IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE **Case FMT 17004**

FINANCIAL MARKETS TRIBUNAL

B E T W E E N:

ANNA WATERHOUSE

Appellant

-and-

THE DUBAI FINANCIAL SERVICES AUTHORITY (DFSA)

Respondent

DECISION

His Honour David Mackie QC

Mr Ali Al Aidarous

Mr Patrick Storey

12 August 2019

INTRODUCTORY.

1. This is an appeal by the Appellant Ms Waterhouse against the DFSA's decision, by a Decision Notice dated 22 June 2017, to impose a financial penalty of US$100,000 and to restrict her from performing any function in connection with the provision of financial services in or from the DIFC. Ms Waterhouse seeks an order setting aside the Decision Notice and a determination that the DFSA should take no action against her, or alternatively a variation of the sanction imposed.

2. This Decision comprises:

- Introductory – Paragraphs 1 to 31.
- The Relevant Facts – Paragraphs 32 to 132.
- Abuse of Process – Paragraphs 133 to 173.
- The Evidence – Paragraphs 174 to 185.
- Role of Ms Waterhouse – Paragraphs 186 to 223.
- Application of findings of fact to the alleged contraventions – Paragraphs 224 to 240.
- Private matter – Paragraph 241.
- Penalty – Paragraphs 242 to 272.
- Other Matters – Paragraphs 273 to 279.
- Overall Conclusion – Paragraph 280.
- Annex 1 – Procedural History.
- Annex 2 – The people involved in this case.
- Annex 3 – Decision on Bias application.
- Annex 4 – Decision about the Data Protection litigation.

3. **Jurisdiction.** The Financial Markets Tribunal (FMT / Tribunal) was created under the Regulatory Law (DIFC Law No 1 of 2004). It hears and determines References and Regulatory Proceedings. A Reference is a proceeding in front of the FMT to review a decision of the DFSA. The FMT conducts a full merits review of any DFSA decision referred to it. It can take into account any relevant new evidence that came to light after the DFSA's original decision. The FMT may, among other things, affirm, vary or set aside the DFSA's original decision. The FMT can also remit the matter to the DFSA with directions as to how the DFSA should make its decision.

4. **Applicable Law.** It is common ground that the law applicable to the Tribunal is the law of the DIFC. There is no requirement to follow precedents from any other legal system, whether in the financial services context or otherwise. However, the Tribunal, the regulatory framework and indeed the DIFC itself were modelled in large part on the legal and regulatory system of England & Wales, and so precedent from England & Wales (and other Commonwealth jurisdictions as appropriate) has persuasive authority.

5. **Rules.** The FMT Rules describe the procedures that apply generally to the conduct of proceedings but (Rule 4) we have the discretion to adopt different procedures to ensure the just, expeditious and economical resolution of proceedings. The overriding objective (Rule 7) of these Rules is to enable the FMT to deal with cases fairly and justly. This includes: (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the FMT effectively; and (e) avoiding delay, so far as compatible with proper consideration of the case. We are not bound by any formal rules of evidence. We bear all these considerations in mind.

6. **Confidential Matter**. Rule 17 concerns Confidential Treatment *"The Hearing Panel on its own initiative or on the application of a person may order that part or all of a proceeding is non-public and that information is to be treated confidentially and not disclosed publicly."*

7. We made such an order on the application of Ms Waterhouse, unopposed by the DFSA, as regards some personal matters which, having now heard the evidence, we do not consider to be central to the outcome of this case. These matters are not referred to in this Decision except in a confidential annex which will not, unless the Tribunal orders otherwise, be published or disclosed except to the parties and to one other individual. We also refer to one DBDIFC employee as Ms X to reduce any embarrassment to someone with no direct involvement in this case.

8. **Resources.** There is inevitably great disparity in resources of time, money and energy between the DFSA and any individual as opposed to corporate Appellant. We have had close regard to that both in the preparatory stages of the case and in evaluating the evidence.

9. **What is this case about?** The case concerns Ms Waterhouse's duties as an Authorised Individual in her role at Deutsche Bank DIFC ("DBDIFC"), a branch of Deutsche Bank AG, licensed by the DFSA on 26 September 2005. During the relevant time DBDIFC operated three lines of business: Corporate Banking and Securities, Global Transaction Banking and Private Wealth Management ("PWM"). PWM was itself subdivided into two teams: PWM Middle East and Africa and PWM Global South Asia. Ms Waterhouse was DBDIFC's Head of Compliance for the Middle East and North Africa ("MENA") throughout the "Relevant Period" identified by the DFSA between 1 January 2011 and 21 January 2014, and Head of Legal for MENA from November 2011 onwards. She was authorised by the DFSA to perform the Licensed Functions of Compliance Officer, Money Laundering Reporting Officer ("MLRO"), and Senior Manager.

10. It is common ground that DBDIFC and its employees within the PWM team serving the Middle East and Africa ("PWM MEA") were, in breach of the regulatory requirements, providing the regulated financial services of (i) "*Advising on Financial Products and Credit*", and (ii) "*Arranging Credit or Deals in Investments*" ("Advising and Arranging") in a way which was undisclosed to the DFSA and which did not comply with the requirements set out in the DFSA Rulebook.

11. A sample-based review carried out by DBDIFC, supervised by Ms Waterhouse, in September and October 2013 resulted in a conclusion that around 40-50% of PWM employees' emails involved Advising and/or Arranging and these findings were confirmed by a subsequent and more extensive review. The DFSA's investigation found that the failure to comply with the DFSA Rulebook extended to approximately 583 PWM clients over the period from 1 January 2011 to 30 June 2013 and that finding is accepted by Ms Waterhouse.

12. DBDIFC subsequently carried out an investigation with the assistance of an external firm (Freshfields), and concluded that Advising and Arranging had been undertaken in the DIFC on a frequent and systemic basis throughout the period from January 2011 until an appropriate compliance framework was implemented in March 2013. On 29 March 2015, DBDIFC accepted a fine of US$8.4m, which included a 20% discount for early settlement. It follows that although PWM may have been a limited part of DBDIFC's business the contraventions were very significant. It is also relevant that in admitting its guilt the bank accepted that it had failed to *"(f) establish and maintain compliance arrangements, including processes and procedures that ensure and evidence, as far as reasonably practicable, that DBDIFC complied with all legislation in the DIFC, in accordance with GEN Rule 5.3.7;* [and] *(g) ensure that the Compliance Officer had sufficient resources, including an adequate number of competent staff, to perform his or her duties objectively and independently as required by GEN Rule 5.3.9 and for DBDIFC to conduct and manage its affairs in accordance with GEN Rule4.2.4 (Principle 4 - Resources)"*. The Decision Notice given to DBDIFC records at Paragraph 1.6. "*The Investigation also found evidence that DBDIFC failed to meet DFSA requirements relating to governance, systems and controls and compliance arrangements. The Investigation found that certain individuals within Senior Management and Regional Management, who collectively were ultimately responsible for DBDIFC's governance, failed to ensure that DBDIFC's governance structure was appropriate in light of DBDIFC's business model. The DFSA considers that DBDIFC's governance breaches contributed to the failures set out in this Decision Notice."*

13. Mr Chetan Parmar, who reported to the Appellant, received a Decision Notice on 22 June 2017, which he did not challenge. This imposed a financial penalty of $25,000 having concluded that *"Despite knowing from, at the very latest, June 2012 that DBDIFC was operating its PWM business in breach of DFSA Rules, the DFSA considers that you provided false and misleading information to, and concealed information from, the DFSA concerning the activities of PWM."* and that *"in July 2012 and April 2013, you contravened Article 66 of the Regulatory Law by providing information to the DFSA which was false, misleading or deceptive and by concealing information, where the concealment of such information was likely to mislead or deceive the DFSA."*

14. We refer at Paragraph 29 below to the claims put forward by the DFSA and to Ms Waterhouse's response.

15. **The Procedural steps in this case.** The FMT seeks to resolve appeals within months if not weeks but this case has occupied over two years. The reasons for this delay lie in the exceptionally large number of procedural issues that have arisen and the unexpected unavailability of witnesses for a considerable period mentioned in the procedural history at Annex 1. We refer to the reasons for the delay again at Paragraphs 274 to 276 below.

16. **Burden and standard of proof.** The FMT conducts in effect a de novo hearing of the process which led to the Decision Notice. The burden of proof lies on the DFSA to prove the case. There is a difference between the parties about the standard of proof which we deal with below.

17. Neither party is confined to the evidence and other material used in the previous process. The Tribunal does not when making orders, for example for disclosure of documents, overlook the fact that extensive activity and examination in this area may have already taken place over a long period. A chronology at Appendix A to the DFSA's Answer lists seventy-five steps taken by the parties and their lawyers between September 2015 and July 2017 in the proceedings before the Decision Making Committee ("DMC") of the DFSA.

18. **The written and oral evidence.** Despite the limited range of the factual disputes between the parties we have had some 14,000 pages of documents in

the bundles before us only a small proportion of which have been significant in this case. There have been extensive written submissions, running to hundreds of pages. We have considered all the evidence and submissions carefully but in the interest of keeping this Decision within an acceptable length we mention only those matters and arguments which we consider to be relevant and significant. We have given references to many documents (although less frequently than the parties in their submissions). The sources of our written information are the pleadings (A), the witness statements (C), the statements given under oath or affirmation to the DFSA (G), the documents (D), the written and oral submissions of Counsel (B) and the transcripts of the hearings (T). Both sides cite transcripts of interviews (G) to support their cases. These are formal interviews under oath or affirmation, usually with lawyers present, they carry weight but not of course as much as live evidence.

19. **The people involved**. Annex 2 contains a chart, which we understand is uncontroversial, taken from the Answer of the DFSA setting out the roles of the individuals involved in relevant events.

20. **Witnesses.** The DFSA produced witness statements from:

    - Adrian Bock, the person in the DFSA's Enforcement Division with day-to-day carriage of the investigation.

    - Ian Johnston, the DFSA's Chief Executive Officer until his departure on 1 October 2018.

    - Bryan Stirewalt who was at the time the Managing Director and Head of Supervision at the DFSA now its Chief Executive Officer.

    Mr Bock and Mr Johnston also gave live evidence.

21. The DFSA also produced witness statements from an individual referred to in the private part of this Decision (and anonymously in this part of the Decision as "Mr A"), from Meena Ajwani, and Serene El-Masri. Ms Ajwani is the DBDIFC Human Resources employee who was involved in an incident concerning Ms Waterhouse and Ms X in October 2011. She did not give live evidence. Ms El-Masri, was the Head of PWM MEA at DBDIFC during the

Relevant Period. Her evidence was challenged but she was not available to give evidence and we refer to that below.

22. The Appellant gave evidence herself as did her husband Mr Hitesh Patel and Ms Eva Horacek (now Abdelrhman) who carried out the survey referred to below. These witnesses all produced witness statements which in the case of Ms Waterhouse were substantial – the first alone running to 128 pages. She also produced witness statements from Vincent Scheurer, Charles Boyle, Joseph Barchini, Martin Homberger, Rachel Kebreth and later Georgina Porter and Michael Cafferty none of which were challenged by the DFSA. These witnesses, including barristers, solicitors, a forensic accountant, a former police officer and a doctor speak mainly to her impeccable character in both her professional and private life and her great skill and competence as a compliance professional over many years. She also produced a witness statement from Patrick Bourke, one of two Norton Rose lawyers who accompanied her to a compulsory DFSA interview on 2 February 2014. He produces his firm's note of part of that interview and it is not challenged by the DFSA.

23. **Representation.** The Appellant was at the outset represented by Mr Christopher Sallon QC but has conducted much of her case herself with the assistance and representation at the hearings of Mr Ian Wright and then Mr Ben Collins QC. Some applications such as the claims of bias decided below have been brought by Ms Waterhouse on her own initiative as a litigant in person and without any legal assistance. The DFSA has been represented by Mr Andrew George QC and Mr Tom Cleaver of Counsel and by Mr James Lake and his colleagues within the DFSA. When we refer in this Decision to 'Mr George' we usually mean 'Mr George and Mr Cleaver'. We are most grateful to all the lawyers on both sides without whom this case would have become difficult to manage.

24. **Relevant legislation.** The DFSA contends that, in the period from 1 January 2011 until her suspension on 22 January 2014 (the "Relevant Period"), Ms Waterhouse contravened the following Principles of the DFSA's Principles for Authorised Individuals set out in Section 4.4 of the General Module of the DFSA Rulebook ("GEN"):

- GEN Rule 4.4.1: Principle 1 - Integrity

  "*An Authorised Individual must observe high standards of integrity and fair dealing in carrying out every Licensed Function.*"

- GEN Rule 4.4.2: Principle 2 - Due skill, care and diligence

  "*An Authorised Individual must act with due skill, care and diligence in carrying out every Licensed Function.*"

- GEN Rule 4.4.4: Principle 4 - Relations with the DFSA

  "*An Authorised Individual must deal with the DFSA in an open and co-operative manner and must disclose appropriately any information of which the DFSA would reasonably be expected to be notified.*"

- GEN Rule 4.4.5: Principle 5 - Management, systems and control

  "*An Authorised Individual who has significant responsibility must take reasonable care to ensure that the business of the Authorised Firm for which he is responsible is organised so that it can be managed and controlled effectively.*"

- GEN Rule 4.4.6: Principle 6 - Compliance

  "*An Authorised Individual who has significant responsibility must take reasonable care to ensure that the business of the Authorised Firm for which he is responsible complies with any legislation applicable in the DIFC.*"

25. The DFSA also alleges breaches of Article 66 of the Regulatory Law which states:

    "*A person shall not: (a) provide information which is false, misleading or deceptive to the DFSA; or (b) conceal information where the concealment of such information is likely to mislead or deceive the DFSA.*"

26. **Authorised Individuals.** Under DFSA Rules, Authorised Individuals are required to comply with the "Principles for Authorised Individuals" set out in

GEN Section 4.4. The Appellant was one of four Authorised Individuals at DBDIFC, she and Nadeem Masud were the only ones concerned with these events, the latter only peripherally. As the DFSA website puts it *"Authorised Individuals are the officers or employees who carry out defined Licensed Functions within an Authorised Firm. These functions are materially linked to an Authorised Firm's management, and/or the provision of its financial services. As a result, Authorised Individuals must meet particular standards relating to their experience, knowledge and qualifications. A firm must make separate applications for each individual it wishes to become authorised. Applicants will only be authorised if the DFSA is satisfied that they are fit and proper, and that the functions of their role will be conducted and managed in a sound and prudent manner."*

27. Mr Stirewalt describes the role in his witness statement. Part of the relevant passage reads: *"The main contact at DBDIFC for all compliance and AML matters was the Appellant. The Appellant was DBDIFC's Head of Legal and Compliance. The Appellant was approved by the DFSA to perform the Compliance Officer and Money Laundering Reporting Officer (MLRO) Licensed Functions for DBDIFC. At all relevant times, I believe the Appellant had been the main point of contact between DFSA Supervision and DBDIFC. As an Authorised Individual, the Appellant had certain specific responsibilities under the DFSA's Rules. As the individual approved to perform the Compliance Officer Licensed Function, the Appellant had responsibility for monitoring compliance matters in relation to DBDIFC's Financial Services…"*

28. **The DFSA's case against Ms Waterhouse and her response.** The DFSA submits that Ms Waterhouse gave false or misleading information to the DFSA on several occasions, with knowledge that it was false or misleading or with recklessness as to whether or not that was the case. She also, it claims, failed over a substantial period to correct false or misleading information provided by herself or others. If that is established, the DFSA submits that it involves (i) a failure to act with integrity, contrary to Principle 1, (ii) a failure to deal with the DFSA in an open and cooperative way, contrary to Principle 4, and (iii) a contravention of Article 66 of the Regulatory Law.

29. Ms Waterhouse says as regards the allegations of false or misleading communications with the DFSA, that she believed them to be true. She did not know that Advising and Arranging was taking place; she relied on members of her team (notably Mr Parmar) to investigate compliance issues and to escalate any issues to her if necessary, and she was not aware of this issue and had no reason to be. As regards her alleged general failure to take steps as Head of Compliance to ensure that (i) the PWM business was being carried on in compliance with the applicable regulations and (ii) information being provided to the DFSA was true, she responds that her role was very demanding and that she lacked the resources to discharge it as fully as she would have liked.

30. **Abuse of Process and Bias.** Ms Waterhouse also asserts that the investigation by the DFSA was an abuse of process on various grounds and that her appeal should be allowed because of that, notwithstanding that this is a de novo hearing of the issues. We will turn to that aspect once we have summarised the facts as without these that debate cannot be properly considered. On 26 February 2019, following the hearing on 31 January 2019, Ms Waterhouse made an application alleging bias and / or apparent bias. We have dismissed that application for the reasons given in Annex 3.

31. **Basis for decision**. Our Decision is unanimous on all issues.

THE RELEVANT FACTS.

32. There is little dispute about what occurred in the Relevant Period, disagreement relates mainly to the Appellant's knowledge of and involvement in those events. In order to avoid frequent repetition later, at places in this section we first set out the relevant events with an indication of how the parties view them and our preliminary views about them before applying important more general considerations at a later stage. We mention only the events that we consider to be relevant but we have considered them all. Many of the matters raised concern issues important to Ms Waterhouse such as her treatment by Deutsche Bank AG and her colleagues which have a limited bearing on the issues we have to decide. In expressing views of the facts we bear in mind at every point that the burden of proof is on the DFSA not Ms Waterhouse.

2011.

33. In March 2011, Mr Danny Bower (Head of Business Management PWM MEA) expressed a concern to Ms Waterhouse by email that the compliance framework governing PWM MEA employees was inadequate to support the regulated activities of Advising and Arranging "*I think they were drafted / reviewed by my predecessor and, unless I have misunderstood, I am concerned that they are not representative of actual practice, appear to confuse policy / procedure of 2 (or more) PWM locations and generally seem to suggest practices that we cannot practically implement*." He suggested a conference call between himself, Daniel Coianiz, and Ms Waterhouse "*in the next 10 days or so*". The KOPs (Key Operating Procedures) described a process of client classification, saying "*Business can only be conducted with a Client which Deutsche Bank AG Dubai, (DIFC) Branch ('Deutsche Bank Dubai') is satisfied meets the regulatory Client Classification requirements as determined by the Dubai Financial Services Authority […]*". They also referred to requirements on DFSA Authorised Firms to notify the client of his classification status, and to keep a record of that notice and the analysis undertaken to support the classification. Mr Bower's comments on the document made clear that the PWM MEA teams were not doing those things. Ms Waterhouse asked Mr Parmar to look into this.

34. On 12 April 2011, Mr Parmar wrote summarising his "*understanding*" of the PWM team's business, including that "*PWM does not engage with clients within the DIFC*". He wrote: "*To the extent that a PWM relationship manager sitting in the DIFC is engaging with a PWM client the likelihood is that regardless of where that client is based, the client will need to be classified under DFSA regulations AND classified under the regulations of the booking centre (e.g. Switzerland). Saxo Bank have recently been censured by the DFSA with regard to not classifying clients locally which has a* [sic] *triggered a review of our clients base across all divisions to ensure that we are in compliance. This is work in progress. We will need to have a think about how or if this can be achieved given Swiss privacy rules*." He looked further into the issue and replied on 17 May 2011 (including copying Ms Waterhouse) saying that although it appeared to him from Mr Bower's description of the team's

work that no regulated activity was taking place, "*the situation is somewhat grey*". Mr Parmar said "*As discussed during our call a few weeks ago, the question is whether the type of activity that PWM individuals in the DIFC are undertaking constitutes carrying on a Financial Service. If it does, then the relevant provisions within the DFSA conduct of business rules and general module would apply […] Having looked at the rules, my view is that based on what you'd described during our discussion (i.e. the set up of the team, the activities that they undertake and the means by which they undertake such activities), that the individuals are not undertaking Financial Services activities and as such that DFSA provisions would not apply or be of relevance. However, the recent censure of Saxo Bank by the DFSA […] means that the situation is somewhat grey and forces institutions like DB to look at their activities in order to see whether or not the provisions apply. On 7th June there will be an industry seminar led by Clifford Chance where this issue will be discussed. […] As such I would propose that we put this exercise on hold so that we can obtain more clarity before coming back with a more informed view*." (D/10/42).

35. In May 2011, the Appellant received an invitation to a Clifford Chance seminar about "*Client Take-On*" and sent it to her Compliance colleagues Mr Parmar and Mr Polli saying "*As a minimum, I think one of us should attend*" and explaining the reasons why she could not attend. At the UAE Executive Committee meeting on 22 June 2011, she "*reported on the DFSA's highlighted awareness on client adoption processes, regardless of geography if have involvement by DIFC employees*". Ms Waterhouse also apparently attended a seminar organised by Deloitte Dubai on 12 June 2011 about the same topic, described as follows: "*The recent political and economic climate have resulted in the regulator taking an almost "zero tolerance" policy for regulatory non-compliance. DFSA has increased the number of thematic reviews undertaken at DIFC Institutions. These reviews are primarily focusing on the firm's KYC & client on-boarding. Focus is also on clients booked in offshore BCs but serviced out from the UAE (and particularly Dubai). This leads to the situation that for all clients serviced from the UAE a KYC and its regular reviews together with copy of identification […] will have to be maintained locally*." (D/17/85).

36. Ms Waterhouse says that there was nothing in the 17 May 2011 email from her technically able deputy to alert her to anything being amiss. She submits that the DFSA's reliance on the conferences confuses the question of advising and arranging with the wider questions of a prospect becoming a client and of the situation where a client is being provided with services both in the UAE and elsewhere.

37. In June 2011, DBDIFC engaged external lawyers (DLA Piper LLP) to give advice on DBDIFC's client take-on and AML processes, including in relation to the PWM business. DLA Piper LLP replied on 4 July 2011 noting that one issue that would need to be explored was "*whether the Private Wealth Management clients indeed qualify as clients for the DB DIFC Branch and if needed, assist in preparing/reviewing guidelines in relation to client contact originated or conducted by the DIFC branch, aimed at avoiding that such clients are qualified as DIFC clients*.", and raising the possibility of sampling "*a random 10-20% of any correspondence and other interaction originating from the DIFC branch to verify that indeed no advisory or transactional services have been rendered*". Ms Waterhouse received that email (D/19/93).

38. Mr Parmar summarised the email for Ms Waterhouse seeking to discuss this, essentially recommending that they proceed: "*On the whole, Aryan has a good idea of what we're looking for and I think with a little better understanding of our practices coupled with his knowledge of the rules, it should enable him/DLA to come up with a remediation plan.*" (D/19/92). No sampling exercise was conducted at the time. Ms Waterhouse points to the fact that the advice was sought on a wider range of questions than PWM. Ms Waterhouse did not agree to the further work but the DFSA has not persuaded us that by this stage she had reason to be alerted to the possibility of breaches. Offers by law firms to do further work need to be scrutinised and, where there was as yet no reason to suspect that breaches had taken place, except perhaps what was implicit in the use of the word "*remediation*", this was a reasonable judgment for the Appellant to make.

39. Ms Waterhouse was copied into an email from Mr Parmar on 8 August 2011 to another Compliance employee (Stephane Polli) asking him to prepare a note about DFSA Rules concerning the offering of financial services, and saying:

"*Please keep in mind that from Danny's perspective, the current activity that PWM in the DIFC are undertaking is on an introduction/referral basis only to Switzerland. Although this might be different to actual practice and what PWM may implement going forward, the email should take into account the practice as Danny sees it."* (D/22/96). That email expressly raised the possibility that the introduction/referral model "*might be different to actual practice*".

40. On 8 November 2011, Daniel Coianiz of DB Suisse emailed Mr Parmar and Ms Waterhouse asking for an "*update*" on the issue of "*DFSA Rules – what constitutes the offering of financial services*" (D/107/393). After a short exchange Mr Parmar had replied "*I am out of the office until 20th November. If you have any further questions, please speak with Anna*." (D/107/391). Mr Coianiz followed up by saying (typos in original): "*What I basically need is an assessment on the direction were are taking in regards to our key ops redraft, other? In the end we have people raising lately a lot of question about our PWM platform in Dubai and what service we are able to oprovide based on our key ops: if this has to chanhe I need to communicate*" (D/107/391).

41. Mr Coianiz's query led to discussion between Ms Waterhouse and Mr Polli, the latter forwarding the memo he had drafted on 8 August 2011, together with a covering note reiterating "*the scope of the memo, as per Chet's instructions*" with Mr Parmar's comment that the "*introduction/referral basis […] might be different to actual practice*". Ms Waterhouse replied asking "*Thanks. Pls can you follow up with Danny to see whether they have amended their key ops as a result and if so, whether we can have a copy?*".

42. Serene El-Masri who had joined DB in June 2011 as the new head of PWM MEA says in her statement that she orally raised concerns similar to those raised by Mr Bower soon after her appointment. She says that in September and October 2011 she raised concerns that Advising and Arranging were in fact already taking place. Ms Waterhouse disputes that. There is no documentary evidence of this beyond another email of 8 June 2011 showing that Ms El-Masri tried to set up a discussion with Ms Waterhouse and Ms Zubkus about "*the upping of regulatory pressure in the UAE (incl the DIFC)*", which "*leads us to monitor our activities more closely*" (D/12/50). There is therefore no reliable evidence to contradict Ms Waterhouse's recollection which we therefore accept

given our conclusion below that where a statement by Ms El-Masri is not supported by other material or clear probabilities we should not accept it.

43. The DFSA conducted an annual supervision-related site visit at DBDIFC's offices in October 2011, in the course of which it asked questions about (among other things) the activity of the PWM team, which was recorded for regulatory purposes as having no clients. Ms Waterhouse notified Ms El-Masri of this in an email (D/34/141). A visit of this kind from a Regulator is important and would have concerned and engaged any Head of Compliance. It resulted in the DFSA focusing directly on the question of what the PWM team did and whether it could truly be said to be limited to introduction/referral such that it fell outside the scope of regulation, and seeking specific confirmation from Ms Waterhouse about that issue. The PWM team's activity was raised in general terms in advance of the visit. On 18 October 2011, Rose Plunkett of the DFSA asked for a *"client list for PWM clients […] so that we can choose a number of PWM files to review"* (D/53/202). In her reply, Ms Waterhouse said *"I would also like to clarify that because the principal activities of the PWM team in the DIFC are advice and referral, we do not believe they currently conduct regulated activities from a DFSA perspective"* (D/53/200). She followed up to correct 'a typo': *"advice and referral"* should instead have said *"information and referrals"* (D/53/199). Ms Plunkett replied indicating that *"PWM activities"* would be discussed during the site visit (D/53/199). The DFSA visited DBDIFC on 19, 20 and 26 October 2011 to conduct a risk assessment.

44. Ms Waterhouse accepts that she sent the emails on 18 October 2011, and says that she did so in reliance on information written by Mr Parmar in her (Ms Waterhouse's) notebook (A/2/10/§19). Mr Parmar disputes that he wrote any such note or ever wrote such notes (F/5/243). Neither the DFSA nor Ms Waterhouse has the original notebook and it is not clear whether it still exists. (In his own responses to the DFSA Mr Parmar disputes that he was ever appointed as 'Deputy' Compliance Officer or that the degree of delegation was as Ms Waterhouse claims. He claims that Ms Waterhouse was the main contact with Ms El-Masri on significant matters as they and not he were both part of senior management. Mr Parmar is correct that he was never formally appointed Deputy Compliance Officer). Just before the 19 October 2011 visit, Mr Parmar

forwarded Ms Waterhouse the 4 July 2011 email from DLA Piper about the PWM work proposal and said: "*FYI – the PWM section of Aryan's email to us (I am not proposing we share all of the advice) is helpful too*."

45. The DFSA originally planned to interview only Mr Al-Khalifa and Ms El-Masri during the risk assessment visit. In his interview, Mr Al-Khalifa talked about his plans to expand the PWM business in the DIFC, including by adding senior relationship managers and having a senior wealth planner "*to work with family offices and individuals on advisory*". At the end of Mr Al-Khalifa's interview, Ms Waterhouse confirmed that "*On PWM […] DIFC branch refer clients to Geneva, where all execution is taking place*". At the end of the scheduled interviews, the DFSA asked to interview a PWM relationship manager, and Mr Parmar arranged for Mr Haider Hammoud to be called in and asked about his work. The interview was held "*to establish his role in Private Wealth Management as Relation Manager (DB stated that only referral business is conducted in DIFC branch)*". Mr Hammoud described a "*very close relationship*" with his clients, with "*a lot of hand holding and facilitation*" and "*no handover*" (D/57/224).

46. Immediately after the interview, Ms Plunkett expressed the view to Ms Waterhouse and Mr Parmar that Mr Hammoud's answers "*appeared to indicate that he was providing advice and arranging rather than providing a referral-only service*" (D/57/225). According to the DFSA's record, "*AW advised that HH had 'overegged' his position and DB was only engaged in PWM referral business. RP advised that DB needed to set out in writing what it does in context of PWM […]*" (D/57/225). In her later DFSA interview Ms Waterhouse did not recall saying that Mr Hammoud had "*overegged his position*" or accept that it would have been wrong of her to say it (T4/143-144). She accepted that the DFSA conveyed the message during the risk assessment visit that the firm needed to provide training to relationship managers in the DIFC branch to make sure they were fully aware of the difference between introduction/referral and advising/arranging (T4/148). She got the sense, as she said in evidence that the DFSA was '*perhaps sceptical*'. Ms Plunkett, who no longer works for the DFSA or lives in Dubai, wrote the record. We reject the criticism that she should have been called as a witness. She had no reason to fabricate or

embellish her notes and the differences between the parties are not wide. In the real world it is unlikely that this lady would have had anything useful or reliable to recollect beyond what is in her note. It was clear that whatever the degree of delegation of this project to Mr Parmar Ms Waterhouse had some involvement, unsurprisingly given that this was a dialogue with the Regulator. It was also clear that the question of whether PWM was conducting regulated activity was in the air.

Emails and other events of 30 October 2011.

47. 30 October 2011 was the Appellant's first day back in the office following an extended period away from the office and her desk hosting "VIPs" and attending external meetings. She also recalls that she was distracted by an incident involving Ms X. This "X incident" is controversial and we deal with it separately.

48. On 30 October 2011, Ms Waterhouse sent an email to Ms El-Masri stating "*By way of update from the DFSA visit, they eventually accepted our analysis that the PWM business prospected in Dubai did not constitute a DFSA regulated activity as of now*" and had "*asked that I set out a brief and non-legalistic description of the existing scenario, for their records*" (D/80/305). The email attached, for comment, a draft note prepared by Ms Waterhouse which she intended to send to the DFSA. That note said: "*From the DIFC Branch, PWM Dubai act in the capacity of identifying and the minimum prospecting of potential client targets on behalf of the offshore PWM booking centres (including, but not limited to Geneva and Luxembourg). The DB DIFC model is then the identification, introduction and referral of prospects to PWM teams offshore, who may or may not ultimately* [be] *adopted by that offshore entity. Members of the PWM Dubai in the DIFC do not provide investment advice to prospect clients of offshore PWM booking centres*." (D/80/306).

49. Ms El-Masri replied that day:

"*Hi Anna,*

I am fine w/ the attached being presented to the DFSA w/ minor amendment: the "larger" team today is by far the South Asia team.

Also internally, and as I have often mentioned to you, Salman, Philippe etc, I wanted it to be recorded that:

A) I have no responsibility over the Asia team: this is key as I have recently learnt that they actively prospect MEA clients, incl. UAE Royals, theoretically outside their remit. Given their high use of leveraged structure products in their client pitches, and the aversion of UAE CB to these instruments, I can assume no responsibility w/ regards to eventual negative repercussions stemming from their activities. I have naturally raised this issue with their Reporting line in Asia and have to date not received any answer.

B) I have indicated that PWM MEA DIFC is already not limiting itself to pure referral activities but is already engaging in advisory. Whilst this is covered by our branch license it is not formally documented w/ the client as per DFSA requirements. This issue, as well as others discussed w/ you (marketing to UAE residents from the DIFC and abroad, Abu Dhabi 'presence'), need to be addressed via an implementation of proper dos and donts [sic], *training, as well as client documentation and records. I remitted a document in June that should help us in implementing part of this framework and, following approval on my development plan, the PWM EMEA COO launched officially last week a "Dubai project" aiming to address these gaps in view of our development plan.*

I am as keen as everyone to do so ASAP.

Very best,

Serene El Masri

Head of Private Wealth Management, Middle East & Africa" (D/92/337).

50. Ms Waterhouse replied, also that day "*Thanks. Completely understood. This document is for a very specific purpose but confirm I am aware of your position in respect of i) and ii) below*.". Ms Waterhouse sent the note to the DFSA without amendment the following day (D/99/356, 361). Ms Waterhouse promised to notify the DFSA of future internal audits.

51. Ms Waterhouse says that she believed this note to be accurate. She says there was a further oral discussion in between the two emails in which Ms El-Masri effectively withdrew what she had said. "*At some point after I received SERENE EL-MASRI's response, I had a discussion with her and asked her to explain why she had written what she had written. It was fundamentally at odds with what she had told the DFSA a few days earlier and I had <u>not</u> been told by her that PWM were already engaging in advisory. II* [sic] *recall that her explanation to me was that she did not in fact mean that regulated activities (such as advisory) were being undertaken without a proper compliance framework being in place, but rather that she couldn't exclude the possibility that one member of her team had without her knowledge provided advice*." (C/87/1957/§181-182). She says both that she failed to recognise the problem but was reassured by this subsequent discussion. The subsequent discussion which she recalls presumably only came about because she had at some stage indeed seen the problem, whether from Ms El-Masri's email or otherwise.

52. There is no contemporaneous record of this and Ms Waterhouse's email reply neither mentions it nor seems consistent with such a conversation having taken place. Given the explicit email exchange initiated by Ms Waterhouse herself and the important nature of the alleged clarification, this is surprising. Ms Waterhouse's recollections are unlikely both to be right. If she had the discussion with Ms El-Masri she must have first understood the significance of the emails and not failed to recognise it. If she had failed to recognise it she would not have initiated the discussion. She also makes many criticisms of Ms El-Masri and her motives for replying as she did. She may be correct but that is irrelevant to the significance of the plain words of the email exchanges. We believe that, given prior events and in particular the 30 October 2011 email exchanges and subject to the issue of the incident we refer to next, it would have been quite clear to any Compliance Officer and almost certainly was to Ms Waterhouse that there was a serious live regulatory issue which required attention.

The incident(s) involving Ms X.

53. Ms Waterhouse's other explanation for her reply to Ms El-Masri on 30 October 2011 is that she was generally stressed and particularly as a result of an angry

confrontation earlier that day with Ms X, with the result that she did not 'take in' the contents of Ms El-Masri's email. She says in her first witness statement (Para 187) *"I have no doubt that the highly unusual incident involving* [Ms X] *had a very significant effect on my approach to Ms El-Masri that day and my ability to process the significance of the information contained in her email to me of 5.33pm."*. She goes on to describe some unhappy and noisy scenes in the office caused by Ms X.

54. The written evidence of Meena Ajwani is that there was indeed a serious incident involving Ms X in which she became involved in her HR role similar to that described by Ms Waterhouse but it occurred not on 30 October 2011 but on 6 October 2011. She sought to calm Ms X and took her out to lunch. She reported the matter to Martyn Bagnall, the Head of Human Resources for MEA and confirmed this in emails dated 6 and 8 October 2011 (D/45/165-166). On the evening of 6 October 2011 at 7:53pm Andrew Sowter emailed Ms Waterhouse (i) notifying her that Mr Bagnall had been contacted by Ms X who had asked him for a meeting, (ii) notifying her that Mr Bagnall would also contact Ms Waterhouse herself, and (iii) saying "*I will call you tomorrow to catch up*" (D/41/155). That evening Mr Bagnall also emailed Ms Waterhouse saying "*Anna – if you want to give me a call over the weekend, happy to talk as I gather you have had a torrid time today*." (D/42/156). Ms Waterhouse replied: "*Thanks Martyn- appreciate it. Yes, a truly awful day but am concerned first and foremost that* [Ms X's] *health does not suffer. If there is any assistance DB can provide on this front, I think it should. Will give you a call tomorrow, when we've both had chance to catch up on sleep. Thanks also to Meena for her help this afternoon.*" (D/42/156).

55. Ms Waterhouse does not accept that this was an understandable misrecollection about dates. In her witness statement, prepared after she had seen Ms Ajwani's statement, Ms Waterhouse says for the first time- "*There was more than one incident involving* [Ms X] *and myself during October 2011 which is relevant to this Reference."* She insists that there was an incident on 30 October 2011 but there is no contemporaneous evidence to support that. In support of her position, she refers to her own enquiries of Ms Ajwani in 2014 which led to a reply in the latter's absence from Mr Bagnall *"I have checked in X's electronic*

file to see if any file note was made by Meena at that time but there is nothing there. X's paper file is in archive storage; before I ask for it to be retrieved, can I ask the reason for your request." On 9 July 2014 Mr Bagnall (Exhibit AW2-19) wrote: *"Anna I discussed the first issue with Meena on her return from leave on Sunday. As I suspected, no file note was made of the incident and she cannot recollect which month it happened in."* She also relies on the evidence of Mr Patel who recalled that the incident was after Ms Waterhouse's birthday party on 13 October 2011 but also that there had only been one incident of this magnitude and that he knew of no other. That recollection helps both sides but, despite the obvious truthfulness of Mr Patel as a witness, carries little weight. He was simply doing his honest best to recall an incident some years previously of which he would have no direct knowledge beyond what his wife told him.

56. The DFSA points to what it says is a developing story about this incident. Originally, in her DFSA interview on 30 June 2014, she referred to an incident on a date "*around* [the] *time*" of the 30 October 2011 emails (G/12/2198). "*What I don't know is the date of that occurrence. […] I think what I'd be happy saying is that there was a deteriorating situation, I'd say, from the middle of October, for a number of weeks until it was ultimately resolved, but it was in the same time period, but I don't have a record myself of the date.*" (G/12/2200). In interview on 14 January 2015, Ms Waterhouse said that she could be "*fairly certain of the timing*" and that it was "*during the week commencing 30 October*" (G/19/3831 to 3834), but that she could not say with certainty whether it was before or after her email exchange with Ms El-Masri (G/19/3839). In the instructions which she provided to Professor Hirsch in around May 2015 (E/3/65), she referred to the incident as having happened "*with no warning […] on my return to the office on 30.10.2011*" (E/3/74/§29). In June 2016, Ms Waterhouse's written representations to the DMC addressed the incident at (F/4/198), placing it "*in the course of the afternoon of 30th October*". In evidence Ms Waterhouse seemed unable to explain how she had managed to narrow her recollection of the date of that incident over that period. She could not identify any documents which supported the 30 October 2011 date on which she had alighted in about May 2015 (T4/163-166).

57. Mr George's submissions make other points, which to us are convincing, relating to the subject matter of Ms X's complaint, to the relative chronology and to the difficulties in accepting that there was a second incident which Ms Waterhouse insists was even more serious than that on 6 October 2011. There is abundant evidence that there was one incident on 6 October 2011 and none, other than Ms Waterhouse's recollection, that there was another more serious one on 30 October 2011. It is puzzling to us that instead of accepting that she has very understandably misrecollected a date Ms Waterhouse has gone to very great lengths and spent much energy on building a case, on a peripheral matter, which in our judgment is obviously mistaken. There was no incident on 30 October 2011 and even if there had been, we would have found it difficult to understand how, given Ms Waterhouse's other explanation of the emails and her conversation with Ms El-Masri, it could have prevented her from focusing on the issue in the manner she alleges.

November 2011.

58. The DFSA's Final Report on the Risk Assessment (contained in a letter dated 14 November 2011) raised the issues arising from the introduction/referral business model as something that would need to be monitored: "*The current structure of trading operations in DBD with the booking of deals and risk management conducted elsewhere in the Group merits some consideration with regard to the control framework. It is recommended that an internal audit review of front office controls in DBD takes place in 2012*." (D/110/403).

Country Risk Workshop.

59. DBDIFC Country Risk Workshop, promoted from outside the country took place on 22 November 2011 by Operational Risk Management. The Country Risk Workshop was an important exercise at which senior representatives of all departments, including Ms Waterhouse, prepared slides and presentations. They did so at the express request of Mr Vollot, the Chief Operating Officer for the MENA region, who referred to it as an "*important exercise*". Ms Waterhouse accepted (T4/196) that it was important that she listen to her colleagues' presentations to hear the potential risks they might identify (T4/197). Ms El-Masri gave a presentation on the risks facing PWM; Ms

Waterhouse was present for Ms El-Masri's presentation and the written material submitted by Ms El-Masri to accompany her presentation made clear that the PWM team was already Advising and Arranging (A/2/14/§35). Ms Waterhouse gave evidence that she missed the beginning of the workshop because of an urgent business enquiry (T4/199) but accepted she "*participated in most of the event*" (T4/199) and that she was there for Ms El-Masri's presentation (G/12/2211). She produced her own slides and had them reviewed on 18 November 2011. It is clear from Ms Waterhouse's notes of the workshop that she attended the relevant part of the presentation (D/102/377).

60. The introductory slides to the PWM section of the workshop said, in large text under the heading 'Risk Parameters': "*1. Our existing procedures, KPIs, client contractual documentation and client data recording practices are not adapted to an advisory model. The latter is already a reality, with PWM DIFC teams providing investment advice to clients. All the above need to be updated – which may conflict with certain booking center regulations if proper care is not applied*." It also referred to the risk of "*Compliance & Legal resource constraints & potential delay for developments that are regulatory necessities*." (D/118A/446). The more detailed slides contained a summary of both issues. The regulatory issues posed by the advisory model were identified on the risk assessment matrix, the risk was categorised in the highest bracket of 'Critical' (incidence 'Likely' and harm 'High'). The issues posed by resource constraints and delay were identified including the text: "*Without mentioning PWM's development plan, it's* [sic] *current status already requires a heightened attention from Legal & Compliance. The lack of resources within these departments (coupled with resistance against local delegation from non-Regional Function teams) has meant that the control & monitoring upgrades proposed by PWM since June have not resulted in the required actions*." It also highlighted two specific points about why the risk was significant: "*On-going discussions with Compliance following PWM identification that existing policies, guidelines & procedures were no long* [sic] *fit for purpose*"; and, "*Following Oct. DFSA visit, the PWM development project is likely to receive special attention*." Ms Waterhouse accepted in oral evidence that the slides contained a very clear statement that Advising and Arranging were taking place, and that if she had seen it it would have "*raised a definite red flag*"

(T5/71). A bound copy of the collected slides was created for the meeting: the printing and binding of the materials was identified expressly as a "*Pre-workshop*" item (D/118/421). According to Rudiger Kaiser, who chaired the event, it was provided to all attendees in hard copy (J/3/200/footnote 80). Mr Vollot appeared to recall having been given it (G/10/1686). When asked about it in interview, Ms Waterhouse said (G/12/2212): "*Q. Now, do you recall having a pack of documents? A. I'm sure we did, but I can't remember which documents […]*". Ms Waterhouse knew that slides were prepared for the meeting, as she had spent some time working on her own (T5/73). Ms Waterhouse says that Ms El-Masri did not mention the matter in her presentation and points to similar recollections of Mr Vollot and Mr Masud. Mr Collins submits that this allegation depends on a self-serving allegation by a liar Ms El-Masri.

61. The risk raised by Ms El-Masri at the workshop was later discussed with Ms Waterhouse, who was asked about the best way of summarising it for the record. Mr Rudiger Kaiser wrote to Ms Waterhouse raising the PWM team's activity as "*one of the main issues identified in the CRWS yesterday*" and asking for her help in redrafting his summary: "*The wording needs to be streamlined in a way to have it clear but not harming if any regulator would read it.*" (D/120/513). Ms Waterhouse redrafted it. She did not query or challenge the suggestion that the text should be redrafted so that a regulator reading it would not be alarmed: her evidence was that Mr Kaiser was not a native English speaker and that she understood him to be asking whether he had "*accurately described a regulatory issue*" (T5/81). The resulting email referred to Advising and Arranging as a future not a current issue. "*PWM plans significantly to increase advisory resources in Dubai"* became, presumably for a purpose clear to Ms Waterhouse when she changed it, "*Due to PWM's expansion plans in MENA (in particular providing advisory services from the DIFC Branch), it is necessary to review existing compliance oversight of such activities.*" (D/120/513). The change also indicates that Ms Waterhouse was aware of the regulatory issue being discussed.

62. The DFSA points out that the significance of this does not turn on the credibility of Ms El-Masri. This was a major event conducted at senior level in which a

Compliance Officer would take a particular interest, perhaps more than any senior manager. It would be odd for a speaker not to mention matters of significance on her slides. The compliance point would by its nature be more likely to catch the attention of the Compliance Officer than others. Further the exchanges with Mr Kaiser speak for themselves. Ms Waterhouse's reliance on the fact that Ms El-Masri also approved her change does not assist. She must have made a change for a purpose, and have had sufficiently clear a grasp of what had happened at the workshop to be asked, and to have felt able to do so.

63. In November 2011 Ms Waterhouse assumed the additional duties of Head of Legal for the MENA region.

64. In December 2011, Ms Waterhouse prepared a draft letter to the DFSA explaining the remediation carried out in relation to the issues identified in the course of the earlier Risk Assessment visit (which the DFSA had requested by the end of the year). She sent it to Mr Parmar for him to tidy it up and send it on her behalf (D/134/570). The letter attached a framework Risk Mitigation Programme (D/134/573). One topic addressed in that document was the identification of the point at which a client relationship ceased to be active. The document recorded that that analysis was not applicable to PWM because "*wealth management employees do not provide any of the services set out in Schedule A [an attached schedule listing the Financial Services provided by DBDIFC]. The mere introduction and referral of prospective clients to booking locations like Geneva, does not constitute providing financial services*" (D/134/579). The letter and attachment were sent on her behalf (pp) by Mr Parmar on 22 December 2011 (D/138/596).

65. The DFSA says that the wording implied that there had not been Advising and Arranging in a context where she had known since October that the DFSA was interested in the subject. It says that she knew that the implication was false or, at least, that she was reckless in not investigating the matter when it was so obviously live. Ms Waterhouse says that she believed that the information was true and the wording reflected what her colleagues had approved.

2012.

66. By early 2012 the PWM team was expanding with a significant number of new relationship managers joining the team in the DIFC (D/147/620). However, the procedures were not yet in place to allow Advising and Arranging in compliance with DFSA Rules. In early February 2012 the documents were being worked on by DLA Piper. Mr Schoorl sent some drafts to Mr Parmar and Ms Waterhouse on 8 February 2012. In that period Ms El-Masri sent Ms Waterhouse and Mr Parmar a number of emails in which she referred to the fact that the PWM MEA team was already providing Financial Services. On 12 February 2012, she wrote of the need to produce a "*client DIFC agreement template so that we can start regularizing this with all existing clients*" (D/148/621). On 16 February 2012, she wrote "*We need to consider new business is coming in all the time (in KSA and the UAE) w/out proper agreements being signed by the clients …*" (D/153/643). Ms Waterhouse says that she did not see the emails as she was on holiday and that they fell within the province of Mr Parmar.

67. On 29 February 2012, Ms El-Masri wrote in relation to a newly hired Relationship Manager in DB's Qatar office, saying: "*Our RM in Doha is ideally to act in the same way as RMs in Dubai i.e. he should solicit, market and advise Qatari clients*." (D/155/649). Ms Waterhouse says that the emails themselves "*look forward to the time when DIFC was going to adopt an advisory model*." (A/2/17/§43). That does not seem to reflect their texts. She also says that she "*did not consider these emails in detail as they were the responsibility of CP*".

68. The DFSA contends that Ms Waterhouse had been involved closely in the process of developing the new policies. She had attended a meeting with DLA Piper in December 2011 about the project (D/125/551, D/127/553). She had liaised with DLA Piper by email about the costs of the exercise (D/125/550); she had been the one to update Ms El-Masri in December 2011 about the progress of the work to date (D/126/552). She had done some drafting of her own in relation to the scope of Financial Services under the DFSA Rules as it applied to the PWM team, which she sent to Mr Parmar for his comments ("*Great if we can speak briefly on this tom am – will explain what I'm trying to do with this doc*") (D/128/559). Ms Waterhouse forwarded Ms El-Masri's email

of 12 February 2012 to Mr Vollot saying "*By way of update see Serene's comments below – we have made good progress with documenting the PWM-relevant policies & procedures*." (D/150/625). She replied directly to Ms El-Masri's email of 29 February 2012, (D/156/651). Ms Waterhouse surprisingly disputed that the fact that she had forwarded Ms El-Masri's email of 12 February 2012 to Mr Vollot with comments on its contents (D/150/625) meant that she had read it in any detail (T5/93).

69. Ms Waterhouse says that she did not see most of these messages, their implications are only apparent in hindsight and this was a matter which she had delegated almost entirely to Mr Parmar. In his own submissions to the DFSA he denied that. On 3 April 2012, Ms Waterhouse and Mr Nadeem Masud (DBDIFC's Chief Country Officer for the UAE and also an Authorised Individual) met the DFSA to provide a 'business update'. The DFSA's note of the meeting records (D/164/668): "*RP asked if the firm had considered its plans with regard to its private wealth management referral business, as discussed at risk assessment last year. AW advised that the firm had reviewed its business model and that this exercise was complete. Firm now looking at compliance framework for the PWM unit to move to arranging/advising in the DIFC rather than just referral. Firm will revert to DFSA when in a position to update*.". The DFSA says that this is the continuation of the same misleading theme. Ms Waterhouse says that she believed this to be true and that the subject was not the main focus of the meeting.

70. On 11 April 2012, Ms El-Masri sent an email to Ms Waterhouse and Mr Parmar, ("*Dear Anna and Chet…*") copied to Mr Bower, in connection with the draft compliance framework proposed by DLA Piper LLP, which included the following statement about the activity of PWM MEA: "*the RMs remain in charge of the client relationship and do get involved more sporadically in providing investment advice themselves […] Am concerned with the fact that we are actively advising clients here and still do not frmalize* [sic] *this in a properly documented manner with our clients*." (D/167/691). It appears that no action followed despite the explicit disclosure. Ms Waterhouse says in her opening submissions: "*The Appellant was on holiday at this time; and she had delegated the PWM transformation project to Mr Parmar – who did in fact*

reply to Ms El-Masri's email dated 11 April 2012." Ms Waterhouse said in her first witness statement: "*I was out of the Dubai office between 5/4/12 and 21/4/12. During this time, I took a holiday with my family in Sri Lanka I…… was making a conscious effort not to check or respond to emails apart from in relation to a few critical problems, which were ongoing at that time. Unfortunately, various people did track me down by phone and I did have to pick up some other ad hoc urgent matters.*" In the Statement of Case she says "*Her holiday practice was not to check emails and her work colleagues knew that any urgent contact should be by phone call. On 11 April itself she received a phone call from CP to check her safety as there had been a Tsunami warning issued for Galle and the surrounding area. In consequence AW was evacuated with her family to high ground and was out of contact. So, she did not receive the email then and later did not read it.*" (A/2/18/§47).

71. Mr Parmar denied in interview (although we bear in mind throughout that he was not a witness in this case and that what he says lacks that weight) that Ms Waterhouse did not deal with emails when on vacation and produced some examples. He also said that while he dealt with more mundane matters like the guidelines being drafted, the serious matter of the alleged breaches was raised by him on Ms Waterhouse's return to be dealt with by her with Ms El-Masri, given the seniority of them both.

72. The DFSA does not accept that she did not read the email on holiday but says that even if that had been so she would obviously have read such a serious message on her return. This was an important matter on which DBDIFC was taking external legal advice, and it was obviously something in relation to which a Head of Compliance would have wanted to investigate, and certainly should have done so. It was an even clearer statement than those in February 2012 that Advising and Arranging were already taking place in the PWM team. They point out that in interview both Mr Bower and Mr Parmar later said that this is when they became aware that Advising and Arranging were taking place without proper compliance. (They had not received Ms El-Masri's email of 30 October 2011.) Ms Waterhouse accepted in her oral evidence that this email "*would have raised red flags*", and that she "*would have been required to immediately say 'Stop doing that if that is happening' and updated the*

regulator" if she had read it (T5/106). Her position is that she did not read it because she was on holiday at the time.

73. The DFSA points out that originally, Ms Waterhouse's position was that she did not read this email because of a general practice of not checking emails while on holiday. Documents were later disclosed showing her replying to many emails while on holiday at different times. She accepted in oral evidence that her pleading was "*not true as an absolute statement*", saying that it had been "*drafted by one of the lawyers in my team*" (T5/104). In her first witness statement she referred to the specific case of a Sri Lanka holiday in April 2012. As she put it at (C/87/1977/§294), she was "*making a conscious effort not to check or respond to emails apart from in relation to a few critical problems which were ongoing at that time*." The DFSA says that this is illogical as the only way to check whether an email was 'urgent' would be to read it and see what it was about. Mr Collins points out that it is easy to check emails broadly without reading them by looking at the heading of the message in the Inbox. Mr George suggests that if anything was sufficiently urgent to justify Ms Waterhouse dealing with it while on holiday, it was an email in which Ms El-Masri was clearly stating something which meant that information which Ms Waterhouse had provided to the regulator – in October 2011, December 2011, and at the very recent 'business update' in April 2012 – was false. He also emphasises that the email from Ms El-Masri, who was senior to Ms Waterhouse (T5/120), was addressed to "*Dear Anna and Chet*". He also points to evidence obtained through the Article 80 request we refer to when dealing with abuse of process, that Ms Waterhouse read and replied to many obviously less important emails while on holiday including ones about the cost of a Sharepoint site (D/166H/689), the approval of an expenses claim (D/171E/711) and an unsolicited request for work experience from a Year 12 student (D/171G/713). The DFSA also relies on the evidence of Mr Patel that Ms Waterhouse would regularly use hotel business centres and her BlackBerry while on holiday (T4/17, 21). He also confirmed that that was the case for their holiday to Sri Lanka, and that there was never a holiday in which she took a different approach (T4/22). In addition, Mr George points out that Ms Waterhouse was reading and replying to emails at about the time that Ms El-Masri's email arrived: (T5/118-123), (D/171C/708-709)-including two about a proposed hire

of a new lawyer. The DFSA claims that the Tsunami had no relevant effect on the practice of Ms Waterhouse of reading some emails on holiday. Mr Collins responds that Ms Waterhouse naturally dealt with emails of a personal kind or which were time sensitive, but not those which were clearly the responsibility of her deputy who was in a senior position.

74. Ms Waterhouse's claims about her practice with email on holiday were at first clearly exaggerated and receded in emphasis as the case continued and disclosures of emails were made. We would not be at all critical of an employee who read no work emails on holiday on the assumption of course that he or she caught up when they returned. There was no need for Ms Waterhouse to adopt these positions about her own email habits. A message of this importance addressed directly to her as well as to Mr Parmar would have come to her attention at some point and required action. Given the seniority of Ms El-Masri and the fact that the message disclosed a clear regulatory problem it was obviously something for the Compliance Officer to deal with.

Internal Audit.

75. On 22 June 2012, Mr Parmar sent an email to Ms Waterhouse in the context of an Internal Audit being carried out as part of the DBDIFC PWM team. Mr Parmar wrote "[n]*otwithstanding the actual activity carried out by* [that team], *I will be stating that from our perspective, the current model allows them to introduce and refer to booking centres."* Later that day, Ms Waterhouse replied *"PWM- sounds fine!"*. The DFSA says that this was Mr Parmar escalating the matter. Mr Collins says it was Mr Parmar supplying information which of itself would not put Ms Waterhouse on guard. As is clear from her reply Mr Parmar was stating what he proposed to say and receiving support from his superior. This should have alerted her to the problem had she not already known of it.

76. Back in October 2011, she had promised to keep the DFSA informed about any subsequent Internal Audit relating to the activity of the PWM team (D/99/356). She knew, in June 2012, that such an audit was taking place: she was asked to be interviewed as part of that audit (D/233/912), but was unable to find time to arrange the interview (T5/137-138).

77. On 11 July 2012, Ms Waterhouse and Mr Parmar met the DFSA in relation to the steps being undertaken to implement a 'new' advisory model for the PWM team with an appropriate compliance framework. Neither of them disclosed that Advising and Arranging were already taking place, or that concerns had been expressed that it might already be. The DFSA submits that it was misleading for her not to do so or not to mention the internal audit in the previous month.

78. On 1 August 2012, Mr Polli sent an email to the DFSA (copying Ms Waterhouse and Mr Parmar) referring to the 11 July 2012 meeting, describing the introduction of Advising and Arranging activity as a future development due to take place "*imminently with the effect that PWM employees based in the DIFC will be providing financial services to clients and such clients will be treated as clients of DIFC Branch in accordance with the relevant DFSA Regulations*." (D/244/981).

79. On 13 September 2012, Ms Waterhouse emailed Rose Plunkett providing information in response to a request (D/268/1034). In that email she reattached "*the risk mitigation programme that we sent to you in response to your final report*", the document which had been sent in December 2011. The DFSA complains that Ms Waterhouse gave no indication that her understanding of the position had changed, and did not disclose that the activity of the PWM team was the subject of investigation by Internal Audit.

80. An Internal Audit report was published on 25 October 2012, which referred to the following 'self-identified issue': "*While Deutsche Bank AG Dubai Branch possesses an advisory licence, the disclosures made to the regulator only allow WM client-facing staff to refer prospects to offshore booking centres in Singapore and Geneva (referral model). However, certain WM GSA Dubai client-facing staff have provided excess services such as investment advisory and banking services to its Dubai International Financial Centre (DIFC) branch customers.*" (D/283/1085). There is no evidence that Ms Waterhouse, as opposed to Mr Hume, saw this at the time and she said that she did not. We find it regrettable that an internal audit report concluding that there were serious regulatory shortcomings was not brought immediately to the attention of the Compliance Officer for the region. Equally it is disturbing that knowing that an

internal audit had taken place the Compliance Officer did not, despite her heavy workload, take steps to review it.

81. Ms Waterhouse received an email about internal audit on 27 November 2012, on which the DFSA places emphasis as it refers to a self-identified issue about DBDIFC's 'operating framework'. Ms Waterhouse appeared to accept in evidence that she should then have asked to see the underlying report (T5/145) but the reference is more oblique than the other references relied on by the DFSA and could have escaped her notice.

82. In late October 2012, Ms Waterhouse, in an event on which she places much importance filed a Suspicious Activity Report with the UAE Central Bank about the activity of 'Client K'. She also met the DFSA to discuss her concerns (C/87/1998/§408).

83. As she puts it: "*407. Throughout the night before I went to see the Central Bank in Abu Dhabi (being the same day that I met with DFSA Supervision), I had been in almost constant contact with one of my counterparts in New York AML. He implored me not to report the matter to the UAE authorities. This argument had continued into the early hours of the day of the meetings in Abu Dhabi and Dubai. I told him that I would comply with the law of the UAE and that never before had I seen such a catalogue of suspicious circumstances. I was determined that legally and morally making that filing was my duty. I had serious concerns about the risks that I thought the Deutsche Bank client posed to the UAE financial system. My duties to the regulators had to come before any commercial concerns of my employers. I knew what it was right to do. 408. On the day that I met with the UAE Central Bank to discuss aspects of the SAR filing, ahead of its submission, I also proactively arranged a meeting with members of DFSA's Supervision team (Mr. Guner and a gentleman who was covering for Bernhard Sperling). There was no regulatory requirement for me to do so. However, I did so in the spirit of openness and transparency and I believe, reflecting the DFSA's Principles for Authorised Firms (in particular, Principle 10- Relations with Regulators).*"

84. Mr Collins places great emphasis on this episode. As he puts it: "*It is an obvious, but important, point that if Ms Waterhouse was seeking to avoid DFSA*

scrutiny of the PWM business in the UAE, it would be a very odd decision indeed for her to draw to the DFSA's attention a problem with this client, when those around her suggested she need not or should not do so. The Tribunal is invited to conclude that her actions in making the report were wholly inconsistent with those of an individual who (1) was aware of, and was attempting to hide from the regulator, wrongdoing within DBDIFC." He says that "[i]*t is simply inconceivable, if Ms Waterhouse had the knowledge the DFSA alleges that she had, and took the approach to her role which the DFSA allege she took, that she would have called in the regulator at this time and in these circumstances. That is a point of real significance to which, it is submitted, the DFSA has no answer*".

85. The DFSA says it does. Ms Waterhouse had a clear duty as MLRO to report Client K regardless of the consequences and no reason to commit what it would see as further breaches of duty. It was by no means clear at the time to Ms Waterhouse that the report might lead to a wider ranging investigation of different issues. Further it was much less difficult for Ms Waterhouse to report a money laundering matter reflecting badly on Client K than to disclose breaches by her own employer with which she was arguably complicit. We will return to this. We have seen no contemporaneous evidence of Ms Waterhouse facing serious internal opposition to this disclosure from DB.

86. DBDIFC's apparent dealings with Client K added to the DFSA's suspicions that the activity of the PWM MEA team was not as limited as had previously been described. On 25 December 2012, the DFSA commenced an Investigation, which initially inquired into suspected breaches of the DFSA's Client take-on and AML Rules by DBDIFC.

2013.

87. On 1 January 2013 Mr Hume took over from Mr Sowter as Ms Waterhouse's Line Manager in London. At that point she also reported to Mr Vollot in Dubai and to Mr Sieve (later Ms Slatter) for her Legal responsibilities. Ms Waterhouse felt bullied, put-down, obstructed and patronised by Mr Hume and makes many strong criticisms of the quality of his management in her written evidence and of his role in the bank's failure to provide her with the support she and her

colleagues needed to face the challenges of 2013. She is also very critical of his role in her later suspension and the procedures within the bank which ensued.

88. Ms Waterhouse was asked to attend a compulsory interview with the DFSA on 20 January 2013. In the course of that interview, which covered much other ground, she described the project undertaken by DBDIFC to implement an advisory model for PWM. When asked whether PWM in DBDIFC was engaging in 'Advising', Ms Waterhouse said: "*They're just starting to do that now…*" (G/1/79). Ms Waterhouse went on to say "*I could confirm the dates for you but within the last two weeks, say, approximately we did the final piece at the internal risk review*." (G/1/79). The 'dates' were not confirmed nor the error corrected. One would expect any witness, and particularly a Compliance Officer and a manager with responsibility for Legal, accompanied by lawyers when interviewed about potentially serious matters to follow this up but Ms Waterhouse did not do so.

89. The DFSA says that this was invention or recklessness. Ms Waterhouse says that she was not prepared for these questions as she believed the interview was convened to discuss the concerns, she had raised about Client K: "*I understood that I was going to be interviewed by the regulator as a witness to fact in relation to the* [Client K] *disclosures*" (T1/87, T5/153). The DFSA points out that the Article 80 Notice by which she was required to attend the interview says: "*The questions and assistance will be in relation to matters relevant to an investigation into suspected contraventions by Deutsche Bank AG DIFC Branch and, where relevant, you of (a) Article 66 of the Regulatory Law […]*" (D/308A/1199A). It was served along with an extract of the relevant provisions which made clear that Article 66 concerned the provision of false, misleading or deceptive information to the DFSA (D/308A/1199E). The DFSA also points out that according to her witness statement, she asked the members of her team for an update on various aspects of their work before attending. She says that Mr Parmar told her that "*PWM had just started Advising and Arranging, now that the training and framework was complete*" (C/87/2006/§459). Ms Waterhouse or her lawyers must have read the notice. The fact that she was accompanied by two lawyers indicates that she knew that this was a serious interview. It is correct that a significant portion of the interview was about

Client K. The transcript does not indicate that she was taken by surprise by questions on other topics. (G001). Ms Waterhouse should have corrected the misleading impression she gave the DFSA at the interview.

90. On 21 February 2013, with the DFSA's investigation under way, DBDIFC offered to the DFSA that it would commission Clifford Chance to prepare a Skilled Person's Report ("SPR"). Ms Waterhouse wrote to Mr Vollot, Mr Masud and Mr Aram explaining that a further Article 80 notice had been served and as well as complying with it she recommended an independent report "*This way we can ensure that information provided to* [the DFSA] *has the right context and to keep the matter out of an enforcement action*" (D/314/1220, T5/156). She added that the DFSA had been receptive and had indicated that it might require this anyway. Mr Aram thanked her for handling the matter well and offered the full support of his two senior colleagues.

91. The revised compliance framework with KOPs for the PWM team was finalised by 11 March 2013 and sent to Ms Waterhouse by Mr Parmar on the same day (D/320/1283). The framework was now in place for the PWM MEA team to begin Advising and Arranging. From this point on DBDIFC was no longer in breach.

92. Preparation of the SPR gave rise to heated internal discussion about the PWM team's activity. Ms El-Masri says that the dispute related to what she saw as Compliance's faulty advice which led the PWM team to act improperly. Ms Waterhouse says that it was about the speed of that advice and the overall PWM project. The DFSA relies on what happened at a meeting between Ms El-Masri and Ms Waterhouse on 17 March 2013 (D/325/1302). As the evidence for this depends entirely on their disputed recollections and Ms El-Masri did not give oral evidence we do not think it appropriate to have regard to this. Each side has its own case about the apparent discovery of what are known as the Roth emails and relies upon it. The evidence about this is too conflicting and confusing for us to reach useful conclusions and we disregard it except as background to a telephone call in April 2013 between senior managers. It is common ground that there was a prior conference call between Ms Waterhouse and Ms El-Masri (together with Mr Aram) on 25 March 2013 in which the subject of Advising and Arranging was discussed (A/2/24/§65(xi)). Ms

Waterhouse's case is that that discussion was limited to sporadic activity by one employee, Fabien Roth. Initially she said that Ms El-Masri's concern was that "*DBDIFC compliance hadn't performed the projects quickly enough […] that the business hadn't received clear instructions from compliance*" (T5/168). She later accepted, however, that the "*clear-cut misunderstanding*" mentioned by Mr Vollot at (D/337/1355) was "*that she was saying 'You guys didn't tell us not to conduct activities' and me saying 'No, no, we did.*" (T5/179) (T6/2). She did not accept that it was obvious from that that Advising and Arranging had been taking place (T5/179). Her evidence was that Ms El-Masri had simply said that if, hypothetically, there was any issue about Advising and Arranging having taken place, it was the Compliance team's fault (T5/177-178). She also said that she believed Ms El-Masri was simply saying that they had been providing Advising and Arranging services since 13 March 2013 when the new model went live (T6/10). That would not have been controversial.

93. A serious misunderstanding had clearly arisen between some of the most senior people in the division, and Mr Aram had asked Ms Waterhouse to arrange a call to resolve it (D/337/1355). In his compulsory interview with the DFSA, Mr Vollot also stated that, on or around 2 April 2013, Ms El-Masri provided him with a copy of the email she had sent to Ms Waterhouse on 30 October 2011. In his interview, Mr Vollot describes how he first discussed Ms El-Masri's email with Mr Aram and then subsequently with Ms Waterhouse. According to Mr Vollot, he called Ms Waterhouse into his office and asked her about Ms El-Masri's email. In summary, Mr Vollot told the DFSA that Ms Waterhouse said she remembered the email and regretted not responding in writing "sharply". Mr Vollot also told the DFSA that Ms Waterhouse described a discussion she had with Ms El-Masri at the time after the relevant email was sent.

94. On 2 April 2013 the conference call took place between Ms El-Masri, Ms Waterhouse, Mr Bower, Mr Parmar, and Mr Philippe Vollot to seek to resolve the dispute. In preparation Ms El-Masri circulated an email attaching several documents in which she had previously raised the issue that Advising and Arranging were taking place including the documents from November 2011 and April 2012 mentioned above (D/349/1387). She introduced the email by saying "*For our discussion this pm, I forward the following documents in which*

the Business highlights the ongoing advisory activities of WM, as well as the related risks." She also summarised several of the attachments in a single line, for example "*WM advisory activities highlighted formally by the Business during the UAE Country Risk workshop in Nov 2011*" and "*WM advisory activities highlighted by the Business in the context of the WM UAE KOPs and Guidelines preparation with Compliance (April 2012): relevant section in red.*". Ms Waterhouse says that she did not have time to read the attachments (C/87/2024/§559), and that she did not understand Ms El-Masri to be saying during the call that Advising and Arranging had taken place in the past (C/87/2025), but that "[a]*udibility was poor*" (A/2/26/§66(iv)).

95. Ms Waterhouse's evidence was that she "*couldn't understand*" what Ms El-Masri was trying to communicate (T6/17). "*After the call I had a conversation with Mr Vollot and I said, you know – he said: I'm confused, I don't understand why she is so strident in this argument. I said: I don't understand either. And I said: well, I think that there is no point in continuing this discussion that is not going anywhere, but she needs to explain her concerns, whatever her concerns are, to the skilled person […]*" (T6/21).

96. Mr George submits that if that were right, a responsible Compliance Officer would have asked for clarity. Alternatively, Ms Waterhouse could have read the attachments which Ms El-Masri had circulated – even if she did not have time to read them before the call, she could easily have read them afterwards - and they would have made the issue clear and of course she had received some of those before. Even the one-line summaries in Ms El-Masri's email made clear that she was alleging that she had previously told the Compliance department as early as 2011 that Advising and Arranging were taking place. The DFSA says that by that point the issue was sufficiently clear and important that Ms Waterhouse's failure to take action cannot have been a question of resourcing. No Compliance Officer acting with integrity could have failed to act.

97. Ms Waterhouse did not inform the DFSA of this issue, and did not pass the documents to Clifford Chance for use in the preparation of the Skilled Person's Report ("SPR") (T6/18-19). The documents were therefore not passed to Mr Hume when he was being briefed around this time. (D/433/1975) (T6/44).

98. The first draft of the Clifford Chance SPR was circulated on 4 April 2013. (D/358/1447). Ms Waterhouse reviewed it and marked it up with comments (D/368/1523). The text in Clifford Chance's original draft included the following at (D/368/1542/§5.42): "*In our view, some of the activities undertaken by the DBDIFC PWM team could be viewed by the DFSA as constituting the Financial Services activity of Arranging Credit or Deals in Investments*." Ms Waterhouse in reviewing that passage commented: "*Which ones and based on what evidence? - has to be v. carefully worded. Why are they of CC giving views about DFSA's possible views?*"

99. Another draft of the SPR, internal to Clifford Chance, dated 18 April 2013, considered including the text "*It is our understanding that the activities of PWM <u>should</u> have been limited to providing information*", instead of "*have been limited*", and that the proposed change was accompanied by the handwritten comment "*fess up?*" (D/392/1693) - a comment that Ms Waterhouse would not have seen at the time. The final version of the SPR, dated 18 April 2013, was submitted on 21 April 2013. The text which had been adopted in the crucial passage, at Paragraph 6.31, was: "*DB DIFC has taken the view that, as PWM personnel are not involved with the resulting transaction (instructions are taken and orders are executed in the relevant booking centre), such personnel are not undertaking Financial Services activities in or from the DIFC*." (D/405/1789). We find it hard on the information available to us to see how Clifford Chance could fairly characterise the issue in this way given the responsibilities imposed on a Skilled Person.

100. A meeting took place on 2 May 2013 between Clifford Chance and the DFSA, a copy of the firm's notes of that meeting being sent to Ms Waterhouse, Mr Parmar and Mr Hume, at which the DFSA said that one thing which "*leaped out*" was "*Whether and how the activities of, in particular, PWM personnel had been supervised / controlled / monitored from a compliance perspective to ensure that PWM personnel did not provide a DFSA regulated Financial Service to someone who, thereby, should have been treated as a DB DIFC client. He made reference to the business model that had been in place, and that the SPR, on occasion referred to what "should" happen or was "expected" to happen"* (D/421/1941). Ms Waterhouse read and digested the note (T6/35).

101. Ms Waterhouse suggested in her oral evidence that around this time she "*raised with the branch's management my recommendation to conduct a wider review to see whether Mr Roth's behaviour was symptomatic of a bigger problem or a systematic problem*" (T5/169, 177). As she puts it in her first witness statement "*Notwithstanding all of the unusual pressures upon me at that time, I would like the Tribunal to have regard to the fact that I was the only one of Mr. Hume, Ms. Slatter, Mr. Masud, Mr. Parmar and Mr. Vollot to suggest any further steps or enquiries following the feedback received from the DFSA on 2 May 2013. I place reliance on my contemporaneous recommendations dating from May 8 2013".*

102. This is as we see it a reference to an email from Ms Waterhouse of 8 May 2013 (D/428/1959) in which she had simply chosen to adopt the least intrusive of three options proposed by the lawyers and herself. She had proposed that Clifford Chance suggest to Mr Bock in order of preference "*(i) An internal investigation- appropriately scoped and staffed. (ii) In the first instance, a more targeted interview process- focussed on PWM front office staff whose* [Client K] *correspondence prompts a need to understand the context of certain correspondence and explore potential "perimeter breaches". This phased approach assisting in so far as seeking to preserve confidentiality and minimise disruption to the centre and the firm.* [and] *(iii) What he already had in mind."* At D/427/1956 she describes this as *"a more palatable route than a wide range of compulsory interviews."*

103. In Paragraphs 613 to 619 of her first witness statement Ms Waterhouse sets out her understandable concerns that Mr Parmar was allowed to leave at the end of July 2013. *"Mr. Hume approved Mr. Parmar's request, without consulting with me or DB DIFC Management, who were "interested parties." I raised with Mr. Hume and Mr. Vollot my extreme surprise at Mr. Parmar's request and of course my concern that this left me with an impossible workload, particularly in view of the ongoing DFSA investigation."*. She says that Mr Vollot had earlier warned *"I am quite concerned about the timing. Originally my understanding was that Chet will go on sabbatical in September and would enjoy normal vacation in July. Then I understood it would start end July which I was OK with since August is usually calm. Seems now we talk about June*

which is literally in a few weeks. How will this work in terms of resources with current load in compliance MENA? Do you already have suitable candidate would have time to join in the meantime for handover? I do not believe such timing is realistic but fully rely on you if you are confident that it will be feasible without jeopardizing the support to the business." (C/87/2037/§624).

104. In March 2013 she had warned colleagues on the MENA ExCo: "*AA informed the committee that the GEC has taken a decision to hire 100 additional compliance officers despite the current cost constraints and hiring freeze. This decision is a clear indication of the Bank's commitment on this topic. AW highlighted the major resource constraints faced by her team at this point in time as they are dealing with various regulatory requests as well as the usual business day-to-day transactions, inquiries and projects. Capacity increase within the team is an immediate and critical priority for compliance.*"

105. Ms Waterhouse's statement also sets out the wider suspicions that she then had about the motives of her colleagues for these personnel changes. Ms El-Masri left apparently unexpectedly at about the same time.

106. On 25 July 2013, the DFSA issued a notice requiring DBDIFC to produce documents and information concerning the activities of PWM (D/455/2053). Among other things, it required DBDIFC to provide a schedule of information relating to all clients that had a DBDIFC PWM employee assigned as a relationship manager, or to whom DBDIFC was providing Financial Services (D/455/2060). Ms Waterhouse (who had been on leave when it first arrived) replied to that Notice on 21 August 2013 (D/461/2078), referring to "*moving away from an introduction/referral model (Old Model)*" and asserting that it would not be possible to provide all the information sought because of provisions of Swiss law (D/461).

107. In July 2013 Ms Waterhouse also assumed responsibility for Legal and Compliance in Pakistan and had relatively recently been required also to cover Legal and Compliance in Nigeria.

108. On 25 August 2013 Ms Waterhouse learned that the DFSA would visit on 27 August 2013 and in an email alerted senior management who recognised the

importance. She said that she would be present throughout. On the day itself, however, she was not present at all of the meetings. On 27 August 2013 Mr Bock and colleagues visited DBDIFC and a lengthy internal note of the DFSA records what happened. Mr Bock expressly asked for documents relating to the discussion of the change in the PWM business model by the Executive Committee. Ms Waterhouse said "*discussions went back to mid-2012 and were not in ExCo but would be recorded in general commu9nications* [sic] *(eg emails) between compliance and senior management*". Mr Bock therefore asked for copies of those communications (D/463B/2091, 2097).

109. The DFSA says that Ms Waterhouse knew that she had such communications in her possession (having referred to them herself). Several of them had recently been collated by Ms El-Masri and circulated on 2 April 2013. They were not provided. DBDIFC's response to the notice on 31 October 2013 did not disclose the relevant emails, and stated that "*key individuals within the current Senior Management team of the DB DIFC Branch have confirmed in writing that they do not, to their knowledge, have email communications in their possession, custody or control that relate to the decision to implement and approve the New Model*." (D/503/2252).

110. Mr Bock also asked "*whether Internal Audit has reviewed PWM.*" Ms Waterhouse told him that she did not think Internal Audit had ever done so (D/463B/2093). That was incorrect. Mr Parmar had on 22 June 2012 reported to her about a meeting with Internal Audit to discuss the PWM team's activity, and she had replied to that email (D/223/898). She also knew that Internal Audit had tried and failed to arrange a meeting with her on 10 July 2012 as part of that investigation (D/233/912, T5/137). The DFSA says that this was an incorrect statement which she did nothing to check or put right.

111. These matters had occurred a year and more before August 2013 but she should have checked the information which she supplied to the Regulator. Further a Compliance Officer ought reasonably to have been aware of an internal audit recently carried out regarding matters of significance in her region. Even if, despite those facts, she genuinely did not remember that there had been an Internal Audit investigation into the PWM team, we agree with the DFSA that

the seriousness of the context required that she check and provide accurate information rather than simply express a belief.

112. During the inspection on 27 August 2013 Mr Bock also went to the workspace of Fabien Roth, a PWM employee, viewed his email arrangements, and asked for "*copies of a sample of emails for a sample of clients*" (D/463B/2095). He pointed out that there could be no concern about Swiss law because the emails were clearly sent and received by a DBDIFC employee and held within the DIFC. He selected the 16 emails he would like to be given (D/463B/2096).

113. The emails were collated and delivered to Ms Waterhouse. An email from Mr Bower of 6 September 2013 to Mr Vollot and Mr Wolfram Lange, copied to Ms El-Masri, at (D/469/2111) records: *"Following the recent (August 2013) on-site inspection conducted by DFSA, we are aware that DB DIFC was requested to provide copies of certain email correspondence as chosen by the DFSA enforcement team during their inspection. These emails currently remain pending with Anna i.e. have not been provided to the DFSA.*

As we discussed, having reviewed some of these emails, it is clear that they evidence "arranging or advising" has been conducted by a DB DIFC employee in respect of a client which has not yet been fully onboarded and subject to the relevant protocols in DB DIFC. Accordingly, the DFSA has grounds to sanction WM.

Equally, if DB DIFC were to withhold these emails (citing Swiss secrecy or other rationale) this could equally prompt the DFSA to take punitive action due to failure to meet a requirement stipulated by its enforcement team."

114. The emails were not provided to the DFSA and remained with Ms Waterhouse.

115. There is no doubt that Ms Waterhouse was under pressure at this time. In addition to materials cited by the parties, there are emails at the end of August 2013 and in September 2013 showing Ms Waterhouse moving forward with filling gaps in the team (D/464/2099). Further on 2 September 2013 Mr Polli says this in an email. (D/466/2102) "*However please note that I am already experiencing a high workload in terms of my ongoing MENA Compliance duties, and with Chet's recent departure from the MENA team the situation is*

unlikely to improve in the near term. We'll need to make sure that the extent of my involvement in this project on an ongoing basis is compatible with the rest of my day-to-day compliance duties." She is also dealing with other jurisdictions with matters like litigation in Pakistan (D/467/2105).

116. On about 1 October 2013 Ms Waterhouse commissioned a temporary member of staff, Eva Horacek, to carry out a sampling exercise of the PWM team's communications (D/474A). The results of that review were ready by 21 October 2013, and demonstrated that some 40-50% of their communications involved Advising and/or Arranging. Ms Waterhouse says that after the results of the sampling exercise were available she immediately escalated the issue to Mr Aram and Clifford Chance. She also showed them to Ms Slatter and Mr Hume. That is not in doubt despite the apparent absence of any record of the handling of this exercise beyond a draft note recording the results: 'PWM CLIENT COMMUNICATION HIGH LEVEL REVIEW' (D/494/2205). That may be why some confusion arose certainly at the law firm as we mention below.

117. On 1 October 2013, the DFSA issued DBDIFC with a further notice requiring the production of documents and information concerning PWM. That notice repeated the request for information and documents that DBDIFC had been asked to provide during the inspection visit on 27 August 2013. In response to the 1 October 2013 notice, Ms Waterhouse continued to engage with the DFSA and provide information and responses in relation to PWM. She did not correct the inaccurate information about PWM's activities previously provided to the DFSA or provide the emails.

118. On 20 October 2013, the DFSA met Clifford Chance. Ms Waterhouse, Mr Masud and Mr Hume were sent a note of that meeting, prepared by Clifford Chance, which stated, in part*: "(a) In the context of their expressed need for the missing information, DFSA elaborated, to a degree, on the status of their investigation. (b) In particular, they* [the DFSA] *wish to understand the position with respect to Old Model PWM, and be in a better position to assess their belief that activities went beyond introduction and referral, and constituted the provision of Financial Services. (c) They indicated that they would wish to conduct further interviews of (i) DB·DIFC Branch personnel*

(DFSA specifically mentioned RMs...) … (d) Furthermore, they wish to be in a position properly to assess the culpability of Authorised Individuals in the context of any alleged breaches by DB DIFC Branch."

119. On 27 October 2013 Mr Aram met Mr Johnston of the DFSA and Ms Waterhouse says that he disclosed at that meeting that Advising and Arranging had been taking place. This is said to be an indication of how seriously the matter was taken and how quick the responsive action was (A/2/31/§82). Despite the importance of the issue and the role of Ms Waterhouse she did not involve herself in the disclosure to the DFSA, if that was taking place. Mr Johnston's evidence was that no such disclosure was made. His contemporaneous notes of the meeting make no reference to any such disclosure (D/497/2215, D/498/2216-2217). Neither is there any hint of it in the note of a call later that day made by Mr Johnston in response to Mr Aram's request for a further word (D/566/2568). The DFSA's actions after the meeting are not consistent with disclosure having been made. No documents from DBDIFC or the Appellant support this claim. There is no briefing document for Mr Aram or note for him to give the DFSA. It would have been unexpected for such a disclosure to take place in a meeting about opposition to court proceedings. It would be unexpected for the Compliance Officer not to be in touch with the regulator at that point or at least for him or her to ensure that proper disclosure was made. Ms Waterhouse left this, as she puts it in her pleading, to "*more senior staff*". Others at DBDIFC, such as the broad recollection of Mr Aram himself, had the same impression as Ms Waterhouse. As Mr Collins puts it "*Mr Aram's account is clear [G15/3062] and, more importantly for the purposes of this hearing, Mr Aram advised colleagues at DB DIFC, including the Appellant, that he had done so [C87/2041]"*. The account of Mr Aram, given well after the event, is understandably vague for someone in his senior position. It is that in a meeting he had arranged for a different purpose he had at his suggestion to colleagues mentioned the Advising and Arranging without providing any detail at all. *"So I explained that to Ian and I said, "Done the sample tests. I was made aware of the results today and it looks like quite a few people were recommended. I would be happy to settle on that matter"* (G/015/3062). *"That's the second message I gave him."*

120. Ms Waterhouse did not do anything to contact the regulator to deal with the consequences of the alleged disclosure. It is right to say that her other colleagues including Mr Hume were equally under the impression that disclosure had been made of the results of the Horacek review. So, we do not attach much importance to this particular incident as regards Ms Waterhouse but it is very clear that the DFSA was not in fact informed of the Horacek exercise at this point. Clifford Chance disclosed its existence to the DFSA for the first time, and supposedly on a 'without prejudice' basis, in a telephone call some weeks later.

121. On 12 November 2013, the DFSA again met Clifford Chance. On 13 November 2013, Ms Waterhouse saw a note of that meeting, prepared by Clifford Chance, which stated, in part, that the DFSA had advised that: *"there were still open issues regarding the PWM business, including whether there were Financial Services provided by it to "Old Model" Clients."* Of course, the situation was more serious than that.

122. The DFSA contends that the issue was not disclosed to it until late December 2013 (on a 'without prejudice' basis), and that no formal disclosure was made until late January 2014. It also points to Clifford Chance's notes of the meetings with the DFSA on 12 November 2013 and 22 December 2013.

123. During a telephone call between Tim Plews and Philip Jolowicz of Clifford Chance and the DFSA on 22 December 2013 about a document request dated 15 December 2013 Mr Plews *"ASKED IF WE COULD HAVE AN OFF THE RECORD AND WITHOUT PREJUDICE CONVERSATION. MS and AB said yes. TP said the firm has been doing sampling for PWM - he does not know the size of the sample but has been advised that the initial indication is that the result is that about 50% of clients were advising arranging. AB said the firm's position to date has been 'referral only', as soon as the firm becomes aware that the position is not 'referral only' it needs to correct that to the DFSA."* (D/535/2422).

124. The DFSA was certainly notified of the Advising and Arranging activities on 22 January 2014 at a meeting with Mr Hume and Mr Plews of Clifford Chance.

The DFSA was also informed in that meeting that Ms Waterhouse had been suspended.

125. In a sense the DFSA's case ends at this point but it is important to refer to some later events for aspects of Ms Waterhouse's case. In a letter the following day summarising the meeting from their standpoint Clifford Chance mentioned: "*Andrew Hume had the opportunity to look at these materials when he arrived in Dubai on Monday morning, 20 January 2014. His initial conclusions have been identical to those of Clifford Chance lawyers who have had an opportunity to review the same material. It would appear that there has been a failure to provide material relevant to the questions asked by the DFSA enforcement team in the course of its investigation of DB DIFC. The extent of that failure is unclear. However, as Andrew Hume noted yesterday, it is Deutsche Bank's intention to ensure that a full, transparent and timely investigation is now conducted…*" (D/564/2561). He then set out the other steps that the Bank would take.

126. In a letter dated 16 February 2014 apparently sent to the DFSA in draft the firm referred to the 22 January 2014 meeting in more detail: "*Andrew Hume, Managing Director in charge of Compliance in DB's EMEA region, disclosed to you:(1) the discovery of email traffic between Serene El Masri and Anna Waterhouse dated October 2011 that shows a concern on Serene's part that there had been DFSA regulated advisory activity occurring within PWM for some time prior to this exchange of emails. The relevant emails are enclosed with this letter. They include a copy of a short unaddressed, unsigned memorandum prepared, Andrew Hume thinks (as do we, Clifford Chance) by Anna Waterhouse….. Andrew Hume and we think this memorandum may have been delivered by hand in early November 2011 to Rose Plunkett at DFSA in response to a question asked by Rose in relation to the activities of PWM in DB DlFC following a DFSA visit to the Bank in 2011. It is difficult to reconcile the content of the memorandum with the content of the email conversation between Serene and Anna (although we have not at this time discussed this in detail with either Serene or Anna). Apart from the copy attached to an email from Anna to Serene, no other copy has yet been found in the email retrieval that has been done to date. (2) a random selection of email traffic drawn by Anna Waterhouse*

from RM inboxes as an incidental piece of work that was done without any preconceived plan of action in the course of implementing the client remediation exercise. From a statistical perspective it must be emphasised that this is a very limited sample. It shows a ratio of 50% of the sampled RM activity constituting regulated advisory and arranging activity. A larger sample would need to be drawn from the RM population and analysed to be able to arrive at a more definitive number. (3) the apparent involvement of Anna Waterhouse in failing to disclose the occurrence of regulated activities without DB DIFC complying with applicable DFSA rules. It was unclear at that time whether members of the senior management team at DBDIFC were fully or partially aware of some or all of this situation... Since 22 January 2014, Andrew Hume has led, and continues to lead, an initiative to undertake an independent investigation intended to:-" and the objectives were then set out (D/569/2573).

127. At a meeting with Clifford Chance on 19 February 2014 Mr Bock asked the bank to provide further details of the sampling exercise referred to in the draft letter of 16 February 2014 (D/569A/2578). Mr Plews said that: *"It was unclear as to when it was undertaken, but it was likely that it was after the DFSA Inspection in August 2013; About 4 weeks later, Anna came to me with a bunch of emails. She said that she had "pulled these", and that they "show a certain number of rule breaches; I asked her what she proposed to do with them; She said that they may be relevant for the settlement discussions but she did not see a reason to come forward to the DSFA with them; The emails were about passing information to clients about investment products, but there was nothing to say that they would be advising."*

128. After her suspension Ms Waterhouse was asked for interview with the DFSA and this took place on 2 February 2014 with two lawyers from Norton Rose representing her. Ms Waterhouse complains that it seemed clear from the attitude of Mr Glynn, Head of Enforcement, that the DFSA had already made up its mind before interviewing her. His remarks were made "off the record" and are not on the transcript of the interview that followed (C/133/2297) but they are summarised in the note of the meeting prepared by Ms Waterhouse's solicitors which is not challenged by the DFSA: *"Stephen Glynn […] explained that the DFSA were investigating Anna and Deutsche Bank (DB) in respect of:*

(a) suspected AML breaches, including client take-on procedures. The DFSA suspected that information that had been submitted to the DFSA was false or misleading; and (b) notices served on DB in respect of DB's Private Wealth Management (PWM) department. Stephen noted that Anna was primarily responsible for responding to the DFSA's notices, and the DFSA suspected that Anna was: (i) deliberately misleading and obstructing the DFSA; and (ii) providing the DFSA with false information by stating that PWM had not been carrying out advising and arranging. Stephen noted that from 2011 to 2013, Anna and DB had knowledge that PWM was providing financial services. DB itself had advised the DFSA of this. Stephen added that, "its inconceivable that you did not know." Stephen explained that Anna had the following three options during the interview: (i) hold your current line, maintain your story; (ii) explain your conduct, defend yourself; or (iii) full and frank disclosure. Stephen concluded that the financial sanctions levied against Anna would depend on which option Anna decided to take, and she conducted herself in the interview".

129. Mr Bock did not dispute this. He said that Mr Glynn was referring to the disclosures that had recently been made about the extent of that activity (T2/44/22-23, T2/45/10-12). His recollection was that Mr Glynn was "*stressing that it was important that Ms Waterhouse be full and frank and tell the truth*" (T2/44/10-11).

130. In the course of discussions leading to a negotiated outcome to the DFSA's action against DBDIFC Freshfields, its solicitors, wrote to the DFSA on 18 December 2014 (D/589A). Ms Waterhouse draws particular attention to two passages in that letter: *"In the draft Notice, the DFSA proposes to impose on DB DIFC the largest fine in the history of the DIFC, to impose Directions that would end the careers in DB DIFC of Ashok Aram (AA), Nadeem Masud (NM) and Philippe Vollot (PV) and to issue a Decision Notice containing language so critical that it would seriously damage, if not end, the careers of these three individuals and Andrew Hume (AH) in financial services. Removing AA, NM and PV from their roles in DB DIFC would very significantly undermine DB's ability to continue operating effectively in the DIFC (and indeed would have a material impact on DB's operations and the future of its franchise across the MENA region, given the regional roles of AA and PV."* The letter also states:

"DB could not, therefore, agree to enter into a settlement on the terms currently proposed by the DFSA in the draft Notice. From DB's perspective, the minimum requirements for any settlement of this matter are as follows: (i) the allegations (explicit or implicit) that any of AA, NM, PV or AH deliberately misled or deceived the DFSA, or concealed information from the DFSA, are removed from the draft Notice. This must include amendments to the draft Notice to make clear in each case, where "the firm" or "DBDIFC" or "Senior Management" are criticised, the specific individuals to whom the particular criticism relates; (ii) the Directions requiring DB to remove AA, NM, and PV from their roles in DBDIFC are removed from the draft Notice; (iii) the DFSA provides written confirmation that it will not refuse to authorise any of AA, NM or PV as Authorised Individuals going forwards as a result of the issues referenced in the draft Notice; and (iv) the DFSA provides written confirmation that it will not bring enforcement actions against any of AA, NM, PV, or AH."

131. Ms Waterhouse was not of course one of the individuals mentioned by DBDIFC and sees this letter as evidence of a plan by the bank to save their senior staff and offer her up as the scapegoat.

132. In July 2014 Ms Waterhouse filed with DB a Grievance (D/585/2946) and a later Supplemental Grievance which were investigated by a bank officer in New York. The bank brought disciplinary charges against her but these were dropped. Her suspension ended in March 2015 and rather than then seek reinstatement she reached a settlement with the bank and left its employment. She has not found suitable employment since.

ABUSE OF PROCESS.

133. Ms Waterhouse claims that her appeal should succeed on the grounds of the DFSA's abuse of process because of the nature and quality of the investigation conducted by the DFSA, and of the process which led to the Decision which is challenged. Mr Collins accepts the DFSA's conduct might be said to be a secondary issue, given that this is a hearing *de novo* but the Tribunal is dependent upon the DFSA to present the case to it, the DFSA relies overwhelmingly on evidence from its own investigators and it took what he

says is the surprising decision to proceed against the Appellant and only one other individual.

134. He says that the DFSA's approach to the Appellant and these proceedings amounts to such a serious departure from fair and proper process that it is an abuse of process such that no action can properly be taken against her. We are required to have regard to the overriding objective of dealing with a case fairly and justly. Fairness and justice in the present context also require the Tribunal to have regard to the DFSA's obligation pursuant to Article 8(3) of the Regulatory Law to foster and maintain fairness, transparency and efficiency in the financial services industry in the DIFC. He says that in the English common law, proceedings will be stayed as an abuse of the process of the Court where it would, "*offend the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case"* (*Warren v Attorney-General of Jersey* [2011] UKPC 10; [2012] 1 AC 22). Mr Collins says that this Tribunal's *"sense of justice and propriety"* should be offended by the DFSA's conduct as set out below and it should direct that no action be taken against Ms Waterhouse. Mr Collins points to four main factors but before addressing these we consider the above general propositions and the DFSA's response to them.

135. Mr George responds that the short answer to this point is that this is a *de novo* hearing. The Tribunal is not "*dependent upon the DFSA to present the case to it*". The system is an adversarial one under which the DFSA and Ms Waterhouse are both entitled to present their case and any evidence on which they rely. Ms Waterhouse has put forward extensive evidence of her own, including documents, and it has been open to her at all times to make use of the Tribunal's Rules. The DFSA does not "*rely overwhelmingly on evidence from its own investigators*" but mainly on the contemporaneous documents. The core issue is what Ms Waterhouse understood about the true position and when. The DFSA's decision not to take action against individuals other than Ms Waterhouse and Mr Parmar is irrelevant to the Tribunal's assessment of the evidence against her, and was a reasonable one. The documentary evidence speaks for itself. The Tribunal is able to interpret it without being affected by how the DFSA may previously have read it and interpreted it. The principle in *Warren v Attorney-General of Jersey* [2011] UKPC 10 is that a prosecution

may be stayed as an abuse of process if it would "*offend the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case*". In that case, the Jersey authorities had obtained evidence in breach of French and Dutch law, and had deliberately deceived the foreign authorities and the Jersey Attorney General and Chief Officer of Police in relation to the investigation. The defendants applied for the prosecution to be stayed and were unsuccessful at all three levels.

136. On any view the facts in this case are, as we see it, far removed from *Warren*. No doubt the Tribunal has power to act as Mr Collins suggests in some extreme case but this is very unlikely to happen in a system where the Tribunal is not reviewing a decision but retaking it from the start in the light of all the evidence now available. We turn next to the individual grounds which, we recognise, Ms Waterhouse asks us to consider cumulatively.

Pre-judgment Abuse – Has the DFSA prejudged the outcome of the investigation from the outset?

137. Mr Collins argues that Mr Glynn, who spoke to Ms Waterhouse before her interview on 2 February 2014, had a preconceived view of her guilt. He said it is "… *inconceivable that you did not know.*" (D/580/2760). Mr Bock agrees that this is what Mr Glynn said (T/29Apr/45/7-8); it is recorded in a contemporaneous note (D/580/2760) and confirmed by Mr Bourke (C/133/2284). As we have already said the most reliable summary of the discussion is probably that of Ms Waterhouse's solicitors in their note together with the views of Mr Bock.

138. Mr George responds as follows. Mr Glynn's views as a "*predetermination*" of Ms Waterhouse's guilt misunderstands the functions of the various organs of the DFSA. Mr Glynn was the Head of Enforcement, the division responsible for investigating suspected contraventions and presenting cases to the DFSA's quite separate DMC. The organ which exists to consider evidence and submissions and to determine whether the case presented by the Enforcement Division is made out is the DMC. It is not enough to point to a comment by Mr Glynn and to seek to extrapolate from it a criticism of the rest of the DFSA. Further, Mr Glynn did not predetermine. Ms Waterhouse's interview took place

on 2 February 2014 by when the investigation into DBDIFC and Ms Waterhouse had been ongoing for more than a year. Third, the DFSA does not accept Ms Waterhouse's characterisation of Mr Glynn's comments. Mr Bock disagreed that Mr Glynn had behaved in an aggressive or threatening manner (T2/44), or that he had said that the purpose of the interview was to determine how great the financial sanction should be (T2/45/16-22). It is however unreal to suggest that such brief remarks by one individual on one occasion in February 2014 characterised the process and conclusions of the DFSA's investigation and the decision of the DMC more than two years later. There is no evidence that they affected, for example, Mr Bock's work. We accept Mr George's other submissions on the point.

139. We agree with Mr Collins that however damning the facts may have seemed at that point it was wholly inappropriate for Mr Glynn to make those remarks. We are concerned that it was apparently Mr Glynn's habit to make such remarks in other cases too. We also reject Mr George's argument that the remarks were justified by the separation between Enforcement and the DMC. In England the separation between investigating police and decision taking judge and jury is even more pronounced but that would obviously not justify a senior officer at a Police Station making similar observations to a suspect about to be interviewed by his or her subordinates. Had the contents of the interview been damaging to Ms Waterhouse, then despite the fact that she had two legal representatives with her, we would have thought it right to disregard them. Further formal investigation of Ms Waterhouse personally did not begin until September 2015 and she and her representatives made the many detailed submissions and requests for information referred to in Annex 2 of the Answer. It is inconceivable that these remarks would have coloured or affected the judgment of the DMC when dealing with such complex and detailed matters and we have had no regard to them (except to criticise them) when hearing this case de novo.[1]

[1] After this Decision had been issued, Mr Glynn, who did not give evidence for either side, contacted the Tribunal after seeing extracts from it. Mr Glynn disagrees with our criticisms, given the context, and emphasises that he was at all times acting in accordance with the DFSA's then practices. He also points out correctly that the only evidence that he made similar remarks in other cases was that given in general terms by Mr Bock of the DFSA.

Abuse – Inconsistent treatment. Ms Waterhouse was selected for enforcement action when others were not.

140. Mr Collins complains of the decision by the DFSA to select Ms Waterhouse and Mr Parmar for enforcement action but no other individual. He submits that the DFSA considered that it had sufficient evidence to bring enforcement actions and/or Directions in relation to the Appellant's senior managers but decided to grant requests from DB's senior management to discontinue. The letter from Freshfields of 18 December 2014 summarised above suggests that the DFSA's actions might lead to DB pulling out of the region. So the DFSA decided not to impose such Directions or to issue such a Decision Notice. No explanation has been provided as to that change of heart on the part of the DFSA (or the decision to remove Ms El-Masri's name). He submits that the DFSA decided not to pursue DB or the individuals named in this letter in order to assist DB. DB did not seek to protect Ms Waterhouse and her position as it did Messrs Aram, Masud, Vollot or Hume. It is improper for an independent regulator to treat some individuals differently from others.

141. Mr Collins says that it is even more serious than that given DB's actions, in particular from December 2013 onwards. On 22 December 2013 Mr Plews and Mr Jolowicz of Clifford Chance met with the DFSA on behalf of DBDIFC. Mr Plews asked for an *"off the record and without prejudice conversation"*. Mr Plews told the DFSA that,*"the big concern for the firm is whether it can settle and what the position of the* [Authorised Individuals] *will be – if the AIs will be charged by the DFSA it would have a big effect on the firm's approach to settlement."*. On the following day Mr Plews and Mr Jolowicz held a telephone conversation with Mr Hume and Ms Slatter (D/537/2440). They discussed a strategy to *"express settle" everything for the Bank"*. Mr Plews suggested that it would be necessary to assess the level of support internally for Ms Waterhouse and the Regional SEO (Mr Masud). Of course, the latter was organisationally senior to Ms Waterhouse and was a major revenue-earner. The conclusion of that assessment was therefore unsurprising. There was discussion of an approach to *"offer up"* Ms Waterhouse. This approach appears to have been put into action on 22 January 2014 when Mr Hume met with the DFSA and advised them, untruthfully, of, *"a random selection of email traffic drawn*

by Anna Waterhouse from RM inboxes as an incidental piece of work that was done without any preconceived plan of action in the course of implementing the client remediation exercise" (D/569/2574). The work was neither "*incidental"* nor "*done without any preconceived plan of action"*. It was the Horacek review, a stand-alone project of Ms Waterhouse's with the specific plan of action of identifying whether PWM RMs had been advising and arranging under the Old Model, and after she had made a request for that work to be undertaken months earlier (see above). Mr Hume misrepresented the truth to *"offer up"* Ms Waterhouse by making it appear as though she had taken no action to identify and disclose the problem.

142. Mr Collins says that to describe a process led by Mr Hume as "*an independent investigation",* is remarkable. Mr Hume further asserted, as fact, that Ms Waterhouse had *"knowledge"* that this had been going on (D/561/2528). He could not possibly, in the short time since his arrival, have known that, as Mr Bock agreed in evidence (T2/32/18-22). These were not the only untruths told by Mr Hume to the DFSA. On 15 September 2014, in the context of a request for more time to conclude internal investigations (D/587A/2998A), Mr Hume asserted that the issues raised by Ms Waterhouse in her grievance "*are internal relating to Anna's suspension and not directly relevant to the matters subject to the DFSA investigation"* (D/587C/2998C). The grievance was dated 25 August 2014 (around three weeks earlier) and unquestionably raises issues which are directly relevant to the matters which are the subject of the DFSA's investigation, including (D/587/2951): (1) whether Ms Waterhouse had been made a scapegoat for the failings of the bank in relation to PWM; (2) whether the bank had orchestrated a deliberate cover-up intended to mask the true origin and magnitude of the breaches by PWM; and (3) whether Mr Hume in particular had been involved in these actions.

143. Mr Collins also submits that the DFSA had also determined to proceed not only against Ms Waterhouse but also against the other individuals until receipt of the Freshfields letter (D/589A/3075) when it changed its position as a result of receiving that letter. So the DFSA has participated in DB's plan to "*offer up"* Ms Waterhouse and treat her as a scapegoat for the bank's failings. A further consequence of this approach is that the DFSA proceeds on the basis that Ms

Waterhouse failed to notify the regulator of the findings of the Horacek review, but does not reach the same conclusions as to Messrs Hume, Aram and Vollot, all of whom had, at this time, the same knowledge as Ms Waterhouse and who, on the DFSA's case, took no action (T1/158-161).

144. The DFSA responds first that Mr Collins obscures the fact that the DFSA's action was not limited to action against individuals. It imposed a substantial fine on DBDIFC (US$8.4m), and ordered it to take corrective action. Ms Waterhouse and Mr Parmar were not made to take the full blame for the underlying conduct. But the short answer is that it is not improper "*to treat some individuals differently from others*" if the circumstances of those individuals' cases warrant that. The regulatory breach concerned a compliance issue and the concealment of it from the DFSA despite it having been raised with the Compliance team over a lengthy period, so it is not unreasonable that the Head of Compliance should be a likely target of disciplinary action. Further Ms Waterhouse was the only individual within Compliance who could have been the target of disciplinary action for breach of the Authorised Individual Principles.

145. The examples which Ms Waterhouse gives of an alleged inconsistency of treatment concern the period after the Horacek Review. Ms Waterhouse was the primary point of contact with Clifford Chance and the person most directly involved in the response to the DFSA's investigation since the very beginning. She was in a much better position than any of the others to see that the DFSA did not react after 27 October 2013 in a way consistent with DBDIFC's wrongdoing having been admitted. She was also an AI under more specific duties to act with integrity and to disclose "*any information of which the DFSA would reasonably expect to be notified*". The DFSA did not reach divergent decisions on comparable questions from 27 October 2013 onwards. The case against Ms Waterhouse covers a much longer period.

146. The draft notice which the DFSA presented to DBDIFC, in which it proposed that it would seek against DBDIFC directions requiring Mr Aram, Mr Masud and Mr Vollot to be removed from their roles, was for the purpose of settlement discussions. Those discussions resulted in an agreed sanction which did not

include those directions. The draft notice did not suggest that enforcement action would be taken against the individuals themselves.

147. The DFSA adds this about the actions of DB. First, Ms Waterhouse implies that the note of a telephone conversation between Mr Plews, Mr Jolowicz, Mr Hume and Ms Slatter on 23 December 2013 (D/537/2440) shows the genesis of a plan to "*offer up*" Ms Waterhouse or Mr Masud as a scapegoat, and that Ms Waterhouse was selected rather than Mr Masud because the latter was "*organisationally senior [and] a major revenue-earner*". The DFSA does not consider that to be a fair reading of the note. The words "*offer up*" appear separately and in the context of a discussion of what should be done if it transpired that Ms Waterhouse was in fact culpable. Second, Ms Waterhouse submits that DBDIFC, through Clifford Chance, untruthfully told the DFSA on 22 January 2014 that the Horacek Review was "*an incidental piece of work that was done without any preconceived plan of action in the course of implementing the client remediation exercise*". But on her own case there was nothing "*preconceived*" about any "*action*" she was going to take in relation to the review. It would depend on what the review showed. The thrust of DBDIFC's reference to there having been no "*preconceived plan of action*" was that the Horacek Review was not a manufactured exercise done with knowledge of what the results would show, a view which Ms Waterhouse shares. Third, Ms Waterhouse submits that DBDIFC's reference to an "*independent investigation*" in the letter of 22 January 2014 was "*remarkable*" because it was led by Mr Hume and not therefore independent. But the letter was clear that Mr Hume had conduct of the investigation. It was clear that the investigation was not external to DB and nobody was misled by the use of the word "*independent*" into thinking that it was. Fourth, Ms Waterhouse submits that Mr Plews of Clifford Chance misrepresented the seriousness with which the results of the Horacek Review were taken, but the DFSA says that that is not a fair or accurate description of his email (D/493/2203).

148. Mr George adds that the conclusion that the DFSA received representations from an affected party and changed its position as a result of its consideration of those representations is not *"participation in an improper plan"*. Even if it were concluded that the Decision Notice could not stand, it would not follow

that these proceedings – which involve the Tribunal considering the facts *de novo* – were also an abuse.

149. As we see things, it is primarily for the DFSA to decide against whom to take action. In this case it acted against the bank itself and the two Compliance individuals most closely involved in dealing with the DFSA over the matter. As Mr Collins pointed out the underlying breach of regulation was not of the gravest kind - no customer appears to have lost money and the unauthorised conduct was in time regularised by DBDIFC. But the lamentable state of compliance within the bank was a most serious matter. There is as we see it nothing inappropriate in the DFSA taking the view that it did - it was well within the range of the reasonable options open to it. None of this comes near an abuse of process. The position with the Freshfields letter is as it says and as the DFSA submits.

150. The DFSA made it clear even by late 2013 that it was looking into the Authorised Individuals whose special responsibilities are reflected in the existence of Principles under which only they can be liable to the Regulator. Amongst all the many arguments being made it is easy to lose sight of this special position and status to which Ms Waterhouse gives only limited attention in her evidence and submissions.

151. Ms Waterhouse is aggrieved that her former colleagues involved in these matters have gone on to apparently successful careers and she sets out details of what they now do. She is perhaps understandably bitter about her treatment by DBDIFC and fiercely and repeatedly critical of former colleagues, in particular Mr Hume, whom she blames for what has befallen her, and of Clifford Chance. But these are not matters for which the DFSA should be held responsible. There is no evidence that they were involved in any plan to offer her up. Further as Mr George points out, some of the elements on which Ms Waterhouse relies in alleging a plot by DBDIFC are misconceived. In this case the DFSA proceeded against the corporate entity and against Ms Waterhouse and Mr Parmar personally. The contraventions were serious ones of Compliance. Ms Waterhouse was Head of Compliance and had been throughout the Relevant Period. Further the most serious matters alleged occurred not in late 2013 on which Ms Waterhouse's allegations of unfair

treatment focus but in 2011 and 2012. She was the Authorised Individual. One can usually put forward arguments in complex regulatory matters as to why particular individuals should or should not be proceeded against but that is a matter for the Regulator except perhaps in extreme cases of which this is certainly not one. One returns to the fact that Ms Waterhouse was the Authorised Individual with particular responsibility for Compliance who had been in post throughout the Relevant Period.

Abuse – The decision to take action against Ms Waterhouse after she made a major whistleblowing disclosure relating to serious suspicions about Client K.

152. Ms Waterhouse filed a Suspicious Activity Report ("SAR") in relation to the bank's Client K on 30 October 2012. She says she expected to be interviewed about that matter but instead, and without warning, she was interviewed about a wholly different topic, namely PWM. For reasons we have already given we believe that Ms Waterhouse is mistaken about that.

153. Ms Waterhouse says that she was a whistleblower who chose to report to the regulator a matter of grave concern relating to her own employer's actions, in relation to money-laundering. Mr Collins invites us to conclude that it is a matter of real concern that this report led to an investigation, not into the alleged money-laundering itself but instead into the individual who had blown the whistle. He says that Ms Waterhouse is not the only whistleblower in relation to Client K. He points to the witness statement of Mr Rihan, Client K's auditor, who is in dispute with the accountancy firm to which he belonged, and has also allegedly faced adverse consequences following a disclosure he made (see witness statement Paragraph 426) (C/87/2001)). The report was made to Mr Guner, whose response gave Ms Waterhouse some cause for concern (see witness statement Paragraphs 416-418 (C/87/2000)) and with whom Ms Waterhouse already had a difficult relationship (see witness statement Paragraphs 372-378 (C/87/1991)) as a result of his work in Qatar. There is no evidence that any action was taken to investigate Client K. Mr Bock confirmed that he and Mr Guner of DFSA Supervision did not discuss the serious underlying concerns in Ms Waterhouse's SAR (T1/83/13-17). That is consistent with the absence of any evidence of investigation or action thereafter; and indeed, the DFSA's express public statement (made through a

press release from Mr Johnston on 24 November 2014) that neither Mr K himself nor his group of companies was or had been the subject of the DFSA's investigation.

154. In his evidence, Mr Bock said that the investigation of an AML SAR was not the task of the DFSA. Mr Collins argues that this is inconsistent with Article 70 of the Regulatory Law and with the DFSA Decision Notice published on 2 November 2005 (DFSA Reference F001198) against ABN AMRO Bank N.V. (DIFC Branch) ('ABN'). The Decision Notice states that ABN was fined US$640,000 for AML failings and that it was directed by the DFSA to take and complete remedial steps in relation to its AML-related systems and controls. The Tribunal is invited to conclude that Ms Waterhouse was treated unfavourably by the DFSA as a result of having raised the SAR about DB's dealings with Client K.

155. Mr George responds as follows. He first addresses the interview and the claim that it was unfair for Ms Waterhouse to be interviewed about the issues in this case and not about Client K. (As we have made clear we consider she is mistaken about that). He says that the other aspect of this alleged abuse is misconceived. It is apparently a claim that it is fundamentally inappropriate for Ms Waterhouse to suffer disciplinary consequences as a result of having made a SAR. Even assuming that the law of abuse of process is capable of being engaged in these circumstances (no authority for that proposition having been identified) the SAR was not a whistleblowing disclosure. It was a report which Ms Waterhouse was required to make in discharge of her role as Money-Laundering Reporting Officer and there is no record of her employer opposing her action. There is no basis for suggesting that the DFSA took action against her for having made that disclosure. At best, its action was "*as a result*" of the disclosure only in the very limited sense that the facts surrounding the disclosure set in motion the enquiries which ultimately led to enforcement action against Ms Waterhouse (and Mr Parmar and, much sooner DBDIFC).

156. Mr George says that the DFSA took no action against K itself because that is the responsibility of the UAE Central Bank as Mr Bock pointed out (T1/84). Ms Waterhouse points to the DFSA having taken action in the past against ABN AMRO for "*AML failings*", but that is completely different: that action related

to the enforcement of the DFSA's own Rules concerning the firm's obligations in relation to AML controls and suspicions of money-laundering. Article 70(3) of the Regulatory Law makes clear that: *"The DFSA has, in respect of Relevant Persons, jurisdiction for regulation in relation to money laundering in the DIFC and the DFSA is the relevant authority that licenses and supervises Relevant Persons in the DIFC for the purposes of the Federal Anti-Money Laundering Legislation."* That provision gives the DFSA jurisdiction in respect of regulation in relation to money laundering so that it imposes regulatory requirements on regulated firms concerning how they investigate and report suspected money laundering. Investigation and prosecution of money laundering is a criminal matter governed by the other legal provisions referred to in Article 70(4) as being unaffected by the provisions of the Regulatory Law. Article 71(3) of the Regulatory Law provides: "*Where the DFSA detects conduct which it suspects may relate to money laundering, it shall advise the relevant authority exercising powers and performing functions under Federal Law No. 4 of 2002 without undue delay*." In other words, even the DFSA itself is required to report its suspicions to another authority, the UAE Central Bank.

157. As we see it Ms Waterhouse was not a whistleblower within the usual meaning of the word, someone who discloses internal wrongdoing. She was doing her job as MLRO, as she was obliged to do, in reporting Client K to the Central Bank and to the DFSA. It was for the Central Bank to deal with the alleged wrongdoing of Client K. One consequence of her doing this was that the report led the DFSA to make enquires which contributed to the findings against DBDIFC. It is common ground that there were serious wrongs to investigate. No criticisms have been made against her for what she did over Client K. The action against Ms Waterhouse is for something else. The evidence shows that the DFSA initiated enquiry, wholly unsurprisingly, into Ms Waterhouse's role and that of Mr Parmar as a result of receiving information from Clifford Chance and from Mr Hume. There is no basis for a claim of abuse of process here.

Abuse – Misuse of statutory powers under Article 80 of the Regulatory Law.

158. Mr Collins cites Article 78(1) of the Regulatory Law which provides: "*The DFSA may conduct such investigation as it considers appropriate and expedient under Chapter 2 of Part 5:(a) where it has reason to suspect that a*

contravention of the Law or of the Rules or of any other legislation administered by the DFSA is being or may have been committed…"

159. Article 80(1) provides: "*Where the DFSA considers that a person is or may be able to give information or produce a document which is or may be relevant to an investigation, it may:*

(b) require such person to give, or procure the giving of, specified information in such form as it may reasonably require;

(c) require such person to produce, or procure the production of, specified documents;

(d) require such person (the interviewee) to attend before an officer, employee or agent of the DFSA (the interviewer) at a specified time and place to answer questions in private (compulsory interview); or

(e) require such person to give it any assistance in relation to the investigation which the person is able to give."

160. Article 80A provides that, "*information given or documents produced as a result of the exercise by the DFSA of powers under Article 80 is admissible in evidence in any proceedings.*"

161. Mr Collins argues that the legislation therefore draws a distinction between an "investigation" and "proceedings". Article 78 empowers the DFSA to conduct an investigation. Article 80 provides a power to undertake a number of activities, including requiring the provision of information, always for the purposes of an investigation as envisaged by Article 78. Article 80A then provides that information provided to the DFSA in the course of the investigation may be used in proceedings. It is clear, therefore, that an investigation is a different statutory concept than proceedings, such as the present proceedings before the Tribunal. That distinction is reinforced by Article 79(2), which makes provision in relation to costs for circumstances where a finding is made by the DFSA, the FMT or the Court *"as a result of an investigation"*. The decision-making process does not form part of the investigation – it follows on from it. It follows that the investigation must

conclude before the decision is taken. The investigation, therefore, is the process by which the DFSA gathers information before a Decision is taken. Once the Decision is taken, the investigation is, inevitably, concluded. It follows that the DFSA was not entitled to rely on Article 80 of the Regulatory Law to compel DB to produce documents or information during the proceedings before the FMT. The DFSA's actions fell outside the scope of its investigation, which had long since concluded.

162. Ms Waterhouse first raised this issue with the Tribunal on 4 April 2018. The categories of document are identified in the DFSA's letter of 9 April 2018. She says that given the shortness of time before the start of the hearing, and given that this is a professional tribunal which is well able to exclude from its consideration documents which it has seen which it subsequently decides are inadmissible, she concluded that the only way to proceed was on the basis that the documents would be included in the bundle and addressed in closing submissions. The Tribunal is invited to reach the conclusion that it should have no regard to documents which have been obtained improperly and unlawfully when reaching its conclusion. The Tribunal is therefore invited to disregard the documents. Furthermore, the DFSA misused its power as a regulator to compel a firm which it regulates to produce documents. That is an example of the DFSA continuing to act outside the proper scope of its powers even in the course of these proceedings.

163. Mr George responds that even if the DFSA had made improper use of Article 80 in obtaining documents from DB, this is not capable of supporting an allegation of abuse of process. He also argues first that the Tribunal has the power under Article 31(5)(a) of the Regulatory Law to consider any evidence even if it would not be admissible in a court. Even if (which is denied) there were any real issue as to whether the documents had been obtained lawfully, the Tribunal should still be guided principally by the question whether the documents are or are not of assistance in resolving the disputed issues. Secondly he says that the documents were obtained lawfully. Article 80 empowers the DFSA to compel the production of information or documents "*Where the DFSA considers that a person is or may be able to give information or produce a document which is or may be relevant to an investigation*." The

DFSA's requests for documents were made so as to enable it to investigate matters relating to Ms Waterhouse's conduct (for example, as to the veracity of Ms Waterhouse's case that it was not her practice to read work emails received while she was on holiday, or as to the incident involving Ms X which Ms Waterhouse alleges took place on 30 October 2011). On the natural and ordinary meaning of the words, they were "*relevant to an investigation*". The DFSA's relevant policy document provides that the DFSA will conclude an investigation when it determines to take no further action and all remedies and obligations resulting from an investigation are concluded and fulfilled (Regulatory Policy and Process Sourcebook, Paragraph 5-19-1). That has not yet happened because the findings and the sanction are under challenge. In any event, even if it were held that the investigation into Ms Waterhouse has come to an end, the documents sought were plainly relevant to that investigation because they relate to the grounds on which Ms Waterhouse challenges the conclusions reached in that investigation. The test of "*relevance to an investigation*" is therefore satisfied.

164. If for any reason the DFSA had been unable to obtain the documents under Article 80, it would have been able to obtain them anyway under Article 73, which empowers it to require an Authorised Person to produce such documents "*as the DFSA considers necessary or desirable to meet the objectives of the DFSA*"; or, by an application for third party disclosure in these proceedings which DBDIFC has indicated it would not have resisted. In those circumstances, it is far too late to raise this issue now. It has been clear to Ms Waterhouse since at least 22 February 2018 that the DFSA was using Article 80 to obtain documents from DBDIFC. She raised a concern for the first time on 22 March 2018; the concern was not pursued at the first hearing in April 2018; it was resurrected shortly before the reconvened hearing in October 2018 but was not pursued then either. The parties and the Tribunal have considered those documents extensively and many of them were exhibited by Ms Waterhouse to her supplemental statement dated 28 September 2018. There is no good reason to exclude them now. She chose not to make an application and the documents have been relied on extensively by both sides.

165. There is as we see it no abuse here either. The documents were sought to pursue issues raised in Ms Waterhouse's Statement of Case, namely (i) contemporaneous emails and calendar entries from October 2011, relevant to Ms Waterhouse's explanation for what she wrote in her email exchange with Ms El-Masri on 30 October 2011, (ii) work emails sent by Ms Waterhouse while on holiday in April 2012, which are relevant to her case about reading emails on holiday and, (iii) internal DBDIFC documents relating to allegations advanced by her in the private matter in May 2013. The documents include items that were, when produced by DBDIFC, unhelpful to Ms Waterhouse's case in each category but clearly material to those issues. But the documents might have proved helpful to her in which case the DFSA would have been open to criticism if it had failed to obtain relevant material.

166. We reject the ably argued interpretation of Article 80 put forward by Mr Collins for the reasons given by Mr George and also because we see no justification for imposing a restrictive interpretation on the powers of the Regulator. The Article 80 powers have been used to assist Ms Waterhouse when she has herself requested it. Even if we had been wrong about our interpretation of Article 80 we would certainly have ordered production of the documents in one of the other procedural ways available as they are centrally relevant to issues that Ms Waterhouse has brought into the case. We will not exclude this material from the case now. Further it would have been difficult to do so given the extensive use made of it – most recently in both sides' closing submissions. The use of obviously relevant material cannot be an abuse of process.

167. We have been very and explicitly conscious of the inevitable disparity in resources between the parties and have had explicit regard to this in interlocutory decisions. This is however not a resources issue.

Abuse – Other matters.

168. Ms Waterhouse relies on four other matters. First she says that the DFSA relied on Freshfields, instructed by Mr Hume, to report the findings of an 'independent review' to it notwithstanding that Freshfields already acted as DBDIFC's legal representatives so could not be independent. A report prepared by them on the instructions of Mr Hume could of course not be independent.

The DFSA responds that the allegation of 'reliance' is not understood. The DFSA had regard to the material presented to it by Freshfields, as it had regard to all the other material it collected, and reached its own conclusions. The DFSA says there is nothing inappropriate about that. We agree and cannot see how that can be a plausible basis for an allegation of abuse of process.

169. Secondly it is claimed that the DFSA withheld evidence from Ms Waterhouse, the clearest example (no others are given) being the conclusions of the 'Project Dastan' investigation. The DFSA points out that it took steps at Ms Waterhouse's request to obtain information about the Project Dastan investigation from DB – see for example the Article 80 Notice issued on 12 July 2016 – and disclosed it to her once it had been obtained (D/609/3195). We agree. Further this is a case where thousands of documents have been disclosed at the behest of lawyers over several years and the example given is a peripheral one.

170. Thirdly it is claimed that the DFSA improperly disclosed details of its confidential and without prejudice discussions with Ms Waterhouse to DB AG; and disclosed her confidential medical records to its expert witness without her consent. The first allegation is unparticularised. Ms Waterhouse complains that she indicated on 13 December 2017 when serving Professor Hirsch's report that she did not "*give consent for the report to be disclosed to any third party*". However, on 23 December 2017 she indicated that she was happy for the DFSA to serve expert evidence in response to it. The DFSA says that it was obviously inherent in that exercise that its expert would need to see the relevant documents and the expert was not a third party. The DFSA understood that the restriction on disclosure to a "*third party*" did not extend to an expert witness which Ms Waterhouse had agreed the DFSA should be able to call. The DFSA says that any allegation of impropriety is rejected and does not come close to establishing an abuse of process. We agree. It would obviously have been impossible for the expert to give an opinion without reading the report and if a party's expert were a 'third party', which we doubt in the context, consent was given implicitly when agreement was given, as it had to be, for the expert to be retained. Further the issue is peripheral.

171. Fourthly Ms Waterhouse also alleges that "*Notwithstanding written assurances to the contrary, the DFSA failed to record and transcribe the lengthy oral submissions made by and on behalf of the Appellant*" at the DMC's meeting on 4 September 2016. The DFSA disagrees fundamentally and in detail. It is however pointless in a de novo hearing for us to go into detail about what happened at the DMC unless it has some serious consequence for our process. It does not.

172. Mr Collins finally submits that the above has been a range of ways in which the DFSA has acted improperly to the detriment of Ms Waterhouse. Such improper conduct must amount to a breach of the guiding principles identified at Article 8(4) of the Regulatory Law. The conduct relied on is so wide-ranging, and so fundamental to the case before the Tribunal as to be an abuse of process.

Abuse – Conclusions.

173. For the reasons we have given none of the points raised individually or cumulatively begin to amount to an abuse of process - certainly not one which might preclude the Tribunal from doing justice in what is a de novo hearing.

THE EVIDENCE.

Witnesses and Live Evidence.

174. Ms Waterhouse submits that the Tribunal's approach should be to give priority to her evidence on any disputed issue because she has given oral evidence whereas *"the DFSA relies almost entirely on the documents"*. Ms Waterhouse gives two reasons why in the present case the oral evidence should be given priority over the documentary evidence. First, she submits that *"this is a hearing de novo based primarily on oral evidence"* but there is no legal basis given for that submission. Further Article 31(5)(a) of the Regulatory Law provides that the FMT may "*receive and consider any evidence by way of oral evidence, written statements or documents"*. Secondly, she refers to Keefe v Isle of Man Steam Packet Company [2010] EWCA Civ 683 at §19 in support of a submission that it would be wrong to base conclusions on the documents if no witness has been called to give evidence about those documents. The case does not support that submission as Mr George points out. Further at least in

England contemporaneous documents are generally seen as a more reliable source of evidence than a witness's recollection of events for the reasons given by the then Leggatt J in Gestmin SGPS S.A. v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) at §§15-22, in which he referred to the various problems inherent in relying on memory particularly in the context of an adversarial dispute:

"*the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.*"

175. Mr Collins submits that it is striking that the Tribunal has no evidence at all from Mr Parmar, Mr Bower, Mr Vollot, Mr Aram or Ms X. We disagree. No indication is given as to how the outcome might have been different had another course been taken. Further it is difficult to see what important evidence these witnesses could have given about the real issues at stake, in the unlikely event of them having being available and in Dubai or London, beyond what they said in interview about their memory of events some years ago which has been very closely examined throughout the intervening period. The approach of the DFSA to presenting evidence to the Tribunal is consistent with that of the FCA in London which has been accepted by tribunals and courts for some years and needs to be proportionate. A further answer to the point arises from another criticism made by Mr Collins. He says that "*Perhaps most striking of all,* [Mr A] *did attend the Tribunal and gave oral evidence, but gave no evidence whatsoever about the key issues of fact in the case about which he had direct*

knowledge. The DFSA's decision not to call evidence from him on, for example, his understanding of the events of 2013 is remarkable in circumstances where he was present in Tribunal to give evidence …". Mr A was available to give evidence because of the confidential matter and also gave a little evidence about the other issues. He could of course have been cross examined at length about numerous other issues. Ms Waterhouse and Mr Collins, perfectly understandably, chose not to cross examine him further about those other issues.

176. Mr Bock who led the day to day investigation gave largely uncontroversial evidence about how it was conducted. He seemed to us to be entirely straightforward and truthful in his evidence. He was frank about Mr Glynn's behaviour toward Ms Waterhouse. He still works in financial regulation but for another regulator outside Dubai.

177. Mr Johnston gave evidence about Mr Aram's discussions with him on 27 October 2013. He too was an obviously truthful witness whose recollection that he had not been told of the Advising and Arranging was consistent with all the documents that do and do not exist and with what both parties did in the period after the meeting.

178. Mr Stirewalt's evidence was uncontroversial.

179. Ms Ajwani did not wish to give oral evidence and we only had her statement. Ms Waterhouse indicated that she did not require Ms Ajwani to give oral evidence. Ms Ajwani's witness statement was not in itself controversial or hostile to Ms Waterhouse and was supported by contemporaneous documentation on which her recollection of dates, the crucial issue, depended. We accept her evidence.

180. Ms El-Masri submitted a witness statement but for various reasons, including medical ones, did not give live evidence. Her statement is highly controversial in that Ms Waterhouse considers her evidence about some crucial matters to be wrong and contends that Ms El-Masri is a liar. It is Ms Waterhouse whose position is at stake and she herself has given live evidence and been cross examined at length. In those circumstances, without criticising Ms El-Masri in

any way or forming any views about her credibility, we do not think it right to accept any part of her statement that depends only on her recollection independent of the contemporaneous documents.

181. We discuss the evidence of the other DFSA witness in the private decision.

Witness evidence on behalf of Ms Waterhouse.

182. Ms Horacek is a highly educated and experienced Compliance professional who had worked at DBDIFC and other banks. Following redundancy, she was available for temporary work at DBDIFC in September 2013. She gave evidence about the sampling review which she was instructed to carry out in September/October 2013 for DBDIFC, the results of that exercise, and Ms Waterhouse's reaction upon being told the results. The exercise took just under two weeks, and it showed that Advising and Arranging were endemic within the PWM team. In her statement she concludes: - "*my conclusions were that the PWM was, in my opinion, doing more than client introductions for DB centers outside of DIFC. Several external e-mail communications between PWM bankers and their clients and prospective clients showed the bankers were marketing and advising to their clients on investments and financial products. When I presented my findings to Anna, she was surprised, I did not have the impression that she knew what the result of the review would be*".

183. In cross examination her evidence about Ms Waterhouse's reaction was in effect that it was "*difficult to say*", but that she (Ms Horacek) did not have the impression "*that this was something* [Ms Waterhouse] *did, knowing what the outcome would be*" (T3/42-43). Ms Horacek referred to Ms Waterhouse's "*shock*" and "*disappointment*" (T3/42/12). "*I didn't have the feeling that she knew*" (T3/43/1). "*I know she was surprised – I think she was surprised*" (T3/43/23). Ms Horacek, who also gave a character reference for Ms Waterhouse, was clearly an honest and straightforward witness the truth of whose evidence we accept.

184. Mr Patel is Ms Waterhouse's husband. His statement originally given in 2016 describes, among other things, Ms X and what he knew of the incident in October 2011, his dealings with Mr Parmar and the intensity of his wife's work

pressures. His oral evidence was that Ms Waterhouse constantly worked while on holiday, including reading and answering emails on her BlackBerry, and that it was a feature of every holiday including their April 2012 holiday to Sri Lanka. In cross-examination he said that although he could not recall the precise date of the Ms X incident he would place it after Ms Waterhouse's birthday party on 13 October 2011. He also recalled that there was only one incident "*of this magnitude*" and that it was "*out of the ordinary*" (T4/14). As we have said Mr Patel was an entirely honest witness who understandably had limited recollection of detail so long after the events but was doing his best to assist us.

185. We refer to another witness statement in the private part of this Decision.

THE ROLE OF MS WATERHOUSE.

186. We have referred briefly to Ms Waterhouse's role above. As the Head of Compliance, MENA, she had a functional reporting line to Mr Hume, the Head of Compliance EMEA within DBAG, and a local reporting line to Mr Vollot, the MENA COO of DBAG. She had an additional reporting line when she became Head of Legal in November 2011, firstly to Mr Sieve and then to Ms Slatter, a role which she told us she was very reluctant to take on. As the Compliance Officer of DBDIFC, the employees in that department reported to her, there were three in Dubai and others in Saudi Arabia and elsewhere, in addition to the Legal team. Ms Waterhouse did not have sole responsibility for Compliance matters, given the three lines of defence model that DBDIFC operated under which initial responsibility for Compliance matters lay with the front office, in this case the PWM bankers, their business manager (Mr Bower) and Ms El-Masri. As the MLRO, she had responsibility for the implementation of DBDIFC's anti-money laundering policies. She was also, among other roles, Head of Compliance and AML officer/MLRO for DBAG's offices in the region including in Abu Dhabi, Algeria, Bahrain, Cairo, Lagos and Qatar. As Head of Legal from November 2011 she had responsibilities throughout the region.

187. "Key Accountabilities" in her job description, included: *"a. ensuring that the businesses and regional management across MENA are appropriately advised and supported on applicable law and regulation; b. being the senior point of*

contact for all regulators and exchanges in the MENA region; c. escalating all material issues to the Head of Compliance EMEA; and d. reporting (as required) all relevant management information relating to material compliance or legal issues."

188. Ms Waterhouse was in a senior role and sat on three important committees; (1) UAE ExCo, which was the main strategic decision making body for DBAG in the UAE, (2) DBDIFC ExCo, over the period from May 2013 (when it was established) to 22 January 2014, which was responsible for matters relating to DBDIFC and reported to the UAE ExCo and (3) MENA UAE OpCo, which was responsible for co-ordinating matters relating to the infrastructure and control functions of DBAG in MENA and the UAE. Of course, others such as Mr Aram and Mr Vollot were senior to her, as was Ms El–Masri, Mr Hume and Mr Masud.

189. Ms Waterhouse came to this role from the background described in her extensive statements. She explains that after reading law at Oxford University she started to train for the Bar but having been given a temporary job in the City of London in 1996 she started to build a career in banking first on trading floors and in time in Compliance. She joined DBAG in 2001 as Vice President in Compliance, based on DB's London trading floor. She explains *"I was hired as a specialist compliance advisor to the convertible bond trading (sales and sales-trading) desk. My responsibilities expanded to encompass equity derivatives trading more generally and derivatives structuring. I became the manager of a team of equities compliance advisors. I also advised on Equity Capital Markets transactions and related issues. I was invited by the Head of EMEA Compliance at Deutsche Bank AG (Mr. Andrew Proctor) to relocate with my family to Dubai to take up the position of Regional Head of Compliance MENA (Middle East & North Africa). In late August of 2007, I relocated to Dubai, together with my husband* [who had retired prematurely in 2006 on grounds which included his ill health] *and daughter. In the space of a few weeks I had also got married, found a school for my daughter, accommodation and so on and travelled extensively on business, including to a variety of MENA offices"*. She was supported in Compliance by Mr Parmar, who had a legal

background, whom she had hired in London in about 2005 for another role. In about 2010 she hired Mr Stephane Polli.

190. We have when dealing with the chronology set out Ms Waterhouse's position on many of the events which gave rise to these proceedings. She also relies on important general points to set these events in context.

Work load.

191. In appraising Ms Waterhouse's performance of her role, we bear in mind the unquestioned shortcomings within which she had to operate as summarised in the Decision Notice given to DBDIFC. It is also important to be aware of the following observations of the DMC in her own Decision Notice with which, having heard this case, we agree: *"The DMC agrees that the way DBDIFC organised its governance and other functions was inadequate and the firm has already been sanctioned for these deficiencies. Equally, we accept that Ms. Waterhouse: a. was overworked; b. spent considerable time travelling because of the geographical scope of her responsibilities; c. was provided insufficient resource to fulfil all the responsibilities she and her teams were allocated, despite making numerous requests to senior management for additional resource, etc.; d. received large volumes of email traffic, particularly because of an ethos within the firm that "If I copy Compliance on my email I'll be alright"; and e. was the recipient of inadequate support from senior management. It is the view of the DMC that Ms. Waterhouse was put in an extremely difficult position by DBDIFC. Compliance Officers have a key role to play within Authorised Firms and they should be able to look to their organisations, and management within those organisations, for help and support in carrying out this important function. That was clearly not the case with Ms. Waterhouse and DBDIFC"*.

192. Ms Waterhouse repeatedly cites her heavy workload as one reason why emails and other indications that Advising and Arranging was occurring did not come to her attention. As Mr Collins puts it: *"Ms Waterhouse's extraordinary workload is important because it explains, by way of context, why there is nothing surprising whatsoever in the proposition that she did not read or absorb the content of all the documents upon which the DFSA relies and which*

are addressed below ... Put shortly, it is unrealistic to expect her to have read and considered every line of every email against the backdrop of her considerable workload and having delegated the PWM project."

193. She was to some degree responsible for that situation. Having been in charge of Compliance since 2007 she had a responsibility with others for those shortcomings and a duty to put them right. There is evidence that she complained about her workload and her lack of support, and we have given examples, but none that she ever warned her colleagues about the regulatory consequences and the fact that she might have, as Authorised Individual, to report the matter to the DFSA. Further she did not report it to the DFSA.

194. We also agree, having now completed a separate exercise, with the conclusion of the DMC at Paragraph 43 of the Decision Notice: *"But, on the other hand, an individual - particularly a professional such as Ms. Waterhouse - has to know when to say "enough is enough". If the work situation was truly as unmanageable as has been described to us, with the impact on Ms. Waterhouse's well-being that has been stated above, then Ms. Waterhouse should have blown the whistle to the DFSA that she was unable properly to carry out her Compliance Officer role because of the work environment and sought other employment."*

195. Similarly, while she says that she took the additional role of Head of Legal in November 2011 reluctantly there is no documentary evidence of that or any suggestion that she warned her colleagues of the risk to the DBDIFC Compliance framework. She continued to assume new Legal and Compliance duties - including those for Lagos and Pakistan in 2013, the latter when an important regulatory exercise was underway, again apparently without protest or warning.

196. We are well aware of the insidious effect that overwork can have such as risks taken from time to time by not being able to look at things thoroughly or at all, meetings where the pressure of other problems prevents one from focusing on the matter in hand and general exhaustion. Notwithstanding her own contribution to the situation the fact remains that overwork may well have made

her less aware of matters than would otherwise have been the case and we make allowance for that, particularly when looking at the second half of 2013.

197. There is also the question of priorities. One example among many of Ms Waterhouse citing her workload is this from Mr Collins' closing submissions in reply in relation to the preparation of the SPR: *"It* [PWM] *was far from the only controversial issue. Indeed, there were a large number of matters (of course some more controversial than others) which Ms Waterhouse was working on with Clifford Chance, including some fifteen outstanding queries relating to business lines, controls and policies which did not relate to PWM; and the position remained that Ms Waterhouse had other pressing matters to deal with as part of her workload. Furthermore, as she wrote to Clifford Chance at the time, she deferred to Mr Parmar's views in relation to PWM."* If one assumes that to be correct how could any of the 15 be more deserving of Ms Waterhouse's time than a report which she had initiated to control what might prove to be a serious regulatory problem?

198. It is important also to bear in mind, on the question of workload, as we do, that we are dealing in this case with many emails but in terms of Ms Waterhouse's daily work load they are a very small fraction of what she was having to read every day.

199. Workload falls away as a justification once it is clear that there is a regulatory issue and it has been drawn to a person's attention. As we see it the issue had been clearly drawn to her attention in October 2011 as part of a dialogue which she had initiated, in the process of the Country Risk Workshop in November 2011 and on other occasions we have mentioned and to which we will return. An alleged lack of the resources necessary to stay on top of compliance issues cannot provide a justification where, for instance, it is clear that a compliance issue was raised in an email which Ms Waterhouse received and to which she replied.

Delegation.

200. PWM was as Ms Waterhouse saw it a very minor part of a very large job – she estimated less than 1% of her time was spent dealing with it; if so it might be

that this was a mistake. It was one of the three main areas of DBDIFC's operations, was expanding fast and, by its nature, contained greater compliance risk than other areas. That obvious risk was that Relationship Managers would in the course of managing relationships with clients and potential clients exceed the "introduce and refer" remit and stray into advising and arranging.

201. Mr Collins says that there can be nothing surprising at all about the fact that the vast majority of her attention was focussed on other areas of the business; all the more so given that specific responsibility for managing change in this part of the business had been delegated to Mr Parmar. He relies on the evidence as to the appropriateness of Ms Waterhouse's approach to delegation of Ms Kebreth (C/86/1924) and Mr Barchini (C/84/1918).

202. Ms Waterhouse frequently puts forward the extent of her delegation to Mr Parmar in answer to criticism. For example, Mr Collins says: *"The DFSA relies on [D-302-1174], an email in relation to a later audit which refers to a need to "implement changes" to address "changes to the AWM business model". The email could not have caused Ms Waterhouse concern since she was well aware of a plan to make changes – the plan she had delegated to Mr Parmar*" (B/4/184/§186) and "*Ms Waterhouse ... would only open those emails which might need a response from her – an email from Ms El-Masri in relation to a matter being dealt with by Mr Parmar would plainly not fall into that category – indeed she could safely ignore any emails about PWM because she knew Mr Parmar would deal with them."* (B/7/269/§43).

203. These submissions seem to us to overlook some important and to some extent obvious considerations. The responsibilities of a job do not diminish or increase with the tendencies of the occupant to delegate more or less. The evidence of Ms Waterhouse's general habits of delegation is of limited assistance when we have direct evidence of what was or was not delegated in this case. It is common ground that Ms Waterhouse properly delegated day to day responsibility for devising and implementing the compliance aspects of the new PWM model, the issue is her knowledge of a serious regulatory matter which came to light in that process. Even if day to day work is delegated, we would expect any Compliance Officer to become immediately involved and to remain so until the matter was resolved. The Head of Compliance would, and certainly should,

have taken an interest in it even if a more junior employee was taking front-line responsibility for the work.

204. Furthermore, as the DFSA points out Ms Waterhouse did at times become directly involved in day to day activity even though there was delegation. Ms Waterhouse was being urged by her superiors (not only Ms El-Masri but also Mr Vollot) to make progress in relation to the compliance framework applicable to PWM. See for example Mr Vollot's email of 12 September 2011 (D/26/113): *"please make sure to drop* [Ms El-Masri] *an email by tomorrow cob the latest. Short one, just mentioning you are working on it."* From the point of the DFSA's October 2011 site visit onwards, it was one of the issues in which the DFSA had expressed specific interest: (D/53/199, D/57/225). She was herself interviewed by the DFSA about the question in January 2013. Her superiors such as Mr Vollot expected her to be directly involved in, for example, the April 2013 phone call.

205. She also retained a degree of control throughout. Among examples relied on by the DFSA is this. When the DFSA asked at the October 2011 risk assessment visit for a written statement of the PWM team's activity Ms Waterhouse drafted it. On 25 October 2011 Ms Waterhouse asked Mr Polli and Mr Parmar for copies of various policy and guidance documents relating to the PWM MEA team (D/66/259); when Mr Parmar asked *"Is this for Serene?"* she answered *"No – it's for me. Salman wants us to amend our existing P+P for PWM urgently and I want to think about the best way to do this" (*D/66/257). We have referred above to detailed activity before February 2012.

206. Ms Waterhouse said that she did not think she had even read Mr Parmar's email of 11 March 2013 stating that the whole project which had allegedly been delegated to him had been completed and the KOPs were in place (T5/162). This seems inconsistent with conventional delegation and also with what she was able to tell the DFSA on 3 April 2013 (D/164/668). It is perhaps an indication that her recollection is understandably at fault. There is at times a tension between Ms Waterhouse recalling that she did not have time to read some emails and citing detail in other messages to support her case.

207. Delegation does not arise as a defence where Ms Waterhouse was directly and personally involved, for example in October and November 2011.

Motive.

208. Mr Collins submits that *"there was no conceivable motive for her to risk her reputation, career and livelihood, all of which (as her character witnesses attest) were and are of the utmost importance to her."* Mr Collins also submits*: "The Tribunal is asked to keep in mind that if Ms Waterhouse had been aware of the PWM issue from the outset as alleged, it would not have been difficult for her to raise it with senior management and with the regulator. The implications for the bank and for her were obviously far more serious if, having become aware of a problem, she sought to hide it than if she made what would have been a straightforward disclosure. Above all, the Appellant valued her reputation, having worked for twenty years to establish a successful career… It would have been in her own interest to take action if she was aware of wrongdoing. The disclosure of the wrongdoing in issue might have affected the reputation of other individuals, but not her. It simply makes no sense for her to have concealed these matters. Of course it is known that the Appellant had no hesitation in making the* [Client K] *disclosures".*

209. In contrast the DFSA says that there was a perfectly plausible motive most apparent from Ms Waterhouse's own words in an email of 13 December 2011 (D/131/563): *"Following the recent onsite risk assessment by the DFSA, we are aware that there are a number of weaknesses in our existing NCA and KYC processes, which are currently internal outsourced to other booking locations in distinct geographical locations. During the inspection, DFSA found 14 of the 15 files they sampled to be defective from an AML perspective. We managed to demonstrate better due diligence on most of these files after extensive local input and working closely with Gail's team. We managed to keep the matter out of enforcement, but are told that if similar issues emerge in the future then we will face immediate referral to enforcement. This would have business critical consequences."*

210. Mr George argues that the reason Ms Waterhouse acted as she did in October 2011 appears to have been that (a) she knew there was a risk of enforcement

action if it emerged that the PWM team was providing unregulated financial services, (b) she believed that the issue was only a short-term one which would soon be regularised, and so (c) she misrepresented the position to the DFSA because what she understood to be a relatively small and victimless falsehood would avoid the "business critical consequences" of a referral to enforcement. The consequences of that initial falsehood snowballed over time, partly because of the delay in implementing the new procedures and partly because the DFSA required further and more formal information about the true position and she needed to be consistent with what she had said before. Ms Waterhouse had nothing to gain directly from the Advising and Arranging and the unauthorised activity ended in April 2013 causing no financial loss to anyone.

211. As Mr Collins has emphasised, Ms Waterhouse had no direct personal motive for disregarding the issue. There are also numerous testimonials to her honesty and integrity. The DFSA has pointed to what they see as a motive as we have mentioned. This is a question that is relevant to whether Ms Waterhouse would do such a thing as not take up a clear regulatory problem. As we see it there are reasons in this case which might well have led Ms Waterhouse to act as she did.

212. The state of regulation and attitude to it within DBDIFC was deplorable as is common ground. There was clearly no atmosphere encouraging anyone to come forward with a regulatory problem or to go to the Regulator. The working atmosphere within DBDIFC was not it seems a happy one either, as events have shown. Ms Waterhouse had been at DB for thirteen years and in charge of Compliance at DBDIFC for seven years by the time of her suspension and was for legitimate reasons making her career there and no doubt hoping to move up the ladder. She was the sole bread winner in her family. The regulatory problem was due to be fixed and was apparently causing no one any loss and in early 2013 it was fixed. There was every likelihood that the problem would be solved without the regulator needing to know. She might have thought that she could control the problem and avoid a lot of trouble for the bank and even more work for her, hard pressed as she was. But as it happened the matter came to the DFSA's attention. We do not presume to identify what was Ms Waterhouse's motive for her conduct but to show that there could well be reasons, of which this is one example, for events to take the turn they did.

Horacek Review.

213. Mr Collins submits that the Horacek review at the end of September 2013 was the culmination of commendable efforts by Ms Waterhouse to get resources and to look into the matter properly. He also points to the evidence of Ms Horacek herself that Ms Waterhouse seemed surprised at the outcome, a matter we have referred to above.

214. By then DBDIFC and its employees were several months into an investigation, with an outstanding Article 80 Notice against DBDIFC from July 2013 requiring production of relevant documents with another given on 1 October 2013. A clip of emails specifically requested by Mr Bock in August 2013, the contents of which were damning, had been with Ms Waterhouse for weeks pending her approval that they be provided to the DFSA in compliance with a request under Article 80. Ms Waterhouse commissioned the Horacek Review without the need for external authorisation (T6/62). Mr George submits that she only did it because, as it were, she knew that 'the game was up.'

215. There was nothing inappropriate in Ms Waterhouse arranging the review as she did and it provided some reliable material for DBDIFC to report to the DFSA. But by this time Ms Waterhouse was under pressure to disclose materials which, as we see it, she must have known would be seriously damaging, and there was nothing to lose by doing the survey and also demonstrating a willingness to do so. She would also be able to show at least some efforts made to get on top of the situation.

216. We have set out above (Paragraph 114) extracts from Mr Bower's 6 September 2013 email to Mr Vollot copying Ms El-Masri. Mr Vollot's response was copied to Ms Waterhouse. The messages give a realistic picture of how things were seen at the time when the Horacek review was commissioned.

217. Evidence based on a witness' demeanour is notoriously unreliable as juries are reminded daily in England and the same considerations apply to Ms Horacek's perceptions of Ms Waterhouse looking surprised. She might have been surprised by a variety of things. The weight of this honest evidence is very limited and vastly outweighed by the extensive material created during the

Relevant Period which in our view demonstrates clearly that Ms Waterhouse was aware of the probability if not the certainty that Advising and Arranging had been taking place.

Client K.

218. Ms Waterhouse was required to report Client K as part of her job as MLRO and it was quite right that she should do so. If she had not done then she might well have been in breach of other regulatory duties. The reporting was not of any wrong doing by her employer. It was not inevitable that the reporting would lead to the investigations which later occurred.

Standard of Proof.

219. There are extensive written submissions between the parties on this issue. The DFSA submits that the correct approach is that identified by the UK Supreme Court in Re S-B (Children) [2010] 1 AC 678 and applied in the financial services context in Carrimjee v FCA [2015] UKUT 0079, namely that the standard of proof is the normal civil standard of the balance of probabilities. As to the law of England that is clearly right. Mr Collins points however to Odhaid Saeed Al Mansouri (2011) DFSARAC 6 where the Regulatory Appeals Committee of the DFSA concluded (at Paragraph 23) that allegations of lack of integrity required a "*higher standard of proof*". The same approach was taken in Husam Al Ameri (2011) DFSARAC 5 (Paragraph 23). With respect to the Committee neither decision is closely reasoned or expressed to be an aspect of DIFC law differing from that of England. In the unlikely event of DIFC law taking a different approach it would be for the Court not the Committee to take it. Nevertheless, we have in practice adopted the approach of Mr Collins and his submission that given the impact of a finding of lack of integrity on the career of a professional person, such a finding should not be made in the absence of cogent evidence.

Conclusions about Ms Waterhouse's knowledge.

220. We are sure that from October, and certainly November 2011 Ms Waterhouse must have been aware that a potentially serious regulatory issue had arisen and that she had regular reminders of this until October 2013, each one of which

should have alerted her. The factors we have identified relating to each issue both individually and collectively form a pattern which we consider to be clear. A factor that Ms Waterhouse appears to overlook is that on their face the most concerning events, and the documents recording them seem very incriminating. It is thus unsurprising, if not excusable, that the first reactions of those reading the documents whether within DB, its solicitors or the DFSA were to assume that Ms Waterhouse had been seriously at fault.

221. We accept that the burden of workload was intense and consider that factor at each stage, particularly in 2013, but as we have said that carries less weight, as does her reliance on delegation, when matters are directly drawn to her attention and are plainly her responsibility as Head of Compliance. We have mentioned the other reasons why Ms Waterhouse's reliance on this factor is misplaced. This is not a matter of preferring the account of Mr Parmar, we have not had evidence from him beyond his interview transcript, but of the realities and the documents we have referred to. The honest evidence of Ms Horacek carries little weight on this issue for the reasons we have given.

222. It does not follow that because we disbelieve her account that Ms Waterhouse was actively lying in her evidence to us. It is now more than 5 years since Ms Waterhouse was suspended and she has been continuously under stress ever since, dealing with internal grievance and disciplinary procedures and then with the process which in time came before the DMC. She has had multiple dealings with a variety of processes sometimes with help from lawyers and sometimes not. She has not, for the reasons which she gives, been able to work at the senior level she enjoyed at DB and her intellectual energy has had to be deployed elsewhere. Her health has been affected, stress requiring the postponement of her evidence for some months. She is also financially and generally responsible for her child and her unwell husband. She has watched others whom she sees as more to blame than herself flourish in the meantime and indeed gives details of their subsequent careers in her submissions. It would not be surprising if these factors and living with these issues for so long had clouded her judgment and affected the accuracy of her recollection. It may be that a sense that a particular event must have happened to explain something otherwise inexplicable has slipped into being an actual recollection that it has. We had a

sense that under all these burdens Ms Waterhouse has in some respects lost touch with reality.

223. It may be presumptuous for us to suggest these factors, there may of course be other explanations. It is however very clear to us, even taking account of her character and reputation and the fact that it is for the DFSA to prove things clearly, that important aspects of Ms Waterhouse's evidence are not true. When aspects of her evidence on peripheral matters, one example being her insistence that there was a separate and later Ms X incident, are obviously not correct, these add to one's reservations about her account of other events particularly when they are inconsistent with contemporaneous documents and the usual realities of financial business life. It is important to bear in mind when examining each incident over a lengthy period that all these events are cumulative. For example, an email in April 2012 has to be seen in the light of what if anything was already known following the October 2011 emails and the November 2011 workshop and the messages earlier in the year. The fact that Ms Waterhouse's evidence is not correct does not of course of itself mean that she has acted in breach of DFSA Rules and it is to that issue which we will turn next.

APPLICATION OF FINDINGS OF FACT TO THE ALLEGED CONTRAVENTIONS.

224. We have set out the claims of the DFSA above but in general terms. The detailed allegations are summarised from Paragraph 3.167 onwards in the Answer. We have already set out the relevant Rules which Ms Waterhouse is alleged to have contravened. Apart from Article 66 they all relate to Authorised Individuals. We bear in mind particularly at every point that it is for the DFSA to prove this allegation to the standard we have identified, not for Ms Waterhouse to disprove them. We also have regard particularly to this from Paragraph 31 of Mr Collins' closing submissions: "*Given the significance of the matter for any professional, a Tribunal such as this must proceed with particular care. In the present case, in which the disparity in power and resources between the parties is so great, the Tribunal will no doubt remain acutely conscious of the need to ensure fairness to Ms Waterhouse. That is of*

course consistent with the overriding objective of enabling the FMT to deal with cases fairly and justly, identified in the FMT Rules of Procedure."

225. The legal concepts in the relevant Rules seem relatively straightforward but we need to clarify the meaning of 'integrity' in Principle 1.

Integrity.

226. Mr Collins puts forward this approach in his closing submissions. The proper approach to questions of integrity has recently been clarified in the context of professional disciplinary proceedings by the Court of Appeal of England and Wales in Wingate v SRA [2018] 1 WLR 3969; [2018] EWCA Civ 266. In that case, Jackson LJ confirmed that the concept of integrity is broader than that of dishonesty (para 95). It is *"a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members"* (para 97) ...*"Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead"* (para 100).

227. Mr Collins says that if Ms Waterhouse knew that DBDIFC was undertaking activities which it was not permitted to undertake, and deliberately misled the DFSA by knowingly providing false information, or by concealing information, then that would amount to a lack of integrity. The burden is on the DFSA to prove such a lack of integrity by reference to the Appellant's actual (i.e. subjective, not objective) state of mind. A professional who unwittingly provides false or misleading information, however, cannot be said to act without integrity. He relies on (Williams v SRA [2017] EWHC 1478 (Admin) at para 109, cited in Wingate at para 101(vi)).

228. Mr George agrees in the sense that honesty is universal, and integrity imposes additional requirements which may be profession-specific. He says that it is clear that recklessness as to the truth of statements made to the regulator, or wilful disregard of information contradicting the truth of such statements, would constitute a lack of integrity citing Batra v Financial Conduct Authority

[2014] UKUT 0214 and Ford and Owen v Financial Conduct Authority [2018] UKUT 0358 (TCC). Batra suggests that *"One example of a lack of integrity not involving dishonesty is recklessness as to the truth of statements made to others who will or may rely on them or wilful disregard of information contradicting the truth of such statements"*. We agree.

229. We do not detect any relevant distance between these approaches given the facts which we find or any reason why DIFC law should be different.

Principles 1 and 4 and Article 66.

230. The DFSA sets out in its Answer at Paragraphs 167 onwards a series of events by which it says Ms Waterhouse was alerted to the risk that DBDIFC's PWM business was Advising and Arranging, or explicitly informed that it was doing so. We disregard the first four as they relate to the period before October 2011 or depend on the evidence of Ms El-Masri. We also disregard some others in that list on the basis of giving Ms Waterhouse the benefit of any doubt. We do find that the DFSA is correct as regards-

- The 30 October 2011 email exchange between Ms El-Masri and Ms Waterhouse;
- The UAE Country Risk Workshop held on 22 November 2011;
- The emails sent from Ms El-Masri to Ms Waterhouse on 12, 16 and 29 February 2012;
- The 11 April 2012 email from Ms El-Masri to Ms Waterhouse;
- The email from Mr Parmar to Ms Waterhouse on 22 June 2012 regarding an upcoming visit of DBAG Group Audit;
- The preparation of the report by Clifford Chance;
- The 2 April 2013 email from Ms El-Masri to Ms Waterhouse leading to the senior management telephone conversation;
- The results of the Horacek exercise.

231. It is important when considering this list to focus not just on each incident individually but upon their cumulative effect over a lengthy period.

232. The DFSA claims that despite having been so alerted, Ms Waterhouse repeatedly provided false or inaccurate information, concealed relevant information, or failed to correct false or inaccurate information which others provided or which she had previously provided to the DFSA. They identify a list of occasions. We disregard some of these but agree with the DFSA about the following:

- email to the DFSA on 31 October 2011;
- letter prepared by Ms Waterhouse, signed on her behalf by Mr Parmar, sent to the DFSA on 22 December 2011;
- at a meeting with the DFSA on 3 April 2012;
- at a meeting with the DFSA on 11 July 2012;
- in her interview with the DFSA on 20 January 2013;
- through her comments on and suggested amendments to a report prepared by Clifford Chance that was submitted to the DFSA on 21 April 2013;
- by not correcting the position set out in the note of the meeting between Clifford Chance and the DFSA on 2 May 2013;
- at a meeting with the DFSA on 13 June 2013 during which Ms Waterhouse was informed that the DFSA was expanding the scope of the investigation to include whether or not PWM had provided Financial Services in breach of DFSA requirements;
- at a meeting with the DFSA on 25 August 2013;
- during a DFSA inspection visit to DBDIFC's offices on 27 August 2013;
- through her responses to the 1 October 2013 notice (and her failure ever to supply the emails requested in August 2013).

233. Here too the importance lies not so much with the individual occasions but with the overall picture of a variety of contacts with the DFSA where Ms Waterhouse should have volunteered the existence of the problem but chose not to do so. Furthermore, Ms Waterhouse was under a continuing duty to bring these matters to the attention of the regulator and if these opportunities had not arisen, she should still have made contact with the DFSA and disclosed them.

Inadequate steps to stop the breaches.

234. In the pleadings but less so at the hearings and in closing submissions the DFSA set out detailed grounds why it claims that Ms Waterhouse took inadequate steps to stop the breaches. It must follow from the fact that we find that she was aware of the breaches and did not disclose their existence to the Regulator and that possible breaches were drawn to her attention by PWM and not acted upon, that the steps that she took were inadequate. The DFSA, while criticising other aspects of her performance, notably over Internal Audit, accepts that Ms Waterhouse did take some steps while criticising other aspects of her conduct. It is at this point that questions of workload and the difficult environment at DBDIFC seem to us to carry additional weight and that it is neither useful, given our other conclusions, nor fair to examine them in more detail.

Principles 1 and 4 and Article 66 – conclusion.

235. It does not follow necessarily that because we do not accept Ms Waterhouse's evidence on various matters, she has contravened the Rules that the DFSA relies on. We have set out their texts above. In applying our findings to these Rules and bearing in mind all the considerations we have identified throughout we conclude as follows.

236. We find that Ms Waterhouse, in breach of Principle 1, failed to observe high standards of integrity and fair dealing in carrying out her Licensed Functions. She acted recklessly and without integrity in repeatedly ignoring clear signs that breaches had been or might be committed and in failing equally repeatedly to bring these to the attention of the regulator. Any competent Compliance Officer in her position would and should have known that these matters should have been communicated to the DFSA at the first opportunity and that, once

she was in written and oral discussions with the regulator in this general area, they cried out for disclosure and for candour. This was not an isolated occasion when there was misrepresentation or a failure to disclose but a consistent practice maintained over a long period. There were a number of occasions when Ms Waterhouse should have been frank and candid with the regulator but chose not to be. Only some of this could have been inadvertence or brought on by misplaced priorities when under pressure of work. The DFSA does not allege that Ms Waterhouse was dishonest. She was however certainly reckless perhaps in the hope and /or belief in the first stages that the problems could be resolved without loss to anyone and without the knowledge of the Regulator. It may be that pressures of her workload and the deplorable attitude to regulation of DBDIFC, for which she bore a share of responsibility, contributed to her turning a blind eye, and refusing to face up to reality but her conduct was certainly reckless over a long period.

237. As we have found that Ms Waterhouse knew of the Advising and Arranging problem by November 2011 at the latest and did nothing to communicate that to the DFSA until late 2013 she is clearly in breach of Principle 4 in that she did not deal with the DFSA in an open and cooperative manner or disclose appropriately information of which the DFSA would reasonably expect to be notified.

238. Principles 1 and 4 apply only to Authorised Individuals thus emphasizing the special position in which such people stand. As we have pointed out it is surprising how little Ms Waterhouse's witness statements and submissions have to say about her role as an Authorised Individual, placing her in a separate position from that of her colleagues whom she sees as much more to blame than her.

239. Article 66 applies generally and is the provision under which Mr Parmar was penalised. We consider also that the pattern of Ms Waterhouse's behaviour toward the DFSA in providing misleading information and failing to disclose, where the concealment was likely to mislead, is a clear breach of Article 66 which is a more explicit obligation than the broader terms of Principle 1.

Failures in relation to systems and controls and compliance arrangements – Principles 2, 5 and 6.

240. These provisions relate to due and reasonable skill and care and appear to us to have been included mainly as alternative claims. They have not been the focus of the case and we consider it unnecessary, given our other findings, and possibly unfair to reach conclusions about them.

PRIVATE MATTER.

241. Our decision on this is in a separate document.

PENALTY.

242. The DFSA asks the Tribunal to affirm the sanction that was imposed by the DMC on 22 June 2017, a restriction under Article 59(1) of the Regulatory Law preventing Ms Waterhouse from performing any function in connection with the provision of Financial Services in or from the DIFC; and a financial penalty of US$100,000 pursuant to Article 90(2)(a) of the Regulatory Law.

243. Ms Waterhouse submits that it would not be appropriate to impose any penalty upon her and that neither a restriction nor a financial penalty is appropriate.

The legal and regulatory provisions.

244. There is no dispute about the applicable legal and regulatory provisions so we take these largely from the DFSA's submission on penalty.

245. Article 29(4) of the Regulatory Law provides: "*At the conclusion of a reference, the FMT may do one or more of the following:*

(a) affirm the original decision of the DFSA which is the subject of the reference;

(b) vary that original decision;

(c) set aside all or part of that original decision and make a decision in substitution;

(d) decide what, if any, is the appropriate action for the DFSA to take and remit the matter to the Chief Executive;

(e) make such order in respect of any matter or any of the parties which it considers appropriate or necessary in the interests of the DFSA's regulatory objectives or otherwise in the interests of the DIFC; or

(f) issue directions for giving effect to its decision, save that such directions may not require the DFSA to take any step which it would not otherwise have the power to take."

246. Thus the Tribunal is free to retake the decision about sanctions if it considers it appropriate to do so. Ms Waterhouse submits that the Tribunal should look at penalty anew and not simply apply the decision of the DMC on this issue. We agree.

247. The powers to impose a sanction for a contravention are set out in Article 90(2) of the Regulatory Law. Under that provision the DFSA may, among other things, "*fine the person such amount as it considers appropriate in respect of the contravention*" (Article 90(2)(a)); or, "*make a direction prohibiting the person from holding office in or being an employee of any Authorised Person […]*" (Article 90(2)(g)).

248. **Restriction.** Article 59 ("*Restricting persons from performing functions in the DIFC*") provides, among other things:

"(1) If the DFSA believes on reasonable grounds that a person is not a fit and proper person to perform any functions in connection with the provision of Financial Services in or from the DIFC, it may restrict the person from performing all or any such functions.

(2) A restriction under this Article may relate to a function whether or not it is a Licensed Function.

(3) The DFSA may vary or withdraw a restriction imposed under this Article.

(4) A person who performs a function in breach of a restriction under this Article commits a contravention."

249. Article 59(1) provides for the possibility of future review of the imposition of a restriction by the DFSA. The DFSA says that there is no provision for the restriction itself to be limited in time and the regime allows someone restricted to return in due course with evidence that (for example) they no longer pose any risk to users of financial services, and to ask the DFSA to revisit the restriction.

250. **Fine.** Article 90(6) requires the DFSA to prepare, publish and maintain a statement of policy as to how the power to impose fines is to be exercised. That statement of policy is set out in the Regulatory Policy and Process (RPP) Sourcebook, and RPP 6 prescribes the manner in which that process will be applied in the case of a financial penalty imposed on an individual.

251. RPP 6-2 provides that the decision as to penalty will be made with regard to a number of factors such as (i) the nature, seriousness and impact of the contravention, (ii) the difficulty involved in detecting and investigating the contravention, (iii) any benefit gained or loss avoided as a result of the contravention, and (iv) the need for the penalty to serve as a deterrent for others. RPP 6-2-2 provides that, in the case of Key Persons, as Ms Waterhouse was, the DFSA will have regard to their position and responsibilities. The more senior the person responsible for the misconduct, the more seriously the DFSA is likely to view the misconduct and the more likely it is to take action.

252. In addition to this summary two points require emphasis. First RPP 6 is quite lengthy and we have at each point had regard to the detail as well as the summary. Secondly the detail has to be read subject to the general requirements in 6-4-3 *"The DFSA recognises that a penalty must be proportionate to the contravention. These steps will apply in all cases, although the details of Steps 1 to 4 will differ for cases against firms (section 6-5), and cases against individuals (section 6-6)"* and 6-4-4 *"The lists of factors and circumstances in sections 6-5 and 6-6 are not exhaustive. Not all of the factors or circumstances listed will necessarily be relevant in a particular case and there may be other factors or circumstances not listed which are relevant."*

253. RPP 6-4 sets out a five-step process for determining the level of a fine.

> Step 1 involves the identification and disgorgement of any economic benefits derived from the contravention;
>
> Step 2 involves the determination of a figure reflecting the seriousness of the contravention;
>
> Step 3 involves an adjustment to take account of aggravating and mitigating circumstances;
>
> Step 4 involves consideration of whether it is necessary in the interests of deterrence to adjust the figure upwards; and
>
> Step 5 involves the application of a discount in the event of a settlement.

Ms Waterhouse's submissions about penalty.

254. Ms Waterhouse points to what she sees as the responsibility of others who she considers should have been proceeded against. Her conduct she says was neither dishonest nor deliberate. The DFSA has failed to produce evidence that she is not fit and proper. She says that she did not fail to cooperate with the DFSA. The penalty imposed on DBDIFC was comparatively modest and it follows that any imposed on her should equally be so. She points to her workload and the unpleasant environment in which she had to work, alleging that the DFSA and this Tribunal are in effect condoning illegal work practices. She reiterates that she is being punished for being a whistleblower. She points to how much she has suffered from the events giving rise to this case. Unlike the others involved she has been unemployed for five and a half years and has lost much income and incurred much expenditure in moving back to the UK. Her daughter has experienced difficulties in this process, her husband's health has deteriorated and she herself has suffered health and stress problems. She points to the 'Big Picture', some of the factors of which are referred to above. Others include the absence of any loss or risk of loss to clients, no fraud, no complaints from clients, no financial profit to herself, that the activities were of themselves lawful subject to the regulatory framework that needed to be and eventually was put into place, that DB eventually found that she had not been

at fault and the decisions that led, she says, to her being made the scapegoat so that other more senior people were let off.

255. We repeatedly suggested to Ms Waterhouse that her submissions on penalty deal, as those submitted by her legal team to the DMC had done, only with matters relevant to that question. She, for reasons we understand, was not able to do that and her submissions on the issue exceeded 50 pages plus a note which we permitted her to submit after she had asked to make a further submission. We will not lengthen this long Decision by dealing again with matters already addressed or with points we do not consider relevant to penalty.

256. Ms Waterhouse asked for a hearing to deal with penalty. We declined this. We had had the benefit of Ms Waterhouse's evidence at the main hearing. There have been four hearings, the last only at Ms Waterhouse's request. Ms Waterhouse identified no issue requiring a hearing. If granted this would of course have led to yet more cost and delay.

257. Ms Waterhouse says that there *'is an argument'* that she cannot be penalised at all as she has not been found to have breached the AML Module. This point is without merit for the reasons given by the DFSA in reply as is what appears to be a new claim, not consistent with the position she had previously adopted through Mr Collins, that a finding of lack of integrity requires there to be deliberate dishonesty.

The Restriction under Article 59(1) – position of the DFSA.

258. The DFSA submits as follows. The power under Article 59(1) to restrict a person from performing certain functions is legally distinct from the provisions relating to the imposition of sanctions in relation to particular breaches. The test is simply whether the person in question is or is not a fit and proper person to perform relevant functions. The DFSA submits, however, that it will generally follow from a finding that a person has failed to act with integrity that the person is not fit and proper for the purposes of Article 59(1). That is because persons who perform functions in relation to financial services must, in practice, be trusted to discharge their duties and comply with the rules with integrity. Once it is shown that a person is prepared to act otherwise, there will

be a strong public interest in ensuring that they are not placed back into that position of trust unless the regulator (or, on a reference, the Tribunal) is satisfied that they have genuinely changed their ways. In support of this the DFSA cites the English cases of *Hobbs v Financial Conduct Authority* (FS/2010/0024, 13 December 2013) and *Batra v Financial Conduct Authority* [2014] UKUT 0214 (TCC) which Ms Waterhouse seeks to distinguish but, as we see it, does not do so on the pertinent issues.

Restriction under Article 59(1) – position of Ms Waterhouse.

259. Ms Waterhouse submits that no restriction should be imposed. She relies on the considerations we have sought to summarise briefly above. She also says that a restriction is unnecessary as she will never return to Dubai. She claims that she fears that she might be arrested if she did. (It is fair to point out that she attended the case conference in Dubai in January 2018 and was due to return for the main hearing before ill health intervened.) Any restriction will end her prospects of ever obtaining a suitable post in the financial services industry and will be disproportionate. Any restriction should be time limited and run from January 2014 when DBDIFC relieved her of her responsibilities.

Restriction under Article 59(1) – Decision of the Tribunal.

260. The context is our findings throughout this Decision and at Paragraphs 230-239 above in particular. We deal with the issue shortly as the position is clear. We are not reviewing the penalty imposed by the DMC but reaching conclusions of our own. The starting point is whether Ms Waterhouse is a fit and proper person within the meaning of the Article. It is clear from our findings above that Ms Waterhouse committed serious regulatory breaches which included acting without integrity for a considerable period. These alone as we see it demonstrated beyond doubt that she was not a fit and proper person within Article 59 and that a restriction is required. Any other course would give a very damaging message to the market. It would also be unfair to all those engaged in Compliance who often face challenges and stress as well as controversy with their employers precisely because they work to ensure that markets are conducted in accordance with regulatory requirements. The position is exacerbated by our conclusion that Ms Waterhouse, for whatever reason, is

unable to accept the truth of what her conduct was over the Relevant Period and by her decision not to acknowledge the wrongdoing found by us or separately by the DMC or indeed any wrongdoing. We will, as the DMC did, impose a restriction from performing any relevant functions within the DIFC. After a period Ms Waterhouse will be free to apply in due course for removal of the restriction if and when she wishes to do so.

261. Given the facts of this case and the provisions of Article 59, it is not necessary for us to consider the issue between the parties about whether a restriction with a time limitation can be imposed.

Fine – Position of the DFSA.

262. The DFSA points first to the decision of the DMC which followed the process set out in RPP 6-6. In summary:

Step 1 did not apply, there having been no material benefit to Ms Waterhouse arising from the contravention;

Step 2. The DMC referred to its findings as to the relevant conduct and determined that a figure of US$100,000 appropriately reflected the seriousness of the contraventions;

Step 3. The DMC considered that her failure to cooperate with the DFSA's investigation and her provision of false information to the DFSA (among other things) constituted aggravating factors justifying an increase to US$150,000. However, it also considered that the lack of adequate support from DBDIFC, the number of roles she performed, her previously unblemished disciplinary record, her personal character references and lack of employment since 22 January 2014 constituted mitigating factors justifying a reduction back to US$100,000.

Step 4. The DMC considered that a fine of US$100,000 would be sufficient to deter others from committing further or similar contraventions, such that it was not necessary to adjust it for the purposes of deterrence; and,

Step 5. The DMC made no reduction for settlement, there having been none.

263. The DFSA says that it is no answer for Ms Waterhouse to say that no consumers were harmed. The regulatory regime could not function if responsible persons acted as Ms Waterhouse has been found to have acted. It is also no answer that Ms Waterhouse did not profit from the actions which are the subject of the adverse findings. These factors may not be an answer but it is plainly pertinent that in comparison with other cases no consumers lost money and Ms Waterhouse made no money out of all this beyond remaining in well remunerated employment.

264. The DFSA places particular emphasis on the fact that Ms Waterhouse was prepared to withhold and conceal material information about a matter under investigation by the DFSA. It says that if a person is prepared to mislead the regulator in those circumstances, users of the financial services system can have no confidence that he or she will not mislead the regulator in other circumstances.

265. The DFSA submits that the DMC's decision to impose a fine of US$100,000 was the product of a reasoned process set out at length in the Decision Notice and that there is no good reason to disturb it. In particular there is no suggestion that the fine is disproportionate to Ms Waterhouse's financial resources. The DFSA points to the remuneration received by Ms Waterhouse when employed at DBDIFC and the size of her severance package. The DFSA invites the Tribunal simply to order that the sanction imposed by the DMC's Decision Notice is upheld.

Fine – Position of Ms Waterhouse.

266. Ms Waterhouse cites the considerations summarised above. She also submits that any comparators relied upon should be those of the DFSA not those of other jurisdictions such as the UK where markets and other conditions are different. She submits that US$100,000 is unreasonably high given the level of other DFSA fines and that the obvious and most relevant comparator is Mr Parmar. Her fine should be less than his because he had, and admitted to having, direct knowledge of matters which she says (incorrectly) the Tribunal has found that she had only 'constructive knowledge' of. She also suggests that the breaches found by this Tribunal were less serious than those on which the DMC

imposed its penalty. She makes submissions about the real level of her remuneration from the bank and points out that she has been paid nothing having been unable to find suitable work since she left that employment and received a settlement.

Fine – Decision of the Tribunal.

267. It is not suggested that the conduct in issue does not cross the threshold of financial penalty set out in RPP 6. We agree with Ms Waterhouse that we should do the relevant exercise anew and not just review that of the DMC. Our starting point is not to take the original DFSA suggested figure and extrapolate from that but to arrive at a figure of our own. What figure reflects the seriousness of the conduct that we have identified above? It will not assist for us in this section to reformulate in different words the facts and the finding of breaches we have made above and in particular at Paragraphs 230-239 above.

268. It is correct that, for reasons explained above, we have not found that Ms Waterhouse was in breach of Principles 2, 5 and 6. These allegations were less serious than those on which we have concentrated. In doing the exercise anew however we are not starting from the same point as the DMC but with our own assessment.

269. Comparables play some part in this exercise mainly, as we see it, to help us move in the right direction and to check that a penalty is not out of line with similar cases where there are any. Each case is different however and the facts are often complex and far removed from the case in hand. Further in this area of the law the size of penalty imposed by a regulator often reflects a person's acceptance of responsibility for the breaches and/or a discount for settlement. We agree with Ms Waterhouse that comparables in DFSA proceedings will generally be more helpful than those of other jurisdictions where the context and conditions will be different. Comparables are not like, for example, precedents used to assess damages for personal injuries. Fixing a penalty is more an exercise of judgment than a mathematical exercise of combining comparators with the detailed points in RPP 6.

270. We also agree with Ms Waterhouse that Mr Parmar is a relevant comparator but not with the result that she suggests. Mr Parmar was her junior, his culpability was less and related to a shorter period. He also accepted responsibility for his breach and this was reflected in the size of the penalty he paid. Ms Waterhouse is not penalised for contesting the matter but neither is she entitled to the mitigation of having accepted responsibility for her breaches. We have regard to the levels of remuneration received by Ms Waterhouse and have taken account of the points on this issue made by both sides.

271. Turning to RPP 6-4:

Step 1 does not apply as Ms Waterhouse obtained no direct financial benefit from the breaches.

Step 2. We, like the DMC but on our own appraisal, take $100,000 as a suitable starting point to mark the seriousness of the contraventions.

Step 3. The aggravating circumstances identified above, such as the persistence of the conduct by a Compliance Officer over a long period and her lack of candour when dealing with the DFSA, particularly during an investigation, and the mitigating circumstances identified such as the workload of Ms Waterhouse, the absence of loss to consumers or of direct gain to her and her unblemished disciplinary record and good character, seem to us to balance out and require no adjustment.

Step 4. US$100,000 is as we see it of itself an insufficient sum for deterrence purposes. It is difficult to overstate the crucial importance to the well-being of financial markets that all those who accept positions as Authorised Individuals act with integrity and deal frankly and openly with the Regulator. In our experience most such individuals take this as a given. We would have increased the penalty to mark the need for deterrence in this area. We do however feel that it is unnecessary to do so given the difficulties and misfortunes which have beset Ms Waterhouse as a result of the circumstances leading to this case. Some of those circumstances are an unsurprising consequence of regulatory breaches by a Compliance professional.

Step 5. There has been no settlement.

272. We therefore conclude that US$100,000 is an appropriate penalty. Standing back from that figure and bearing in mind the personal setbacks that Ms Waterhouse has experienced since 2014 we reduce the penalty to US$75,000.

OTHER MATTERS.

Filing fee.

273. The DFSA asks us to order Ms Waterhouse to pay the filing fee of US$5,000 in addition to any fine it may decide to impose. Ms Waterhouse has given no reasons why the filing fee should not be paid and the DFSA submits that it should be paid as an important point of principle that users of the Tribunal should pay such a modest sum as a contribution towards the costs of the Tribunal process. The Tribunal may make such an order regarding the filing fee under Article 31(9) of the Regulatory Law which provides: "*At the conclusion of a proceeding, the FMT may also make an order requiring a party to the proceedings to pay a specified amount, being all or part of the costs of the proceedings, including those of any party.*" As Paragraph 2 of Annex 1 explains, the filing fee was waived on 23 July 2017 only on the basis that the DFSA could apply to have it or an equivalent sum paid later. There is no reason for the fee or an equivalent sum in costs not to be paid by Ms Waterhouse and we will order accordingly.

Delay.

274. The events in issue cover a three-year period, and many aspects of DBDIFC's activities. Ms Waterhouse also raised, as she was entitled to do, matters not directly related to the central issues but alleged abuses of process, which we have addressed above. There has been little common ground and as a result more than 14,000 pages of documents have, as we have said, been before us.

275. While Ms Waterhouse has engaged Counsel for hearings she has controlled the conduct, and to some extent the content, of the case and, as is common with litigants in person (and in human terms very understandable), has not found it easy to agree to the procedural concessions that lawyers make to keep a case moving or to separate the relevant from the irrelevant. Further her approach has also been affected by anxiety and poor health. She has regularly sought lengthy

extensions of time and, given her position and personal difficulties we have accommodated many of these. As Annex 1 illustrates there was also an adjournment of the hearing for some months as a result of Ms Waterhouse's ill health. There was a further delay due to Ms Waterhouse's decision, having ceased to be legally represented, to make serious allegations of bias following the last short hearing. Other unexpected issues, such as the effect of the Data Protection litigation involving the parties, have come up. Progress has also been slow since the draft Decision was circulated on 10 April mainly because of Ms Waterhouse's concerns to have further time to prepare.

276. Although the Tribunal has dealt with several cases before, these have ended either by agreement or by determination without the need for evidentiary hearings. This absence of relevant past cases has meant that the parties have had no guidance about the Tribunal's likely approach to issues that they might want to raise. We have had that uncertainty in mind when giving extensions of time. Uncertainties about the Tribunal's approach will now have diminished. It is therefore unlikely that the Tribunal will in future permit a case such a long time to complete.

Appeal.

277. An appeal may be made to the Court from our Decision only on a question of law and only with permission from that court or from the Tribunal. We are at this point going to refuse Ms Waterhouse permission to appeal. This will enable her, should she wish to seek leave to appeal, to apply for permission only to the Court and will spare the parties the expense and avoid the delay of two applications.

278. The real issues in this case have been questions of fact and judgment in the world of financial services determined by a specialist Tribunal created to deal with such matters. To us the answers to those questions are clear. None of the many issues of law raised by Ms Waterhouse so far, including the views she has already expressed about the merits of the draft decision, which could have had an effect on the outcome, have, as we see it, had merit or any real prospect of success. It is unrealistic to suppose that the Tribunal is likely to grant

permission to appeal. It will be more satisfactory for any application to be made to the Court.

279. It is the duty of the DFSA to publish Decisions of this Tribunal and desirable for it to do so promptly. On the other hand, this Decision should not be published until Ms Waterhouse has had a reasonable opportunity to apply to the Court, if she wishes, for permission to appeal. We direct the DFSA not to publish for 21 days from today. If Ms Waterhouse seeks further time, she should apply to the Court, which will be much better informed about its procedural realities than we are, not to the Tribunal.

CONCLUSION.

280. The Tribunal finds that for the reasons given in this Decision, and in particular at Paragraphs 230 to 239 above, that Ms Waterhouse was in breach of Principles 1 and 4 and of Article 66 in the period between 2011 and 2013. The Tribunal orders that Ms Waterhouse will be restricted from performing any functions within the DIFC, will pay a penalty of US$75,000 and will pay the filing fee of US$5,000 (or an equivalent sum by way of costs). The DFSA is to implement this Decision under Article 31(11) of the Regulatory Law. This Decision takes effect from today and the penalty and the filing fee are to be paid within 28 days.

ANNEX 1 – PROCEDURAL HISTORY.

1. On 22 June 2017 the DFSA imposed on the Appellant a financial penalty of US$100,000 and a restriction preventing her from performing any function in connection with the provision of financial services in or from the DIFC.

2. On 23 July 2017 the Appellant filed a reference to the Tribunal and applied for a remission of fees. On 17 August 2017, after receiving submissions from the parties we waived the fee on the basis that if the application failed it would be open to the DFSA, if appropriate, to claim that the fee, or an equivalent sum, should be paid by the Appellant at that stage. The Appellant also applied for, and the Tribunal granted permission to serve a Statement of Case rather than adopt the approach prescribed by the Rules.

3. On 16 August 2017 the Appellant applied for a stay of the decision of the DFSA. After submissions the Tribunal on 11 September 2017 granted a stay of the penalty but not of the restriction. The Tribunal urged the parties to consider and discuss the issues with a view to a pre-trial conference in December 2017 and a full hearing early in 2018.

4. On 19 September 2017 Freshfields Bruckhaus Deringer acting on behalf of Deutsche Bank DIFC branch ("DBDIFC"), the Appellant's former employer, wrote to the Registrar requesting that hearings in this case be in private, that the references at hearings and in Decisions be anonymised to protect the reputation of senior managers and that the FMT provide them with copies of pleadings and related documents. After submissions from the parties the Tribunal refused that application on 11 October 2017.

5. The Appellant served the Statement of Case on 8 October 2017. The DFSA's Answer was served on 5 November 2017 and the Appellant's Reply on 3 December 2017.

6. After consulting the parties the Tribunal fixed a Case Management Conference for 18 December 2017 to be held in Dubai but agreed to the Appellant's request to postpone this until 8 January 2018. The Tribunal had offered the possibility of that Conference being held electronically should there be a measure of agreement between the parties.

7. On 8 January 2018 the Tribunal made directions to lead to a hearing from 28 April until 4 May 2018, dates convenient to the parties, *"subject to the possibility of additional dates being required"*. The Appellant then represented by Counsel, Mr Ian Wright, was concerned that this hearing would be too early and not long enough. The Order reflected the decision of the Tribunal, supported by the parties, to hear some evidence in private.

8. On 2 March 2018 the Appellant applied for an adjournment of the hearing on grounds that *"the current listing is too short to hear the case even if it dealt with evidence alone"* and that things had changed since the decision to fix the hearing was taken. We refused that application for the reasons given in our Decision of 12 March 2018.

9. On 18 April 2018 the Appellant, through her Counsel Mr Ben Collins QC, applied for an adjournment on medical grounds. In view of the urgency, after receiving submissions the Tribunal refused that application for the reasons set out in its Summary Decision of 21 April but on the basis that the Appellant herself would give evidence at a later date. The Tribunal also agreed to postpone hearing evidence from the other witness dealing with the matter being heard in private. The Appellant applied to the Tribunal for permission to appeal which we refused. The Appellant sought to apply to the Court but that did not proceed.

10. The case was heard, intermittently when witnesses were available, between 28 and 30 April 2018. It was then adjourned, initially until September but then until 29 to 31 October 2018, for the purpose of hearing evidence from the Appellant, from the other witness to the private matter and from Mr Patel, the Appellant's husband who had experienced a difficulty in giving evidence at the first hearing.

11. When the case adjourned in April the Tribunal agreed that the Appellant could file, four weeks before the October date, a supplemental witness statement responding only to matters arising from the DFSA's statements - the equivalent of the evidence in reply which the Appellant might otherwise have submitted before the hearing, had it proceeded as intended.

12. On 28 September 2018 the Appellant served her supplemental witness statement in two parts and renewed an application that some evidence be excluded on the grounds that the DFSA had obtained it improperly under Article 80. She also served without prior permission four further witness statements from Dr Porter, Mr Cafferty, Mr Bourke and Mr Rihan. The DFSA did not object to the first three of these, as they were essentially character references but opposed admission of the evidence of Mr Rihan. We refused to allow this late evidence from Mr Rihan for the reasons given in the transcript of Day 1 of the October hearing. At the end of the hearing we also refused, for the reasons given on the transcript, a renewed application by the Appellant for third party disclosure (whether by an order from the Tribunal or by our requesting the DFSA to procure material from DBDIFC).

13. That resumed hearing took place in London between 29 and 31 October 2018. At the end of this the Tribunal agreed to the request of both parties that closing submissions be in writing, and, reluctantly that these not be served until 11 December 2018, with written replies served by 11 January 2019. (The Appellant later applied for and was granted an extension of 7 days). The Tribunal also agreed to consider, should the parties request it, holding a short further hearing with only Counsel and the Chairman being physically present. This was provisionally set for 17 January 2019.

14. Having received and considered the submissions and replies we notified the parties that we did not think that a further hearing would be required. Ms Waterhouse then asked for a further hearing which we agreed to. This took place on the first date convenient to her Counsel on 31 January 2019 and lasted one hour and ten minutes.

15. On 26 February 2019 Ms Waterhouse made an application based on bias and the further procedural steps are referred to in Annex 3.

16. On 10 April the Tribunal sent this decision in draft to the parties inviting them, in accordance with the practice of the High Court in England, to suggest corrections of typographical and other minor errors by 24 April. The DFSA did this. Ms Waterhouse was given extensions of time at her request and submitted her suggestions on 24 May.

17. On 6 May the Tribunal asked the DFSA to provide its submissions on penalty and it did so on 19 May. Ms Waterhouse sought various extensions of time and was eventually given until 4 July to respond.

18. On 15 May the Tribunal sent to the parties reasons for its decision on 6 May to refuse Ms Waterhouse's request that the conclusion of this case be postponed until after the end of Data Protection proceedings in the courts. That decision is at Annex 4 below.

19. On 4 July Ms Waterhouse provided her submissions on penalty and the DFSA replied on 15 July. Ms Waterhouse made further submissions about publication on 16 July and asked for two further weeks for another submission. In response the Tribunal granted Ms Waterhouse a further week to submit a final note which she provided on 29 July.

20. Having considered these submissions, the Tribunal issued its decision on 12 August 2019.

ANNEX 2 – LIST OF RELEVANT INDIVIDUALS AND ROLES.

NAME	FIRM	DEPARTMENT / BUSINESS LINE	POSITION	LOCATION	DFSA LICENSED FUNCTION
Nasim Ahmad	DBDIFC	PWM GSA	Team Leader of ME Pakistan team of PWM GSA	DIFC	
Salman Al-Khalifa	DBDIFC	Regional Management MENA	Chief Country Officer, UAE (until December 2011)	DIFC	Senior Executive Officer (March 2011 to December 2011)
Ashok Aram	DBDIFC	Regional Management MENA	Chief Executive Officer, MENA	DIFC	
Martyn Bagnall	DBDIFC	Human Resources	Director, Head of HR Middle East & Africa	DIFC	
Marco Bizzozero	DB SUISSE	PWM MEA	Head of PWM EMEA and CEO of Deutsche Bank Suisse SA	Switzerland	
Adrian Bock	DFSA	Enforcement	Associate Director, Enforcement	DIFC	
Danny Bower	DB SUISSE	PWM MEA	Business Manager, PWM MEA	Switzerland	
Daniel Coianiz	DB SUISSE	PWM GSA	Business Manager PWM GSA	Switzerland	
Serene El-Masri	DBDIFC; DB SUISSE	PWM MEA	Head of PWM MEA	DIFC from June 2011 to August 2013; Relocated to	

NAME	FIRM	DEPARTMENT / BUSINESS LINE	POSITION	LOCATION	DFSA LICENSED FUNCTION
				DB Suisse in Switzerland from August 2013	
Stephen Glynn	DFSA	Enforcement	Head of Enforcement	DIFC	
Jodi Griffiths	EXTERNAL	Clifford Chance LLC	Lawyer Clifford Chance LLC	DIFC	
Serdar Guner	DFSA	Supervision	Director, Supervision	DIFC	
Katrina Hackett	DFSA	Supervision	Senior Manager, Supervision	DIFC	
Kelvin Heng	DB SINGAPORE	PWM GSA	Business Manager, PWM GSA	Singapore	
Eva Horacek	DBDIFC	Compliance MENA	Temporary employee for two months, Compliance MENA (from September 2013)	DIFC	
Andrew Hume	DB LONDON	Compliance EMEA	EMEA Head of Compliance (from January 2013); APAC Head of Compliance (until January 2013)	London (from January 2013); Singapore (until December 2012)	
Ian Johnston	DFSA	Chief Executive's Office	Chief Executive Officer	DIFC	
Philip Jolowicz	EXTERNAL	Clifford Chance LLC	Senior Associate at Clifford Chance LLC	DIFC	
Rudiger Kaiser	DB FRANKFURT	Operational Risk Business Continuity Management	A senior manager in Operational Risk Business Continuity Management	Frankfurt	

NAME	FIRM	DEPARTMENT / BUSINESS LINE	POSITION	LOCATION	DFSA LICENSED FUNCTION
			(ORBCM), based in Frankfurt		
Wolfram Lange	DB SUISSE	PWM MEA	Chief Operating Officer, PWM EMEA	Switzerland	
Rajesh Mahadevan	DBDIFC	PWM GSA	Team leader of ME NRI team, PWM GSA	DIFC	
Nadeem Masud	DBDIFC	Regional Management MENA	Chief Country Officer, UAE (from January 2012); Co-Head of CB&S, MENA	DIFC	Senior Executive Officer (from January 2013)
Sudhir Nemali	DB SINGAPORE	PWM GSA	Acting Head of PWM GSA (April 2011 to February 2012)	Singapore	
Richard Olley	EXTERNAL	Clifford Chance LLC	Lawyer at Clifford Chance LLC	DIFC	
Lawrence Paramasivam	DFSA	Supervision	Director, Supervision (Associate Director, Legal during Relevant Period)	DIFC	
Chetan Parmar	DBDIFC	Compliance MENA	Vice President, Compliance, MENA (promoted to director in February 2013). On unpaid leave from August 2013	DIFC	
Tim Plews	EXTERNAL	Clifford Chance LLC	Partner at Clifford Chance LLC	DIFC	

NAME	FIRM	DEPARTMENT / BUSINESS LINE	POSITION	LOCATION	DFSA LICENSED FUNCTION
Rose Plunkett	DFSA	Supervision	Associate Director, Supervision	DIFC	
Stephane Polli	DBDIFC	Compliance MENA	Vice President, Compliance MENA	DIFC	
Piers Reynolds	EXTERNAL	Freshfields	Partner	London	
Fabien Roth	DBDIFC	PWM MEA	Relationship Manager, PWM MEA	DIFC	
Aryan Schoorl	EXTERNAL	DLA Piper	Partner, DLA Piper	DIFC	
Matthew Shanahan	DFSA	Legal	Associate Director, Legal	DIFC	
Amrit Singh	DB SINGAPORE	PWM GSA	Head of PWM GSA from February 2012	Singapore	
Emma Slatter	DB LONDON	Legal	General Counsel, Western Europe and Middle East	London	
Andrew Sowter	DB LONDON	Compliance EMEA	Head of Compliance EMEA (until December 2012)	London	
Bernard Sperling	DFSA	Supervision	Senior Manager, Supervision	DIFC	
Philipe Vollot	DBDIFC	Regional Management MENA	Chief Operating Officer, MENA	DIFC	
Anna Waterhouse	DBDIFC	Compliance MENA; Legal MENA	Head of Compliance, MENA (1 October 2007 to 22 January 2014); Head of Legal (MENA) (1 November 2011 to 22 January 2014)	DIFC	Compliance Officer, MLRO, Senior Manager

NAME	FIRM	DEPARTMENT / BUSINESS LINE	POSITION	LOCATION	DFSA LICENSED FUNCTION
Hans-Juergen Weide	DB FRANKFURT	Operational Risk	Head of Operational Risk EMEA		
Callum Watts-Rehman	DBDIFC	PWM MEA	Head of Gulf PWM MEA (From July 2012)	DIFC	
Margarita Zubkus	DBDIFC	Legal	Head of Legal, MENA (until October 2011)	DIFC	

ANNEX 3 – BIAS APPLICATION.

Background.

1. Hearings in this case took place at the DIFC Court in January and April 2018 and, in order to hear evidence from Ms Waterhouse, her husband Mr Patel and one other witness, in London in October 2018 at the International Dispute Resolution Centre.

2. After closing submissions and replies had been submitted the Tribunal concluded that a further hearing, provisionally fixed for 17 January 2019 was not required. On 14 January 2019 Ms Waterhouse objected to this and asked for a hearing. The Tribunal agreed, despite the DFSA's objections that the hearing was unnecessary, to hold a hearing on 31 January 2019, the first date convenient to Mr Collins QC, Counsel for Ms Waterhouse.

3. As Mr Collins was representing Ms Waterhouse we declined to permit her to make a statement at that final hearing. Her Counsel was there to deal with legal submissions and Ms Waterhouse's evidence had finished. If she made a statement the DFSA might seek to cross examine her on what she said or to make some non-lawyer statement of its own leading to yet more delay in this case.

4. The Registrar, (who is primarily Registrar of the DIFC-LCIA Arbitration Centre and not an employee of the DFSA), then had at short notice to find a hearing room with facilities to have video links to the DFSA lawyers and representatives at the DFSA and to Mr Ali Al Aidarous at his office in Dubai. The Registrar arranged for this to take place in a meeting room off the reception area of Blackstone Chambers. No objection was raised to this venue either by Mr Collins QC or by Ms Waterhouse before the hearing or at it.

5. A hearing lasting one hour and ten minutes took place on 31 January 2019. Physically present were the President and Mr Storey, Ms Waterhouse and Mr Collins QC, Mr George QC and a member of the public, Mr Verity of the BBC. Present on video link were the DFSA representatives and the Registrar (at the DFSA and in the same room) and Mr Al Aidarous (in his Dubai office).

6. At the end of the hearing the President and Mr Storey wished to discuss matters with their colleague Mr Al Aidarous. Having checked that everyone in the room in London had left and with the Registrar that the DFSA representatives were no longer on the link and had left their room, we had that discussion.

Email exchanges and witness statement.

7. On 12 February 2019 Ms Waterhouse emailed the Tribunal attaching a witness statement she had obtained from Mr Verity, a BBC News Reporter, the operative parts of which we summarise as follows. Mr Verity refers to the glass fronted hearing room and the two satellite links and says *"I exited the room and stopped after a couple of steps to check emails and text messages on my smartphone…the door was shut. However, the glass fronting was by no means sound-proof. I was still just a couple of metres outside the room and I could clearly hear those who remained in the room. The voices on the satellite links were less audible"*. He took a contemporaneous note and emailed it to himself. *"I heard Judge Mackie QC say: "I will draft a judgment; then I'd suggest we then meet in London - if your representatives can be in London in the next few weeks?" After a pause he then said: "Then we'll have a discussion by Skype after I've circulated a draft. Would that be a satisfactory way of proceeding? I then heard Judge Mackie QC say: "I'm not sure we learned anything new this morning but there you go… Has your own view of the case changed at all as a result of what happened today?.....Me too. I will send you a draft I would hope in two weeks' time…. Thanks Mike"*.

8. In response to Ms Waterhouse's entirely reasonable requests for clarification, we explained that the conversation which Mr Verity had overheard was not with the DFSA, but a confidential one between the members of the Tribunal. Each member of the Tribunal and the Registrar (as well as the DFSA representatives) confirmed that position. Ms Waterhouse then sought and was given details (with a seating plan) of all the individuals who had been present in the room at the DFSA to which the hearing had been video linked. When supplying these details, the Registrar added- *"I can also confirm that, for the avoidance of any doubt, when the hearing formally concluded, the recording equipment was turned off and all of the DFSA staff exited the meeting room. I can also confirm that all of the DFSA staff then moved to a different part of the*

DFSA office and were not within the vicinity of the meeting room at the time when the hearing panel engaged in their private discussion."

9. We pointed out to Ms Waterhouse that the conversation Mr Verity had apparently overheard, albeit not entirely accurately, was a private one between members of the Tribunal fulfilling their judicial function so it would not be appropriate to comment on the contents. We did however respond to a question about particular words which had obviously been misheard through the closed door in the next room. The word 'representatives' would not have been used, nor the word 'Mike' as a name as opposed to an object, there being no one of that name in the case. As we see it the matter should have ended there.

10. The DFSA has been critical of the circumstances in which Mr Verity came to be listening to what was obviously a private conversation. The DFSA has not however sought to exclude the witness statement and we do not think it appropriate to express views at this stage on Mr Verity's conduct.

The application.

11. On 26 February 2019 Ms Waterhouse made this application claiming from the DFSA costs and damages for financial loss. She also seeks "*discontinuation of the action brought against me by the DFSA. Given the set up of the FMT, it is not possible to 'cure' the bias and conflicts of interest by substituting the tribunal members and re-hearing the case"*. On 7 March 2019 the DFSA replied. On that day Ms Waterhouse applied to have four weeks to lodge a reply. We granted such a long period only because Ms Waterhouse is a litigant in person on this aspect of the case. She submitted her Reply on 4 April 2019 explaining that *"I drafted it myself"* indicating that her lawyer did not. The application at different points alleges bias and apparent bias, the Reply indicates that it is probably only the latter.

12. Ms Waterhouse applies for an order setting aside the action brought by the DFSA by the exercise of powers under Article 29 (4) (d) of the Regulatory Law, DIFC Law No.1 of 2004 on the grounds of the FMT's alleged apparent bias. The application relies on grounds related to Mr Verity's witness statement but

also on quite separate ones not raised before. She describes the most important particulars as being:

"A. The regulatory structure and composition of the FMT;

B. The witness statement from Mr. Andy Verity;

C. The lack of any explanation from the FMT of the particular words used by Judge Mackie after the end of the recent hearing;"

and develops her application by reference to the following.

Mr Verity's witness statement.

13. Ms Waterhouse says; *"It is submitted that apparent bias has occurred in this case and that Mr. Verity's evidence cannot be ignored. Like Mr. Verity, I believe that the conversation which he overheard was between the Tribunal and the DFSA. I have twice asked the Tribunal to explain the remarks which Mr. Verity overheard, but I have still not received a satisfactory response."*

14. The difficulties we have immediately with this submission are these.

15. First, Ms Waterhouse is mistaken as to Mr Verity. He does not say, and could not say, as he points out that he could not hear who was speaking on the video link, that the conversation was between the Tribunal and the DFSA. There is thus simply no evidence that the discussion was between the Tribunal and the DFSA. Ms Waterhouse's submission that *"The positions of the Panel and Mr. Verity's evidence cannot be reconciled"* is equally incorrect.

16. Secondly, all three members of the Tribunal and the Registrar have made it clear that the conversation was a private one between the Tribunal members only. Further the DFSA employees who were present during the hearing by video link confirm that they were not involved in any way with that conversation.

17. Thirdly, the Tribunal has explained, but Ms Waterhouse has apparently not understood, that the conversation was a confidential judicial discussion and the Tribunal cannot properly debate its contents. It would usually be wholly

improper for a party to enquire into the content of such discussions once it was clear what their nature was.

18. Fourthly, briefly setting aside concerns about confidentiality given Ms Waterhouse's position as a litigant in person, the conversation even as inaccurately reported is obviously consistent with three members of a Tribunal discussing the case with the possibility of a meeting in London should the two members who live in other jurisdictions be making a visit. Once a hearing is over it is of course the right and duty of the members to exchange views about the merits of the case.

Hearing under threat.

19. Ms Waterhouse says *"I also could not help but notice that it was only after Mr. Verity showed an interest in attending the hearing (which had been listed on the FMT's website) that the hearing came under threat."*

20. We find this hard to understand. We do not know what is meant by 'under threat'. A hearing was agreed to after the Tribunal had first decided not to have one. The Registrar fixed it and it then took place. The members of the Tribunal did not consider, let alone give any instructions as regards, the listing on the website. If alternatively, this complaint is the one the DFSA identifies in its Response it is without merit for the reasons Mr George gives.

Mode of address.

21. Ms Waterhouse says *"I note that Judge Mackie has on numerous occasions addressed individuals at the DFSA as "dear colleagues" in correspondence during these proceedings."*

22. This mode of address is used, as all the relevant emails demonstrate, by the President when addressing all parties and the lawyers on all sides, consistently with informality and the cooperative approach expected in this and other tribunals and required by the Rules. Ms Waterhouse's suggestion that it is used only to the DFSA and its lawyers is not true.

Location of final hearing.

23. Ms Waterhouse says *"I also note the fact that the proceedings on 31 January 2019 were heard at the chambers of the DFSA's counsel, which can hardly be said to be a neutral venue and that there appears to be a long association between Blackstone Chambers and the DFSA. For example, I note that Charles Flint QC is a member of the DFSA's Board of Directors."*

24. As we have pointed out no objection was raised by Mr Collins QC or by Ms Waterhouse when the Registrar arranged the hearing. Any objection should have been made before or even at the hearing. It is not explained how the location of the venue for a short hearing without evidence has the appearance of bias. Neither the members of the Tribunal nor the Registrar have any connection with Blackstone Chambers. We do not accept the claim in Ms Waterhouse's Reply that she was somehow deterred from objecting for fear that a hearing would not then take place. Ms Waterhouse has rightly not hesitated to make objections in this case and her Counsel was there to advise her. The Registrar had the challenge of fixing a technologically sophisticated location at short notice on a date that suited Ms Waterhouse's Counsel and we reject criticism of him.

Decision – January hearing and related matters.

25. It is common ground that, following the introduction of the European Convention into English and Scots law the test for apparent bias adopted by the House of Lords is that set out in Porter v Magill [2002] 2 AC 357. Both sides rely on this test so we are content to do so also, for the purposes of this application; "*whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*."

26. That test must as it states be applied first to the conclusions of a fair minded and informed observer (as opposed to the assertions of a party) and secondly to the facts as they truly are not to suspicions or beliefs of a party. The facts as we have found or rather know them to be, for evaluation by the observer, are that the discussion was a private and confidential one between members of the

Tribunal. Those are the facts and there can be no possibility of bias or the appearance of bias in those circumstances. It would be obvious to the fair minded and informed observer, once informed of the facts, that the conversation was a private one. Had the facts been as Ms Waterhouse says she believes them to be, that the conversation had been with the DFSA employees at the hearing and that, by implication, all three members of the Tribunal, the Registrar and others are now lying about the matter and behaving disgracefully then of course there would have been bias and the appearance of bias, regardless of the other factors relied on. Particularly in her Reply Ms Waterhouse submits that the three other factors mentioned above (C, D and E in her Reply) cumulatively contribute to an overall picture of a lack of impartiality and an appearance of bias. As we see it all three points are misconceived individually and are cumulatively irrelevant given the realities of the conversations which led to the application.

27. It follows that these aspects of the application are without merit. Ms Waterhouse adds to them a claim about the structure of the Tribunal.

Structure.

28. Ms Waterhouse says *"I believe that this Tribunal is biased and that there is a fundamental and irreconcilable conflict of interest inherent in the set-up and function of the DFSA's Financial Markets Tribunal."*

29. Ms Waterhouse says this (underlinings removed):

"*18. The FMT's President is appointed by the Dubai Financial Services Authority and its members may be appointed by the DFSA.*

19. The Regulatory Law, DIFC Law No. 1 of 2004 provides (at Article 26):

The DFSA shall maintain a tribunal of the DFSA called the Financial Markets Tribunal; and

The DFSA Board of Directors:

(a) Shall appoint persons for fixed terms to serve as the president and other members of the FMT; and

(b) May reappoint the president or any of the members for further fixed terms; and

(c) The DFSA Board of Directors may dismiss the president or any of the members of the FMT for just cause."

20. The power to hire and fire characterizes an employer/ employee relationship. I do not know whether the FMT members are DFSA employees or contractors paid by the DFSA. Either way, they cannot be said to be independent.

[…]

22. I simply cannot ignore the fundamentally conflicted position that the Tribunal members are in, as I have asked you to find against the DFSA.

23. I am unaware of a comparable set-up in a jurisdiction which is based on principles of English Common Law."

30. She cites cases and in particular Lord Hope in Millar v Dickson [2001] UK PC D4 , [2002] 1 WLR 1615 where he referred to*:*

"the fundamental importance of the Convention right to an independent and impartial tribunal. These two concepts are closely linked, and the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done."

31. In response the DFSA points out that Ms Waterhouse has in her application omitted the definition of just cause - which is: *"For the purpose of this Article, just cause means inability, incapacity or misbehaviour"*. Mr George goes on to cite materials suggesting that the power of removal would be a difficult one to invoke. He also refers to Article 26(3)(c) of the Regulatory Law 2004 which precludes certain categories of individual who are connected to the DFSA or another *"agency or body of the DIFC established by Dubai law"* from holding office as President or a member of the Tribunal. He also points to Lord Walker's explanation of Millar in Save Guana Cay Reef Association v The

Queen [2009] UKPC 44 at Paragraphs 51 and 52, *"The decisive point ... was the fact that ... the appointment of a temporary sheriff could be "recalled" (that is terminated) by the executive at any time and for any reason."* In contrast the Tribunal members cannot be removed at any time or for any reason.

32. In her Reply, which is mainly directed to this aspect, Ms Waterhouse turns to the fixed term nature of the appointments of members of the Tribunal citing Starrs v Ruxton 2000 JC 208 a case related to Millar v Dickson. These cases concerned the effect of the coming into force directly of the European Convention for the Protection of Human Rights on the appointment on a temporary basis, usually for one year, of criminal judges in Scotland. The court pointed to the fact that in Scotland temporary judges would often aspire to permanent appointments or at least to reappointment and there was a risk of their being over deferential to those with power to reappoint them. She also refers to Paragraphs 51 and 52 of Save Guana set out below. She says that similar considerations affect the appointment of members of this Tribunal. As this point was only raised in Reply the DFSA has not had (or sought) an opportunity to respond to it.

33. The DFSA argues that another reason why this application must fail is that the matters about which Ms Waterhouse complains are matters which are part of the inherent structure of the FMT, as set out in the Regulatory Law 2004 which created it. The requirements of natural justice are context-specific, and the context is that the Tribunal is merely performing its functions in the manner mandated by the statute which created it, citing Woolf J (as he then was) in R (Lewis) v Board of Visitors of Frankland Prison [1986] 1 WLR 130 at 135F *"the reasonable and fair-minded bystander would have to take into account the nature of the proceedings and the nature of the duties which* [the decision-maker] *has to perform."* Ms Waterhouse correctly points out that Frankland does not decide that in terms but it is however an example of the application of a broad proposition related to the approach in Save Guana referred to below.

34. If the Tribunal were to assume for the purposes of this decision only in favour of Ms Waterhouse that our law would follow that of England as modified by the formal application of ECHR principles following the Human Rights Act

1998, the most useful guide is the summary of Lord Walker in Paragraphs 51 and 52 of Save Guana mentioned in part by both sides:

"50 The test for apparent bias has been laid down by the House of Lords in Porter v Magill [2002] 2 AC 357. The opinion of Lord Hope of Craighead in that case (paras 95 to 103) invited the House to accept, as it did, a "modest adjustment" in the formulation of the English principle, so as to bring it fully into alignment with Strasbourg jurisprudence, in terms put forward by Lord Phillips of Worth Matravers MR In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 , para 85: "The Court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair- minded and informed observer to conclude that there was a real possibility [, or a real danger, the two being the same,] that the tribunal was biased." (Brackets added) Lord Hope's formulation (para 103) omitted the words in square brackets.

51 Both before and since Porter v Magill there have been cases considering whether the fact that a judge has no long-term security of tenure would lead a fair-minded and informed observer to conclude that there was a real possibility of bias, because of the temporary judge's inclination to be over-deferential to those who had power to terminate or renew his appointment. The most important authorities are Starrs v Ruxton 2000 JC 208 , Millar v Dickson [2002] 1 WLR 1615 and Kearney v HM Advocate 2006 SC(PC) 1. Kearney shows that there is no single test that is decisive. All the circumstances have to be taken into account. The decisive point invalidating the use of temporary sheriffs was the fact that under section 11(4) of the Sheriff Courts (Scotland) Act 1971 the appointment of a temporary sheriff could be "recalled" (that is, terminated) by the executive at any time and for any reason; this was reinforced by practical arrangements (for instance, an age limit) which had no statutory authority. Kearney upheld the validity of the appointment of temporary judges of the High Court of Justiciary, where those difficulties did not arise."

35. In the event the Privy Council found no apparent bias in the appointment of a High Court Judge in The Bahamas for a period of six months.

36. All the circumstances have to be taken into account. No test is decisive. Neither the DFSA nor Ms Waterhouse have sought to identify these circumstances except in isolation. The starting point is the nature of the Tribunal which is not a national court (in particular not a criminal one) with a regular judiciary. It is, as is obvious from the website, part of the DFSA in a structure established by law as a specialist tribunal of the DFSA. It operates in a jurisdiction infinitely smaller and quite different in character from those of England and Scotland. Criticism of the grounds of removal is misconceived for the reasons given by Mr George. The grounds of removal are similar to those, for example, of Circuit and Senior Circuit Judges in England, often dealing with cases affecting government interests, who may be removed *'by the Lord Chancellor on grounds of incapacity or misbehaviour'* (s17(4), Courts Act 1971).

37. The appointment of a member of the Tribunal is different from, for example, that of a temporary criminal judge in Scotland. Tribunal members are senior professionals in the area of financial services from across the world who have no other connections with the DFSA. They have no aspirations for permanent appointments for which there is no possibility anyway. Membership of the Tribunal does not bring any assurance of engagement in a case. The majority of members have never been on a case and, as these are very infrequent, may never be on one. Even if they were selected the work of the Tribunal would be a very small part of their overall current or potential future workload. Selection of members for a case is made by the President not by the DFSA. The President is appointed for a fixed period expiring in 18 months time with no prospect of renewal. The DFSA has not made submissions on this aspect of the case and it is not for us to speak for it. Nevertheless, it would seem undesirable in principle for members or the President to be appointed for life or to retirement in the fast-moving world of financial services where part of the function of the specialist Tribunal is to have regard to their awareness of industry standards.

Structure – Decision.

38. Applying these and looking at all the other circumstances it is clear to us that Ms Waterhouse's claim that "*this Tribunal is biased and that there is a fundamental and irreconcilable conflict of interest inherent in the set-up and function of the DFSA's Financial Markets Tribunal."* is not correct.

39. A further difficulty with this application to which we turn next is that Ms Waterhouse chose not to bring her objections at the outset of her claim or reasonably soon thereafter but left it until after the final hearing was over 18 months later.

Waiver.

40. The DFSA contends that these proceedings have been ongoing for a long period, the first hearing being in January 2018, and if Ms Waterhouse had wished to challenge the terms upon which the members of the Tribunal held office she would have needed to do so well before the conclusion of the hearing. The contents of Article 26 of the Regulatory Law 2004 were well known and Ms Waterhouse was represented, at various times, by two senior barristers. Ms Waterhouse's knowledge is indicated by her own description of the issue as "the elephant in the room" (i.e. an issue which she knew of but chose not to raise). This is a reference to Ms Waterhouse's statement in her application *"Had I addressed the FMT on 31 January 2019, I would have said the following about this huge conflict of interest:"*. The DFSA says she made a *"voluntary, informed and unequivocal election"* not to raise any relevant objection prior to the conclusion of these lengthy proceedings and has waived her right to do so. It cites examples of the long-established principles in English and Scots law, R v Byles ex p Hollidge [1911-13] All ER Rep 430; Millar v Dickson [2002] 1 WLR 1615. (We agree with Ms Waterhouse that Byles is of limited relevance).

41. Ms Waterhouse says that she did not make that choice because she was prevented from addressing the Tribunal at the last hearing (Reply 44). She says that at the CMC in January 2018 she found herself unaware that it was open to her to make an objection (Reply 49) and that it was only after the last hearing that the 'principal evidence' became available (Reply 50). She cites observations from Millar and from decisions referred to in that case. She also cites a handbook about the ECHR and Newland a case about relief from sanctions under the English Civil Procedure Rules, not waiver. She also relies on the obligation to deal with cases justly under our Rules and the absence of any time restriction for bringing applications.

42. It has been open to Ms Waterhouse to raise the concerns about structure now brought forward since she brought her appeal in July 2017. She is not a defendant in a criminal trial brought involuntarily before a court. She is an Appellant and brought her case with access to sophisticated legal advice. The ground "*The regulatory structure and composition of the FMT*", was available to her and to her advisers from the outset. It was not raised then, or at the hearing in January 2018 when she was represented by Counsel or at the hearings in April and October 2018 or in January 2019 when she was represented by Queen's Counsel. Neither was it raised in any of the numerous email exchanges between the Tribunal and the parties, nor was it the subject of an application until February 2019.

43. Ms Waterhouse twice suggests that she would have raised this issue at the hearing on 31 January 2019 had she not been prevented from doing so by not being permitted to make a statement. As we have pointed out she had every opportunity to raise any matter through her Counsel at the hearing. Indeed, we took a short break at the end of the last hearing (Page 31 of the transcript) so that Ms Waterhouse and her Counsel could consider whether they wished to say anything further. It is fanciful to suggest that Counsel would not have raised the matter had Ms Waterhouse wished him to do so. Further of course Ms Waterhouse has been free at any time since July 2017 to make applications and has often done so - but not about this issue.

44. Ms Waterhouse's claim that she would have raised the point at the hearing also undermines her simultaneous suggestion that she could not have raised it until she had material following what Mr Verity overheard. That material concerned particular events and had the flaws referred to above and was not related to structure. The question of structure adds nothing to that side of the application.

45. The question of waiver is not an issue without a purpose. There is no suggestion that DIFC law would differ from that of England and Scotland. One of the objects, as with the approach to challenges to jurisdiction, is to prevent parties from trying out a particular tribunal by bringing a case and carrying it through on its merits and then, perhaps when sensing that things are not going as hoped for, abandoning that course and trying something else. That approach, if

permitted, would lead to very great waste of costs and time and injustice to other parties.

Waiver – Decision.

46. Ms Waterhouse made a voluntary, informed and unequivocal election by bringing this appeal and continuing it to a conclusion and doing so with access to very able and experienced legal advice and representation.

47. It follows that this aspect of the application fails both on its merits and because Ms Waterhouse has waived her right to rely on it.

Other aspects.

48. The parties disagree about the law affecting any relief we might have granted on this application. As relief does not arise, we do not deal with those points.

Conclusion.

49. For the reasons given above the application is dismissed.

ANNEX 4 – DECISION OF THE TRIBUNAL - DATA PROTECTION LITIGATION.

1. **Data Protection litigation.** Our understanding is that in August 2017 Ms Waterhouse applied to the DFSA under Data Protection legislation for access to the data that it holds about her. The DFSA declined to provide this and Ms Waterhouse applied to the DIFC Commissioner of Data Protection. On 20 June 2018, the Commissioner issued a decision that the DFSA had contravened Article 17 of the Data Protection Law by refusing to comply with the request and directed the DFSA to provide certain of the information requested by Ms Waterhouse within thirty days. On 4 July 2018 and pursuant to Article 33(6) of the Data Protection Law, the DFSA asked the Commissioner to review his direction (the Review Application). As well as seeking a review of the direction, Article 37 of the Data Protection Law provides that a data controller found to contravene the Law (or a direction of the Commissioner) may also appeal to the DIFC Courts. As the Review Application had not been decided by the Commissioner within the thirty day period specified in Article 37, on 19 July 2018, the DFSA filed an appeal with the DIFC Courts. On 8 October 2018, the Commissioner communicated his decision in respect of the Review which apparently upheld the original decision. This has apparently led to a Statutory Appeal to the DIFC Courts and an application for judicial review. Ms Waterhouse is a party to both of these cases. A preliminary hearing of some aspects took place in June 2019, but it seems that it will be a considerable time before the matters are decided.

2. If we have misstated points of detail the parties need not correct these because it seems clear that there is litigation arising from Ms Waterhouse's request for data from the DFSA and that it will not conclude for some time.

3. **Submissions of the Parties.** On 2 October 2018 Ms Waterhouse asked the Tribunal not to conclude the present proceedings until the outcome of the challenge to the CDP's Decision is known, *'since to do so would risk a decision being taken in the absence of important documents.'*

4. On 8 October the DFSA responded claiming that it had disclosed all documents relevant to this case. It submitted that Ms Waterhouse had been free to seek,

and had sought, disclosure of material in these proceedings. It observed that Ms Waterhouse had identified no categories of relevant material which the DFSA might still have failed to disclose. There was no justification for disclosing what was irrelevant.

5. Ms Waterhouse replied on 11 October identifying categories where the DFSA might have relevant data. She identified:

   - details of her settlement with DBAG,

   - documents relating to a Deloitte report that had been disclosed,

   - documents seen by Freshfields in their internal investigation for DB,

   - meetings including a suggested informal meeting between Mr Bock and a DB employee about the terms of Ms Waterhouse's settlement with the bank, and

   - full details of the interaction between the DFSA and DB concerning the settlement.

6. The DFSA responded on 18 October apparently answering these particular points and Ms Waterhouse replied on 23 October. The suggestion of missing further documents relevant to the real issues did not arise in the October 2018 Hearing or in closing submissions. At the Hearing the parties made oral submissions similar to those they had put into writing.

7. **Decision.** The context of this issue is set out in the Decision. The DFSA has apparently been disclosing documents to Ms Waterhouse and her lawyers since 2016. There have been more than 12,000 pages of documents in this case disclosed either voluntarily or by order made by the Tribunal. It seems improbable that there are yet more relevant documents given the nature of the real issues. Further if there were any they could easily have been obtained by an order from the Tribunal.

8. Ms Waterhouse argues that if the outcome of the litigation leads to disclosure of the data, she seeks it may have an effect on this case also. As a matter of principle, it should not have that effect. The DFSA should have disclosed all material relevant to the issues in this case and confirms that it has.

9. The main issue in this case has been whether DB's admitted regulatory breaches were or should have been known to Ms Waterhouse and, if so, why she did not disclose them to the DFSA. The particular categories identified by Ms Waterhouse do not as we see it assist her argument. First, they are of limited or no relevance. Secondly, despite that, the requests appear to have been answered by the DFSA. Thirdly even if the documents had been relevant and the DFSA had refused disclosure Ms Waterhouse would have obtained an order from us and does not need data protection law to obtain this.

10. In a situation where the DFSA insists that it has given full disclosure and when no remotely plausible case has been made that this claim is untrue, there is no reason to delay the conclusion of the case again and yet further and for an indeterminate period.

11. If at the end of the Data Protection litigation the DFSA were required to disclose data which should have been disclosed in these proceedings that would be a serious matter and Ms Waterhouse would be free to apply to us for suitable relief.

12. These are our reasons for the Decision which we communicated to the parties on 6 May 2019.

15 May 2019