محاكم
DIFC
COURTS

Claim No: CFI 026/2009

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 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

Hearing: **2-3 March 2015**

Counsel: Mr Richard Hill QC and Mr Sharif Shivji with Ms Gayle Hanlon of Hamdan Al Shamsi for the Claimants

Mr Michael Brindle QC and Ms Chloe Carpenter with Ms Rita Jaballah and Mr Robert Maxwell Marsh of Al Tamimi & Co for the First Defendant

Mr Michael Black QC and Ms Sarah Bayliss instructed by Al Tamimi & Co for the Second Defendant

Judgment: **7 October 2015**

JUDGMENT OF THE DEPUTY CHIEF JUSTICE SIR JOHN CHADWICK

Deputy Chief Justice Sir John Chadwick:

1. Following the trial of this action I held, for the reasons set out in my judgment dated 21 August 2014, (i) that the first-named Defendant, Bank Sarasin-Alpen (ME) Limited ("Sarasin-Alpen"), had failed to comply with its obligations under the Dubai Financial Services Authority Rules ("the DFSA Rules) – and, in particular, with its obligations under COB Rules 3.2.2.(1) and 6.2.1(1) – and that it was appropriate in the circumstances to make orders against Sarasin-Alpen, pursuant to the power conferred on the Court by Article 94(2) of the Regulatory Law (DIFC Law No. 1 of 2004), for the payment of compensation to the Claimants, Rafed Abdel Mohsen Al Khorafi ("Mr Al Khorafi"), his mother, Amrah Ali Abdel Latif Al Hamad ("Mrs Al Hamad"), and his wife, Alia Mohamed Sulaiman Al Rifai ("Mrs Al Rifai"), and (ii) that the second-named Defendant, Bank J. Safra Sarasin Ltd (then known as Bank Sarasin & Co Ltd) ("Bank Sarasin"), had dealt with the Claimants in breach of the Financial Service Prohibition imposed by Article 41(1) of the Regulatory Law and that it was appropriate in the circumstances to make orders against Bank Sarasin, pursuant to the power conferred on the Court by Article 65(2)(b) of the Regulatory Law, for the payment of compensation to the Claimants.

2. At paragraph 428 of my judgment dated 21 August 2014 I recorded that the losses in respect of which the Claimants sought compensation could be divided into the following categories: (i) losses on the sale of the Claimants' investments with Bank Sarasin (which had been agreed as to amount), (ii) other fees and interest charged by Bank Sarasin and (iii) other fees and interest charged by Al Ahli Bank Kuwait ("ABK"). I recorded, also, that the Claimants sought interest on their losses pursuant to Articles 18 and/or 32 of the Law of Damages and Remedies 2005, and/or Articles 65 and/or 94 of the Regulatory Law of 2004.

The Order of 28 October 2014

3. The parties were unable to agree the terms of the order to be made following my judgment of 21 August 2014. The matter came before me on 2 October 2014 to settle those terms; which were incorporated in an Order dated 28 October 2014. Paragraphs 1 and 2 of that Order were in these terms:

> "1. It is adjudged and declared that [Sarasin-Alpen] 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 94(2) of the Regulatory Law.
>
> 2. It is adjudged and declared that [Sarasin-Alpen] 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."

Those paragraphs were intended to give effect to, and must be read in conjunction with, my judgment of 21 August 2014. As I have said, the findings made against Sarasin-Alpen in that judgment were that it had failed to comply with its obligations under Rules made by the DFSA: that is to say, obligations under COB 3.2.1 – read with COB 3.2.2(1) and (3) – and COB 6.2.1(1). The carrying on of a Financial Service by Sarasin-Alpen (as an Authorised Firm) in breach of Rules made by the DFSA was a breach of the Financial Services Prohibition. The breach of the Financial Services Prohibition to which paragraph 1 refers is (or includes) the breaches of COB 3.2.1 and COB 6.2.1(1) which Sarasin-Alpen had been found to have committed. It may be said that paragraph 2 of the Order adds nothing and is unnecessary.

4. Paragraph 4 of the Order of 28 October 2014 was in these terms:

> "4. It is adjudged and declared that [Bank Sarasin] 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."

That paragraph, also, must be read in conjunction with the findings in my judgment of 21 August 2014. The finding made against Bank Sarasin in that judgment was that it was carrying on activities which constituted a Financial Service in or from the DIFC – in particular, the prescribed activities "Dealing in Investments as Principal", "Arranging Credit or Deals in Investments", "Advising on Financial Products or Credit", and "Arranging Custody" – in the circumstances that (as was common ground) Bank Sarasin was not a person – within Article 42(3) of the Regulatory Law or otherwise – authorised to carry on prescribed activities in or from the DIFC. The breach of the Financial Services Prohibition to which that paragraph refers is the carrying on of those prescribed activities in or from the DIFC.

5. Paragraphs 3(a) and 5(a) of the Order of 28 October 2014 quantified the amount of those liabilities "in respect of the losses on the sale of the Claimants' investments" in

relation to each Claimant; together, in each case, "with interest to be assessed". Paragraph 3(b) was in these terms:

> "3. The amount of [Sarasin-Alpen's] liability under paragraphs 1 and 2 above shall be:
>
> ...
>
> (b) further amounts to be assessed in respect of
>
> (i) other fees and interest charged by [Bank Sarasin] and
>
> (ii) losses arising out of the Claimants' relationship with Al Ahli Bank Kuwait ('ABK')".

Paragraph 5(b) was in similar terms (*mutatis mutandis* in respect of Bank Sarasin's liability), save that it contained the words "including amounts" between "assessed" and "in respect of". That difference in wording was not intended to be of significance; and it has not been suggested that it was of significance.

6. At paragraph 6 of the Order of 28 October 2014 it was directed that payment of the amounts quantified in paragraphs 3(a) and 5(a) was to be made by the Defendants, jointly and severally, within 14 days. In making that order I rejected the Defendants' submission that, on a proper reading of my judgment, I had not determined that that sum should be payable by way of compensation. After referring to paragraphs 428 and 429 of that judgment, I said this:

> "3. The Defendants say, correctly, that the agreement referred to under paragraph 428(1) was an agreement only as to the calculation of the losses based upon the difference between the amounts invested and the amounts 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. In earlier paragraphs of the judgment I had said this: At paragraph 308, under the sub-heading 'Was the loss or damage in respect of which compensation was claimed "caused as a result of such conduct':
>
> > "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."
>
> At paragraph 321, after setting out the reasons why I concluded that compensation should be payable, I stated the following:

"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."

At paragraph 403, this:

"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 on a no-transaction approach. It is submitted that, in order properly to measure compensation, it is necessary to make a counter-factual analysis of what would have happened if the investments with Bank Sarasin had not been made. In particular, it is necessary to ask whether, if the Claimants had not invested with Bank Sarasin, they 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 counter-factual analysis that the Court can reach a proper conclusion as to what the losses actually were.

6. I reject that submission; and I take the view that that rejection is clear from the judgment if read as a whole. 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 100% 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 - that is to say, 100% capital protection and a sufficient income return to service the interest charges on a guaranteed basis - was not available. To suggest otherwise was unrealistic and unreal. 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 investigate on a counter-factual basis what they would have done if they had not made the investments which they did make, would produce only one answer: they would have not borrowed (as they did) in order to make investments which did not have the criteria which they required.

8. Accordingly, as I sought to explain in my judgment, the only sensible basis upon which compensation could be ordered was 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 or no point in that matter going to a further hearing by way of assessment in order to be re-argued before me. It is for that reason that I conclude that the right course is to order payment of the US$ 10.4 million forthwith."

7. At paragraph 7 of the Order of 28 October 2014 it was directed that:

> "7 All other claims for interest and damages including the quantification of the interest referred to at paragraphs 3(a)(i) – (iii) and 5(a)(i) – (iii) above and the quantification of the categories of damage referred to in paragraphs 3(b) and 5(b) above shall, together with any other claims (including in particular 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 ('the Quantum Determination')."

8. My Order of 28 October 2014 included directions for filing of evidence in advance of the Quantum Determination. Those included a direction that the evidence to be filed by the Claimants in support of their claims on quantum should – subject to further order of the Court – be limited to events which had occurred since 13 July 2013 (that being the last day of the trial in these proceedings). In the reasons set out in the schedule to the order of 28 October 2014, I explained why that restriction had been imposed:

> "9. There is force in the Defendants' submission that this is not a case in which the Court was asked to order, or did order, a split trial. The evidence on which the Claimants are entitled to rely for the purpose of assessing the quantum of their claims is the evidence that was before the Court at the trial; subject to the possibility that the quantification of those claims may be affected 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 contentions on the Quantum Determination to post-trial matters, but I leave open the possibility that there may be some further matters which justice requires the Court to consider; and, if there is, the Claimants may apply in writing to rely on evidence of those matters..."

The Order of 4 February 2015

9. The matter came back before me on 13 January 2015 for further directions as to the evidence which could be relied on at the Quantum Determination. The directions sought by the Claimants included an order that they be permitted to adduce evidence of a pre-trial event: the refinancing on 23 September 2010 of part of Mr Al Khorafi's and Mrs Al Hamad's loan accounts with ABK by a new loan in the amount of KWD10.8 million from Commercial Bank of Kuwait ("CBK"). For the reasons set out in the oral ruling given on that day, and issued in writing on 20 January 2015, I made the order sought. I said this:

> "12 Paragraph 3(b)(ii) and 5(b)(ii) of my Order of 28 October 2014 provided that the amount of the Defendants' liability to the Claimants should include 'losses arising out of the Claimants' relationship with ABK'. That went beyond the statement of losses in respect of which compensation was claimed as set out at paragraph 428 of my judgment of 21 August 2014. It did so because the Court became aware at the hearing to settle the order in October 2014 that losses arising from the ABK loans might not be limited to fees and interest charged by ABK itself.

13 The first question, therefore, in this context is whether interest charged by CBK on the KWD10.8 million loan said to have been borrowed by the First and Second Claimants in order to refinance partial repayment of the ABK debt is properly to be considered as 'losses arising out of the Claimants' relationship with ABK' for the purposes of paragraphs 3(b)(ii) and 5(b)(ii) of my Order of 28 October 2014. In my view, the answer to that question is 'Yes'. If the Claimants can establish by evidence that they needed to refinance the ABK debt or part of that debt in September 2010 and that borrowing from CBK was a reasonable method of funding that need, then (as it seems to me) that cost of borrowing from CBK can properly be said to be a loss arising out of their relationship with ABK.

14 The further question, then, is whether the Claimants should be permitted to adduce evidence of circumstances in which they did need to refinance the ABK debt in September 2010 and in which borrowing from CBK was a reasonable method of funding that need; given that, as the Defendants emphasize, such evidence could have been adduced at trial. In my view, the answer to that question also is 'Yes'. The provision in paragraph 8 of my Order of 28 October 2014 under which the Claimants make the application for permission to adduce the evidence of pre-trial events was included for the reason mentioned in paragraph 9 of the Schedule of Reasons contained in that order; that is to say, to meet the possibility that there might be further matters which justice required the Court to consider. The effect of denying the Claimants the opportunity to advance their claims to interest on the CBK loans in relation to both pre-trial and post-trial interest would be that they would be limited to claims for interest on the ABK loans in circumstances where the amount of that interest was less than it would have been if the refinancing by means of funds borrowed from CBK had not taken place. If a claim to interest on monies borrowed by the Claimants to fund the investments which, as I have held in my judgment of 21 August 2014, would not have been made but for the Defendants' breaches of the DFSA regulatory regime is a claim which, in principle, it is open to the Claimants to advance, then it is unjust that the Defendants should have the benefit of the refinancing of part of the ABK loan - in the sense of a reduced claim to interest accruing on that debt - without suffering the burden of a claim to interest on the borrowing from CBK which gave rise to that benefit.

15 For those reasons, I will make the order sought by the Claimants in their application CFI-026-2009/21 of 20 November 2014. They may rely on the evidence, such as it is, set out in HAS 2."

10. The directions given on 13 January 2015 were subsequently confirmed in an Order dated 4 February 2015. Those directions included (in addition to the Order permitting the Claimants to adduce evidence of the refinancing of part of the ABK loan accounts to which I have just referred) a direction, at paragraph 9, that the parties file a joint statement setting out: "(a) those matters (if any) of quantum on which (subject to legal defences) they are agreed as to calculation and/or as to methodology; and (b) those matters of quantum on which they were not agreed as to calculation and/or methodology, summarising the reasons for such disagreement."

11. The Quantum Determination came before me for oral hearing on 2 and 3 March 2015. The joint statement which I had directed in the Order dated 4 February 2015

had not been agreed or filed in time to be available at that hearing (although the Claimants had provided the Court with a draft). The definitive version, dated 1 April 2015, ("the Updated Joint Statement on Quantum") was sent to the Court by the Defendants' legal representatives on 6 April 2015. It has been of assistance in defining and refining the issues.

The claims to be determined at the Quantum Determination

12. As I have said the quantification of the losses sustained by the Claimants on the sale of their investments with Bank Sarasin (head (A)) were agreed as to amount; the sums payable by the Defendants to each of the Claimants under this head were set out in the Order of 28 October 2014; and payment of those amounts was to be made within 14 days of that Order. Those payments were made, although belatedly. The quantification of the fees and interest charged to the Claimants by Bank Sarasin (head (B)); the fees and interest charged to the Claimants by ABK down to 18 September 2014 (head (C)); and the interest charged to the Claimants by CBK after 18 September 2014 (head D) remains outstanding.

13. Paragraphs 3(a), 5(a) and 7 of the Order of 28 October 2014 provided for interest on head (A) losses to be assessed at the Quantum Determination. The Claimants do not, in terms, advance a claim for such interest in their "Written Submissions on Quantum" dated 25 February 2015; nor do they advance a claim for interest on head (A) losses in their "Supplemental Written Submissions on Quantum" dated 28 February 2015 or in the Updated Joint Statement on Quantum to which I have referred. But, in the course of oral argument at the hearing of the Quantum Determination, Counsel for the Claimants indicated that he was seeking an order for interest on head (A) losses at the rate of 4.5% per annum compounded annually. In those circumstances, I do not think it appropriate to treat the claim for interest on head (A) losses as abandoned: in my view it remains outstanding and falls to be determined.

14. Paragraph 7 of the Order dated 28 October 2014 also provided for "all other claims for interest and damages...together with any other claims (including in particular claims (if any) under Article 40(2) of the Law of Damages and Remedies (Law No. 7 of 2005))" to be determined at the hearing of the Quantum Determination. The Claimants seek an order against Sarasin-Alpen for multiple damages pursuant to Article 40(2) of the Law of Damages and Remedies (DIFC Law No 7 of 2005). That

claim also remains outstanding. No order under that article is sought against Bank Sarasin.

The quantification of losses under heads (B), (C) and (D)

The amounts claimed

15. The amounts claimed under head (B), head (C) and head (D), as appears from the Updated Joint Statement on Quantum, are these:

	Head (B) US$	Head (C) US$	Head (D) US$	Heads (B)+(C)+(D) US$
Mr Al Khorafi	1,338,266	5,747,909	0	7,086,175
Mrs Al Hamad	7,733,387	5,487,040	7,520,100	20,740,527
Mrs Al Rifai	1,506,614	7,491,895	0	8,998,509
All Claimants	10,578,267	18,726,844	7,520,100	36,825,211

The amounts claimed are based on three reports prepared for the Claimants by Mr T J Bramston FCA of Griffins, a firm of forensic accountants: the first dated 3 May 2015 ("the Griffins May 2013 Report"), the second dated 7 January 2015 ("the Griffins January 2015 Report") and the third dated 27 February 2015 ("the Griffins February 2015 Report"). It is stated in the May 2013 Report that Griffins were asked to review documents provided by the Claimants' then legal representatives and provide a forensic accounting analysis pertaining to quantum; including a detailed review of the receipt and dissipation of funds through the accounts held by Mr Al Khorafi, Mrs Al Hamad and Mrs Al Rifai, a detailed calculation of the net capital gains arising from those accounts (treating the analysis as if no transactions had occurred, and including within it reference to the initial borrowing from ABK as well as subsequent investment and leveraging) and a conclusion as to the losses sustained by the Claimants in proceeding with the transactions. Those reports were prepared to assist the Claimants in quantifying their claims. They were not adduced as expert evidence

(in the conventional sense); rather they and the contents were adopted by Counsel in making submissions.

16. At paragraph 8 of the Griffins May 2013 Report the analytical methodology which has been adopted is explained:

> "8.1. This Report has been prepared on a nil transaction basis, i.e. If the claimants had not entered into agreements to open the accounts reviewed, none of the transactions would have occurred. We have assumed that at the dates on which the accounts were opened the overall financial position between the claimants and the defendants stood at US$0.00. It follows that any costs/losses arising from investments undertaken or drawdowns on loan facilities by the account holder should be identified, together with any gains arising.
>
> 8.2. Our approach has been to schedule all of the accounts and to summarise the movements. From those summaries we have identified the items where the claimants have suffered costs and losses, as well as receiving any benefits. We have summarised the identified sums to arrive at an overall figure..."

The Defendants' response

17. The Defendants' primary response to the claims for compensation under heads (B), (C) and (D) is that they are bound to fail, both on procedural and on substantive grounds, and should have been dismissed. In summary it is said:

(1) That, on procedural grounds, it is not open to the Claimants to pursue those claims; given that (i) save for interest charged by ABK in respect of the period up to 6 June 2009 (part of head (C) loss), these heads of loss were not pleaded; (ii) permission to amend the particulars of claim was not sought (and, if it had been sought, should not have been given); (iii) these heads of loss were not advanced in submission at trial; and (iv) there is no good reason to allow the Claimants to advance these heads at this stage of quantum determination.

(2) That, in any event, as a matter of law, those claims cannot succeed; in that (i) the heads of loss are irrecoverable as they fall outside the scope of the duty, or are too remote; and/or (ii) the failure to repay the ABK loans in October 2008, or by 2010, and the decision to take out the CBK loan in 2010 were failures to mitigate loss and so any claim for interest and charges paid thereafter is irrecoverable; and/or (iii) the failure to repay the ABK loans in October 2008, or in 2010, and the taking out of the CBK loan in 2010 was an

independent decision of the Claimants which broke the chain of causation and/or resulted from personal borrowings of the Claimants unconnected with the relevant investments and/or was not in law caused by the acts or omissions of Sarasin-Alpen; and/or (iv) each of the heads of loss is irrecoverable because this is not a nil-transaction case.

In those circumstances, it is said, the Court must hold at the Quantum Determination that those claims are to be quantified at zero.

18. In the alternative, if (contrary to the Defendants' primary position), the Court finds that any head of loss is in principle recoverable, it is said that, in any event, the amounts claimed are incorrectly quantified, unfounded in fact and incorrect, in that the Claimants have taken an incorrect and overly broad approach to assessing loss on a no-transaction basis (if applicable) and/or the claimed heads of loss are inadequately documented and/or unproven and should therefore be dismissed.

19. Before turning to the quantification of claims to compensation under heads of loss which are, in principle, recoverable, it is convenient to address the Defendants' primary response: that, on procedural grounds, it is not open to the Claimants to pursue those claims and that in any event, they are bad in law.

Whether, on procedural grounds, the Claimants are precluded from advancing claims to compensation under heads (B), (C) and (D)

20. In developing their submission that unpleaded heads of loss should be dismissed (or quantified at zero) it was said that, although the Claimants were granted permission to amend their particulars of claim on three separate occasions prior to trial, their pleaded case on quantum remained, unamended, as set out at appendix B to the re-re-amended particulars of claim dated 18 April 2013. As pleaded, the claim was for losses in an amount said to be the difference between (i) the aggregate of the initial investment of US$80,000,000 and ABK interest and charges of US$9,253,542 accrued up to 6 June 2009 and (ii) the aggregate of US$20,000,000 advanced for partial repayment for partial repayment of ABK loans, US$15,000,000 for a private investment and US$9,460,343 for withdrawals against the initial investment. In seeking to advance a case on loss under head (B), head (C) (save interest and charges accrued up to 9 June 2009) and head (D) the Claimants have to rely on their

contention that they do not need to amend. That, it is submitted, is not permissible: the Claimants should be held to their pleaded case.

21. Further, it is said that, in opening the Claimants' case at trial, Counsel did not adopt the pleaded case; but purported to substitute a new case (raised, for the first time, at paragraph 202 of the Claimants' written opening submissions) based on the Griffins May 2013 Report, which, it is said, had been served shortly before trial and without the permission of the Court. The opening submissions at trial - and the Griffins May 2013 Report – advanced a case on quantum based on losses in a total sum of US$33,372,201; being the aggregate of (i) net losses incurred on the investments (US$10,445,049), (ii) the balance of fees and interest charged by Bank Sarasin after giving credit for gains (US$10,578,266.82) and (iii) interest and fees charged by ABK to 14 December 2009 (US$ 12,348,886).

22. It is pointed out that the Defendants objected at trial that the claims for compensation in respect of fees and interest said to have been charged by Bank Sarasin (head (B)) and fees and interest to ABK post 6 June 2009 (part of head (C)) were unpleaded; and would have to be pleaded if the Claimants could have any possibility of recovery in respect of them. The Defendants submit that the Court never ruled on the Defendants' objections; which were maintained at the hearings in October 2014 and January 2015 and continue to be maintained. Further, since trial, the Claimants have purported to seek to claim further unpleaded heads of loss: that is to say, ABK interest from 15 December 2009 to date and CBK interest payment and charges.

23. It is submitted that the Claimants' contention that they did not need to plead the new heads of loss, that it was sufficient that they had made it clear in their pleading and at trial that they claimed damages on a "nil transaction" basis and it was not necessary to go further and identify in their pleading the heads of loss that would arise on a no transaction basis was incorrect, in that:

(1) The Claimants had not pleaded that they claimed compensation on a nil transaction basis. Their pleaded claim against Sarasin-Alpen was for:

> "...an order pursuant to Article 94(1) of the [Regulatory] Law, requiring [Sarasin-Alpen] to compensate the Claimants for the loss and damage suffered as a result of its conduct or to otherwise restore the Claimants to the position they were in prior to such conduct (i.e. before the Claimants made the Investment)"

and, against Bank Sarasin, for an order in like terms pursuant to Article 65(2) of the Regulatory Law. Properly understood, it is said, the Claimants' pleaded claim was for compensation in respect of the loss and damage pleaded in Appendix B to their particulars of claim, or, alternatively, restitution, under Article 94 or Article 65 of the Regulatory Law (as the case might be).

(2) In any event, even if the Claimants had pleaded that they sought compensation on a nil transaction basis, that would have been wholly insufficient. A claimant is required to plead not the "basis" of its case, but each head of loss claimed and the amount thereof so that the issues between the parties are clearly identified, so that a defendant is not taken by surprise at trial, and so that a defendant can require disclosure of each head of loss and carry out its own investigation of each head of loss claimed prior to trial. In support of that contention the Court was referred to *Pedro Emiro Florez v Equion* [2013] EWHC 3150 at [9] to [16], [48] to [49] and [55] to [56].

(3) The failure to plead losses now claimed under head (B), head (C) – in respect of interest and charges accrued after June 2009 – and head (D) has led to the Defendants being taken by surprise, and has deprived the Defendants of the opportunity, prior to trial, to seek disclosure in relation to such heads of loss and to carry out their own investigations of each head of loss claimed. This, it is said, is particularly unsatisfactory in circumstances where, because there was not a split trial, it was the Claimants' obligation to put forward their full and quantified claims at the trial.

24. It is submitted further that, in so far as the Claimants contend (as, it is said, they appear to do) that it does not matter whether heads of loss were pleaded by them, as the Court has already determined at paragraphs 428, 429 and 433 of the judgment of 21 August 2014 and/or paragraphs 3(b) and 5(b) of the Order of 30 October 2014 that they are entitled to compensation in amounts to be assessed in respect of "other fees and interest charged by the Second Defendant" and "losses arising out of the Claimants' relationship with ABK" so that it is enough that a head of loss now claimed falls within the terms of the Order and, if so, it can be assessed and is payable, that contention is also incorrect, in that:

(1) Paragraphs 428, 429 and 433 of the judgment and paragraphs 3(b) and 5(b) of the Order simply record the Claimants' submissions: they do not determine

the validity of those submissions. Sarasin-Alpen recognises that the Order of 28 October 2014 defined what matters should be determined at the Quantum Determination; but, it submits, that Order did not determine the Defendants' pleading objections. It remains open to the Defendants to raise those objections at the hearing of the Quantum Determination.

(2) The concession by Counsel for the Claimants at the hearing on 12 January 2015 (transcript, 12 January 2015, pages 11 and 115) that the pleading objections remain open and to be ruled upon at the Quantum Determination is consistent with that view.

(3) Further, by referring in the Order of 28 October 2014 to "losses arising out of the Claimants' relationship with ABK" the Court was not intending to broaden, or to allow amendment of, the Claimants' pleaded claim; still less ordering that the Claimants could advance further claims (unpleaded, and unknown to both the Defendants and the Court) for new heads of loss somehow related to ABK which were not even made by submission at trial.

25. In further support of their contention that it is not open to the Claimants on their pleaded case to claim as heads of loss (i) ABK interest payments made after 6 June 2009 or (ii) any interest payments or charges to Bank Sarasin or (iii) any interest payments to CBK it is submitted that pleadings are required to mark out the parameters of the case advanced by each party, so that the issues in dispute are clear prior to trial and so that the parties can decide what evidence to place before the Court at trial and what preparations are necessary before trial. It is therefore wrong in principle for the Court to proceed on the basis of an unpleaded case. The Court must insist that permission to amend be sought if the Claimants wish to pursue the unpleaded heads of loss; and then proceed to determine an application for permission to amend if made. If permission to amend is not sought, the Court must dismiss (or assess at zero) the heads of loss claimed on the basis that they are not open to the Claimants on their pleading. In support of that submission the Defendants rely on *Loveridge and Loveridge v Healey* [2004] EWCA Civ 173 at [23] to [25] and [30].

26. In that context it is emphasised that the Claimants have not sought to amend their pleaded case on quantum: the Claimants have chosen to limit their pleaded claims to the losses on the Notes and the ABK interest and charges up to 6 June 2009. It is

submitted that that choice must have been deliberate and for tactical reasons - given that the relevant information was available when the pleadings were settled – and that the most likely explanation is that the Claimants wanted to control the extent of the disclosure they were required to give to the Defendants. However, now that liability has been established in their favour the Claimants are seeking to broaden their claim without the risk that doing so might undermine their case on liability. It is submitted that the Court should not allow the Claimants to manipulate the course of the proceedings to their advantage in this way. The Defendants should have been given the opportunity to challenge all of the relevant evidence at trial for the purposes of undermining the Claimants' case on liability as well as quantum, and the absence of that opportunity is likely to have caused them considerable prejudice.

27. It is said that the Claimants have provided no good reason for their failure to address these issues before trial. In particular:

(1) If and insofar as the Claimants contend they did not have in their possession at trial ABK bank statements for the period post 14 December 2009, due to a dispute with ABK, that contention is not accepted. The Claimants have been asked, but have refused, to provide, documentary evidence of a request to ABK for bank statements prior to trial and a refusal by ABK to provide them. It is said that the correct inference to draw is that the Claimants did have available to them at trial (and now) ABK bank statements for the entire period but have been selective as to which statements they chose to disclose.

(2) In any event, in the circumstances that the Claimants contend they still do not have access to ABK bank statements after 14 December 2009, on their own case nothing has changed. The Claimants could have estimated the post 14 December 2009 interest and charges payable to ABK prior to trial; and it is to be inferred that they made a deliberate decision not to do so.

(3) No reason has been given as to why a claim for loss under head (D) was not advanced at trial. Again, it is said that it is to be inferred that the Claimants made a deliberate decision not to do so.

28. Further, it is submitted, losses in respect of ABK interest and charges post 14 December 2009 (part of head (C)) and CBK interest and charges (head (D) were not only unpleaded; they were not even argued at trial. There is no good reason why

such heads of loss were held back by the Claimants. In circumstances where such heads of loss were not only unpleaded but also unargued and unevidenced at trial, the Claimants should not be permitted to claim them now. The Defendants will suffer particular prejudice if the Claimants are allowed to advance these claims at the Quantum Determination, because they had no opportunity to address them at trial.

29. The Claimants invite this Court to reject the Defendants' complaints that their quantum figures were not pleaded; describing them as "a hopeless point and one which has already been unsuccessfully put forward at trial, again on 28 October 2014 and yet again on 12 January 2015". It is said that the Defendants "have lost on each occasion, the Court should not revisit that point and it is respectfully submitted that it is abusive of the Defendants to continue to invite the Court to do so". It is said that the point is currently before the Court of Appeal. In that context, reference is made to paragraph 166.3 of the skeleton argument filed on behalf of Sarasin-Alpen in support of its appeal and paragraphs 74 and 82 of the skeleton argument filed by Bank Sarasin. Further, it is said that this Court – at paragraph 428 of the judgment of 21 August 2014 - recognised the heads of loss that were the subject of claims; and, following the hearing in January 2015 at which the defendants attempted to strike out the Claimants' further evidence on the basis of the same pleading point, refused to do so (save for the evidence of RAFCO losses, which is not material in this context). They submit that the Court cannot and should not now revisit that decision.

30. In my view, there is force in the Claimants' contention that this Court should reject what may be seen as the Defendants' attempt to re-open pleading points which the Court has already determined against them. I find the Defendants' submission that their pleading points remain to be determined by this Court in the context of the Quantum Determination difficult to reconcile with their apparent reliance on the same pleading points in the context of the pending appeal against the Order of 28 October 2014. But – given the Defendants' submission that their pleading points do remain to be determined in this Court because, it is said, this Court has never ruled on their objections – I think it appropriate to address the question whether the Claimants are precluded from advancing claims to compensation under heads (B), (C) - save for interest charged by ABK in respect of the period up to 6 June 2009 - and (D) on the grounds that these heads of loss were not pleaded.

31. In addressing this question it is important to have the following matters in mind:

(1) The Griffins May 2013 Report had been disclosed to the Defendants before the commencement of the trial on 19 May 2013.

(2) At or shortly after the commencement of the trial, the Court (and the Defendants) appreciated from that report - and from what had been said by Counsel in opening the Claimants' case - that the losses in respect of which the Claimants sought compensation were those recorded at paragraph 428 of my judgment of 21 August 2014 (that is to say losses on the sale of the Claimants' investments with Bank Sarasin, other fees and interest charged by Bank Sarasin and other fees and interest charged by ABK up to 6 June 2009).

(3) As recorded at paragraph 428 of that judgment, the ABK losses were quantified only up to 14 December 2009 for the reason, it was said, that the Claimants did not have statements in respect of their ABK accounts after that date but that the indebtedness to ABK had not been wholly repaid and interest continued to accrue in respect of that indebtedness;

(4) Although this was not a case in which there had been an order for a split trial, the trial in May 2013 proceeded on the understanding, common to all parties and the Court, that the Claimants would not adduce evidence of quantum at that stage; it being anticipated that there was a real possibility that the forensic accountants whom they had respectively instructed would be able, given time, to reach agreement on the figures.

(5) As explained in paragraph 12 of the ruling given on 13 January 2015, paragraphs 3(b)(ii) and 5(b)(ii) of the Order of 28 October 2014 – which provided that the amount of the Defendants' liability to the Claimants should include "losses arising out of the Claimants' relationship with ABK" - went beyond the statement of losses in respect of which compensation was claimed (as set out at paragraph 428 of my judgment of 21 August 2014) because the Court became aware at the hearing to settle the Order (in October 2014) that losses arising from the ABK loans might not be limited to fees and interest charged by ABK up to 6 June 2009 itself.

(6) In that ruling of 13 January 2015 I held that, notwithstanding that the claim could have been raised earlier, justice required that the Claimants should be

permitted to advance a claim to compensation on the basis of losses arising from interest and fees charged by CBK following the re-financing of the ABK loans.

32. I accept, of course, that the purpose of pleadings is to mark out the parameters of the case advanced by each party - so that the issues in dispute are clear prior to trial and the parties can decide what evidence to place before the Court at trial and what preparations are necessary before trial – and that, where the failure of a party to plead his case (or a part of his case) in a manner which enables the other party to obtain and put before the Court the evidence which he needs to meet that case would give rise to injustice, the Court may be expected to take the view that the appropriate response is to strike out that case or (as the case may be) to dismiss that part of the case. But it is important to keep in mind that the purpose of pleadings is to promote justice; not to frustrate it. The relevant question, in the present case, is whether – in the events which happened - the failure of the Claimants to plead their case on quantum in advance of the trial with sufficient particularity to enable the Defendants to obtain and put before the Court at the trial the evidence which they needed to meet that case has given rise to injustice. If it has not, then the Claimants are not to be denied the opportunity to pursue their case on quantum, at the hearing of the Quantum Determination some two years later, on the ground that the case which they now seek to advance differs from that which was pleaded.

33. In my view the answer to the question posed – whether the failure to plead, in advance of the trial, the losses now claimed under head (B), head (C) (in part) and head (D) has led to injustice is "No". Given the common understanding (to which I have referred) that – notwithstanding that there had been no order for a split trial – the Claimants would not adduce evidence of quantum at that stage, there is no substance in the contention that the Defendants have been taken by surprise or have been unfairly deprived of the opportunity, prior to trial, to seek disclosure in relation to such heads of loss and to carry out their own investigations of each head of loss claimed. As I have said, the Defendants knew –from the contents of the Griffins May 2013 Report and the manner in which the Claimants' case had been opened at trial – that losses under head (B) and head (C) (in addition to interest and charges accrued up to June 2009) would be claimed; and, the Claimants were permitted (by the Order of 4 February 2015) to adduce evidence relating to head (D) on terms that the

relevant witnesses were available for cross-examination at the hearing of the Quantum Determination.

34. I reject the submission that the reference in the Order of 28 October 2014 to "losses arising out of the Claimants' relationship with ABK" did not reflect the Court's intention that the Claimants should be permitted to advance losses which might be outside their pleaded claims: given the observations in paragraph 12 of my ruling on 13 January 2015, I find it difficult to understand how that submission can be now be advanced. I reject, also, the submission that the Claimants made a deliberate choice "for tactical reasons" to defer advancing their claims in respect of head (D) losses in order "to control the extent of the disclosure they were required to give to the Defendants" or "to manipulate the course of the proceedings to their advantage". There was no direct evidence to support that submission; and I am not persuaded that the fact that the head (D) losses were advanced after trial justifies the inference that the Claimants were seeking to obtain some tactical advantage. It seems to me at the least equally likely that the Claimants and their advisers had not fully analysed the possible extent of their losses until after the judgment of 21 August 2014.

35. For those reasons I hold that the Claimants are not precluded on procedural grounds from advancing their claims to compensation under heads (B), (C) and (D).

Whether the claims to compensation under heads (B), (C) and (D) should be dismissed on the grounds that the losses claimed fall outside the scope of the duties in respect of which the Defendants have been held to be in breach or are too remote

36. It is convenient to consider, first, the claims against Sarasin-Alpen under Article 94(2) of the Regulatory Law. Article 94 is in these terms:

> "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..."

37. As I have said, earlier in this judgment, Sarasin-Alpen has been held to be in breach of the Financial Services Prohibition imposed by the Regulatory Law; in that it carried on Financial Services in relation to each of the Claimants in breach of Rules made by the DFSA. In particular, Sarasin-Alpen acted in breach of COB 3.2.1 – read with COB 3.2.2(1) - and COB 6.2.1 (1).

38. COB 3.2.1 and COB 3.2.2 – at the time when Sarasin-Alpen accepted Mr Al Khorafi and Mrs Al Hamad as Clients – were 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.
>
> ...
>
> 3.2.2
>
> (1) 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.
>
> ...
>
> (3) Any Person who does not meet the criteria in (1) or (2) is a Retail Customer."

At paragraph 261 of my judgment of 21 August 2014 I held that Sarasin-Alpen failed to carry out any or any sufficient investigation in order to satisfy itself, in respect of any of the Claimants, that the criteria under COB Rule 3.2.2(1) were met; and that, on the facts, none of the Claimants could properly have been accepted as Clients under the DFSA Rules. At paragraph 262 of that judgment I held that each of Mr Al Khorafi, Mrs Al Hamad and Mrs Al Rifai ought to have been treated as Retail Customers; and that, accordingly, Sarasin-Alpen was not permitted under the DFSA Rules to conduct Investment Business on behalf of any of them. In doing so, Sarasin-

Alpen was in breach of the duty (or prohibition) imposed by COB 3.2.1 of the DFSA Rules; and in breach of the Financial Services Prohibition.

39. Prior to 1 October 2007, COB 6.2.1(1) was in these terms (so far as material):

> "6.2.1 (1) Subject to (2), an Authorised Firm may only:
>
> (a) advise a Client who is an individual on Financial Products or Credit;
>
> (b) recommend a Transaction to a Client who is an individual; or
>
> (c) execute a Transaction for any Client on a discretionary basis; where that advice, recommendation or Transaction is suitable for that Client having regard to:
>
> (d) that Client's investment objectives and risk tolerance; and
>
> (e) any other requirements or relevant facts about that Client of which the Authorised Firm is, or ought reasonably be aware."

COB Rule 6.2.1 was amended on 1 October 2007: thereafter (so far as material) paragraph (1)(a) of that Rule was in these terms:

> "6.2.1(1) Subject to (2), an Authorised Firm may only:
>
> (a) give advice of the kind referred to in GEN Rule 2.11.1(1)(a) or (b) to a Client who is an individual."

For the reasons set out in my judgment of 21 August 2014, I held (at paragraph 303) that Sarasin-Alpen failed to comply with its obligations under COB Rule 6.2.1(1). In particular, I held (at paragraph 299 of that judgment) that the suitability requirement was not met either (i) in relation to the purchase of the REIT Notes by Mr Al Khorafi and Mrs Al Hamad in June 2007 or (ii) in relation to the purchase of the July 2007 SaraFloor Notes by Mrs Al Hamad or (iii) in relation to the purchase of the February 2008 SaraFloor Notes by Mrs Al Rifai. If (contrary to my finding) Sarasin-Alpen was permitted under the DFSA Rules to conduct Investment Business on behalf of the Claimants (or any of them) it was, nevertheless, in breach of the Financial Services Prohibition; in that, in doing so, it acted in breach of the suitability requirement imposed by COB 6.2.1(1) of the DFSA Rules.

40. In developing its submission that the claims to compensation under heads (B), (C) and (D) should be dismissed on the grounds that losses under those heads fall outside the scope of the duties in respect of which it has been held in breach or are too remote, it was said on behalf of Sarasin-Alpen that if (as it understands to be the case) the Claimants contend that no scope of duty test applies to a claim under Article 94(2) of the Regulatory Law - so that they are entitled to any consequential losses incurred, irrespective of whether or not the losses fell within the scope of

Sarasin-Alpen's duty, as understood in the light of *South Australia Asset Management v York Montague* [1996] UKHL 10; [1997] AC 191 ("*SAAMCO*") – that contention is incorrect. It is said that Article 94 contains a clear test of causation: that only "loss or damage caused" to the Claimants "as a result of" Sarasin-Alpen's breach of duty is recoverable; and that scope of duty is an aspect of causation (*SAAMCO* at [22],[23]; page 214A-C).

41. Further, it is submitted on behalf of Sarasin-Alpen that, under English law, "the scope of duty principle" applies to cases of breach of statutory duty; and that the question whether a particular type or head of loss is within the scope of a defendant's duty is as relevant to claims under section 138D of the Financial Services Act 2012 ("the FSA 2012") (formerly section 150 of the Financial Services and Markets Act 2000 ("the FSMA 2000")) as it is to claims for breach of contract or negligence. In that context reliance is placed on observations in *SAAMCO* at 211H; *Rubenstein v HSBC Bank Plc* [2012] EWCA Civ 1184 ("*Rubenstein*") at [114]; *Al-Sulaiman v Credit Suisse* [2013] EWHC 400 (Comm) ("*Al Sulaiman*"), at [212]; *Camerata Property Inc v Credit Suisse Securities (Europe)* [2012] EWHC 7 (Comm) ("*Camerata Property*") at [100]-[103]. It is said that, under the principles to be derived from the reasoning in *SAAMCO*, losses caused by a defendant's breach of duty in the "but for" sense may, nevertheless, be irrecoverable on the basis that they fall outside the scope of that duty; and that, notwithstanding there has been a breach of duty without which no transaction would have taken place, it does not follow that the defendant is liable for all the losses suffered by the claimant as a consequence of entering into that transaction. Reliance is placed on observations in *Zaki & ors v Credit Suisse (UK) Ltd* [2013] EWCA Civ 14 ("*Zaki*"), at [107]. It is submitted that the position under Article 94(2) of the Regulatory Law is the same.

42. In the context of advisory duties, such as COB 6.2.1(1), it is said on behalf of Sarasin-Alpen that losses will fall outside the scope of the duty where, *inter alia*, they were not a foreseeable result of a breach of it. In support of that proposition the Court was referred to observations in *SAAMCO*, at p.214E-F, and in *Camerata Property*, at [101] to [103]). Applying that test to the facts in the present case, it is said the losses in respect of which claims are made under heads (B), (C) and (D) were caused by a series of unforeseeable events; and so fall outside the scope of the duty imposed by COB 6.2.1(1). In particular:

(1) The unforeseeable effects of the global financial crisis render the losses claimed outside the scope of the duty owed.

(2) The ABK interest and charges after the date of the liquidation of the Notes (October 2008) were outside the scope of the duty as it was not reasonably foreseeable at the time of entry into the contract that the Claimants would maintain the ABK borrowing after the Notes were sold and therefore keep on incurring interest and charges.

(3) The CBK interest and charges were outside the scope of the duty as it was not reasonably foreseeable at the time of entry into the contract that the Claimants would maintain the ABK borrowing after the Notes were sold and then replace it with CBK borrowing (or any other borrowing) and therefore continue to incur interest and charges.

43. Accordingly, it is said – seeking to draw by analogy on the decision in *Al-Sulaiman* - the Claimants' decision not to repay their outstanding debts after the Notes were sold in October 2008 – alternatively, as soon as possible thereafter - was wholly unforeseeable given the strength of the Claimants' finances at all material times. In that context, it is said that:

(1) The Claimants had access to securities and other readily realisable assets with a total value far in excess of their outstanding indebtedness to Bank Sarasin and ABK; and that they could have provided the required funds by realising the value of some of those securities and assets.

(2) Their failure to do so was wholly unforeseeable; given that the result was substantially to increase the losses made as a result of the investment in the Notes.

(3) Their conduct became all the more surprising and unforeseeable the longer interest and charges continued to accrue on their outstanding debts.

(4) It was entirely unexpected not only that the Claimants would fail to pay off the ABK loans promptly, but that they would refinance those loans by taking out the CBK Loan almost two years after the Notes were sold, and would (allegedly) incur significant additional costs in raising the money which they did inject into their accounts with Bank Sarasin and ABK.

It is pointed out that the Claimants are now claiming ongoing losses incurred (or said to be incurred) over six years after the Notes were sold. It is said that such losses are outside the scope of Sarasin-Alpen's duty to advise on the suitability of the Notes: liability for breach of such a duty cannot extend to events so far in the future which were plainly not foreseeable at the time of breach.

44. In those circumstances it is submitted that all of the losses claimed in the Quantum Determination – or, at the least ABK interest after October 2008 and any CBK interest and any financing costs - fall outside the scope of Sarasin-Alpen's duty under COB 6.2.1(1) to advise on the suitability of the Notes.

45. Further, it is submitted that, if the losses fall outside the scope of the duty in COB 6.2.1(1), then they must also fall outside the scope of the duty in COB 3.2.2(1); which, it is said, relates to an earlier stage in the parties' commercial relationship before any advice had been given in relation to specific investments. It is said that, if the losses were not foreseeable under COB 6.2.1(1), it would be illogical if they were nevertheless recoverable pursuant to COB 3.2.2(1).

46. In what may be seen as a submission which puts the same point – that is to say, the "scope of duty" point – under a different legal label, it was said on behalf of Sarasin-Alpen that, if (as it understands to be the case) the Claimants contend that no remoteness test applies to a claim for compensation under Article 94(2) of the Regulatory Law - so that they are entitled to any consequential losses incurred, no matter how unforeseeable such losses may have been – that contention is also incorrect. The submission that Article 94 contains a clear test of causation – and that only "loss or damage caused" to the Claimants "as a result of" Sarasin-Alpen's breach is recoverable – is repeated. It is said that remoteness is simply a test of legal causation: if losses are unforeseeable they are in law not caused by the breach of duty. It follows that a test of remoteness must apply. That proposition is supported by English case-law in the context of section 150 of the FSMA 2000. Reliance is placed on observations in *Camerata Property at [100] to [103] and in Rubenstein at [116] to [125])*.

47. It is submitted that the test of remoteness is whether each head of loss claimed was reasonably foreseeable at the time of entry into the contract (June 2007 and July 2007 in the case of Mr Al Khorafi and Mrs Al Hamad, and January 2008 in the case of Mrs Al Rifai) as not unlikely to result from the breach (*Heron II* [1969] 1 AC 350 at

385); in the alternative, the test is "for what losses may the defendant be said to have assumed responsibility" (*The Achilleas* [2009] 1 AC 61, per Lord Hoffmann at [21]-[25]). It is said that a classic example of losses that are too remote is where unforeseeable market volatility causes losses which otherwise would not have been suffered: *The Achilleas*, at [60] per Lord Rodger of Earlsferry.

48. Applying that test to the facts in the present case, the claims are in respect of losses which are said to be too remote to be recoverable for the same reasons as are advanced on behalf of Sarasin-Alpen in relation to the scope of duty. It is said that scope of duty and remoteness cover very similar ground. It was wholly unforeseeable and outside Sarasin-Alpen's reasonable contemplation that the Claimants would continue to incur losses for over 6 years after the Notes were purchased, and Sarasin-Alpen did not assume responsibility for such extensive losses accruing so long after breach.

49. In support of the contention that the claims under heads (B), (C) and (D) fail for lack of causation, the Court was taken to a passage in *Jackson and Powell on Professional Liability* (7th edition, at paragraph 15-079) for the proposition that the burden is upon the Claimants to prove that Sarasin-Alpen's breach of duty was the cause of the losses claimed:

> "...[this] is confirmed by several other cases in the investment context. In *Australia & New Zealand Banking Group Ltd v Cattan* the claimant was held to have committed "at best technical" breaches of IMRO requirements as to completion of certain formalities before the defendant could be classified as a non-private customer and as such allowed to make certain trades. Nevertheless it was held that such breaches had not caused any loss. Even if he had not been able to enter the relevant trades before the required formalities had been completed, upon their completion he would still have entered the same trades. There was no evidence to indicate that there would have been any difference in price in the defendant's favour in that instance. The effect of there being no loss was fatal to the statutory right of action relied upon, loss being an ingredient of that right of action. Similarly, in *Ata v American Express Bank Ltd* the claimant failed to establish that the defendant bank's breach of fiduciary duty caused him any loss. The judge found as a matter of fact that, even if the bank had traded the claimant's open positions, further losses were as likely as any profits. The Court of Appeal rejected the contention that, in assessing what the claimant's financial position would have been but for the defendant's default, every presumption should be made against the defendant. It overruled a previous first instance decision to the effect that, in assessing damages against a stockbroker who had prematurely sold an investor's shares in breach of contract, the measure of damages was the highest price at which the shares could have been later sold by the investor. Further, the 'chain of causation' from the defendant's relevant failure may be broken by the act or omission of the claimant or some third person. This happened in *Gorham v British*

Telecommunications Plc...where the deceased's failure to act on helpline advice indicative of the superiority of the BT occupational scheme precluded his dependants recovering a element of loss consisting of lump sum death benefit. See also *Zaki v Credit Suisse (UK) Ltd [2011] EWHC 2422 (Comm)*: no reliance on advice given in breach of COBS 9.2 and hence loss not caused by breach."

It was submitted that:

(1) The Claimants' failure to repay the Sarasin loans when the Notes were sold by Bank Sarasin in October 2008 (or alternatively thereafter) was an independent and unreasonable decision of the Claimants which broke the chain of causation; and that, accordingly, the Claimants cannot claim losses under head (B) which accrued after October 2008.

(2) The Claimants' failure to repay the ABK loans and facilities when the Notes were sold by Bank Sarasin in October 2008 (or alternatively thereafter) was an independent and unreasonable decision of the Claimants which broke the chain of causation; and that, accordingly, the Claimants cannot claim losses under head (C) which accrued after October 2008; and/or

(3) The alleged ABK losses claimed by Mr Al Khorafi and Mrs Al Hamad to date would not have arisen but for other loans totalling US$39.1 million which they had taken from Bank Sarasin to fund expenditure which was wholly unconnected to the investment in the Notes; being required in order to fund the Claimants' personal expenditure. If that US$39.1 million loan had not been taken out - and/or if funds received on liquidation of the Notes had not been used to repay it - there would have been a surplus position after the liquidation of the Notes, which could have been transferred to the Claimants and used to partially pay down their ABK loans in October 2008 upon the close out of the Notes; thereby substantially reducing the ABK principal loan balances at 11 October 2008 and the interest thereon. The principal loan balances of Mr Al Khorafi and Mrs Al Hamad on their ABK accounts would then have been cleared, as at 14 December 2009, upon a US$21,660,000 incoming guarantee payment from Bank Sarasin into Mr Al Khorafi's ABK account; which would have resulted in a surplus of US$2,846,566.82 on his account. The ABK interest which accrued on the accounts of Mr Al Khorafi and Mrs Al Hamad on their ABK accounts after October 2008 had little, if any, causal relationship to the Defendants' mis-selling of the Notes.

(4) The decision to take out the CBK loan in 2010 (or, in the alternative, the decision not to repay the CBK loan thereafter) was an independent and unreasonable decision by the Claimants which broke the chain of causation.

(5) It would not have been necessary to take out the CBK loan, had it not been for the need to repay the US$39,100,000 personal loan. The indebtedness of Mr Al Khorafi and Mrs Al Rifai to ABK would have been effectively paid off on 14 December 2009 if they had not taken the US$39,100,000 personal loan; and so there would be no need for their indebtedness to ABK to be refinanced by a loan from CBK to refinance on 29 September 2010.

50. The Claimants' response to those submissions was that this Court has already determined the "scope of duty" (or *SAAMCO*) point in their favour. It is said that, if the Court had thought that the decision in *SAAMCO* had the effect for which the Defendants contend (and had ignored the observations in *Rubenstein*), the Claimants could not have recovered compensation for the losses under head (A) which they did under the Order of 28 October 2014. This, it is said is recognised by Sarasin-Alpen; in that, at paragraph 28.1 of its skeleton argument dated 25 February 2015, it is said that:

> "This and other causation points (in particular as to the true cause of the margin calls being made and remaining unpaid) were taken at the October 2014 hearing in respect of the losses on the Notes themselves. It is recognised by [Sarasin-Alpen) that the Court will not take a different view on the same points in connection with the present inquiry. [Sarasin-Alpen] makes the same points again in order to preserve its position on appeal."

But, in any event, it is submitted that this Court cannot and should not revisit this point.

51. There is obvious force in the Claimants' contention that this Court should not revisit points which have already been decided in my judgment of 21 August 2014: *a fortiori*, in circumstances where, following further argument at the hearing in October 2014, the Court has reflected its decision on those points in the Order which it made on 28 October 2014. It is necessary, therefore, to have in mind those passages of my judgment of 21 August 2014 in which issues of causation were addressed.

52. At paragraphs 310 to 315 of my judgment of 21 August 2014 I addressed Sarasin-Alpen's submission that, if (contrary to its contentions) the Claimants were able to establish the other conditions leading to an order for compensation under Article

94(2) of the Regulatory Law, their claims to compensation must fail on the grounds that the loss or damage in respect of which compensation was claimed was not caused as a result of conduct falling within Article 94(1): that is to say, the breaches of the Financial Services Prohibition which it was found to have committed. In particular, it was said (i) that it was to be inferred that, even if the Claimants had been differently informed or advised by Sarasin-Alpen, they would still have bought the same Notes on the same terms, whether or not the transactions were arranged through Sarasin-Alpen; and would have suffered the same losses; and (ii) that, in any event, the Claimants' failure to pay the margin calls on their account was so unreasonable and irrational as to break the chain of causation. In rejecting those submissions, I said this:

> "313. First, I have held that the Claimants' investment objectives were to obtain 100% capital protection – so that they could be sure of being in a position to pay off the borrowing by means of which the investments were funded – and to obtain an income stream out of which the interest payments on that borrowing could be serviced. For reasons which I have explained those twin objectives could not be met by the Notes, or by any comparable structured financial product which treated the coupon payments as made on account of the return of 100% of the capital invested. Unless the Claimants were ready and willing to change their investment objectives, the Notes were not suitable investments for borrowed money. There was no evidence to support the proposition that, if they had understood that, they would have invested in the Notes or in a comparable structured financial product.
>
> 314. Second, there was no evidence to support the proposition that Mr Al Khorafi (*a fortiori*, Mrs Al Hamad or Mrs Al Rifai) were in a position to meet the margin calls, when made, within the time set by Bank Sarasin. It is pertinent to keep in mind (i) that the margin calls were made against Mrs Al Hamad and Mrs Al Rifai (there was no margin call against Mr Al Khorafi) and (ii) that the Notes (including the REIT Notes held by Mr Al Khorafi) were closed out on 8 October 2008 on 24 hours notice (the time for payment of the margin calls specified in Bank Sarasin's letter of 29 September 2008 having been truncated by the subsequent letter of 7 October 2008). There was no material to support the proposition that Mrs Al Hamad or Mrs Al Rifai could have found the monies needed to meet the margin calls made against them (US$5,077,977 and US$3,423,353 respectively) within the 24 hours that they were given to do so.
>
> 315. I am satisfied that the loss or damage in respect of which compensation is claimed was caused as a result of Sarasin-Alpen's failure to comply with its obligations under COB Rules 3.2.2.(1) and 6.2.1(1). I accept the submission made on behalf of the Claimants that, but for Sarasin-Alpen's breaches of those regulatory obligations, the Claimants would not have made the investments in the Notes that they did; and I am not persuaded that the causal link between the breaches of the regulatory obligations and the loss suffered by the Claimants on failing to meet the margin calls was broken by the Claimants' own conduct. In reaching that conclusion, I have in mind that the possibility that the Claimants would be unable to meet margin calls was a factor which leads to the conclusion that the Notes were an unsuitable investment for them: it was a risk against which they needed to be protected."

I accept the Claimants' submission that it is not open to the Defendants to re-open those issues in this Court in the context of the Quantum Determination. Further, of course, I have in mind the terms of the Order of 28 October 2014, which provides for the payment of compensation by Sarasin-Alpen (i) of a specified amount in respect of losses on investments (head (A) losses) and (ii) in amounts to be assessed in respect of interest and fees charged by Bank Sarasin (head (B)) and in respect of interest and fees charged by ABK (head (C) losses).

53. Nevertheless, in relation to the assessment of losses under heads (B) and (C) – and in relation to both liability for and assessment of interest and fees charged by CBK (head (D) losses) - there are issues as to scope of duty/causation which do need to be addressed in this judgment. Those issues may be summarised as follows: to what extent are the losses in respect of which compensation is claimed under Article 94(2) of the Regulatory Law irrecoverable on the grounds (i) that they fall outside the scope of Sarasin-Alpen's duty, as understood in the light of *SAAMCO*, and/or (ii) that they are too remote, and/or (iii) that the "chain of causation" linking those losses to the conduct within Article 94(1) on which (in the light of the findings against Sarasin-Alpen) the Claimants are entitled to rely has been broken by "an independent and unreasonable decision of the Claimants".

54. As I have said, in developing its submission that the claims to compensation under heads (B), (C) and (D) should be dismissed on the grounds that losses under those heads fall outside the scope of the duties in respect of which it has been held in breach or are too remote, Sarasin-Alpen relies on observations of Lord Hoffman in *SAAMCO* ([1996] UKHL 10, at [14], [15]), of Lord Justice Rix in *Rubenstein* ([2012] EWCA Civ 1184 at [114]), of Mr Justice Flaux in *Camerata Property* ([2012] EWHC 7 (Comm) (at [100]-[103]), and of Mr Justice Cooke in *Al-Sulaiman* ([2013] EWHC 400 (Comm) (at [212]). ;

55. In *SAAMCO* the issue before the House of Lords was the extent to which loss arising from a fall in the property market could be recovered from a negligent valuer. Lord Hoffman, in a judgment with which the other members of the House of Lords agreed, said this:

> "[14] A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has

suffered. Both of these requirements are illustrated by *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605. The auditors' failure to use reasonable care in auditing the company's statutory accounts was a breach of their duty of care. But they were not liable to an outside take-over bidder because the duty was not owed to him. Nor were they liable to shareholders who had bought more shares in reliance on the accounts because, although they were owed a duty of care, it was in their capacity as members of the company and not in the capacity (which they shared with everyone else) of potential buyers of its shares. Accordingly, the duty which they were owed was not in respect of loss which they might suffer by buying its shares. As Lord Bridge of Harwich said, at p. 627:

> 'It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.'

In the present case, there is no dispute that the duty was owed to the lenders. The real question in this case is the kind of loss in respect of which the duty was owed.

[15] How is the scope of the duty determined? In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute: *Gorris v. Scott* (1874) L.R. 9 Ex. 125. In the case of tort, it will similarly depend upon the purpose of the rule imposing the duty. Most of the judgments in the *Caparo* case are occupied in examining the Companies Act 1985 to ascertain the purpose of the auditor's duty to take care that the statutory accounts comply with the Act. In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies."

56. In *Rubenstein* the plaintiff sought damages against the defendant bank on the basis of an allegation of negligent advice in respect of the recommendation of a safe haven for the proceeds of sale of his home, pending the purchase of another property. His claim was brought for breach of statutory duty (under the FMSA 2000) and in contract and tort. At paragraph [44] of his judgment (with which the other members of the Court of Appeal agreed) Lord Justice Rix referred to section 150(1) of the FSMA 2000. He went on, at paragraph [45] to say this:

> "[45] It is said that a section 150 claim is subject to identical principles relating to causation, foreseeability and/or remoteness of damage as may apply in contract or tort, and the judge generally made no distinction between any of Mr Rubenstein's three causes of action for these purposes, or for the purposes of his finding of negligence. However, whereas the underlying principles may be the same, they may operate in different ways, seeing that the purpose of a statutory rule may be more focussed than the general law of tort or contract is likely to be. Lord Hoffmann referred to this possibility in *SAAMCO*...[citing the passage at [15] set out in the preceding paragraph of this judgment]"

At paragraph [114] Lord Justice Rix said this (so far as material):

> "[114] ... As Lord Hoffmann pointed out in *SAAMCO* in the passage cited above at [45], in a case of statutory duty the question as to scope of duty is to be answered by reference to the statute itself, and in such a context the

position in negligence and contract will fall in behind the statutorily discerned purpose..."

57. In neither of the other two cases on which Sarasin-Alpen rely in this context - *Camerata Property* and *Al-Sulaiman* – did the court find it necessary, in reaching its decision, to consider the "scope of duty" point. Such observations on the point as there are in the judgments of Mr Justice Flaux and Mr Justice Cooke, respectively, in those cases, are *obiter*, and add nothing to the observations of Lord Hoffmann in *SAAMCO* and those of Lord Justice Rix in *Rubenstein*.

58. Of more assistance – although also *obiter* – are the observations of Lord Justice Rix in *Zaki* ([2013] EWCA Civ 14, at [103] to [107]. In order to put those observations in context, it is necessary to set out the findings of the trial judge (Mr Justice Teare). For convenience, I take those from the headnote to the report at [2013] 1 BCLC 640, at 641:

> "Z [Mohamed Magdy Zeid], a wealthy businessman, bought seven yield-enhanced notes from the defendant bank [Credit Suisse (UK) Ltd], which was the United Kingdom branch of the Credit Suisse banking group. The notes were linked to stock market indices or individual stocks and Z used loans provided by the Swiss branch of Credit Suisse to leverage the purchases. The loans were arranged by a relationship manager who was Z's contact at the bank with responsibility for his account, although he was in fact an employee of another Credit Suisse company. When Z failed to meet a margin call by the bank it liquidated his position resulting in a loss of $US69.4m. Z brought proceedings against the bank claiming that it was responsible for the loss because it had acted in breach of its statutory duty under the Conduct of Business Rules (COB), issued by the Financial Services Authority pursuant to the Financial Services and Markets Act 2000, to ensure that its advice was suitable for him, in breach of the suitability requirement in COB rule 5.3.5, which obliged the bank to take reasonable steps to ensure that its investment advice was suitable for a client, and its duty to comply with the restrictions on lending in COB rule 7.9.3, which provided that the bank could not 'lend money or grant credit to a private customer (or arrange for any other person to do so)'in the course of, or in connection with, its investment business unless it assessed the client's financial standing, based on information disclosed by him, and took reasonable care to ensure that 'the arrangements for the loan or credit and the amount concerned' were suitable for the type of transaction proposed and obtained his prior written consent to the essential details of the loan. Z claimed that he had purchased the notes on the relationship manager's personal recommendation given to him as a private customer of the bank. Z died in 2010 and his wife [Soheir Ahmed Zaki] and two daughters, who were joint account holders with him on his investment account, took over the action. The judge dismissed the claim on the grounds that the restrictions on lending in COB rule 7.9.3 only applied to the overarching contractual arrangements and not to individual draw-downs for the leveraging of the purchase of each note, that it was very likely that Z understood the essential characteristics of the notes and the risk attached to them and the circumstances in which a margin call could be made, that the bank, acting through the relationship manager, had made personal recommendations to Z to buy the notes and owed a duty under COB 5 to

> take reasonable steps to ensure that its advice or recommendations were suitable for him, but, in the light of Z's knowledge and experience, his financial situation, his investment objectives and the fact that he had his own views on the markets and what was an appropriate investment and made his investment decisions accordingly, the claimants had not discharged the burden of showing that the recommendations or advice were not suitable or that Z relied on the advice and recommendations or that he would not have purchased the notes if no recommendations had been made."

The Claimants appealed to the Court of Appeal, contending (i) that the bank had failed to keep a proper record of Z's financial standing, (ii) that it had failed to take reasonable steps to ensure that the loans drawn down for the individual purchase of notes were in each case 'suitable', and (iii) that it had not taken reasonable steps at the time of each transaction to ensure that the amount of leverage was suitable and was not excessive, based on the information which ought to have been available to it if a proper assessment of Z"s financial standing had been carried out. The Court of Appeal (Sir Terence Etherton, Chancellor, Lord Justice Rix and Lord Justice Patten) dismissed the appeal; holding (in so far as the point was open to appeal on the facts) that the judge was entitled to find that the leverage on the notes was not unsuitable. But, in the concluding sections of his judgment under the heading "Further considerations of causation, scope of duty and contributory negligence", Lord Justice Rix said this:

> "[103] However, even if there had been some breach of either sub-rule (1) or sub-rule (2) of COB 7.9.3, or if there might in theory have had to be a remission to the trial court to investigate the question of such breach further, additional matters are relied upon by the bank as making any success for the appellants beyond their reach. The bank submits that the judge has made conclusive findings against Mr Zeid on causation. The bank also submits that any liability in damages would either lie outside the scope of the statutory duties concerned or be limited, for instance to the extent that the lending exceeded suitable leverage. Finally, the bank relies on contributory negligence. I regard this passage of my judgment as being obiter.
>
> [104] As for causation, this could in theory constitute an entirely separate ground for dismissing this appeal. Although the judge did not think it was necessary to make any finding as to causation with respect to notes 1–7, Mr Beltrami [counsel for the bank] submits that it must follow from the finding that Mr Zeid was the cause of his own losses on notes 8–10 that the same must be true with respect to notes 1–7.
>
> [105] Mr Anderson [counsel for the claimants] does not I think submit otherwise as a matter of inferential fact, but he has a legal submission that the position is different for the purposes of a breach under COB 7.9.3 from that which obtains upon breach of COB 5.3.5, which is what the judge was dealing with. For these purposes Mr Anderson relies on the wording of COB 7.9.3 which is expressed in prohibitory terms, rather than positive mandatory terms. Thus COB 7.9.3 states that a firm 'must not lend ... unless', and there then follow the cumulative sub-rules (1), (2) and (3), whereas COB 5.3.5 states that a firm 'must take reasonable steps to ensure' that any personal recommendation is suitable. On that basis Mr Anderson submits that it

follows that, because any lending (or the arranging of lending) is prohibited unless the subrules are complied with, any breach of those subrules renders the firm liable for the full consequences of the lending. The question of causation is not what would have happened if the bank had not made an unsuitable recommendation, but what would have happened if the bank had simply refused to mediate the lending by CSAG, because it was not able lawfully to do so. If the lending simply was not there, how could Mr Zeid have suffered the losses he went on to incur? Mr Anderson points to the events of early 2008 when there was a shortfall of about $3m on Mr Zeid's account. During this period Mr Zaki purchased two notes (on 1 February and 18 March 2008) without leverage (see the judge's judgment at [47]). These notes are not among the ten notes made the subject matter of this litigation.

[106] I agree with Mr Anderson's submission to this extent: that if Mr Zeid would not have been able to purchase notes 1–7 without the assistance of funding from CSAG, then he could not have suffered the losses he incurred. The judge did not have to consider this possibility, because he did not consider that COB 7.9.3 was engaged. He only had to ask himself whether Mr Zeid would have bought the notes even if Mr Zaki had advised against them. If therefore, contrary to my holdings above, the bank *had been* in breach of COB 7.9.3, I do not consider that it would be safe to extrapolate from the judge's findings on causation in relation to notes 8–10 and COB 5.3.5 to what the position might have been in relation to notes 1–7 and COB 7.9.3 and the lending arrangements. Much might depend in such circumstances on what the nature of the hypothetical breach of COB 7.9.3 might be. But if the only problem was that the leverage afforded was too great, so that it might have to be assumed that leverage of, say, greater than 70% or 75% could not properly be afforded, there might have to be only a further limited inquiry: such as whether that would have impeded Mr Zeid's bullishness to any extent at all in the circumstances described at [33], above, especially where Mr Zeid had between $9m and $11m of his own money on deposit, which he could have applied to make up any lending shortfall. It is unlikely that such an inquiry would produce anything like the loss figure put forward on this appeal of $46·1m.

[107] In any event, it seems to me that Mr Anderson's submissions at this stage of the argument tended to confuse an issue about scope of duty with the question of causation. It may be open to argue that because the scope of the statutory duty is to be derived from the statutory purpose, and because there is an indication that the statutory purpose is to prevent lending in breach of the COB 7.9.3 subrules, therefore a firm in breach of COB 7.9.3 should be responsible for all the consequences of lending in such circumstances. However, the jurisprudence regarding scope of duty led by *South Australia Asset Management Corp v York Montague Ltd* [1996] 3 All ER 365, [1997] AC 191, *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305, [1997] 1 WLR 1627 and *Aneco Reinsurance Underwriting Ltd (in liq) v Johnson & Higgins Ltd* [2001] UKHL 51, [2001] 2 All ER (Comm) 929 (see also *Haugesund Kommune v Depfa ACS Bank (Wikborg Rein & Co, Pt 20 defendant)* [2011] EWCA Civ 33, [2012] 1 All ER (Comm) 65) rather demonstrates to the contrary: that, even where there has been a breach without which no transaction would have taken place at all, it does not follow that the defendant in breach is liable for all the losses suffered by the claimant in consequence of entering into the transaction[3] [[3] Although, it might do so: see *Rubenstein*'s case [2012] EWCA Civ 1184; [2012] 2 CLC 747, a case concerned with COB]. In the present case I am doubtful that an investor would be entitled to be compensated in full for an otherwise suitable investment just because there has been some breach, of whatever kind, of COB 7.9.3. Suppose the sole breach was one of process under sub-rule (1), or was one of the requirements for express

> acceptance of clear terms under sub-rule (3): I do not imagine that there would be full compensation for an otherwise suitable investment which had in the event gone wrong. Suppose similarly that the only fault under COB 7.9.3 was that the lending arrangements came with unsuitably high leverage: I do not think that there would be compensation for losses in full, as distinct from losses to the extent of the unsuitable leverage. Thus, if leverage at, say, 70% would have been suitable, it would only be the losses on leverage in excess of such a figure which would be recoverable."

59. As I have said, Sarasin-Alpen submits that, under the principles to be derived from the reasoning in *SAAMCO*, losses caused by a defendant's breach of duty in the "but for" sense may, nevertheless, be irrecoverable on the basis that they fall outside the scope of that duty; and that, notwithstanding that there has been a breach of duty without which no transaction would have taken place, it does not follow that the defendant is liable for all the losses suffered by the claimant as a consequence of entering into that transaction. In support of that submission, reliance is placed on the observations of Lord Justice Rix in *Zaki* which I have just set out. I accept those submissions as far as they go – that is to say, I accept that losses caused by a defendant's breach of duty in the "but for" sense may be irrecoverable on the basis that they fall outside the scope of that duty and I accept that, notwithstanding that there has been a breach of duty without which no transaction would have taken place, it does not necessarily follow that the defendant is liable for all the losses suffered by the claimant as a consequence of entering into that transaction. But, as the Court of Appeal of England and Wales recognised in *Zaki*, there may be circumstances where, taking account of the purpose of the statutory prohibition in respect of which the defendant has been found to be in breach and of the nature of the breach, the correct conclusion – on the facts of the particular case - is that the defendant is, indeed, liable for all the losses suffered by the claimant as a consequence of entering into that transaction.

60. As Lord Justice Rix indicated (by the reference in footnote 3 to paragraph [107] of his judgment in *Zaki*) *Rubenstein* was a case in which, on the facts, the defendant was liable for all the losses suffered by the claimant as a consequence of entering into the transaction. I have referred, briefly, to the facts of *Rubenstein* earlier in this judgment. I take a more complete summary (so far as material) from [2012] All ER (D) 75 (Sep):

> "In August/September 2005, the claimant investor wanted to find a safe place for the proceeds of the sale of his home pending the purchase of another property. The defendant bank introduced the claimant to its financial adviser (the adviser). The claimant told the adviser that he could not afford to risk his capital at all and that the prospective time scale was unlikely to be longer than a year. The adviser recommended investment in a company's (the

> company) fund, and persuaded the claimant that the investment recommended was the same as an instant access deposit account and that the only risk was the ultimate risk of default, which was no risk at all. The adviser omitted to explain that the essential risk of the investment was that it was an investment in the market and subject to market fluctuations. After the recommendation of the investment, the claimant entered a contract document with the bank providing, inter alia, for its fees. The claimant's funds had remained invested three years later. In September 2008, the claimant decided to withdraw his investment. Late on the following Monday, the day of Lehman Brothers' failure, the company told the claimant that withdrawals from the fund had been temporarily suspended. The claimant suffered a capital loss of £179,530.17...The claimant commenced proceedings against the bank for breach of statutory duty under the Financial Services Authority's Conduct of Business Rules (the COB rules), and in contract and tort. The judge found that the bank was negligent in the advice which it gave, in breach of various statutory duties and in breach of contract, and that the claimant had relied on the bank's advice (see [2011] EWHC 2304 (QB)). However, the judge further found that the loss suffered by the claimant was not caused by the bank's negligence or breach of duties: it was, rather, caused by unprecedented market turmoil, and was unforeseeable and too remote..."

The Claimant appealed on the basis that the judge was wrong to hold that no loss flowed from the established breaches. The bank cross-appealed on the basis that the judge had been wrong to rule that the adviser had failed to recommend the most suitable investment. It further contended that it had no duty which extended beyond the claimant's own projection that he would be unlikely to need the investment for more than a year. The issues before the Court of Appeal of England and Wales included (so far as material) whether the scope of the bank's duty was set by the claimant's time scale of up to one year and whether the claimant's loss was too remote. In allowing the appeal Lord Justice Rix, after observing at paragraph [114], in the passage already set out earlier in this judgment, that "in a case of statutory duty the question as to scope of duty is to be answered by reference to the statute itself", went on to say this:

> "[115] In the present case, therefore, it seems reasonably clear that the statutory purpose of the COB regime pursuant to FSMA is to afford a measure of carefully balanced consumer protection to the 'private person'. That purpose is elucidated not only by the content of the COB rules themselves, but also by section 2 of FSMA, which speaks of 'the protection of consumers', i.e. 'securing the appropriate degree of protection for consumers' (section 2(2)(c) and section 5(1)) as among the regulatory objectives. The rules to be created by the regulatory authority are to be informed by a proper regard for 'the differing degrees of risk involved in different kinds of investment...the need that consumers may have for advice and accurate information...the general principle that consumers should take responsibility for their decisions' (see section 5(2)). In the present case it is not suggested on this appeal (although it was at trial) that Mr Rubenstein is seeking to avoid responsibility for his decisions. These basic principles and purposes are reflected in the imposition under the COB rules of onerous

duties (albeit in a well conducted operation these should not be difficult to achieve and they are couched for the most part in terms of 'reasonable care') designed to ensure that the investment adviser understands his client and his client understands risk. Of course, much investment business is conducted with investors who are familiar, even expert, in investment markets. But in the present context of Mr Rubenstein and HSBC we are dealing with a consumer on the one side and an expert on the other. Unfortunately, the judge's findings establish that Mr Marsden [the adviser] understood neither the client he was advising, nor the product he was recommending. He did not even understand that he was advising, as distinct from merely executing his client's instructions. He failed therefore to undertake the standard statutory procedures designed to assist the parties to a satisfactory transaction. He misled his client, by omission and commission, into thinking that he had invested in something which was the same as cash. This is not, to my mind, a promising context in which to find that a loss suffered as a result of following a recommendation to enter into an unsuitable investment, when that loss came about because of the very factor which made the investment unsuitable (namely its inherent susceptibility to risk from market movements) was too remote to be recovered from the defaulting advising bank. For reasons discussed above, this is wholly unlike the case of the mountaineer's knee.

[116] Three arguments are raised by HSBC as to why nevertheless the judge was right to conclude that the loss was too remote.

[117] The first is that, as found by the judge, the loss was ultimately caused by the 'extraordinary and unprecedented financial turmoil which surrounded the collapse of Lehman Brothers' (at para 117). To the extent that the judge was saying that this was unforeseeable (see his para 116), what was unforeseeable about it? Was it the insolvency of Lehman Brothers? Was it the run on AIG's PAB funds which accompanied that insolvency (fear of the default risk)? Or was it the collapse of market values of the securities in which the EVRF, but not, it must be remembered, the SVRF, was invested (the market risk)? The insolvency of Lehman Brothers may have been unforeseeable, but Mr Rubenstein was not invested in Lehman Brothers. (If he had been, because his adviser had recommended him to be so invested, but unsuitably so, would the unforeseeability of Lehman Brothers' collapse have saved the negligent adviser? It is unnecessary to consider that case, which may well depend on the particular features of the breach of duty.) The extent of the run on AIG may have been unforeseeable, but it was not the run which ultimately caused Mr Rubenstein's loss: it has to be restated that the SVRF survived any apprehension about AIG's solvency. In any event, a run on AIG Life was both foreseeable and foreseen, for its brochure discussed the need, in such circumstances of high demand for withdrawals, for a three months' moratorium. Ultimately, however, it was the collapse in the value of the market securities in which the EVRF (but not the SVRF) was invested which in my judgment, on the findings of the judge as I would analyse them and on my understanding of the situation, caused the loss. If it were otherwise, the SVRF investors would have been caused a similar loss, but they were not. But such a loss was both foreseeable and foreseen, because AIG Life's brochure referred, albeit rather obliquely, to the 'costs' which might accompany 'selling assets prior to their intended maturity date' (see at [30] above). Those losses or 'costs' may have been unforeseeably high, but that is the nature of markets at a time of stress, and in any event that merely represents an unforeseeable extent of loss of a kind or type which is foreseeable (see *Brown v. KMR Services*). And in truth, although the Lehman Brothers collapse was both a symptom and a contributory cause of market turmoil, the underlying causes of that turmoil went infinitely beyond Lehman Brothers' difficulties. It stretched to a failure of confidence in marketable

securities in which there had previously been greater confidence. And what is new about that?

[118] It seems to me that in the relevant passages of his judgment, the judge was implicitly selecting, for the purpose of giving effect to the law on remoteness, one out of a number of possible causal factors as the essential cause of Mr Rubenstein's loss. This, as Lord Hoffmann remarked in *The Achilleas*, is ultimately an exercise in legal assessment: this court will pay regard and respect to the judge's choice, but it is not a factual finding such as should deter an appeal court from acting upon its own understanding and analysis of the primary findings of the trial court. In my judgment, the judge was ultimately selecting as the cause of loss an 'unthinkable' run on AIG (see his [115]). However, to my mind this was not the right selection. Against the background of the facts found and of the origin of the transaction, and the scope of HSBC's duties, what connected the erroneous advice and the loss was the combination of putting Mr Rubenstein into a fund which was subject to market losses while at the same time misleading him by telling him that his investment was the same as a cash deposit, when it was not. Therefore, the correct selection of the cause of Mr Rubenstein's loss was the loss in value of the assets in which the EVRF (but not the SVRF) was invested. Therefore, unlike the case of the mountaineer's knee, advice and the loss were not disconnected by an unforeseeable event beyond the scope of the bank's duty. It was the bank's duty to protect Mr Rubenstein from exposure to market forces when he made clear that he wanted an investment which was without any risk (and when the bank told him that his investment was the same as a cash deposit). It is wrong in such a context to say that when the risk from exposure to market forces arises, the bank is free of responsibility because the incidence of market loss was unexpected.

[119] The second matter to which [counsel for the bank] has drawn attention has been the judge's finding (among others) that at the time of investment in September 2005, the EVRF would have been regarded as without risk. So it might, but then nearly all the greatest losses come out of a cloudless sky. In some circumstances, which were not those which obtained between Mr Rubenstein and the bank, that might have closed the door on any recovery by the investor. However, as discussed above when I was setting out the judge's findings, that did not prevent HSBC from being in breach of its statutory duties in recommending an investment in the EVRF, when a proper understanding of Mr Rubenstein's desires and needs would have led to a recommendation of either the SVRF or a combination of bank deposit accounts. If that was not already obvious when Mr Rubenstein made it clear that he could afford no risk to his capital, it would have become still more obvious had Mr Marsden performed his statutory duties pursuant to COB. In either event, that is to say, whether Mr Rubenstein had invested in the SVRF or in a number of bank deposit accounts, he would have suffered no loss: not merely because he would not have followed the wrong advice (and thus avoided the EVRF), but because it was the bank's duty to take care to guide him to the right advice which reflected a suitable response to his needs.

[120] It is the third matter on which [counsel for the bank] has relied (in fact his primary submission) which has all along given me greatest reason to consider that the judge might ultimately have come to the right answer, albeit on a somewhat different analysis. That is [counsel's] *leitmotiv* concerning the short-term nature of Mr Rubenstein' investment. The submission is that a loss two years outside of the period about which Mr Rubenstein spoke is simply beyond the scope of the bank's duties of care and foresight. That is a powerful submission. On balance, however, I have not been persuaded by it

[121] Thus, in one sense the time for investment was undefined and uncertain: it was until the Rubensteins had bought a new home. That was thought to be likely to occur within a year, but the possibility obviously existed that that timescale would be exceeded. The achievement did not lie within their hands, as the example of their failed attempt to purchase in 2007 demonstrated. Moreover, Mr Marsden had himself told Mr Rubenstein that no further advice would be needed, since 'once the account is open it is effectively an instant access account'; also that 'We view this investment as the same as cash deposited in one of our accounts'. With instant access to a cash deposit account, why should Mr Rubenstein be concerned about changing financial weather, and why should HSBC be free of responsibility once a year was up? Moreover, it follows from the fact that Mr Rubenstein was misled as to the nature of his investment, that he did not understand that he was exposed to a risk that he did not want. That risk, of market movement in the value of an investment of a type Mr Rubenstein did not even realise he was committed to, was exactly the risk which caused his loss. Finally, the whole purpose of COB was to protect the consumer from a failure to understand risk. If Mr Marsden had done his duty, for instance by warning Mr Rubenstein that, because his investment was *not* like cash, its safety depended on the financial weather, then Mr Rubenstein would have either been on the *qui vive* for more advice, which he had been told he would not need, or, as was still more likely, he would have queried the investment, and that would have led to reformulated advice, or he would not have proceeded with the recommended investment.

[122] The question remains: if the scope of the bank's duty is not set by Mr Rubenstein's own timescale of up to one year, then what is it set by? Three years, ten years, twenty years? It is a good question, with some reminiscence of a similar question posed by Lord Hoffmann with respect to the length of the follow-on fixture in *The Achilleas*. Nevertheless, I consider that the question is answered by the factors mentioned above: and in any event, a period of three years is, in terms of a 'cash' deposit, not significantly different from an indefinite period of about a year.

[123] Ultimately, the question of remoteness (at any rate in a contractual setting, which Lord Reid in *The Heron II* suggested was the more restricted one, because a claimant could stipulate contractually for his own protection) is a matter of the reasonable contemplation of the parties. In the context of statutory protection for the consumer, it seems to me that a bank must reasonably contemplate that, if it misleads its client as to the nature of its recommended investment, and thereby puts its client into an investment which is unsuitable for him, when it could just as easily have recommended something more suitable which would have avoided the loss in question, then it may well be liable for that loss. Lord Reid contemplated, but he was thinking in the context of merchants, that a claimant could stipulate for his own protection. However, what may be true of merchants is not likely to be true of consumers. In effect the obligation of explaining matters properly to its clients is put by statute on the advising expert. In such circumstances, if HSBC is to be protected by some relevant, albeit indefinite, time limit for its advice, then perhaps the obligation of making that limitation clear rests on the recommending expert, not on the misled consumer.

[124] Where the obligation of a defendant is not merely to avoid injuring his claimant but to protect him from the very kind of misfortune which has come about, it is not helpful to make fine distinctions between foreseeable events which are unusual, most unusual, or of negligible account (*cf* Lord Reid in *The Heron II*). Whether the test of remoteness is expressed in the classic terms found in the leading authorities, or has to reflect that sense of balance (an exercise in judgment) to which Lord Hoffmann referred in *SAAMCO* at 212E (see [101] above), or has to take account of the manner in

> which the scope of duty may extend responsibility for even unusual events (see *Supershield*, cited at [108]-[109] above), in my judgment it should not be said that the loss which Mr Rubenstein has suffered by reason of HSBC's breach is to be regarded as too remote.
>
> [125] For all these reasons, I consider that the judge came to the wrong conclusion on questions of remoteness, and I would allow the appeal on this issue."

61. It is not suggested that the position under Article 94(2) of the Regulatory Law differs from the position under the comparable customer protection provisions in FMSA 2000; or that the approach of this Court to scope of duty and remoteness in the context of breach of the Financial Services Prohibition should differ from the approach of the Courts of England and Wales in the cases to which I have referred. In my judgment of 21 August 2014 I accepted (at paragraph 318) that – if the Claimants were properly to be treated as Clients by Sarasin-Alpen and the advice and recommendations were, in fact, suitable having regard to their investment objectives – then it would not be right to make an order under Article 94(2) for the payment of compensation in respect of the losses which they suffered as a result of their investment in the Notes. But COB 3.2.1 - read with COB 3.2.2(1) - as it seems to me is intended to protect the inexperienced investor from his or her own lack of understanding of the risks associated with sophisticated structured financial products; and the suitability requirement in COB 6.2.1(1) is intended to ensure that he or she is not sold products which are not suitable having regard to his or her investment objectives. For the reasons which I gave in that judgment, I have held that Sarasin-Alpen intended that the Claimants should be denied the protection which those rules were intended to provide. In those circumstances I am not persuaded that the losses in respect of which compensation is claimed under Article 94(2) of the Regulatory Law are irrecoverable on the grounds that they fall outside the scope of Sarasin-Alpen's duty, as understood in the light of *SAAMCO*, or that they are too remote.

62. Nor am I satisfied that the "chain of causation" linking those losses to the conduct within Article 94(1) on which (in the light of the findings against Sarasin-Alpen) the Claimants are entitled to rely has been broken by "an independent and unreasonable decision of the claimants". In my judgment of 21 August 2014 (at paragraph 314) I found that there was no evidence to support the proposition that the claimants were in a position to meet the margin calls, when made, within the time set by Bank Sarasin; and (at paragraph 315) I held that the causal link between the breaches of

the regulatory obligations and the loss suffered by the Claimants on failing to meet the margin calls was not broken by the Claimants' own conduct. Notwithstanding the further cross-examination of Mr Al Khorafi at the hearing of the Quantum Determination, I find that there is still no evidence that the Claimants (or any of them) were in a position to repay the Sarasin loans before, or after, close-out in October 2008. Nor was there evidence that the Claimants (or any of them) were in a position to repay the ABK loans and facilities in full following close-out and the transfer of the proceeds of the Notes in October 2008 or thereafter (save by further borrowing from CBK). I reject the submission that the decision to take out the CBK loan in 2010 was unreasonable in the circumstances that ABK was pressing for payment and had obtained an order for sale from the Kuwaiti Court over land which stood as security for its lending. There was no evidence that the Claimants (or any of them) were in a position to repay the CBK loan thereafter.

63. Nonetheless, I accept that part of the ABK losses claimed by Mr Al Khorafi and Mrs Al Hamad in respect of the period after October 2008 would not have arisen but for the need to repay loans totalling US$39.1 million previously made to them to fund personal expenditure. I accept Sarasin-Alpen's contention that, had that US$39.1 million loan not been taken out (or had funds received on liquidation of the Notes not been used to repay it), there would have been a surplus after the liquidation of the Notes, which could have been transferred to the Claimants and used to partially pay down their ABK loans in October 2008; thereby substantially reducing the ABK principal loan balances at 11 October 2008 and the interest which thereafter accrued thereon. And I accept that to the extent that (but for the US$39.1 million loans to fund personal expenditure) the ABK loans would have been repaid in October 2008, interest charges and fees accrued on those loans and facilities after that date would have been reduced; and that it would not have been necessary to take out the CBK loan (or, at the least, not necessary to take out the whole of that loan) in order to refinance the indebtedness of Mr Al Khorafi and Mrs Al Rifai to ABK on 29 September 2010. Accordingly, it cannot be said that the whole of the head (C) losses accruing after October 2008 – or the whole of the head (D) losses - were the result of the breaches of duty under Article 94(1) that have been found against Sarasin-Alpen.

64. I turn, then, to the claims against Bank Sarasin under Article 65(2) of the Regulatory Law. The Article is in these terms:

"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) ...

(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."

65. Bank Sarasin submitted, correctly, that Article 65(2)(a) provides that the relevant party may apply to the Court to recover any money paid or property transferred under the agreement(s) that were made in breach of the Financial Services Prohibition. It describes that as "the primary right". It submits that "additionally" Article 65(2)(b) provides for recovery of "any loss sustained by the relevant party as a direct result of...any money or property transferred by him"; and that "on the plain meaning of the words the loss must be a direct result of the transfer of the money, not as a result of the impugned agreement under which the money was paid". In developing that submission, it was said that:

(1) It could easily have been provided in the legislation that compensation was payable in respect of any loss sustained by the relevant party as a direct result of entry into the agreement made in the course of carrying on a Financial Service in breach of the Financial Services Prohibition. It was not so provided. The clear legislative intention must have been that relief granted under Article 65 is restitutionary in nature. Reliance was placed on the observations of Lord Justice Scott in *SIB v Pantell SA (No 2)* [1993] Ch 256, at 269-270, in the context of section 5 of the Financial Services Act 1986 ("the FSA 1986"; then in force in England and Wales and on which the Regulatory Law was based). Lord Justice Scott said this:

> "The Act not only imposes criminal sanctions for contraventions of its various provisions but also provides remedies for investors who enter into share transactions as a result of the contraventions. The remedies provided by the Act fall into three categories. There are provisions enabling investors to recover loss they have suffered as a result of entering into the share transactions. There are provisions enabling the contravener to be stripped of the profit made out of the transactions and for the profit to be distributed among the investors. And there are provisions of a restitutionary character designed to restore the respective parties to the share transactions to their former positions.
>
> The present case is concerned with the restitutionary provisions contained in the Act. But it is necessary to refer also to the provisions dealing with the recoupment of losses and the disgorging of profits in order to enable the restitutionary provisions to be construed in the context of the Act as a whole.
>
> Section 5 of the Act provides remedies for individual investors who have entered into investment agreements with persons carrying on unauthorised investment businesses. Subsection (1) provides that any such agreement
>
> '...shall be unenforceable against the other party [i.e. the investor]; and that party shall be entitled to recover any money or other property paid or transferred by him under the agreement, together with compensation for any loss sustained by him as a result of having parted with it.'
>
> The subsection combines, therefore, a restitutionary remedy and a compensatory remedy..."

It is said that, although Lord Justice Scott was not concerned with the nature of compensation payable, he was clearly of the view that the compensatory element of the remedy fell within a restitutionary provision.

(2) Mr Justice David Richards, when considering section 26 of the FSMA 2000 (the successor to section 5 of the FSA 1986) in *Re Whitely Insurance Consultants* [2008] EWHC 1782 ("*Whitely*") , said this (*ibid,* [27]):

> "All policyholders from the Earlier Period who claim a return of the premiums paid by them are also entitled to claim compensation under section 26(2)(b) for any loss sustained by them as a result of parting with the premiums. As Scott LJ observed in *SIB v Pantell* (No 2) [1993] Ch 256 at 270 on section 5 of the Financial Services Act 1986, it combines a restitutionary remedy and a compensatory remedy. Compensation for the interest which could have been earned on the premiums would certainly be within section 26(2)(b), but it may be that if a party could establish that he had paid the premium out of borrowed money he could recover the actual costs of borrowing incurred by him. The precise scope of the remedy provided by section 26(2)(b) raises difficult issues. Would it for example extend to profits which would have been earned on an alternative use of the money which the claimant can establish he would have pursued, or do the words 'as a result of having parted with it' confine the remedy to more direct losses such as interest or, in the case of other property such as shares transferred by the investor under an agreement, dividends and other benefits which the investor would have received on the shares if he had retained them?"

(3) In section 5(1) of the FSA 1986 and in section 26(2)(b) of the FSMA 2000 the legislature had provided for compensation for loss sustained "as a result" of having parted money or property transferred under the relevant agreement. Article 65(2)(b) of the Regulatory Law addresses the question posed by Mr Justice David Richards by the use of the phrase "as a direct result". In *Whitely*, Mr Justice David Richards questioned whether a party who could establish that he had paid for the investment out of borrowed money could recover the actual costs of borrowing incurred by him: the inclusion of the word "direct" in Article 65(2)(b) of the Regulatory Law shows that it was intended to exclude claims for the costs of borrowing the sum invested.

(4) Decisions in the courts of England and Wales on the distinction between direct and consequential damages are of no assistance in giving meaning to the word "direct" in the Regulatory Law because DIFC law does not recognise such a distinction, instead adopting a broad test of foreseeability of harm (for example, Article 113 of the DIFC Contract Law). Rather, the interpretation of Article 65(2)(b) must be approached from first principles. In that context, it is submitted that:

(i) The loss in respect of which compensation is granted is "any loss sustained by the relevant party as a direct result of ...any money or property transferred by him". Compensation under Article 65(2)(b) is ancillary to the primary remedy under Article 65(2)(a) - recovery of money paid by the relevant party - not a free-standing right.

(ii) The loss must be the direct result of paying the money.

(iii) The loss is not the direct loss caused by entering into the transaction but something more limited: it is limited to the immediate effect of paying the money.

(iv) The relevant party must prove the direct loss.

(v) This is a limited statutory right to restitution of the principal sum and losses directly consequent on the payment of the principal sum that arises on proof that the relevant agreement was made in breach of the Financial Services Prohibition. It is in addition to all other rights. It is not a right to damages. The relevant party may recover its consequential losses in a claim for damages.