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IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE FMT 19007

FINANCIAL MARKETS TRIBUNAL

BETWEEN:

(1) AL MASAH CAPITAL LIMITED

(*a company incorporated in the Cayman Islands*)

(2) AL MASAH CAPITAL MANAGEMENT LIMITED

(*a company incorporated in the DIFC*)

(3) MR SHAILESH DASH

(4) MR NRUPADITYA SINGHDEO

(5) MR DON LIM JUNG CHIAT

Applicants

and

THE DUBAI FINANCIAL SERVICES AUTHORITY

Respondent

DECISION

His Honour David Mackie QC

Mr Ali Malek QC

Mr Patrick Storey

27 October 2020

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INTRODUCTION

1. This case is essentially about placement fees and the extent to which they should have been and were disclosed to investors. It takes place against a complex legal background.

2. On 26 September 2019 Mr Charles Flint QC on behalf of the Dubai Financial Services Authority ("the DFSA") issued five Decision Notices each dated 25 September 2019 ("the Decision Notices") against Al Masah Capital Limited ("Al Masah Cayman"), Al Masah Capital Management Limited ("Al Masah DIFC"), Mr Shailesh Kumar Dash ("Mr Dash"), Mr Nrupaditya Singhdeo ("Mr Singhdeo") and Mr Don Lim Jung Chiat ("Mr Lim") (collectively, "the Applicants").

3. Pursuant to Articles 29 and 90(5) of the DIFC Regulatory Law No 1 of 2004 ("the Regulatory Law") and Rules 24-26 of the Rules of Procedure of the Financial Markets Tribunal ("the FMT Rules"), the Applicants exercised their right to refer the matter (by way of reference notices) to the Financial Markets Tribunal (the "FMT" or "Tribunal") by FMT Form 1 Notices of Appeal dated 27 October 2019. In this Decision we refer, except where the identity of a particular individual or company is significant, for brevity, to "the Applicants", even where some not all of them are concerned. References to "Al Masah" are to the companies in general.

4. **Investigation.** An investigation began on 5 November 2015 following a whistle-blower complaint by a former employee of Al Najah Education Limited ("ANEL").

5. Initially the investigation only concerned Mr Dash and Mr Singhdeo but on 12 April 2016 it was extended to Al Masah Cayman and Al Masah DIFC and also to Mr Lim. On 15 November 2015, officers from the DFSA Enforcement and Supervision Teams, together with forensic support from Deloitte who had been engaged by the DFSA, attended at two addresses in the DIFC occupied by Al Masah DIFC and Al Masah Cayman. A notice pursuant to Article 80(a) (b) (c) and (e) of the Regulatory Law 2004 was served on Al Masah DIFC at the time of this inspection which was unannounced.

6. On 16 March 2017 the First Investigation Report was produced. This was the result of interviews and a review of documents coming from a number of sources including regulators in the United Arab Emirates, the United Kingdom and the Cayman Islands.

7. In June 2017 the Applicants provided to the DFSA, in four volumes, their responses to the First Investigation Report. The Final Investigation Report was produced on 30 September 2018.

8. In October 2018 Enforcement referred the Final Investigation Report and recommendations to the DFSA's Decision Making Committee ("DMC").

9. On 12 February 2019, the DMC gave each of the Applicants a preliminary notice setting out the findings and action the DFSA was proposing to take.

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10. On 20 June 2019 the Applicants made written representations in response to the preliminary notices.

11. On 26 September 2019 the DMC decided to take action against the Applicants and issued the Decision Notices and these were referred to this Tribunal on 27 October 2019 as set out in paragraph 3 above.

12. **Essence of the DFSA Decisions.** In broad terms the DFSA has found that the Applicants have engaged in misleading and deceptive conduct by deliberately concealing from investors the payment of placement fees with respect to arrangements which amounted to unauthorised Collective Investment Funds that the Applicants were involved in promoting in or from the DIFC. The DFSA claims that, in particular, the Applicants made misleading statements in marketing materials in relation to fees and provided prospective investors with financial statements that had been falsified. The Applicants all deny all these allegations. They say that the structures adopted were lawful and compliant and followed professional advice. There was no requirement to disclose the placement fees as claimed by the DFSA. They also deny that there was any improper misleading of potential investors or that there was any falsification of documents by any Applicant.

13. The DFSA imposed the following penalties;

    a. Al Masah Cayman: a fine of US$3,000,000;

    b. Al Masah DIFC: a fine of US$1,500,000;

    c. Mr Dash: a prohibition from holding office in or being an employee of any Authorised Person, DNFBP, Reporting Entity or Domestic Fund, and a fine of US$225,000;

    d. Mr Singhdeo: a prohibition from holding office in or being an employee of any Authorised Person, DNFBP, Reporting Entity or Domestic Fund, and a fine of US$150,000;

    e. Mr Lim: a prohibition from holding office in or being an employee of any Authorised Person, DNFBP, Reporting Entity or Domestic Fund, and a fine of US$150,000.

14. This Decision contains the following sections:

- Conclusions of the DMC – Paragraph 16
- The hearings – Paragraph 18
- Approach of the FMT – Paragraph 24
- Summary of the facts – Paragraph 33
- Management and placement fee agreements – Paragraph 47

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- Marketing to prospective investors – Paragraph 49
- ANEL annual reports and financial statements for 2013 & 2014 – Paragraph 59
- Alleged misleading statements to Investor A as to placement fee income received by Al Masah Cayman – Paragraph 66
- Allegedly misleading and deceptive statements in relation to fees – Paragraph 67
- Alteration of a copy of a bank statement – Paragraph 75
- The evidence of the witnesses – Paragraph 79
- The Evidence – Paragraph 80
- General observations about the evidence of the individual witnesses – Paragraph 120
- List of Issues – Paragraph 133
- Issue 1 – Paragraph 134
- Fund Manager – Paragraph 214
- Other issues on the list – Paragraph 266
- Sanctions – Paragraph 392
- Costs – Paragraph 427
- Conclusion – Paragraph 439

15. This Decision was sent in draft to the parties on 22 July 2020, apart from the paragraphs on sanctions which we distributed following a further round of submissions on 11 September. We sent out paragraphs on costs following further submissions on 23 October. On 8 October we were informed that the first two Applicants were in insolvency and on 21 October we received details of this from the joint liquidators. Al Masah Cayman was placed in voluntary liquidation on 22 August and Al Masah DIFC on 1 October.

CONCLUSIONS OF THE DMC

16. The contraventions found and the sanctions imposed by the DFSA are contained in Appendix A of its Answer dated 24 November 2019. It is set out below.

    a. <u>*Al Masah Cayman*</u>

    Financial penalty of US$ 3,000,000 pursuant to Article 90 of the Regulatory Law for:

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- *Making misleading or deceptive statements as to fees in documents relating to Offers of Units in Funds managed by Al Masah Cayman, contrary to Articles 56(1)(a) and (b) and 56(2) of CIL and (after 21 August 2014) Article 41B(1) of the Regulatory Law;*

- *Making Financial Promotions in or from the DIFC, other than as provided by the Rules, as it was not an Authorised Person or other Person referred to in GEN Rule 3.4.1(1) to (3) and the communications did not meet the requirements to be an "exempt Financial Promotion" under GEN Rule 3.4.1(4), contrary to Article 41A(1) of the Regulatory Law;*

- *Offering Units of Funds to prospective Unitholders in contravention of Article 50(1)(b) of CIL, on the basis that Al Masah Cayman was not a fund Manager as defined by Article 20(4), as it was not authorised to act as Fund Manager of the Funds offered, nor otherwise authorised to make an Offer of Funds; and*

- *Carrying on Financial Services in the DIFC, that is managing a Collective Investment Fund and Arranging Deals in Investments, when it was not an Authorised Firm with a Licence authorising it to carry on those activities, contrary to Article 41(1) of the Regulatory Law.*

b. <u>*Al Masah DIFC*</u>

Financial penalty of US$ 1,500,000 pursuant to Article 90(2)(a) of the Regulatory Law for:

- *Making misleading or deceptive statements as to fees in documents relating to Offers of Units in funds managed by Al Masah Cayman, contrary to Article 56(2) of CIL, and (after 21 August 2014) Article 41B(1) of the Regulatory Law; and*

- *When communicating Marketing Materials and Subscription Forms to investors, failing to take reasonable steps to ensure that the information contained in those documents as to fees was clear, fair and not misleading, contrary to COB Rule 3.2.1 and GEN Rule 4.2.6.*

c. <u>*Mr Dash*</u>

Financial penalty of US$ 225,000 pursuant to Article 90(2)(a) of the Regulatory Law and a prohibition from holding office in or being an employee of any Authorised Person, DNFBP, Reporting Entity or Domestic Fund, pursuant to Article 90(2)(g) of the Regulatory Law; and

- *Being knowingly concerned in the contraventions by Al Masa DIFC and Al Masah Cayman and thus, under Article 86(1) of the Regulatory Law, he committed contraventions of legislation administered by the DFSA; and*

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- *In his capacity as an Authorised Individual, failing to observe high standards of integrity and fair dealing in carrying out his Licensed Function in breach of GEN Rule 4.4.1 (Principle 1 of the Principles of Authorised Individuals).*

d. *Mr Singhdeo*

Financial penalty of US$ 150,000 pursuant to Article 90(2)(a) of the Regulatory Law and a prohibition from holding office in or being an employee of any Authorised Person, DNFBP, Reporting Entity or Domestic Fund, pursuant to Article 90(2)(g) of the Regulatory Law; and

- *Being knowingly concerned in the contraventions by Al Masah DIFC and Al Masah Cayman and thus, under Article 86(1) of the Regulatory Law, he committed contraventions of legislation administered by the DFSA;*
- *Contravening Article 41B of the Regulatory Law in counselling and procuring or being knowingly involved in the alteration of a bank statement to conceal the payment of Placement Fees, from, or the source of funds transferred into, a bank account of Al Najah Education Limited (ANEL); and*
- *In his capacity as an Authorised Individual, failing to observe high standards of integrity and fair dealing in carrying out his Licensed Function in breach of GEN Rule 4.4.1 (Principle 1 of the Principles of Authorised Individuals).*

e. *Mr Lim*

Financial penalty of US$ 150,000 pursuant to Article 90(2) of the Regulatory Law and a prohibition from holding office in or being an employee of any Authorised Person, DNFBP, Reporting Entity or Domestic Fund, pursuant to Article 90(2)(g) of the Regulatory Law; and

- *Being knowingly concerned in the contraventions by Al Masah DIFC and Al Masah Cayman and thus, under Article 86(1) of the Regulatory Law, he committed contraventions of legislation administered by the DFSA; and*
- *Contravening Article 41B of the Regulatory Law in counselling and procuring or being knowingly involved in the alteration of a bank statement to conceal payment of Placement Fees, from, or the source of funds transferred into, a bank account of Al Nahaj Education Limited (ANEL).*

17. **Statutory and regulatory background.** The case therefore concerns the application of legal provisions of some complexity which were set out at the end of each Decision Notice and are together reproduced in Annex 1 to this decision.

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THE HEARINGS

18. **Privacy hearing.** The Tribunal met for one day in London on 18 December 2019 to hear the Applicants' application that the Decision Notices not be published and that the main hearing be in private. On 16 January 2020 the Tribunal issued its Decision, now on the FMT section of the DFSA's website, that the Decision Notices would not be published until the first day of the main hearing, which would be in public.

19. On the first day of the main hearing the Tribunal refused the Applicants' renewed applications for privacy considering that no developments in the interim justified a change in approach.

20. **Main hearing.** As a result of the coronavirus epidemic it was not possible to hold the hearing within the DIFC because very few of the participants would have been able to be present. The Tribunal therefore exercised its powers to hold a remote hearing by video link. This took place over 8 days from 10 to 14, 17 to 18 and 28 May 2020.

21. Rule 16 requires the hearing to be in public unless the panel orders otherwise. As in another FMT case the previous week, we ordered otherwise because the kind of hearing we were having could not be in public. In order to provide some public access we ordered that a copy of the transcript of each day's hearing be placed on the website. We recognised that the hearing could also be characterised as being, in a limited sense, in public but the distinction seemed to us not to matter. The hearing was conducted successfully through the faultless technology provided by Mr Muhammad Saeed and his colleagues at Lloyd Michaux.

22. **Representation.** The DSFA have been represented by Ms Sarah Clarke QC and Mr Adam Temple and by Mr James Lake and others in the DFSA Legal Department. The Applicants have been represented by Mr Richard Hill QC and Mr Gregory Denton-Cox and by KBH Kaanuun. We are extremely grateful to all of them for their assistance without which this case would have been very difficult to manage.

23. **Decision.** This Decision is unanimous on all issues.

APPROACH OF THE FMT

24. **Jurisdiction.** The FMT 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.

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25. **Applicable Law.** 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.

26. **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.

27. **Nature of the process and the burden and standard of proof.** The FMT conducts in effect a de novo hearing of the process which led to the Decision Notices. Neither party is confined to the evidence and other material used in the previous process.

28. The burden of proof lies on the DFSA to prove the case to the civil standard of the balance of probabilities. The Tribunal recognises however that cogent evidence is required before it makes a finding of absence of integrity or of similar conduct or behaviour. We bear this in mind, but do not repeat it, throughout.

29. **The written and oral evidence.** Despite the limited range of the factual disputes between the parties we have had some thousands 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. The sources of our written information are the pleadings (A), the witness statements (C), the documents (D), the written and oral submissions of Counsel (B) and the transcripts of the hearings (H). References in this Decision to the transcripts of the hearings are in the form of 'Day/page:lines'. Both sides cite transcripts of interviews within Bundle D 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.

30. **The people involved**. Annex 2 contains a chart, which we understand is uncontroversial, taken from Appendix 4 of the opening statement of the DFSA setting out the roles of some of the individuals in companies involved in relevant events.

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31. **Witnesses.** The DFSA produced statements from the following witnesses, all of whom, apart from Mr Jensen, who was not challenged, gave live evidence:

- Mr Robert Clink and Mr Rajesh Mehta, who invested in ANEL and HML and (in the case of Mr Mehta) the logistics platform.

- Ms Ilona Zudikova, who was a Relationship Manager at Al Masah (in a general sense: she explains that she did not distinguish between the two Al Masah companies). Her evidence is that her role involved 'on-boarding' new investors, maintaining the folder of marketing material, and sending out Annual Reports for ANEL and correspondence to investors correcting those reports.

- Ms Helen Baines, who was Head of Compliance and Risk at Al Masah DIFC. She explains her role in approving marketing materials, and which documents were treated as such within Al Masah DIFC.

- Mr Sharif Sikander Sharif, the partner at Ernst & Young in charge of the audit of ANEL for 2013/2014 and who engaged with Mr Singhdeo and Mr Lim for that purpose and in relation to the corrections sent to investors in relation to the inaccuracies in the financial statements contained in ANEL's 2013 and 2014 annual reports.

- Mr Anthony Jensen and Mr Matthew Hammond, both working in the Enforcement Division of the DFSA during the investigation into the Applicants.

In addition, the DFSA relies on the contents of the interviews conducted with a number of other individuals which are contained within Bundle D.

32. The Applicants produced statements from Mr Dash and Mr Singhdeo who gave live evidence and from Mr Lim, who did not. Mr Hill QC for Mr Lim disclosed the day before Mr Lim was due to give evidence that he would not after all be doing so but no reason for this decision was given. As explained below, we considered Mr Lim's witness statements but note he was not prepared to be cross-examined on them.

SUMMARY OF THE FACTS

33. We next set out a summary of the relevant facts taken from the Answer of the DFSA but amended to take account of our views and those of the Applicants.

34. Al Masah Cayman was incorporated in the Cayman Islands as an exempted company on 8 October 2009. Al Masah Cayman was not authorised by the DFSA to carry on any Financial Services in or from the DIFC.

35. Al Masah DIFC is a subsidiary of Al Masah Cayman and was incorporated in the DIFC on 9 August 2010 and licensed by the DFSA on 19 August 2010. During the period August

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2010 to June 2016, "the Relevant Period", Al Masah DIFC was authorised by the DFSA to carry on Financial Services in or from the DIFC, including Arranging Deals in Investments and Managing a Collective Investment Fund. The Applicants say that it was envisaged from an early stage that Al Masah Cayman would establish a subsidiary with the appropriate regulatory license to (among other things) arrange investments and market the investment vehicles to be established by Al Masah Cayman.

36. Al Masah Cayman established four companies (referred to as "Investment Companies" by the DFSA and referred to as "Holding Companies" by the Applicants), which were exempted companies incorporated in the Cayman Islands, each holding shares in a subsidiary (the "Operational Company") incorporated in the UAE. The Investment Companies, which were described by Al Masah Cayman as private equity platforms, and the Operational Companies are as follows:

Platform	**Operational Company**	**Investment Company /Holding Company**
Healthcare Fund	Alchemist Healthcare LLC	Avivo Group
Education Fund	Al Najah Education LLC	Al Najah Education Limited
Logistics Fund	Gulf Pinnacle Investments LLC	Gulf Pinnacle Logistics Limited
Lifestyle Fund	DLL Emirates Restaurants LLC	Diamond Lifestyle Limited

37. Each Operational Company invested in businesses and assets within a particular sector of the economy, primarily through the acquisition of shares in unlisted companies. The companies operated in a similar manner and ANEL will be taken as an example of them all. We will use the various expressions adopted by the parties for the companies interchangeably and without any significance attaching to that use.

38. Al Masah Cayman's registered office address is in George Town, Grand Cayman, in the Cayman Islands. However, Al Masah Cayman did not carry on any significant business from its registered office in the Cayman Islands. The DFSA says (and the Applicants deny) that, during the Relevant Period, Al Masah Cayman operated from premises in the DIFC that it shared with, and that were leased by, Al Masah DIFC. The offices were at Level 6, North Tower, Emirates Financial Towers, DIFC and Level 9, Suite 906 & 907, ETA Star – Liberty House, DIFC.

39. During the Relevant Period, substantially the same people served on the boards of directors of Al Masah Cayman and Al Masah DIFC respectively. The senior management included (amongst others):

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- Mr Dash who from 19 August 2010 was authorised by the DFSA to perform the Licensed Functions of Senior Executive Officer and Licensed Director at Al Masah DIFC. Mr Dash was also on the board of directors of Al Masah Cayman and chairman of the board of directors of each of the Investment Companies;

- Mr Singhdeo who was the chief financial officer of Al Masah Cayman and authorised by the DFSA to perform the Licensed Functions of Finance Officer and Senior Manager at Al Masah DIFC in the period from 27 September 2010 to 27 April 2016. Mr Singhdeo was also secretary to (but not a member of) the boards of directors of both Al Masah Cayman and Al Masah DIFC and a member of the board of directors of each of the Investment Companies; and

- Mr Lim who was not authorised by the DFSA to carry on any Licensed Functions, but was an executive director (although not a board member) of Al Masah Cayman and on the board of directors of each of the Investment Companies.

40. Under a service fee agreement dated 15 January 2011, Al Masah DIFC was to receive in a client bank account, money from clients of Al Masah Cayman to be deployed towards investment opportunities, on which a service fee of 2% of money received would be payable to Al Masah DIFC.

41. Under an investment advisory agreement dated 1 April 2012, Al Masah Cayman was to pay a fee, limited to 75% of the total expenses of Al Masah DIFC, towards common expenses shared for managing their businesses.

42. Under an advisory agreement, as amended on 28 June 2012, Al Masah Cayman was to pay to Al Masah DIFC an advisory fee equivalent to 90% of the total revenues earned by Al Masah Cayman as management fees or other direct fees, not including Placement Fees.

43. Under an agreement dated 31 December 2012, it was recorded that all employment contracts of employees in the group were entered into with Al Masah Cayman (although the signatory appears to be Al Masah DIFC). The costs of all employees in the DIFC were to be shared as to 75% for Al Masah Cayman, and 25% for Al Masah DIFC. Salaries were to be paid by Al Masah DIFC and employment visas issued in the name of Al Masah DIFC.

44. As evidenced by the investor relations team manual:

- Al Masah DIFC was the main operational office of the Al Masah Group, of which Al Masah Cayman was the holding company;

- All employees were obliged to maintain standards of conduct, including that employees in the Dubai office should present themselves as working for Al Masah DIFC;

- Introduction of referral agents, client on-boarding and the compliance function was to be carried out by the investor relations team in the office of Al Masah DIFC;

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- All investor relations team members were required to make themselves aware of the DFSA rules and regulations regarding financial promotions in or from the DIFC;

- Only documents that had been reviewed and approved by Compliance were permitted to be shared with clients;

- Investor relations team members should not formulate their own marketing information; and

- The Al Masah Group was only permitted to deal with High Net Worth and other Professional Clients.

45. The DFSA says that the effect of these arrangements was that the businesses and activities of both Al Masah Cayman and Al Masah DIFC were carried on together in the DIFC. In dealing with investors and communicating Marketing Material (defined below), directors and employees were acting both for Al Masah Cayman and Al Masah DIFC, and their acts and omissions may be attributed to either company depending on the circumstances. The Applicants dispute this and contend that marketing, arranging and distribution activities were carried out by Al Masah DIFC.

46. The DFSA says that during the Relevant Period the activities of Al Masah Cayman in relation to marketing, making arrangements for the sale of shares in the Investment Companies, and in managing the Investment Companies were mainly carried on in and from the DIFC, where all its directors and senior employees were based. Al Masah Cayman did not carry on any significant business from its registered office in the Cayman Islands. The Applicants contend that Al Masah Cayman did not carry on such activities in or from the DIFC (or at all).

MANAGEMENT AND PLACEMENT FEE AGREEMENTS

47. Each Investment Company entered into a separate management agreement with Al Masah Cayman in substantially the same terms ("Management Agreements"). The Management Agreements recited that Al Masah Cayman provided asset and portfolio management services to investors in the MENA region, and appointed Al Masah Cayman to act as manager of the Investment Company. Al Masah Cayman was defined as "the Manager" and was appointed to perform certain services and duties for the Investment Company. The agreement provided that the Manager would always have a majority of representation on the Board of Directors of the relevant Investment Company but that the Board should be the governing body of the Company and should have overall direction, supervision and ultimate control of all matters pertaining to the operations of the business. The CEO and other management staff of the Investment Company and its subsidiaries would be appointed by the Manager and would manage the day-to-day operations of the Company in accordance with the instructions of the Board. The Manager would do all things necessary to provide a

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profitable exit for all investors in the company. The Investment Company agreed to pay to Al Masah Cayman an annual management fee of 2% of total equity employed.

48. Al Masah Cayman also entered into a placement fee agreement with each of the Investment Companies in substantially the same terms ("Placement Fee Agreements"). Under the Placement Fee Agreements, the Investment Company engaged Al Masah Cayman to help it raise equity capital at a premium to its par value and agreed to pay to Al Masah Cayman a Placement Fee of up to 10% of the capital raised from new investors, to be payable to Al Masah Cayman when the Investment Company received the subscription payment from a new investor.

MARKETING TO PROSPECTIVE INVESTORS

49. Between 2012 and 2016, Al Masah Cayman, according to the DFSA, and Al Masah DIFC communicated marketing material to prospective investors in the Investment Companies by various means including by email, personal delivery or through the website of Al Masah Cayman (www.almasahcapital.com). The Applicants say that marketing material was communicated by Al Masah DIFC, not by Al Masah Cayman.

50. The marketing material communicated or made available to prospective investors included the following classes of documents ("Marketing Material"):

    - investor presentations which included an overview of the businesses and assets under management, financial projections, terms of subscription for the shares on offer, anticipated returns for the investor, the management fees charged and the incentive fee payable by the investor to Al Masah Cayman on exit;

    - short summaries of investor presentations which included terms of subscription for the shares on offer, anticipated returns for the investor, the management fees charged and the fee payable by the investor to Al Masah Cayman on exit; and

    - (disputed by the Applicants) annual reports for Al Masah Cayman and the Investment Companies (apart from Diamond and GPL) and the Subscription Forms for investors.

51. The Investment Company Marketing Material also included financial projections which did not include any disclosure of fees.

52. Prior to 2015, the Marketing Material was sent by the investor relations team to prospective investors by email. From early 2015, the Marketing Material was also uploaded onto a portal on the website of Al Masah Cayman and prospective investors were provided with a username and password with which to access the material on the portal.

53. In addition to this, and throughout the Relevant Period, Marketing Materials were also delivered in person by Al Masah DIFC employees to potential investors.

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54. In addition to direct marketing (which the Applicants say that it did not carry out), Al Masah Cayman entered into agreements with referral agents (or distribution partners) to distribute securities issued by what is referred to in the referral agreements as the 'Al Masah Cayman Group'. The referral agent agreed to use only the Marketing Material provided by the Al Masah Cayman 'Group'. The fees payable by Al Masah Cayman were stated to be up to 5% of the amounts raised towards the share capital of the Investment Companies and, in respect of subsequent investments by introduced clients, a percentage of the management fees to be earned by Al Masah Cayman.

55. The relevant Marketing Material on which the DFSA relies is listed in Annex D to each of the Decision Notices. In many cases the Marketing Material purports to have been distributed by Al Masah DIFC on behalf of Al Masah Cayman. In a few cases, the Marketing Material purports to have been distributed by Al Masah Cayman and approved by Al Masah DIFC. The Applicants say that all marketing material that was sent to prospective investors was in fact distributed, and approved, by Al Masah DIFC. The Applicants dispute the accuracy and value of Annex D.

56. The terms in which fees were disclosed in the Marketing Material were by reference to the Subscription Forms, which stated that Al Masah Cayman as manager would be charging a 2% management fee per annum from the capital of the Investment Company, and charging the investor 20% on any returns exceeding an internal rate of return of 10%. The Applicants say that investors agreed to pay the incentive fee to Al Masah Cayman in the Subscription Forms, but this was not a fee payable to Al Masah Cayman "as manager".

57. The Subscription Forms, which contained the contract between the investor and the Investment Company and Al Masah Cayman, contained the following terms:

- an acknowledgement that the investor had received and read an offering presentation of the company;

- an application for shares at a stated issue price;

- an acknowledgment that Al Masah Cayman as manager would receive an annual management fee of 2% of the equity of the company;

- an agreement to pay on exit to Al Masah Cayman, an incentive fee equal to 20% of the returns received by the investor, provided that the return net of the incentive fee yielded an internal rate of return of at least 10% per annum from the period of investment;

- an agreement by the investor to be bound by the memorandum and articles of association of the company, and an agreement that the issue of shares was subject to the provisions of the articles;

- a term granting Al Masah Cayman a voting rights proxy in respect of the shares; and

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- warranties that the investor had the knowledge, expertise and experience in financial matters to evaluate the risks of investing in the Investment Company, and had been provided with all documentation regarding the Investment Company as requested and satisfied themselves completely before investing.

58. The Subscription Forms were counter-signed on behalf of Al Masah Cayman.

ANEL ANNUAL REPORTS AND FINANCIAL STATEMENTS FOR 2013 & 2014

59. On or about 29 August 2013, Mr Singhdeo, as a ‘director’ of Al Masah DIFC, signed an engagement letter with Ernst & Young to perform an audit of the financial statements of ANEL and its subsidiaries for the period 17 October 2011 to 31 August 2013. (Mr Singhdeo’s evidence was that the engagement letter was intended to be signed by him as director of ANEL, as ANEL was Ernst & Young’s client.)

60. After 31 March 2014, the board of directors of ANEL, including Mr Singhdeo and Mr Lim, approved its audited financial statements for the year ended 31 August 2013. Those audited financial statements correctly disclosed in the notes, related party transactions with Al Masah Cayman, including management fees of US$460,157 and advisory fees and other costs of US$6,507,182, which consisted mainly of the Placement Fees paid to Al Masah Cayman. Ernst & Young had required that the audited financial statements disclose the payment by ANEL of Placement Fees as transaction costs, in order to comply with International Financial Reporting Standards (“IFRS”). The report of the directors was signed by Mr Lim and Mr Singhdeo and dated 31 March 2014.

61. The 2013 annual report of ANEL, produced for communication to shareholders (and, the DFSA contends, prospective investors], purported to include the audited financial statements for the year ended 31 August 2013, including Ernst & Young’s report to shareholders and the signature of two directors, Mr Bukhamseen and Mr Singhdeo, certifying that those statements had been approved by the board on 31 March 2014. However, notes 7 and 10 to those financial statements, although disclosing management fees of US$460,157, had been altered so as not to disclose advisory fees and the other costs of US$6,507,182. The DFSA claims that the purpose and effect of the purportedly audited financial statements as so altered was to conceal from shareholders and prospective investors the Placement Fees paid by ANEL to Al Masah Cayman.

62. On about 5 May 2015, the board of directors of ANEL, including Mr Singhdeo and Mr Lim, approved its audited financial statements for the year ended 31 August 2014. The report of the directors was signed by Mr Singhdeo and Mr Lim and dated 5 May 2015. Those audited financial statements correctly disclosed, in the notes, related party transactions with Al Masah Cayman for 2013 and 2014, including advisory fees. In the 2014 annual report, those financial statements had again been altered, the DFSA claims but the Applicants deny, so as to conceal from shareholders and prospective investors the Placement Fees paid by ANEL

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to Al Masah Cayman. The altered financial statements appearing in the 2014 annual report were also signed by Mr Singhdeo and Mr Lim.

63. The DFSA claims but the Applicants deny that the falsification of the financial statements for inclusion in the 2013 and 2014 annual reports of ANEL was known to, and approved by, Mr Singhdeo (the chief financial officer of Al Masah Cayman) and Mr Lim (an executive director of Al Masah Cayman).

64. The DFSA says (but the Applicants deny) that production of the 2013 and 2014 annual reports of ANEL was co-ordinated in the offices of Al Masah DIFC by its employees for communication to the shareholders of, and prospective investors in, ANEL. Physical copies of annual reports were delivered to and stored at Al Masah DIFC's offices. The Applicants have not disputed that such reports were communicated to shareholders of ANEL, and the DFSA contends that emails show that such reports were also communicated by Al Masah DIFC to distributors or prospective investors), including the following:

- On 8 July 2014, Mr Lim sent an email to what the DFSA says, but the Applicants deny, was a prospective investor ("Investor A"), copied to Mr Singhdeo and Mr Dash, attaching a copy of the 2013 annual report for ANEL, falsely representing that the report contained the audited financial statements of ANEL. Neither Mr Singhdeo nor Mr Dash took any steps to clarify or otherwise correct this position following his receipt of that email.

- On 24 November 2014, an employee of Al Masah DIFC, on the instructions of Mr Lim, emailed the 2013 annual report of ANEL to a distributor ("Distributor B") interested in distributing the Healthcare and Education funds. That email was sent in response to a request for copies of audited financial statements for carrying out due diligence on the funds and Al Masah Cayman. Mr Singhdeo was included in the relevant email exchanges at the time but did not oppose the proposal to send Distributor B the annual report instead of the audited financial statements and Mr Dash approved that stating "*that's right*".

65. The ANEL financial statements for 2013, in the state described above, were also communicated by Al Masah DIFC as follows:

- On 17 December 2014, Mr Lim sent an email to a firm of financial advisers, copied to Mr Singhdeo, in response to a request for the audited financial statements of ANEL, attaching a copy of the falsified financial statements, describing those statements as the audited financials for ANEL for the 2013 financial year. The DFSA says that again, Mr Singhdeo was included in the relevant email exchanges at the time but did not correct the description of what was provided as being the 'audited statements'; and

- On 17 March 2015, Mr Lim sent an email to an intermediary bank, copied to Mr Singhdeo and Mr Dash, attaching a copy of the falsified financial statements for

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provision to a prospective investor ("Investor C"), describing the document as the audited financial statements for ANEL for the 2013 financial year. The DFSA relies on the apparent absence of any steps taken by Mr Singhdeo or Mr Dash to correct the misleading impression given that these were the 'audited' statements.

ALLEGED MISLEADING STATEMENTS TO INVESTOR A AS TO PLACEMENT FEE INCOME RECEIVED BY AL MASAH CAYMAN

66. On 10 September 2014, a member of the placement team employed by Al Masah DIFC emailed to Investor A information about the fee income of Al Masah Cayman, in response to a query which had been raised in relation to the figure of US$14.3 million disclosed as fee income from assets under management in the audited financial statements of Al Masah Cayman for the year ended 31 March 2014. The DFSA claims but the Applicants deny that the email falsely represented that the fees that pertained to the private equity platform were only management fees of US$4.7 million, and concealed that there were also Placement Fees in excess of US$5 million which were not included in the information disclosed. The DFSA says (but the Applicants deny) that the concealment of Placement Fee income received was known to Mr Lim and had been approved by Mr Singhdeo and Mr Dash.

ALLEGEDLY MISLEADING AND DECEPTIVE STATEMENTS IN RELATION TO FEES

67. The Marketing Materials referred to in Annex D to the Decision Notices, including Subscription Forms, were communicated to prospective investors by Al Masah DIFC (the parties dispute whether this material was also distributed by Al Masah Cayman).

68. The DFSA alleges (and the Applicants deny) that the statements made in the Marketing Material, including Subscription Forms, as to the fees to be paid out of the Investment Company or to be received by Al Masah Cayman were misleading, deceptive and not fair to investors in that:

- the disclosure of annual management fees, payable out of the assets of the Investment Company to Al Masah Cayman, impliedly represented that there were no other fees arising from the capital subscription made by the investor to be paid by the Investment Company to Al Masah Cayman; and

- the Placement Fees of up to 10% of the capital subscription to be made by the investor and payable to Al Masah Cayman were material to an investor's decision to invest than the annual management fees.

69. The DFSA says (and the Applicants dispute) that the following points are relevant to assessing knowledge and intention in relation to these statements:

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- the disclosure of annual management fees demonstrates that Al Masah DIFC and Al Masah Cayman appreciated that the payment of substantial fees from the Investment Company to Al Masah Cayman in respect of the investment to be made by the investor would be material to the investment decision;

- the fact that the Placement Fees were not disclosed in any of the Marketing Material or Subscription Forms demonstrates that the omission of the reference to Placement Fees was not inadvertent but a deliberate policy; and

- the facts referred to above corroborate the finding that the omission of Placement Fees from the fees disclosed in the Marketing Material was a deliberate policy.

70. The DFSA further contends that Al Masah DIFC acting on behalf of Al Masah Cayman also communicated to shareholders of ANEL and to prospective investors:

- the 2013 and 2014 annual reports of ANEL containing the altered financial statements of ANEL for 2013 and 2014;

- the altered 2013 financial statements of ANEL; and

- the incorrect information sent to Investor A as to Placement Fee income received by Al Masah Cayman.

71. The DFSA says and the Applicants deny that those annual reports and financial statements were misleading, deceptive and not fair to investors:

- in deliberately concealing the Placement Fees paid to Al Masah Cayman, and

- in falsely representing that the financial statements included in the annual reports complied with applicable accounting standards and were those which had been approved by the board of directors, audited by the auditors and were subject to the auditors' report.

72. The DFSA says, but the Applicants deny, that false information sent to Investor A was communicated to a prospective investor in the context of discussions about the valuation of investments in the Investment Companies and that the email was misleading, deceptive and not fair to investors for the reasons given above.

73. The annual reports for ANEL had been produced and distributed without the knowledge or approval of the auditors. At a meeting with Mr Singhdeo and Mr Lim held on about 22 November 2015, the auditors required ANEL to withdraw the annual reports, and write to shareholders notifying them of the material omissions and discrepancies in the financial statements contained in the annual reports and the audited financial statements. The Applicants do not accept that this was the nature of the requirement imposed.

74. Instead, investors received an email, which was drafted by Protiviti, describing the reason for the retraction of the financial statements as "*printing errors*". The Applicants dispute

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the DFSA's claim that Mr Singhdeo and Mr Lim had been directly involved in the discussion with the auditors about the retraction, and were aware that the changes to the financial statements were deliberate and could not reasonably be described as printing errors.

ALTERATION OF A COPY OF A BANK STATEMENT

75. On 19 September 2014, the financial controller of ANEL raised with Mr Lim the difficulty of reconciling entries in an ANEL bank account at Royal Bank of Canada (Suisse) SA ("the RBC Account") with other accounts and transactions. The DFSA says but the Applicants dispute that Mr Lim told him to alter the bank statements.

76. On or about 9 December 2014, the financial controller, acting the DFSA says but which the Applicants dispute, on the instructions of Mr Singhdeo and Mr Lim, deleted entries and made alterations to an RBC copy bank statement relating to the period 15 August 2013 to 29 October 2013.

77. The DFSA says that the effect of the deletions and alterations was to disguise the origin of funds paid into the RBC Account and to conceal the payment of Placement Fees out of the account. Mr Lim and Mr Singhdeo were sent copies of the genuine bank statement and the alteration and asked to comment on the differences in the physical appearance of the statement. Mr Singhdeo responded to this request with a query about why some payments to ANEL from an investor were still appearing in the bank statement, by implication requiring that further alterations be made. Mr Singhdeo also received two emails from Mr Lim commenting on the appearance of the altered copy. Mr Singhdeo and Mr Lim thereby counselled or procured or were knowingly involved in the alteration. The Applicants reject this characterisation.

78. Copies of the falsified bank statement were found in a folder relating to ANEL audit documents. The purpose of preparing the altered bank statement, the DFSA says, was to make it available to be viewed by the auditors of ANEL, in the event they requested access to bank statements. The Applicants reject this conclusion.

THE EVIDENCE OF THE WITNESSES

79. The most convenient way of approaching a variety of different legal issues concerning five separate Applicants is, as we see it, to follow the order of the Agreed List of Issues. Before doing that we need to review the evidence to enable us later to make findings of fact necessary to resolve the issues.

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THE EVIDENCE

80. Most of the factual differences between the parties concern the extent of the knowledge and involvement of the Applicants in, and the significance of, matters not themselves disputed. We will discuss each witness in the order in which she or he gave evidence at the hearing.

81. **Mr Clink** is an experienced investor who, on the introduction of a Mr Bond who received commission, made substantial investments in what he referred to as funds of Al Masah. He made three investments in HML and one in ANEL. He did not distinguish between Al Masah companies. He was unaware that any placement fees were being paid and would have reviewed his decision to invest if he had been aware of these. He dealt with one individual at Al Masah. He did not believe that he ever received the Articles of Association of either HML or ANEL.

82. Mr Clink accepted in cross examination that brokerage or placement fees were commonly paid, he said at around a percentage of 2 per cent (Day 2/27:13-18). He would expect a company such as Healthcare MENA or ANEL to be funding some brokerage fees or placement fees (Day 2/28:11-24). He was not particularly concerned about what fees ANEL or Healthcare MENA were paying to third parties: he would have assumed that there was some level of placement fees or brokerage fees "at a sensible rate" (Day 2/29:17-30:7). Mr Clink also assumed that Mr Bond would receive a brokerage fee for introducing people. Like Mr Mehta, his evidence was that the size of the placement fees was a lot higher than anything they would have accepted:

(Day 2/31):

19 Had someone told me that they were paying 6 per cent
20 placement fees, I would not have invested, because that
21 is higher than the regular 2 per cent rate around the
22 Middle East.

(Day 2/33):

7 … But I had no
8 knowledge of what placement fees they were paying. Had
9 they been upfront about the placement fees, I probably
10 wouldn't have invested at 6 per cent.

83. Mr Clink's evidence was entirely straightforward and obviously truthful. Overall it was clear that he would have expected any placement fees charged on investments to be disclosed and, if he was to participate, at a level much lower than that charged by Al Masah.

84. **Mr Mehta** is a very substantial investor. He met Mr Dash and others in 2012 and in that year and in 2015 invested in HML as well as in ANEL and GPL. He said that he had not been told about placement fees, which he described as 'absurd and unwarranted' and had not received the Articles of any of the companies in which he had invested. In July 2014 he

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received an email from Ms Zudikova attaching what were described as "Audited financial statements which are included in the Annual Reports for 2013". He had expected that the financial statements appearing in the annual report would be the same as the financial statements signed by the auditors. He was concerned to be told much later that he had been provided with altered financial statements, and does not think this practice is acceptable.

85. He did not think it acceptable for the later correction to describe the changes as being "printing errors". Further his records showed that the hard copies containing the correction had never been received at his home.

86. In cross examination Mr Mehta accepted that it was common for a brokerage or commission fee to be paid to introducers, but said he expected that it would be a fee of up to 1 per cent (although he also said he "*did not clarify what percentage they are paying*") (Day 2/42:13-43:10). He said (as he had said to the DFSA in interview) that he assumed that there must be a small commission being paid (Day 2/45:13-17) (Day 2/46:8-14), although he said at Day 2/49:3-9 that up to 2 per cent would be normal. His view was that if fees were above the normal level of fees ("*out of level*") they would be disclosed (Day 2/50:14-18).

87. Mr Mehta also said this (Day 2/49):

3 …what I have been told is they were getting
4 10 per cent, but 5 per cent is also surprising. Because
5 no normal fund would give 5 per cent. Normally, it
6 would be 2 per cent. 1.5, 2, 1, or half a per cent or
7 quarter per cent. We invested in European private
8 equities, American, we have never had this kind of
9 commissions. Never heard of this.

(Day 2/50)

11 … I know in America and I know in India,
12 that these amounts are just not acceptable. And if it
13 is, it is disclosed, of what commission is given.
…
18 … if it is out of level, they will be disclosed.

88. Like Mr Clink, Mr Mehta suggested that one would not expect to see any indication of placement fees in the Articles (Day 2/20:24-21:4), (Day 2/53:25-54:2).

89. Where a private equity vehicle carried out its own placement, Mr Mehta would not expect them to charge placement fees to (in effect) themselves (Day 2/58):

Q1 Would you expect private equity vehicles to charge
2 placement fees where it does its own placement?

3 A. No, certainly not. We have done that in Europe in one

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4 *or two or three private equity. We didn't do it, but at*
5 *that time, when we went directly to them, they had no*
6 *placement fees, but that was clear.*

90. The truth and accuracy of the evidence of Mr Mehta, and his very considerable experience and expertise in investments were not in doubt and we entirely accept what he told us. Mr Mehta memorably characterised forceful salespeople of investments as 'tie wallahs'.

91. **Ms Zudikova** joined Al Masah Capital Limited (Al Masah Cayman) in the DIFC on 1 April 2012 as the Office Manager. Her employment contract was with Al Masah Cayman, but was signed by Mr Dash on behalf of Al Masah Capital Management Limited (Al Masah DIFC). She understood that she was employed by Al Masah Capital in a general sense and did not distinguish between Al Masah Cayman and Al Masah DIFC.

92. Members of staff were aware that Al Masah Cayman earned placement fees, and that they could earn a "*referral fee on the initial placement fees plus the recurring management fee income*" share.

93. Ms Zudikova's job title changed over the years. Among her duties were looking after the client database and 'on-boarding' new clients. She explained how the relevant systems and processes worked. Her evidence was not controversial. She said that the marketing materials sent out to investors and contained in the online portal was limited to documents excluding the Articles. She recalled that it was well known in the office that the placement fees were charged and she would have expected Ms Baines to be aware of this but she had no memory of ever discussing this with her.

94. Marketing materials were created by the teams working for the Holding Companies themselves and then vetted by Ms Baines (Day 2/76:14-18).

95. Ms Zudikova was a clear and helpful witness and was plainly telling the truth.

96. **Ms Baines** was Head of Compliance between July 2013 and March 2017. She was therefore not around when the platforms were set up. The Applicants say that she must still have been aware of the placement fees and, having approved the structure at regular intervals and all the marketing documents as part of her duties, they are entitled to rely on the fact that their expert compliance department was content with the arrangements now in issue. They look to Ms Baines on the question of what was done by Al Masah Cayman and what by Al Masah DIFC. They also rely on the fact that Ms Baines never indicated that the arrangements might amount to unauthorised regulated Funds either internally or when completing reporting forms for or having discussions with the DFSA.

97. It was not suggested that she played any role in the concealment of placement fees in the ANEL annual reports or the alleged misstatements to investors and others. She clearly did not.

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98. Ms Baines was adamant that despite her contract being with Al Masah Cayman, her role was limited to that of being compliance officer for Al Masah DIFC. She insisted that she was Money Laundering Reporting Officer ("MLRO") for Al Masah Cayman, but not its Compliance Officer. The Compliance team, which she headed, provided services to various companies in the Al Masah group of companies, including Al Masah Cayman, Al Masah DIFC and Al Masah Asia. Ms Baines' employment contract similarly provided that "*The Company [i.e. Al Masah Cayman] will employ you and you will serve the Company as "Compliance Officer*" (clause 1.1) and that she could be required to perform services for Al Masah Cayman and also for any Group Company. That was her only employment contract. There was no separate contract appointing her MLRO (only) of Al Masah Cayman.

99. As to the placement fees, she was taken to much material none of it decisive. She was shown an email in 2012 predating her employment referring to staff commissions but there is no evidence she was ever sent the email, and she stated that she was unaware of it (Day 3/74:17-19). She said that she was unaware of the remuneration practices of Al Masah DIFC (Day 3/71:18-20). There are some staff commission calculations in the bundle, none of which were copied to Ms Baines. She was asked about agreements with referral agents, which referred to payments to those agents. She acknowledged that she was aware that such agents received a fee (but not a placement fee), but had no knowledge that the investment platforms were paying a fee to Al Masah Cayman (Day 3/68:6-69:8). She was referred to an email dated 1 May 2014 that she was copied in to from Ms Danila to a software consultant. Although the face of the email does not show the attachments, the Hearing Bundle contains 8 separate attachments. She was shown two of them: a Placement Fees flowchart, and Staff Commission flowchart. She could not recollect the email (Day 3/67:12-20) and there is no reason to suppose that she paid particular attention to it, given that it was an email to a software consultant. Nor is there any reason to think that she reviewed the attachments sent.

100. She denied that she would have reviewed placement fee agreements and no documents were put to her to support Mr Dash's general claim (Day 3/75:18-23) that she had reviewed the Placement Fee Agreements. Ms Baines was asked about minutes of a meeting of the board of directors of Al Masah Cayman but these do not refer to placement fees and she was probably there for only part of the time on 10 November 2013. Against that Ms Baines suggested that she would not have reviewed agreements between Al Masah Cayman and the Investment Companies, but she acknowledged that she could have asked for Placement Fee Agreements (Day 3/76:5-8). Ms Baines was aware that referral agents were paid brokerage fees by Al Masah Cayman, and was involved in the negotiation of at least some contracts (Day 3/80:3-9). She was also a member of the executive management committee, and attended meetings at which Al Masah Cayman's revenue streams were discussed.

101. Ms Baines was involved in the process of appointing Salesforce, as part of which she was sent the "Placement fee Process Flow" documents which explained the system under which placement fee income was due, and staff commissions were calculated. Ms Baines accepted

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that she was aware that staff were receiving commissions, although she claimed to have "*limited knowledge of that*" (Day 3/70:2-4).

102. She seemed clear in general (but without any specific examples that we found convincing) that the activities of the staff in the Al Masah DIFC offices were indeed the activities of Al Masah DIFC (and not of Al Masah Cayman).

103. Ms Baines indicated that if she had thought that the way the business was being conducted gave rise to a breach of DFSA regulations by Al Masah Cayman, she would have raised it (Day 2/128:6-25). She did not have any recollection of any worries or doubts in her mind at the time that Al Masah Cayman was managing a fund in or from the DIFC in breach of the prohibition (Day 2/32:15-33:5).

104. Ms Baines' value as a witness was limited. Of course, there were limitations imposed by the audio-visual process which make judging demeanour of even more limited value than it is with conventional live evidence. Nevertheless in contrast to all the other witnesses her answers to questions seemed to be as short and uncommunicative as she could make them. If this was as a result of having sought advice on the process of giving evidence, that advice was very poor. We cannot disagree with the Applicants' suggestion that her denials were strained and formulaic.

105. There is no evidence that she was ever put on notice of the placement fees or asked about how to present them. But it seems to us very unlikely, given not only the evidence but the familiar realities of a financial services operation that she could have been one of the few in the office unaware of them and their effect on colleagues' pay.

106. As the DFSA suggests, it was clear from her evidence that she had a narrow view of her responsibilities. She saw her role as very limited and the evidence of her written communications seems to confirm that. It was perhaps that her knowledge of the placement fees was limited or vague and she did not apply her mind to the issues that should have occurred to her. She was clearly not someone of any great influence in Al Masah. Both sides rely on her evidence for some purposes but do not accept it for others.

107. **Mr Hammond's** evidence was controversial only in the sense that there is a debate about the significance of Annex D to the Decision Notices as explained in his witness statement and in the additional statement he produced at the hearing to clarify this. There was no issue about the truth of what he was saying. Annex D was compiled from what Al Masah DIFC itself provided in response to a DFSA Notice requiring amongst other things '*the prospectus and marketing documents*' for the platforms. The material was cross-referenced against Ms Baines' list of documents that she had in fact approved for her marketing register. There is to and froing between the parties about the value of the Annex but it seems to us a reasonably good but not infallible guide to what was seen as marketing material and to what is reasonably likely to have been distributed.

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108. **Mr Sikander Sharif**, an Associate Partner at Ernst & Young gave evidence the truth and accuracy of which neither side questioned and rightly so.

109. **Mr Dash** produced four witness statements about various aspects. He gave evidence for over two days. He is a distinguished business figure although his legal team do not refer to this in their submissions. As he puts it in his Second Witness statement:

> "*I am a qualified Certified Financial Analyst (CFA) from the CFA Institute of the United States. I went on to receive my MBA from the Fore School of Management. I have lived in the region for more than 19 years with 23 years' experience in reputable investment companies, mainly in the alternative investments sector.*
>
> *Al Masah Capital Limited (AMCL) was established in 2009. AMCL has raised over US$1 billion and established itself as one of the fastest growing alternative investment management and advisory firms in the MENA & SE Asia region.*
>
> *Throughout my career I have enjoyed a good professional reputation and my success and track record has been recognised by my peers. I have been consistently ranked as one of the most influential people in the regional investment industry. I have done so by working hard and working with integrity.*
>
> *In my professional life, I have received several awards that I consider are a testimony to my achievements recognising my professionalism and abilities including:*
>
> *a. Excellence in Funds Management 2018 at the Indian Innovator Awards presented by Entrepreneur Middle East.*
>
> *b. Investments Innovation Award 2017 at Indian Innovator Awards presented by Entrepreneur ME.*
>
> *c. Best Strategic Vision Award presented by the Banker Middle East Industry Awards 2017.*
>
> *d. Recognised among the top 100 Indian Leaders in the Arab World – 2016 / 2017 by Forbes Magazine.*
>
> *e. Recognised among the top 100 influential people in Dubai – 2016 / 2017 by Arabian Business Magazine …*"

110. He describes the inception of Al Masah in his Third Witness Statement:

> "*I have over 23 years' experience in the alternative investment industry and have accumulated a good understanding of the asset management industry. In my previous role with Global Investments House, Kuwait, I played a key role in its private equity business, growing it to become the sixteenth largest private equity business in Asia over a period of five years. I saw the potential for growth in the GCC region and in particular Dubai. I have always been attracted towards the vision of the rulers of*

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Dubai and UAE leadership and the developments that have taken place in UAE in the last 20 years including its open economy.

Dubai and UAE have been places which have been attracting entrepreneurs and investors from the region and internationally too. High net worth individuals, family businesses and financial institutions were seeking good opportunities to deploy their capital in suitable businesses. It was also obvious to me that generally high net worth individuals and family businesses did not have professional asset managers to guide them in investing their capital. They were also growing increasingly wary of investing into blind pools of funds where they might not have controlling influence."

111. Mr Dash is fluent in English although it is not his first language and he came over as an extremely intelligent and forceful individual. He had a formidable mastery of the arguments in this case as his evidence showed. While Mr Dash is no doubt essentially a truthful person it seemed at times from his answers that he was advocating the position adopted by the Applicants towards an issue rather than giving an accurate recollection of events. This may perhaps be partly the results of this dispute and the competing arguments having been current now since late 2015 and of a necessary degree of informality in the audio-visual process.

112. Despite knowing and having been warned that he should not discuss his evidence with anyone else while it was continuing, he chose to ignore this. During a short break in the proceedings he left his microphone on and inadvertently revealed to the Tribunal that he was talking to his internal legal adviser about the answers he had been giving and what he was 'supposed to say'. This was regrettable and in a small way confirmed the sense we had of his approach to giving evidence (Day 5/138-9).

113. He was able to put forward explanations, many unconvincing, for all the matters which contradicted his case and we refer to some of these below. It was obvious from the evidence as a whole that he was in charge of the broad detail in his businesses, and not much went on that he was not fully apprised of. The idea that he just let Mr Singhdeo and Mr Lim get on with their jobs and did not concern himself with issues as important as the disclosure of placement fees totalling more than US$10 million in this case is fanciful and we reject it. He had known and worked closely with both colleagues for some years. The three of them would have known well what standards to expect from each other.

114. The DFSA give examples of Mr Dash taking an interest in matters within the businesses as detailed as the colour of the uniforms to be worn by waitresses in restaurants. We accept that in many hundreds of thousands of emails these may well have been taken out of context but this does not obscure the fact that Mr Dash was as closely involved with the businesses and the Al Masah companies as his roles in them all would suggest. Taking emails out of context was a temptation to both sides - see the Applicants' claim that they informed the DFSA about the placement fees which was literally true in that they are referred to in a subsidiary sentence in a two page email in 2011 about variation of a licence.

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115. **Mr Singhdeo** produced four witness statements. He describes his background as a chartered accountant and in business as follows:

> "*I am a qualified Chartered Accountant, having qualified from the Institute of Chartered Accountants of India. For over 21 years I have worked across different companies and sectors, including audit Firms, investment and advisory companies as well as companies in the alternative investment space. I have worked in different countries including India, Kuwait and the United Arab Emirates.*
>
> *I consider myself as a private equity professional with more than 21 years of experience. I have been employed in the private equity industry in the Middle East North Africa (MENA) and South East Asia (SEA) regions for more than 15 years. I was one of the founding team members of Al Masah Capital Limited (AMCL) and was closely associated with the setup. My deep local knowledge and networks have helped AMCL identify and source promising investments and projects in high-potential sectors and markets.*"

116. Mr Singhdeo has known Mr Dash since about 2001. In 2008 he discussed joining Mr Dash in a new venture and did so in 2010. He was of course less senior than Mr Dash but more involved in the detail. His replies to many questions about aspects in which he was clearly personally involved were not answers. He was prone to answering a different question or not addressing the issue at all.

117. Mr Singhdeo sometimes refused to accept even straightforward facts, evident from the documents. For example, an email stated in terms that Mr Lim and Mr Singhdeo wanted to avoid an audit committee meeting with Mr Sikander in case "*he brings up the placement fee issue from last year*". Despite this clear text, Mr Singhdeo denied that they sought to avoid Mr Sikander attending the meeting and raising the issue of placement fees (Day 6/74:7-17). Only on the third time that it was put to him did he accept that he (a board member) was senior to Mr Agarwalla, the financial controller, within ANEL (Day 6/65:21-66:15). He said that, despite being a chartered accountant he would "*not necessarily*" know what the phrase 'material omissions' meant in reference to altered financial statements (Day 6/87:9-88:19). More generally, Mr Singhdeo struggled to explain away the fact that he had a central role, at least in terms of the ANEL annual report, the Investor A misstatement and the forgery of a bank statement. He repeatedly gave long, rambling answers that avoided the question he was being asked. This gave us the impression that this highly intelligent and numerate businessman had no real answer to much of what was being to put to him.

118. **Mr Lim** produced a witness statement with a view to giving evidence and that is all we have from him. As we have mentioned we were told only the day before he was due to give evidence that he would not do so, despite being a party not just a witness. No reason has been given for that. We will consider the witness statement when discussing matters affecting Mr Lim but give it only limited weight, less than if he had given a credible reason for not giving evidence.

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119. Mr Lim says this about his background and how he came to be with Al Masah:

> "*I have a Master of Science in Electrical Engineering from the University of Michigan, Ann Arbor.*
>
> *I currently have a good professional reputation with family, colleagues and investors, earned through my professionalism and dedication to my work.*
>
> *I graduated with an undergraduate degree and postgraduate degree in engineering and have had a career in R&D investing, venture capital and then private equity investing in Singapore, Kuwait and the UAE.*
>
> *In or about late 2009, I was approached by Mr Dash about a business that he was looking to set up and asked whether I would like to be a part of it. I had known Mr Dash for approximately 3 years from Global Investment House, Kuwait. Mr Dash was heading the department I was in and he hired me to join Global Investment House in 2007.*"

Mr Lim then joined Al Masah in 2010.

GENERAL OBSERVATIONS ABOUT THE EVIDENCE OF THE INDIVIDUAL WITNESSES

120. As a starting point there are some general first impressions, which may of course turn out to be wrong, with which one begins to approach a case of this kind.

121. As the Tribunal said in Waterhouse at 174, 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.*"

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122. The Applicants had the positions of seniority in Al Masah and the platforms described above. In broad terms their knowledge of detail would decline with their seniority.

123. While senior people may get large numbers of messages, they can use their authority to control that flow and usually do.

124. An email that is replied to has obviously been read. Where an email is sent for information it is understandable that the recipient does not always read the enclosures even if they receive them.

125. More junior staff will not generally copy to their superiors' information about inappropriate activity if there is any risk or chance that it will be criticised or disapproved of.

126. The question of Placement Fees was on any view a very significant one. They amounted to some US$29.8 million in all and their implications had been discussed at board level. It is improbable that those at the level of responsibility of the individual Applicants would not have been alive to the matter.

127. The Board of a reputable company will take a close interest in any Annual Report and accompanying accounts. Any prudent Chairman would study a report closely before putting his name to it or communicating about it to shareholders and potential investors.

128. Perpetration of acts lacking integrity, such as those which concealed the Placement Fees, is unlikely to have been taken on the initiative of junior staff, with nothing personal to gain, without approval from the top.

129. The apparent nonchalance of senior people towards the dishonesty over the annual report and financial statements should not be allowed to diminish its seriousness.

130. While apparently dubious explanations may be accepted for an isolated incident, they become less plausible when similar events occur over a period of time and seem to form a pattern.

131. Where individuals are accused of wrongdoing, a claim that this is attributable to others is difficult to accept if the latter are not identified.

132. Reliance on what is said to be market practice is, unless common ground, unconvincing in the absence of expert evidence to support it.

LIST OF ISSUES

133. The parties agreed that the outcome of this case depended upon the answer to twenty-nine issues (but a greater number of identified questions) in their Agreed List of Issues. So, it is

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to this that we now turn placing a copy of the List as Annex 3 to this Decision and answering each group of questions in turn.

ISSUE 1

134. **Issue 1** is formulated as an issue with a number of sub-issues. It is "*Were Avivo Group, Al Najah Education Limited, Gulf Pinnacle Logistics Limited and Diamond Lifestyle Limited (together, "the Investment Companies") 'Funds' within the meaning of Article 11(1) of the Collective Investment Law ("CIL")*?"

135. The sub-issues are these:

a. sub-issue 1 (a): "*Were the profits or income out of which payments were to be made to Unitholders pooled (Art 11(1)(c)(i) CIL)*?"

b. sub-issue 1(b): "*Was Al Masah Cayman a 'Fund Manager' (Art 11(a)(c)(ii) and Art 20 CIL)? In particular:*

a. Was Al Masah Cayman responsible for the management of the property held for or within the Funds and otherwise operated the Funds?

b. For the purpose of Art 11(a)(c)(ii) is it necessary that a Fund Manager was legally accountable to Unitholders?

c. If so, was Al Masah Cayman legally accountable to Unitholders in a Fund for the management of the property held for or within the Fund (see Art 20(2)(a))?

d. In any event, was Al Masah DIFC and not Al Masah Cayman the Fund Manager?"

c. sub-issue 1 (c): "*Did the exclusion in Rule 2.1.10 of the Collective Investment Rules apply?*"

d. sub-issue 1(d): "*Was the purpose or effect of the arrangements the investment management, in the exercise of discretion for a collective purpose, of Investments or Real Property for the benefit of shareholders or partners?*"

136. The agreed List of Issues recorded that it was common ground between the parties that if the Investment Companies were not '*Funds*' then:

a. Al Masah Cayman did not contravene: (1) Article 50 CIL (offering Units of a Fund); Article 56(1) or (2) CIL (misleading and deceptive statements in relation to Funds); or Article 41 of the Regulatory Law in relation to managing a Collective Investment Fund.

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b. Al Masah DIFC did not contravene: Article 56(1) or (2) CIL (misleading and deceptive statements in relation to Funds).

c. Further, if Al Masah Cayman is not a '*Fund Manager*', it is not to be regarded as carrying on the Financial Service of Managing a Collective Investment Fund.

137. **Overview.** The DFSA alleges that the case is that Al Masah Cayman and Al Masah DIFC operated a model in which the arrangements constituted a form of Collective Investment Fund (or a Fund). If this is correct, this triggered the DFSA's legal framework regarding the marketing and promotion of such a Fund, which the DFSA contends Al Masah Cayman and Al Masah DIFC have breached. The DSFA contends that each of the four investment platforms constituted a Fund for the purposes of Article 11 of the CIL. Specifically, the platforms are Foreign Funds as defined in Article 13(3) of the CIL as they do not meet the Domestic Fund criteria. The DFSA relies on the reasons set out in paragraphs 36 to 46 of the Decision Notice for Al Masah Cayman and the corresponding paragraphs of the Notices for Al Masah DIFC (paras 35-45), Mr Dash (paras 38-48), Mr Singhdeo (paras 39-49) and Mr Lim (paras 37-47).

138. This was disputed by the Applicants. They contend that they were engaged in private equity financing and that the documents produced in connection with that were legitimate, in line with industry standards and did not mislead any actual or prospective investors.

139. **Article 11 CIL** defines such Funds as follows:

> "*(1) A Collective Investment Fund ("Fund") is, subject to Article 12, any arrangements with respect to property of any description, including money, where:*
>
> > *(a) the purpose or effect of the arrangements is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income;*
> >
> > *(b) the arrangements must be such that the persons who are to participate ("Unitholders") in the arrangements do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions; and*
> >
> > *(c) the arrangements have either or both of the following characteristics:*
> >
> > > *(i) the contributions of the Unitholders and the profits or income out of which payments are to be made to them are pooled; or*
> > >
> > > *(ii) the property is managed as a whole by or on behalf of the Fund Manager.*

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(2) If the arrangements provide for such pooling as is mentioned in Article 11(1)(c)(i) in relation to separate parts of the property, the arrangement is not to be regarded as constituting a single Fund unless the Unitholders are entitled to exchange rights in one part for rights in another."

140. **The Decision Notices** covering Issue 1 were in very similar terms. The Decision Notice in relation to Mr Dash set out the DFSA's case as follows:

"*Collective Investment Funds*

38. Each of the Investment Companies was a Collective Investment Fund (a ***Fund****) as defined in Article 11 of CIL.*

39. The relevant arrangements, as contained in and evidenced by the Subscription Forms and the investor presentation or offering document referred to in the Subscription Forms, were made with respect to property including shares in unlisted companies acquired by an Operational Company and Real Property. The investor presentation or offering document described the assets to be held by the Operational Company, the projected returns for investors and the exit strategy.

40. The purpose or effect of such arrangements was to enable investors, by acquiring shares in an Investment Company, to participate in, or receive profits or income from, the acquisition, holding, management or disposal of the property referred to above, or sums paid out of such profits or income to the Investment Company.

41. The investors did not have day-to-day control over the management of the property referred to above. Under Article 11(1) of CIL the investors who are to participate in the arrangements are Unitholders.

42. The contributions of the investors and the profits or income out of which payments were to be made to them were pooled in the accounts of the Investment Company, and the property referred to above was managed as a whole by or on behalf of Al Masah Cayman.

43. Under the terms of the subscription agreement, Al Masah Cayman was legally accountable to investors for the management of the Investment Company, including shares in companies held by the Operational Company, and established, managed or otherwise operated the Investment Company, so that under Article 20(2) of CIL, Al Masah Cayman was the person managing each Investment Company. Under Article 11(1)(c)(ii) of CIL, Al Masah Cayman was a Fund Manager.

44. The Investment Companies did not fall within the exclusion from Article 11 of CIL set out at CIR Rule 2.1.10 which provides:

"An arrangement does not constitute a Collective Investment Fund if the arrangement comprises a closed-ended Partnership or Body Corporate, unless on

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

45. *The purpose or effect of the arrangements referred to at paragraphs 39 to 43 above appears to the DFSA on reasonable grounds to have been the investment management, in the exercise of discretion for a collective purpose, of Investments, that is Shares in the Operational Company or in companies acquired by the Operational Company and Real Property owned by the Investment Company, the Operational Company or its subsidiaries, for the benefit of shareholders in an Investment Company. In reaching that finding the DFSA has taken into account:*

    (1) *the Marketing Material referred to at paragraph 25 above;*

    (2) *the terms of the Subscription Forms in providing for an incentive fee based on the returns generated on an investment in the Investment Company;*

    (3) *the assets overview, exit strategy and financial returns described in the Marketing Material;*

    (4) *the private equity overview dated February 2015 which describes the role of Al Masah Cayman in managing, through four platforms, 65 private equity investments through controlling stakes in small to mid-cap companies, to create value on exit; and*

    (5) *that the business model of Al Masah Cayman falls within the definition of a Private Equity Fund at CIR Rule 3.1.6 through its investment in unlisted companies by means of Shares or otherwise.*

46. *Each of the funds was a Foreign Fund as defined in Article 13 of CIL as the Investment Companies were not established or domiciled in the DIFC and were not External Funds as defined in Article 14 of CIL, as they were not managed by a Fund Manager that was an Authorised Firm.*

47. *As defined in Schedule 1 of CIL the rights or interests of the investors participating in the arrangements set out at paragraphs 37 to 43 above were Units. The Subscription Forms, which formed part of the Marketing Material, set out the contractual basis for the prospective investor's investment and constituted an Offer of a Unit of a Fund to a prospective or existing Unitholder under Article 13 of CIL.*

48. *Under Article 19 of CIL the Offer of Units in the Funds contained in the Subscription Forms was made by the Investment Company offering shares and by Al Masah Cayman, which had made arrangements for the issue of shares, on whose behalf the Subscription Form was signed, which managed the placement for the Investment Company, and whose fees were agreed under the Subscription Form.*"

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The DFSA case: outline.

141. The DFSA invited us to make the same findings as the Decision Notices. It alleged that the investment platforms behaved like collective investments:

    a. The distributions paid to investors were not typical dividends, paid out at *x* cents per share. Investors received a distribution based on the sum they invested, not the number of shares that they owned (see the Answer §64).

    b. Shares were issued as and when an investor wanted to invest. The whole point of the structure was to provide a pool of investments which could then be used to purchase assets.

    c. The Investment Companies/Operational Companies were vehicles for purchasing those assets, much as a fund would.

142. The DFSA also alleges that the platforms were often treated like funds and/or referred to as such by those involved. It is not suggested by the DFSA that these matters are determinative of the legal analysis, but the DFSA contends that they reflect the reality of how the platforms were presented to investors and how they were viewed by those concerned with offering, promoting and operating the funds.

143. In support of this allegation concerning how the platforms were treated, the DFSA relies on the following:

    a. Ms Baines, compliance officer for Al Masah DIFC, referred to the platforms in interview as "*collective investment schemes fund structures for the products that are offered*." This tallies with her internal email dated 13 January 2014, referring to "*the private equity / fund vehicles*".

    b. The annual report for the Education Fund included a page referring to its success at the 2013 Acquisition International M&A Awards. That page described the Education Fund as "*one of UAE's first private equity funds with a dedicated focus on the MENA education sector*" and included a quotation from Mr Dash that "*We are extremely elated by this recognition of Al Najah Education for its performance as an education fund.*"

    c. Walkers referred to them as funds, referring to an investor presentation for the Lifestyle Fund as the "*offering document for a fund*".

    d. When asked what his day-to-day responsibilities were, Mr Dash stated that his role required him to "*oversee the activities of Al Masah and its funds*". During his initial interview on 15 November 2015, Mr Dash regularly referred to the 'funds' and Al Masah Cayman's role in 'fund management' or as a 'fund manager'. He was aware that the platforms were legally structured as companies, but saw a distinction between

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"*two things. One is legal form, one is, who do you say, the business form*". He understood that, for practical purposes, the platforms could be seen as funds.

e. Mr Lim likewise referred to Al Masah Cayman as '*fund manager*' for the platforms, though he was aware that they were structured as companies.

The Applicants' case: Outline.

144. Mr Dash gave evidence as to his understanding of the position in his third statement. A fair amount of his evidence was argument rather than factual evidence but it sets out the Applicants' case on this issue. He made a number of points which we summarise below.

145. First, he explained that he does not understand why a structure that was considered by the DFSA to be compliant for a period of five years prior to the investigation is now constructed to be unlawful. He points out that the allegation in relation to the breach of the Collective Investment Law came to him as a complete surprise and it was something that he would have expected the DFSA (or indeed Al Masah's external, and subsequently internal, compliance) to have raised before if the allegations are well-founded.

146. Secondly, he points to the external advice that Al Masah Cayman received over the years. In particular he refers to October 2009, when he consulted a lawyer, Mr Wood at Walkers (Dubai) LLP ("Walkers"). The reason why the Board of Al Masah Cayman engaged Walkers was because they were looking at either the Cayman Islands or the DIFC as a jurisdiction to set up. Walkers had a presence both in Cayman and the DIFC.

147. Mr Dash's evidence was that they were looking at a potential structure which was restricted to private equity business. The rationale was because the founders of Al Masah Cayman were high net worth families who would not have been comfortable in a more complex regulatory structure. It was later, however, that they became comfortable with Al Masah independently setting up regulatory fund structures in jurisdictions such as Luxembourg and Cayman Islands.

148. Walkers were instructed to advise on the best structure for the Al Masah business and in particular to develop and grow underlying corporate entities in a private equity structure. Walkers assisted with the setup of Al Masah Cayman (and Al Masah DIFC) including advising Al Masah Cayman's Board about the structure as well as securing the licences. They were also appointed as the registered agents for Al Masah Cayman (and later Al Masah DIFC).

149. Al Masah Cayman also engaged Total Solutions and Protiviti to handle the compliance, risk management and internal audit function for Al Masah DIFC once it had been formed. Al Masah Cayman also engaged PricewaterhouseCoopers (PWC) to deal with the accounts and audits.

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150. Third, as a part of its 2010 and 2013 Regulatory Business Plan, Al Masah DIFC had a licence to set up a Collective Investment Fund. Mr Dash contends that had the Board of the Companies intended to set up a Collective Investment Fund, they would have used Al Masah DIFC's licence to do so. It was never the intention of the companies that Al Masah Cayman or Al Masah DIFC were to be components of a Collective Investment Fund or any sort of fund in the DIFC. Al Masah Cayman was engaged in setting up various businesses which included funds and private equity companies. Mr Dash says that the Board of Al Masah Cayman clearly understood the distinction between a fund structure and a private equity structure.

151. Mr Dash states that within its first year of incorporation, Al Masah Cayman launched a Special Opportunities Fund focused on equities which was established in Luxembourg and was a UCITS 4 Fund established under the Commission de Surveillance du Secteur Financier (CSSF). Similarly, several special funds were also established to leverage interest rate opportunities in the GCC market. Mr Dash stresses in his evidence that these were classic regulated investment funds unlike the relationship between Al Masah Cayman and the Holding Companies.

152. Mr Dash relies in particular on the 2013 Regulatory Business Plan which was reviewed by Total Solutions. This plan shows that Al Masah Cayman and Al Masah DIFC maintained a distinction between a private equity structure and a fund structure. The 2013 Regulatory Business Plan was provided to the DFSA, "*intensively scrutinised and subsequently approved*". It took the DFSA until late 2015 before arguing for the application of the CIL.

153. Fourth, the Holding Companies asked Walkers to confirm whether they fell under the definition of a Fund or Collective Investment Fund Regime.

154. On 22 March 2017, more than a year after the DFSA Investigation had started, Walkers responded to each of the Holding Companies stating:

> "*(a) the Company does not fall within the definition of a "mutual fund" as defined in the Mutual Funds Law (as amended) of the Cayman Islands (the **"Mutual Funds Law"**) and therefore, does not require to be registered or regulated by the Cayman Islands Monetary Authority under the Mutual Funds Law;*
>
> *(b) the Company is not required to be registered or regulated under any other collective investment fund regime (or similar) in the Cayman Islands; and*
>
> *(c) the memorandum & Articles of Association, offering document and subscription form of the Company comply with Cayman Islands law.*"

155. Fifth, Mr Dash accepts that there is terminology in some of the documentation which is consistent with a fund but he considers that none of this renders the structure a fund, and it was not a fund in his view. The Holding Companies were established as distinct corporate and legal entities to manage businesses for a profit or gain. Al Masah Cayman was only responsible for charting the strategy and business plan of the company by raising capital and

identifying investment opportunities for the Boards of the Holding Companies to evaluate and approve.

156. The Holding Companies made decisions on the nature of the investments which their subsidiaries, the Operational Companies, would implement by acquiring underlying assets in any given area such as education and healthcare.

157. The Holding Companies were incorporated with the objective of having a diversified shareholder base. The reasons for a diversified shareholder base included the fact that from an exit scenario of listing an entity, a diversified shareholder base provided greater value; networking between the diversified shareholder base would provide further opportunities and the reputation would increase the goodwill of the Holding Companies in the market. Insofar as such shareholders were influential persons or entities in their own right, the Articles of Association reflected the requirement of being actively involved in the Holding Companies and how they were managed.

158. The shareholders' rights and obligations within the context of the Holding Companies meant that they could not set up the structure as a fund where the shareholders would lose their control or say in the management of the Holding Companies. Similarly, and for the same reason Al Masah Cayman was not set up as a fund but a Cayman Islands company to be distinct and separate from the Holding Companies. The overall objective being that none of these companies were to be construed or seen as components of a fund structure.

159. In the context of setting up Al Masah DIFC and its operations in the DIFC including its ability to operate as a Fund Manager or an exempt fund manager or purely as an adviser/arranger under its category 3 licence, he said that they extensively engaged with the DFSA. Various structures were discussed with the DFSA including the possibility of setting up a fund in the DIFC with Al Masah DIFC as a fund manager for domestic and non-domestic funds and obtaining permission for Al Masah DIFC to be an exempt fund manager. However, this was all considered in the context of establishing a Collective Investment Fund and in this context, permission was obtained for Mena Growth Private Equity Fund Limited Partnership wherein it was contemplated that Al Masah Cayman would be the general partner and would appoint Al Masah DIFC as the fund manager. This approval was in fact taken, however Al Masah DIFC could not find any traction in the market for investors to invest in the fund. As a consequence, the initiative to run a fund and a fund related structure in the context of the Collective Investment Law was abandoned.

160. Sixth, it was not at any point in time contemplated either by Al Masah Cayman as the investment manager or the Board of the Holding Companies that they would offer units in those companies akin to the interest that a unit holder would have in a fund structure. The objective was that the Holding Companies would offer shares and Al Masah Cayman would arrange for those shares to be marketed by Al Masah DIFC and third party referral agents to investors.

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161. The shares acquired by the investor were the ordinary shares in the share capital of the Holding Company at the relevant issue price. As warranted in each Subscription Form, the issue and allotment to investors of shares in a Holding Company was subject to the provisions of the Articles of Association of that Holding Company from which the investor receives income or profits by way of dividends arising from the management of the Holding Company.

162. In the structure Al Masah Cayman was the investment manager of the Holding Companies and had the obligation to advise the Holding Companies and raise capital for them, although it had contracted its obligations to Al Masah DIFC. As and when the Holding Companies wished to raise capital, they would set out the amount of money they wished to invest at any given time, the share price at which they would issue the shares and the returns they were prepared to offer to investors. The sale of shares was a matter directly related to the Holding Companies; the role of the Holding Companies had to approve the sale of shares, the price of the shares, and the rights attached to those shares.

163. All of this was provided in the Subscription Form and the Articles of Associations which were then made available to the potential investors to acquire shares in the Holding Companies. Al Masah Cayman was not offering shares or any other interest to the investors. The investors had the opportunity to evaluate the value of the shares being offered to them in the Holding Company. The investor was neither invited to nor did it look at Al Masah Cayman for the purposes of evaluating the share price and its decision to acquire or not to acquire shares in the Holding Company. It also did not seek to obtain advice from Al Masah Cayman in this regard.

164. Once the investor had signed the Subscription Form, and the KYC documentation was complete, he would be required to transfer the funds for the investment. These funds were in consideration of and in exchange for the shares. On receipt of the proceeds of the share value received from the investors, the Holding Company would issue share certificates.

165. Once the money was paid by the investor for the purchase of shares, the money was transferred into the consolidated account or the Holding Company to meet its operational expense and also invest into the Operational Companies. Pursuant to that investment and in due course the Holding Company would receive dividends from the Operational Companies as a return on the investments made. The dividends from the Operational Companies were treated as income by the Holding Companies. The Holding Companies based upon the terms and conditions provided in the Subscription Form, and the dividend policy set out in the Articles of Association, would calculate the dividend payable to any given investor. Overall, once the shares were issued the money no longer belonged to the investor. Once the monies had been paid by each investor for the purchase of shares, the monies were transferred into the operational account, it was no longer the investor's money.

166. Further, the applicable law in the Subscription Form is Cayman Law. In accordance with the usual company law rules (similar to the DIFC law), Cayman Law provides that dividends may only be paid from the distributable reserves of a company, in this case from the

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operational account. Hence, any dividends payable by the companies are not returns payable as a contractual obligation, which would be the case in relation to a unit holder in a Fund.

167. In relation to the investment made by the investor in the Holding Company under the Subscription Forms, Al Masah Cayman was not legally accountable, and nor was it ever intended that it would be legally accountable to the investor as there is no liability from Al Masah Cayman to the investor arising under the terms of the Subscription Forms and/or the Management Agreements. Neither the Subscription Forms nor the Management Agreements contain any provision for services to be rendered by Al Masah Cayman to investors on an individual basis (save for the appointment of Al Masah Cayman as proxy).

168. Seventh, Mr Dash contends that Al Masah Cayman was not a fund manager. It was registered as a Cayman Islands company and at no point in time did it apply for a role as a fund manager in the Cayman Islands. Notwithstanding the fact that Al Masah Cayman was not a fund manager, Mr Dash says that this did not prevent Al Masah Cayman from being a holding company or a general partner to set up a fund entity in various jurisdictions. It did in fact set up, amongst others, two funds being the Lux Fund and a SICAV UCITS Fund. The establishment of both these funds was known and was disclosed to the DFSA in the 2013 Regulatory Business Plan which was approved by the DFSA and Al Masah DIFC had the permission to be the fund manager in respect of these two funds.

169. Mr Dash also points out that the ordinary fund structure was not in place. He gave two examples in his evidence.

    a. First, it would be the fund manager under a contractual agreement who would be responsible for and control the issue and cancellation of units. However Al Masah Cayman was not responsible for the issuance of the share certificates; it was the Holding Companies. Furthermore, Al Masah Cayman was not responsible for valuing the shares or the Holding Companies holding those shares. The valuation of the shares was dependent on their market valuation provided to the Holding Companies by independent valuations not on a calculation by Al Masah Cayman or offers made by buyers.

    b. Furthermore, and by reference to the Management Agreements, there was no contractual accountability of Al Masah Cayman to the investors, not least because the investor was not a party to the Management Agreement. It was for this purpose that the Management Agreement contains an indemnification clause in favour of Al Masah Cayman in connection with its role, against all and any claims including those claims arising out of tort.

170. **Two preliminary observations** should be made before looking at Issue 1.

171. First, it is correctly pointed out in paragraph 61 of the Answer, that there is no appeal by the Applicants to the findings in the Decision Notices about the arrangements within the

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investments. It contends that there is no basis for going outside the four sub-issues raised in Issue 1.

172. In support of this submission limiting the Applicants to their grounds in the Reference Notices, two matters are relied on by the DFSA:

a. First, the FMT rules require the Applicants to state in their Reference Notices, the grounds for contesting the decision (Rules 24 and 25).

b. Secondly, the Applicants had the option to serve a Reply which identifies all matters in the Respondent's Answer which are disputed and state why (Rule 31). This would include Replying to the Answer §61. The Applicants elected not do so.

173. It is therefore argued that the FMT should not permit the Applicants to widen the scope of the FMT proceedings by introducing further issues which should have been set out in both their Reference Notices and a Reply.

174. Secondly, the Applicants point out that the DFSA's case that a fund was operated for the purposes of the CIL with Al Masah Cayman operating as fund manager in or from the DIFC was not one considered by any of the advisers or the DFSA at the time. In their Closing Submissions at para 31, the Applicants summarised their submission on this as follows:

"*a. No-one at the time considered the private equity structures to be funds, or the Collective Investments Law to be infringed (or in play).*

b. The structures were set up with the assistance of lawyers who understood the business and did not suggest that the requirements of the Collective Investment Law were engaged. There were thereafter 2 sets of compliance officers: first, external compliance officers, secondly Ms Baines, none of whom considered the structures to be funds engaging the CIL. While Ms Baines was unwilling in cross-examination to confirm her reasoning at the time, it is obvious from her various declarations to the DFSA in relation to the marketing of foreign and domestic funds that she did not regard the private equity structures as being funds of either type.

c. The DFSA also understood the business and discussed it with Ms Baines. They even discussed with her the approach she should be taking to correctly complete the return in respect of Al Masah DIFC's marketing of foreign and domestic funds. The DFSA was aware of the private equity structures and had no issue with the fact that they were not being treated as funds: as was made clear to them in Al Masah DIFC's filings.

d. The original investigation by the DFSA did not include any inquiry into whether there may have been a breach of the CIL. Even after the investigation had been extended, Ms Baines was not even asked questions relating to any of the structural allegations in her interview – despite being the person dealing with compliance,

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and responsible for notifying the DFSA in respect of any funds that were being marketed by Al Masah DIFC (which on the DFSA's current case the private equity structures were).

e. *In summary, the funds allegation represents a retrospective and manufactured attempt to extend the DFSA's other allegations into an area where the companies and their management were diligently attempting to put in place a lawful structure, and everyone at the time believed that they had achieved that.*

f. *Against this background it is unsurprising that the technical allegations now made by the DFSA are themselves strained and incorrect. The private equity structures were not funds. The view that everyone had at the time was correct.*"

175. The points made by the Applicants are important ones which we have considered. It is undoubtedly the case that the CIL is technical and complicated. It is a feature of this case that the DFSA's allegations involving breach of this law emerged late. But we have to consider the arguments and materials before us and reach a conclusion on the issues we are required to determine. The fact that others did not consider the application of CIL is not relevant when considering liability. It is however relevant on sanctions (if this is reached) and the degree of culpability and responsibility for those who are found to have infringed the law.

Arrangements /Property

176. There is force in the DFSA's submission that the Applicants should be confined to the four sub-issues set out in Issue 1. But the Tribunal has decided that it is prepared to consider the argument in the Applicants' Outline Opening (at paras 123-131) which seeks to challenge the Decision Notices on an additional ground. The Tribunal takes the view that it has a discretion in this matter; that the allegations did not involve the introduction of new evidence and because the DFSA is not prejudiced we should allow this additional ground to be argued.

177. The Applicants' case is set out in paras 33-35 of its written Closing Submissions. It can be summarised as follows. First, it relies on the fact that the DFSA's case as to what the "*property*" is within Article 11(1) CIL has shifted. It is clear that Mr Flint QC had difficulty with the DFSA's initial case that the relevant property was the shareholding in the Investment Company because that property is not held collectively with others. This case has been abandoned.

178. Secondly, para 37 of the Al Masah Cayman Decision Notice states that the arrangements were made with respect to "*property including shares in unlisted companies acquired by an Operational Company and Real Property*". In other words the property in question is the underlying assets of the Operational Companies.

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179. The Applicants argue that there are no "*arrangements*" with respect to the Operational Companies the purpose of which is to enable persons taking part in the arrangements to participate in profits arising from the acquisition, holding, management or disposal of that property.

180. As the Applicants allege in paras 128-129 of their Outline Opening:

> "*The assets of the Operational Companies are owned by the Operational Companies. If the Operational Companies make a profit from those assets (through management, which leads to the receipt of dividends, or sale), then their shareholders (the relevant Holding Company) only "participate" in those profits to the extent that dividends are paid to them. The investors in the Holding Companies do not participate in profits with the Holding Companies: if the Operational Companies are the relevant "arrangement" then investors do not participate in that arrangement. Rather, any indirect income they might receive from the management/disposal of the assets of the Operational Companies is received from, not with, the Holding Companies.*
>
> *It would be artificial to then regard the Holding Companies as being an arrangement with respect to the underlying assets. At most the Holding Companies might be deemed to be an arrangement with respect to the property they hold, but that comprises the shares in the Operational Companies.*"

181. The DFSA's case is summarised in paras 34-42 of its Written Closing Submissions. It accepts that its position on the relevant property has shifted. But the DFSA says this does not preclude it from the case now advanced. Clearly this is right. But as mentioned above it does draw attention to the fact that the legislation is complicated with fine technical distinctions.

182. The DFSA argues that it is necessary to look at the reality of what the investors were investing in. These were the assets that were expected to generate the profits such assets being unlisted companies and their businesses and assets.

Discussion.

183. The key part of Article 11(1)(a) CIL provides as follows: "*arrangements with respect to property... where... the purpose or effect of the arrangements is to enable persons taking part... to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.*"

184. This language is similar to section 235(1) of the UK Financial Services and Markets Act 2000 ("FSMA") which provides:

> "*In this Part "collective investment scheme" means any arrangements with respect to property of any description, including money, the purpose or effect of which is to*

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> *enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.*"

185. Reference is made in FSMA to a "*collective investment scheme*" rather than a "*Collective Investment Fund*" in Article 11(1)(a) CIL. When considering FSMA it is important to keep in mind that unlike the DFSA's regime, under English law all corporate bodies (other than limited liability partnerships) are excluded from the definition of a Collective Investment Scheme except for "open ended investment companies".

186. In *Financial Conduct Authority v Capital Alternatives Ltd* [2015] EWCA Civ 284; [2016] 1 All ER 321, Christopher Clarke LJ said at [24]:

> "*The purpose of the section is to provide protection for an investor in a collective investment where there is pooling of (a) contributions and income/profits and/or (b) collective management. In such circumstances the operator is not, or may not be, dealing with the characteristics and needs of each individual investor, or his appetite for risk, or his need for income or capital, but with the operation of the scheme, and the assets forming part of it, as a whole. The investor's individual interests may thus be subordinated to the interests of the scheme as a whole.*"

187. In *Financial Services Authority v Fradley* [2005] EWCA 1183; [2006] 2 BCLC 616 at [32], Arden LJ said:

> "*First section 235 is drafted in an open-textured way in that it is drafted at a high level of generality and uses words such as 'arrangements' and 'property of any description', which have a wide meaning. Secondly, the application of section 235 depends on the specific facts of the case and in the event of a dispute those facts will have to be determined by a court of law on the evidence before it. Once those facts are found, then it is unlikely that an appellate court will set those findings aside unless the judge was plainly wrong. ... Thirdly, since contravention of the general prohibition in section 19 may result in the commission of criminal offences [subject to section 23(3) of FSMA], section 235 must not be interpreted so as to include matters which are not fairly within it.*"

188. This passage was referred to by Lord Carnwath in *Asset Land Investment Plc v The Financial Conduct Authority* [2016] UKSC 17; [2016] Bus LR 524 at [6]. Lord Sumption in the same case stated:

> "*88. I would agree with the submission, which provided the abiding theme of the authority's argument, that it is important when construing a regulatory statute of this kind not to allow technical distinctions to frustrate the purpose of the legislation. But the Financial Services and Markets Act 2000 cannot be construed on the assumption that it was intended to regulate every kind of investment in which members of the*

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public are liable to have advantage taken of them by an unscrupulous intermediary. In the first place, as cases like Office of Fair Trading v Abbey National plc [2010] 1 AC 696 remind us, most regulatory legislation is a compromise between the protection of consumers and the avoidance of regulatory overkill. In a statute such as the Financial Services and Markets Act 2000 , which deliberately sets out to regulate some forms of investment but not others, the omission of some transactions from the regulatory net cannot of itself be regarded as compromising the efficacy of the statutory scheme. Secondly, there is, as the White Paper preceding the 1986 Act pointed out, a tension between the need to provide certainty for practitioners, customers and investors, and the need to cast the net wide enough to ensure consistency of treatment between different financial services. The consequences of operating a collective investment scheme without authority are sufficiently grave to warrant a cautious approach to the construction of the extraordinarily vague concepts deployed in section 235. Arden LJ was surely right in Financial Services Authority v Fradley [2006] 2 BCLC 616 , para 32, to say that the section "must not be interpreted so as to include matters which are not fairly within it". It must, moreover, be interpreted in a way that provides intelligible criteria which can be applied by professional advisers considering schemes in advance of their being marketed. The Treasury has a wide power under section 235(5) to exempt particular categories of transaction, but criminal liability and the avoidance of contracts are not results which can properly be made to depend wholly on the discretion of the Treasury or the enforcement division of the Financial Conduct Authority.

89. It follows that any conclusion that Mr Banner-Eve and his companies were operating collective investment schemes must be firmly founded on the language and purpose of section 235 , without making arbitrary teleological assumptions."

189. The term 'arrangements' is a very broad concept. As Lord Sumption stated in *Asset Land* at [91]:

"*A collective investment scheme means, as section 235(1) provides, "arrangements" of the prescribed description. Subsections (1) to (4) all describe the characteristics that the relevant "arrangements" must have if the resultant scheme is to qualify as a collective investment scheme. "Arrangements" is a broad and untechnical word. It comprises not only contractual or other legally binding arrangements, but any understanding shared between the parties to the transaction about how the scheme would operate, whether legally binding or not. It also includes consequences which necessarily follow from that understanding, or from the commercial context in which it was made. In these respects, the definition is concerned with substance and not with form. It is, however, important to emphasise that it is concerned with what the arrangements were and not with what was done thereafter. Of course, what was done thereafter may throw light on what was originally understood. It may for example serve to show that some record of the understanding was a sham. It may found an argument that the arrangements originally made were later modified. But it must be*

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possible to determine whether arrangements amount to a collective investment scheme as soon as those arrangements have been made. Whether the scheme is a collective investment scheme depends on what was objectively intended at that time, and not on what later happened, if different."

190. The "*arrangements*" must be "*with respect to property of any description, including money*". The underlying property may take any form.

> "*.....It seems to me that the words 'purpose or effect' are broad enough to cover all stages from the preparatory step of gathering in funds up to and including the making of the communal investment. Therefore, the fact that an investor's funds may rest in client account pending putting in place a particular loan, does not stop it being in a CIS. If the money was placed there for the purpose of such an arrangement, it is from that time in a CIS. The 'arrangements' to which s.75 (1) relate are those which enable, or are intended to enable, the communal funds to be invested. They include the preparatory steps which allow individual investors to park their money in the Elliott's' client account with a view to future investment in a communal property-based loan as well as the investment itself.*"

191. This approach was approved by Hamlen J in *Andrew Brown v Innovatorone* [2012] EWHC 1321 (Comm) at [1171].

192. There are two concepts that need to be considered: property and "*arrangements*".

193. First, the property, since the "*arrangements*" must be "*with respect to property of any description, including money*". Since the time of the Decision Notices, the DFSA has been consistent that this does not refer to shares in the Holding Companies or shares in the Operational Companies. It refers to the shares and assets held by the Operating Companies.

194. The FMT agrees with the DFSA that the relevant property is the property which is expected to generate profits or income. As Lord Carnwath stated in *Asset Land* (supra) at [56]: "*It is clear in my view that the relevant "property" for the purposes of s 235(1) was each of the company's sites taken as a whole, not the individual plots. That was the property whose sale was to lead to the profits which were the object of the exercise, and which brought the scheme within the scope of the section.*"

195. The example given by the DFSA in relation to the Education Fund shows this. In an Investor Presentation dated March 2015, following the title page and disclaimers, ANEL is described as follows:

> "*Al Najah Education Limited (www.alnajaheducation.com), is an education management company that invests in and manages educational assets throughout the MENA & South East Asia region ("MENASEA")*"

196. The presentation contains numerous references to "*assets*" by reference to schools and nurseries (e.g. pages 6, 9, 24-29). Likewise, the 'teaser' documents for the Education Fund

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made it clear that the 'strategy' was to "*Invest preferably in operating assets with significant growth potential…*".

197. It is also relevant to consider how the investments were presented to investors. Structure charts (set out in para 40 of the DFSA's Closing Submissions) show how the platforms operated in the same way: a structure of companies through which the investors obtained profits from shareholdings in the underlying (operational) companies.

198. The Applicants contend that there was a private equity structure in which dividends were passed up the chain of companies. The company law structure is one stressed by Mr Dash in the evidence we have summarised above. However, this overlooks the legal principles referred to above which make it clear that technical distinctions need to be avoided. As the passage from Lord Sumption referred to makes clear what matters is the understanding shared between the parties to the transaction about how the scheme would operate, whether legally binding or not. It is about substance and not form.

199. Secondly, as to the "*arrangements*", this was not the Investment Company or the Operational Company. It is the entirety of the arrangements that make the scheme through which the profits or income is expected to be generated. Art 11 CIL refers to participation "*whether by becoming owners of the property or any part of it or otherwise*".

200. We have allowed this additional ground of appeal to be argued but we reject it.

Pooling - Issue 1(a)

201. The first Ground of Appeal relates to the pooling of profits or income out of which payments were to be made to investors. It arises out of the criterion in Art 11(1)(c)(i) CIL:

> "*the profits or income out of which payments are to be made to them are pooled.*"

202. As pointed out in the Answer at para 62, the Applicants deny that there was a pooling of profits. It is pointed out that there was a pooling of contributions since the monies invested by investors were used to purchase shares in unlisted companies. There is a single account for each Investment Company into which the investor monies are paid. It follows that this issue was concerned with the dividends paid to investors from each of the Investment Companies.

203. In their Written Opening at paras 132-135, the Applicants argued as follows:

> "*132. Art 11(1)(c)(i) requires that the contributions of the Unitholders and the profits and income out of which the payments are to be made to them are pooled*".

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133. Here, the profits and income derived from the "property" which is the subject of the arrangements are not pooled at all. Profits are made by the underlying businesses. The Operational Company may derive profits or income by way of dividend from those businesses, or may derive profits or income from a sale of the businesses. Those profits are retained by the Operational Company, although it may upstream dividends to the Holding Companies. The Holding Companies would in turn hold any income they received for their own purposes, subject to declaration of a dividend.

134. Even after a dividend is declared by the Holding Companies, there is no pooling of profits or income: each shareholder has only a contractual right against the company, and no right to any money in any account. The company pays out from its own funds.

135. The DMC regarded the "profits" as being "pooled in the accounts of the Investment Company and the Operational Company" (Al Masah Cayman Decision Notice, page 26 para 4 (A-001, page 26)). But that merely illustrates the imprecision in the approach: these are different profits derived from different activities. Payments are not made to investors out of monies in the accounts of the Operational Companies: and those profits were derived from the management by the Operational Companies of the underlying business and assets."

204. The DSFA responded as follows. As to the meaning of "pooling" it relied on dicta of Nicholas Strauss QC in *FCA v Capital Alternatives* [2014] EWHC 144 (Ch); [2014] Bus LR 1452 at [159]. He said:

"*There appears to be no authority on the meaning of pooling of profits or income in section 235 [of the Financial Services and Markets Act 2000]. In my opinion, it bears its ordinary meaning. There is pooling where the profit from the investment property provides a fund to be used for the combined or common benefit of all investors.*"

205. Mr Strauss QC's conclusions on pooling were upheld on appeal, with no criticism of his approach by the Court of Appeal (*FCA v Capital Alternatives* [2015] EWCA Civ 284; [2015] Bus LR 767 at [29-31]).

206. Lord Sumption explained in *Asset Land* (supra) [81]:

"*81. The current statutory provisions for regulating collective investment schemes have their origin in previous schemes for regulating unit trusts, i.e. arrangements under which a manager invests in securities which are then held in trust for participants. ...*"

207. The DFSA points out that the typical unit trust involves investors paying in their money, which is then used to purchase assets (e.g. shares) which form part of a general pool of assets. Dividends from those assets are pooled and distributed to investors. In the present case, limited companies were involved. The fact that shares were issued to investors is not

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relevant because of the definition in Art 11 CIL. The position is different in the UK where there is an exception for bodies corporate.

208. The DSFA explained this in paras 64-66 of the Answer as follows:

> "*Investors purchased shares in the Investment Companies at a price determined by those companies and/or Al Masah Cayman. The price per share increased over time. Accordingly, USD 1 million invested in 2012 would have purchased approximately 1 million shares in the Education Fund, whilst USD 1 million in late 2013 would only have purchased approximately 666,667 shares.*
>
> *Dividends are calculated on the basis of the initial nominal investment with no reference to the number of shares purchased. The dividends paid to August 2013, for example, were calculated at 8% of an investor's investment irrespective of the number of shares.*
>
> *Moreover, dividends paid to August 2013 were calculated on a pro rata basis depending on how long the investor had held the shares.*
>
> *Accordingly, dividends are calculated pro rata by reference to the initial investment sum. Dividends are not attributable to the number of shares held by the investor. Investors obtain a share of the pool of profits derived from the underlying investments.*
>
> *This pooling can be seen in practice by reference to the dividends paid and the accounts for ANEL in the period to 31 August 2013:*
>
> *- A spreadsheet of dividends shows total payments to investors of USD 3,121,940, calculated on the basis explained above.*
>
> *- ANEL's accounts show profits of USD 3,371,909 for the same period, derived from management fee income (USD 681,199), rental income (USD 1,662,125) and dividend income (USD 1,500,000). The dividend payments to investors were therefore paid out of this pooled income/these pooled profits.*"

209. The DFSA contends that the investors received income from the pooled profits derived from the shares and real property held by the investment platforms with each investor obtaining a return attributable to specific property purchased with their contributions. The returns are aggregated within the investments, providing a pool from which payments were paid to investors.

210. **Pooling – Discussion.** The FMT rejects this ground of appeal relating to pooling for the reasons given by the DFSA which are summarised above.

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211. In short, the FMT finds that money comes in at the bottom of the structures, it is pooled and then passed on to investors. As Mr Temple stated in his oral submissions for the DFSA on Day 8/24-26:

> "*The question here is not whether the money that comes out of a pool is beneficially owned by the investors. It simply has to be that the profit or income out of which payments are to be made are pooled. And the payments that are made to investors are the dividends on their shares in the investment company and that clearly comes from a pool of money held within that investment company.*
>
> *That is a pool that is generated from a collective mix of investments held by the operating company. The operating company can then pay that up to the investment company. It is a pool, we would say.*"

212. We agree with this analysis. The present case is different from *FCA v Capital Alternatives* where there was no pooling since each investor received profits directly attributable to its own patch of land. Each patch was different and each investor received payments corresponding to the amount of rice grown on their own patch of land.

213. In the present case investors receive income whether by way of dividends or distributions by reference to a fraction of a whole with each share of the same type being the same.

FUND MANAGER

214. The next set of issues are concerned with the question of whether Al Masah Cayman was a Fund Manager within the meaning of Article 11(1)(c) CIL.

215. The arrangements must have one or other or both of the characteristics set out in Article 11(1)(c): either "*pooling*" or "*managed as a whole by or on behalf of the Fund Manager*". Since we have found that the pooling characteristic is satisfied it is not strictly necessary to consider the second alternative characteristic of "*managed as a whole*" but we do so.

216. The List of Issues sets out a number of sub-issues:

   a. Whether Al Masah Cayman is responsible for the management (Para 1(b)(i) of the List of Issues).

   b. Whether Al Masah Cayman as Fund Manager has to be legally accountable to Unitholders (para 1(b)(ii) and 1(b)(iii) of the List of Issues).

   c. The issue of attribution (para 1(b)(iv) of the List of Issues).

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Issue 1(b)(i): responsible for the management

217. The Applicants contend as follows:

a. What has to be managed as a whole is the property that is the subject of the arrangements.

b. Al Masah Cayman was not responsible for management of the property. It points out that Al Masah Cayman was the Investment Manager of the Holding Companies but the property in issue for the Fund related allegations is the shares and property held by the Operational Companies.

c. The staff of the Operational Companies had day-to-day responsibility over this property and this responsibility did not belong to Al Masah Cayman. The Holding Companies acting by their respective boards had oversight of the activities of the Operational Companies.

d. A distinction needs to be drawn by conducting investment management activities and managing a Fund. Al Masah Cayman did not do the latter.

218. The DFSA contends Al Masah Cayman was responsible for the property held for or in the Funds.

219. **Discussion**. In *FCA v Asset Land* (supra), Lord Sumption said this at para 97:

> "*[Section 235(3)(b)] provides that what has to be 'managed as a whole' is the property the subject of the scheme, not the scheme itself so far as that is different. Acts by way of management of the scheme are relevant only so far as they involve the management of the property. In a classic collective investment scheme, say a unit trust, the property the subject of the scheme will usually comprise incorporeal property such as securities. But where the property of the scheme comprises physical assets, sub-s (3)(b) requires the arrangements to be such that the operator manages the physical assets. In this case the property falling to be managed by or on behalf of the operator is, as we have seen, the site. Accordingly, the question is whether, objectively, the functions which the arrangements assigned to Asset Land after the investor's acquisition of his plot constituted management of the site. Asset Land had, as I have pointed out, two functions: negotiating with the planning authority and finding a buyer for the site. These two functions amounted to managing the business project, in other words the scheme. But that is not the question. The question is whether, either separately or together, they also constituted managing the site.*"

220. As the DSFA points out in its Closing Submissions (para 57), the fact that the Operational Companies had their own staff who handled day-to-day operations is not decisive. As Lord

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Sumption states in the passage cited above, it is the property the subject of the scheme that matters.

221. In *FCA v Capital Alternatives Limited* [2015] EWCA Civ 284 it was found that there had not been any pooling of profit/income and therefore the Court of Appeal had to focus on the test of what constitutes "managed as a whole". Christopher Clarke LJ at [72] said this:

> "*The phrase "the property is managed as a whole" uses words of ordinary language. I do not regard it as appropriate to attach to the words some form of exclusionary test based on whether the elements of individual management were "substantial" — an adjective of some elasticity. The critical question is whether a characteristic feature of the arrangements under the scheme is that the property to which those arrangements relate is managed as a whole. Whether that condition is satisfied requires an overall assessment and evaluation of the relevant facts. For that purpose it is necessary to identify (i) what is "the property", and (ii) what is the management thereof which is directed towards achieving the contemplated income or profit. It is not necessary that there should be no individual management activity — only that the nature of the scheme is that, in essence, the property is managed as a whole, to which question the amount of individual management of the property will plainly be relevant.*"

222. It is clear from the above that the focus has to be on the management that produces the profit or income. As explained above, this property is the underlying shares and property owned by the Operational Companies.

223. The DFSA in its submissions pointed to a number of matters which indicated that Al Masah Cayman had management of this property and we refer to some of the relevant evidence below.

224. First, the marketing materials, including the Subscription Forms that made it clear that the investments would be managed by Al Masah Cayman.

225. Secondly, the Management Agreements and Articles of Association showed that Al Masah Cayman had substantial control particularly over the boards. The lack of day-to-day control in the arrangements is clear from the Articles of Association for the Investment Companies and investors' agreement in the Subscription Forms to granting proxy to Al Masah Cayman in relation to the exercise of investors' right qua shareholders.

226. This can be shown using the Management Agreement for the Education Fund as an example:

    a. By clause 1.1(a) and 1.1(b), Al Masah Cayman was to have a majority of representation on the Board of Directors of ANEL and to appoint the CEO and management staff of ANEL.

    b. By clause 4(b), the Management Agreement was stated to be irrevocable, in the absence of default under clause 5.

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227. The Subscription Forms stated that:

   a. Al Masah Cayman was to act as manager, and the investors agreed to pay the incentive fee of 20% of returns in excess of an internal rate of return of 10%.

   b. Al Masah Cayman was authorised to act on instructions in relation to the investor's shares (in relation to which the investor agreed to indemnify Al Masah Cayman).

   c. Investors appointed Al Masah Cayman to act as proxy at any meeting.

228. Thirdly, the DFSA relies on Mr Dash's oral evidence. At Day 4/84:5-11, Mr Dash accepted that the ANEL accounts were accurate where they state that "*Major commercial and financial decisions are taken by Al Masah Capital*".

229. Fourthly, the DFSA relies on the written evidence of Mr Dash in his third statement, paras 11 and 66, referring to an AUM of over US$1 billion that indicates that the assets were managed by Al Masah Cayman.

230. The Tribunal rejects the Applicants' argument that the Investment Companies were largely self-managing. This does not reflect the reality of the situation established by the evidence in which the managing was done by Al Masah Cayman.

Fund Manager: Issue (1)(b)(ii) and (iii)

231. The dispute here is concerned with the question of whether Al Masah Cayman is a Fund Manager. The Applicants contend that the Fund Manager has to be legally accountable to the Unitholders in the Fund for the management of the property held within the Fund.

232. The Applicants rely on the following provisions in support of their case. Art 20 CIL provides that:

> "*(1) A person shall not manage a Domestic Fund unless:*
>
> *(a) that person:*
>
> *(i) is a body corporate;*
>
> *(ii) is an Authorised Firm whose Licence authorises it to act as the Fund Manager of the particular type or specialist class of the Fund; and*
>
> *(iii) meets any additional criteria, requirements or conditions that may be prescribed in the Rules; or*
>
> *(b) the person is an External Fund Manager.*

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(2) *For the purposes of this Law, any other DFSA administered law and any rules made for the purposes of those laws, the person who "manages" a Fund, subject to Article 20(3), is the person who:*

(a) *is legally accountable to the Unitholders in the Fund for the management of the Fund, including the property held for or within the Fund ("Fund Property"); and*

(b) *establishes, manages or otherwise operates or winds up the Fund.*

(3) *The DFSA may, by Rules, prescribe when a person who engages in any of the activities specified in Article 20(2) is not managing a Fund.*

(4) *A person referred to in Article 20(1)(a) or (b) is a "Fund Manager" and a reference to a "Fund Manager" in this Law or in any other DIFC Law or any legislation made for the purposes of such laws includes both persons, unless otherwise provided.*"

233. GEN Rule 2.12.1(1), provides:

"*(1) In Rule 2.2.2, Managing a Collective Investment Fund means:*

(a) *being legally accountable to the Unitholders in the Fund for the management of the property held for or within a Fund under the Fund's Constitution; and*

(b) *establishing, managing or otherwise operating or winding up a Collective Investment Fund; and*

(2) *To the extent that any activity under (1) constitutes Managing Assets, Providing Fund Administration, Dealing as Agent, Dealing as Principal, Arranging Deals in Investments, or Providing Custody, such a Financial Service is taken to be incorporated within Managing a Collective Investment Fund.*

(3) *The Person referred to in (1) is a Fund Manager.*"

234. The guidance to GEN Rule 2.10.2 provides that a person does not become a Fund Manager of a Fund merely by being appointed by a Fund Manager of a Fund to provide the Financial Service of Managing Assets to the Fund, and states:

"*This is because the Fund Manager remains legally accountable to the Unitholders of the Fund for the proper management of the Fund in accordance with its Constitution and Prospectus.*"

235. The DFSA disputes this argument. It contends that all that needs to be established is that the Fund Manager is a person separate from the investors and is controlling the property.

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This applies to Al Masah Cayman. It also contends that if legal accountability is necessary then it can be shown that there is in fact legal accountability on the part of Al Masah Cayman to investors for the management of each of the Investment Companies.

236. **Discussion**. Section 235(2)(b) of FSMA speaks in terms of "*the property is managed as a whole by or on behalf the operator of the scheme*". Art 11 CIL uses a capitalised phrase "*Fund Manager*" rather than the term "*operator of the scheme*". The question is whether this has any significance.

237. It is also necessary to consider whether or not for the purposes of Art 11(1)(c)(ii) CIL the "*Fund Manager*" has to be legally accountable to the Unitholders.

238. The Tribunal considers that it is relevant to see the requirement in Art 11(1)(c)(ii) CIL in its context with Article 11 CIL. The requirement is reached after it has been shown: (1) the purpose or effect of the arrangements is to enable the person taking part in the arrangements to participate in or receive profits or income arising from the acquisition, holding, management or disposal of property; and (2) the Unitholders of the arrangements do not have day-to-day control over the management of the property.

239. What Art 11(1)(c)(ii) CIL is directed at is the person who in fact controls the property by referring to "*the property is managed as a whole by or on behalf of the Fund Manager*".

240. In *Asset Land,* Lord Sumption said this at paras 98 and 99 (so far as is relevant):

> "*[98] ....Section 235(3) identifies two ways in which the investor may part with control over the property. The reason why the subsection treats them as alternative criteria for recognising a collective scheme is that they are functionally equivalent. Subsection (3)(a) refers to cases where the contributions and the profits or income generated by them are pooled, which necessarily imports a loss of control in favour of whoever controls the pool. Subsection (3)(b) refers to cases in which there may be no pooling, but there is an equivalent loss of control to the operator by virtue of his powers of management of the whole property.*
>
> *[99] The fundamental distinction which underlies the whole of s 235 is between (i) cases where the investor retains entire control of the property and simply employs the services of an investment professional (who may or may not be the person from whom he acquired it) to enhance value; and (ii) cases where he and other investors surrender control over their property to the operator of a scheme so that it can be either pooled or managed in common, in return for a share of the profits generated by the collective fund.....*"

241. The Tribunal considers that the Fund Manager (in CIL) or the operator of the scheme (in FSMA) is concerned with identifying a person separate from the investors who is controlling the property. In this case, Al Masah Cayman carried out that role.

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242. As stated above, the Applicants rely on the reference to "*Fund Manager*". Art 20 CIL is headed 'Fund Manager' but directed to the identity of those who may manage a Domestic Fund (albeit that these were not Domestic Funds because the arrangements were led by Cayman registered entities). Art 20(1) CIL provides that a person shall not manage a Domestic Fund unless they are a body corporate and an Authorised Firm with appropriate permissions. There is no definition of Fund Manager in the context of Foreign Funds. It is also right to stress that Article 20(4) CIL provides that "*…a reference to a "Fund Manager" in this Law or in any other DIFC Law or any legislation made for the purposes of such laws includes both persons, unless otherwise provided*" (emphasis added). The reference to "includes" indicates that this is a non-exhaustive description.

243. The Applicants rely on Art 20(2) CIL which refers to a person who is "*legally accountable to the Unitholders*". The definition within the Glossary Module of "Fund Manager" contains no reference to legal accountability and simply refers to the person "*responsible for the management of the property*". This brings in Art 11(1)(c)(ii) CIL. The Tribunal rejects the argument that limits the definition of "Fund Manager" by reference to Articles 20(1) and 20(4) CIL.

244. The Tribunal therefore concludes that it is enough that the fund manager is "*responsible for the management of the property*" and that legal accountability is not a further requirement.

245. The Tribunal finds that Al Masah Cayman managed each Investment Company as a whole. In particular:

    a. Each Investment Company had only one management and decision-making structure.

    b. Al Masah Cayman had the majority of representation on the Board of Directors of each Investment Company.

    c. Al Masah Cayman appointed the Chief Executive Officer and management of each Investment Company.

    d. Al Masah Cayman was concerned with the business plan/strategy for each Investment Company.

246. If the Tribunal is wrong about this, it considers that Al Masah Cayman was legally accountable to Investors as investment manager of the platforms. The term used is "accountability" and "liability".

247. The Tribunal agrees with the analysis in the Al Masah Cayman Decision Notice (at page 27):

> "*….The words "legally accountable" are wide in scope, and do not require that the function of management be contained in a contract between each Unitholder and the putative manager. A person who establishes or winds up a fund is unlikely to have a*

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contract with Unitholders, yet he may be treated as the Fund Manager as contemplated by GEN Rule 2.12.1.

Under the relevant arrangements the investor did enter into a contract with Al Masah Cayman under which it accepted the responsibility of acting as manager of the Investment Company and in consideration of so acting was entitled to an annual management fee from the Investment Company and an incentive fee from the investor. In order to ensure that it had control and management of the Investment Company, Al Masah Cayman was granted a proxy by the investor for company meetings; a power which gave rise to a duty to exercise it for proper purposes. Al Masah Cayman was thus legally accountable to investors for management of the Investment Company. However, for the reasons given above this point is not material as the arrangements fell within Article 11(1)(c) in any event on the basis that contributions and profits or income were pooled."

248. The DFSA argued that the shareholders would be able to claim against Al Masah Cayman either directly or by way of a derivative action. We agree.

249. It is important to stress that since there was pooling of contributions and profits (as found by the Tribunal) this issue is irrelevant to the determinations in the Decision Notices.

Attribution – Issue 1(b)(iv)

250. The issue here is whether the Fund Manager was Al Masah DIFC rather than Al Masah Cayman.

251. The basis of the Applicants' argument is that the activities relied upon by the DFSA were carried out by staff seconded to Al Masah DIFC operating in or out of the DIFC. In support of this argument it relies on the fact that Al Masah DIFC was licensed to be a manager of Collective Investment Funds.

252. The Tribunal rejects this argument. The DFSA points out a number of matters which indicate that the fund manager was Al Masah Cayman and not Al Masah DIFC;

    a. Al Masah Cayman was presented as the manager in the marketing materials. Taking the Education Fund as an example, and an Investor Presentation dated March 2015: page 4 described the Education Fund as: "*an education management company that invests in and manages educational assets…*"; page 6 shows the 'Corporate Structure' including Al Masah Cayman as the '*Investment Manager*' and numerous assets; page 9 describes Al Masah Cayman as the '*Manager*' and refers to '*Asset Allocation*'; page 10 quotes press coverage describing Al Masah Cayman as an '*alternative asset management company*'; and page 14 sets out the 'Investment Team' and describes it as being "*responsible for the overall oversight of the acquired assets…*".

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b. Al Masah DIFC has no contractual or other relationship with the investors, nor with the Investment Companies.

c. Mr Dash refers to Al Masah Cayman as "*one of the fastest growing alternative investment management and advisory firms in the MENA & SE Asia region*". Management is attributed to Al Masah Cayman.

d. The email from Ms Baines to the DFSA dated 30 October 2013, relied upon by the Applicants as disclosing the structure to the DFSA, referred to "*Al Masah Capital Limited – who is the Investment Mgr for the PE funds ie: Al Najah Education; Healthcare MENA; and Diamond Lifestyle.*"

e. Mr Dash himself refers to Al Masah Cayman as the 'investment manager' under the management and placement fee agreements. He also suggested that this terminology was accurate in the hearing (Day 4/91:18-20) "*as investment manager. I think that's the correct way of looking at it...*".

f. Mr Dash acknowledged that the role of manager fell to Al Masah Cayman: "*In order to fulfil its role under the management agreement it was important that board members of AMCL sat on the boards of the Holding Companies.... AMCL was providing services to the Holding Companies pursuant to management and placement fee agreements.*"

g. Mr Saikat Kumar, Senior Executive Officer of Al Masah DIFC described the relative roles of Al Masah DIFC and Al Masah Cayman in his witness statement for the first privacy application in these proceedings. He stated (at paras 12-13) that Al Masah DIFC's primary business activities were and are to identify investment opportunities, and that Al Masah Cayman provided advisory services and asset management for the Investment Companies.

h. The materials which suggests that Al Masah DIFC might have been intended to be responsible for managing the investments are dated early, prior to the Relevant Period (August 2010 to June 2016).

The CIR Rule 2.1.10 Exclusion - Issue 1(c)

253. The issue here is whether the arrangements are excluded from Art 11(1) CIL under Rule 2.1.10 of the Collective Investment Rules ("CIR") Module of the DFSA Rulebook.

254. CIR Rule 2.1.10 of the in force at the relevant times stated:

> "*An arrangement does not constitute a Collective Investment Fund if the arrangement comprises a closed-ended Partnership or Body Corporate, unless on reasonable grounds the purpose or effect of such an arrangement appears*

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to be the investment management, in the exercise of discretion for a collective purpose, of Investments or Real Property for the benefit of the shareholders or partners."

255. 'Investments' are defined as including shares, whilst 'Real Property' has its natural meaning.

256. The Decision Notice at para 37 set out the property in respect of which there were arrangements, as "*property including shares in unlisted companies acquired by an Operational Company and Real Property*".

257. As explained above, the Tribunal has accepted this description of the property.

258. The reference to "reasonable grounds" suggests the enquiry is a broad one and focuses on how the matter appears the fund operates rather than what the position was as a matter of law. CIR Rule 2.1.10 refers to the 'purpose or effect' being the management of Investments or Real Property. The Tribunal finds that this was satisfied. The Investors' money was deployed in the acquisition of shares. The Operational Companies held shares in other businesses. The investments were managed for the collective benefit of investors.

259. The Tribunal agrees with the Al Masah Cayman Decision Notice at page 26:

"*The focus of CIR Rule 2.1.10 is on the purpose and effect of the relevant arrangements. As between the parties to those arrangements, that is the investor, the Investment Company and the manager, the purpose of the arrangements was to enable an investor to participate in a private equity fund holding shares in a portfolio of operational subsidiaries, with a number of potential exit routes including a strategic sale of the Operational Company, an IPO or a trade sale of shares to financial investors. The arrangements thus did comprise the investment management of Shares in the subsidiaries of the Operational Company. The active management and development of the underlying operational businesses to create value on exit is not inconsistent with a finding that the purpose of the manager and the investor is the investment management of Shares, with a view to a sale.*"

260. This is also relevant to Art 11(1)(b) CIL being that the arrangements must be such that the persons who participate in them do not have day-to-day control over the management of the property. The individuals did not have this control. The Investment Companies were managed by Al Masah Cayman and its appointed representatives on the Board of Directors.

261. It is also the case that in order to transfer shares, an investor needed to obtain the prior written consent of the directors of the relevant Investment Company. This was provided for in the Articles of Association which investors agreed to be bound by when signing the Subscription Form.

262. There only needs to be "reasonable grounds" to conclude that the situation "*appears to be*" one of investment management (CIR Rule 2.1.10). The DFSA has reasonable grounds for determining that the purpose and effect of these arrangements was the investment

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management of Investments comprising shares in the subsidiaries of the Operational Company, and Real Property. The exclusion set out in CIR Rule 2.1.10 does not apply.

263. **Issue 1- Conclusion.** It follows that the four Investment Companies were funds as contended by the DFSA. We amplify some of the factors considered above when addressing aspects of the DFSA's alternative case below.

Alternative case of the DFSA

264. In the event that the FMT was to conclude that the Investment Companies did not constitute Funds under Article 11 CIL, the DFSA invited the FMT to vary the original decisions pursuant to Article 29(4)(b) of the Regulatory Law, make a decision in substitution pursuant to Article 29(4)(c) of the Regulatory Law; or otherwise make such order as it considers appropriate pursuant to Article 29(4)(c) of the Regulatory Law.

265. The DFSA argued that if the Investment Companies did not constitute Funds, investors were investing in Shares in the Investment Companies. Accordingly, other contraventions would still arise and should be reflected in reformulated findings against the Applicants. The Tribunal has decided that it is important to deal with the alternative case in the List of Issues. If the Tribunal were wrong on Issue 1 the other issues would then have to be decided at great additional cost and delay. Further discussion of the other issues in the List in some respects amplifies the discussion of Issue 1.

OTHER ISSUES ON THE LIST

The Financial Services Prohibition - Issues 2-3

2. Did Al Masah Cayman Arrange Deals in Investments in or from the DIFC, in contravention of Article 41(1) of the Regulatory Law ("the Financial Services Prohibition")? In this regard:

(a) Did the exclusion in GEN Rule 2.9.2 apply by reason of Al Masah Cayman being a party to the subscription contract with investors?

266. The Applicants say that Al Masah Cayman was party to the transaction being arranged, a subscription for shares in the relevant Holding Company on the terms set out in the Subscription Form, including the agreement to pay the incentive fee to Al Masah Cayman.

267. The DFSA responds that this rule cannot be allowed to subvert the Financial Services Prohibition, by a party inserting some collateral provisions relating to itself into a contract. Instead, it is necessary to consider what 'transaction' Al Masah Cayman is claiming that it is a party to. The relevant 'transaction' for these purposes was discussed in *In re The Inertia*

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Partnership LLP [2007] EWHC 502 (Ch); [2007] Bus LR 879 at [39] per Jonathan Crow QC (sitting as a Deputy High Court Judge) where it was seen as plainly the purchase and sale of shares as was the case in *Al Khorafi v Sarasin [2015] DIFC CA 003*, with a sale of securities. Al Masah Cayman was not a party to the transaction for the purchase of shares. It did not hold shares in the Investment Company, which it was selling to the investors. Under the subscription agreement, Al Masah Cayman was not the party liable to perform the obligation to allot shares and thus was not a party to that transaction. The fact that the subscription agreement also included the terms on which Al Masah Cayman acted as arranger does not make Al Masah Cayman a party to the transaction for the purchase and sale of shares.

268. The Applicants respond that there is no basis for any suggestion that Al Masah Cayman was a party to the transaction simply in order to engage the exclusion. The contemporaneous intention and understanding was that Al Masah DIFC would do any "arranging". Al Masah Cayman was party to the transaction because the terms relating to Al Masah Cayman, including the agreement to pay the incentive fee, were an integral part of the transaction, without which the shares would not have been issued.

269. We prefer the approach of the DFSA. Al Masah Cayman was not a party to the substantive transaction for the sale and purchase of shares and the exclusion does not apply.

(b) Are any arranging activities carried out in or from the DIFC properly attributable to Al Masah Cayman (rather than Al Masah DIFC, as the Applicants contend)?

270. The Applicants argue that any arranging activities in or from the DIFC (i.e. making arrangements with a view to prospective investors subscribing for Units – see GEN Rule 2.9.1) were carried out by staff acting for Al Masah DIFC. They say that Ms Baines' evidence was clear that Al Masah DIFC was carrying out the arranging and advising functions for the Investment Companies (Day 2/117:10-12). She regarded the investor relations team as employees of Al Masah DIFC, and she considered that they "*did their job in regards to the licensed advising and arranging function*" (Day 2/139:8-14). She also confirmed that staff of Al Masah DIFC were responsible for generating new subscriptions into the Holding Companies. With regard to the question whether investors should have been on-boarded as clients of Al Masah DIFC, Ms Baines stated that if they were undertaking regulated activities of arranging and advising it was the other Al Masah DIFC staff's responsibility to start the on-boarding process (Day 3/35:2-7). Ms Baines had a role in updating and approving the manuals that dealt with the on-boarding process, as well as in the process itself. She was clear that if the investor relations team's activities did amount to arranging, that would be arranging by Al Masah DIFC, not by anyone else (Day 3/35:19-23).

271. The Applicants say that Ms Baines' contemporaneous understanding reflected the reality. Potential subscribers were introduced to the Investment Companies by the investor relations teams at Al Masah DIFC. It would be wholly artificial to now retrospectively attribute arranging activities to Al Masah Cayman, on the ground that the staff had entered into

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employment contracts with Al Masah Cayman (to the extent that they did, the relevant contracts being apparently signed by Al Masah DIFC). It is common ground that staff had at least been seconded to Al Masah DIFC, and it was in their capacity as Al Masah DIFC representatives that they carried out any activities that could fall within the definition of arranging, as Ms Baines correctly understood at the time.

272. The DFSA responds that Al Masah Cayman was responsible for the formation of the Investment Companies and the arrangements by which investors would invest. The Subscription Forms were addressed to Al Masah Cayman and counter-signed by Al Masah Cayman. Authority to do so had either been provided by the Investment Companies by virtue of the Placement Fee Agreements or by implication. As Al Masah DIFC had no relationship (contractual or otherwise) with the Investment Companies, it would not have any authority to sign the forms. The forms provided that Al Masah Cayman was entitled to require additional documentation to satisfy anti-money laundering requirements. Various steps then had to be taken to 'on-board' investors as clients of Al Masah Cayman. It is common ground that the 'placement agent' was Al Masah Cayman. Arranging deals in investments encompasses a wide breadth of activity. It is plain from the evidence that relevant arrangements were made by Al Masah Cayman (whether or not they were also made by Al Masah DIFC – as the answer to this question does not require an either / or). All relevant documents were in the name of Al Masah Cayman, and it was Al Masah Cayman which provided services to the Investment Companies. Further, if Al Masah DIFC had been making the arrangements, then each investor should have been on-boarded as a client: COB Rule 2.1.1, in order to be assessed as a Professional Client, but they were not. The checks were being carried out by Al Masah Cayman (as Ms Baines confirmed at Day 3/33:11-34:1; 35:5-7; 40:22-23; 43:9-12). The DFSA relies on documents between 2012 and 2014 supporting this.

273. The Applicants had not previously taken this point but, as they were entitled to do, raised it for the first time in this appeal. As we see it the written record, the most reliable evidence in complex financial transactions, makes it very clear that the relevant arrangements are attributable to Al Masah Cayman. It is not displaced by the recollections of Ms Baines which are not all one way and whose evidence in other areas is questioned by both sides. As we mention elsewhere there was a blurring of roles in practice between the companies but from what we have seen that does not detract from the fact that the arrangements are indeed attributable to Al Masah Cayman.

3. ***If the Investment Companies were not Funds, is it open to the FMT to, and if so will the FMT, vary/substitute the original decisions, to the effect that Al Masah Cayman contravened Article 41(1) of the Regulatory Law by Arranging Deals in Investments in or from the DIFC, being shares in the Investment Companies?***

274. The Applicants develop this only briefly in their opening and closing arguments on the basis that the DFSA told the DMC that the "central theme" of the case was that the Applicants operated a Fund. In a context where the hearing is a de novo reconsideration it is difficult to see how that indication could be the basis for preventing an alternative case going ahead.

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Moreover, the Applicants have known that the issue has been a live one for some time as the DFSA points out in its closing.

275. The List of Issues repeatedly refers to this alternative basis (Items 3, 5, 8, 10). The alternative case has been live for some time and is in the Decision Notices and in the Answer of 24 November 2019. The DFSA's alternative case does not depend on any different factual evidence and no prejudice is caused to the Applicants in meeting it.

276. The answer is 'Yes'.

The Financial Promotions Prohibition-Issues 4-5

4. Did Al Masah Cayman make Financial Promotions in or from the DIFC, in contravention of Article 41A of the Regulatory Law ("the Financial Promotions Prohibition")? In this regard:

(a) Are the activities on which the Respondent relies properly attributable to Al Masah Cayman (rather than Al Masah DIFC)?

277. The Applicants say that the clear intention was that any marketing activities in or from the DIFC would be, and were being, carried out by Al Masah DIFC, the licensed entity. Any marketing material sent out by staff was sent out by the investor relations team. Ms Baines confirmed that Ms Zudikova and the placement and investor relations teams were working for Al Masah DIFC (Day 2/93:16-30). Al Masah DIFC was carrying on marketing and distribution activities in respect of the private equity platforms, through the investor relations / placement team, who were employees of Al Masah DIFC (Day 2/116:19-25; 152:13-24). Her view was that the marketing activities of the investor relations team should have been, and were in fact, carried out only for and on behalf of Al Masah DIFC, not Al Masah Cayman (or any other third party) (Day 3/31:3-32:2). That is consistent with the marketing materials stating that they were distributed by Al Masah DIFC, wording which Ms Baines had approved. There is no sensible basis on which it could be concluded that the relevant staff were in fact acting for Al Masah Cayman, or that financial promotions were being made by that company. Nor does the fact that material was obtainable from the website after 2015 assist the DFSA. The provision of access to the website was by the investor relations teams, and there is no basis on which it could be concluded that the obtaining of documents from the website amounted to Al Masah Cayman making financial promotions in or from the DIFC.

278. The Applicants stress that the issue is whether Al Masah Cayman was in fact carrying out those activities. It is plain from the agreements that Al Masah Cayman was entitled (but, the Tribunal would note, of course not obliged) to perform its obligations through brokers including affiliates, that the marketing function had in fact been outsourced to Al Masah DIFC, and that Al Masah Cayman reimbursed Al Masah DIFC for the majority of the costs

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of its employees, including those carrying out marketing and placement activities. In all events both Al Masah Cayman and Al Masah DIFC plainly were operating on the mutual basis that activities including marketing and placement activities were being carried out by Al Masah DIFC.

279. The DFSA's primary position is that there is ample evidence that Al Masah Cayman was directly making financial promotions in the DIFC (whether or not they were also being made by Al Masah DIFC). This was also the finding of the DMC. Al Masah Cayman's website was used to promote the Funds, and it has never suggested that Al Masah DIFC had any role in respect of that website. Mr Singhdeo stated in interview that as far as he was aware Al Masah DIFC did not do any marketing. Mr Singhdeo separately explained that it was Al Masah Cayman, and not Al Masah DIFC, which identified potential investors. The contractual obligation to raise capital for the Funds lay with Al Masah Cayman under the Management Agreements for each Investment Company. Thereafter, despite assertions to the DMC that this was sub-contracted to Al Masah DIFC, there is no evidence that Al Masah Cayman ever in fact did sub-contract this obligation. That being so, the issue of attribution does not arise.

280. However, as regards attribution, the DFSA contends that, in substance, the financial promotions ought to be attributed to Al Masah Cayman which had the contractual obligation to raise capital for the Investment Companies, an obligation which was not sub-contracted to Al Masah DIFC. Even if marketing had been sub-contracted, all activities would have been in pursuit of Al Masah Cayman's contractual responsibilities to the Investment Companies, and that company cannot realistically seek to disclaim those responsibilities whilst receiving the placement fees. The placement fees were retained by Al Masah Cayman. The way that Al Masah DIFC's activities were presented to the DFSA, in relation to the investment platforms was, as noted above, limited to the provision of 'advisory services'. (The Applicants point out that the 2013 Regulatory Business Plan states, after providing details of the Holding Companies and the Luxembourg Funds, that, "*Additionally, [Al Masah DIFC] will engage with investment advisors and conduct marketing / distribution activities as set out by DFSA regulations*" (page 27) and (under the heading "Investor Relations Management") that Al Masah DIFC "*will conduct marketing activities as set out by the rules of the DIFC*".) It was not suggested that Al Masah DIFC was promoting the investments. Most of the marketing materials bore the logo of 'Al Masah Capital' (i.e. Al Masah Cayman). Al Masah DIFC was identified with Al Masah Cayman. Furthermore, the suggestion that the promotion of the investments was carried out by Al Masah DIFC contradicts Mr Dash's position that Al Masah Cayman 'has raised over US$1 billion'. This recognises that the capital raising can properly be attributed to Al Masah Cayman, whether or not others were also involved in the promotion of the investments.

281. ***Al Khorafi v Sarasin***. As both sides have relied on this case we must mention it. It concerned a Swiss bank (Bank Sarasin), which was found to have been providing Financial Services, in breach of the Financial Services Prohibition, on the basis that the acts of a local, authorised, firm (Sarasin-Alpen) should be attributed to the bank. Both sides rely on aspects

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of the facts of the case. The Court of Appeal upheld the Judge's decision that the activities of Sarasin-Alpen should be attributed to Bank Sarasin saying this among other things:

> "*... What in substance the judge found was that the employees of Sarasin-Alpen were implicitly authorised by Bank Sarasin to conduct on its behalf its banker/client relationship with the Respondents short of having authority to enter in contracts binding on the bank. The fact that the persons in question were employees of Sarasin-Alpen and not Bank Sarasin was not fatal to the judge's finding. Nor was it fatal that there was no express conferment of authority on the Sarasin-Alpen personnel or on Sarasin-Alpen itself. It was the substance, not the form, of what was happening that mattered.*
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> *... We would stress, however, that the decision was reached on the particular facts of the case and for this reason may have little effect on financial services business resulting in deals made outside the DIFC pursuant to introductions made by firms carrying on business in the DIFC where care has been taken to ensure that the activities of the introducing firm are not attributable to the firm outside the DIFC.*"

282. This was a case, which the Court of Appeal made clear, turned on its own facts, emphasising that the process is indeed a factual determination. We must decide on the facts in this case and we are not much helped by extrapolating from those of others.

283. The issue is not simply which of the two companies made financial promotions but whether Al Masah Cayman did. It is easy to seek the answer in too much of the detail. The parties debate the significance of an email from Ms Danila dated 15 January 2013. The DFSA points out that it uses the Al Masah Cayman's domain name, the footer includes Al Masah Cayman's website and logo, Ms Danila refers throughout to Al Masah Cayman, on whose behalf she speaks: "*We have successfully created 2 permanent capital structures...*". The Applicants respond that this is not at all surprising given that Al Masah Cayman is the holding company of the group but it is expressly sent by her as Senior Vice President of Al Masah DIFC, and the footer concludes by saying that the email contains information proprietary to Al Masah DIFC, that Al Masah DIFC is regulated by the DFSA, and that information in the email is directed to those who qualify as Professional Clients under the DFSA rules. To us the email simply illustrates that both companies were involved.

284. As so often the legal division between parent and subsidiary company became elided in practice and the best evidence is the contemporaneous documents rather than later anecdotal recollection in cross examination. Isolated documents appearing occasionally over an extended period may of course give a false impression but the overall pattern is clear. This is not a conventional arrangement where, for example, a wholly owned subsidiary sells the cars of the heavily branded parent. The parent plays a much greater role and is operating from the same offices with many of the same personnel.

285. The answer is 'Yes'. As we see it the contractual structure, the duties assumed by Al Masah to investors, the absence of delegation or sub-contracting, the allocation of costs and the role

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of that company's employees and the presentation of its services within the DIFC make it clear that it was indeed making financial promotions. Having reviewed these matters for ourselves we entirely agree with Paragraphs 17 to 18 of the Al Masah Cayman Decision Notice which state:

"*17. The effect of these arrangements was that the businesses and activities of both Al Masah Cayman and Al Masah DIFC were carried on together in the DIFC. In dealing with investors and communicating Marketing Material, directors and employees were acting both for Al Masah Cayman and Al Masah DIFC, and their acts and omissions may be attributed to either company depending on the circumstances*

18. During the Relevant Period the activities of Al Masah Cayman in relation to marketing, making arrangements for the sale of shares in the Investment Companies, and in managing the Investment Companies were mainly carried on in and from the DIFC, where all its directors and senior employees were based. Al Masah Cayman did not carry on any significant business from its registered office in the Cayman Islands."

(b) If so, were the relevant marketing materials approved by Al Masah DIFC so as to be 'exempt Financial Promotions' pursuant to GEN Rule 3.4.1(4)(a)?

286. It is common ground that some marketing materials were approved by Al Masah DIFC, the issue is how much. This is apparent from Ms Baines' Marketing Approval Register which listed out a relatively limited number of documents as having been approved.

287. The DFSA sees the position as follows. Under GEN Rule 3.6.1, Al Masah DIFC was required not to approve a Financial Promotion unless it included a clear and prominent statement that it had been so approved. The absence of such a statement from much of the marketing material raises an inference that such material was not so approved.

288. Some marketing material was approved by Al Masah DIFC, and therefore fell within the exemption. However, many Marketing Materials used by Al Masah Cayman had not been approved by Ms Baines. Annex D to each of the Decision Notices sets out the Marketing Materials and which of those documents, only a minority, actually were approved. Annex D shows no approval by Al Masah DIFC prior to the 'Al Najah Teaser March 2013'. Prior to that date there were a number of offering documents for Healthcare, MENA and Al Najah investments with no evidence of approval and no statement that they had been approved. Indeed, emails from April 2013 explain why there was no approval, apparently a belief that they did not need it because they were not marketed by Al Masah DIFC but by placement agents appointed by Al Masah Cayman. Further, Ms Baines stated that she did not approve the Subscription Forms nor annual reports for the platforms although these were Marketing Materials.

289. The status of Annex D was clarified in Mr Hammond's fifth witness statement. It arose out of what Al Masah DIFC itself provided in response to a DFSA Notice requiring it to provide

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amongst other things ‘the prospectus and marketing documents’ for the platforms. The material was cross-referenced against Ms Baines’ list of documents that she had in fact approved. The DFSA says that Annex D is the best evidence of what was actually approved.

290. The Applicants say that there were clear systems in place to ensure that all marketing material was approved by Compliance before being sent out. Those systems were described in Ms Zudikova’s evidence and in interview with the DFSA, by Ms Baines in her interviews, and in the investor relations team manual. Ms Baines’ evidence was that to the best of her knowledge all marketing material was submitted to her for approval (Day 2/141:2-11), and she was not aware of anything going wrong with the systems in place (Day 3/58:18-21). She contemporaneously reported in her quarterly compliance report that, “*Marketing documentation, presentations, updates to Offering Documents and Term Sheet and Teasers are reviewed by Compliance on an ongoing basis and a Register of all Marketing Documentation approved by Compliance is maintained*”.

291. The Applicants say that it is not correct that all the documents listed in Annex D were in fact sent out to prospective investors or that only those documents which “purported” to have been approved had in fact been approved, making detailed criticism of some of its contents. They also say that distribution by Al Masah DIFC would itself amount to approval by Al Masah DIFC, even if a particular document had, for whatever reason, not been internally approved by the compliance officer.

292. The answer is ‘no’. Annex D and Ms Baines’ Register are as we see it a sound basis for approaching the question. The Annex starts from being the product of what the Applicants were asked to provide and has been carefully compiled. There may be some isolated flaws but it seems to us that the broad picture is clear. The Subscription Forms were inevitably part of the marketing materials. When materials were prepared or circulated without approval and outside the system it is unsurprising that Ms Baines (whose recollection the Applicants reject for other aspects of their case) or Ms Zudikova would be unaware of them. While some materials were approved by Al Masah DIFC, most were not.

5. ***If the Investment Companies were not Funds, is it open to the FMT to, and if so will the FMT, vary/substitute the original decisions, to the effect that Al Masah Cayman contravened the Financial Promotions Prohibition in relation to shares in the Investment Companies?***

293. The Applicants at 124 of their closing submissions make similar arguments to those on Issue 3 above and the DFSA responds at 90 to 93. For substantially the same reasons as we give on Issue 3 the answers are ‘Yes’ and ‘Yes’ if it wishes to.

Alleged Misleading statements – Issues 6-8

6. ***Did Al Masah Cayman and/or Al Masah DIFC make misleading statements as to fees in documents relating to Offers of Units in Funds, in contravention of Article 56(1)(a)***

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and (b) CIL, Article 56(2) CIL and/or (after 21 August 2014) Article 41B(1) of the Regulatory Law?

(a) For the purpose of Article 56(1)(a) and (b) CIL, Article 56 (2) CIL and (after 21 August 2014) Article 41B(1) of the Regulatory Law, is it necessary to show that a misleading or deceptive statement was made to a 'prospective investor'?

294. The Applicants contend that the annual reports were not documents which related to an Offer of Units made by Al Masah Cayman so as to fall within Art 56(1) CIL. They were not intended for distribution to prospective investors, and did not form part of the marketing materials submitted for approval and made available in the shared marketing folder. They were generally shared either with people who were never made an Offer, or with existing shareholders. The Applicants say that it does not assist the DFSA to identify a smattering of occasions on which it appears that an annual report may have been sent, or passed on, to a person who could be characterised as a prospective investor.

295. The DFSA says that the annual reports were provided to prospective investors. Ms Danila, a member of the 'placement team' who promoted the Funds, stated that the reports were sometimes sent to prospective investors. Mr Kulkarni, of Kotak bank, was provided with a copy of the 2014 annual report for the Education Fund for one of his clients who was considering investing and wanted to consider the Fund's financial statements. Four emails demonstrate that at least some prospective investors received the annual reports. Where reports were given to the investor relations team, or referral agents, rather than investors, it is said that they were provided so that those individuals could 'understand the business' but there is no evidence that such agents were told not to pass them on to investors, which is the more obvious reason for providing them. Mr Dash said in evidence (in answer to the question whether it would have been a board decision to prepare an annual report) (Day 5/92):

> "A. *Yes, that's correct. It was a board decision to make a good PR document, marketing document, which could help the sales team at Al Masah Capital, the referral agents and the various PR firms who do market information about these companies.*"

296. The DFSA points out that the annual reports were sent out to ANEL investors. Given that a number of investors invested more than once, it is to be expected that a significant part of the reason for preparing and sending out the annual reports was to present a picture of success with a view to encouraging existing investors to invest more money.

297. It seems to us unreal to suggest that where any investment will be substantial and made by a 'professional investor' the annual report of the company will not be a statement to a prospective investor as part of the materials persuading him or her to invest. The evidence of the reports being sent is not 'de minimis'. Despatch of the reports to agents will obviously be mainly to inform and encourage prospective investors not for general information. The fact that the reports may not have been required by Cayman Law as the Applicants submit

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indicates that they were produced for a purpose as Mr Dash conceded. The Applicants themselves saw a wider purpose to the reports than accounting to existing shareholders. The substance of the Annual Reports of ANEL was considerably more than factual reporting to shareholders and was in our view promoting investment into the funds. Further, the dishonest conduct over the reports to which we come next would have had limited purpose if not seen as directed at prospective investors.

298. It follows that (a) does not require a detailed answer as the reports were communicated to prospective investors.

(b) To the extent relevant, was "Investor A" a prospective investor?

299. The DMC found that Investor A had been misled as to the placement fee income earned from the Holding Companies (Al Masah Cayman Decision Notice, paras 35, 52).

300. The Applicants say that Investor A was not a prospective investor in the Holding Companies. Rather, it was considering investing in a joint venture in respect of a new fund, which would in turn invest in the Holding Companies, which makes clear that what was envisaged was that the fund (i.e., as opposed to Investor A) would invest in the three platforms. Mr Dash said that Investor A was never considering an investment into the Holding Companies themselves (Day 5/151:18-25). There was some suggestion that Mr Dash and Mr Singhdeo had been inconsistent in their interviews with the DFSA, but the point being made there was that Investor A was not looking to invest in Al Masah Cayman itself. The information provided to Investor A was not provided in a document relating to an Offer of Units (or shares) in the Holding Companies. No contravention of Art 56(1) could arise.

301. The DFSA points to the contrasting accounts given by Mr Dash and Mr Singhdeo in interview (summarised at para 180 of the DFSA's Closing Submissions) and argues that Investor A was clearly talking to Al Masah Cayman, on the basis that one way or another it was considering an investment into the platforms. We agree. We are wholly unconvinced by the distinction drawn by the Applicants' Counsel to explain the contrast between the witnesses' account in interview that Investor A had in mind an investment in the platforms and what they said to the contrary in evidence.

(c) Were any statements in communications with investors misleading or deceptive, having regard to the content and context of the communications?

302. The DFSA says that the Investor A Misstatement allegation has two elements: first, the email falsely represented that the fees that pertained to the private equity platform were only management fees of US$4.7 million and second, it concealed that there were placement fees in excess of US$5 million omitted from the information disclosed. The DFSA says that the Applicants failed to grapple with the first element of the Investor A misstatement, the false statement that "*The fee income that pertains to the PE platforms is the Management Fee*

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income of USD4,707,961", omitting reference to the Placement Fee income which also pertained to the 'platforms' (para 158 of the DFSA's Closing Submissions).

303. The Applicants claim that the information provided to Investor A was neither misleading, deceptive nor unfair. Investor A had sought information in relation to Al Masah Cayman's fee income. It is common ground that the total figure provided was correct. The breakdown was accurate, as "*transaction fees and advisory income*" was an appropriate way to describe the placement fees paid by the Holding Companies: consistent with how those payments were described in the audited financial statements. The email to Investor A stated that "*the fee income that pertains to the PE platforms is the Management Fee income*" (of US$4.8m). That was in a context where Investor A's request for more information in relation to Al Masah Cayman's "*fee income from assets under management*" was understood as an attempt by Investor A to ascertain the total assets under management from the fee income. This was precisely the understanding that people had at the time, as is clear from Mr Lim's email. In these circumstances the statement in the email fairly explained to Investor A the information they were understood to be seeking, which was the management fee income with respect to the PE platforms (such that the AUM could be inferred). The DFSA's interpretation of the email as misleading involves a misreading of the email and the context.

304. As we see it this approach is specious as the Decision Notice points out. The misrepresentation alleged is very clear, and relates to the quantum of fee income on the private equity platform, not just to the description of that fee income. The table of income totalling US$14.34 million had been altered so as to reduce placement fee income from the true figure US$9.98 million to US$2.2 million, which lower figure was falsely represented not to relate to the private equity platform.

305. Moreover the deception was intentional. The alleged Investor A Misstatement arose out of Investor A's request for a breakdown of the figures in Al Masah Cayman's Annual Report 2013. Mr Singhdeo initially provided the breakdown, internally, by email dated 9 September 2014 but Mr Dash replied "*This will not go out*" and asked Mr Singhdeo and Mr Huwaij to speak to him the following morning. The email relied upon as giving rise to the Investor A Misstatement says "*A breakdown of the 'Fee Income from Assets Under Management' in AMCL's financials for the period March 2014 is detailed in the table below. As explained on the call, it consists of fee income from various asset classes from the various departments within AMCL. The fee income that pertains to the PE platforms is the Management Fee income of USD4,707,961.*"

306. The email, although sent out by Ms Danila, was drafted by Mr Lim "*with inputs from NS, SD and Andreea*", and sent to Mr Dash and Mr Singhdeo (and others) with a request that they "*take a look and give your comments*". In his evidence Mr Dash suggested that at his meeting with Mr Singhdeo and Mr Huwaij he had to be persuaded to send out the financial information, and that he required it to match the terminology in the audited financial statements. In evidence, he expanded on this, suggesting that he required amendments to the figures in an attempt to ensure consistency between annual reports and the figures to be provided (Day 6/7-8). As the DFSA points out this cannot be correct. If, as we believe,

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those at the meeting knew that the reports contained falsified accounts then consistency would require concealment. Even if the falsification had not been known to them this exercise would have revealed it.

307. Mr Singhdeo's evidence was, initially, that he could not remember his conversation with Mr Dash (Day 6/128:23-25). This was also what he had said in interview. However, his witness statement stated that Mr Dash had referred to the terminology in the Annual Reports. When asked about this, Mr Singhdeo's evidence was (Day 6/131):

> *10 A. There's another team member who is also part of this*
> *11 process. And I do see, because I have looked into the*
> *12 email chain, and it was kind of asked that, fine, let*
> *13 them look into the annual report, let them look into the*
> *14 financials of Al Masah, let them look into in what way*
> *15 the placement fee has been presented across the*
> *16 different annual reports and so that the correct*
> *17 information can go to Investor A.*

308. Mr Singhdeo was asked about the statement in the email, which suggested that the income from the '*PE platforms*' was limited to management fees. His answers included this: "*Q The notes were forged, so that information was removed relating to fees, including placement fees? A. No, this is not the case. The annual reports or there are different timelines in terms of the way the financial year endings were happening, for the different portfolio company. And that was the reason why the information had been put and readjusted out here.*"

309. This explanation provides no basis for the changes to the table. The different accounting years for the different companies could not have explained why the Investor A Misstatement was made. This and the other flawed and sometimes incoherent explanations from such intelligent and experienced businessmen confirm an impression that the position is as it appears to be from the documents. The Investor A Misstatement was, it seems, and as the DFSA suggests, a deliberate continuation of the policy of concealing placement fees, either because the Applicants did not want a potential investor to know how much money had been taken from the Investment Companies or because honest answers would have revealed the omissions from the ANEL annual report. An honest breakdown would have described them as they were. They were placement fees, paid under Placement Fee Agreements, and should obviously have been included within any table that included a category for placement fees.

310. At this point we mention the argument not pressed hard in closing arguments that somehow the placement fees were in fact disclosed because of the existence of a power in the Articles of each platform, at the end of an article allowing the Investment Companies to pay commissions to persons who had subscribed, as follows: "*The Company may also pay such brokerage as may be lawful on any issue of Shares*." Quite apart from the question of whether potential investors ever considered the Articles, and Mr Mehta for example did not,

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this is of course a power not a duty and the proposition seems to us to be absurd. Indeed we do not believe that the Applicants genuinely thought that it did.

311. The answer is therefore 'Yes' as it is to 6 overall.

7. Did Al Masah Cayman and Al Masah DIFC: (i) make all inquiries that were reasonable in the circumstances; and (ii) believe on reasonable grounds that the statements or omissions were not misleading or deceptive, so as to have defences under Art 57 CIL to the alleged contraventions of Art 56 CIL?

312. The Applicants concede that this defence is not open to them if the annual reports are held, as they have been, to be misleading statements. As to the remaining allegations they say that there was no deliberate policy that communications should mislead, or should not provide investors with information to which they were entitled. Al Masah Cayman's board did not decide the content of marketing materials. Ms Zudikova's evidence was that marketing materials were created by the teams working for the Holding Companies themselves and then vetted by Ms Baines (Day 2/76:14-18). The Articles were drafted by Walkers, and Subscription Forms were reviewed by Walkers and Ms Baines. Systems were in place intended to ensure that all such materials were not distributed unless the compliance officer was satisfied that they were true, fair and not misleading.

313. The DFSA emphasises that it is for the Applicants to show that this defence applies. Art 56 CIL is aimed at protecting investors who may invest on the basis of misleading or deceptive statements. Art 57(1) CIL is aimed at situations where a factual statement depends upon inquiries. It is hard to see how it can assist the Applicants, where they knew without making inquiries that placement fees were payable. To the extent that the Applicants seek to suggest that they inquired of external professional advisors whether it was misleading or deceptive to omit references to placement fees, Art 57(1) CIL ought not to apply. External advisors cannot change the objective effect of the statements, and bad advice on the law does not provide a defence. The only evidence of advice that the Applicants have adduced is an irrelevant letter dated 22 March 2017 on Cayman Islands law and a single email from Walkers in which Mr Dash asked about '*marketing cayman, lux companies*' and was warned about the restrictions on marketing Foreign Funds. Even if Ms Baines was at fault, some of the marketing material predated Ms Baines' employment and this can provide no defence for the corporate Applicants, which cannot rely on internal failings as demonstrating 'reasonable care'.

314. The DFSA says Ms Baines was not aware of the placement fees. She was shown an email referring to staff commissions dated 10 May 2012 from before she started her job. There is no evidence she was ever sent the email, and she stated that she was unaware of it (Day 3/74:17-19). More generally she was unaware of the remuneration practices of Al Masah DIFC (Day 3/71:18-20). There are some staff commission calculations in the bundle, none of which were copied to Ms Baines. Ms Baines was asked about agreements with referral agents, which referred to payments to those agents. She acknowledged that she was aware that such agents received a fee, but had no knowledge that the investment platforms were

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paying a fee to Al Masah Cayman (Day 3/68:6-69:8). It was put to her that she would have reviewed placement agreements (Day 3/75:18-23). She stated that she did not do so and no documents were put to her to contradict her evidence on this point. Indeed, whilst Mr Dash's third witness statement included the unsupported statement that Ms Baines had reviewed the Placement Fee Agreements, in evidence he accepted that he had not provided them to her, and he was merely asserting that he thought that it was part of her role (Day 4/96:11-16). Ms Baines was asked about minutes of a meeting of the board of directors of Al Masah Cayman which took place in the DIFC on 10 November 2013. The minutes record that revenues were discussed but (a) the document starts with a list of those present and 'invitees', not including Ms Baines corroborating her suggestion that she may only have been present for the part of the meeting at which she was introduced to the board (Day 3/77:20-24); and (b) the minutes do not refer to placement fees in any event.

315. The context is that the Applicants had decided not to disclose placement fees and did not do so. If there was any evidence that they had received informed professional advice that it was proper not to do so we would have seen it. It is unclear whether Ms Baines knew about the placement fees. She may have done but she also saw her role as very limited, as did the Applicants. There is no suggestion that the Applicants ever asked her about the matter. Moreover in situations where the Applicants actively sought to conceal the placement fees she was conspicuous by her absence. The Applicants positively intended to mislead as even the most cautious reading of the contemporaneous documents makes clear.

316. The answer is 'No'.

8. If the Investment Companies were not Funds, is it open to the FMT to, and if so will the FMT, vary/substitute the original decisions, to the effect that Al Masah Cayman and/or Al Masah DIFC contravened Article 41B(1) of the Regulatory Law by engaging in conduct in connection with shares that was misleading or deceptive or likely to mislead or deceive?

317. 'Yes' for substantially the same reasons given under issues 3 and 5.

COB Rule 3.2.1 and GEN Rule 4.2.6 – Issues 9-10

9. As to the alleged contraventions by Al Masah DIFC of COB Rule 3.2.1 and GEN Rule 4.2.6, did Al Masah DIFC take reasonable steps to ensure that information in communications to investors was clear, fair and not misleading?

318. The considerations in this case and addressed in Issue 7 above apply equally to COB Rule 3.2.1 and to "*reasonable steps to ensure that the communication is clear, fair and not misleading*". The answer is 'No'.

10. If the Investment Companies were not Funds, is it open to the FMT to, and if so will the FMT, vary/substitute the original decisions, to the effect that Al Masah DIFC

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contravened COB Rule 3.2.1 and GEN Rule 4.2.6 by failing to take steps to ensure that marketing material in respect of shares was clear, fair and not misleading?

319. 'Yes' for substantially the same reasons given under issues 3, 5 and 8.

Sanctions against Al Masah Cayman/Al Masah DIFC – Issues 11-12

11. If any contraventions were committed by Al Masah Cayman, what is the appropriate sanction (if any) in all the circumstances?

12. If any contraventions were committed by Al Masah DIFC, what is the appropriate sanction (if any) in all the circumstances?

320. These issues will be addressed after further submissions.

Generic 'knowing concern' issues – Issues 13-15

13. As to the status of the Investment Companies:

(a) If they are found to be Funds, is it necessary to find that Mr Dash, Mr Singhdeo and Mr Lim knew that the Investment Companies were Funds in order to find that they were knowingly concerned in contraventions based on that premise?

(b) If they were not Funds, is it open to the FMT to, and if so will the FMT, vary/substitute the original decisions, to the effect that Mr Dash, Mr Singhdeo and Mr Lim were knowingly concerned in contraventions in relation to shares?

14. Is it necessary to find that Mr Dash, Mr Singhdeo and Mr Lim knew that Al Masah Cayman was carrying on activities in the DIFC for which it required authorisation which it lacked in order to find that they were knowingly concerned in contraventions based on that premise?

15. Is it necessary to find that Mr Dash, Mr Singhdeo and Mr Lim knew that communications were deceptive or misleading in order to find that they were knowingly concerned in contraventions based on that premise?

321. By Article 86(1) of the Regulatory Law 2004:

> "*(1) If a person is knowingly concerned in a contravention of the Law or Rules or other legislation administered by the DFSA committed by another person, the aforementioned person as well as the other person commits a contravention and is liable to be proceeded against and dealt with accordingly….*

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(2) *If an officer of a body corporate is knowingly concerned in a contravention of the Law or Rules or other legislation administered by the DFSA committed by a body corporate, the officer as well as the body corporate commits a contravention and is liable to be proceeded against and dealt with accordingly.*

…

(7) *For the purposes of Article 86, a person is 'knowingly concerned' in a contravention if, and only if, the person*

(a) *has aided, abetted, counselled or procured the contravention;…*

[or]

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

322. It is common ground that it must be established both that the person in question was concerned in the contravention, and there must be "*actual involvement in the contravention*" and not mere passive knowledge of a contravention (*SIB v Pantell* [1993] Ch 256 (B 3) at 283G) and also that the person was knowingly so concerned.

323. The DFSA contends that all that is required is actual knowledge of the facts which constitute a contravention. On that basis the DFSA contends that the individual Applicants could be knowingly concerned in a contravention on the part of the Holding Companies despite not knowing that the Holding Companies were Funds, and not knowing that communications were, in fact, deceptive or misleading. It relies in this regard on *FCA v Capital Alternatives* (B 19) at [802], where it was said that if an individual has knowledge of the facts on which the contravention depends, "*it is immaterial as to whether or not the individual knows that such facts constitute a relevant contravention. This is because the individual is presumed to know what the law is, and ignorance of the law is no defence*". The DFSA says that it is not necessary to show that Mr Dash, Mr Singhdeo and Mr Lim knew that the Investment Companies were Funds; or that activities required authorisation; or that the communications were objectively deceptive or misleading. The only question is whether they had actual knowledge of the relevant facts. Indeed, a lack of knowledge as to the law or the legal conclusions from known facts is irrelevant to a finding of knowing concern. They cite further cases to similar effect: *SIB v Scandex Capital Management* [1998] 1 WLR 712 (CA) at 720F-H (Millett LJ), *FCA v Skinner* [2020] EWHC 1097 (Ch) and *Fryett v FSA* [2008] at [22] and [60].

324. The Applicants say that this is an over-simplistic analysis of the question that arises in determining whether a person (A) was "*knowingly concerned in*" a contravention by another person (B) (as opposed to, e.g., the question whether B *committed* a contravention at all). It is especially over-simplistic when applied in the regulatory context. The purpose of the regulations is not to visit a surprise punishment on innocent and diligent business persons who could not even be aware of the putative transgression. The correct approach, which

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should be adopted by the FMT, is that a person cannot be "knowingly concerned" if they have an honest and reasonable belief that no contravention is occurring. The Applicants develop attractive arguments in favour of this approach with which we have sympathy but ultimately there is no basis for it in the case law or in the fact that we are dealing with a statutory provision separate from those with which the English cases dealt. Art 86 is as wide as the provisions in those cases. While we are not bound by the English cases, they are persuasive particularly in the regulatory sphere where consistency across jurisdictions is desirable.

325. Additionally, the Applicants submit that it is still necessary to focus closely on what are the facts which constitute the contravention, and distinguish between facts and legal consequences. The DFSA's approach fails properly to identify the facts upon which the contraventions depend. The Applicants suggest that the question of attribution is a question of fact and not law, such that Mr Dash must be shown to have known that acts would be attributed to Al Masah Cayman. The DFSA says that attribution is properly characterised as a mixed question of fact and law: following the authorities above all that is necessary is that Mr Dash knew the relevant facts. Mr Dash knew all relevant facts. As we see it that is correct.

326. The reasons for the well-established approach which we follow are well known but the consequences could obviously be harsh in some cases. It follows that the answer to Issue 13(a), 14 and 15 is 'no' and to 13(b) for reasons given in addressing similar issues above 'Yes'.

Mr Dash – Issues 16-19

16. Did Mr Dash commit contraventions by reason of being knowingly concerned, as defined in Article 86 of the Regulatory Law, in contraventions by Al Masah Cayman and/or Al Masah DIFC? In this regard:

(a) Are any contraventions on the part of Al Masah Cayman or Al Masah DIFC established?

327. Yes - see above.

(b) Was Mr Dash knowingly concerned or knowingly involved, whether directly or indirectly, in the contraventions?

328. This sub-issue involves consideration of four aspects.

329. **Funds.** The Applicants contend that Mr Dash was not knowingly concerned in any contravention of Art 50 in circumstances where he reasonably believed that (i) the Holding Companies were not Funds, and (ii) any "offering" activities in or from the DIFC were carried out by Al Masah DIFC. Mr Dash did not regard the Holding Companies as "Funds" within Art 11. His evidence was that there were substantial differences between a fund structure and that of the Holding Companies, including that shareholders in the Holding

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Companies would have a measure of influence that unitholders in a fund do not have – and some shareholders had their own representatives on the board.

330. It is common ground that occasional references to the Holding Companies using the word "funds" do not change the position. In fact, the Holding Companies were usually referred to as "platforms" and distinguished from the Luxembourg and Cayman funds (which were consistently described as Funds, and treated accordingly). For example Mr Dash's "message from the Founder & CEO" does not refer to any of the Holding Companies as Funds, but rather refers to them (on 22 occasions) as platforms. The Compliance Officer, Ms Baines, did not regard the Holding Companies as being Funds for the purposes of CIL. She was required to file reports with the DFSA identifying those Funds that were being marketed by Al Masah DIFC, and she did not include the Holding Companies. The DFSA itself understood, from the various submissions and correspondence that the Holding Companies were regarded as "private equity vehicles" rather than Funds.

331. Equally, Ms Baines could not recall having at any stage advised management that the Holding Companies should have been classified as Foreign Funds, or having suggested that there was any regulatory non-compliance arising from the Holding Companies having the status of Foreign Funds (Day 3/29:7-17). Nor did Ms Baines' predecessors, who were external specialists, suggest that the private equity structures were Funds.

332. In the circumstances, Mr Dash was entitled to rely on the substantial measures put in place to ensure regulatory compliance, including the appointment of an experienced and well remunerated compliance officer. Mr Dash should not be the subject of any allegation in circumstances where Ms Baines' own view (and that of her predecessor) – and that of the DFSA itself, the Applicants contend - was that the Holding Companies were not Funds, and that the system by which Al Masah DIFC marketed the Holding Companies, and shares were issued by the Holding Companies themselves, did not give rise to Al Masah Cayman offering Units in contravention of the CIL (or any other regulatory breach).

333. It would be absurd to single out Mr Dash (and not Ms Baines) in being knowingly concerned in a contravention that he had no reason to believe might be occurring – especially when no criticism of any kind has been levelled against Ms Baines whose role it was to monitor and advise on the operations' compliance with DIFC law and regulations. That is particularly so given that the DFSA acknowledges that the points raised are "*head-scratchingly complicated*", even for specialists.

334. The DFSA points to the fact that in his first interview, Mr Dash was well aware that the investments acted much like Funds. That interview is replete with references to 'funds'.[1] When seen in context, Mr Dash recognised that the legal structure did not necessarily reflect the 'business form', and the private equity investments were 'exactly the same' as other funds. Mr Dash's refrain in respect of his first interview was that he was 'shaken up' (Day 4/85:15 and 89:8) but being stressed would not justify a regular and coherent discussion

[1] A search for the term 'fund' reveals 72 instances.

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about the investments as 'funds'. Further, the description of the investments as 'funds' stretched well beyond Mr Dash's interview into a number of settings. The Al Masah Annual Report 2012: "*In addition, Al Masah Capital established a new private equity fund that aims to invest in the food and beverage sector*". The Al Masah Corporate Overview dated January 2015 referred to six 'Funds'.

335. Walkers' advice that the investments were not funds for the purpose of Cayman Islands law is irrelevant and was given only in 2017. No advice has been disclosed about DIFC law. It appears that Walkers were only asked to provide advice on this issue in 2017 – after the commencement of the DFSA investigation - and then only in relation to Cayman not DIFC law.

336. As we see it Mr Dash was clearly aware that the investments were funds in the sense that he referred to them as such. If, as he claims, the Applicants had received advice that the investments were not funds it would have been easy for them to produce this. Indeed its absence is a little concerning. Against that the issue is, as the DFSA puts it, 'head-scratchingly' complex, there was nothing hidden or underhand about the structure and auditors, regulators and compliance officers could see it for what it was. The compliance officer did not pick up the issue and made returns accordingly. Furthermore having started to investigate the Applicants in November in 2015 it was not until much later that it occurred to the DFSA that the funds issue should be raised. This seems consistent with the complexity of the point. The answer on this issue is 'Yes', given the approach the law requires us to take.

337. **Marketing materials, the ANEL accounts for 2013 and 2014, Investor A and Distributor B.** Mr Dash sought to distance himself from these issues by claiming not to have any active roles in the companies, that placement fees did not have to be disclosed, and were not concealed and that he trusted compliance and other staff to ensure that matters were in order.

338. Mr Dash explained that his view was that there was no need for any disclosure (and certainly no need for any further disclosure beyond that given in the Articles) because the company, not the investor, was paying the fee (see e.g. Day 5/27:9-17; 34:23-35:12; 41:9-12, and 51:9-52:2). He said that this was industry practice – but there is no independent evidence of that. He also insisted that placement fees were not being concealed: the DFSA had been informed of them, and the compliance officers were aware of them, as were the lawyers and the auditors of the various companies (Day 5/34:23-35:2).

339. Mr Dash said that his role was that of a non-executive, not generally concerned in day-to-day operations having a largely hands-off role as a member of the Board of the Holding Companies (as would be expected of a Chairman of the Board). Mr Dash did not give accurate evidence about his role. He eventually conceded that his role was not non-executive (Day 4/18:15-17). Mr Dash was presented to the world as CEO: "*Shailesh is the Founder & Chief Executive Officer of Al Masah Capital Limited that, over the last 4 years, has successfully raised more than $1bn*". Mr Dash signed contracts for Al Masah Capital,

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when not signing on behalf of the Operating Companies, or Al Masah DIFC. The DFSA put to him several examples of him filling an executive role. It also points out that it was Mr Dash that Mr Lim went to with the suggestion that the 2014 ANEL accounts should be signed by him and Mr Singhdeo, avoiding Mr Sikander joining them in case "*he brings up the placement fee issue from last year*". Mr Dash confirmed that this was acceptable.

340. Marketing materials were reviewed by the Compliance Officers including Mr Basharat, Ms Baines' predecessor, to ensure that they were clear, fair and not misleading. In an email of 27 August 2012 (without any suggestion of secrecy albeit when dealing with a different subject) he had informed the DFSA that "*We have been charging placement fees to the PE companies for the fund raising*".

341. Mr Dash's claims about his role are wholly unconvincing. His job titles almost speak for themselves. Suggestions that the decisions about marketing materials and their compliance with regulation were for the compliance and other more junior staff are falsified by his active role in the transactions evidencing active steps to conceal the placement fees.

342. It is equally clear that Mr Dash and his colleagues did not want placement fees disclosed. According to the Applicants' own representations to the DMC – "*The Board Members of ANEL in various discussions about retaining their competitive edge in the market decided that Placement Fees should not be referred to in the financial statements included in the Annual Reports, and accordingly that the Annual Reports should not purport to include audited financial statements. ...*". Mr Dash dismissed this as "*writing by the lawyers*" [Day 5/103:10].

343. We have referred to Mr Dash's own role in the misleading of Investor A. In the email sent on 9 September 2014 Mr Dash gave an instruction that the table disclosing placement fee income of US$9.9 million should not be sent, having made a suggestion that placement fee income could be reduced to 3% in the information disclosed; the emails showing how the placement fee income had been reduced to US$2.2 million were copied to Mr Dash, and are inconsistent with the assertion that this was an honest attempt to describe fees in a legitimate way.

344. We have also referred to Mr Dash's awareness of the misleading financial statements two years running. The email exchange on 24 November 2014 evidences that Mr Dash understood the significance of sending annual reports, rather than signed audited statements, and contradicts his evidence that he was not aware of the falsity of the annual reports until November 2015. Furthermore Mr Dash's own message to investors in the 2013 annual report stated that "*I present the annual report and the audited financial statements*". Whilst he may not have drafted the text, he certainly read it and therefore knew what readers were being told.

345. The email exchange on 24 November 2014 shows his awareness of the misleading of Distributor B who had requested audited statements but ended up with the annual report instead.

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346. Mr Lim complained (in an email not copied to Mr Dash): "*RAJ – what you gave to Firas below is the WRONG VERSION of the separate financials – it contains the placement fees!!!!!!!*".

347. Nine minutes later Mr Lim emailed 'Firas' directly:

> "*All the documents you included below is correct EXCEPT for the Separate Financials in which Raj had an earlier wrong version.*
>
> *The correct version is as per what we have used in the annual report. Please just send a copy of the annual report which has the signed audit financials. And we will not like to send audited financials over the internet since we are already sharing the annual report but if they want to sight the signed audited financial statements they can come sight it at our office. …*"

348. Mr Dash approved the suggestion that Distributor B should be sent the annual report "*as it includes the financial statement*". The suggestion that Mr Dash's response shows that he did not understand that there was anything misleading about this seems to us to be misconceived.

349. While loyalty is commendable and Mr Dash showed this to his colleagues there was no suggestion from him that he in any way disapproved of any of the actions of Mr Singhdeo and Mr Lim.

350. The Applicants, led by Mr Dash, did not want to disclose the placement fees and took active steps to conceal them. Once that is accepted the various acts and omission relied upon by the DFSA and contested in detail by the Applicants fall into place. The answer to 16 (b) is 'Yes'.

17. As an Authorised Individual at the relevant times, has the Respondent shown that Mr Dash failed to observe high standards of integrity and fair dealing in breach of GEN Rule 4.4.1?

351. The Tribunal considered the question of integrity in Waterhouse at 226 and followed the approach adopted 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).

352. Applying that approach to the facts in the context of this case Mr Dash's knowing concern and involvement in the matters just mentioned by their nature involve a lack of integrity calculated as they were to facilitate the misleading of existing and potential investors.

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18. Has the Respondent shown that Mr Dash is not fit and proper to perform any function in connection with provision of Financial Services in or from the DIFC?

353. The reasons that cause us to reach the conclusions we do about integrity lead us to conclude that Mr Dash is not at present a fit and proper person.

If so, irrespective of which contraventions are established, is it open to the FMT to, and if so will the FMT, vary/substitute the decisions to impose a restriction on Mr Dash, pursuant to Article 59 of the Regulatory Law, on the grounds that his conduct demonstrates that he is not fit and proper to perform any functions in connection with the provision of Financial Services in or from the DIFC?

354. The Tribunal clearly has that power and considers the matter when dealing with sanctions.

19. If Mr Dash committed any contraventions, by being knowingly concerned or otherwise, what is the appropriate sanction (if any) in all the circumstances?

Sanctions are considered below.

Mr Singhdeo – Issues 20-24

20. Did Mr Singhdeo commit contraventions by reason of being knowingly concerned, as defined in Article 86 of the Regulatory Law, in contraventions by Al Masah Cayman and/or Al Masah DIFC? In this regard:

(a) Are any relevant contraventions on the part of Al Masah Cayman or Al Masah DIFC established?

355. Yes as explained above.

(b) Was Mr Singhdeo knowingly concerned or knowingly involved, whether directly or indirectly, in the contraventions?

356. The role of Mr Singhdeo has been considered when we reviewed that of Mr Dash and some of what we say above applies to him. Detailed examination of Mr Singhdeo's precise role in the issues of Investor A and Distributor B was conducted in evidence but it is clear that he had some role in each revealing that he was fully aware of the misleading nature of the exercise and that he was content to go along with it.

357. We mention now three areas where the role of Mr Singhdeo was more central.

358. **The accounts.** The Applicants accept, in their Grounds of Appeal, that the annual reports 'contained an error' but the DFSA says that the evidence demonstrates that the omissions from Notes 7 and 10 of the financial statements, were a deliberate choice by ANEL, and the reports were distributed by Al Masah in the knowledge that they were misleading. The

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DFSA says that, in reality, the same individuals – Mr Dash, Mr Singhdeo and Mr Lim – took charge in respect of both ANEL and Al Masah. Why else would this occur two years running?

359. The DFSA submits that Mr Singhdeo was less senior than Mr Dash, but he had a senior role in both the Al Masah companies and the Investment Companies. As CFO of Al Masah Cayman he had access to all the accounting information and part of his role was to ensure that placement fees were properly invoiced and accounted for. He therefore knew all about the placement fees. Mr Sikander Sharif was clear and unchallenged that his '*primary contact*' for the audit of ANEL was Mr Singhdeo although the latter disagreed while accepting that he was responsible for the placement fee discussions, which went as follows.

360. On 7 April 2014, Mr Sikander suggested an alternative to an earlier approach, such that the notes referred to 'Transaction costs' and stated "*Transaction costs represent costs placement fees (advisory fees) and other costs incurred in connection with the equity raising activity*". Mr Singhdeo replied the same day, editing the text so that it removed explicit reference to placement fees. The version in the accounts was similar, though not identical to, Mr Singhdeo's proposed text. Mr Singhdeo also accepted that, prior to this email chain, he had had a discussion with Mr Sikander in which he had requested that references to placement fees come out of the financial statements (Day 6/41:18-42:1).

361. The wording that Mr Singhdeo agreed to with EY was apparently not good enough, such that Notes 7 and 10 were deleted from the financial statements which were otherwise reproduced in the annual reports and which purported to be the 'audited' financial statements. On 30 September 2015, Mr Lim provided the 2014 annual report to be forwarded to a potential investor, stating in the first line: "*Please find attached the annual report of Al Najah Education Limited wherein the 2014 audited separate financial statements are found in the last section*" . That email was copied to Mr Singhdeo. When asked about this language in the opening words of an email, Mr Singhdeo said that he "*won't have paid attention… I can't control or comment on the language, what he has used*" (Day 6/154:4-6).

362. The three individuals with access to the word version of the real financial statements were Mr Singhdeo, Mr Lim and Mr Agarwalla. Mr Agarwalla would not have any motive to change them on his own initiative. Mr Singhdeo and Mr Lim, on the other hand, were senior employees within Al Masah Cayman, which received the placement fees and had an obvious motive for concealing them. By an email dated 2 August 2015 Mr Lim warned Mr Singhdeo that Mr Agarwalla might take "*our annual reports and 'edited' financials to EY*". Mr Singhdeo replied saying that Mr Agarwalla would not be able to "*take advantage of the accounting presentation he prepared*". Mr Singhdeo's explanation was that these phrases referred to 'summarised financials' which he believed to be in the annual report (Day 6/82:12-83:11) but that he did not check the annual reports. That is not consistent with the context. It is obvious that Singhdeo initiated this with Mr Lim even if he did not do the typing.

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363. **Marketing materials.** The Applicants claim that Mr Singhdeo did not send these out. By an email dated 9 February 2013, he provided the HML Offering Document and Teaser to three individuals, who he identifies as referral agents. By an email dated 31 May 2015, he sent marketing materials for ANEL to 'Pramod', apparently a referral agent. Consistently with the DFSA's position that Articles were not regularly sent out, Mr Singhdeo provided Investor Presentations, a 'Teaser' and a Subscription Form, but not the Articles. By an email dated 3 July 2015, he provided Subscription Forms for ANEL and HML to Ms Dhingra, a director at Al Masah. Looking at all the evidence it is clear that he did, directly or indirectly, send out marketing materials or cause them to be sent out.

364. **Corrective letter to shareholders.** The altered accounts of ANEL had been sent out to shareholders without the knowledge or approval of the auditors. That was of itself quite wrong and any Chartered Accountant should know this. The subsequent corrective letter was very misleading and the Applicants seek to excuse themselves by pointing to the fact that it was sent out because of the need to comply with a deadline. While that is correct when looked at in isolation, this is no excuse when seen in context, as the Applicants must themselves be aware. Having heard the witnesses and read the correspondence it clear to us what happened following the despatch of misleading accounts. On 23 November 2015, Mr Sikander Sharif met Mr Singhdeo and Mr Lim to agree a course of action. Mr Singhdeo and Mr Lim referred to the differences as 'printing errors', which EY did not accept. Mr Sikander then wrote the email to Mr Singhdeo and Mr Lim, summarising their discussion and stating:

> "*We require you to write to the shareholders of Al Najah Education Limited intimating that you are seeking to withdraw the annual reports for years ended 2013 and 2014 which were distributed to them due to material omissions in the financial statements included in the annual reports and as such those financial statements should be considered erroneous. As discussed, the letters should have space for the shareholder to acknowledge and the shareholder should be requested to return the signed letter directly to EY. We would be happy to review the draft wording if you require assistance.*"

365. Mr Sikander's evidence was that he was clear at the meeting that EY would have to review the wording of a letter (Day 3/111:1-3). The next day, Mr Lim provided a draft letter to EY ("*After consultation with the management here*"), which referred to "*erroneous printing in parts*". That draft set out in detail the 'erroneous note' and the 'actual note'. After that, Al Masah sent a different draft to Protiviti and by the time that EY had sent back a draft replacing "*printing errors*" with "*material errors of omission*" the letter had been finalised and despatched. At 20:14, Mr Dash emailed Ms Zudikova and Ms Benseghir, asking them to work over the weekend, stating that "*There cannot be anything more urgent and important than this*". The courier packs were dispatched on the evening of 29 November 2015.

366. The fact that the Applicants obtained a draft from Protiviti which they must have known would not have been acceptable to EY and that EY did not respond to enable a deadline (of

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no great significance in itself) to be met is of course no excuse for putting out a letter which they knew to be untrue.

367. As with Mr Dash we return to our perception that all these individual events form a pattern and however much the detail of the role of Mr Singhdeo is refined it is plain that he was centrally involved in an arrangement to conceal placement fees from actual and potential investors.

21. Did Mr Singhdeo contravene Article 41B of the Regulatory Law by counselling or procuring or being knowingly involved in the alteration of a copy of a bank statement?

368. Yes for the reasons set out below where we consider the position of Mr Lim.

22. As an Authorised Individual at the relevant times, has the Respondent shown that Mr Singhdeo failed to observe high standards of integrity and fair dealing in breach of GEN Rule 4.4.1?

23. Has the Respondent shown that Mr Singhdeo is not fit and proper to perform any function in connection with provision of Financial Services in or from the DIFC?

369. Yes. The same considerations arise as in the case of Mr Dash.

If so, irrespective of which contraventions are established, is it open to the FMT to, and if so will the FMT, vary/substitute the decisions to impose a restriction on Mr Singhdeo, pursuant to Article 59 of the Regulatory Law, on the grounds that his conduct demonstrates that he is not fit and proper to perform any functions in connection with the provision of Financial Services in or from the DIFC?

370. Yes it is open to the Tribunal and the issue is considered with sanctions.

24. If Mr Singhdeo committed any contraventions, by being knowingly concerned or otherwise, what is the appropriate sanction (if any) in all the circumstances?

371. Sanctions are considered below.

Mr Lim – Issues 25-28

25. Did Mr Lim commit contraventions by reason of being knowingly concerned, as defined in Article 86 of the Regulatory Law, in contraventions by Al Masah Cayman and/or Al Masah DIFC? In this regard:

(a) Are any relevant contraventions on the part of Al Masah Cayman or Al Masah DIFC established? **Yes for reasons given above.**

(b) Was Mr Lim knowingly concerned or knowingly involved, whether directly or indirectly, in the relevant activities that constitute contraventions?

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372. The DFSA says that Mr Lim was knowingly concerned in the contraventions involving misleading or deceptive statements being made, because of his knowledge that the financial statement in ANEL's annual reports did not make disclosure of placement fees, his involvement in the preparation of the information to be sent to Investor A and sending ANEL's annual reports to Distributor B and prospective investors (Lim Decision Notice para 58). It also contends that Mr Lim knew that placement fees had not been disclosed in the marketing material.

373. The Applicants point to what Mr Lim says in his witness statement. He says that he had not appreciated that the annual reports gave the impression of including the full audited accounts, rather than a summary. He also said that his instruction that the financial statements should only be accessible to himself, Mr Agarwalla and Mr Singhdeo was because he understood that the level of placement fees were sensitive commercial matters. He was aware of the accounting treatment in the audited financial statements: and he explained in his statement that his suggestion that he and Mr Singhdeo should sign ANEL's 2014 financial statements was simply because the presence of Mr Sikander at an audit committee meeting could lead to an unnecessary debate, on an issue that had been debated at length the previous year. Mr Lim understood that the circulation of annual reports was limited to shareholders on request, as well as referral agents.

374. The Applicants also defend Mr Lim's involvement in the sending of corrective letters. His first draft of a letter referred to "*erroneous printing*" but also fairly set out the whole of the erroneous and actual notes, such that shareholders would have full disclosure. He also sent the draft to EY for approval (which he was not required to do) and must therefore have thought it was suitable to be approved, i.e., would meet their expectations. In the event, his draft was superseded by the Protiviti draft. For the general reasons we gave when discussing Mr Singhdeo these assertions outside the full context do not affect the clear overall picture of what happened referred to above.

375. The Applicants contend that Mr Lim was not closely involved in the alleged misleading of Investor A in the provision of the breakdown of Al Masah Cayman's fee income by reference to arguments that we have already considered for the other individuals and by citing aspects of the emails to minimise his role. As we see it this does not change the overall picture which is that he was aware and involved.

376. The Applicants also argue that Distributor B had initially asked for audited financial statements and Mr Lim's view was that if they wished to see the audited statements, they could visit the office to do so, and that the provision of the annual reports (which he understood contained a summary) would be sufficient for their purpose. It is improbable that this was his understanding. He also chose not to give evidence about it. These and other claims about the changes to the accounts are unconvincing and of course unsupported by live evidence.

377. In view of these considerations, the role of Mr Lim and his written communications referred to elsewhere above we have no doubt that he was as involved as the other individuals, albeit

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in the most junior role of the three, in seeking to conceal the placement fees in the ways alleged by the DFSA.

378. The answer is 'Yes'.

26. Did Mr Lim* [and Mr Singhdeo] *contravene Article 41B of the Regulatory Law by counselling or procuring or being knowingly involved in the alteration of a copy of a bank statement?

379. The central facts of this incident are clear and as set out in the Decision Notices. On 19 September 2014, the financial controller of ANEL raised with Mr Lim the difficulty of reconciling entries in an ANEL bank account at Royal Bank of Canada with other accounts and transactions. Mr Lim told him to alter the bank statements. On or about 9 December 2014 the financial controller, acting on the instructions of Mr Singhdeo and Mr Lim, deleted entries and made alterations to a copy bank statement relating to the period 15 August 2013 to 29 October 2013. The effect of the deletions and alterations was to disguise the origin of funds paid into the RBC Account and to conceal the payment of Placement Fees into and out of the account. Mr Singhdeo was sent copies of the genuine bank statement and the alteration and asked to comment on the differences in the physical appearance of the statement. Mr Singhdeo responded to this request with a query about why some payments to ANEL and deposits from an investor were still appearing in the bank statement, by implication requiring that further alterations be made. Mr Singhdeo also received two emails from Mr Lim commenting on the appearance of the altered copy. The DFSA says that Mr Singhdeo thereby counselled or procured or was knowingly involved in the alteration. Copies of the falsified bank statement were found in a folder relating to ANEL audit documents. The DFSA says that the purpose of preparing the altered bank statement was to make it available to be viewed by the auditors of ANEL, in the event they requested access to bank statements.

380. There are relevant emails including these. On 19 September 2014, Mr Agarwalla wrote to Mr Lim that he was "*having difficulties in adjusting placement fees against the AED fund. Also we have transferred 4million USD from RBC to FGB new Cayman a/c… How to hide this a/c, it has 3.28 million usd balance*". Mr Lim replied "*Alter the statements*".

381. On 9 December 2014 Mr Agarwalla wrote to Mr Singhdeo and Mr Lim:

> "*Dear NS/Don,*
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> *Please find attached RBC statement both for same period 15th Aug13 to 29Oct13. It is taking lot of time to adjust the alignment, font etc. But I will finish this by tomorrow and mean time Al Najah Dubai entity we are starting from tomorrow morning. More than this bringing perfection in PDF modification and mainly in alignment/font is not possible I feel, unless we give it to a professional person.*
>
> *Kindly see both the attachment RBC1 and RBC-15th Aug13-29Oct13 final and compare it with original and check if it is ok.*"

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382. Attached to that email were the genuine RBC bank account statement, and two forged versions of that bank account statement. Mr Lim responded at 00:38 (10 minutes later) stating that he would look at it the following day (i.e. later that day, given the time) but "*as long as we convert all and back so it all looks similar its ok*". Later that morning, at 10:12, Mr Lim stated that "*Only thing I see is that some alphabets are slightly larger than the other alphabets. Is that the case when you convert from pdf to word back to pdf?*". Mr Agarwalla replied at 10:43 with a one word reply: '*Yes*'. At 11:26, Mr Singhdeo responded to Mr Agarwalla's original email, stating "*Raj – Please review the yellow highlighted number from the statement. In the attached document, I also note that there is a transfer to Zent International of USD 250,000. Why this is getting reflected in the statement. This is one of the repurchase carried out. Hope, you have adequately reviewed the entire bank statement of RBC, and have gone through each debit and credit item*". Mr Lim followed that up at 11:57 suggesting that "*the attachment below is the original one before changes?*". Mr Lim was noting that the two items raised by Mr Singhdeo had already been amended in the forged versions. At 12:01, Mr Agarwalla replied that he had spoken to Mr Singhdeo and '*clarified*' this issue.

383. The DFSA says that these emails speak for themselves. Mr Agarwalla was sending his superiors two forged versions of a bank statement, making it clear in his email that he was having difficulties creating forged versions that would satisfy any close inspection. Mr Singhdeo and Mr Lim commented on these documents. They asked no questions about why he was forging the bank statements because they had given him the task.

384. The DFSA says that Mr Singhdeo's evidence that he had no involvement in or knowledge of the task is false. The only rational reason for Mr Agarwalla emailing Mr Singhdeo is because the latter knew what the task was. Neither Applicant questioned why alignments or fonts were being adjusted because they must have known very well. The only reason put forward by both Mr Singhdeo and Mr Lim to explain the emails is that Mr Agarwalla was engaged in a reconciliation for ANEL. There would be no need to produce forged bank statements for that purpose.

385. The Applicants point out that Mr Agarwalla was not called to give evidence and say that the DFSA is unable to identify who it is said was intended to be misled (and how and why) by the altered statement or show that any altered bank statement was ever provided to anyone for any purpose, let alone that anyone was in fact misled. If the altered bank statement was not in fact shown, or likely to be shown, to anyone, then there was no misleading, deceptive, fraudulent or dishonest conduct (or conduct likely to mislead or deceive). Further there is no evidence that the conduct was "*in connection with a Financial Product or Financial Service*".

386. It is said on behalf of Mr Lim that his remark "*alter the statements*" was in the context of a discussion between Mr Lim and Mr Agarwalla in relation to the reconciliation of placement fees with investor subscription monies. Mr Lim's reply was in relation to reconciling the AED position with the USD position. It is also said that it would be unfair to make any adverse finding against Mr Lim on the basis of Mr Agarwalla's unsatisfactory evidence.

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387. We accept most of the DFSA's submissions. The documents speak for themselves. Mr Lim's account in his witness statement is implausible and makes little sense. Mr Singhdeo's denials in evidence are falsified by the record. The emails assume that the Applicants knew all about this. Any honest business person who did not know the details would immediately have asked and then put things right. The forgery was intended to mislead or deceive; otherwise it would have served no purpose and, relating to placement fees it was obviously in connection with a Financial Product or Service as defined. We cannot be sure what the purpose of this exercise was but it seems to be the Applicants and others seeking to cover their tracks. It is common where dishonesty is uncovered and those involved decline to tell the truth about it for there to be a lack of precision. That is of course no reason not to recognise and address the dishonesty. It goes to the gravity of the incident not to whether it happened at all. This is clearly a breach of Art 41B, dishonesty in relation to a financial product or service and both Mr Lim and Mr Singhdeo were involved. The answer is 'Yes'.

27. Has the Respondent shown that Mr Lim is not fit and proper to perform any function in connection with provision of Financial Services in or from the DIFC?

388. Yes, essentially for the reasons given under issue 25.

If so, irrespective of which contraventions are established, is it open to the FMT to, and if so will the FMT, vary/substitute the decisions to impose a restriction on Mr Lim, pursuant to Article 59 of the Regulatory Law, on the grounds that his conduct demonstrates that he is not fit and proper to perform any functions in connection with the provision of Financial Services in or from the DIFC?

389. Yes. The matter is considered separately with sanctions.

28. If Mr Lim committed any contraventions, either by being knowingly concerned or otherwise, what is the appropriate sanction (if any) in all the circumstances?

390. Sanction is considered separately.

29. What, if any, order should made as to costs?

391. Costs are considered below.

SANCTIONS

392. The parties have made extensive and helpful submissions and for brevity we refer to their competing arguments only briefly when turning first to the general considerations and then to those of the individual Applicants. We do however bear all the submissions closely in mind including those we do not mention.

393. **The relevant legal and regulatory provisions as regards penalty**. Article 29(4) of the Regulatory Law provides: "*At the conclusion of a reference, the FMT may do one or more*

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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." Thus the Tribunal is free to retake the decision about sanctions if it considers it appropriate to do so. In a case where the Tribunal has reached substantially the same conclusions as the DMC it may well be sufficient for us to review the submissions of the parties about the penalty and then affirm or vary that decision. Where there are significant differences between the conclusions of the DMC and those of the Tribunal then we will often re-take the sanctions decision.

394. 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)); "*make a direction requiring the person to effect restitution or compensate any other person in respect of the contravention within such period and on such terms as the DFSA may direct*" (Article 90(2)(c)); or, "*make a direction prohibiting the person from holding office in or being an employee of any Authorised Person […]*" (Article 90(2)(g)).

395. 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.*"

396. Article 59(1) provides for the possibility of future review of the imposition of a restriction by the DFSA. 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.

397. **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.

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398. 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, 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.

399. 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 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.*"

400. We have set out the penalties imposed by the DMC at 13 above.

401. **General.** The DFSA seeks to maintain the sanctions imposed by the DMC. It emphasises particularly the Art 8(3) objectives, the importance of ensuring that investors are not misled, the seriousness of the contraventions and their impact on investors, the deliberate policy not to disclose placement fees to investors implemented over five years, the material effect of that policy on investors and the active steps to conceal taken by the individual Applicants. It emphasises these factors saying that they, rather than characterisation of the charges in terms of Funds or otherwise, are what is important.

402. The Applicants analyse the history of the dispute from the first memorandum from Enforcement to the DMC to submit that until the hearing the DFSA was focussed on the 'structural contraventions' relating to Funds causing them to obtain the 'badge' of authorisation without the actual oversight from the Regulator which goes with that. The Applicants point to a changing emphasis which they say led the DFSA to concentrate only on the 'misleading communications'. This shows that the DFSA accepts that, as the Tribunal found, the structural contraventions were less serious than the DMC found them to be and the sanctions should be reduced to reflect that.

403. As we see it the distinction between structural and concealment contraventions should not obscure the main feature of this case. We are not concerned with appraising the degree of importance the DFSA appears to have given to each at various points. The DMC rightly saw concealment as by far the greater issue - see for example paragraphs 6 and 7 of Mr Dash's Decision Notice. This was a case of serious and deliberate concealment over a long period aggravated to a degree by an appearance of regulation without its substance.

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404. **Prohibition and Restriction**. The parties make submissions about the power to impose these sanctions. The DFSA submits that the key question is whether the contraventions demonstrate a lack of fitness and propriety. Key to this is the honesty, integrity and reputation of the individual. It follows therefore that a finding of lack of integrity or dishonesty justifies a prohibition direction being made, citing the UK Upper Tribunal made the same point in Bedford v FSA (FS/2010/0015) at §13: "*The purpose of the provision is not, as is sometimes thought, to punish the individual but to protect the public. For that reason the effects on the person concerned of prohibition are, at best, a subsidiary factor; the primary focus must always be on whether any lesser course is adequate for public protection. Nevertheless the consequences for an approved person of his being prohibited are likely to be severe, and the step should correspondingly not be taken lightly; and it is no doubt for that reason that sub-s (2) provides that the Authority may, rather than must, make a prohibition order.*"

405. The Applicants submit that the key question is whether protection of the public in the DIFC requires that the individual be the subject of a prohibition or restriction order, bearing in mind the broad effect of such an order and the impact it will have upon the individual and his ability to earn a livelihood. Bolton v Law Society [1994] 1 WLR 512, which concerned solicitors and a very different context, cannot simply be read over into the approach that ought to be taken by the DFSA or FMT. (We agree with the Applicants that we are not concerned with activity outside the DIFC.)

406. Mr Dash submits that he should not be subject to a Prohibition, a measure intended not to punish but to protect the public. He points to his distinguished career and the financial consequences he has suffered from the events in dispute. He has not been accused of any financial crime or seeking personal monetary gain and has lived through all this for four years. Should any restriction be needed it should be a limited one. Mr Singhdeo and Mr Lim make similar points.

407. It is clear to us that whichever emphasis one places on the provisions the three individual applicants must be subject to the Prohibitions imposed by the DMC. We refer to and do not need to repeat the reasons we have given above in concluding in each case that the individual has failed to observe high standards of integrity and is not a fit and proper person to perform any function in connection with the provisions of financial services in or from the DIFC. We have carefully considered the submissions made on behalf of each individual but the seriousness of our conclusions and the absence of recognition or acceptance of wrongdoing make that decision essential and do so even on the DFSA's alternative case.

408. **Comparables.** As to the financial penalties imposed, the Tribunal will have in mind fines imposed in previous cases. As we said in Waterhouse at [269], comparables can provide a check, though each case is different, and the level of penalty that is appropriate in a given case is ultimately an exercise of judgment applying all factors relevant to the particular case under consideration. We bear the comparables in mind as a useful indicator and check but we do not arrive at our decision by extrapolating from particular past cases. None of these are very similar to the present case.

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409. **Al Masah Cayman.** The DFSA says that while it is not possible to determine the economic benefit to the company of concealment of the placement fees and no restitution is sought, the magnitude is considerable - US$29 million of which US$8.8m was paid to agents. The US$2,000,000 starting point is a small fraction of the relevant profits made by the company. The DMC was right to raise that by 50% at Step 2 to take account of the concealment. Mitigation advanced by the company is thin. It could not have been properly advised to conceal, its good disciplinary record has to be seen against its short active life and the length of time for which the contraventions continued.

410. The company says that it obviously earned no profit from the structural contraventions and the placement fees would still have been earned even if disclosed. It suggests that the evidence to the contrary is thin. (Tribunal - As we see it a difficulty in quantification does not mean that the vice did not exist. While the only direct evidence of this came from Mr Clink in cross examination it is a reasonable inference to draw that investors would have been deterred by disclosure of such high fees and indeed that is almost certainly why the matter was concealed. As a specialist tribunal with knowledge of this area we have no doubt that the company benefited from substantial investment that would not otherwise have been made). Any fine should reflect the net not the gross fees received by the company.

411. The structural contraventions were not deliberate or reckless and involved rules that were very complex about which the company had advice from an experienced compliance officer and from outside. (Tribunal - As we have pointed out above we have seen no relevant outside advice and the company has not sought to explain its absence). The company's co-operation and good record should be considered in mitigation at Stage 2 to offset the aggravating features which the company says are mainly the concealment which was already built into Stage 1. Deterrence at Step 4 should be minimal because the company has already suffered considerably and there should also be a reduction to take account of the financial hardship. The effect of the fine will be to reduce any dividend to other creditors.

412. We do not repeat the conclusions reached above except to emphasise that this was a deliberate concealment calculated to deceive investors that persisted over a substantial period, from which the company will have benefited considerably. Despite all the mitigation put forward including the suggestions that the DMC may have overestimated the scale of the placement fees, whether one sees this as a review of that body's decision or the separate determination of a penalty following the steps, US$3 million is the lowest fine that justice will permit us to impose.

413. **Al Masah DIFC**. Similar considerations apply to this company and it is common ground that the contraventions were serious but less so than those of Al Masah Cayman.

414. The DFSA mentions that the company produced the misleading materials and gave legitimacy to the wider venture. The company says that the structure was not deliberately set up to avoid regulation and relies on similar points to those put forward by Al Masah Cayman and its own poor financial position.

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415. By the same process of reasoning we apply to Al Masah Cayman and for the reasons given by the DMC the fine for Al Masah DIFC will be US$1.5 million.

416. **Mr Dash**. The DFSA points to his senior position and to the Tribunal's conclusions as to his integrity in these matters and that he is not at present a fit and proper person. The sanctions imposed by the DMC should be upheld.

417. Mr Dash suggests that his 'knowing' responsibility for the structural contraventions does not warrant penalty for the reasons that apply to Cayman and because this was a structure that was very complex, set up openly with external and internal expert advice and of concern to the DFSA only late in the day.

418. Mr Dash makes submissions about the concealment issue some of which are not consistent with our findings of fact. He suggests that the absence of a paper trail and our reliance on inference shows that he was a distance from the offending acts. Further, any concealment was from the market but not from others or even the DFSA. He also submits that the current financial penalty reflects the structural allegations excessively. Mitigation in terms of cooperation, record and absence of concern shown by the DFSA over the years has not been taken account of. As with the companies, aggravating features have in effect been double counted. Consideration of the comparables suggest a penalty in the low five figures.

419. We do not repeat our conclusions about Mr Dash except to point out that he was not as we have found, at a distance from the offending acts (which he has himself done nothing to disassociate himself from or to criticise). Given his senior position, the gravity of the breaches and his role in them and the mitigation put forward on his behalf we consider that by the same process of reasoning we have adopted for the companies the fine must be US$225,000.

420. **Mr Singhdeo.** The DFSA relies on our findings, the senior role of Mr Singhdeo and the deliberate non-disclosure of placement fees. It says that this with his actions over the financial statements of ANEL and the bank statement show dishonesty and lack of integrity requiring us to uphold the penalties imposed by the DMC.

421. Mr Singhdeo points out that he did not himself produce the misleading draft letter and the final version came from Protiviti. He did not himself alter the bank statement and it was not used for any purpose. He made no personal gain from either matter nor from his role with the ANEL reports. He makes similar points as to financial penalty to those on behalf of Mr Dash.

422. We agree with the DFSA but, perhaps as a result of seeing his evidence examined in detail, see Mr Singhdeo's responsibility as somewhat greater than that reflected in the fine imposed by the DMC. By the same process of reasoning we impose a fine of US$175,000.

423. **Mr Lim.** The DFSA accepts that Mr Lim was the most junior of the individuals but says he was relatively senior in the business. It relies on his role in the concealment and also in the falsification of ANEL statements and the bank statement.

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424. Mr Lim advances similar arguments to Mr Singhdeo adding that any restriction should be limited as he had no licensed role and is based in Singapore. As he sent the draft corrective letter to Ernst & Young he cannot have regarded it as misleading or inappropriate (a point we do not accept).

425. We have nothing to add to the views we have already expressed about Mr Lim. By the same process of reasoning adopted with the other Applicants we impose a fine of US$150,000.

426. **Alternative Case**. We do not think it appropriate to consider the question of sanctions on the Alternative case.

COSTS

427. The Tribunal has the power under Article 31(9) of the Regulatory Law to order a party to pay costs: "*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.*"

428. We also bear in mind Article 74 which states*:* "*The FMT may not make an order for costs against a person (the "paying person") without first: (a) giving that person an opportunity to make representations; and (b)if the paying person is an individual, considering that person's financial means.*"

429. We received helpful submissions from the DFSA on 7 October and from the individual Applicants on 18 October. On 21 October, those now administering the first two applicants informed the Tribunal that they are taking a neutral position in the proceedings.

430. We do not need to decide between the various approaches discussed by the parties since as we see it the position is clear. The FMT has been given a broad discretion which does not oblige it to adopt either a traditional 'costs follow the event' approach or one set out in a UK or other common law statute. The Tribunal needs to take a flexible approach to deal with the very varied and international range of issues it may have to address. While some cases may merit a 'costs follow the event' approach others may not. There may well in future be cases where no order for costs is made despite an application not being successful. We are fortified in this approach by the observations, cited to us by the individual applicants, of the DIFC Court of Appeal in Sky News Arabia FZ-LLC v Kassab Media FZ (LLC) [2016] DIFC CA 10 (12 July 2017) at [145] emphasising that the "*court had the discretion to award costs with consideration of the entirely of the surrounding circumstances*" and that it was "*not bound by the general rules that the party that has been successful overall is usually awarded its costs.*"

431. We bear in mind all the considerations drawn to our attention in the submissions. As we see it the following considerations are particularly important.

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432. The Applicants knew or should have known from the outset that if and when the truth emerged the applications were bound to fail whichever view of the law prevailed. The fact that one aspect of the case raised complex legal issues is thus of limited relevance. That is a particular reason why the Applicants should pay the costs and we will order them to do so.

433. The costs should be apportioned between the Applicants. The fact that some applicants are insolvent is not a reason either not to make costs orders to prove in the liquidations or to pass that burden onto the individual applicants.

434. The disparity between the financial penalties is not a good reason to order the first and second Applicants to pay more costs than the others given, amongst other reasons, the role of the individuals in one or both of the companies.

435. Despite what is said in Section D para 23 of the Applicants' Submission on Costs, the individuals have not chosen to disclose the detailed information about their means required if real financial hardship had been claimed. We do however bear in mind all the personal considerations referred to in the submissions.

436. It follows that twenty per cent of the costs should be paid by each of the first two Applicants and sixty per cent by the individuals. As we see the role of Mr Lim and his likely involvement in the case as being less significant than that of his former colleagues that sixty per cent should be paid so that the third and fourth Applicants pay twenty four per cent of the total and the fifth Applicant twelve per cent.

437. Looking at the case broadly we do not think it appropriate for the Applicants to have to pay all the costs of the preliminary issue. We will therefore vary the order on that matter to no order for costs. Should it be suggested that we lack the power to do this we vary this costs order to bring about the same result.

438. The figures for costs do not seem to us to be unreasonable and the information we have is sufficient for summary assessment in the amounts claimed.

CONCLUSION

439. The Decision of the DMC is upheld. The First and Second Applicants will pay financial penalties of US$3 million and US$1.5 million respectively. The Third, Fourth and Fifth Applicants will pay financial penalties of US$225,000, US$175,000 and US$150,000 and be subject to Prohibitions. The Applicants will pay costs as ordered above.

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ANNEX 1 – RELEVANT LEGISLATION AND REGULATORY PROVISIONS

This annex sets out the text of relevant legislation and regulatory provisions in force during the Relevant Period.

1. RELEVANT LEGISLATION

Regulatory Law - DIFC Law No.1 of 2004 (Regulatory Law 2004)

8. The Powers, Functions and Objectives of the DFSA

(…)

(3) In performing its functions and exercising its powers, the DFSA shall pursue the following objectives:

(…)

(b) to foster and maintain confidence in the financial services industry in the DIFC;

(…)

(d) to prevent, detect and restrain conduct that causes or may cause damage to the reputation of the DIFC or the financial services industry in the DIFC, through appropriate means including the imposition of sanctions;

(e) to protect direct and indirect users and prospective users of the financial services industry in the DIFC;

(…)

Other relevant extracts from the Regulatory Law 2004 are set out below.

41. The Financial Services Prohibition

(1) Subject to Article 41(9) and Article 42(3), a person shall not carry on a Financial Service in or from the DIFC.

(2) The DFSA shall make Rules prescribing the activities which constitute a Financial Service.

.

(3) The prohibition in Article 41(1) is referred to in the Law as the "Financial Services Prohibition".

(4) The DFSA may make Rules adding to, removing activities from, or otherwise modifying the list of Financial Services made under Article 41(2).

(5) A person shall, in engaging in activity constituting a Financial Service, or in engaging in any like activity that may constitute a Financial Service except for the form and manner in which the activity is carried out, comply with Federal Law to the extent that such law applies in the DIFC.

(6) DELETED

(7) DELETED

(8) DELETED

(9) A Fund is exempt from the Financial Services Prohibition with respect to any Financial Service which is carried on for the purposes of, or in connection with, the Fund if the Fund has a Fund Manager or External Fund Manager that falls within Article 42(3) (a) or (b). This exemption applies to a Fund even where it does not have legal personality.

41A. Financial Promotions Prohibition

(1) A person shall not make a Financial Promotion in or from the DIFC except as prescribed by the Rules made pursuant to this Article.

(2) The prohibition in Article 41A(1) is referred to as the "Financial Promotions Prohibition".

(3) For the purposes of the Financial Promotions Prohibition, a Financial Promotion is any communication, however made, which invites or induces a Person to:

(a) enter into, or offer to enter into, an agreement in relation to the provision of a financial service; or

(b) exercise any rights conferred by a financial product or acquire, dispose of, underwrite or convert a financial product.

(4) For the purposes of the Financial Promotions Prohibition, the DFSA may make Rules as to:

(a) a person or class of persons who may make a Financial Promotion in or from the DIFC and any requirements which apply to such persons when doing so; and

.

(b) any other definition, requirement or matter which the DFSA considers necessary to give effect to the requirements or intent of the Financial Promotions Prohibition.

41B. General prohibition against misconduct

(1) A person must not, in or from the DIFC, engage in conduct in connection with a Financial Product or a Financial Service that is:

(a) misleading or deceptive or likely to mislead or deceive;

(b) fraudulent; or

(c) dishonest.

(2) The DFSA shall make Rules prescribing what constitutes a Financial Product for the purposes of Article 41B (1).

(3) Nothing in this Article limits the scope or application of any other provision in legislation administered by the DFSA.

42. Authorised Firms, Authorised Market Institutions and Financial Services

(1) The DFSA shall make Rules prescribing which kinds of Financial Services, with such modifications or limitations as may be specified may be carried on by:

(a) an Authorised Firm; and

(b) an Authorised Market Institution.

(2) The DFSA may make Rules adding to, removing activities from, or otherwise modifying the lists of Financial Services prescribed under Article 42(1).

(3) A person may carry on one or more Financial Services in or from the DIFC if such person is:

(a) an Authorised Firm whose Licence authorises it to carry on the relevant Financial Services;

(b) an External Fund Manager as defined in Article 20(5) of the Collective Investment Law 2010, in so far as its activities relate to a particular Domestic Fund that falls within Article 41(9); or

(c) an Authorised Market Institution whose Licence authorises it to carry on the relevant Financial Services.

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(4) An Authorised Firm or Authorised Market Institution shall:

(a) act within the scope of its authority under its Licence; and

(b) comply with any condition or restriction applicable to its Licence.

(5) A person who is not an Authorised Firm or Authorised Market Institution shall not represent that he is such a person.

…..

PART 6: CONTRAVENTIONS AND FINES

85. General Contravention Provision

(1) A person who:

(a) does an act or thing that the person is prohibited from doing by or under the Law, Rules or other legislation administered by the DFSA;

(b) does not do an act or thing that the person is required or directed to do by or under the Law, Rules or other legislation administered by the DFSA; or

(c) otherwise contravenes a provision of the Law, Rules or other legislation administered by the DFSA; commits a contravention of the Law, Rules or other legislation, as the case may be, by virtue of Article 85 unless another provision of the Law, Rules or other legislation administered by the DFSA provides that the person commits, or does not commit, a contravention.

(2) In Article 85, 'person' does not include the DFSA or the President.

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90. Sanctions and directions

(1) Where the DFSA considers that a person has contravened a provision of any legislation administered by the DFSA, other than in relation to Article 32, the DFSA may exercise one or more of the powers in Article 90(2) in respect of that person.

(2) For the purposes of Article 90(1) the DFSA may:

(a) fine the person such amount as it considers appropriate in respect of the contravention;

(b) censure the person in respect of the contravention;

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(c) *make a direction requiring the person to effect restitution or compensate any other person in respect of the contravention within such period and on such terms as the DFSA may direct;*

(d) *make a direction requiring the person to account for, in such form and on such terms as the DFSA may direct, such amounts as the DFSA determines to be profits or unjust enrichment arising from the contravention;*

(e) *make a direction requiring the person to cease and desist from such activity constituting or connected to the contravention as the DFSA may stipulate;*

(f) *make a direction requiring the person to do an act or thing to remedy the contravention or matters arising from the contravention; or*

(g) *make a direction prohibiting the person from holding office in or being an employee of any Authorised Person, DNFBP, Reporting Entity or Domestic Fund.*

(…)

(5) *If the DFSA decides to exercise its power under this Article in relation to a person, the person may refer the matter to the FMT for review.*

Collective Investment Law - DIFC Law No.2 of 2010 (Collective Investment Law 2010))

PART 2: DEFINITIONS

Chapter 1: Collective Investment Funds

11. Arrangements constituting a Collective Investment Fund

(1) *A Collective Investment Fund ("Fund") is, subject to Article 12, any arrangements with respect to property of any description, including money, where:*

(a) *the purpose or effect of the arrangements is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income;*

(b) *the arrangements must be such that the persons who are to participate ("Unitholders") in the arrangements do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions; and*

(c) *the arrangements have either or both of the following characteristics:*

.

(i) the contributions of the Unitholders and the profits or income out of which payments are to be made to them are pooled; or

(ii) the property is managed as a whole by or on behalf of the Fund Manager.

(2) If the arrangements provide for such pooling as is mentioned in Article 11(1)(c)(i) in relation to separate parts of the property, the arrangement is not to be regarded as constituting a single Fund unless the Unitholders are entitled to exchange rights in one part for rights in another.

12. Arrangements not constituting a Collective Investment Fund

The DFSA may, by Rules, specify when arrangements or types of arrangements that meet the definition of a Fund in Article 11(1) do not constitute a Fund.

Chapter 2: Types of Funds and relevant criteria

13. Domestic and Foreign Funds

(1) A Fund is either a Domestic Fund or a Foreign Fund.

(2) A Fund is a Domestic Fund if it is either:

(a) established or domiciled in the DIFC; or

(b) an External Fund as defined in Article 14(1).

(3) A Fund that does not meet the Domestic Fund criteria in Article 13(2) is a Foreign Fund.

14. An External Fund

(1) An External Fund is a Fund which is:

(a) established or domiciled in a jurisdiction other than the DIFC; and

(b) managed by a Fund Manager which is an Authorised Firm.

(2) The requirements relating to Domestic Funds do not apply to an External Fund except to the extent otherwise provided in this Law or the Rules.

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19. Definition of an Offer of Units

(1) An "Offer" of a Unit of a Fund constitutes any one or more of the activities specified in Article 19(2) and such activities may also be referred to as "marketing" of Units of Funds.

(2) A person is to be regarded as making an Offer of a Unit if he:

(a) makes an offer to another person which, if accepted, would give rise to a contract for the issue or sale of Units by him or by another person with whom he has made arrangements for the issue or sale of the Units; or

(b) invites another person to make an offer which, if accepted by him, would give rise to a contract for the issue or sale of Units by him or by another person with whom he has made arrangements for the issue or sale of the Units, whether or not the offer or invitation referred to in Article 19(2)(a) or (b) is made by way of a financial promotion of the Units.

(3) For the purposes of Article 19(2), a "financial promotion" includes an advertisement or any other form of promotion, marketing or inducement inviting a person to:

(a) enter into an agreement;

(b) offer to enter into an agreement; or

(c) exercise any rights conferred by a Unit

to acquire, dispose of, underwrite or convert a Unit.

(4) In Article 19(3), the financial promotion may be communicated in any manner including, but not limited to, the following:

(a) orally;

(b) electronically; or

(c) in writing.

(5) For the purposes of Article 19(2) and (3), where a Fund Manager of a Listed Fund discloses information in accordance with the requirements of the Markets Law 2012 or the Rules made for the purposes of that law, disclosure of such information is not a financial promotion provided the disclosure of the information does not:

(a) include an express invitation or offer; or

(b) expressly encourage a person;

to engage in any of the activities specified in Article 19(2) (a) or (b).

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PART 3: ROLES AND FUNCTIONS OF THE FUND MANAGER AND TRUSTEE

Chapter 1: General prohibitions

20. Fund Manager

(1) A person shall not manage a Domestic Fund unless:

(a) that person:

(i) is a body corporate;

(ii) is an Authorised Firm whose Licence authorises it to act as the Fund Manager of the particular type or specialist class of the Fund; and

(iii) meets any additional criteria, requirements or conditions that may be prescribed in the Rules;

or

(b) the person is an External Fund Manager.

(2) For the purposes of this Law, any other DFSA administered law and any rules made for the purposes of those laws, the person who "manages" a Fund, subject to Article 20(3), is the person who:

(a) is legally accountable to the Unitholders in the Fund for the management of the Fund, including the property held for or within the Fund ("Fund Property"); and

(b) establishes, manages or otherwise operates or winds up the Fund.

(3) The DFSA may, by Rules, prescribe when a person who engages in any of the activities specified in Article 20(2) is not managing a Fund.

(4) A person referred to in Article 20(1)(a) or (b) is a "Fund Manager" and a reference to a "Fund Manager" in this Law or in any other DIFC Law or any legislation made for the purposes of such laws includes both persons, unless otherwise provided.

(5) A person is an External Fund Manager if that person:

(a) is a body corporate;

(b) manages a Domestic Fund:

(i) which is not an External Fund; and

(ii) which is excluded from the Financial Services Prohibition under Article 41(9) of the Regulatory Law 2004; and

.

(c) manages the Fund in (b):

(i) from a place of business in a Recognised Jurisdiction or a jurisdiction otherwise acceptable to the DFSA; and

(ii) in accordance with any additional requirements prescribed by the DFSA for the purposes of this Article.

…..

PART 7: MARKETING OF DOMESTIC AND FOREIGN FUNDS

Chapter 1: General

50. Marketing prohibition

(1) Subject to Article 50(2), a person shall not, in or from the DIFC, Offer a Unit of a Fund to a prospective or existing Unitholder unless:

(a) a Prospectus that complies with the requirements in this Law and the Rules made for the purposes of this Law is made available to such a Unitholder;

(b) the person making the Offer is either the Fund Manager of the Fund or an Authorised Firm whose Licence authorises it do so; and

(c) the Offer is made in accordance with the requirements in this Law and the Rules made for the purposes of this Law.

(2) The DFSA may, by Rules, exempt any person or class of persons from the prohibition in Article 50(1) and in doing so, may subject such person or class of persons to any conditions it considers appropriate.

(3) A Prospectus includes, except where expressly stated otherwise:

(a) an Information Memorandum in respect of an Offer of a Unit of an Exempt Fund or a Qualified Investor Fund;

(b) a Supplementary or Replacement Prospectus; and

(c) in the case of an External Fund or Foreign Fund, the Units of which are marketed in or from the DIFC, any prospectus or other disclosure document prepared in accordance with the laws applicable to that External Fund or Foreign Fund.

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Chapter 4: Misconduct in relation to Domestic and Foreign Funds

56. Misleading and deceptive statements

(1) A person shall not make an Offer of Units if there is:

(a) a misleading or deceptive statement in:

(i) the relevant Prospectus;

(ii) any application form that accompanies the relevant Prospectus; or

(iii) any other document that relates to the Offer, or the application form;

(b) an omission from any document specified in Article 56(1)(a) of information that is required to be stated or that is necessary to make the statement not misleading or deceptive; or

(c) a new circumstance that under the Law or the Rules requires a Supplementary or Replacement Prospectus to be published or issued and this has not been published or issued.

(2) A person shall not, in or from the DIFC, make a misleading or deceptive statement in relation to a Fund or in connection with an Offer of Units, whether in the DIFC or elsewhere.

(3) This Article does not apply to conduct which occurs outside the DIFC unless the conduct affects the DIFC markets or users of the DIFC markets.

57. Defences to misconduct

(1) A person does not commit a contravention of Article 56, if that person proves that he:

(a) made all inquiries that were reasonable in the circumstances; and

(b) after doing so, believed on reasonable grounds that the statement or omission was not misleading or deceptive.

(2) A person does not commit a contravention of Article 56, if that person proves that reasonable reliance was placed on information given to that person by:

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

(b) if the person is a natural person, someone other than an employee or agent of that individual.

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(3) For the purposes of Article 57(2), a person does not become an agent of another person simply because he performs a particular professional or advisory function for the person.

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SCHEDULE 1: INTERPRETATION

…..

3. Defined Terms

Terms ***Definitions***

(…)

Unit *a Unit or share representing the rights or interests of Unitholders in a Fund and includes a right or interest in such a Unit.*

…..

2. RELEVANT DFSA RULEBOOK PROVISIONS

Collective Investment Rules (CIR)

2 ARRANGEMENTS NOT CONSTITUING A COLLECTIVE INVESTMENT FUND

2.1 Exclusions

(…)

Bodies corporate not undertaking investment management

2.1.10 *An arrangement does not constitute a Collective Investment Fund if the arrangement comprises a closed-ended Partnership or Body Corporate, unless on reasonable grounds the purpose or effect of such an arrangement appears to be the investment management, in the exercise of discretion for a collective purpose, of Investments or Real Property for the benefit of the shareholders or partners.*

…..

Private Equity Fund

3.1.6 *A Fund is a Private Equity Fund if it;*

(a) invests in unlisted companies, by means of Shares, convertible debt or other instruments carrying equity participation rights or reward; or

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(b) participates in management buy-outs or buy-ins.

…..

15 MARKETING OF FOREIGN FUNDS

15.1 Access to Foreign Funds and availability of Prospectus

Guidance

1. *Rules 4.1.3 and 4.1.4 exclude from being treated as Offers any Transactions undertaken by an Authorised Firm where such Transactions are Execution-only Transactions, or Transactions for the purposes of managing a Discretionary Portfolio for a Client, or for the purposes of redeeming a Unit of a Fund for a Client. Similarly, an offer made by an Authorised Firm to a Market Counterparty is also excluded from being an Offer. As a result, such excluded Transactions and offers do not attract the marketing prohibition in Article 50 of the Law and the requirements in both the Law and this module relating to the marketing of Units.*

2. *….*

3. *Under Article 54(2) of the Law, the DFSA has the power to prescribe any additional criteria, requirements or conditions that apply to the Offer of Units of a Foreign Fund, including disclosure that must be included in a Prospectus and the legal form and structure of the Fund such as being open-ended or closed ended or listed or not. This section contains additional criteria and requirements prescribed pursuant to Article 54(2) of the Law.*

(…)

Prospectus disclosure relating to Foreign Funds

15.1.2 *Where an Authorised Firm Offers a Unit of a Foreign Fund to a Person, it must make available to that Person a copy of a current Prospectus relating to the Fund which complies with the additional requirements in Rule 15.1.3 at the time of the Offer.*

Guidance

Under Article 50(3)(c) of the Law, a Prospectus includes, in the case of a Foreign Fund the Units of which are marketed in or from the DIFC, any prospectus or other disclosure document prepared in accordance with the laws applicable to that Foreign Fund.

15.1.3 *(1) The Prospectus of a Foreign Fund made available by an Authorised Firm must be in the English language.*

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(2) The Prospectus must contain in a prominent position, or have attached to it, a statement that clearly:

(a) describes the foreign jurisdiction and the legislation in that jurisdiction that applies to the Fund;

(b) states the name of the relevant Financial Services Regulator in that jurisdiction;

(c) describes the regulatory status accorded to the Fund by that Regulator;

(d) includes the following warning:

"This Prospectus relates to a Fund which is not subject to any form of regulation or approval by the Dubai Financial Services Authority ("DFSA").

The DFSA has no responsibility for reviewing or verifying any Prospectus or other documents in connection with this Fund. Accordingly, the DFSA has not approved this Prospectus or any other associated documents nor taken any steps to verify the information set out in this Prospectus, and has no responsibility for it.

The Units to which this Prospectus relates may be illiquid and/or subject to restrictions on their resale. Prospective purchasers should conduct their own due diligence on the Units.

If you do not understand the contents of this document you should consult an authorised financial adviser.";

(e) if the Offer is not directed to Retail Clients, includes a prominent statement to that effect to be incorporated within the warning in (d); and

(f) in the case of an Offer of a Unit in a Money Market Fund, contains the risk warning referred to in Rule 14.4.7.

15.1.4 *An Authorised Firm which makes an Offer of a Unit of a Foreign Fund must maintain at its place of business or other designated location in the DIFC copies of the relevant Prospectus for inspection by Clients and by the DFSA during normal business hours.*

Guidance

In relation to Rule 15.1.4, copies of the Prospectus may be stored electronically so long as Clients and the DFSA have ready and immediate access.

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General Module (GEN)

2.2 Financial Service activities

2.2.1 *An activity constitutes a Financial Service under the Regulatory Law and these Rules where:*

- *(a) it is an activity specified in Rule 2.2.2; and*
- *(b) such activity is carried on by way of business in the manner described in section 2.3.*

2.2.2 *The following activities are specified for the purposes of Rule 2.2.1:*

- *(a) Accepting Deposits;*
- *(b) Providing Credit;*
- *(c) Providing Money Services;*
- *(d) Dealing in Investments as Principal;*
- *(e) Dealing in Investments as Agent;*
- *(f) Arranging Deals in Investments;*
- *(g) Managing Assets;*
- *(h) Advising on Financial Products;*
- *(i) Managing a Collective Investment Fund;*
- *(j) Providing Custody;*
- *(k) Arranging Custody;*
- *(l) Effecting Contracts of Insurance;*
- *(m) Carrying Out Contracts of Insurance;*
- *(n) Operating an Exchange;*
- *(o) Operating a Clearing House;*
- *(p) Insurance Intermediation;*
- *(q) Insurance Management;*
- *(r) Managing a Profit Sharing Investment Account;*
- *(s) Operating an Alternative Trading System;*
- *(t) Providing Trust Services;*

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(u) Providing Fund Administration;

(v) Acting as the Trustee of a Fund;

(w) Operating a Representative Office;

(x) Operating a Credit Rating Agency;

(y) Arranging Credit and Advising on Credit; and

(z) Operating a Crowdfunding Platform.

Guidance

Note that the ambit of these activities in Rule 2.2.2 may be restricted under COB, AMI or REP and may be fettered by the continuing operation of the Federal Law.

2.2.3 *Each activity specified in Rule 2.2.2:*

(a) is to be construed in the manner provided under these Rules; and

(b) is subject to exclusions under these Rules which may apply to such an activity.

…..

2.3 By way of business

2.3.1 *Subject to Rules 2.3.2 and 2.3.3, for the purpose of these Rules a Person carries on an activity by way of business if the Person:*

(a) engages in the activity in a manner which in itself constitutes the carrying on of a business;

(b) holds himself out as willing and able to engage in that activity; or

(c) regularly solicits other Persons to engage with him in transactions constituting that activity.

…..

2.9 Arranging deals in investments

2.9.1 *(1) In Rule 2.2.2, Arranging Deals in Investments means making arrangements with a view to another Person buying, selling, subscribing for or underwriting an Investment (whether that other Person is acting as principal or agent).*

(2) The arrangements in (1) include:

(a) arrangements which do not bring about the transaction; and

(b) arrangements comprising or involving the receipt and transmission of Client orders in relation to Investments.

.

(3) The arrangements in (1) do not include arrangements which amount to Operating an Alternative Trading System.

(4) In this Rule and in Rules 2.9.2 to 2.9.7, an "Investment" includes rights under a contract of Long-Term Insurance, that is not a contract of reinsurance.

…..

2.12 Managing a collective investment fund

2.12.1 (1) In Rule 2.2.2, Managing a Collective Investment Fund means:

(a) being legally accountable to the Unitholders in the Fund for the management of the property held for or within a Fund under the Fund's Constitution; and

(b) establishing, managing or otherwise operating or winding up a Collective Investment Fund; and

(2) To the extent that any activity under (1) constitutes Managing Assets, Providing Fund Administration, Dealing as Agent, Dealing as Principal, Arranging Deals in Investments, or Providing Custody, such a Financial Service is taken to be incorporated within Managing a Collective Investment Fund.

(3) The Person referred to in (1) is a Fund Manager.

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2A. DEFINITION OF FINANCIAL PRODUCT IN THE GENERAL PROHIBITION AGAINST MISCONDUCT

Definition of Financial Product in the general prohibition against misconduct.

2A.1.1 *For the purposes of Article 41B of the Regulatory Law, a "Financial Product" means an Investment, a Credit Facility, a Deposit, a Profit Sharing Investment Account or a Contract of Insurance or a Crowdfunding Loan Agreement.*

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CHAPTER 3 - FINANCIAL PROMOTIONS

3.3 Definition of a Financial Product

3.3.1 *Pursuant to Article 41A(4) of the Regulatory Law, "financial product" in Article 41A(3)(b) of the Regulatory Law is hereby prescribed to mean an Investment, a Credit Facility, a Deposit, a Profit Sharing Investment Account, or a Contract of Insurance or a Crowdfunding Loan Agreement.*

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3.4 Scope of the Financial Promotions Prohibition

3.4.1 *(1) A Person shall not, subject to (2) and (3), make a Financial Promotion in or from the DIFC unless that Person is an Authorised Person.*

(2) A Representative Office may make a Financial Promotion in or from the DIFC only in relation to a financial service or financial product offered:

(a) in a jurisdiction other than the DIFC; and

(b) by a related party (as defined in Rule 2.26.1(3)) of the Representative Office.

(3) A Person other than an Authorised Person may make a Financial Promotion in or from the DIFC if, and only to the extent that, the Person:

(a) is licensed and supervised by a Financial Services Regulator in the UAE;

(b) is a Recognised Body or External Fund Manager;

(c) is a Reporting Entity and makes a Financial Promotion in or from the DIFC exclusively for the purpose of discharging its mandatory disclosure requirements; or

(d) makes an exempt Financial Promotion as specified in (4).

(4) For the purposes of (3)(d), a communication is an "exempt Financial Promotion" if it is

(a) approved by an Authorised Firm other than a Representative Office;

(b) approved by a Representative Office and it is a communication relating to a financial service or financial product offered by a related party (as defined in Rule 2.26.1(3)) of the Representative Office;

(c) directed at and capable of acceptance exclusively by a Person who appears on reasonable grounds to be a Professional Client of the type specified in COB Rule 2.3.4;

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(d) made to a Person in the DIFC (the "recipient") as a result of an unsolicited request by the recipient to receive the Financial Promotion;

(e) made or issued by or on behalf of a government or non-commercial government entity; or

(f) made in the DIFC by a Person in the course of providing legal or accountancy services and may reasonably be regarded as incidental to and a necessary part of the provision of such services.

Guidance

If a Person proposes to conduct Financial Promotions in or from the DIFC other than as permitted under (3) and (4), that Person should consider obtaining an appropriate Licence.

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APP2 INVESTMENTS

A2.1 General definition of investments

Investments

A2.1.1 *(1) An Investment is, subject to (3), either:*

(a) a Security; or

(b) a Derivative,

as defined in Rule A2.1.2 or Rule A2.1.3.

(2) Such a Security or Derivative includes:

(a) a right or interest in the relevant Security or Derivative; and

(b) any instrument declared as a Security or Derivative pursuant to Rule A2.4.1(1).

(3) Where a Rule provides that a Security or Derivative has a different classification for a specified purpose, it shall have that effect for that specified purpose and no other purpose.

Guidance

An example of the application of Rule A2.1.1 (3) is Rule A2.1.2(2), where a Derivative is treated as a Security for the purposes of the requirements in PIB.

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Security

A2.1.2 *(1) For the purposes of Rule A2.1.1(1)(a), a Security is:*

(a) a Share;

(…)

(e) a Unit; …

(…)

A2.2 Definitions of specific securities

A2.2.1 *For the purposes of Rule A2.1.2:*

Shares

(a) a Share is a share or stock in the share capital of any Body Corporate or any unincorporated body but excluding a Unit;

(…)

Units

(e) a Unit is a unit in or a share representing the rights or interests of a Unitholder in a Fund; …

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ANNEX 2 – LIST OF COMPANIES / DRAMATIS PERSONAE

The table on the following pages sets outs some of the more prominent companies involved in these proceedings, and the individuals involved in those companies.

<table>
<tr><th>Company</th><th>Individuals</th></tr>
<tr><td>Al Masah Capital Limited
Incorporated 08/10/09 in the Cayman Islands.
The First Applicant, and the parent undertaking of the Second Applicant.</td><td>Taken from the list of directors on Al Masah Cayman’s website as at 19 February 2017
Najjad Zeenni (Chairman)
Hamad Jasim Al Darwish (Vice Chairman)
Jassem Zainal
Sheikh Saqer Humaid Abdulla Al Qassimi
Shailesh Dash
Sheikh Khalid Al Mashani
Mohammed Alshaiba Al Mazrouei
Sadek Ahmed El Sewedy
Further names are listed in a ‘Corporate Overview’ dated January 2015

Senior Management Team
Amitava Ghosal (Partner)
Nrupaditya Singhdeo (Partner & CFO)
Arindam Bose (Partner)
Saikat Kumar (Executive Director)
Eyad Abu Huwaij (Executive Director)
Don Lim (Executive Director)
Akber Naqvi (Executive Director)
Additional Board Members listed
Kuldip Singh Dhingra
Haamad Abdullah Mass
Dr. Dato Mohd Amin Liew Abdullah
Ghanim Algunaiman
Ahmad Nazim Bin Abdrahman
Don Lim</td></tr>
<tr><td>Al Masah Capital Management Limited
Incorporated 09/08/2010 in the DIFC.</td><td>Licensed Directors:
Dipti Dhingra
Hamad Jassim Al Darwish Fakhroo
Jassem H A Zainal
Khalid Mustahil Ahmed Al Masheni
Mohammed AlShaiba Saleh Ghannam Al Mazrouei
Najjad Ahmad Zeenni
Sadek Ahmed ElSewedy
Shaikh Saqer Humaid Abdulla Alqassimi</td></tr>
</table>

.

	• Shailesh Kumar Dash • Hamad Abdulla Mohamed Abdulla Al Mas • Kanwar Deep Singh • Kuldip Singh Dhingra Other notable names: • Nrupaditya Singhdeo (Finance Officer and Senior Manager from 27/09/10 to 27/04/16) • Helen Linda Baines (Compliance Officer, Money Laundering Reporting Officer, and Senior Manager from 15/07/13 to 28/02/17) • Polly Jackson (Compliance Officer of from 19/08/10 to 31/01/13; Money Laundering Officer from 20/02/13 to 15/7/13; Senior Manager from 20/02/13 top 15/07/13)
Regulus Capital Limited • Incorporated 14/12/2015 in the Cayman Islands	Directors (as at 28 February 2017) • Shailesh Kumar Dash. • Hamad Jassim Aldarwish Fakhroo • Dipti Dhingra • Jassem H A Zainal • Mohammed AlShaiba Saleh Ghannam AlMazrouei • Khalid Mustahil Ahmed Al Masheni • Sadek Ahmed Elsewedy • Shaikh Saqer Humaid Abdulla AlQassimi • Najjad Ahmad Zeenni
Healthcare MENA Limited/Avivo Group • Incorporated in the Cayman Islands as Healthcare MENA Limited. • Changed its name to Avivo Group on 11/12/15. • Parent undertaking of Al Chemist Healthcare LLC, incorporated in Dubai.	Board Members (as at January 2016) • Shailesh Dash (Chairman) • Amitava Ghosal • Nrupaditya Singhdeo • Eyad Abu Huweij • Dr Khaled Elnaggar • Mr Ihab Asali • Don Lim • Anshul Gupta
Al Najah Education Limited • Incorporated 17/10/2011 in the Cayman Islands as Al Masah Education Holding Ltd. • Changed its name to Al Najah Education Limited on 01/10/2012.	Board Members (as at dated 6 March 2017) • Shailesh Dash (Chairman) • Nrupaditya Singhdeo (Chief Executive Officer) • Amitava Ghosal • Don Lim • Jamal H. Al-Barrak • Eyad Abu Huweij • Dr Khaled El Naggar

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• Parent undertaking of Al Najeh Education LLC, incorporated in Dubai.	
Diamond Lifestyle Limited • Incorporated 12/12/2012 in the Cayman Islands. • Parent undertaking of DLL Emirates Restaurants Limited, incorporated in Dubai.	Board of Directors (as at 6 March 2017) • Shailesh Dash (Chairman) • Amitava Ghosal • Nrupaditya Singhdeo • Khalid Hamoodah • Saikat Kumar • George Kunnappally • Don Lim • Eyad Abu Hweij
Gulf Pinnacle Logistics Limited • Incorporated 08/08/2014 in the Cayman Islands. • Parent undertaking of Gulf Pinnacle Logistics LLC, incorporated in Dubai.	Board of Directors (as at 6 March 2017) • Shailesh Dash (Chairman) • Nrupaditya Singhdeo • Amitava Ghosal • Arindam Bose • Don Lim • Chardutta Joshi • George Kunnappally • Eyad Abu Hweij

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ANNEX 3 - LIST OF ISSUES

Investment Companies as Funds

1. Were Avivo Group, Al Najah Education Limited, Gulf Pinnacle Logistics Limited and Diamond Lifestyle Limited (together, "the Investment Companies")1 'Funds' within the meaning of Article 11(1) of the Collective Investment Law ("CIL")?

   In this regard:

   (a) Were the profits or income out of which payments were to be made to Unitholders pooled (Art 11(1)(c)(i))?

   (b) Was Al Masah Cayman a 'Fund Manager' (Art 11(a)(c)(ii) and Art 20)? In particular:

      i. Was Al Masah Cayman responsible for the management of the property held for or within the Funds and otherwise operated the Funds?

      ii. For the purpose of Art 11(a)(c)(ii) is it necessary that a Fund Manager was legally accountable to Unitholders?

      iii. If so, was Al Masah Cayman legally accountable to Unitholders in a Fund for the management of the property held for or within the Fund (see Art 20(2)(a))?

      iv. In any event, was Al Masah Capital Management Limited ("Al Masah DIFC") and not Al Masah Cayman the Fund Manager?

   (c) Did the exclusion in Rule 2.1.10 of the Collective Investment Rules apply?

      i. Was the purpose or effect of the arrangements the investment management, in the exercise of discretion for a collective purpose, of Investments or Real Property for the benefit of shareholders or partners?

   NB: It is common ground that if the Investment Companies were not 'Funds' then:

   - *Al Masah Cayman did not contravene: (i) Article 50 CIL (offering Units of a Fund); (ii) Article 56(1) or (2) CIL (misleading and deceptive statements in relation to Funds); or (iii) Article 41 of the Regulatory Law in relation to managing a Collective Investment Fund.*

   - *Al Masah DIFC did not contravene: Article 56(1) or (2) CIL (misleading and deceptive statements in relation to Funds).*

   - *Further, if Al Masah Cayman is not a 'Fund Manager', it is not to be regarded as carrying on the Financial Service of Managing a Collective Investment Fund.*

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- *The Applicants consider that in order to resolve this issue and issue 1(c), it is necessary to determine what was the relevant property said to be managed by or on behalf of the 'Fund Manager' (Art 11(1)(c)(ii)), and what was the purpose and effect of the relevant arrangements with respect to such property (Art 11(1)(a) and Rule 2.1.10).*

- *Further, if fund management activities are to be attributed to Al Masah DIFC rather than Al Masah Cayman, then Al Masah Cayman is not to be regarded as offering Units of a Fund. The individual Applicants could not have been knowingly concerned in the same.*

The Financial Services Prohibition

2. Did Al Masah Cayman Arrange Deals in Investments in or from the DIFC, in contravention of Article 41(1) of the Regulatory Law ("the Financial Services Prohibition")? In this regard:

   (a) Did the exclusion in GEN Rule 2.9.2 apply by reason of Al Masah Cayman being a party to the subscription contract with investors?

   (b) Are any arranging activities carried out in or from the DIFC properly attributable to Al Masah Cayman (rather than Al Masah DIFC, as the Applicants contend)?

3. If the Investment Companies were not Funds, is it open to the FMT to, and if so will the FMT, vary/substitute the original decisions, to the effect that Al Masah Cayman contravened Article 41(1) of the Regulatory Law by Arranging Deals in Investments in or from the DIFC, being shares in the Investment Companies?

The Financial Promotions Prohibition

4. Did Al Masah Cayman make Financial Promotions in or from the DIFC, in contravention of Article 41A of the Regulatory Law ("the Financial Promotions Prohibition")? In this regard:

   (a) Are the activities on which the Respondent relies properly attributable to Al Masah Cayman (rather than Al Masah DIFC)?

   (b) If so, were the relevant marketing materials approved by Al Masah DIFC so as to be 'exempt Financial Promotions' pursuant to GEN Rule 3.4.1(4)(a)?

5. If the Investment Companies were not Funds, is it open to the FMT to, and if so will the FMT, vary/substitute the original decisions, to the effect that Al Masah Cayman contravened the Financial Promotions Prohibition in relation to shares in the Investment Companies?

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Alleged Misleading/Deceptive Statements

6. Did Al Masah Cayman and/or Al Masah DIFC make misleading statements as to fees in documents relating to Offers of Units in Funds, in contravention of Article 56(1)(a) and (b) CIL, Article 56(2) CIL and/or (after 21 August 2014) Article 41B(1) of the Regulatory Law?

   (a) For the purpose of Article 56(1)(a) and (b) CIL, Article 56(2) CIL and (after 21 August 2014) Article 41B(1) of the Regulatory Law, is it necessary to show that a misleading or deceptive statement was made to a 'prospective investor'?

   (b) To the extent relevant, was "Investor A" a prospective investor?

   (c) Were any statements in communications with investors misleading or deceptive, having regard to the content and context of the communications?

7. Did Al Masah Cayman and Al Masah DIFC: (i) make all inquiries that were reasonable in the circumstances; and (ii) believe on reasonable grounds that the statements or omissions were not misleading or deceptive, so as to have defences under Art 57 CIL to the alleged contraventions of Art 56 CIL?

8. If the Investment Companies were not Funds, is it open to the FMT to, and if so will the FMT, vary/substitute the original decisions, to the effect that Al Masah Cayman and/or Al Masah DIFC contravened Article 41B(1) of the Regulatory Law by engaging in conduct in connection with shares that was misleading or deceptive or likely to mislead or deceive?

COB Rule 3.2.1 and GEN Rule 4.2.6

9. As to the alleged contraventions by Al Masah DIFC of COB Rule 3.2.1 and GEN Rule 4.2.6, did Al Masah DIFC take reasonable steps to ensure that information in communications to investors was clear, fair and not misleading?

10. If the Investment Companies were not Funds, is it open to the FMT to, and if so will the FMT, vary/substitute the original decisions, to the effect that Al Masah DIFC contravened COB Rule 3.2.1 and GEN Rule 4.2.6 by failing to take steps to ensure that marketing material in respect of shares was clear, fair and not misleading?

Sanctions against Al Masah Cayman/Al Masah DIFC

11. If any contraventions were committed by Al Masah Cayman, what is the appropriate sanction (if any) in all the circumstances?

12. If any contraventions were committed by Al Masah DIFC, what is the appropriate sanction (if any) in all the circumstances?

Generic 'knowing concern' issues

13. As to the status of the Investment Companies:

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(a) If they are found to be Funds, is it necessary to find that Mr Dash, Mr Singhdeo and Mr Lim knew that the Investment Companies were Funds in order to find that they were knowingly concerned in contraventions based on that premise?

(b) If they were not Funds, is it open to the FMT to, and if so will the FMT, vary/substitute the original decisions, to the effect that Mr Dash, Mr Singhdeo and Mr Lim were knowingly concerned in contraventions in relation to shares?

14. Is it necessary to find that Mr Dash, Mr Singhdeo and Mr Lim knew that Al Masah Cayman was carrying on activities in the DIFC for which it required authorisation which it lacked in order to find that they were knowingly concerned in contraventions based on that premise?

15. Is it necessary to find that Mr Dash, Mr Singhdeo and Mr Lim knew that communications were deceptive or misleading in order to find that they were knowingly concerned in contraventions based on that premise?

Mr Dash

16. Did Mr Dash commit contraventions by reason of being knowingly concerned, as defined in Article 86 of the Regulatory Law, in contraventions by Al Masah Cayman and/or Al Masah DIFC? In this regard:

(a) Are any contraventions on the part of Al Masah Cayman or Al Masah DIFC established?

(b) Was Mr Dash knowingly concerned or knowingly involved, whether directly or indirectly, in the contraventions?

17. As an Authorised Individual at the relevant times, has the Respondent shown that Mr Dash failed to observe high standards of integrity and fair dealing in breach of GEN Rule 4.4.1?

18. Has the Respondent shown that Mr Dash is not fit and proper to perform any function in connection with provision of Financial Services in or from the DIFC? If so, irrespective of which contraventions are established, is it open to the FMT to, and if so will the FMT, vary/substitute the decisions to impose a restriction on Mr Dash, pursuant to Article 59 of the Regulatory Law, on the grounds that his conduct demonstrates that he is not fit and proper to perform any functions in connection with the provision of Financial Services in or from the DIFC?

19. If Mr Dash committed any contraventions, by being knowingly concerned or otherwise, what is the appropriate sanction (if any) in all the circumstances?

Mr Singhdeo

20. Did Mr Singhdeo commit contraventions by reason of being knowingly concerned, as defined in Article 86 of the Regulatory Law, in contraventions by Al Masah Cayman and/or Al Masah DIFC? In this regard:

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(a) Are any relevant contraventions on the part of Al Masah Cayman or Al Masah DIFC established?

(b) Was Mr Singhdeo knowingly concerned or knowingly involved, whether directly or indirectly, in the contraventions?

21. Did Mr Singhdeo contravene Article 41B of the Regulatory Law by counselling or procuring or being knowingly involved in the alteration of a copy of a bank statement?

22. As an Authorised Individual at the relevant times, has the Respondent shown that Mr Singhdeo failed to observe high standards of integrity and fair dealing in breach of GEN Rule 4.4.1?

23. Has the Respondent shown that Mr Singhdeo is not fit and proper to perform any function in connection with provision of Financial Services in or from the DIFC? If so, irrespective of which contraventions are established, is it open to the FMT to, and if so will the FMT, vary/substitute the decisions to impose a restriction on Mr Singhdeo, pursuant to Article 59 of the Regulatory Law, on the grounds that his conduct demonstrates that he is not fit and proper to perform any functions in connection with the provision of Financial Services in or from the DIFC?

24. If Mr Singhdeo committed any contraventions, by being knowingly concerned or otherwise, what is the appropriate sanction (if any) in all the circumstances?

Mr Lim

25. Did Mr Lim commit contraventions by reason of being knowingly concerned, as defined in Article 86 of the Regulatory Law, in contraventions by Al Masah Cayman and/or Al Masah DIFC? In this regard:

(a) Are any relevant contraventions on the part of Al Masah Cayman or Al Masah DIFC established?

(b) Was Mr Lim knowingly concerned or knowingly involved, whether directly or indirectly, in the relevant activities that constitute contraventions?

26. Did Mr Lim contravene Article 41B of the Regulatory Law by counselling or procuring or being knowingly involved in the alteration of a copy of a bank statement?

27. Has the Respondent shown that Mr Lim is not fit and proper to perform any function in connection with provision of Financial Services in or from the DIFC? If so, irrespective of which contraventions are established, is it open to the FMT to, and if so will the FMT, vary/substitute the decisions to impose a restriction on Mr Lim, pursuant to Article 59 of the Regulatory Law, on the grounds that his conduct demonstrates that he is not fit and proper to perform any functions in connection with the provision of Financial Services in or from the DIFC?

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28. If Mr Lim committed any contraventions, either by being knowingly concerned or otherwise, what is the appropriate sanction (if any) in all the circumstances?

Costs

29. What, if any, order should made as to costs?