IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE
FINANCIAL MARKETS TRIBUNAL
Case: FMT 19007

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B E T W E E N:

Al Masah Capital Limited
Al Masah Capital Management Limited
Shailesh Kumar Dash
Nrupaditya Singhdeo
Don Lim Jung Chiat

Applicants

- and -

The Dubai Financial Services Authority

Respondent

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- before -

His Honour Mr David Mackie CBE QC (President)
Mr Ali Malek, QC
Mr Patrick Storey

Day 8
Thursday, 28 May 2020

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Mr Richard Hill, QC, and Mr Gregory Denton-Cox (of 4 Stone Buildings), Mr DK Singh, Ms Bushra Ahmed and Ms Tina Asgarian (of KBH Kaanuun) appeared on behalf of the Applicants

Ms Sarah Clarke, QC, (of Serjeants' Inn) and Mr Adam Temple (of 4 Pump Court) appeared on behalf of the Respondent

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P R O C E E D I N G S

(1.00 pm)

PRESIDENT: Good morning, everybody. Welcome back. It's time for the closings.

Mr Hill, thank you. I haven't acknowledged the schedule, which your team have kindly sent in. We thank you for that now.

Only one opening point for us to make, which is that it's going to be difficult to have a conventional dialogue between the three of us and the two of you in a conventional way. We will be asking questions or it may be that you both leave us speechless, but if we're asking questions, can you keep an eye open for the green mic sign, because any one of us will want to ask questions and it's quite difficult to interrupt your flow.

So if you could keep half an eye, or your junior can, on our mute buttons, when one of the three of us unmutes, it may be just an error, but it may also be because we want to ask a question.

I think you suggested to us that Ms Clarke, you would begin?

MS CLARKE: Yes, sir. In fact, it's going to be Mr Temple first, because he's going to deal with the collective investment fund issues and the matters that arise in

13:00 relation to that.

Closing submissions by MR TEMPLE

MR TEMPLE: Thank you. In fact, I'm intending to deal with three topic areas. The first is the overarching question of attribution and the case of Al Khorafi v Bank Sarasin. Secondly, I'm going to look at funds and a number of connected issues. And then thirdly, I'm briefly going to touch on the DFSA's alternative case, if you find that these are not collective investment funds.

Starting with the --

PRESIDENT: Can I just be clear about one thing. I don't know whether it's for you or Ms Clarke to respond, which is that to someone coming fresh to this, one might think that the mischief or the alleged mischief, which the authority is seeking to address, is the alleged concealment of substantial placement fees in the course of obtaining investments.

If that's correct, and perhaps it isn't, I'm not quite clear why it is that the focus and the starting point for the authority is on what we could call the structure issue. Is there a particular reason for that?

MS CLARKE: Only in the sense that obviously I opened the case in exactly the way that you've described. And in terms of closing the case, there are certain other

13:02 issues that weren't touched upon in the opening, in the interests of time, but do also arise and of course are relevant because they cut across many of the other allegations.

The issue of whether these are funds or not is, of course, primarily relevant to a good number of the allegations which also involve misleading statements.

PRESIDENT: It's the starting point in your written submissions, both before we started and quite sensibly also now. But, all right, thank you for that. So back to Mr Temple.

MR TEMPLE: Sir, the other issue with that question and the funds is that in order to reach a penalty, there needs to be a contravention. The first question is: what is the contravention in relation to? We have said that it's a variety of things in connection with them being funds. But we have our alternative case, which is that even if these aren't funds, they are still the sale of shares.

So we would say that even if you find against us on the funds issue, there are still contraventions and there is still a relevant jurisdictional basis for them. So I was going to touch on that a bit later, but really I think funds go first in the sense that they are the jurisdictional basis for a lot of the contraventions.

13:03 As I say, I was going to look at the Al Khorafi v Bank Sarasin case first. Unless the tribunal wants me to, I wasn't intending to ask for it to be pulled up onto the screen. It may be that you find it more convenient to look at a PDF, in any event, in particular if you want to scroll through some passages I'm not specifically taking you to. On that basis, if you would like to pull it up, it's in bundle B, case 17. The case being a decision of the DIFC Court of Appeal.

It is of relevance to this case because of the question of attribution. We've noted my learned friend's written closing suggesting that it's a case to be determined on its own facts. But, of course, it is a decision of the DIFC Court of Appeal, so binding upon this tribunal and in terms of those facts, that Mr Hill wants to confine it to, there are a few I'd like to draw your attention to.

The case involved claimants who purchased structured investment products and they were essentially claiming those products were being mis-sold to them. The first defendant is Sarasin-Alpen, a DFSA authorised firm, I think incorporated in the DIFC, and that was a joint venture in which the second defendant, Bank Sarasin, was a 60 per cent owner. So we have Bank Sarasin being a Swiss bank, not authorised by the DFSA, and

13:05 Sarasin-Alpen, a DIFC firm, which was authorised.

The case focused on the conduct of two individuals, Mr Blonde and Mr Walia. You can see that in paragraph 20 of the decision that they were both employees of Sarasin-Alpen, the DIFC firm.

The question that arose was whether Bank Sarasin -- or one of the questions that arose, that is relevant for us today, is whether Bank Sarasin was acting through Mr Blonde and Mr Walia. So it was a breach of the financial services prohibition, that gave rise to a claim to set aside the contract or at least the compensation on the basis there had been a breach of the financial services prohibition.

The case on that issue starts, or the discussion of it really starts, from paragraph 267 on page 66. You can see there, the heading is "'In or from' Dubai". I think it means in or from the DIFC. It rehearses what the judge at First Instance had decided, which was that:

"... whatever may have been the intentions behind the setting up of the joint venture through Sarasin-Alpen, in practice Bank Sarasin dealt with the Respondents through Mr Blonde as its own Client Relationship Manager. It was immaterial that Mr Blonde had been employed by Sarasin-Alpen; his role, vis à vis Bank Sarasin, was indistinguishable from what it would

13:06 have been if he had been employed by Bank Sarasin. It followed that in dealing with the Respondents, Bank Sarasin was carrying on activities which constituted a Financial Service in or from the DIFC and in doing so, it was in breach of the Financial Service Prohibition."

Given that the Applicants say that this is a case that turns on its own facts, you can see those facts at paragraph 270 setting out a number of factors. You can see in paragraph 270, on page 67, that these are actually set out as matters that the respondents, Mr Hill's clients, relied upon. But it is evident from later paragraphs, in particular 281 and 319, that these are the facts the judge relied upon in concluding that Bank Sarasin, the Swiss firm, was conducting a financial service in or from the DIFC.

There's a lot in here. I'm not intending to go through them. There are 16 subparagraphs, but just to highlight a few of them that maybe can be read in a bit more detail in due course by the tribunal, there's subparagraph (1) noting that Bank Sarasin account opening forms were sent to the claimants from the DIFC by an employee of Sarasin-Alpen in the DIFC. And we will, of course, note that because that has a close parallel in this case where the documents, including the subscription forms, were sent out by Al Masah DIFC, but

13:08 we say the subscription forms are clearly the subscription forms of the investment companies, but going via Al Masah Cayman.

So it is Al Masah Cayman that ended up signing these forms and that picks up subparagraph (13) of this Al Khorafi case, which also notes that the application forms in that case were processed in the DIFC.

Another subparagraph I'd pick up is subparagraph (6) here, which really summarises the fact that all the steps in this case involved communications between Bank Sarasin and the claimants, via Mr Walia and Mr Blonde, another Sarasin-Alpen personnel, all of whom were based in and operated from the DIFC.

The overall picture that one gets is that everything in this case was done by DIFC personnel, but that was no bar to the court concluding that those actions should be attributed to the Swiss bank, Bank Sarasin.

I'd also just pick up paragraph 271, which has a number of other factors that the respondents in that case relied upon, noting that account statements were sent out by the DIFC firm, the money laundering checks were carried out in the DIFC. And at subparagraph (5) of that, the queries about the investments were dealt with by Mr Blonde and Mr Walia in the DIFC.

Again, the same factual pattern there, that a lot

13:09 of, I think pretty much everything in the case was conducted by two individuals employed by a DIFC firm, but perhaps -- this is in line with what Mr Hill says -- they were the instruments of the Swiss firm.

I think it's fair to say that a lot of the arguments pursued in our case were also pursued by counsel for Bank Sarasin. For your note, you can read those arguments of counsel from paragraph 289, in particular paragraph 294 echoes some of the arguments in this case.

But perhaps it's most easily summarised by looking at page 80, paragraph 323, which sets out a number of factors relied upon by counsel for Bank Sarasin, saying whether taken individually or in the aggregate, they didn't require the judge to find that Bank Sarasin had not carried out an investment activity in or from the DIFC.

These are not all directly applicable to our case, but there are issues such as item 1, the separate incorporation of the DIFC entity. Item 3, the fact that Bank Sarasin was not authorised in the DIFC, whereas item 4, Sarasin-Alpen was authorised in the DIFC. Item 5, Sarasin-Alpen was not authorised to act as an agent for Bank Sarasin and another item 5 that Sarasin had a separate client relationship with the respondents.

Those are all arguments that were pursued by counsel

13:11 for Bank Sarasin to say, well, it's not right that we were conducting a financial service in or from the DIFC and they were not found to be good reasons for finding in their favour.

On the contrary, the conclusion at paragraphs 331 and 332, that, in substance, it was found that the employees of Sarasin-Alpen were implicitly authorised to conduct on its behalf its relationship with the respondents.

We quote that in our written closing. I won't read the whole thing out. It does have the line that I think Mr Hill relies upon, from the Court of Appeal, saying that they stress that:

"... the decision was reached on the particular facts of the case and for this reason may have little effect on financial services business resulting in deals made outside the DIFC pursuant to introductions made by firms carrying on business in the DIFC ..."

Importantly, the next words:

"... where care has been taken to ensure that the activities of the introducing firm are not attributable to the firm outside the DIFC."

That's the warning that Mr Hill would like heed to be paid to.

I went through that in some detail, because we

13:13 suggest there are some key echoes between the Al Khorafi v Bank Sarasin case and the case before the tribunal now.

Firstly, we have the fact that, on any analysis, it was Al Masah Cayman which was the entity that contracted to provide services to the investment companies and indeed entered into the subscription forms with the investors. Al Masah DIFC didn't have any such direct contractual link and yet it was their employees or at least people based in their office, who were the instruments through which Al Masah Cayman was able to conduct its business.

In fact, a question of employment is, if anything, less clear cut in the case before the tribunal than it was in Al Khorafi. In that case, there was no doubt that Mr Blonde and Mr Walia were employed by the DIFC entity, whereas here our understanding is that each employee was in fact employed under a contract with Al Masah Cayman, was in some sense seconded or placed within the DIFC office, but that the salary of each employee was accounted for, I think to 90 per cent, possibly 75 per cent, to the Cayman entity.

In fact, the employees, the instruments were being accounted for, largely accounted for in the accounts of the Cayman entity. We say all of those are overarching

13:14 issues that goes to attribution. We'll look at some more specific points in due course for the specific contraventions.

But also noting that warning in the case that firms can take care to ensure that activities are properly attributable to a DIFC entity, we would say there is no such separation or care taken in this case. It would have been one thing if the DIFC entity had entered into the contracts with the investment companies and if the DIFC entity had taken on all these clients as their own clients and reported them to the DFSA, then that would be one thing. But that isn't the case in this situation. There is no care taken of the type that the Court of Appeal was referring to.

Those were my submissions on the Al Khorafi v Bank Sarasin case. I was now going to move on to funds and in particular five sub-issues within this question.

First of all is the definition in the Collective Investment Law, Article 11. Secondly, whether Al Masah Cayman were carrying out the financial services of managing the fund. Thirdly, returning to the question of attribution in this specific context. Fourth, looking at the exception in CIR, the Collective Investment Rules, 2.1.10. And finally, whether Al Masah Cayman were offering units in the funds.

13:16 The first two issues are Article 11, definition of a fund, and the question of whether Al Masah Cayman was carrying out the financial service of managing a fund.

These are, in my submission, two separate questions. You can have a fund without finding that Al Masah Cayman was the Fund Manager of it. You probably can't have Al Masah as a Fund Manager without Article 11. Article 11 is the first question and that is the definition of a Collective Investment Fund.

I wonder whether it would be helpful to get everybody looking at the same text to get that definition on the screen. It's document G007, being the Collective Investment Law, and when we get to that, it's page 7 of that document, Article 11.

This is the statutory definition of a Collective Investment Fund. Very similar to section 235 of FSMA in England, the big distinction being those final two words on the screen, reference to a Fund Manager, capital "F" and "M". The other distinction being that this is referred to as the "Collective Investment Fund" whereas the English law refers to a "Collective Investment Scheme".

The grounds of appeal focus on just subsection (c) there, but I'm going to briefly look at the earlier Sub-articles. First of all is to notice that

13:18 Sub-article (1)(a) refers to:

"The purpose or effect of the arrangements is to enable persons taking part ... [to] receive profits or income ..."

Purpose or effect is, in part, the reason why the English courts have consistently held that one doesn't take a legalistic view of the arrangements limited to the contract or things that are there in writing. One has to look at the common understanding of investors.

Second issue to notice about Sub-article (a) is that it refers to:

"... the arrangements ... [being] to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property ..."

And also in the parentheses, noting that you don't have to become an owner of the property. This draws attention to the question: what is the property? Certainly since the Decision Notice, the DFSA has been consistent in what the property is. It's the shares in unlisted companies that were to be acquired by the investment company -- sorry, by the holding company and the real property acquired.

In short, these are the assets, the underlying, in the case of ANEL, educational assets that were being

13:20 purchased. The idea was you have a whole structure in which the investor puts their money into an investment company, which gets fed down to a holding company and is used to purchase the property.

That's clearly right, because that's where the investors were anticipating that the profits or income would arise from, as you can see in Sub-article (1)(a). The Applicants' opening asked whether this was the shares in a holding company or shares in the investment company. The focus of where the income or profit was going to come from was neither of those, it was from these underlying assets.

MR MALEK: Mr Temple, could we just sort of look at 11(1), just to make sure that we understand what the case is. I mean, you focused on property, but we've also got to look at arrangements as well. But just focusing on property for one moment. It's common ground, I think, that the property is not the investors' shares in the holding company, so we can ignore that.

Is the property that we're concerned with, then, the shares that the holding company owes in the operating companies, or for some purpose, do you look at the property in terms of the assets and business of the operational companies?

In other words, is the distinction between having

13:21 the property being shares, in other words, the shares that the holding company owes in the operational companies and then the business and assets of the operational company, which is not necessarily the same property, because, as I understand it, there can be other parties who have interests in the operational companies.

Is my question clear?

MR TEMPLE: Yes, I think so. That's the way it's put in paragraph 37 of the Decision Notice, the property includes the shares in unlisted companies and real property. That's a reference not to the shares of the operational company. It's the shares that were purchased by the operational company in the nurseries, et cetera.

I think you can see from the accounts that it is all done through subsidiaries and subsidiaries of subsidiaries. The operating company itself wasn't operating the school. It was owning other companies that did so.

So the primary focus of where the money was going to come in is via the dividends paid by the nursery, et cetera, into the operational company, that then gets paid up to the holding company, that then gets paid out as dividends. That is where investors expected to

13:23 receive profits or income.

I don't know if Mr Hill --

MR HILL: I'm sorry to intervene. The way my learned friend just put it is exactly as we understand the DFSA's case. So it's the shares and possibly assets held by the operational companies that count as the property.

Just a few minutes ago, my learned friend was referring to "holding companies" and I think when he said "holding companies", he meant operational companies. So his distinction is between investment companies on the top and operational companies underneath. Holding companies we use, as I say, was investment companies, they are not the same as operational companies.

MR TEMPLE: Yes, thank you. I misspoke in that case. I do recognise that "holding companies" is being used as an alternative word for investment company, but I must have got my terms muddled up. So thank you for that.

Yes, investment company at the top, owns 100 per cent of the shares in an operational company. Operational company owns a bunch of other shares and some real property as well.

MR MALEK: It's that that we're looking at in your case for the description, when it refers to "property", of any description, including money, in Article 11(1) and where

13:24 we see "property" referred to, I think, in other places. That's the property that you are looking at. Is that right?

MR TEMPLE: Yes, that's right. It's done via the mechanism of the 100 per cent shareholding in the operational company. So one might say that to an extent, the holding of that property, which is one of the activities in Article 11(1)(a), is part of the means by which investors will get their profits or income. But the primary focus of where the actual money making is coming from, comes from the bottom of that diagram.

MR MALEK: In terms of the other concept in Article 11, when it talks about "any arrangements", I understand "arrangement" is broader than "contract" and encompasses other matters. But, on your case, who are the parties to the arrangement referred to here?

MR TEMPLE: I mean, the parties to the specific contract are clearly the investment company and the investor, but it doesn't require you to look, in a sense, at both ends of that. It's looking at those who are participating in the arrangements. And for this context, a participant is an investor. So they participate in the structure, they participate in the arrangements by getting their shares in the investment company.

We say that the arrangements are the diagrams that

13:26 we refer to. Investors are not merely purchasing shares in the top company without any understanding as to where the money is coming in. They're not directly investing in the holding company all the shares at the bottom of the tree. Sorry, did I say "holding company" again. I meant operational company.

The arrangements they're participating in is the entire structure.

MR MALEK: Are they also, on your case, the unit holders?

MR TEMPLE: Yes. So a share in the investment company on our case is the unit. We'll come to this briefly at the end, but the way that the law works is that an investment can either be a Capital "S", share, or a unit. And share with a capital "S" is defined as a share in a company unless it's a unit.

So we would say that is precisely what's happening here. The share is the unit.

MR MALEK: In terms of looking at the case law, I mean, repeated reference has been made to the Supreme Court case, for obvious reasons, but you have identified I think two differences. On behalf of the Fund Manager, that's one. And the second one I think you've identified is that the Cayman or the Dubai definition is a "Collective Investment Fund", rather than "scheme".

Are those the only two differences? Are there any

13:28 other differences in terms of the legislation or approach where one might say caution needs to be exercised in looking at and relying upon English decisions? Is there anything else that we should be aware of?

MR TEMPLE: Yes, obviously there are some tiny tweaks, the numbering is different and it refers to unit holders in (b) there, which is in the English law, but the main structural difference isn't to be found in a sense here in the definition, but it's in the exceptions.

So, in England, a corporate vehicle, unless it's an open-ended investment company, is not to be found to be a collective investment scheme. That's carved out by, I think, a statutory instrument. So, in England, there's no question of a company being a fund unless you can construe it's an open-ended investment company.

MR MALEK: But is the scheme similar, which is to catch a lot of -- well, let's use the words "structures" or "schemes", the equivalent to Article 11, but then to let them out by use of an exception, would you say that that is the same concept that applies in this legislation as we have seen in the UK legislation?

MR TEMPLE: Yes, it is. We'll look at the particular exception they rely upon, CIR 2.1.10, which is addressing the question of bodies corporate, but in

13:29 a different way to the English approach.

It is, we would say, taking the same approach of a fairly broad definition here and then carving out things which are felt not to be appropriate to be classed as a fund.

MR MALEK: Just one other question, then I will stop. Can you explain why this definition that we have been looking at emerged effectively so late in the history, so to speak?

Because the point that I think comes up -- and I have no view on this, but the point that comes up is that it's rather odd that the allegations in relation to this emerged so late and on a different basis. And you might say, well, that doesn't matter. But it does seem to me, certainly, that with so many professionals involved in this, first of all, why it wasn't picked up earlier, why wasn't it more the subject of the investigation, why was it that the definition was in terms of what the Collective Investment Fund was -- why did it change?

Then the final question that arises, I think, is how can somebody be said to be knowingly concerned when there appears to be a lot of complexity in terms of what arrangements amount to a Collective Investment Fund?

It seems to me that those are questions that need to

13:31 be looked at. I see the argument that that deals with penalty and blameworthiness, but it does -- certainly on my part, is a question that I find difficult, which is what is it that came out resulting in this analysis which you're now giving us? Why didn't it come out much, much earlier?

MR TEMPLE: In terms of the suggestion that it wasn't put in interviews, et cetera, I would have to take specific instructions, but I suspect the answer is that there was fact finding going on. And the question of the analysis under this definition was something applied after the facts had been determined or at least the DFSA had investigated them.

I'm not sure in terms of saying it's late in the day. I mean, it was there as the enforcement team's case from the reports and I think the report that gets quoted by my learned friends is an investigation report of, I think, October 2018. But the analysis was taking place before -- you know, in discussions with the DMC, as it were. That's all there in the papers. I'm told that March 2017 was the first investigation report also using this analysis.

My learned friends can complain or point out that the DMC didn't actually agree with all the analysis in the first instance. But that was a question of applying

13:33 this test. This definition itself didn't change in any relevant period. The law, as a whole, came in, in 2010, so it's been around. It wasn't the focus of the interviews. I think I'd accept that. But after that it was the focus of the analysis.

Finally on the question of knowing concern, that's really something, I think, Ms Clarke is going to focus on with kind of parking that as an overall issue.

I mean, the short answer is that there are a whole bunch of English cases, which have explicitly said that all you need to know is the underlying facts and the Capital Alternatives, the case that gets quoted a few times, they argued there they didn't understand this was a collective investment scheme and that was found to be an irrelevant question for the purpose of knowing concern.

But I will leave Ms Clarke to deal with that.

MR MALEK: Thank you very much.

MR TEMPLE: Going back to the definition on the screen, I don't think there's any issue on Sub-article (1)(b) that there was no day-to-day control over the management of the property by investors.

As I said, the focus of the grounds of appeal are firmly and squarely in (c). I'm sure the tribunal has the point already, but these are alternative criteria.

13:34 You can either have pooling or you could have management as a whole or we would say you could have both. As long as one of, at least one of those criteria are met and the earlier ones, you have a fund, subject to the exceptions.

So on pooling, this is (c)(i), you can see that the characteristic of the arrangement has to be that:

"The contributions of the Unitholders and the profits or income out of which payments are to be made to them are pooled ..."

So there's two bits of pooling. Contributions and profits or income. It's common ground that the contribution of the unit holders were pooled. Of course, that's right. The money went into the investment company, was then used as a pool, to pay down into the operational company, which was then used to purchase assets. It isn't like the Capital Alternatives type case, where an investor remains in -- with ownership rights over a specific piece of property -- of the property from which profits or income are to be derived.

Both sides, in relation to this, quotes the judgment of Mr Nicholas Strauss QC in Capital Alternatives as to what "pooling" means. Don't need to repeat it, but what I would obviously urge caution on is it's not to be

13:36 treated as a statute.

Mr Strauss referred to the funds coming out of a pool -- sorry, of the money coming out of a fund, which I think my learned friends use as the hook to say, well, the monies coming from the investment company are beneficially owned by the investment company, they're not a fund held for the investors, to which we would say, well, that's right insofar as the money is held within a company. It obviously belongs to the company. But the purpose or effect of these arrangements is to get that money out to the investors.

This is one of a number of points they make, which gets very close to saying that a limited company can't be a fund because of its separate legal personality. We don't accept that. It doesn't work because of -- it doesn't work in the DIFC. There are a number of places in the law where it is recognised that a limited company can amount to a fund. One of those is the definition of a share being a share in a company unless it's also a unit of a fund. We'll see it in CIR 2.1.10, but the broad point is that all of those arguments about limited companies don't assist. We need to look at this statutory language.

The question here is not whether the money that comes out of a pool is beneficially owned by the

13:37 investors. It simply has to be that the profit or income out of which payments are to be made are pooled. And the payments that are made to investors are the dividends on their shares in the investment company and that clearly comes from a pool of money held within that investment company.

That is a pool that is generated from a collective mix of investments held by the operating company. The operating company can then pay that up to the investment company. It is a pool, we would say.

That's why we focus in our written arguments on the Capital Alternatives case, which is quite instructive on this. The references are there in the written submissions. But it's instructive, because that case involved a number of different schemes, one of which had investors buying acres of rice farm in Africa.

Their payments were derived from the rice grown on their specific plot of land. And so both Mr Strauss and the Court of Appeal said that there was no pooling of the income in that case. The income was derived from the individual property held by an investor. It was still a collective investment scheme because of management as a whole.

Another scheme within that same case involved carbon credits, where a swathe of land in the Brazilian

13:39 rainforest was granted carbon credits. Individual investors owned acres within that forest land, but the money they got was just distributed out to them. It wasn't carbon credits attributable to their specific plot of land.

We say really that structural difference is what you see in this case and every unit trust. The money comes in from shares at the bottom, it gets pooled, and it gets divvied up between the investors.

If the tribunal agrees there's pooling, then the second criterion here is less important for the question of whether this is a fund or not. As I said, these are alternatives. But I will now move on to (c)(ii), the question of whether the property is managed as a whole by or on behalf of the Fund Manager.

Our starting point on that is that it's plain that the property is managed as a whole. That part of it is what typically causes disputes in the English courts where they say, no, there's individualised management. Each plot of land in the rice farm, it was said, was managed separately, so there's no management as a whole. That kind of analysis doesn't work here. Obviously, those underlying shares are managed as a whole.

But my learned friends will say that's not enough, because here in this definition, we have this reference

13:40 to "by or on behalf of the Fund Manager" and they say that brings with it all these questions of legal accountability, et cetera.

You have our written submissions on that, but what I would say is that my learned friend's arguments really don't rescue them, because they seem to be saying that the management was undertaken by either the investment company itself or possibly the board of directors of the investment company. But as long as there is somebody who is sitting in that position of there being a Fund Manager, then we have a Fund. That's a separate question to whether Al Masah Cayman were the Fund Manager. So that's my first point on that.

The second point is then to engage with the argument from my learned friends as to whether it is in fact Al Masah Cayman or somebody else.

This brings me to the second of my sub-issues on funds, which is whether Al Masah Cayman was conducting the Financial Service of Managing a Collective Investment Fund.

For this, if I could ask Fatima to bring up document G008, page 7. Then we can see here the definition of financial services. I'm sure the tribunal has it in mind how we get here. Article 41 of the Regulatory Law prohibits the carrying out of financial services unless

13:42 you're an authorised firm.

This Article here on the screen, Article 2.2.1 says that you find the definition of financial services under rule 2.2.2 and it's carried on by way of business. I don't think there's any debate about carrying on by way of business.

Then in 2.2.2, you get the big list of financial services. (i) on that list is the one I'm focusing on, Managing the Collective Investment Fund. But we also rely upon (f), arranging Credit or Deals in Investments. I think Ms Clarke will deal with that later on.

So that's the financial services. It's defined in greater detail on page 17. Managing a Collective Investment Fund, under 2.12.1. This is where my learned friends say, "Well, it's all very well and good that Al Masah Cayman signed up to those management agreements, et cetera, but they're not legally accountable to the unit holders in the fund for the management of the property."

Whatever the rights and wrongs of legal accountability in Article 11, it's right that we have to show legal accountability here to show that Al Masah Cayman were conducting this financial service.

Standing back for a moment, we say it's plain from the way this was presented to investors, that it was

13:44 Al Masah Cayman that would be the one managing the investments. It's all in the brochures, it's referred to in the subscription forms and it's an integral part of those diagrams that we have in our written closing, showing the companies linked together with Al Masah as the manager on the side.

You may recall I asked Mr Mehta whose private equity vehicles he saw these as. He said it was Al Masah's vehicle, he didn't distinguish, and also Mr Dash's vehicle. We say that speaks to really how one should objectively view this, that it was an Al Masah product, they attach their name to the product and assume responsibility for the management of the product.

In terms of legal accountability, we have within the articles of association for each investment company, the definition of a manager, of the manager, being Al Masah Cayman and it's therefore baked into these investment companies that it's Al Masah Cayman who will be the one carrying out the management.

My learned friends say, yes, but you can't show any direct link between Al Masah Cayman and the investors. How can it be said they're legally accountable to the investors? That's where, in our submission, you get all of the -- you look at the reality and ask: would a court grant any relief to an investor who wanted to hold

13:45 Al Masah Cayman liable? Or accountable, I should say. The focus being on accountability. They don't need to be liable for the unit holders, but they need to be accountable to the unit holders.

We would suggest that this is easily wide enough to encompass a unit holder's ability to force the investment company to act. In a typical company, that would be by way of potentially replacing directors or a vote at a shareholder's meeting.

Those are mechanisms which, oddly enough, don't really work in this case, because of the way that the Articles are structured. They make it all but impossible for the investors to require the board to act, because the board is made up of Al Masah Cayman, the majority Al Masah Cayman.

But even if that's right, that just strengthens our position that a court would grant relief to an investor, who wanted to hold Al Masah Cayman accountable by virtue of a derivative action. We quote the cases in our written arguments.

One of the key questions as to whether a derivative action is appropriate is whether the company itself is preventing -- or sorry, whether the wrongdoer is preventing the company from acting. In this case, we would have, in any question of wrongdoing, Al Masah

13:47 Cayman controlling the very company itself. So, in terms of accountability, an investor would have means of bringing Al Masah Cayman to book.

It doesn't mean that there would be necessarily liability there, because of course a derivative action is in the interests of the company, not for the individual unit holders, but liability isn't the phrasing of this rule.

The other way we have put it is that the combination of the subscription forms, the obligation to pay an incentive fee and the way these things were marketed as a whole, together with the articles of association, in fact, provide an ample basis for a direct cause of negligence actually. There's an assumption of responsibility here.

The Applicants say we are being artificial in suggesting there is legal accountability. We say that the real artificiality is in their suggestion that they be entitled to a fee of 20 per cent of the investors' profits, subject to a hurdle rate, but without, on their case, owing any duties to the investors.

So that is our basis for saying that there would be legal accountability.

Before moving on, I'll just quickly address paragraph 57 of my learned friend's written closing,

13:48 which quotes a frequently asked question from the DFSA website, distinguishing between what one might term mere asset management and management of Collective Investment Fund. They say even if there's investment management, it doesn't amount to management of a Collective Investment Fund. And I'll be interested to hear how they develop that point, because, of course, asset management is itself a financial service in the DIFC.

So not something that should rescue them, but more importantly, perhaps, that frequently asked question I think really brings us back around in any event to the question of legal accountability, because it maintains that that is the key feature for managing a Collective Investment Fund.

If you're with us that there is a fund and the question then arises as to attribution, one of the grounds of appeal is to suggest that if there was management of a Collective Investment Fund, that ought to be attributed to Al Masah DIFC instead of Al Masah Cayman.

I don't intend to spend too long on this. In our submission, the position is absolutely clear. It was Al Masah Cayman that had signed up to be the manager for each fund. The articles of association specifically mention Al Masah Cayman and indeed Al Masah Cayman's

13:50 directors were the ones who -- sorry, the directors put in place by Al Masah Cayman were the ones who sat on the boards of the investment companies.

Even if it's said that some of those individuals were employed by Al Masah DIFC or seconded to them, then again, in the words of Mr Hill in his opening, that would just be them acting as the instruments of the Cayman company to allow the Cayman company to perform its activities.

MR MALEK: While we're looking at this definition at 2.12.1, managing a Collective Investment Fund, you dealt with legally accountable to the unit holders. And so, unit holders, we know who they are. You talked about the fund and then you talk about management of the property held for or within a fund under the fund's constitution. What is the fund's constitution on your case, with a capital "C"?

MR TEMPLE: Yes, it is a capital "C" and it is defined in schedule 1 to the Collective Investment Law, saying words to the effect of save where the context requires otherwise, in a case of body corporate, it refers to the instrument of incorporation.

Where here -- I mean, this is another example of where the law clearly anticipates that you'll have companies that are Collective Investment Funds. I can

13:51 only understand that to be the articles of association --

MR MALEK: Which company?

MR TEMPLE: Of the investment company.

MR MALEK: In other words, down the chain? So it's not the Cayman investment holding company, it's a matter of jargon, I suppose, but it's not at that level. It's not the operational company going down another level, is it? Or is it the level below the operational company that we're talking about in terms of the fund's constitution?

MR TEMPLE: No, I have certainly read it as being the top company, the Cayman investment company, the one that the investors actually get their shares in.

MR MALEK: Okay, fine. So it's at the top, then.

MR TEMPLE: Yes, that's the one that does have Al Masah Cayman defined as the manager, with a capital "M", and reserves to them various rights such as replacement of the manager being something that is reserved to them, in effect.

MR MALEK: Okay, so that's the Cayman company that's being referred to in terms of the fund's constitution. At that company level, is there anything in there that's dealing with the property which is held down the chain, so to speak?

MR TEMPLE: No, there's nothing specific about that, that

13:53 I recall.

MR MALEK: Thank you.

MR TEMPLE: I was going to move on to the CIR 2.1.10 extension. This again is probably worth just having it up on the screen, so we're all looking at the same text. It's document G009, page 9, bottom of the page, 2.1.10.

This is the exception that replaces that -- or doesn't replace. The law of the DIFC is not the same as English law, which simply carves out bodies corporate. This one carves out:

"... Body Corporate, unless on reasonable grounds, the purpose or effect of such an arrangement appears to be the investment management, in the exercise of discretion for a collective purpose, of Investments or Real Estate assets for the benefit of the shareholders or partners."

The first point I have noted on this is the language that's used. It refers to reasonable grounds, purpose or effect and what appears to be the investment management, which is perhaps slightly unusual language in statute. But we would say it goes to, much like Article 11, it goes to cutting through the legal niceties to a certain extent and looking at the reality of what a fund is intended to do.

Because we're only looking at this to the extent

13:55 that we have demonstrated it's a fund. So we are looking at an investment for the collective, which is for the -- with the purpose or effect of getting profits or income managed as a whole, et cetera.

As I say, it looks to cut through any arguments that says you can look at separate personalities or say that the funds are held by, in this case, the investment company, legally owned by them, beneficially owned by them. We say that's not what this is getting at. It is asking the decision maker here, the tribunal, to take an overall look at the arrangements and ask whether that is for the investment manager in the exercise of discretion for collective purpose of investments or real estate.

In this case, we clearly have that, because we have Al Masah Cayman which, at the very least, is in the position of an investment manager. Mr Dash referred to Al Masah Cayman as the investment manager in his evidence.

In a sense, that kind of provides the whole answer, because why else do you have an investment manager unless it is to exercise discretion for the benefit of the shareholders of which investments it's going to purchase?

Indeed, in this case, we can also see from the investor presentations, there's references to the

13:56 planned exit from these investments. So it's not just the buying, but it's also the selling, one way or another.

We say, standing back, it is transparent that any fund which has a separate investment manager, which is aimed at -- they call it private equity platform, it's in order to purchase underlying shares cheaply -- and that shares in underlying companies cheaply, sell them at a profit in due course. And that's all done on the discretion of the investment manager.

Otherwise, what are they doing?

That was my submission on CIR 2.1.10.

I'm going to move on now to --

MR MALEK: Just pausing there, the "body corporate" in line 2, that's the holding company? Is that right?

MR TEMPLE: Yes, we would say that -- I mean, there is a slight wrinkle in the sense that when you look at Article 11, it refers to "arrangements". When you look here, it refers to "an arrangement", singular.

So we have the possibility -- the task of reconciling those two. In a case like this, where you've got arrangements, which we would say are very clearly involving more than one company, because you have your investment company and you've got your operational company, we would say that, I think, it's

13:58 clearly aimed at whichever company the unit holder has an interest in. So, in this case, it would be the holding company.

But you can't divorce that from the overall arrangements. You can't just say, well, in that case, you're just owning a single -- you're owning a share in an investment company, which is 100 per cent shareholder in an operational company. That's what my learned friends want to do. They want to say there is no exercise of discretion, because it stays 100 per cent shareholder all the time.

So they would say, I think, that you don't have discretion for a collective purpose, because there's nothing happening between investment company and operational company. It just stays 100 per cent shareholder throughout.

We would say that's absolutely the wrong approach and it ignores the language here of reasonable grounds, the purpose or effect, et cetera. And would, in effect, allow anybody to set up a parent company-subsidiary company arrangement, and then just claim that that division between two companies takes them outside of this legislation.

In essence, the parent company and subsidiary is just a mechanism by which the investment management

14:00 occurs.

Next I was going to look at offers of units, which is a point which doesn't arise on the grounds of appeal. We have made that point in our written closing. As I read the Applicants' closing, this seems to be another issue of attribution.

They seem to be saying, as I read it, that really there was an offer of units, it just happened by Al Masah DIFC rather than Al Masah Cayman. I don't really have a great deal to add to our written closing from paragraph 119.

The short point is that definition of an offer in Article 19 of the Collective Investment Law looks to the person who invites the investor to make an offer, where that person can then accept the offer from the investor. In this case, the person that accepts the offer from the investor is Al Masah Cayman. They countersign the forms. So plainly, it was the one making the offers.

As I say, I wasn't planning on saying anything beyond that on that point.

Finally, I was going to address the question of our alternative case, which is, in a sense, the question that Judge Mackie posed at the start of these submissions, which is: does it matter whether this is a fund? Because if it's not a fund, they are still

14:01 selling shares.

We would say for a large part of the gravity of the contravention, it doesn't make a huge amount of difference, as long as the Financial Markets Tribunal is willing to countenance our alternative case.

Just to be clear, this isn't necessarily an alternative case. As I said earlier, if one looks in appendix 2 to the general module of the DFSA rulebook, shares in a body corporate are defined to be capital "S" shares unless they are a unit.

If the tribunal finds that these are units in a fund, then they are not capital "S" shares. But if it's not found to be a fund, then necessarily these are capital "S" shares for the purposes of the DFSA rules and that means they are capital "I" investments for these rules.

And we would say that a large amount of the case remains, save that we would have to accept that the contraventions of the Collective Investment Law fall away, because they do depend upon this being a fund.

As I read their submissions on the other side, the only reason they say we shouldn't be entitled to rely on this alternative case, is they say it's too late in the day. We have pointed out in our written submissions that this is not a new point. It was specifically

14:02 discussed at the DMC and the reference is there in our written submissions.

I would invite the tribunal to read that discussion before the DMC, because it makes it crystal clear that this was always on the table. The other point that my learned friends make is that back in the recommendation to the DMC, in October 2018, it was said that whether these are funds or not is the central theme of the case. So they say we can't reverse course and say it's not central anymore. But that is something, an internal document within the DFSA, that has not been a threat since then.

So just briefly I would refer you to our -- sorry, the DFSA enforcement submissions to the DMC. We don't need to bring it up, but for your note, it's document F12, page 3 when we said, that's Ms Clarke and I, and the enforcement division, that the central question was the concealment of fees.

Again, this brings us back to Judge Mackie's point earlier, that that is a large -- that is the central wrongdoing that the penalty in this case focuses upon.

We say there's really no reason, there's no prejudice they put forward, that they could put forward, given how long this has been on the table, by allowing the DFSA to rely on its alternative case. And it's

14:04 plain that the FMT has the power to substitute this decision. It's there in Article 29(4) of the regulatory law.

There is no good reason for suggesting that if they can show it's not a fund, then all of the contravention should drop away.

Unless there is anything for me on those points, I'll hand back to Ms Clarke now to give the rest of our submissions.

PRESIDENT: No, thank you very much, Mr Temple. That's most helpful.

MS CLARKE: Sir, I note the time. I don't know whether you wanted to do a five-minute break for the shorthand typist or whether you'd like me to just carry on?

PRESIDENT: If that's a good moment, we'll break for 10 minutes now, but it will be our only break before lunch.

MS CLARKE: Yes, I understand.

(2.06 pm)

(Short break)

(2.14 pm)

Opening submissions by MS CLARKE

MS CLARKE: In the hour or so that remains of my allotted time today, clearly I can't cover and do any justice to all of the remaining issues. We put in an extensive

14:14 written closing document, which covers everything. I know you will have read it carefully and I don't think that me trying to rush through all the topics is going to actually be of benefit to anyone.

So I was proposing to focus principally on two issues, the first being the issue of knowing concern. And the second being the issue of reasonable steps or reliance placed on advice or conduct of others and the relevance of that and how that fits in to the allegations that are being made.

Then if I've got time, probably to then just bring back the focus to where we started in our opening a week ago, two weeks ago, reminding you that the penalties were imposed on the basis primarily of the misleading conduct, misleading and deceptive conduct. But obviously, that's a third issue, if I've got time to do it.

Unless I hear from you that there are in fact other topics that you'd rather that I spent the next hour talking about, in which case I'm happy to do that, I'll start with knowing concern.

This issue covers items 13 to 28 in the list of issues and it ranges, of course, in terms of the individuals, across most of the contraventions. In terms of Mr Dash, of course, he is alleged to be

14:16 knowingly concerned with all of the contraventions. Mr Singhdeo's knowing concern is limited to the contraventions that involve misleading statements, deceptive conduct and the like.

Of course, similar for Mr Lim.

But the general principles of knowing concern, it seems to me, is an appropriate starting point. What I propose to do is to start with the regulatory law and what that actually says about what knowing concern means. And then to go to the UK law, principally FCA v Capital Alternatives, and also the 2020 case of FCA v Skinner that we provided which, in my view, sets out quite neatly how to approach this issue.

To summarise, what my conclusion is going to be, is that one must be careful not to confuse the underlying facts from which a contravention then flows, so therefore a person must know the underlying facts, but that is not the same as them having to know the conclusion that flows from it.

For example, the fact that an Applicant didn't understand that the platforms were funds, if you find that they were. That doesn't matter in terms of knowing concern, provided you are satisfied that the person knew the elements, the factual elements, which led to the conclusion, to your conclusion, that these were funds.

14:18 Similarly, for example, Mr Dash has said, both orally and in written submissions, that he didn't consider that the marketing documents were misleading. Again, that confuses the factual underpinning with the conclusion. The factual underpinning is all of the relevant factors that then lead you to the conclusion, if you so find it, that the documents were misleading.

He needs to know the underlying facts, but he doesn't need to know that they are misleading. Because otherwise somebody with a very low moral compass would say, "Well, I didn't think that was misleading" and that would mean that they were not knowingly involved, on the basis of their own low moral standards. And that, of course, can't be right.

And, of course, I say that's inconsistent with both the regulatory law and the case law.

That's my argument in a nutshell.

Can we perhaps first go to the regulatory law and again, it might be helpful to have this up on the screen, G002, Article 86, page 66.

Article 86 is what gives rise to the issue of knowingly concerned. And, of course, those words are used in terms in Article 86(1). In Article 86(2), the words are used again in the context of an officer of a body corporate. If the body corporate commits an

14:20 offence, then the officer as well as the body corporate commits a contravention if that person is knowingly concerned.

Then we need to know what does "knowingly concerned" mean? For that we need to go to Article 86(7), which is on page 67. This actually provides a very wide, I would say, definition of what "knowingly concerned" means for the purposes of the allegations that you are considering.

Although, of course, it uses the words "if and only if", it then gives four ways in which knowingly concerned can arise, and it includes aiding, abetting, counselling or procuring, which is relevant in particular to Mr Singhdeo in terms of allegations made against him.

"Inducement", that's not a term that's used in any of the Decision Notices, but again demonstrates the breadth of what "knowingly concerned" can encompass:

"(c) has in any way, by act or omission, directly or indirectly, been knowingly involved in or been party to, the contravention ..."

Again, a wide, expansive definition. Lastly:

"(d) has conspired with another or others to effect the contravention."

Those are all of the ways, the various ways in which

14:22 knowingly concerned can arise.

The case law, of course, is based on UK law. The reason for that is because, as you know, I'm sure, that FSMA 380 and 382 use the term "knowingly concerned" in order to attribute responsibility to individuals when there are breaches by companies.

In summary, what the case law says is that you have to have knowledge of the underlying facts and involvement in those matters or at least involvement in enough of those matters to be sufficient to amount to knowing concern.

The first case I'm going to invite you to look at is FCA v Capital Alternatives, which we can find in the original bundle B, number 19. It might be helpful to have this on the screen, because there are particular bits that I just want to go through, which I think illustrate the point that I've made quite neatly.

The relevant sections are paragraph 797, which sets the scene. Paragraph 798 starts to deal with some of the previous case law and includes the case of SIB v Pantell, which of course is one of the cases that the Applicants have referenced themselves.

In that case, it was said:

"The most obvious example of a person 'knowingly concerned' in a contravention will be a person who is

14:24 the moving light behind a company ..."

One might think that the term "moving light" is apt to describe the role of Mr Dash and that's something that I'll come back to.

If we could go to 799, there it talks about:

"... the most obvious example of a person who is 'knowingly concerned' ... [is] the 'moving light' ..."

But then goes on to say:

"... but, in my judgment, the matter is not limited to those who are the moving lights behind the contravening entity. Each case must be considered on its own unique facts."

That, in my submission, is relevant when one is considering the positions of Mr Singhdeo and Mr Lim. Neither of whom, I suspect, could be described as "moving lights", but both of whom, in my submission, would fall within the lesser requirements of 799, ie it's not just limited to moving lights.

Then at paragraph 800, common ground, proof of actual knowledge is essential but not enough. Passive knowledge is not sufficient, there's got to be actual involvement in the contravention.

801:

"The concept of 'involvement' is a broad one, covering those who pull the strings at a directorial

14:26 and/or managerial level ..."

Which we contend would include Mr Dash, and actually, to a limited extent in some of these matters, perhaps Mr Singhdeo as well.

It also says at paragraph 801 that it:

"... could, in an appropriate case, include those who are involved at a lower level, depending on their knowledge and participation in the contravention."

Again, we would submit that that would encompass Mr Singhdeo and, of course, Mr Lim.

802 refers to the previous case of SIB v Scandex, in which the court:

"... confirmed that the relevant knowledge is knowledge of the facts on which the contravention depends, and that it is immaterial as to whether or not the individual knows that such facts constitute a relevant contravention. This is because the individual is presumed to know what the law is, and ignorance of the law is no defence."

That feeds into the point that I made at the beginning, that one has to be very careful not to confuse the underlying facts from the conclusion. Because once one tries to bring the conclusions into this analysis, then one is bringing with it the risk that one is importing perhaps the lower moral standards

14:27 of the person who is under consideration.

Facts are one thing. Conclusions are a matter for you, based on the facts as you find them. Knowing involvement, knowing concern relates to the underlying facts and not the knowledge that those facts amount to certain conclusions.

So that, I think, sets the scene. Then can we go to the case of FCA v Skinner, which was one that was provided along with our closing submissions. I don't know whether it's got into the bundles as such.

Can we go to paragraph 111, Fatima. Just to set the scene, this was a case about financial promotions, unauthorised financial promotions. The FCA alleged that various individuals were knowingly concerned in that activity that was being carried on by a company and the individuals disputed that they were knowingly concerned.

So the court had to grapple with the question of what does "knowingly concerned" mean in terms of the financial promotions prohibition? The FCA's position is set out at paragraph 111 that we have on the screen here.

It focuses very much on the wording of the allegation. And section 21 of FSMA, which creates the financial promotions prohibition, requires:

"Knowledge of the acts that constitute the offence

14:30 under section 21(1), namely the communication of an invitation or inducement to engage in investment activity ..."

And the FCA says it's not necessary to go further and show that the defendants knew that the various potential exemptions were not engaged.

If we could go to paragraph 113, that fleshes this out a bit and also relates back to some of the previous cases that we have looked at. 113 refers us back to SIB v Pantell, and the issue of moving light and the person who's pulling the strings, which we have already dealt with.

Then item (ii) talks about knowledge -- the first requirement is actual involvement and the second requirement is:

"Knowledge of the facts on which the contravention depends. It is immaterial whether or not the person knows that those facts constitute a contravention."

That's the High Court adopting Scandex and also, of course, Capital Alternatives, which I previously dealt with.

Then if we could go from there to paragraph 116. I'm not going to go through every paragraph of this, you'll be pleased to hear, but I think these are important in terms of setting the scene.

14:31 What the FCA said is you have to actually look at what the contravention is and what it says and what the elements are. In terms of section 21, the financial promotions, the elements are a communication of an invitational inducement to engage in an investment activity and communication was made in the course of business.

So in terms of the drafting, it's virtually identical to the drafting that you're considering in terms of the financial promotion prohibition in this case.

The judge, at 117, initially, I think, perhaps, was a little bit sceptical as to whether the issue could really be that simple. At 118, the FCA's counsel, I think fleshed it out a bit and referred to Scandex again and acknowledged, of course, that in Scandex, the issue was whether there was a contravention of what was then section 3 of the Financial Services Act 1986, which was the predecessor of section 19 of FSMA ie breaching the general prohibition. And the contravention, as it was defined in the Act, amounted to the carrying on of an investment business, secondly in the UK, by a person who is not authorised.

Because all of those elements were specific requirements under the legislation, then, in Scandex, it

14:33 was decided that those were the elements that the person had to know.

If we go to 120, however, the FCA's counsel said, yes, and that's why you can distinguish Scandex from the position here, because Scandex focused on the words of the statute that gave rise to the contravention and this is what I am inviting you, the judge, to do in this case, but it leads to a different result because the drafting is different.

The result of that we can see at paragraph 121:

"Section 21(1) of FSMA sets out an absolute prohibition on communicating an investment or inducement."

At paragraph 122:

"Mr Purchas was right to place emphasis on the structure of the prohibition in section 21."

Then paragraph 123, the third line down:

"If, as a matter of construction, the elements of the contravention incorporated the fact that no exception or disapplication provision applied, the result would be that proof of knowing concern would require an inquiry into the defendant's knowledge or belief. But on the facts, that doesn't apply in this case, because the prohibition doesn't require any element of mens rea."

14:34 At 124, FCA's counsel said that that approach fits with policy reasons as to the concept of knowing concern.

Then finally, paragraph 125:

"If a company has contravened section 21 of FSMA, it is no defence for it to assert that it believed, (reasonably or otherwise), that the relevant communications to investors were authorised. It would [therefore] be illogical if a director who is the controlling mind of the company, could avoid a finding of knowing concern [in the] contravention by reference to such a belief, particularly in light of the rationale for orders against those 'knowingly concerned'."

Then, at 126, he repeats that the section 21 is where you need to look for the facts that give rise to the contravention.

In terms of the allegations that you're looking at, just by way of example, Article 41(1) of the regulatory law -- I'm not suggesting we need to pull it up on the screen --

PRESIDENT: Before you go on, could I be clear. The knowing concern, being knowingly concerned in the cases which you've taken us to, relates to the use of the expression in -- is it 380 and 382 of FSMA?

MS CLARKE: That's right, yes.

14:36 PRESIDENT: But it's not a defined term? As I understand it, what we're dealing with is a defined term.

MS CLARKE: Yes, it is. Although --

PRESIDENT: Isn't that right? Just pausing a moment.

I mean, the expression "knowingly concerned" has a widespread use in English law. I mean, for years I used to sit at the Isleworth Crown Court, and drug importations are, or certainly were then, all dealt with under a provision which made it a crime to be knowingly concerned in a fraudulent evasion of the prohibitions of importation of goods.

And the word, expression "knowingly concerned", one would say to juries, "Members of the jury, 'knowingly concerned', they're ordinary words in the English language, you know exactly what that means, don't you? On you go."

I mean, that's one approach to knowingly concerned.

Another approach is the case law you've shown to me or to us. But am I not right that, really, it's simply for us to apply the statutory definition, which has been put in this law for good or for bad and we just have to get on with that?

MS CLARKE: Yes, because the statutory definition actually goes rather wider than the simple knowing concern aspect that the cases that I've cited deal with. But, of

14:38 course, knowing concern is cited in the Decision Notices as the basis for the involvement of the individuals in the various contraventions.

It does seem to me to be helpful to at least understand how to approach the analysis, because my submission is that when one reads the Applicants' approach to this, what they have done is elided the factual basis, which is what a person has to know, with the conclusion.

For example, the offering document didn't disclose placement fees, but did disclose the other two fees. That's the factual basis. The conclusion that we invite you to draw, is that was misleading, deceptive, et cetera.

The Applicants seem to suggest that for knowing concern, the person has to also know that the communication is misleading, deceptive, et cetera. But that, we say, is clearly wrong and the reason why it's wrong is because the case law that I've cited demonstrates that and also because one has to look at the wide way in which knowing concern can occur under 86(7) of the regulatory law.

I hope that assists.

PRESIDENT: Thank you.

MS CLARKE: Just by way of example, 41.1 of the regulatory

14:39 law is that the person shall not carry on a financial service in or from the DIFC.

So it's, in effect, the DFSA equivalent of the breaching the general prohibition.

Then, of course, we know that GEN 2.9.1.1 says that arranging deals in investments is a financial service, ie making arrangements with a view to another person, buying and subscribing for an investment.

What does the person need to know? The person needs to know the underlying facts, which lead to the conclusion that arranging deals in investments was taking place. They don't need to know that those facts amount to the financial service of arranging deals and investments.

The same analysis, I submit, applies to the financial promotions legislation, because frankly, it's virtually identical to the English version and has been dealt with in the cases that I've cited.

Interestingly, there is a difference between Article 41.1 and section 19 of FSMA, because Article 41.1 is drafted in the stark terms in the same way as the financial promotions prohibition. It's not drafted in the same way as section 19.

So the analysis as to why if it was a section 19 breach, you might need to know that you were not

14:41 authorised or whatever, just doesn't apply in this jurisdiction, I submit.

Certainly not in relation to Article 41.1.

That, I submit, is the basis for how to approach being knowingly concerned. In terms of how that applies to the various Applicants in this case, we dealt with that at some length in our closing submissions and we've also dealt with the case law that the Applicants cite in support of their argument as to how knowing concern should be approached.

That we dealt with at paragraph 219.6 of our closing submissions. I'm not proposing to bring the cases up, but just to hit the headlines, they rely on Secretary of State v Hart. The difficulty with that is that, in that case, the criminal offence involved the specific element of knowledge that the defendant was disqualified for appointment to the office.

So you had to prove -- the prosecution had to prove knowledge as a requisite part of the offence.

Westlaw, as far as I can tell, have never cited that case in any other context.

Ess Production v Sully, the proposition cited there is that when the ambit of penal statutory provision is unclear, it should be interpreted in favour of the person who would be penalised.

14:42 That may have an application where there is a situation where the language is reasonably capable of two interpretations, but we submit that is not the position here. The language is clear and unambiguous. The definition of "knowing concern" is set out in Article 87(c). The case law is similarly clear. Therefore, the principle that is relied upon of doubtful penalisation just doesn't arise.

The other factor that the Applicants rely upon in their opening, at paragraph 183, where they suggest attribution is a question of fact, not law. So Mr Dash must be shown to have known that acts would be attributed for AMC.

Again, what that does is confuses the underlying fact with the conclusion that flows from it. All that it's necessary to show is that he knew the relevant facts from which you, if you decide it's appropriate to do so, may conclude that conduct can be attributed to Al Masah Cayman. That is consistent, entirely consistent with the analysis that I have set out.

Dealing, then, with the issue of involvement. I've already demonstrated that that can happen in a number of ways. And, of course, Article 86(7) makes that clear, because, of course, it refers to such conduct as aiding and abetting, counselling, procuring, conspiring. Those

14:44 are all the types of ways in which involvement can occur and certainly as regards aiding and abetting and counselling and procuring, did occur in this case.

The remaining matter is that my learned friends came up with a late authority, the Racing Partnership Ltd case. Again, I'm not suggesting we bring it up on the screen, but if I could draw your attention to paragraphs 282 to 287. I'm not suggesting you need to look at it, but perhaps make a note.

My submission is that when you read the context of what was actually being decided, the focus was on the tort of conspiracy and the intent that was required in relation to the tort of conspiracy. And at 283, it made clear that it regarded a conspiracy as an agreement between two or more to do an unlawful act or to do a lawful act by unlawful means.

Therefore, that would import, so it was said in this case, an element of knowledge of unlawfulness into the offence. But we say that's a completely different case on completely different facts to do with a tort, an English tort, and just doesn't help in terms of the analysis that I invite you to take.

That is the approach that I would submit is appropriate.

We have set out in our closing submission the

14:46 various reasons why we say Mr Dash was knowingly concerned in all of the contraventions. And really it amounts to the fact that he had relevant knowledge of all the activities that founded the factual basis for the contraventions. He was on the boards of all the investment companies and AMC and AMDIFC. And he was the SEO and licensed individual at AMDIFC, which imports a responsibility for day-to-day management, supervision and control of one or more or all parts of an authorised firm's financial services. That's what being a senior executive officer is under GEN 7.4.2.

It is clear, we submit, that he was the moving light behind everything, really, that happened, in terms of how this was set up, who was doing what, the way in which the funds were marketed, what was said to the investors, what was not said. And the decision not to reveal placement fees, as the Decision Notices in all instances rightly concluded, can only be consistent with a deliberate decision.

There is reference to that in the previous documents submitted by the Applicants, where some concessions are made as regards, "Well, we did decide that we're not going to reveal placement fees in terms, because it was commercially sensitive." So that was a deliberate decision.

14:48 But then what flowed from that, of course, is the lengths that he was prepared to go to or to have others do on his say-so, to ensure that that remained the policy that investors didn't know about the placement fees.

Mr Singhdeo is in a slightly different position, but of course, he was also an authorised, approved person. He had senior roles in all of the entities. He knew what placement fees were, because part of his role as CFO at Al Masah Cayman, as he admitted, was that he was in charge of making sure that they were properly accounted for and invoices raised and monies are claimed from the holding companies.

So he knew perfectly well that placement fees were being charged. And we submit that he, on the evidence, as we have set out in our closing submissions, was clearly aware that the marketing documents did not reveal placement fees to investors.

And then his conduct in relation to the ANEL reports, the way in which Ernst & Young were dealt with, Distributor B, Investor A, and the like, and of course the false bank statement as well, demonstrate that he was party to and actively involved in, and aiding and abetting a deliberate strategy of concealment, which one is driven to the conclusion was misleading, deceptive,

14:49 et cetera.

So that is how we attribute knowledge and involvement to him.

Mr Lim, of course, we've not really heard much from him and not much has been said about him in the closing submissions, I guess because he never gave evidence.

His witness statement is there. It's obviously part of the evidence for you to consider. I would submit it carries no weight or limited, very limited weight, because it has not been tested in cross-examination.

Frankly, when one reads it, in particular in relation to the more difficult issues he has to face, which is, of course, the ANEL reports, Investor A, Firas, who sent the wrong version of the statements email. Those matters, the witness statement, when you look at the explanations, just don't stand scrutiny, I submit.

Of course, he never came here to have those explanations tested.

MR MALEK: Do we know, Ms Clarke, why that witness statement -- why Mr Lim declined to support his witness statement?

MS CLARKE: I don't know. Mr Hill may.

MR MALEK: If we don't know, I have to say, I find it difficult how any weight can be given, because it's a matter of speculation, but it may be that he's put in

14:51 statements that he now thinks are untrue.

MS CLARKE: We don't know. That's the problem. We don't know. It is speculation, because he's not here and no explanation for his absence has been given. I can't give an explanation obviously, because I don't know any more than you do.

But it is a surprising approach for someone in his position to play no part at all in these proceedings, particularly given the financial and reputational ramifications and professional ramifications that may well flow from any decision that you make about his conduct.

But the fact that he's not come and hasn't therefore tested his explanations in cross-examination, I submit is consistent with the fact that he knows that he cannot answer satisfactorily the various factual matters that we have set out at great length and that's why he's not here.

I can't say that for sure, but that seems to me to be consistent with him playing no part in these proceedings. He did turn up to the DMC. He didn't say anything. None of them did. But they were all there, as I recall.

PRESIDENT: What makes it perhaps more unusual is you say he played no part in the proceedings. But, as I understand

14:52 it, he did in the sense that he's been represented by counsel and solicitors and attorneys throughout. And looking at the running order, it was, it seems, always intended that he was to give evidence until we were told the day before he was going to give evidence that he was not after all going to do that. In a sense, that distinguishes it from other cases which we come across.

MS CLARKE: Absolutely. I do accept that he was represented, extensive written submissions were put in on behalf of all three of them, but none of them actually spoke in the DMC hearing. There's no reason why they should. There's no obligation on them to do so.

But the fact that he has not played any part in these proceedings at all and the fact that we have no explanation for why he's not here and why he hasn't subjected himself to cross-examination, means that you're entitled to be very sceptical indeed about the statements that he makes in his witness statement and hold them to scrutiny against the factual evidence, which I submit, when you do that, that the witness statement explanations and the factual documentary evidence just don't -- they're not consistent.

PRESIDENT: But it's not our job to hold it against Applicants who did or did not do particular things in

14:54 the DMC, when the whole function of this tribunal is a re-run and not a review of what happened there.

MS CLARKE: No, absolutely. I'm not suggesting that you should. All I'm saying is that he was -- as I recall, he was present at the DMC. He has not been present for any of this hearing. I don't know why. We don't know why. But you're entitled to work with the evidence that you have and decide how much weight can you really give that witness statement when you hold it against the factual evidence and the inconsistencies are stark.

That's my submission. Of course, there's nothing from him in terms of oral evidence to explain any of that. That's his difficulty and no doubt he knows that. But in the end, the issue of weight is a matter for you and the factual findings, of course, are a matter for you as well.

MR MALEK: If this was in court, what would happen is that the witness statement would be taken out of the bundle, wouldn't it?

MS CLARKE: Probably. Well, in a civil case, probably.

MR MALEK: I mean, I know we're not, but the reason it presumably goes out of the bundle is that if the person is not prepared to support it, and we don't know the reason why the person is not -- if it's ill health or some other reason, then of course that's different. But

14:55 how are we, the tribunal, to know why the witness has not been prepared to give evidence and why should we place any evidence on a statement like that?

MS CLARKE: I must say, I could well understand that view. Because we don't have any explanation. We certainly had no medical certificate or anything like that or any evidence to suggest that the absence is for a genuine reason like, for example, he has been taken ill and is in hospital or something like that. We don't have that.

So it puts you in a very difficult position. But you're entitled, it seems to me, to look at the evidence in the round, the evidence you do have, which is the witness statement, the fact that he's not here with no explanation, therefore none of this has been tested in cross-examination. And you're entitled to say, in those circumstances, how much weight can we safely give this witness statement, when it is so obviously inconsistent and contradictory with the documentary evidence? You're entitled to, it seems to me, to make factual findings on that basis.

So that's all I was going to say about knowing concern. I'm going to move now to the reasonable steps and reliance point, unless there's anything else that arises from anything that I've said.

Reasonable steps and reliance. This is issue 7 and

14:57 9 in the list of issues.

First of all, in my submission, it's important to understand where this arises and where it doesn't. For example, it does arise in relation to the COB breaches or breach that's alleged against Al Masah DIFC, because that is couched in terms that an authorised firm must take reasonable steps to ensure that the communication is clear, fair and not misleading.

So it does arise there.

It also arises in the CIL breach, alleged against Al Masah Cayman and DIFC, under 56 of CIL, because Article 57 provides a specific defence to misconduct, which says:

"A person does not commit a contravention of article 56 if he proves he made all inquiries that were reasonable in the circumstances and after doing so, believed on reasonable grounds that the statement or omission was not misleading or deceptive."

That's a specific defence.

57(2) is relevant as well, because it says:

"If that person proves that reasonable reliance was placed on information given to that person by:

(a) if it is a body corporate, someone other than a director, employee or agent of the body corporate; or

(b) if the person is a natural person, someone other

14:58 than an employee or agent of that individual."

So in terms of, for example, Al Masah Cayman or Al Masah DIFC, to the extent that they place reliance and they would say reasonable reliance, on, for example, Helen Baines, an employee of Al Masah DIFC, then we would submit that Article 57(2) says, "Well, I'm sorry, but you can't place reasonable reliance on somebody who's working for the company in question."

Because otherwise the company could, in effect, evade liability for its own internal failings, which can't be right, we submit.

The same would follow for the natural person, because it would have to be someone other than an employee or agent of that individual.

Of course, we don't have evidence to assert that Mr Dash personally employed Helen Baines, for example. But she was somebody who was internal to the company that he was a board member of and occupied a senior role and a licensed function.

But what's clear is that the onus is on, in terms of COB, Al Masah DIFC to show that they took reasonable steps. And in terms of Article 57(1), the onus is on Cayman and DIFC to prove that they made all the inquiries that were reasonable in the circumstances and whether the inquiries were reasonable, must, because of

15:00 the wording of 57(1), be an objective test.

They must also prove that they believed, on reasonable grounds, that the statement or omission was not misleading or deceptive.

So the burden is on them and those are the things they have to show.

We submit that they have not discharged that burden.

We also submit that the submissions, both the opening and the closing submissions, attempt to widen this issue beyond where it properly sits. Because, by way of example, in paragraph 9 of the Applicants' closing submissions, they say:

"The role played by [the] compliance officers, from time to time, is crucial to the question of whether any of the contraventions are established, and also whether the individual Applicants were knowingly concerned."

The answer is, I'm afraid, no, it is not relevant to all the contraventions. It may be relevant to the issue of penalty, but it's not relevant to all the contraventions, other than the ones that I have specifically mentioned.

It's important to understand the limit of this issue.

The other factors that we say amount to the Applicants not discharging the burden upon them, are by

15:02 way of example, Article 57(1), we say it is aimed at situations where a factual statement depends on inquiries. And, of course, the Applicants, all of them knew that placement fees were payable. They didn't need to make inquiries about that. They all knew about placement fees.

Reliance on external advisers is a point that's come up a lot. If the Applicants are suggesting that they inquired of external advisers whether it was misleading or deceptive to omit references to placement fees, actually external advisers can't change the objective effect of the statement. If they're given bad advice, that doesn't, we submit, provide a defence.

But, in any event, we say that what the Applicants have produced isn't sufficient anyway for them to discharge the burden that is on them.

We have summarised that, and I won't go through it in the interests of time, because I'm going to finish at 12.30, come what may, and it is at paragraph 213.4 of our closing submissions.

What we say is that they have never produced a document from an external adviser or an internal adviser for that matter, which deals with the issues that you are concerned with. They've given you a letter that says that these platforms are not funds in Cayman

15:03 Islands. Great. They haven't given you a letter that says they're not funds in the DIFC.

They haven't provided a document that has clear advice ...

(Ms Clarke's video feed lost)

PRESIDENT: I think you have lost us, or at least you have lost me.

MR MALEK: And me.

MR STOREY: And me.

MS CLARKE: ... the issue of Helen Baines.

MR STOREY: Sorry, Ms Clarke. Can you hear us? You faded out for the last sort of 20, 30 seconds. I'm sorry. Can you double back?

MS CLARKE: Yes, I'll go back.

I'm not sure what you didn't hear, but I suspect it was something to the effect of that the evidence that they have produced in order to attempt to discharge the burden on them, is not sufficient. And we have set out at paragraph 213.4, what they've provided and why it's not sufficient.

In summary, what I say is they haven't produced anything that says that they ever asked for or received specific advice on, for example, whether the way in which they were revealing two types of fees, but not the other placement fees, was acceptable and was not

15:05 misleading or deceptive. They never produced an advice that says these are not funds under DFSA law.

So what you have got is just not sufficient and doesn't actually go to the issues.

The issue of Helen Baines was the topic that I was going to move to next, because the Applicants have spent a lot of time trying to pin a lot of the blame on her, one way or the other. A number of points flow from that.

First of all, she was not employed until 2013, as I recall. So some of the conduct, because the period we're concerned with started in 2010, pre-dates her employment. It follows that the marketing material, some of it, pre-dates her employment. And, of course, because she was an employee, the corporate Applicants, we submit, can't rely on any internal failings by her, if you find that there were any, as demonstrating reasonable care by the corporate Applicants.

The other issue is that they would need to show that Helen Baines was aware of the placement fees, because otherwise there wouldn't be a basis upon which it could be said that she could have corrected the marketing materials or made an informed decision or given informed advice on the issue.

One of the things she said when I was re-examining

15:07 her was, "Well, I can only react to what I know. If I'm not told things, then I can't deal with that", which of course is commonsense.

PRESIDENT: It's commonsense, but it presupposes that a witness does indeed know nothing about placement fees.

MS CLARKE: True.

PRESIDENT: I can't speak for my colleagues, but I don't think anyone would accuse Ms Baines of being verbose. And I just wondered whether there was anything -- she is one of those witnesses whom, to an extent, you both depend on, but I don't know if you wanted to say -- I know her evidence is a matter for us, but if you want to say anything about it, please do so.

MS CLARKE: I will. So what we submit is that given how long Ms Baines was employed at DIFC, it's notable how weak the evidence is of her awareness of placement fees. We summarise that at paragraph 216.1 of our closing submissions.

But, in summary, we say, the Applicants rely on an email regarding staff commission, but that was sent in 2012 and appears therefore to have been before she started in the job.

There is no evidence she ever saw the email and she said she was unaware of it. She said she was unaware of remuneration practices in AMDIFC. There were some staff

15:08 submission documents in the bundle, but none of those were copied to her. She said she was aware that referral agents received the fee, but she had no knowledge that Al Masah Cayman was also getting a fee. Of course, we know that the referral agreements do not refer to the fee that was going to Al Masah Cayman.

So if she had referred or reviewed a referral agreement, it would not inform her of a payment additionally being made to Al Masah Cayman.

Reliance is placed on an email. I don't suggest we bring it up, because we have looked at it, but it's SKD 4-10. And this is all in the paragraph I have quoted of our closing submissions. It's from Ms Danila. It's to do with the software consultant, you may remember, that were engaged to -- I don't know what -- do some kind of clever IT work on the computer systems.

The email attached various documents, including two flow charts, one of which referred to placement fees and the other referred to staff commissions.

Her evidence was she couldn't recollect the email and given that it was an email in relation to a software consultant issue, there's no reason, I submit, to suggest that she would have necessarily taken the time to review each of the eight attachments.

She denied reviewing the placement fee agreements.

15:10 There are no documents in our bundles or produced by the Applicants that were put to her to contradict her evidence on that point. Of course, if such documents existed, one would expect that the Applicants would have produced them.

Mr Dash, in his witness statement, made a statement that she did review placement fee agreements, but in evidence he said that he accepted that he had not provided them to her and was merely asserting he thought it was part of her role. So that's where the evidence ended up from Mr Dash.

Then we've got the board meeting, the AMC board meeting that took place in the DIFC. You may recall we spent time looking at the minutes. The minutes record that revenues were discussed, but the document starts with a list of those present and the invitees.
Ms Baines was not listed, which lends credibility to her suggestion that she may have only in fact been present for part of the meeting, to be introduced to the board and do her little presentation. There's no reference in the minutes to placement fees in terms.

That is what we say about her.

In the Decision Notice, and I'm referring to the Cayman Decision Notice, page 34, it dealt with the COB issue, that firstly, this was part of a deliberate

15:12 policy of concealment of placement fees. Secondly, that Al Masah DIFC took no reasonable steps to meet the requirements of COB.

Thirdly, the assertion that the compliance officer was aware of the placement fees and reviewed the marketing material with that knowledge is inconsistent with her evidence, of course, at that stage, only an interview, that she didn't know about placement fees. And the assertion that Al Masah solicitors in Cayman advised that placement fees did not need to be disclosed is a misstatement of the effect of the email relied upon.

That email, in fact -- we won't need to look at it, but it's exhibit R003, pages 82 to 85. And when one looks at that, it's quite clear that what the questions Walkers were being asked had absolutely nothing to do with placement fees. That, however, didn't stop the Applicants' solicitors selectively editing it, only reproducing a small part of it in written submissions and suggesting that was clear advice that placement fees didn't need to be disclosed. But, of course, once it was viewed in the full context, it was clear that that was just completely wrong.

Then the Decision Notice went on to say that provision of marketing materials to Helen Baines

15:13 couldn't constitute inquiries for the purposes of Article 57, because they can't have been reasonably inquiries where the Applicant hadn't furnished her with the information required for her to assess the accuracy of the fees disclosure.

In the Decision Notice, it said she didn't approve the subscription forms, nor the annual reports, nor a large number of other marketing material which contained misleading information.

Just breaking that down, "other marketing material that contains misleading information", this is a reference to the Annex D and we've now got the statement of Mr Hammond, Hammond 5, which sets out how Annex D came into being.

And basically, it was compiled from the documents that the Applicant gave him, albeit the DFSA, in response to an information requirement, to provide their marketing materials and then a comparison was done between that and Ms Baines' marketing register. And lo and behold, it turns out that a large number of documents in Annex D do not appear on the marketing register, ergo they have not in fact been reviewed and approved.

That's the simple and most, we submit, compelling analysis.

15:14 In terms of not approving the subscription forms, of course, we do have limited evidence in relation to that now, because the Applicants did produce some evidence that she had reviewed or at least been involved in the drafting with Walkers of, I think, the GPL subscription forms.

But again, that was not with a view to considering the issue of placement fees and there's no reference to her being asked to specifically consider that issue ...

(Ms Clarke's video feed lost)

MR STOREY: I think we've lost Ms Clarke again.

Ms Clarke --

PRESIDENT: We've lost you.

MR STOREY: Sorry, we lost you again. Just about 10 seconds this time.

MS CLARKE: Yes, sorry.

Total Solutions, Ms Baines' predecessors --

PRESIDENT: I'm sorry to interrupt, but what is happening is that you are cutting out from time to time for 10 or 15 seconds.

MS CLARKE: I'm sorry. I don't know why that is. I'll sit closer to the computer, that might help.

MR SAEED: Is it possible, ma'am, if you can rejoin?

PRESIDENT: Thank you for your help.

MS CLARKE: Is that any better?

15:17 PRESIDENT: Yes.

MS CLARKE: I think I was talking about Total Solutions. Again, as I say, there's no documents produced by them to say that the issue of whether or not placement fees should be disclosed or whether or not these platforms were funds, et cetera, had ever actually been posed to them and that the proper advice had been sought.

Lastly, the suggestion that the DFSA were well aware of everything that was going on, on the basis of the scanty emails that the Applicant has produced, is just, we submit, woefully short of the burden that's on them.

What the DFSA were aware of is the limited facts that they knew about DIFC, which included the fact that DIFC apparently had only eight clients or something like that, none of which were the investors.

The suggestion, because of the email chain where Mr Singhdeo mistakenly sends, I think, Al Masah Cayman's business plan as opposed to Al Masah DIFC's business plan, to the DFSA, and then the DFSA come back and say, "Can you tell us a bit more about these platforms and the placement fees that you're going to be earning." Then Mr Singhdeo replies and says, "No, sorry, I have sent you the wrong information". On the basis of that exchange, the Applicants say, "Well, it's quite clear that the DFSA knew all about what was happening and all

15:18 about what Al Masah Cayman were doing." That is just not a credible way to read that email chain, I submit, and does not bear the strength that the Applicants seek to put upon it.

That really is what I have to say in terms of the reasonable steps reliance. First of all, it has actually a narrow application to the provisions that I've cited. Second of all, it is not, I submit, relevant to knowing concern, because knowing concern depends on knowledge of the underlying facts, not the conclusions that one draws from those facts.

It may be relevant to penalty, if you decide that there was reasonable reliance by any of these Applicants on advice given, et cetera. But I submit that there just simply isn't the evidence adduced by the Applicants that would enable you to draw that conclusion.

So that's my submission in relation to the reasonable steps.

I note the time. I think I have 10 minutes. What I really intended to do was to say nothing further about the various other issues, all of which I think we have fleshed out in detail in our written submissions and I know that you will read that carefully.

But the final point, that I just wanted to bring the case back in terms of focus to where I began, when I did

15:20 my opening over a week ago, is that when one looks at the way in which the Decision Notices were drafted in each case, and this is set out at paragraph 240 of our closing submissions, what is clear is that the overarching rationale of the penalties imposed in each of the five cases record in similar terms the factors that were particularly relevant, as according to the DMC, in determining the size of the penalties, et cetera.

It amounts to this. Investors shouldn't be misled by those who are marketing funds. Deterrence is an important factor. Nature, seriousness and impact on investors of the contravention was an important factor.

The fact that it was a deliberate policy that placement fees were not disclosed. And that, in my submission, is the only conclusion that one can reasonably draw from all the evidence in the case, because if that wasn't the position, there would be no need to have forged or falsified the ANEL annual report, financial statements, and to mislead Investor A in the way that he was and deal with Distributor B and the various other matters. There would be no need to do any of that unless there was a deliberate policy that placement fees should not be disclosed and should be concealed, frankly at all costs.

15:22 The next matter was proper disclosure of information relating to placement fees was material for the decision of the investor as to whether to invest. That's a live issue between the Applicant and the DFSA. Both sides have set out their position in writing and I don't propose to do it orally.

But in short, what I say, is that when you read the transcripts of the interviews, when you hear from the two witnesses that gave evidence, the two investors, what is clear is that if they had known about these placement fees, particularly given the size of them, it would have been something that would have been relevant to their decision to invest or the terms upon which they invested.

The next factor was that the effect of the placement fees meant that up to 10 per cent of the investment was paid out by the investment company and that reduced the equity available for investment. However the Applicants tried to characterise this in various different ways, that's the practical upshot.

If I invest £1 million and £100,000 then goes to Al Masah Cayman, what that means in practical terms is that only £900,000, or $900,000, I suppose, is available to be invested in terms of buying schools or shares in unlisted companies or whatever. That's the practical

15:23 reality.

Lastly, the fact that all three of the individual Applicants were involved in steps taken to conceal information, which might have disclosed the payment of placement fees from the investment companies to Al Masah Cayman.

We submit those are the factors that should remain of central relevance in terms of the consideration of the appropriate penalty, whether that be financial, whether it be prohibition or both.

We submit that on those issues, you can be satisfied to the requisite standards, and therefore, that the penalties imposed are appropriate in each case.

So that's all I propose to say and I note that it's 12.24.

PRESIDENT: Thank you very much indeed for your help. We're most grateful.

Mr Hill, when you're ready.

Closing submissions by MR HILL

MR HILL: Thank you, sir.

I'm going to deal with the allegations in the order that I did in my oral opening, dealing first with the structural allegations, then with the question of whether the literature which went to prospective investors was misleading with regard to fees, then with

15:24 the other allegations in the case.

You have my --

PRESIDENT: Are you going to go according to the order in the Applicants' guide to the contraventions and related issues?

MR HILL: Yes, broadly, exactly. You have that schedule and the idea of that is to deal with each of the contraventions in what we hope is the best logical order, then give the sub-points in the best logical order, and in each case have cross-references to the list of issues and both sides' written closings. So I'm hoping that's a helpful document for you to take away.

Starting with the structural allegations, before I come on to the legal propositions, if I could just start with some matters of background or context. We do suggest the background is important.

On any view, the business operations in this case were set up with a view to being compliant with regulation. Legal advice was taken, the DIFC subsidiary established, to be regulated, experienced compliance officers were hired, first externally and then internally, and the detailed compliance manual was prepared to seek to ensure compliance with regulation.

There was also detailed guidance for the investor relations team dealing with investors in a manual for

15:26 them.

No one thought there was any problem at the time. Whether arising from the proposition that the private equity platforms were funds or arising from the proposition that the activities being carried out by the investor relations team were in some way to be attributed not to Al Masah DIFC, as everyone thought, but to Al Masah Cayman. Ms Baines certainly didn't think there was any problem of that kind and nor did her predecessor compliance officers.

Each of those people had a function to look after compliance issues of this kind. We saw Ms Baines' role involved physical checks on the activities of the company. She clearly understood the nature of the business and the activities that were being carried out. And that's clear from her own work on the internal compliance manuals as well as her various submissions to the DFSA.

She, of course, was reviewing marketing material, including quite detailed material for the holding companies, to ensure that what was said was clear, fair and not misleading.

You will recall that we took Ms Baines in cross-examination to an example -- and there's no need to go to it now, but for your note, it's exhibit

15:27 EXH-632.

That was an investor presentation for ANEL from December 2013. That's a document that's on Ms Baines' marketing register, so it's common ground that she reviewed it.

Her evidence, indeed -- and this is paragraph 33 of her witness statement, was that she would print out every document that she reviewed, read it in its entirety for the purposes of assessing its clarity and reasonableness, based on her understanding of the fund and its assets.

That particular presentation is 50 pages long. What you'll notice when you look back at it is that it includes the same structure chart as that which the DFSA has now pasted into its closing submissions. The DFSA say now that this structure chart graphically demonstrates the reality of what the investors were investing in.

But Ms Baines knew all that. She well understood the nature of the investments, and she well understood what the activities were that were being carried out in relation to these investments in the DIFC and who was carrying them out.

We do suggest that it's highly significant that these experienced compliance officers, including

15:28 Ms Baines, didn't apprehend there to be any problem of the kind that's now identified by the DFSA.

My learned friends just referred to us pinning the blame on Ms Baines. That's not a fair characterisation.

We say that she was fundamentally correct in the views that she took, that there was no breach of regulation, but we do say that if there was an error, this was her area and she never either apprehended it or mentioned anything to others in management.

As we submitted in opening, this is all relevant to the tribunal's assessment. The tribunal's assessment involves nuanced questions of mixed fact and law, as to whether on the detailed facts of this case, there are any breaches at all.

For example, we have here Ms Baines, the person implementing and monitoring the system for how DIFC staff are going to conduct marketing activities, in accordance with the investor relations team manual that she herself edited.

Ms Baines considered that this involved these people, these individuals, these staff, conducting activities for Al Masah DIFC, not for Al Masah Cayman.

That position on her part is a significant point for your own assessment as a tribunal in determining which company those marketing activities are to be

15:30 attributed to. So we do say the position of Ms Baines is relevant to starting the assessment of whether the structural allegations are made out at all.

Her position is also relevant to the issue of whether individuals can properly be said to be knowingly concerned in any contraventions. We do suggest it would be a remarkable outcome for an individual such as Mr Dash to be held to be knowingly concerned, let's say, in the breach of the marketing financial services prohibition by Al Masah Cayman, when he did not consider that Al Masah Cayman was even carrying out any marketing or could conceivably be in breach of any such prohibition, and where he had taken, we suggest, all reasonable steps to prevent any non-compliance of that kind, in particular by employing someone of Ms Baines' experience and expertise.

We also obviously suggest, and the DFSA I think agrees to this extent, that the position of Ms Baines is relevant to questions of penalty, even if the tribunal were to decide that any allegations are made out.

Putting those points together, when you look at the DFSA's closing document, we suggest they seriously underplay matters at paragraph 9.3(b) of their document, where, just to quote them, they say:

"The DFSA does not consider that the question of

15:31 whether Ms Baines was compliance officer for Al Masah Cayman is particularly relevant, in any event."

Then they say:

"In terms of a list of issues, Ms Baines' role is, at most, tangentially relevant to the question of penalty for the individual Applicants."

We suggest that seriously understates matters and, indeed, would represent an unfair approach by the regulator.

If that really is the DFSA's considered position, it conveys an alarming message to business people wanting to conduct financial services business in the DIFC. This regulator is apparently telling them that whatever steps they take to ensure compliance, by having skilled professionals advising them and monitoring the activities, that will still be of only tangential relevance in the event of a regulatory action, in which these business people, as directors, may be pursued personally and in circumstances where the compliance professional is not.

The other point I should mention that the DFSA make in the same paragraph, and the point my learned friend made today, are also bad ones. My learned friend makes the point that Ms Baines only came on the scene when the business was already set up. But, first, there were

15:33 compliance officers in place externally before Ms Baines. Management, of course, were also able to rely on them to be doing their job.

Secondly, Ms Baines' job was to monitor the business on an ongoing basis. She was submitting a quarterly return to management, every quarter, confirming in each quarter that there were no regulatory breaches, and that Al Masah DIFC's licence remained appropriate for the work that it was carrying out.

Just for your note, we went to one with Ms Baines, but one reference is at C016, SKD 4-15. It's headed, "Attached with Email". That document, which we went to with Ms Baines, gives a good flavour, we suggest, of the ongoing monitoring and review and also regular reporting and meetings and of Ms Baines' meetings with the DFSA.

We do say, when you look at a document like that, that management was entitled to rely on the work that Ms Baines was doing. The DFSA's suggestion -- and I'm quoting -- that it doesn't provide "any great mitigation", is a remarkable one and quite wrong. So that's the background.

Turning now to the funds allegation, which Mr Temple dealt with this morning, we deal with the allegation at paragraphs 33 to 66 of our closing. It is at the heart, first, of the issue of whether Al Masah Cayman was or

15:34 was not offering units in funds in or from the DIFC. That's the allegation that we list at item 1 of our schedule, because it's the first of the Al Masah Cayman Decision Notice contraventions.

No one considered the private equity structures to be funds, for the purposes of the Collective Investment Law. That is clear, for example, from the fact that they were not reported as funds on the forms filed to the DFSA on the marketing of foreign and domestic funds.

That, of course, is important background, for the reasons I have said. What we suggest is not important background is a point made by the DFSA, which is that there are occasional references in documents where the private equity structures are conceivably referred to as funds.

As we submitted in opening, it's not a useful exercise for the DFSA to scour the documents in the case for sporadic references to the private equity structures being referred to as funds in some business sense. That's an exercise the DFSA, nevertheless, carry out at paragraph 32 of their document.

Even when they do undertake an exercise of that kind, the DFSA's presentation, we would suggest, is unfair. For example, at paragraph 32.2 of their document, the DFSA note a reference to six funds. It's

15:36 also a reference made at their paragraph 55. That is a reference to the document at exhibit 601 on page 4. It might be worth Fatima just putting that up.

There is a reference on that page to six funds at the bottom of the page in the second blue box. But if you go to page 6 and look at the top right-hand corner, you can see there is a reference there to:

"Launched IPO fund along with the 6th fixed maturity fund ..."

That is a bad point by the DFSA, so the exercise they're conducting of searching for references to "fund" is not only not useful, it actually leads to misdirection.

While I accept it may be possible to find sporadic references to "funds", the documents in this case overwhelmingly do not, in fact, refer to these structures as "funds", but they refer to them as "platforms" or as "companies".

One only has to look at the corporate structure charts that the DFSA reproduce in their closing document and they rely on, to see that we are dealing here with investments in companies and not in funds.

The DFSA have previously accepted that references in documents to "funds" are not determinative, and we of course accept that, but we go further; they don't assist

15:38 at all.

On a similar point, paragraph 29.6 of the DFSA's closing contains a summary of some evidence from Mr Dash himself on this topic. Indeed, 29.5 also, so those two subparagraphs together have a quote from Mr Dash's evidence.

That, I'm afraid, is a selective quote, because it misses out some words, some lines indeed, in the quote. As you see from the paragraph of the DFSA's submission, they quote the first eight lines of transcript from day 6, page 15, and then they quote lines 18 to 22.

I'm sorry. The missing part is in between subparagraphs 29.5 and 29.6. It may be easiest if we pull the passage up. If Fatima could pull up day 6, pages 14 to 15.

If you scroll down the page to line 18, you can see the DFSA quote Mr Dash's evidence:

"A fund manager decides where to put the money, when to put the money and when to sell the businesses."

The DFSA then move on and don't quote the next lines, which are important lines:

"The liability solely lies and all activities are done by the fund manager, no other person is involved in that. We can see that in an equity fund, in a hedge fund, in a bond fund, in a money market fund. That is

15:41 how a fund unit operates, such as the IPO fund that we had, the opportunities fund that we had, the five fixed maturity funds that we had. So we know the structures of how a fund operates."

Then the DFSA quote the next section, so they've missed out that parted in the middle. The effect of that is to underplay and fail to recognise the crucial point that Mr Dash is making. There is a fundamental difference between a fund with a Fund Manager and the private equity companies.

The Fund Manager, in the case of a fund, makes the decisions and has all the liability. In the case of these companies, they are run by their boards which have decision making power and the shareholders have ultimate power in respect of the boards themselves and matters such as that. I'll come back to that in a moment.

I'll deal with that point now. Under the Articles in the relevant period, directors could be removed. For your note, we have a set of Articles at exhibit 212.

When you look those up, what you'll be reminded of is that the Al Masah directors, as they're quoted, are only within the definition of "Al Masah directors", as long as they are directors.

Article 88, you'll see, provides that the manager is entitled to appoint and remove a majority by number of

15:43 directors. But subject to that, shareholders are entitled to appoint and remove directors, and there are shareholders who are representatives on the boards of these companies.

What you'll also see is that the Articles provide for reserve matters, including the removal of the manager. But -- and this is an important point -- the Articles themselves can be amended by special resolution of the shareholders. That has, in fact, happened in this case.

In other words, what we have in this situation, unlike in a fund situation, is overriding shareholder control. If they want to, the shareholders can take complete control, and that is a very important point.

In that context, the DFSA makes submissions about Regulus. You'll see that at paragraph 29.6(c) of their closing document.

That is a bad point. It is entirely wrong to use the position of Regulus as an example, because the position with Regulus is different from the position of Al Masah Cayman. There are new provisions in the Articles. For your note, the Articles for Diamond Lifestyle illustrate this and are at exhibit A003. Under the new Articles, Regulus does have the sole right to remove or appoint directors.

15:44 For your note, that's at Article 93. There's also been amendments to the ANEL Articles, which are at exhibit A003.

It's not at all helpful for the tribunal to be shown or for the position of Regulus to be mentioned to the tribunal as being in some way relevant to the position of Al Masah Cayman. These are separate rights and they're not reflective of the position of Al Masah Cayman.

That's what I wanted to say about the background to the legal points.

Turning to the legal points, the starting point is: what is the property, which is a point picked up by Mr Malek this morning with Mr Temple. The DFSA have now made it clear that for the purposes of Article 11, the property comprises the assets and in particular the shares owned by the operating companies.

That's the footing on which we analyse whether there's an arrangement in respect of that property, which satisfies the requirements of Article 11. That's the preliminary point we identify in our schedule at 1.1.1.

That brings us to pooling, which is in our table at 1.1.2. We give there the references to each side's position, where the rival positions are set out. We

15:46 would submit that on this pooling question, we have, by some margin, the better of the arguments.

As we explain in our document, the background is that where there is a unit trust, properly so-called, there is a trust of pooled money for investors. There's no read across to this structure, where you have profits being made by the underlying property, which those profits then belong to the operational company, and potentially before that even to a sub-subsidiary. It's only if the operational company chooses to declare a dividend and can lawfully do so that there's any upstreaming even to the holding company.

Then even at that level, the investors themselves have no rights to any share in those profits. They are only entitled to their dividends, if and when the holding company chooses to declare dividends and is lawfully able to do so.

So you have essentially a chain of companies and in no sense can you say that the underlying profits made by the businesses underneath the operational company are pooled for investors. That's pooling.

Next is the question: is Al Masah a Fund Manager? The question being whether or not the property was managed as a whole by a Fund Manager within the meaning of Article 11.1(c)(2).

15:47 Both sides have broken this down into sub-issues. We suggest in our schedule a slightly different sequence for dealing with them, which we suggest is the most logical. The first logical issue is the two issues regarding whether or not Al Masah Cayman was legally accountable to unit holders. If not, then it's not a Fund Manager, so the requirement of management by a Fund Manager can't be satisfied.

We deal with that at our paragraphs 41 to 52. In those paragraphs, we address all the arguments which, to that point, the DFSA had made, in particular in their opening skeleton, and which we suggest are insubstantial and indeed incorrect.

My learned friend Mr Temple this morning repeated his submission that, as he puts it, a Fund Manager can be legally accountable under this structure, because you can have a derivative action. We would submit that that doesn't give any proper substance or meaning to the idea of accountability because, on that footing, any person dealing with a company, would be legally accountable to all the company's shareholders. That is stripping the idea of accountability of all meaning, in our submission.

In their written closing, the DFSA have added no new points on this topic that go to the issues.

15:49 But what they do do in their written closing is shoe horn in further allegations in respect of Regulus. They say that the tribunal is not required to make any findings about Regulus and they say it's outside the scope of the DMC's decision and no part of these proceedings. But that being so, it's not appropriate for the DFSA to be inviting the tribunal to place any focus on it, in our submission.

Indeed, one example of the dangers of the DFSA's approach is that it invites the tribunal to draw conclusions about Al Masah Cayman, based on the rights that Regulus has. But as I have just submitted, the rights that Regulus has are different and they arise from changes in the Articles that have happened since Regulus took over. So it does illustrate why jury points of this kind are, in our submission, dangerous and should be ignored. Those points are ones that are made at paragraphs 29.6(c), 72 and 74 of the DFSA's closing.

We would suggest that the fact that the DFSA feels a need to refer to Regulus in order to make points indirectly about Al Masah Cayman, rather shows the lack of merit and lack of any ability to make points by reference to Al Masah Cayman itself.

There is a related point at paragraph 74.7 of the

15:50 DFSA's closing. This notes that the wording of the subscription form has now changed, so as to say that distributors and placement agents receive a placement fee, which will reflect the prevailing market rates and which are subject to negotiation.

What the DFSA suggest is that this undermines the Applicants' arguments that it was not appropriate to refer explicitly to placement fees.

But the reality, of course, here is that the DFSA have now pursued the Applicants, they've complained about the wording of the previous versions of the subscription forms, and they've imposed substantial provisional fines on them.

So it's hardly surprising and isn't any sort of concession, that the wording has been changed to guard against the points being taken by the DFSA. Indeed, what we would note is that the new wording, which has been put in to guard against the DFSA's points, in fact does little more than make explicit that which was already clear, we submit, from the Articles. There's no description of the level of fees. There is simply a notification to investors that the company may pay fees of this kind. We would submit that's exactly what the Articles said first time around.

The next logical issue is whether, even if Al Masah

15:52 Cayman was a Fund Manager, the property was not managed as a whole by Al Masah Cayman, for the purposes of Article 11(c)(2). We have identified that at 1.1.3.3 of our document. It's 1(b)(1) of the list of issues. In our document, we give the references to each side's closing.

In our document, this point is picked up at paragraphs 43 to 58. We make the short point that the property in question -- that being the shares in the assets of the operational companies -- was managed by the boards of the operational companies. It wasn't managed by Al Masah Cayman as Fund Manager.

We point out that the DFSA themselves on their website articulate the distinction between a Fund Manager and an Investment Manager. We give the reference in our document.

Here, Al Masah Cayman was not the manager of the assets. The companies' boards were the managers of the assets. As we explain in our document, the fact that Al Masah Cayman had an investment management role doesn't alter the fact that managerial responsibility over the companies' assets rested, as you'd expect, in the companies' boards.

We would invite the tribunal, when analysing this allegation, to be particularly alert to the references

15:54 in the DFSA's closing document to Al Masah Cayman being described as investment manager. Examples are at paragraphs 76, 81.5 and 84 of the DFSA's document. That is not the same as being a Fund Manager. In our submission, this reveals an error in the DFSA's approach.

The DFSA also say that in trying to identify who is the Fund Manager and whether property is managed as a whole by the Fund Manager, the relevant management is that which produces the profits or income. That's a point they make at paragraph 57.

Their point is that the relevant management is the purchase, holding and disposal of shares in the underlying assets. But of course it is the operation of the companies that produces these profits -- whether by way of dividend or profit on sale. This isn't a case of passive investment. So this point from the DFSA doesn't take them anywhere, because one still ends up at the position that the relevant management is the management by the directors of the relevant companies which, in this case, are the operational companies.

That, then, leads to the next question, which is attribution. This is the point which is at 1(b)(4) of the list of issues and identified at 1.1.3.4 of our document. If there was a Fund Manager, it was

15:55 Al Masah DIFC.

This issue primarily arises in a different context, which is: was Al Masah Cayman undertaking fund management activities in or from the DIFC or was it Al Masah DIFC which was undertaking fund management activities in or from the DIFC? That's an issue that we deal with at paragraphs 59 and 103 of our document.

The question is: insofar as there are fund management activities being carried out, are they being carried out by Al Masah Cayman or Al Masah DIFC? The answer to that, as is clear, we submit, from Ms Baines' evidence, is that all the fund management activities were carried out by staff of Al Masah DIFC and were activities of Al Masah DIFC.

I'll come back to the question of attribution shortly.

The next question -- I'll just cover this before we break, if I may -- is whether the exclusion applies. That's the exclusion at Collective Investment Rules 2.1.10 and it's the exclusion of the bodies corporate.

The DFSA have, in their closing document, essentially repeated the submission which they made in opening and which we have dealt with in our document. We do suggest that the DFSA's closing shows a lack of commercial understanding, in particular in paragraph 84

15:57 of their document. This is a point repeated by Mr Temple this morning.

The suggestion is that because Al Masah Cayman was an investment manager to the holding companies, that leads to the conclusion that the holding companies were engaged in the business of investment management. That is a non sequitur, but one that was repeated this morning.

The next point relates to paragraphs 88 and 89 of the DFSA's closing. These are essentially two new paragraphs introduced by the DFSA from their opening, and they rather miss the point.

What the DFSA are suggesting in paragraphs 88 and 89 is that it is our case that by the interposition of a subsidiary, a structure can avoid amounting to a Collective Investment Fund when it otherwise would be a Collective Investment Fund. But the DFSA have got all this the wrong way around. The question is whether the body corporate exclusion applies.

The body corporate exclusion doesn't apply if the body corporate is engaged in investment management.

We accept that if the operational companies themselves, if their business was itself that of investment management, then using subsidiaries isn't going to help us. We accept that.

15:59 But where this point arises is the other way around. Our case is that the business of the operational companies is decidedly not investment management. They're operating a real business. They've operating schools and the like in the case of ANEL. This is a business, not an investment management portfolio.

That being so, the fact that you have, as my learned friend calls, it a wrapper, above the operational companies, you have a holding company who only holds the shares in the operational companies, that doesn't suddenly transform this into being investment management, so as to make the body corporate exception inapplicable. That's why we say the DFSA have it the wrong way around.

We're fortified in our position, we suggest, by the DFSA's own analysis that the property, for the purposes of Article 11, is the assets of the operational companies. That being so, it wouldn't be right just to fasten on the fact that the holding companies own the shares in the operational companies, to say, "Hey presto. It has suddenly become an investment business." That's unrealistic.

Given that on their case, one looks below the operational companies to identify the property, you don't do an artificial exercise of fastening on the

16:00 intermediate holding. Something that is not an investment business, suddenly doesn't become an investment business.

So we do say the DFSA have matters the wrong way around at their paragraphs 88 to 89.

If that's a convenient moment, I'll resume at 2 o'clock, if I may.

PRESIDENT: Yes, we'll stop now and start again at 2 o'clock.

MS CLARKE: Sir, before we do, can I just correct one matter that I raised this morning and that may or may not --

PRESIDENT: I'm sorry. I can't hear you.

MS CLARKE: No, I can hear an echo. I'm not sure whether anyone else can. Is that better?

The point was I said that Mr Lim was present at the DMC oral representations meeting. That was my recollection, but I've had a flurry of --

PRESIDENT: We're not concerned. I can't repeat this often enough. We're just not interested, frankly, in what goes on at the DMC. This is a re-run.

MS CLARKE: All I wanted to say was the team's recollection is he wasn't there, so I just wanted to correct that.

PRESIDENT: Thank you.

(4.01 pm)

(Lunch break)

16:41 (5.00 pm)

PRESIDENT: Welcome back, Mr Hill, ready when you are.

MR HILL: Can I just start with one correction from this morning. I gave you a reference to Diamond Lifestyle's new Articles and the rights of Regulus. Just to be clear, those are the only new Articles in the bundle. I may have inadvertently suggested that the new ANEL Articles are also in the bundle. The Articles are not, but there are meeting minutes which do show that ANEL's articles have also been amended, which are at exhibit EXH-A045. The old ANEL Articles that are relevant to this case that apply to the Al Masah Cayman era are at exhibit EXH-212.

I was dealing with the funds allegations and I have dealt with all the key issues, bar one, that go to the question of whether Al Masah Cayman was offering units in funds in or from the DIFC.

There is one additional remaining issue, which we identify in our schedule at 1.3. That is where we say, in any event, Al Masah Cayman was not offering units in funds, because to the extent that any Al Masah entity was doing so, it was Al Masah DIFC. Then we say it's common ground that if fund management activities are to be attributed to Al Masah DIFC, then Al Masah Cayman is not to be regarded as offering units in a fund.

17:01 That reflects the common ground in the list of issues which is at A014.

We make the point at paragraph 65 of our closing that all the marketing and promotional activities were carried out by Al Masah DIFC.

What we see in the DFSA's document is a new point on this and this is at their paragraph 121. And the gist of their argument is that the subscription form is itself an offer by Al Masah Cayman that investors would then apply for shares, which Al Masah Cayman would accept, giving rise to a contract for the issue of shares and it said that brings Al Masah Cayman within Article 50 of the Collective Investment Rule.

The difficulty with this argument is that it doesn't address the activity of offering. The legislation requires that there must be an offer being made in or from the DIFC. The activity of offering in this case is, for example, the provision of forms to investors, which is something that Al Masah DIFC is engaged in and not something that Al Masah Cayman is engaged in.

The mere fact that Al Masah Cayman is, for example, a party on the forms, cannot lead to the suggestion that it is making an offer in or from the DIFC. It's obvious why, because the alternative would be an absurd floodgate situation. Every single offshore fund which

17:02 had a paper which you could sign to take up a subscription would, on that argument, be engaging Article 50 and making an offer in or from the DIFC, regardless of the fact that you had lots of independent third parties who were, for example, engaged in doing all the promotional and marketing activities. So that would be an absurdity and that argument doesn't run.

Those are all the points on the funds allegations.

If I could move to arranging deals and investments. This is issue 2 and it's picked up in my schedule at item 3.

What we have done in our schedule is reversed the sequence of the issues, so we have listed issue 2(b) dealt with before issue 2(a), which we suggest is the more logical sequence, looking first at whether arranging activities were carried out by Al Masah DIFC rather than Al Masah Cayman. And then, secondly, the more technical question of whether Al Masah Cayman was, in any event, party, so as to engage the exclusion.

Dealing first with the arranging and attribution question, we deal with that at paragraphs 92 to 96 of our document. And the short point is that any and all arranging activities were carried out by Al Masah DIFC. If the activities of the Al Masah DIFC staff, in promoting and marketing this material to investors and

17:05 liaising with investors, if that amounted to arranging, then it was arranging on the part of Al Masah DIFC.

Ms Baines was entirely clear on that point and we give the references at paragraph 95 of our document.

Looking beyond the activities of the investor relations team, the DFSA, in their closing, are unable to point to any actual activities of any substance that would amount to arranging, other than the activities of the investor relations team. They do make an effort, but, for example, the fact that Al Masah Cayman formed the investment companies doesn't, for a moment, amount to arranging deals or investments.

The issue does essentially boil down to one of attribution and the question is: who were the investor relations team representing? The obvious answer is the one that Ms Baines gave. They were representing, and their conduct is to be attributed to, Al Masah DIFC.

The DFSA's main counter argument to this is one they make at paragraphs 105 to 107 of their document. The argument is that Al Masah DIFC couldn't have been doing the arranging because it wasn't on-boarding investors as clients.

We deal with that at paragraph 95 of ours. It does involve a non-sequitur. Ms Baines was entirely clear, correctly, that if there were arranging activities, they

17:06 were being done by Al Masah DIFC. In other words, the activities of the investor relations team were for and on behalf of Al Masah DIFC. And if it's right that client on-boarding didn't happen sufficiently, that doesn't reflect at all back on the question of who was doing the underlying activity.

All it means is that client on-boarding, perhaps on that argument, should have been taken further than it was. But that, of course, is an area entirely for Ms Baines. She set up and ran the client on-boarding system. If, as a result of her systems, there was not sufficient client on-boarding to meet the arranging activities that were happening, that doesn't mean that the arranging was being done by Al Masah Cayman instead. It means the arranging was still being done by Al Masah DIFC, but there should have been more client on-boarding.

But client on-boarding and a deficiency in taking investors on as clients is no part of this case and it's important to remember that. So it doesn't take the DFSA anywhere.

On a related point, the DFSA, at paragraph 182 of their document, question whether some of the investors really were professional clients, whether they were sophisticated. That is another argument that doesn't

17:08 take them anywhere. The investor relations team and Ms Baines, in particular, had systems in place for checking that all investors qualified under the DFSA definition of professional clients.

That was what the investor relations manual said and we have given references in our opening, in fact, at paragraph 67(c)(2) and at paragraph 78(h). That's also the process that Ms Zudikova explained was happening and Ms Baines was part of the process.

It doesn't take the DFSA anywhere to say that clients may not -- investors may not have been professional clients. There was in fact a system in place to check that they were and that was a system that Ms Baines and Ms Zudikova were part of.

It's also worth noting that the suggestion that some of the investors may not have qualified and may not have been sophisticated enough, was not one that was put to any of the Applicants' witnesses. In my submission, it should have been, if the DFSA want to make something of that point.

While I'm just on my last point, can I just note that although the president of the tribunal indicated, rightly, that not every document needs to be put to a witness, there are a number of occasions in the DFSA's closing where they seek to draw conclusions or

17:09 inferences about what the Applicants meant in documents, in circumstances where those documents were not put to the relevant individual.

I don't intend to take time addressing each of them, but if I can just give you some references very quickly. Paragraph 73, referring to exhibit EXH-A002, paragraph 107.3, referring to exhibit EXH-710, paragraphs 182.1 and 182.2, referring to exhibits EXH-C704 and EXH-C706, and paragraph 186.3(b), referring to exhibit EXH-A045.

I was just dealing with the reference to whether investors were or were not professional clients or sophisticated. We would suggest that's a non-point. Where one comes back to on this part of the case is the question of attribution, as I say, and the DFSA's reliance in particular on the Sarasin case. They had a section on the Sarasin case in the start of their document and my learned friend Mr Temple picked up on it today.

I dealt with that case at some length in oral opening. We deal with it further in our document at paragraph 114. The DFSA have fairly indicated that my analysis in terms of the critical point being the court seeing the particular Sarasin-Alpen staff as the instrument or parts of cogs in the machine of the bank

17:11 is one to bear in mind.

Drawing on our analysis, Mr Temple and the DFSA still seek to suggest that the Sarasin case assists them in the sense that, as they put it, the Al Masah DIFC staff were the instruments of Al Masah Cayman, but that doesn't wash for the reasons we have given. This isn't a case where you have a few Al Masah DIFC staff, who despite their notional employment status are just operating as cogs in some larger offshore team, which is what you had in the Sarasin case.

Here the whole of the activities are taking place in the DIFC. There is no larger team operating somewhere else for them to slot into. It is a DIFC team, who are, as a whole, exercising the DIFC regulated functions and acting for and on behalf of the DIFC company. And Ms Baines understood that.

Just to pick up on the references to the judgment, one needs to look in the Court of Appeal judgment at paragraphs 268, 269 and 270 and then at paragraphs 319 to 324.

What you'll see there is that the Court of Appeal stress the point, points such as the one that Bank Sarasin had its own client relationship team structure and the relevant individuals from the DIFC entity were just slotted in as part of that client relationship

17:12 team, with no distinction or acknowledgement that they were, in fact, part of a separate legal entity.

What the Court of Appeal were doing was acknowledging that there were a plethora of evidential points, which established that it was in fact Bank Sarasin who was carrying on the investment activity and just using individuals who happened to be employed by the DIFC joint venture company.

So there's no comparison with this case where you don't have, if you like, the wider operation that certain members of the DIFC team are in some way slotting into.

I should just reiterate that the Court of Appeal were very careful, at paragraph 333 of their judgment, to say that the point that they were making should not be assumed to be of general application to a situation where you have a DIFC regulated entity which performs functions for an entity offshore.

So much for the Sarasin case.

The next point relates to the contractual position, as between Al Masah DIFC and Al Masah Cayman. We deal with that in our document at paragraphs 20 to 23. As we explain there, in our submission, the contractual position does in fact comprehend the delegation to Al Masah DIFC and is sufficiently broad to capture, as

17:14 a matter of contract, services carried out.

But whether that's right or not, in a sense, doesn't matter. Because both companies were plainly proceeding on the mutual basis that Al Masah DIFC was delegated the authority to perform activities, such as marketing and arranging on behalf of Al Masah Cayman.

That's entirely clear from the regulatory returns, for example, that were submitted to the DFSA, which explained that Al Masah DIFC was conducting promotional activities in respect of the structures launched by Al Masah Cayman. And we refer to what was said and what was apparent to the DFSA at paragraph 112 of our document.

That was, of course, the way in which the operation was set up. Ms Baines had no doubt about it. She was approving and implementing the systems by which this was actually happening on the ground.

We would submit that the DFSA derive no support for their case from the contractual analysis that they've undertaken, and if it supports anyone, the contractual analysis supports our case.

It is worth pointing out that there's something of an inconsistency now in the DFSA's case. The DFSA maintain an earlier submission from their opening -- this is paragraph 22.2 of their document. They maintain

17:16 an earlier submission, which says that Al Masah DIFC was, as they put it, limited to providing advisory services to Al Masah Cayman.

But the DFSA have now added footnote 18, where they say that the point is only being made in the context of the agreements and the DFSA accept that Al Masah DIFC also in fact conducted marketing activities.

In our submission, that just drives a coach and horses through the DFSA's argument. So it's common ground that as a matter of the mutual dealings between the parties, Al Masah DIFC was authorised and able to conduct these activities. And that's all we need.

But despite this, despite that acknowledgment in the footnote, what you'll see in the DFSA's document is that they return to the contention that Al Masah DIFC was only contracted to perform advisory services. You see that at paragraphs 112.3 and 114.1.

So we suggest that is a continuing inconsistency in that what's said in those paragraphs is undermined by the candid concession in their footnote.

That's all I wanted to say about issue 2(b).

The next question is issue 2(a), which concerns whether the exclusion applies on the basis that Al Masah Cayman was party to the arrangements even if it was otherwise arranging deals and investments.

17:17 On any view, Al Masah Cayman was a party to the subscription form. It was a signatory. It was a beneficiary of an undertaking to pay fees from the investor. We submit that really is the end of the matter.

It's worth noting that there are inconsistencies here also in the DFSA's case. The DFSA, at paragraph 121.3 of their closing, when they're trying to characterise Al Masah Cayman as making an offer in units, they say that the subscription form was an application for shares by the investor, which Al Masah Cayman would then accept. That's paragraph 121.3.

At other parts of their case, of their argument, they're keen to characterise Al Masah Cayman as being a party to the subscription form. But not when it comes to the exclusion.

That's an inconsistency.

Similarly, the DFSA positively rely on Al Masah Cayman's status in the subscription form as saying that Al Masah Cayman came under a liability to investors, thereby engaging the fund management definition of whether there's accountability for the purposes of Article 11.

Again, that's inconsistent with their position in relation to the exclusion.

17:19 The reality is the other way around. Al Masah Cayman was undoubtedly a party and therefore the exclusion is engaged. But for the purposes of Article 11, Al Masah Cayman did not assume legal responsibility to investors with regard to managing the fund.

Then we also specifically deal in our closing with the allegation of the breach of the financial services prohibition as it relates to fund management activities. And just for your note, that's at items 5 to 6 of our schedule, paragraphs 102 to 105 of our closing.

That's the exclusion and what I wanted to say about arranging.

The next point is financial promotion, which is issue 4 in the list of issues. It comes up from item 7 onwards on our schedule.

The starting point here is to look at what is the relevant financial promotional material. We suggest that it's unrealistic to include either the annual reports or the subscription forms as promotional material.

Dealing firstly with annual reports, they weren't intended for prospective investors. Ms Baines didn't treat them herself as marketing material. She was the person who decided what was and wasn't marketing

17:20 material. And if she had taken the view that the annual reports were marketing material, she would have included them in her list and reviewed them.

That was also the gist of Ms Zudikova's evidence. And as we explain, at paragraph 152, if it was the case that annual reports were in fact provided to any prospective investors, rather than existing shareholders, that was an exception and it's not an exception that establishes anything of significance for this case.

What we see in the DFSA's document is that they draw these exceptions together, but we would submit that they make too much of them, because they are not exceptions that establish any practice so that it would justify treating the annual reports as marketing material.

The DFSA also make a new point, this is at paragraphs 111 and 187 of their document. The new point is that annual reports were sent out to existing shareholders, who later had a further subscription for shares. And the argument is that in those circumstances, that renders the annual reports marketing documents.

That, again, is, in my submission, a stretch and an artificial point. There's no suggestion that the annual reports were going out with a view to soliciting further

17:22 investments. The happen chance of whether existing subscribers chose to make a further investment can't of itself render annual reports as marketing material.

That's the annual reports. Next is the subscription forms.

It's worth noting that Ms Baines did, in fact, vet and approve subscription forms. But leaving that aside, she didn't regard them as marketing material and she had a good reason for that. The subscription forms are the contractual documents themselves. They're not the material that's intended to promote or solicit a purchase. So it's, again, an inaccurate classification to describe them as marketing material.

The next point on financial promotions is again the question of attribution and we pick that up at 7.1 of our schedule.

We address that at paragraphs 101 to 114 of our document and the DFSA address it at paragraphs 112 to 115. It's worth just picking up a few of the DFSA's points. They refer at paragraph 112 to the website portal.

That portal, that website, doesn't itself suggest there has been any promotion in or from the DIFC. If the DFSA are intending to refer to any acts in the DIFC, for example, referring investors to go on to the portal,

17:23 those again are the acts of the Al Masah DIFC investor relations staff and therefore the acts of Al Masah DIFC, not the acts of Al Masah Cayman.

There's then a reference by the DFSA to something Mr Singhdeo said in his interview about the structure. That's at paragraph 112.2. This is another insubstantial point. A person who would know about the structure is Ms Baines, who was the person checking that it was all regulatory compliant. She understood very well that the marketing was being undertaken by Al Masah DIFC through its staff. She explained that to the DFSA.

The DFSA also say that the obligation to raise capital was that of Al Masah Cayman, but that doesn't take you anywhere. It doesn't answer the question of who was conducting the financial promotions, especially when the companies were operating on the basis that it was outsourced to Al Masah DIFC.

So, in our submission, there are no new points from the DFSA that we haven't met in our document.

We then move to issue 4(b) and that is our submission that there's a system in place for all marketing materials to be approved. We say that the DFSA haven't established that there was any unapproved material that was in fact used or sent out.

So that first engages the Annex D from the DFSA. We

17:25 have made the point before, and we repeat it, that Annex D is an unsatisfactory document. It doesn't establish that any of the listed material was ever sent out.

We also say that the exercise that the DFSA conduct in criticising documents by reference to Annex D is somewhat artificial. There's no suggestion that there's anything significant in any of the items on Annex D, which are said to be unapproved, as compared with the items which were said to be approved. No suggestion, for example, that there's some particular misleading statement that's present in one, but not on the other.

So what one has is an artificial exercise from the DFSA of trying to find some documents which are unapproved, which happen to be in substantially the same terms as approved documents and then seeking to make some point out of it.

You'll have seen that the DFSA even goes as far as to complain that a Word version of the document has been approved, but there's no evidence of approval of a PDF version of the same document, which, in our submission, is utterly unreal.

Leaving aside the fact that the content of the documents is an unpromising beginning from the DFSA, they have the fundamental problem that there's no

17:26 evidence that any of the purportedly unapproved material was in fact used or sent out and therefore amounted to marketing material.

The DFSA don't have an answer to that point. All they can say is that the material was supplied to them by Al Masah in response to a request for marketing material. They say the fact that it was supplied to them is the best evidence that it was used. But that doesn't work on the evidence, because as we have seen, the covering letter supplying the material explained that Al Masah were effectively giving the DFSA the kitchen sink and there was no representation that the material had been used.

We make that point at paragraphs 118 and 119 of our document.

Indeed, it's self-evident, because one can see that the material listed actually includes things expressly referred to as drafts. So there's clearly no statement that this is material that was being used as marketing material.

We would suggest the DFSA have nothing of substance to address the points that we make at paragraphs 115 to 123 of our document.

That's what I wanted to say about the structural allegations. I'm about to move on to the allegations in

17:28 relation to fees in the literature. Before I do, can I say something about the allegation that Mr Dash was knowingly concerned in the structural allegations. And the starting point here is the commentary that the DFSA have given about his role and about how it fits in as compared with the roles of other individual Applicants and their combined roles in the business.

We have mentioned in our document what we suggest is an unrealistic case theory from the DFSA, that Mr Dash and Mr Singhdeo and Mr Lim were all operating together as some kind of cabal, rather than as we suggest is the reality of simply being three members amongst a rather larger team of professionals, conducting private equity business, all of whom had normal professional relationships with each other.

You will have seen that the DFSA's theme is one that's perpetuated in their closing. It comes up again at paragraph 220 of their document. We don't accept that the characterisation they give at that paragraph is a fair characterisation of the documents in the case.

The documents in this case are replete with references to this being a wider team, replete with references to other members of the team, such as Mr Eyad. And the documentary evidence doesn't, in our submission, support the idea that there's some kind of

17:29 cabal of the three of them operating as a close-knit group.

It's noticeable, we submit, that the DFSA have now rather qualified their line on this, at paragraph 220 of their closing, because the way they put it is to say that these three were a close-knit group at least for some of the activities dealt with in this case, which is a significant qualification.

It's a recognition that the evidence doesn't generally support the idea that these three individuals operated as a close-knit group. That implicit recognition is significant, in my submission, because the DFSA still in their document rely on a considerable amount of conjecture as to what one or more of these individuals might have thought or believed on the basis of documents relating to others of the three of them.

We submit the evidence just doesn't support any kind of inference or conjecture on the hypothesis that these individuals operated as some kind of inner group or cabal.

That's what I wanted to say about the individuals' roles, looking at the three of them, which we suggest is not -- the DFSA's approach is not a useful one.

Just dealing first with Mr Dash, I want to address now, because he's said to be knowingly concerned in the

17:31 structural allegations. We suggest the DFSA paint an unrealistic picture of his involvement. It's one that starts in their document at paragraphs 10 and 11 and the gist of their argument is that Mr Dash was master of everything and on top of the detail of everything.

In our submission, that's not a fair portrayal. We always have to remember that we're talking here about a private equity business with extensive underlying businesses. Between them the businesses have thousands of employees. Each of the operational companies have their own dedicated team for day-to-day management. Mr Dash operated as non-executive chairman of the holding companies, he was not on the audit committees, he was not involved in the detail of finance.

He couldn't conceivably have been across the detail of everything and the evidence does not suggest that he was. It's worth noting that the DFSA still, in our submission, misunderstand the distinction between an executive and a non-executive role.

A director is a member of a board. He's not necessarily a member of executive management. A non-executive member of the board is a board member without responsibilities for day-to-day operation.

So to take Al Masah Cayman, Mr Dash's point was that he was -- although he was CEO of Al Masah Cayman, there

17:32 was virtually nothing to do in that capacity, because it didn't have operational activities that made a CEO's role relevant.

That's, in fact, borne out by the DFSA's examples. They show, for example, Mr Dash signing a few contracts on behalf of Al Masah Cayman and choosing members of the advisory board, which will be a non-exec board. None of that is the actions of a CEO of an operational business. It's all the actions that could equally be described as a non-executive role.

Take the holding companies. Mr Dash was non-executive chairman. Approving financial statements is something that he was involved in. That's a matter for the board. That's not an operational matter.

What we see is that the DFSA have selected a few scattered examples, which show him getting involved in some day-to-day affairs, but they don't remotely show him taking responsibility for the day-to-day operations of the company.

They show occasional involvement in particular matters, in particular which relate to wider presentation or communication matters. They're all consistent with a non-executive role and a non-executive person who takes an interest in the particular aspect.

It's worth stepping back and considering what is the

17:34 point and substance of what the DFSA are saying. What they're trying to do is to attribute responsibility for everything that the companies did to Mr Dash and attribute awareness of it to Mr Dash, and to sidestep in that way the need for actual evidence. And then the reason they do it is that there is an absence or a lack of evidence that links Mr Dash to what they want him to be linked to.

We must keep in mind that the DFSA made an unannounced visit before the Applicants could be said to have been alerted to any possible investigation, and they took forensic images of all the companies and documents, laptops, mobile devices and servers.

That's all clear from Mr Hammond's witness statement at paragraphs 50 to 51. They retrieved 700,000 emails. So the DFSA has all the evidence. And so if, as is the position here, you don't have evidence of Mr Dash having any real involvement in the day-to-day operation of the companies, or the preparation of annual reports or the preparation and distribution of marketing materials, the reasons for that is that he wasn't involved in those matters.

It doesn't help the DFSA to have these widespread high-level assertions that he was on top of the detail of everything, because the documents show that he

17:35 wasn't.

We do say, just to pick up one example, it's not right to say he must have been aware that everything was happening, because he was once concerned that in a restaurant that was a start-up business, that the investors in the start-up business wouldn't want the hostesses to be wearing long dresses. We say that's a rather different situation from the ongoing operations of the established businesses where there is just a dearth of evidence to suggest that he's taking overall operational control.

There will in any collection -- sorry, I may have misspoke. It's important I get this right.

Yes, I don't know if I said this wrong, his position was he didn't want them to be wearing short dresses, he wanted them to be wearing long dresses. I hope I said that correctly, but if I didn't, that's what I meant.

But I do say in any collection of hundreds of thousands of emails, there will always be exceptions that prove the rule. In this case, the DFSA can alight on hardly anything to show detailed involvement by Mr Dash.

Just one small additional point on this area. The DFSA suggest at paragraph 10.4(b) and footnote 3 of their document, that Mr Dash was incorrect in his

17:37 statement that investment in that restaurant came from Al Masah Cayman money and money from his board members. What the DFSA have done is pulled together some references that they make in -- sorry, not footnote 3, in footnote 4, but those are references that weren't ever put to Mr Dash.

Had they been put, he would have been able to explain that, in fact, overwhelmingly, by reference to those references, this was money that came from Al Masah Cayman and its board members. So it's an example of where it's dangerous for the DFSA to be making statements or submissions in their closing, which they haven't put to the witness, in relation to documents.

I'll come back to the role of the other individuals -- that's Mr Dash. I'll come back to the role of the other individuals when we get to the allegations of them being knowingly concerned in the later allegations.

But, at this stage, I want to emphasise another point that we should keep in mind when assessing the individual Applicants and their evidence. In particular, the precise words used by them in their evidence, whether in interview or in their cross-examination.

That is, of course, that English is not their first

17:38 language. We saw this with Mr Singhdeo's evidence, cross-examination, where he was repeatedly asked questions which involved the "purported", and where it was evident from his answers that he plainly hadn't understood the point that the DFSA was making. And eventually, it was picked up with him, because my learned friend realised that he didn't understand what "purported" meant. But that's just one example.

The language issue is something that's not credited in the DFSA's approach, which we submit is overly linguistic. Indeed, the one occasion on which the DFSA's skeleton acknowledges any language issue is in paragraph 128.1 of their skeleton, where they refer to a misuse of English by one of the witnesses. And we would submit that we would have hoped not to see any content of the kind that the DFSA make at paragraph 128.1 of that skeleton, which is not appropriate at all.

We would expect to see an acknowledgment that they don't give of the fact that these witnesses are dealing not in their first language. And so, you have to be careful not to parse precise words used by them overly linguistically.

Can I come back to Mr Dash and the allegation that he was knowingly concerned --

17:40 PRESIDENT: Yes, but I'm interested in the remarks you made about language. It occurred to me to ask the witnesses whether English was their first language, but you hadn't led any evidence about that and it would have seemed discourteous. However, it seemed to be reasonably clear that English was not their first language, but I'd like that to be clarified in respect of each of the witnesses.

MR HILL: Yes.

PRESIDENT: You can just tell us. We don't need evidence.

MR HILL: Yes, I can confirm that in relation to the witnesses you heard give evidence, Mr Dash and Mr Singhdeo. I don't know the position in relation to Mr Lim. I don't know that.

PRESIDENT: Thank you.

MR HILL: Coming back to Mr Dash, and the allegation that he was knowingly concerned in the structural allegations. We suggest that the DFSA's allegations that he was knowingly concerned in contraventions, when he was not aware of them and could have had no basis for thinking that there was a contravention, we suggest that that's unreal.

To take the example of arranging investments or financial promotions by Al Masah Cayman, Mr Dash had no reason to think this was happening. He knew about the

17:41 activities of the business in broad terms. He understood, rightly, we suggest, that any marketing activities were being undertaken by Al Masah DIFC. He had installed compliance officers to ensure that that side of things was being taken care of and those compliance officers were themselves satisfied that there was no compliance failure in that area and they didn't advise him of any.

We suggest that it's absurd to regard Mr Dash as being knowingly concerned in those circumstances in any non-compliance.

It's common ground that those kinds of points at least go to penalty. And we, of course, would certainly say that any penalty with regard to any of the structural allegations should be nil, given the steps taken and fairly relied on to ensure compliance. But we suggest it also goes further than that and that the law cannot be that a person in Mr Dash's position should be held to have been knowingly concerned in the first place.

One needs to bear in mind that we're dealing here, as the president said, with your application of the statutory definition at Article 86, which we suggest, contrary to my learned friend Ms Clarke's submission, is in fact narrowly drawn rather than widely drawn. And at

17:43 every stage of the various subparagraphs, emphasises the importance essentially of the state of mind and of being knowingly concerned. And whether it's conspiracy or inducing or procuring or being knowingly involved, in each case, you're looking at a mental element that's envisaged.

We have identified in our document two routes to the conclusion which we would urge on you.

One of these, probably logically the second one, but I'll take it first. One of these involves a careful analysis of what are the relevant facts that a person would need to know to be knowingly concerned. We deal with that at paragraphs 80 to 84 of our document.

For example, one of the facts is that Al Masah Cayman, not Al Masah DIFC, is on the DFSA's case, doing any arranging or financial promotion.

That is a fact. That doesn't involve elision by us. It involves careful identification of what are the facts that a person needs to know. So that's the first approach, which we submit is sufficient to get us home.

The second approach is more fundamental and involves an analysis of what it must mean to be knowingly concerned, and we deal with that at paragraphs 75 to 79 of our document. And we give the example where a person is positively advised by the regulator that certain

17:44 activity doesn't involve a contravention.

On the DFSA's case, on the authorities and the meaning of the law, they would say he could still be knowingly concerned in such a contravention. We would submit that that is an absurdity. And in order to provide a regime which is fair and not unjust, and in order to give proper meaning to the concept of being knowingly concerned in the contravention, it must be the case, where someone is both unaware of a contravention and believes on reasonable grounds that there is no contravention, then he's not knowingly concerned. And we should say the FMT is in no way bound by English authority on this question, because as the president pointed out, we're dealing with a situation where we have our own statutory code in Article 86, which the tribunal is looking at.

None of this can be seen as a means of importing a lower moral standard, which is my learned friend's submission, because we fully accept that you have to not only honestly believe, but also have reasonable grounds for your honest belief.

Just on that area, can I also mention the idea of Mr Dash as a moving light. My learned friend refers to that repeatedly by reference to the Capital Alternatives case. She seemed to be saying at times that it's

17:46 a shortcut to establishing that someone is knowingly concerned if they are a moving light. That's not at all what the authorities are saying. In each case, whether someone is a moving light or not, you need to establish, first, whether they have the requisite element of knowledge of the relevant facts. And secondly, whether they have the involvement.

The most you might say is that, in some cases, you may evidentially be able to get further along your way if someone is a moving light. It's by no means a shortcut to the ultimate conclusion.

That's what I wanted to say about knowingly concerned and knowingly concerned in the structural allegations.

If I can now move on to the next topic, which is the question of fees and disclosure of fees in the marketing literature.

The allegation that we have to meet is that the lack of greater disclosure of placement fees was misleading in light of a disclosure that was given of other fees in those documents.

We have addressed all this at paragraphs 135 to 150 of our document and we would suggest that the DFSA's closing doesn't meet the gravamen of our arguments. The DFSA say that there was an implied representation that

17:47 no other fees were paid, but that implied representation can't be right, because it would be inconsistent with the express representations that were made in the literature.

There was express representation in the Articles, which was clearly in turn signposted by the subscription form, which made it clear that the holding companies could pay fees in respect of brokerage. So the implied representation case breaks down, we would suggest, as a threshold point.

PRESIDENT: Can I just interrupt a moment. Leaving aside other points that may be made by the Articles, as I understand it, the reference in the Articles is simply the existence of a power, amongst numerous other powers, contained in the Articles of Association. It's one thing to have the power to do something. It's quite another thing to exercise it.

If you want to go through all the Articles of Association, one by one, and look at the potential powers of the company, you may find, as I do, that it covers an absolute myriad of different potential activity as opposed to those activities which the power is then used to engage in.

MR HILL: Two points on that. First, fees are not in each case necessarily going to be charged in terms of these

17:49 placement fees. In each case, it's a placement fee that may be charged from 0 up to 10 per cent. One has to bear in mind that any disclosure that's going to be given is only ever likely to say "fees may be charged". We would say that the Articles are indeed saying exactly that, that fees may be charged.

It wouldn't be right to say fees will be charged in a particular amount, because that isn't necessarily what would happen.

So we would suggest that the wording of the Articles reflects what could have been put in the subscription form and it would never be necessary or indeed appropriate to go further than to say fees may be charged.

In substance, what investors are being told in the Articles, is exactly what they could have been told in the subscription forms. We would suggest that they are put on notice that fees may be charged and in circumstances where they're told they may be charged, they can't be surprised when no fees are then charged. That would be the purpose of telling them. There's no need, we would say, to go further.

The point that I've just had to answer is exactly the submission that's made by the DFSA in their document. And I do say it's answered by imagining what

17:50 some hypothetical further disclosure would have looked like. All it would have said is we may -- the holding companies may charge fees as brokerage fees of varying amounts, they may say.

Indeed, I'll come to this in a moment, but when you get to the amendment that was made to the subscription form, in light of the criticisms of the DFSA, those themselves only make clear that the investment companies may pay placement and brokerage fees.

We would suggest that's an indicator of what any further disclosure would have looked like and it's very similar to the disclosure that you get, the only difference really being that it's in the subscription form and not in the Articles.

I should say that the placement fees, of the placement fees listed at exhibit EXH-F600, some of them are at a level of 0 per cent. In other words, no effective charge.

The DFSA do run the point that the investors didn't, they say, have a copy of the Articles, at least in some cases. But the answer to that is that the Articles were given full prominence, we suggest, in the forms that the investors signed and it could not have been clearer to them that they were signing up to the Articles. It was the first on the list of descriptions of what it was

17:52 that they were signing up to and they also explicitly confirmed in subscription forms that they had been provided with everything they needed.

The two investors, who were witnesses, signed repeated versions of the subscription forms and they confirmed each time on multiple occasions that they were bound by the Articles.

Although the DFSA don't accept the Articles were given prominence, we suggest they plainly were. And we would also remind the tribunal that the Articles were on the portal, as Ms Baines confirmed. We gave the references to Ms Baines' evidence on that at paragraphs 78(b) and 79(h) of our opening skeleton argument.

We would suggest there's no possible basis for saying that the Articles were not available to investors and if they chose not to look at them, that's not a matter that can be laid at Al Masah's door.

The DFSA also address the position of the two investors who did give evidence, Mr Clink and Mr Mehta. I would submit they ignored the real point that emerged from their evidence. The real importance of their evidence was that those investors confirmed that they did expect some placement fees to be paid, despite the fact that, at least on the DFSA's case, there wasn't

17:53 sufficient specific disclosure.

What we saw is the investors in each case did have a complaint about the level of the fees, but the level of the fees is no part of the DFSA's case. The DFSA's case is about non-disclosure or inadequate disclosure and this of itself didn't create any problems for these two investors, who assumed that there were indeed some fees.

We would also suggest that the evidence makes it clear that it's normal in the industry for brokerage fees to be paid and also normal for there not to be anymore --

PRESIDENT: I'm sorry, but how are you able to submit what is normal in the industry when there is a deafening silence in terms of expert evidence?

MR HILL: Well, I can only go on the evidence in the case.

PRESIDENT: Well, how do you say that can amount to the practice of an industry, when there is simply no evidence of what the practice of the industry is?

MR HILL: I certainly haven't got expert evidence. I'm just about to identify the evidence I do have and obviously the tribunal will have to make of it what they want to. But, in our submission, the evidence, we obviously have the Applicants' own evidence and they are themselves experienced market practitioners and that is backed up

17:55 by the evidence of Nomura, again another highly experienced market practitioner. You get a good --

PRESIDENT: Sorry, we do not have the evidence of Nomura. We have had thrown at us some documents affecting Nomura, which in a sense rather illustrate the value of expert evidence when you have it, which is that sense can be made of documents like that.

MR HILL: Well, I certainly accept it's not expert evidence, but the Nomura document is not difficult to understand. And it's quite clear what it is that Nomura were proposing, which was to charge a brokerage fee and to have a letter to investors that would describe the investment and that that letter would not itself separately disclose the brokerage fee and in circumstances where there were separate management fees.

So all the ingredients are -- you don't need an expert, in my submission, to explain the Nomura proposal.

That proposal made it clear that you would have a situation where brokerage fees were being charged, not being separately disclosed, and in circumstances where there were separate management fees.

That is very similar to the Al Masah situation and that does -- I accept there's no expert evidence, but that does reinforce Mr Dash's evidence that he regarded

17:56 this as being within the market norm.

I really made the point I was going to make on Nomura. We do suggest that the DFSA's attempt to distinguish the Nomura situation, at paragraph 206 of their document, gives rise to a distinction without a difference, because all the critical ingredients of the Nomura situation are the same as we have in the Al Masah case.

Also worth noting that the DFSA accepts that Mr Bond, who's another market participant, was drawing brokerage fees and not disclosing those to Mr Clink.

We do have such evidence as we have of what's happening in this market, does bear out Mr Dash's evidence, in our submission, that he regarded himself as operating within market norms.

There's also the position of the compliance officers. Ms Baines approved the literature, including the subscription forms. She was, in our submission -- and this is obviously something the tribunal need to reach a finding on -- aware of the placement fees. It's not just Ms Baines who was aware, the external compliance officers who preceded her were also undoubtedly aware. And we have given references to the evidence for that.

Both sides obviously summarise the evidence they

17:58 rely on in relation to Ms Baines' awareness or otherwise of the placement fees. Both sides invite the tribunal to draw opposing conclusions.

We submit that our analysis is, by some margin, the more likely and convincing version of events. The DFSA haven't grappled at all with the fact that the placement fees were known across the organisation. They were known to the previous compliance officers and they were known to the auditors of the holding companies, they were referred to, to the DFSA. And indeed, Ms Baines, on her evidence, seems to be the only person working closely with this business, who was unaware of them, despite the senior position she held.

This is, in our submission, just not credible. We would also suggest that the absence of credibility in her evidence was borne out by the way in which she answered questions when I came to ask her on that issue. And obviously, that's a matter which you will all have your own impressions and I can't do more than draw attention to the way in which she gave her evidence.

I wonder if now would be a convenient moment for a short break for the shorthand writer?

PRESIDENT: We'll stop there for five minutes. Thank you.

(5.59 pm)

(Short break)

18:00 (6.04 pm)

MR HILL: This brings me to the question of reasonable care and reasonable steps. We deal with those points at items 10.3 and 12.1 on our list.

I just want to pick up one point in our oral closing and that is that the DFSA suggest in the context of those allegations, that we cannot rely on any internal steps that were taken. We don't accept that.

If the tribunal were to conclude that the companies took proper steps to have a good system in place for checking the accuracy of the literature, then this can amount to the taking of reasonable care, and belief on reasonable grounds in its accuracy.

Obviously, the tribunal's conclusion will depend on its conclusion on the factual circumstances. But we would suggest that the fact that measures may be internal does not preclude them from amounting to reasonable steps.

In that context, the advice from Walkers that the DFSA refer to at paragraph 213.4 of their document itself made the point that management should be seeking advice on compliance from their compliance officer. Ms Baines was advising management and did not consider there to be any non-compliance, either with regard to the structural issue or with regard to the literature or

18:06 in description of fees or anything else.

And there is, in our submission, an error of approach in the DFSA's analysis, which emerges at paragraph 213.7 of their document. That refers to Article 57 of the Collective Investment Law and Article 57.2 provides an exoneration regime, where reasonable reliance is placed on information provided by another and that regime doesn't operate where the person giving information is a director, employee or agent. We accept that.

But there's no such restriction given in Article 57.1, which we rely on. The setting up and faithful conduct of a compliance officer, who takes careful steps to ensure compliance, can, we suggest, qualify within Article 57.1. And it would be a false point to say that because there is a specific exclusion in 57.2, you read that exclusion into 57.1 where it's not there and of course as a matter of statutory construction, the opposite applies.

We suggest the same point applies to reasonable steps for the purposes of the conduct of business rules 3.2.1. And we would suggest that reasonable steps can include appointing experienced and well-qualified compliance officers who then operate proper systems and ensure compliance.

18:07 So we dispute also the proposition at paragraph 215.2 of the DFSA's document.

I should also just mention on that, we also don't accept with regard to COB rule 3.2.1 that the burden is on the Applicants. We would suggest that the burden -- that the lack of reasonable steps is built into the rubric of the rule and the burden remains on the DFSA.

It's also worth keeping in mind with regard to the fee allegation that the placement fees were not concealed from the DFSA, that they were told about them. The DFSA is dismissive of this point, at paragraph 252.5 of their document and they say, well, there's some suggestion the DFSA ought to have played detective and investigated all the activities of Al Masah Cayman.

That's not the point that we're making. Our point is that it's the DFSA's case that the Applicants were desperate to conceal the fact that the holding companies were paying placement fees to Al Masah Cayman. That's the allegation, that's the case theory that underlies the DFSA's approach to this case and also their submissions on penalties.

The fact that Al Masah told the DFSA about placement fees suggests it was not being concealed in the manner that the DFSA suggest. You get a similar point from the fact that it wasn't concealed from the compliance

18:09 officers.

On any view, placement fees were not concealed from the people who were responsible for checking whether offering documents were fair and not misleading.

Whatever conclusion you reach on Ms Baines' evidence about whether she was in fact aware of them, there can't possibly be a suggestion that the placement fees were concealed from her. That would be inconsistent with the documents.

None of that is consistent with the DFSA's case theory. What it really shows is that people at the time thought that what they were doing was permissible, reasonable and not improper or deceptive.

Can I come on to the other allegations in the case? Starting with the annual reports for ANEL for 2013 and 2014.

This is dealt with at paragraphs 138 to 161 of the DFSA's closing. In our document, it's dealt with in a number of places. At paragraphs 151 to 153, we make the point that the document was not for prospective investors, so it's not relevant for the alleged contravention at Article 56 of the CIL. I have dealt with the DFSA's reliance and we would say over-reliance on the exceptions to this, which prove the rule.

We also deal with this allegation at paragraph 162,

18:10 where we make the point that the annual reports were not statements by Al Masah, but by ANEL. Of course, they were statements made by ANEL in a context where there was no obligation to provide audited financial statements to shareholders at all, which is a point that sometimes gets lost in the DFSA's closing, in particular at paragraph 209.1 of their document.

We also make the point at paragraph 168(c) of our document that these annual reports were not in connection with financial services for the purposes of regulatory law, Article 41(b).

The DFSA don't really grapple with those points that we make in those paragraphs. And, in my submission, they're not to be dismissed as technical. They are necessary ingredients in the allegations.

The other point we make, and this is at paragraph 168(a) of our document, is that there was no deliberate deception on the part of the Al Masah companies. And we deal with the role and the understanding of each of the individual Applicants, at paragraphs 184 to 190 in the case of Mr Dash; 195 to 202 in the case of Mr Singhdeo; and 215 to 218 in the case of Mr Lim.

We do accept that errors were made, but this was an ANEL document and an ANEL process. As far as the

18:12 Al Masah people are concerned, who you have heard evidence from, they were unaware of errors that had been made as they explained.

I will invite you to look carefully at DFSA's allegations against the individuals and to note that their analysis contains a lot of conjecture, but no proof, we would submit, of knowing participation by any of the individual Applicants. For example, there's a point made against Mr Dash that he prepared his own chairman's message for investors. That's at paragraph 139.7 of the DFSA's document.

But the contemporaneous documents made clear that his chairman's message was prepared when there was no financial information of any kind in the draft annual reports and indeed the audited financial statements had not yet been produced. That all came later. That's the point we make at our paragraph 186(c).

The DFSA also conjecture that all the senior staff must have looked into the final version of the reports and seen what was in them. That is at DFSA's paragraph 139.6. But the DFSA have all the emails, so there should be no need for conjecture of this kind and if we can't see it happening through the documents, then the natural inference is it didn't happen, not that one could conjecture that it did.

18:13 The DFSA also conjecture that Mr Singhdeo and Mr Lim must have been primarily responsible for the edits. That's their paragraph 139.4. But again, the DFSA has the email servers and they can't make this good. The fact that we see all this conjecture does indicate the amount of speculation involved in the DFSA's case in circumstances where they have all the email servers. And if there isn't evidence of senior Al Masah staff in fact being involved in or aware of the problems, the better conclusion is that they were not involved in or aware of them.

MR MALEK: Can I just ask one question about ANEL. I'm right in thinking that this is only in relation to ANEL and nothing happened in relation to the three other platforms? Am I right on that?

MR HILL: Yes. The DFSA's case only relates to the ANEL situation.

MR MALEK: Why would it happen in relation to ANEL and not in relation to the other companies?

MR HILL: I think it's right to say there are -- well, I don't want to mischaracterise the evidence, but there may be some other annual reports in relation to other companies, but the DFSA don't complain about them.

MR MALEK: Do we know whether they have the same kind of structure, where there were audited reports and also

18:15 annual reports, is it the case that we don't know what the position is in relation to the other companies?

MR HILL: There are certainly some annual reports in relation to other companies. But it's also important to keep in mind that there are different teams for the other companies. Each operational company has its own team, so one wouldn't necessarily -- on our case, where, as we explained, something went wrong with the ANEL report, it's not very surprising that there isn't a problem with other companies.

MR MALEK: Thank you.

MR HILL: If I could come on to the correction process and the printing errors. We suggest the DFSA persist in presenting this episode unfairly. We dealt with it in our opening and we covered the ground again in our document by reference to Mr Singhdeo's evidence at paragraph 202.

The DFSA suggest, this is their paragraph 145.2, that a draft letter was required by E&Y to be sent to them for approval, but that's not maintainable on the documents. E&Y's own letter specified what it required and it made clear that it was a voluntary for Al Masah to provide their draft E&Y and not compulsory -- ANEL, I should say, provided its draft to E&Y and not compulsory.

18:16 Mr Sikander's evidence that he asked for this to happen was unconvincing. And even if he did, it was overtaken by the subsequent letter, which did not require it, but only offered the opportunity.

The DFSA also overstate the position by suggesting that E&Y set out the language to be used in the draft letter when they didn't. They only indicated what should be intimated. The DFSA also set out the history in an attempt to suggest it was in some way unreasonable to send out Protiviti's draft to shareholders when the deadline was about to expire.

But, in my submission, that was an entirely reasonable thing to do. There was a deadline of extremely serious consequences, which was about to expire, and the text had been provided by external consultants.

There's nothing improper or nefarious, we would submit, about the subsequent courier bundle. The letters provided by Ernst & Young were included as Ernst & Young required and it was essentially an administrative exercise of putting them in the courier pack, which is what happened.

That is the ANEL annual reports.

There is then Investor A, which is [redacted], and this is of course a table of fees. Investor A was not

18:17 a prospective investor. We have addressed that at paragraph 156 of our document and suggest the DFSA have no answer to this aspect. The DFSA pick it up at paragraphs 179 to 180, but that position is confused, in our submission.

It's clear on the documents that [Investor A] was not going to be an investor in the platforms, but instead was going to be a joint venture partner, and, in that sense, investor, in a new fund. That new fund might then invest in the platforms. That's all clear from the documents. And, in particular, if you look through exhibit EXH-714, you can see precisely that what's envisaged is a new fund and a fund investing in the private equity platforms.

But in their closing, the DFSA seem to be ignoring all this actual evidence and they suggest that in reliance on the interview notes from Mr Dash, that there might be some other version of events, something else going on involving direct investment into the platforms.

That does not make sense once you understand from the documents what the business proposal is. We also say that at paragraph 180 of their document, the DFSA misconstrue the interviews that were given of Mr Dash and Mr Singhdeo.

They were asked whether [Investor A] was investing

18:19 in Al Masah or in the platforms. In answer to that question, they essentially agree that it was the platforms rather than Al Masah, but that doesn't mean it was a direct investment. In no way was [Investor A] ever investing into Al Masah. What it was going to be was a holder in a new fund, so it was not a prospective investor in the platforms of the kind that would be necessary for the legislation.

We otherwise deal with the Investor A position, at paragraphs 155 to 158, and 191 and 192, of our document and where we also address Mr Dash's role.

The essence of Mr Dash's explanation is that he initially didn't want [Investor A] to have a breakdown at all. But having been persuaded otherwise, he then wanted the information to be consistently presented to reflect the accounting period and the terminology represented in the accounts.

When you look at the DFSA's criticisms of this, they don't attempt to gainsay that the changes do reflect a reconciliation in relation to timings and terminology and the like. And that's with one exception, which is at paragraph 160.3 of the document, where they say that the audited financial statements for ANEL don't use the language advisory and transaction fee. They stated transaction costs represent advisory fees and other

18:20 incremental costs.

That is a very minor discrepancy and does not undermine the thrust of Mr Dash's explanation.

The main point that the DFSA make is that the need to reconcile with the financial statements doesn't make sense in circumstances where certain fee income had been adjusted out of the financial statements as they appeared in the annual reports.

This case theory and this argument all assumes rather a lot. It assumes that Mr Dash had a detailed understanding of what was in the annual reports and what was or was not being sent to [Investor A], had been sent or would in the future be sent to [Investor A]. None of that was borne out by the evidence.

His position is he didn't have this detailed understanding of what was in the annual reports. And more than that, what Mr Dash was doing, his concern was one of principle. It's a simple concern that you understand the CEO of a business giving, which is that any breakdown should match the terminology in the financial statements. So there's no scope for confusion in whatever might arise.

It's a fallacy to say that his process of reasoning would have involved some detailed understanding on his part of what material [Investor A] was otherwise

18:22 getting. All he is simply saying is there should be consistency with the financial statements, which is an understandable position.

There's then the covering email which the DFSA suggest is a misleading document. The DFSA quote it at paragraph 155, which is a useful place to remind yourself what it says. They deal with it at paragraphs 161 to 162.

Our submission is that these are exaggerated criticisms and for the reasons we give at our paragraph 192(e). The starting point here is that [Investor A] was seeking this information to establish assets under management, or at any rate, that's what Al Masah thought at the time. And it's clear that that is what Al Masah thought at the time, because that's exactly what is said in the contemporaneous email at exhibit EXH-769.

Although the DFSA try to cast doubt on whether that was what Al Masah could have thought at the time, it's exactly what the contemporaneous email records.

Therefore, the covering email which the DFSA now characterise as misleading, was in fact giving [Investor A] the information it needed to meet this perceived requirement. It was identifying them, for them, the management fees that related to the private

18:23 equity platform, which was thought to be the information that [Investor A] was looking for.

When you look at matters in that light, and you then see that the covering email at exhibit EXH-714 is not misleading, but in fact helpful to [Investor A] in that it gives them the information they're seeking. It would, of course, have been better, certainly better in terms of given the allegation now made in this case, it would have been better if it had said "the management fee income" rather than "the fee income".

But the documents clearly demonstrate that it was the management fee income that [Investor A] was understood to be interested in, because that is what would enable them to try to infer the assets under management.

We do say that in order to characterise this as misleading, you need to look through the wrong end of a telescope and you need to start from the incorrect assumption that this is all concerned with concealing placement fees.

If I can come back to the individuals, and the role they had in these latter allegations, I do invite the tribunal to watch out for a series of arguments from the DFSA which all rest on assumption. As we have just seen with the Investor A example, there's frequently an

18:24 assumption that each of the individuals were fully aware of the discrepancies in the ANEL annual report and the fact that it incorrectly represented itself as containing the audited accounts.

The DFSA start with an assumption of awareness, which then leads them into an avalanche of further criticisms, all based on that underlying assumption. But the evidence from each of the individuals is that he was not so aware. So we do invite you to be careful of the head of steam DFSA seek to build up, for instance, around what Mr Dash thought Investor A was getting, all of which assume an understanding of the issues with the annual reports which, from their evidence, the applicants didn't have.

With regard to Mr Dash and these non-structural allegations, we deal with his position at paragraphs 172 to 193 of our document. We do suggest the DFSA have greatly exaggerated his role. He believed that the marketing material was fair and not misleading. He believed the company was regulatorily compliant, that the placement fee information was known to those who were approving the literature. It's indisputable that it was known to Ms Baines' predecessor and openly discussed at executive management level. He would not have thought there was any improper concealment of

18:26 anything that needed to be disclosed.

We had an assertion this morning about the length that Mr Dash would go to, it was said, to have others do things on his say-so in this context. That was all assertion and not supported by the evidence.

I have dealt with Mr Dash's role in relation to the annual report and Investor A and we cover this in detail in our document. His involvement was generally high level and peripheral and we do suggest the defendants can't establish that Mr Dash was all over the detail of everything.

With respect to Distributor B, as we explain at paragraph 193 of our document, the most important email is Mr Dash's original response, which made it clear that he was happy for audited statements to be provided to Distributor B. We would submit, in that light, at paragraph 224.2 of my learned friend's document, she does show how thin and indeed strained the DFSA's case is on this aspect on Distributor B.

That's Mr Dash.

There's then Mr Singhdeo. We reject the suggestion from the DFSA that he was not a satisfactory witness. The examples that they select at paragraph 12 of their closing document are unfair. The first example is of an email from Mr Lim that Mr Singhdeo made clear in his

18:27 evidence he did not recall. So whatever his evidence was, what he was explaining would be a reconstruction of what he thought Mr Lim might be saying.

The questioning in the passages that my learned friend relies on in her closing document consisted of a series of long compound questions. At the end of those questions, Mr Singhdeo was asked by the President for his views on the actual passage that the DFSA focus on.

Mr Singhdeo speculated perfectly fairly that Mr Lim was wanting to avoid board time being taken up on the issue that had been discussed the previous year. The reference for all that is at day 6, page 77, lines 16 to 25.

So what it was, was a fair set of responses on an email that he wasn't party to, where when asked to grapple with the relevant passage, he did so fairly and volunteered a reasonable and, in my submission, accurate answer.

The second example of Mr Singhdeo not being a satisfactory witness, according to the DFSA, related to the question of Mr Agarwalla's seniority as compared with Mr Singhdeo's seniority. That was said to have demonstrated a refusal by Mr Singhdeo to accept straightforward issues.

18:29 That's at paragraphs 12.2 and 139.5.

It's said Mr Singhdeo was doing his best to deny the obvious fact that he was senior. Again, this arose because it was a bizarre set of questions in cross-examination, even for someone who has English as a first language.

A director of a company is, on one view, senior to a company's financial controller. But questions of seniority within an organisation are usually to do with reporting lines. The way the question was put was to say that Mr Singhdeo and Mr Lim were more senior than Mr Agarwalla. The way Mr Singhdeo responded was entirely fair. This is day 6, pages 65 to 66 onwards.

His evidence was that Mr Agarwalla was part of ANEL's finance team and that he and Mr Lim were on the board of ANEL. That is accurate. Indeed, it's the point in substance that the DFSA are trying to make, because they're saying in a loose way, a director outranks a financial controller. But the question was repeated. Mr Singhdeo said he didn't follow the question. Mr Agarwalla didn't report to him. So it would be wrong to say Mr Singhdeo was senior.

Then it was put to him that he and Mr Lim were on the board, which is a point he had already volunteered. And he agreed and said, yes, in that way, he and Mr Lim

18:30 were above Mr Agarwalla. It was, especially for someone whose English was not his first language, a perfectly fair set of responses to some rather unusual questioning.

The third example that's relied on relates to the accounting term "material omissions". That is a term of art and in fact a definition of materiality is one that we all know is subject to change from time to time as a simple internet search will tell you. It's not at all surprising that Mr Singhdeo would be cautious before asserting that he knew what that term of art meant in any particular context at any point of time and he rightly said he would want to look at the accounting standards.

So in terms of Mr Singhdeo's involvement in the alleged contraventions, we deal with that at paragraphs 194 and 211. And we would suggest that there is more unfair characterisation when you get to the DFSA's section on Mr Singhdeo at paragraph 227 of their document.

Mr Singhdeo made the point, which is obviously right, that while he was the relationship contact for E&Y, E&Y would have dealt with someone else for the field work. Anyone who knows how an audit is conducted would know that this is likely to be correct, because

18:32 field work involves interaction between the team at E&Y and the finance department at the company and it doesn't involve interaction with the board member.

Nevertheless, having not challenged Mr Singhdeo on that explanation, paragraph 227 of the DFSA's closing suggests that Mr Singhdeo was incorrect in his evidence.

Because of the time, I'm not going to ask you to turn it up now, but in due course, it's worth turning up paragraph 7 of Mr Sikander's witness statement at page 2 of C002.

It makes clear in terms that the manager and team on the audit, in other words, the people doing the field work, had contact with the financial controller Mr Agarwalla. So Mr Singhdeo was correct.

That is just a small example of a spin that you see in the DFSA's document to put everything in an unfair light.

Turning to Mr Lim, we have dealt with him at paragraphs 212 to 220 of our document, which we do commend over the treatment you get in paragraph 231 of the DFSA document.

Can I confirm in relation to something from Mr Malek earlier, that Mr Lim has not withdrawn and is not withdrawing his witness statement, but it is right to say he has not been prepared to come to be

18:33 cross-examined on it. So, in those circumstances, it is common ground that it stays in the bundle, but obviously, it's a question for you of what, if any, weight to give to it.

Just in terms of how it compares with court proceedings, it is a little different, because in the English court, the witness statement isn't anything, because the witness statement is only, if you like, advance notice of what the witness will come and say.

It's different here. The witness statement is something. It is his witness statement. It stays his witness statement. But its weight is obviously affected and I have to accept significantly affected by the fact he hasn't been prepared to come and do more than put his witness statement in and not be cross-examined on it.

One more point on Mr Lim. At paragraph 143 of the DFSA's document, it's suggested Mr Lim took his lead from his bosses, including at least Mr Dash and Mr Singhdeo. It's not clear what's meant by that. But no conclusions of any significance, we suggest, can be drawn from the three examples that the DFSA refer to, to support that point, whatever the point is.

Can I come to the bank statements allegation. We have dealt with that at paragraphs 221 to 232 of our document. As we make clear there, whatever Mr Agarwalla

18:34 was doing, there's no evidence to suggest that document was put to any use and the DFSA accept this at paragraph 239 of their document.

They say there that the DMC was correct to conclude that on the balance of probability, the motive was to use the document for the purpose of an audit. But there's no sufficient evidence for that and it's an unlikely proposition for the reasons we give at paragraph 225 of our document.

Where you end up is that there's no evidence to suggest this document not only was used, or of any prospective use of that document.

Although the DFSA criticise Mr Singhdeo's evidence on the topic of the bank statements, they ignore the key point, which is the one we make at paragraph 228 of our document, which is that it's clear from Mr Singhdeo's contemporaneous email that he simply did not, in fact, have any real understanding at the time of what was happening. And that's absolutely clear from the fact that he's looking at the wrong document and doesn't understand what the document is doing.

Where you end up, in our submission, is that this is an unusual episode. It's not one that went anywhere, not one that one can get to the bottom of now and certainly not in the absence of Mr Agarwalla. And we

18:36 suggest should simply be ignored.

I'm about to move to the question of penalties. Can I briefly mention before I do, something about the question of lack of integrity. The tribunal has previously made clear in the Waterhouse case that a finding of lack of integrity requires cogent evidence. That is common ground, as we see from paragraph 7 of the DFSA's written closing.

Just for completeness, if you want to follow up the authorities, paragraph 8 of my learned friend's skeleton does overstate what the Supreme Court has been saying about the test. The Supreme Court have approved Re B, which in turn was approving the Re H case. The point being approved is that there is room and still is room for considering inherent probabilities.

One of Lord Nicholls' examples was that fraud is usually less likely than negligence. The English courts do still, and the Supreme Court does still, approve the principle that the more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probabilities, its occurrence would be established.

That's lack of integrity. If I can now move to penalties.

The question of penalty obviously depends on what,

18:37 if any, contraventions are made out. It's difficult to address penalty in any detail at this point.

PRESIDENT: Yes. I perhaps should have made it clearer earlier, that you're most welcome to address penalty in broad terms, if you wish. But clearly, if we get to the stage where a penalty is on the cards, we would first indicate to the parties what our conclusions were, so that they would know upon what basis to make submissions about penalty. So you can deal with this quite briefly, if you wish.

MR HILL: That's extremely helpful, because it's one of the things I was going to submit the tribunal might want to do. I'm very grateful that the tribunal is already minded to do that.

In that case, I will take matters very briefly. We do say, as far as the structural allegations are concerned, we submit that no financial penalty or prohibition is required, even if you were against me on any of the underlying contraventions.

And we have already made submissions on why we submit all parties acted entirely reasonably and properly, and there were significant good faith efforts to ensure compliance, even if the tribunal were to find ultimately they were unsuccessful.

We do say -- again, it may be that I won't take much

18:39 time on this, but in terms of running through the regulatory policy and process source book, starting with Al Masah Cayman, this is not a question of any profit being made as a result of the contravention. So there is going to be no question of disgorgement.

We say in relation to seriousness, contraventions, if there were any, they were plainly not deliberate or reckless. The compliance officers regarded the instructions as compliant and the activities as being carried out by the appropriate entity.

It's also worth keeping in mind, and we saw this from my learned friend Mr Temple's submission this morning, difficult and complex areas of law are engaged as to whether the holding company is a fund and questions of attribution on which reasonable minds differ.

Senior management considered that internal procedures were being followed.

Also, no benefit was gained from any of these contraventions.

Mitigating and aggravating factors, again, I will address very briefly, just so the tribunal has it in mind anyway. Cooperation, structural allegations were not raised by the DFSA in interview. Senior management were unaware. The DFSA hadn't previously identified any

18:40 concerns. And as a matter of deterrent, Al Masah Cayman is hardly going to commit further or similar contraventions. In terms of the structural allegation, the points have been raised, it will arrange matters so that if there are problems, they don't recur.

As regards Mr Dash, similar points arise. We do suggest for the reasons we say Mr Dash couldn't have been knowingly concerned, but even if he was and we're wrong on that, the same points do go to questions of penalty. He was particularly entitled to rely on the compliance officers to ensure compliance, pursuant to the system in place, and he was not himself responsible for specific compliance matters. He was responsible for ensuring that there were systems in place, which is exactly what he did. And he took steps to comply with the DFSA's rules and thought that the firm was acting in accordance with internal procedures. There's no question of any financial crime or lack of integrity or abuse of trust in this regard.

That's all the structural allegations.

When it comes to the misleading literature, starting with the companies, this hasn't been causative of any loss. We say the conduct, if there was an error in the literature, was not deliberate, nor reckless, and that there was a system in place for review of marketing

18:42 materials by compliance officers. And we suggest the parties cooperated and there was a good disciplinary record and no suggestion of non-compliance prior to the investigation.

When it comes to Mr Dash, again, we'll return to this in the light of any findings, if there ever are any, but it would be important to focus very closely on the alleged involvement or lack of it on the part of Mr Dash in deciding whether or not he was knowingly concerned in any contravention.

We would submit he was not knowingly concerned in any contravention. And, of course, he himself, there's no suggestion he's made personal gain from any of this. There's no financial crime, we submit, not deliberate on his part, and the nature of any contravention by him was at most a failure to supervise others as closely as he might.

He was reasonably entitled to place reliance, we submit, on the fact that the marketing materials were reviewed by compliance officers to ensure they were fair, clear and not misleading.

It's worth keeping in mind and will be worth keeping in mind that Mr Dash has had a long and distinguished career, with no regulatory problems arising. And we will be submitting that, on any view, it's not a case

18:43 for disqualifying him from the industry, which is his life, effectively.

Similar points arise in relation to Mr Singhdeo, again, need to focus on what conduct on his part is actually established. And we submit that the DMC, in particular, overstated or viewed unduly harshly his involvement in or awareness of a number of matters.

Then lastly, on Mr Lim, there's no evidence to suggest that Mr Lim was himself responsible for any alteration to the financial statements. That was Mr Agarwalla's responsibility. We do say that the dim view that the DMC took of Mr Lim's use of the expression "erroneous printing" is rather unfair, because what the DMC failed or did not do was recognise that Mr Lim was putting this expression in a draft letter that was going to E&Y. He didn't even have to send it to them for approval, but he chose to. And he obviously took the view that it was a reasonable thing to say, otherwise he wouldn't have written it in the draft he had asked them to approve.

That's all I want to say at this stage on penalty. But I'm very grateful for the confirmation that if, as I submit hopefully will not be the case, the situation arises, we'll have an opportunity to make further submissions.

18:44 Is there anything else you'd like me to say?

PRESIDENT: I have one question, but I'm just going to ask my colleagues first if they have any questions for you.

MR MALEK: None from me.

MR STOREY: Nothing from me, thank you very much.

PRESIDENT: Can I just ask you this. It arises from you inviting us to disregard the bank statements issue. It's a sort of general point. The starting point is perhaps that it's trite that when people decide to engage upon or to go along with a cause of action that is discreditable or may be seen so, the last thing they do is to make a written note of what they've decided to do.

Standing back from all the detailed submissions, wonderful submissions that both sides have made, what might be said is this: is that the starting point may be a recognition, of which we have some evidence, that your clients felt that there were good commercial reasons for not disclosing placement fees. We then have the bulk of the case and we then have the difficulties with the ANEL accounts and we then have the bank statements.

One thing they all have in common is that they can be seen as a concern to conceal or not reveal the existence of placement fees.

I just wonder what you would say if it was said that

18:46 the question of bank statements maybe a bit elusive, but it still does have some relevance in forming a small part of what some would say was an overall pattern.

MR HILL: We would dispute that. The bank statements, in fact, are a real hodgepodge. One of the reasons that no one has got to the bottom of them is because it's very difficult to know why the adjustments are being made in relation to the bank statements. You can't just say placement fees are being taken out. There are all sorts of other things going on with those adjustments.

So you don't even have that rhyme or reason to the adjustments being made to the bank statements. Indeed, that's one of the reasons why we would say you can't safely assume anything or conclude anything about the bank statements.

It's, of course, right to say that the adjustments to the annual reports have the effect of not disclosing information about placement fees. But I don't accept that you can fairly make the same conclusion about the bank statement adjustments, because it's such a hodgepodge of different adjustments and you can't reconcile any solitary purpose.

PRESIDENT: Thank you very much for that.

Ms Clarke, did you want to say anything else?

MS CLARKE: I think that Mr Temple may have one point.

18:48 PRESIDENT: Okay. Mr Temple, would you like to say something?

Further closing submissions by MR TEMPLE

MR TEMPLE: Yes, I mean, it's a very brief point, really. It's just one thing that my learned friend said about a suggested inconsistency between our case on offering units and our position that Al Masah Cayman are not party to the transaction for the purposes of GEN 2.9.2, the exception on making arrangements.

If it wasn't clear earlier and if it's not clear from our written submissions, I hope that it is, it has always been the DFSA's case that Al Masah was a party to that contract, but that it was not a party to the transaction by which the shares were issued.

Those two positions are reconcilable. Article 19 of the Collective Investment Law expressly recognises that the person making the offer can be separate from the person who is going to issue the units. You'll see that from the definition in Article 19 when you get to it.

That was the brief point that I wanted to make.

PRESIDENT: Thank you very much. Do my colleagues have any points they want to raise at this stage?

MR STOREY: No, thank you.

MR MALEK: No, thank you.

PRESIDENT: In which case, that is the conclusion of the

18:49 case. A number of points arise. The first is obviously we will seek to provide a decision within a reasonable time. I doubt it will be as quick and speedy as the one we were able to produce in relation to the issues last December, but we'll do our best.

Secondly, we may have further questions to ask you and if we do, obviously we can do that in writing.

Thirdly, we're extremely grateful to the lawyers on both sides for the formidable quality of the submissions and preparations which have been made. We're very grateful indeed to you all.

Finally, as I said on the last occasion, very, very grateful to Mohammed and his colleagues at Lloyd Michaux for all they have been able to do. Again, many thanks for organising the documents. We will ensure that's recorded in some way, for Lloyd Michaux's promotional purposes, in our decision.

So unless there's anything else arising, thank you all very much indeed for your assistance and you will hear from us, eventually. Thank you.

(6.50 pm)

(The hearing was concluded)

I N D E X