Claim No: CFI-026-2009

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BEFORE THE DEPUTY CHIEF JUSTICE SIR JOHN CHADWICK

BETWEEN

(1) RAFED ABDEL MOHSEN BADER AL KHORAFI

(2) AMRAH ALI ABDEL LATIF AL HAMAD

(3) ALIA MOHAMED SULAIMAN AL RIFAI

Claimants

and

(1) BANK SARASIN-ALPEN (ME) LIMITED

(2) BANK SARASIN & CO. LTD

Defendants

ORDER OF DEPUTY CHIEF JUSTICE SIR JOHN CHADWICK MADE ON 28 OCTOBER 2014

UPON reviewing the Defendants' draft order and submissions dated 2 October 2014 on quantum, interest, costs and the terms of the order arising out of the Judgment of the Deputy Chief Justice Sir John Chadwick dated 21 August 2014;

AND UPON reviewing the Claimants' draft order and reply submissions on costs and the form of the order dated 13 October 2014;

AND UPON reading the relevant material in the case file

AND UPON hearing Counsel for the Claimants and Counsel for the Defendants on 28 October 2014;

IT IS HEREBY ORDERED THAT:

On 21 August 2014 I delivered judgment in this action. The matter now comes back to me because the parties have been unable to reach agreement on the terms of the order which should be made so as to give effect to the findings made and conclusions reached in that judgment and to decide issues relating to costs. The convenient way of dealing with the matter, as it seems to me, is first to indicate the order that I propose to make and then to give brief reasons explaining why, in relation to the paragraphs of the order, which will be subject of dispute, I have reached the conclusions embodied in the order.

The order which I make is as follows:

1. It is adjudged and declared that the First Defendant was in breach of the Financial Services Prohibition within the meaning of Article 41 of the Regulatory Law and is liable to pay compensation not the Claimants under article 94(2) of the regulatory law.

2. It is adjudged and declared that the First Defendant was in breach of COB 6.2.1 and is liable to pay compensation to the claimants under article 94(2) of the regulatory law

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

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

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

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

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

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

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

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

4. It is adjudged and declared that the Second Defendant was in breach of the Financial Services prohibition within the meaning of Article 41 of the regulatory law and is liable to pay compensation to the claimants under Article 65(2)(b) of the Regulatory Law.

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

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

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

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

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

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

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

(2) losses arising out of the Claimants' relationship with Al Ahli bank Kuwait

6. The amounts of (a) US$ 1,263,549 to the First Claimant, (b) US$ 8,540,000 to the Second Claimant, (c) US$ 641,500 to the Third Claimant referred to at paragraphs 3 and 5 above shall be paid by the Defendants jointly and severally within 14 days of this order.

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

8. The Claimants shall file and serve any evidence in support of their claims on quantum for the quantum determination ordered under paragraph 7 by no later than **4pm on 20 November 2014**. Subject to further order of the Court, for which the Claimants may apply in writing with a draft of the further evidence on which they seek to rely, such evidence shall be limited to evidence of events which have occurred since 10 July 2013 (being the last day of the trial in these proceedings).

9. The Defendants shall file and serve any evidence in answer to the Claimants evidence served in accordance with paragraph 8 above by no later than **4pm on 11 December 2014**.

10. The Claimants may file and serve any evidence in reply to the Defendants evidence served in accordance with paragraph 9 above by no later than 4pm on **1 January 2015**.

11. The Claimants and the Defendants shall file and serve written submissions for the quantum determination by no later than **4pm on 15 January 2015**.

12. The First Defendants shall pay 90% of the Claimants costs of and incidental to these proceedings up to and including the date of this order, such costs to be assessed if not agreed on the indemnity basis.

13. The Second Defendant shall pay 80% of the Claimants costs of and incidental to these proceedings up to and including the date of this order, such costs to be assessed if not agreed on the standard basis.

14. The Defendants are to be liable on a joint and several basis for the payment of costs up to the amount of the costs payable by the Second Defendant.

15. The Defendants are to pay interest on costs pursuant to RDC 38.10 in respect of costs paid from the date of payment by the Claimants to their legal representatives up to the date of reimbursement by the Defendants pursuant to this order. A claim for interest under this paragraph is to be supported by a certificate of the Claimants legal representatives that the costs in respect of which interest is claimed have been paid by the Claimants on the date specified.

16. The Defendants shall pay on a joint and several basis the amount of US$ 1,000,000 on account of the Claimants costs in respect of the costs ordered under this order.

17. The costs of this application shall be treated as costs in the action and shall follow accordingly.

REASONS FOR THE ORDER:

1. A word, then, as to the reasons for resolving the matters in dispute in the manner indicated by the order.

2. The first issue in dispute was whether there should be immediate payment of the amounts specified in paragraphs 3(a) and 5(a) of the order; that is to say the amounts in aggregate of some US$ 10.4 million. The Defendants asserted that on a proper reading of my judgment of 21 August 2014 I had not determined that that sum should be payable by way of compensation. The point turns on an analysis of certain paragraphs in the judgment to which I shall now refer. At paragraph 428, I said this:

"428. The losses in respect of which the Claimants seek compensation can be divided into the following categories:

1. Losses on the sale of the Claimants' investments with Bank Sarasin (these are agreed as to amount).

2. Other fees and interest charged by Bank Sarasin (these are not yet agreed).

3.��� Other fees and interest charged by ABK up to 14 December 2009 (these are not yet agreed).

The ABK losses are only calculated up to 14 December 2009 as the Claimants only have account statements for ABK up to this point. However, the ABK indebtedness has not been wholly repaid and interest continues to accrue in respect of that liability. The Claimants also seek interest on their losses pursuant to Articles 18 and/or 32 of the Law of Damages and Remedies 2005, and/or Article 65 and/or 95 of the Law of 2004.

� 429. It is only these categories (together with interest on those losses) which the Claimants seek to recover."

3. The Defendants say correctly that the agreement referred to under paragraph 428(1) which I've just read was only an agreement as to the calculation of the losses based upon the difference between the amount to be invested and the amount recovered. They say that I did not decide, or should not have decided, that loss measured in that way was the appropriate measure of the compensation which I had indicated in earlier paragraphs of the judgment that I would award under Article 65 and or 94 of the Regulatory Law.

4. The relevant paragraphs were these: paragraph 308 under the sub heading "Was the loss or damage in respect of which compensation claimed "caused as a result of such conduct"" was in these terms:

> "308. It is said on behalf of the Claimants that, given Sarasin-Alpen's failure to comply with its regulatory obligations, it was not permitted to take on the Claimants as Clients at all; and accordingly was not permitted to market any of Bank Sarasin's products to the Claimants. In the circumstances, the Claimants should have never been sold the financial products which, by reason of Sarasin- Alpen's failure to comply with the regulatory obligations imposed upon it under the Regulatory law, they were sold."

And at paragraph 321, after setting out the reasons why I concluded that compensation should be payable, I said this:

> "321. .I am satisfied that it is appropriate, pursuant to the power conferred on the Court by Article 94(2) of the Law, to make orders against Sarasin-Alpen for the payment of compensation to the Claimants in the present case." As to Bank Sarasin, the conclusion is at paragraph 403 which reads:
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> "403. 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."

5. Put shortly, it said that to measure compensation by reference to the loss on the sale of investments is naive and over simplistic. It is a measure based essentially on a no-transaction approach. What is submitted is that in order properly to measure compensation it is necessary to make a counterfactual analysis of what would have happened if the investments with Bank Sarasin had not been made. In particular, it is necessary to ask whether the Claimants would have invested elsewhere and, if so, in what they would have invested and what the consequence of such investment would have been. It is only, it is said, through such a counterfactual analysis that the Court can reach a proper conclusion as to what the losses actually were.

6. I reject that submission and take the view that that rejection is clear from the judgment. The position in this case is that these Claimants were not investing their own monies. As to the first tranche of investments, they were proposing to invest monies which would be lent to them by ABK for the specific purpose of investing in capital protected investments with this bank, Bank Sarasin, which would produce a sufficient return to service the lending which ABK was prepared to make. In relation to the second and third tranches of investment, again, the Claimants were not investing with their own monies; they were investing with monies to be lent by Bank Sarasin on a leveraged basis, again, to purchase 100% capital protected investments which would produce a sufficient return to service not only the interest charges that would be made by bank Sarasin for the lending but also the interest charges incurred in respect of borrowing from ABK.

7. The conclusion that I reached in my judgment was that an investment which satisfied the two criteria which the Claimants required, namely 100% capital protection and a sufficient income return to service the interest charges on a guarantee basis, was quite simply unrealistic and unreal. Such an investment was not available. There was no question of the Claimants ever proposing to invest in some other product. They should have been advised that a product having the characteristics they required was not one which could be obtained. In those circumstances, to invest on a counterfactual basis as to what they would have done if they had not made the investments which they did would produce only one answer; they would have not borrowed to invest at all.

8. Accordingly, as I sought to explain in my judgment, the only sensible basis upon which compensation could be ordered is the actual loss suffered on the sale of investments. If I were wrong to reach that conclusion, the Court of Appeal can consider whether to take the opportunity of reversing my decision but there is little point in that matter going to a further hearing by way of assessment. It is for that reason that I conclude that the right course is to order payment of the US$ 10.4 million forthwith.

9. The second matter which requires a little explanation is the restriction on evidence that I have included under what will now be paragraph 8 of my order. There seems to be force in the Defendants submission that this is not a case in which the Court was asked to order, or did order, a split trial. The evidence on which the Claimants are entitled to rely for the purpose of assessing the quantum of their claims is the evidence that was before the court at the trial, subject to the possibility that the quantification of those claims may have altered by reason of post-trial events. It is for that reason that I think it right to restrict the evidence which the Claimants may adduce in support of their intentions on the quantum determination to post-trial matters, but I leave open the possibility that there may be some further matters which justice requires the Court to consider and, if there is, the Claimants may apply in writing to provide evidence of that in advance of the quantum determination, but in Order to determine such application, the Court will require to see, in draft at least, the further evidence which the Claimants seek to put in.

10. The third matter is costs. On this, there are two factors to address. First, what costs should be borne by the Defendants and secondly, on what basis should those costs be assessed.

11. I was urged to take the view that this was a case in which the Claimants had advanced their claims under a number of different heads of which breach of the regulatory regime was only one. The other heads were breach of contract, negligence and misrepresentation. Having determined that

the Claimants were entitled to succeed on their regulatory claims, I took the view that they could not establish that they had suffered damage recoverable under their contractual or tortious claims for the reason that the Court could compensate them for their loss under Articles 94 and 65. In those circumstances, it was unnecessary to reach final determinations on the contractual and tortious claims but I indicated that, at least in relation to the First Defendant, I took the view that the contractual claim would have succeeded if it were not for the fact that by reason of the breach of the Financial Services Prohibition, the agreement on which that contractual claim was based had to be treated as void.

12. The tortious claims, and in particular the misrepresentations claim, were in my view ill-founded given the requirement of Kuwaiti Law, by which that claim would be governed, that a claim in misrepresentation needed to be founded upon an allegation of fraud which, in the event, this was not.

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.

15. The other matter to be addressed under costs was whether costs should be awarded on an indemnity basis. It is unnecessary I think to explain in any detail the difference between assessment on a standard basis and assessment on an indemnity basis; the two bases of assessment are well known. But, put shortly, on a standard basis assessment it is for the receiving party to satisfy the Court that the costs claimed were reasonably incurred and reasonable in amount, whereas on an indemnity basis it is for the paying party to satisfy the Court that the costs claimed were not reasonably incurred or not reasonable in amount. The burden of proof differs in that respect in the two cases and in practice is found normally to result in an award on an indemnity basis which is some considerable degree higher than an award on a standard basis assessment.

16. The Court has issued a Practice Direction, Practice Direction No. 5 of 2014, dated 12 August 2014, that is to say shortly before the judgment in these proceedings, as to the approach which the Court should adopt when determining whether costs should be assessed on the indemnity basis as opposed to the standard basis. The factors which the Court should take into account are these:

> "1. .
>
> (i) circumstances where the facts of the case and/or the conduct of the paying party are/is such as to take the situation away from the norm; for example where the Court has found deliberate misconduct in breach of a direction of the Court or unreasonable conduct to a high degree in connection with the litigation; or
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> (ii) otherwise inappropriate conduct in its wider sense in relation a paying party's pre-litigation dealings with the receiving party, or in relation to the commencement or conduct of the litigation itself; or
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> (iii) where the Court considers the paying party's conduct to be an abuse of process."

17. In my judgment of 21 August 2014, I found that the First Defendant, Bank Sarasin-Alpen (ME) Limited, had deliberately decided not to conform to the regulatory regime applicable in the DIFC. It had done so by taking on these Claimants as clients in circumstances in which it had no reason to think that they qualified as clients under that regime, and in order to achieve that end, deliberately falsified documents known as AGBC's to make them appear as if they had been completed by the Claimants in their own hands in circumstances in which there were employees within the First Defendants offices who must have known that that was not the case. The only reason for filling in those forms in the first person as if they had been completed by the Claimants themselves can have been to mislead any regulatory authority looking at those forms to take the view that they had actually been completed in accordance with the regulations.

18. That conduct, as it seems to me, does take this case out of the norm, or at least I hope it takes this case out of the norm, in relation to the compliance which ought to be expected of financial institutions operating within the regulatory regime. This is not a case of the First Defendant making a mistake; this is a case of the First Defendant deliberately falsifying its records in order to put both the Claimants and the regulatory authority off the scent. That, in my view, is conduct which is rightly marked by some order which indicates the Courts disapproval.

19. The position is worse than that, because the First Defendant called no witness within their office to explain how this had happened. The person who might have been expected to know why it had happened or how it had happened, a Mr Kerry, was not called for reasons, as the Court was informed, that the First Defendant did not feel able to rely on his evidence. The only witness that was called, Mr Walia who is a substantial investor in the First Defendant and its guiding mind, did not know what had happened and he must have realised that he did not know what had happened. The Defendants therefore chose to fight this case on the basis that they would not explain what had happened and would not produce any witness who could explain what had happened. That, as it seems to me, was irresponsibility of a high degree. This litigation should not have been contested by the First Defendant in the way it was and it is for that reason that I take the view that an order for indemnity costs against the First Defendant was appropriate. I do not take that view in relation to the Second Defendant; I am satisfied that the Second Defendant did not know of the falsification of the AGBCs.

20. The next matter to which I need to address is interest on costs. It seems to me appropriate to make an order for the payment of interest on costs, to the extent that if the Claimants are out of pocket because they have had to pay their lawyers costs during the course of the proceedings,

which they may well have done, then they have had to lay out money which has not been reimbursed to them. That represents a loss of the use of that money and should be compensated by an award of interest.

21. I'm asked to make an order for interim payment. It is common practice in this Court, as in other courts exercising a commercial jurisdiction, to recognise that a party who has obtained the benefit of an order for costs in his favour should not be kept out of his money longer than is necessary while the process of assessment grinds through. Accordingly, in principle, I think it right in this case to make what is the usual order in cases of this kind; that is to say, an order for payment on account of costs which will be assessed in due course.

22. The guiding consideration in such a case is to seek to limit the amount of the interim payment to an amount which is not greater than that which will be obtained on assessment. I have had put before me an affidavit of Gayle Hanlon, of partner in the firm of legal representatives who now represent the Claimants but did not do so at the trial, which contains a detailed and comprehensive account of what the cost expenditure has been, but it was put in at a late stage and is in such detail that the Defendants are entitled to say that, in fairness, they haven't had a proper opportunity to examine it. It excludes a proportion of the costs claimed by the Claimants previous legal representatives, but it includes costs which would be as it seems to me already the subject of a cost order made by the Court of Appeal in the course of these proceedings in relation to which no application for an interim payment was made. The difficulties of reaching a precise figure which will be not greater than the amount ultimately to be recovered are acute, and it is for that reason that seeking to err on the side of caution I have come to the conclusion that the amount to be awarded by way of interim order is US$ 1 million, conscious that that is likely on the material in the witness statement to be considerably less than what may be recovered, but it is the best estimate that I can make with caution in mind on the material that is available.

23. The registry will draw up an order which reproduces the order which I have made from studying the transcript. The only matter remaining is how should the costs of this application be dealt with, and as to that I have heard submission from the parties and it seems to me the appropriate order is to direct that the costs of this application be treated as costs in the action and follow accordingly.

24. I have indicated in the order that the quantum hearing should be on the first available date after the end of January. Available is not the same as convenient, so it would be sensible if people started now to get that date sorted out.

Issued by:

Mark Beer

Registrar

Date of issue: 30 October 2014

At: 10am