: save that it was said, in the second sentence, that those Notes:
>
> ".enable to protect the Invested capital at 70.00% (USD 35,000.00) of the nominal amount and pay interest of 30.00% (USD 15,000.00, 10.00% p.a.)"
>
> ***** and the indicative participation in those Notes was 86% (rather than 88%).

47. The Issuer, Lead Manager, and Calculation Agent were all "[tba]". The Lead Distributor was "Bank Sarasin-Alpen (ME) Ltd, Dubai and Bank Sarasin & Cie AG, Basel". *"Underlying*" REIT Basket VIII, in each case, was specified as FTSE EPRA/NAREIT EURO Zone PR index (25%), FTSE EPRA/NAREIT Europe Index (25%) and Tokyo SE REIT Index (50%). The Notes were offered in units of US$50,000.00 (Notional) at an Issue price per unit of 100% of Notional (US$50,000.00). The Redemption Date was "*Final Fixing + 5 business days"*; Final Fixing was "*Initial Fixing + 3 years"*; and Initial Fixing was "[tba]". Capital Protection was stated to be "*76% [or 70%, as the case might be] of the Notional (US$38,000.00 [or US$35,000.00, as the case might be]*". The Coupon was stated to be "*8% p.a. [or 10% p.a. as the case might be] paid semi-annually*". The Redemption Amount was stated in these terms:

Redemption Amount	At the Redemption Date the Investor receives per Note an amount in cash (USD) according to the following formula: N x [CP + P/X x Max ($S_?$-X;0)] with: N[illegible] Notional Amount CP[illegible] Capital Protection (excluded Coupons) P[illegible] Participation $S_?$[illegible] Official closing price of the Underlying at the Final Fixing X[illegible] Strike Price

[illegible]As noted above, Participation was stated (in the case of the 8% Notes) to be 88% and (in the case of the 10% Notes) 86%. The formula was illustrated by worked examples based upon an estimate of basket growth of 80% over three years. Based on that estimate of growth, the indicative Redemption Amount on an investment of US$30,000,000 in the purchase of the 8% Notes was US$43,920,000; and, on an investment of US$50,000,000 in the purchase of the 10% Notes was US$69,400,000.

48. The Indicative Termsheets in respect of the REIT Notes included a paragraph in these terms:

> "Risk[illegible] The structure of the Capital Protected Notes is designed to provide Capital Protection, as the product pays back a minimum amount on maturity, but at the same time you participate in the performance of a specific Underlying.
>
> Under certain circumstances the price of the Notes may dip below the Capital Protection Level during the lifetime. The product's value does not only depend on the Underlying's performance but also on the credit rating of the Issuer."

49. The July 2007 SaraFloor Notes were described in Indicative Termsheets dated 17 July 2007.

(1) The Termsheet in respect of the Notes on the Special Materials Basket contained an introductory paragraph, by way of general description, which was in terms very similar to those of the REIT termsheets:

> "SaraFloor on the ESSENTIAL (sic) Basket quanto in USD allow a participation in the positive performance of the Underlying. Simultaneously they enable to protect the invested capital at 76.00% (USD 38,000.00) of the nominal amount and pay interest of 24.00% (USD 12,000.00, 8.00% p.a.) The participation in the Underlying performance at the Final Fixing Date is 85% with unlimited profit capabilities."

(2) The general description in the Termsheet in respect of the Notes on the Financial Services Basket was in the same terms (save that the reference was to "*SaraFloor on the Financial Services Basket quanto*"). Again, the Issuer, Lead Manager, and Calculation Agent were all "[tba]"; and the Lead Distributor was "Bank Sarasin-Alpen (ME) Ltd, Dubai and Bank Sarasin & Cie AG, Basel. The components making up the Underlying Special Materials Basket (or Financial Services Basket, as the case might be) were specified. The Notes were offered in units of US$50,000.00 (Notional) at an Issue price per unit of 100% of Notional (US$50,000.00). The Redemption Date was 23 July 2010. Capital Protection was stated to be "*76% of the Notional (US$38,000.00)*". The Coupon was stated to be "*24.00% (US$12,000.00, 8% p.a.*". The Redemption Amount was stated in the same terms (save for the substitution of the words "per SaraFloor" for the words "per Note") as in the REIT termsheets. There were no worked examples illustrating the formula.

(3) The general description in the Termsheet in respect of the Notes on the Energy Basket was in similar (but not the same) terms:

> "SaraFloor on the Energy Basket quanto in USD allow a participation in the positive performance of the Underlying. Simultaneously they enable to protect the invested capital at 76.00% (USD 38,000.00) of the nominal amount and pay interest of 16.00% (USD 8,000.00, 8% p.a.) Additionally 8.00% (USD 4,000.00, 8.00% p.a.) OR 75% of the underlying performance with unlimited profit capabilities are paid at expiration."
>
> The Issuer of the Notes was named as Bank Sarasin (CI) Ltd, Guernsey and the Lead Manager as Bank Sarasin & Cie AG, Basel. The components making up the Underlying Energy Basket were specified. The Notes were offered in units of US$50,000.00 (Notional) at an Issue price per unit of 100% of Notional (US$50,000.00). The Redemption Date was "*Final Fixing plus 2 weeks*"; Final Fixing was "*Initial Fixing plus 3 years; and Initial Fixing was "tba"*". Capital Protection was stated to be "*76% of the Notional excluded coupons (US$38,000.00)*". The Coupon was stated to be "*16.00% (US$8,000.00, 8% p.a.*". The Redemption Amount was stated in the same terms (save for the substitution of the words "per SaraFloor" for the words "per Note") as in the REIT termsheets; and the formula was expanded to:
>
> "MAX (8%; N x [CP + P/X x Max ($S_?$ -X;0)]"
>
> There was no worked example illustrating the formula.

50. The February 2008 SaraFloor Notes were described in Definitive Termsheets issued on 12 February 2008. Again, the termsheets in respect of the Notes on a Agri & Coal Basket II contained an introductory paragraph, by way of general description, which was in terms very similar to those of the REIT termsheets:

> "SaraFloor on the Agri & Coal Basket II in USD allow a participation in the positive performance of the Underlying. Simultaneously they enable to protect the invested capital at 68.00% (USD 34,000.00) of the nominal amount and pay a total coupon of 32.00% (USD 16,000.00, 8.00% p.a.) The participation in the Underlying performance at the Final Fixing Date is 65% with unlimited profit capabilities."

51. The general description in the termsheet in respect of the Notes on the JPMorgan Efficiente Index was in the same terms (save that the reference was to "*SaraFloor on the JPMorgan Efficiente Index*"; and the participation in the Underlying performance was 73%. The Issuer of the Notes was named as Bank Sarasin (CI) Ltd, Guernsey, the Lead Manager was Bank Sarasin & Cie AG, Basel and (in the case of the Notes on the JPMorgan Efficiente Index) the Lead Distributor was "*Bank Sarasin-Alpen (ME) Ltd, Dubai and Bank Sarasin & Cie AG, Basel*".

52. The components making up the Agri & Coal Basket II were specified: the Underlying in respect of the Notes on the JPMorgan Efficiente Index was stated to be "*JPMorgan Efficiente Index in USD*". In each case the Notes were offered in units of US$50,000.00 (Notional) at an Issue price per unit of 100% of Notional (US$50,000.00). The Redemption Date was 21 February 2012 (in the case of the Notes on the Agri & Coal Basket II and 22 February 2012 (in the case of the Notes on the JPMorgan Efficiente Index). Capital Protection was stated to be "*00% of the Notional excluding coupon (US$34,000.00)*". The Coupon was stated to be "*32.00% (US$16,000.00, 8% p.a.*". The Redemption Amount was stated in the same terms (save for the substitution of the words "per SaraFloor" for the words "per Note") as in the REIT termsheets. There were no worked examples illustrating the formula.

53. The Indicative Termsheets in respect of the July 2007 SaraFloor Notes and the Definitive Termsheets in respect of the February 2008 SaraFloor Notes included a paragraph as to Risk which was in substantially the same terms as the paragraph in the Indicative Termsheets in respect of the REIT Notes to which reference has already been made:

> "Risk
>
> The structure of the SaraFloor unit is designed to provide capital protection (floor), as the product pays back a minimum amount on maturity, but at the same time you participate in the performance of a specific Underlying.
>
> Under certain circumstances the price of the SaraFloor may dip below the floor during the lifetime. The product's value does not only depend on the Underlying's performance but also on the credit rating of the Issuer"

54. The Indicative Termsheets and Factsheets each contained a disclaimer and risk information in these terms:

> ".No guarantees are given as to any of the information provided.[illegible] Please consider carefully whether this investment is, by virtue of its nature, suitable for you, by seeking the advice of an independent financial advisor if necessary..."

The account opening forms

55. The Claimants each signed application forms for opening current and custody accounts with Bank Sarasin. In signing those forms the Claimants confirmed that he or she had respectively:

> [illegible]".received the Bank's brochure `Special Risks in Securities Trading' and that he/she is aware that the value of investments may suddenly substantially fall in value and that he/she may not recover the full value of his/her investment on withdrawal".

The credit facility agreements

56. Bank Sarasin made credit facilities available to Mr Al Khorafi upon the terms of letter agreements dated 21 June 2007, 5 September 2007 and 20 December 2007 (as revised and reduced by a letter dated 12 February 2008). Bank Sarasin made credit facilities available to Mrs Al Hamad upon the terms of a letter agreement dated 20 July 2007 (as revised and increased by a letter dated 26 July 2007). Bank Sarasin made credit facilities available to Mrs Al Rifai upon the terms of a letter agreement dated 12 February 2008. Each of those credit facility agreements provided for the provision of pledged assets as collateral security; and each contained a paragraph in these terms:

> "The total amount of all transactions covered by this credit facility, which will be counted against the credit facility by our institutions, must be covered by the lending value of the above-mentioned collateral at all times (lending value = value of collateral minus margin). The size of the margin is determined by us, at our entire discretion, and is based on the type of collateral, its market-, nominal- or redemption- value where applicable, and its risk profile. Margins applied to individual items of collateral can vary greatly. We reserve the right to adjust these margins in line with prevailing conditions at any time and without prior notice. We will be happy to provide information on the lending value of the collateral on request."

57. Each of the agreements contained provision that the credit facility could be terminated with immediate effect by either party at any time.

The pledge agreements

58. Mr Al Khorafi and Mrs Al Hamad each signed a pledge agreement in favour of Bank Sarasin on 6 June 2007. Mrs Al Hamad signed a further pledge agreement in favour of Bank Sarasin on 23 July 2007. Mr Al Khorafi signed a further pledge agreement in favour of Bank Sarasin on 26 July 2007. Mrs Al Rifai signed a pledge agreement in favour of Bank Sarasin on 17 January 2008; and a further pledge agreement in favour of Bank Sarasin on or about 5 April 2008. By each of those agreements Mr Al Khorafi, Mrs Al Hamad or Mrs Al Rifai (as the case might be) as Pledger, pledged in favour of the Bank all securities which were then or in the future held by the Bank for his or her account. In

each case the pledge was expressed to cover all claims which the Bank had, or might have in the future, against the Pledger. But, in addition, (i) the pledge given by Mr Al Khorafi in the agreement which he signed on 26 July 2007 also covered claims which the Bank had, or might have in the future, against Mrs Al Hamad and (ii) the pledge given by Mrs Al Rifai in the agreement which she signed on or about 5 April 2008 also covered claims which the Bank had, or might have in the future, against Mr Al Khorafi and/or against Mrs Al Hamad.

59. Each of the pledge agreements contained a paragraph in these terms:

> "Should the value of the pledged assets fall below the customary or agreed margin, or if the Bank should, for other reasons, consider the value no longer adequate to cover its claims, the Debtor [meaning the Pledger and the other person or persons against whom the Bank had claims secured by the pledge] shall be bound upon simple demand by the Bank to either reduce the debt by repayment or furnish sufficient additional security to re-establish said margin. In the event of the Debtor failing to comply with said conditions within such time limit as may be set by the Bank at its discretion, the debt shall become repayable and due immediately. If, for any reason or exceptional circumstances, the Bank is unable to notify the debtor immediately of a fall in value of the pledged assets below the customary or agreed margin, the full amount of the outstanding claims of the Bank shall become immediately due and payable."

60. Under the terms of the agreements the Bank was entitled, as soon as the debt became due, at its discretion and after previous warnings, to realise the pledge assets by free sale.

The implications of the investment structure

61. Against that background, at paragraph 49 of the judgment, the judge summarized the effect of the arrangements into which the Claimants entered in the course of making their investments in the Notes as follows:

> The return on the investments was dependent on the credit of the issuer: that is to say, on the ability of the issuer to make the coupon payments and the redemption payment when they fell due. The investments were not underpinned by assets which had a value independent of the issuer's covenant. In that context it is pertinent to have in mind that, at the time the Notes were purchased, (i) the issuer was not identified in the Indicative Termsheets (dated 16 May 2007) in respect of the REIT Notes, (ii) the issuer was not identified in the Indicative Termsheets (dated 17 July 2007) in respect of two out of the three purchases of the July 2007 SaraFloor Notes (the Notes on the Special Materials Basket and the Notes on the Financial Services Basket) and (iii) in the cases in which the issuer was identified prior to the purchase (in the Indicative Termsheet in respect of the July 2007 SaraFloor Notes on the Energy Basket and in the Definitive Termsheets in respect of the February 2008 Sarafloor Notes), where the issuer was named as Bank Sarasin (CI) Ltd, Guernsey, the issuer's credit rating was said to be "Not Available"). The risk of default by the issuer may be described as "Issuer Risk".
>
> The investment in the Notes was "Capital Protected" only to the extent that, if the Notes were held until maturity, the investor would receive (subject to Issuer Risk) a specified percentage of the notional value (being the difference between 100% and the percentage amount already received as coupon payments). There was no capital protection if the Notes were not held to maturity.
>
> The deeds of pledge (and the associated credit facility agreements) entitled Bank Sarasin to make margin calls against the borrower in the event that the value of the assets pledged fell below the "lending value" (that is to say, the value less the margin); and to realise the assets pledged (by closing out the Notes prior to maturity) if the margin calls were not met. The effect was that, if the value of the "Underlying" fell as a result of market conditions over which the investors had no control, each was at risk of having the Notes closed out prior to maturity - so vitiating such capital protection as the Notes might otherwise provide - if the borrower could not, or did not, meet the margin call. This risk may be described as "Margin Call Risk".
>
> If, but only if, the coupon payments were treated as a return of capital (with no interest element) could it be said that the Notes provided capital protection of the whole amount invested.
>
> Given that the purchase monies were funded wholly by borrowing, the investor needed to service the cost of that borrowing. The effect of the Irrevocable Payment Order dated 25 June 2007 was that the coupon payments in respect of the 10% REIT Notes purchased by Mrs Al Hamad were to be paid to ABK. To the extent that those coupon payments were to be set against the interest accruing on the US$50 million which she had borrowed from ABK in order to fund that purchase, they could not properly be treated as a return of capital.
>
> The effect of the pledge agreements with Bank Sarasin was that the assets pledged included the coupon payments in respect of the REIT Notes, the July 2007 SaraFloor Notes and the February 2008 SaraFloor Notes. To the extent that those coupon payments were to be set against the interest accruing on the monies borrowed by Mrs Al Hamad and/or Mrs Al Rifai from Bank Sarasin in order to fund their purchases of Notes, they could not properly be treated as a return of capital.
>
> Interest was payable on the ABK loans at a variable rate. The coupon payments in respect of the Notes were fixed. There was a risk that the variable rate at which interest accrued on the ABK loans could exceed the coupon payments on the REIT Notes.
>
> The purchases of the July 2007 SaraFloor Notes and the February 2008 SaraFloor Notes were funded by loans (to Mrs Al Hamad and Mrs Al Rifai respectively) from Bank Sarasin. Those loans were secured by pledges over the Notes purchased by the borrower; and by pledges (by way of cross-collateral) over the Notes purchased by the other investors. In particular, the loan to Mrs Al Hamad was secured not only by a pledge over the Notes held in her name (being the 10% REIT Notes which she had purchased in June 2007 - to the extent consistent with the Irrevocable Payment Order - and the July 2007 SaraFloor Notes which she purchased with the monies lent), but also by a pledge over the 8% REIT Notes held in the name of Mr Al Khorafi and the February 2008 SaraFloor Notes held in the name of Mrs Al Rifai.
>
> The liabilities for which the July 2007 SaraFloor Notes purchased by Mrs Al Hamad were pledged as security included the interest charges accruing on the US$100 million which she had borrowed to fund that purchase; and the liabilities for which the February 2008 SaraFloor Notes purchased by Mrs Al Rifai were pledged as security included not only the interest charges accruing on the monies borrowed by Mrs Al Rifai to fund her purchase but also the interest charges accruing on the US$100 million borrowed by Mrs Al Hamad.

62. In our judgment that summary was correct.

The contractual arrangements between the Claimants and Sarasin-Alpen

The Confirmations of Investment

63. Mr Al Khorafi signed a Confirmation of Investment, dated 6 June 2007, in respect of his investment of US$30 million in the REIT Notes. There is no record that Mrs Al Hamad signed a Confirmation of Investment in respect of her investment of US$50 million in the REIT Notes; although an unsigned Confirmation of Investment form in respect of that investment, to which the Indicative Termsheet (bearing her signature on each page) was attached, was produced by the Defendants/Appellants. Mrs Al Hamad signed, by her attorney Mr Al Khorafi, Confirmations of Investment, dated 17 July 2007, in respect of her investments (amounting to US$100 million in aggregate) in the July 2007 SaraFloor Notes. There is no record that Mrs Al Rifai signed Confirmations of Investment in respect of her investments (amounting to US$10 million in aggregate) in the February 2008 SaraFloor Notes.

64. The Confirmations of Investment were on the headed paper of Sarasin-Alpen. They are addressed "*Dear Sir/Madam*". They confirm "*my purchase of the investment product as mentioned below*". Details of the investment product - which include Product Name, Amount to be invested, Term Sheet/Factsheet Date and Capital Protection Level at maturity - are set out in a table. Immediately below the table there is the following statement:

> "By signing below, I/we confirm that I/We have read the attached `Indicative Term Sheet/Factsheet/other product information documents in full.
>
> I/We are aware of the product characteristics and the inherent risks of investing in the same.
>
> I/We appreciate that past performance is no guarantee of future results and that the value of my Investment, during its life, may go down as well as up.
>
> I/We confirm that it is suitable to my/our financial condition and circumstances, and corresponds to my/our investment objectives."

The forms conclude:

> "I/We hereby authorise Bank Sarasin & Company Limited to debit my/our bank account for the above mentioned product on or before the settlement date."

The Additional General Business Conditions

65. The Additional General Business Conditions ("AGBCs") set out the terms of the contracts between the Claimants (each referred to in the AGBCs as "*the Client*") and Sarasin-Alpen which was referred to in the AGBCs as "BSA"). The AGBCs contained an introductory paragraph in these terms:

> "These Additional General Business Conditions are entered into to ensure compliance with the applicable legislation and rules of the DIFC for Clients of Bank Sarasin-Alpen (ME) Limited (`BSA'), an Authorised Firm regulated by the Dubai Financial Services Authority (`DFSA') and forms part of the business relationship between the Client and BSA. No other agreement entered into with Bank Sarasin & Co Ltd, its branches, representatives offices or affiliated companies (together the `Sarasin Group'), or any document executed in favour of the Sarasin Group, shall be replaced hereby. If there is any conflict between such agreements and/or documents and these Additional General Business Conditions regarding the business relationship between the Client and BSA, the Additional General Business Conditions shall prevail
>
> Capitalised Terms not otherwise defined herein are used in their context as defined terms in the Glossary Module of the DFSA Rulebook. Please refer to the excerpts [from] the Glossary Module attached hereto for ease of reference in this regard.
>
> These Additional General Business Conditions comprise a client agreement for the purposes of the Conduct of Business Module of the DFSA Rulebook and shall come into force upon execution by both parties."

66. The AGBCs comprised, or were intended to comprise, in addition to the terms of the agreement (set out in seven clauses on numbered pages 1 to 5), two annexes: (i) Annex 1, headed "*Client Declarations, Undertakings & Authorizations*" (set out on pages 6, 7 and 8 of the document); and (ii) Annex 1A, headed "*Individual Client Analysis*" (set out on pages 9 and 10 of the document). The document was intended to be signed by both BSA and the Client on page 8: that is to say, on the last page of Annex 1, and before Annex 1A. Clause 1 of the agreement ("Client Qualification") was in these terms:

> "1.1 The Client has completed the Client Declarations, Undertakings & Authorization set out in Annex 1.1.2 The DIFC is a wholesale jurisdiction and the Client, when dealing with BSA, will not be afforded the retail customer protection and compensation rights that may generally be available to them in other jurisdictions."

67. Annex 1 to the AGBCs contained declarations, undertakings and authorisations to be given by the Client. It comprised eleven numbered paragraphs. Paragraph 1 was intended to contain a declaration in these terms:

> "I, the undersigned, hereby: Represent and warrant that I meet the definition of `Client' as set out in the Conduct of Business Module of the DFSA Rulebook as follows (Please tick the appropriate box signifying the criterion for qualification):."

68. There followed eleven sub-paragraphs, each setting out criteria for qualification as a Client under the Conduct of Business Module of the DFSA Rulebook. The first of those was in these terms:

> "...
>
> An individual who:
>
> Has at least US$1 million in liquid assets, having provided BSA with written confirmation of this (where `liquid assets' can be defined as cash or assets that can be readily converted into cash, including but not limited to marketable securities, government bonds, treasury bills and notes that mature within 90 days);
>
> Has sufficient financial experience and understanding to participate in financial markets in a wholesale jurisdiction (such as the DIFC); and

Consents hereby to being treated as a Client in a wholesale jurisdiction, such as the DIFC;"

69. The purpose of Annex 1A to the AGBCs was explained in its introductory paragraph:

"If the Client in Clause 1 of the Additional General Business Conditions is stated to be an individual, please complete the following questionnaire to establish your financial experience and understanding of financial markets in a wholesale jurisdiction, such as the DIFC."

70. There followed six numbered questions to which Sarasin-Alpen sought answers from the prospective Client:

"1. State the details of your knowledge and understanding of the relevant financial markets, types of investment and of the risks involved, either generally or in relation to any proposed transaction that you consider entering into with BSA or any other member of the Sarasin Group, or through the intermediation of BSA or any other member of the Sarasin Group:

Confirm the length of time you have been active in the relevant financial markets, the frequency of your dealings and the extent you have relied on financial advice from financial institutions in this regard:

Give an indication of the size and nature of transactions that have been undertaken for you in the relevant financial markets:

����� State your relevant qualifications relating to the relevant financial markets:

����� Give an indication of the composition and size of your existing financial investment portfolio;

Is there anything else you consider relevant in our assessment of your financial experience and your understanding of financial markets in a wholesale jurisdiction?"

71. The remaining numbered paragraphs of Annex 1 included the following (so far as material):

"I, the undersigned, hereby:

2. Declare that the particulars and information provided by me to BSA and/or the Sarasin Group herein are accurate, correct, true and complete as at the date hereto, and that such particulars and information (whether provided to BSA or the Sarasin Group) will be depended on by BSA in making its decision as to whether I qualify as a Client hereunder;

����� .

4. Acknowledge and accept full responsibility as to any particulars or information provided at any time to BSA and/or the Sarasin Group proven to be inaccurate, incorrect, untrue or incomplete;

5.�Authorise BSA to contact any source of information, or any person or entity nominated herein as a reference in order to verify the accuracy and correctness of the particulars and information provided;

6. Declare and confirm that, in providing this information to BSA and in seeking advice or recommendation from BSA pursuant to the Additional General Business Conditions, I am acting as principal and not as agent for any third party;

7. Declare and further consent to being treated as a Client under the laws and regulations of the DIFC, and confirm that I understand that, by making this declaration and giving this consent, I will not be afforded the retail customer protections and compensation rights that may generally be available to me in other jurisdictions;

8. Authorise BSA and/or the Sarasin Group, in order to assess and decide on my application to make inquiries about me to obtain information as it may consider necessary, from any sources;

9. Authorise any such contacted references, financial institutions, debt collection companies, credit bureau, or any other person or entity to disclose and provide BSA and/or the Sarasin Group with any requested available information about me;

10. Acknowledge having read and fully understood the General Terms & Conditions, the Safe Custody Regulations and the Metal Account Regulations of Bank Sarasin & Co Ltd and the Additional General Business Conditions under which BSA is willing to carry out its services; and

11. Acknowledge that BSA has the discretion to approve or decline my application."

72. Following those numbered paragraphs and immediately above the position for the signatures of Sarasin-Alpen and the Client (on page 8 of the document) there was the following confirmation by the Client (which appeared in bold print):

"I hereby confirm that BSA is not required to consider the suitability of any particular investment when giving any advice or recommendation to, or accepting instructions or orders from, me in respect of such investments, unless in relation to a specific request for advice or recommendation or other Investment Services, I have supplied to BSA specific information on my situation or requirements for that Investment and requested specifically that these be taken into account when BSA is preparing such advice or recommendation or accepting instructions or orders."

73. Clause 2 of the agreement ("Investment Services to be provided by BSA" contained the following (amongst other) provisions:

"2.2��� Investment Services

����������� BSA will offer the following services (`the Investment Services') to the Client on the terms set out in these Additional General Business Conditions:

2.2.1� Advice and recommendation on investments or arrangements involving investments in instruments or credit including without limitation, shares, stocks, bonds, notes derivative contracts or other similar property;

2.2.2� Advice and recommendation on entities to undertake execution of investments, custody or other banking services on behalf of the Client including, without limitation, other members of the Sarasin Group;

2.2.3� Provision of research and other information and materials related to investment opportunities that BSA considers may be of interest to the Client or which may be requested by the Client; and

2.2.4� Such other services as BSA is authorized and licensed by the DFSA to offer to the Client from time to time.

����������� .

2.4 ��� Restrictions on Investments

There shall be no restrictions on the types of investments or markets in which you as Client wish to invest except as specifically agreed to in writing between the Client and BSA at the time any advice or recommendation or other Investment Services are requested by the Client pursuant to these Additional General Business Conditions, or as permitted under the applicable laws and regulations of the DIFC or the DFSA's application or interpretation thereof����������� .

2.6���� BSAs Obligations when providing Investment Services

2.6.1 BSA will not be required to consider the suitability of any particular investment for the Client when giving advice or recommendation or accepting instructions or orders in respect of such investment, unless in relation to a specific request for advice or recommendation or other Investment Services, the Client has supplied to BSA specific information on its situation or requirements for that investment and requested specifically that these be taken into account when preparing such advice or recommendation or accepting instructions or orders.

2.6.2 BSA may assist and advise the Client in its investment activities, upon request by the Client, by supplying the Client with research and other information including details of investment opportunities, markets, companies, prices, currencies etc, as well as making specific investment recommendations. Such advice shall be based on information and sources deemed reliable by BSA. The majority of general investment recommendations made by BSA are based on the Sarasin Group's and/or BSA's investment policy and are aimed at a wide target group. Any investment recommendations or offers made in direct contact with individual Clients shall only take the Client's specific situation into account if the Client has supplied such information to BSA when making the enquiry in accordance with sub-clause 2.6.1 above.

����������� .

2.6.5 The Client acknowledges and agrees that, to the extent permitted by law and the DFSA Rules, neither [Sarasin-Alpen] nor any other member of the Sarasin Group shall be responsible for any loss or damage suffered by the Client as a result of:

any advice or recommendation given under these Additional General Business Conditions (including, without limitation, any adverse tax consequences); or

����������� .

2.6.6 Nothing in this Additional General Business Conditions nor any advice or recommendation given to the Client by BSA will give rise to any fiduciary or equitable duties on our part which would require BSA or any other member of the Sarasin Group to accept responsibilities more extensive than those set out in these terms."

74. Clause 3 of the agreement ("Information and Communication Authorisation") provided, at sub-clause 3.2, that:

"3.2 The Client hereby agrees to communicate with each Member of the Sarasin Group directly and agrees to forward messages and orders to the respective Member of the Sarasin Group. The Client agrees that the Sarasin Group may send its messages addressed to the Client through BSA."

75. Clause 7 of the agreement provided that the AGBCs were to be governed by and construed in accordance with the laws of the DIFC; and that both Sarasin-Alpen and the Client submitted to the non-exclusive jurisdiction of the DIFC Courts.

The regulatory framework imposed by DIFC Regulatory Law No. 1 of 2004

76. The provision of financial services in and from the Dubai International Financial Centre is, and was at the material times, regulated by the DIFC Regulatory Law.

77. Part 2 of the Law provides that the DFSA (Dubai Financial Services Authority) is a body established under Dubai law with the powers and functions conferred by the Law. Article 23 of the Law provides that the DFSA has the power to make Rules in respect of any matters related to those functions. In particular, Article 23(2)(c) confers power to make rules in respect of

"standards of practice and business conduct of persons in dealing with their customers and clients and prospective customers and clients".

78. Article 41(1) of the Law contains a general prohibition against carrying out "*Financial Services"* in the DIFC without a license. Article 41(2) requires the DFSA to make Rules prescribing the activities which constitute a Financial Service. Article 42(1) requires the DFSA to make Rules prescribing which Financial Services may be carried out by a licensed entity. Those articles were (at the relevant time) in these terms:

"41. The Financial Services Prohibition

(1) Subject to Article 41(6), (7) and (9) and Article 42(3), a person shall not carry on a Financial Service in or from the DIFC.

(2) The DFSA shall make Rules prescribing the activities which constitute a Financial Service.

(3) The prohibition in Article 41(1) is referred to in the Law as the `Financial Services Prohibition'.

**** .

42. Authorised Firms, Authorised Market Institutions and Financial Services

(1) The DFSA shall make Rules prescribing which kinds of Financial Services, with such modifications or limitations as may be specified, may be carried on by:

(a) an Authorised Firm

**** .

(3) A person may carry on one or more Financial Services in or from the DIFC if such a person is

(a) an Authorised Firm whose License authorises it to carry on the relevant Financial Services.

**** .

(4) An Authorised Firm shall:

(a) act within the scope of its authority under its License; and

(b) comply with any conditions or restriction applicable to its License.

**** ."

79. Article 65 of the Law was in these terms (so far as material):

"65. Unenforceable Agreements - Breach by Party to the Agreement

(1) Subject to Article 65(5), a person who makes an agreement in the course of carrying on a Financial Service in breach of the Financial Services Prohibition . . .**** shall not be entitled to enforce such agreement against any party (a "relevant party") to the agreement.

(2) Subject to any agreement that may otherwise be reached between the parties, a relevant party may apply to the Court to recover:

(a) any money paid or property transferred by him under the agreement;

(b) compensation reflecting any loss sustained by the relevant party as a direct result of such payment or transfer; and.

(c) .

(3) .

(4) The compensation recoverable under Article 65(2)(b) is the amount agreed between the parties to the agreement or, following an application to the Court, the amount determined by the Court.

(5) If the Court is satisfied that the person:

(a) carrying on the Financial Service reasonably believed that he was not in breach of the Financial Services Prohibition.

**.

and that it is fair and just in the circumstances to make such an order, it may make one or more of the following orders:

(d) an order that the agreement be enforced between the parties to such extent and under such terms and conditions as the Court sees fit; or

(e) an order that money paid or property transferred under the agreement be retained or dealt with in accordance with the agreement or in such manner as the Court deems fit.

(6) .

(7) In Article 65, "agreement" means an agreement, the making or performance of which constitutes, or is part of, the carrying on of a Financial Service."

80. Article 85(1) of the Law was, at the relevant time, in these terms:

"85. General Contravention Provision

(1) A person who:

(a) does an act or thing that the person is prohibited from doing by or under the Law or Rules or any other legislation administered by the DFSA;

(b) does not do an act or thing that the person is required or directed to do by or under such Law, Rules or other legislation;

(c) otherwise contravenes a provision of such Law, Rules or other legislation:

commits a contravention of such Law, Rules or other legislation, as the case may be, by virtue of Article 85 unless another provision of such Law, Rules or other legislation provides that the person commits, or does not commit, a contravention."

Articles 87 to 93 of the Law provide that where there has been a contravention, the DFSA or the Financial Markets Tribunal has the power to issue a fine. Alternatively, the DFSA has the power to issue an administrative censure or to seek an injunction from the Court.

81. Article 94 of the Law provides that there shall be a civil claim for damages in certain circumstances. The article was, at the relevant time, in these terms (so far as material):

"94. Civil Proceedings

(1) Where a person:

(a) intentionally, recklessly or negligently commits a breach of duty, requirement, prohibition, obligation or responsibility imposed under the Law or Rules or other legislation administered by the DFSA; or

(b)**** .

the person is liable to compensate any other person for any loss or damage caused to that other person as a result of such conduct, and otherwise is liable to restore such other person to the position they were in prior to such conduct.

(2) The Court may, on application of the DFSA or of a person who has suffered loss or damage caused as a result of conduct described in Article 94(1), make orders for the recovery of damages or for compensation or for the recovery of property or for any other Order as the Court sees fit, except where such liability is excluded under the Law or Rules or other legislation administered by the DFSA."

The DFSA Rules

82. The Rules made by the DFSA were contained in the DFSA Rulebook. The Rulebook comprised a number of Modules. Rules made pursuant to Article 41(2) of the Law prescribing the activities which constitute a Financial Service are contained in Chapter 2 ("Financial Services") of the General (GEN) Module of the DFSA Rulebook. GEN Rule 2.2.1 provided that:

"2.2.1 An Activity constitutes a Financial Service under the Regulatory Law 2004 and these Rules where:

********** it is an activity specified in Rule 2.2.2; and

********** such activity is carried on by way of business in the manner described in section 2.3."

83. GEN Rule 2.2.2 provided (so far as relevant to this case) that:

"2.2.2 The following activities are specified for the purposes of Rule 2.2.1:

********** .

(f) ���� Arranging Credit or Deals in Investments,

�������� .

(h) ��� Advising on Financial Products or Credit,

�������� .

(k) ��� Arranging Custody,

�������� ."

84. GEN Rule 2.3.1 was in these terms (so far as material):

"2.3.1 Subject to Rules 2.3.2 and 2.3.3, for the purposes of these Rules a Person carries on an activity by way of business if the Person:

�������� Engages in the activity in a manner which itself constitutes the carrying on of a business;

."

85. The Rules prescribing which kinds of Financial Services might be carried on by an Authorised Firm are contained in Chapter 3 ("*Financial Services which may be carried on in or from the DIFC*") of the GEN Module. GEN Rule 3.2.1 provided, in effect, that an Authorised Firm might be authorised to carry on any of the activities specified in GEN Rule 2.2.2 (Financial Services) other than Providing Money Services, Operating an Exchange and Operating a Clearing House.

86. Chapter 4 of the GEN module of the Rulebook contains the Core Principles to be observed by Authorised Firms and Authorised Individuals. Those principles include, at GEN Rule 4.2.8, Principle 8 ("Suitability"). That Principle requires that:

"4.2.8 An Authorised Firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for customers who are entitled to rely on its judgment."

87. The Rules setting out standards of practice and business conduct are contained, *inter alia*, in the Conduct of Business (COB) Module of the DFSA Rulebook. COB Rule 3.2.1 is in these terms (so far as material):

"3.2.1

(1) ��� An Authorised Firm must ensure that it does not conduct Investment Business.with or for a Retail Customer.

(2) ��� An Authorised Firm must only conduct Investment Business.with or for a Person who is a Client.

(3)���� If an Authorised Firm is aware that a Client with or for whom it is intending to carry on Investment Business.is acting as agent for another Person, the `second person' in relation to a particular transaction then, unless the Client is another Authorised Firm or a Regulated Financial Institution, the Authorised Firm must not effect the transaction unless the second person is a Client."

88. "Investment Business" includes "*Arranging Credit or Deals in Investments"* and *"Advising on Financial Products or Credit":* activities which are specified in GEN Rule 2.2.2.

89. COB Rule 3.2.2 defines who is a Client and who is a Retail Customer for the purposes of Rule 3.2.1.

90. In summary, therefore, the regulatory framework provided:

(1) That it was contrary to the Financial Services Prohibition - and so in contravention of the Law - to carry on in or from the DIFC a Financial Service without obtaining a license from the DFSA authorising that activity.

(2) That Investment Business could only be conducted with or for a Client and not with or for a Retail Customer.

(3) That standards of practice and conduct of persons dealing with their customers and clients and prospective customers and clients were prescribed by Rules issued by the DFSA.

(4) That a breach of the Law, or of the Rules issued by the DFSA pursuant to the Law, was a disciplinary/regulatory matter for which an Authorised Firm could, *inter alia*, be brought before the Financial Markets Tribunal and/or fined or censured.

(5) That, in addition, pursuant to Article 94 of the Law, a civil claim for damages might arise where a person intentionally, recklessly or negligently commits a breach of duty, requirement, prohibition, obligation or responsibility imposed under the Law or Rules or other legislation administered by the DFSA.

Chronology of events

91. There followed in the judgment from paragraph 71 to paragraph 160 a more detailed chronology, with particular reference to meetings that took place between Mr Al Khorafi and Mr Blonde and Mr Walia at various dates in 2007. It is necessary to repeat some of that chronology in order to establish the framework of the main focus of this appeal - namely alleged wholesale errors by the judge in his findings on disputed issues of fact attributable in large, so it was contended, to his inappropriate and perverse rejection of the evidence of Mr Walia. In this regard we are focusing at this stage on the appeal by Sarasin-Alpen. Nonetheless much of the material is also pertinent to the appeal by Bank Sarasin.

Events leading to the purchase of the REIT Notes in June 2007

92. In February 2007, Mr Al Khorafi recruited Alaa Taha as a financial adviser with the intention that Mr Taha would assist him in raising finance for a proposed real estate development in Kuwait. At or about the same time, Mr Al Khorafi decided to explore the possibility of borrowing against uncommitted assets in order to make investments from which he could derive a regular income. He asked Mr Taha to approach Kuwaiti banks with this in mind.

93. Mr Taha spoke to Steven Cheerian at ABK. Mr Cheerian told Mr Taha that ABK would be willing to lend to Mr Al Khorafi and Mrs Al Hamad for investment outside Kuwait on condition that the funds would be used to purchase capital guaranteed investment products with an AA or higher rated bank. He recommended Bank Sarasin.

94. Mr Cheerian introduced Mr Taha to Mr Blonde of Sarasin-Alpen. In April 2007 Mr Taha and Mr Blonde met at the offices of Mr Al Khorafi in Kuwait. Mr Taha's evidence was that he explained to Mr Blonde in the course of that meeting that Mr Al Khorafi and Mrs Al Hamad were looking at investing money; and that ABK had indicated that it would lend money on condition that the investment be "capital guaranteed". He further stated that "*Mr Blonde said they had a product called capital guarantee notes which would be ideal as it would guarantee the investment and pay the interest on the ABK loan*". Since Mr Blonde was not called that evidence was not contradicted and it was accordingly accepted by the judge.

95. Following that introductory meeting, a meeting which lies at the heart of this appeal took place at Mr Al Khorafi's offices on or about 24 April 2007. That meeting was attended by Mr Walia and Mr Blonde of Sarasin-Alpen, and Mr Al Khorafi (for part of the meeting), Mr Taha, Mohammed Nour (then an engineer engaged by Mr Al Khorafi in connection with the proposed real estate development, and subsequently employed as Mr Khorafi's office manager) and Abdullah Al Shatti (the General Manager of the Khorafi National Group and a business associate of Mr Al Khorafi).

96. There was considerable dispute as to what was said at that meeting. The judge accurately recited the witness evidence in paragraphs 170 to 183 of the judgment. He then considered this evidence in the light of his general impression of the witnesses as set out in paragraphs 162 to 168. As regards Mr Walia he made the following somewhat devastating comment at paragraph 166:

"His attempts to evade and prevaricate led me to the conclusion that he had no interest in assisting the Court in its of ascertaining the true facts of the case. Through his ownership (in part) of Alpen Corporation he had a financial interest in the outcome of these proceedings which he only revealed under cross examination. I found his evidence self-serving, evasive, self- contradictory and unreliable.

97. It is the challenge to this assessment which forms the thrust of the Appellants appeal on the facts. The judge had some reservations about the evidence of Mr Al Khorafi and Mr Taha. But their evidence was supported by Mr Nour and Mr Al Shatti, and in the absence of any evidence from Mr Blonde, the judge felt driven to place no weight on the evidence of Mr Walia where it was inconsistent with the claimants' witnesses. The resulting conclusion as to the content of the meeting is set out later in this judgment.

98. On 25 April 2007, there were discussions between Mr Blonde and Matthias Leuenberger (an employee in the financial engineering department of Bank Sarasin) as to possible investment structures. Following those discussions Mr Blonde prepared an investment proposal for Mr Al Khorafi and Mrs Al Hamad - which he sent to Mr Taha as an attachment to an email on 29 April 2007. The investment proposal was described in the email as "*investment proposal for `Real Estate Investment Trust Basket' capital protected notes with income payments"*.

99. The attachment to Mr Blonde's email of 29 April 2007 was an "Indicative Factsheet". The Factsheet contained particulars of a structured financial product, described as "Public SaraFloor with Coupon on the Real Estate World Basket". The product offered in the Indicative Factsheet was in the form of a note to be issued by "Bank Sarasin (CI) Ltd, Guernsey". A section headed "Price Indication" contained the following information:

"Capital Guarantee������������������ 100%

Coupon������������������������������ 10% Annual payment

Maturity������������������������������ 3 years"

������������ Immediately thereunder there was a table:

Structure	Min Redemption	CPN p.a	Total Floor	Participation
	70.00%	10%	100%	90%

and a formula to showing the computation of "Redemption at Expiration":

Redemption at Expiration	Minimum Redemption + {(Nominal/Spot at Issue x Participation (%) x (Max(Spot at Expiration - Strike; 0))}"

100. As the judge recorded in paragraph 80 of his judgment, it was put to Mr Walia that the statement "Capital Guarantee - 100 %" was not clear but in fact potentially misleading. Mr Walia's response was that it was necessary to read the "structure" table to make sense of the capital guarantee and the 10% annual payment. But when he was asked to explain the formula (or "equation"), his response was:

> "That equation is an equation which very clearly specifies how the calculation will be done for redemption purpose."
>
> But in fact he was not able to explain how the equation worked.

101. On 5 May 2007, Mr Blonde sent an email to Mr Taha to which he attached a process flow document, a sample of the pledge document, Termsheets and detailed investment proposals for the investments (Factsheets). The Factsheets, in common with the previous Factsheet sent on 29 April 2007, identified the issuer as Bank Sarasin (CI) Ltd, Guernsey. They contained illustrations. In particular, the Factsheet relating to Mr Al Khorafi was based on an initial investment of US$30 million. It stated that there was a 100% capital guarantee with 5% per annum semi-annual coupon although as the judge found an analysis of the small print showed that the capital protection was only 85%. The projected return over 3 years was US$57 million.

102. The Factsheet in relation to Mrs Al Hamad provided for a 100% capital guarantee with an 8% per annum semi-annual coupon; although again as the judge found an analysis of the small print showed that the capital protection was only 76%. The projected return over 3 years was US$98 million. The Termsheets contained no illustrations. Although not easy for a financially inexperienced reader to understand - in that they contained a list of parameters and formulae - on close analysis it can be seen that they state, correctly, that the levels of capital protection were 85% and 76%, respectively.

103. On 19 May 2007, Mr Blonde chased Mr Taha for the return of the Bank Sarasin account opening forms (which had been sent out on 24 April 2007). He told Mr Taha that if there were any difficulties, Mr Taha should contact Mr Walia. Mr Blonde also sent a revised draft guarantee to Mr Cheerian of ABK; stating that this form had been approved by Al Tamimi & Co and that internal approvals from Rabobank were expected in the following week. On 21 May 2007 ABK granted loans to Mr Al Khorafi and Mrs Al Hamad, respectively, of US$30 million and US$50 million. Mr Cheerian and Mr Blonde discussed the form of the guarantee over the following days.

104. In an e-mail sent on 5 June 2007 Mr Taha asked Mr Blonde for a worked illustration of the equation used to describe the product in the forms that Mr Al Khorafi and Mrs Al Hamad were to sign, a clear definition of the capital protection and the expected proceeds from the liquidation before or at maturity. Mr Blonde responded on the same day, attaching worked illustrations for the investments and term sheets. The illustrations projected a redemption payment of US$44 million on Mr Al Khorafi's investment (of US$30 million) and US$69 million on Mrs Al Hamad's investment (of US$50 million).

105. On about 6 June 2007, Sarasin-Alpen sent its Additional General Business Conditions, Dubai International Financial Centre, ("AGBCs") to Mr Al Khorafi and Mrs Al Hamad for signature. Mr Al Khorafi and Mrs Al Hamad signed the AGBCs, in the places indicated, and returned the documents to Mr Blonde. The AGBCs, as returned, were not completed in that neither Mr Al Khorafi nor Mrs Al Hamad completed paragraph 1 in Annex 1 or provided answers to the questions in Annex 1A.

106. In the form in which those documents were produced from Sarasin-Alpen's files, they contained manuscript entries in paragraph 1 in Annex 1 and answers to the questions in Annex 1A. However it was the evidence of Mr Al Khorafi and Mrs Al Hamad that they had only signed the documents but had not otherwise completed them. That evidence was not challenged. In evidence which the judge rejected as being entirely speculative, Mr Walia had said in his witness statement that the manuscript entries had been made by Mr Blonde.

107. At around this time, Sarasin-Alpen completed "Client Profile" and "Client and investment profile" forms for Mr Al Khorafi and Mrs Al Hamad. These were dated 12 and 13 June 2007 but were recorded as received by Bank Sarasin in Switzerland on 28 June 2007. Attached to the "Client and investment profile" was a file note signed by Mr Blonde, which purported to set out some information on the Al Khorafi family. This led to a somewhat inconclusive debate in regard to the fact that the document recorded Mrs Al Hamad as an account holder and gave her account number. Since the document was dated 31 May 2007 the judge found that difficult to reconcile with the fact that Mrs Al Hamad's account was not opened by Bank Sarasin until, at the earliest, 17 June 2007 and thus it was not clear how her account number would have been known on 31 May 2007. We do not think anything turns on this point.

108. The Client Profiles purported to record information about Mr Al Khorafi and Mrs Al Hamad and their requirements. The judge was satisfied from the evidence given by the claimants that that information was incorrect in material respects. For example, the Client Profile in respect of Mr Al *Khorafi recorded, incorrectly, that Mr Al Khorafi was a "commerce* graduate *from USA*", that he was "*Managing director of Khorafi businesses*" and that "*his business line includes Technology, Real Estate, Banks & Finance*". In fact, Mr Al Khorafi's wealth and technology business interests had been inherited. Further, in the section entitled: "*Purpose of the relationship with Bank Sarasin & Co Ltd and the origin of the assets being invested*", there was no mention of the money being lent from ABK: rather, it was stated that the "*origin of the assets being transferred"* was "*Dividend and Income from business inherited from family"*.

109. The Client Profile in respect of Mrs Al Hamad recorded, incorrectly, that she was "*Managing Partner of all Khorafi businesses*". Again, in the section headed: "*Purpose of the relationship with Bank Sarasin & Co Ltd and the origin of the assets being invested"*, there was no mention of the money being lent from ABK; rather, as in the case of Mr Al Khorafi, it was stated that the "*origin of the assets being transferred*" was "*Dividend and Income from business inherited from family"*.

110. On 17 June 2007 Bank Sarasin opened current and custody accounts in the names of Mr Al Khorafi and Mrs Al Hamad. The same day Mr Blonde emailed confirming the terms of the Irrevocable Payment Order, scheduling a meeting with Mr Al Khorafi in London for 22 June 2007, setting out the bank account numbers for Mr Al Khorafi and Mrs Al Hamad and confirming that he was still looking into the difference between coupon paying out through capital growth or profit lock-in.

111. On 20 June 2007, Mr Cheerian emailed Mr Blonde confirming that from ABK's perspective everything was in place. On 21 June 2007, Stephan Wernli (of Bank Sarasin) sent to ABK the form of the Irrevocable Payment Order and the form of Bank Sarasin's proposed confirmation.

112. Also on 21 June 2007, Mr Blonde emailed Mr Leuenberger asking for all of the versions of the product that had been priced. In an apparent bid to encourage Mr Leuenberger to pull together this information, Mr Blonde said "*Please bear in mind this is for a USD 80M new money & client deal with a client that has been having a PB relationship for 40 years with Credit Suisse & HSBC. Bank Sarasin is a total new name for this client!*". As the judge observed, given that Mr Al Khorafi was then aged 40 years, it is difficult to understand how Mr Blonde could have thought that he had had a 40 year relationship with either Credit Suisse or HSBC.

113. On the same date, Bank Sarasin issued a secured credit facility letter to Mr Al Khorafi which confirmed a facility up to a maximum amount of US$21.6 million. The intention was for the credit facility to be secured on Mr Al Khorafi's investments with Bank Sarasin; and for a guarantee to be issued to ABK (based on the credit facility), thereby satisfying ABK's requirements that the proceeds on maturity would be remitted back to ABK. The credit facility letter was signed by Mr Al Khorafi on 23 June 2007 in London.

114. On 22 June 2007, Mr Walia, Mr Blonde, Mr Nour and Mr Al Khorafi met again in London. It was clear that by now Mr Al Khorafi and Mrs Al Hamad had been accepted as "Clients" by Sarasin-Alpen. It was common ground that, at this meeting Mr Al Khorafi told Mr Walia to proceed with the investments proposed for him and his mother. It was also common ground that there was discussion as to the possibility of borrowing against (or `leveraging') the original US$80 million investment in order to make further investments. But there was disagreement on the question whether (as Mr Walia contended) that possibility was first suggested by Mr Al Khorafi and on the question whether the risks of leveraging were discussed. There was also a disagreement as to whether Mr Taha attended the meeting.

115. Once again, in paragraphs 192 to 199 of the judgment, the judge accurately summarized the important sections of the witness evidence in regard to the controversial aspects of the 22 June meeting. Given the view he had formed as to the credibility of Mr Walia he predictably rejected the evidence of Mr Walia where it was inconsistent with that of Mr Al Khorafi and Mr Nour. In particular he concluded that Mr Taha was not present (a topic on which Mr Walia conceded he had no recollection), that it was Mr Walia who had raised the idea of leveraging, that Mr Walia repeated the assurances that the coupons would cover the interest on the loans and that the further loans were devoid of risk.

116. By 25 June 2007, Mr Malpani (of Sarasin-Alpen) gave Bank Sarasin the necessary trading instruction in the wake of which Bank Sarasin was able to purchase the instruments from Rabobank at less than their nominal value. In particular, in respect of Mr Al Khorafi's investment of US$30 million investment, Bank Sarasin paid Rabobank US$29.37 million (but booked the purchase to Mr Al Khorafi's account at US$30 million); and, in respect of Mrs Al Hamad's investment of US$50 million, Bank Sarasin paid Rabobank $49,005,000 (but booked the purchase to Mrs Al Hamad's account at US$50,000,000). The difference (of US$630,000 in the one case and US$995,000 in the other) was treated as the fee earned by Bank Sarasin on the trade and was remitted to Sarasin-Alpen under the fee sharing agreement.

117. Mr Al Khorafi and Mrs Al Hamad gave written instructions for the purchase of the first tranche of investments although these instructions were not in fact received by Bank Sarasin until 28 June 2007, after the investments had been purchased. The instructions were in standard form, each on the letterhead of Sarasin-Alpen. Each was described as *"Confirmation of Investment in a Structured Note/Certificate/Mutual Fund/Bond*"; and confirmed "*my purchase of the investment product as mentioned below*". There followed a box in which some of the details of the product were set out.

118. Attached to the confirmation forms was the Indicative Termsheet of 16 May 2007 with the accompanying illustration. But, because the termsheet had been prepared as a draft, the issuer, lead manager, calculation agent and clearer were all marked "[tba]" and other material terms had not been completed, including the initial fixing and the secondary market provisions. Mr Al Khorafi signed the first page of his confirmation form and initialled each page of the termsheet. Mrs Al Hamad initialled each page of the termsheet although she did not sign the first page of her confirmation form.

119. This first tranche of investments was booked into Mr Al Khorafi's and Mrs Al Hamad's accounts on 28 June 2007 for value on 2 July 2007. On 2 July 2007 the REIT Notes were purchased using the monies advanced by ABK.

Events leading to the purchase of Notes by Mrs Al Hamad in July 2007

120. The proposals for a second tranche of investments, on the basis of "leveraging" funded by Bank Sarasin, were discussed at the meeting in London on 22 June 2007. It was arranged that Mr Taha should visit Sarasin-Alpen in Dubai in order to take those proposals forward.

121. The first indicative term sheet for this second round of investments was prepared on 28 June 2007. It contained a proposal for a "*Sarafloor investment on the Financial Services Basket*". The proposed investment was to be similar to the first investment in structured products save that the performance of the Note was linked to the weighted performance of a basket of financial institutions. Indicative Termsheets were also produced for investments into an Energy Basket and a Special Materials Basket. In each Termsheet the issuer of the notes was identified as Bank Sarasin (CI) Limited and the Lead Manager and issuer of the warrants was Bank Sarasin. The products were selected by Mr Blonde and others at Sarasin-Alpen or Bank Sarasin.

122. On Monday 2 July 2007, Mr Taha met Mr Walia and Mr Blonde at Sarasin-Alpen's offices in the DIFC. They discussed the proposals for leveraging which had been raised at the meeting with Mr Al Khorafi in London. Mr Taha was asked to send over a document setting out Mr Al Khorafi's financial position. In an email enclosing that information, Mr Taha asked Mr Blonde for proposals which would expand the investment portfolio to US$180 million; those proposals to be prepared in time for the "final" meeting on 11 July 2007. On 4 July 2007, Mr Blonde responded: confirming the various proposals that were being considered and referring to the meeting to be held in London on 11 July 2007.

123. On 3 July 2007 following a meeting in Dubai, Mr Taha emailed Mr Blonde with information as to the personal financial position of Mr Al Khorafi. On 4 July 2007 Mr Blonde emailed Mr Taha attaching five different "*refinancing solutions*" by Bank Sarasin for Mr Al Khorafi's group of companies including a proposal to leverage and expand the portfolio of Mrs Al Hamad/Bank Sarasin to US$180 million.

124. On a date between 4 July and 7 July 2007, Mr Blonde sent a further proposal in relation to leveraging. This proposal was initially sent to Mr Nour; but was sent on to Mr Taha at his request. Two possible leveraging structures were proposed: the one based on a chain of guarantees and the other based on leveraging of US$100 million on the original US$50 million investment made by Mrs Al Hamad. The proposals in respect of the second structure projected a surplus each year of US$9.7 million over the first structure (before taking into account the cost of the leveraging).

125. Shortly before the meeting on 11 July 2007, Mr Taha sent a spreadsheet to Mr Blonde setting out his calculation of the difference between the two different methods of paying the coupon in relation to the first tranche of investments. Mr Taha's calculation projected a return of between US$82.4 million to US$86.9 million. Mr Malpani responded the same day, on behalf of Mr Blonde, with a spreadsheet which projected the returns (depending on the way that the coupon was paid) at the lower rate of between US$71 million and US$75.6 million.

126. On 11 July 2007, there was a meeting in London attended by Mr Al Khorafi, Mr Nour, Mr Taha, Mr Walia and Mr Blonde. There was a dispute between the parties as to where this meeting took place. Mr Al Khorafi, Mr Taha and Mr Nour said that the meeting took place in the offices of Bank Sarasin; but that was not accepted by Mr Walia (whose evidence was that it took place in a hotel).

127. The purpose of the meeting was to execute documents - and it may be that the confirmation forms in relation to the first tranche of investments were signed at that meeting - but there were further discussions at this meeting about the leveraging. Further, there was a discussion at this meeting about Bank Sarasin providing a further loan of US$35 million to Mr Al Khorafi for his personal use. The parties disagreed as to whether the loan was suggested by Mr Walia; or whether (as Mr Walia contended) it was requested by Mr Al Khorafi.

128. Mr Khorafi signed a power of attorney given in his favour by Mrs Al Hamad in relation to dealings with Bank Sarasin. It was said on behalf of Bank Sarasin that it was agreed that "Mrs Al Hamad would advance [*sic*] USD$100 million for the purposes of leveraging the investment portfolio in her name". Mr Walia, it was said, stated that the coupons would allow Mr Al Khorafi and Mrs Al Hamad to pay the interest due on the ABK loan and the interest due on the leveraging and provide them with additional income as well as repay the ABK and the Bank Sarasin loans in full on maturity.

129. Once again the judge carefully and accurately summarized the witness evidence in regard to this meeting. It is set out in paragraphs 200 to 206 of the judgment.[illegible] The judge rejected the evidence of Mr Walia where it was inconsistent with the evidence of Mr Al Khorafi, Mr Nour and Mr Taha.[illegible] He found that the meeting did take place in the offices of Bank Sarasin and that the proposal that Mrs Al Hamad's account should be leveraged by some $100million was not made by Mr Al Khorafi but by Mr Walia.[illegible] Further he held that Mr Walia repeated the assurances that the coupon would always cover the interest payments and that the capital available at the end of the investment would repay the loan.[illegible] It is clear that these conclusions were in large part the consequence of his assessment of the reliability of Mr Walia's evidence.

130. Shortly thereafter Mr Blonde provided Mr Taha with a number of term sheets. He recommended the leveraged funds be invested in (i) 8% Sarafloor on Special Materials Basket quanto in USD ("Special Materials Basket"), (ii) 8% Sarafloor Energy Basket quanto in USD ("Energy Basket") and (iii) 8% Sarafloor Financial Services Basket quanto in USD ("Financial Services Basket"). Mrs Al Hamad signed a Power of Attorney in favour of Mr Al Khorafi.

131. On 16 July 2007, following this meeting, there was an adjustment to one of the products. Mr Malpani sent an email to Mr Taha, copied to Mr Blonde, to which he attached a term sheet with an "*enhanced participation rate, with reduction in Natural Gas participation to 40% and change of 2 stocks*".

132. On 17 July 2007, Mr Blonde sent to Mr Nour, three subscription agreements, together with their respective term sheets, with the request that Mr Nour "secure Mr Rafed's signature and send the same back to me by scanned email or fax". Attached to the email were three Confirmation forms in relation to the three investments. Two of the Confirmation forms had (attached) termsheets which differed from the earlier termsheets: amending the issuer of the notes, the warrants and the lead manager to "[tba]" and identifying the lead distributor as Sarasin-Alpen and Bank Sarasin. In the other term sheet, the issuer was specified as Bank Sarasin (CI) Ltd, Guernsey, and no lead distributor was identified. In each of the term sheets, in the section entitled "Secondary Market", it was explained that Bank Sarasin intended to maintain a secondary market in the product under normal market conditions.

133. On 17 July 2007 Mr Al Khorafi signed the investment Confirmations as attorney for Mrs Al Hamad for US$30 million in the Special Materials Basket, US$30 million in the Energy Basket and US$40 million in the Financial Services Basket.

134. At or about the same time, there was an exchange of emails between Mr Taha and Mr Walia relating to Mr Al Khorafi's investments in various unlisted companies in Kuwait. The intention was that Mr Walia would assist Mr Al Khorafi to borrow further money from Bank Sarasin in relation to those investments. On 19 July 2007, Mr Walia sent an email to Mr Taha and Mr Nour asking for a valuation report on the unlisted companies.

135. On 20 July 2007 Bank Sarasin issued a secured facility letter, providing for a loan of US$100 million to Mrs Al Hamad to the purpose of funding the proposed second tranche of investments.

136. On 21 July 2007, Mr Taha emailed Mr Blonde asking about updates for the new portfolio and about an "over the counter" (OTC) derivatives course.

137.[illegible]The credit facility agreement and the deed of pledge were signed by Mrs Al Hamad on 23 July 2007. Significantly, the combined effect of the credit facility and the deed of pledge was to place Mrs Al Hamad and Bank Sarasin in breach of the agreement with ABK that the investments purchased in June 2007 with the US$80 million loan from ABK loan (the REIT Notes) should not be subject to any lien or mortgage.

138. On 24 July 2007, the new purchases were booked to Mrs Al Hamad's account with Bank Sarasin. Definitive term sheets for the investments purchased were not issued until much later (9 October 2007); and were then reissued for the Special Materials basket on 9 January 2008.[illegible]

Events leading to the purchase of Notes by Mrs Al Rifai in January 2008

139. On 25 July 2007, Mr Blonde emailed Mr Attiger and others at Bank Sarasin seeking a US$35 million loan. The email contained an elaborate explanation as to why the money was required: and the suggestion that the bank should lend the money because it would earn them "*brownie points*" and to get "*a share of the USD 350 million [the client] receives thru 45% dis-investment of his company in Dec2007 or Jan2008*". It also said that whilst the increase was only for US$35 million, they could get the client to sign a document for US$150 million.

140. On 26 July 2007, Bank Sarasin issued a further facility letter increasing the facility granted to Mrs Al Hamad to US$135 million. This facility letter was signed by Mr Al Khorafi in London on 26 July 2007, under the power of attorney which Mrs Al Hamad had given to him. Mr Al Khorafi also signed a deed of pledge over assets held for his account as security for liabilities on Mrs Al Hamad's account. On 26 July 2007 Bank Sarasin issued another secured facility letter to Mrs Al Hamad increasing the available facility by US$35 million: and that sum was, on the same day, transferred to an account of Mr Al Khorafi with HSBC UK.

141. On 3 August 2007 Mr Taha travelled to Basel. The purpose of the visit was for Mr Taha to gain an understanding of the derivatives market and to get a feel for the institution with which Mr Al Khorafi and Mrs Al Hamad had placed investments. He spent three hours with Mr Juergen Anders of Bank Sarasin.

142. By mid-August 2007, there was already a collateral shortfall on Mrs Al Hamad's account. On 14 August 2007, Mr Blonde sent an internal email to Mr Zeuggin (at Bank Sarasin) referring to a margin call on Mrs Al Hamad's account and saying that he had set up a conference call with Mr Al Khorafi and "*the financial adviser*". In that email Mr Blonde raised a number of questions about the margin call: in particular he pointed out that "*We had during the initial discussion informed the client about up to 95% available on Rabo/Sarasin guaranteed products as exception*" and asked "*if this is possible to show him & her commitment*". The email was copied to "BC Dubai" with the request that Mr Blonde be sent the screenshot showing the shortfall.

143. There was in fact no evidence before the judge of a conference call between Mr Blonde, Mr Taha and Mr Al Khorafi at or about this time. The judge concluded that Mr Blonde called neither Mr Taha nor Mr Al Khorafi on or about 15 August 2007. That does not now seem to be challenged. But Mr Al Khorafi did receive a telephone call from Mr Walia. The evidence relating to the content of that telephone call was set out by the judge in paragraphs 207 to 212 of the judgment.[illegible] The judge was satisfied that Mr Walia made no mention, in the course of that telephone call, of the need to cover collateral shortfall on Mrs Al Hamad's account by the payment of a margin call.

144. Nevertheless, the judge concluded that at Mr Walia's request - and because he was told, by Mr Walia, that "*it would make him [Mr Walia] look good in front of the bank*" and "*would be good generally for my relationship with the bank and would show that I was a special client*" - Mr Al Khorafi did pay US$10 million into his account with Bank Sarasin. Those funds were received by Bank Sarasin on 31 August 2007.

145. On 2 September 2007, Mr Blonde sent an email to Mr Attiger (at Bank Sarasin) to explain that "*the margin call situation had been resolved*" by the payment of US$10 million into Mr Al Khorafi's account as collateral. The funds were used to invest in a USD Fiduciary Call 5.15% Money Market Fund.

146. Shortly thereafter, Bank Sarasin granted Mr Al Khorafi a further credit facility of US$30 million (thereby increasing his lending) to be invested, together with the US$10 million already paid into his account, in a short term note. On 5 September 2007, Mr Blonde sent to Mr Taha a credit facility letter of US$51.66 million for Mr Al Khorafi, a blank confirmation of investment from and a term sheet for a proposed investment. The term sheet had the issuer described as "[tba]". Mr Al Khorafi signed the credit facility letter. On 10 September 2007, Mr Blonde sent Mr Taha the final term sheet for the US$40 million investment.

147. In the period from 3 September 2007 to the end of December 2007 there was limited communication between Sarasin-Alpen (or Bank Sarasin) and Mr Al Khorafi and Mrs Al Hamad. The portfolio statements in September 2007 recorded that the capital protected investments sustained losses of between 3.2% and 9.7%.

148. In late September 2007, the first steps were taken to correct Bank Sarasin's breach of its undertaking to ABK (in the IPO) that it would not permit any lien or mortgage on Mrs Al Hamad's investments. On 4 October 2007, Bank Sarasin reissued the Irrevocable Payment Order; although without any agreement from ABK that the previous version was to be replaced. On the same day Mr Blonde wrote to Mr Cheerian confirming that the investment had been made in a product with capital protection of not less than US$35 million.

149. In late 2007, discussions resumed as to further investments with Bank Sarasin. On 4 December 2007, Mr Blonde sent an email to Mr Taha with "*12 products for your review & feedback*" and "*3 more products for your review*". On 20 December 2007, Bank Sarasin increased the facilities available to the Claimants to US$202 million as part of these discussions.

150. In January 2008 Mr Al Khorafi told Mr Walia that he was interested in investing further funds on behalf of and in the name of his wife; and that he also wanted to borrow another US$10 million for a real estate company he was establishing. Mr Walia said that Bank Sarasin would supply the funds if Mr Al Khorafi would provide a guarantee from ABK in respect of any facilities made available to Mrs Al Rifai. The guarantee was to be in the sum of US$27.5 million; and was to be secured on land in Kuwait.

151. At or about the same time, there were discussions between Mr Al Khorafi and Mr Walia and Mr Blonde about the possible listing of Mr Al Khorafi's real estate venture, "Rafco".

152. In mid-January 2008, Mr Blonde completed "*Client and Investment profile*" and "*Client Profile*" forms in respect of Mrs Al Rifai. A further "*Client and Investment profile*" completed at Sarasin-Alpen manifestly overstated Mrs Al Rifai's investment experience and misrepresented her investment objectives; in that it recorded that she had knowledge of various asset classes including derivatives, that her investment time horizon was 5 to 8 years and that her risk tolerance was medium.

153. On 17 January 2008 Mr Blonde carried out money laundering checks on Mrs Al Rifai in Dubai. At or about that date Mrs Al Rifai signed: (i) account opening application forms (in the same form as the application forms signed by Mr Al Khorafi and Mrs Al Hamad) which recorded that Mr Blonde was processing the application; (ii) a power of attorney in favour of Mr Al Khorafi; (iii) a US tax declaration; (iv) a deed of pledge; and (v) AGBCs. The forms were dated 17 January 2008, but were not received by Bank Sarasin until 15 February 2008.

154. On 22 January 2008, Mr Al Khorafi having provided ABK with collateral in the form of security over a plot of land in Kuwait, ABK issued a guarantee in the sum of US$27.5 million to Bank Sarasin.

155. The AGBCs signed by Mrs Al Rifai were in the same form as the AGBCs signed by Mr Al Khorafi and Mrs Al Hamad. The Respondents make the same complaints in relation to Annex 1 and Annex 1A of the AGBCs signed by Mrs Al Rifai as they do in relation to the AGBCs signed by Mr Al Khorafi and Mrs Al Hamad. As in the case of those AGBCs sent nearly a year earlier, Annex 1A of the AGBCs signed by Mrs Al Rifai had been completed in manuscript by someone at Sarasin-Alpen so as to suggest that it had been completed by Mrs Al Rifai (which was not the case). Again, even in a greater degree to the AGBCs completed by Mr Al Khorafi and Mrs Al Hamad, Annex 1A significantly overstated Mrs Al Rifai's wealth and financial experience.

156. On 12 February 2008, Ms Naz of Sarasin-Alpen sent an email to Mr Taha, copied to Mr Nour and Mr Blonde, asking that Mrs Al Rifai sign the documents which were attached; that is to say (i) a credit facility agreement issued by Bank Sarasin in favour of Mrs Al Rifai in the amount of US$60 million and (ii) Confirmation of Investment forms and Termsheets for two proposed investments of US$10 million each. There is no evidence that Mrs Al Rifai did sign the Confirmation of Investment forms. Nevertheless, these structured products were purchased for Mrs Al Rifai in two tranches of US$5 million.

157. On the same date (12 February 2008), Bank Sarasin reduced the credit facility available to Mr Al Khorafi from US$202 million to US$51 million. Also on 12 February 2008 Bank Sarasin offered Mrs Al Rifai a collateralised credit facility of USD 60 million. On the same day Sarasin-Alpen emailed Mr Taha with product summaries of (i) a four year note linked to the Efficiente Strategy of Portfolio Optimisation ("Efficiente Strategy"), and (ii) a four year note linked

to an Agricultural Basket including coal ("Agri Basket"). On the advice of Mr Blonde, given to Mr Taha, US$20 million was invested; of which US$10 million was used to purchase the two 4 year notes (US$5 million each) and US$10 million was invested in a fixed advance US dollar fiduciary call money market fund.

Events subsequent to the purchase of the third tranche of investments

158. Following the purchase of the third tranche of investments, Sarasin-Alpen and Bank Sarasin continued to market investments to the Respondents. On 26 February 2008, Mr Blonde sent Mr Taha further Bank Sarasin termsheets, with the observation: "Attached please find 3 new ideas for your feedback".

159. The portfolio statements supplied to Mr Taha on 28 April 2008 showed falls in the values of Mrs Al Hamad's and Mrs Al Rifai's investments.

160. By an email sent on 14 May 2008 Mr Blonde informed Mr Taha that Mr Al Khorafi could not have the US$10 million discussed in January 2008 for financing a real estate company he was intending to set up on the grounds that the whole account was regarded by Bank Sarasin's credit department as one family relationship; and, on that basis, the account was overdrawn.

161. On 27 May 2008, Bank Sarasin recorded the receipt of updated "*Client and Investment profile*" forms in respect of Mr Al Khorafi and Mrs Al Hamad. The forms had been completed by Mr Walia. They were dated 10 March 2008; although not received by Bank Sarasin until May 2008. The forms purported to record, for the first time, information about Mr Al Khorafi's and Mrs Al Hamad's investment requirements and attitude to risk. In particular, the forms recorded that both Mr Al Khorafi and Mrs Al Hamad had high risk tolerance. Mr Walia did not obtain instructions from Mr Al Khorafi or from Mrs Al Hamad before completing the forms: and the information which the forms recorded was incorrect.

162. At or about this time Mr Taha negotiated a cancellation of the Irrevocable Payment Order of 4 October 2007 - whereby Bank Sarasin had undertaken to ABK (in relation to the US$50 million advance to Mrs Al Hamad to fund her purchase of the 10% REIT Notes) to remit the redemption amount and transfer the yearly coupon - in consideration of a one-off payment to ABK of US$20 million. On 2 June 2008, Mr Blonde sent an email to Mr Taha showing a collateral shortfall of US$3.3 million on the combined accounts. That shortfall took into account the US$20 million payment to be made ABK in respect of the release of the obligation under the Irrevocable Payment Order.

163. On 8 June 2008, ABK released the Irrevocable Payment Order. On the following day (9 June 2008) Mr Taha wrote to Mr Blonde:

> "Please be informed that we're working on the release of the coupon on USD 30MM of Mrs Amra Hamad. In this regard, you're kindly requested to inform us expressly, how much do you intend to give Mr Rafed against the release of the said coupon in the form of cash loan?"

164. By June 2008, it was becoming clear that there were serious issues with the accounts. In July 2008 the Respondents instructed external advisers in an attempt to investigate their position; but those investigations - and subsequent discussions with Sarasin-Alpen - did not resolve matters.

165. On 22 August 2008 there was a meeting between Mr Al Khorafi and Mr Walia and Mr Blonde in Nice attended by members of Mr Al Khorafi's bank HSBC Private Bank, Switzerland. Mr Walia and Mr Blonde said that they required Mr Al Khorafi to make a margin payment of US$5-6 million. Mr Al Khorafi said that he had been promised a steady income as well as servicing the ABK loan payments and that the interest payments with growth would be sufficient to meet the ABK loan. He said that "*the mechanism of leverage was not properly explained to him*". He asked for an explanation of the forced early repayment of US$20 million.

166. On 29 September 2008 (after the Respondents had first consulted solicitors) a margin call was made against the accounts of Mrs Al Hamad and Mrs Al Rifai. Mr Blonde sent two letters from Bank Sarasin referring to "cover shortfalls" in relation to the loans taken out on the accounts held by Mrs Al Hamad and Mrs Al Rifai. The amounts were US$5,077,977 and US$3,423,353 respectively. The emails requested that the payments be made by 17 October 2008 "at the latest". On 7 October 2008 Bank Sarasin sent further letters stating that the 17 October 2008 deadline could no longer be given and that "additional standard collateral needs to be provided by immediately". The letters required the payments by 8 October 2008.

167. Those calls were not met. The Respondents were unable or unwilling to provide the collateral requested or pay down the loans; and they denied that they were under any obligation to do so. Bank Sarasin terminated the facilities extended to Mrs Al Hamad and Mrs Al Rifai on 8 October 2008; and on the same date closed out the Notes held by each of the Respondents collectively under the cross-collateralisation provided by the pledges which had been given. That resulted in significant losses on the portfolios; and left Mr Al Khorafi and Mrs Al Hamad with outstanding balances on the loans with ABK.

The Court's approach

168. The burden on an Appellant in seeking to challenge findings of fact on the part of the trial judge is a heavy one. The trial judge had the benefit of being immersed in the entire trial. He saw and heard all the witnesses. He had the benefit of submissions from all parties both in preparation for the trial and in its wake. In the result, an appeal court will be highly resistant to overturning findings of fact not least those which depend on the trial judge's assessment of the credibility of witnesses: see ***Assicurazioni Generali v. Arab Insurance*** [2003] 1 WLR 577.

169. In short, in common with the approach in other leading common law jurisdictions, it must be shown to this Court that the judge was clearly wrong: ***McGraddie v. McGraddie*** [2013] UKSC 58, ***Anderson v. Bessemer*** (1985) 470 U.S. 564**, *Housen v. Nikolaisen*** [2002] 2 SCR 235. In this respect we would adopt a passage from the judgment of the English Court of Appeal in ***Sohal v. Suri*** [2012] EWCA Civ 1064 as to the correct approach:

> "30. It is common ground that, on an appeal against a judge's findings of fact, the appellant has in general to show that the judge was plainly wrong. It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence which is not available to the appellate court. It is, therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court will not interfere with a finding made by the judge unless the judge's conclusion is "outside the bounds within which reasonable disagreement is possible". Where, however, the finding turns on matters on which the appellate court is in the same position as the judge, the appellate court in general must make up its own mind as to the correctness of the judge's finding (see Datec Electronic Holdings v United Parcels Service [2007] 1 WLR 1325 at [46] per Lord Mance).
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> 31. In this case, the appellant makes a number of challenges: he contends that the judge failed to draw certain inferences from the primary facts, that, in other respects, he drew the wrong inferences and that in drawing or not drawing inferences the judge attached the wrong weight to various matters. In my judgment, where the challenge is to an inference not drawn, or drawn, by the judge from other facts the principles are as set out above. The appellant has to show that the failure to draw the inference, or as the case may be the making of the inference, was plainly wrong. The respect which, as I have just explained, an appellate court accords to primary facts based on oral evidence, and to an evaluation of facts made by the judge, applies also to inferences drawn from such facts or evaluation. Putting the matter another way, in those circumstances, the appellant will in general have to show that the inference, which he contends should have been drawn, was one that should inevitably have been drawn, so as to entitle the appellate court to interfere. In addition, it follows from the fact that the appellate court must be satisfied that the judge is wrong that it is not enough merely to disagree with the weight which, when drawing or deciding not to draw inferences, the judge has given to some factors over others.
>
> 32. Further, it is in general not enough on an appeal from a judge's findings of fact to point to the fact that there are additional findings that the judge could have made. The judge is not bound to make findings on every matter in issue in the trial. In general a judge is only obliged to make findings on key matters though in some cases it may also be appropriate to make findings on an alternative basis in case the judgment is overturned on appeal. This principle is relevant because in this case there are factual issues on which the judge did not make findings, such as the issue whether Patwant had made more than one loan of £30,000 to Tony. It is obvious that a judge could be criticised for causing excessive cost if he seeks to investigate every matter that was raised in the trial, even if it is not necessary to do so for the purposes of his decision."

170. The Appellants do not baulk at this task. They make a myriad of complaints about the judge's conduct of the trial, the judge's approach to his findings of fact and the judge's delay in finalising the judgment. Indeed, the scale of the challenge, if legitimate, might well have justified an order for a retrial. But the Appellants shy away from that. The primary thrust of the appeal on this aspect of the case is an assertion that the judge failed to adopt the correct and conventional approach to analysing the witness evidence in respect of events which occurred some years earlier.

171. The complaint is that the judge failed to test the witness evidence against the contemporary documents, the probabilities and the motives of those concerned: see e.g. ***Grace Shipping v. Sharp & Co*** [1987] 1 Lloyd's Rep 207, ***Gestmin v. Credit Suisse*** [2013] EWHC 3560 (Comm). Supplementing this complaint, the Appellants asserted that the judge made "*excessive and unbalanced interventions during Mr Walia's evidence.*" This *"serious procedural irregularity"* was said to have undermined the judge's approach to the evidence.

Mr Walia's oral evidence

172. We first deal with this last point namely the contention that the judge made extensive unfair interventions during Mr Walia's evidence. We have read the full transcript with particular focus on the individual examples specifically relied upon by the Appellants. We unhesitatingly reject the complaint.

173. Some of the examples merely reflected the judge's role in exercising discipline on the formulation of the questions posed in cross-examination.

174. In our judgment, his occasional terse and somewhat impatient interventions were not unfair; nor did they betray bias or a closed mind. Rather, they reflected careful attention to the questions asked and answers given and demonstrated the judge's grasp of the issues.

175. The judge clearly formed the view that Mr Walia's evidence tended to be evasive and speculative and, in due course, so found. Our reading of the transcript does nothing to undermine the judge's view.

176. Notably, his interventions made with a view to persuading the witness to respond directly to the questions posed and to avoid speculating as to matters about which he had no knowledge were confined to Mr Walia alone out of the eight factual witnesses.

177. Since this is such an important threshold issue on this appeal it is desirable that we should identify examples of the evasive nature of Mr Walia's evidence leading to what we would perceive as legitimate and proper interventions by the judge. By the same token it affords fully convincing material in support of the judge's conclusion that Mr Walia had no interest in assisting the court but instead proffered evidence that was self-serving and unreliable:

A .Mr Walia's comments on the significance of the relationship between Bank Sarasin and Rabobank at Day 5 p.18:

> "Q. You were advertising Bank Sarasin to the claimants in part on the basis they were majority-owned by Rabobank which was the only AAA-rated bank in the world, private bank?
>
> A. My Lord, I don't like the word "advertising", I was explaining to the client who owns Bank Sarasin.
>
> Q. Explaining to the clients for promotional purposes, to try to get them to invest in Bank Sarasin?
>
> A. Incorrect. I was explaining for the clients to understand who is Bank Sarasin.
>
> Q. You're not seriously expecting the court to accept that you were just mentioning Rabobank for information purposes and not as part of your promotional puff?
>
> A. I think, my Lord, I would like to explain. If you look at Credit Suisse, for example, Credit Suisse is owned in the majority percentage by the Qatar government. If you had to ask me who owns Credit Suisse, I would tell you who owns Credit Suisse. It's the first question learned counsel asked me: who owns Alpen Capital Corporation?
>
> HIS LORDSHIP: Are you going to answer counsel's question or not?
>
> A. Sorry?
>
> HIS LORDSHIP: Are you going to answer the question that's put to you or not?

A. I will. I was not advertising. I was just explaining the ownership structure of Sarasin --

HIS LORDSHIP: Ask the question again, Mr Hill.

MR HILL: I'll put it in terms. You're not seriously expecting the court to accept that you were just mentioning Rabobank for information purposes and not as part of your promotional puff?

A. I was explaining to every client of mine who owns Bank Sarasin. That's part of our presentation."

B. Mr Walia's attempt to identify the direct contacts between Bank Sarasin personnel and the Respondents at Day 5 page 27:

"Q. In relation to any of the sales of products or the advancing of credit on their accounts, there were no dealings at all, were there, between my clients and anyone in Switzerland? All the dealings were with Dubai personnel?

A. I think if you read the DFSA Rulebook yourself -- I'm sorry to be rude -- you will very clearly figure out that our regulatory regime does not allow us to deal --

Q. This is not remotely an answer to my question. Just answer my question.

A. I'm answering your question, counsel. I'm saying if you look at what I'm licensed to do, I'm not licensed to do any of the things you are suggesting I did. So we did not do it.

Q. I'll ask the question again. In relation to any of the sales of products or the advancing of credit to my clients, can you identify any contact between Bank Sarasin Switzerland individuals and my clients, as opposed to Dubai personnel and my clients?

A. All the term sheets which the client ultimately signed off were produced by Bank Sarasin in Switzerland. Who particularly produced them, I would not know, it's not my job to find out who down the road is producing termsheets.

Q. It's right to say, isn't it, every conversation would have been had between a Dubai person and one of my clients or their advisers, and every document was sent or received by Dubai personnel?

A. Every document came through directly from Switzerland. We were a post office, we passed it on to the client, and some documents would have gone directly to the client. Both things work.

Q. Every conversation?

A .Sorry?

Q. And every conversation?

A Which conversation?

Q. Every single one between any of my clients or their advisers and anyone of the Sarasin side in relation to the sales of their products or the advancing of credit?

A. Again, I think you need to repeat this question. We are getting lost, or at least I'm getting lost.

HIS LORDSHIP: Do repeat the question, Mr Hill. The witness will understand, I'm sure, that if he chooses not to answer a question, when he plainly understands what the question is, I shall have to draw my own conclusion why he's not doing so."

C. Mr Walia's attempt to explain the content of the marketing brochure issued by Sarasin-Alpen in the passage on Day 5 p.37 to 43.

"Q. Can I ask you to look at page 1383. At the bottom of the page you deal with your structured investment programmes:

"Our investment professionals are always on the look-out for timely products and strategies. Our product selection,is regularly expanded to keep up to date with market developments. At the same time, we can financially structure, on request, customised products to meet specific client requirements."

You were also selling yourselves as engaging in selling instructed products to meet clients' individual requirements, weren't you?

A. No, I think we were not selling ourselves as people who get structured products. We will listen to the client, see what his requirements are, relay them to whichever bank we think can produce the client requirement and then relay it back to the client.

Q. You're saying: "... we can financially structure ... customized products to meet specific client requirements."

Aren't you?

A. I think I don't want to debate this English too much, really -- "we". It's a brochure. We know what we do. We know how we do it. So if a brochure says "we", it's not -- I'm sorry.

Q. This brochure is telling the outside world what you do and how you do it, isn't it? That's what it's there for?

A. That's incorrect.

Q. It's publicised for this purpose, to tell clients what you do and how you do it, as you put it?

A. Well, enough brochures have enough mistakes, as I have seen in my 30-year career in banking, so I wouldn't get stuck on this.

HIS LORDSHIP: I'm sorry, I had thought this was Bank Sarasin-Alpen's brochure. Is that accepted or not accepted?

MR HILL: My Lord, I think it is accepted. Could I just check that. It's accepted it is your brochure?

A. It is a brochure produced by Banker Middle East, which is a CPI-owned magazine in this town.

HIS LORDSHIP: If I look at page 1376, I see Sarasin-Alpen's name on it. If I look at the foot of page 1383, I see Sarasin-Alpen's name on it.

A. Correct.

HIS LORDSHIP: Are you telling me that it is not Sarasin-Alpen's brochure?

A. It is a brochure produced for Bank Sarasin-Alpen by Banker Middle East.

HIS LORDSHIP: So it is Bank Sarasin-Alpen's brochure?

A. Correct.

HIS LORDSHIP: Are you telling me that it's not true?

A. Well, it's correct. It's a correct brochure. I'm saying -- because this is --

HIS LORDSHIP: If it's your brochure and you do not tell me that it's not true, then I shall assume that what is written here is what you wanted to say to the world.

A. My Lord, all I was trying to say is when they come and interview whoever they interview, this was not done with me, and they put down what they want to say, I'm not sure I had a chance to see the final copy, so I haven't seen this, for all practical purposes, and I definitely have not read the whole brochure. What I'm trying to say is what we do, in actual fact.

HIS LORDSHIP: What is being put to you is whether this brochure is telling the world what you do with the authority of Bank Sarasin-Alpen. That's effectively the question. If you say that it's not your brochure, or that what it says is not true, then I will obviously listen to that evidence. But if you're not telling me either of those things, then I can read what it says.

A. Correct.

MR HILL: What are you saying?

A. What I'm saying, my Lord, is that the client gives us in reality, forget the English which is put down here, the client tells us what he wants, we relay the information to the provider we think who can execute and then pass it back. We do not structure anything. We don't have the capability of structuring anything, I would go on to add, in the Dubai office.

Q. So it's not true?

HIS LORDSHIP: You can't tell me to forget the English, Mr Walia. The English says: "... we can financially structure, on request, customised products ..." Either that's true or it's not true. If it's not true, tell me.

A. It's not true.

HIS LORDSHIP: It's not true?

A. Not in the way it's --

HIS LORDSHIP: What is it doing in your brochure?

A. It's incorrect. It's a mistake.

HIS LORDSHIP: Why is it a mistake?

A. Because, like I said, you know, if anybody who knows us, and we have enough clients in this part of the world, the structuring is all done at the office or the product office of the bank who actually sells the product. We don't do the structuring.

HIS LORDSHIP: You want me to understand that what is in your brochure is not true; is that the position? A. I think maybe we're getting stuck, my Lord --

HIS LORDSHIP: I'm going to have to take a view, sooner or later, about quite a lot of things, as to whether they're true or not true.

A. Correct, I agree.

HIS LORDSHIP: Are you telling me that what is in your brochure is not true?

A. You're putting me in an awkward spot, my Lord. I'm telling you what actually --

HIS LORDSHIP: I'm not putting you in an awkward spot. I'm simply asking for an answer to a perfectly straightforward question. Are you telling me that what is in your brochure is not true?

A. No, it's true. But we do not do the structuring. What I'm trying to clarify is that we don't do the structuring here. We can, but we don't do it here. It's done by the bank who executes the transaction. That's reality. We can do it, I'm sure we can. You know, we are all bankers, we can do it. But we don't do it. That's ultimately when the transaction gets executed, it gets done by the bank which is executing the transaction."

D. Mr Walia's attempt to describe the source of the information as to the investment experience of Mrs Al Rifai at Day 6 p.189 to p.194:

"Q. In relation to Mrs Al Rifai, no one in fact established whether she had the investment experience and understanding to be categorised as client. That's right?

A. Like I said, we never met her.

Q. You had no idea at all?

A. No, we were told by Mr Alaa Taha that this is the kind of investments she likes to do, she's got stocks, bonds, she's got bank accounts, Credit Suisse, HSBC, what have you, she does investments in all kinds of products, and this is what they thought was suitable for her.

Q. Is this more speculation about what Mr Taha would have said at meetings that you were not at?

A. No, this is not speculation. Again, ultimately, the term sheets were signed off by her when they were sent to her. She got the account opening -- I mean, she got her own statements and this account was in her personal name. All the three accounts were in the personal names of the three claimants. So all the statements would have gone back to each of them every month.

Q. What investigations of her investment position or her risk tolerance are you actually aware of, as opposed to what would have happened, what Mr Taha or Mr Blonde would have done? A. I'm sorry, I don't understand your question.

Q. What are you actually yourself aware of in terms of investigations of her financial position or financial understanding?

A. No, I personally was not.

HIS LORDSHIP: Just pausing there. The last passage, about the last minute and a half of evidence, is another rather bad example of the witness failing to tell me whether this is something that he knew or he supposed or he was told by Mr Blonde. This is an endemic theme which runs through this evidence and which I have inadequately sought to avoid. But when we get this sort of answer, I'm completely in the dark as to whether this witness is telling me something that he was told by Mr Al Khorafi or by Mr Taha, or whether it's some information that's been relayed to him by Mr Blonde, or whether he's simply assuming that this is what happened.

MR HILL: My Lord, as I understand --

HIS LORDSHIP: When I come to go through this transcript, there are going to be numerous cases like it.

MR HILL: As I understand his last answer, which I got out of the witness, he was saying he wasn't in fact aware, and that means that the earlier points were speculation of the "would have" variety. If I'm wrong about that, the witness can correct me now. That's as I understood his last answer.

A. What do you say was speculation?

Q. I asked you, and I understood you confirmed, whether you were actually aware of any actual investigation into Mrs Al Rifai's financial experience or risk tolerance, and I understood you said you weren't.

A. Correct.

Q. Everything about what Mr Taha would have said is something you are speculating on and you cannot say?

A. Absolutely correct."

178. Against that background it is clear to us that the judge's interventions, far from being "*excessive, pejorative and unbalanced*" were necessary and not unfair.

179. If further examples are required of the evasive and unsatisfactory nature of Mr Walia's evidence the following extracts from the transcript are worthy of note:

A. Mr Walia's explanation of the proposition advanced by the Appellants' former solicitors that the AGBC's had been completed in manuscript by the claimants themselves at Day 5 p. 182 to 183.

"Q. The position taken by your former solicitors is that the clients, my clients, and indeed your clients, had signed off on the information in annex 1A. That's right, isn't it?

A. Correct.

Q. Presumably, the position taken by them was on instructions from you?

A. Correct.

Q. How did that position come to be taken on instructions from you?

HIS LORDSHIP: Is that a matter that's privileged?

MR HILL: If it is --

MR BRINDLE: Yes, my Lord, the form of the question is privileged. I'm sure it could be rephrased without endangering --

MR HILL: I'll try again.

MR BRINDLE: Thank you, my Lord. You are quite right.

MR HILL: You must have been aware, weren't you, that this position was being taken and you must have been aware that this position was untrue?

A. No, as far as Baker & McKenzie is concerned, this matter was being handled by the bank's legal team in Zurich, so I'm not really aware of what discussions were being had there.

Q. But the instructions would have come from you, wouldn't they?

A. It wouldn't come from me, it would come from the legal team in the bank.

Q. I don't want to go into your discussions with your lawyers.

HIS LORDSHIP: He has already told me already that the position taken was on instructions from him.

MR HILL: That's what I thought.

HIS LORDSHIP: There was no privilege on that, the question. You then went on to ask him what instructions did he give, but he's told me that it was on instructions from him.

MR HILL: I'm grateful, my Lord."

B. Mr Walia's account of the source of the information put into AGBC's at Day 5 p. 184 to p. 187.

"Could you also tell me why it was that Mr Blonde filled in this form in the first person?

A. I'm sorry?

Q. Why did Mr Blonde fill in the form in the first person, "My family"?

A. I don't know why he filled up in this fashion, but that's how he filled it up.

Q. That gives a thoroughly misleading impression to any reader of the form, doesn't it?

A. No, I think he's filled up the form in the fashion Mr Taha gave him the information. So why should it -- it's got a few facts on it.

Q. It gives a thoroughly misleading impression and that is a misleading impression that your solicitors, on your instructions, sought to perpetuate in that letter we have just looked at.

A. No, I think what's filled up in the form are facts.

Q. The form gives a thoroughly misleading impression and your solicitors, on your instructions, sought to perpetuate that misleading impression in this litigation?

A. There are facts on that. Those numbers, whatever put down there was told to Mr Blonde by Mr Taha.

Q. It's not a question of that, is it? This form gives the impression that the information has been filled in by the client, but we actually know that the information was not filled in by the client, but after the client's signature was on the form.&#65533; That is thoroughly misleading, isn't it?

A. The information was filled in by Mr Blonde on what he heard from the financial adviser, either on the first or the second meeting.

Q. If it wasn't a misleading form, it wouldn't be possible for your solicitors to have taken the position they did on your instructions, would it? A.&#65533; Why do you say it's a misleading form?&#65533; I'm sorry.&#65533; I don't understand this question at all.

A. The problem with what's happened is that it presents to the reader the impression that the clients have signed off on these details on a form signed by them, and that is a completely false impression, isn't it?

Q. The client -- like I said, we'll stay with the facts and then you can form your own impression. The facts were filled in by Mr Blonde after he had met them the first and the second time.&#65533; These are the facts he had on the clients.&#65533; He filled them up.

A. And didn't, for instance, return the form to the clients for confirmation that the data had been filled in accurately?

Q. I'm not sure.

A. We know that didn't happen, don't we?

Q. Like I said, I'm not sure. These are details that would be handled by client servicing.&#65533; I wouldn't get involved in things like this.

A. The result is that the forms sitting on your files present a misleading and false picture of what's happened, don't they?

Q. They present the picture of what was given to Mr Blonde by Mr Taha.

A. They present a false picture of happened here?what's A.&#65533; They present the picture which was given to Mr Blonde by Mr Taha.

HIS LORDSHIP:&#65533; Did you ask Mr Blonde about that?

A. Actually, most of this --

HIS LORDSHIP:&#65533; Did you ask Mr Blondeabout that?

Q. About that?

HIS LORDSHIP:&#65533; Did you ask Mr Blonde when he spoke to Mr Taha?

A. No, I did not.

HIS LORDSHIP:&#65533; How are you able to give the answer you have just given?

Q. This information which is in the form was also --

HIS LORDSHIP:&#65533; Did Mr Blonde tell you that?

A. My Lord, in the --

HIS LORDSHIP:&#65533; Did Mr Blonde tell you that?

Q. He did, when he came back.

HIS LORDSHIP:&#65533; When?

A.&#65533;After he came back from the first meeting.

HIS LORDSHIP:&#65533; After he came back from the first meeting?

Q. Correct.

MR HILL:&#65533; I don't know what you mean by that answer.&#65533; Could you explain by that?

A. Normally, whenever any of these CRMs come back from a meeting, they brief me for summary like this on a day-to-day basis of what they have talked about, what the client has said. Again a lot of information which is put down by Mr Blonde in this form was again repeated to me by Mr Taha in the first 20 minutes when I went to meet Mr Khorafi for the first time.

HIS LORDSHIP:&#65533; You told me just now that this information was filled up as a result of a telephone conversation after 6 June.&#65533; Which answer, if either, am I meant to believe?

A. Well, the answer, sir, is that we had the first two meetings, I was in the second meeting, I heard the information. The forms came back to us blank.&#65533; Presumably, I presume that Mr Blonde would have called and said, "Why haven't you filled up these forms", and we will do that to a client.

HIS LORDSHIP:&#65533; You told me that he had called the client and obtained the information from the client.&#65533; I think you're now telling me that you don't know that, so you're giving me another explanation.&#65533; Why should I believe the new explanation any more than I should believe the last one?

A. I'm sorry, my Lord. Maybe I got confused.

HIS LORDSHIP:&#65533; I don't think you got confused at all, Mr Walia.&#65533; I think what happened is you realised you'd got trapped."

C. Mr Walia's explanation of the disparity between the confirmation of the Energy Basket product dated 19 July 2007 and the Term Sheet in respect of the same product dated 8 October 2007 at Day 6 p. 133 to p.140:

"Q. If you turn back in D4, to the energy basket, which you'll see is signed off on at page 1048, you will see at page 1049 that what was being asked for was natural gas, 40 per cent weighting; do you see that?

Q. Which page are you looking at?

A. I'm looking low down on page 1049. A.&#65533; Yes.

Q. What's being asked for was natural gas with a 40 per cent weighting, and then a 5 per cent weighting in relation to a number of other energy stocks; do you see that?

A. Correct.

Q. But if you look in the core bundle, at page 185, over the page at 186, and in fact, 188 is the last page of the document, you'll see that what is delivered is completely different, isn't it?

A. There are some common stocks, but, yes, it's different.

Q. There are some common stocks, but we don't have the natural gas 40 per cent weighting -- natural gas seems to have disappeared -- and we have a different collection of stocks, some of which are the same and some of which are not, all with different weighting?

A. Correct.

Q. Again, the client is not even being given what it has signed up for.

A. Yes, that's correct.

Q. How does that come to be?

A.&#65533;Because, like I said, when we do a draft term sheet, this is what is looked at, but when financial engineering actually goes to execute, at a point in time they cannot get the right pricing for the right stock, so they would go ahead and in the approximate area of the type of companies they want to invest, they would go ahead and do it.

Q.&#65533;You would need, if there are material differences of this kind, to go back to the client, wouldn't you?

A. Correct, but this always happens, as a matter of practice, after the trade is done. Not specifically on this client.

Q. How does that work, to go back after the trade is done, because the trade is done by that point?

A. Correct, the trade is done.

Q. It's no good to go back as a matter of practice after the trade is done, because the client is not getting what it signed up for.

A. I agree, but if the client objects after the trade is done -- like I said this is standard operate procedure -- the client gets what has been done and if he doesn't like it, you have to unwind the trade.

Q. How is the client going to know?

A. When he gets the term sheets.

Q. This client doesn't get the term sheets until after October 2007.

A. If you see what's out here, the first term sheet which is signed up, it says indicative term sheet, July 2007. The trade gets done as of October, as I can see out here, and it shows that there have been adjustments in October -- as of October 2008.

Q. That's not right, because we were looking at the - just looking at the bank statement, the trade is done in July, the term sheet isn't delivered until after October and that shows an adjustment at October?

A. I wouldn't know. It's difficult for me to comment on this."

D. Mr Walia's attempt to explain the reference to "our credit team" in his e-mail dated 19 July 2007: Day 6 p.153 to p. 156.

"Q. Could we go on to tab 195 in this bundle. This is an email from you. You say:

"Dear Alaa,

Please send us the Global Investments House valuation report for the three unlisted companies. I would like to carry the same with me to Switzerland on 23 July for discussion with our credit team."

Who is the "our"?

A. You see, I think by this, my Lord, I would like to answer this in two separate sentences. By this point of time, Mr Khorafi's demand or request for leverage was going higher and higher and there was no more leverage which could be given on the back of the investments with Bank Sarasin. I think the credit department was not willing to give any more. So what they requested is to see if on any of these -- and Bank Sarasin, my Lord, does not give leverage on the back of unlisted equities or bonds. They have to be liquid. So by then, in their demand for more and more loans and leverage for their own business, they wanted to see if we could help them raise some money on behalf of unlisted companies. So I asked for the balance sheets of these companies, to show them to our team in Dubai to see if anything could be done, but we did not take that --

HIS LORDSHIP: Mr Walia, the question is being asked, of which you are not at the moment answering, as I'm sure you understand, is very simple. It's your email?

A. Yes, correct.

HIS LORDSHIP: And you refer to "our credit team". I think the question is whether "our" means Sarasin-Alpen or means Bank Sarasin or means somebody else?

A. It means Alpen Capital's credit team, my Lord.

HIS LORDSHIP: Alpen Capital's credit team?

A. Yes, if you see the bottom, where my signature is there --

HIS LORDSHIP: Why was Alpen Capital's credit team in Switzerland?

A. It's not in Switzerland. It's in Dubai.

HIS LORDSHIP: But if you read the -- I think you really would be quite sensible not to treat me as completely stupid, Mr Walia.

A. Sure.

HIS LORDSHIP: Because I might turn out not to be. What you have is:

"I would like to [take them] to Switzerland ... for discussion with our credit team."

You tell me "our credit team" means Alpen Capital's credit team. What's Alpen Capital's credit team doing in Switzerland?

A. No, Alpen Capital's credit team is not in Switzerland.

HIS LORDSHIP: Read the sentence again and see if you can come up with a more convincing answer than the one you have just given.

A. You see, the answer to that is the credit team in Switzerland gives leverage on liquid investments. I was possibly going to Switzerland at that point of time, but the Swiss team does not give leverage on these kind of -- that's not the bank's policy. So the thought of that point of time, and that's why you see the letterhead at the bottom is Alpen Capital, not Sarasin-Alpen, was to get our credit team in Alpen Capital to take a look at it. Because the bank would not do this. There's no point me talking to Sarasin about doing this. That's not the bank philosophy or policy. There's no point talking to the credit team there. I was possibly going to Switzerland at that point of time, but the discussion would have to be done -- we have a debt team in Alpen Capital, which is the one which would take a look at seeing if leverage is possible against unlisted investments. That's --

HIS LORDSHIP: That's the answer you want on the record?

A. Yes, sir.

HIS LORDSHIP: So there is no answer to the question why you have to take these documents to Switzerland to discuss it with Alpen Capital's credit team?

A. I think it's the way the English has come out. Because like I said, I was going to Switzerland at that point of time, I would have taken these documents along with me to look at, to read and then come back and discuss it, because in Switzerland, Alpen Capital doesn't have, nor does Sarasin have a credit team which would look at structures like this."

180. The judge's conclusion on the credibility and reliability of Mr Walia's evidence is to be found in paragraph 166 of the judgment part of which we have cited already:

"166. Mr Walia was a witness at the trial. For reasons which I shall explain in the course of making the findings of fact which I do, I found it necessary to approach his evidence with great caution. His attempts to evade and to prevaricate - together with his inability to distinguish between matters within his own knowledge, matters of which he had been informed by Mr Blonde or others, and matters of which he had no knowledge (but in respect of which he was ready to speculate as to what might have happened) - led me to the conclusion that he had no interest in assisting the Court in its task of ascertaining the true facts in this case. Through his ownership (in part) of Alpen Corporation he had a financial interest in the outcome of these proceedings, which he only revealed under cross-examination. I found his evidence self-serving, evasive, self-contradictory and unreliable."

181. This conclusion is unassailable in our judgment. There are no good grounds for forming a different one, let alone one that contradicts the view of the trial judge such as to conclude that he was obviously wrong. The judge was fully entitled to place emphasis on his impression of the reliability and credibility of Mr Walia (in contrast to the impression derived from the evidence of the Respondents' witnesses). By way of counter to the impact of those impressions, the Appellants complain that the judge failed to approach the disputed witness evidence correctly. This is not merely a surprising complaint to make against a judge of the experience of the DCJ but is also clearly misconceived. The fundamental proposition here is that the judge failed to assess the reliability of the oral evidence against the contemporary documents. In fact there can be no doubt that the judge had read and absorbed the contemporary documents most of which are expressly referred to and discussed in the narrative above. To the extent that they furnished assistance in assessing the oral evidence, it is clear that the judge clearly had proper regard to them.

182. But it must be borne in mind that the contemporary material was clearly of very limited assistance since there was a substantial lacuna in the documentation. Mr Walia and his colleague Mr Blonde failed to make (let alone keep) a single written record of the meetings with the Claimants. This was astonishing in itself not least because of the massive size of the products sold to individual investors and, to our mind, reflects poorly on the professionalism of Mr Walia and his team. It has to be said that un-minuted meetings would have afforded an unhappy opportunity for mis-selling or overselling the financial products.

183. Mr Walia was asked about the absence of notes or minutes of meetings in his cross-examination. He accepted that the only documents containing any record of the course of the negotiations and the provision of any advice were the term sheets and fact sheets. His explanation for the absence of notes and records is to be found at Day 5 p.52. It appears to be asserted (and it strikes us as a wholly counter-intuitive proposition) that the only reason notes were not made and retained was because Mr Al Khorafi and his family were big clients. Indeed all this is in stark contrast with the detailed notes prepared by representatives of HSBC when the Claimants sought advice about a potential margin call in July 2008.

184. In any event, the absence of such documents renders the thrust of any complaint that the judge did not assess the evidence of Mr Walia against the contemporary documents somewhat bizarre. There were none - at least none focused directly on the meetings which led to the purchase of the notes. In substitution the Appellants sought to rely on the fact sheets and term sheets furnished to the Respondents particularly in the wake of the meeting in April 2007 which were said to provide a clear picture of the proposed products, which it was submitted must have been read by the Respondents and which it was said were wholly inconsistent with the Respondents' case.

185. The difficulty as we see it is that the judge duly had regard to these documents and concluded that in fact what they contained did not reflect any clear inconsistency with the Respondents' case. The starting point here is the Fact Sheet dated 29 April 2007. It expressly referred to both a 100% Capital Guarantee **and** 10% per annum coupon over 3 years. Whilst this is followed by a description of a structure based on a minimal redemption, it is accompanied by an unexplained if not inexplicable formula as set out above.

186. As set out earlier in this judgment, there then followed worked examples two without leverage and two with leverage: e.g.

"**Investment into SaraFloor real Estate Basket over the last three years:**

2) With Leverage:

Assumption:

Participation 90.00%

Your assets: USD 30 mio

Loan: SD 30 Mio

Performance: +91%

Redemption at expiration:

Step 1: Formula [as before]

Step 2: Assumption that performance is earned on50% of the coupon payments

USD 60,000,000+[USD51,000,000 *(191%-100%)] +Coupon

Step 3: Finance costs are calculated with 5.80% over the three years

USD 60,000,000+[USD41,769,000]-cost of financing (Libor USD 6 mio+50 bp) + 18,000,00

USD 119,769,000 - USD 5,220,000(approx.)

Step 4: Reduction by the loan

USD 30,000,00

Step 5: Performance by investing USD 30 Mio

USD 84,549,000 (+182%)"

187. Mr Walia was unable to explain how the underlying formula worked. Mr Leuenberger said in terms that the examples made no sense. Mr Fitzgerald (the Appellants' expert witness) described them as nonsensical.

188. In fact the clear impression left by these remarkably encouraging examples is as Mr Leuenberger accepted that the Respondents would indeed recover their capital, plus the coupon, plus a performance related recovery just as they asserted had been requested. The true position was as already explained that the investor would receive at maturity only a specified percentage of the notional value representing the difference between 100% and the percentage amount already received as coupon payments.

189. Term sheets were then provided. These contained a formula for the redemption amount which was wholly opaque. It was common ground that it was correct. However, we consider that this was hardly of use to a financially inexperienced reader who would still be left with the uncorrected fact sheets. It is not surprising that the judge was not minded to accept that contemporary documents such as these enabled him to conclude that the Respondents' account of what had been sought and offered at the April meeting should be rejected as improbable. In short to the extent that they were comprehensible, we simply reject the submission that the contemporary documents were inconsistent with the investment objectives contended for by the Respondents. It was not suggested that the position was further clarified at the later meetings.

190. By the same token there was little if anything by way of contemporary record in regard to Sarasin-Alpen's assessment of the wealth and financial experience of the Respondents. The judge made the following points as regards Mr Walia's inquiries at paragraph 251(2) of the judgment:

> "(2)..his understanding in relation to those matters was founded on (i) his introductory and subsequent telephone discussions with Mr Cheerian in April 2007 (of which there is no contemporary record), (ii) information provided to him by Mr Taha during the second meeting in Kuwait on 24 April 2007 (of which there is no contemporary record), (iii) information provided by Mr Al Khorafi during that meeting on 24 April 2007 (of which there is no contemporary record), (iv) research conducted using publicly available information sources (which he summarised in the memorandum dated 21 June 2007) and (v) information provided to him by Mr Blonde (who had no first-hand knowledge of the truth of that information and who did not, himself give evidence and, in relation to whose statements to Mr Walia, no hearsay notice was served);"

191. So much for the documents. As regards the probabilities, it may be that Mr Al Khorafi had been tempted to overreach himself by borrowing against his and his family's assets only to be caught out by market movements. But these were enormous orders by individuals in respect of sophisticated derivative products. The potential for misunderstanding on the one part and mis-selling on the other was significant. But as we have noted the professionals involved kept no notes or minutes.

192. These circumstances made it all the more necessary to hear from Mr Blonde, Mr Walia's colleague. He was the author of much of the e-mail correspondence from Sarasin-Alpen. He attended most of the meetings with Mr Khorafi. But he was not called to give evidence. In the first place, his absence meant that Mr Walia's account had no corroboration. But secondly his absence called for some explanation: see ***Wizniewski v. Central Manchester Health Authority*** [1998] Lloyd's Rep 223.

193. The explanation furnished by Sarasin-Alpen was that Mr Blonde felt aggrieved that payment of $3 million allegedly due to him from Sarasin-Alpen had not been paid on his departure from their employment in 2008. He refused to give oral evidence unless paid that sum by one or other party. This in itself must cast doubt on his likely reliability as a potential witness. Be that as it may, the judge in the event concluded the right approach was simply to recognise that his evidence was accordingly not before the court, leaving a substantial hole in the Appellants' case.

194. But significantly, when Mr Walia gave evidence he gave a completely different explanation namely that Mr Blonde's new employers refused him permission to attend the trial although he was in the very same building as the court room. The implausibility (if not dishonest nature) of this assertion was a further example of the unsatisfactory nature of his evidence. Thus Sarasin-Alpen were left in the unhappy position in regard to the manner in which this product had been sold that of their two witnesses one was wholly unreliable and the other missing because he would only give evidence for a substantial sum.

195. As regards motive, the judge correctly identified the strong financial motive on the part of Mr Walia to obtain these enormous orders from the Khorafi family. It emerged in the course of his evidence that he was a forty per cent shareholder in Sarasin-Alpen. All income from the sale of products by Bank Sarasin to customers introduced by Sarasin-Alpen was payable to Sarasin-Alpen. In the present case that amounted to $3 million.

196. Put bluntly, the assertion that the judge failed to assess the evidence, and Mr Walia's evidence in particular, in accord with established practice was unfounded. We also reject the submission that the time taken to hand down the judgment was in any sense inordinate let alone such as to undermine the reliability of the findings as to the credibility of the witnesses of fact. Any fair assessment of the time taken to prepare the judgment would allow for the scale of the case, the volume of documentation and the numerous witnesses both factual and expert. It is also right to bear in mind the fact the judge is not a full time judge of the DIFC. In any event, again any fair reading of the judgment demonstrates that the judge had a full grasp of the issues, the evidential and legal materials relating to them, the content of the transcripts and the written and oral submissions of the parties.

Investment objectives

197. It follows that the Appellants' threshold ground of appeal that the judge wrongly rejected the evidence of Mr Walia must fail. It equally follows that he was fully entitled to accept the evidence of the Respondents as to what was said at the relevant meetings and telephone conversations. Accordingly, we conclude that the judge's findings as to what the Respondents identified as their investment objectives are unchallengeable: namely products which would guarantee 100% return on maturity of the capital invested, service of the loan on the borrowings from ABK and some surplus income.

198. In fact the evidence in support of that conclusion was pretty well overwhelming. The most significant meeting was that on 24 April 2007. The judge's summary was set out in paragraph 76 of the judgment:

> "76. .At this stage it is sufficient to state that I find that, at the meeting on 24 April 2007, Mr Walia and Mr Blonde were made aware (in so far as not already aware from Mr Blonde's introductory meeting with Mr Taha) (i) that Mr Al Khorafi and Mrs Al Hamad wished to invest moneys which were to be borrowed from ABK; (ii) that they were seeking investment products which would guarantee 100% return on maturity of the capital invested, would service the loan interest on the borrowings from ABK and provide some surplus income; and, further, that Mr Al Khorafi was assured by Mr Walia that Sarasin-Alpen could offer structured financial products which would meet those requirements. I find that, in particular, Mr Al Khorafi was assured by Mr Walia at that meeting that the structured financial products to be offered would ensure that, if held to maturity, there was no risk of capital loss, that the coupon payments would always be sufficient to service the interest on the ABK loans, and that it could be expected (with a high degree of confidence) that the investments would provide capital profits on maturity. In that context it was understood that the "structured financial products" would take the form of derivative instruments under the terms of which the performance of the investment was linked to the performance of other investments or indices."

199. As submitted by the Respondents this was not materially different from Mr Walia's understanding as put to Mr Khorafi in the course of his cross-examination. It was also supported by the evidence of Mr Nour and Mr Al Shatti. Nor is there anything in our judgment in the proposition that it is improbable that the Respondents were proposing these investment objectives on the grounds that they were obviously impossible to achieve. As submitted by the Respondents, a high yield bond would achieve all the objectives (albeit importing significant issuer risk).

200. The judge rejected Mr Walia's suggestion in his oral evidence that the question of using the coupon to cover the interest payments on the ABK loan was not mentioned at the April 2007 meeting but raised later. This conclusion was inevitable. Leaving aside his general credibility, this proposition was contrary to his own witness statement.

201. In the event Mr Walia was reduced to claiming that there was no assurance that the "coupon" would "always" cover the interest. But it is clear that there was no discussion of the implications of a disparity between the floating and fixed rates. There was no reservation of that kind. Mr Walia's evidence on [Day 5 p. 85 - 87] confirms that:

> "Q. Could you be given bundle B1, tab 6, page 312. This is the witness statement of Mr Al Shatti and I'm going to ask you to look at paragraph 10:
>
> "Mr Walia and Mr Blonde told Mr Al Khorafi that the coupon would always meet the interest payment to ABK, that the capital at the end of the investment would repay the ABK loan, that there was no risk of not making substantial capital return at the end and that there was no risk of losing any money."
>
> I'm going to ask you about the first part of that sentence, just the first line and a bit, where it says:
>
> "Mr Walia and Mr Blonde told Mr Al Khorafi that the coupon would always meet the interest payment to ABK ..."
>
> It was put to Mr Al Shatti on Sarasin-Alpen's behalf by Mr Brindle that if you take out the word "always", this sentence accurately reflects what you said at the meeting. This is again your case in this litigation. Is Mr Brindle fairly summarising your case in this litigation?
>
> A. Correct.
>
> Q. But the problem with that is that it amounts to much the same thing, doesn't it?
>
> A. No.
>
> Q. If you were telling Mr Khorafi that the coupon would meet the interest payment to ABK, what else is he going to understand, except that it would always meet the interest payment to ABK?
>
> A. You see, again, I go back to what I said earlier. Mr Khorafi said that he wanted coupons - not Mr Khorafi; it was Mr Taha, if I remember correctly. Mr Khorafi would never get into such details. Mr Taha said he wants coupons to meet the interest payments. I don't think we got into this discussion "always", whatever Mr Shatti is saying on the statement. This discussion was to a large extent the detailed discussion had with Alaa Taha.
>
> Q. You have just accepted that you were saying that the coupon would meet the interest payments to ABK?
>
> A. When they said that they wanted a return of 8 or 10 per cent, which was the final discussion after the 5 per cent, I thought that over a three-year period, LIBOR being where it was, it should be enough to cover interest payments, everyone if the LIBOR rates moved up. In the meanwhile, for the first one or two years, they would have a lot of surplus.

Q. Are you saying that in your own mind, you thought that there was headroom and therefore notwithstanding the difference between fixed and floating rates, you felt it safe to tell them that the coupon would be --

A. They didn't ask me. Like I said, if they'd asked me, I would have told. It was just my own personal thought. The decision whether it's 5, 8 or 10 was always theirs. They did the calculations.

Q. They didn't ask you and you didn't tell them, that there was a risk that the floating rate might not --

A. I think in this particular case, they seem to know it all. They have done their own calculations, they think they know what is best for them. They are not really looking for any advice from me."

Q. We should add that the Appellants sought to argue that the judge was wrong to fail to conclude that the Respondents had relied upon Mr Taha as their financial advisor and that he was able to furnish clear advice as to the nature of the products thus overcoming any difficulty in understanding the fact sheets and term sheets. In summary the judge said this about Mr Taha:

"165 .I reject the Defendants' attempt to portray Mr Taha as an expert adviser to Mr Al Khorafi (or to Mrs Al Hamad or Mrs Al Rifai) in relation to investments generally or structured financial products in particular. I accept that he had no relevant experience in relation to the investment decisions that were made in this case."

203. As the judge found:

(1) He had no clear understanding of derivative products - indeed the Second Appellant suggested that he should attend a derivatives course.

(2) He never met the second or third respondent.

(3) He did not even attend the meeting on the 22 June 2007.

204. The judge further developed his analysis of Mr Taha's role in paragraphs 337 to 341 of the judgment. In our judgment there was more than adequate material to support the judge's conclusion that the submission the Respondents were content to rely on advice from Mr Taha should be rejected. Likewise, it is not seriously arguable that the judge was clearly wrong to conclude that that Mr Taha was not in a position to understand the fact sheets and term sheets. Indeed Mr Taha was seeking instruction and training on the subject of derivatives. His own effort at an analysis of the instant products in a recommendation dated 11 July 2007 was wildly wrong.

205. In the result we reject the proposition that the finding that the investment objectives suggested were never proposed let alone accepted was perverse. We have already touched on this point but repeat there was a disturbing paucity of contemporary documentation which focused directly on the discussions between the parties. The fact sheets and term sheets bordered on the incomprehensible even to those who issued them. Yet they incorporated extravagant examples of potential performance.

206. It is important to add that it was accepted by Mr Walia that an additional or rather all embracing requirement of the Claimants was that there should be no risk: see Day 5 p.67/68:

"Q. Mr Al Khorafi made it very clear, didn't he, that was not a gambler, he didn't want risk and he wanted very secure investments?

A. Yes, he did.

Q. Mr Khorafi was not overly concerned about how much money he made from the investments, but he made it clear he didn't want to lose money?

A. Correct, he was very clear."

207. In short there was a wealth of evidence in support of the judge's conclusions in regard to the meeting on 24 April 2007 which really sets the scene for the whole claim. The judge's conclusions as to the content of the 22 June and 11 July meetings in London are equally not open to challenge.

The Claimants as Clients

208. We now move to the "Client" issue. This was summarised by the Appellants as follows:

"The Judge's decision that the First Defendant did not determine that any of the Claimants were clients within the meaning of COB 3.2.2 was infected by errors of law and/or findings of fact that were perverse and/or against the weight of the evidence."

209. As already set out, COB Rule 3.2.1 bars an authorised firm from conducting investment business with retail customers. It must only conduct such business with a person who is a Client. This leads to the relevant rules in this respect:

"3.2.2

(1) A Client is a Person who the Authorised Firm has determined, prior to the establishment of a relationship, is:

an individual who:

has at least $1 million in liquid assets and has provided the Authorised Firm with written confirmation of this fact;

appears to the Authorised Firm, after analysis, to have sufficient financial experience and understanding to participate in financial markets; and

has consented in writing to being treated as a Client.

.

(2) Any Person who does not meet the criteria in (1) is a Retail Customer.

3.2.3 For the purpose of Rule 3.2.2(a)(i) (sic), liquid assets are cash or assets which can be readily converted into cash, including but not limited to marketable securities, government bonds, treasury bills and notes that mature within 90 days.

3.2.4 For the purpose of Rule 3.2.2(a)(ii) and (b)(ii) (sic) an Authorised Firm must ensure that the analysis includes consideration of each of the following matters:

(a) the individual's knowledge and understanding of the relevant financial markets, types of investment and of the risks involved either generally or in relation to the proposed transaction;

(b) the length of time the individual has been active in relevant financial markets, the frequency of dealings and the extent to which the individual has relied on financial advice from financial institutions;

(c) the size and nature of transactions that have been undertaken for the individual in relevant financial markets;

(d) the individual's relevant qualifications relating to financial markets;

(e) the composition and size of the individual's existing financial investment portfolio; and

(f) any other matters which the Authorised Firm considers relevant.

3.2.5

(1) An Authorised Firm must have systems and controls in place to verify, prior to undertaking Investment Business . . . for a Person, that the Person is a Client.

(2) These systems and controls must include carrying out appropriate checks.

(3) If the Person is an individual these systems and controls must also include obtaining sufficient information to conduct the analysis under Rule 3.2.4.

3.2.6

(1) An Authorised Firm must keep records of the verification process undertaken for each Client including any documents which evidence the Client's status.

(2) If the Client in (1) is an individual the records must include the analysis undertaken, the reasons for the Authorised Firm concluding that the individual merits classification as a Client and the Client's written consent to being treated as a Client.

(3) These records must be kept for at least six years from the date on which the business relationship has ended. If the date on which the business relationship ended remains unclear it may be taken to have ended on the date of the completion of the last transaction."

210. Part 1 of the Conduct of Business (COB) Module of the Rulebook was relaxed on 1 October 2007 to provide (amongst other things) that the financial experience test did not apply to individuals who were merely receiving generic advice or a referral to an Authorised Firm or to an entity authorised or licensed and supervised by a Financial Services Regulator. From 1 October 2007 - that is to say, at the time when Sarasin-Alpen accepted Mrs Al Rifai as a Client - COB Rule 3.2.2 was in these terms:

"3.2.2

(1) Subject to (2) a Client is a Person who the Authorised Firm has determined, prior to the establishment of a relationship, is:

(a) an individual who:

(i) has at least $1 million in liquid assets and has provided the Authorised Firm with written confirmation of this fact;

(ii) appears to the Authorised Firm, after analysis, to have sufficient financial experience and understanding to participate in financial markets; and

(iii) has consented in writing to being treated as a Client;

.

(2)

(a) For the purposes only of giving advice of the kind specified in (b)(i) or the making of arrangements of the kind specified in (b)(ii), a Client is a Person who appears to the Authorised Firm on reasonable grounds to be:

(i) an individual who has at least $1 million in liquid assets; or

(ii) an Undertaking

(b) For the purposes of (a):

(i) the advice is limited to generic advice as defined under GEN Rule 2.11.1 (3); or

(ii) the arrangements as defined under GEN Rule 2.9.1 are limited to the making of a referral to an Authorised Firm or to an entity authorised or licensed and supervised by a Financial Services Regulator.

(3) Any Person who does not meet the criteria in (1) or (2) is a Retail Customer."

211. Generic advice was defined under GEN Rule 2.11.1(3) - at the relevant time - to mean:

"2.11.1(3).any communication.that:

Contains information about a particular financial product or Credit Facility;

could reasonably be regarded as being intended to influence a Person when making a decision relating to a decision relating to any financial product or Credit Facility to which the communication relates; and

does not contain any advice on the merits of that particular Person entering into a transaction to buy, sell, hold, subscribe for or underwrite those financial products or enter into a particular Credit Facility, whether as principal or agent."

212. In fact it became common ground that the apparent relaxation in October 2007 was merely a reflection of a proper construction of the rules throughout.

213. At the forefront of the Appellants' case before the judge was the degree of reliance that could be placed on the AGBC's and Annex 1 of them in particular. As we have recorded, these had been sent out in blank save for the name of individual potential clients. They were returned signed but otherwise incomplete. They were then filled in by an unidentified person. At no stage were the completed forms returned to or checked with the claimant.

214. At the risk of repetition, the AGBC forms constituted the contract between Sarasin-Alpen (BSA) and the Respondents.

"These additional General Business Conditions comprise a client agreement for the purposes of the Conduct of Business Module of DFSA Rulebook and shall come into force upon execution of both parties."

The forms were executed on 5 June.

215. The more important provisions were as follows:

"1. Client Qualification

1.1. The Client completed the Client Declaration, Undertaking and Authorisation set out in Annex ?

2. Investment Services

BSA will offer the following services (the "Investment Services") to the Client ..

2.2.1 Advice and recommendations on investments or arrangements involving investment in instruments of(?) credit including, without limitation, shares, stocks, bonds, notes, derivative contracts..

2.4 Restrictions on investments.

There shall be no restriction on the type of investments or markets in which you as Client wish to invest except as specifically agreed in writing..

2.6 BSA's obligation when providing investment services

2.6.1 BSA will not be required to consider the suitability of any particular investment for the Client when giving any advice or recommendation or accepting instructions or orders in respect of such investment unless in relation to a specific request for advice or recommendation or other investment services. The client has supplied to BSA the specific information on its situation or requirements for that investment and requested specifically that those be taken into account when preparing such advice or recommendations or accepting instructions or orders."

216. Annex 1 of the AGBC forms starts with a reference to "*I, the undersigned*" followed by a sequence of boxes referring to one of eleven individuals or entities that "*represent or warrant that I meet the definition of "Client* .." The form goes on: "*Please tick the appropriate box signifying the criterion for qualification.*" In fact no box was ticked.

217. The potentially relevant box from the perspective of the Respondents was the first one (being an individual with the characteristics specified in COB rule 3.2.2 (1) as above. Annex 1 goes on as follows:

"2. Declare that the particulars and information provided by met to BSA and/or Sarasin Group herein are accurate, correct, true and complete as at the date hereto, and that such particulars and information (whether provided to BSA or the Sarasin Group) will be depended on by BSA in making its decision as to whether I qualify as a Client hereunder.

7. Declare and further consent to be treated as a Client under the laws and regulations of the DIFC and confirm that I understand that by making my declaration and giving this consent I will not be afforded the retail customer protections and compensation rights that may generally be available to me in other jurisdictions.

I hereby confirm that BSA is not required to consider the suitability of any particular investment when giving any advice or recommendation to, or accepting instructions or orders from, me in respect of such investment, unless in relation to a specific request for advice or recommendation or other Investment Services, I have supplied to BSA specific information on my situation or requirements for that Investment and requested specifically that these be taken into account when BSA is preparing such advice or recommendation or accepting instructions or orders."

218. Annex 1A contained a questionnaire "*to establish your financial experience and understanding of financial markets in a wholesale jurisdiction such as the DIFC."* The questions, and the content of the answers inserted into the three questionnaires returned by the three Respondents, are set out in paragraph 232 of the judgment as follows:

Question	**Answer attributed to Mr Al Khorafi in the completed AGBC**	**Answer attributed to Mrs Al Hamad in the completed AGBC**	**Answer attributed to Mrs Al Rifai in the completed AGBC**
1. State the details of your knowledge and understanding of the relevant financial markets, types of investment and of the risks involved, either generally or in relation to any proposed transaction that you consider entering into with BSA or any other member of the Sarasin Group, or through the intermediation of BSA or any other member of the Sarasin Group:	Investing into financial markets since my grandfather's days. Have a CFO to manage Inv.	My family has been investing for over 40 years into international markets	Investing into financial matters since 10 years. Having a CFO to manage investment.
2. Confirm the length of time you have been active in the relevant financial markets, the frequency of your dealings and the extent to which you have relied on financial advice from the financial institutions in this regard:	Very long time 15 - 20 years. Have a CFO to monitor Inv.	None, my CFO assists me in managing the portfolio	10 years. Have a CFO to manage investment
3. Give an indication of the size and nature of transactions that have been undertaken for you in the relevant financial markets:	$>200 million in stocks, bonds, currencies etc.	$>200 million into stocks and shares	$>200 million in stocks, bonds, currencies etc.

Question	Answer attributed to Mr Al Khorafi in the completed AGBC	Answer attributed to Mrs Al Hamad in the completed AGBC	Answer attributed to Mrs Al Rifai in the completed AGBC
4. State your relevant qualifications relating to the relevant financial markets:	Have studied commerce it the US.&#65533; I have a qualified CEO to manage Inv.	None, my son (Rafed) + CFO are qualified to manage investments for me	Haves studied commerce in the US.&#65533; I have a qualified CFO to manage investment
5. Give an indication of the composition and size of your existing financial investment portfolio:	$>200 million	>200 million	$>200 million
6. Is there anything else you may consider relevant in our assessment of your financial experience and your understanding of financial markets in a wholesale jurisdiction?			&#65533; &#65533;

219. The Appellants faced insuperable difficulties in regard to these answers. In the first place it was common ground that most of these answers were simply wrong. For the sake of example the proposition that each Appellant had undertaken transactions in excess of $200 million in the *"relevant financial market"* and had an existing portfolio of in excess of US$200 million. But more unfortunately, each questionnaire was in effect a forgery written in the first person by an unidentified member of staff at Sarasin-Alpen based on information derived from an unidentified source.&#65533; Presumably at the same time the creator of the answers ticked the first box in Annex 1.

220. The whole purpose of the AGBC forms was to enable Sarasin-Alpen (BSA) to comply with the rules so that it could determine whether any or all of the Respondents were Clients. In reality none of the representations, warranties or confirmations were made (or confirmed) by the Respondents.&#65533; This was, as the judge found, a deliberate failure to comply with the rules by Sarasin-Alpen.&#65533; Like the judge, we reject the submission that by signing the AGBC's the Respondents were declaring that they fell within the definition of Client.&#65533; Absent ticking a box, no declarations were made.

221. Once the AGBC's fall away there was precious little if any material to allow Sarasin-Alpen to conclude that the Respondents were Clients properly so called in the lead up to the June meeting. The judge dealt with all these matters between paragraphs 243 and 262 of the judgment.&#65533; That section of his judgment is not open to serious challenge. There was never a proper process of analysis by Sarasin-Alpen: merely reliance ex post facto on a collection of comments which were not much better than gossip. In truth, absent Mr Blonde and absent any contemporary records, the judge's conclusion in the wake of his rejection of the AGBC's was inevitable.

222. Equally, the judge was right to reject the submission that on a proper analysis the Respondents were in fact Clients. In particular it is not arguable in our judgment that they had experience and understanding of structured financial products.&#65533; The judge was right to hold that mere investment experience was sufficient. The relevant sections from the Respondents' witness statements are set out at paragraphs 267 to 271 of the judgment.

223. It is impossible to contend in our judgment that the judge was clearly wrong to hold that the Appellants could not rely on the AGBC's. Although signed by the Respondents, the responses to the questions which were intended to allow the Appellant to determine whether the signatories satisfied regulatory conditions for acceptance as a Client were written later by someone at the Sarasin-Alpen office. The answers were in many respects clearly wrong as accepted by the Appellants. And in any event, the answers were never shown to or checked with the Respondents.

224. The purported source of the information remains unknown save it is accepted:

(1) That no one from Sarasin-Alpen ever spoke to the second and third Respondents.

(2) It is not suggested that Mr Al Khorafi supplied the information; it is contended that Mr Taha supplied the information but his denial that he did so was not challenged.

(3) Mr Walia's position was simply to speculate that Mr Blonde had extracted the information from some unidentified source.

225. As was submitted by Counsel for the Respondents, the Appellants were seeking to pull themselves up by their own bootstraps by claiming that their own manuscript insertions in the form of "*Declaration Undertakings and Authorisations"* could be relied upon. The whole form in terms of Client Qualification was based on the pre-condition that the Client had completed (or at least approved the content) Annex 1 and Annex 1A.

226. The judge was also correct to reject the proposition that, because the Respondents had signed the form containing the Clause 7 declaration of consent to being treated as a client, such was sufficient to constitute the signatories as Clients. Quite apart from the regulatory need on the part of the First Appellant to make a determination, the consent is meaningless in the absence of **both** a selection of Box 1 in Annex 1 claiming status as a Client as an individual in the specified respects, together with the associated requirement for a completed Annex 1A "*Individual Client Analysis*".&#65533; A blank form is devoid of effect.

227. Rather the same considerations apply to the proposition that merely by signing the document the signatory is to be deemed as having selected the most appropriate box which could be deemed as ticked. If Annex 1A had been completed by the signatory the point might be arguable. But again a blank form is simply that and contains no representation or warranty.&#65533; But even if it did, it is no answer to the point that Sarasin-Alpen needed to conduct both an analysis and a consequent determination.&#65533; If any such process was undertaken it is contained in the bogus entries on the forms.&#65533; But self-certification by the prospective client is not available let alone by some third party.&#65533; The right process would have been to go back to the signatories and obtain fully completed forms.

228. The last argument by Sarasin-Alpen in this sequence is that the Respondents were estopped from contending that they were not Clients within the meaning of the rules. This raises similar considerations. As the judge held (paragraph 325) it is not permissible to contract out of the rules in the sense that a retail customer who does not meet the conditions required for acceptance as a client cannot agree to be treated as one.

229. The invocation to the principle of contractual estoppel said to flow from the signing of the blank forms is in our judgment misconceived. Absent a ticked box and completed answers in Annex 1A there can be no contractual estoppel.&#65533; There is no agreement that the signatory is to be treated as a client (even if he is not).&#65533; In any event, the regulation requires Sarasin-Alpen to embark on an analysis and determination which cannot be avoided or short circuited.&#65533; Consent is an entirely separate requirement.

230. In the circumstances, it is unnecessary for us to venture into the supplementary argument advanced by the Respondents (based on a decision in the courts of Singapore) that contractual estoppel has limited application in the context of consumer protection.

231. This leads to the last point in this area - the question of causation - because the Appellants urge on us that the Respondents would in fact have qualified as Clients if properly assessed.

232. The first requirement of $1 million liquid assets is easy to deal with. The judge found that the first and Second Appellants passed this threshold requirement but the third Appellant did not.&#65533; We see no reason to conclude that the judge was clearly wrong.

233. As regards the question whether the person concerned "*had sufficient experience and understanding to participate in financial markets in a wholesale jurisdiction.",* an important threshold issue is what the relevant experience and understanding is that is called for. Is it financial markets generally or in the market for the kind of investments which were in fact sold?&#65533; The judge found that it did not matter.&#65533; Mr Al Khorafi did not in his judgment have significant experience and the other Appellants were inexperienced.&#65533; The issue is dealt with at some length.&#65533; His conclusions are set out at paragraphs 267 to 276.&#65533; We are wholly unpersuaded that he was clearly wrong.

234. But in any event, we accept the Respondents' submission that mere experience in financial markets is not enough. First, it has to be experience in financial markets in a wholesale jurisdiction such as the DIFC.&#65533; Apart from the Second Appellants' purchase of investment fund units through Credit Suisse there was little evidence of any participation in a wholesale market.&#65533; Second, COB rule 3.2.4 makes it clear that for the purpose of assessing sufficient financial experience and understanding, the analysis must include consideration of the knowledge and understanding of the "*relevant financial market, types of investment and of the risks involved.*"&#65533; There was no evidence available to the judge that the Respondents had any experience of the types of investment being offered in the present case let alone the risks involved.&#65533; That leaves aside such matters as length of time in the relevant market, and the frequency and size of dealings.

235. There was no assessment of these matters not least because there was nothing to bite on. Indeed when choosing to record material purporting to be both true and relevant in the AGBC's, it was neither.&#65533; Furthermore, even if true it was made up of a scrappy, imprecise and largely irrelevant commentary.

236. Against that background we reject the Appellants' challenge to the finding that the Respondents were retail customers and that accordingly the Appellants were not authorized to conduct investment business for them.

Suitability

237. We turn now to the suitability issue. The threshold point was the Appellants' submission that they had limited any obligation to consider the suitability of any investments by notice pursuant to COB rule 6.2.1(2).&#65533; The relevant exclusion is to be found in the paragraph preceding the signature on the AGBC's.

238. The difficulty that the Appellants face is that, given our conclusion on the appeal against the factual findings in regard to the content and outcome of the various meetings in 2007, it is not open to the Appellants to challenge the finding that the proviso to this exclusion clause is made out. The Appellants had identified their requirements and specifically requested they be taken into account for the purpose of the advice and recommendation by Sarasin-Alpen.&#65533; The point is covered by paragraph 293 of the judgment:

> "293. I accept that Mr Al Khorafi, (on his own behalf and on behalf of Mrs Al Hamad) in relation to the purchase of the REIT Notes and (on behalf of Mrs Al Hamad) in relation to the purchase of the July 2007 SaraFloor Notes, made specific requests for advice or recommendation, or other investment services; and I accept that, in making those requests, he&#65533; supplied to Sarasin-Alpen specific information on his and Mrs Al Hamad's requirements for the proposed investments and requested specifically that those requirements be taken into account. In reaching that view I have had regard to the circumstances leading to the purchases of the REIT Notes and the July 2007 SaraFloor Notes; and, in particular, to what was said at the meetings on 24 April 2007, 22 June 2007 and 11 July 2007. I am satisfied that Mr Al Khorafi made it clear to Mr Walia (on behalf of Sarasin-Alpen) that he and his mother were seeking 100% capital protection (so that the ABK loans - and the loans from Bank Sarasin - could be repaid) and an income stream which would service the interest payments due in respect of the ABK loans (which had funded the purchase of the REIT Notes) and the further loans from Bank Sarasin (which funded the purchase of the July 2007 SaraFloor Notes)."

239. The second point taken is that the advice tendered was generic advice within the meaning of COB 2.11.1(3) C. Again, given the findings as to the manner of selling of these products it is not possible to conclude that the advice was only generic.&#65533; The advice advanced by Sarasin-Alpen went beyond being likely to influence a buyer and constituted advice on the merits.&#65533; For the sake of example, the introduction to the Indicative Factsheet dated 29 April 2007 reads:

"Public Sarafloor with Coupon on the Real Estate World Basket

Global quoted real estate is the best performing asset class over the last years. Especially Real Estate investment Trusts (REITS) are highly attractive as of their liquidity and low correlation to other financial assets. Therefore we offer a product with the underlying of three indices covering Japan and two European Real Estate indices."

240. In any event given the judge's conclusion on the content of the meetings in April, June and July 2007 as described by the Respondents' witnesses and his rejection of the evidence of Mr Walia (which we uphold), it follows that the judge's conclusion at paragraphs 286 to 288 of the judgment must be treated as sound. They are each in similar terms so we quote paragraph 286 as an example:

"286. In my view there is no doubt that, in relation to the purchase of the REIT Notes in June 2007, Sarasin-Alpen was carrying out activities which fell within both paragraphs (a) and (b) of COB Rule 6.2.1: that is to say (i) Sarasin-Alpen gave advice to Mr Al Khorafi (and, through him) to Mrs Al Hamad as to the suitability of the REIT Notes as a structured financial product for the purposes of the investment of the funds to be advanced by ABK and (ii) Sarasin-Alpen recommended that Mr Al Khorafi and Mrs Al Hamad entered into the transaction with Bank Sarasin under which those Notes were purchased. In reaching that view I have had regard to the circumstances which led to the purchase of the REIT Notes (set out earlier in this judgment) and, in particular, to the evidence as to what was said at the meetings on 24 April 2007 and 22 June 2007."

241. It follows that suitability was a requirement not merely for any discretionary execution but also in respect of advice and recommendations. As regards actual suitability, the judge's findings are not seriously open to challenge as being "*perverse or against the weight of the evidence*". Once the Respondents' requirements are identified it is not arguable that the products met those requirements and were thus suitable.

242. The judge accurately summarised the structural problems with all the products at paragraphs 300 to 302 of the judgment:

"300. Put shortly, the REIT Notes did not meet the requirements of Mr Al Khorafi and Mrs Al Hamad that the investments provide both (i) 100% capital protection (so that the ABK loans could be repaid) and (ii) an income stream which would service the interest payments due in respect of the ABK loans. Given that the income stream was to be provided by the coupon payments, there was no guarantee that the capital returned on maturity (together with any surplus remaining out of the coupon payments after servicing the interest due in respect of the ABK loan) would be equal to or in excess of 100% of the capital invested in the purchase. Whether or not the capital returned on maturity (together with any surplus remaining out of the coupon payments) would be equal to or in excess of 100% of the capital invested would depend on the performance of the underlying index; not on the "capital protection" afforded by the minimum redemption covenant. That was not consistent with the investment objectives of Mr Al Khorafi or Mrs Al Hamad. And it is no answer to suggest (as Dr Fitzgerald suggested in his expert report) that those investment objectives were not attainable in practice: even if that was a correct view. If the investment objectives were not attainable, then it was impossible for Sarasin-Alpen to advise that they were met by the investments which it recommended: the only course open to Sarasin-Alpen, consistently with the obligation imposed by COB Rule 6.2.1(1), was to advise that there were no investments capable of meeting the Client's investment objectives.

301. Nor did the July 2007 SaraFloor Notes meet Mrs Al Hamad's investment requirements of both (a) 100% capital protection (so that the Bank Sarasin (leverage) loans could be repaid) and (ii) an income stream which would service the interest payments due in respect of the Bank Sarasin loans. In addition to the matters described in the previous paragraph (mutatis mutandi) there were two other factors which made the investment in the July 2007 SaraFloor Notes unsuitable. First, the Irrevocable Payment Order in favour of ABK made it impossible (consistently with the obligations thereunder) to use the coupon payments in respect of those Notes to service the Bank Sarasin loan. Second, the potential for margin call (arising from the leveraging provided by the Bank Sarasin loan) posed the additional risk that the Notes would not be allowed to run to maturity.

302. That latter factor was present - and to a greater degree - in relation to the purchase of the February 2008 SaraFloor Notes by Mrs Al Rifai. Given that, by reason of the cross-collateralisation under the pledge into which Mrs Al Rifai was (to the knowledge of Sarasin-Alpen) required to enter as a condition of obtaining funding from Bank Sarasin, the Bank could have recourse to the February 2008 SaraFloor Notes to meet a margin call in respect of the July 2007 leveraging, there was, in practice, little chance that (unless margin calls were funded from elsewhere) her investment would run to maturity; and, if they did not, there was no capital protection at all."

243. One can add for good measure two further factors. First, the products required constant and unfluctuating growth at 17% to avoid a margin call: indeed margin was probably due on Day 1. The prospect of such a return was illusory. Second, given that the July 2007 Notes put the Claimants in breach of contract with ABK, the Respondents were faced with making a payment of US$20 million in settlement.

244. In addition to these structural problems was the fact that far from being free from risk as required there were numerous risks associated with the investments, some of which were far from apparent. We see no reason to interfere with the judge's preference for the views of Dr Walford (the Respondents' expert) on this topic. The risks were accurately itemised in paragraph 352 of the judgment:

"The risks which Dr Walford identified were these:

A risk that the regular coupon on the investments would not be sufficient to meet the interest payments on loans which ABK had made to Mr Al Khorafi and Mrs Al Hamad.

A risk that the investments might not produce sufficient return to meet the financing costs associated with the leveraging provided by Bank Sarasin and the interest payable on the ABK loans. In particular, it is said that there was a risk that, if interest payments on leveraging were missed, then this could result in an early liquidation of the totality of the investments in which case there would be no capital guarantee and the Claimants would face a potential capital loss on their investments.

A risk that a fall in value of the leveraged investments would trigger a margin call requiring the immediate payment of substantial collateral. A failure to pay margin call would result in early liquidation of the totality of the investments, exposing the Claimants to a capital shortfall with regard to their ability to repay the ABK lending and/or the Sarasin lending.

A risk that, in the circumstances that the coupons were guaranteed and the capital value was only partially guaranteed, the structured products would not meet their target.

A risk that, absent very significant capital growth over the course of the investments, there would be insufficient funds at the end of the period to pay out the Claimants in full; and so a risk of capital loss.

A risk that the treatment by Bank Sarasin of the accounts as being within one single family relationship would lead to losses on one account spreading to other accounts."

245. We reject the challenge to the finding that the products were suitable for the Respondents' objectives.

Section 94

246. The finding that the breach in respect of the false and improper designation of the Respondents as Clients was deliberate is not open to serious challenge given both that the forms were effectively forgeries created by Sarasin-Alpen and they contained false information.

247. Likewise the finding that the breach in respect of suitability was reckless was well within the range of proper conclusions on the judge's part. Given that Sarasin-Alpen purported to have taken the view that it was only affording generic advice or alternatively had (or at least claimed to have had) a false appreciation of the Respondents' requirements, it follows that no consideration was ever given to the question of suitability. Furthermore, Sarasin-Alpen either gave no consideration to the risks associated with the products that they recommended or having appreciated the risks chose not to reveal them. A particularly outrageous consequence of the second tranche was to put the Respondents in breach of their obligations to ABK.

Margin calls

248. As regards the cause of a margin call emerging, this was a reflection of systemic faults in the products which are readily identifiable and duly developed over the life of the instruments. It is difficult to see why the Respondents should be expected to prolong the life of these wholly unsuitable products. In the view of Dr Walford they "*were doomed to failure*". In any event, the judge was fully entitled to find that there was no break in the chain of causation as a consequence of the Respondents' failure to meet the margin calls made in October 2008. The time available was a matter of a few hours. The judge was entitled to find that it was improbable that the call could be met in time even if it was appropriate to expect the Respondents to meet it.

Causation

249. The judge was fully entitled to conclude that absent the recommendations made by Sarasin-Alpen the Respondents would not have purchased similar products elsewhere. The challenge to that conclusion falls away given the rejection of the appeal on the content and outcome of the meetings. As the Respondents asserted, there was no possibility let alone likelihood that products meeting the Respondents' requirements could be met from another source.

Conclusion on the First Appellant's appeal

250. We accordingly dismiss the First Appellants appeal and do not propose to add to the length of this judgment by dealing with the alternative ground of appeal as regards liability in contract were the Respondents to be properly classified as Clients. Accordingly we turn to the appeal brought by the Second Appellants.

Bank Sarasin's appeal

251. The judge held that, contrary to the Financial Services Prohibition contained in Article 41 of the Regulatory Law, Bank Sarasin had carried on Financial Service activities in or from the DIFC when it was not authorized by the DFSA so to do. The judge then went on to hold that, pursuant to s. 65 (2)(b) of the Regulatory Law the Respondents were entitled to an order for compensation.

252. In reaching these conclusions, the judge first considered whether Bank Sarasin had carried on a Financial Service *quoad* the Respondents and having concluded that it had, went on to consider whether it had done so "in or from" the DIFC.

Carrying on an activity that constitutes a Financial Service

253. By virtue of GEN Rule 2.2.1, "an activity constitutes a Financial Service under the Regulatory Law 2004 and these Rules where: (a) it is an activity specified in Rule 2.2.2; and (b) such activity is carried on by way of business in the manner described in section 2.3."

254. GEN Rule 2.3.1 provides:

"Subject to Rules 2.3.2 and 2.3.3, for the purpose of these Rules a Person carries on an activity by way of business if the Person:

(a) engages in the activity in a manner which in itself constitutes the carrying on of a business;

(b) holds himself out as willing and able to engage in that activity; or

(c) regularly solicits other Persons to engage with him in transactions constituting that activity."

255. The judge held that Bank Sarasin had carried on the following activities specified in GEN Rule 2.2.2 as constituting a Financial Service: (i) Dealing in Investments as Principal [para (d)]; (ii) Arranging Credit or Deals in Investments [para (f)]; (iii) Advising on Financial Products or Credit [para (h)]; and (iv) Arranging Custody [para (k)]; and (ii) that Bank Sarasin had carried on those activities "in or from" DIFC.

Dealing in Investments as Principal

256. GEN Rule 2.7.1 and GEN Rule 2.7.4 provide:

"2.7.1. Dealing in Investments as Principal" means buying, selling, subscribing for or underwriting any Investment as principal.

2.7.4. A Person who is not an Authorised Firm or an Authorised Market Institution does not Deal in Investments as Principal in relation to an Investment by entering into a transaction with or through an Authorised Firm or a Regulated Financial Institution."

257. In paragraph 372 of the judgment, the judge identified, inter alia, the following four activities carried on by Bank Sarasin which the Respondents contended fell within the category of Dealing in Investments as Principal and had been carried "in or from" the DIFC: (1) the opening of accounts for the Respondents with the express purpose of the Respondents purchasing investments structured by Bank Sarasin; (2) the arranging of structured investments for the respondents based on the requirements provided by the Respondents; (3) the marketing of investments and leveraging and credit facilities to the Respondents. (4) the taking of investment instructions from the Respondents for the purchase of the said investments.

258. In paragraphs 375B[2] - 377 of the judgment, the judge set out the facts and submissions relied on by the Respondents for the contention that they had purchased investments from Bank Sarasin as principal and not as agent:

"375B.It is said that the following facts point to the conclusion that the Claimants purchased investments from Bank Sarasin as principal and not as agent:

(1) It was accepted by Mr Walia that the Claimants purchased the Investments from Bank Sarasin. He stated in his witness statement (at paragraph 130) that "The documents signed by each of Mr Al Khorafi and Mrs Al Hamad authorized the purchase of the RAK 30M REIT and the AAH 50M REIT products from Sarasin Switzerland". He recognised that the fact that the underlying investments had been issued by a (related) third party was irrelevant: it was Bank Sarasin that was selling the REIT Notes.

(2) The instructions that the Claimants gave (in the Confirmations of Investment) for the purchase of the Notes were addressed to Bank Sarasin (albeit on Sarasin-Alpen's letterhead and through Sarasin-Alpen's office in the DIFC); they were not addressed to a third party issuer. Indeed, there is no suggestion that the Claimants knew the identity of the issuer at the point when the investment instructions were given; or that the issuers had any contact with the Claimants. In some cases, the issuers were not identified until many months after the deal had been done.

(3) Bank Sarasin has produced no evidence to suggest that it was acting as agent for the third party issuers or that it was authorised by those issuers to do so or that the issuers knew the identity of the Claimants (as would be expected if, as Bank Sarasin now seeks to contend, the sale and purchase contracts were not between the Claimants and Bank Sarasin).

(4) The fact that Bank Sarasin was taking a "turn" on the deals (represented by the difference between the price that it paid to the issuer and the price at which it booked the purchase to the Claimants) is another indication that it was acting as principal and not as agent. It is said that the evidence clearly shows that Bank Sarasin was acquiring the structured products at a discount to nominal value (around 98%, at least in relation to the first tranche of investments) and selling these to the Claimants at nominal value. Bank Sarasin was both buying and selling the Notes. That, it is said, is the hallmark of a principal to principal transaction. No significance is to be attached to the statement on the contract note that Bank Sarasin was "purchasing on your behalf": Bank Sarasin did not, in fact, purchase the Notes at the price stated on the contract note: it purchased the Notes at a price equal to 98% of the price stated on the contract note. Bank Sarasin treated itself as purchasing the Notes as principal and not as agent: it made no disclosure to the Claimants of any commission taken as agent on the purchase.

376. Further, it is said, even if Bank Sarasin were acting as agent for the issuers in taking instructions from the Claimants, it would, nevertheless be carrying on an activity - "Dealing in Investments as Agent" - which constituted a Financial Service for the purposes of the Financial Service Prohibition (GEN Rules 2.2.2(e) and 2.8): so the point takes it nowhere. In the circumstances it is said that, on any view, Bank Sarasin was Dealing in Investments within the meaning of the GEN Rules.

377. In response to the allegation that it was Dealing in Investments as Principal within the meaning of GEN Rule 2.7, Bank Sarasin submits that "This could only mean that Bank Sarasin was dealing in investments through the agency of Sarasin-Alpen". It is pointed out, correctly, that the Claimants have expressly disclaimed any allegation that the Sarasin-Alpen was Dealing in Investments as Agent within the meaning of GEN Rule 2.8.1. In those circumstances, it is said that it is not open to the Claimants to make the allegation that they do under this head.

378. In my view there is no substance in that point. Properly understood, the Claimants' allegation, under this head, is that Bank Sarasin, itself, was Dealing in Investments as Principal in and from the DIFC; not that it was doing so through the agency of Sarasin-Alpen. I address the question whether, on the facts, Bank Sarasin was, itself, carrying on the regulated activity in and from the DIFC in a later part of this section. Subject to that question, I am satisfied that Bank Sarasin was Dealing in Investments as Principal."

259. In our judgment, it is readily to be inferred that the judge's conclusion in paragraph 378 that Bank Sarasin was Dealing in Investments was based on the factual allegations he referred to in paragraph 375B, these being allegations that were not substantially in dispute and which he was implicitly accepting as having been established.

Arranging Credit or Deals in Investments

260. In paragraphs 379, 380 and 381 of the judgment, the judge considered the relevant provisions of GEN Rule 2.9 as it was then worded, set out the activities of Bank Sarasin alleged by the Respondents to include both arranging credit and arranging deals in investments and concluded that Bank Sarasin had carried out activities that constituted Arranging Credit or Deals in Investments:

"379. GEN Rule 2.9 defines "Arranging Credit or Deals in Investments" to mean (a) making arrangements with a view to another Person whether as principal or agent buying, selling subscribing for or underwriting an investment; or (b) making arrangements for another Person, whether as principal or agent, to borrow money by way of a credit facility". "Arrangements" include "arrangements which do not bring about the facility" and "making invitations or, engaging in any other conduct with a view to influencing another Person to enter into an investment transaction or credit facility". "Invitations" mean "any communications that directly or indirectly invite a Person to enter into [an investment transaction or credit facility]"; and "other conduct" means "any conduct, though not amounting to an invitation, that can be viewed as a step in the chain that directly or indirectly leads a Person to enter in to [an investment transaction or credit facility]". Communications which contain "generic advice" are within this definition. Further, whilst promotional material that does not contain any information about any particular financial product (for example, flyers containing general information about any financial service provider) is not regarded as generic advice, the distribution of such material can still amount to "arranging credit or deals in investments".

380. It is said on behalf of the Claimants that Bank Sarasin's activities included both arranging credit and arranging deals in investments. In particular:

(1) Bank Sarasin circulated various marketing material, including the Termsheets (and the Factsheets prepared by Mr Blonde) which invited the Claimants to enter into investments with Bank Sarasin.

(2) Bank Sarasin sent out the account opening forms (through Sarasin-Alpen). It was always the intention from the outset that, if the Claimants opened accounts with Bank Sarasin, it would be for the purpose of making investments.

(3) Bank Sarasin's proposals included leveraging and these were, properly analysed, an invitation to enter into a credit facility with Bank Sarasin; an invitation which the Claimants in due course took up.

Each of those steps, it is said, fell within the scope of "invitations" or "other conduct".

381. It is accepted on behalf of Bank Sarasin that it did carry out the activities alleged to constitute Arranging Credit or Deals in Investments within the meaning of GEN Rule 2.9; but it is said that it did so from Switzerland and not "in and from" the DIFC. That, also, is a question which I address in a later part of this section."

Advising on Financial Products and Credit

261. Advising on Financial Products and Credit was defined in GEN Rule 2.11.1(1) and (2) as follows:

"(1) In Rule 2.2.2 Advising on financial products or credit means giving advice which:

(a) is given to a Person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor on the merits of his buying, selling, holding, subscribing for or underwriting a particular financial product (whether as principal or agent); or

(b) is given to a Person in his capacity as a borrower or potential borrower or as agent for a borrower or potential borrower on the merits of his entering into a particular Credit Facility ; or

(c) constitutes generic advice."

(2) Advice in (1)(a) and (b) includes a statement, opinion or report:

(a) where the intention is to influence a Person, in making a decision, to select a particular financial product or an interest in a particular financial product or to enter into a particular Credit Facility; or

(b) which could reasonably be regarded as being intended to have such an influence."

262. As stated above, "Generic advice" was defined under GEN Rule 2.11.1(3) to mean:

"2.11.1(3).any communication.that:

(a) Contains information about a particular financial product or Credit Facility;

(b) could reasonably be regarded as being intended to influence a Person when making a decision relating to a decision relating to any financial product or Credit Facility to which the communication relates; and

(c) does not contain any advice on the merits of that particular Person entering into a transaction to buy, sell, hold, subscribe for or underwrite those financial products or enter into a particular Credit Facility, whether as principal or agent."

263. Paragraphs 383 and 384 of the judgment read:

"383. Bank Sarasin produced a number of marketing presentations for the Claimants. These were distributed to the Claimants through Mr Blonde, Mr Walia and others at Sarasin-Alpen in the DIFC. Further, Bank Sarasin structured investments for the Claimants (which constituted giving advice) based on instructions taken in the DIFC.

384. It is said on behalf of Bank Sarasin that it gave no advice in or from the DIFC. I address that question in a later part of this section. Subject to that question, I am satisfied that Bank Sarasin was Advising on Financial Products and Credit within the meaning of GEN Rule 2.11."

Arranging Custody

264. GEN Rule 2.14 read with GEN Rule 2.13.1 defined "Arranging Custody" to mean "arranging for one or more Persons to safeguard Investments belonging to another Person and the administration of those Investments."

265. As recorded in paragraph 385 of the judgment, the Respondents contended that by Mr Morf's instruction to Mr Blonde to run the irrevocable payment order by the bankers to check whether they agreed the wording, the security arrangements between Bank Sarasin and ABK were arranged with Bank Sarasin's concurrence by Mr Walia and Mr Blonde. The Respondents also contended that the dispatch of the pledge agreements from the DIFC and their return to the DIFC constituted the arranging of custody of the Respondents' investments.

266. In paragraph 386 of the judgment, the judge said:

> "As in the case of `Arranging Credit or Deals in Investments', it is accepted that Bank Sarasin did carry on the activity of "Arranging Custody" within the meaning of GEN Rule 2.14; but it is said that it did so in Switzerland and not `in or from' the DIFC. That, also is a question which I address in the next part of this section."

"In or from" Dubai

267. In paragraph 395 of the judgment, the judge concluded that whatever may have been the intentions behind the setting up of the joint venture through Sarasin-Alpen, in practice Bank Sarasin dealt with the Respondents through Mr Blonde as its own Client Relationship Manager. It was immaterial that Mr Blonde had been employed by Sarasin-Alpen; his role, vis-à-vis Bank Sarasin, was indistinguishable from what it would have been if he had been employed by Bank Sarasin. It followed that in dealing with the Respondents, Bank Sarasin was carrying on activities which constituted a Financial Service in or from the DIFC and in doing so, it was in breach of the Financial Service Prohibition.

268. The judge's reasons for reaching this conclusion are contained in paragraphs 393 and 394 of the judgment:

> "393. In my view it is beyond argument that other employees of Sarasin-Alpen (in particular, Mr Blonde), made no distinction in their dealings with the Claimants and Mr Taha between the business of Sarasin-Alpen and the business of Bank Sarasin. The evidence that they saw themselves as dealing with the Claimants in the conduct of the business of Bank Sarasin is overwhelming. Stephan Wernli, who was employed by Bank Sarasin as "Department Head of Legal and Compliance Clients Switzerland", accepted in the course of cross-examination (transcript, 27 May 2013, page 201, lines 10 to 13) that "on any view, Bank Sarasin was dealing with the clients from Dubai through individuals in the Sarasin-Alpen Office"; and (ibid, page 218, line 21 to page 219, line 10) that there were "many, many documents . . . showing Mr Blonde or other Sarasin Individuals emailing people within Bank Sarasin plainly regarding themselves as part of the Bank Sarasin team". He accepted that the reality was that "Mr Blondewas leading this proposed deal on behalf of the sellers of the product, Bank Sarasin, and indeed the people who were going to provide an element of credit, also Bank Sarasin".
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> 394. More pertinently, perhaps, that is how the position was seen at the time from within Bank Sarasin. Mr Leuenberger accepted (transcript, 27 May 2013, page 131, line 23 to page 140, line 18) that Bank Sarasin dealt with its clients through a "Client Relationship Manager"; and that that individual could be either an employee of Bank Sarasin or an employee of Sarasin-Alpen. He accepted (ibid, page 140, lines 13 to 18) that there was no difference in practice between a case where the relationship manager was an employee of Sarasin-Alpen and a case where the relationship manager was an employee of Bank Sarasin. In the present case Bank Sarasin saw Mr Blonde as the Client Relationship Manager. The clearest example of that, perhaps, is in the letter from credit department, signed by the vice-president and managing director of Bank Sarasin, by which the margin call was made. The evidence of Mr Wernli (ibid, page 200, lines 2 to 16) shows that he, at least, recognised that for Bank Sarasin to treat Mr Blonde as its own Client Relationship Manager for the purpose of its dealing with the Claimants, was inconsistent with its case that it was not carrying on Financial Service activities in and from the DIFC. "

269. Paragraph 358 of the judgment is also relevant here:

> "358. I am satisfied that Sarasin-Alpen did, in fact, take general instructions from the Claimants; and then communicated specific trading instructions to Bank Sarasin. For Sarasin-Alpen to contend that "it did occasionally act as a post box between the Claimants and Bank Sarasin" is to ignore, or misrepresent, the evidence. It is plain that Mr Walia and Mr Blonde, with other employees of Sarasin-Alpen, were the principal - if not the only - channel of communication between the Claimants and Bank Sarasin. But I am not satisfied that Sarasin-Alpen was "acting as an intermediary" between the Claimants and Bank Sarasin. For reasons which I shall explain, later in this judgment, I take the view that, on a true analysis, Bank Sarasin was treating employees of Sarasin-Alpen (in particular, Mr Blonde) as its own relationship manager for the purpose of conducting its business with the Claimants."

270. Earlier, in paragraphs 388 - 390 of the judgment, the judge rehearsed the matters relied on by the Respondents in support of their contention that Dealing in Investments as Principal and Arranging Credit or Deals in Investments. These matters included many instances of actions taken by Mr Blonde which we summarise as follows:

> "(1) ·· The Bank Sarasin account opening forms were sent to the Claimants from the DIFC by Ms Naz, an Executive Manager of Sarasin-Alpen who was based in the DIFC. The covering letter stated that if there were any further questions (in relation to account opening), Mr Blonde should be contacted on his Dubai mobile number. No contact details were provided for Bank Sarasin. The letter concluded: "We are looking forward in providing you with all required banking and investment services". This can only have been a reference to the services to be provided by Bank Sarasin once the accounts were opened: Sarasin-Alpen did not have the infrastructure to provide banking and investment services (and was not licensed to do so).
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> (2) ··· The first investment proposal was sent to the Claimants by email headed "Proposed real estate Khorafi.doc" by Mr Blonde (at his email address in the DIFC) in which Mr Blonde wrote, "please feel free to call me for any additional information or clarification" and provided his Dubai mobile number for that purpose. No contact details were provided for Bank Sarasin. Attached to the email was an "Indicative Factsheet" for a real estate investment which identified Bank Sarasin as the "lead manager". The introduction to the Factsheet provided various reasons why real estate investments were attractive and stated: "Therefore, we offer a product with the underlying of three Indices covering Japan and two European Real Estate indices". The statement "we offer" can only have been a reference to Bank Sarasin: this was an investment offered by Bank Sarasin, Sarasin-Alpen had no capacity to sell these investments, and was not licensed by the DFSA to do so.
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> (3) ··· On 3 May 2007, Mr Leuenberger, who was employed by Bank Sarasin in Switzerland, sent an email to Mr Blonde (at his DIFC address) referring to the investments that Bank Sarasin was structuring for Mr Al Khorafi· and Mrs Al Hamad. Mr Leuenberger asked Mr Blonde, "will the client be trading these products at the same time (contingent) or are the trades independent from each other" and requested feedback on the 6 month real-estate structure which had previously quoted. In both instances, Mr Leuenberger was relying on Mr Blonde to obtain answers to these questions from the Claimants.
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> (4) ··· On 4 May 2007, Mr Blonde sent an email from his DIFC address to Mr Zeuggin at Bank Sarasin in Switzerland from which it is clear that Mr Blonde was seeking to organise the Claimants' investments with Bank Sarasin, and did not regard his role as confined to acting for Sarasin-Alpen or within the scope of Sarasin-Alpen's limited licensed functions.
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> (5) ··· On 5 May 2007, Mr Blonde sent an email from his DIFC email address to Mr Taha attaching a process flow document, a sample of Bank Sarasin's pledge document, Bank Sarasin's termsheets and detailed investment proposals for the investments. The email concluded "Please call me for any additional clarification/information"; and gave Mr Blonde's Dubai mobile number for that purpose. The process flow document provided for the following steps (involving Bank Sarasin) to take place: "(i) Sarasin presents AAA/Aaa rated Rabobank investment product; (ii) Client to confirm investment product trade with Sarasin; (iii) Sarasin trades product on 3 week forward; (iv) Sarasin to confirm pledge to Client & ABK; (v) Sarasin to transfer interest semi-annually to Client's ABK account; (vi) Sarasin to transfer principal on maturity into Client's ABK account".
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> (6) ··· In so far as the said steps involved communications between Bank Sarasin and the Claimants, those communications were passed through Mr Walia and Mr Blonde and other Sarasin-Alpen personnel, all of whom were based in and operated from the DIFC.
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> (7) ··· Attached to the email sent on 5 May 2007 were Indicative Factsheets which were on Sarasin-Alpen letterhead but listed Bank Sarasin as lead manager the preamble to which said "we offer" which can only have been a reference to Bank Sarasin.
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> (8) ··· On 9 May 2007, Mr Blonde explained in an email to Mr Nour attaching a proposed draft guarantee that he had discussed the product details with Mr Taha on the previous day; and that "Our product management is working on the products actively today since US markets were closed yesterday". The reference to "Our product management" can only have been a reference to Bank Sarasin.
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> (9) ··· On 15 May 2007, Mr Blonde sent an email to Mr Cheerian of ABK attaching a draft guarantee for Mr Cheerian's consideration. The email said: "Our lawyers are currently working on the format ." The references to "our" can only have been a reference to Bank Sarasin.
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> (10) ·· As and when the Termsheets were updated, they were sent to Mr Blonde for distribution on to the Claimants, rather than sent to the Claimants directly. Also, requests for updates of the pricing were made by Mr Malpani who was based in the DIFC rather than by employees of Bank Sarasin in Switzerland.
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> (11) ·· On 19 May 2007, Mr Blonde sent an email to various employees of Bank Sarasin in Switzerland headed "Bank Sarasin Bank Guarantee" in which he summarised the proposal to sell US$80 million of structured products to a "new client in Kuwait" and set out the terms of the proposed bank guarantee. Under the heading of "Credit Progress", Mr Blonde said "We have first spoke[n] to Peter Attiger [of Bank Sarasin] during his visit to our office. He was principally fine with the idea however required credit committee approval. We have also successful bounced this proposal to our Chairman (Fidelis Gotz)". Mr Blonde's email also set out a timeline for various steps that needed to take place in the lead up to completion which were clearly to be co-ordinated by Mr Blonde.
>
> (12) ·· At around this time, Mr Blondealso started chasing for the return of the Bank Sarasin account opening forms. In an email on 19 May 2007, he chased again saying that if there was any difficulty with the forms "please contact . .. Rohit Walia on [his Dubai mobile number]".
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> (13) ·· The account application forms stated that they were "processed" in the DIFC and identified Mr Blonde as the person processing the application.
>
> (14) ·· On Bank Sarasin's case (disputed by the Claimants), Bank Sarasin sent out the Special Risks in Securities Trading document, along with the account opening forms (which were sent out from the DIFC).
>
> (15) The Confirmation of Investment forms for the investments were dispatched from Mr Blonde's email address in the DIFC and returned to the DIFC.
>
> (16) On 5 February 2008, Mr Blonde sent Mr Taha and Mr Nour an Investment Strategy paper from Bank Sarasin (which he referred to as "our" investment strategy paper)."

271. The Respondents also relied on:

> (1) All the account statements were sent out by Sarasin-Alpen from the DIFC.
>
> (2) The money laundering checks for the opening of the accounts were carried out in the DIFC;
>
> (3) The security arrangements between Bank Sarasin and ABK were arranged by Mr Walia and Mr Blonde from the DIFC;
>
> (4) The Respondents were sent by Sarasin-Alpen, in the DIFC, advice from Bank Sarasin's subsidiaries on market performance and investment strategy;
>
> (5) Queries from ABK about the Respondents' investments with Bank Sarasin were dealt with by Mr Blonde and Mr Walia in the DIFC;
>
> (6) When a banking reference was required by Mr Al Khorafi from Bank Sarasin, Mr Blonde procured it from the DIFC.·

Compensation under Article 65 (2) (b) of the Regulatory Law

272. Article 65 (1) - (5) of the Regulatory Law provides:

> "(1) Subject to Article 65(5), a person who makes an agreement in the course of carrying on a Financial Service in breach of the Financial Services Prohibition or the Collective Investment Prohibitions, or who makes an agreement as a result of the making by himself or another person of a Financial Promotion which is in breach of the Financial Promotions Prohibition shall not be entitled to enforce such agreement against any party (a "relevant party") to the agreement.
>
> (2) Subject to any agreement that may otherwise be reached between the parties, a relevant party may apply to the Court to recover: (a) any money paid or property transferred by him under the agreement; (b) compensation reflecting any loss sustained by the relevant party as a direct result of such payment or transfer; and (c) compensation for an amount becoming due that is dependent upon a contingency occurring under the relevant agreement, provided that such contingency shall have occurred prior to the relevant party being notified by the other party or by the DFSA that the agreement has been entered into in breach of the Financial Services Prohibition, the Collective Investment Prohibitions or the Financial Promotions Prohibition.

(3) If the relevant party chooses not to perform the agreement or, under Article 65(2), recovers money paid or property transferred by him under the agreement, he shall in turn repay any money or property he has received under the agreement.

(4) The compensation recoverable under Article 65(2)(b) is the amount agreed between the parties to the agreement or, following an application to the Court, the amount determined by the Court.

(5) If the Court is satisfied that the person: (a) carrying on the Financial Service reasonably believed that he was not in breach of the Financial Services Prohibition or the Collective Investment Prohibitions by entering into such agreement; or (b) who made the Financial Promotion reasonably believed that he was not in breach of the Financial Promotions Prohibition, or 41 (c) who made an agreement as a result of the making by another person of a Financial Promotion which was in breach of the Financial Promotions Prohibition, did not know that the relevant Financial Promotion was in breach of the Financial Promotions Prohibition, and that it is fair and just in the circumstances to make such an order, it may make one or more of the following orders: (d) an order that the agreement be enforced between the parties to such extent and under such terms and conditions as the Court sees fit; or (e) an order that money paid or property transferred under the agreement be retained or dealt with in accordance with the agreement or in such manner as the Court deems fit."

273. Bank Sarasin argued at trial that it was fair and just for it to retain money paid under the relevant agreements with the Respondents because it reasonably believed that it was not in breach of the Financial Services Prohibition by entering into any agreement with the Respondents, that belief being based on legal advice as to the regulatory regime in the DIFC and the structure of the joint venture with Alpen Capital Corporation. However, Bank Sarasin declined to disclose the legal advice it had received on grounds of professional legal privilege notwithstanding that it was made clear in the cross-examination of Bank Sarasin's witness, Mr Wernli, that if the advice was not disclosed, the court would be invited to ignore his evidence as to the content of the advice.

274. The judge held that in the absence of the production of the advice, it was impossible to be satisfied that Bank Sarasin's belief that it was not in breach of the Financial Services Prohibition was reasonable or that it would be fair and just not to make an order under Article 65(2) (b). Paragraph 399 of the judgment reads:

"In those circumstances [viz those related in paragraph 23 above], given that Bank Sarasin has chosen to take the position (as it was entitled to do) that it will withhold from the Court knowledge as to what legal advice it received regarding the regulatory regime in the DIFC and the structure of its joint venture with Alpen Capital Corporation - and, whether it followed that advice, either in the structure adopted or in the practical implementation of its relationship with Sarasin-Alpen - I hold that it is impossible to be satisfied that Bank Sarasin's professed belief that it was not in breach of the Financial Services Prohibition by carrying on the activities which it did, in the way that it did, was reasonable; or that it would be fair and just in the circumstances to decline to make an order under Article 65(2)(b) for compensation reflecting loss sustained by the Claimants as a result of that breach."

275. As recorded in paragraphs 400 - 402 of the judgment, it was argued on behalf of the Respondents that they should be paid compensation that would put them in the position they would have been in if they had not purchased the investments from Bank Sarasin and thereby be compensated for the losses they had sustained as a direct result of the payments they had made to Bank Sarasin. They accordingly sought a compensation order to cover their principal losses on the investments with Bank Sarasin, the bank charges and interest imposed by Bank Sarasin on those investments and the leveraging, and the bank charges and interest imposed by ABK on the initial lending. Alternatively, the Respondents sought recovery of the monies paid to Bank Sarasin under the agreements, with the Respondents giving credit for the monies returned by Bank Sarasin and used to reduce the Respondents' indebtedness to ABK.

276. Paragraph 403 of the judgment reads:

"I am satisfied that Bank Sarasin dealt with the Claimants in breach of the Financial Service Prohibition; and that the Court should make an order for compensation pursuant to Article 65(2) (b) of the Regulatory Law."

Bank Sarasin's submissions challenging the finding that it had breached the Financial Service Prohibition.

277. Bank Sarasin's Counsel, Mr Hodge Malek QC, challenged root and branch the judge's findings that Bank Sarasin had carried on in or from Dubai the activities of Dealing in Investments as Principal; Arranging Credit and/or Deals in Investments; Advising on Financial Products or Credit; and Arranging Custody.

278. In respect of the findings that Bank Sarasin had carried on an activity constituting a Financial Service, Mr Malek contended: (i) the judge erred in not taking into consideration the evidence of the First Claimant as to his financial experience and his wish to use the structured products purchased from Bank Sarasin as funding for his real estate ventures; (ii) Bank Sarasin's activity of Dealing in Investments, viz selling the Notes to the Respondents, took place in Switzerland or Kuwait and not in Dubai; (iii) Bank Sarasin entered into the transactions in respect of the Notes through Sarasin-Alpen, an Authorised Firm and thus pursuant to GEN Rule 2.7.4, it did not deal in Investments as a Principal; (iv) the judge erred in proceeding on the basis that Bank Sarasin accepted it carried out activities constituting Arranging Credit or Deals in Investments within the meaning of GEN Rule 2.9.1; (v) the judge erred in finding that Bank Sarasin Advised on Financial Products or Credit by: (a) producing marketing presentations for the Respondents that were distributed by Sarasin-Alpen; and (b) structuring investments for the Respondents based on the Respondents' instructions taken in the DIFC; and (vi) the judge erred in proceeding on the basis that Bank Sarasin accepted it performed the activity of Arranging Custody within GEN Rule 2.14 when in fact Bank Sarasin only accepted that it Provided Custody in Switzerland.

279. In respect of contention (i) Mr Malek relied on the submissions to like effect advanced on behalf of Sarasin-Alpen.

280. In developing contention (ii), Mr Malek submitted that whether one focused on: (a) the actual purchase and sale of the Notes; or (b) the inception of a binding agreement for the sale of the Notes, both of these events occurred outside the DIFC. In the case of (a), the sale occurred when Bank Sarasin purchased the Notes from the issuers and held them under a custody arrangement for the Respondents and this occurred in Switzerland. In the case of (b), the obligation to buy and sell the Notes incepted either in Kuwait when the Respondents signed the Confirmation of Investment forms or in Switzerland once the Respondents' acceptances contained in the Confirmation of Investment forms were notified to Bank Sarasin in Switzerland.

281. As for contention (iii), Mr Malek argued that the judge's findings in paragraph 388 of the judgment were consistent only with Bank Sarasin having Dealt in Investments by entering into a transaction with or through an Authorised Firm (Sarasin-Alpen) and that therefore the judge should have found pursuant to GEN Rule 2.7.4 that Bank Sarasin did not Deal in Investments as a Principal.

282. In respect of contention (iv), Mr Malek submitted that Bank Sarasin had only accepted that it Granted Credit and Dealt in Investments from Switzerland. He also argued that by reason of GEN Rule 2.9.2 (which excluded from Rule 2.9.1 "any arrangements for a transaction into which the Person making the arrangements enters or is to enter whether as principal or agent for some other Person"), it was not open to the judge to find that Bank Sarasin had Arranged Credit or Deals in investments.

283. In support of contention (v), it was submitted that Bank Sarasin did not provide advice to the Respondents; any advice they received came from either Sarasin-Alpen or from their own in-house adviser, Mr Taha; or was not given by Bank Sarasin in or from the DIFC. Mr Malek also complained that the judge did not specify what he had in mind when he said in paragraph 383 of the judgment that Bank Sarasin produced "a number of marketing presentations for the Claimants" which "were distributed to the Respondents through Mr Blonde, Mr Walia and others at Sarasin-Alpen in the DIFC". If he was referring to general marketing material, that did not relate to any of the investments made by the Respondents and if it was a reference to the term sheets, they were not intended to influence the Respondents and contained an express disclaimer stating that they were for information only and the clients should seek their own advice. Any advice that was given to the Respondents as to the Notes was given by Sarasin-Alpen who was licensed in the DIFC and not by Bank Sarasin.

284. As to the judge's finding that the structuring of the Notes constituted advice, this activity could not amount to the giving of advice; instead it was producing the product that had been requested and this was done in Switzerland and not in the DIFC.

285. In support of his contention that any advice that had been given had not been communicated in or from the DIFC but where the Respondents received the same outside the DIFC, Mr Malek cited ***FSA v Bayshore Nominees*** [2009] EWHC 285 (Ch) in which the FSA brought an action arising out of the giving of investment advice outside the UK to investors within the jurisdiction in breach of Article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 and s.19 of the Financial Services and Markets Act 2000. Floyd J held that the act of advising was not completed until the investor has received it and therefore where advice is given on the telephone by an unauthorised person situated outside the UK to an investor in the UK, the activity of advising is carried on either both at the location of the adviser and the investor or exclusively at the location of the investor. In either case (and it was not necessary to decide which it is) the activity is within the prohibition.

286. In respect of contention (vi), it was submitted that: (1) in paragraph 385 of the judgment the judge was merely setting out the matters the Respondents relied on in support of their case that Bank Sarasin had Arranged (at least in part in the DIFC) for one or more Persons to safeguard Investments belonging to the Respondents; and (2) the judge erred in paragraph 386 when he said that Bank Sarasin admitted that they had arranged for custody of the Respondents' investments, this having been denied by Bank Sarasin in its Amended Defence. All that Bank Sarasin had admitted was that it had provided custody of the Respondents' investments in Switzerland, outside the DIFC.

287. It was further submitted that the matters relied on by the Respondents as set out in paragraph 15 above and paragraph 385 of the judgment did not constitute the activity of arranging for the custody of investments belonging to the Respondents. Mr Morf's instruction to Mr Blonde to run the irrevocable payment order by the bankers to check whether they agreed the wording related to the security arrangements between Bank Sarasin and ABK, not the custody of the first tranche of the Notes which was provided by Bank Sarasin in Switzerland, albeit that the Notes were actually held by a sub-custodian. And the pledge arrangements dispatched from and returned to the DIFC did not relate to the provision of custody of the Respondents' investments, either.

288. Mr Malek also launched a broadside attack on the judge's finding that the Financial Service Activities he held had been carried on by Bank Sarasin had been carried on "in or from" the DIFC.

289. Addressing the matters relied on by the Respondents that are adumbrated in paragraph 388 of the judgment, Mr Malek submitted that the Respondents were outside the DIFC in London or Kuwait when the "oral discussions in relation to the purchase of the Notes" referred to in sub-paragraph (1) took place and those conversations were not conducted by or on behalf of Bank Sarasin but were conducted by and on behalf of Sarasin-Alpen in the course of its client relationship with the Respondents. Further, these discussions did not fall within any of the four Financial Service activities found by the judge to have been carried on by Bank Sarasin ("the Four Activities"). As for the communication of instructions referred to in sub-paragraph (2), that was done by Sarasin-Alpen within its client relationship with the Respondents, and this too was not a Financial Service activity within any of the Four Activities. Finally, in respect of the dispatch of the account statements pleaded in sub-paragraph (3), this also was not within any of the Four Financial Activities and further, the statements had been dispatched from Switzerland to Kuwait.

290. Mr Malek also argued that none of the matters identified in paragraphs 389 and 390 of the judgment was within any of the Four Activities and that in respect of all of these matters Sarasin-Alpen was servicing its own clients with whom it had a client relationship. In his submission, the judge's approach was fundamentally flawed because he had failed, to take each of the three tranches of Notes separately and considered whether in respect of each thereof, Bank Sarasin was acting by way of business.

291. And in respect of the additional matters relied on the Respondents as identified by the judge in paragraph 390 (1) -(6) of the judgment, Mr Malek submitted:

(1) In sending account statements from the DIFC, Sarasin-Alpen were merely acting as a conduit for communications between itself other members of the Sarasin group as contemplated by the Additional General Business Conditions issued by Sarasin-Alpen to the Respondents.

(2) Whilst Sarasin-Alpen had Bank Sarasin's authority to carry out money laundering checks for the opening of the accounts and these checks were carried out in the DIFC they were not a Financial Service activity.

(3) Whatever the security arrangements were, they were dealt with between Switzerland and Kuwait where they were performed and to the extent any arranging thereof by Sarasin-Alpen, this was something it was licensed by DFSA to do.

(4) What was effectively happening was that Sarasin-Alpen were sending its own clients information, as one would expect a financial adviser to do.

(5) ABK had originally advised the respondents to go to Sarasin-Alpen and Bank Sarasin had no control over how ABK chose to communicate concerning the Respondents' investments with Bank Sarasin.

(6) Procuring a bank reference is not a financial activity and the reference itself was produced in Switzerland.

292. In Mr Malek's submission the judge had erred in finding that Bank Sarasin carried on the Four Activities in or from the DIFC, inter alia, for the following reasons:

(a) the judge considered attribution as the only factor relevant to whether Bank Sarasin was in breach of the Financial Services Prohibition and carrying on business in or from the DIFC;

(b) the judge failed to have sufficient regard to the fact that the Court of Appeal in its Judgment in these proceedings on jurisdiction of 5 January 2012 (CA No. 003/2011) found that: "there was no performance of any part of the overall transactions within DIFC nor did the transaction call for any such performance. The transmission of pre-contractual messages cannot be relied upon as "performance". Nor can any subsequent communications for such communications as there were did not constitute performance in the sense of carrying out any transitional obligations;

(c) the key transactions were not signed or executed within the DIFC. In particular:

(i) the key documents for the execution of the transactions, including for the purchase of the products, granting of credit facilities and opening of accounts were all signed outside of the DIFC and executed in Switzerland;

(ii) the whole part of the transactions in relation to Bank Sarasin took place in Switzerland, including the opening and holding of bank accounts, etc;

(iii) meetings between the Respondents and the Appellants commonly occurred in Kuwait or London; there was only ever one meeting in the DIFC and this was at Alpen Capital's offices after the accounts had been opened, credit facilities granted and products purchased;

(iv) Bank Sarasin's base was in Basel Switzerland and the judge's approach to Bank Sarasin was inconsistent with the findings of the Court of Appeal;

(v) the instructions for the products and their specification were communicated and sent to Basel, Switzerland; (vi) the products were designed and engineered from Bank Sarasin's fixed office in Switzerland and not in the DIFC;

(vi) the investments were purchased in or from Switzerland;

(vii) Mr Leuenberger, the employee who structured the Respondents' products was himself employed by Bank Sarasin and based in Switzerland;

(viii) the First and Second Claimants signed Bank Sarasin's application for opening current and custody accounts in Kuwait on 6 June 2007;

(ix) in June 2007, the current and custody accounts for the First and Second Claimant were opened by Bank Sarasin at its Zurich branch, following which they were operated by Bank Sarasin;

(x) the Third Claimant signed Bank Sarasin's application for opening current and custody accounts in Kuwait on 17 January 2008;

(xi) in January 2008, the Third Claimant's current and custody accounts were opened by Bank Sarasin at its Geneva branch, following which they were operated by Bank Sarasin.

293. Mr Malek also contended that the judge placed undue weight on Mr Blonde being identified as the "relationship manager" assigned to the Claimant. In particular:

(a) the judge ought not to have attached any importance to Mr Blonde's own subjective understanding of his position; see ***Chopra v Bank of Singapore*** [2015] EWHC 1549 (Ch), per Arnold J;

(b) the judge ignored the fact that Mr Blonde had a limited role and had no authority to enter into any contracts on behalf of Bank Sarasin; the only authority to contract lay with Bank Sarasin and thus Mr Blonde's role was limited to that of communicator;

(c) Bank Sarasin was not in control of the communications sent by Mr Blonde to the Respondents; it was not privy to all the communications between the Claimants and Mr Blonde; nor did it need to be in circumstances where the Respondents were clients of the First Defendant as well as Bank Sarasin;

(d) the Respondents were also clients of Sarasin-Alpen wherein Mr Blonde was the relationship manager under Sarasin-Alpen's contract with the Respondents; the opening and operating of the accounts with Bank Sarasin was done by personnel employed by Bank Sarasin in Switzerland; neither Mr Blonde nor Sarasin-Alpen had any role in the execution or performance of any agreement;

(e) there was also a special "Dubai Desk" set up in Switzerland to deal with introductions and recommendations from the First Defendant.

294. It was also submitted that the judge's finding on the issue of "in or from" the DIFC was inconsistent and could not stand with the following:

(1) As found by the DIFC Courts of Appeal in the jurisdiction challenge brought by the Appellants (CA No 003/2011), Sarasin-Alpen was not a branch of Sarasin Bank. Instead, it was a separate legal entity incorporated in the DIFC licensed and authorised by the DFSA as an Authorised Firm with limited delegated functions under the Intra Group Delegation Agreement for the purpose only of verifying client backgrounds for KYC and money laundering purposes.

(2) The Respondents were clients of Sarasin-Alpen and had as their relationship manager, Mr Blonde who was employed by Sarasin-Alpen, not by Bank Sarasin.

(3)Acts done in the DIFC cannot constitute a Financial Service activity carried on by way of business in or from the DIFC unless they are a significant part of the relevant business (see paragraph 53 of Arden LJ's judgment in ***FSA v Fradley and Woodward*** [2005] EWCA (Civ) 1183), which none of the acts relied on by the Respondents was.

295. In addition, Mr Malek argued that the judge should have adopted the approach of the English courts in deciding whether a corporation is resident within the jurisdiction by carrying on business there for the purpose effecting valid service of proceedings. In support of this submission, Mr Malek cited ***Okura & Co Ltd v Forsbacka Jernverks Aktiebolag*** [1914] 1 KB 715 and ***Adams v Cape Industries Plc*** [1990] 1 Ch 433.

296. In ***Okura***, Buckley LJ said that there were three matters to be considered: (i) the acts relied on constituting the carrying on of business must have continued for a sufficiently substantial period of time; (ii) the acts should have been done at a fixed place of business; and (iii) the corporation must be "here" in the jurisdiction by a person who carries on business for the corporation. On the facts, he and Phillimore LJ concluded that the defendants were not carrying on business in the jurisdiction because the agent they employed (who had an address in London) was not bound to place orders coming to them with the defendants and when they sold the defendants' steel, they did so expressly as agents and only after having obtained from the defendants the price and terms of the sale. This case was accordingly to be distinguished from ***Saccharin Corporation Ltd. v. Chemische Fabrik Von Heyden Aktiengesellschaft*** [1911] 2 K.B. 516 where the defendant was held to be carrying on business in the jurisdiction through a sole agent who carried on business at a fixed place in London who had power to enter into contracts of sale for the defendants and had their goods on his premises or a wharf under his control.

297. In ***Adams***, the English Court of Appeal said:

".the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation. (3) In particular, but without prejudice to the generality of the foregoing, the following questions are likely to be relevant on such investigation: (a) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation; (b) whether the overseas corporation has directly reimbursed him for (i) the cost of his accommodation at the fixed place of business; (ii) the cost of his staff; (c) what other contributions, if any, the overseas corporation makes to the financing of the business carried on by the representative; (d) whether the representative is remunerated by reference to transactions, e.g. by commission, or by fixed regular payments or in some other way; (e) what degree of control the overseas corporation exercises over the running of the business conducted by the representative; (f) whether the representative reserves (i) part of his accommodation, (ii) part of his staff for conducting business related to the overseas corporation; (g) whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation; (h) what business, if any, the representative transacts as principal exclusively on his own behalf; (i) whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such manner as to bind it; (j) if so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations. (530F-531B)."

298. In Mr Malek's submission, if the questions posed in ***Adams*** had been considered by the judge by reference to the facts before him, he would have been bound to find that Bank Sarasin was not present in the DIFC by carrying on business there and therefore bound to conclude that any Financial Service activity carried on by Bank Sarasin was not carried on by way of business "in or from" the DIFC.

299. Mr Malek drew the Court's attention to the following factors set out in 2.3.7 of the UK Perimeter Guidance Manual ("PERG") for consideration when deciding an individual is carrying on his business or the business of another (the principal firm) and submitted that on the facts before the court, none supported the finding that Bank Sarasin had carried on Financial Service activities in or from the DIFC through the acts of employees of Sarasin.

(1) The degree of control the principal firm has over the individual.

(2) The integration of the individual into the principal firm.

(3) The degree to which the individual takes on the financial risks and rewards of an independent business.

(4) Whether the individual is paid commission.

(5) The degree to which the individual deals with the principal firm's customers in his own name.

(6) The degree to which the services supplied to the principal firm and supplied to other clients as well.

300. Mr Malek further argued that on a proper application of the attribution principles propounded by Lord Hoffmann in ***Meridian Global Funds Management Asia Ltd v Securities Commission*** [1995] 2 AC 500 the judge should not have attributed the acts of Mr Blonde and Mr Walia to Bank Sarasin. Those principles (as summarized in the headnote) are that a company's rights and obligations are determined by rules whereby the acts of natural persons are attributed to the company normally to be determined by reference to the primary rules of attribution generally contained in the company's constitution and implied by company law and or general rules of agency; but that, in an exceptional case, where application of those principles would defeat the intended application of a particular provision to companies, it was necessary to devise a special rule of attribution to determine whose act or knowledge or state of mind was for the purpose of that provision to be attributed to the company; that, although the description of such a person as the "directing mind and will" of a company did not have to be apposite in every case, knowledge of an act of a company's duly authorised servant or agent, or the or the state of mind with which it was done, would be attributed to the company only where a true construction of the relevant substantive provision so required.

Bank Sarasin's submissions in its appeal against the judge's decision to order that Bank Sarasin should pay compensation to the Respondents under Article 65 (2) (b).

301. It was submitted that the judge should not have made a compensation order without first identifying or analysing which agreements were made in the course of carrying on a Financial Service in breach of Article 41 and considering whether there was any causal link between the alleged breach of Article 41 and the making of the relevant agreements.

302. It was also submitted that even in the absence of the production of the legal advice Mr Wernli testified had been received by Bank Sarasin, the judge should have accepted Mr Wernli's uncontradicted evidence that Bank Sarasin did take legal advice to ensure it was not acting in breach of the DFSA rules and believed the DFSA rules did not apply to its dealings with the Respondents.

303. Lastly, it was argued that the judge should have found that it was fair and just in all the circumstances not to make a compensation order on the grounds that: (i) Bank Sarasin was not guilty of any morally reprehensible conduct; (ii) Bank Sarasin was authorised in Switzerland; (iii) Sarasin-Alpen was regulated and authorised in the DIFC; (iv) Bank Sarasin's conduct did not cause any loss to the Respondents- such loss as they suffered was due to the fall in the markets and not meeting the margin call; and (v) Bank Sarasin had acted in good faith throughout.

Discussion

The GEN Rule 2.3.2 (b) (1)[3] point.

304. In our judgment, there is nothing in this point. As submitted by Mr Richard Hill QC for the Respondents, the exemption provided for in GEN Rule 2.3.2 (b) (1) applies where the entity in question's sole activity is to act as principal with or for other bodies corporate within the same group. That was not the situation in the instant case. Apart from anything else, Bank Sarasin acted as counterparty in the investment transactions it entered into with the Respondents.

Dealing in Investments as Principal

305.Mr Hill's submission in response to Mr Malek's argument that Bank Sarasin had dealt in investments outside the DIFC had two limbs. The first limb was that the judge's finding that Bank Sarasin conducted its banking relationship with the Respondents in the DIFC through individual employees of Sarasin-Alpen was unassailable. The second limb was founded on the contention noted by the judge in paragraph 388(2) of the judgment and was that the manner in which the Respondents' accounts with Bank Sarasin came to be opened and the investment trades were put on clearly demonstrated that Bank Sarasin was dealing in investments in the DIFC. In support of the second limb, Mr Hill relied on the following incontestable facts relating to the REIT Notes which were comprehended within an appendix to the Claimants' Closing Submissions at trial: (i) the dispatch and the return of the account-opening forms was undertaken by Sarasin-Alpen personnel in the DIFC; (ii) the Confirmation of Investment forms confirming the Client's purchase of the specified investment product and authorizing Bank Sarasin to debit the Client accordingly were sent to Sarasin-Alpen in the DIFC; (iii) as confirmed by Mr Wernli in cross-examination [Day 7:237: 6-11]), Sarasin-Alpen was authorized by Bank Sarasin to receive the Confirmation of Investment forms with the intention that Bank Sarasin would rely thereon, (iii) on 25 June 2007 at 09:52, Mr Malpani in the DIFC emailed Mr Leuenberger of Bank Sarasin stating " We are now ready to trade the REIT basket. I need you to price and let us know. You can trade once we confirm."; (iv) later on 25 June 2007 at 16:18, Mr Malapani asked Mr Leuenberger to execute the trade and was informed by Mr Leuenberger at 6:59 pm that the trade had been done with Rabocorp with the index levels to be fixed later; (v) the execution by Bank Sarasin of the trade requested by Mr Malpani occurred 3 days before Bank Sarasin received the Confirmation of Investment forms in Switzerland on 28 June 2007; and (vi) Sarasin-Alpen rather than Bank Sarasin confirmed the trade by sending out the account statements, portfolio updates and investment confirmation advices.

306. As to the second and third tranches of the Notes, Mr Hill relied on the fact that here too the trades were put on following initiatives taken by Sarasin-Alpen before Bank Sarasin received the relevant Confirmation of Investment Forms; indeed, in the 3rd Claimant's case, it seems that she never at any time signed the Confirmation of Investment forms (see paragraph 146 of the judgment).

307. Mr Hill also submitted that Sarasin-Alpen could not have been acting as agent for the Respondents when passing dealing instructions to Bank Sarasin but was acting on behalf of Bank Sarasin, for the following reasons: (i) the instruction was at a different price to the price at which the investments were sold to the Respondents; and (ii) the difference in price was taken as commission by Bank Sarasin and then remitted to Sarasin-Alpen under the arrangements between those two entities without any disclosure to the Respondents.

308. We accept both limbs of Mr Hill's submission and reject Mr Malek's argument that Bank Sarasin dealt in investments as a principal outside the DIFC. For reasons that are developed below, we uphold the judge's finding that Bank Sarasin conducted its banking relationship with the Respondents in the DIFC through Sarasin-Alpen, particularly Mr Blonde and Mr Walia. As for Mr Hill's second limb, accepting as we do his first limb, we agree that the facts he relied on do indeed establish, as the judge found, that Bank Sarasin was dealing in investments in the DIFC in respect of all three tranches of the Notes by: (i) sending out and receiving the account opening forms and Confirmations of Investment forms in the DIFC through the instrumentality of Sarasin-Alpen personnel; and putting on the trades in the DIFC through trading requests made by Sarasin-Alpen personnel in the DIFC before the Confirmation of Investment forms were received by Bank Sarasin in Switzerland.

309. We also reject Mr Malek's submission founded on Rule 2.7.4[4]. In our view, GEN Rule 2.7.4 applies where an authorized firm is the counterparty in a bilateral transaction or in a back-to-back transaction effected through the authorised firm. On the facts established at trial, it is plain that Bank Sarasin was contracting directly with the Respondents and to the extent that Sarasin-Alpen had a role, it was not interposed in the contractual dealing relationship between Bank Sarasin and the Respondents. Further, Sarasin-Alpen was not authorized to deal in investments as an agent (as opposed to being authorized to advise on or arrange deals). In addition, as the judge found, Sarasin-Alpen was not conducting any formal role as agent. Instead, some of their employees (principally Mr Blonde and Mr Walia) were being used by Bank Sarasin to do its dealing with the Respondents.

Arranging credit or deals in investments

310. Mr Malek submitted that the judge was mistaken when he said that Bank Sarasin accepted that it had carried on the activities of Arranging Credit or Deals in Investments. Contrary to the judge's understanding, Bank Sarasin's admission was that it had granted credit and dealt in investments and this only occurred in Switzerland.

311. Mr Malek submitted that the exemption provided for in GEN Rule 2.9.2 was applicable, namely, that there is excluded from Rule 2.9.1 "any arrangements for a transaction into which the Person making the arrangements enters or is to enter whether as principal or agent for some other Person". Mr Malek argued that the only investments in issue were the Notes sold by Bank Sarasin to the Respondents and since Bank Sarasin had made those sales as principal, it cannot also have arranged those investments for the purposes of GEN Rule 2.9.2. And he made the same point in respect of the credit granted by Bank Sarasin to the Respondents. Bank Sarasin granted the loan facilities as principal and therefore pursuant to GEN Rule 2.9.2 cannot be said to have arranged those credit facilities.

312. Mr Hill submitted that Bank Sarasin arranged deals in investments contrary to GEN Rule 2.9.2 in that it had purchased for re-sale the three tranches of Notes from the issuers thereof (Rabobank and Bank Sarasin (CI) Limited) before selling the Notes to the Respondents and had thereby arranged the relationship between the Respondents and the issuers of the Notes which arose once the Notes had been sold by Bank Sarasin to the Respondents. We decline to accept this ingenious submission. In our view, the GEN Rule 2.9.2 exemption is not limited to situations where a firm enters into a transaction as principal under which the rights and obligations created by the transaction are enforceable only against a counterparty to the transaction and not also against an issuer whose covenant is enforceable by the holder of the investment without the need for privity of contract, as is the case in the great majority of investments bought and sold in financial markets. In our judgment, therefore, the GEN Rule 2.9.2 exemption applied in respect of the investment transactions made between Bank Sarasin and the Respondents so that, whilst Bank Sarasin dealt as a principal in respect of those investments within the scope of GEN Rule 2.7.1, it did not in addition arrange those investments within GEN Rule 2.9.1.

313. So far as arranging credit was concerned, Mr Hill sought to uphold the judge's finding on this issue by relying on the steps taken by Sarasin-Alpen personnel regarding the IPO in respect of the ABK loan. In taking this approach Mr Hill was impliedly conceding that the GEN Rule 2.9.2 exception applied to the steps taken by Sarasin-Alpen personnel regarding the loan facilities advanced by Bank Sarasin to the Respondents. In our judgment, he was right to make this concession. The trouble with Mr Hill's reliance on the steps taken by Sarasin-Alpen personnel in respect of the IPO is that this was not a matter the Respondents relied on at trial to support their case on arranging credit or deals in investments; accordingly it was not included as one of the "arranging credit and deals in investments" activities listed by the judge in paragraph 380 of the judgment. In the circumstances, we think it is now too late for the Respondents to advance the new case Mr Hill sought to advance and thus we overturn the judge's finding that Bank Sarasin arranged credit and arranged deals in investments in the DIFC within the scope of GEN 2.9

Advising on Financial Products and Credit

314. It is not clear what the judge had in mind when he noted in paragraph 383 of the judgment that "Bank Sarasin produced a number of marketing presentations for the Claimants." However, there can be do no doubt as to what he was referring when he further held, "Bank Sarasin structured investments for the Claimants (which constituted giving advice) based on instructions taken in the DIFC." Included in this finding is the part played by Sarasin-Alpen personnel, especially Mr Blonde as *de facto* Client Relationship Manager, in ascertaining and considering the Respondents' requirements and communicating the same to Bank Sarasin's Financial Engineering department so that structured products could be produced.

315. As we have already said in paragraph 308 above, for reasons given later in this judgment, we uphold the judge's finding that Bank Sarasin conducted its banking relationship with the Respondents in the DIFC through Sarasin-Alpen, particularly Mr Blonde and Mr Walia. That finding having been made, we are of the clear opinion that the following actions taken by Mr Blonde and other employees of Sarasin-Alpen[5] afford ample justification for the judge's conclusion that Bank Sarasin carried on the activity of giving non-generic advice on financial products and credit in or from the DIFC: (i) on 25 April 2007 Mr Blonde and Mr Leuenberger discussed possible investment structures for Mr Al Khorafi following which Mr Blonde prepared an investment proposal in the form of a fact sheet that was sent to Mr Khorafi on 29 April 2007; (ii) on 3 May 2007, Mr Blonde and Mr Leuenberger exchanged further emails as to a possible investment structure; (iii) on 4 May 2007, Mr Blonde sent an email to Mr Zeuggin at Bank Sarasin setting out details of the proposed investment; (iv) on 5 May 2007, Mr Blonde sent an email to Mr Taha to which he attached a process flow document, a sample of a pledge document, term sheets and factsheets; (v) on 19 May 2007, Mr Blonde sent a revised form of guarantee and the Termsheet for the proposed product to Mr Cheerian of ABK and sent a detailed summary of the investment proposal to Bank Sarasin; (vi) on 5 June 2007, Mr Taha sent an email to Mr Blonde on behalf of the first two Claimants asking for a worked illustration of the equation used to describe the product in the forms that the First and Second Claimant were to sign a clear definition of the capital protection and the expected proceeds from the liquidation at maturity to which Mr Blonde responded the same day attaching worked illustrations for the investments and term sheets; (vii) on 13 June 2007, Mr Blonde emailed Mr Taha setting out two different product structures, one where the coupons were paid out of capital growth and the other where they were guaranteed; later that day Mr Blonde advised over the telephone following the first structure; and (viii) on 22 June 2007, Mr Blonde sent Mr Taha the approved form of the irrevocable payment order stating that "This is designed to protect the rights including NO lien etc. for Mr Amra (sic); (ix) following the preparation by Sarasin-Alpen personnel of the first indicative term sheet for the second tranche of the Notes, Mr Blonde and Mr Walia discussed the proposals for leveraging with Mr Taha in the DIFC on 2 July 2007; (x) on 4 July 2007 Mr Blonde emailed Mr Taha attaching five different "refinancing solutions by Bank Sarasin for Mr Al Khorafi's group of companies; (xi) between 4 and 7 July 2007, Mr Blonde sent a further proposal involving two possible leveraging structures to Mr Nour that was forwarded to Mr Taha; (xii) on 11 July, Mr Malpani on behalf of Mr Blonde sent Mr Taha a spreadsheet projecting the returns depending on the way that the coupon was paid; (xiii) following a meeting in London, Mr Blonde provided Mr Taha with a number of term sheets and recommended how the leveraged funds should be invested; (xiv) on 16 July 2007, Mr Malpani sent an email to Taha, copied to Mr Blonde, to which was attached a term sheet with "an enhanced participation rate, with reduction in Natural Gas participation to 40% and change of 2 stocks"; (xv) on 5 September 2007, Mr Blonde sent a credit facility letter to Mr Al Khorafi, a blank confirmation of investment form and a term sheet for a further proposed investment; (xvi) on 4 October 2007, Mr Blonde sent to Mr Taha an email with "12 products for your review & feedback" and "3 more products for your review"; and (xvii) on 12 February 2008 Ms Naz of Sarasin-Alpen sent to Mr Taha, inter alia, Confirmation of Investment forms for the Sara Floor Notes to be signed by Mrs Al Rifai.

316. ***FSA v Bayshore Nominees*** [2009] EWHC 285 (Ch) is not authority for the proposition that the act of advising occurs only where the advice is received. Whilst Floyd J opined in that case that the activity of advising was not completed until the investor had received it and that the activity was carried out within the UK where advice was received in a call from outside the jurisdiction, he left open the possibility that the activity would also have been carried on where the call was made. In our judgment, the activity of advising on investments products and credit within GEN Rule 2.11.1(1) and (2) occurs in the place where the advice is issued as well as where it is received.

317. As for Mr Malek's submission that the judge erred in not taking into consideration the evidence of the First Claimant as to his financial experience and his wish to use the structured products purchased from Bank Sarasin as funding for his real estate ventures, we have already rejected the like submission made by Mr Brindle on behalf of Sarasin-Alpen.

Arranging Custody

318. Bank Sarasin assumed the role of custodian of the Notes vis ♦ vis the Respondents and did so in Switzerland. Mr Malek submitted that it inevitably followed that it cannot have carried out the activity of arranging custody in or from the DIFC. In fact, Bank Sarasin held the Notes through a custodian account with a third party global custodian comparable to Sega Intersettle or Euroclear or Clearstream. Clearly, the booking of the Notes to the global custodian account resulted from some prior arrangement. Was that prior arrangement organized in or from Dubai as the judge held that it was? Mr Hill argued that custody followed and went hand in hand with the purchase of the investments and just as Bank Sarasin had purchased the Notes for resale to the Respondents through the activities of personnel employed by Sarasin-Alpen (see paragraph 56 above), so had it arranged custody through the global custodian. We reject this submission. In our opinion, if Bank Sarasin arranged custody as distinct from itself providing custody, this was done in Switzerland and not in the DIFC.

In or from the DIFC

319. As we have already said, we uphold the judge's finding that Bank Sarasin carried on Financial Service activities in or from the DIFC. As the judge noted in paragraph 387 of the judgment, the Respondents cited in Appendix 3 to their Closing Submissions at trial many instances that they contended were evidence of the banker/client relationship between Bank Sarasin and the Respondents operating out of the DIFC. A large of number of these instances are identified in the judgment in paragraphs 388-390. In our judgment these instances and indeed those in Appendix 3 not selected by the judge for mention constitute a solid evidential basis for the factual finding the judge made.

320. In our opinion, none of Mr Malek's many submissions attacking this finding is well-founded.

321. It was not in dispute that whatever may have been the client relationship between the Respondents and Sarasin-Alpen, the Respondents were clients of Bank Sarasin in respect of the accounts they opened, the investments that were booked to those accounts and the leveraging provided by Bank Sarasin, including the security the Respondents provided in respect thereof. Nor was it open to challenge that Bank Sarasin's invariable *modus operandi* was to assign to its clients a Client Relationship Manager through whom Bank Sarasin would largely conduct its side of the client relationship. In fact, Bank Sarasin did not formally assign a Client Relationship Manager to the Respondents; in particular, it did not assign a Client Relationship Manager from the ranks of its own employees based outside the DIFC. Instead, as the judge was entitled to find, Mr Blonde and to some extent Mr Walia performed the role of Client Relationship Manager and thereby were the chief means by which Bank Sarasin conducted its banker/client relationship with the Respondents. Thus, to the extent that Mr Blonde and Mr Walia carried out Financial Service activities in the course of carrying on Bank Sarasin's banker/client relationship with the Respondents, these were activities imputable to Bank Sarasin and were done in or from the DIFC.

322. Indeed, it is remarkable that there was no direct face to face contact between any employee of Bank Sarasin and the Respondents and, save for confirmation of trades and statements of account, there are to be found in the chronological H Appeal Bundles only the following four communications between Bank Sarasin and one or other of the Respondents and in each thereof the addressee is told that if there are any queries they should contact Mr Blonde

and, in one case, Mr Walia: (i) by letters dated 29 September 2008 to each of Mrs Al Hamad and Mrs Al Rifai notice was given that the deposited capital was insufficient to provide full cover for the loan; (ii) by an email dated 7 October 2008, Mr Khorafi was sent a copy of the margin call letter that had been sent to Mrs Al Rifai; and (iii) by a letter dated 7 October 2007 Mrs Al Rifai was told that additional capital had to be provided immediately.

323. In our opinion, none of the following matters relied on by Mr Malek, whether taken individually or in the aggregate, required the judge to find that Bank Sarasin had not carried on any investment activity in or from the DIFC: (i) Sarasin-Alpen was not a branch of Bank Sarasin for jurisdiction purposes and was separately incorporated from Bank Sarasin; (ii) the key contractual documents as between Bank Sarasin and the Respondents were signed outside the DIFC; (iii) Bank Sarasin was authorised to carry on investment business in Switzerland by the Swiss authorities but not authorised to carry on any Financial Service in the DIFC; (iv) Sarasin-Alpen was authorised to arrange credit or deals in investment, advise on financial products or credit and arrange custody in the DIFC but was not authorized to carry on any Financial Service in Switzerland; (v) Sarasin-Alpen was not authorised to act as an agent for Bank Sarasin; (v) Sarasin had a separate client relationship with the Respondents separate from Bank Sarasin's banker/client relationship with the Respondents. Instead, notwithstanding these features of the evidence it was open to the judge on the evidence to conclude that way in which Bank Sarasin carried out its banker/client relationship with the Respondents was through personnel employed by Sarasin-Alpen in the DIFC and that the acts of those individuals in discharging this function were attributable to Bank Sarasin.

324. In our opinion, the importance the judge attached in paragraph 393 of the judgment to the fact that the employees of Sarasin-Alpen, including in particular Mr Blonde, saw themselves as dealing with the Respondents in the conduct of the business of Bank Sarasin, does not undermine the judge's finding on the "in or from DIFC" issue. We say this because the judge's finding was not based simply on the subjective impressions of the witnesses but also on the objective reality of the banking/client relationship between Bank Sarasin and the Claimants and the acts done by Mr Blonde and Mr Walia in carrying on that relationship.

325. Mr Malek cited ***Chopra v Bank of Singapore Ltd and Oversea-Chinese Banking Corporation*** [2015] EWHC 1549 (Ch). In our view, this decision does not advance Bank Sarasin's cause because it is distinguishable on the facts and was concerned with an issue of jurisdiction, not whether a financial service activity had been carried on within the jurisdiction. The claim was for the mis-selling of investments by the first defendant which at the material time was called ING Asia Private Bank Ltd ("IABP"). (It had since been acquired by the second defendant and changed its name to Bank of Singapore Ltd). The claimants had been introduced to IABP by the private banking operation of the second defendant ("OCBC London") which carried on business under the name of "Bank of Singapore" from a registered office in London where the claim form had been served. IABP and OCBC London were parties to a "Services Agreement" under which OCBC London agreed to refer investment clients to IABP and to market IABP's products but the agreement expressly provided that nothing contained therein in or otherwise shall be deemed to create any partnership or the relationship of agent and principal and OCBC London acknowledged that neither it nor its employees or representatives would hold themselves out as anything other than an independent contractor to IABP. CPR r. 6.9(2) enabled a claim form to be served on a company or corporation other than one registered in England and Wales at "[a]ny place within the jurisdiction where the corporation carries on its activities; or any place of business of the company within the jurisdiction". A former employee of OCBC London testified that he saw himself as an employee of "BoS", that the impression given to clients was that they were dealing with "BoS" and that "BoS" had a presence in the UK at OCBC London's offices.

326. Arnold J held that it was not established on the evidence that IAPB was carrying on a private banking business in the UK. On the contrary, the evidence showed that the defendants were extremely careful to ensure that IAPB did not carry on business in the UK, where it is not regulated by the FCA and PRA, and to ensure that business in the UK is carried on by OCBC London, which is regulated by the FCA and PRA. The former employee's evidence was confusing; he had failed to distinguish between "Bank of Singapore" (i.e. OCBC London) and "Bank of Singapore Ltd" (i.e. IAPB).

327. Citing ***FSA v Fradley and Woodward*** [2005] EWCA (Civ) 1183 at para 53, Mr Malek contended that acts done in the DIFC cannot constitute a Financial Service activity carried on by way of business in or from the DIFC unless they are a significant part of the relevant business, which none of the acts relied on by the Respondents was. We reject this submission. We do not think that *Fradley* is binding authority on this Court for the proposition that it is only if steps taken within the DIFC amount to a "significant" part of the alleged Financial Service activity in question that that activity will have been made out. The question in *Fradley* was whether Mr Fradley had a real prospect of defending a claim that he had continued to carry on a collective investment scheme (CIS) involving a betting operation carried on by two companies - 147 and TBPS once he had moved his operations to Ireland. In paragraph 53 of her judgement, Arden LJ said:

> "In my judgment, it is sufficient if the activities in question which took place in this jurisdiction were a significant part of the business activity of running the CIS (if any) constituted by the betting services offered by 147 and TBPS. In this case, the communications with clients and prospective clients, and the maintenance of a bank account and an accommodation address, all of which took place in the United Kingdom, were all business activities. In my judgment they were of sufficient regularity and substance to constitute the carrying on of business here even after Mr Fradley moved his own office to Ireland in April 2003 and gave instructions by post or internet from there. I leave open the question whether the requirement for carrying on business within the jurisdiction can be satisfied in any other case."

328. We note that having stated that it was sufficient if the activities in question which took place in the jurisdiction were a "significant part" of the business activity of running the CIS, Arden LJ went on to consider whether the acts in the jurisdiction "were of sufficient regularity and substance to constitute the carrying on of business" in the jurisdiction, which is a different enquiry from considering whether the acts were a significant part of the business. With respect, in our judgment, the former enquiry is the appropriate enquiry, not the latter.

329. Further and in any event, the question to be determined by the judge in the instant case was whether Bank Sarasin had carried on by way of business a Financial Service activity in the DIFC, which is a different question from that which arose for decision in ***Fradley***. The steps taken by Mr Blonde and Mr Walia *et al* in the course of carrying on Bank Sarasin's banking relationship with the Respondents were not trifling or in any sense *de minimis*. Rather, they contributed substantially to the carrying on of that relationship, including the above-mentioned steps involved in the putting on of the trades and advising the Respondents, thereby entitling the judge to hold that Bank Sarasin had carried on Financial Service activities in or from the DIFC.

330. As for Mr Malek's reliance on the cases of ***Okura***, ***Saccharin Corporation*** and ***Adams***, in our judgment the approach laid down in these authorities does not compel a finding different from that made by the judge. These decisions were concerned with whether there had been valid service on a company on the basis it was resident in the jurisdiction by carrying on business there. That is a different question from the question whether a firm has carried on by way of business a Financial Service activity in the jurisdiction in breach of the Financial Services Prohibition. It is different because (apart from anything else) residence imports a greater connection with the *locus in quo* than does the carrying on by way of business of a Financial Service activity.

331. Nor do we think that the judge's decision attributing the acts of Mr Blonde and other personnel employed by Sarasin-Alpen to Bank Sarasin falls foul of Lord Hoffmann's primary and general attribution principles propounded in ***Meridian Global Funds Management Asia Ltd v Securities Commission*** [1995] 2 AC 500. What in substance the judge found was that the employees of Sarasin-Alpen were implicitly authorised by Bank Sarasin to conduct on its behalf its banker/client relationship with the Respondents short of having authority to enter in contracts binding on the bank. The fact that the persons in question were employees of Sarasin-Alpen and not Bank Sarasin was not fatal to the judge's finding. Nor was it fatal that there was no express conferment of authority on the Sarasin-Alpen personnel or on Sarasin-Alpen itself. It was the substance, not the form, of what was happening that mattered.

332. Mr Malek suggested that the judge's decision against Bank Sarasin had caused shock waves in the European and Middle Eastern financial services markets because the expectation had been that a company authorised to deal in investments outside the DIFC would not be subject to the DIFC Regulatory Law if it sold investments outside the DIFC to clients who had been introduced by a firm carrying on financial service business within the DIFC. Whether or not the judge's decision has had this effect cannot of course be determinative of Bank Sarasin's appeal. We would stress, however, that the decision was reached on the particular facts of the case and for this reason may have little effect on financial services business resulting in deals made outside the DIFC pursuant to introductions made by firms carrying on business in the DIFC where care has been taken to ensure that the activities of the introducing firm are not attributable to the firm outside the DIFC.

Compensation under Article 65(2)(b) of the Regulatory Law

333. Although the judge did not say in terms that he was awarding compensation against Bank Sarasin under Article 65 of the Regulatory Law on the basis that each of the purchases of the three tranches of Notes involved a breach of the Financial Services Prohibition, we think that it is implicit that this was the basis on which he proceeded. We say this because in the lead-up to his conclusion in paragraph 403 of the judgment that there should be an order for compensation he recited in paragraph 400 the Respondents' case that there was a causal link between the original loan monies advanced by ABK, the investments purchased by the Respondents, the leveraging provided by Bank Sarasin and the losses made when the investments were closed out.

334. Moreover, as we have found, the evidence at trial supported the conclusion that, in respect of all three tranches of the Notes, Bank Sarasin breached the Financial Services Prohibition in that it dealt in investments and advised on financial products and credit within the DIFC.

335. Accordingly, we reject Mr Malek's ground of appeal based on an alleged failure of the judge to identify which agreements were entered into in breach of Article 41.

336. Did the judge err in deciding that Bank Sarasin should not have the benefit of the exemption from a compensation order provided for in Article 65(5)? Mr Malek argued that the legal advice received by Bank Sarasin was only one of the relevant factors to be considered when determining whether Bank Sarasin reasonably believed that it was not in breach of the Financial Services Prohibition and that it was fair and just in the circumstances not to make a compensation order. He referred us to the following paragraphs in the Second Witness Statement of Mr Wernli, Bank Sarasin's Head of Legal and Compliance Clients Switzerland:

> "3. I understand that it is now alleged by the Claimants that the Bank carried on by way of business Financial Services activities as defined in the Law in or from the DIFC in breach of the Financial Services Prohibition set out in Article 41 of the Law.
>
> 4. The Bank believes that the Law does not and has never applied to it because the Bank has never had a presence and has never carried on business or any Financial Service activity in or from the DIFC.
>
> 5. I was not involved in the establishment of the First Defendant Sarasin-Alpen in the DIFC which I understand occurred in or about 2005. However, without waiving any legal privilege, I have since been informed by Bank personnel that in the course of the establishment of Sarasin-Alpen in the DIFC and the Bank's negotiations of the relevant Business and Shareholders Agreements, the Bank obtained legal advice regarding the regulatory regime in the DIFC and the structure of its joint venture with Alpen Capital Corporation.
>
> 6. Sarasin-Alpen was incorporated and established in the DIFC as a separate legal entity to be licensed to carry on regulated business and Financial Services activities in and from the DIFC including marketing of all types of financial products, not just Sarasin Group products. The Bank did not intend ever to establish itself in or to operate from the DIFC or to carry on Financial Services activities in or from the DIFC -- all regulated business in or from the DIFC was to be conducted by Sarasin-Alpen. On this basis and consistently with the advices it received at the time Sarasin-Alpen was being established and licensed, the Bank was satisfied that it was not required to be licensed by the Dubai Financial Services Authority ("the DFSA"). There has been no change to those arrangements which would require the Bank to have obtained a DFSA Licence.
>
> 7. It is of course the policy of the entire Sarasin Group of companies (including the Bank and Sarasin-Alpen) to comply with the laws, directives and regulations applicable in the countries in which we operate.
>
> 8. If the Bank had believed or been advised that it was required to be licensed by the DFSA at any time, the bank would have applied for a Licence. It would not have anticipated any difficulty in obtaining such a Licence, already being a regulated financial institution in good standing in all of the jurisdictions in which the Bank carries on business."

337. Mr Malek contended that what mattered was the subjective belief of Mr Wernli. He cited ***Watersheds Ltd v DaCosta*** [2009] EWHC 1299 (QB) as an example of the court applying the UK equivalent of Article 65(5) on the strength of the subjective belief of a witness who gave evidence that she believed that her firm was exempt from the requirements of the Financial Services and Markets Act 2000. In Mr Malek's submission, the judge ought to have concluded from Mr Wernli's statement that Bank Sarasin reasonably believed that it was not in breach of the Financial Services Prohibition and further that it was fair and just in the circumstances not to make a compensation order. We are unable to accept this submission. Bank Sarasin having opted through hearsay evidence given by Mr Wernli to claim the virtue of having received legal advice on the establishment of Sarasin-Alpen without disclosing at least a summary of the advice and showing that the advice had been followed, the judge was entitled to reach the conclusion he did. The facts of ***Watersheds*** were vastly different from the situation faced by the judge and we find that decision to be of no assistance at all on the issue we have to decide.

338. In his written submissions, Mr Malek argued that the judge erred in: (i) failing to consider the causative link between the money paid by the Respondents under any agreement made by the Claimants and Bank Sarasin and any loss allegedly sustained as a direct result of such payment within the meaning of Article 65 (2); (ii) ordering payments in the sums of US$ 1,263,549 to the First Claimant, US$8,540,000 to the Second Claimant and US$ 641,500 to the Third Claimant; and (iii) in ordering any interim payment in the sum of US$ 1 million. In the course of the hearing those submissions were directed to be made in the anticipated appeal against the judge's subsequent decision on quantum.

Bank Sarasin's costs order appeal

339. In an order dated 28 October 2014, the judge ordered Sarasin-Alpen to pay 90% of the Respondents' costs on an indemnity basis and that Bank Sarasin should pay 80% of the Respondents' costs to be assessed, if not agreed, on the standard basis.

340. In his reasons dated 30 October 2014 for these costs orders the judge said:

> "13. It is said on behalf of the Defendants that in making an order for costs I should have regard to the fact that the Claimants did not succeed on all the courses of action which they brought. I do have regard to that, but I also have regard to the undoubted feature that the evidence as to what actually happened in this case was to a very large extent common to both the regulatory claims and to the contractual and negligence claims. Accordingly, as it seemed to me, rather than make an issue based order for costs which would lead in practice to very considerable difficulties of assessment, probably difficulties that would be more expensive to resolve than the benefit of resolving them would produce, the right approach is to make a discount. I make a discount of 10% in relation to the costs awarded against the First Defendant because I take the view that, on a broad approach, probably about 5% of the costs on each side could be attributed exclusively to the claims on which the Claimants failed.
>
> 14. I make a rather larger discount, a discount of 20% in relation to the costs awarded against the Second Defendant, because the regulatory claim on which the Claimants succeeded against the Second Defendant was not introduced until a late amendment a few months before trial. As I have said, much of the preparatory work needed to meet the regulatory claim as amended would already have been done in preparation for meeting the other claims, but the Second Defendant was entitled to take a different view of its liability up until the time that the regulatory claim was introduced. It is for that reason that I make a costs order which discounts by 10 or 20 percent, as the case may be, the liability of the Defendants, and it is for that reason that I make a different discount in respect of the First Defendant and Second Defendant."

341. Mr Malek submitted that the judge's decision was wrong in principle. What the judge should have done was to award Bank Sarasin its costs down to the time one month before the trial when the Respondents were permitted to amend their claim to plead the regulatory claim on which they eventually won. Mr Malek cited the decision of the English Court of Appeal in ***Beaco Ltd v Alfa Laval Co Ltd*** [1995] QB 137 at 154A where Stuart-Smith LJ said:

> "As a general rule, where a Plaintiff makes a late amendment as here, which substantially alters the case the Defendant has to meet and without which the action will fail, the Defendant is entitled to the costs of the action down to the date of the amendment. There may, of course, be special reasons why this general rule should not be applied. An example of this is to be found in the case of Kaines (U.K.) Ltd. v. Osterreichische [1993] 2 LLds l at p. 9, where the judge was satisfied that, even if the amendment had been made earlier, the action would have been vigorously resisted. The judge disbelieved the Defendant's witnesses and the Plaintiff received substantial damages."

342. In Mr Malek's submission, the judge not only failed to have regard to this well-known authority, he also ignored the fact that the amendment was made only one month before the trial and none of the Respondents' claims pleaded before the regulatory claim were upheld.

343. In reply, Mr Hill submitted that account should be taken of the fact that the judge held in paragraph 413 of the judgment that a Financial Advisory Contract between the Respondents and Bank Sarasin came into being under Swiss law and he only declined to award damages for its breach because "the Claimants have suffered no damage by reason of the breach of that contract (if any) in the circumstances that the Court can award compensation for under Article 65 (2) (b) of the Regulatory law." True it is, argued Mr Hill, that the judge did not in terms hold that there had been a breach of the advisory contract, but if there had been no compensation overlap it is a fair inference that he would have so held, given his finding that in the same paragraph that Mr Blonde held himself to the Respondents as performing services for Bank Sarasin.

344. Mr Hill also argued, as the judge observed in his reasons for the costs ruling, that much of the preparatory work needed to meet the regulatory claim would already have been done in preparation for meeting the other claims by the time the amendment was made.

345. Without deciding whether Bank Sarasin was in fact in breach of the advisory contract, we think there is considerable force in Mr Hill's submissions and we find that in the exercise of the wide discretion the judge had in ruling on the question of costs he did not depart from the margin of appreciation allowable to him. Bank Sarasin's appeal against the costs order made against it therefore fails.

The Respondents' Notice and Cross Appeal

346. By their Respondents' Notice, the Respondents sought a finding that there had been a breach of the advisory contract found by the judge or an order remitting that issue to the judge. In the course of his submissions, however, Mr Hill told the Court that he was not inviting us to deal with the Respondents' Notice if the Respondents were otherwise successful on the appeal because in that case they "would have all they need".

347. It follows that, given that this Court is upholding the main regulatory claims against Bank Sarasin in respect of dealing in investments and advisory on investment products and credit, we make no decision on the Respondents' Notice.

348. We propose to take the same approach to the Respondents' Cross Appeal by which the Respondents sought to appeal the judge's findings that: (i) Bank Sarasin was not vicariously liable for Sarasin-Alpen's negligence because the duty of care of care in negligence owed by Sarasin-Alpen was governed by the law of Kuwait; and (ii) the claim in misrepresentation against Bank Sarasin was not established. We do so because we are quite satisfied that success on either or both of these grounds of appeal would not add to the compensation to which the Respondents are entitled against Bank Sarasin under Article 65.

Conclusion

349. For the reasons given above:(1) Bank Sarasin's appeal is dismissed save in respect of the judge's findings that it engaged in the activities of Arranging Credit or Deals in Investments and Arranging Custody in or from the DIFC. The setting aside of those findings, however, is no reason for modifying the judge's order in favour of the Respondents under Article 65 of the Regulatory Law. We say this having in mind the judge's findings (that we uphold) that in respect of all three tranches of the Notes, Bank Sarasin carried on the Financial Service activities of Dealing in Investments and Advising on Investment Products and Credit in or from the DIFC in breach of Article 41 of the Regulatory Law.

(2) We make no order on the Respondents' Notice or on the Claimants' Cross Appeal.

Issued by:**Mark Beer**Registrar Date of Issue: 3 March 2016At: 10am