
IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE
FINANCIAL MARKETS TRIBUNAL

Case: FMT 19007

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

- before -

His Honour Mr David Mackie CBE QC (President)

Mr Ali Malek, QC

Mr Patrick Storey

Day 1

Sunday, 10 May 2020

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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1 P R O C E E D I N G S

2 (1.00 pm)

3 PRESIDENT: Welcome, everybody. I was passed by my wife a
4 copy of an article from the Financial Times about this
5 type of hearing, which included some examples of what
6 had happened to American judges, one of whom had to
7 request his counsel to put on a shirt.

8 So my colleagues and I are relieved at least to be
9 able to congratulate, at least two of you, upon having
10 achieved that.

11 We would like to start with, I suggest, the agenda,
12 which is being put forward, which seems to us an
13 entirely sensible way to proceed, subject to something
14 we'll say in a moment.

15 But the first item is, bafflingly to us, entitled,
16 "FMT Constitutional Issues". I'm not sure what those
17 are and I don't know whether it's Mr Hill or Ms Clarke
18 who's concerned about them?

19 MS CLARKE: Sorry, I think some were added by my solicitor.
20 Maybe he felt that there were certain preliminaries that
21 the panel would have to go through or that the tribunal
22 had to go through, in order to properly constitute
23 itself as sitting in Dubai, rather than in our various
24 homes dotted around the UK and the world.

25 PRESIDENT: That's kind of you, but I think we have done

1 13:02 that sufficiently by email communication, so I'll go on
2 to housekeeping.

3 We're obviously very pleased to have and grateful
4 for the electronic hearing bundle. Is there anything
5 you wanted to say about that?

6 MS CLARKE: I have two matters. One is that the skeleton
7 argument that we filed in relation to the privacy matter
8 should have had with it a case called Cape, a Supreme
9 Court case, but we're not sure whether that made it to
10 everybody and we know that it hasn't made it into the
11 electronic bundle.

12 If anyone doesn't have it, then we can send it
13 around electronically and we will add it to the bundle.
14 That's one thing.

15 PRESIDENT: You said there was another?

16 MS CLARKE: The second was I think actually really more of
17 a matter for my learned friend than me. It was one of
18 the applicants' exhibits, which late, I think on Friday,
19 if I remember rightly, we were sent a slightly updated
20 version and I just wanted to double-check whether that
21 had made its way into the bundle. I think it has, but
22 if not, just to check that everybody has it. We will
23 add it to the bundle.

24 That's all I have on the electronic bundles.

25 PRESIDENT: Thank you for that.

1 13:04 Let's move on to what's described as "protocol for
2 hearing". Again, could you sort of talk us through
3 this? I'm not sure what state it is in.

4 MS CLARKE: This is the protocol for video conference
5 hearings, which was circulated to everyone, and I think
6 is in the bundles as well, although --

7 PRESIDENT: Yes, what we said to you about that was that we
8 were broadly happy with it and we'll follow it as far as
9 it seems sort of sensible to do so. So I think we can
10 move on from that.

11 MS CLARKE: Yes, in terms of -- there's a mention in
12 paragraph 17 of the protocol to non-essential
13 participants being kept to a minimum/avoided altogether.
14 We just felt it right to flag up that certainly on the
15 DFSA's side, we have two pupils -- one from my chambers
16 and one from my junior's chambers -- who will be
17 observing the proceedings.

18 And so those are the two names, Louisa Brown and
19 Samantha -- I'm afraid I have forgotten the surname, but
20 if you see those names there, and no discourtesies
21 intended, but obviously, at the moment, the pupils,
22 trying to do any active court work is quite difficult.

23 MR HILL: I would say that we have the same position in our
24 chambers. We have one pupil attending remotely, his
25 name is Hossein Sharafi.

1 13:05 MS CLARKE: Thank you. That was really just a courtesy to
2 you and to my learned friends as well and (unclear ...)

3 The next matter is the issue of microphones muted
4 and cameras off, which I'm told can be very disruptive
5 if people don't remember to do it. It's obviously
6 something that's very easy to forget, so I think that's
7 there, just to flag up to everybody that if they could
8 remember to do that, that will help. That's all on
9 that.

10 PRESIDENT: In light of the last hearing, sometimes we all
11 forget that and if we could remind each other regardless
12 of who we are, that will be most helpful.

13 Next, timetabling.

14 MS CLARKE: Yes, I know, sir, that you have views about the
15 timetable that has been circulated --

16 PRESIDENT: Let's just start and I would be grateful if my
17 colleagues would chip in too.

18 We have your suggested outline. At the moment,
19 we're sitting principally 10 till 4. You have mentioned
20 Ramadan. In the case we had a couple of weeks ago, we
21 tended -- we started, because most of the witnesses were
22 in other parts of the world, we started at 8 in the
23 morning, but we finished at 3, because that seemed to be
24 a time that was the best time to stop, convenient for
25 those who were of the Muslim religion and needed to meet

1 13:07 their requirements. So obviously, we're open to that,
2 but no one -- has anyone got any other suggestions in
3 relation to 10 to 4 in principle and Ramadan?

4 MR HILL: Our understanding, when we suggested this timing,
5 was that that did accommodate the requirements of
6 Ramadan. That was part of the basis on which we
7 suggested that.

8 PRESIDENT: If anybody has a problem, obviously let us know.

9 Item 3, you want a 15-minute break every one and
10 a half hours for the shorthand writer. I assume that
11 it's more like the UK, that there's a sort of break
12 mid-morning and a break mid-afternoon. Is that what you
13 have in mind?

14 MS CLARKE: What we suggested is if a morning session runs
15 for three hours, which I guess it would between 10 to 1,
16 that there be a break mid-morning and the same would
17 happen in the afternoon, assuming we sit from -- 2 to 4,
18 of course, won't be three hours, will it? So it will be
19 a short break in between when convenient.

20 PRESIDENT: No, but with this system, it will feel like it.

21 MS CLARKE: Yes.

22 PRESIDENT: Do my colleagues have any views that they want
23 to raise about the timetable or the sitting times?

24 MR MALEK: Nothing from me.

25 MR STOREY: Nothing from me either. Thank you. I'm happy

1 13:09 with that.

2 PRESIDENT: Then we have here, at item 3, what simply seems
3 to be the issues on that application.

4 MS CLARKE: Yes.

5 PRESIDENT: We'll deal with that in a minute, but we have
6 then got openings.

7 I don't know if you saw an email I sent to Mr Lake,
8 but we feel we have had a pretty comprehensive
9 introduction to this case and weren't looking for
10 anything other than brief openings. But obviously,
11 we're open to your views about that, so why don't you
12 both tell us what you want to do?

13 MS CLARKE: I think what you'd asked Mr Lake to do was to
14 potentially line up Mr Clink to see if he could give
15 evidence today. My understanding is we have managed to
16 make contact with him and he can do that, if that's what
17 the tribunal would think would be most helpful. So we
18 can certainly have him on standby to give evidence.

19 I think the position is that -- well, I always take
20 the view that openings are supposed to help the tribunal
21 and if the tribunal don't need help by way of a lengthy
22 opening and being taken to lots of documents, then
23 I don't see the point of doing that.

24 So it seems to me that my time would be better
25 served by just hitting a few headlines and being, to

1 13:10 some extent, guided by you, if I'm telling you things
2 that you already know.

3 Therefore, I'm perfectly content to take the very
4 heavy hint that a short opening would be appreciated.

5 PRESIDENT: Mr Hill, what do you feel?

6 MR HILL: From our point of view, I do suggest this is quite
7 a knotty case, a complex case factually, as well as
8 legally. I had thought it would be quite helpful to
9 have a bit of an opening on my side. I do appreciate,
10 you have seen what are -- I apologise for that -- overly
11 lengthy submissions from my side, but even that having
12 happened, I still submit it would be helpful to have
13 a little bit of development in opening. Obviously, it's
14 your decision and we will do whatever you say.

15 PRESIDENT: Okay, thanks for that.

16 I suggest what we do, then, is start with the
17 application and when we have heard from you both on the
18 application, we will break briefly, come back with
19 a decision, we hope, and also discuss the question of
20 openings. Obviously, if leading counsel think it's
21 going to be useful, then we're likely to be content to
22 go along with that.

23 Unless there's anything else arising, shall we turn
24 to the privacy application, where I think it would be
25 Mr Hill to start?

1 13:12 Submissions by MR HILL

2 MR HILL: Thank you. On this application, the application
3 as you have it is at bundle A016, supported by Mr Khan's
4 witness statement, C012. It should have a short
5 supplemental witness statement from him, C017. And in
6 terms of the material on the other side, it should have
7 a responsive submission from DFSA, at A019, two witness
8 statements from Mr Hammond, C013 and C014. Your
9 judgment from January is A013.

10 Our application as formulated is for an order that
11 publication of decision notices be stayed, the
12 substantive hearing of the reference should not be in
13 public.

14 On the decision notices, the tribunal will recall
15 the current status quo is in the light of the January
16 judgment is publication on the DFSA website of the
17 existence of references, not yet any publication of the
18 decision notices themselves. Hence not yet any
19 publicity from the DFSA of the content of this and
20 what's envisaged is from the January judgment is that
21 the decision notices would be published at the
22 commencement of this hearing.

23 This was on the basis that the public be unlikely to
24 be able to follow proceedings without having the
25 decision notices. We, as you know, were given liberty

1 13:13 to apply, in the event there were developments that made
2 it necessary for the decision notices to remain
3 non-public.

4 Things have moved on. As we explain in our
5 application, it's common ground that this hearing is not
6 now to be in public anyway. On the public hearing
7 aspect, the real question is whether or not there should
8 be publication of a daily transcript on the DFSA
9 website, which is what is envisaged if we're
10 unsuccessful.

11 Dealing first with that question. As I say, we're
12 not having a public hearing anyway, so the tribunal is
13 already ordering otherwise within the meaning of rule 16
14 of the FMT rules. And the question for the tribunal is
15 given that it is already ordering otherwise, what is the
16 appropriate alternative regime?

17 In that context, the tribunal set out at
18 paragraph 130 of the judgment, factors that generally
19 apply in relation to the question of whether the hearing
20 should be in public. We're not seeking to reargue any
21 of that. They clearly remain relevant key factors.

22 We do submit the balancing act being undertaken by
23 the tribunal may be a little different once one has
24 already accepted there's not going to be a public
25 hearing anyway, as you're choosing between competing

1 13:15 types of non-public hearing.

2 And what we submit in a nutshell is that weighing
3 all the factors, in particular the evidence that we now
4 have where we have, in our submission, far more cogent
5 evidence of harm than we had on the last occasion, we
6 submit the appropriate alternative regime is to continue
7 the current deferral publicity of the allegations and we
8 essentially submit what would only be continuing with
9 the deferral of publicity for a short time.

10 We say deferral of publicity should be continued
11 now, today, while the tribunal is in the thick of seeing
12 for itself whether the allegations are justified. We
13 would hope and submit the deferral could then remain in
14 place until judgment. And in that context, we would be
15 hoping along the way to persuade the tribunal the merits
16 of our points on the substance of the case, so the
17 tribunal will feel reassured in its decision not to
18 expose the underlying businesses, the employees and the
19 investors, the risks of publicity and allegation, which
20 we hope as matters go along, show you are not well
21 founded.

22 But our position is that, of course, the tribunal,
23 assuming it defers today, can always decide at any point
24 during the hearing or prior to its judgment that it will
25 direct publicity. What we're really saying is not today

1 13:16 and keep it under review.

2 If I could now turn to why we submit there's now
3 sufficiently cogent evidence to justify a deferral of
4 the kind I'm suggesting. I'm not going to go back over
5 the material you saw on the last occasion. You will
6 recall evidence from Mr Kumar, Mr Zeenni, that dealt
7 with potential damage from publication, to damage to the
8 operational companies, which are of course healthy and
9 thriving businesses with thousands of employees and
10 indeed damage potentially to shareholders, who are the
11 investors in this case. You will also recall the
12 evidence from Mr Dash and Mr Singhdeo to that effect.

13 Although we had that evidence last time around, the
14 tribunal's conclusion was that it was not sufficiently
15 satisfied. There was insufficient cogent evidence of
16 how prejudice or significant harm might arise and that
17 was paragraph 158 of the judgment.

18 The tribunal did accept there was a real prospect of
19 reputational damage to the applicants, but didn't
20 consider there to be sufficient factual basis that can
21 lead to serious consequences which we were suggesting in
22 our evidence.

23 The tribunal did accept, importantly, that business
24 interests of third parties could be relevant, though
25 there again what was needed was more sufficient cogent

1 13:17 evidence, in particular evidence from the third parties
2 themselves.

3 We submit there is this cogent evidence given by
4 Mr Khan. He's the CEO of ANEL, that's the underlying
5 education business. That business is not subject to any
6 allegations of misconduct in this case. His witness
7 statement is at bundle C012. He gives evidence of
8 adverse enquiries that have generally come about, he has
9 had to field.

10 That, of course, is only after the fact of the
11 limited references so far published, not the content of
12 the allegation. That is paragraph 8. He refers to the
13 loss of shareholder confidence that he's concerned
14 about. Again, just following the barebones publicity so
15 far. It's fair to assume that it will get worse after
16 publication of the allegations.

17 His concern is that publication of the allegations
18 will lead to shareholders losing confidence, wanting to
19 make secondary sales. That would be destabilising,
20 especially when a sale of ANEL business is imminent.

21 In that context, when we get to the evidence of the
22 case, the evidence of Mr Clink, one of the things you'll
23 notice is that he sought to sell his shares as soon as
24 he heard even of the investigation. His reasoning being
25 that he protected himself by exiting, he feels things

1 13:19 are not right, he said, there's no smoke without fire.

2 So it's a serious risk of loss of shareholder
3 confidence.

4 The third area dealt with by Mr Khan is a risk to
5 the current ANEL sales process negotiations, which are
6 in train right now. He deals with that at paragraph 11.
7 In his second witness statement, he exhibited a bid
8 summary, prepared by KPMG. It sets out current
9 indicative bids that have been received.

10 So this is a current process which may get derailed
11 and may lead to reductions or removals of bids from
12 bidders. That's a point he explains in his second
13 witness statement.

14 What we're looking at here is real harm to business
15 and all its stakeholders. The stakes involved are huge
16 and we have put in evidence a redacted version of the
17 current indicative bid status. That's an exhibit to
18 Mr Khan's second witness statement. You can see there
19 where we have invited that to be treated confidentially.
20 We'll see there that the numbers involved are very large
21 indeed. This is the kind of scale of damage we are
22 seeing.

23 Fourth area dealt with by Mr Khan relates to the
24 banking relationship that ANEL has. Some time after the
25 DFSA published the existence of the references of

1 13:20 the January hearing, bankers to ANEL gave notice they
2 intended to close ANEL's bank account. ANEL has managed
3 to negotiate, for the time being, the bank account not
4 to be closed. And that's on the basis of the
5 operational risk to the business. That may change
6 again, the bank's position may change again, if there's
7 more publicity of the allegations.

8 One cannot know for sure, and this is the point that
9 the DFSA make, cannot know for sure the inner thinking
10 of the bank. Mr Khan is the person who has the
11 relationship with them. He believes the bank's notice
12 of closure was prompted by the DFSA publication. That's
13 all paragraph 30 of his statement.

14 And he makes three important points in this.

15 First, that closure of the bank account will mean
16 closure of the operational company's banking
17 arrangements. That's about as serious a thing as you
18 can imagine. This is a business that has schools, many,
19 many employees need banking.

20 Secondly, the closure of the banking facilities is
21 even more of a problem than usual with the current Covid
22 crisis. That's because if the bank account is closed,
23 there is a serious problem of trying to get new banking
24 facilities, because banks aren't really on boarding new
25 clients in the current climate.

1 13:21 Thirdly, this is his paragraph 14, in his
2 experience, reputation, sentiment and what one calls
3 soft perceptions particularly matter for banking
4 relationships in Dubai. More so, he suggests than in
5 markets such as London and New York. There's nothing
6 pejorative or critical in that observation. This is
7 Mr Khan's experience as CEO of ANEL.

8 The other area Mr Khan explains about concerns other
9 reputational damage to the business. This is at
10 paragraphs 15 to 18. He makes the point that the ANEL
11 business is a success story for its shareholders and
12 employees and a success story in a difficult sector. He
13 emphasises the risk and seriousness of reputational
14 damage with the school parents and the need to avoid
15 negative association with the brand.

16 So putting all that together, the January judgment
17 does rightly observe that what's called a ritualistic
18 assertion of unfairness is not sufficient and that's
19 quite right.

20 We would submit that this is as far from
21 a ritualistic assertion of unfairness gets. This is
22 a prospect of very potentially serious existential harm
23 to the business with underlying operations, no part of
24 the allegations in this case.

25 We say right away that evidence, which we suggest is

1 13:23 cogent evidence against the alternative, but rather than
2 running the risk of all this harm, allegations that may,
3 we suggest, will be unfounded, we do say wait, we're not
4 having a public hearing anyway, defer publication of the
5 transcripts on the website until such time as the
6 tribunal thinks right. We suggest after judgment, but
7 if not, at some stage before judgment, but not now.

8 The same points apply to the decision notices. If
9 the tribunal is with us on publication of the
10 transcripts of the hearing, then the need for any
11 release of the decision notices falls away. The key
12 rationale in the judgment for publicising them at all
13 was to enable the public to make more sense of the
14 hearing. That will, of course, have gone away.

15 We also submit that even if a transcript were to be
16 published, it's not necessary, in fact, to have
17 publication of the decision notices to make sense of the
18 transcripts.

19 Turning to the points made by the DFSA, we have two
20 witness statements from Mr Hammond. The first of them,
21 the third witness statement at bundle C013 contains
22 a great deal, which we suggest is of little, if any,
23 materiality. Mr Hammond makes a number of forensic
24 points about Regulus, which is the company that has
25 replaced Al Masah Capital in the investment management

1 13:24 role. Those, we submit, are of little, if any,
2 relevance (unclear ...)

3 As regards the evidence that matters, Mr Khan's
4 evidence, Mr Hammond in fact has very little to say.
5 What he does suggest is that the timelines prior to
6 negotiation of the ANEL sale process are not imminent,
7 judging from a timeline that he pursues, which is at
8 page 4, a presentation to ANEL shareholders, which is at
9 your bundle at F651.

10 That is an unreal point. The timeline Mr Hammond is
11 referring to in fact shows that, as of now, the data
12 room has been prepared, NDAs have been signed and
13 indicative offers have already been received by Regulus.
14 April to June on that timeline is the time to be
15 discussing those indicative offers, clarifying
16 evaluation as to how (unclear ...) go/no-go decision.

17 That's all supported by Mr Khan's confidential bid
18 document that lists the indicatives. So we are plainly,
19 contrary to Mr Hammond's suggestion, plainly really at
20 a stage of the sale process. Destabilisation of the
21 indicative bid would be highly damaging.

22 Mr Hammond also makes points about an ANEL meeting
23 of shareholders in which references to these regulatory
24 proceedings were made by Mr Dash. And in his further
25 witness statement, he also refers to an article

1 13:26 containing a statement by Mr Dash. These seem to be the
2 main points picked up by the DFSA in their written
3 submissions. And I'll address them in that context now.

4 Turning to the DFSA's submissions, they make
5 essentially four points. First, they dispute we would
6 use evidence of (unclear ...) harm. That's the
7 paragraph (unclear ...)

8 In that context, the DFSA recite the tribunal's
9 assessment in January, that banks could reach their own
10 views.

11 That assessment was, of course, given when we were
12 looking at evidence put in by my side, which operated
13 only at a general level. We now have third-party
14 evidence, which explains about the notice to close the
15 bank account. The fact that for the time being, it is
16 not yet imposed, Mr Khan's concern is that it may yet be
17 and his concern that the bank's action has resulted in
18 the publication of (unclear ...). We also have the
19 evidence about soft perceptions. So we have concrete
20 evidence, tangible evidence coming to the operational
21 businesses.

22 All that's said at that point by the DFSA is that
23 there was a time gap between publication, notice of
24 closure from the bank. And Mr Khan didn't suggest the
25 negotiations themselves related to the FMT hearing.

1 13:27 Those are, in our submission, insubstantial points.

2 Mr Khan, the one who has this (unclear ...) he is
3 the best placed to form his view as to the bank's likely
4 motives to close down the account. Nothing is said at
5 all by the DFSA that the evidence about soft -- the
6 importance of perception, and soft perceptions, nothing
7 at all is said by the DFSA about the catastrophic risk.

8 But when it comes to the sales process, DFSA simply
9 repeat Mr Hammond's point. This is a bad point about
10 the timing of the bid process. They also underplay
11 Mr Khan's evidence, which is the effect that the risk is
12 the loss of the bids altogether or a reduction of value.

13 Nothing at all is said by the DFSA about the other
14 reputational consequences to the business Mr Khan refers
15 to.

16 So we do suggest that the DFSA's dismissal after
17 Mr Khan's evidence is quite wrong. We also submit there
18 may be a danger on the DFSA's part of not looking past
19 the fact they're in litigation. The DFSA need, we
20 submit, to take a measured approach to the risks to
21 investors and to others. Mr Khan's evidence does deal
22 with risks to a very large number of employees and
23 investors which is not to be dismissed lightly
24 (unclear ...)

25 The second point focused on by the DFSA relates to

1 13:29 the AGM of ANEL, the educational business. That is
2 a reference to an AGM minute that you have in your
3 bundle, I think at F650, and they complain about what
4 Mr Dash said to shareholders at the AGM.

5 I would invite you to look at Mr Dash's statement
6 for yourselves. It is in fact an anodyne and fair
7 statement given by Mr Dash. We would suggest it
8 represents a more than reasonable attempt by Mr Dash to
9 allay investor concerns relating to allegations which
10 may have proven in this hearing to have no foundation,
11 in which, in any event, have nothing to do with ANEL.

12 Mr Dash was in a position where there were
13 shareholder queries arising in circumstances where there
14 is existing publication of these FMT proceedings. And
15 we submit that the fact that it was necessary in those
16 circumstances to make some kind of statement, that
17 doesn't mean the DFSA should now be piling on more
18 adverse publicity.

19 The third point from the DFSA relates to a press
20 article given by Mr Dash. The DFSA make a lot of this.
21 In our submission, they are forensic and insubstantial
22 points.

23 We have the press article in your bundle at exhibit
24 F670. The claimant suggests that it's misleading. In
25 their skeleton, they do so by reading into Mr Dash's

1 13:30 comments a series of things he would not say,
2 exaggerating the things he did say.

3 To give one example, Mr Dash referred to concern
4 about the regulator penalising minor issues. When you
5 read the article, that wasn't even a reference by him to
6 these proceedings. The point being expressed generally.

7 But you'll see from the DFSA's submission at
8 paragraph 7.1 that it's the first point that they latch
9 on to.

10 There is, in fact, when you analyse the DFSA's
11 criticism, there's only one example of a statement made
12 by Mr Dash in that interview, which is inconsistent with
13 the position that the DFSA or at least the DFSA's
14 witnesses say pertains. That is his statement to the
15 press to the effect that Al Masah Capital was
16 cooperating (unclear ...) and the DFSA's witness
17 Mr Hammond said that's not the case.

18 What you'll notice about that is that there's in
19 fact no allegation about non-cooperation from the DFSA
20 itself. You won't find any decision. Indeed,
21 paragraph 192.3 of the DFSA's answer makes it clear that
22 DFSA are not alleging the applicant (unclear ...)

23 We would suggest that nothing in Mr Dash's comments
24 in a press statement justify the serious step of
25 jeopardising this business and the interests of

1 13:31 investors and employees in the operation of the company.

2 We do submit the DFSA should be exercising far more
3 consideration for those (unclear ...) than they are and
4 their approach really does have a flavour, we suggest,
5 of playing the man, but not the ball.

6 The fourth point, last point I'm going to deal with
7 raised by the DFSA is at paragraph 8 of our skeleton.
8 There they simply repeat certain points made last time
9 around. None of them address the harm which is
10 addressed in our evidence.

11 That's with one exception. It is said at
12 paragraph 8.4 of the DFSA skeleton that Mr Khan's
13 reference to shareholders exiting is difficult to
14 understand. The shareholders have no right to.

15 But Mr Khan, in fact, explained the position very
16 clearly at paragraph 10 of his witness statement. He
17 made it clear that the concern would be that
18 shareholders would be looking to exit. He referred to
19 secondary exits, in other words, a secondary market.
20 What he's referring to quite obviously, in our
21 submission, is collapse of investor confidence in the
22 investments. That is, of course, a serious matter of
23 concern for investors.

24 In their skeleton, the DFSA dismiss all that by
25 saying secondary sales is a matter for the investor.

1 13:33 That's a surprising submission, I would suggest. It
2 suggests a lack of consideration for the real economic
3 interests in this. Collapse in the perceived value of
4 the shares is obviously a huge problem. We do suggest
5 that in all of their hostility (unclear ...) loss of
6 perspective (unclear ...)

7 We invite the tribunal to direct both the
8 publication of the decision notice be deferred and that
9 at least for now there be no publication of the
10 transcripts.

11 Those are my submissions on the substance. We have
12 very small points on the press release, which if you're
13 against me on the application, I wonder if the best
14 thing to do is to defer those until we hear from my
15 learned friend.

16 PRESIDENT: What I was going to say was simply this, that
17 both sides are assuming that we have decided under rule
18 16 that this hearing will be in private and that
19 assumption seems to derive from an email which I sent on
20 29 April, which says simply:

21 "It may narrow debate between the parties if we
22 point out that in a case being heard by the Tribunal
23 this week, the order on the question of sitting in
24 public was simply this:

25 Rule 16 requires the hearing to be in public, unless

1 13:35 the panel orders otherwise. We propose to order
2 otherwise, because this is not practicable, given the
3 kind of hearing we're having to hold. However, we
4 consider that an attempt should be made to provide some
5 public access, and we propose to place a copy of the
6 transcript on the website each day."

7 It may not matter and it may in any event be
8 a matter of semantics, whether this is a private hearing
9 with public aspects or a public hearing with
10 limitations. But I just thought it was right to let you
11 both know that we have not actually decided that and it
12 was only an email I threw out in the hope of, as it
13 turns out vain hope, narrowing the debate a bit.

14 So do you want to come back on that or come back in
15 reply if you want to?

16 MR HILL: Really my submission is the tribunal is ordering
17 otherwise anyway. And so, it's a question of to what
18 extent would derogate and to what extent you're ordering
19 otherwise? So the submissions I have made still apply
20 in that context.

21 PRESIDENT: Thanks very much.

22 Ms Clarke.

23 Submissions by MS CLARKE

24 MS CLARKE: Thank you. My primary submission is that we
25 mustn't lose sight of what the overriding principle is,

1 13:36 which is open justice. That is enshrined in the
2 tribunal rules and it is also enshrined in common law by
3 virtue of the various cases that you have had cited to
4 you, in particular the Supreme Court case of Cape that
5 we appended to our most recent skeleton.

6 That was the principle that the tribunal had very
7 much in mind, when it made its decision first time
8 around in January or perhaps just before the end of last
9 year.

10 We submit that nothing of sufficient significance
11 has changed since then, that should cause the tribunal
12 to revisit that decision and to revisit those essential
13 principles.

14 Some practical things, of course, have happened, one
15 of which is that we are all sitting virtually in our
16 various homes, conducting these proceedings by video
17 conferencing rather than in a courtroom in the DIFC.

18 Had it not been for that, and were we in a courtroom
19 in the DIFC, then this hearing would be taking place, we
20 submit, in public. It can't, because of the Covid
21 restrictions.

22 But that of itself, we submit, does not turn this
23 hearing from a public hearing into a private hearing.
24 And I think that's probably the point that you, sir,
25 were seeking to make when you drew our attention to the

1 13:38 email that you sent last week and to the reference in it
2 to rule 16.

3 So the question then arises: what can be done in
4 order to meaningfully meet the requirements of open
5 justice given the current circumstances?

6 One route that has been adopted in other cases and
7 certainly this jurisdiction, and I know in other
8 jurisdictions around the world, is for hearings to be
9 televised and placed on YouTube and that has been done.
10 That's not going to happen here. But the second best
11 option is for transcripts to be put on the internet, so
12 that members of the public or the press who want to read
13 about this hearing and to understand what the issues are
14 on both sides, can do so.

15 We submit that that is the entirely proper way that
16 the panel should approach this hearing and that there is
17 nothing that the applicants have provided you with,
18 since the last decision was made, that materially
19 changes that position.

20 So that's my overarching point. "Open justice", of
21 course, is not just a word or a phrase that exists in
22 a vacuum. There's very real purpose to it. It's to
23 enable, of course, the public to understand proceedings
24 and to be able to follow them. It's to enable the
25 (unclear ...) in order to fairly and accurately report

1 13:40 them. And, of course, it ensures transparency of
2 justice for both sides. Because, of course, if the
3 hearings are being conducted in public, then the judge
4 is under scrutiny as are the parties and observers can,
5 of course, pay attention to that and report on it
6 accordingly.

7 The need for open justice is something that extends
8 far wider than perhaps the phrase may at first appear.

9 It's not just about what the press can report. It
10 goes far wider than that.

11 What was decided, of course, last time was that
12 there would need to be evidence really of significant
13 harm going beyond the inevitable damage, potential
14 damage to reputation, potential business interests,
15 potential economic loss, but something really
16 significant, which it would be beyond the norm, such
17 that the balancing act would shift away from the open
18 justice principle towards holding a private hearing.

19 That, I submit, would need to be a very heavy burden
20 for the applicant to discharge. And that, I submit, is
21 what is in effect acknowledged by the various
22 authorities that were submitted last time around and
23 reflected in the judgment of the tribunal in relation to
24 that application.

25 The point that my learned friend, on behalf of the

1 13:41 applicants, relies upon in order to meet that high
2 hurdle are, we submit, inadequate.

3 Firstly, the issue of Noor Bank. What we know or
4 the limit of what we know is that Noor Bank apparently
5 told Mr Khan that they were considering withdrawing
6 their banking facilities in March 2020.

7 We have no further information than what is in
8 Mr Khan's statement, which is a fairly limited piece of
9 information, because what he says is that, "Noor Bank
10 told us that they intended to close our accounts." And
11 he says:

12 "I believe that this action was prompted by Noor
13 Bank learning of the hearing through the publication of
14 the references on the DFSA website."

15 Then he says that although they have negotiated with
16 Noor Bank to keep the accounts open, he's extremely
17 concerned that more adverse publicity would cause them
18 to terminate.

19 "I believe that this action was prompted by Noor
20 Bank learning of the hearing through the publication of
21 the references on the DFSA website", we submit falls
22 woefully short of the hurdle that the applicants would
23 have to meet.

24 Firstly, because of the timing, and this is not an
25 insignificant matter, as my learned friend would

1 13:43 suggest, but the update on the website went on
2 in January and we are told it wasn't until March that
3 Noor Bank made this intimation.

4 Therefore, it seems, we submit, unlikely that there
5 is necessarily a link or at least there is no sufficient
6 evidence that there is a link, such as there would need
7 to be in order to discharge the burden that the
8 applicants have.

9 Secondly, the statement:

10 "I believe that this action was prompted by Noor
11 Bank learning of the hearing ..."

12 Again falls woefully short of the sort of detail
13 that you, sir, might expect in support of this kind of
14 application, particularly given the fact that last time
15 around, we were faced with fairly similar statements
16 from, I think, a number of witnesses, none of which were
17 particularly substantial, a lot of which used phrases
18 like "I believe", and none of which did you find at that
19 time to be sufficiently compelling.

20 I submit that this statement falls into the
21 inadequate category as well, because if it is the case
22 that Mr Khan is the one who has been negotiating with
23 Noor Bank, in order to persuade them to keep banking
24 facilities open and has successfully, so it seems,
25 persuaded them to do so, then one might expect to see

1 13:45 rather more detail about those allegations or about
2 those matters and about those conversations, and about
3 what was said by Noor Bank about the reasons for why
4 they want to withdraw their facilities. And what was
5 said by Mr Khan, in order to persuade them not to,
6 perhaps supported by emails, because one might think in
7 this electronic age that some of this communication may
8 well have taken place by email, or any other documents.

9 But we don't have any of that, nothing at all. All
10 we have is the statement, "I believe". I submit that
11 that is simply not good enough in terms of the standard
12 that the applicants have to meet.

13 The other matters that are raised by Mr Khan on the
14 applicants, or adopted by the applicants, because of
15 course, we remind ourselves that Mr Khan in fact works
16 for ANEL as opposed to any of the -- either of the two
17 entities in this case, is the collateral damage issue.

18 The fact of the matter is that if transcripts are
19 put on the website for the public and the press, and if
20 the decision notices are published, then such collateral
21 damage, as there is, can be managed, because it can be
22 managed in a number of ways.

23 Firstly, because it will be clear that the
24 allegations that are being made are being made against
25 the applicants and not against ANEL.

1 13:47 Secondly, because as things stand now, and for quite
2 some time, neither of the applicant companies have any
3 connection, so we're told, with ANEL, because Regulus
4 took over from Al Masah Cayman as the manager of ANEL
5 some time ago.

6 In any event, the public would be able to see that
7 the allegations are simply allegations and also would
8 have a record, were the decision notices to be published
9 and the transcripts to go into the public domain, of
10 what the arguments are on both sides.

11 That is one of the reasons for open justice, so that
12 the arguments for both sides are in the public domain.
13 And it would, of course, be clear that it is not ANEL
14 that is a party to these proceedings.

15 We submit that collateral damage, such as it is, is
16 not sufficient.

17 The issue of shareholder confidence. Well, it may
18 be the case that some shareholders will be concerned
19 about what they read or hear about these proceedings.
20 But it is not, as we understand, the operation of these
21 investments -- and I use the term neutrally
22 "investments", because, of course, our case is they were
23 funds as well as investments. But our understanding of
24 the way in which it works is that it is not like buying
25 shares on the NASDAQ Dubai, where if you decide you

1 13:49 don't want to hold the shares any more, you go back on
2 to the NASDAQ Dubai and sell them.

3 The exit strategy, as we understand it, is a sale of
4 the underlying assets or the underlying fund business or
5 whatever. But what the investor can't do is simply say
6 to ANEL or to Regulus, "Actually, I don't want these
7 shares anymore and I want you to buy them back from me
8 or I want you to give me my money back."

9 Under the terms of the agreements and the
10 subscription agreement, they can't do that.

11 So we submit that shareholder confidence, such as it
12 is, may well, in practical terms, have very little
13 effect on the operation of these funds or the success of
14 them or their stability. Because if the investors, like
15 it or not, can't actually exit, then it seems to me that
16 my learned friend's point on that aspect falls away.

17 Risk to sale is the other one that my learned friend
18 referred you to and is the fourth topic, I think, in
19 their skeleton argument. You have been shown a document
20 that I think was exhibited to Mr Hammond's witness
21 statement, which gives a timetable for when various
22 things are due to happen for the sale strategy for ANEL.

23 You have the evidence of Mr Khan about that as well
24 and including the two pages out of, I think, a total of
25 11 -- the others being completely redacted -- which,

1 13:51 I submit, don't really take things very much further.

2 It's suggested that publicity at this stage would be
3 catastrophic for the exit proposals that are being put
4 in place, the strategy that has been, so we're told,
5 embarked upon.

6 Again, we submit that that would not -- even if that
7 were true, which we don't accept it is, we submit that
8 that would not of itself be sufficient either. Because
9 the position would be inevitably that as part of the
10 data room, one has to populate with documents relating
11 to due diligence and any potential buyer would be bound,
12 we submit, to have knowledge of, or frankly, should
13 probably be put on notice of, the fact that there are
14 these connected ongoing proceedings if they're not
15 already aware of them.

16 Inevitably, then, questions would be asked, we
17 submit, and they would have to be answered and that
18 would be the case whether the transcripts were put on
19 the website for the press and whether the decision
20 notices are published or not. And frankly, because
21 apart from anything else, Mr Dash has chosen to brief
22 the press himself about these proceedings.

23 So it seems to us, we say inevitable, that he having
24 chosen to do that, that knowledge of this matter is in
25 the public domain in any event.

1 13:53 We submit that although my learned friend asserts
2 that it would be catastrophic to the sale process, there
3 hasn't been any evidence, cogent evidence or otherwise,
4 submitted by them in order to support that. Nothing at
5 all other than what we have in their skeleton argument
6 and what Mr Khan says in his witness statement. We
7 submit that that simply isn't enough.

8 Turning to the evidence that the DFSA has supplied.

9 My learned friend appeared to be, I'm sure
10 unintentionally, a little scathing about this, but
11 I submit that I suppose in many ways he had to be,
12 because it is not a comfortable position to be making an
13 application to the tribunal that a hearing that ought to
14 be being held in public under open justice principles,
15 should be held totally in private. And that the
16 allegations that are the subject of these proceedings
17 should similarly not be revealed to the press, in
18 circumstances where one of the applicants in two public
19 forums has chosen to speak, it seems, openly and as far
20 as the AGM was concerned, apparently transparently,
21 about the allegations that were being made.

22 That being so, we submit that open justice cuts both
23 ways, because, as I said at the outset, the principle is
24 wider than just the press being able to report. It's
25 about fairness to both parties and about the public

1 13:55 understanding the case of both sides and the position of
2 both sides.

3 The AGM and the minutes of the AGM note, as we have
4 quoted at paragraph 5 of our skeleton:

5 "Mr Dash elaborated on the detail of the matter in
6 the interests of transparency."

7 We say transparency needs to go in both directions,
8 and decision notices and transcripts would enable that
9 to happen and would enable everyone to understand what
10 the allegations are, what the case is on both sides and
11 what the position is.

12 As I have said, if the hearing is already in the
13 public domain, and then Mr Dash chooses to put it even
14 further in the public domain by speaking at the AGM in
15 the way that he did and then briefing the Khaleej Times,
16 then it's difficult to imagine how Noor Bank or any
17 potential purchaser would be less affected by the
18 unknowns that confidentiality would bring as opposed to
19 the transparent approach that we submit should be the
20 default position.

21 Turning then to the Khaleej Times article, and for
22 the reasons that we have set out at paragraph 6 of our
23 skeleton, we submit that this puts the matter really
24 beyond doubt. Because Mr Dash, having chosen, so it
25 appears, to freely give an interview to the press in

1 13:57 which he makes a number of comments about the
2 proceedings and about the allegations that are being
3 made, and far from being open and frank about the way in
4 which he did that, and far from being balanced about the
5 way in which he did that, he took the opportunity to
6 criticise, we submit unfairly, the DFSA, make comments
7 about the way in which the DFSA operates and how it
8 inappropriately goes after the wrong people, in effect.

9 Furthermore, make, we submit, inappropriate, at
10 best, and we submit, at times -- well, at best
11 one-sided, but at times positively misleading
12 characterisations of the allegations.

13 We have set out at paragraph 6 the specific examples
14 of that.

15 My learned friend suggests that in effect what we
16 have done is cherry-picked certain parts of that
17 article. I would invite you to read the relevant bit of
18 that article and measure it against paragraph 6.

19 And I submit that you will see that far from
20 cherrypicking particular parts, in fact, what we have
21 done is paid due attention to the entirety of it. And
22 what it shows, both individually and in the round, is
23 that he has minimised the allegations that are made. He
24 has failed to refer at all to any of the more serious
25 allegations, in particular the misleading allegations

1 13:59 and the matters that fall under that. And has really
2 tried to characterise this as the DFSA having got it all
3 wrong, not seeing the bigger picture, and, "If they
4 really thought there was anything wrong with us, they
5 would have shut the business down long before and they
6 haven't. And that means that really there's nothing
7 wrong."

8 That, of course, ignores, not only the large fines
9 that have been imposed on or the decision notice has
10 decided to impose on the parties, the businesses and the
11 individuals, but of course also the prohibition orders
12 on the individuals, which demonstrates, of course, that
13 as far as the DFSA are concerned, that this action by
14 these applicants makes them unfit to be connected with
15 financial services businesses within the DIFC.

16 That, we submit, completely contradicts the
17 statement that Mr Dash makes to the effect that, "We're
18 still in business, so there's nothing to worry about."

19 We simply say this. Far from those matters being
20 insignificant, as my learned friend submits that they
21 are, what they do is demonstrate that these applicants
22 want it all one way. They want the hearing to be in
23 private and they don't want anything to get into the
24 public domain about the truth of what these allegations
25 are, because it suits them professionally and personally

1 14:01 for that to happen.

2 But the flipside is they are not above themselves,
3 or certainly Mr Dash is not above himself using public
4 forums when it suits him, to give his own version of
5 these matters. And we submit that what that does is
6 underline the principle of why open justice is as
7 important as we submit it is and as all the case law
8 says that it is. And, of course, that is why it is
9 underpinned as the default position in the FMT rules.

10 Of course, really, one follows the other. If you
11 take the view that the transcript should be published,
12 consistent with a hearing being held as in public as is
13 possible in the circumstances, then it would follow, we
14 submit, that the decision notices ought also to be
15 published, because it is inevitable, apart from anything
16 else, that they will be mentioned regularly throughout
17 the proceedings and referred to heavily by both sides.

18 Just by way of example, were it to be the case that
19 a member of the public or the press reading a transcript
20 and noticing that references were being made to decision
21 notices and things in the decision notices, then made
22 a request to the tribunal for a copy of that document,
23 then the tribunal, of course, applying the principles
24 set out in Cape and also Guardian Newspapers, may well
25 find itself taking the view that the document ought to

1 14:03 be provided. We submit that that would be the view that
2 the tribunal would be driven to.

3 So it must follow, we submit, that if there are to
4 be transcripts made public, that the decision notices
5 should also be made public and for the same reasons.

6 My final submission is this. Nothing that the
7 applicants have provided us with changes fundamentally,
8 we submit, the position as it was when the first
9 tribunal decision on this topic was made. There's
10 nothing significant that's changed, that warrants
11 a change of view.

12 So we submit that you should dismiss both of these
13 applications.

14 PRESIDENT: Thank you.

15 Mr Hill?

16 Further submissions by MR HILL

17 MR HILL: Just nine points to pick up very quickly. I'm not
18 going to spend time on or too much time on the question
19 of whether this counts as a public or private hearing.

20 We suggest that transcript --

21 MR MALEK: Mr Hill, can I just raise one point on that,
22 because -- can you hear me, Mr Hill?

23 MR HILL: Yes, I can.

24 MR MALEK: Because I do think it is potentially important.

25 I mean, Covid 19 has obviously given a lot of problems

1 14:04 in terms of how hearings should take place. I think the
2 way it's been dealt with falls within three categories
3 of how cases have been dealt with.

4 There's the one in the Stewarts Law website that has
5 been cited, the Kazakh case, which I was actually in.
6 The way it was dealt with then was, first of all,
7 transcripts were put on a website and then in later
8 days, it was done by YouTube. So those are the first
9 two ways.

10 Then as I understand the position in London, the way
11 it operates is that the cases are listed, an email
12 address is given and if somebody is interested in the
13 case, they get in contact with the judge's clerk and
14 they can listen in exactly the same way that we're doing
15 so at the moment.

16 But, in my view, all three of those processes,
17 whether it's by way of a transcript or by way of
18 a YouTube or by way of being able to participate in the
19 way that we're doing now, they are all public hearings.

20 I just thought I ought to make that clear, because
21 I don't want, speaking for myself, to put you in a false
22 position that this is not a public hearing. It is
23 a public hearing.

24 Your point, I think, is that the decision notices
25 were left outside the ruling and if you could show that

1 14:06 the decision notices were going to cause the type of
2 damage that would justify a private hearing, then your
3 case is that there should be a private hearing and not
4 a public hearing.

5 I think, as I understand that, that's what your case
6 is, is that the logic of your case, that the decision
7 notices are going to give rise to the damage that you
8 have outlined and we have read in Mr Khan's case, is of
9 a degree that effectively this decision should be
10 private and the two points that are dealt with together.

11 Again, last point I want to make, just so that you
12 understand where I'm coming from, so there's no doubt,
13 is that the question of decision notice and private is
14 very closely connected and comes to, I think, the same
15 point. But you may have a different submission on that
16 point, but they are obviously closely connected.

17 I hope that helps.

18 MR HILL: It does help. I'm very grateful for that. Part
19 of the reason why I said I didn't want to take time on
20 the public/private space, because I quite see one can
21 see this as a public hearing anyway. Of course, the
22 court is ordering otherwise.

23 I agree with the points that have just been made,
24 with one small caveat, which is that given that we are
25 looking at an alternative, in practice, which consists

1 14:07 of putting transcripts on a website, I do say it falls
2 to the tribunal to consider whether that alternative
3 really justifies the harm of doing so.

4 Of course, in a way, that is me renewing the
5 question of whether a public hearing justifies the harm?
6 But it's worth bearing in mind the particular type of
7 public hearing we're having, is just a question of a
8 transcript on a website.

9 Why that matters is because one of the points made
10 by my learned friend, for example, is about the
11 importance of judges being under scrutiny and the
12 parties, it does need to be realistic about this. We
13 are talking about putting transcripts on a website on
14 a daily basis, or, in my submission, doing so perhaps in
15 a few days' time, or a couple of weeks' time, whenever
16 the tribunal decides.

17 One shouldn't divorce the practicality from the
18 broad proposition.

19 That's really the first point I wanted to make. But
20 I accept it is really a question of whether I can
21 justify on the evidence that there is, a departure.

22 The second point is the question of whether there's
23 significant harm. And my learned friend says there's
24 always significant harm -- there's always normal damage
25 to reputation or the like in any case. So the question

1 14:08 is whether there's significant harm going beyond that?

2 Of course, this point overlooks the fact we're not
3 just talking about the applicant, we are talking about
4 the underlying operational businesses, their employees
5 and stakeholders.

6 On that, my third point, Noor Bank, DFSA suggest
7 there's not sufficient evidence of linking the Noor Bank
8 action. But that again overlooks Mr Khan as the CEO who
9 has the relationship. He works for ANEL, he has a
10 relationship with the bank and is in the best place.
11 They're never going to be able to get a statement from
12 the bank saying, "This is why we took this action."
13 It's an unrealistic suggestion.

14 The fourth point, collateral damage. My learned
15 friend suggests glibly that it could be managed. She
16 talks of lack of connection between ANEL and the
17 company, and the like, and the fact that they can get an
18 explanation for the allegations.

19 That, in my submission, again is not a real world
20 submission. What evidence from Mr Khan about the way
21 banks work is clear from the investors, the way they
22 work, where there's no smoke without fire. The
23 suggestion that there can be an explanation that's going
24 to massage the problem away, in my submission, is not
25 evidence.

1 14:10 The fifth point, shareholder confidence. Of course,
2 we're not suggesting that these are shares listed on the
3 NASDAQ and freely traded, but the DFSA go too far, if
4 they're suggesting that there doesn't exist any
5 secondary action, secondary buying and selling in
6 respect of these shares.

7 We have the example of Mr Clink, their own witness.
8 And my learned friend, I submit, is excessively glib
9 again about the effect of collapse of investor
10 confidence, even if there is difficulty in selling
11 investments on the secondary market. Not a thing to be
12 ignored if investors perceive their shares have
13 collapsed in value. That would be highly destabilising,
14 particularly destabilising in the context of the sale
15 prices, which is my next point.

16 My sixth point. My learned friend suggests that
17 shareholders -- that bidders should be told anyway or
18 maybe being told anyway about the existence of this.
19 That's missing the point. The evidence that is
20 explained by Mr Khan deals with the effect of the public
21 loss of investor confidence on the bidding process.
22 It's that that may lead to reductions in (unclear ...)
23 It's not sufficient just to say the bidders may know
24 something about these proceedings. It goes much further
25 than that. The bidders will react to the impact of

1 14:11 investor confidence.

2 Rather like a banking situation, my learned friend
3 says there's not sufficient evidence that the sale and
4 purchase is affected. What more could one have? The
5 only better evidence you could have is to wait and see
6 what happens and say, "I told you so". It's much too
7 late.

8 Seventh point, the AGM. My learned friend didn't
9 address my observation, Mr Dash had very little that he
10 could do, other than to allay the existing investor
11 concerns other than to do what he did, to give an
12 anodyne, in my submission, fair description there of how
13 the situation stood.

14 That is not a reason, the fact that he had to give
15 that explanation is not a reason, in my submission, to
16 add investor concerns.

17 Eighth point, press article. I do submit we get
18 a flavour of where the DFSA are coming from on this. In
19 response to this application, my learned friend focused
20 on her submission where she said Mr Dash unfairly
21 criticised the DFSA.

22 That is why I suggested the DFSA are playing the
23 man, but not the ball. It's not a question of
24 (unclear ...) and being unfairly criticised. It's
25 a question of what is the right thing to do, given the

1 14:13 risks to investors and the risks to employees of the
2 ANEL business.

3 Just to be clear, I'm not suggesting that the DFSA
4 cherry-picked Mr Dash's comments. I'm suggesting that
5 their interpretation of what he was saying is
6 exaggerated and unfair.

7 Last point, my ninth point, is the DFSA's suggestion
8 that they don't want allegations to be in the public --
9 that the applicants don't want allegations to be in
10 public domain because it suits them. That is quite
11 wrong.

12 First, we have evidence from the ANEL CEO. He's not
13 one of the applicants, he's the CEO of ANEL. He is the
14 person who is explaining cogently, in my submission, why
15 he considers publicity of these allegations very
16 damaging. It's nothing to do with the situation at
17 hand.

18 Secondly, we fully accept that if the DFSA are
19 right, the FMT, at the end of its process as it gets us,
20 these allegations will all be public. Nothing we can do
21 about it. And that is exactly the right thing to
22 happen. We don't want allegations that may not be
23 proved.

24 That's a perfectly fair position to take, especially
25 the damage, we say, that will cause ANEL stakeholders.

1 14:14 Thank you.

2 PRESIDENT: Thank you both very much. We will take a break
3 now and consider where we go from here.

4 I would suggest that we break for 20 minutes, maybe
5 a bit longer than that, and we'll then return and give
6 you, I hope, our decision on this issue, which of
7 course, we have had a good deal of time to consider,
8 since we got all the helpful submissions.

9 So it's now 11.15. We would hope to return to you
10 at 11.35. Thank you very much.

11 (2.15 pm)

12 (Short break)

13 (2.36 pm)

14 PRESIDENT: The tribunal is going to give very brief reasons
15 for the decision it's reaching on this application.
16 Essentially so that we can get on with the case.

17 The position is this, that the tribunal gave
18 a decision on 16 January that the merits hearing of this
19 case would be heard in public. It's directed that the
20 decision notice be published on the first day of this
21 hearing, but there was liberty to apply for a further
22 stay "relying on developments taking place after the
23 ruling".

24 As I say, there was no such qualification to the
25 decision that the merits hearing should be in public.

1 14:37 These remarks should be seen in the context and
2 having regard to the contents of that decision, which
3 set out the considerations in considerable detail.

4 The starting point, of course, is that the decisions
5 of the tribunal are generally to be in public and every
6 applicant to this tribunal by the nature of the work
7 that it does, will be concerned about the effect of
8 publicity on them about a decision which is being
9 subjected to in effect rehearing.

10 This further application is brought on 24 April by
11 the applicants, supported principally by a witness
12 statement from Mr Khan. The applicants draw attention
13 to what they say is harm and potential harm, not just to
14 applicants, but in particular to third parties such as
15 ANEL, with the suggestions in the witness statement that
16 bank facilities may be lost and may still be lost and
17 the prospect of at least one major deal being in peril.

18 There is a response from the DFSA supported by
19 a witness statement from Mr Hammond, which broadly
20 contends that the need for disclosure to the public is
21 paramount, almost so. They contend that nothing
22 material has changed since the decision of 16 January
23 and they also rely upon some observations made by
24 Mr Dash, both to what is in a sense the public at an AGM
25 or a section of the public at an AGM and also his recent

1 14:39 remarks in the press.

2 The position, as we see it, is that none of the
3 developments, if they can be called that, since
4 16 January are sufficient to change the balance. We
5 bear in mind, I'm sure, the genuine concerns of the
6 deponents about ANEL, and the harm, but there is
7 a degree, it seems to us, of speculation about them.
8 While it is true that the remarks of Mr Dash don't
9 necessarily contain quite the force that the DFSA
10 attributes to them, they are nonetheless a step towards
11 putting this into public view.

12 It's also important to bear in mind that the
13 question here is about the disclosure of the decision
14 notice and a degree of public disclosure of the
15 proceedings in a context where the allegations are being
16 fiercely contradicted by the applicants. And it will be
17 clear from the very fact that these proceedings are
18 already under way, that that is not a mere posture on
19 their part.

20 All in all, as we say, we simply do not consider
21 that the developments change the balance sufficiently to
22 disturb the decision which we reached about the decision
23 notice back in January.

24 As far as the question of sitting in public is
25 concerned, we did in our January decision emphasise the

1 14:41 importance of that, giving reasons for it. It probably
2 doesn't matter whether this is characterised as a form
3 of sitting in public or a form of sitting in private,
4 attempting to replicate some degree of public access.

5 What has been proposed is simply the placing of the
6 transcript each day upon the website of the tribunal and
7 we can see no legitimate objections to that, given the
8 legal position, as we see it to be, and therefore
9 applying our rules. And in the exercise of our
10 discretion, we refuse the application and point out that
11 to the applicants themselves, that we are not in this
12 case, unlike the position in other jurisdictions,
13 requiring there to be any streaming, whether by YouTube,
14 television or other means. We also propose to reserve
15 the costs of this application.

16 Moving on from that, two things. The first is the
17 question of the press release and the issues arising
18 from that. And the other is the openings having, as it
19 were, heard you a bit, we are very content to leave it
20 to you both to decide upon the form and nature of your
21 openings, however you choose to present them. We're
22 sure that you'll do it in a way that is of great
23 assistance to us.

24 MS CLARKE: Thank you, sir.

25 The press release issue is the next topic that falls

1 14:42 under the agenda. And I think that the panel and also
2 my learned friends have been sent by email, by Mr Lake,
3 what is, I think, the current version or proposed
4 version, there having been a few iterations going
5 backwards and forwards between both sides during the
6 course of the morning.

7 I don't know whether my learned friends have had the
8 chance to look at the latest iteration and whether they
9 have any comments on it. But perhaps the first question
10 is: does everybody have the latest iteration, which was
11 sent to the panel on 12.56, that must be Dubai time, so
12 9.56 this morning?

13 If everybody has an email from Mr Lake and it looks
14 as if it went to -- certainly it went to the panel, I'm
15 not sure it went to my learned friends. So my learned
16 friends might want to check whether they received
17 something at a similar time.

18 MR STOREY: Yes, I can confirm that I at least have received
19 that, thank you.

20 MR HILL: I have received it.

21 MS CLARKE: I think really the question is whether my
22 learned friends are content with the draft as it now
23 stands or not. And if they're not, then no doubt
24 Mr Hill will tell us why not.

25 MR HILL: Thank you. Things have moved on, as my learned

1 14:44 friend says, a lot. The original version was
2 contentious and this version is far less contentious.

3 Just so you understand where -- the background to
4 the remaining point of difference. When we were
5 provided with the contentious version, we went to the
6 DFSA website and found the press release for the case
7 against Mr Sheikh, which was a recent case, Dr Sheikh,
8 which you know about.

9 That was a neutral press release and we therefore
10 provided a draft, which mimicked the Dr Sheikh press
11 release and contended that in order to ensure
12 consistency, DFSA should adopt our draft.

13 What's now happened in the draft that you have in
14 front of you is that to a large extent, the DFSA have
15 agreed with us, certainly when it comes to the
16 description of the allegations, we have dropped a lot of
17 the contentious wording, it is much more like the Sheikh
18 draft.

19 That now leaves one point of difference, which is
20 that in the Dr Sheikh draft, there was no description of
21 the penalties that the DFSA are recommending. I don't
22 know if you have the Dr Sheikh one, but all it does in
23 the second paragraph is say:

24 "... the DFSA decided to take action against
25 Dr Sheikh, including a direction that he should pay

1 14:46 restitution ... imposed a fine, and restricted and
2 prohibited Dr Sheikh from performing certain functions
3 in or from the DIFC."

4 We were proposing that similar wording should be
5 adopted for this case. What the DFSA have instead done
6 in their draft is elevated, right at the front of the
7 document on the first page, is have a description in
8 a tabular form, with the details, fines, penalties
9 imposed.

10 We still submit that there should be consistency and
11 that our original suggestion of a description in line
12 with Dr Sheikh's case is appropriate, rather than the
13 more elevated version that the DFSA are suggesting.

14 Our suggestion, we suggest, I don't know if you have
15 our version, that the penultimate paragraph of the
16 DFSA's press release is sufficient.

17 Just so I understand the two reasons the DFSA have
18 for departing from their press release, they make two
19 points. One, they say each case turns on its
20 circumstances. That can't be a reason to have
21 a heightened publicity of the proposed penalties in the
22 press release.

23 Second point, they say there has been a change of
24 policy in February of this year.

25 These are current ongoing proceedings and we're

1 14:47 dealing with the implications of the decision notice
2 subject to directions in January. We obviously have
3 legitimate expectations it shouldn't be subjected to the
4 consequences of a change in policy in February.

5 So it's a short point, we simply say that
6 a description of the penalties should be removed from
7 the first page of the press release.

8 PRESIDENT: Thank you. Ms Clarke?

9 MS CLARKE: Sir, just because a particular approach was
10 taken in a completely different case on another day and
11 no doubt in circumstances pertaining to that particular
12 case, that particular applicant, and the allegations
13 which all, I'm sure, would have formed a part of the
14 decision that was taken, does not set a binding
15 precedent for the wording of a press statement forever
16 after.

17 The question, we submit, that the panel should be
18 considering is what is appropriate in the context of
19 this case that the panel are currently seized of?

20 When the panel asks itself that question, my
21 submission is that the answer would be, what is there in
22 this draft of this press notice that is objectionable,
23 given that the tribunal have now ruled that the decision
24 notices can be publicised, which contain in stark terms
25 the fines and the prohibitions that are being levied

1 14:49 against these applicants and what for, and given the
2 fact that transcripts are going to be --

3 PRESIDENT: I'm sorry to interrupt, but I was going to ask
4 you that, because the decision notices are being
5 published.

6 MS CLARKE: Yes.

7 PRESIDENT: The proceedings are continuing with the
8 transcripts on the website. Why is the tribunal
9 concerned with the details of your press release when
10 presumably the applicants are also free to issue a press
11 release? That's one point.

12 The other point is, I recollect with the Dr Sheikh
13 case, the decision notices were published quite early
14 on. It wasn't a publication -- it wasn't a recent
15 publication. I can't remember the details of the
16 difference, but I'm not really sure why I and my
17 colleagues are having to get involved in the details of
18 a press release. Why is that?

19 MS CLARKE: Sir, I can answer that one very easily and the
20 reason is because it was in your order from your ruling
21 in January that the press release was to be brought
22 before the tribunal if it couldn't be agreed.

23 I'm just going to turn up the paragraph where it
24 says that.

25 PRESIDENT: You'll be as impressed as I am to know that

1 14:51 Mr Malek has already sent me a message that it's 190C.

2 MS CLARKE: I know Mr Malek is always ahead of everybody,
3 including me. But, yes, it's that. That's why you're
4 being troubled with this.

5 I have to say, from my perspective, it's not
6 something that I would normally want to trouble any
7 tribunal with, because it ought to be a matter that
8 should be capable of resolution between the parties.
9 But it seems not on this occasion, because there is this
10 now one remaining sticking point.

11 I should say that all sides have been working
12 extremely hard to try to come to a measure of agreement,
13 and I say that of the applicants as much as I do of
14 those who instruct me, there is one remaining issue that
15 we cannot resolve and that's why you're being asked to
16 express a view on it.

17 I realise, of course, though, that it's not exactly
18 the most important thing on the agenda today, from the
19 panel's perspective, or perhaps anyone else's, and that
20 it shouldn't take up more time than it needs to.

21 PRESIDENT: We'll come back to you after the lunch break on
22 that.

23 MS CLARKE: Right.

24 PRESIDENT: Unless you want to say anything more about the
25 issue?

1 14:52 MS CLARKE: All I want to say is there's no binding
2 precedent. It's what's appropriate in the
3 circumstances. When you have made an order that the
4 decision notices can be published and transcripts can go
5 on the internet, which will clearly set out what the
6 penalties are, then putting them in short form in
7 a simple, easy to digest press release cannot, on any
8 view, be objectionable. And would be wholly consistent
9 with the principles of open justice, transparency and,
10 of course, accessibility to all stratas of the public,
11 not just perhaps the well-informed financial press or
12 the like, who might take the trouble to read lengthy
13 decision notices.

14 For those reasons, we submit that the way that we
15 drafted this press release is entirely fair and
16 appropriate and that's what should go out.

17 PRESIDENT: We'll come back to you after the lunch break and
18 we'll now move on to the openings, which you, I think,
19 both want to assist us with.

20 MS CLARKE: Sorry, Mr Hill wants to say something.

21 MR HILL: There's just more point of housekeeping, which is
22 the timetable for closing arguments. The DFSA's
23 timetable suggests that at the end of the evidence,
24 there's a short break and then we return for closing
25 arguments in the afternoon, I think, of Thursday next

1 14:54 week.

2 We're conscious in the Sheikh case, there was
3 a break for 28 days for closing arguments. From our
4 side, we would have thought that that's the right order
5 to make.

6 But obviously, again in your hands, but there's
7 going to be quite a lot to cover in closing and it will
8 be quite a lot of compression otherwise.

9 PRESIDENT: Thank you for raising that. It is true that
10 there's 28 days in the Sheikh case, but that's because
11 of principally the convenience of counsel. But
12 generally, we, in this tribunal -- and obviously I will
13 talk to my colleagues about this.

14 Generally, we find it useful to have written closing
15 submissions. This is not one of those cases -- there is
16 some complexity and not one where you want to tell jokes
17 to the jury for 10 minutes and ask for a decision and
18 off you go.

19 So I suspect that, I'll talk to my colleagues, but
20 we'll want to have written closing submissions in a case
21 as complex as this.

22 MR HILL: In that case, all the more reason, in my
23 submission, for having something like a 28-day period to
24 provide written closings.

25 MS CLARKE: Sir, can I just make comment on that.

1 14:55 Experience tells that the more time that in particular
2 counsel are given to produce written submissions, the
3 longer and more verbose they tend to be, whereas
4 a shorter timeframe focuses the mind. And, of course,
5 means that the submissions are drafted at a time when
6 the evidence is fresh and can therefore be more focused.
7 That's why we drafted the timetable that we did.

8 Can I just ask you to consider that view as well,
9 please.

10 PRESIDENT: Ms Clarke, I have few qualities as a lawyer, but
11 one of them is experience. The position is we'll debate
12 that when we have got to the end of the case, if that's
13 okay? It does depend to some extent on the convenience
14 of counsel, and also if I may say it, the convenience of
15 ourselves. So we're going to leave that for the time
16 being. Okay?

17 MS CLARKE: Certainly. Can I raise --

18 MR HILL: Can I --

19 MR MALEK: Just one point for Mr Hill. What you're
20 proposing, is it this, that at the end of the evidence,
21 there's a break of 28 days and then there's written
22 submissions and then there's an oral hearing? Is that
23 right? Whereas the difference with the DFSA is that the
24 evidence breaks, you're given a window to make some
25 submissions, but we have the submissions a day or so

1 14:57 after the end of the factual evidence? Is that the
2 difference?

3 MR HILL: There should be written submissions and then oral
4 closing in one afternoon, all to be squeezed in by the
5 end of next week. We suggest that's too tight. We
6 would prefer certainly long -- we understand lengthy
7 written closings or substantial written closings,
8 therefore we want a period. But we also do suggest
9 there should be an oral hearing, just as the DFSA is
10 suggesting there should be one. But it should be short,
11 the oral aspect.

12 MR MALEK: That's clear. Thank you.

13 PRESIDENT: We'll come back to you on that and shall we now
14 get on with the openings?

15 MS CLARKE: Can I raise one matter of housekeeping?

16 Mr Clink, who we put on standby following your
17 email, sir, this morning, but given that it's now
18 12 o'clock, and the breaks, lunch, et cetera, and given
19 my learned friend's comments, the likely length of his
20 opening, it strikes me that it's unrealistic probably to
21 have Mr Clink on standby for the rest of today and that
22 it might be fairer to him to tell him that tomorrow
23 morning would be a more realistic window.

24 But, of course, that's entirely subject to your view
25 and obviously the views of your fellow panel members.

1 14:58 PRESIDENT: They're welcome to chip in at this point, if
2 they wish, but it seems to me that we should lay him
3 off, not least because it gives you both an incentive to
4 get us a bit of a Sunday afternoon. So we'll lay him
5 off, unless anybody -- Mr Malek or Mr Storey, are we
6 happy with that?

7 MR MALEK: Agreed.

8 MR STOREY: Agreed.

9 MS CLARKE: Thank you, sir. That's very helpful.

10 Opening submissions by MS CLARKE

11 MS CLARKE: The appendix B to the DFSA's answer, which is at
12 A012 -- and I know we have somebody who can bring
13 documents up on the screen for us, so that we don't have
14 to do that ourselves, so I don't know if A012 could come
15 up, page 71.

16 That document sets out the summary of contraventions
17 that are alleged against each of these five applicants.
18 And, of course, the financial penalties that the DFSA
19 decided to impose on each of them. And, of course, in
20 respect of the three individuals, the prohibition orders
21 that the Dubai FSA decided it was appropriate to impose.

22 Standing back from the detail, what is that case
23 that is summarised in appendix B there, really all
24 about? For that, can I ask that another document is
25 brought up, which is the Al Masah Cayman decision notice

1 15:02 at A001, page 17, paragraph 75.

2 What that paragraph does is it sets out certain
3 factors that the decision making committee, reflected in
4 the decision notice, considered to be of particular
5 relevance.

6 The first, unsurprisingly, the DFSA's objectives are
7 mentioned, detection and restraining of conduct that
8 causes damage to reputation of the DIFC, et cetera.

9 Secondly, the importance of ensuring that investors
10 are not misled by marketing of funds.

11 Thirdly, the deterrence nature of authorised firms
12 being deterred from committing similar contraventions
13 and, of course, the nature, seriousness and impact.

14 And, of course, as to that, we submit that one of
15 the most important factors is the failure to disclose
16 the placement fees that were payable in respect of any
17 investment in the shares of the investment companies
18 between the relevant period, in any marketing material,
19 or in any of the subscription forms that were given to
20 the investors. And that that, as the decision making
21 committee found, reflected in the decision notice, could
22 only be when one looks at the evidence in the round,
23 standing back from the granular detail and the sometimes
24 head-scratchingly complicated law. But standing back
25 from all of that, what is this case really about?

1 15:05 It's about the fact that placement fees, heavy, big,
2 large placement fees of between 3 to 10 per cent of each
3 investor's sum that they invested into these platforms,
4 went out to Al Masah Cayman in placement fees during
5 this relevant period.

6 The reason why no investor was ever told that that
7 was what was happening to a chunk of their money in
8 effect -- and I know that the applicants take issue with
9 whether it was in fact their money, but in effect, it
10 was a diminution in the value of their investment,
11 however you want to look at it, none of them were ever
12 told that that was happening.

13 When one sets that into the context of the facts,
14 the conclusion that we submit the panel would be driven
15 to -- and, of course, you will have to decide, having
16 heard the evidence, whether that is a valid submission,
17 complaint -- is that it was a deliberate policy by these
18 three men, possibly others, but certainly by these
19 three, that that information should not be disclosed.

20 We remind ourselves of who the senior management of
21 Al Masah Cayman was. Al Masah Cayman, of course, being
22 common ground, were the recipients of these placement
23 fees, excepting, of course, that sometimes a portion of
24 the placement fee was paid to a referral agent, if
25 a referral agent was involved in introducing the

1 15:07 investor.

2 But, on any view, at least a portion and sometimes
3 all of these placement fees went to Al Masah Cayman
4 during the period we're concerned with.

5 During that relevant time, the senior management of
6 Al Masah Cayman included Mr Dash, who was the CEO and
7 director, Mr Singhdeo, who was the CFO, and Mr Lim, who
8 was an executive director.

9 In addition, we know that Mr Dash was the chairman
10 of the boards of the four investment companies and
11 Mr Singhdeo and Mr Lim were directors of all four of
12 those companies. Those are the companies that are
13 paying the placement fees to Al Masah Cayman.

14 The way in which, we say, the senior management,
15 which on any view these three were, were involved in
16 taking steps to conceal information which might have
17 disclosed to an investor that pay (unclear ...) fees
18 were being paid out of their money, were principally
19 these.

20 So alteration of these financial statements that
21 were included in the ANEL 2013 and 2014 annual reports,
22 sending of those reports to, amongst others, distributor
23 B and to investor A, and obviously not telling them that
24 they were not the audited financial statements that they
25 were expecting to receive, and in fact reporting that

1 15:09 they were, and the false and deceptive information that
2 was sent to investor A, as regards the value of
3 placement fees, the placement fee table, or the table of
4 fees that were sent to investor A in response to
5 enquiries they were making about the Al Masah Cayman and
6 the relationship between them and the various investment
7 platforms.

8 In addition to that, of course, we have the fact
9 that the documentation that was being given to investors
10 in order to, first of all, market the products to them,
11 we say funds -- I'm going to use the shorthand term
12 "funds", recognising that it is a contentious term, but
13 that is the term that the Dubai FSA choose, and no doubt
14 my learned friend will have a different term, but
15 I think everybody understands what I'm talking about,
16 that the marketing material that was given to investors
17 and also the subscription forms, which we also say,
18 certainly within the meaning of the relevant rules that
19 we're concerned with, also qualify as marketing
20 material.

21 None of that told the investors anything about these
22 placement fees.

23 I'll come back to the issue of the articles of
24 association later.

25 The effect of that was that placement fees of up to

1 15:11 10 per cent was taken off the share capital, that was
2 the moneys in return for shares that was paid in
3 ultimately to the investment company's accounts, never
4 reached any form of investment, because as soon as the
5 money was paid in to the investment company account,
6 a corresponding percentage payment was then paid from
7 the investment company to Al Masah Cayman.

8 Leaving aside arguments about whether the investor
9 lost any interest in that money, because it was
10 converted into the accounts of ANEL and they therefore
11 lost any interest in it, and whether there was
12 a contract or not, or various other technical arguments,
13 none of which we say actually, in the end, are relevant
14 to the issues in this case, where when you're talking
15 about collective investment funds and the like, are
16 fairly untechnical language, as it was described in
17 Asset Land, was used.

18 But leaving all of that aside, that was the
19 practical reality, that the investors thought that when
20 they paid in, let's say, £100,000 in return for shares
21 in ANEL, they thought that their £100,000 was going to
22 go to investments in schools or shares in unlisted
23 companies, in nurseries, or whatever. But the reality
24 was that, of course, that wasn't the case, because
25 a large sum, we say, was being skimmed off the top and

1 15:13 was very largely into the pocket of Al Masah Cayman.

2 Why was it that everybody concerned with this issue
3 were so concerned to ensure that investors didn't find
4 out about these placement fees? Well, firstly, of
5 course, because Al Masah Cayman directly benefited from
6 the payment to it of the placement fees. And we have in
7 the final investigation report at exhibit 520, bundle D,
8 page 77, you can see how much money we're talking about.

9 Basically, the way in which this table was
10 calculated was that the applicants were asked to provide
11 information about what placement fees were received
12 during the relevant period, June 2011 to March 2016, and
13 then what was received was analysed by enforcement. And
14 to cut a long story short, reproduced into this table
15 here.

16 What it shows is that during the relevant period
17 that this table is concerned with, just shy of
18 \$360 million was received in shareholder funds, of which
19 nearly 30 million was paid in placement fees to Al Masah
20 Cayman. And, of course, that shows you that although 3
21 to 10 per cent is the range that was quoted in some of
22 the documentation that you will have seen, and maybe we
23 will look at, but just doing the maths there, it's quite
24 obvious that it was nearer 10 per cent than 3 per cent
25 on average that was being charged, just by doing the

1 15:17 maths.

2 Then of that, we can see that about \$8,850,000-odd
3 was being paid to brokers.

4 The upshot of that is that over that period, about
5 US\$21 million remained in the Al Masah Cayman accounts
6 as their cut of the placement fees that were being
7 charged, which the investors knew nothing about, because
8 they weren't told.

9 The three individual applicants in this case all
10 held senior roles at Al Masah Cayman and also at the
11 investment or holding companies who paid the money to Al
12 Masah Cayman in the first place.

13 That's the sort of level of reward, financial
14 reward, that was at stake here. We submit that it is
15 important that the applicants should not be permitted to
16 obfuscate the central issues, those central issues,
17 through resorting to unduly technical argument.

18 I don't mean that in any disrespectful way. This is
19 in some ways a technically legally complicated case.
20 The law doesn't make it any less complicated in some
21 respects and in other respects perhaps counsel doesn't
22 either. I don't shy away from any of that, from the no
23 doubt erudite legal arguments that will ensue, hopefully
24 when the case is over, rather than during the opening.

25 But the reality is that, in the end, cases tend to

1 15:19 stand or fall on the facts, not the law. Because the
2 law is only relevant insofar as it applies to the facts.

3 So we ask you, please, to look carefully through the
4 legal minefield, at least at this stage, and focus on
5 the central factual issues, which, we submit, drive to
6 the conclusion that this must have been a deliberate
7 plan to make sure that investors didn't know about these
8 placement fees.

9 Placement fees, a word about them. I think I have
10 already touched on this, so I can take it shortly. I am
11 not saying that when I, as an investor, send a 100,000
12 pound cheque for my investment in the Al Najah Education
13 Fund, I'm not saying that £10,000 of that, if it's
14 a 10 per cent fee, is taken directly out of my cash.

15 What appears to happen is my money goes into the
16 investment company's accounts and once that has
17 happened, then the investment company pays the
18 10 per cent to Al Masah Cayman.

19 So that gives rise to an argument that the applicant
20 raises, which is, "Oh, well, this is not the investor's
21 money, and therefore, this is completely different to
22 the fees that were disclosed to the investors", because
23 we know obviously that certain types of fees were
24 disclosed, but this one wasn't. That feeds into one of
25 the reasons why, they say, it wasn't necessary,

1 15:21 appropriate, required, not misleading, et cetera, not to
2 disclose these fees.

3 But as I have said, that ignores the obvious truth,
4 which is whatever way you cut it, the reality is that
5 only £90,000 of my money is available to be invested in
6 nurseries and schools and the like, and shares in
7 unlisted companies and whatever that investment
8 rationale was, and not 100,000. And the inescapable
9 truth is that I wouldn't know that that was the
10 position.

11 Then the next question is: if I did know, would it
12 make a difference to whether I would agree to make the
13 investment? Again, this is something that
14 I respectfully ask that you don't get too drawn into,
15 because different investors may have different views on
16 that.

17 You will have seen that in various of the documents,
18 the applicants seek to characterise, by picking certain
19 parts of transcripts of investors' interviews, as
20 saying, "Oh, well, you know, the investors have said
21 they wouldn't have cared anyway or they're not really
22 interested, or whatever, or they suspected that, you
23 know, the company was getting a cut somewhere along the
24 line. So it's not a problem."

25 Then the DFSA responds and says, "Well, actually, if

1 15:23 you look at these parts of the interview, that isn't
2 what they're saying at all. They're actually saying
3 that, you know, they are actually very concerned about
4 it."

5 You're going to hear, of course, from two investors,
6 but not all. But you're entitled to take the
7 transcripts, of course of those two, but also of all of
8 the others into account, because these are tribunal
9 proceedings and therefore, flexibility is key and
10 hearsay evidence, of course, is also admissible, subject
11 to weight.

12 So you're entitled to weigh up all of that evidence.
13 What we submit is that if you do that, the weight of the
14 investors' evidence is that -- well, firstly, they
15 didn't know about these placement fees and certainly not
16 in terms. And secondly, if they had, at the very least,
17 they would have asked a lot more questions and would
18 have been concerned to understand how that would affect
19 the investment and the return and the like.

20 Some of these said in terms, "If we had known that,
21 then frankly, we probably wouldn't have invested at
22 all."

23 But the weight of the evidence, we submit, is that
24 in favour of the DFSA's case rather than the
25 applicants'.

1 15:24 Another point, should it be needed -- and I'm going
2 to try and do this without bringing up every document,
3 because it seems to be taking a long time to bring up
4 a document on to the screen. So what I'm going to try
5 and do is when it's a document that perhaps we don't
6 necessarily have to have on the screen, I'll try and do
7 it by description, but if that's causing a problem,
8 perhaps someone would let me know.

9 One of the documents that we will look at later is
10 the ANEL accounts for 2013 and 2014. And, of course, we
11 have the genuine versions and then we have the versions
12 with the obviously deliberate deletions. I don't doubt
13 that those are documents that you, the panel, will have
14 spent some time on, which is why I think I can deal with
15 this without bringing the document up on the screen.

16 But what you'll remember is that what was deleted
17 from the version that was attached to the annual reports
18 were certain parts of the notes at note 7 and note 10.
19 And the deletions, in effect, deduct or delete any
20 reference to transaction costs or other fees or whatever
21 the wording was that was finally agreed, which amounted,
22 in effect, to placement fees.

23 The deletion was to obfuscate the fact that
24 placement fees, large placement fees, were being
25 deducted from the share premium figure.

1 15:26 So the way in which these placement fees were being
2 accounted for in the ANEL accounts was not in the profit
3 and loss and on the balance sheet, but as a deduction
4 from the share premium, which is what the investors
5 would pay or at least part of what the investors would
6 pay for their shares.

7 So the share premium goes in and then against that
8 is a deduction for the placement fees. That
9 demonstrates that in a crude way, I accept, but still in
10 an accounting compliant way, the point that I have made,
11 which is in every real sense, this was the investor's
12 money that was being deducted. Therefore, they really
13 should have been told about it.

14 As we know, the placement fees were going to
15 Al Masah Cayman. Why were the placement fees going to
16 Al Masah Cayman? Because, we say, Al Masah Cayman was
17 the manager and placement agent of these collective
18 investment funds, as we would term them.

19 If you look at a sample management agreement, that
20 could not be clearer.

21 Perhaps we could look at exhibit 308. If we can
22 just scroll down to page 2 of 8. What we can see is
23 that obviously we have the names of Al Masah Education
24 Holding, known by shorthand as ANEL, and Al Masah
25 Capital, which is of course Al Masah Cayman, and in

1 15:28 brackets termed "the manager". This being a management
2 agreement, it's not surprising that the recitals set out
3 what the parties, or indeed in this case Al Masah
4 Cayman, were expected to do under the agreement.

5 If we look at the recitals, the first two lines:

6 "... the Manager provides asset and portfolio
7 management services to investors interested to invest in
8 the [MENA] region ..."

9 Then the third paragraph:

10 "Whereas, the Company desires to appoint the Manager
11 to achieve its objective of providing education services
12 across the MENA region by identifying opportunities and
13 setting up a team of operational management and
14 coordinating with them to grow the business across MENA;
15 and

16 WHEREAS, the Manager desires to render such services
17 to the Company ..."

18 Pausing there, those six lines, we submit, couldn't
19 encapsulate more clearly what a manager of a fund type
20 structure such as this would do.

21 They are involved and expected to be involved in
22 more or less every aspect of the arrangements that give
23 rise to the expected returns for the investor and the
24 increase in the value of the fund and the underlying
25 fund property. And presumably, ultimately, the more

1 15:30 successful exit strategy that it's hoped to be achieved.

2 Those six lines, we submit, are a critical starting
3 point in your determination of who the Fund Manager was
4 in relation to each of the four funds that we're
5 concerned with.

6 So that's what that says. Then when we get to
7 services and duties, it says the company engages the
8 manager to perform the following duties. The manager
9 agrees to perform them, et cetera:

10 "(a) The Manager will always have a majority of
11 representation on the Board of Directors which ... shall
12 exercise overall direction, supervision and ultimate
13 control of all matters pertaining to the operations of
14 the Business."

15 That tells you in a nutshell how much direction and
16 control the Al Masah Cayman, the manager, was expected
17 to have. What one might say that actually really what
18 that says is total control, because there doesn't seem
19 to be much room for anyone else to have any control, if
20 that's what they were doing.

21 It says:

22 "(b) The CEO and the rest of the management staff
23 ... shall be appointed by the Manager and shall manage
24 the day-to-day operations of the Company in accordance
25 with the instructions of the Board ..."

1 15:32 Then it says:

2 "... responsible for expanding the activities ...

3 helping the Company to raise capital and identify

4 investment opportunities ...

5 ... charting the strategy and business plan ...

6 ensure smooth functioning of the daily operational

7 activities ..."

8 Deputing their own staff if necessary, and:

9 "... doing all things necessary to provide

10 a profitable exit for all investors in the company."

11 Really, more evidence, should it be needed, of the

12 fact that Al Masah Cayman were in every sense both

13 legal, technical, and in reality, the manager of this

14 fund -- these funds.

15 Then we get to the fee. According to this

16 management agreement, what were Al Masah Cayman going to

17 get in return for this managing? The answer

18 apparently is:

19 "... a management fee ... of two per cent ... on the

20 Total Equity Employed of the company every year ..."

21 That's what they were going to get, according to

22 this agreement. That's relevant, because, of course,

23 what is clear from the documentation is that the

24 investors were told about that management fee.

25 It may be of interest -- of interest and not

1 15:34 determinative, I don't suggest, but of interest to the
2 panel to know that the applicants in the oral reps, and
3 I believe also the written reps, to the decision making
4 committee, effectively conceded the point that these
5 management agreements demonstrated managing in a real
6 sense and the issue was whether they were fund
7 managers -- inverted commas -- being of course a defined
8 term under the Collective Investment Law. And whether
9 there had to be a Fund Manager -- with a capital F and
10 M -- in order for the investments to be a fund. That
11 was the battleground in the DMC.

12 This issue was not even fought over. It seems to be
13 an issue now. And one of the things that you will have
14 to decide is whether that's appropriate at this stage
15 and if it is, of course, then you will decide whether
16 having heard all the evidence, what you make of it.

17 But we submit that there were good reasons why this
18 was not fought over in the DMC and it's because the
19 evidence is crystal clear.

20 I should point out that this is also a point that
21 doesn't seem to be or at least is not explicitly stated
22 in the grounds of appeal either, which appears to be
23 focused on the issue again of the Fund Manager as
24 a defined term and the issue of legal accountability,
25 which of course is another thing that arises in

1 15:36 connection with Fund Manager as a defined term under
2 CIL.

3 So it doesn't appear to have been, certainly not in
4 terms, flagged up in the grounds of appeal.

5 We make the point in our skeleton argument that it
6 isn't appropriate for an applicant, certainly not an
7 applicant that has been represented by competent counsel
8 and solicitors throughout, to not appeal a particular
9 finding and then come along late in the day, we submit,
10 with an 88-page skeleton argument -- I make no criticism
11 of my learned friend for that, for the reasons we all
12 know -- where for the first time, we understand
13 something of the reason why they submit that this is
14 a point that is now in issue.

15 I'll touch on whether it's appropriate for the panel
16 to consider an issue that hasn't been pleaded later on,
17 but for the moment, I'll just flag it up.

18 There are countless other documents, we say, and I'm
19 not going to take you through them all, because I'm
20 conscious of the fact that I said this wouldn't be
21 a long opening. And if I did, then it would be a very
22 long opening.

23 But there are countless other examples of where the
24 Al Masah Cayman referred to as the Fund Manager and
25 where, as I have said, fees are disclosed that relate

1 15:37 principally to 2 per cent management fees and a hurdle
2 rate of 20 per cent on returns on exit. But nothing
3 said about placement fees.

4 Of course, we know that on the boards of all four of
5 these investment companies were our three applicants,
6 plus others, or a lot of whom were in common. And, of
7 course, the same people were also in common with
8 Al Masah DIFC.

9 And so, in reality, it was the same people that were
10 making the key decisions. In particular, the key
11 decisions about what was happening to the money and how
12 much money was going to be paid to who, and when and in
13 what circumstances, were all being made by, in effect,
14 the same people, including principally our three
15 applicants, in particular Mr Singhdeo and Mr Dash.

16 Let's look at a placement fee agreement, just to see
17 what that says. Can we look at exhibit 304. That's an
18 example of a placement fee agreement. If we can scroll
19 down to page 2.

20 Again, we have Al Masah Capital being referred to as
21 "the Manager". If we scroll down:

22 "1. CAPITAL RAISING

23 1.1 ... the Company hereby engages the Manager to
24 help raise equity capital at a premium to its par
25 value."

1 15:39 Then item 2, "PLACEMENT FEE":

2 "The Company shall pay to the Manager a fee (the
3 'Placement Fee') of up to 10% of the funds raised from
4 the new investors. The fee will be payable to the
5 Manager when the Company receives the subscription
6 capital from the new Investor."

7 It's common ground, I think, that that is pretty
8 much exactly what happened. I've already described
9 that, so I'm not going to repeat it again.

10 What we also know -- and I'm not going to go to each
11 document, because they're pretty much all the same -- is
12 that the same types of documents are in existence in
13 respect of all four of these investment funds. So there
14 are management agreements and placement fee agreements
15 and the like in existence that say exactly the same
16 thing in material terms.

17 The fact that I have only picked on one is really
18 just in the interests of time.

19 The other point that I have made is how closely
20 connected everybody was with the decision making
21 process. But one of the points that was made by the
22 applicants along the way, in response to the original
23 investigation report, was that the placement fees were
24 explicitly approved by the holding companies, the boards
25 of the holding companies. Therefore, it's in effect an

1 15:41 arm's length transaction.

2 Technically, legally, it may be. But as I've said,
3 the reality is that it's the same people making the
4 decisions. So we submit that that is a very
5 disingenuous way of describing the reality of what was
6 happening.

7 The clear upshot of all of this was that Al Masah
8 Capital would have full control over the operation of
9 the funds. They were the ones who were responsible as
10 well for sourcing investors and introducing investors
11 into the fund. So they had control of that too. And,
12 of course, they had control of what they were going to
13 receive by way of placement fee, because of the
14 placement fee agreements and because of the individuals
15 that were in common to the various entities.

16 That's the background to the gravamen of the
17 allegations that this case is concerned with.

18 If I could turn to the specific misstatements that
19 were made with respect to these placement fees to the
20 investors and they fall really under three headings.

21 The first of which is what's described as the fees
22 misstatement. The decision notices, in summary,
23 characterise this as saying it was misleading or
24 deceptive for investors to be given information in
25 marketing material about specific fees, ie the

1 15:43 management fee and the incentive exit fee, but not the
2 placement fees. Because what that did is that it gave
3 the impression to a reader that the disclosed fees were
4 the only ones that were payable.

5 So if you're going to disclose some fees, then it's
6 incumbent upon you to ensure that other fees are also
7 disclosed, so that the disclosure that's made in total
8 is full and accurate and proper.

9 In effect, an omission to disclose is or can be
10 misleading and/or deceptive. We say it was both.

11 If you look at some of the documents -- and again,
12 in the interests of time, I'm going to go straight to
13 the key one, which is the subscription form, an example
14 of which we see at exhibit 631. If we scroll down to
15 the bottom of page 1, item (a), this is what the
16 investor is signing up to or agreeing to:

17 "(a) I/We hereby agree to be bound by the memorandum
18 and articles of association of AN ... and the provisions
19 of this Subscription Form ..."

20 I'll come back to the articles:

21 "(b) I/We hereby confirm that we have read the
22 Offering Document ..."

23 Then we get to the next bit on page 2, "Fees":

24 "I/We acknowledge that Al Masah Capital ... has been
25 appointed the manager of AN and will receive an annual

1 15:45 management fee ... equal to 2% of the Equity ..."

2 Then there's a "1". "Equity" is defined. If we go
3 down to the bottom of the page, we can see what "equity"
4 is defined as:

5 "... aggregate proceeds raised by the Company from
6 time to time by the issuance of equity shares ..."

7 That's one fee that they were told about.

8 The next paragraph tells us what is the other fee
9 that they were told about and this is what's described
10 as the incentive fee on exit. Basically what that means
11 is if we do a really good job and grow these funds and
12 make it super successful and earn lots of money, then we
13 get a cut of that on exit. That's broadly what that
14 says.

15 Those are the two fees that were fair and square in
16 terms disclosed. But nowhere else in that document does
17 it refer at all to any other type of fee, let alone
18 a placement fee of, in the region of 10 per cent, or to
19 be fair, 3 to 10 per cent, but I would submit the
20 figures show more likely up at the 10 per cent range,
21 rather than down at the 3.

22 The other documents, other marketing documents that
23 investors were given, so, for example, a term sheet --
24 I'm not going to ask you to bring it up, because
25 I suspect these are documents you have looked at

1 15:47 already. But there's a term sheet which, again, informs
2 the investors about exactly the same fees, teasers,
3 another document they were provided with. And again,
4 the same fees are disclosed in pretty much the same
5 terms, and there are various other documents, brochures
6 and the like. And to the extent that fees are referred
7 to, that's how they're referred. There's nothing that
8 talks about placement fees.

9 Where does that leave the applicants? It leaves
10 them, we submit, in a difficult position, because they
11 cannot and have not, and I'm sure if they could, they
12 would have done so by now, point to one document, not
13 one, in this case, that actually informs an investor in
14 terms that a placement fee would be applied to the sum
15 that he invests and therefore, that less of his money
16 would be, in effect, invested in the nursery or school
17 or whatever.

18 Not one document, and as I say, I'm sure if it
19 existed, we would have seen it by now.

20 What they do point to, though, is the statement in
21 the subscription form that we have just looked at, which
22 says, "Ah, well, the investor signed up to the fact that
23 he read the articles of association."

24 One of the issues -- and it's a factual issue that
25 you will hear evidence about, and in the end, you'll

1 15:49 obviously decide where you think the truth lies or the
2 weight of the evidence lies on this issue, that there is
3 a dispute about whether articles of association were
4 provided to investors. Some say they never saw them, it
5 was never given to them. Others say maybe it was.
6 That's something that you will, in the end, take a view
7 about.

8 However, even if an investor was given the articles
9 of association, what would it show? For that, can we
10 look at exhibit 212. If you could go down to page 10 of
11 the PDF and page 5 of the document, paragraph 11.

12 An investor who has been given the articles of
13 association, assuming that he or she was, and who has
14 read it, would have to, first of all, read four pages of
15 legal jargon before they got to paragraph 11, where they
16 would read the following:

17 "The Company may ... pay a submission to any Person
18 in consideration of his subscribing or agreeing to
19 subscribe ... Such commissions may be satisfied by the
20 payment of cash ..."

21 That's not going to help, because that's nothing to
22 do with placement fees at all. No one is suggesting
23 that it is.

24 Then there's this one sentence at the end of
25 paragraph 11, which reads as follows:

1 15:51 "The Company may also pay such brokerage as may be
2 lawful on any issue of Shares."

3 That one line at the end of paragraph 11 in the
4 articles of association, and it's identical across all
5 the articles of association for all the investment
6 companies, so we don't need to look at any others, that
7 one line is the line that the applicants rely upon to
8 say that sufficient disclosure of the existence of these
9 placement fees was made such that no contraventions of
10 the DFSA rules or laws apply.

11 That is the key as far as the applicants are
12 concerned. Of course, a number of points, we submit,
13 arise from that.

14 Firstly -- and I'll be corrected if I'm wrong, but
15 the grounds of appeal do not specifically refer to that.

16 Secondly, on any reasonable view, the vague
17 possibility of paying an unspecified amount of
18 brokerage, whatever that term may mean, cannot be
19 realistically or with any, we submit, degree of
20 credibility, be relied upon by the applicant as
21 demonstrating anything close to what would be adequate
22 disclosure of these placement fee investors.

23 This sentence is not capable, as a matter of
24 construction, plain English, law or anything else, of
25 placing the weighty responsibility that the applicants

1 15:54 seek to place upon it. It doesn't come close.

2 If the investment companies were going to pay
3 placement fees, and we know they did, then that should
4 have been disclosed along with the other fees, together
5 with sufficient information regarding terms and amount,
6 et cetera, which would enable a potential investor to
7 understand the fees that were being charged and the
8 implications for him or her and their investment. The
9 implications for me, as an investor, knowing about this
10 placement fee.

11 In the various skeleton arguments and documents that
12 have been drafted by lawyers and counsel, at various
13 stages of this hearing -- and you'll be addressed about
14 it I'm sure at length at another time, but not by me and
15 not now -- a lot of law is quoted about what needs to be
16 disclosed and when and to who. And we submit that, in
17 summary, the cases quoted by the applicant are
18 inapposite, both in facts and law.

19 Secondly, they ignore the position that is factually
20 the case here, which is that disclosure is given upfront
21 and in terms of some fees, but not of the one that's
22 going to cost the most money, by quite some way.

23 Suggestions -- and I touched on this before, but
24 it's relevant to this point -- that the applicant puts
25 forward in addition to the case law about when

1 15:55 disclosures need to be made, et cetera, is: well, these
2 fees were not a liability of the investor. They were
3 a liability of the holding company or the investment
4 company. So it wouldn't be appropriate to tell the
5 investor about these fees.

6 We say when you look at the actual facts in
7 a sensible way of what was actually happening here, and
8 it's obvious that this is a fee that directly affects
9 the investment of the investor, on any sensible view,
10 and in most instances would be something that, at the
11 very least, they would want to know about and consider
12 before deciding whether to proceed. And in some cases,
13 may well make the difference as to whether they proceed
14 or not.

15 We submit, for the reasons we have set out in our
16 skeleton and our answer, that the way in which the
17 DFSA's laws and rules are drafted, are not limited to
18 contractual misstatements or who was the -- whether it
19 was the company that owned the money at the time it went
20 into their accounts or not. The point is you look
21 through all of that and you say is what was happening
22 here likely to mislead or deceive? If it was, then it
23 breaches the rules.

24 We say it clearly was and it clearly gave rise to
25 a duty to disclose and once there's a duty to disclose,

1 15:57 it has to be a full, accurate and proper disclosure. On
2 no view can that one sentence, hidden in paragraph 11 on
3 page 5 of the articles of association, come even close
4 to discharging that responsibility.

5 Of course, the other issue is that if this was
6 a deliberate decision not to disclose, then it's
7 difficult to see how representations can be taken to be
8 not misleading if there was a deliberate decision not to
9 disclose.

10 In the applicants' representations to the DMC -- and
11 I'm not going to ask for it to be brought up, but I'll
12 give you the reference, in case you perhaps can look at
13 it later. F011 at page 49 of the applicants' written
14 representations to the DMC. It says:

15 "147.2.6 The Board Members of ANEL [bear in mind, we
16 all know who was on the board] in various discussions
17 about retaining their competitive edge in the market
18 decided that Placement Fees should not be referred to in
19 the financial statements included in the Annual Reports,
20 and accordingly that the Annual Reports should not
21 purport to include audited financial statements."

22 To be fair -- and I'll read the rest of it:

23 "Mr Dash was not responsible for implementing that
24 decision, and was not involved in its implementation."

25 Obviously, I recognise that they are addressing the

1 15:59 issue of placement fees not being referred to in the
2 annual reports and so that obviously goes to a slightly
3 different contravention. But what it does show is that
4 the board members of ANEL had decided that placement
5 fees should not be referred to.

6 That does, I think, I submit, give a clue to what
7 really was going on, which was this was a deliberate
8 decision and that that's what the evidence shows.

9 The fact that it was a deliberate policy of omission
10 is evident from the other evidence in the case, which
11 given that it's now 1 o'clock, I don't know, sir,
12 whether I would be better off saving that and taking
13 a red pen to certain sections of my opening over the
14 lunch adjournment, but I'm in your hands.

15 PRESIDENT: I think it will be useful if we break. Thank
16 you very much for that.

17 Before we do break, there's just a couple of
18 practical points, which I think concern more the
19 registrar and the DFSA.

20 The first is that the January decision of the
21 tribunal will be released to go on the website, but the
22 version of the 16 January decision is still in
23 a semi-draft form and it doesn't have a date on it. And
24 therefore, I think we, the tribunal members, would be
25 grateful if before it goes up on the website, we see

1 16:01 a copy of, as it were, the version, the tidied up
2 version that is to go on the website.

3 So I'm not sure whether, Mr Lake, that's one of your
4 many responsibilities or whether that's up to the
5 registrar, who I don't think is on at the moment. But
6 either way, we would be grateful if we could have that
7 sorted.

8 And in the same vein, with websites and reports,
9 could I also add this, that I notice that in both the
10 submissions of both parties, there are references to the
11 Waterhouse case. The report of the Waterhouse case on
12 the website does not, at least the one I looked at,
13 refer to the question of appeal within the decision as
14 a refusal for permission to appeal by the tribunal. But
15 there was an application for permission to appeal to the
16 court, I think on about 12 or 13 grounds, which had
17 a reasoned -- all of which were refused, with reasons
18 given.

19 So we need to put on to the website, report of the
20 Waterhouse case, some reference to the fact that
21 permission to appeal was refused by the court.

22 I would be grateful if either the DFSA and/or the
23 registrar would have a go at that and then let us see
24 what they propose to put up before it goes up.

25 Subject to that, we'll break now and resume again at

1 16:02 5 minutes past 2. Is that all right with my colleagues?

2 Yes.

3 MS CLARKE: Sir, we'll sort both of those things and if
4 there's any problem, we will come back to you. But
5 I hope there won't be.

6 PRESIDENT: Thank you.

7 (4.03 pm)

8 (Lunch break)

9 (5.04 pm)

10 PRESIDENT: Over to you, Ms Clarke.

11 Can I just mention, two practical points. One,
12 Mr Malek I think has a condition for you, but more
13 mundane than that, could I just explain that when you
14 see us holding our mobile phones, it's not what you
15 think it is. What it is is that we have, in order to
16 communicate between the three of us, we have got
17 a WhatsApp group, because the virtual facility we have
18 only works outside sitting hours, so we send each other
19 the sort of messages that we would otherwise be
20 whispering in each other's ears, by WhatsApp, which
21 could be misunderstood by those of you not familiar with
22 the proceedings.

23 Right, okay, so we'll start, but I think first
24 Mr Malek had a question.

25 MR MALEK: Yes. Ms Clarke, when reading the papers and

1 17:05 I use the phrase "investment companies" or "holding
2 companies" or whatever, we have got these four
3 platforms. Is there any suggestion that the result is
4 going to be different from one platform to another? Or
5 is it the case that we have to focus on all four of them
6 or can we focus on one of them, on the basis that our
7 conclusion on one of them is likely to be decisive on
8 the other three?

9 It just strikes me there is a lot of paper and is it
10 really necessary to go through what appears to be the
11 very same structure in relation to all four of them,
12 four times, or can we focus on one of them and proceed
13 on the basis that that, whatever we conclude in relation
14 to that one platform is going to apply to the others as
15 well. Does that make sense?

16 MS CLARKE: Yes, it does make sense and I think it's the
17 latter, the last point that you made is correct, which
18 is that if you focus on one, the arrangements in
19 relation to the other three are virtually identical, if
20 not identical.

21 That's why you may have noticed, I haven't taken you
22 to four different versions of management agreements or
23 placement agreements or the like, or subscription forms,
24 because they are in fact all the same. As indeed are
25 the articles of association of the four investment

1 17:07 companies.

2 That's my view --

3 MR MALEK: If that's right, it may be that you can have
4 a word with Mr Hill later this afternoon, but if that is
5 the case, then it might be sensible for the two of you
6 to focus on which companies. So if we are required to
7 look at articles of association, to see how article 11,
8 the reference to brokerage fees, we don't need to do it
9 in relation to different companies, we can just focus on
10 one of them.

11 But I think that's something for you to talk to
12 Mr Hill about, to see if you can agree an approach to
13 make it easier. The last thing we want to do is produce
14 an award that's just mass, going through all four of
15 them in detail, when in fact one of them is a good
16 analogue for the others, although it's right to take it
17 into account.

18 But we can proceed on the basis that there are no
19 material differences between them and that by focusing
20 on one, that's perfectly acceptable. Perhaps that's
21 something you can think about and discuss with Mr Hill.

22 MS CLARKE: Of course, I will. And I'll obviously take it
23 back to my team in case I have said anything
24 inadvertently that they disagree with. But certainly my
25 analysis is that one structure was operated in the same

1 17:08 way across all four platforms or funds as we would call
2 them.

3 You may have noticed actually that the documents for
4 the most part that I have been taking you to are all
5 what I have been calling ANEL documents and because it
6 seemed to me to make sense, given that then that flows
7 through into the misrepresentation in relation to the
8 accounts, et cetera.

9 So that's why I have been doing it that way. But
10 I will speak to Mr Hill and I'll speak to my team as
11 well. And perhaps we can come back to you with
12 hopefully a consensus view, or at least if not, a clear
13 view of where our differences lie. But I hope it will
14 be a consensus.

15 MR MALEK: You just touched upon a point which is about
16 language as well. Whatever language I was using, I've
17 got a completely open mind as to whether that's --

18 MS CLARKE: Sure.

19 -- (Overspeaking) --

20 MR MALEK: -- or whatever. It's just one sees these phrases
21 and you just use the phrase that comes to your head, but
22 entirely neutral. Thank you very much.

23 MS CLARKE: Obviously, I made -- you'll recall in my
24 submissions, the same point, that I use the language
25 that my client considers is the appropriate language.

1 17:09 But, of course, the applicants don't share that view and
2 they use different language, which is consistent with
3 their case.

4 I'm sure nobody means discourtesy to anybody else.
5 It's just that that's the shorthand that we're adopting
6 and, of course, you will decide whether these vehicles
7 were funds or not and everything that flows from that.

8 MR MALEK: Thank you very much.

9 MS CLARKE: I hope that helps.

10 MR MALEK: Yes, thank you.

11 MS CLARKE: Moving, then, to the next misrepresentation,
12 which is the misleading information in the ANEL annual
13 reports. And, of course, what we know, just to set the
14 scene, is that ANEL signed an agreement with Ernst
15 & Young to produce audited financial statements for the
16 financial years 2013 and also 2014. Those reports were
17 duly produced and they were signed off on behalf of the
18 board. 2013 by Mr Singhdeo and Mr Lim. And 2014,
19 I think by Mr Singhdeo and possibly somebody else. But
20 I think Mr Singhdeo was common to both.

21 But at any event, as part of the drafting of those
22 reports, there had been a bit of backwards and forwards
23 discussion between Ernst & Young and Mr Singhdeo and/or
24 Mr Lim about the way in which these placement fees
25 should be accounted for and the terminology that should

1 17:11 be used. And, of course, Mr Sikander from Ernst & Young
2 is going to give evidence tomorrow and he covers this in
3 his witness statement, so I'm not going to spend time
4 rehearsing that.

5 But the upshot is that Mr Sikander was very clear
6 that, first of all, yes, these fees do have to be
7 disclosed. And secondly, though, he was willing to
8 negotiate somewhat on the terminology that was used and
9 in the end, I think what was agreed upon was terminology
10 that didn't use the word "placement fees". "Transaction
11 costs representing advisory fees and other incremental
12 costs" is what was come up with by a sort of measure of
13 compromise and agreement.

14 But the key point is that the sums of money
15 attributable to placement fees had to be disclosed in
16 the financial audited accounts.

17 That is what was done and if we were to look at the
18 2013 accounts, then perhaps we can look at the genuine
19 version and then look at the non-genuine version. The
20 2013 genuine version is exhibit 400.

21 If we could go to, first of all, page 15 of 18, and
22 if you could scroll down a little bit more.

23 That shows us the two places in which the placement
24 fee figure was accounted for or at least reflected in
25 these audited accounts. The first one is in the figure

1 17:14 where it says, "Less: transaction costs", 6.5 million.

2 The brackets obviously meaning it's a deduction.

3 That, as we can see, is a deduction off the share
4 premium, which was the point that I made this morning
5 and therefore I won't repeat.

6 What that leaves you with is a total figure of
7 4,256,000. That's the first place that it appeared.

8 It also appeared in note 10, which we can find two
9 pages further down, page 17 of 18.

10 There you can see:

11 "Advisory fees and other incremental costs relating
12 to the capital increase."

13 It's the same figure that you saw in note 7.

14 That's what the official audited genuine accounts
15 showed.

16 The same process happened in 2014, so we have --
17 I don't need to show you the 2014 accounts, but the same
18 process happened for the 2014 audit that the transaction
19 costs representing placement fees were shown in the same
20 way in notes 7 and 10.

21 Then what happens is that an annual report was
22 prepared for the ANEL platform or fund, which included
23 a document which purported to be the audited financial
24 statements. If we could go to that and it's
25 exhibit 503.

1 17:17 If you could go to page 83 of 86, scroll down a bit.

2 What you can see there is that the section that
3 showed the placement fee deduction has been removed from
4 note 7. It gives the correct figure, but it doesn't
5 show that the correct figure was arrived at by taking
6 away 6 million-odd from a figure of 10 million-odd.
7 There has been an editing of that note.

8 The same thing has happened in note 10, which we
9 will find at page 85 of 88.

10 It says there:

11 "Other transactions with related parties include the
12 following ..."

13 It says, "Transfer of buildings", but the section
14 that related to the placement fee amount has been
15 removed.

16 There is no possibility that that could have
17 happened by accident in two places, note 7 and 10,
18 relating to the same figures that relate directly to
19 placement fees. That has to be right, because we know
20 that a year later, with the 2014 accounts, exactly the
21 same thing happened. Exactly the same deletions were
22 made to exactly the same notes for the same reason.

23 The only conclusion, we submit, is this was done
24 deliberately. Why was it done? That feeds back into
25 where I began my submissions. Because it was a

1 17:20 deliberate decision to disguise the fact that placement
2 fees were being paid and, of course, by how much they
3 were getting.

4 That has to be the only explanation that is of any
5 credibility.

6 Of course, Ernst & Young knew nothing about this.
7 Ernst & Young did say, and Mr Sikander will say, they
8 didn't know what was purporting to be the audited
9 accounts, but of course wasn't, were being sent out with
10 these annual reports.

11 We don't need to go to it, but it's quite clear that
12 the annual reports are representing that the accounts
13 that are attached and are part of them were the genuine
14 audited statements, but they clearly and absolutely
15 weren't and somebody knew about it.

16 It wasn't, as the applicants would claim, solely
17 down to the evil doings of Mr Agarwalla. It was, we
18 suggest, quite obviously down to the more senior
19 management, who took the big decisions and perhaps who
20 had the most to gain or the most to lose by investors
21 knowing about these placement fees, ie the three
22 individual applicants with which this case was
23 concerned.

24 What then happened was these documents were sent
25 out, they were sent out in bulk to existing investors.

1 17:22 The evidence shows that they were also sent to
2 prospective investors as well. There is a dispute of
3 fact about that with the applicant who contends that
4 that didn't happen. But there are emails that
5 demonstrate that it did.

6 It doesn't actually make a huge amount of difference
7 in terms of the allegations, because I think there's
8 only one allegation where the promotion has to be made
9 to a perspective investor to buy or sell.

10 But, of course, the point also has to be made, even
11 if it is an issue, if you're sending a document like
12 this, which is all upside, if you read it, it's all
13 upside, "Good news, lots of money being paid, we're
14 a big success", then the people that you're sending it
15 to, who have got money in already, are being induced,
16 are they not, to consider putting more money in?

17 So they can fall in, we suggest, insofar as it's
18 relevant or an issue, into the category of potential
19 investors as well.

20 But anyway, that's what happened.

21 Nobody was any the wiser, certainly not the
22 investors, because how would they know? Because they
23 knew nothing about placement fees, and certainly no one
24 at the company said anything until Mr Agarwalla fell out
25 with his bosses and decided to blow the whistle.

1 17:23 He did that by contacting the Dubai FSA, I think he
2 also contacted Ernst & Young, and he told them what had
3 happened and provided certain evidence of that.

4 Mr Agarwalla is not being called as a witness by
5 either side and it's quite clear that there are some
6 concerns about areas where he may not have been entirely
7 truthful. But actually, none of the allegations that
8 the Dubai FSA make against these applicants depends or
9 stands or falls on the evidence of Mr Agarwalla.
10 Certainly this issue absolutely doesn't, because what it
11 relates to is what is apparent on the face of the
12 documents and also the email traffic.

13 As to that, the email traffic is quite lengthy and
14 I'm not going to go through every email for the
15 interests of brevity, but there are a couple that are
16 worth, in my submission, looking at.

17 The first one is exhibit 765. If you could scroll
18 down to the bottom, because it's an email chain. Scroll
19 up slowly.

20 What it shows is that Ernst & Young sent the
21 statement, financial statements for 2013, to
22 Mr Agarwalla, and then Mr Agarwalla forwards them to
23 Mr Lim and cc'd to Mr Singhdeo:

24 "Please find attached final Word FS for annual
25 report."

1 17:25 Can we stop there. The fact that the document was
2 provided in Word format of course would make it easier
3 to edit, wouldn't it, than if it was in PDF?

4 I can't take the point any further than that,
5 because that's all I've got on the face of that email.
6 But what we do know is somebody did the editing and the
7 people who had a Word copy of the accounts were
8 Mr Agarwalla, Mr Lim and Mr Singhdeo. So that's what
9 that email shows.

10 Then if we could scroll up, we have there Mr Lim to
11 Mr Agarwalla, cc'd again to Mr Singhdeo:

12 "Raj,

13 Financial statements for Al Najah will only be
14 accessible to the 3 of us here.

15 Any usage of the statements or sharing with any
16 party outside the 3 of us can only be done through NS or
17 myself."

18 That is, we submit, a telling email, because what it
19 does is it restricts the number of people who had access
20 to that Word version of the document, assuming, of
21 course, that Mr Lim's instruction was carried out. Two
22 out of the three of them were Mr Singhdeo and Mr Lim.

23 The second question is: why is it only accessible to
24 the three of us here? Why is it so important that the
25 signed audited genuine financial records only be kept

1 17:27 within that small party of three and that if anyone else
2 was going to see them, it has to go through Mr Singhdeo
3 or him and Mr Lim?

4 The reason for that, we say, is because Mr Lim and
5 Mr Singhdeo -- and let's face it, probably Mr Agarwalla
6 as well -- knew that the statements that went out with
7 the annual reports were not the same, because they had
8 been edited to remove placement fees and the editing had
9 been done deliberately.

10 The inference is that these people at the very least
11 knew about that or, and possibly more likely in the
12 circumstances, given the email that we have just looked
13 at, were responsible directly for doing the editing.

14 That is why, we say, it was so important to keep
15 a very close eye on who was getting to look at the
16 legitimate financial statements.

17 Then, as I say, the same thing happens a year later
18 to the 2014 statements in exactly the same way. We
19 submit that it is not a great leap of faith to take the
20 view that it was probably driven by Mr Lim and
21 Mr Singhdeo for the same reasons that the 2013 actions
22 were undertaken.

23 And, of course, although Mr Dash has not got his
24 fingerprints on this email, or indeed any or many direct
25 emails in connection with this issue, given the central

1 17:29 role that he had and given the close interest that he
2 paid to the issue of placement fees, as we'll come to
3 when we look at a slightly different aspect of the
4 evidence, we submit that the evidence, directly or
5 indirectly, implicates him in being knowingly concerned
6 in this falsification and then sending out to investors
7 and potential investors.

8 A bit more evidence of knowledge, exhibit 768 is
9 another email.

10 If you could scroll down and start at the bottom and
11 then we can work our way up.

12 MR HILL: Can I interrupt my learned friend. Can I just
13 make the point that it's now half past 2, so I hope
14 she's wrapping up imminently, because then we'll have
15 split the time between us.

16 MS CLARKE: I'll do my best.

17 Keep going up. To summarise, then, in the interests
18 of time, stop there. What's happened is there's been
19 a falling out between Mr Agarwalla and Mr Kishore Dash,
20 who I think was his line manager, and Mr Dash, Kishore
21 Dash -- no relation, I don't think, to Mr Shailesh
22 Dash -- emails to Mr Singhdeo and Mr Lim, saying that he
23 wants, in effect, to get rid of him.

24 If you can keep going up to the top, Lim to
25 Singhdeo:

1 17:32 "There is a risk of Raj taking our annual reports
2 and 'edited' financials to EY so I want to manage this
3 process well to minimise any possibility of that etc."

4 Then you can go up to the top, "... don't worry on
5 that front."

6 Et cetera. He says, "Don't worry about it." In
7 effect, he's not got any credibility and it's fine.

8 That's a clear, we would say, admission or as close
9 to, that Mr Lim knew that there was a problem with the
10 edited financials and that Mr Singhdeo, of course, being
11 also part of the email chain and the recipient, knew
12 about that and was party to it and in effect knowingly
13 concerned.

14 Then what happened was -- and I'm going to
15 paraphrase this, because I don't think we need to go
16 directly to the emails -- is that Ernst & Young got to
17 know about what had happened. They were horrified.
18 There was a difficult meeting on or about
19 22 November 2015 in which Mr Singhdeo and Mr Lim were
20 present along with Mr Sikander.

21 You'll hear evidence from Mr Sikander about that
22 tomorrow. He would say that Lim and Singhdeo tried to
23 suggest that the differences were as a result of
24 printing errors, but he didn't accept that as a credible
25 explanation.

1 17:33 He then required that they write to all the
2 investors and inform them of what had happened and
3 withdraw the previous version of the accounts and give
4 them the correct ones, and provided wording of the
5 letter to send, which most certainly did not include the
6 word "printing errors" and instead used terminology of
7 "material omissions".

8 But what happened was that in the interim,
9 Mr Singhdeo and Mr Lim, in conjunction with the board of
10 ANEL, which of course included Mr Dash as chairman, took
11 the decision to press "go" on the email that was being
12 sent out to all the investors. And the email that they
13 got contained a letter which said, "This was as a result
14 of printing errors", firstly.

15 Then paragraph 2 was, "And by the way, we have
16 declared 9 per cent dividends, so isn't that great?"

17 So twofold. Firstly, we say, printing errors must
18 have been a lie and a deliberate attempt to cover up
19 even at that stage what was going on. Secondly, that to
20 then say, "And we have declared a really big dividend"
21 is a way of trying to distract the reader from the
22 former paragraph.

23 You'll have seen in the witness statements and the
24 documents disclosed now by the applicants that they have
25 a slightly different explanation as to what happened.

1 17:35 I will let them deal with that and of course it will be
2 developed in the evidence.

3 But what then happened, though, was that when Ernst
4 & Young found out that the letter that had been sent out
5 contained the word "printing errors", they weren't
6 satisfied with that, so they required that a hard copy
7 of documents be couriered to every shareholder and that
8 it should contain a letter, which had been drafted by
9 them, which included wording like "material omissions"
10 and which they thought was compliant.

11 In fact, and if we look -- we won't look at it,
12 because it takes too long, but exhibit F207, if you
13 wanted to make a note of it, is an email from Mr Lim,
14 cc'd to Mr Dash and Mr Singhdeo, with the text of the
15 letter in the email itself. The instructions are:

16 "This letter is to be printed and included in every
17 courier to the AN investors."

18 The letter that is in the body of that email in fact
19 contains the wording "printing errors". So even at that
20 stage, it appears that they were intending or did
21 mislead the investors by sending out, not the letter
22 that Ernst & Young intended that should be sent out, or
23 at least if that letter was sent out, then it looks as
24 if the preferred letter, if I can put it in that way,
25 from the three applicants, was sent out as well.

1 17:37 That is that misrepresentation.

2 I have dealt with the distribution point and the
3 fact that it did go to potential investors -- and I'll
4 deal with the emails relating to that at another time.
5 It also went to investor A, who is one of the specific
6 allegations that's in the decision notices. And there
7 is a dispute of fact, which you no doubt will have to
8 resolve, as to whether investor A was in fact
9 a prospective investor in any one or all of the funds
10 that we're concerned with or whether in fact they were
11 just looking for some kind of business partnership.

12 The applicants say it was the latter. The DFSA
13 says, "Well, when you actually look at what was going
14 on, it may have been that", but it then also turned into
15 potential investment in the funds and that was one of
16 the reasons why they were asking a lot of questions
17 about the funds and the figures that went alongside
18 them.

19 As a result of that, they were also provided with
20 the annual reports which contained the altered financial
21 statements and it was Mr Lim himself that sent those
22 out.

23 But in addition to that, there's another way in
24 which we say that investor A was misled and that was --

25 MR HILL: This really is now trespassing very significantly

1 17:38 on the time that's going to be allowed for my opening
2 and I don't, at the moment, see an end. Sorry to
3 interrupt.

4 MS CLARKE: Right, well, I'm sorry about that. I'll going
5 as quickly as I can, but there are certain headlines
6 that I need to hit. I don't expect I'm going to be much
7 longer. It's now 20 to 3 and I had expected to wind up
8 by 3 o'clock. If that's going to cause a problem to my
9 learned friend, then it may be that we need to discuss
10 the timetable and he goes over until tomorrow.

11 MR HILL: That obviously causes a problem, because that
12 would give my learned friend two hours for opening --

13 PRESIDENT: Let's not -- I don't think we need to bicker
14 about this. It seems to me that, Mr Hill, clearly your
15 clients expect you to be able to put over what they
16 would, on your advice, they consider is the right sort
17 of thing for the opening. So if we spill over into
18 tomorrow, then we spill over into tomorrow.

19 MR HILL: I'm grateful.

20 PRESIDENT: That is not intended to ask you to decelerate,
21 Ms Clarke, but I just wanted to reassure Mr Hill that
22 he'll get his time.

23 MS CLARKE: I'm not going to. When I said I would take the
24 hint to be short rather than long, I hope you appreciate
25 that this is a case that one could open over two days

1 17:40 rather than the, I think, broadly two hours that I will
2 have spent on it.

3 So I have taken the hint and I'm doing the best that
4 I can. But I realise that my learned friend has also
5 got duties to his clients as well. And, of course, he
6 must have the time he needs, of course.

7 So shall I carry on?

8 The next issue is the specific representations or
9 misrepresentations regarding --

10 PRESIDENT: I hate to interrupt, but it was not a criticism
11 of you or your opening. We made it clear that we wanted
12 to hear you both to the extent that you felt
13 appropriate. No one is suggesting that you're going too
14 fast or too slow. All I'm seeking to do is to reassure
15 Mr Hill that his chance would come. Okay?

16 MS CLARKE: I'm grateful. Frankly, sir, that's what I was
17 intending to do as well. It's difficult to extend
18 courtesies to one's opponent when --

19 PRESIDENT: Enough. On you go.

20 MS CLARKE: -- being done over video, so I'm trying to do
21 that, as I'm sure he is.

22 So back to where I was, then. The other
23 misrepresentation to investor A was also -- surprise,
24 surprise -- to do with placement fees. What was
25 happening was there was a long period of backwards and

1 17:41 forwards with investor A where they were asking for lots
2 of information. What was being discussed seemed to
3 morph over time from some kind of partnership
4 arrangement or special fund to more closely looking like
5 they were contemplating at least in part an investment
6 into one or more or all of the platforms.

7 In connection with that, they were asking for a lot
8 of financial information, which is why they got the
9 annual reports with obviously the false audited
10 accounts.

11 In addition to that, they were asking for, having
12 seen the annual reports, a breakdown of fee income from
13 assets under management of US\$14 million plus. That was
14 obviously a figure that they picked up from the annual
15 report. The explanation they were initially given
16 didn't have enough detail and so it went on.

17 What then happened was that Mr Singhdeo sent an
18 email to Mr Lim and Ms Danila, who worked in the --
19 well, at Al Masah DIFC/Al Masah Cayman, we would say,
20 and provided a breakdown, which was set out in the body
21 of the email in a table. And the ideal position would
22 be if the tables could be brought up, side by side, but
23 that may not be possible.

24 But the one that has the original figures on it is
25 exhibit 769, so if we could bring up 769.

1 17:43 Email from Mr Singhdeo to Mr Lim, Ms Danila and cc'd
2 to Mr Dash, "Don -- Please find below the break up of
3 income."

4 He's broken out the figures and of significance
5 you'll see that there's a placement fee income figure of
6 just shy of \$10 million.

7 Scroll up the page. Mr Dash responds:

8 "This will not go out. NS and Eyad speak to me
9 tomorrow morning."

10 Mr Dash has clearly read that email and responded
11 within a matter of minutes, I think, of it being sent.

12 The position, as I understand it, is that there was
13 a meeting the following day. There have been
14 explanations put forward by Mr Dash, Mr Lim and
15 Mr Singhdeo about what was being discussed, et cetera.

16 But we submit that because of what happened next,
17 what appears to have been discussed was Mr Dash saying
18 something to the effect of there is no way that this
19 document is going out showing a placement fee income of
20 \$10 million, because of the question that that would
21 inevitably engender, which of course, he would not have
22 wanted to answer and nor would Mr Singhdeo or Mr Lim.

23 Then what happens is the figures -- there is
24 a meeting, it seems, and the figures are then rejigged
25 and another email is sent with -- and this is 723A.

1 17:46 As we can see, Mr Singhdeo, Mr Dash are involved in
2 that email chain. Now, the placement fee income has
3 gone down to 2,200,000 and other numbers have gone up or
4 have changed, in order to arrive at a total income
5 figure, which is not quite the same, but is not vastly
6 different from where it was on the previous email.

7 That's what then happened. Then what happened is
8 that Mr Singhdeo replies -- and we don't need to look at
9 this -- and he says:

10 "Club the management fee income and the management
11 company fees together. Let the description remain as
12 management fee income. Rest of the information looks
13 fine to me."

14 Then the email that's actually sent is exhibit 714.
15 If you could scroll down. Mr Lim is cc'd on this and if
16 you could stop there. That's what's actually sent and
17 of course it bears little, if any, relation to the
18 original figures that we started out with. Most
19 notably, placement fee income has remained at that
20 significantly reduced figure.

21 That is the key issue. There are other issues, but
22 that's the key issue in relation to this
23 misrepresentation.

24 The other thing is that in the same email -- sorry,
25 there's an earlier email and I'll find the reference,

1 17:48 where it appears that what is being expressed to the
2 client, to potential client, investor A, is that the
3 fees are from management fees. That's what Al Masah
4 Cayman were earning was management fees as opposed to
5 placement fees. So there's that as well. I can develop
6 that at another time.

7 In the end, investor A decided not to proceed with
8 the investment into anything and that was that.

9 The other issue is investor B or rather
10 distributor B, as he's known, as it is now known. They
11 were also given the wrong reports, financial reports.
12 Initially, they were given the correct version and then
13 an email was sent in saying, "You have sent out the
14 wrong version of the reports."

15 What happened here was distributor B requested the
16 audited financial statements for ANEL and Avivo. That
17 request was passed on to, amongst other people,
18 Mr Singhdeo and Mr Dash. Mr Dash then instructed Mr Lim
19 and Mr Huwaij, who featured on the other email chain, to
20 send the requested information.

21 Then Mr Agarwalla emails Mr Lim, saying:

22 "Firas was asking for ANEL Cayman audited
23 financials. I'm sending him and you what I have.
24 Please guide him how to use this."

25 Then Mr Agarwalla replies -- and this is a reference

1 17:51 you might want to note down, which is exhibit 724:

2 "... what you gave to Firas below is the WRONG
3 VERSION of the separate financials -- it contains the
4 placement fees!!!!!!!"

5 With a very large number of exclamation marks
6 after it.

7 And, of course, the authority says there's only one
8 reason why someone would send an email like that and
9 that is because you're knowingly involved in the
10 misleading of investors and potential investors that
11 goes with this whole issue.

12 Then there's a further email chain and so it
13 goes on.

14 Then, in the end, it's decided to send the annual
15 report, which includes the financial statement. And, of
16 course, we know that it didn't include the genuine
17 financial statement and involved in the email chain that
18 led up to that decision were Mr Lim, Mr Dash and
19 Mr Singhdeo. And at the very end of it all was Mr Dash
20 replying, "That's right".

21 That, we say, is direct evidence of Mr Dash being
22 involved in the misrepresentation issue relating to the
23 annual reports and the audited, but not genuine,
24 financials that accompanied them.

25 The next issue, and I'll deal with this quickly, is

1 17:53 the production of altered bank statements. Of course,
2 nobody can say, including I might add, Mr Singhdeo and
3 Mr Lim, precisely what purpose this activity was being
4 put towards. But what we do know is that it was
5 relating to an account of one of the investment
6 platforms, Royal Bank of Canada account. And what was
7 clearly happening was that an original version of one of
8 the bank statements for that account was being altered
9 and edited so as to remove certain entries, which
10 included, amongst other things, two references to
11 placement fee payments out of that account and obviously
12 in favour of Al Masah Cayman.

13 There's a lot of backwards and forwards between
14 Mr Lim and Mr Agarwalla and Mr Singhdeo as well about
15 the editing of that document and why isn't the font the
16 same throughout and, you know, some bits look slightly
17 larger than other bits.

18 It's quite obvious, we say, that that email chain is
19 showing that what they are doing is trying to make the
20 original bank statement altered so that it still looks
21 like an original bank statement.

22 There's no point in doing that if all they were
23 actually doing was trying to attempt some kind of
24 reconciliation or the like, as is being, I think, now
25 suggested. Because if you needed to do that, you just

1 17:54 get an Excel spreadsheet and you do what you have to do.
2 You don't go altering original bank statements and then
3 trying to make them look as if nothing has happened to
4 them.

5 I won't take you to the three documents, but there
6 are three different versions. The original and then
7 there are, I think, two different edited versions, but
8 the upshot of it is that, amongst other things,
9 placement fees were being deleted and there were other
10 deletions as well.

11 No one, least of all Mr Lim or Mr Singhdeo, can give
12 a sensible explanation as to why that was done. But the
13 Dubai FSA says there is absolutely no reason to do that
14 if you are people who have integrity and who are fit and
15 proper to work within financial services.

16 Whatever was being done and whatever the reason was,
17 and we suspect that the reason may well have been
18 because it was in some way to do with the audit, because
19 the documents were found originally in the audit file,
20 but whatever the purpose was, it was clearly connected
21 to the regulated activity that involved the platform for
22 whom the accounts were in favour of. And therefore,
23 falls within the contraventions alleged and clearly
24 shows that these two are not fit (unclear ...)

25 That, in summary, is what we say about the bank

1 17:56 statements.

2 Then those are the gravamen of the allegations in
3 terms of misrepresentations. Of course, there are other
4 aspects as well to do with whether the general
5 prohibition was being breached, ie managing a CIF and
6 also, of course, arranging deals in investments. And
7 the issues on those are, I think, clearly set out in the
8 skeleton arguments and also in the DFSA's answer, and
9 frankly, very clearly, in the decision notices as well.

10 Perhaps I don't need to develop those issues any
11 more than have already been in writing. But really, in
12 short, what we say is that because of the close
13 relationship that DIFC and Cayman had with each other
14 and with the platforms, that really any conduct could be
15 attributed to Al Masah Cayman, either because Al Masah
16 Cayman were doing it themselves directly or because DIFC
17 were doing it on their behalf. But because of the close
18 relationship, in effect, it should be taken to be the
19 conduct of Al Masah Cayman as well.

20 So that's a very short summary of the very lengthy
21 issues of attribution that both sides have devoted many
22 pages to in the written documents.

23 Then the last point is that -- sorry, touching on
24 the arranging issue, what the applicants appear to be
25 saying is the applicant was a party to the arrangements

1 17:58 and therefore fall within the exclusion. We simply say,
2 no, they weren't. They weren't a party to the
3 arrangement by which the investor obtained shares in the
4 holding company. That's the arrangement for the
5 purposes of the DFSA legislation.

6 Finally, if I can get to the end, financial
7 promotions, as I say, were made either directly Al Masah
8 Cayman or were made on their behalf and should be
9 attributed to them, for the reasons set out in writing.

10 To the extent that it could be said that some of
11 these financial promotions were approved by Al Masah
12 DIFC, we submit the evidence just doesn't support that.
13 Certainly some of them were, but a good deal of them
14 were not. Therefore, that exclusion or that exemption
15 does not assist.

16 Finally, if I can get to the end, reasonable care is
17 an issue that's raised by both the corporate and the
18 individual applicants, in slightly different contexts.

19 Basically, what it amounts to is: we relied on other
20 people to give us advice and it was perfectly reasonable
21 for us to do so. Therefore, you shouldn't hold it
22 against us, in terms of breaches of the laws.

23 We say, first of all, that doesn't work, because
24 you're relying, to the extent that you were, on your own
25 internal advice. Secondly, there's not enough evidence

1 17:59 to should that you were genuinely relying on external
2 advice from others.

3 Also, what we say is that that doesn't absolve you
4 of the responsibility to know what the rules are and
5 work within them or ensure that you work within them.
6 We submit, in short, that that doesn't assist.

7 That feeds through, of course, into what principally
8 Mr Dash, but also the others, say about (a) whether they
9 were knowingly concerned in the contraventions, because
10 they say we were told everything was fine, so how are we
11 supposed to know that it wasn't; and (b) that it would
12 be relevant to whether they are culpable, in terms of
13 the level of any penalty. Perhaps that's something
14 that's best returned to once you have heard the evidence
15 from the applicants. Then I won't be making submissions
16 in a vacuum, but it can be done on the basis of the
17 evidence that you have heard. So I'll reserve my
18 position on those issues, if I may.

19 The final aspect to touch on is the alternative case
20 that we have posited in the event that you find against
21 my clients in relation to whether this was the
22 collective investment fund arrangement. The applicants
23 say we shouldn't be entitled to have an alternative
24 case.

25 We submit that we should. Principally, we say, we

1 18:01 have always been clear about this. It was something
2 that was ventilated in the DMC oral representations.
3 Everyone has been on notice of it since. We have raised
4 it in our answer. We have raised it in the skeleton.
5 It doesn't prejudice the other side if that -- other
6 than, of course, they would have contraventions found
7 against them, but it's not asking them to meet
8 a different case.

9 Therefore, that would be an option, we submit, that
10 would be open to you, if you find against us on the CIF
11 issue. But, again, that can perhaps be better developed
12 in closing.

13 So at 2 minutes past 3, having said I would finish
14 at 3 o'clock, those are my submissions, unless I can
15 assist further.

16 PRESIDENT: Thank you very much.

17 We'll have a five-minute break for the shorthand
18 writer and then it will be Mr Hill's turn.

19 Before we do that, we did, over the lunch break,
20 consider the question of the press release. Without
21 getting into detailed drafting, we think it's unreal
22 probably to have a press release that does not refer to
23 the penalty. Therefore, the preferred form of press
24 release should be in the sort of modified form that it's
25 moved into being, as far as the other aspects are

1 18:03 concerned, but it should make some reference to the
2 penalties, because it seems to us that it's an unreal
3 release if it does not.

4 We hope that's sufficient guidance. If it's not, we
5 shall see.

6 On that basis, we are just going to break for five
7 minutes.

8 MS CLARKE: Thank you, sir.

9 (6.03 pm)

10 (Short break)

11 (6.08 pm)

12 Opening submissions by MR HILL

13 MR HILL: From our side, we would like to use the
14 opportunity we have in oral openings to do two related
15 things.

16 The first is draw attention to some of the factual
17 details that we will be inviting the tribunal to
18 particularly look out for before we get to the
19 witnesses.

20 Secondly, as we go along, to pick up some of the
21 points made by the DFSA, particularly as they relate to
22 those factual points at issue.

23 Before I start, can I clear one point up and that
24 relates to a number of suggestions from the DFSA that
25 certain points raised by us are not properly raised on

1 18:09 the grounds of appeal or in the list of issues not open
2 to us. We submit that all the points that we are
3 running are properly raised, properly open to us and we
4 will elaborate on that in closing.

5 We have summarised in our written opening how we
6 divide the allegations into three groups. I'll address
7 each in turn today, as first what one might loosely call
8 the structural allegations. Those are the allegations
9 that the way in which the private equity business was
10 structured, resulted in contraventions of the DFSA
11 regulations.

12 Those allegations and in particular the fund related
13 allegations described to the DMC by the DFSA as
14 a central theme to the case. It's rather noticeable
15 today that all those allegations received a very light
16 billing in the DFSA's oral opening.

17 There are within those allegations three headline
18 contraventions the tribunal will be aware of. First,
19 whether Al Masah Cayman was in breach of the Collective
20 Investment Law by making offers of units in funds in or
21 from the DIFC. And that obviously raises the knotty set
22 of legal questions whether these private equity
23 structures were indeed funds. It also raises the
24 question of whether Al Masah Cayman was making offers in
25 units in or from the DIFC as opposed to Al Masah DIFC or

1 18:10 anyone else.

2 Second headline allegation, whether Al Masah Cayman
3 was in breach of the financial services prohibition by
4 carrying on financial services in or from DIFC and not
5 authorised to do so.

6 There are two relevant financial services to be kept
7 in mind. The first, arranging deals and investments and
8 that in turn raises the question of who was doing any
9 arranging, if there was any arranging to be done anyway?
10 In other words, was the arranging being conducted by Al
11 Masah DIFC as the intention behind the structure or was
12 it in fact happening from Al Masah Cayman?

13 There is also a separate legal point about whether
14 exclusion applies on the basis of Al Masah Cayman was
15 party to relevant contracts.

16 The second financial service in this context was
17 whether Al Masah Cayman was managing collective
18 investment fund in or from the DIFC? That in part comes
19 back to the fund question. But it also raises the
20 question as to whether Al Masah Cayman itself was acting
21 as Fund Manager.

22 Third headline allegation in this area, structural
23 allegations, is whether Al Masah Cayman were making
24 financial promotions in or from the DIFC? This raises
25 similar issues to the ones I just mentioned. Were there

1 18:12 any financial promotions in fact made by Al Masah Cayman
2 in or from the DIFC or were they being made by Al Masah
3 DIFC?

4 That point as well as raising the question of who
5 made the promotions, which we suggest was clearly Al
6 Masah DIFC? Secondly, the question is the allegation
7 comprehensible yet? We say it is, by the fact that all
8 financial promotions were approved by Al Masah DIFC.

9 I'll come back to that.

10 In relation to all of those structural allegations,
11 we have explained in the skeleton our core submission.
12 This structure was set up and monitored and administered
13 and we suggest diligently administered with the aim of
14 ensuring regulatory requirements, there not being any
15 issues of the kind alleged in the structural
16 allegations.

17 We make a high-level point that all these issues
18 were firmly in the hands of the compliance officer,
19 Ms Baines, in particular, was the risk and compliance
20 officer for the whole group and she fully understood how
21 the business worked and never suggested to be
22 non-compliant. And indeed, the DFSA reviewed the
23 business.

24 Points of this kind are relevant, potentially
25 relevant to your analysis and your decision in four

1 18:13 ways. First, this kind of material is all relevant
2 evidentiary to the tribunal's assessment of how the
3 operation actually worked from the ground. You will
4 need to reach findings of fact about what was happening,
5 whether doing your best to assess the situation now, the
6 actual workings of the business were in fact of the kind
7 which did or did not conform.

8 Secondly, the attitude and understanding of people
9 in the market and on the ground at the time, something
10 that you may find of some assistance in addressing some
11 of the nuanced legal questions, which involve fixed
12 questions of fact and law, such as whether Al Masah
13 Cayman and Al Masah DIFC, whether that relationship
14 really led to the conclusion that Al Masah Cayman in
15 regard was doing anything.

16 Thirdly, these sort of points are relevant or
17 potentially relevant to the question of whether
18 individuals are knowingly concerned in contraventions.

19 Fourthly, and as my learned friend accepts, on any
20 view, it's relevant to questions of penalty.

21 On these points, there are three evidential areas
22 I particularly invite the tribunal to be looking out for
23 when you assess and listen to the evidence.

24 The first point is that advice was taken from
25 Walkers to check and ensure that the setup between Al

1 18:15 Masah Cayman and Al Masah DIFC would lead to compliance,
2 given the potential role of staff in the DIFC office and
3 the financial promotions or potentially in arranging.

4 It's important to understand, it is I think to some
5 extent common ground, what the situation was on the
6 ground. What you had in the office of -- Al Masah DIFC
7 offices was what's been described as a placement team
8 and investor relations team.

9 These were individuals who did interact with
10 prospective investors, at least until 2015, when
11 marketing material were placed on a portal, these
12 individuals may have sent out marketing materials. In
13 any event, they were having discussions.

14 These were the people who were interacting. They
15 worked in the DIFC office, all of them had staff, all of
16 those staff had contracts, which ostensibly named the
17 group as their employer, Al Masah group, but which
18 specifically stipulated the employer could in fact --
19 the employee could in fact be appointed to work for any
20 group company. That's important.

21 We'll come in due course to see Ms Zudikova's
22 contract. What you'll see is that she could work for
23 any group company and the signatory to her contract was,
24 in fact, Al Masah DIFC. The DIFC company was the
25 licensed entity. They are the counterparty.

1 18:16 That is the case for all the employment contracts
2 the DFSA have produced to rely on in these proceedings.
3 On any view, the placement and the investor relations
4 team, like the other DIFC staff, were at the very least
5 seconded to -- were in fact employed by Al Masah DIFC.

6 The DFSA essentially accept this. Their position is
7 that Al Masah Cayman didn't have any staff, because they
8 had all been seconded to Al Masah DIFC. That's at
9 paragraph 119.3 of the investigation report.

10 Indeed, the DFSA's argument is that whether or not
11 these were indeed the staff of Al Masah DIFC is
12 irrelevant and they rely on the Bank Sarasin case, which
13 is a case they have misunderstood. And I will come back
14 to it.

15 The way in which all this business was set up is
16 that these people in the investor relations team in
17 Dubai, in DIFC, were carrying on activities which were
18 exclusively the province of Al Masah DIFC. Unlike the
19 Bank Sarasin case, which I'll come to.

20 Still on the question of Walkers' involvement, we
21 described Walkers' involvement, setup, and the
22 structure, at paragraphs 14 to 1 and paragraphs 25 to 26
23 of our skeleton.

24 Two particular points I draw attention to. First,
25 Walkers were involved not only in the actual setup of

1 18:18 the structure, but also both Walkers and the external
2 compliance officers, Total Solutions, were involved in
3 the regulatory business plan that was put to DIFC.

4 You'll note that document is at exhibit R004.
5 I particularly refer you, for your note, to
6 paragraphs 2.4 at page 7 of that document, where you get
7 a description of the intended activities of the
8 business. The document envisages:

9 "As Al Masah DIFC, we undertake marketing and
10 distribution activities for funds and structures
11 launched by Al Masah Cayman."

12 What you'll see is that what was envisaged
13 corresponds very closely to what actually happened, the
14 event and the arrangements that Ms Baines, the
15 compliance officer, was given.

16 No one, not Walkers, and as we'll see, not the
17 compliance officers, not the DFSA, who knew all about
18 this, no one imagined this process meant anything other
19 that Al Masah DIFC was performing the relevant financial
20 service which it was seeking a licence.

21 Walkers also gave specific advice to this topic in
22 2011, so a year or so after the instruction was set up,
23 when management checked the arrangements involving Al
24 Masah DIFC staff were indeed compliant.

25 That's referred to at paragraph 50 of our skeleton

1 18:19 and Walkers confirmed that it would indeed be compliant
2 for Al Masah DIFC to be sending out from Al Masah DIFC
3 emails, marketing and distribution materials in respect
4 of the Cayman structures. In other words, given that Al
5 Masah DIFC was the licensed entity, marketing and
6 distribution activities were happening from staff using
7 Al Masah DIFC emails, but that wasn't in the scope of
8 Al Masah DIFC's licence.

9 Again, no suggestion there was any problem, but in
10 some way, this might lead to a breach of the prohibition
11 by Al Masah Cayman.

12 So that's the first area.

13 The second area to look out for is compliance and
14 the fact that this structure continued to be monitored,
15 overseen by experienced compliance officers, including
16 Ms Baines.

17 Total Solutions were the first external professional
18 compliance providers. For your note, their letter of
19 engagement is at bundle C010, SKD3-6. That document has
20 a section, internal page 9, titled, "Duties of the
21 Compliance Officer". It makes clear that the compliance
22 role for Total Solutions included providing advice on
23 compliance, directors, implementing rule changes,
24 administering the firm's procedures with regard to
25 marketing, client classification, and other matters.

1 18:21 In other words, they took responsibility for a host
2 of activities aimed at ensuring the company was
3 compliant.

4 They were in due course replaced by Ms Baines, who's
5 going to be a witness. She was highly qualified,
6 experienced and a well remunerated compliance officer.
7 We'll go into the detail of that in her evidence. One
8 of the features of the evidence, as you'll see, is that
9 she was clearly an independent person who took her own
10 views and who spoke her own mind.

11 A point that is obscured in the DIFC's evidence,
12 which I'll come back to -- sorry, DFSA's case, which
13 I'll come back to, is that she was a risk and compliance
14 officer not only for Al Masah DIFC, but for the whole
15 group. We'll come back to the significance.

16 After she was appointed, Ms Baines conducted
17 a review and overhaul of compliance arrangements. That
18 involved a rewrite of regulatory business plan for the
19 DFSA, rewriting the compliance manual and rewriting
20 a number of other compliance documents.

21 What you'll see when we go through some of that
22 materials are two things. First, her work was and
23 certainly appeared to be thorough and wide-ranging.
24 It's just the kind of work management would hope to see
25 from their well remunerated compliance officer. They

1 18:22 were entitled to take comfort from her that the job was
2 being properly done.

3 Secondly, Ms Baines was also satisfied that the
4 structures were compliant. None of the big picture
5 structural issues now presented in these proceedings
6 occurred to Ms Baines. None of them were the subject of
7 advice from her to the directors that there was any
8 problem in the way in which the business was being set
9 up.

10 I referred to the overhaul of materials which
11 Ms Baines was responsible for. One of them is the
12 regulatory business plan. I will be going to that in
13 the evidence. This was something that Ms Baines
14 approved.

15 I wonder if we do try pulling it up, if it takes too
16 much time, we'll abandon the effort. Could we try
17 bundle D, exhibit R004, tab 2. It's about 21 pages into
18 the exhibit, if possible. I'm afraid it's one of the
19 more difficult of the documents to pull up, I suspect.

20 Down to about page 25. Can I perhaps ask you to
21 zoom out, to get a little bit more on the page. Then
22 perhaps scroll down to 2.4.

23 This deals with investor relations management, where
24 it says:

25 "AMCML is engaged by various investments funds (to

1 18:25 be launched predominantly by the Holding Company) to
2 undertake investment management and ancillary services.
3 Details of which can be found in the preceding sections.

4 With respect to investment advisory services, AMCML
5 intends to target High Net Worth Individuals ... and
6 institutional investors as prospective clients. All
7 clients of AMCML are classified as a 'professional' or
8 'Market Counterparty' in accordance with the DFSA
9 Conduct of Business Module."

10 You'll see there what's envisaged is marketing and
11 distribution activities or investment funds. And
12 indeed, if you look, we'll see also structures and you
13 will also see an intention to only market to
14 professional clients. I'll come back to that.

15 If the operator can then go back a few pages.
16 "Business activities", 2.1. This again is making clear,
17 the second paragraph, that:

18 "AMCML supports the other Al Masah group companies
19 in management and advisory services relating to the
20 following Private Equity structures and Investment
21 Funds, although it must be stressed that with regards to
22 the Private Equity funds, there is no direct
23 relationship with AMCML."

24 It lists those two funds, which is at the bottom of
25 the list of bullet points. It also lists the private

1 18:27 equity structure. We'll look again at that document
2 with Ms Baines. But the net effect of it is that the
3 document makes very clear that what's happening in this
4 structure is that you have investor relations activities
5 being carried on by Al Masah DIFC.

6 We'll see those are carried out by the investor
7 relations team. Those are Al Masah DIFC services. They
8 include marketing and distribution for structures,
9 including the private equity structures launched by
10 Al Masah Cayman, and the services being provided to
11 investors going to be classified as professionals.

12 That was, in a nutshell, the way in which the
13 organisation worked.

14 Pausing there, then it comes to the question: which
15 is this entity that is undertaking with marketing and
16 distribution? The whole scheme of the arrangements is
17 that which Ms Baines was put in place, is that it's
18 Al Masah DIFC undertaking the marketing and undertaking
19 the distribution.

20 We will also see that that's implemented through the
21 other documents, which Ms Baines was involved with,
22 which we'll come to in the evidence.

23 When it comes to the legal submissions as to what
24 follows from this, and who was carrying on any arranging
25 activities or any financial promotion activities, there

1 18:29 is a lack of consistency, the DFSA's case, as it appears
2 from their skeleton.

3 DFSA's case is that all the employees are to be
4 treated as just doing the bidding of Al Masah Cayman.
5 Hence, they say their conduct is just to be attributed
6 to Al Masah Cayman. The DFSA carve out an exception for
7 Ms Baines. What they say about her, at paragraph 6.4 of
8 their skeleton, is that she was just a compliance
9 officer for Al Masah DIFC. They do not attribute her
10 role as being for the group generally.

11 In my submission, that's something that's been done
12 for tactical reasons. Because the reality is the other
13 way around.

14 In the case of Ms Baines, she was the compliance and
15 risk officer for the whole group. That was the role she
16 was appointed to, the documents are repeat examples of
17 her performing that role, not just for Al Masah DIFC.

18 The group, as a whole, including Al Masah Cayman.

19 The reason why the DFSA are coy about recognising
20 that is that it's unhelpful to their case. That's
21 because all these structure based allegations are now
22 being levelled against Al Masah Cayman. Ms Baines was
23 looking after compliance of Al Masah Cayman. It never
24 suggested there was any problem.

25 So it is an important point if there were any

1 18:30 issues, and we suggest there weren't, that if there
2 were, they were issues precisely of the kind Ms Baines
3 was employed at considerable expense (unclear ...)
4 provide. She never saw a problem with it, never
5 notified them.

6 When it comes to the rest of the staff, the reality
7 is again the other way around. They were working for
8 the DIFC entity. That was the purpose of having them in
9 the DIFC, sponsored by Al Masah DIFC, with their visas.
10 I can show you some of the material from the witnesses.

11 They were operating under the watch of Ms Baines
12 who's ensuring that their activities were activities for
13 the DIFC company.

14 It is, in our submission, a telling inconsistency.

15 The same point arises when we come to consider
16 financial promotions. There Ms Baines had a strict
17 system in place. Ms Zudikova gives evidence about it
18 too. If any marketing material was going to go out,
19 going to be given to any investors or to be put up as a
20 thought, it first needed to be approved by Ms Baines.
21 That was the way the system worked. Material didn't
22 even get to the investor relations team, it couldn't get
23 to investors, unless it had first been cleared by
24 Ms Baines.

25 The whole premise of the DFSA's case is that there

1 18:32 was material which wasn't sent out by DIFC, which she
2 said was somehow sent out by or on behalf Al Masah
3 Cayman. They even say it wasn't approved.

4 That set of propositions is alien, the way in which
5 this business was set up and managed.

6 For the reasons I have given, the practice, all the
7 promotion was done by Al Masah DIFC, but because anyone
8 involved in it was an Al Masah DIFC employee,
9 particularly the investor relations people, who are
10 working for Al Masah DIFC, but anyway, the system
11 ensured all the material was approved by Ms Baines,
12 therefore was approved by DFSA licensed entities.

13 That is Ms Baines' role. In particular, as it
14 relates to arranging and promotional activities.

15 We then have her role as it relates to the fund
16 question. As I say, no one regarded the private equity
17 structure of the big funds fell within the collective
18 investment board. Hence meant that that law might not
19 be being complied with.

20 On that topic, we'll be going with Ms Baines over
21 a number of documents and her interactions with the DFSA
22 on that question. It was very clear, she did not regard
23 that the private equity structures as being funds. She
24 was open with the DFSA about her approach. There were
25 even notifications to the DFSA of which funds, foreign

1 18:33 funds and domestic funds, were or were not being
2 marketed.

3 Those notifications which she discussed with the
4 DFSA did not list private equity structures. That was
5 because neither she nor the DFSA, who she was discussing
6 matters with, thought private equity structures amounted
7 to funds within the Collective Investment Law.

8 On those topics, it's important to note that there's
9 no suggestion or partly any suggestion that anything was
10 hidden from the DFSA or obscured, or anything either
11 Ms Baines or the DFSA didn't understand about this fund.

12 That brings me to the third general area I wanted to
13 cover. We just covered Ms Baines and compliance. The
14 third one is the DFSA itself.

15 The DFSA inspected Al Masah DIFC on repeated
16 occasions. Ms Baines had an open relationship with
17 them. She could and did deal with them on her own
18 initiative, working to the business were completely open
19 to them.

20 DFSA plainly shared Ms Baines' view that the
21 structure was not funds. The DFSA also knew that
22 Al Masah DIFC was marketing private equity structures
23 and also marketing some actual funds, which we accept as
24 funds, but in particular a Luxemburg fund, that was
25 being launched.

1 18:35 One of the oddities in the DFSA's case now is that
2 you'll see there has never been and still isn't any
3 allegation against Al Masah Cayman that the marketing by
4 the investor relations team of the Luxemburg fund
5 amounted to financial promotions and arranging by
6 Al Masah Cayman.

7 The DFSA accept that that is an activity of the
8 Al Masah DIFC investor relations team, properly
9 attributable to Al Masah DIFC.

10 When it comes to them doing the same job in respect
11 of the private equity structures, suddenly their
12 activities are not just associated with Al Masah DIFC,
13 they suddenly become instruments only to the Al Masah
14 Cayman company.

15 We submit that there's an inherent inconsistency
16 there, that it rather shows the trying nature of things.

17 Those are the three evidential areas I would invite
18 the tribunal to be on the lookout for when we get to the
19 evidence.

20 Can I just say a few words about the structural
21 allegations themselves and in particular some of the
22 points raised by the DFSA.

23 Starting with the first contravention alleged
24 against Al Masah Cayman which is offering units and
25 funds.

1 18:36 This obviously engages the question of whether the
2 units were funds, and if at the time they thought they
3 were. The tribunal obviously has to determine legal
4 issues. We submit there are many legal issues that
5 applies. They are nuanced and they are quite complex.
6 They will take time up in closing and I'm not going to
7 address them now.

8 We will be suggesting that we're right on the legal
9 issues. But what we also suggest is that even if the
10 tribunal are ultimately decided differently, the extent
11 of the nuance and the complexity in these issues is
12 itself a relevant factor. Certainly on the question of
13 penalty but also on the question of whether anyone
14 was -- could realistically be said to be knowingly
15 concerned on contravention.

16 This allegation also raises the question whether it
17 was Al Masah Cayman or Al Masah DIFC offering units and
18 funds and that is something which also arises in
19 connection with the financial promotion, which I'll
20 come to.

21 The second structural allegation was the breach of
22 the prohibition and I have referred to some of the
23 evidence as to why Al Masah Cayman was not thought at
24 the time to be itself arranging deals and investments.
25 And why all of these activities would be activities of

1 18:38 Al Masah DIFC staff operating in the Al Masah DIFC
2 office.

3 It's worth seeing what my learned friend has to say
4 about that general proposition. Her main point is to
5 suggest that we're wrong as a matter of law. And
6 indeed, she says wrong as a matter of fact and law. She
7 relies on that proposition, that proposition from the
8 Bank Sarasin case. You'll find that submission at
9 paragraphs 9 and 10 of her skeleton.

10 Although the DFSA suggest there that Bank Sarasin
11 case answers our argument on this part of the case, it
12 doesn't do so at all. I want to say a few words on
13 this, because it's important the tribunal is given what
14 we suggest is the correct analysis of the Sarasin case,
15 its relevance, before you hear evidence relevant to
16 different roles of the DIFC company.

17 Our position, which we'll expand on in closing, is
18 that the Bank Sarasin case was a very different case.
19 Just picking up DFSA's skeleton at paragraph 10.3 of
20 their skeleton. They say:

21 "... the decision of the Judge at first instance was
22 set out, to the effect that the fact that a person was
23 employed by Sarasin-Alpen was irrelevant, where in
24 substance the relevant employees acted on behalf of Bank
25 Sarasin."

1 18:39 You need to be extremely careful with that summary
2 of the first instance decision and it risks overstating
3 the decision of the Court of Appeal and indeed the first
4 instance.

5 The question of which entity an employee is employed
6 by is ordinarily a very important, ordinarily a decisive
7 factor. Neither the first instance court in the Bank
8 Sarasin case nor the Court of Appeal is suggesting
9 otherwise. And that's for an obvious reason.

10 Just standing back, it's common for banks, such as
11 Swiss banks, to have correspondence with subsidiaries or
12 partners, who are authorised to conduct arranging
13 activities in a regulated jurisdiction.

14 It would generally be a very significant step to
15 ignore or override the fact that staff of that nice
16 correspondent entity are carrying out relevant
17 activities for their employer and not for the overseas
18 holding company or partner.

19 For the DFSA to suggest that the employment status
20 is irrelevant, that of course alarms, we suggest, much
21 of the investment community, because this is how matters
22 are often set up in the DIFC jurisdiction and other
23 regulated jurisdictions.

24 The point about the Sarasin case is that although
25 that is the norm and it normally works, the situation

1 18:41 can arise where in all the circumstances, employees of
2 the regulated entity are not just carrying out the
3 activities for and on behalf of an employer. Instead,
4 those individuals or certain individuals' activities
5 properly be seen in all the circumstances as being the
6 activities of the offshore entity, notwithstanding that,
7 of course. In other words, they just become instruments
8 of the offshore entity, because of the quirks and the
9 particular circumstances in which they're operating.

10 That is what happened in the Sarasin case. In the
11 Sarasin case, the gist of the judgment both below and in
12 the Court of Appeal is that notwithstanding the
13 existence of the separate legal status of the DIFC joint
14 venture partner, the employer, in reality, the Swiss
15 bank offshore was in fact conducting relevant financial
16 services through the instrumentality of certain
17 individuals in the DIFC part and in particular in that
18 case dealing with investments.

19 The finding was not that individuals could simply --
20 the finding was that those individuals could not just be
21 seen simply as being employees representative of the
22 DIFC entity in that way. On the facts of the case, they
23 were instruments of the offshore entity.

24 There are key features in the Court of Appeal
25 judgment which explain the reason for that. We don't at

1 18:42 all derive the proposition, it's generally just
2 irrelevant, who the employers are. It is normally, as
3 I say, a decisive factor.

4 I should say the Court of Appeal were extremely
5 careful in paragraph 333 of their judgment to say that
6 the judgment should not be assumed to be a general
7 application. That passage is in fact quoted by my
8 learned friend in her paragraph 54.

9 We have a very different case here. The fact of the
10 Al Masah DIFC. This case, the whole team who are
11 conducting the relevant activities are very much an Al
12 Masah DIFC team. They're all operating in the DIFC
13 offices. They're all seconded to the DIFC, or employed
14 by them. They are all operating under the watchful eye
15 of the compliance officer, Ms Baines.

16 It's not like Bank Sarasin, you don't have a
17 parallel organisation in the Cayman, which you just are
18 annexing certain individuals for the DIFC entity to act
19 as part of their external teams, unlike for Bank
20 Sarasin. Instead this is an integrated whole DIFC team,
21 working for the DIFC entity, in the DIFC.

22 I should also say that the Bank Sarasin decision was
23 hotly contestable and one that has been seen in some
24 quarters as a controversial decision.

25 As I say, the Court of Appeal were careful to say

1 18:44 the decision operates on its own merits.

2 So for all those reasons, we suggest the Bank
3 Sarasin case doesn't even assist the DFSA, let alone
4 operate in the dispositive way they have suggested.

5 The case does, though, have some relevance in
6 a different context. The Bank Sarasin case was
7 a private litigation between, as it happens, my then
8 clients, Mr Khorafi, who was successful, and the Sarasin
9 entities. It didn't involve a regulator, DFSA at all.
10 So the questions of regulatory consequences for the Bank
11 Sarasin breach, or the breach of the prohibition, didn't
12 arise in the litigation.

13 What is striking is that the DFSA did not take any
14 action at all against Bank Sarasin even after successive
15 judicial findings. Bank Sarasin is in breach of the
16 prohibition. We suggest the reason for that is obvious.
17 Because the DFSA recognise that, at that time, this was
18 a difficult gray area, that while that may not afford
19 private litigants, like my then clients, any
20 difficulties in establishing their rights, it did mean
21 that it wasn't a case for a regulatory sanction, the
22 DFSA against Bank Sarasin. And no doubt also informed
23 by the fact that DFSA had monitored Bank Sarasin.

24 That is the same situation we have here. All of
25 these structural allegations, the fund allegation and

1 18:45 arranging financial promotion allegation, are looking at
2 a structure setup, benefit of professional advice, no
3 one appreciating there was anything wrong, if there was,
4 and then looking at a situation where DFSA didn't
5 dissent in all of its various reviews.

6 As in the approach they clearly took with the Bank
7 Sarasin case, we would suggest this isn't territory or
8 regulatory territory at all, even if contrary to all my
9 arguments, legal analysis conducted with hindsight might
10 suggest that they were the wrong side on any of the
11 legal analysis.

12 Having referred to the Sarasin case, the DFSA in
13 their skeleton identified what they describe as the
14 important factors applying to this case, which went to
15 the proposition it was Al Masah Cayman and not Al Masah
16 DIFC who was carrying out the relevant financial
17 services activity. That is all at paragraph 11.

18 Give the time, I'm not going to spend time on it
19 now, we would suggest the list of factors identified by
20 the DFSA is insubstantial in the extreme. It doesn't
21 come close to establishing the DFSA's propositions.

22 One test of that is that the DFSA summarise their
23 submission, at paragraph 12.2 of their skeleton, where
24 they make the unreal suggestion that the position on the
25 ground was that Al Masah DIFC was limited to providing

1 18:47 advisory services, that Al Masah DIFC didn't provide
2 services that extended to marketing activities.

3 But, of course, it is unreal, because Ms Baines was
4 supervising actual marketing activities of the DIFC
5 entity. The DFSA were told all about those actual
6 marketing activities. They were marketing fund
7 structures and everyone knew it.

8 Another point relied on by the DFSA, this is
9 paragraph 12.4 of their skeleton, is that if Al Masah
10 DIFC was indeed doing the arranging, we suggest that it
11 was if there was any arranging going on at all, then
12 there must have been something going wrong, because the
13 investors were not treated as clients by Al Masah DIFC.

14 That doesn't at all answer the question of whether
15 any arrangements are done by Al Masah DIFC. If the
16 activities counted as arranging, then the activities
17 were on any view conducted by Al Masah DIFC. When it
18 comes to client classification, that was Ms Baines'
19 responsibility. She was responsible for on boarding
20 investors. She conducted extensive on boarding and
21 you'll see her proceed this. And if there are
22 additional steps, she should have been taking them to on
23 board the clients, the investors as clients. That was
24 all her territory.

25 Failure on her part to have sufficient on boarding

1 18:49 is not an allegation in this case. If it was, it would
2 have been very much one for Ms Baines.

3 That's the breach of the prohibition.

4 There's then financial promotions, which is the
5 third of the structural allegations.

6 The issue here is whether Al Masah Cayman are making
7 financial promotions in or from the DIFC. I have
8 already addressed the evidential area to look out for.
9 In my submission, it indicates clearly Al Masah DIFC was
10 the entity doing this. It was the sort of place for
11 that.

12 On that, on whether it was Al Masah DIFC, or the
13 Cayman company who were undertaking any financial
14 promotions, the DFSA's arguments are summarised at
15 paragraph 74 of their skeleton. They raise similar
16 points to those I have already addressed in connection
17 with arranging, in my submission, are insubstantial.

18 There is then our second point in this area, which
19 is even if there were financial promotions, or even if
20 you could somehow say they weren't undertaken by the
21 DIFC entity in the first place, nevertheless any
22 financial promotions were approved by the DIFC entity,
23 therefore exempt.

24 On that point, the DFSA -- and it was interesting
25 hearing my learned friend deal with that orally. She

1 18:50 suggests, she accepts that some were approved, but she
2 says a lot were not.

3 For that point, DFSA rely on the annex D decision
4 notices. They suggest this identifies material that was
5 distributed as marketing material and which was in fact
6 unapproved. We disagree.

7 Can I say something briefly about annex D. It's an
8 unsatisfactory document. It does not properly evidence
9 there were unapproved financial promotions in play.
10 That annex is not part of the material in the
11 investigation. It came about as a forensic submission
12 after the decision maker asked for clarification of what
13 document is relied on by the DFSA.

14 The documents identified are said to have been taken
15 from marketing materials supplied by Al Masah DIFC, with
16 the investigation. There are numerous problems with the
17 annex. First, it's not at all clear, and no evidence
18 has been given, that any of the material DFSA suggests
19 was unapproved was in fact used or sent.

20 The DFSA proceed by way of assertion and assumption
21 and not evidence. What the evidence in fact shows is
22 there were solid systems in place, so that anything that
23 did go out was approved. And that is the best evidence,
24 we submit, that everything was in fact approved.

25 Secondly, the DFSA suggestion that the material they

1 18:52 suggest was unapproved, was indeed unapproved, that
2 proposition lacks supporting evidence and is at times
3 unreal.

4 To give one example, the decision notice makes the
5 point that some documents did not even purport to
6 (unclear ...). That is a reference to documents stating
7 the terms they had been distributed by Al Masah DIFC
8 without using the word "approved".

9 Contrary to what the decision notice appears to be
10 assuming, documents with that rubric, distributed by
11 Al Masah DIFC, were in fact approved. That's clear from
12 Ms Baines' own evidence and her own witness statement.

13 The "distribution" wording, that was language
14 that -- I'm sorry, did someone have a question or was it
15 something with the technology?

16 PRESIDENT: Someone said something, but I don't think they
17 pursued it. It wasn't one of us.

18 MR HILL: I'm grateful. I'll press on in that case.

19 The "distributed by DIFC" wording is something that
20 Ms Baines herself was implementing, the documents that
21 she was in fact approving. Far from being evidence
22 there was not approval by the DIFC company, it's
23 evidence that there was approval by the DIFC company.
24 It's artificial to try and draw a distinction.

25 We suggest that if there's material in annex D,

1 18:54 looks like there is some material in annex D, which
2 isn't on Ms Baines' approval register, there's no
3 evidential basis saying that that material was both
4 unapproved and actually used.

5 We submit that there's no justification in general
6 for saying on the basis of annex D or anything else,
7 there was any material not in fact approved and that was
8 used.

9 As I have submitted, if that ever did happen, we
10 don't accept it, if it ever did happen, that would
11 plainly have been an aberration, because the system in
12 place didn't allow it to lag like that.

13 That's all I wanted to say about the first group of
14 allegations save to draw attention to one further point.

15 We do suggest that all of these structural
16 allegations are about -- and it's worth noting that none
17 of them were the focus of DFSA investigations at the
18 time of the interviews. The investigation seemed at the
19 time to cover other matters. The point such as the fund
20 allegation and the arranging were not even canvassed in
21 the interviews. They certainly weren't canvassed in
22 Ms Baines' as a compliance officer.

23 We suggest they have come in as an afterthought and
24 we have also suggested there is a reason for that. It's
25 an attempt to paint this case as one where there has

1 18:55 been wholesale and systematic (unclear ...). That's an
2 unfair picture.

3 The structural allegations are not a helpful
4 addition to the case. They are an unmeritorious set of
5 claims, which should not be thought of by the tribunal
6 as adding in any way other allegations, so as to give
7 the impression of systemic problems within (unclear ...)

8 We do suggest that my clients are in a very odd
9 situation now, where they are the respondents, Ms Baines
10 now appears as the DFSA's witness. My individual
11 clients said to be knowingly concerned in these alleged
12 contraventions, they took place on her watch, she was
13 the person appointed the lookout, both Al Masah DIFC and
14 Al Masah Cayman, all the areas covered by the structural
15 allegations. She never advised of any wrongdoing or
16 non-compliance. It was her job to do so. They were
17 relying on her.

18 What's telling is that there has been no criticism
19 of her at all by the DFSA. She is not said to be
20 knowingly concerned with any contravention, or has
21 fallen down in any way. DFSA didn't even ask her about
22 these matters in interview.

23 I'm just going to move to the second group of
24 allegations, which relate to whether placement fees were
25 sufficiently disclosed in the marketing material.

1 18:57 I'm conscious of the time. I am going to be quite
2 quick, because I want to spend less time on these
3 allegations, but there's no chance of me finishing in 3
4 minutes. So I wonder if I could go over until tomorrow,
5 but I really won't be long. I would have thought less
6 than half an hour.

7 PRESIDENT: Again, unless my colleagues think otherwise, it
8 will be fine for you to go into tomorrow.

9 MR HILL: On that basis, I'll make a clean start, I think,
10 on the placement fees and the allegation of misleading
11 literature regarding placement fees when I start
12 tomorrow.

13 MR MALEK: Mr Hill, can I ask you one question about
14 transcripts? Is the plan that we'll get certainly
15 a first draft of the transcript this evening? And have
16 you sorted out an arrangement with Ms Clarke about
17 checking for errors and things like that? Because it's
18 good to get final drafts within a couple of days. Is
19 that something you can look at, please?

20 MR HILL: It may be Ms Clarke or Mr Lake are better to
21 answer that question.

22 MS CLARKE: Sir, I'm afraid I can't answer that question.
23 I have no idea, but I'm sure Mr Lake will be able to
24 assist, so I can take instructions from him and perhaps
25 report back in the morning, if that's acceptable.

1 18:58 MR LAKE: Sorry to interrupt. We understand that the
2 transcripts of today's proceedings will be available
3 somewhere in the region of three to four hours' time,
4 but they will be in draft form and will be emailed to
5 certainly the hearing panel and the legal
6 representatives for both sides.

7 We haven't formally sort of discussed or informally
8 discussed any arrangements to actually correct any
9 errors that may be identified in those transcripts, but
10 at least in draft form, they should be available later
11 on this evening.

12 MR MALEK: Are they the ones that go on the website?

13 MR LAKE: They will be, yes. And there will be a caveat
14 making the observation that they have not been reviewed
15 or verified for accuracy. And they do clearly state it
16 in the header of those transcripts that they are a draft
17 format.

18 MR MALEK: Thank you.

19 PRESIDENT: On that basis, therefore, and on the
20 representations that you be quite short tomorrow, we'll
21 break at this point and resume at 10 o'clock tomorrow to
22 hear the rest of your submissions and then to start the
23 first witness. Thank you all very much.

24 (7.00 pm)

25 (The hearing adjourned until 1.00 pm on the following day)

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