

Abu Dhabi: Claims for misrepresentation and advice after the collapse of the Lehman Brothers

El-Ameir Noor - Partner - Litigation

a.noor@tamimi.com - Abu Dhabi

Zane Anani

z.anani@tamimi.com

The Claimants filed a case against the Bank seeking to rescind a bank facility contract, the mortgage deed (securing the facility contract) and a promissory note. The Claimants argued that the Bank was liable in tort for gross negligence and misrepresentation in relation to an investment made with the Lehman Brothers shortly before they filed for bankruptcy in 2008.

This judgment does not create any new principles but it was predictable that with the economic downturn in 2008 and the loss of investments, claims for misrepresentation and negligent advice would follow. This judgment sheds light on the courts' approach in these types of matters.

BACKGROUND OF THE CLAIM

It was contended that the Defendant Bank had contacted the Claimants in May 2008 offering an attractive investment opportunity with a 40% profit return, risk free. The Bank also offered the joint purchase of CRAN Series 6 shares, a commodity issued by the Lehman Brothers, supplying the Claimants with information indicating that it would be a deal with huge profits. The Claimants contributed USD 1.6 million to the investment and as a result, the Bank granted the Claimants with a facility of USD 4 million. The investment and loan was for a 15 year term. During the 15 year period, the Claimants would receive an annual payment of USD 377,200. After the 15 year period, the Claimants would have recovered their capital contribution in full.

The Claimants partnered with a major financial institution (the Defendant Bank) and were led into accepting the offer, particularly in view of the fact that the Defendant Bank was a leading partner and gave assurances that it would protect the capital. The Claimants argued that the Defendant Bank should have the expertise and ability to protect its investment and take measures that are normally taken in the banking industry in connection with capital market investment.

News of financial difficulties

Shortly after the facility agreement was signed, news started to emerge that the Lehman Brothers were facing financial difficulties. The Claimants conveyed this information to the Defendant Bank asking the Defendant Bank to verify the information and take action, most importantly to sell if the shares dropped below 10% of its value. The Defendant's response was that the news was just a rumour. The Bank would reassure the Claimants that it would take appropriate measures to protect the investment and maintained its position despite knowing about the share issuer's deteriorating situation before inviting the Claimants to conclude the deal. In August 2008, the Claimants heard more information with respect to the Lehman Brothers experiencing financial difficulties and that the value of the shares dropped by 85%. They reported this to the Defendant Bank but the Defendant Bank did not sell the investment.

On the 15th September 2008 the Defendant Bank notified the Claimants that the Lehman Brothers had filed for bankruptcy after having just informed them the day before that the Lehman Brothers were in a strong financial position, despite the Bank receiving several reports concerning Lehman Brother's falling

share prices. The Claimants argued that the Defendant Bank had been aware of the situation since February 2008 thereby rendering the Defendant liable in tort as well as in contract.

The Bank's defence

The Bank argued that the Abu Dhabi courts did not have jurisdiction on the basis that the facilities had been issued in favor of the Claimants by the Dubai branch and not Abu Dhabi. Accordingly the matter should be heard before the Dubai courts because the agreement was made in Dubai by the branch of the bank in Dubai, whereas the promissory notes (CRAN series 6) were issued by Lehman Brothers outside the UAE.

COURT OF FIRST INSTANCE

The Court of First Instance ruled that Abu Dhabi did not have jurisdiction.

COURT OF APPEAL

The Court of Appeal upheld the Court of First Instance's decision and confirmed that the Abu Dhabi court's do not have jurisdiction.

SECOND APPEAL

The Claimants appealed again to the Court of Cassation which allowed the appeal and reversed the judgment of the Court of Appeal. The Court of Cassation decided that the courts of Abu Dhabi have jurisdiction on the basis that the Claimants were approached by the Abu Dhabi branch of the bank. Accordingly the Abu Dhabi courts have jurisdiction to try the case. The matter was then referred back to the Court of First Instance to look into the merits of the dispute.

BACK TO THE COURT OF FIRST INSTANCE

The Court of First Instance proceeded to adjudicate the matter and the Bank then submitted a counter claim. The Bank requested the court for a judgment on the counter claim remedies in the amount of \$ 4 million representing the banking facility with interest. The court then issued its judgment and accepted the Bank's arguments as follows:

THE BANK'S DEFENCES ACCEPTED BY THE COURT OF FIRST INSTANCE

1. The Bank argued that it had not misrepresented the Claimants since the Claimants signed the facility agreement in May 2008 whereas the Lehman Brothers filed for bankruptcy on the 15 September 2008. Accordingly, the bank could not have foreseen that the Lehman Brothers would file for bankruptcy 4 months after the facility agreement had been signed.
2. The Bank had relied upon (and submitted to the courts) reports issued by Standard and Poor, Moodys and Fitch, leaders in financial market intelligence. Lehman Brothers continued to maintain excellent credit ratings and a classification of AAA until one day before it filed for bankruptcy. The reason for this was that the Lehman Brothers had sufficient liquidity to deal with all its debts but had filed for bankruptcy anyway.
3. In response to the Claimants' argument that the Bank was under an obligation to sell the (CRAN 6) investment notes when it had been notified by the Claimants that the Lehman Brothers stocks were devaluating, the bank referred to the investment documents and to its provisions. The investment documents very clearly indicate that the Bank was not a consultant to the investors (Claimants) and that it did not give any advice to them to invest in these products and that they should have sought independent advice before investing in these products. The Bank accordingly argued that it could not have sold the (CRAN 6) investment notes as these were owned by the Claimants nor can the Bank be held responsible for not advising the Claimants with respect to their investment due to the above reasons.

FINDINGS OF THE COURT OF FIRST INSTANCE

1. The Court held that the basis of the Claimant's main claim is an argument by the claimants that the Bank has committed an act of misrepresentation and secondly the bank was negligent by not investigating the status of the investment.
2. The Court then held that it is well established under Article 185 of the Civil Code that "misrepresentation is when one of the two contracting parties deceives the other by means of fraud by word or deed which leads the other to consent to what he would not otherwise have consent to." Article 186 of the Civil Code also provides that "deliberate silence concerning a fact or circumstance shall be treated as a misrepresentation if it is proved that the person misled thereby would not have made the contract had he been aware of that fact or circumstance."
3. The Court then held that the trial court has absolute power in the assessment and weight of evidence and documents submitted by the parties. The trial court can review the agreements to decide and conclude what the intention of the parties was.
4. The Court then concluded that the incident attributed to the Bank and described by the Claimants as misrepresentation is their argument that the Bank had not declared to them the financial situation of Lehman Brothers (the issuer of the (CRAN 6) investment notes) which continued to deteriorate until it had been declared bankrupt.
5. The Court then held that the above incident is not connected to the facility agreement concluded between the Bank and the Claimants. Accordingly such incident can not be considered as an act of misrepresentation which would nullify the facility agreement.
6. The Court then stated that the Claimants did not argue that the agreement to invest in the notes issued by Lehman Brothers was affected by misrepresentation or fraud and accordingly dismissed the Claimants arguments on this part of the claim also.
7. The court then rejected the claim of the Claimants to recover the amount of US\$ 1.6 million (their deposit) on the basis that this amount had been part of the investment fund and had been utilised by the Bank to buy the (CRAN 6) investment notes for the Claimants which was 100% property of the Claimants. As a result, they can not claim it back from the Bank. The Court held that the issue of investment on these notes should be between the Claimants and the Lehman Brothers and accordingly the main claim has no basis.
8. The Court held that the counter claim is based on clear documents such as the facility agreement, the pledge agreement and the promissory note and accordingly the Court decided that since the Claimants failed to pay any of the installments, the total amount of the facility of US \$ 4 million is therefore due and the Court ordered that the counter respondent (main Claimants) pay this amount to the Bank.

COURT OF APPEAL

The Claimants appealed again to the Court of Appeal. The Court of Appeal held the following after receiving the bank's defence:

The Court held that it was clear that the Claimant had changed its cause of action before the Court of Appeal which differed from the claim filed before the Court of First Instance (the Claimant now argued that there was no facility agreement and that they did not receive any money out of that facility). The Court of Appeal held that the Claimant may change his cause of action at the appeal level. However, the reasons for appeal were still baseless.

The Court held that the Claimant did not deny or contest his signature on the facility agreement and accordingly he was bound by the document (Article 11(1) of the Civil Transactions Law).

It was clear that the Claimants acknowledged the existence of the contract when it was argued that the nature of the relationship in the investment was a partnership. This was a clear admission that the contract existed.

The court also argued that the relationship could not be considered a partnership as the provisions of the facility agreement clearly show that the Claimant contributed USD 1.6 million to the purchase of the Lehman Brothers' (CRAN 6) investment note. The Court interpreted this to mean that the Bank was not a partner in the investment as it is well known that Banks do not advance 100% of a loan but typically require that the borrower contribute some money in order to limit or minimize the risk of the loan. There is nothing in the facility agreement which provides that the parties have agreed to share the profits and accordingly the requirements of participation were not met. The Court referred to the definition of a loan under Article 409 of the Commercial Transactions Law and accordingly confirmed that the Facility Agreement was very clear on its terms.

In light of the above, the Court of Appeal upheld the lower judgment and rejected the Claimant's appeal.