Neutral Citation Number: [2025] EWHC 2480 (Ch)

BL-2020-001543

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

1 October 2025

Before:

MR JUSTICE LEECH

- -

B E T W E E N:

(1) TRANSWORLD PAYMENT SOLUTIONS UK LIMITED
(in liquidation)
(2) STEPHEN JOHN HUNT
(in his capacity as liquidator of Transworld Payment Solutions UK Limited)
Claimants

- and -

(1) FIRST CURAÇAO INTERNATIONAL BANK N.V.
(2) JOHANNES ('JOHN') CHRISTIAAN MARTINUS AUGUSTINUS MARIA DEUSS
Defendants

- -

MR CHRISTOPHER PARKER KC, MR CALEY WRIGHT and **MR JAMES WOOLRICH** (instructed by **Gowling WLG (UK) LLP**) appeared on behalf of the Claimants.

MR ANDREW SCOTT KC and **MR BARNABY LOWE** (instructed by **Jones Day**) appeared on behalf of the First Defendant.

MR BANKIM THANKI KC, MR SAUL LEMER and **MR PAUL FRADLEY** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) appeared on behalf of the Second Defendant

Hearing dates: 24, 27, 28 and 31 March 2025
1, 2, 3, 4, 7, 8, 9, 10, 14 and 15 April 2025
6, 7, 8, 9 and 12 May 2025
Judgment circulated: 1 September 2025

- -

APPROVED JUDGMENT

- -

Table of Contents

I. Introductions ..... **[1]**

A. The Parties ..... [1]

B. The Claims ..... [10]

C. Settlement ..... [33]

II. The Direct Claims ..... **[47]**

D. MTIC Fraud ..... [47]

E. The Law ..... [57]

F. The VAT Claims ..... [105]

G. Assistance ..... [142]

H. Dishonesty ..... [219]

I. Limitation ..... [508]

III. The Indirect Claims ..... **[514]**

J. Dishonest Assistance ..... [514]

K. S.213 ..... [575]

L. Limitation ..... [601]

IV. The TWPS Claims ..... **[719]**

V. The Curacao Judgment ..... **[722]**

VI. The IPSAs ..... **[742]**

M. The Terms ..... [742]

N. Forfeiture of Rights ..... [746]

O. Other Curacao law issues ..... [792]

VII. Circuity of Action ..... **[793]**

VIII. Summary ..... **[794]**

P. The Direct Claims ..... [794]

Q. The Indirect Claims ..... [798]

R. The TWPS Claims..... [804]

S. Curacao Law ..... [806]

Mr Justice Leech:

I. Introduction

A. The Parties

(1) TWPS

1. The First Claimant, Transworld Payment Solutions UK Ltd ("**TWPS**"), is a company which was incorporated in England and Wales on 23 October 1979 and registered under company registration no. 01456234. The nominal share capital of the company was £1,001,000. On 21 September 2010 it was struck of the register and on 5 October 2010 it was dissolved. On 6 August 2014 Mr Tim Bramston, who was then a partner in Griffins, a firm of licensed insolvency practitioners ("**Griffins**"), applied to restore TWPS to the register and to wind up the company. Mr Bramston issued the petition in his capacity as the liquidator of a company called TC Catering Supplies Limited ("**TC Catering**"). On 22 August 2014 the petition was advertised and in September 2014 TWPS was restored to the register and put into compulsory liquidation.

(2) Mr Hunt

2. On 17 November 2014 the Second Claimant, Mr Stephen Hunt, was appointed to be the liquidator of the TWPS. He is (and was) a partner in Griffins and he brings the claims in this action in his own name and in the name of the company itself. Mr Hunt is also the liquidator of ten companies which I list below together with the dates on which each company first went into liquidation (although in a number of cases Mr Hunt was not the original liquidator):

    (1) 30 August 2006: Kingswood Global Business Ltd ("**Kingswood**").

    (2) 18 April 2007: Mobile Telephones Ltd ("**MTL**").

    (3) 25 July 2007: AC Electrical EU Ltd ("**ACEL**").

    (4) 27 February 2008: Mobile Mayhem Ltd ("**MML**").

    (5) 14 August 2008: Leeds Smith Consulting Ltd ("**Leeds Smith**").

    (6) 3 September 2008: 385 North Ltd ("**385 North**").

(7) 22 July 2009: Xicom Systems Ltd ("**Xicom**").

(8) 12 August 2009: Eliyon Ltd ("**Eliyon**").

(9) 28 July 2010: Gold Digit Ltd ("**Gold Digit**").

(10) 20 January 2014: Star Telecommunications Ltd ("**Star**").

3. By a series of letters dated 17 September 2020 Mr Hunt gave notice to the Defendants that each of these companies had assigned two kinds of claim to TWPS defined in the letter as the "**Assignor Company Claims**" and the "**Assignor Liquidator Claims**". He also gave notice to the Defendants that a further nine companies had assigned their claims to TWPS. The liquidator of six of those companies was Ms Michaela Hall, who was a partner in Moore Kingston Smith (formerly Kingston Smith & Partners) ("**MKS**") between 2011 and her retirement in 2022. The liquidator of the remaining three companies was Mr Kevin Goldfarb, who was also a partner in Griffins. I identify those nine companies below together with the date on which they first went into liquidation (although, again, in a number of cases the liquidator at the date of the notices of assignment was not the original liquidator):

(1) 22 July 2005: Blue Fox Trading (UK) Ltd ("**Blue Fox**").

(2) 4 April 2006: 05245559 Ltd (formerly The Callender Group Ltd) ("**TCG**").

(3) 5 April 2006: Northdata Ltd ("**Northdata**").

(4) 16 April 2008: Environmental Timber Products Ltd ("**ETP**").

(5) 16 December 2009: Wood Works (Sheffield) Ltd ("**Wood Works**").

(6) 17 December 2012: Comveen Ltd ("**Comveen**").

(7) 9 May 2014: JD Group Ltd ("**JDG**").

(8) 23 June 2014: Notebook Express Ltd ("**Notebook**").

(9) 15 June 2015: @tomic Ltd ("**@tomic**").

4. I will refer to the 19 companies which have assigned their claims to TWPS as the "**MTIC**

Companies". The Assignor Liquidator Claims which the MTIC Companies assigned (or purported to assign) to TWPS were defined in each of the notices of assignment to include "any actions, claims and rights arising pursuant or relating to section 213 of the Insolvency Act 1986". On 31 October 2022 Freedman J held that it was impossible for the liquidators of the MTIC Companies to assign any claims which they may have had under section 213 ("**S.213**") of the Insolvency Act 1986 ("**IA 1986**") because all of the companies went into liquidation before 1 October 2015: see [2022] EWHC 2742 (Ch) at [164] to [180]. The Claimants did not challenge that decision at the trial before me.

(3) Mr Deuss

5. The Second Defendant, Mr John Deuss, was born in Amsterdam in 1942. In the 1970s he moved to Bermuda where he still lives. Since the 1960s he has operated in the oil sector, first as a trader of petroleum products before moving into oil and gas exploration. By the 1980s the Transworld Group, which consisted of over 70 companies and which he owned and controlled, was one of the largest privately held oil trading companies in the world. In the 1990s he became involved in commercial banking and acquired a controlling interest in the Bermuda Commercial Bank ("**BCB**").

6. Between 1979 and 2010 (when it was originally dissolved) Mr Deuss was the ultimate beneficial owner of TWPS. The *de jure* directors of TWPS during the period with which this judgment is concerned were Ms Tineke Deuss, Mr Deuss's sister, and Mr Charles Geerts, Mr Deuss's cousin. Mr Deuss also owned and controlled a number of other Transworld companies which are relevant to these proceedings. In particular, he owned and controlled Transworld Oil Computer Centrum B.V. ("**TWOCC**"), which was incorporated in the Netherlands and based in Berg en Dal near Nijmegen; Transworld Information and Communications Technology Solutions Pty ("**TWICTS**"), which was incorporated and based in Bangalore, India; and First Curaçao Ltd which later became Transworld Payment Solutions Ltd (Bermuda) ("**TWPS Bermuda**").

(4) FCIB

7. On 25 June 1973 the First Defendant, First Curaçao International Bank N.V. ("**FCIB**"), was incorporated in Curaçao in what was then the Netherlands Antilles. Mr Deuss owned 100% of FCIB's share capital from its incorporation and he became the Managing Director, President and CEO of FCIB. In 2003 he gave up the role of Managing Director

and became a member of the Supervisory Board or a "**Supervisory Director**". He remained the CEO and President of FCIB until 2006 when those roles were abolished. He remained a Supervisory Director until the events which I now describe.

8. On 9 October 2006 the Court of First Instance of Curaçao (the "**Court of First Instance**" or "**CFI**") placed FCIB into emergency measures under Article 28 of the National Ordinance on the Supervision of Banking and Credit Institutions 1994 ("**Emergency Measures**" and "**Article 28**"). By letters dated 10 October 2006 Dr Tromp, who was the President of the Bank van de Nederlandse Antillen (the Central Bank of the Netherlands Antilles) (the "**Central Bank**"), wrote to Mr Nasr Farag, Mrs Martha Neuman-Rovira and Mr Christian Peterson appointing them to be "**proxy holders**" to exercise the powers of the Central Bank. In 2014 and 2015 Mr Peterson acted for FCIB in the settlement negotiations below.

(5) Representation

9. Mr Christopher Parker KC, Mr Caley Wright and Mr James Woolrich appeared on behalf of the Claimants at the trial instructed by Gowling WLG (UK) LLP ("**Gowling**"). Mr Andrew Scott KC and Mr Barnaby Lowe appeared on behalf of FCIB instructed by Jones Day and Mr Bankim Thanki KC, Mr Saul Lemer and Mr Paul Fradley appeared on behalf of Mr Deuss instructed by Quinn Emmanuel Urquhart & Sullivan UK LLP ("**QE**"). Where I refer to the oral or written submissions made by individual counsel, I do so by name. I recognise, however, that those submissions were the product of a team effort by both counsel and solicitors and I express my thanks to all of them for the quality of their submissions both oral and written. I am also pleased to say that I had the benefit of hearing from junior counsel on each team.

B. The Claims

(1) The VAT Claims

10. Each of the MTIC Companies went into liquidation at a time when His Majesty's Revenue and Customs ("**HMRC**") claimed substantial sums from them in respect of unpaid VAT (and many of them were wound up on the petition of HMRC). The Claimants allege that those liabilities arose because the MTIC Companies participated in "carousel" or "missing trader intra-community" fraud ("**MTIC fraud**"). I will have more

to say about the indicia of MTIC fraud and how the liability of each of the MTIC Companies for VAT arose. But for present purposes it is sufficient to note that in Schedule 8[1] to their closing submissions the Claimants' submit that the MTIC Companies were liable to HMRC for the following sums (including interest):

(1) Kingswood: £387,634.87.

(2) MTL: £592,064.79.

(3) ACEL: £12,907,783.70.

(4) MML: £4,662,151.88.

(5) Leeds Smith: £767,025.00.

(6) 385 North: £42,014,512.08.

(7) Xicom: £123,853.86.

(8) Eliyon: £548,603.51.

(9) Gold Digit: £2,032,203.96.

(10) Star: £22,303,065.27.

(11) Blue Fox: £18,432,107.00.

(12) TCG: £83,826,229.99.

(13) Northdata: £19,734,763.34.

(14) ETP: £2,990,157.05.

(15) Wood Works: £9,568,642.71.

(16) Comveen: £24,826.50.

[1] The Claimants produced a series of schedules annexed to their written opening submissions and added further schedules to their closing submissions numbered sequentially. I refer to those schedules as "**S1**" to "**S8**" with the prefix "**Cs**'" Thus, the reference in the text above is Cs' S8 using this notation.

(17) JDG: £1,508,260.43.

(18) Notebook: £1,162,654.46.

(19) @tomic: £2,180,783.87.

11. HMRC's claims against the MTIC Companies totalled well in excess of £200 million and I will refer to each of the 19 claims above as a "**VAT Claim**" and all 19 claims together as the "**VAT Claims**". Mr Hunt and the other liquidators of the MTIC Companies have admitted all of these claims to proof and it was the Claimants' case that these were genuine debts due to HMRC which they were entitled to admit to proof and that the Court should accept their decision to that effect. It was also their case that the MTIC Companies had incurred these debts as a consequence of the breaches of fiduciary duty which their individual directors had committed by dishonestly participating in MTIC fraud.

12. The Defendants did not dispute the involvement of the MTIC Companies in MTIC fraud. They also accepted that the MTIC Companies had used FCIB bank accounts to facilitate their activities (or at least some of them). But they did not admit the extent of the VAT Claims or that FCIB, TWPS or Mr Deuss had any involvement in the individual transactions or payments which gave rise to the VAT Claims. Moreover, the Defendants denied that Mr Hunt and his fellow liquidators should have admitted many of the VAT Claims to proof or that they were losses which were recoverable as a matter of law.

(2) The Direct Claims

(i) The Claims

13. Because of the decision of Freedman J that the Assignor Liquidator Claims were not capable of assignment to TWPS, the Claimants were unable to pursue any claims against FCIB to recover any contribution to the debts due to HMRC under S.213. It follows that the only claims which were validly assigned to TWPS were the Assignor Company Claims. These were claims by each MTIC Company against FCIB for dishonest assistance in the breach of fiduciary duty which the directors of each MTIC Company had committed by causing that company to commit MTIC fraud and incur liability for VAT to HMRC.

14. It was the Claimants' case that FCIB assisted the directors of the MTIC Companies to commit MTIC fraud by providing FCIB's electronic banking services to them and by using TWPS to market those services. The only individual against whom the Claimants alleged dishonesty was Mr Deuss himself in his capacity as an officer of FCIB until 2006 and as a Supervisory Director thereafter until 9 October 2006 when FCIB went into Emergency Measures. The Claimants had brought a similar claim against Mr Deuss himself but by a notice of discontinuance dated 13 September 2024 the Claimants discontinued this claim.

15. I will refer to the claims by the MTIC Companies against FCIB as the "**Direct Claims**" because they were claims brought directly by the MTIC Companies against FCIB. All of the MTIC Companies traded in the UK telecommunications and computer sector (the "**T&C sector**") and the relevant period of trading upon which the Claimants relied began in late 2003 and came to an end when FCIB went into Emergency Measures. There was no dispute that Mr Deuss was either the Managing Director or a Supervisory Director of FCIB throughout that period and continued to hold his executive roles for at least some of that period.

(ii) The Defences[2]

16. *Liability.* Both Defendants denied that they were liable for dishonest assistance to the MTIC Companies. Mr Deuss's primary defence was that he was not dishonest and this was the principal issue at trial. It was also his case that the Claimants had failed to prove the individual chain or chains of transactions through which each MTIC Company had incurred liability to HMRC or that those transactions were routed through an FCIB bank account. They also took a number of specific points in relation to individual MTIC Companies. Mr Deuss submitted that the Claimants had failed to prove that FCIB assisted or that they had suffered any loss as a consequence. FCIB adopted Mr Deuss's case.

17. *Limitation.* FCIB also advanced a defence of limitation. Its case was that the cause of action of each MTIC Company had accrued by 9 October 2006 and that this was more than six years before the issue of the Claim Form on 21 September 2020. The Claimants

[2] I refer to the First Defendant's Re-Amended Defence dated 10 January 2025 as "**FCIB's Defence**" and the Second Defendant's Amended Defence dated 11 November 2024 as "**Mr Deuss' Defence**" throughout this judgment.

made no formal admission that this analysis was correct although they admitted in their Trial Skeleton dated 7 March 2025 that the *lex causae* was English law and that the limitation period was six years: see paragraph 452.[3] However, they did not dispute that all of the causes of action upon which the MTIC Companies relied had accrued by 9 October 2006 and, in case there is any doubt, I hold that they had all accrued by that date.

18. However, the Claimants argued that the limitation period ceased to run and became suspended when FCIB went into Emergency Measures under a principle of insolvency law to be derived from the decision of the Court of Appeal in *Re General Rolling Stock Co* (1871-2) LR 7 Ch App 646 ("***General Rolling Stock***"). The Defendants disputed the existence of such a principle or that it applies either to a foreign company or to Emergency Measures in Curaçao. I will refer to this as the "***General Rolling Stock* point**" and to any principle to be derived from the case itself as the "***General Rolling Stock* principle**".

(3) The Indirect Claims

(i) Accessory Liability

19. The Claimants alleged that TWPS dishonestly assisted the MTIC Directors to commit MTIC fraud by soliciting customers in the T&C sector, assuming the role of performing KYC checks for customers when they applied for an account (which the Claimants described as "**onboarding**") and also assuming responsibility for FCIB's AML obligation to monitor the unusual activity of customers. The individuals against whom the Claimants alleged dishonesty were Mr Deuss himself and Mr Daniel Maurice-Vallerey ("**Mr Vallerey**"), who is alleged to have been the President of TWPS. The Claimants also alleged that Mr Deuss was at all material times a de facto or shadow director of TWPS and that he was its directing mind and will. This allegation was not made against Mr Vallerey and I was not taken to any documents to prove the scope of Mr Vallerey's authority to act for TWPS although Mr Deuss accepted that he was one of TWPS's executives in his witness statement dated 28 August 2024 ("**Deuss 1**").

[3] Where I refer to the parties' written opening and closing submissions for the first time in the text of this judgment, I introduce the relevant document fully. Where I refer to that document later in the text I refer to it by the prefix "**Cs**", "**D1**" and "**D2**" and the letter "**O**" for opening submissions and "**C**" for closing submissions. Thus, the reference in the text above is Cs, O452 using this notation.

(ii) S.213

20. Mr Hunt and the liquidators of the MTIC Companies also asserted claims under S.213 against TWPS. Their claims were pleaded in the alternative to the accessory liability claim and based on the same facts. The Claimants asserted that the MTIC Companies were carrying on business with the intent to defraud creditors or for a fraudulent purpose and that TWPS was a party to them doing so knowing that they were engaged in MTIC fraud or turning a blind eye to them doing so.

21. The Claimants alleged that TWPS was liable to pay equitable compensation measured by the amount of the MTIC Companies' liabilities to HMRC for the VAT Claims as a result of dishonestly assisting the directors of the MTIC Companies to commit MTIC fraud. They also claimed a contribution to those liabilities under S.213 amounting to 100% of the VAT Claims. They alleged that TWPS was liable for the full amount of the VAT Claims and Mr Hunt gave evidence in his trial witness statement dated 28 August 2024 ("**Hunt 6**") that the MTIC Companies had submitted proofs of debt in relation to the VAT Claims and, although he had not formally adjudicated on these proofs of debt, it was unnecessary for him to do so until he was in a position to declare a dividend.

(iii) Defences

22. *Liability*. The Defendants advanced the same defences to the Indirect Claims in relation to dishonesty, causation and loss as they did in answer to the Direct Claims. They also denied that Mr Deuss was a de facto or shadow director of TWPS or that TWPS was knowingly a party to the MTIC Companies carrying on business with intent to defraud HMRC or for a fraudulent purpose. Finally, they denied that TWPS was or would have been liable to the MTIC Companies because the VAT Claims gave rise to a notional rather than real liability and contended that it was open to them to take the limitation defences (below) which Mr Hunt should have taken or, alternatively, that his failure to do so broke the chain of causation.

23. *Limitation.* As stated, it was the Claimants' pleaded case that since Mr Hunt had taken no limitation defence in answer to the VAT Claims in his capacity as the liquidator of TWPS, it was not open to the Defendants to raise a limitation defence to the VAT Claims themselves. I will call this issue the "**Standing Issue**" because the Claimants framed it by reference to the question whether the Defendants had any standing to take this point

given that they were not creditors of TWPS. But if they were permitted to take this point, the Defendants also took a limitation defence to the Indirect Claims.

24. It was common ground that on 22 September 2014 TWPS went into liquidation and that time ceased to run in respect of claims against it for the purposes of the Limitation Act 1980 (the "**LA 1980**") on that date. It was also common ground that the cause of action of any MTIC Company which accrued on or before 22 September 2008 was now barred by limitation unless the Claimants were able to rely on section 32 ("**S.32**") of the LA 1980. I will use the term the "**Cut Off Date**" to describe or define this date. The Defendants accepted that the Claimants were entitled to rely on S.32 in relation to those MTIC Companies which had not gone into an insolvency process or appointed an insolvency practitioner before that date or which had no independent directors. However, they asserted that even after making that concession VAT Claims to the value of approximately £189 million are barred by limitation.

25. The principal issue between the parties, therefore, was whether the liquidators of the MTIC Companies which went into liquidation before the Cut Off Date or the uninvolved directors of those MTIC Companies which had not gone into liquidation before the Cut Off Date (the "**Uninvolved Directors**") could with reasonable diligence have discovered that TWPS had dishonestly assisted the directors of the MTIC Companies to commit MTIC fraud and also that it had knowingly participated in that fraud. I will call this the "**S.32 Issue**". The Defendants also took a related point, namely, that TWPS had no liability to the MTIC Companies under S.213 because they failed to issue an Insolvency Application Notice under S.213(2) and it is now far too late to do so. I will call this the "**Application Issue**".

(4) The TWPS Claims

(i) Mr Deuss

26. *Breach of fiduciary duty.* It was the Claimants' case that Mr Deuss committed breaches of the fiduciary duties which he owed to TWPS as a de facto or shadow director of TWPS by having TWPS perform the relevant conduct which enabled TWPS to facilitate the assistance which FCIB gave to the directors of the MTIC Companies (i.e. soliciting and onboarding customers and monitoring their activities). The Claimants did not allege that Mr Vallerey committed any breaches of his duties as an executive or employee of TWPS

or that he was personally liable to TWPS for exposing it to liability to the MTIC Companies and no claim was brought against him personally.

27. It was the Claimants' case that Mr Deuss was liable to pay equitable compensation to TWPS for his breaches of duty measured in the amount of the MTIC Companies' liability to HMRC for the VAT Claims. The claim against Mr Deuss depended, therefore, on the Court reaching the conclusion that TWPS either is or would have been liable to the MTIC Companies for the VAT Claims (or at least some of them).

28. *S.213.* Mr Hunt also claimed a contribution against Mr Deuss under S.213 in his capacity as the liquidator of TWPS and it was his case that the Court should declare that Mr Deuss was liable to make a contribution to the assets of TWPS of 100% of the amount which was required to meet TWPS's liability to the MTIC Companies. He advanced this claim on a similar but not identical basis to the S.213 claim made by the liquidators of the MTIC Companies against TWPS, namely, that the business of TWPS was carried on for a fraudulent purpose and that he was knowingly a party to this.

29. *Contribution.* At the beginning of the trial TWPS also asserted a separate claim for contribution against Mr Deuss under section 1 of the Civil Liability (Contribution) Act 1978 (the "**CA 1978**"). By notice dated 9 April 2025 the Claimants discontinued this claim (subject to the question of costs). It follows that it was unnecessary for the Court to decide this claim.

(ii) FCIB

30. Mr Hunt also claimed a contribution against FCIB under S.213 in his capacity as the liquidator of TWPS for 100% of the amount which was required to meet TWPS's liability to the MTIC Companies on the basis that TWPS was carrying on business for a fraudulent purpose and that FCIB was a knowing participant. At the beginning of the trial TWPS also discontinued its claim for a contribution under section 1 of the CA 1978 against FCIB (subject to the question of costs).

31. I will refer to the claims brought by TWPS and Mr Hunt against Mr Deuss and FCIB as the "**TWPS Claims**" because they were brought by TWPS against Mr Deuss and FCIB and, if successful, their practical effect would have been to pass on the liability of TWPS to the MTIC Companies – and the MTIC Companies to HMRC – to FCIB and Mr Deuss

in contrast to the Direct Claims which the MTIC Companies advanced against FCIB directly. The analogy which came to mind was with "dog-leg" claims brought by the trustees or beneficiaries of a trust against the directors of a company owned by the trust. The analogy is not exact in legal terms but, when viewed diagrammatically, they look similar.

(5) Summary

32. There was a symmetry between the claims against both Defendants. The Claimants advanced one group of equitable claims against each of them (claims for dishonest assistance against FCIB and for breach of fiduciary duty against Mr Deuss himself) and one claim for a contribution against each of them under S.213. The precise basis for each of the claims (or group of claims) varied. But the primary facts upon which both the Direct and Indirect Claims were based were essentially the same. The Defendants also raised the same or similar defences to each claim (or group of claims) in relation to liability, causation, loss and limitation although there were important differences between FCIB's limitation defence to the Direct Claims and the Defendants' limitation defence to the Indirect Claims which I will have to consider.

C. Settlement

33. In 2015 Mr Hunt, Mr Bramston and Ms Hall together with a number of other insolvency practitioners entered into a series of settlement agreements with FCIB one purpose of which was to recover funds which were frozen in FCIB accounts. FCIB's case was that the purpose of the negotiations and the ultimate settlements was to settle all potential claims, to facilitate a wind down of FCIB's business and to safeguard the interests of its legitimate creditors. It was also FCIB's case that the conduct of the negotiations which preceded those settlements or the settlements themselves give rise to a complete defence to the Direct, Indirect and TWPS Claims.

(1) The IPSAs

34. Once FCIB had gone into Emergency Measures, the Dutch authorities commenced a criminal investigation which resulted in criminal proceedings. In the meantime, FCIB was unwilling to release account balances to account holders. In 2008, however, a protocol was agreed to enable FCIB to release or pay out 75% of account balances (the

"**Protocol**"). The Claimants described the Protocol as follows in their Narrative Chronology:[4]

> "455. Following a meeting between (among others) Mr Hunt, representatives from HMRC and Mr Broekhuijsen (a Dutch Public Prosecutor) in late Spring 2008, a 'Protocol' was agreed for officeholders appointed under the Insolvency Act 1986 to seek approval from HMRC for the release of funds from FCIB (the FCIB Protocol). The FCIB Protocol was designed to facilitate (but not actually mandate) the release of funds from FCIB to account holders subject to insolvency procedures in England and Wales (and to avoid the release of funds to those involved in orconnected to MTIC fraud).
>
> 456. By letters dated 11 July 2008 and 20 October 2008, Mr Broekhuijsen confirmed that the Dutch Prosecution Service would not commence criminal investigations if funds were released to insolvency practitioners under the FCIB Protocol.
>
> 457. In summer 2008, Mr Hunt as liquidator of RS Sales Agency Limited (in liquidation) brought proceedings in Curaçao against FCIB and the Central Bank regarding the former's refusal to release monies to RS Sales, notwithstanding the FCIB Protocol. FCIB were apparently concerned about the risk of prosecution by the DPS. Those proceedings were settled, and in December 2008, FCIB confirmed that it would release funds (75% of FCIB account balances) to any liquidator who had an entitlement to the monies held by FCIB and who satisfied the conditions under the FCIB Protocol. That was announced on the FCIB website 'as of 1 January 2009'."

35. In 2013 the criminal proceedings in the Netherlands came to an end. Mr Deuss's evidence was that the criminal proceedings were compromised on appeal without any admission of the facts or any admission of guilt or wrongdoing although he had been found guilty of two charges and acquitted of three others at first instance. Once the criminal proceedings had been resolved, however, FCIB was unwilling to continue to make payments under the Protocol. The Claimants record as follows at NC468 and NC470:

> 468. On 22 November 2013, the Central Bank wrote to HMRC: "In view of the recent settlement between FCIB and the Dutch Public Prosecutor, the current rules and policies in relation to the wind-down of the bank are being re-evaluated including those which fall under the [FCIB Protocol]. In this context FCIB will be considering its rights and remedies under the Account Terms and Conditions agreed by each client (the GT&Cs) including taking measures against those clients who have used their accounts at FCIB for unlawful activities. We hereby confirm our

[4] I will refer to paragraphs in this document by using the prefix "**NC**". Thus, the reference in the text above is NC455 to NC457 using this notation.

> preparedness to continue the discussions which were held with you in 2011 with a view toward reaching a global resolution of all relevant issues relating to those clients."
>
> 470. On 31 December 2013, FCIB published an update on its website regarding an increase in monthly maintenance fees: "Clients who have not complied by March 1, 2014 with FCIB's wind down procedures, as published on FCIB's website in December 2006 and March 2007, are in breach of FCIB's applicable Account Terms and Conditions ("GT&Cs"), and as a result will be held responsible for the extra expenses incurred by FCIB in an amount equal to 15% of the client's balance on each account plus all applicable fees and charges. At that time the accounts of all such Clients will be closed, and the Bank will hold their funds in an account of the Bank where they will be available for payout once the client has satisfied the applicable requirements. All funds held in such account will be subject to an administrative handling fee to cover the Bank's costs for holding such funds. In addition, FCIB reserves all rights it may have with respect to damages resulting from other breaches of the GT&Cs […]."

36. In early 2014 representatives of FCIB and the Central Bank got in touch with Griffins and by letter dated 14 February 2014 Mr Andrew Fatherly, who was employed as a manager at Griffins, wrote to Mr Peter Sawyer of HMRC, informing him of this fact and that Griffins intended to meet them for a confidential discussion on possible settlement. Between February 2014 and February 2015 negotiations took place between Griffins and the proxy holders of FCIB together with their lawyers. I will have to consider those negotiations in detail but, for present purposes it is sufficient to note that they were successful and that on 6 February 2015 and 7 April 2015 Mr Hunt and a number of other insolvency practitioners entered into settlement agreements with FCIB.

37. I will refer to Mr Hunt and the other insolvency practitioners who entered into these agreements with FCIB as the "**IPs**" or the "**IP Group**", each agreement as an "**IPSA**" and all eight agreements together as the "**IPSAs**". I will have to consider the terms of the IPSAs in some detail. But for present purposes it is sufficient to state that in return for a lump sum and the payment of account balances each IP agreed to give a release in wide terms both to FCIB and a number of other parties. Mr Hunt entered into four IPSAs, Mr Bramston entered into two IPSAs (including one with Mr Hunt) and Ms Hall entered into three IPSAs.

38. Each IPSA expressly provided that the relevant IP entered into the agreement in his or her capacity as the liquidator of a number of companies identified in Exhibit A to that agreement. However, none of the MTIC Companies were identified in Exhibit A to any

of the agreements apart from one, Star, which was included in Exhibit A to an IPSA dated 6 February 2015 which Mr Hunt entered into himself. However, the Claimants admit that by the date on which they entered the IPSAs, members of the IP Group had been appointed as liquidators of all of the MTIC Companies (apart from @tomic, Notebook and Comveen). Mr Hunt has since asserted that Star is not bound (or has ceased to be bound) by the IPSA to which it was expressed to be a party.

(2) The Curaçao Judgment

39. By letter dated 5 February 2016 (the "**Letter of Claim**") Blake Morgan LLP ("**Blake Morgan**"), who were acting on behalf of the Claimants wrote to FCIB, the Central Bank and Spigt Dutch Caribbean ("**Spigt**"), a law firm who represented FCIB, asserting claims of in excess of £180 million. The Letter of Claim enclosed a list of creditors including eleven of the MTIC Companies. On 9 March 2016 FCIB commenced two sets of proceedings in the CFI against a number of Defendants, who included Mr Hunt, Mr Bramston, Ms Hall, TWPS and the eleven MTIC Companies referred to in the list of creditors.

40. The Defendants challenged jurisdiction and their application is the subject of four judgments in the CFI, the Curaçao Court of Appeal and the Curaçao Supreme Court. That challenge failed and on 29 July 2024 Judge PE De Kort (the "**Judge**") handed down judgment (the "**Curaçao Judgment**") ruling as follows (and I quote from the agreed translation):

> "The court: in both cases 5.1. rules that nothing is owed by FCIB to either TWPS or Hunt as liquidator of TWPS by virtue of the so-called TWPS claim, insofar as it is based on an unlawful act in respect of facilitating or assisting in the MTIC fraud, to the extent that this claim does not relate to the claim under section 213 Insolvency Act - in respect of which the court does not have jurisdiction."

41. The Judge's decision was based on the principle of Curaçao law known as *rechtsverwerking* which is usually translated as "**forfeiture**" or "**forfeiture of rights**" and I will use those terms interchangeably to refer to this principle. In substance, the Judge held that Mr Hunt and TWPS had forfeited the right to bring the "so-called TWPS claim" because of their conduct in the negotiations for the IPSAs. On 21 October 2024 Mr Hunt and TWPS filed a Statement of Appeal Grounds against the decision. At the

time of the trial and of the preparation and handing down of this judgment, the appeal has yet to be determined.

(3) Issue estoppel

42. The Defendants contended that the Curaçao Judgment gave rise to an issue estoppel binding on the English Court because the CFI is a court of competent jurisdiction and it had finally and conclusively determined on the merits that the Claimants had forfeited their rights to assert any of the claims in this action. The Claimants challenged these submissions on a number of grounds including and, in particular, that the judgment was not final or binding.

(4) Forfeiture of rights

43. The Defendants also submitted that if the Claimants were not bound by an issue estoppel, then Curaçao law applied to determine whether the Claimants were barred from bringing any of the claims by their pre-contractual conduct under Article 12(1) of Regulation (EC) No 864/2007 dated 11 July 2007 on the law applicable to non-contractual obligations (the "**Rome II Regulation**"). They also submitted that the Court should determine on the merits that the Claimants have forfeited those claims. It is common ground that the Rome II Regulation applies to this issue. But the Claimants denied that Article 12 applied and submitted that Article 4 applied. They argued that the Court should apply English law and reject this defence.

44. The Defendants argued in the alternative that the conduct of TWPS and the Insolvency Practitioners during the negotiations and in entering into the IPSAs amounted to unlawful (group) conduct (*onrechtmatige (groeps) daad*) against FCIB for the purposes of Article 6:162 and 6:166 of the Curaçao Civil Code (the "**CCC**") with the consequence that the Claimants were precluded from pursuing any of the claims against FCIB or, alternatively, that FCIB was entitled to claim damages. I will refer to this principle as "**unlawful group conduct**".

(5) Construction

45. The Defendants also argued in the alternative that as a matter of contractual interpretation the Claimants were bound by the IPSAs. There was no dispute that Mr Hunt was a party

to a number of the IPSAs. The real issue between the parties was whether the effect of the IPSAs was to preclude Mr Hunt from bringing claims in his capacity as the liquidator of TWPS and of a number of the MTIC Companies and whether the list of companies set out in Exhibit A to each of the IPSAs to which he was a party or to which the other IPs were parties, was to be interpreted exhaustively.

(6) Circuity of actions

46. The final defence which the Defendants raised was circuity of actions as between TWPS and the MTIC Companies and as between FCIB and the Claimants. They argued that TWPS had an equal and opposite claim against the MTIC Companies which would extinguish any liability for the VAT Claims and that FCIB would have an equal and opposite claim against TWPS. The Claimants disputed the application of the principle on the basis that there is no allegation that the directors of the MTIC Companies were party to TWPS's dishonest conduct and that the Supreme Court had rejected this argument in *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23, [2016] AC 1 ("***Bilta (No 2)***").

II. The Direct Claims

D. MTIC Fraud

47. On 25 May 2007 the European Committee of the House of Lords (the "**Committee**") published a report entitled: "Stopping the Carousel: Missing Trader Fraud in the EU" (the "**Committee Report**"). The Committee stated in the very first paragraph that HMRC believed that approximately £3 billion in VAT was retained by fraudsters in the financial year ended 5 April 2006 (the central period with which this judgment is concerned). The report also stated that the majority of frauds had centred on the mobile phone and computer chip sector although the subject of fraud was beginning to diversify. In *Red 12 Trading Ltd v HMRC* [2010] STC 589 Christopher Clarke J (as he then was) described "basic" MTIC fraud at [2] to [3] and [5] to [6]:

> "This case concerns what is called "Missing Trader Intracommunity Fraud" ("MTIC fraud"). Anyone reading this judgment is likely to be familiar with this expression, which has been explained in several tribunal and High Court decisions. The classic way in which the fraud works is as follows. Trader A imports goods, commonly computer chips and mobile telephones, into the United Kingdom from the European Union ("EU"). Such an importation does not require the importer to pay any VAT on the

> goods. A then sells the goods to B, charging VAT on the transaction. B pays the VAT to A, for which A is bound to account to HMRC. There are then a series of sales from B to C to D to E (or more). These sales are accounted for in the ordinary way. Thus C will pay B an amount which includes VAT. B will account to HMRC for the VAT it has received from C, but will claim to deduct (as an input tax) the output tax that A has charged to B. The same will happen, mutatis mutandis, as between C and D. The company at the end of the chain – E – will then export the goods to a purchaser in the EU. Exports are zero-rated for tax purposes, so Trader E will receive no VAT. He will have paid input tax but because the goods have been exported he is entitled to claim it back from HMRC. The chains in question may be quite long. The deals giving rise to them may be effected within a single day. Often none of the traders themselves take delivery of the goods which are held by freight forwarders.
>
> 3. The way that the fraud works is that A, the importer, goes missing. It does not account to HMRC for the tax paid to it by B. When HMRC tries to obtain the tax from A it can neither find A nor any of A's documents. In an alternative version of the fraud (which can take several forms) the fraudster uses the VAT registration details of a genuine and innocent trader, who never sees the tax on the sale to B, with which the fraudster makes off. The effect of A not accounting for the tax to HMRC means that HMRC does not receive the tax that it should. The effect of the exportation at the end of the chain is that HMRC pays out a sum, which represents the total sum of the VAT payable down the chain, without having received the major part of the overall VAT due, namely the amount due on the first intra-UK transaction between A and B. This amount is a profit to the fraudsters and a loss to the Revenue."
>
> "5. A jargon has developed to describe the participants in the fraud. The importer is known as "the defaulter". The intermediate traders between the defaulter and the exporter are known as "buffers" because they serve to hide the link between the importer and the exporter, and are often numbered "buffer 1, buffer 2" etc. The company which export the goods is known as the "broker".
>
> 6. The manner in which the proceeds of the fraud are shared (if they are) is known only by those who are parties to it. It may be that A takes all the profit or shares it with one or more of those in the chain, typically the broker. Alternatively the others in the chain may only earn a modest profit from a mark up on the intervening transactions. The fact that there are a series of sales in a chain does not necessarily mean that everyone in the chain is party to the fraud. Some of the members of the chain may be innocent traders."

48. This is the basic fraud which the MTIC Companies (or those behind them) practised on HMRC and I will also use the terms "**defaulter**", "**buffer**" and "**broker**". However, as Christopher Clarke J explained at [7] to [10], VAT fraudsters became expert at disguising the fraudulent chains of transactions and distancing themselves from the defaulter:

"7. There are variants of the plain vanilla version of the fraud. In one version ("carousel fraud") the goods that have been exported by the broker are subsequently re-imported, either by the original importer, or a different one, and continue down the same or another chain. Another variant is called "contra trading", the details of which are explained in paragraphs 9 and 10 of the judgment of Burton J in *R (on the application of Just Fabulous (UK) Ltd) v HMRC* [2008] STC 2123. Goods are sold in a chain ("the dirty chain") through one or more buffer companies to (in the end) the broker ("Broker 1") which exports them, thus generating a claim for repayment. Broker 1 then acquires (actually or purportedly) goods, not necessarily of the same type, but of equivalent value from an EU trader and sells them, usually through one or more buffer companies, to Broker 2 in the UK for a mark up. The effect is that Broker 1 has no claim for repayment of input VAT on the sale to it under the dirty chain, because any such claim is matched by the VAT accountable to HMRC in respect of the sale to UK Broker 2. On the contrary a small sum may be due to HMRC from Broker 1. The suspicions of HMRC are, by this means, hopefully not aroused. Broker 2 then exports the goods and claims back the total VAT. The overall effect is the same as in the classic version of the fraud; but the exercise has the effect that the party claiming the repayment is not Broker 1 but Broker 2, who is, apparently, part of a chain without a missing trader ("the clean chain"). Broker 2 is party to the fraud.

8. HMRC will have records of whatever returns have been made to them by companies registered for VAT and will know what has been accounted to them and what has not. Using those records and information provided by VAT registered companies they are able to trace a chain of transactions in respect of which output tax received has been accounted for and claims to deduct input tax have been made. They can, thus, trace back from exporter E to (say) importer A. But at some stage the trail is likely to go cold. In the classic version of the fraud it will do so when HMRC gets to A because A and its documents have disappeared. HMRC will know that A has defaulted on its obligations in respect of VAT since it will not have received any of the output tax paid by B to A (as accounted for by B).

9. However, HMRC may not be in a position to know whether A is in fact the importer or whether there may have been earlier companies in the chain, either as purchasers or transferees, such that its full length was (say) Y – Z – A – B etc. In that example there will have been a defaulter (A), who will not have accounted to HMRC for VAT, but there will also have been an importer (Y). Whether or not Y or Z are liable to account for VAT may depend on the exact nature of the dealings between Y, Z and A, between whom money may not have changed hands.

10. In a chain of transactions between traders all of whom are honest each trader will account to HMRC for the output tax received (in respect of which the trader acts, broadly speaking, as agent for HMRC: *Elida Gibbs Ltd v Customs & Excise Comrs* [1997] QB 499), less any input tax incurred, which he will claim from HMRC. He will, ordinarily, need most of the money received from his sales to pay his supplier and the VAT due. The full extent of any chain will be patent. Where there is dishonesty the position is different. It is in the interests of those who seek to defraud

> HMRC of VAT to hide the full extent of any chain by the use of buffer companies. Such persons lack any interest in seeing that they, or the companies through whom they operate, are able to account to HMRC for all the VAT that they should."

(1) The T&C "grey" market

49. The Federation of Technological Industries, which was the trade body representing companies trading in the T&C sector, gave evidence to the Committee that there was substantial trading in a legitimate "grey" market of surplus stock released on to the market by authorised distributors and wholesalers. Mr Mike Eland, the Director General of Law Enforcement at the HMRC, also gave evidence to the Committee which was consistent with this:

> "Perhaps I could just give a little background. To make this fraud operate, you need three groups of people. You need the organisers, a relatively small number of people, and we will be coming on to who they are and so on later. You need the missing traders who are usually men of straw and the whole purpose of them is to have no assets, and then you have got a whole raft of people in the middle without whom this fraud cannot work. They have to have a degree of knowledge of what is happening, otherwise you cannot keep a carousel moving. To make a carousel move, people have to sell to the right people and they have to sell at the right price, so it is not just a set of haphazard transactions which somehow seem to manage to keep going round in the same circle, but it clearly needs an element of contrivance there, so it is that middle group of people that we are looking at in the verification process. Those groups are not the whole industry. We think that the reverse charge will affect something like 15,000 companies. The number of people whose repayments we are investigating in this verification campaign, and I do not want to get into the precise details, but it is a very small part of that 15,000 and in percentage terms it is in single figures, so it is not the entire industry, as some of the people giving evidence before you have, I think, suggested. How have we selected those people? Well, we have done so by looking at things like patterns of trading, but we have also done so in relation to particular flows of trade."

50. Mr Eland later added that HMRC's VAT data showed that there were about 15,000 VAT registrations trading in the T&C market selling mobile phones and computer chips or similar products. The Committee itself recorded what it meant by a "grey" market and clearly accepted that it involved legitimate trade:

> "A "grey market" normally refers to the flow of new goods through distribution channels other than those usually authorised or intended by the manufacturer. Goods are imported outside of the manufacturer's normal

> distribution channels, often in order to take advantage of different pricing policies in different jurisdictions, and normally sold on at a price below the manufacturer's recommended level. Some grey markets include goods traded entirely legitimately, for example when a manufacturer is looking to dispose of excess stock.
>
> "It is clear from the evidence we have received that a number of participants— often small businesses operating in the grey market—in the mobile telephone and computer chip sectors have been adversely affected by the Government's attempts to eradicate the fraud in their industry. Big businesses do not appear to have been affected, primarily because they trade directly with manufacturers and end users (Q 286)."

(2) Networks

51. Mr Eland's evidence to the Committee was that there were a small group of serious criminals behind the organisations involved in MTIC fraud and another witness gave evidence that Dubai was a hub or "node" for such organisations. Mr Parker used the term "**closed loop network**" to describe all of the individual traders who were involved in a fraud ring committing MTIC fraud and the organiser of each ring as the "**network head**". Again, I adopt those terms. Mr Yannic Hulot, who was the Fiscal Co-ordinator of research at the Belgian Finance Industry, gave the following evidence about the connection between Dubai and FCIB:

> "Eurocanet is a detection method, not an evaluation method. It is a network between all the Member States between anti-fraud units about the fraudulent transactions. If we have a transaction from Member State one to Member State two, to Member State three, Member State four, we have the companies which are targeted. The aim of the project is to monitor closely electronically the companies which are invoicing constantly to missing traders. With that data it is possible to make a reproduction of where the missing traders are in the EU. Do you understand what I mean? Q54 Chairman: Yes. Mr Hulot: It is possible to do a reproduction. With the network it was possible to make this study, and we did it. The first conclusion is that VAT fraud is not homogenous in the EU, there are big differences."
>
> "Mr Hulot: No. I have to say we saw the figures for the first quarter to 2006 and the transactions went down from 70 per cent, and also in the UK. That means that the study gave some figures and now it is not the situation we had then. Q60 Lord Watson of Richmond: It is less. Mr Hulot: Yes. The reason we know was there was the First Curacao bank which closed and on the Dubai route everybody had an account in this bank. Q61 Chairman: The bank was in Curacao, not Dubai. Mr Hulot: Yes, Curacao. Q62 Chairman: One in Dubai as well? Mr Hulot: Yes, but it was for the fraud that we call the "Dubai route". It was the Dubai route but— Q63 Chairman: It was banked in Curacao. Mr Hulot: The accounts were offshore in

> Curacao. This fraud disappeared in September. In the study the Dubai route represented 66 per cent of the fraud in the UK which means these figures have disappeared. We imagine now the fraud in the UK is at least a third less than last year."

(3) The pattern of trading

52. With the benefit of hindsight it is clear that there were a number of individual signs of MTIC fraud which together formed a pattern of trading to which most traders engaged in MTIC fraud conformed. HMRC published (and still publishes) guidance entitled "How to spot missing trader VAT fraud" which identified the following signs:

> "The following are examples of indicators that could alert you to the risk of a connection with missing trader fraud:
>
> 1. Legitimacy of customers or suppliers. For example:
>
> • What is your customer's/supplier's history in the trade?
>
> • Have you been contacted within a short space of time by a prospective buyer and seller offering to buy/sell goods of the same specifications and quantity?
>
> • Has your supplier referred you to a customer who is willing to buy goods of the same quantity and specifications being offered by the supplier?
>
> • Does your supplier offer deals that carry no commercial risk for you – e.g. no requirement to pay for the goods or services until payment is received from the customer?
>
> • Are you being offered deals that involve consistent or pre-determined profit margins, irrespective of the date, quantities or specifications of the goods or services being traded? Have normal commercial practices been adopted in negotiating prices?
>
> • Are you being asked to make payments to third parties other than your supplier or payments to an offshore bank account?
>
> • Are the goods adequately insured?
>
> • Are high value deals being offered with no formal contractual arrangements?
>
> • Are high value deals being offered by a newly established supplier with minimal trading history, low credit rating etc?
>
> • Is a small, newly-established business offering to supply you with goods cheaper than a long-established supplier?
>
> • Has HMRC specifically notified you that previous deals involving your supplier were connected to fraudulent VAT losses?
>
> 2. Viability of the goods as described by your supplier. For example:
>
> • Can you be sure the goods exist in the quantity and specification being

> offered?
>
> • Are they in good condition and not damaged?
>
> • Why are large quantities of goods with non-UK specifications being offered for supply to you in the UK?
>
> • What recourse is there if the goods are not as described?"

53. In assessing whether the directors of each of the MTIC Companies (the "**MTIC Directors**") committed breaches of their fiduciary duties (and, in particular, acted in bad faith), the Claimants relied on the pattern of trading of the MTIC Companies and the warnings given to them by HMRC as well as any admissions made by an individual director in answering a questionnaire or making a witness statement giving an account of their dealings under section 236 ("**S.236**") of the IA 1986 or in giving an undertaking under the Company Directors Disqualification Act 1986 (a "**CDDA undertaking**"). In deciding whether the Claimants have proved a breach of duty by the director or directors of an MTIC Company, I have principally relied on admissions (where available) but also the pattern of trading which the MTIC Company adopted and whether it displayed the signs set out above.

(4) Third party payments

54. One particular sign of MTIC fraud is the instruction by a trader to its customer to pay the sale price of the relevant goods to a third party. For example, Northdata instructed its customers to pay almost £47 million to third parties. Where there is a long and complex chain, third party payments may be used to cut out a buffer company in the middle of the chain either to ensure that the funds arrive more quickly at their final destination or to reduce the risk of exposure (because the more bank accounts the funds pass through the more likely the fraud is to be discovered). In *Red 12 Trading Ltd v HMRC* Christopher Clarke J described this kind of third party payment at [84]:

> "In many cases of MTIC fraud the defaulter, i.e. the company which fails to account for VAT and beyond which HMRC will not have been able to trace the chain, will be the actual importer. But it need not be so. Y may be the actual importer who sells (or transfers possession of) the goods to A who sells to B. Both the actual importer and A may go "missing" and make no payment to HMRC at all (as was the case with deals 12-14: see para 21 (iv). The goods may bypass the defaulter and be allocated by the freight forwarder directly to one of the buffer companies (as happened in deal 1) although input and output tax is accounted for by a buffer company earlier in the chain. The buffer company serves its function of preventing

> HMRC tracing back to the original importer. Third party payments may be made by purchasers in the middle of the chain cutting out those above. What is needed for an MTIC fraud to work is an importation without payment of VAT, a trader who disappears without accounting to importation without payment of VAT, a trader who disappears without accounting to HMRC for the output tax it has received, and an export which generates an entitlement to claim back input tax. The original importer will make the most profit from failing to pay over output VAT. For that reason the defaulter is usually the original importer; but any company in the chain which defaults at any stage in the chain will make a profit from not accounting for the VAT, assuming that it has sold on at a profit. In order to justify denial of the right to deduct input tax there must be knowing participation in a transaction connected with fraudulent evasion of the tax. If that is established, the right is lost. It would be inconsistent with that principle, and an unmerited boon to fraudsters, to require the authorities to prove that the defaulter was the original importer. In the present case the tribunal had evidence as to who was the defaulter in each of the 46 chains, and HMRC proved a full tax loss i.e. not just the difference between an input tax paid and an output tax not accounted for. None of the defaulters had accounted for output tax or claimed input tax."

55. This passage also illustrates another feature of the present case. Because a defaulter will rarely account for VAT to HMRC, most of the MTIC Companies were either buffers or brokers and they became liable to HMRC usually because HMRC denied their claims for input tax and required them to account for the VAT on their sales. There were one or two examples of defaulters. But for the most part the MTIC Companies bought and sold the same goods on the same day for a small commission and became insolvent because they could not pay the VAT on their own sales because they had passed it through to the supplier or had been by-passed altogether.

56. There was, however, a second kind of third party payment which provided a tell-tale sign of MTIC fraud. The MTIC Companies would often require their customers to pay the price of the goods into one bank account and their own commission into another. Mr Thanki showed me six invoices which TCG, one MTIC Company, had issued to customers in his oral opening submissions. None of the invoices contained bank details but each was accompanied by an instruction to pay most of the purchase price into one account and a much smaller sum into another. For example, TCG issued an invoice dated 28 February 2006 to MG Components Ltd for £184,998.48 (inclusive of VAT) for the purchase of 1,785 Intel Pentium CPUs. TCG also issued a payment instruction requiring the customer to pay £174,930 into an FCIB account in the name of IQ Trading and £9,219.52 into an account called "World Wide Currencies Clients Account" at the branch

of Barclays Bank plc ("**Barclays**") in Bromley.

E. The Law

57. There was a large measure of agreement about the law. The parties were agreed that the Claimants had to satisfy three requirements before the Court would impose liability for dishonest assistance. First, they had to establish that the directors of the MTIC Companies committed a breach of trust or breach of fiduciary duty. Secondly, they had to prove that FCIB procured or assisted that breach. Thirdly, they had to prove that FCIB acted dishonestly in doing so: see *Bilta (UK) Ltd v NatWest Markets plc* [2020] EWHC 546 (Ch) at [159] (Snowden J).

(1) Breach of duty

58. It was common ground that the relevant events upon which the Claimants relied all took place before the Companies Act 2006 (the "**CA 2006**") came into force and that the Claimants had to establish that the MTIC Directors committed breaches of their equitable or fiduciary duties rather than breaches of their statutory duties in sections 172 to 176 of the CA 2006. In the event, in an email dated 24 February 2025 QE admitted on behalf of both Defendants that the directors of the MTIC Companies had committed breaches of fiduciary duty by engaging in MTIC fraud:

> "In response to the question raised in your letter regarding the MTIC Companies' directors, we can confirm that (consistent with our letter of 23 December 2024) the Defendants admit that the MTIC Companies' directors were in breach of their fiduciary duties by virtue of their engagement in MTIC fraud. This admission is made without prejudice to the Defendants' position on the Uninvolved Directors (as defined in the First Defendant's Re-Amended Defence and Second Defendant's Amended Defence), whose knowledge and conduct is relevant and the Defendants do not admit. It is also subject to the conditions set out in our letter of 23 December 2024."

59. This was a realistic admission. However, it was made in general terms and it remained necessary for me to make specific findings of breach of duty in order to decide whether FCIB provided assistance to them for reasons which I explain below. In doing so, I address the evidence very briefly given the general admission made by the Defendants. In particular, where the director made no admission in a statement under S.236 or in a CDDA undertaking, I have assessed their conduct by reference to the pattern of trading

and the warnings given by HMRC. The Claimants produced a separate schedule for each MTIC Company in Bundle G of the trial bundle containing the relevant evidence upon which they relied and for the most part I made findings in relation to the MTIC Directors by reference to the material in those schedules.[5]

(2) Assistance

60. I identify the individual MTIC Directors in section G below. It was common ground that the Claimants had to prove that FCIB assisted them to commit the breaches of duty and not that the assistance itself caused the relevant loss. In *Group Seven Ltd v Nasir* [2019] EWCA Civ 614, [2020] Ch 129, the Court stated (in the judgment of the whole Court) that this required a two stage approach. They stated at [110]:

> "(1) We accept the legal analysis of the respondents. On authority, the matter must be approached in two stages. It must be shown that the conduct in fact assisted the breach of trust, and that the loss directly resulted from the breach of trust. The test at the first stage is that the assistance given must be more than minimal: *Baden v Société Générale* [1993] 1 WLR 509, 574. The test at the second stage is that the loss in fact resulted from the breach of trust: *Grupo Torras SA v Al-Sabah* [2001] CLC 221, para 119, *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503, para 135. As it is put in Underhill & Hayton, Law of Trusts and Trustees, 19th ed (2016), para 98.56:
>
> > "a claimant must at least show that the defendant's actions have made the fiduciary's breach of duty easier than it would otherwise have been. But the causation requirement for dishonest assistance is no stronger than this, and it is no answer to a claim, for example, that the claimant's loss would have occurred anyway, because the wrongdoing fiduciary would have committed the breach even if the defendant had not assisted him."
>
> (2) It is made clear by *Target Holdings Ltd v Redferns* [1996] AC 421, 434E and by *AIB* at para 136 that there is no warrant for introducing common law concepts into this area of the law in the manner proposed by the appellants. What must be shown is that the conduct assisted the breach of trust and that but for the breach of trust the loss would not have occurred. The statements in *Novoship* [2015] QB 499 arose in the different context of a claim for an account of profits and do not assist the appellants in the present circumstances.
>
> (3) Even if (contrary to our view) there were some substance in the appellants' advocacy of some stricter test of causation, so that there needed to be a direct link between the assistance and the loss, as opposed to the breach of trust and the loss, it would not avail them on the facts of this

[5] I refer to each of these schedules as "**G1**" to "**G19**" in the text.

> case. Without the payments out of the Notable account, Mr Louanjli himself could not have succeeded in being paid. On the judge's finding, his interventions at critical moments in the chronology had precisely the effect that he and Mr Nobre intended. That finding, which goes some way beyond what was necessary to fix Mr Louanjli with accessory liability, is unassailable."

61. The authorities use different formulations to describe the potency of the assistance which the Claimants must demonstrate. The Court of Appeal in *Group Seven* stated that the assistance must make the breach of fiduciary duty "easier than it would have been". In *Bilta v NatWest* Snowden J (as he then was) used the concept of "more than minimal". He stated this at [161] to [163]:

> "161. In the instant case the breach of fiduciary duty relied upon by the Claimants is the breach of duty by their directors in causing the VAT element of the price paid to their companies for sale of EUAs to be paid away and not remitted to HMRC to satisfy the Claimant companies' obligations to account for VAT. It was ultimately not disputed by the Defendants that there had been such breaches of duty by the directors of the Claimant companies.
>
> 162. What is sufficient for the ingredient of "assistance" is "simply conduct which in fact assists the fiduciary to commit the act which constitutes the breach of trust or fiduciary duty": Madoff Securities International v Raven [2013] EWHC 3147 (Comm) ("Madoff") at [351]. Accordingly, if the defendant's conduct provides no assistance and does not enable the breach to be committed at all (Brown v Bennett [1999] BCC 525 at 533), or if it played no more than a minimal role in enabling the breach to be committed (Brinks v Abu-Saleh (No.3) [1996] CLC 133 at 148-149), there will be no liability.
>
> 163. It is not necessary, however, to show that what is done by the defendant inevitably has the consequence that loss is suffered: Baden v Société Générale [1993] 1 WLR 509 at 575A-B. It is also not an answer to a claim for dishonest assistance to show that the breach of trust or fiduciary relationship would have occurred in any event, regardless of whether the assistance was provided: Balfron Trustees Ltd v Peterson [2001] IRLR 758 at [21]."

62. The Claimants submitted in opening that neither FCIB nor Mr Deuss had denied assisting the MTIC Directors to implement MTIC fraud as if they had also admitted this element of the Direct Claims too: see Cs, O56 and O57. I reject that submission. FCIB clearly denied that it knew of or participated in the fraudulent trading of the MTIC Companies. FCIB also denied that it caused the MTIC Companies any loss. Mr Deuss specifically pleaded that FCIB and TWPS did not assist in specific fraudulent schemes which the

MTIC Companies alleged. He also denied that they had suffered any loss. It was for the Claimants to prove their case and I turn to consider what this required of them.

63. *Bilta v NatWest* is instructive because it involved a claim for dishonest assistance to an MTIC fraud ring or network. In *Alpha Sim Communications Ltd v CAZ Distribution Services Ltd* [2014] EWHC 207 (Ch) Mr David Donaldson QC (sitting as a Deputy High Court Judge) had held a number of defendants liable for assisting a defaulter at the centre of a network. But in *Bilta v NatWest* Snowden J considered that it was not necessary to prove that the accessory assisted the defaulter to evade liability and that it was sufficient to establish that the accessory assisted a buffer. He explained his reasoning in [170] to [173]:

> "170. Although the facts were different, I accept that the decision in Alpha Sim is authority for the proposition that a person who causes a company to participate in a transaction under which monies are passed in one direction and goods are passed the other, together with the company itself, can be liable for providing "assistance" to defaulting fiduciaries of a company further along a chain of similar transactions. As a matter of principle, such actions provide the means by which an MTIC fraud can ultimately be committed by directors of an importer company further along the chain. Put another way, the defaulting fiduciaries would not be able to commit their breaches of duty if the defendant individual did not cause his company to enter into the transaction in question, and if the defendant company did not then pay or transmit the monies due under it.
>
> 171. I acknowledge that Alpha Sim appears to have been a case in which, in one sense, the defendants were more closely connected to the fraud than the Traders or RBS are said to have been involved in the instant case. It would seem that the judge in Alpha Sim took the view that all of the links in the chain were artificial transactions, whereas the Traders and RBS were separated from the frauds at the Claimant companies by at least one buffer company (CarbonDesk), against which fraud is not alleged. It is also not alleged that the Traders had the same type of direct knowledge of the fraud as Mr. Sakhi (who was told what prices to agree for the trades).
>
> 172. However, if a chain of transactions can be established linking the actions of the Traders and RBS with the misappropriation or misapplication of the VAT monies by the directors of the Claimant companies, then I consider that the necessary assistance can still be said to have been given. I do, however, accept that the fact that the Traders and RBS are not alleged to have been as closely connected to the operation of a fraudulent scheme in the same way as Mr. Sahki, but were trading with a market counterparty against whom no fraud is alleged, does require the Court to look particularly closely at the allegations of dishonesty. But that is a different question to whether the necessary assistance has been given.
>
> 173. I also do not accept the Defendants' argument that this conclusion

> would lead to the absurd result that the entirety of the participants in the secondary market for trading in EUAs would be liable for dishonest assistance simply because there might be fraud at some point along a chain of otherwise legitimate transactions. The factual connection between the trading and the fraud still needs to be established. Moreover, even if it is, the essence of the liability for dishonest assistance is the requirement for proof of dishonesty. That requirement acts as an essential filter and limit to the scope of the equitable principle, which will ensure that parties who participate in the market in good faith are not held liable."

64. As Christopher Clarke J stated in *Red 12 Trading* the purpose of a buffer is to hide the link between the defaulter and the broker. I accept as a matter of principle that an accessory can be held liable for assisting a buffer to buy and sell goods in order to hide the link between the defaulter and the broker and to prevent HMRC from discovering (or discovering in time) that the broker who reclaims the VAT is engaged in MTIC fraud. The Claimants went further, however, and argued that it was not necessary for them to prove that FCIB assisted the MTIC Directors to carry out the specific transactions which gave rise to the relevant VAT liabilities and it was enough for them to demonstrate that the MTIC Companies each traded through an FCIB account.

65. I reject that submission. It is not sufficient simply to show that FCIB provided banking facilities to the MTIC Companies which enabled them to engage in MTIC fraud and, in my judgment, it is necessary for them to show that FCIB assisted them to carry out the transactions which gave rise to the relevant VAT Claim. The MTIC Companies had to have a UK bank account to register for VAT and obtain a registration number. The Claimants did not contend that, say, Barclays assisted them to commit MTIC fraud simply by permitting them to open a bank account. In my judgment, the position is the same for FCIB. The Claimants must show that FCIB assisted the MTIC Directors to perform the transactions which gave rise to the VAT Claim.

66. The Defendants submitted that there was a conventional method of proving this and they cited *Greystone International Ltd v HMRC* [2011] UKFTT 321 (TC) as an example. They cited it because the Claimants themselves relied on the decision in support of their claim in relation to TCG in G5. In that case the tax payer appealed against HMRC's decision to deny a credit for input tax in relation to nine transactions (as HMRC often did in relation to many transactions performed by the MTIC Companies). The FTT undertook an analysis to determine whether each "deal" could be traced back to a loss of VAT (i.e. a default by a defaulter). I set out their analysis of the first deal by way of example:

> "13. Deal 1. Deal 1 was a purchase on 3 February 2006 by the Appellant of 15,750 Intel Pentium CPUs at a unit price of £90 from Multisystems International Limited of Richmond, Surrey ("Multisystems") – for a total consideration of £1,417,500 plus £248,082.50 VAT. These goods were onsold by the Appellant by two sales, one of 6,300 units to Venture Tech International of Clearwater, Florida, USA ("Venture Tech") and one of 9,450 units to Best Buy Computers (S) PTE Ltd of Singapore ("Best Buy"). The sales were also invoiced on 3 February 2006 and the unit price charged to Venture Tech was $167. The unit price charged to Best Buy was £95.50. No VAT was, of course, charged on either sale.
>
> 14. HMRC's evidence (which we accept) was that the chains of Multisystems' supply of these CPUs could be traced back to supplies of 6,300 units and 8,190 units respectively by Myco Telecom Ltd. ("Myco") to Euro Imports & Exports Limited ("EI&E") and a supply of 3,150 units by Puwar (UK) Ltd. ("Puwar") to PM Transport & Communications Ltd ("PMT&C"). All transactions in these chains took place on 3 February 2006.
>
> 15. We received evidence (which we accept) that Myco and Puwar were both defaulters in that Myco failed to pay assessments to VAT totalling some £38 million, including output tax on the supplies in the deal chains for deal 1, and Puwar had a debt for unpaid VAT of just under £76 million on 12 March 2009."

67. The Defendants also submitted that the Claimants ought to have carried out a *Greystoke* analysis (as I will refer to it) in relation to the specific chains upon which HMRC relied in order to make each MTIC Company liable. After some hesitation, I reject that submission. Although it is consistent with Snowden J's analysis in *Bilta*, I do not consider that it is necessary for the Claimants to prove that each deal can be traced back to a defaulter or forward to a broker which reclaimed the VAT. The Claimants do not contend that FCIB "assisted defaulting fiduciaries of a company further along a chain of similar transactions": see *Bilta v NatWest* at [170] (above). They claim that FCIB assisted the MTIC Directors to commit the breaches of duty which caused the MTIC Companies to incur liability for the VAT Claim.

68. In my judgment, it is sufficient for the Claimants to prove that the funds which were used to purchase or sell the relevant goods passed through the MTIC Company's FCIB account. For example, where the MTIC Company incurred liability for VAT on the sale of the relevant goods because HMRC denied its claim for a credit for input tax on the supply of those goods because the MTIC Company, the supplier and the customer were all part of a MTIC network, it is sufficient for the Claimants to prove that the MTIC Company paid the purchase price to the supplier through its FCIB account or that the

proceeds of the onward sale passed through that account. Moreover, I am prepared to accept that FCIB gave more than minimal assistance to one MTIC Company even though the only evidence of FCIB's involvement is that its commission was paid through its FCIB account. Finally, I record that I gave the Claimants considerable latitude in proving their case in relation to each MTIC Companies and drew inferences in their favour where I was able to do so.

(3) Dishonesty

69. The test for dishonesty was also common ground. In *Group Seven* the Court of Appeal held that *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391 was of general application and should be adopted for civil claims for dishonest assistance. Lord Hughes JSC articulated that test at [74]:

> "The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and by Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, para 10: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

70. Where the principal or beneficiary does not assert that the accessory knew that the trustee or agent was committing a breach of trust or breach of fiduciary but turned a blind eye to the wrongdoing, the principal must establish both that the accessory suspected that the fiduciary was engaged in wrongdoing and also that they made a conscious decision to look the other way and not to investigate. The Court of Appeal stated these conditions in *Group Seven* at [59]:

> "The discussions of knowledge by Lord Hoffmann and Lord Millett in *Twinsectra* [2002] 2 AC 164 indicate that knowledge of a fact may be imputed to a person if he turns a blind eye to it, as Nelson is supposed to have done at Copenhagen, or if in legal parlance he deliberately abstains from inquiry in order to avoid certain knowledge of what he already

> suspects to be the case. It is convenient to use the expression "blind-eye knowledge" to denote imputed knowledge of this type. In the context of dishonest assistance for breach of trust or fiduciary duty, it was common ground before us, and we consider it correct in principle, to equate blind-eye knowledge with actual knowledge for the purposes of the first stage of the test laid down in *Tan* [1995] 2 AC 378 and endorsed in *Barlow Clowes* [2006] 1 WLR 1476 and *Ivey.* It is important, however, to understand the limits of the doctrine. It is not enough that the defendant merely suspects something to be the case, or that he negligently refrains from making further inquiries. As the House of Lords made clear in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2003] 1 AC 469 the imputation of blind-eye knowledge requires two conditions to be satisfied. The first is the existence of a suspicion that certain facts may exist, and the second is a conscious decision to refrain from taking any step to confirm their existence: see the speech of Lord Scott of Foscote at para 112, and the observations to similar effect of Lord Hobhouse of Woodborough at para 25. The judgments also make it clear that the existence of the suspicion is to be judged subjectively by reference to the beliefs of the relevant person, and that the decision to avoid obtaining confirmation must be deliberate."

71. It was also common ground that it was unnecessary for the principal or beneficiary to prove that the accessory understood the legal position and either knew or suspected that the fiduciary was committing a breach of trust or fiduciary duty. It is enough that the accessory knew or suspected wrongdoing: see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 at [28] (Lord Hoffmann). It is also unnecessary for the principal to prove that the accessory knew or suspected the particular fraud in question.

72. *Abou-Rama v Abacha* [2006] EWCA Civ 1492, [2006] 1 All ER (Comm) 827 is an instructive example for the present case. There, the claimants were the victims of an "advance fee" fraud and paid £1.375m into the account of the fraudsters at the defendant bank and the fraudsters cleared out the account immediately and disappeared. The claimants brought claims for dishonest assistance in relation to two individual payments of US $400,000 and $225,000. Treacy J found that the bank manager suspected that the fraudsters were involved in corruption "in a general way" but did not have any concerns about the individual transactions and dismissed the claim for dishonest assistance: see [95] and [96]. The Court of Appeal declined to interfere with his decision. Nevertheless Rix LJ made the following observations at [36] and [37]:

> "[36] In these circumstances, Mr D'Cruz submitted that to describe Mr Faronbi's laxity in opening the Trusty International account or permitting

> its early operation merely as inefficiency or oversight was simply to fly in the face of the suspicions entertained by Mr Faronbi as to the essential honesty of Messrs Ibrahim and Saminu at the time.
>
> [37] In my judgment, these are powerful submissions. It seems to me that once Mr Faronbi suspected Trusty International's directors of participating in money laundering, on the basis of the judge's clear findings of what Mr Faronbi was aware of, the distinction which the judge then drew between Mr Faronbi's suspicions of the business in general and his ignorance about the particular transactions in question in this case becomes a thin line whose value for the purposes of insulating Mr Faronbi and thus the bank from the necessary complicity is highly uncertain. It is one thing to be negligent in failing to spot a possible money launderer, providing the negligence does not extend to shutting one's eyes to the truth. It is another thing, however, to have good grounds for suspecting money laundering and then to proceed as though one did not. Money laundering is a serious crime, for the very reason that ex hypothesi its subject matter is the proceeds of crime. It is true that such proceeds are not necessarily those of a breach of trust—they could be the proceeds of drug dealing. But I am doubtful that that possibility provides any protection where there is a breach of trust. It is also true that the growing concern now experienced about money laundering and the international precautions now taken against it must be viewed in the context of public policy rather than on the level of an equitable tort designed to provide remedies in the civil law against knowing assistance in breach of trust. Nevertheless, I do not see why a bank which has, through its managers, a clear suspicion that a prospective client indulges in money laundering, can be said to lack that knowledge which is the first element in the tort."

73. In the present case the Claimants do not allege that Mr Deuss had any personal involvement in any of the individual transactions which gave rise to the VAT Claims or, indeed, with the MTIC Companies or the MTIC Directors. They assert that Mr Deuss either knew or turned a blind eye to the fact that companies in the T&C sector were engaged in MTIC fraud and this is sufficient to establish liability. In my judgment, this is a finding open to the Court. But it is important to appreciate what it requires the Court to find. I must be satisfied that Mr Deuss had a clear suspicion that the vast majority of prospective customers in the T&C sector were engaged in MTIC fraud.

74. I also bear in mind that the Claimants did not allege dishonesty against any other members of the senior management of FCIB or TWPS. Although they pleaded a case of dishonesty against Mr Valery, they did not try to prove it at trial. The Claimants accepted that they had to prove that Mr Deuss was dishonest and took on that burden. But it is important for the Court to remind itself of the difficulties faced by a claimant who alleges dishonesty against one individual in a large organisation. In *Stanford International Ltd v*

HSBC plc [2021] EWCA Civ 355, [2021] 1 WLR 3507 the Court of Appeal upheld the decision of Nugee J (as he then was) to strike out a claim for dishonest assistance against a bank for involvement in a Ponzi scheme. Sir Geoffrey Vos MR explained why the allegations of dishonesty were bound to fail at [42] to [47]:

> "42 As it seems to me, the judge correctly stated the applicable principles. What he said is summarised at para 17—20 above, including the principle to be extracted from *Armstrong* [1952] 1 KB 232 and *Greenridge* [2016] EWHC 91 (Ch) to the effect that it was not possible to aggregate two innocent minds to make a dishonest whole. SIB supplied supplemental written submissions after the hearing referring to a raft of Commonwealth cases, but none of them, on analysis, supported the proposition that dishonesty can properly be alleged by adding the knowledge of one innocent person to that of another.
>
> 43 Instead, as I have already recorded, Mr Fenwick argued a rather more elusive case to the effect that: "in a case where dishonesty is pleaded against a [large] corporate entity, [one has to look] at all the facts, all the actual and constructive knowledge of those who were involved in representing the company at all stages of the events against which criticism is made. It [is] at that stage that you then take an objective view and [ask]: looked at objectively, is a person or entity with that knowledge to be regarded as dishonest?" He submitted in a range of different formulations that the scale of HSBC's alleged neglect of good practice and failure to ask questions amounted to some kind of exception to the general rules I have stated, applicable specifically to large corporations.
>
> 44 In my judgment, SIB's submissions on this issue are affected by three fundamental flaws.
>
> 45 First, SIB has disavowed alleging institutional dishonesty in the sense that board members and compliance officers generally did not care whether the bank supported fraudulent customers. SIB's case was based on how HSBC applied its policies and procedures specifically to SIB. Yet, it has been unable thus far (despite having statements from those most closely involved with SIB and significant disclosure) to allege that any specific employee was either dishonest or suspected the Ponzi fraud and made a conscious decision to refrain from asking questions.
>
> 46 Secondly, the reality of SIB's pleading, looked at as a whole, is that it is alleging gross neglect on a grand scale. This is a case that falls squarely within Lord Scott's strictures in *Manifest Shipping*. If a plea of dishonesty were to be permitted in these circumstances, it would be to allow blind-eye knowledge to be constituted by a decision not to inquire into an untargeted or speculative suspicion rather than a targeted and specific one. It would be to allow gross negligence to be the basis for a finding of dishonesty, which can never be the case.
>
> 47 Thirdly, SIB cannot hide behind the fact that HSBC is a large corporation. That makes no difference. As the cases show, if dishonesty and blind-eye knowledge is to be alleged against corporations, large or

> small, it has to be evidenced by the dishonesty of one or more natural persons. The rules that have been laid down as to what amounts to dishonesty for the purposes of dishonest assistance cannot be circumvented. Of course, the court must look at all the facts and all the actual and constructive knowledge of those involved in representing HSBC, but one cannot avoid the subjective dishonesty stage of the test in order to proceed directly to the objectively dishonest stage as Mr Fenwick seeks to do. The subjective dishonesty that needs to be established, after consideration of all the facts, must either be the dishonesty of a person within the corporation or the blind-eye knowledge of such a person. The latter requires, as I have said and the judge held, that person to have a targeted suspicion (here that there was a Ponzi fraud) and then to decide not to ask questions that might lead to its discovery. The use of the epithet "recklessly dishonest" does not help, because the substantive allegation is simply that HSBC's management allowed HSBC to be run in such a way that "nobody ever got to the point of realising that SIB was a massive Ponzi scheme". That is negligence not dishonesty."

75. I do not suggest that the Claimants in the present case made the same mistake in pleading their case as SIB did in *Stanford*. They pleaded and advanced a case of dishonesty against a natural person, Mr Deuss. But what is significant in the present case is that the individual in question had no knowledge of the individual customers or transactions. If Mr Deuss was dishonest, then the Claimants have to explain in some way why the other directors, officers and employees of the bank were not dishonest when dealing with those individual customers or, if they were, why no allegations of dishonesty were pursued against them. In short, I have to be satisfied that the Claimants have not elevated a claim for "gross neglect on a grand scale" by focussing its criticisms on Mr Deuss himself.

76. Mr Thanki also reminded me that the Court is entitled to draw inferences from what a defendant knew, said and did: see *Barlow Clowes* (above) at [26]. But he also reminded that the Court must not draw inferences of dishonesty from facts which are consistent with honesty or even negligence. In *Suppipat v Narongdej* [2023] EWHC 1988 (Comm) Calver J identified the following four principles to be applied in approaching inferences of fraud or dishonest conduct generally (and for simplicity I exclude the citations):

> "a. It is not open to the Court to infer dishonesty from facts which are consistent with honesty or negligence, there must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.
>
> b. The requirement for a claimant in proving fraud is that the primary facts proved give rise to an inference of dishonesty or fraud which is more probable than one of innocence or negligence.

> c. Although not strictly a requirement for such a claim, motive "*is a vital ingredient of any rational assessment*" of dishonesty. By and large dishonest people are dishonest for a reason; while establishing a motive for conspiracy is not a legal requirement, the less likely the motive, the less likely the intention to conspire unlawfully.
>
> d. Assessing a party's motive to participate in a fraud also requires taking into account the disincentives to participation in the fraud; this includes the disinclination to behave immorally or dishonestly, but also the damage to reputation (both for the individual and, where applicable, the business) and the potential risk to the "liberty of the individuals involved" in case they are found out."

77. These are useful principles and I apply them in assessing the evidence against Mr Deuss. But I also agree with Mr Parker and his team that at bottom the question of dishonesty is a jury question and that an honest person should have little difficulty in knowing whether a transaction (or their participation) would offend against the normally accepted standards of honest conduct: see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] AC 379 at 390F-391B (Lord Nicholls).

(4) Compensation

78. The Defendants accepted that if the Claimants proved the three requirements of a claim for dishonest assistance, they were entitled to recover all of the losses flowing from the breaches of duty. However, they submitted that the Claimants still had the burden of proving what loss flowed from the breach of trust or duty: see *Grupo Torras SA v Al-Sabah* [1999] CLC 1469 at 1667. In Grant & Mumford Civil Fraud: Law Practice & Procedure (2018) the editors introduce a note of caution stating that care must be taken to identify the breach or breaches of trust or fiduciary duty in which there has been assistance. They state as follows at 13—027:

> "However, care must be taken to identify the breach or breaches of trust or fiduciary duty in which there has been assistance. What may be characterised as a single dishonest scheme may nevertheless involve a number of distinct breaches, and the loss recoverable from the dishonest assister is only that which may be said to have resulted from the particular breach or breaches in which he assisted.So where payments are abstracted from the claimant and channelled through a number of different routes to different ultimate recipients as part of a single "scheme", it may be open to a defendant who is implicated only in the onward diversion of one of the payments but not others to contend that the relevant breach of trust in which he assisted is only that by which that particular payment was made and concealed, and so the loss which he must bear (even when analysed

> with reference to the underlying breach of trust and not the assistance in it) is limited to that particular payment."

79. I accept that this guidance is correct and that it is important to identify or characterise the breaches of duty committed by the MTIC Directors before going on to consider the extent to which FCIB may be liable. I am prepared to accept that each payment or deal should not necessarily be characterised as a separate breach of fiduciary duty and that it may be possible to characterise the conduct of an MTIC Director who participates in a MTIC network as a single breach of trust or breach of duty. But it depends on the facts and, in particular, whether the payments or receipts which give rise to the VAT Claim can be treated as a continuous series of transactions.

(5) Limitation

(i) S.21 of the LA 1980

80. Section 21 ("**S.21**") of the Limitation Act 1980 (the "**LA 1980**") is headed "Time limit for actions in respect of trust property" and it provides as follows:

> "(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action— (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of subsection (1)(b) above to recover that property or its proceeds after the expiration of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over his proper share. This subsection only applies if the trustee acted honestly and reasonably in making the distribution.
>
> (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued. For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.
>
> (4) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order

> obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence."

81. In *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 the Supreme Court held by a majority that S.21(1)(a) did not apply to strangers to the trust who are liable for knowing receipt and dishonest assistance and that the subject claims were barred by limitation. None of the members of the Court stated in terms what limitation period applied to a claim for dishonest assistance but it appears to have been assumed by the parties and the Court that the limitation period in S.21(3) applied to such a claim. For example, Lord Neuberger stated as follows at [97]:

> "Approached in this way, I consider that the fact that it is common ground that the words "an action... in respect of any breach of trust" in section 21(3) are broad enough to cover a claim against a dishonest assister or knowing recipient, actually support, rather than undermine this first reason. At first sight, there is force in Lord Clarke of Stone-cum-Ebony JSC's argument that, if that expression in section 21(3) covers dishonest assistance or knowing receipt, the similar expression "an action... in respect of any... fraudulent breach of trust" in section 21(1)(a) should do so as well. But the vital words "to which the trustee was a party or privy" are not to be found in section 21(3). The essential point in this connection is that the fact that the expression "in respect of" in section 21(3) has a broad, rather than a restrictive, effect suggests that the expression should also have a broad effect in section 21(1)(a), in which case the words "to which the trustee was a party or privy" are otiose unless section 21(1)(a) as a whole is given the narrower meaning for which Central Bank of Nigeria contends, rather than the wider meaning supported by Dr Williams."

82. It is important to identify the statutory provision which applies in the present case because of the effect (if any) of the *General Rolling Stock* principle upon that statutory provision. Mr Parker and his team conceded that a six year limitation period applied to the Direct Claims and the textbooks generally accept that the relevant period is contained within S.21(3): see, e.g., *Lewin on Trusts* 20th ed (2020) Vol I at 50—064. In case there is any doubt, I hold that the Direct Claims for dishonest assistance against FCIB attract the six year limitation period in S.21(3).

(ii) The *General Rolling Stock* principle

83. Section 98 of the Companies Act 1862 ("**S.98**") provided that once an order for winding up a company was made, it was the duty of the Court to cause its assets to be collected

and applied in discharge of its liabilities. In 1865 a company was wound up and in 1871 a dividend was paid. For some unexplained reason, a creditor holding bills of exchange for £25,500 which fell due in 1865 failed to notify the liquidators of its claim and Lord Romilly MR held that it was barred by limitation from doing so. The Court of Appeal allowed an appeal. It is convenient to set out in full the short judgments of both James LJ and Mellish LJ:

> "I think that this case is entirely unprejudiced by the decision in *Forest's* Case before Vice-Chancellor Stuart, and that it is unnecessary for us to consider whether that decision was founded on a right view of the combined operation of the Acts of Parliament then in force. The statute which governs the present case is clear. The 98th section enacts that, "As soon as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities." A duty and a trust are thus imposed upon the Court, to take care that the assets of the company shall be applied in discharge of its liabilities. What liabilities? All the liabilities of the company existing at the time when the winding-up order was made which gives the right. It appears to me that it would be most unjust if any other construction were put upon the section. After a winding-up order has been made, no action is to be brought by a creditor except by the special leave of the Court, and it cannot have been the intention of the Legislature that special leave to bring an action should be given merely in order to get rid of the Statute of Limitations. It must have been intended that such leave should be given only in cases where the Court thought that an action was the most proper means of determining the question as to the liability of the company. In the present case it is not disputed that at the time of the winding-up order the company was liable to the holders of these bills, and the winding-up order enures to the benefit of the holders. No possible mischief or inconvenience can arise from this, for a day is fixed for creditors to come in and prove, and the Act expressly provides that any creditor who does not come in within the time named shall lose the benefit of any dividend that has been paid in the meantime. No mischief, therefore, can be done to the other creditors by reason of the delay or laches of any creditor, since if he delays beyond the proper time he must take his chance of what assets he can find for payment of his debt, not disturbing any former dividend."

> "I am of the same opinion. I think that the case is governed by the 98th section of the present Act, and that it is unnecessary to consider what was the proper construction of the former Acts. It appears to me to be the clear meaning of that section, that the assets should be applied in satisfaction of all the liabilities which existed at the time of the winding-up order. That being so, I think we must consider that the Legislature intended us to follow the analogy of other cases where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency, or

> under a trust for creditors, or under a decree of the Court of Chancery, in an administration suit. In these cases the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against this claim, but, as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend."

84. The decision in *General Rolling Stock* was limited to the question whether a creditor whose claim was not barred by limitation at the date on which the company was wound up could prove in the liquidation if the limitation period had expired at the date on which the creditor submitted its proof. However, the decision has been treated as authority for the proposition that time ceases to run more generally once the debtor company has gone into liquidation. In *Ritchie Capital Management LLC v Lancelot Investors Fund* (unreported, 2 September 2024) the Court of Appeal of the Cayman Islands held that the principle applied not merely to proofs but also to ordinary proceedings against a company in liquidation. In his judgment John Martin KC (JA) referred to a number of English authorities in support of this proposition and I accept it. The judge also gave a very useful explanation why the effect of insolvency legislation is to stop time running for the purpose of limitation at [26]:

> "On that basis, the policy of the Limitation Act and the policy of the insolvency legislation are in conflict; and in my view it is plain that that conflict is to be resolved in favour of the insolvency legislation. This is not judicial law-making: it is the recognition that there are two contradictory legislative policies, one of which must prevail. There are three reasons why I consider it is the policy of the insolvency legislation which must prevail. First, all that the relevant provisions of the Limitation Act do is impose a procedural bar on the promotion of proceedings, without affecting the underlying cause of action (unlike, for example, in the case of actions to recover land, where after the expiration of the limitation period title to the land is expressly extinguished: section 23 of the Act): the words "an action shall not be brought" do not prevent commencement of an action but provide a ground of defence if a defendant chooses to take the point. By contrast, the insolvency acts impose a system of rateable distribution which has a practical (although not legal) effect on the substance of the underlying claim through limiting recovery. Secondly, the policy of the insolvency legislation (that all liabilities should be brought into account) already prevails over the policy of the Limitation Act (that there should be certainty and finality of claims) in relation to proofs of debt, that being the undoubted effect of the General Rolling Stock principle; and it is a small step to say that it should prevail also in relation to actions. (In this connection, it is worth pointing out that the effect of allowing a proof after

> the expiration of a limitation period is no more or less inconsistent with the policy of the Limitation Act than would be the effect of applying the principle in the case of conventional causes of action, so that the judge's comments (paragraph 51) that applying the principle to actions would produce a "most surprising outcome" are nothing to the point.) Thirdly, insofar as the test for resolution of the conflict is necessity, it is necessary for the proper operation of the statutory trust resulting from the insolvency legislation that liabilities existing at the relevant date should be included in the statutory scheme whatever the method used to establish them."

85. Martin JA placed particular reliance upon the decision of the Court of Appeal in *Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd* [2005] EWCA Civ 1408, [2006] QB 808. In that case all of the members of the Court held that time ceased to run for the purposes of a claim under the Third Parties (Rights against Insurers) Act 1930. However, Moore-Bick LJ made an important distinction between claims inside and outside the liquidation. After citing earlier authority he stated this at [60] to [62]:

> "60…They support the conclusion that a distinction is to be drawn between rights to obtain satisfaction of claims from the property of the company through the process of the liquidation, which are determined as at the date of the commencement of the winding-up, and rights that may be enforceable outside the liquidation, for example by recourse to security. In the case of the former time does not run after the date of the winding up so that a proof may be submitted at any time, although without disturbing any previous distributions. In the case of the latter time runs in the ordinary way.
>
> 61. This makes it necessary to consider whether the claims brought against the company in the present case are claims within or outside the liquidation. The company says that they are claims outside the liquidation because the claimant is seeking to obtain the benefit of the rights under the insurance policy which do not form part of the company's property. The learned judge accepted that argument. He held that although the underlying cause of action remained one against the company, the potential for recovery under the policy could nonetheless be treated as an asset outside the bankruptcy. He considered the claimant to be in substantially the same position as a secured creditor and therefore subject to the normal operation of the Limitation Act.
>
> 62. With great respect to the learned judge I think he was wrong about that. Although the 1930 Act operated to transfer the company's rights under the policy to the claimant at the commencement of the winding up, those rights were inchoate and entirely dependent upon the establishment of the company's liability to the claimant. Until that liability has been established neither the company nor the claimant has a right to recover under the policy. The position is unlike that of a secured creditor who has an immediate right to satisfy his claim by recourse to the security.
>
> 63. In the present case, as Lloyd L.J. has explained, the claimant's rights

> against the company could be established by proceedings in the ordinary way (this being a voluntary liquidation) or by an appeal against the refusal of the liquidator to admit its proof, but in either case if it were successful it would establish its right to prove in the liquidation. By so doing it would also complete its cause of action against the insurers under the policy, but that does not mean that the claim is one that is made outside the liquidation or that the present proceedings are proceedings to enforce rights against property outside the liquidation. They cannot be, since no such rights exist until the company's liability has been established."

86. In *Khan v Singh-Sall* [2023] EWCA Civ 1119, [2024] Bus LR 79 the Court of Appeal dismissed an appeal by a bankrupt against the Court's decision to refuse an annulment of the bankruptcy order. One issue which had arisen below was the effect of an annulment on a limitation period which was running at the date of the bankruptcy order. Nugee LJ did not consider it necessary to decide this issue. But, again, he emphasised that the reason why time stopped running was that the creditor no longer had a right to bring an action against the debtor. He stated as follows at [77] and [78]:

> "77. It is not disputed that once a bankruptcy order is made the creditors in the bankruptcy no longer have a right to bring an action against the debtor. This is the effect of section 285(3)(b) IA 1986 which provides: "(3) After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall— … (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose."
>
> 78. The corollary of this is that if a provable debt is not statute-barred at the commencement of the bankruptcy, it does not become barred by lapse of time thereafter, at any rate for the purposes of proof and distribution in the bankruptcy: see *In re Benzon* [1914] 2 Ch 68, 75, per Channel J giving the judgment of this court. That is of course consistent with the nature of bankruptcy as a collective process for the benefit of unsecured creditors (or, to be more accurate, those with provable claims). It would be inconsistent with that collective process for individual creditors to be able to take action to enforce their claims; and it seems to me that it would be equally inconsistent with it for them to be required to do so to preserve their claims from becoming statute-barred. It can therefore be seen that this prima facie bar on bringing an action for claims within the bankruptcy is a necessary part of the legislative scheme. (That can be contrasted with claims outside the bankruptcy such as claims by secured creditors to enforce their security, where time continues to run normally: *Cotterell v Price* [1960] 1 WLR 1097, 1105, per Buckley J.)"

87. In *Contract Natural Gas Ltd v Zog Energy Ltd* [2025] EWHC 86 (Ch) Mr Andrew Twigger KC (sitting as a Deputy Judge of the High Court) held that the making of an

administration order under the statutory regime introduced by the Enterprise Act 2002 did not stop time running for the purposes of the statutory limitation period for breach of contract: see [139]. He held in the alternative that a company's entry into a creditors' voluntary liquidation did have the effect of stopping time running for that purpose: see [144]. It is clear from the judge's reasoning that he considered the critical difference between liquidation and administration to be that one gave rise to a statutory trust but the other did not. He also rejected the similarity between the two insolvency procedures as a reason for reaching a different conclusion. He stated this at [133] and [134]:

> "133. Mr Brown also relied on the assimilation of the rules relating to administration and those relating to liquidation so far as they concern distributions and proof of debts, in part 14 of the 2016 Rules. I have considerable sympathy with creditors who submit a proof of debt in an administration and are subsequently taken by surprise by the discovery that their claims have become time barred. The process of submitting a formal proof of those debts which were due at the date on which the administration order was made might reasonably suggest to anyone not versed in the law of insolvency that their claim had thereby crystallised at that date. An awareness of the moratorium on claims would be likely to reinforce such a view: the restriction on issuing proceedings might reasonably appear consistent with any claim being sufficiently preserved by submitting the proof of debt. Furthermore, such creditors might reasonably feel aggrieved to be told that the identical process would have stopped time running in a liquidation, but did not do so in an administration. Administration is supposed to produce a better outcome than liquidation for all creditors, not a better one for some at the expense of others whose claims have become time-barred.
>
> 134. Regrettably, however, the question of whether an administration has the effect of stopping time running for liquidation purposes does not depend on what creditors might reasonably understand from the proof of debt process; or even on an interpretation of the 2016 Rules. What matters is whether the provisions of Schedule B1 of the 1986 Act implicitly give rise to a statutory trust, with the effect that creditors become able to claim as beneficiaries to whom no limitation period applies. The process of proving debts is part of the mechanism which enables a distribution to be made by an administrator, where appropriate. For the reasons explained above, however, there is no inevitability under Schedule B1 that an administrator will make a distribution to creditors. Consequently, there can be no statutory trust. The assimilation of the proof of debt process in administration with that in liquidation was a product of the 2016 Rules which cannot have changed the meaning and effect of Schedule B1 enacted in 2002."

88. The judge also cited *Ayerst (Inspector of Taxes) v C&K (Construction) Ltd* [1976] AC 167 where the issue for the House of Lords was whether a company in liquidation

retained beneficial ownership of its assets for the purposes of tax legislation relating to capital allowances. Lord Diplock cited *General Rolling Stock* and *Re Oriental Inland Steam Co* (1874) 9 Ch App 557 (another decision of both James and Mellish LJJ) before stating as follows at 180B-F:

> "The authority of this case for the proposition that the property of the company ceases upon the winding up to belong beneficially to the company has now stood unchallenged for a hundred years. It has been repeated in successive editions of *Buckley on the Companies Acts* from 1897 to the present day. Nevertheless your Lordships are invited by the appellant company to say that it was wrong because it was founded on the false premise that the property is subject to a 'trust' in the strict sense of that expression as it was used in equity before 1862.
>
> My Lords, it is not to be supposed that in using the expression 'trust' and 'trust property' in reference to the assets of a company in liquidation the distinguished Chancery judges whose judgments I have cited and those who followed them were oblivious to the fact that the statutory scheme for dealing with the assets of a company in the course of winding up its affairs differed in several aspects from a trust of specific property created by the voluntary act of the settlor. Some respects in which it differed were similar to those which distinguished the administration of estates of deceased persons and of bankrupts from an ordinary trust, another peculiar to the winding up of a company is that the actual custody, control, realisation and distribution of the proceeds of the property which is subject to the statutory scheme are taken out of the hands of the legal owner of the property, the company, and vested in a third party, the liquidator, over whom the company has no control…All that was intended to be conveyed by the use of the expression 'trust property' and 'trust' in these and subsequent cases (of which the most recent is *Pritchard v. M. H. Builders (Wilmslow) Ltd* [1969] 1 WLR 409) was that the effect of the statute was to give to the property of a company in liquidation that essential characteristic which distinguished trust property from other property, viz., that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons."

89. Mr Parker argued that *CNG v Zog Energy* (above) was decided per incuriam because the judge failed to have regard to *Khan v Singh-Sall* and also to changes made by the Insolvency (England and Wales) Rules 2016. In particular, he relied on Rule 14.1(3) which amended the definition of both "debt" and "relevant date". In *Re Nortel GmbH* [2013] UKSC 52, [2014] AC 209 Lord Neuberger PSC explained the effect of those changes as follows at [35] and [37]:

> "35. In general, the unsecured debts of a company after an insolvency event are payable pari passu to the relevant creditors, who claim payment by proving for their debts. There has to be a cut-off date to determine the

> class of creditors who are to participate in the distribution of the company's available net assets. As the law stood as regards the companies with which these appeals are concerned, the cut-off date for claims in a liquidation is the date on which the company goes into liquidation, whether or not the liquidation was immediately preceded by an administration. The cut-off date for claims in an administration is the date on which the company entered administration. Under this regime, if an administration is followed immediately by a liquidation, the debts provable in the liquidation would include any which arise during the administration, although debts provable in the administration would be limited to those arising before the administration."
>
> "37. First, the position described in para 35 above has now changed. The cut-off date for claims in a liquidation, which follows an administration started after 5 April 2010, is the date when the administration began. The same issue as arises in these appeals can still arise. However, there will no longer be an artificial distinction between the positions where the company proceeds from administration to winding up and where it does not. The change will tend to increase the importance of the dispute as to the correct treatment for insolvency purposes of the liabilities arising under a FSD or a CN."

90. I reject Mr Parker's submissions. As Mr Scott submitted, *Khan v Singh-Sall* was a personal bankruptcy case. Moreover, the Court of Appeal did not decide what effect annulment had on a limitation period which had been suspended under the *General Rolling Stock* principle and the views which Nugee LJ expressed about that issue were necessarily *obiter dicta*. But in any event, I see no inconsistency between those views and the views expressed by the judge. The reasoning of Nugee LJ which I have set out above is entirely consistent with the judge's conclusion that an administration order does not stop time running because it does not involve the creation of a statutory trust.

91. I also reject the submission that the judge did not have regard to the law relating to administrations after 2010 or to the position as explained in *Nortel*. On 9 December 2021 the Defendant went into administration and it is clear that the judge was considering the rules in their amended form: see [85]. In that paragraph he described administration as "a distributive process from the outset of the administration". But in any event, I consider that *CNG v Zog Energy* was rightly decided and consistently with the *General Rolling Stock* principle or, alternatively, that it is not so obviously wrong that I should not follow it as a decision by a judge of concurrent jurisdiction.

(iii) S. 143 of the IA 1986

92. Section 130 ("**S.130**") and section 143 ("**S.143**") of the IA 1986 set out the consequences of the Court making a compulsory order to wind up a company and those sections provide as follows:

> "**130.— Consequences of winding-up order.**
>
> (1) On the making of a winding-up order, a copy of the order must forthwith be forwarded by the company (or otherwise as may be prescribed) to the registrar of companies, who shall enter it in his records relating to the company.
>
> (2) When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose.
>
> (3) When an order has been made for winding up a company registered but not formed under the Companies Act 2006, no action or proceeding shall be commenced or proceeded with against the company or its property or any contributory of the company, in respect of any debt of the company, except by leave of the court, and subject to such terms as the court may impose."
>
> "**143.— General functions in winding up by the court.**
>
> (1) The functions of the liquidator of a company which is being wound up by the court are to secure that the assets of the company are got in, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it.
>
> (2) It is the duty of the liquidator of a company which is being wound up by the court in England and Wales, if he is not the official receiver— (a) to furnish the official receiver with such information, (b) to produce to the official receiver, and permit inspection by the official receiver of, such books, papers and other records, and (c) to give the official receiver such other assistance, as the official receiver may reasonably require for the purposes of carrying out his functions in relation to the winding up."

93. S.143 is the statutory successor to S.98 and neither party argued that it should be interpreted any differently from the earlier provision. In *Ayerst (Inspector of Taxes) v C&K (Construction) Ltd* (above) the House of Lords held that the Part V of the Companies Act 1948 gave rise to a statutory trust and, in my judgment, S.143 should also be construed as doing so. The issue between the parties was whether the *General Rolling Stock* principle extends beyond S.140 of the IA 1986 and applies to a company which has entered a foreign insolvency process.

(iv) How far does the principle extend?

94. Mr Parker submitted that the *General Rolling Stock* principle was of general application and that once this was accepted, there was "no reasoned basis" for limiting it to funds within the jurisdiction or applying it to a foreign insolvency regime. He cited no authority for either of these propositions apart from Franks Limitation of Actions (1959), p.28. Mr Scott submitted both in his opening submissions and orally that there is no such principle and that the Court of Appeal in *General Rolling Stock* itself was doing no more than giving effect to S.98 which had no application to foreign courts and foreign states.

95. I accept Mr Scott's submissions on this issue and I hold that the decision of the Court of Appeal in *General Rolling Stock* is limited to companies which are either wound up or put into voluntary liquidation under the IA 1986 (or the predecessor legislation) and has no application to foreign companies. I have reached this conclusion for the following reasons:

(1) The Court has no general power to ignore a statutory provision imposed by Parliament and it is the Court's duty to give effect to S.21(3) of the LA 1980 unless Parliament has legislated otherwise. It follows, therefore, that the Direct Claims shall not be brought after the expiration of six years from the date on which the right of action accrued to the MTIC Companies unless there is a relevant statutory exception to that rule.

(2) I accept that S.143 does not state in terms that the limitation period under S.21(3) is suspended when a company goes into liquidation. But in *General Rolling Stock* the Court of Appeal held that this was its effect. The assets of the company are held on a statutory trust for the benefit of each creditor "who had a subsisting claim at the time of the adjudication, the insolvency". It made no difference, therefore, whether the limitation period expired after the company went into liquidation but before the creditor had submitted a proof or the liquidator had distributed the assets because the claims of creditors crystallised when it went into liquidation and from that point in time the assets of the company were held on trust to be applied for their benefit. They were parties entitled to a surplus (if any) under S.143(1).

(3) As Nugee LJ explained in *Khan v Singh-Sall* this is "a necessary part of the legislative scheme" or, put another way, a matter of necessary implication. It would be inconsistent with the collective process for individual creditors to be able to take

action to enforce their claims or to be required to do so to preserve their claims from becoming barred by limitation. Although *Khan v Singh-Sall* was a personal bankruptcy case, the *General Rolling Stock* principle operates in the same way and as a matter of necessary implication into S.143 for the reasons articulated by Martin JA in *Ritchie Capital Management LLC v Lancelot Investors Fund* (above).

(4) I am prepared to accept (without deciding) that the *General Rolling Stock* principle applies not merely to proofs but also to ordinary proceedings against a company in liquidation: see *Ritchie*. In *Khan v Singh-Sall*, however, Nugee LJ was not prepared to accept without further argument that the principle extended beyond "the purposes of proof and distribution in the bankruptcy" and I do not consider that it is necessary for me to express a view on that issue either.

(5) But even assuming that the principle extends to separate legal proceedings as well as to the submission of a proof (or amended proof) to a liquidator, there are undoubted limits to the application of the principle. It applies only to claims which fall within the liquidation and not to claims which the creditor is entitled to enforce outside the liquidation, e.g., by enforcing a security: see *Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd* (above). Nor does the principle apply to administration whether before or after amendment to the rules in 2010: see *CNG v Zog Energy*.

(6) Again, it is unnecessary for me to decide what claims fall within a liquidation and those which fall outside it. But one obvious way to test that question is to ask whether the creditor needs the permission of the Court to bring a claim under S.130 or whether the creditor can enforce the debt independently and without doing so. For example, claims under the Third Parties (Rights against Insurers) Act 2010 should now fall outside the liquidation although they did not when *Larnell* was decided. For present purposes, however, what is important is that there are clear limits to the application of the principle. It does not apply to every claim by a creditor. It applies to the liquidation of companies under the IA 1986 and to claims which are provable in that liquidation. Furthermore, the statutory trust provides the rationale for the existence and application of the principle.

96. However, if I am wrong and the *General Rolling Stock* principle applies to a foreign

insolvency process, then in my judgment that process must be analogous to the liquidation of an English company under the IA 1986 before the principle can apply. The insolvency process must create the equivalent of a statutory trust which prevents a creditor either beginning or continuing legal proceedings against the company and the relevant debt must be provable (or the equivalent) in the insolvency process.

(v) Modified universalism

97. Mr Parker and his team sought to persuade the Court that it could disapply S.21(3) by the alternative route of "modified universalism". The editors of Dicey, Morris and Collins The Conflict of laws 16th ed (2022) ("**Dicey**") Vol 2 state the relevant rule of private international law at 30R—142 and provide the following commentary at 30—176 (footnotes removed):

> "Rule 193(4): English courts have a common law power to provide assistance to foreign insolvency proceedings where such assistance can be provided in a manner consistent with English law and public policy."
>
> "The court's power to provide assistance at common law has long been recognised, but the parameters of the assistance that may be provided have undergone a process of judicial development in recent years. It now appears to be accepted that the underlying principle is one of "modified universalism", which (as the term suggests) is a moderate or pragmatic version of the more extreme view that there should be a unitary winding up proceeding in a debtor's "home" jurisdiction, and that these proceedings should apply universally to all the debtor's assets and receive worldwide recognition. Modified universalism, in contrast, provides that the English courts should assist foreign winding up proceedings so far as they properly can so as to achieve that aim. The obvious question is to identify the limits of what the English court can properly do in this regard."

98. It will be noticed at once that the purpose of the "universalism" which underlies the rule is to enable the Court in the debtor's home jurisdiction to carry out a "unitary winding up proceeding". Moreover, the limits to what the English Court can properly do were recently explored in *Kireeva v Bedzhamov* [2024] UKSC 39, [2024] 3 WLR 1010. In that case the debtor, who was domiciled in England, was declared bankrupt in Russia and his trustee applied to the English Court for recognition of her appointment and for an order vesting the debtor's London property in her. The Supreme Court held that the principle of modified universalism did not permit the Court to provide assistance to a foreign Court which was inconsistent with the rules of substantive law such as the "immovables rule".

99. Lords Lloyd-Jones and Richards JJSC gave the only judgment with which the other members of the Court agreed. They defined the immovables rule as the rule by which a foreign Court has no jurisdiction to make orders in respect of land in England and Wales, and rights relating to such land are exclusively governed by the law of England and Wales: see [25]. After a detailed discussion of the principle in the context of immovable property, they stated as follows at [87] and [88]:

> "87. The first principle identified by Lord Hoffmann, that of modified universalism, remains an important element of the common law as regards assistance in cross-border insolvencies, but it is necessarily subject to jurisdictional limits. As Lord Sumption JSC said in *Singularis* at para 19: "In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers."
>
> 88. It is on the inevitable qualification that common law powers are subject to local law and local public policy that the appellant's reliance on the principle of modified universalism founders. To repeat what we have already said, the immovables rule is a long-established rule of substantive law. The court's common law powers of assistance do not permit it to provide assistance which is inconsistent with rules of substantive law. Mr Davies did not dispute that qualification, but he relied on his basic submission that the immovables rule was concerned only with legal title to immovable property and did not prevent the court from recognising and taking steps to give effect to the appellant's duties and powers under Russian law as regards immovable property situated in England. For the reasons already given, we are clear that the rule is not limited in this way but has the effect that those powers and duties under Russian law are not recognised in this jurisdiction. It would therefore be contrary to English law, and to the principle of modified universalism, for the court to accede to the appellant's application for the appointment of a receiver or other assistance as regards the Property."

100. The judges then went on to consider whether it was appropriate to develop the common law so as to enable the Court to give assistance to the trustee. In doing so they made the following observations about *Singularis Holdings Ltd v PricewaterhouseCoopers LLP* [2014] UKPC 36, [2015] AC 1675 (a case on which Mr Parker and his team relied) at [108]:

> "In *Singularis* [2015] AC 1675, the Judicial Committee of the Privy Council, on appeal from Bermuda, rejected a more extreme submission than that made in *Rubin*: that it should apply legislation, which ex hypothesi did not apply, as if it did apply. A Cayman Islands company was wound up in the Cayman Islands and liquidators appointed. The liquidators, seeking to trace the company's assets, made an application in

> Bermuda for an order requiring the company's auditors, a Bermuda registered partnership, to produce certain documents relating to the company. Under the Bermudan Companies Act 1981, the Bermudan courts had power to make such an order but only in relation to a company which that court had ordered to be wound up. The Privy Council held that the judiciary could not by analogy extend the scope of insolvency legislation to cases where it did not apply. As a result, the Bermudan court could not apply, by analogy, the statutory powers under the Bermudan Companies Act 1981 as if the foreign insolvency were a domestic insolvency. It seems to us that in the present case there is force in the point made by Snowden J (at para 254) that by the recognition application the trustee in bankruptcy seeks, under the pretext of extending the common law, to apply by analogy the CBIR to situations to which, by their terms, they do not apply."

(vi) Limitation: choice of law

101. At common law the choice of law rule for the application of limitation periods turned on whether the relevant statutory provision was to be regarded as substantive or procedural. Where it was substantive, the *lex causae* or governing law of the obligation or wrong would apply and where it was procedural, the *lex fori* or law of the forum would apply to the limitation period. Further, statutes of limitation were regarded as procedural rather than substantive where they barred the remedy rather than extinguished the right and, in general, the English law of limitation was regarded as procedural at common law: see Dicey at 4—057 or 4—058. However, as the editors of Dicey point out where English law was both the *lex fori* and the *lex causae* were the same, English law would apply and nothing would turn on the substantive or procedural distinction.

102. On 1 October 1985 the Foreign Limitation Periods Act 1984 (the "**FLPA 1984**") came into force and on 11 January 2009 the Rome II Regulation on the Law Applicable to Non-Contractual Obligations also came into force. Between the two dates section 1 of the FLPA 1984 provided as follows:

> "**1.— Application of foreign limitation law.**
>
> (1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter— (a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and (b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.

> (2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account."

103. The editors of Dicey state that the FLPA 1984 adopted the general principle that the limitation period of the *lex causae* are to be applied to actions in England: see 4—061. None of the parties made submissions on the choice of law rule to be applied in the present case although, when I put it to him, Mr Scott submitted that the FLPA 1984 applied. In my judgment, he was right to do so. No cause of action upon which the Claimant relied arose earlier than 2004 or later than the date on which FCIB went into Emergency Measures and I can see no basis on which the Rome II Regulation could have applied. In any event, Mr Parker did not submit that either the common law or the Rome II Regulation applied in the present case.

104. In my judgment, the choice of law rules set out in the FLPA 1984 are rules of substantive law in the same way as the immovables rule in *Kireeva* (above). They are statutory provisions which were introduced to simplify the common law rules and to eliminate the unsatisfactory distinction between substantive and procedural rules developed at common law. The law has moved on considerably since 1984 and it may well be that S.21(3) would no longer be classified as a procedural rule in any event. But even if it is a procedural rule, the choice of law rule for determining whether it applies in the present case is a rule of substance and not procedure. I consider the relevance of this conclusion when I come to consider the facts below.

F. The VAT Claims

105. The first issue which I have to decide is whether the MTIC Companies are liable to HMRC for the VAT Claims. It does not necessarily follow that either the Direct or the Indirect Claims must fail if the Claimants are unable to prove that the MTIC Companies are liable as a matter of law for the amounts claimed by HMRC. But this must be the starting point. In support of the VAT Claims the Claimants rely on section 73 ("**S.73**") of the Value Added Tax Act 1994 ("**VATA 1994**") which provides as follows:

> "(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment

> and notify it to him.
>
> (2) In any case where, for any prescribed accounting period, there has been paid or credited to any person— (a) as being a repayment or refund of VAT, or (b) as being due to him as a VAT credit, an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.
>
> (3) An amount— (a) which has been paid to any person as being due to him as a VAT credit, and (b) which, by reason of the cancellation of that person's registration under paragraph 13(2) to (6) of Schedule 1, paragraph 9 or 11 of Schedule 1A or paragraph 6(1) or (2) of Schedule 3A ought not to have been so paid, may be assessed under subsection (2) above notwithstanding that cancellation.
>
> (4) Where a person is assessed under subsections (1) and (2) above in respect of the same prescribed accounting period the assessments may be combined and notified to him as one assessment."
>
> "(9) Where an amount has been assessed and notified to any person under subsection (1), (2), (3), (7), (7A) or (7B)] above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced."

106. The terms of the section are very clear and in *Infinity Distribution Ltd v HMRC* [2010] EWHC 1393 (Ch) Simon J stated in terms that a tax payer is bound by an assessment unless and until it is successfully appealed whether or not the sum is actually due: see [62]. It follows, therefore, that if the Claimants were able to produce the assessments or reliable evidence that they were raised by HMRC, there could be no dispute that the MTIC Companies were legally liable to pay the amount of the VAT Claims.

107. In assessing a number of the MTIC Companies for VAT, HMRC also relied on section 77A ("**S.77A**") of the VATA 1994. This section provides that traders in a supply chain may be held jointly and severally liable for VAT where the tax is unpaid by the original supplier. S.77A provides as follows (so far as relevant):

> "(2) Where— (a) a taxable supply of goods to which this section applies has been made to a taxable person, and (b) at the time of the supply the person knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply of those goods, would go unpaid, the Commissioners may serve on him a notice specifying the amount of the VAT so payable that is unpaid, and stating the effect of the notice.
>
> (3) The effect of a notice under this section is that— (a) the person served

> with the notice, and (b) the person liable, apart from this section, for the amount specified in the notice, are jointly and severally liable to the Commissioners for that amount.
>
> (4) For the purposes of subsection (2) above the amount of VAT that is payable in respect of a supply is the lesser of— (a) the amount chargeable on the supply, and (b) the amount shown as due on the supplier's return for the prescribed accounting period in question (if he has made one) together with any amount assessed as due from him for that period (subject to any appeal by him).
>
> (5) The reference in subsection (4)(b) above to assessing an amount as due from a person includes a reference to the case where, because it is impracticable to do so, the amount is not notified to him.
>
> (6) For the purposes of subsection (2) above, a person shall be presumed to have reasonable grounds for suspecting matters to be as mentioned in paragraph (b) of that subsection if the price payable by him for the goods in question— (a) was less than the lowest price that might reasonably be expected to be payable for them on the open market, or (b) was less than the price payable on any previous supply of those goods.
>
> (7) The presumption provided for by subsection (6) above is rebuttable on proof that the low price payable for the goods was due to circumstances unconnected with failure to pay VAT.
>
> (8) Subsection (6) above is without prejudice to any other way of establishing reasonable grounds for suspicion."

108. The Claimants called no witness of fact from HMRC who might have been able to explain to the Court how HMRC had calculated the relevant liability or to produce the relevant documents. Nor did they call an expert tax accountant to provide similar evidence and to express the view that the sums had been properly calculated. Instead, the Claimants relied on a series of dense schedules which referred to figures, documents and numbers which, in almost every case, had not been the subject of any oral submissions or verification by a witness statement.

109. Given the resources which the Claimants deployed on this litigation, I was not given any explanation for their failure to call an expert tax accountant to explain and prove the VAT Claims or even a factual witness from HMRC. If the Claimants had done so, the Defendants might well have chosen not to contest the figures or the issues could have been narrowed very significantly to assist the Court. On the other hand, I do not see why it was not open to the Claimants to prove liability by other admissible evidence and so I was faced with the task of trying to check whether the Claimants had proved their case

and their numbers were correct by working through all of the figures in Cs, S8 and attempting to verify them by reference to the materials in G1 to G19. I am bound to record that this has increased the time taken to prepare this judgment considerably.

(1) Kingswood

110. The Claimants relied on a letter dated 4 June 2007 in which HMRC wrote to Griffins stating that an assessment would be raised for VAT totalling £387,634.87 because the purchaser of the goods, a Spanish company, had been de-registered for VAT by the Spanish tax authorities. The Defendants did not dispute that such an assessment was raised or advance a positive case that it was withdrawn, reduced, appealed or paid. I find that Kingswood was assessed to VAT for £387,634.87 and that it was liable to HMRC for that sum under S.73(3) and (9).

(2) MTL

111. The Claimants relied on a notice of assessment dated 13 November 2006 for £587,788.53. The Defendants did not dispute the assessment or advance a positive case that it was withdrawn, reduced, appealed or paid. I find that MTL was assessed to VAT for £587,788.53 and that it was liable to HMRC for that sum under S.73(9).

(3) ACEL

112. The Claimants relied on a series of notices of assessment and correspondence which were itemised in a table in G3 and they asserted that ACEL was assessed for either £12,888,571.24 or £12,892,787.22. It is clear that HMRC assessed ACEL for substantial sums after it ceased to trade. But there was no single document from which I could safely derive the final figure and I found it difficult to reconcile Cs, S8 and the table. Moreover, although the Claimants relied on an assessment dated 24 May 2007 which showed that ACEL's VAT account had a total balance of £10,059,768.96, they also relied on a more recent assessment dated 9 December 2008, which showed a total balance of £2,833,018.26.

113. It appears to me very likely that the two sums should be added together because ACEL had gone into liquidation between the two assessments. But the Claimants did not adduce any evidence to prove this or even give me this explanation in submissions. In G3 the

Claimants relied on the decision of the FTT in *Global Enterprise (GB) Ltd v HMRC* [2013] UKFTT 786 (TC) in which Judge Brooks stated at [63] that: "Assessments remain outstanding against AC Electrical in excess of £12 million and it is accepted that the loss of tax was the result of fraud." Although that finding is not admissible as proof of liability because of the rule in *Hollington v Hewthorn*, I see no reason why I cannot rely on it to support the inference that ACEL was liable for both assessments. I find, therefore, that ACEL is liable for VAT of £12,892,787.22.

(4) MML

114. The Claimants relied on a notice of assessment dated 23 July 2007 for £4,443,565.00. The Defendants did not dispute the assessment or advance a positive case that it was withdrawn, reduced, appealed or paid. I find, therefore, that MML was assessed to VAT for £4,443,565.00 and that it was liable to HMRC for that sum under S.73(9). The Claimants claimed an additional £218,566.88 and it is clear from G13(ix) that they did so on the basis that Mr Hunt had added this sum to MML's claim against TWPS to account for interest between the notice of assessment and its liquidation. But there is no evidence that HMRC raised a notice of an assessment for that sum and I disallow it for the reasons which I explain in relation to 385 North (below).

(5) Leeds Smith

115. The Claimants rely on a notice of assessment dated 9 December 2008 for £767,025.00. The Defendants did not dispute the assessment or advance a positive case that it was withdrawn, reduced, appealed or paid. I find, therefore, that Leeds Smith was assessed to VAT for £767,025.00 and that it was liable to HMRC for that sum under S.73(9).

(6) 385 North

116. The Claimants rely on a notice of assessment dated 5 March 2008 for £41,604,060.33. The statement of account annexed to the notice states, however, that the total amount which 385 North owed on its VAT account at that date was £40,513,355.54 (inclusive of interest and penalties) and HMRC requested payment of this amount rather than the higher figure. The Defendants did not dispute the assessment or advance a positive case that it was withdrawn, reduced, appealed or paid. On the other hand, the Claimants did not explain why HMRC was entitled to recover the higher amount as opposed to the

amount for which HMRC had requested payment. I find, therefore, that 385 North was liable to HMRC for VAT of £40,513,355.54.

117. 385 North's VAT Claim also included the figure of £1,474,124.90 from the date of the relevant assessment to the date of liquidation. In the Particulars of Claim[6], Schedule A1 the Claimants pleaded that 385 North's liability to HMRC was a statutory liability arising out of the import of goods and accrued under a number of assessments which preceded the notice of assessment dated 5 March 2008. However, they did not allege or seek to prove that HMRC had raised a further assessment for the additional sum of interest claimed. Nor did they plead or prove that HMRC was entitled to recover interest from 385 North on an alternative basis. I, therefore, reject the claim for additional interest.

118. Furthermore, 385 North's Direct Claim against FCIB and its Indirect Claim against TWPS are for dishonest assistance in the breach of fiduciary duty committed by its directors in exposing and then subjecting the company to liability for VAT. Its loss crystallised when the notice of assessment dated 5 March 2008 was served and 385 North failed to challenge it. It may well be that the Claimants are entitled to interest in equity or under S.35A of the Senior Courts Act 1981 if they are successful in recovering the principal sum and that Mr Hunt was entitled to admit the claim for interest to proof on that basis. But in the absence of any notice of assessment, the additional claim for interest is not a statutory liability to HMRC.

(7) Xicom

119. The Claimants alleged that Xicom owed £123,853.06 to HMRC. They relied on HMRC's VAT ledger which showed a total liability of £178,273.00 and two letters dated 12 July 2008 which suggested that an additional £11,575.04 had become payable after an amendment to Xicom's VAT return. The Claimants did not claim the full sum shown on HMRC's ledger because Xicom did not begin to use an FCIB account until December 2005.

120. It was for the Claimants to satisfy the Court that Xicom was liable to HMRC at the date on which it went into liquidation and, in my judgment, they failed to do so. The VAT

[6] I refer to the Re-Re-Re-Amended Particulars of Claim dated 1 February 2025 throughout this judgment as the "**Particulars of Claim**".

ledger does not suggest that a notice of assessment was raised by HMRC for any of the sums which form part of Xicom's VAT Claim. Moreover, the correspondence upon which the Claimants relied shows that HMRC's decision to deny Xicom input tax was the subject of appeal and that £1,126,826 was in dispute. I was not taken to any documents which show the outcome of the appeal although it is clear that Xicom obtained costs orders against HMRC in relation to two appeals: see *HMRC v Xicom Systems Ltd* [2008] EWHC 1945 (Ch) (David Richards J). I therefore reject Xicom's case that it was liable to HMRC for £102,008.19 when it went into liquidation.

(8) Eliyon

121. The Claimants' pleaded case was that Eliyon was liable to HMRC for £455,360.09 based on three assessments dated 8 April 2006, 2 October 2006 and 22 February 2007 for £187,687.00, £242,561.09 and £25,112.00 respectively. The first two assessments were not in evidence although they were shown on HMRC's ledger. The third assessment was in evidence. The Defendants did not dispute any of the assessments or advance a positive case that they were withdrawn, reduced, appealed or paid. I add that in closing submissions the Claimants asserted that Eliyon was liable for £548,603.51: see Cs, S8. This change of case was not explained to me and no application was made to amend. I find, therefore, that MML was assessed to VAT for £455,360.09 and that it was liable to HMRC for that sum under S.73(9).

(9) Gold Digit

122. The Claimants' pleaded case was that Gold Digit was liable to HMRC for £2,032,203.96 at the date of its insolvency: see the Particulars of Claim, Schedule A9. It is clear from a table in G9(xi) that this figure was based on two returns recorded as unpaid for £296,507.24 and £706,506.12, a first notice of assessment dated 17 November 2006 for £210,510.99 and a second notice of assessment dated 30 October 2008 for £740,337.51. The balance of £78,342.20 was made up of interest. I am satisfied that the first notice was issued and the Defendants did not dispute it or advance a positive case that it was withdrawn, reduced, appealed or paid. However, the copy of the second notice to which I was referred was marked up "Not issued as per Wm Hodgson". Mr Hodgson was identified in the notice as the relevant officer.

123. I followed up all of the additional references in G9(xi) and looked at some additional

correspondence. But I was unable to verify the second assessment or to locate any notices of assessment for the interest claimed. It is clear that both assessments were the subject matter of at least one appeal (which may have been later withdrawn). But in any event, I found it difficult to reconcile the table in G9(xi) with the figures in Cs, S8. It was for the Claimants to prove their case by admissible evidence and they failed to do so. They chose not to call a witness to verify the claim or to refer the Court to correspondence which would have made the position clear. I find, therefore, that Gold Digit was liable to HMRC for £1,231,524.20. I discount any interest charged by HMRC on the basis that a claim for interest could be made if the claim had succeeded.

(10) Star

124. The Claimants' relied on four letters dated 28 January 2009, 24 July 2009, 24 July 2009 and 11 December 2009 in which HMRC gave notice to Star that it was denying it the right to claim input tax and that sums of £1,821,248, £11,774,105.21, £5,322,614.43 and £1,446,556.01 were due under S.77A. They also relied on two notices of assessment dated 28 January 2009 and 29 July 2009 in which HMRC claimed additional interest of £364,559.42. I am satisfied that the effect of the four letters was that Star became liable under S.73(2) or jointly and severally liable under S.77A(3) for the amounts claimed. The Defendants did not advance a positive case otherwise. Nor did they advance a positive case that the notice of assessment was withdrawn, reduced, appealed or paid.

125. The Claimants' pleaded case was that Star was liable to HMRC for the total sum of £20,974,132.27 at the date of its liquidation. I was unable to verify this figure. The HMRC ledger shows that HMRC applied further interest and charges of £246,193.20 between 18 July 2007 and 24 March 2017. But even taking these sums into account, HMRC's ledger (which the Claimants produced in spreadsheet form) showed that the total sum owed by Star to HMRC on 19 May 2014 was £20,977,345.27 (before write offs). Given that the difference is very small and there was no application to amend, I find that Star was liable to HMRC for the pleaded amount of £20,974,132.27. I disallow a claim for interest of £1,328,933.00 for the reasons which I have given in relation to 385 North but also because it is clear that HMRC continued to apply interest and charges to Star's account until it went into liquidation in January 2014.

(11) Blue Fox

126. The Claimants relied on a letter dated 21 July 2005 in which Ms LJ Orr, who was a Higher Officer of HMRC, wrote to Blue Fox stating that she had recently raised an assessment for £18,432,107.00. They did not produce the assessment itself although the ledger records that it was issued. I have considered whether I should reject this claim on the basis that the Claimants should have been able to produce the notice of assessment itself. But I remind myself that a hearsay statement in a document is proved by the production of that document (see the Civil Evidence Act 1995, section 8(1)) and that the Defendants have not challenged the authenticity of either the letter or the ledger. Moreover, they have not advanced a positive case that no assessment was issued or that (if one was) it was withdrawn, reduced, appealed or paid. I find, therefore, that at the date of liquidation Blue Fox was liable to HMRC for £18,432,107.00.

(12) TCG

127. The Claimants' pleaded case was that TCG was liable for £83,755,462.00. Particulars were not given but in G5 they relied on a notice of assessment dated 20 March 2006 for £26,492,633.00, a notice of assessment dated 25 January 2008 for £143,368.00, a notice of assessment dated 30 January 2008 for £248,195.00, a notice of assessment dated 5 February 2008 for £214,830.00, a notice of assessment dated 14 July 2008 for £151,952.00 and a notice of assessment dated 29 July 2008 for £286,281.00. They also relied on a letter dated 2 August 2007 which referred to an assessment for £1,017,275.00 and a ledger entry dated 17 August 2007 which records an "INS WO AMEN" of £54,183,653.00.

128. I am prepared to accept that TCG was liable to HMRC for the sums claimed in the notices of assessment under S.73(9). However, I am not prepared to accept that it was liable to HMRC for the sum of £1,017,275.00 set out in the letter dated 2 August 2007 because it is not recorded in HMRC's ledger at all and it was not included in the proof of debt which HMRC submitted on 11 November 2011. Moreover, it contains a statement that: "The debt due to the Crown has been withdrawn and replaced by a VAT Assessment being raised for undeclared output tax for the amount of £1,017,275.00." If this assessment had actually been raised then it would have replaced an existing liability.

129. Finally, I would not have been prepared to accept that TCG was liable to HMRC for the ledger amount of £54,183,653.00 because I did not understand the narrative which I have

quoted above and the entry was written off immediately. However, Mr Parker and his team also referred in G5 to a notice of assessment dated 8 June 2006 for £50,353,579.00 which was stamped on 12 June 2006 and HMRC's proof of debt annexed an extract from the ledger which showed that there had been a central assessment of £55,200,928.00. I am prepared to accept that this is secondary evidence of a notice of assessment and that TCG was liable for this sum under S.73(9). The Defendants did not object to its admissibility or require the Claimants to produce the assessment itself.

130. On the basis of this analysis I find that TCG was liable to HMRC for £82,703,912.26 as shown in HMRC's proof of debt submitted on 11 November 2011. I reject the Claimants' case that it was liable for the slightly higher figure of £83,755,462.00 claimed in Cs, S8 and I also reject an additional claim for interest of £70,767.99. I add that this was (and is) a huge claim and the Claimants ought to have called a witness to produce all of the relevant documents, explain the ledger and reconcile it with the other documents upon which they relied.

(13) Northdata

131. The Claimants' pleaded case was that Northdata was liable to HMRC for £19,848,976.93 on the basis of the proof of debt submitted on 9 June 2006 by Mr Sawyer on behalf of HMRC in its liquidation. In the proof of debt form he stated that this sum was based on assessment but he only attached one notice of assessment dated 2 February 2006 for £7,913,255.00 together with a copy of HMRC's ledger. There is no evidence that Mr Bramston, who was the liquidator at the time, ever asked HMRC to provide copies of any additional assessments.

132. The balance of the total claim for £19,848,976.93 was, therefore, based solely on two entries in the ledger of £3,305,306.00 and £8,499,359.00 both of which are dated 19 April 2006. The first entry records that it relates to May 2006 and the second entry records that it relates to February 2006. The reason stated in the ledger for both entries is "AI" or "Assessment Insolvency". The Defendants challenged the first entry in opening because the liability appeared to relate to a period (i.e. May 2006) after Northdata had gone into provisional liquidation: see D2, O288(2). In his oral opening submissions Mr Wright submitted that this must be wrong. But he did not explain the entry or refer me to any other documents.

133. The Claimants called no evidence to explain the meaning or effect of the entry "AI" or how Northdata could have incurred further VAT liabilities of £11.8 million after it went into provisional liquidation. Neither entry is recorded as a "C" (which stands for "Central Assessment") or as an "OA" (which stands for "Officer Assessment") and in the absence of a proper explanation for the ledger entries, I am not prepared to apply the statutory deeming provision in S.73(9) and I reject the balance of the claim. Furthermore, it is clear from G15 that the liquidators of Northdata paid a dividend of £199,993.61 and the Claimants must give credit for that sum (as they recognise). I find, therefore, that Northdata was liable to HMRC for the sum of £7,713,261.39 when it went into liquidation.

(14) ETP

134. The Claimants relied on two entries in HMRC's ledger recording that two notices of assessment for £2,691,588.00 and £44,398.92 were issued on 9 February 2007 and 27 February 2007. Although neither of the liquidators of ETP, Mr Ian Defty and Ms Hall, appear to have asked for copies of those assessments before admitting HMRC's claim to proof, the Defendants did not challenge the accuracy of the ledger or submit that the Court could not rely on it. Moreover, they have not advanced a positive case that either assessment was withdrawn, reduced, appealed or paid. I find, therefore, that at the date of liquidation ETP was liable to HMRC for £2,735,986.82. For the reasons which I have given I reject ETP's claim for additional interest of £254,170.13.

(15) Wood Works

135. The Claimants relied on HMRC's ledger as evidence that Wood Works was liable to HMRC for £9,004,904.84 when it went into liquidation. The ledger recorded that the company submitted returns for tax of £2,242,059.81 in month 01/06 and £1,934,141.03 in 07/06 and that HMRC issued an amended assessment for £4,828,204.00. It is clear from the documents referred to in G18 that Wood Works became liable for these sums as a result of HMRC's decision to deny input tax in four different quarters. I am prepared to accept that Wood Works became liable for unpaid tax based on its returns and that HMRC's ledger is accurate where the Defendants have not challenged it or advanced a positive case that the liability was not withdrawn, reduced, appealed or paid. I find, therefore, that Wood Works was liable to HMRC for £9,004,904.84 when it went into

liquidation. I reject, however, its claim for additional interest of £563,737.87 for the reasons which I have given.

(16) Comveen

136. The Claimants' pleaded case was that Comveen was liable to HMRC for £24,826.50. They relied on a letter dated 16 July 2008 in which HMRC denied Comveen the right to claim input tax totalling £865,856.25. They also relied on the decision of the First Tier Tribunal in *Comveen Ltd v HMRC* [2012] UKFTT 408 (TC) upholding that decision and, in particular, the statement at [42] that its return dated 3 July 2006 "showed output tax of £2,026,122.16 and input tax of £2,860,456.56 on a turnover of £16,706,915". They submitted that I should draw the inference that the balance remained outstanding.

137. I reject that submission. The FTT made no finding that Comveen was liable to HMRC for £24,826.50 and the letter dated 16 July 2008 did not contain a notice under S.77A(2) specifying that it should pay that amount. For all I know, HMRC may have taken the view that it was not worth pursuing an amount of £24,826.50 and it denied input tax and then defended the appeal in order to resist making a VAT refund to the company. The Claimants chose not to call a witness to prove the debt and in the absence of any documentary or witness evidence I reject Comveen's claim that it was liable to HMRC for £24,826.50 when it went into liquidation.

(17) JDG

138. The Claimants relied on an assessment dated 1 April 2008 for £1,246,736.17 and a letter dated 1 April 2008 denying input tax and giving notice of the assessment. The Defendants did not challenge the assessment or submit that it was withdrawn, appealed or paid. I find that JDG was assessed to VAT for £1,246,736.17 and that it was liable to HMRC for that sum under S.73(9). I reject an additional claim for interest of £261,524.26 for the reasons which I have given.

(18) Notebook

139. The Claimants' pleaded case was that Notebook was liable to HMRC for £993,617.23 on the date on which it went into liquidation. They relied on a winding up petition presented on 12 May 2025 which appeared to be based on returns submitted by Notebook

for 2006. However, none of the underlying documents were drawn to my attention or referred to in G16. The Claimants relied on a series of letters denying input tax but they did not refer me to the returns themselves or any assessments. The Claimants did refer to a spreadsheet containing HMRC's ledger in G16 but I was unable identify the necessary information.

140. This was clearly a VAT Claim in which the Claimants had not verified the contents of the winding up petition or presented the information in a way which was easy for the Court to digest and to make a finding of fact on the basis of the documents alone. The Claimants chose to do neither and I reject Notebook's claim that it was liable to HMRC for £993,617.23 when it went into liquidation. I accept that Notebook's VAT Claim is a significant one (unlike, say, Comveen's VAT Claim) and that the Defendants did no more than put the Claimants to proof. But they only have themselves to blame.

(19) @tomic

141. The Claimants relied on HMRC's ledger as evidence that @tomic was liable to HMRC for £2,083,422.86 when it went into liquidation. The ledger recorded that HMRC issued an assessment for £1,272,720.52 in unpaid tax and a civil penalty of £985,592.00. It is also clear from the documents referred to in G2 that @tomic became liable for these sums as a result of HMRC's decision to deny input tax and that the company attempted to appeal it unsuccessfully to the FTT: see *@tomic Ltd v HMRC* [2014] UKFTT 546. I find, therefore, that @atomic was liable to HMRC for £2,083,422.86 when it went into liquidation. I reject its claim for additional interest of £97,361.01 for the reasons which I have given.

G. Assistance

(1) Kingswood

(i) Breach of duty

142. Mr Aidan Duddy was the sole director and shareholder of Kingswood. The Claimants' pleaded case was that Kingswood was engaged in MTIC fraud as particularised in Mr Duddy's CDDA undertaking dated 17 April 2008:

> "I, during the period from 17 November 2004 to 30 November 2005,

> caused Kingswood to undertake a method of trading which involved it in, and put HM Revenue & Customs ("HMRC") at risk of being subject to, Missing Trader Intra-Community fraud ("MTIC") In particular:
>
> 1. Kingswood undertook wholesale trades in mobile phones and computer components to make total gross purchases of £83,830,360 from EU-based and UK-based suppliers and total grows sales of £84,567,878 to EU-based and UK- based customers;
>
> 2. Kingswood failed to safeguard Value Added Tax ("VAT") monies of £463,119, according to its own records. for which Kingswood was obliged to account to HMRC during the period front 17 November 2004 to 30 November 2005;
>
> 3. Kingswood issued payment instructions totalling £23,708.429 in favour of unrelated third parties in the period 1 February 2005 to 14 April 2005. In doing so, it by-passed UK-based suppliers who were due purchase consideration, including VAT, contributed materially to the unpaid VAT in their insolvencies and allowed VAT monies to be retained by these unrelated third parties, to the detriment of HMRC as follows:
>
> - Carryit Limited ("Carryit") in respect of payments of £3,762,721. Carryil was subsequently wound up by HMRC for £591,482 in unpaid VAT;
> - Tilex Trading Limited ("Tilex") in respect of payments of £15,532.458. Tiles was subsequently wound up by HMRC for £20,954,554 in unpaid VAT;
> - Riff Trading Limited ("Riff") in respect of payments of £6,433,914. Riff was subsequently wound up by HMRC for £20,954,554 in unpaid VAT;
>
> 4. I failed to ensure that Kingswood conducted satisfactory due diligence checks generally with regards to Kingswood's trading partners in accordance with HMRC guidelines in the period after 30 June 2005. In particular, zero rated supplies of £2,608,600 in the period from 18 November 2005 to 23 November 2005 to a Spanish customer were disallowed as the customer had been deregistered for VAT on 17 November 2005, with the result that an assessment of £387,634 for VAT due was raised against Kingwood in respect of these trades."

143. I accept this evidence and I find on a balance of probabilities that in breach of his fiduciary duties Mr Duddy made zero rated supplies to a de-registered Spanish customer between 18 November 2005 and 23 November 2005 without carrying out satisfactory due diligence checks and caused Kingswood to incur a VAT liability of £387,864.87.

(ii) Assistance

144. There was no dispute that Kingswood opened an FCIB account and traded through it. The Claimants relied on a statement dated 27 September 2007 in which Mr Duddy stated

that Kingswood used accounts at the Bank of Scotland plc ("**BOS**") and Lloyds TSB Bank plc ("**Lloyds**") for day to day expenses but that most of the monies went through FCIB. They did not, however, seek to prove directly that payment for the supplies of £2,608,600 which Kingswood made to its Spanish purchaser passed through the FCIB account. The Defendants submitted that the Claimants were unable to prove that FCIB assisted Kingswood in relation to the specific VAT Claim relating to these transactions and relied upon a Griffins' report dated 2 June 2008 which suggested that approximately £2 million passed through its BOS account.

145. I find on a balance of probabilities that payment for the supplies of £2,608,600 which Kingswood made to its Spanish purchaser passed through the FCIB account and that FCIB assisted Mr Duddy's breaches of duty. The Griffins report identified the Spanish purchaser as Global Venture Capital SL and confirmed that the trades took place between 18 November 2005 and 23 November 2005:

> "HMRC have a made a VAT claim against the company for the amount of £389,154. This amount relates to 4 trades where Kingswood, acting as a broker, purchased goods from a UK based company, Ideas to Go Ltd, and the subsequent exports to a Spanish customer namely Global Venture Capital S.L. (Global) between 18 November 2005 and 23 November 2005. Global had been deregistered for VAT on 17 November 2005 therefore the trades were no longer "zero-rated" and the VAT element on the sales to Global should have been collected by Kingswood and remitted to HMRC. Inquiries with the HMRC Red Hill Office show that HMRC notified Kingswood on 01 November 2004 that all VAT verification on customers/suppliers should be done through their office. Kingswood never made such verification with regards to Global."

146. The Claimants put in evidence a spreadsheet of payments into and out of Kingswood's FCIB account to support their case about the volume of trades more generally and although the Claimants did not state in G11 that the statements contained entries showing that Kingswood received payment for these trades into its FCIB account, I carried out this fairly simply task myself and found the entries relating to these payments over the relevant period.

(2) MTL

(i) Breach of duty

147. Mr David Abrahamovitch was the sole director of MTL. The Claimants' pleaded case

was that MTL engaged in MTIC fraud as particularised in Mr Abrahamovitch's report to the Official Receiver and correspondence with HMRC. The report to which I understood this to be a reference was a report to creditors dated 18 April 2007 in which Mr Abrahamovitch provided the following history of business:

> "The company was incorporated on 24 June 1998 as Mobile Telephones Limited. It was dormant until August 2005 when it commenced trading in order to provide mobile phones to customers. The director occupied a desk in the upstairs office of 213 Old Street, London, EC1V 9NR. He used all of the office services, computers, phone answering facilities etc at that site from the commencement of trading. The initial period of trading was spent building a contact base and looking for possible deals with adequate margins. The company registered for VAT around December 2003. The VAT number was issued in 2004. A bank account was opened July 2005 with Abbey National PLC. The company remained dormant until August 2005 when it made its first export, to Italy. The directors visited Italy to ensure that the buyer was a bona fide company however, the cost of the trip was more than the profit on the deal. At the same time as this it became clear that it was impossible to trade without a First Curacao International Bank CFCIB) account which was duly set up. At the same time a request was made to HM Revenue & Customs (HMRC) for a change from quarterly returns to monthly returns. This request was refused, making it very difficult to export, and restricting the trading options to solely UK customers.
>
> Trading started in the UK to UK market in April 2006 when it became apparent that the sort of margins that were available previously in the trade were now much reduced. Enhanced due diligence checks were undertaken, despite the fact that no guidelines were available from HMRC on which checks were required. All suppliers were visited and VAT verified. The company traded successfully for a couple of months with the contacts made between 1999 and 2005, and there were also introductions to companies via a Dubai broker in exchange for a commission payment. Some imports and exports were also done during this period and trading continued through April and May, and got very busy. At the end of May FCIB ask for due diligence documentation for several of the early trades. The director provided this, however the company's account was suspended as certain payments on deals contravened the commercial terms and conditions of FCIB. In light of this the director decided to cease trading in early June 2006. The company's VAT number was also suspended in August 2006. Subsequently the company received an assessment for under-declaration of VAT for the period 1 February 2006 to 30 April 2006 from HMRC for all the VAT on its exports. The assessment having been made because the documentation provided for several export transactions was inadequate. The document situation was the same for the company's imports, but HMRC chose to disregard these. This left the company with a notional debt of approximately £570,000."

148. The Claimants did not rely on any direct evidence of MTIC fraud but invited the Court to draw the inference that Mr Abrahamovitch was engaged in fraudulent activity from this report and from the pattern of trading. In particular, they relied on documents showing that the transactions to which Mr Abrahamovitch was referring in his report involved the purchase of goods from Kingswood Global Business Ltd for £3,862,700 and the sale on to Powertec Components LDA in Portugal for £3,322,700 on 11 April 2006. The documents upon which the Claimants relied in G14 also established that HMRC assessed MTL to unpaid VAT on the four invoices issued by MTL.

149. I am satisfied that it is appropriate to draw the inference that Mr Abrahamovitch was engaged in MTIC fraud from those documents and the other documents upon which the Claimants relied in G14. I find on a balance of probabilities that in breach of his fiduciary duties Mr Abrahamovitch entered into the trades with Kingswood (above) and Powertec Components LDA for the purpose of defrauding HMRC and, as a consequence, caused MTL to incur a VAT liability of £587,788.53.

(ii) Assistance

150. I also find on a balance of probabilities that the payments from Powertec Components LDA to MTL and from MTL to Kingswood Global Business Ltd all passed through MTL's FCIB account and that FCIB assisted Mr Abrahamovitch's breaches of duty. The Claimants produced a spreadsheet of MTL's bank statements showing that on 27 April 2006 all of the relevant payments took place. The spreadsheet also shows that the relevant payments were all intra-account transfers passing between FCIB accounts.

(3) ACEL

(i) Breach of duty

151. Mr Shakil Ahmed was a director of ACEL. The Claimants' pleaded case was that he acted as sole director and was engaged in MTIC fraud as a "defaulter" purchasing goods from overseas companies and selling them on to UK companies. Again, the Claimants did not rely on any direct evidence of MTIC fraud but invited the Court to draw that inference from ACEL's pattern of trading. In two statements which he gave to the Official Receiver on 4 December 2007 and 1 April 2009 under S.236 Mr Ahmed gave evidence about the formation of the company and the mechanics of each trade:

> "The Company was formed by my brother, Jalil Ahmed, in April 2004. At the time it undertook claims management & Jalil Ahmed solely ran the Company. I purchased the Company from Jalil Ahmed in July 2005 for £500, paid in cash. Thereafter, Jalil Ahmed ceased to have any role in the Company & I ran & managed the Company alone. I had no assistance whatsoever & was responsible for all aspects of the Company's affairs.
>
> The mechanics of a trade was [sic] as follows:-
>
> I would identify a supplier of a consignment of CPUs online & telephone the supplier to agree a purchase price. I would telephone aprox. 5-8 potential customers & negotiate a sale price giving a profit margin of 10 – 15p per CPU. Upon agreeing purchase & sale prices, I would fax a purchase order to my supplier and receive a faxed sales invoice. Likewise, the customer would fax me a purchase order & I would fax him a sales invoice. The customer would transfer the full sale price into the Company's Barclays bank account & I would transfer the purchase cost to the supplier's account. The goods would remain at bonded warehouses throughout."
>
> "AC used an account at First Curacao International Bank (FCIB) for the wholesale transactions. The full amounts of the sales invoices were paid into the FCIB account and then immediately transferred to the purchaser less our commission which was paid into AC's account at Barclays. The FCIB account was i [sic] the name of AC and I was the sole signatory on the account. I gave HMRC copies of all statements for Barclays and for FCIB."

152. The Claimants also relied on correspondence from HMRC in which Mr Ahmed was warned about MTIC fraud and asked to provide trading records to verify the legitimacy of ACEL's trading. He was uncooperative and by letter dated 3 November 2006 Mr Andy Morris, a Higher Officer of HMRC, wrote to ACEL's accountant stating that ACEL's claim for a VAT refund had been disallowed:

> "The claim due to your client for 02/06 has been disallowed on the grounds that 100% of the chains go back to defaulters as was the case for the two earlier periods. We have been unable to carry out a complete verification of your client's records. He has not responded to enquiries and provide the required evidence, specifically for the apparent export of goods to an Irish company. He has continually failed to provide records and due diligence and has consistently ignored warnings in respect of third party payments."

153. I am satisfied that it is appropriate to draw the inference that Mr Ahmed was engaged in MTIC fraud from these documents and the other documents upon which the Claimants relied in G3 and I find on a balance of probabilities that in breach of his fiduciary duties Mr Ahmed entered into trades with a number of companies for the purpose of defrauding HMRC and, as a consequence, caused ACEL to incur a VAT liability of £12,892,787.22.

(ii) Assistance

154. The Claimants' pleaded case was that ACEL entered into transactions with a total value of £115 million of which in excess of £80 million passed through ACEL's FCIB account. Because approximately £35 million passed through accounts at other banks, the Defendants submitted that the Claimants could not prove that the receipts and payments relating to the transactions which gave rise to the VAT Claim passed through the FCIB account. They also relied on the fact that the amount of that claim (£12,892,787.22) was almost double the amount of VAT which would have been payable on the total sales which ACEL made and that if ACEL were made liable under S.77A on a joint and several basis its liability would relate to trades by other companies. In opening, Mr Deuss also took that point that the Claimants had relied on an additional assessment for £1,171,894 which HMRC issued on 18 January 2007 in relation to six invoices which his team had been unable to locate in ACEL's FCIB bank statements: see D2, O288(4).

155. The Claimants sought to answer this point by relying on Mr Ahmed's evidence that it traded through its FCIB account and made commission payments into its Barclays account. They also relied on the fact that HMRC consistently complained that ACEL made third party payments and submitted that this explained the discrepancy. The Claimants did not answer Mr Deuss's challenge to the assessment dated 18 January 2007 either in their written or oral closing submissions. In particular, I was not taken to any entries in FCIB's bank statements or the transaction enquiry report for ACEL showing that payment for the relevant invoices passed through ACEL's FCIB account.

156. I accept Mr Deuss's submissions on this issue. I cannot be satisfied on a balance of probabilities that the receipts and payments relating to the transactions which gave rise to the VAT Claim passed through ACEL's FCIB account and, therefore, that FCIB assisted Mr Ahmed to commit the relevant breaches of fiduciary duty. I was prepared to accept that ACEL was liable to HMRC for the full amount but I had real difficulties in reconciling the various assessments and understanding the basis of liability for each one. Moreover, when Mr Deuss challenged a single assessment, the Claimants could not prove that FCIB assisted Mr Ahmed to perform the transactions referred to in HMRC's letter which accompanied the assessment. I attribute significant weight to their failure to do so.

157. Further, I cannot be satisfied either that the receipts and payments relating to any specific

transactions passed through ACEL's FCIB account. It may well be that a significant number of receipts and payments relating to trades which ACEL undertook passed through that account. It may also be that ACEL was held to be jointly and severally liable for VAT with other companies who used FCIB accounts to commit MTIC fraud. However, I have no way of identifying the relevant transactions and calculating the relevant sums because the Claimants did not carry out a *Greystoke* analysis for any of them. I therefore dismiss ACEL's Direct Claim against FCIB.

(4) MML

(i) Breach of duty

158. The Claimants' pleaded case was that MML engaged in MTIC fraud as particularised in statements given to the Official Receiver by its two directors, Mr Mohammed Junaid and Mr Yasser Hussain. Both directors admitted that they were equally responsible for the company's trading and both gave evidence about their pattern of trading which exhibited the indicia of MTIC fraud. By letter dated 23 July 2007 Mr Selwood, the relevant officer, wrote to Mr Junaid setting out the basis of the assessment for £4,443,565.00:

> "I note that since previous visits and discussions concerning the alleged activities of the company, no VAT return declarations have been made nor original records produced to substantiate the Directors' claims that the company was undertaking major deals involving the wholesale of mobile phones and computer processors. The only documentation produced to me was a folder of photocopied papers said to consist the purchase and sales records of the company. Despite requests, original documents were never produced. In view of the lack of cooperation by yourselves, I have calculated what I believe to be the VAT liability of the company up to the date of cancellation of the VAT registration, based on the copy documents provided.
>
> However, due to lack of any original evidence of dispatch of the alleged goods, and of supporting documents including inspection reports, transport documents, insurance documents, evidence of commercial checks on suppliers and customers, bank statements, I have disallowed any zero-rating and have treated those alleged deals as being sold within the UK, therefore taking the invoice total to be VAT-inclusive. I have attempted to trace the deal chains back and forward, and have noted that there are defaulting companies within all alleged deal chains involving Mobile Mayhem, with resultant significant tax losses in each case. I have formed the opinion that the activities of the directors of the company formed part of an overall scheme to defraud H.M. Revenue and Customs. As a result, I am raising an assessment to the value of £4,443,565.00, and this will be formally advised to you shortly."

159. In his statement dated 24 April 2008 to the Official Receiver under S.236 Mr Junaid admitted that when MML began trading in the wholesale sale of mobile phones "there was a failure to deal with the company's tax affairs properly which led to HMRC raising an assessment which the company cannot settle". In a CDDA undertaking Mr Hussain also admitted as follows:

> "In the period from 29 March 2006 to 11 May 2006 I caused or allowed Mobile Mayhem Limited ("Mobile Mayhem") to undertake a method of trading which put Her Majesty's Revenue and Customs ("HMRC") at risk of being subject to, a Missing Trader Intra Community ("MTIC") Value Added Tax ("VAT") fraud, which resulted in VAT monies owed to HMRC of £4.4 million which remains unpaid at the date of the liquidation. If I did not know, then I abrogated my duty by either being reckless or grossly negligent as to whether Mobile Mayhem was involved in such a fraud. In particular: i. I caused or allowed Mobile Mayhem to enter into the purchase and sale of mobile telephones and CPI 'A with EC and UK companies which resulted in onward sales of at least £62 million including VAT of £4.4 million;…"

160. I am satisfied that Mr Junaid admitted HMRC's allegations in his interview with the Official Receiver and that Mr Hussain did so in his CDDA undertaking. I find on a balance of probabilities that in breach of their fiduciary duties Mr Hussain and Mr Junaid traded in the sale of mobile phones either for the purpose of defrauding HMRC or recklessly and not caring whether they were involved in an MTIC fraud and thereby caused MML to incur a VAT liability of £4,443,565.00.

(ii) Assistance

161. The Claimants' evidence was that MML traded through its FCIB account between 12 December 2005 and 9 November 2006 and that the throughput was £92,148,388.24. They also relied on a statement dated 23 October 2008 which Mr Hussain gave to the Official Receiver under S.236 in which he admitted that: "All payments for wholesale was via the company's FCIB account." Mr Junaid also gave evidence to the same effect in his statement dated 24 April 2008. Finally, the Claimants produced evidence that although MML had two other bank accounts during the relevant period, the throughput on those accounts was £812,067.11 in total.

162. Mr Deuss challenged the Claimants' case that MML used its FCIB bank account to conduct the relevant trades because the FCIB bank account showed that credits of only

£22,386,229.62 passed through MML's FCIB account during the quarter 1 March 2006 to 30 June 2006. He submitted, therefore, that the maximum VAT liability to which this volume of trading could give rise was £3,334,119.31. He submitted that the Claimants' analysis must be wrong and that I could not safely accept their figures.

163. I reject Mr Deuss's submission on this issue. It assumes that the assessment dated 23 July 2007 related solely to the single quarter 1 March 2006 to 30 June 2006. But it is clear from Mr Selwood's letter (above) that the assessment related to all zero rated supplies which MML had made. Moreover, in his CDDA undertaking Mr Hussain admitted that the assessment related to trading to the value of £62 million and in his statement dated 24 April 2008 Mr Junaid stated that the turnover was in the region of £59 million. I therefore find that the receipts and payments relating to all of the transactions which gave rise to the VAT Claim passed through MML's FCIB account and that FCIB assisted Mr Junaid and Mr Hussain to perform the transactions which gave rise to a VAT liability of £4,443,565.00.

(5) Leeds Smith

164. Mr Stuart Wright was the sole director of Leeds Smith and the Claimants' case was that Leeds Smith engaged in MTIC fraud as particularised in a questionnaire and the decision of the FTT in *Leeds Smith Consulting Ltd v HMRC* (unreported, 28 June 2016) on the company's appeal against HMRC's assessment. I was not taken to the questionnaire, it was not referred to in G12 and I was unable to locate it in the electronic bundle. However, having heard Mr Wright's evidence, the FTT found that all of the payments were made through FCIB from the same IP address, that HMRC had proved MTIC fraud and that Mr Wright either knew that the company was involved in the fraudulent evasion of VAT or turned a blind eye to this fact. They set out these findings at [173] to [175]:

> "173.We were satisfied that the FCIB data was accurate and reliable and that it demonstrated circularity of payments which supports the existence of a highly orchestrated fraudulent scheme extending beyond the fraudulent defaulters. However we took the view that circularity, of itself, did not indicate knowledge on the part of the Appellant. In relation to the evidence regarding IP addresses in 06/06, we found the evidence of HMRC compelling. We accepted Mr Letherby's evidence that the data as a whole did not support the Appellant's assertion that he used software which changed the IP address of his computer every 60 seconds or that, if such software was used, it had not been correctly installed or configured. We also accepted Mr Letherby's evidence that multiple windows of a bank

> account could be opened. We found Mr Wright's evidence as to the software he told us he used was vague and unconvincing and we did not accept his opinion regarding the opening of multiple windows. We concluded from the evidence that the payments made in the transactions under appeal came from the same IP address, all being made within a short space of time and moving in a circle. We inferred from the evidence that the payments were controlled from one source; that being so, the only conclusion we could reach was 20 that the Appellant was aware of this fact.
>
> 174. We were satisfied that HMRC had established fraudulent tax losses and that there was an orchestrated scheme for the fraudulent evasion of VAT connected with the transactions which form the subject of this appeal.
>
> 175. We concluded that in respect of the periods under appeal the Appellant knew, through Mr Wright, that the transactions were connected with the fraudulent evasion of VAT or that the factors set out above would at the very least support a finding of means of knowledge. We were satisfied that the evidence indicated Mr Wright's knowledge of the fraud or, in the alternative, his turning a blind eye to the only reasonable explanation being that the transactions formed part of an overall scheme to defraud the Revenue. There is no single circumstance from which we have inferred that the appellant knew or should have known of the connection with fraud. We have considered all the circumstances and whether, on balance, we are satisfied that the appellant knew or should have known of the connection with fraud."

165. Neither party made any submissions about the admissibility of these findings. But in my judgment, they are not admissible to prove that Mr Wright committed a breach of his duties under the CA 2006 or that FCIB assisted him: see *Phipson on Evidence* 20th ed (2022) at 73—49. In the absence of these findings, the Claimants did not adduce any evidence to support a finding of fact that FCIB assisted Mr Wright to commit any breaches of his fiduciary duty apart from the fact that on 13 January 2006 Leeds Smith opened an FCIB account. FCIB had been unable to locate its bank statements in the meantime and the Claimants either did not consider it worthwhile or were unable to call a witness to prove the facts and matters upon which the FTT relied in its decision. I, therefore, dismiss Leeds Smith's Direct Claim against FCIB.

(6) 385 North

(i) Breach of duty

166. Ms Lea Tindall was the sole director of 385 North. The Claimants' pleaded case was that 385 North engaged in MTIC fraud as particularised in questionnaires and statements

which she gave to the Official Receiver. On 6 July 2004 she gave an interview to HMRC and on 25 June 2010 she made a statement to the Official Receiver in which she gave evidence about 385 North's pattern of trading which exhibited all of the indicia of MTIC fraud. On 8 October 2010 Ms Tindall also entered into a CDDA undertaking in which she made the following admissions:

> "During the period of at least 1 January 2006 to 30 June 2006 I caused 385 North Limited ("385") to undertake a method of trading which involved it in, and put Her Majesty's Revenue & Customs ("HMRC") at risk of being subject to, a Missing Trader Intra Community ("MTIC") Value Added Tax ("VAT") fraud. I was grossly negligent as to whether 385 was concerned in such a fraud. In particular:
>
> a. I caused 385 to enter into purchases from United Kingdom ("UK") and European Union ("EU") companies to the value of at least £483,817,732 plus VAT of £45,797,271;
>
> b. I caused 385 to make onward sales of the same goods, generally on the same day, to UK and EU based companies totalling £491,980,239 plus VAT of £41,231,476;
>
> c. I failed to make appropriate checks with HMRC's Redhill VAT office, despite knowing that 1 was recommended to do so, as such putting both 385 and IIMRC at risk of serious loss;
>
> d. I caused 385 to enter into 53 transactions which commenced with defaulting traders resulting in a loss of revenue within the transaction chains totalling £42,296,640;
>
> e. HMRC disallowed input tax of £40,319,545 on UK purchases as they were deemed to be part of an MTIC fraud against HMRC; as 385 had not completed due diligence on those suppliers 385 was unable to satisfy HMRC of its right to offset such tax. This resulted in a liability to HMRC for that period of £36,573,203;
>
> f. IIMRC have claimed £48,667,585 in the liquidation which remains unpaid."

167. I am satisfied that Ms Tindall admitted that she participated in MTIC fraud and in the light of those admissions, her statements and answers to the Official Receiver and HMRC I find on a balance of probabilities that in breach of her fiduciary duties to 385 North, Ms Tindall traded in the sale of mobile phones either for the purpose of defrauding HMRC or recklessly and not caring whether she was involved in an MTIC fraud or grossly negligently and thereby caused 385 North to incur VAT liability of £40,513,355.54.

(ii) Assistance

168. The Claimants' evidence was that 385 North traded through its FCIB account between

18 February 2005 and 7 April 2006 and that the throughput was £1,254,593,928.77. They also produced evidence that although 385 North had another bank account at HSBC Bank plc ("**HSBC**") the throughput for that account was £14,260,142.52. They submitted that the receipts and payments from approximately 99% of 385 North's trading passed through its FCIB account and that it was overwhelmingly likely that all of the relevant receipts and payments passed through 385 North's FCIB account.

169. Mr Lemer, who presented this part of the argument, did not accept this analysis for two reasons: first, because the Claimants could not say with certainty that they had identified all of 385 North's bank accounts and, secondly, because they accepted that 385 North might have incurred a VAT liability as a result of third party payments which might not have passed through 385 Norths' account at all.

170. I accept the Claimants' submission on this issue and I reject Mr Lemer's submission. Mr Wright took me to the spreadsheet containing the entries in 385 North's FCIB bank statements and also to examples of the trades which the company carried out. Many of the companies in the various rings in which 385 North participated could be identified through a series of FTT decisions and there was no indication that it was trading with any of them through a different account.

171. Furthermore, almost all of the transactions shown on 385 North's bank statements involved intra-account transfers. The inference which I draw is that Ms Tindall was paid her commission into the HSBC account but that third party payments to the network heads or other members of the ring were made into other FCIB accounts. I therefore find that the receipts and payments relating to all of the transactions which gave rise to the VAT Claim passed through 385 North's FCIB account and that FCIB assisted Ms Tindall to perform the transactions which gave rise to a VAT liability of £40,513,355.54.

(7) Eliyon

(i) Breach of duty

172. Between 27 May 2002 and 31 March 2006 Mr Kamlesh Gathani was Eliyon's sole director and on 1 January 2007 he was reappointed as a director. Between 30 March 2006 and 1 January 2007 Ms Janine Breitenfeld was its sole director. Based on the documents which the Claimants adduced in G7 the inference which I draw is that Mr Gathani

continued to control Eliyon whilst Ms Breitenfeld was the sole director and I find that he was a shadow director of the company. In particular, in a statement to the Official Receiver under S.236 Mr Gathani admitted that Ms Breitenfeld's role in the company's management and control was very limited.

173. The Claimants' case was that Eliyon was engaged in MTIC fraud as particularised in Mr Gathani's questionnaire, his statement to the Official Receiver and the documents which were produced as part of an earlier claim brought against him by Eliyon's liquidator. Mr Gathani did not admit that Eliyon was engaged in MTIC fraud but in his statement dated 15 February 2011 he admitted a pattern of trading which gave rise to the inference of MTIC fraud. The additional documents which the Claimants assembled from earlier proceedings by HMRC and the liquidator produced provided very strong evidence of MTIC fraud and, in particular, that a number of the transactions on which Eliyon relied to claim VAT credits were fictitious. I find on a balance of probabilities that in breach of his fiduciary duties as a director or as a shadow director Mr Gathani traded in the sale of Samsung mobile phones for the purpose of defrauding HMRC and thereby caused Eliyon to incur a VAT liability of no less than £455,360.09.

(ii) Assistance

174. The Claimants relied on a witness statement dated 4 April 2008 and made by Mr Timothy Reardon, an HMRC officer, in Eliyon's appeal against HMRC's decision to deny input tax for the purchase of Samsung "Serenes" between February 2006 and June 2006. His evidence was that the suppliers of these products were Future Communications (UK) Ltd, Soul Communications Ltd and Infinity Holdings Ltd and that they were sold on immediately to Mr Shabir Mahomedbhay, Allimpex Handels GmbH and Universal Handels GmbH. It was also Mr Reardon's evidence that these sales were either wholly or partly fictitious because the relevant model was not released until 1 March 2006 and Eliyon could not have bought and sold the volume of this model which it claimed to have done.

175. The Claimants produced evidence that Eliyon operated an FCIB account with a total throughput of £658,376,101. The Defendants relied on the fact that Eliyon had four bank accounts with a total throughput of £32.5 million although the Claimants met this submission by calculating that the throughput of the FCIB account amounted to 95.32%

of credits and 95.24% of debits. Given that HMRC had identified the specific purchases and sales which gave rise to the VAT Claim and the dates on which they took place, the obvious way to establish whether the payments and receipts passed through Eliyon's FCIB account was to check its bank statements. I have done so and I am satisfied that both the payments and receipts which gave rise to the VAT Claim passed through Eliyon's FCIB account in all cases by intra-account transfer. I find, therefore, that FCIB assisted Mr Gathani and Ms Breitenfeld to carry out transactions which gave rise to a VAT liability of £455,360.09.

(8) Gold Digit

176. Mr Richard Jones was the sole director and shareholder of Gold Digit. The Claimants' pleaded case was that Gold Digit engaged in fraud as particularised in a number of documents including his answers and statements to the Official Receiver. In his CDDA undertaking Mr Jones also admitted that he caused Gold Digit to participate in transactions connected with the fraudulent evasion of VAT. In particular:

> "The trading in which Gold Digit was involved had features which put, or should have put, me on enquiry about the legitimacy thereof. Gold Digit was always able to sell exactly the same quantities of mobile telephones as it purchased. The amount of profit made by Gold Digit on the transactions in which it was involved reflects a pattern common in MTIC VAT fraud. Despite the high value of the goods being purchased and sold, Gold Digit did not enter into any written agreements with its suppliers or customers. Again, despite the high value of the goods being purchased and sold, Gold Digit did not have any insurance;
>
> In view of the evidence MTIC hallmarks and failure to take adequate steps to reduce risks of involvement with MTIC trading, Gold Digit was not then entitled to offset and reclaim VAT and consequently the reclaims totalling £4,404,414 that Gold Digit submitted on 6 March 2006, 4 April 2006 and 28 April 2006 were wrongful;
>
> The trading chains in which Gold Digit was involved caused significant loss to HMRC, as a result of the fraudulent transactions I, acting on behalf of Gold Digit, caused tax losses to HMRC of at least £821,709 which remains unpaid to date.
>
> On or around 3 November 2005, 6 February 2006, 6 March 2006, 4 April 2006 and 28 April 2006 I caused Gold Digit to wrongfully claim the sums of £707,174.83, £202,212, £1,286,748.75, £1,404,605.13 and £1,508,825.50 respectively from HM Revenue and Customs."

177. I am satisfied that Mr Jones admitted that he participated in MTIC fraud and I find on a

balance of probabilities that in breach of his fiduciary duties he traded in the sale of mobile phones for the purpose of defrauding HMRC and thereby caused Gold Digit to incur a VAT liability of no less than £1,231,524.20.

(ii) Assistance

178. The Claimants' evidence was that between 1 April 2005 and 9 November 2006 Gold Digit made gross payments to suppliers of £65,874,942.68 and received gross receipts from customers of £60,241,744.00. They also produced evidence that Gold Digit operated an FCIB account with a total throughput was £95,518,414.04 and that it operated three other bank accounts with a total throughput of £15,193,514.94. They therefore submitted that it was more probable than not that Gold Digit paid the relevant suppliers and received payment from the relevant customers through its FCIB account.

179. The Defendants submitted that the total volume of Gold Digit's trading was £126 million but only £95m passed through its FCIB account and that because at least £30 million must have passed through other accounts, the Court could not be satisfied even to the civil standard that FCIB had assisted Mr Jones to commit the relevant breaches of duty. If the Claimants had been unable to produce any other evidence to support a finding that the relevant funds passed through Gold Digit's FCIB account, I would have accepted that submission. However, I am satisfied that the relevant payments which gave rise to the VAT Claim passed through Gold Digit's FCIB account and that FCIB assisted Mr Jones to perform transactions which gave rise to a VAT liability of (at least) £1,231,524.20 for the following reasons:

(1) The Claimants produced HMRC's statement of case in the appeal brought by Gold Digit in the VAT & Duties Tribunal in Manchester dated 20 July 2007 signed by Mr D Hogg, General Counsel and solicitor to HMRC. He annexed a letter dated 8 March 2007 sent by Mr Hodgson, the Higher Officer responsible for the VAT Claim, denying Gold Digit's claim for input tax in the periods 02/06, 03/06 and 04/06. It is clear from the letter that the effect of his decision was that Gold Digit was a buffer and became liable to pay the VAT on the purchases which it had included in its returns during those periods.

(2) It is also clear from a letter dated 9 October 2006 that Mr Hodgson had refused Gold Digit's application for an interim payment of its VAT credit. This letter

explains, therefore, why HMRC claimed the VAT unpaid by Gold Digit in relation to its 02/06 and 03/06 returns. The inference which I draw is that HMRC had previously paid Gold Digit's credit claims and that it was for this reason Mr Hodgson raised the assessment dated 17 November 2006 for period 01/06.

(3) In the statement of case Mr Hogg stated that the subject of the decision to deny input tax were all purchases made by Gold Digit from companies called Future Communications Ltd and Infinity Holdings Ltd. The Claimants' evidence confirmed that this statement was accurate and also that £42,964,136.50 was paid out of Gold Digit's FCIB account to FCIB accounts in the name of both of those companies and another company called Soul Communications Ltd.

(4) There was no evidence (or at least no evidence to which I was referred) that the individual transactions on which Gold Digit was later assessed for VAT passed through its FCIB account and most of the customers which the Claimants identified were outside the UK. But in my judgment, it is unnecessary for the Claimants to prove this fact and I am satisfied that FCIB gave more than minimal assistance to Mr Jones in carrying out the breaches of duty which exposed Gold Digit to the VAT Claim.

(9) Star

(i) Breach of duty

180. The three directors of Star were Mr David Needham, Mr Anthony Marshall and Mr Stephen Mannion. The Claimants' pleaded case was that Star was engaged in MTIC fraud and they relied on the company's pattern of trading rather than any admissions. However, they also pleaded that all of Star's directors entered into CDDA undertakings and in those undertakings dated 18, 19 and 19 January 2016 respectively, each director admitted that Star's pattern of trading put him on enquiry about its legitimacy and also made the following admissions:

> "Between November 2005 and October 2006 I caused or allowed Star Telecommunications Ltd ("Star") to participate in transactions which were connected with the fraudulent evasion of Value Added Tax ("VAT"), such connections being something which I either knew or should have known about….I caused Star to wrongfully claim the sums of £911,590, £1,656,626, £934,071, and £66,065 from HM Revenue & Customs

> ("HMRC") for the VAT periods 01/06, 04/06, 07/06 and 10/06 respectively."

181. I am satisfied that in their CDDA undertakings the three directors of STAR admitted that they participated in MTIC fraud and wrongfully claimed VAT from HMRC and I find on a balance of probabilities that in breach of their fiduciary duties all three directors traded in the sale of wholesale mobile phones for the purpose of defrauding HMRC and thereby caused Star to incur a VAT liability of £20,974,132.27.

(ii) Assistance

182. The Claimants' evidence was that between 18 May 2005 and 31 August 2006 Star operated an FCIB account with throughput of £761,690.614.00. Each letter from HMRC denying input tax (above) also stated that Star, its suppliers and its customers all used FCIB accounts and the Claimants' analysis of Star's FCIB bank statements confirmed that most of the transactions on the account were intra-account transfers. Finally, the correspondence from HMRC referred to two specific companies with which Star traded called Lets Talk IT Ltd and Crestview Enterprises Ltd.

183. Despite this evidence, I am not satisfied on a balance of probabilities that the three directors of Star used its FCIB account to perform the transactions which gave rise to the VAT liability of £20,974,132.27. The Claimants adduced no evidence to show that Star traded through its FCIB account exclusively or to connect the liabilities with individual transactions. They accepted that Star had other bank accounts but they did not obtain or analyse the relevant statements. Nor did they obtain or produce an analysis of Star's business records comparing its total trading with the throughput on its FCIB account (as they had done for other MTIC Companies).

184. I might have been prepared to draw an inference that Star conducted the relevant trading through its FCIB account from HMRC's letters denying input tax. But Mr Deuss pointed out in opening that in the letter dated 11 December 2009 HMRC denied input tax for four invoices dated 31 August 2006 and that these transactions could not be found in Star's FCIB bank statements: see D2, O288(3). Mr Wright speculated in closing that these transactions must have involved third party payments but he identified no evidence to support such a conclusion far less to prove that the relevant payments passed through an FCIB account. This was a very substantial claim and, in my judgment, the Claimants

could and should have carried out a *Greystoke* analysis before the Court could be expected to find that FCIB was liable as an accessory. I, therefore, dismiss Star's Direct Claim against FCIB.

(10) Blue Fox

(i) Breach of duty

185. Mr Kevin Glover was the sole director of Blue Fox and the Claimants' pleaded case was that Blue Fox engaged in MTIC fraud as particularised in a note of a meeting on 17 May 2005 between HMRC and him. I have read that note and although it does not contain an admission by Mr Glover, he admitted a pattern of trading from which I draw the clear inference that he used Blue Fox as a vehicle for MTIC fraud. That inference is supported by the correspondence upon which the Claimants relied in the Particulars of Claim. Schedule A4 and G4. I find on a balance of probabilities, therefore, that in breach of his fiduciary duties Mr Glover traded the purpose of defrauding HMRC and thereby caused Blue Fox to incur a VAT liability for £18,432,107.00.

(ii) Assistance

186. Blue Fox traded for a very brief period between 9 May 2005 and 17 June 2005. In her letter dated 21 July 2005 Ms Orr stated that most of the input tax which she had denied related to supplies by a company called VFM Ltd (trading as Ferndale Communications) and the accompanying schedule showed that this company had sold goods worth £91,436,100.00 to Blue Fox for which it had reclaimed VAT of £16,001,317.50. The letter also showed that Mr Glover had failed to cooperate with HMRC or to supply documents and had forged a number of affidavits.

187. The Claimants' evidence was that Blue Fox operated an FCIB account from 6 May 2005 to 8 September 2006 with throughput of £32,005,011.35 of which the total debits were £16,002,082.75. The Defendants submitted (and I accept) that Blue Fox's sales were substantially higher than the funds passing through its FCIB account and, indeed, that the VAT Claim is higher than the credits passing through the account. Moreover, I could find no reference in the spreadsheet of Blue Fox's bank statements in the electronic bundle to VFM Ltd or Ferndale (or, indeed, to the purchasers to whom Blue Fox sold on the relevant stock). I am not satisfied that the payments for the sales by that company passed

through Blue Fox's FCIB account or that FCIB assisted Mr Glover to make a fraudulent claim for input tax based on those sales. I, therefore, dismiss Blue Fox's Direct Claim.

(11) TCG

(i) Breach of duty

188. Mr John Callender was TCG's sole director. The Claimants relied on TCG's pattern of trading, its correspondence with HMRC and the conduct of Mr Callender in support of its case that he was engaged in MTIC trading. In particular, they relied on the fact that TCG persistently failed to file returns despite demands by HMRC who calculated that it was liable for VAT of at least £76 million. They also relied on the fact that on 22 February 2006 TCG was served with a freezing injunction but TCG continued to trade until 15 March 2006. Finally, they relied on the fact that Mr Callender was disqualified as a director for 15 years.

189. I am satisfied that TCG was engaged in MTIC fraud and that the allegations made by Claimants are well-founded. The documents to which the Claimants referred in G5 supported their allegations about TCG's pattern of trading. Mr Thanki also took me in opening to samples of TCG's invoices which supported those allegations and that TCG continued to trade after 22 February 2006. I have also seen the freezing injunction, HMRC's letter dated 16 March 2006 and the submissions made in support of the application to disqualify Mr Callender. In my judgment, those submissions are borne out by the underlying documents and I find on a balance of probabilities that in breach of his fiduciary duties Mr Callender traded for the purpose of defrauding HMRC as a "defaulter" and failed to pay VAT of no less than £77,389,727.00.

(ii) Assistance

190. The Claimants' evidence was that between 18 August 2005 and 9 November 2006 TCG operated an FCIB account with credits of £95.712,143.76 and a total throughput of £192,439,506.44. However, the transaction enquiry report which the Claimants produced showed that although the account was opened on 18 August 2005 the last transaction on the account took place on 21 February 2006 (apart from some adjustment for fees). This is consistent with the evidence that on 22 February 2006 HMRC obtained a freezing injunction and FCIB suspended the account.

191. This presented a real difficulty for the Claimants because most of TCG's VAT Claim related to the period after TCG's account was frozen. The Defendants submitted (and I accept) that four of the assessments upon which the Claimants' relied totalling £1,695,119 related to the period covering 1 March 2016 to 15 March 2006.[7] The Defendants also submitted that the final assessment dated 17 August 2007 for £55,200,928.00 related to the period 1 March 2006 to 16 March 2006 and they relied on the ledger which HMRC submitted with their proof of debt on 21 November 2011. I accept this submission which is supported by the assessment dated 8 June 2006 which also referred to the period 1 March 2006 to 15 March 2006. I find, therefore, that TCG did not use its FCIB bank account to conduct any of the transactions which gave rise to five of the assessments upon which the Claimants relied including the final assessment for £55,200,928.00.

192. Mr Wright submitted that when its account was frozen TCG continued to trade through FCIB using third party accounts. Mr Wright relied on the fact that between October 2005 and February 2006 TCG had traded predominantly with a company called MG Components Ltd and through intra account transfers. Mr Thanki had taken me in opening to six payment instructions which Mr Callender had given to make payments into different bank accounts. Mr Wright submitted (and I accept) that out of ninety-one payment instructions these were the only examples of payment instructions to other banks. Mr Wright submitted that FCIB would have continued to trade in exactly the same way by routing payments through FCIB accounts in the names of third parties.

193. Although Mr Wright put the argument persuasively, I reject his submission and I am not prepared to draw the inference that TCG continued to trade through third party accounts after its account was frozen. I have reached this conclusion for two reasons: first, there is insufficient evidence to conclude that TCG exclusively traded through its FCIB account before it was frozen. Mr Lemer submitted that the VAT payable on the credits of £95,712,143.76 which passed through TCG's account would have been no more than £14,330,603.70. Mr Wright did not really have an answer to this submission. He submitted that there could be reasons why HMRC would have raised assessments for more than the VAT payable. But he could not really explain how TCG could have

[7] One of the sums claimed was set out in a letter dated 2 August 2017 and I have rejected that part of the VAT Claim above in quantifying the claim. However, the point that it related to a period after TCG stopped using its FCIB account still holds.

incurred such huge liabilities if it was only trading through its FCIB account.

194. Secondly, if the Claimants wished the Court to find that TCG continued to use the FCIB accounts of third parties after its own account was frozen, they could and should have called evidence to prove it. It is clear that Mr Goldfarb was fully alive to this point when he submitted his proof of debt to TWPS on 3 September 2020:

> "The liquidator obtained disclosure of an HMRC note on MG Components which schedules MG Component deals including a substantial number with TCG. Between 27/02/2006 and 15/03/2006 TCG issued sales invoices to MG Components with a value of £64m. All of these included instructions for third party payments. According to the HMRC note, MG Components had an account with the FCIB account. That account is not identified in the TCG FCIB account because of the third party payments. The payee accounts identified on the instructions issued to MG Components included payments to the FCIB accounts of the following companies: (i) Intertech SARL; (ii) Electron Global Limited; (iii) Multimode Marketing; and (iv) IC), Trading. All of this trading was conducted by TCG in breach of the freezing injunction obtained by HMRC on 22 February 2006."

195. I have considered whether I could properly accept this as evidence in support of the claim. In my judgment, however, it would not be right to do so. Mr Goldfarb did not give evidence and his statement was based on a note prepared by HMRC and not on the underlying records and neither the note nor the records were in evidence. I have dismissed TCG's Direct Claim in relation to the notice of assessment dated 2 August 2017 on the basis that HMRC did not prove in TCG's liquidation for that sum. I also dismiss TCG's Direct Claim that FCIB assisted Mr Callender to incur the liabilities in the four notices of assessment dated 25 January 2008, 30 January 2008, 29 July 2008 and 17 August 2007.

196. Finally, I have also considered whether I could properly find that FCIB assisted Mr Callender to conduct the transactions which gave rise to the three remaining notices of assessment relating to the earlier period between 1 December 2005 and 28 February 2006. My difficulty with this approach is that the Claimants did not plead it as a fall-back position or seek to prove it and positively discouraged the Court from taking such an approach in their opening submissions. In Cs, S3 they stated as follows:

> "The Claimants submit that there is no requirement on them to prove or for the Court to find any particular figure for TCG's trading, or as to what

> proportion of that trading went through FCIB accounts. The Claimants have set out above the basis for their calculations, and the documents supporting those calculations, and (particularly in the absence of any actual challenge by the Defendants) invite the Court to accept them."

197. For the reasons which I have given I do not accept the Claimants figures and since they do not ask the Court to make any findings as to what proportion of TCG's trading went through FCIB's account, I dismiss TCG's Direct Claim in its entirety. It would be unjust to impose liability on FCIB for as much as £27 million when the Claimants adopted an all or nothing approach. But in any event, I am not satisfied that TCG traded exclusively through its FCIB account between 1 December 2005 and 21 February 2006 given the discrepancy between the amount of the VAT liability and the amount credited to the account. It is possible that TCG traded through other FCIB accounts in the name of third parties during that period too. But if so, it was for the Claimants to prove it and they did not do so. I, therefore, dismiss TCG's Direct Claim in its entirety.

(12) Northdata

(i) Breach of duty

198. Mr Jason Walker was the sole director of Northdata. The Claimants' pleaded case was that the company engaged in MTIC fraud as particularised in the HMRC correspondence and they relied on the fact that Mr Walker gave instructions to customers to remit funds totalling £46,791,788.82 to third party suppliers (who also held FCIB accounts). From the documents referred to in G15, I am satisfied that he gave these instructions and that his purpose in doing so was to commit MTIC fraud. I find on a balance of probabilities that in breach of his fiduciary duties Mr Walker caused Northdata to incur liability for VAT of no less than £7,713,261.39 (after giving credit for the dividend).

(ii) Assistance

199. I have held that Northdata's VAT Claim is limited to £7,713,261.39 based on the notice of assessment dated 2 February 2006. That assessment related to the period between 1 September 2005 and 30 November 2005. On 13 February 2006 Mr Venvili Rajkumar, an HMRC officer, made an affirmation in support of HMRC's application to put Northdata into provisional liquidation in which he gave the following evidence:

> "On 11 January 2006, HMRC received the VAT return of Northdata for

> the period 1 September 2005 to 30 November 2005. The return, signed by Mr Large and dated 9 January 2006, stated that the total VAT due from Northdata was £16,263,088 and that the VAT reclaimed by Northdata on purchases and other inputs was £16,242,631 and that a VAT liability of £20,457 was due from Northdata. The box to be ticked if payment was being enclosed was ticked (VR1/A35/137). The VAT return also stated that the total value of sales and other outputs excluding VAT was £92,931,935 and that the total value of purchases and all other inputs excluding VAT was £92,815,037."

200. Mr Rajkumar then gave very detailed evidence about Northdata's pattern of trading to explain why HMRC had disallowed input tax and assessed the company for additional VAT. His evidence was that Mr Walker conspired with Lets Talk IT Ltd (which also traded with Star) and a Mr Paul Walsh to defraud HMRC by reclaiming VAT on sales by a company called Vollitone Ltd, which had given a false VAT registration number on its invoices and was not registered for VAT. It was also his evidence that Northdata directed Vollitone to pay the proceeds of sale to third parties:

> "125 It will be Northdata's case (in the event that the application for the appointment of the provisional liquidator is granted) that Lets Talk and Mr Walsh have conspired with and dishonestly assisted Mr Walker in his breach of his duty to Northdata.
>
> 126 The assistance itself consists in the role of Lets Talk and Mr Walsh in the safe transactions between Northdata and Lets Talk that resulted in Northdata incurring VAT liabilities to HMRC of some £4,410,733.81 without, it would appear, any (or any substantial) corresponding payments being made to Northdata.
>
> 127 Furthermore where HMRC has obtained payment instructions issued by Northdata these provided for no payments to be made to Northdata, thus leaving Northdata with no funds with which to meet its VAT liability on the corresponding transaction. As I have shown, where payment instructions have been obtained they provide for the bulk of the payments to be made to unconnected third parties."

201. Finally, it is clear from Mr Rajkumar's evidence that the decision to disallow input tax in relation to the sales by Vollitone (and other sales during period 11/05) was the basis for the notice of assessment and he referred directly to the notice of assessment in his affirmation:

> "I would refer the Court (pages 456 to 463 of VR1/5) to the VAT assessment raised by HMRC against Northdata for the period ended 11/05 together with interest respectively. As stated above, Northdata submitted a VAT return for the period 11/05. The court is referred to the document

> at (VR1/A35/137). The November 2005 VAT return shows a net sum due to HMRC of £20,457. This sum has been paid. The assessment that has now been raised is in respect of the same period and is an additional sum due to HMRC based on HMRC's best judgment of sums due having regard to the fact that invoices purportedly from Vollitone addressed to Northdata and in relation to which Northdata appears to have claimed input tax as an offset to output tax are invalid."
>
> "I believe that Northdata is insolvent. On 13 February 2006 HMRC raised a VAT assessment in the sum of £7,958,349.71 in respect of the period ended 11/05 (VR1/5/456). This assessment was due and payable immediately but remains unpaid. Accordingly, Northdata's total indebtedness for the periods up to and including 11/05 is £7,958,349.71."

202. Based on the work which Howes Percival LLP had performed for HMRC in support of the application to appoint a provisional liquidator, the Claimants' evidence was that total sales of £117,137,109.00 passed through an FCIB account in Mr Walker's own name between 29 September 2005 and 14 February 2006 of which £46,791,788.92 were paid to third parties. The third party payments included a payment of £50,000 to Lets Talk IT Ltd itself and payments totalling £37,552,360.80 to a company called Snow Rix Ltd. In his affirmation, Mr Rajkumar gave evidence that this company was part of the ring and gave an example of a deal in which the proceeds of a sale by Northdata to Vollitone Ltd were paid to Snow Rix Ltd.

203. I accept this evidence and I find on a balance of probabilities that the payments to suppliers on which Northdata claimed input tax in period 11/05 and which HMRC disallowed passed through Mr Walker's FCIB account and that FCIB assisted him to make those payments. I also find on a balance of probabilities that the proceeds of the onward sales to Northdata's customers passed through its FCIB account or other FCIB accounts in the names of third parties. Accordingly, I find that FCIB assisted Mr Walker to commit the breaches of duty which caused Northdata to incur a net VAT liability of £7,713,261.39.

(13) ETP

(i) Breach of duty

204. Mr Nathan Field was the sole director of ETP. The Claimants' pleaded case was that ETP engaged in MTIC fraud as particularised in his questionnaire and statement to the Official Receiver. The Claimants placed particular reliance on the fact that Mr Field admitted

third party payments in a statement dated 21 July 2008:

> "For all the deals that I conducted for ETP, all of the customers paid ETP its mark up on the deal and the customers paid ETP's suppliers directly. The mark up of ETP was received into its FCIB bank account and I would then transfer funds to ETP's HSBC bank account. As I didn't have the finance to fund the purchases, ETP would pass on an instruction to its customers, to pay its supplier the amount owed by ETP. I didn't think there was any problem in making 3rd party payments. There were no payments instructions to pay anybody else other than ETP or its supplier. I didn't have any concerns that ETP's customer would go direct to ETP's supplier. ETP never took possession of any of the goods it purchased. ETP had no warehouse and no insurance cover. I don't recall any goods being held in a freight warehouse. I believe that the supplier was sending the goods direct to the customer of ETP. I would advise the supplier of where the goods were to be sent to. ETP had no delivery costs and this was built into the purchase price."

205. I have held that the VAT Claim succeeds and that ETP is liable to HMRC for £44,398.92 and £2,691,588.00 based on two assessments relating to the period between 1 March 2006 to 31 May 2006 and the period between 1 June 2006 and 10 July 2006 respectively. However, in the statement upon which the Claimants relied, Mr Field also stated that he thought that ETP had ceased trading in March 2006, that he had sold the company to RHF Ltd and that he did not conduct any trading himself after 1 June 2006. He also claimed that he had never seen either assessment. The Claimants did not allege MTIC fraud against any other individual apart from Mr Field.

206. Although Mr Field denied involvement in the trading which gave rise to the relevant liabilities or any knowledge of the notices of assessment, I find on a balance of probabilities that he continued to control ETP until 10 July 2006 and that in breach of his fiduciary duties, he traded in computer components or hardware for the purpose of defrauding HMRC and thereby caused ETP to incur a total VAT liability of £2,735,986.90. Based on the admissions (above) and the other documents in G8 I am satisfied that Mr Field was engaged in MTIC fraud. I attribute no weight to Mr Field's evidence that he had no involvement in the trades which gave rise to the VAT liability. He remained a director of ETP and had to accept that the relevant minutes and resolution changing the company's name were dated 12 July 2006 (which was two days after HMRC cancelled ETP's registration). Furthermore, FCIB did not suggest that there was any change in the control of ETP's FCIB account.

(ii) Assistance

207. The Claimants' evidence was that between 6 July 2005 and 9 November 2006 ETP operated an FCIB account with throughput of £111,204,543.78. They also relied on the fact that ETP operated an HSBC account between 19 August 2005 and 25 January 2007 with throughput of £598,042.50. Finally, they also relied on deal listings or deal logs which HMRC had compiled and which showed that ETP traded with a number of companies all of whom operated FCIB accounts. Unfortunately, I derived little or no assistance from these documents for two reasons: first, because Mr Field's evidence was that only his commission passed through the FCIB account and the total throughput on the account was therefore of no assistance; and, secondly, because none of the deal logs related to the relevant period and the latest transaction which they record was dated 12 May 2006. I could not verify the Claimants' case, therefore, that third party payments were routed through FCIB accounts for the relevant periods.

208. I find on a balance of probabilities that Mr Field required his customers to pay ETP's commission into its FCIB account. His explanation of ETP's pattern of trading made this inherently likely and the Defendants did not challenge it. However, in the absence of any documentary evidence I am not prepared to find that ETP's customers paid the balance of the purchase price payable on each trade into an FCIB account in the name of a third party or third parties. But in any event, I consider that it is unnecessary to require the Claimants to establish this fact because I am satisfied that FCIB assisted Mr Field to commit the relevant breaches of fiduciary duty simply by providing a bank account into which the commission payments were made.

(14) Wood Works

(i) Breach of duty

209. Mr David Cutts was the sole director of Wood Works. The Claimants' pleaded case was that Wood Works engaged in MTIC fraud as particularised in HMRC correspondence. They also relied on the admissions which Mr Cutts gave in his CDDA undertaking dated 8 December 2011:

> "Between October 2005 and July 2006 1 caused Wood Works (Sheffield) Limited ("Wood Works") to participate in transactions which were connected with the fraudulent evasion of Value Added Tax ("VAT"), such

> connections being something I either knew or should have known about. In particular:
>
> • I was aware that Missing Trader Intra Community ("MTIC") VAT fraud was rife in the trade in wholesale electronic goods, in which Wood Works engaged or ought to be aware of it because:
>
> o I had been warned of it by H M Revenue & Customs ("HMRC") with regards to Wood Works by letter dated 5 December 2005;
>
> o I had been provided by IIMRC with copies of public notices regarding security, joint and several liability and invalid input tax and these matters had been specifically discussed by me with officers of HMRC at meetings on 13 March 2006 and 12 May 2006 and at subsequent meetings;
>
> • The trading in which Wood Works was involved had features which put, or should have put me on enquiry about the legitimacy thereof, as follows:
>
> o I had been a professional footballer before being employed in the retail trade and had no background in sales. Wood Works had quickly without significant effort or working capital generated huge turnover (some £248,712.824 in a little over nine months trading);
>
> o Wood Works was able to source goods and complete the onward sale within a very short period of time — usually on the same day;
>
> o Wood Works was able to sell exactly the same quantity of goods as it purchased;
>
> o the amount of profit made by Wood Works on the transactions in which it was involved reflects a pattern common in VAT fraud."

210. Mr Cutts also admitted that the trading chains in which Wood Works were involved caused serious losses to HMRC, that input tax totalling £4,326,020 had been disallowed and that this contributed to Wood Works' overall VAT liability of £9,004,905. I am satisfied that Mr Cutts admitted the allegations made by HMRC and I find on a balance of probabilities that he committed breaches of his fiduciary duties to ETP by causing it to incur a total VAT liability of £9,004,904.84.

(ii) Assistance

211. The Claimants' evidence was that between 7 September 2005 and 30 November 2006 Wood Works operated an FCIB account with throughput of £499,003,360.81 and that although it had a NatWest account, there was minimal activity on that account during the relevant period. In my judgment, the volume of activity on the FCIB account is sufficient to give rise to an inference that Wood Works traded exclusively or almost exclusively through its FCIB account. I find, therefore, that FCIB assisted Mr Cutts to carry out all of the transactions which gave rise to the VAT liability of £9,004,904.84.

(15) JDG

(i) Breach of duty

212. The three directors of JDG were Mr Deepak Bhatia, Ms Joti Bhatia and Ms Suman Bhatia. The Claimants' pleaded case was that JDG engaged in fraudulent trading and they relied on Mr Bhatia's questionnaire, his statement dated 10 September 2014 and two interviews which he gave to the Official Receiver on 5 May 2015 and 31 October 2017. On none of those occasions did he admit fraudulent trading and there was no evidence before me that Mr Bhatia was prosecuted for any criminal offences or disqualified as a director.

213. I cannot be satisfied that Mr Bhatia was engaged in fraudulent trading on the basis of the material before me. However, I draw the inference that he turned a blind eye to the fraudulent trading of the other participants in MTIC rings of which JDG was a part. I do so because of the volume and pattern of JDG's trading, the identity of the suppliers and customers with which it traded and the number of warnings which HMRC gave to him about MTIC fraud. I find, therefore, that in breach of his fiduciary duties Mr Bhatia caused JDG to incur a VAT liability of £1,246,736.17.

(ii) Assistance

214. The Claimants' evidence was that on 5 August 2005 JDG opened an FCIB account although they were unable to say how long it remained open or what the throughput was because they were unable to produce JDG's bank statements or account entries. Nevertheless, they submitted that the Court could draw the inference that JDG conducted the relevant transactions through its FCIB account because JDG traded extensively with suppliers and customers who also had FCIB accounts. The notice of assessment dated 1 April 2008 covered the period between 1 March 2006 and 31 May 2006 and it was their evidence that during that period JDG sold its products to the Export Company (UK) Ltd, Compagnie International, Rakha SPRL and URTB.

215. After some hesitation, I draw the inference that the proceeds of JDG's sales between 1 March 2006 and 31 May 2006 passed through its FCIB account and I find on a balance of probabilities that FCIB assisted Mr Bhatia to carry out the transactions which gave rise to the VAT Claim. In 2001 JDG was incorporated and unlike a number of the MTIC

Companies it appears to have been a genuine trading company. Its application to open the FCIB account stated that for five years it had an account at Barclays and I can see no reason why it would have opened an FCIB account other than to trade with its suppliers and customers. Moreover, Mr Bhatia confirmed this in his statement dated 10 September 2014. He also confirmed that Barclays was unwilling to process these payments:

> "JD Group only ever had one bank account in the UK with Barclays. I also had a FCIB account. I found out about this account through other traders. Barclays also said that they could not deal with the size of the company transactions or able to sustain the speed at which transactions were processed. FCIB sent a manager to open an account."

(16) @tomic

(i) Breach of duty

216. Mr Harpal Singh Bahia was the sole director of @tomic. It was the Claimants' pleaded case that @tomic engaged in MTIC fraud as particularised in Mr Bahia's questionnaire, his statement to the Official Receiver dated 11 September 2015 and his interview with his trustee in bankruptcy. They also relied upon the decision of the FTT in *@tomic Ltd v HMRC* [2014] UKFTT 546 where @tomic appealed against the decision to deny input tax. Although that decision is not admissible as evidence of Mr Bahia's breaches of duty, I reach the same conclusion as the tribunal. Based on the documents referred to in G2, I find that Mr Bahia was engaged in MTIC fraud and that in breach of his fiduciary duties he caused @tomic to incur a VAT liability for VAT for £2,083,422.86.

(ii) Assistance

217. In the decision letter dated 17 September 2008 Mr J Baines, the HMRC officer, stated that HMRC had decided to deny @tomic input tax of £7,300,683.47 for the period 1 May 2006 to 30 June 2006 and the FTT upheld this decision on appeal. Mr Baines annexed a schedule of the relevant transactions which all took place between 10 May 2006 and 17 May 2006 and involved sales to Gold Phone SLU, Nordisk Telecom APS, Brianstom Investments Ltd, Belcom AB and Sigma (Sixty) BV. The Claimants produced evidence to show that all of these companies operated FCIB accounts and Mr Baines stated in the letter itself that: "@tomic and all parties it dealt with in the relevant transaction chain transferred funds using the offshore First Curaçao International Bank."

218. I am satisfied that all of the payments which @tomic received from these five customers passed through its FCIB account. There is no reason to doubt the accuracy of Mr Baines' statement in the decision letter dated 17 September 2008 and the Defendants did not challenge it. Moreover, it is supported by the evidence which the Claimants assembled in G2. Finally, it is supported by the site visit form completed by Mr Steve Atkins on 19 May 2006 which records that Mr Bahia told him that "Goldphone Spain" was one of his main clients, that 90% of transactions involved intra-account transfers and that he was trying to convince all of his connections to use them. I find, therefore, that FCIB assisted Mr Bahia to carry out the transactions which caused @tomic to incur the VAT liability.

H. Dishonesty

(1) The Claimants' Case

219. In addressing the question of Mr Deuss's honesty or dishonesty the parties traversed the two year period between 2004 and 2006 from many different angles and by reference to many different documents. The only way in which I could keep the fact-finding process within manageable bounds was to stick closely to the Claimants' pleaded case. I begin, therefore, by setting out their case on dishonesty and where I refer to paragraphs in this section of the judgment, I intend to refer to paragraphs in the Particulars of Claim unless I state otherwise.

220. The Claimants set out particulars of the dishonesty of the MTIC Directors in paragraph 5. However, they did not allege that Mr Deuss knew any of them or knew that they were dishonest or that he had a personal involvement in operating or monitoring their FCIB accounts. They alleged in paragraph 6 that he assisted the MTIC Directors to commit the relevant breaches of fiduciary duty by owning and operating FCIB and by offering "**eBanking**" services:

> "(1) Mr Deuss used FCIB and TWPS, companies in his control, to create, facilitate the creation of, and/or to enable FCIB to profit from the existence of networks of companies engaged in MTIC fraud including the MTIC Companies. FCIB provided e-banking facilities to such companies, and those services were promoted by TWPS. Such companies (including the MTIC Companies) would not have been able to engage in the MTIC fraud without the assistance of banking services (which FCIB provided) and would never have been participating in such trading but for such services….

> (2) The MTIC Companies were onboarded (alternatively, and to the extent different, which is not admitted, "pre-screened") as customers of FCIB by TWPS.
>
> (4) (a) In breach of his fiduciary duty as a director of TWPS, Mr Deuss caused TWPS thereby to participate and assist the directors of the MTIC Companies in their MTIC fraud as a result of which TWPS has suffered loss and damage, namely its liability to the MTIC Companies;
>
> (b) Mr Deuss is liable to TWPS for breach of fiduciary duty in the amount of such VAT liabilities;
>
> (5) TWPS, FCIB and Mr Deuss (whether or not a director of TWPS) thereby dishonestly assisted the breaches of duty by the directors of the MTIC Companies. TWPS and FCIB and are all liable for such dishonest assistance to the MTIC Companies in the amount of their unpaid VAT liabilities (the MTIC Companies' claims in dishonest assistance against Mr Deuss being time barred);…"

221. The Claimants set out their detailed case on the dishonesty of Mr Deuss in paragraph 11. In substance their case was that he knew or shut his eyes to the facts that the T&C sector was fraudulent and that reputable banks had pulled out of financing it and that he deliberately decided to target the T&C sector as a business opportunity:

> "(1) At all material times Mr Deuss and Mr Vallerey were aware that any honest bank needed to follow Anti-Money Laundering ("AML") procedures involving Know Your Customer ("KYC") requirements and on-going monitoring of its customers' transactional activity with a view to avoiding providing financial services to any company involved in any money laundering activity or other financial crime.
>
> (2) From late June 2004 Mr Deuss and Mr Vallerey knew that (alternatively shut their eyes to the fact that, or wilfully and recklessly failed to make enquiries that an honest and reasonable man would make as to whether) MTIC fraud was believed to be prevalent amongst the UK Telecommunications and Computer ("T & C") sector and such accounts were, as a result, considered to be, and were designated by FCIB as being, "high risk".
>
> (3) Further by October/November 2005 at the latest, Mr Deuss and Mr Vallerey knew that (alternatively shut their eyes to the fact that, or wilfully and recklessly failed to make enquiries that an honest and reasonable man would make as to whether) many reputable banks had ceased to provide financial services to the T & C sector as they had concluded that there was evidence giving grounds for believing that the transactions in that sector were likely to be part of a VAT fraud.
>
> (4) Mr Deuss, despite such knowledge, dishonestly determined to capture (or to continue to attempt to capture) such business for FCIB by offering the e-banking services of FCIB without imposing any effective AML procedures. The Claimants contend that Mr Deuss was dishonest from

> June 2004 onwards (inclusive), or alternatively, a date thereafter, but in all probability no later than November 2005.
>
> (5) Further, to that end Mr Deuss decided to make FCIB attractive to fraudsters by emphasising the benefits that FCIB's electronic banking services offered to such companies, namely, high-speed international transfers that could be made from any jurisdiction and any time-zone anonymously in a closed loop with other traders in the cell who also had accounts at FCIB, thereby minimising the possibility of outside scrutiny of their transactions. TWPS positively encouraged the creation of the 'closed loops' used in the MTIC fraud by customers of FCIB as outlined in a document entitled 'Trading Segment action plan (December 2004)' produced by Mr Vallerey.
>
> (6) Thereafter Mr Deuss had FCIB provide e-banking facilities to companies in the T & C sector (including the MTIC Companies) knowing that there was a serious or real possibility that such companies were engaged in MTIC fraud but without making inquiries to see if that were the case. He was thereby dishonestly reckless as to whether he and FCIB were assisting in such fraud."

222. The Claimants also alleged that Mr Deuss committed breaches of his fiduciary duty as a de facto or shadow director of TWPS, allegations to which I return in Section III (below). In paragraphs 17 to 19 they then alleged that Mr Deuss charged TWPS with monitoring customer activity rather than instructing FCIB to carry out proper monitoring itself and that Mr Deuss paid lip service to the need to understand the business of FCIB's customers:

> "17. Furthermore, whilst aware of the need for a bank to monitor a customer's activity for any unusual transactions or volumes, at the latest by early 2005 Mr Deuss had formally charged TWPS with doing so even though he knew it would not be doing so and did not do so. In the alternative, TWPS through Mr Deuss was made aware of (alternatively deliberately shut their eyes to, or wilfully and recklessly failed to make the enquiries that an honest and reasonable man would make as to) the level of account monitoring on the part of FCIB and was aware, or ought to have been aware, that it was insufficient.
>
> 18. These failings of the AML procedures that FCIB should have had in place were all the more disreputable given that the substantial majority of FCIB's clients were, as Mr Deuss and FCIB knew, operating in the high risk T&C market sector in the UK where VAT carousel fraud was thought by many, including HMRC and reputable banks, to be prevalent and had no legitimate economic justification (and that as a result all reputable banks refused to provide banking facilities to such companies). Had he been an honest man, Mr Deuss would have been concerned properly to inquire about and understand the business model of FCIB's customers in order to satisfy himself that such extensive trade was legitimate.

> 19. Mr Deuss gave lip service to the need to understand the business model of FCIB's customers but did not cause steps to be undertaken in order to do so, whether as part of the onboarding process or in the discharge of TWPS' the purported monitoring of the accounts or otherwise. Mr Deuss did not do so lest it confirm what he already suspected and thought was likely to be the case, namely that FCIB's clients in the T&C sector (or at least many of them) were engaged in illegitimate activity, specifically VAT fraud."

223. The Claimants pleaded that Mr Deuss was kept informed about the volume and nature of the transactions which were being conducted through FCIB accounts and the number and nature of new clients onboarded by TWPS and also that FCIB assisted the MTIC Directors by providing bank accounts, by processing the transactions which gave rise to the VAT Claims through those accounts and also by processing third party payments through FCIB accounts. In paragraph 33 they pleaded a telephone conversation between Mr Danny Barrs, a TWPS marketer, and a potential customer and in paragraph 35 they set out particulars of the dishonesty of Mr Deuss and FCIB itself:

> "35. Furthermore, the dishonesty of Mr Deuss and FCIB is evident from the following particulars.
>
> PARTICULARS
>
> (1) Mr Deuss and FCIB knew that many if not all of the UK High Street banks refused to provide accounts to the companies in the T & C sector that it provided banking services to because of the risk that such companies were involved in VAT carousel fraud. Mr Deuss tried to avoid the involvement in any wire transfers of other banks and for that reason sought to persuade his clients not to transact in sterling. It should be inferred that this was for fear of any other bank questioning the legitimacy of the transactions.
>
> (2) Mr Deuss, FCIB and TWPS knew that many applications from T & C customers were organised by the same persons, known as "network heads", who vouched for the applicant. No consideration was given as to how such a "network" was consistent with the applicants being engaged in legitimate commercial activity or as to how the network head could vouch for that person.
>
> (3) At a meeting on 4 October 2004 held in Dubai, Anthony Elliot-Square of Third Dimension Limited (who introduced prospective T & C customers for FCIB to Paul Bailey, a marketer for TWPS) informed TWPS' Antonio Calderon that traders in the T & C sector were reluctant to use the services of FCIB unless they knew that their counter-parties also had FCIB accounts (which, as they would have appreciated, would ensure no third party AMLscrutiny of the transaction).
>
> (4) Both the Chilterns Presentation and the FTI Best Practice Guide highlighted third party payments as indicative of VAT fraud. It appears

> that FCIB were able to check whether (or knew) that such payments were being made by customers but continued to process transactions on those accounts.
>
> (5) FCIB continued to operate accounts for companies that RMC (as defined at paragraph 2, above) recommended should no longer be accorded such facilities because of suspicions that such companies were involved in VAT fraud and for companies in respect of whom MOT reports (being reports filed in respect of unusual transactions) had been filed with Financial Intelligence Unit Curacao. Such accounts were not subjected to any special supervision or due diligence.
>
> (6) FCIB processed transactions for such companies which it knew to be of an unusual nature without filing a report of performed or intended unusual transactions to the Dutch Financial Intelligence Unit as required by Article 9 of the Dutch Disclosure of Unusual Transactions (Financial Services) Act 1993."

224. The Claimants then gave particulars of individual transactions of which they were aware by reference to the judgment of the Arnhem Court on 24 May 2012 in the prosecutions of FCIB, Mr Deuss and Ms Deuss. The Claimants also pleaded a specific allegation that Mr Deuss, TWPS and FCIB were "not interested in whether their clients' unusual trading was consistent with legitimate trading" and relied on, amongst other things, their response to Barclays' decision to terminate its correspondent relationship with FCIB. Their pleaded case on this issue was set out in paragraph 35(1) to (3) as follows:

> "(1)(a) Prior to 18 March 2005 Barclays was FCIB's correspondent bank for sterling transactions.
>
> (b) Barclays raised concerns with Ms Deuss (a director of TWPS and Mr Deuss' sister) in March 2005 about the account FCIB held with it because of suspicions arising following an increase in turnover from £60 million per month to £1 billion per month in the previous 14 months (though the actual increase in turnover on the Barclays account was from £180 million per month to £651 million per month in the space of 3 months). It is averred that analysis by FCIB would have disclosed that the sudden and dramatic increase in turnover was largely on account of accounts in the T & C sector which was known to be high risk for MTIC fraud.
>
> (c) Following a meeting with Ms Deuss Barclays sent FCIB a letter on 18 March 2005 for the attention of Ms Deuss (the treasurer of FCIB) terminating the Barclays relationship with FCIB. Barclays having closed its account, FCIB simply moved its account, via the correspondent bank HSBC, to an account with Rabobank. Subsequently Rabobank too gave notice to terminate its relationship with FCIB in November 2005.
>
> (2) By April 2005, a number of FCIB's customers in the UK had been made the subject of freezing orders in connection with VAT fraud;
>
> (3) In October 2005, Mr Potts of Blake Lapthorn warned Mr Ulrich of

> FCIB of the risk of MTIC fraud in the T & C Sector and at a meeting in November 2005 (also attended by Nick Oliver of Blake Lapthorn and Frances Coulson and Richard Saunders of Moon Beever) discussed with him the involvement of FCIB account-holders in such fraud.
>
> (4) Whilst TWPS, FCIB and Mr Deuss may have preferred that FCIB's customers were legitimate, they had no genuine concern about whether or not they were and they proceeded on the basis that all that mattered was the revenue being generated from the customers' transactional activity."

225. By a request dated 21 December 2022 the Claimants were asked to give further information of the allegation that MTIC fraud was believed to be prevalent amongst the UK T&C sector and the Claimants pleaded that: "The belief that MTIC fraud was prevalent amongst the UK T&C sector was widely held among, at least the banking industry." The Claimants did not explain what they meant by the word "prevalent" but I took them to be alleging that MTIC fraud was widespread or very common in the UK T&C sector. The Claimants were also asked which banks were meant by the phrase "reputable banks" and they pleaded that it included "any UK high street bank".

(2) The Witnesses

(i) Mr Deuss

226. Mr Deuss made Deuss 1 for trial and in anticipation of giving evidence either in person or remotely. But he did not attend the trial and was unable to give evidence. There was no dispute between the parties that Mr Deuss was unable to do so because of his medical condition and I addressed that issue in a private ruling which I gave at the PTR. Mr Parker did not suggest that I should attach no weight to Mr Deuss's evidence because he had not given oral evidence before the Court. In my judgment, the Court was entitled to accept the evidence of Mr Deuss even though it was not tested in cross-examination but I did not give it the same weight which I would have done if he had given oral evidence.

227. Mr Parker undertook an exercise to take the Court through the documents which he would have put to Mr Deuss if he had been able to give oral evidence. He took me to the relevant passages which he would have put to Mr Deuss and stated what points he would have made to the witness. I found this a useful exercise in the absence of Mr Deuss. I also encouraged Mr Parker to identify those passages in Deuss 1, which he directly challenged and why. Mr Thanki elected to deal with those passages and points in closing submissions.

228. Mr Parker submitted that if Mr Deuss had given oral evidence before the Court, he would have had no answer to the allegations which the Claimants made against him given the documents which would have been put to him in cross-examination. I reject that submission. It is of some significance that in a document-heavy case such as this Mr Parker and his team could not point to any "smoking gun" documents from which the Court could clearly draw the inference of dishonesty. However, I agree with Mr Parker that the weight which the Court could attach to Mr Deuss's evidence depended on the extent to which it was both consistent with and supported by the contemporaneous documents. I have therefore tested Mr Deuss's evidence carefully against those documents.

(ii) Mr Sharma

229. Mr Deuss also called Mr Saurabh Sharma to give evidence. Between 2001 and 2006 he was employed by TWICTS as a business analyst and then as a Senior Vice President performing the roles of Head of Testing for ExactPay and then in autumn 2005 as Senior Compliance Officer and Head of Risk Management & Compliance ("**RMC**"). Mr Sharma's professional background was in software development rather than banking or compliance although his evidence was that the scope of his role was project management and process delivery.

230. Mr Parker and his team were severely critical of Mr Sharma's evidence. They submitted that he had been heavily coached and that his evidence was partisan and defensive. I reject those criticisms. In my judgment, Mr Sharma was a reliable witness doing his best to assist the Court. It was not put to him that he had been coached or that he had been through a program of witness familiarisation and this was not obvious to me from his evidence. Whilst I accept that he would naturally want to defend his record and that of the RMC, he had no interest in the outcome of the proceedings. Nevertheless, given that the events about which he was giving evidence happened almost 20 years ago, Mr Sharma's evidence was bound to be impressionistic in relation to detailed timing and events. Again, I accepted his evidence where it was consistent with the documents.

(iii) Mr Ganesh

231. Mr Deuss also called Mr Meenakshisundaram Venkataraman Ganesh, who was Mr Sharma's predecessor as head of the RMC. In 2001 Mr Ganesh was originally employed

as a business analyst but he ultimately became President of TWICTS and in April 2005 he set up the RMC. Mr Ganesh also had a background in software development rather than banking or compliance. Mr Parker and his team were equally critical of Mr Ganesh and I also reject their criticisms of him. It was not put to him that he had been coached and I am satisfied that he was a reliable witness doing his best to assist the Court. He spoke very quickly and his evidence was apt to be a little confusing as well as impressionistic but again I accepted his evidence where it was consistent with the documents.

(iv) Other potential witnesses

232. Mr Parker and his team relied on the absence of other witnesses whom the Defendants might have called to give evidence. He submitted that if Mr Deuss's evidence had been truthful, then there were a large number of witnesses whom the Court would have expected FCIB to call to corroborate it. They pointed out that FCIB had not called Mr Vallerey, Ms Deuss or Mr Tim Ulrich, who had been the General Counsel and Chief Compliance Officer of FCIB and was the Managing Director of FCIB from 3 October 2003 until November 2004 and a Supervisory Director from 2004 until 9 October 2006. They also relied on the fact that FCIB did not call Mr Victor De Wijze, who was FCIB's Chief Compliance Officer from 2003 to 2005 or Mr Jan Willem Smulders, who was the Assistant Risk Manager for TWOCC.

233. The Claimants did not invite me to draw any adverse inferences from the failure to call these witnesses and, in particular, to call Mr Vallerey against whom allegations of dishonesty were also made. But if they had wished the Court to do so, it would have been necessary to set out clearly what inferences they invited the Court to draw: see *Phipson* (above) at 45—35. Moreover, Mr Deuss did call Mr Sharma and Mr Ganesh and Mr Parker did have an opportunity to put his case to them. Finally, I bear in mind that Mr Parker chose not to pursue the pleaded case of dishonesty against Mr Vallerey and so it can be said that there was, therefore, no reason to call him to answer it.

(v) Expert evidence

234. Again, the Claimants did not call any expert evidence either to prove that MTIC fraud was very common or widespread in the UK T&C sector or to prove that such a belief was widely held in the banking sector. Further, and as Mr Thanki and his team submitted, the

Claimants did not call any expert evidence to prove what AML and KYC procedures would have been reasonable to combat MTIC fraud throughout the period between 2004 and 2006. Finally, as Mr Thanki submitted (and I accept below), other banks continued to service the T&C Sector even after FCIB had ceased to do so and after MTIC fraud had become widely publicised. But the Claimants called no evidence to explain how many banks chose to do so and what (if any) enhanced due diligence they carried out.

(vi) The Documents

235. In my judgment, the Claimants' case against both Defendants stands or falls on the documents and whether they are consistent with his honesty or whether I can and should draw the inference of dishonesty from them. For the reasons which I have given, I have to test Mr Deuss's evidence against the contemporaneous documents in answering each of the pleaded allegations against him. In approaching this issue I have well in mind the guidance of Calver J in *Suppipat v Narongdej* (above).

236. Before I set out the facts and address the individual documents upon which the Claimants relied, it is important that I should state how I have approached them. I accept that it was perfectly possible for the Claimants to prove their case by asking the Court to draw inferences from individual documents about Mr Deuss's knowledge, understanding and belief (and Mr Thanki did not submit otherwise). But I approach this issue on the basis that it is inherently unlikely that he did not believe what he said to his close advisers and colleagues or accept what they said to him unless he expressly said so. I also approach adverse documents with some caution in assessing the weight to be attached to them given that they are almost 20 years old and I had limited context in which to place them given that I did not hear evidence from Mr Deuss himself or any banking experts.

(3) The Facts

(i) Background

237. In late 2001 or early 2002 Mr Deuss decided to expand FCIB's third party banking services to digital banking by extending the use of the Transworld group's existing digital banking technology to FCIB's customers. In 2002 it began to offer eBanking services and in 2003 it began to offer "**ExactPay**" to its customers as well. Mr Ganesh explained the two platforms in his witness statement dated 28 August 2024 ("**Ganesh 1**"):

> "16. As I have mentioned above, the focus when I joined in 2001 was on developing the eBanking platform for BCB. In or around late-2002, the Transworld group was getting ready to launch the BCB eBanking project. At that stage, Mr Deuss decided to also launch a similar platform for FCIB. At the time that I joined TWICTS, my recollection is that FCIB was mostly involved in private banking. I was not involved in the decision to expand eBanking to FCIB (because my focus was on software development), but I recall thinking that the idea made sense, as FCIB had the same software systems that supported the running of its applications, so we could easily adapt the eBanking system to work for FCIB.
>
> 17. My recollection is that Mr Deuss had mentioned at the time that there were not enough staff in Curaçao to support the growing businesses of BCB and FCIB and that it was not easy to hire high calibre employees in Curaçao. At the same time, there were major global banks such as Rabobank and Standard Chartered who had already outsourced part of their operations to Indian subsidiaries. So Mr Deuss made the decision to start an operations team in Bangalore whose purpose was to provide back-office services to FCIB such as customer support and reconciliation of transactions. My role then expanded from software development to assisting with banking functions, and I was put in charge of facilitating the hiring of individuals from other banks in India (for example, Standard Chartered) to assist with the eBanking back-office support. Although I was involved in their hiring and management, the back-office operations team took instructions on their day-to-day roles directly from the FCIB team in Berg en Dal.
>
> 18. Around early-2003, the Transworld group launched ExactPay (initially for BCB and then for FCIB), which was a global payment software system. ExactPay was similar to eBanking in that it enabled customers to make intra-account, inter-account and cross-border wire transfers, with the key difference being that it was a card-based platform, where users would be issued a debit card and could access their funds anywhere in the world without needing to be physically present in Curaçao, as long as they had access to an ATM machine. Again, these are functionalities which most banks offer nowadays, but at the time it was uncommon (especially for offshore banks) to offer these facilities to retail customers.
>
> 19. When ExactPay was launched, the back-office team in Bangalore was expanded to customer support and software development services for the ExactPay platform as well. I was involved in facilitating the growth and management of the back-office team, and my role also expanded to being in charge of the software development team for ExactPay."

238. TWPS's marketing strategy was to recruit a series of intermediaries who would assist its marketers to sell FCIB's eBanking services to businesses and traders. The Claimants set out this marketing strategy at NC9 (and I adopt the terms used in the following extract):

> "Part of the marketing strategy for eBanking and ExactPay, at least initially, was to recruit 'multi-channel intermediaries' (**MCIs**) and 'master

> multi-channel intermediaries' (**MMCIs**) across different market segments to promote them. MCIs could be (1) (for example) banks, trust companies, or corporate service providers, or (2) individuals. MCIs could open eBanking accounts with FCIB allowing them in turn to operate subaccounts for clients and share in the revenues produced (in the form of transaction fees and so on) through compensation agreements with FCIB. MMCIs dedicated 100% of their time to marketing ExactPay to MCIs, distributor banks and end users. Distributer banks were smaller banks which acted as franchisees of ExactPay (so-called ExactPay Representatives, or **EPRs**) to offer the platform to their existing client base."

239. By email dated 19 February 2004 Mr Deuss wrote to Mr Vallerey informing him that Mr Paul Bailey, Mr Barrs and Mr Brian Partridge had all joined TWPS as marketers and as operations co-ordinator respectively and setting out their salaries. By memo dated 9 December 2004 Mr Deuss sent a memo to Mr Mike Sanchez, who was President of Transworld Payment Solutions Inc (USA), and to Mr Vallerey under the heading "Quality" and stating as follows:

> "Having reviewed the preliminary business plans for the individual marketers for Y-2005, it is my opinion that we must improve the quality of our clients, leads and opportunities. At many occasions I have made the point that large clients are easier to implement than small ones and of course the large clients need to be of sufficient substance and standing that we can have a high level of confidence that they will be able to generate the projected volumes of business. Each marketer should be instructed to review its database of leads and opportunities accumulated during the year in order to identify those prospects we already know about but received insufficient focused follow up to turn possible opportunities into realized business."

240. In July 2004 TWPS introduced a template for site visit reports and I was taken to a number of examples of completed reports which related to the MTIC Companies. By email dated 28 July 2004 Mr Partridge wrote to the TWPS marketers stating as follows:

> "Attached is the approved template for Visit Reports. This document as indicated by Mr Deuss should contain the relevant business facts as discussed during your visits, including an indication of the type of client business, potential areas of interest and the follow-up required. Any basic forecast figures are welcome."

241. It is common ground that in June 2004 FCIB had in place very limited "**Know Your Customer**" or "**KYC**" and "**Anti-Money-Laundering**" or "**AML**" procedures (to which I will refer collectively as "**compliance**" procedures). In a memo dated 24 August 2004

Mr Ulrich wrote to Mr Deuss recommending "sensible/reasonable changes to the existing KYC/AML programs" in both BCB and FCIB. He also set out a series of issues which FCIB had recently faced. Mr Parker described this memo as one of two "bookends" at either end of the factual chronology.

242. Mr Deuss's evidence was that on 3 July 2000 Mr Ulrich produced the initial version of the AML Manual Policy Statement (the "**AML Manual**"). It was also his evidence that in September or October 2004 FCIB adopted a "**Special VAT Certification**" which customers were required to complete and on 22 December 2004 FCIB adopted version 2.1 of the AML Manual. The following businesses were described as high risk in this version: "Companies involved in the sale/distribution of telecommunications or computer equipment in the UK." It is clear from the contemporaneous documents that Mr Deuss himself had a detailed involvement in preparing the Special VAT Certification process. Mr Ganesh also gave the following evidence about the compliance procedures in early 2005:

> "My recollection is that before March 2005, FCIB's compliance activities such as the review of account opening documentation were done by Martha Neuman-Rovira and her team in Curaçao, with the assistance of Victor de Wijze and Jan-Willem Smulders, who worked at Transworld Oil C.C. B.V. in Berg en Dal ("TWOCC"). Victor and Jan-Willem Smulders were also responsible for the scrubbing (i.e., checking names against databases such as World-Check to identify potential risks) of FCIB's customers and their account transactions."

243. On 27 September 2004 a presentation was given by FCIB to TWPS marketers on "Anti-Money Laundering and Know-Your-Customer Obligations – A Primer for Marketers". The purpose of the slides was to explain FCIB's compliance requirements to them and Slide 4 set out the duties imposed on banks and explained their relevance to marketers. Slide 12 also contained the following summary:

> "1. The duty to "know" our customers
>
> 2. The duty to establish a compliance department to identify "unusual" transactions and report those transactions (on a confidential basis) to designated Governmental agencies
>
> 3. The duty to maintain records of all client transactions
>
> 4. The duty to provide appropriate training to all staff
>
> Of these only #1 is relevant to those who are involved in marketing the banks' services, including the TWPS marketing staff. Although, if we spot

> a transaction which appears "unusual", the compliance staff may seek your assistance in discussing this transaction with the client in order for us to better understand it and to make a determination if we are required to report it."
>
> "• Compliance with KYC and Anti-Money Laundering rules is a job for each of us.
>
> • While primary responsibility rests with the Compliance Department, by understanding the basic rules of what is required to open new accounts, marketers can help explain to their clients what is required, and thus speed up the process of account approval and account opening. This should result in fewer delays, fewer rejections and more new accounts.
>
> • Failure to comply with KYC and Anti-Money Laundering rules potentially exposes all we are doing to unacceptable risks and undermines all of our marketing efforts.
>
> • Our eBanking, ExactPay and Global Clearing products are second to none — compliance with the basic KYC and AML rules should not and cannot be a deterrent to our success."

(ii) Introduction to the T&C sector

244. On 18 June 2004 Mr Vallerey sent Mr Deuss a copy of a note prepared by Mr Bailey, now employed as a TWPS marketer, in which he described the T&C sector as an opportunity for the following reasons:

> "Currently International Phone traders are facing a difficult business environment in which to operate as a direct result of two main issues. Firstly proposed draconian European legislation aimed at V.A.T. measures which attempt to make all parties to a business transaction jointly and severally liable for the V.A.T. payable. In many cases a particular transaction to purchase a bulk order of mobile phones (av. deals between GBP 300k and GBP1m) can be traded across 5 traders in the process who although would properly account for their individual V.A.T. aspect to the transaction will as a result of the new proposed legislation potentially be held accountable for the V.A.T. to other parties to the overall transaction as well. The FTI (Federation of Technological Industries) has secured the right to appeal and challenge the case to the European Court of Justice and this is ongoing.
>
> The second issue relates to the major UK Banks apparent reluctance to continue to provide payment processing services within this industry. In view of the trading nature where often high value payments will pass in and out of bank accounts on a daily basis, this places a high emphasis on internal money laundering procedures within the banks which often result in manual checks with the clients for large value transactions both inward and outward having to be made with these companies before completion of the transaction can be made. The Banks are also risk adverse to the risks of money laundering within the sector despite the bona fide nature of the

> businesses represented within the industry.
>
> Banks used by the industry are generally high street banks. Fees paid range from 6£ to 20£, the lower fees applying to electronic transactions, the higher fees to manually submitted transactions."

245. Mr Bailey identified 125 international phone traders as potential customers of whom 88 were UK based. He also referred to the FTI before stating that he believed that TWPS had found a "valuable niche in the market". On 19 August 2004 Ms Jo Bello, who was a director of Indirect Tax at PriceWaterhouseCoopers LLP (London) ("**PwC**"), spoke to Mr De Wijze and then reported to her colleagues as follows: "I explained that Customs in the UK think this sort of fraud is prevalent but that we as PwC have not seen the evidence to suggest that it is as prevalent as Customs are suggesting." On 19 August 2004 Mr De Wijze also sent an email to Mr Deuss reporting his discussions with PwC and Mr Deuss's evidence was that this was the first occasion on which he learnt about MTIC fraud:

> "I do not recall exactly, but I believe Victor's email was the first time I had been told about VAT carousel fraud. I remember that Victor continued to speak with PwC even after sending me this email, and I remember being updated a short while after this email that PwC did not think the fraud was prevalent in the industry."

246. By email dated 2 September 2004 Mr Vallerey wrote to Mr Deuss stating that TWPS had signed about 60 eBanking accounts for T&C customers. He stated that: "One of the reasons for this success is that UK banks are closing these traders accounts under pressure from the UK customs and excise, the latter are seeing this telecommunications trading activity as a vehicle for VAT carousel fraud." Mr Vallerey also enclosed a briefing note dated 31 August 2004 in which Mr Bailey had set out in some detail how MTIC and carousel fraud operated. His description was very similar to the one which I have set out above. He also identified a number of measures by which it was possible to identify honest transactions and identified the significance of third party payments:

> "**Authenticity and best practice adopted by telecoms traders**
>
> • Full due diligence is carried on each trader recruited to our ebanking solutions. This involves a visit to the business premises and full KYC satisfying the account opening requirements in Curacao.
>
> • I complete on the source of funds declaration under "business operating income" the annual turnover and anticipated annual number of wire and intra account transfers for risk control purposes.

> • I establish with each trader what proactive steps they undertake before commencing any deals with a potential supplier. This can include for example :-
>
> Taking reasonable steps to ensure integrity of supplies and supplier
>
> What is the suppliers history in the trade?
>
> Are normal commercial arrangements in place for the financing of the goods?
>
> Are the goods adequately insured?
>
> Taking reasonable steps to ensure commercial viability for the transaction
>
> Is there a market for this type of goods, such as superseded or outdated mobile phone models?
>
> Copy of VAT documentation evidencing that duty has been paid.
>
> Taking reasonable steps to ensure goods will be as described by supplier
>
> Do goods exist (consignment notes, invoice documents etc)
>
> Arrange inspection at bonded warehouse.
>
> In all cases a copy of companies VAT certificate is presented to me and invoice documentation of previous deals evidenced."
>
> "• Risk Management / Money Laundering reporting requirements
>
> As mentioned previously, all traders that sign up to the ebanking platform fully satisfy all the KYC requirements for Curacao and realistic projections are provided as to annual turnover and annual number of wire and intra account transfers within the source of funds declaration within the application form. The issue therefore is whether it is sufficient having established the bona fide nature of the business and transactional activity through the account for this to satisfy Curacao money laundering reporting requirements. particularly as our web based solutions for sending intra account and wire transfers are virtually instantaneous with our direct straight through processing and speed of execution.
>
> Clearly additional risk monitoring especially for evidence of third party payments and potential carousel fraud will be required which is an issue which needs to be properly managed internally.
>
> Another area for consideration is whether we should go over and above the account opening requirements for Curacao and for example only accept traders in the future that have been established for a minimum period for eg 12 months or even produce a set of audited annual accounts. To do this would limit potential account opening opportunities within the industry for FCIB but would give us amore [sic] protection against potential fraudsters who recently open an account and possibly be more susceptible to carousel fraud."

247. On 3 September 2004 Mr Vallerey sent Mr Ulrich and Mr De Wijze a number of press reports about MTIC fraud all of which linked it to the T&C sector and he copied Mr

Deuss in. For example, in an article in the Tax Journal dated 22 March 2004 Ernst & Young LLP ("**EY**") repeated the figures later given to the Committee and commented as follows:

> "**What is a carousel fraud?**
>
> The fraud itself is relatively simple and is usually perpetrated by organised criminal gangs. However, Customs have found that it is increasingly difficult to identify and prosecute organised crime bodies and, therefore, they are trying to stem the tax loss by tightening the rules that directly impact on the legitimate business community trading in these sectors.
>
> The term 'carousel' applies to goods that are sent on a circular or roundabout routing in order to disguise the origin of the goods. This process enables them to be sold into the open market via shell companies that do not account for the VAT. Because the trade in mobile telephones and computer chips is driven by demand, this demand has led to a significant market, where prices change daily. For some time now dealers have been involved in brokering the trade for profit (in many ways similar to other `futures' markets). The very speed of this market makes it extremely difficult to police and allows the unscrupulous trader to commit widespread fraud.
>
> Sadly, Customs' present view of the trade in mobile telephones and computer chips is sufficiently jaundiced to lead them to suspect virtually all traders who deal as brokers in these goods to be a risk. Any trader who purchases these kind of goods with a view to reselling them to another purchaser is likely to be targeted by Customs as someone who is potentially involved in fraud, whether knowingly or not. Unfortunately, Customs are not particularly interested at this time in seeking to differentiate between legitimate and illegal trade in this area, because legitimate and illegal trade are separated only by the failure of fraudulent companies in the supply chain to properly account for VAT."

248. On 1 October 2004 a meeting of the TWPS marketers took place at which Mr Thanki and his team accepted that Mr Deuss was present. I was taken to a note of the meeting although neither Mr Parker nor Mr Thanki was able to identify the note taker. Under the heading "Market Segmentation" the note recorded as follows:

> "JMD-Need programs for each of the market segments we have identified
>
> • Need early validation of proof of concept as to whether market is right direction - needs to be one of first steps in terms of identifying markets early on
>
> • MLM market
>
> • Law firms, trust companies, financial services, domiciliation companies - umbrella account - however, implementation process is quite long (95% of eBanking clients we're signing in Luxembourg are offshore companies)

> - per Danny, Mike S validating same in Americas
>
> • Mobile Traders (UK) - due diligence contract that traders need
>
> • Mobile Traders (UK) - due diligence contract that traders need to sign Telecom Eqpt (UK) - significant risk management issue in terms of potentially losing corresponding banking relationships - as these companies are basically evading VAT (value added taxes)
>
> • Money exchange houses such as Western Union- provide wire transfer function services vs selling the card
>
> • Distributor Bank
>
> • Insurance Companies? Can potentially be either EP cards or through GC
>
> Wealth Management Companies - may be too small a potential to be a target industry - using cards to pay their agents
>
> • Payroll Solutions for cross border payments"

(iii) T&C networks

249. On 22 September 2004 Mr Roy Nixson, who was another TWPS marketer, met a potential customer called "Jimmy" and his associates in London and completed a site visit report. He recorded that the visit was the result of telephone enquiry "for corporate clearing as part of the mobile trading network in the UK". Mr Nixson recorded the following details of the visit:

> "• Met with `Jimmy' and associates at Mossop Street Office
>
> • Can introduce over 1000 traders? Will become MCI
>
> • Explained the actions activities required for MCI in trading environment and the certification qualification process — explained differences between MCI an referral agent — confirm the best activity
>
> • Banking facilities withdrawn unexpectedly within the industry — assumed following pressure to high street banks form Customs & excise VAT offices.
>
> • Demonstration of the system
>
> • Via Paris Prestige a number of company introductions will be made (Myriam Sacile)
>
> • Discussed activity requirements of an MCI and Paris Prestige do not want the overheads of performing the certification. The referral agreement was issued to them — but as such no confirmed plans for remuneration — all introductions are being monitored as `Paris Prestige' introductions. In some cases there is an overlap with previous introductions."

250. On 4 October 2004 a meeting took place between Mr Anthony Elliott-Square, a director of Third Dimension Ltd, and Mr Antonio Calderon of TWPS and Mr Calderon recorded

the conversation in an attendance note. Mr Elliott-Square was described as the sales director of Third Dimension and an MCI of Mr Bailey and he identified a series of difficulties which traders were having in making applications to FCIB. The Claimants specifically pleaded that traders were reluctant to use FCIB services unless their counter-parties had accounts. This appears to be a reference to the following sentence in the attendance note:

> "Apparently some traders are not using the accounts as they do not know which other traders have accounts.\how can each trader be advised as to who has accounts without braking [sic] confidentiality."

251. On 12 November 2024 Mr Bart van Laarhoven, who was the nephew of Mr Deuss and at the time Vice President – Private Banking at FCIB, also met Jimmy and sent Mr Deuss a memo recording the conversation. He stated that he had been introduced to Jimmy by Mr Nixson and to Jimmy's partner "Mickey" and that Jimmy had been in Dubai for six weeks. He then recorded as follows:

> "I asked Jimmy how many traders there are worldwide which are of real importance. He believes there are an additional 500 traders who have not yet applied for accounts with FCIB. Therefore, I suggested to Jimmy that we arrange a date in the not too distant future where we get the majority of the traders in one location. We would hire a room in a hotel where we would set up computers and printers. A number of our people would be at this location and in the course of lets say one week, we would just apply for all the accounts for all these traders, certify the documents and arrange for the applications to be couriered to Curacao. Jimmy believes this is the best way forward and told me he could get at least between 100 and 200 traders who are all over the world together in Dubai at the end of this month or at the beginning of December. He also asked if we could plan one of these events in the UK before the end of this year to do the same for the traders over here."

252. In December 2004 a document headed "Trading segment action plan (December 2004)" was prepared. It is clear from the contents of the document that it was directed at the individual marketers. The Claimants pleaded that it was produced by Mr Vallerey although I was not taken to any evidence to that effect. The first page set out a general trading strategy which included the expression "cells" and "closed loop environment":

> "**Trading strategy**
>
> ▪ It is imperative that we develop our presence in the Trading world as swiftly as possible; this will create a sustainable critical mass and

encourage an escalating number of transactions to become closed loop as the segment develops and matures (corporate clearing).

▪ This expansion must be geographic with a "spill over"/cross pollination into other trading universes (from telecommunications, computers and parts, electronics to textiles, telephone minutes, gems and precious metals).

▪ Find targets in the trading segment where we are currently active, extend into other types of trading, qualify as early as possible, use and coordinate referrals (London office).

▪The strategy is to lever our referrals to penetrate cells of traders with the result of signing all the traders within a particular cell. This will be achieved by using our presence in various jurisdictions across the world with intense analysis of each jurisdiction and communication with existing partners.

▪ It is essential to adopt a fitting methodology to identify approach and to gain signup of accounts. This includes early qualification of the leads and type/sector of business (Validation).

▪ Referrals of Traders by traders must be actively pursued as it is in the interest of the traders to create a closed loop environment and to benefit from the convenience of intra-account transfers. This must be a global initiative, although complicated by the general confidentiality associated with banking, several traders have indicated their willingness to openly display their association with FCIB on their websites and partner MCI websites (logo next to name).

▪ Activity levels of the traders are not sufficient (62 inactive); actions are required to make sure the activity will reach the levels initially indicated by the traders. This action will involve the proactive support of India and ongoing training/coordination of London to actively promote and energize these traders. At this stage of the business it is vital that we take a proactive role in the promotion of the trading platform, complaints and feedback must be carefully monitored and dealt with expediently.

▪ There is an interesting opportunity to sell EP cards to the traders as add-on products. To be pursued by each marketer at the time of sign up or shortly thereafter — note EP should not be promoted as a substitute to eBanking but as a differentiated product offering the trader the opportunity of accessing the excess funds of his eBanking account.

▪ There is an interesting opportunity to sell Global Gateways to the traders as it allows them to domicile themselves offshore while being able to operate their account online from any location."

253. By email dated 25 February 2005 Mr Van Laarhoven explained the progress of signing up traders. He referred to one particular issue which had arisen, namely, that some accounts remained dormant for some time. He also used the term "cells":

"As you will see, some applications were done on the phone. Basically

> Jimmy would speak to his contact and tell them about the Bank. He would than pass over the phone to me and at the request of the clients I assisted them on the phone. In addition, I have also provided them with the necessary training over the phone. We both sat behind our computers and I directed them to the ebanking demo site (www.twps.com/demo/ebanking). Step by step I took them through this."
>
> "Finally, I would like to quickly elaborate on the unfunded accounts issue. I know that there are quite a number of accounts that yet have to be funded but I think it is too early to panic. Don't forget, we have only just actively started. In addition, I saw an email in which it was mentioned that clients have applied for an accounts as a backup in case their UK accounts are closed. From my informal discussions with my clients on this subject I have the following information:
>
> - A lot of the traders are working in cells. There are typically one or two main people who are at the top of the cell. It is these people that make the other traders in a cell open accounts at FCIB. I have been told that the majority will only start to use the accounts once most of the people in a cell have active accounts.
>
> - My main contacts in the business do not agree that traders have applied for an ebanking account as a backup. Traders, especially the medium to small ones will be "forced" to open accounts with FCIB as the main traders in the business are telling people that they have to have an account with FCIB or otherwise they do not want to trade with them. In addition, the quickness and 24/7 intra-account functionality is one of the main reasons people want to bank with us. They also reiterated the above comment.
>
> - My main contacts in the business told me that we will see an increased activity and funding of accounts over the next few months. They all believe that by the end of this year FCIB will be used by 70% to 80% of the telecoms trading community with other industries appearing on the horizon.
>
> I fully agree that we need to monitor the activity very closely so that we can react to unfunded accounts in a timely fashion. At the same time, we need to be a bit careful that we do not approach this too aggressively and come across as being too hungry for business. We should definitely not say to clients that their accounts will be closed down if they have been unfunded after 2 or three months."

254. By email dated 26 April 2005 Mr James Mallaburn, who was another TWPS marketer, wrote to Ms Neuman, who was the resident compliance officer of FCIB in Curaçao between 2000 and November 2004 and the Managing Director after Mr Ulrich until it went into Emergency Measures, copying in Mr Nixson about a T&C customer called UTL Enterprises, whose application for an account had been turned down. He used the term "trading loop":

> "I originally signed this client on behalf of Bart in Dec, in fairness he did

> appear completely perplexed as to why his account should be refused. He was referred from a client of Bart's and they are in the same trading loop. Can I safely assume that there is no question of a mistaken identity or anything like that, the checks that are performed on our behalf, are they completely infallible?? I fully understand and agree that we cannot divulge the confidential information we have, however is there any area of concern that we have where we could give the applicant an opportunity to respond? Forgive me for raising this with you; I am not familiar with our background procedures and searches. I personally feel that we should give a declined applicant an opportunity to respond, but if this is not our policy I accept this and will advise accordingly. One of the reasons I raise this is from a business perspective, my view is that it may not reflect us in a good light to clients who refer us when we simply refuse the application, without, what appears to be any explanation. From their viewpoint, however, I stress, I will take your instruction and act accordingly."

255. By email dated 28 April 2005 Mr Vallerey wrote to the TWPS marketers stating that TWPS had received 525 B2B applications and that 306 B2B accounts had been approved. B2B was a acronym for "business to business" and he also stated that there was an interesting diversification of business and that "we have now entered Telecom, Computer parts, Computers, Textile, Precious metals, Fruits and vegetables, commodities and start having a good geographical spread". By email dated 26 June 2005 Mr Vallerey wrote to the TWPS marketers stating as follows:

> "A quick note to congratulate all of you as the EMEAA team has now produced over 20,000 booked yearly transactions for the third consecutive week. This is a real achievement and Mr Deuss has expressed his appreciation of the results. I want to share his appreciation with you through this mail. What is very motivating is that this is the result of almost all of you successfully implementing the highly focused B2B strategy (traders, import/export companies and Freight forwarders). We also see increased geographical and industry segment diversification, It is very important that we keep riding this wave."

(iv) Barclays

256. Mr Deuss had originally bought Barclays' shareholding in BCB and Barclays had historically provided correspondent banking services to both BCB and FCIB. However, by email dated 7 March 2005 Mr Alan Croot of Barclays wrote to Ms Deuss asking to come and see her with a colleague on Wednesday 9 March 2005 and she forwarded the email to Mr Deuss. Mr Croot gave the following reasons for the visit:

> "As you well know, Barclays operates several accounts for First Curacao

> International Bank N.V., and we see many transactions of different types in your name. Our systems and people monitor your accounts with us, and we have become concerned about a number of different transactions involving your accounts, some of which we have already drawn to your attention. We have also noted the portfolio of clients originating transactions across your account. Many of these clients are entities that we have made a strategic decision not to deal with because of the business risk that we perceive such entities to have. We do not identify such entities as we are aware that other institutions may have a different business risk policy.
>
> We also have a concern that your KYC and AML procedures may not be as tight as we would desire. Again we recognise that other institutions may have different views on what appropriate KYC and AML procedures should be put in place. However we consider such matters to be of reputational importance. Reputational risk is a very major consideration for us, and as such we would not wish to continue a banking relationship where we felt that relationship could give rise to circumstances that may adversely impact our reputational risk."

257. On 9 March 2005 the visit took place. Mr Deuss was not present at the meeting although he provided an agenda to Ms Deuss for the meeting in which he stated that FCIB took the management of reputational risks extremely seriously. He also prepared the following statement for Ms Deuss:

> "**Due Diligence Procedures**
>
> FCIB applies strict KYC and AML procedures which include on site visits of significant clients and an in-depth analysis of their business activities, their KYC and AML procedures as appropriate, etc. When deemed necessary outside auditors are engaged to augment our in-house due diligence procedures. All records are kept in Curacao and routinely reviewed by the regulator of the Netherlands Antilles."

258. Ms Deuss made a note of the meeting which she sent to Mr Deuss and Mr Ulrich. Barclays also made a note of the meeting which the Claimants were able to produce from disclosure in the Netherlands. Mr Thanki relied on Ms Deuss's note in which she stated as follows:

> "In my introduction I covered paragraphs 1, 2 and 3 of your Agenda. Mr. Croot then took over the conversation and started to talk about FCIB's KYC and AML procedures. He stated that he duly received our latest KYC manual. He was pleased with that. Victor explained the procedures we are following and the electronic systems we are using, how we perform our KYC procedures and the extra due diligence procedures we are following for certain businesses such as Telecom business. As part of the enhanced due diligence we mentioned the on-site visits and the use of auditors like

> PWC and Deloitte in various countries to assist us.
>
> We then asked if they could indicate to us which specific businesses or individuals they had problems with. They stated that they definitely could not give any names and they were also very reluctant in going into details. They had taken the strategic decision to definitely stay out of Telecom Business and Exchange Houses. They said that although they have some Telecom Business themselves, in this particular business they are only willing to rely on their own due diligence. In respect of the Exchange Houses they said that they had been facilitating that business but had pulled out because they felt uneasy about the control over the bulk payments and they said that the risk is not worth it.
>
> They then stated that over the last couple of months they had experienced a greater level of fraud (3 fraudulent checks) in such a short period than they had ever seen and they also gave the example of the Spanish Lottery in New York. We asked them for more details about the lottery scam in New York and they said that they would have to talk to their colleagues in New York about that. They also gave an example about the fraudulent cheques. The latest one they had come across was for USD 1.6 million, which they intercepted. We stated that we would obviously take away the types of businesses they are uncomfortable with, e.g. Telecom and Exchange House, as we have a system with the possibility to do so. At the end of the meeting they stated they would take all the input back with them, they thanked us for our open and frank discussions and said that they would internally review the situation. However, they were very non-committal about our statement that if we took certain businesses back they would unconditionally continue the business.
>
> Since a strategic decision has been made with regards to the business mentioned we have to take steps to take them elsewhere. We must however anticipate that similar objections may be raised by other correspondent banks."

259. Mr Parker and his team submitted that the Barclays note differed substantially from that of Ms Deuss. They also submitted that it "pulled no punches" and against the side headings "Our concerns" and "Their reaction" the Barclays note recorded as follows:

> "**Our concerns**
>
> They were aware of our concerns and the reason for our meeting, and having explored the background, and their work practice, we outlined the following:
>
> a) we have seen three instances in NY: a. Traffic from Lespan — an institution identified by the NY District Attorney's Office as facilitating transactions for the benefit of Colombian drug trafficking b. A victim of internet fraud was trying to pay funds to a customer of FCIB c. A third incident – not discussed in detail — occurred where another US bank had cause to invoke sec 314(b) of Patriot Act to find out details of transactions FCIB were involved in.

> b) we have seen three separate fraudulent cheques in the UK a. two involving exactly the same sum £142,128.00, paid into FCIBs £ a/c for Prime Commodities (UK) Ltd. One was picked up, the other was paid, and HBOS is out of pocket and pushing hard for the funds back. b. Earlier this week a fraudulent cheque for US$1,600,000.66 was paid into FCIB's a/c for Octagon Electronics Ltd.
>
> c) we expressed concern over the high percentage of mobile phone traders amongst their clients. An illustrative list of beneficiaries and remitters names, picked at random from transactions passing across their account was left with them.
>
> We explained how vital it is for us to avoid our name being linked with anything [sic] laundered money — something they fully understand. They suggested in reply, that for Barclays publicity of this nature would be a serious blow, but for them it would be the end of their business.
>
> **Their reaction**
>
> Most of the above, they already knew of, and whilst we had not mentioned mobile phone traders, or carousel trading, they mentioned it before we got to it! They expressed and demonstrated a huge desire to get their business totally clean and acceptable to us. They encouraged us to show them any procedure that would help them avoid doing business with any criminal elements.
>
> They immediately offered to send all elements of business that we did not like, such as mobile phone traders payments, to another bank. They struggled to grasp that we were not willing to specify what we wanted, and did not want. The only other bank names mentioned in this context were UBS and Rabobank. Earlier in the conversation we asked for a copy of their SSI's which TD promised to e-mail.
>
> As for the cheque loss, they suggested we asked for permission to debit their account (the implication being that this would be granted) and they would seek the funds back from their customer, who apparently has significant volume. When challenged as to the process at their end, when a customer pays a cheque into FCIB's a/c — they suggested that they would call us to identify the credit, but that this was not a practice that they were aware of. They said they would simply return the funds to us, if they did see this happen, and enquired how they could stop their customers paying cheque in in the first place.
>
> Whilst avoiding the threat to refuse their business and close their a/c's, they mentioned this themselves, as a possible, but unpalatable outcome (for them) if they did not satisfy us. We agreed to return home, consult with our colleagues and revert to them in due course. No specific time frame was given."

260. By letter dated 18 March 2005 Mr Croot wrote to Ms Deuss terminating the correspondent banking relationship with FCIB with effect from 18 April 2005. The reason which they gave was as follows: "we have reached the decision that the anti-

money laundering procedures that you have in place are not adequate to meet the standards that we feel are appropriate". On 11 April 2005 Mr Deuss, Ms Deuss and Mr Ulrich met Barclays again at FCIB's request. Barclays' note of that meeting records that they gave the following reasons for terminating the relationship and Mr Deuss responded as follows (original emphasis):

> "**1. Disproportionately high level of fraud cases seen on their a/c's**
>
> • Lottery scam funds in the US
>
> • US Patriot Act (Sect 314 (b)) Investigation
>
> • UK Cheque Fraud £142,128 — Prime Commodities
>
> • UK Cheque Fraud £142,128 — Prime Commodities
>
> • UK Cheque Fraud US$1,600,000.66 — Octagon Electronics
>
> • Two fraudulent payments last week from HSBC
>
> • Possible share scam today?
>
> **2. Major involvement with known high-risk client sector**
>
> • Mobile Phone Sector
>
> • Lespan & its subsidiary Gales. Casa Cambiaria (Uruguay money exchange house)
>
> **3. Perceived higher than normal risk in marketing practice**
>
> • With an almost global reach, a limited number of staff, and very limited physical presence, the ability to select customers through (what we regard as, vital) personal interaction is very limited.
>
> **4. Perceived higher than normal risk in AML process execution**
>
> • Personal presentation of original documents to skilled and proven staff for vetting, is difficult for you.
>
> • The use of Multi Client Intermediaries is of concern to Us.
>
> • And even the use of Intl Serv Providers e.g. Accountants, tends toward reduction in control of risk
>
> **5. Perceived higher than normal risk in business strategy**
>
> • Building a business, banking small corporates worldwide, that choose not to bank with local banks. We speak from the experience of focussed attempts to build businesses in both developed and developing markets — and we've caught colds.....
>
> A judgement of risk necessarily has subjective elements, but our **perception is that you are running a business that carries a significant amount of risk, and our experience to date confirms our view**. The facts, plus our risk judgement, have led us to ask you to withdraw your business. Not a marginal case, but a clear-cut case.
>
> These concerns are known and shared across the Barclays Group — in UK

> Banking, in Barclays Capital, and in BGI. Compliance, Group - AML, and Relationship in the three areas of Barclays that work with FCIR are Completely united in their decision."
>
> "JD then replied at length covering:
>
> • 40 years of experience in the global market, in oil, property and finance
>
> • Always open, straightforward, in their dealings, and everything must be `above board' in every country they deal in
>
> • Emphasised the world-class standard of their money transmission product
>
> • 25 people travelling all the time, marketing. Advised that they visit every customer the world over
>
> • Make sure all customers are legitimate, and that they run a legitimate business.
>
> • Major attention paid to AML and KYC
>
> • "We don't take cash or cheques"
>
> • His plea in conclusion was that our two institutions were very much aligned in our processes, and of one mind, so how should we work together going forward.
>
> Our reply pointed out that despite our-AML procedures being in place, and despite both parties having a good understanding of the risks of banking certain customers, it was abundantly evident that we felt very differently about what constitutes an acceptable level of risk."

(v) The RMC

261. Mr Deuss gave evidence that in March 2005 he decided to create a risk management and compliance department in Bangalore (ultimately called the RMC) to support FCIB's compliance function in Curaçao. By email dated 21 March 2005 Mr Deuss wrote to a number of his colleagues including Mr Vallerey, Mr Ulrich and Ms Neuman stating as follows:

> "FCIB's present marketing strategy focuses on Money Service Businesses (MSBs), B2B customers and Direct Sales organizations (DSOs or MLMs). Recently there have been several occurrences that put FCIB's reputation at risk. The high risk nature of our target markets and dealing digitally with global customers impose the need to go way beyond the KYC documentation as defined in our Anti Money Laundering Manual and checking applicants against relevant data bases, including WorldCheck.
>
> FCIB's golden rule is to deal only with LEGITIMATE CUSTOMERS who are engaged in LEGITIMATE BUSINESS. This is the only and most effective defense against the misuse of FCIB's financial system and in turn the misuse of the financial systems of FCIB's correspondent banks and the

> global financial banking networks.
>
> A comprehensive understanding and verification of the client, as business, business owners, directors and business practices need to be developed to protect FCIB's golden rule. To that effect draft enhanced due diligence checklists have been developed and sent to you separately by Tim Ulrich for the different target markets we pursue."

262. Mr Ganesh, who had no relevant experience at the time, accepted in cross-examination that the RMC would need to be headed by someone with substantial banking experience (including compliance) although he also accepted that he managed the process for setting up the RMC himself. By email dated 6 April 2005 Mr Daniel Kornitzer, who was Head of Operations in Bermuda, set out the intended scope of the RMC's operations and activities:

> "The scope of procedures required from a risk management and control perspective include:
>
> - Document verification using independent sources: Some of the techniques could include:
> o Conducting an enquiry by a business information service, or an undertaking from a reputable and known firm of lawyers or accountants confirming the documents submitted;
> o Undertaking a company search and/or other commercial enquiries to see that the institution has not been, or is not in the process of being, dissolved, struck off, wound up or terminated;
> o Utilising an independent information verification process, such as by accessing public and private databases; etc
> o Third-party reference check
> o Verify with authorities who have provided the necessary certification
>
> - Verification of the overall credibility of the customer
> o Analysis of business model of the company
> o Financial analysis and comparing against industry benchmarks using a copy of the latest report and accounts (audited, if available)
>
> - Verification of customer identity (i.e. the customer is what he claims to be and to identify the real entities who have control over the business and the company's/partnership's assets)
> o Prevent corporate business entities from being used by natural persons as a method of operating anonymous accounts.
> o Trust, nominee and fiduciary accounts can be used to circumvent customer identification procedures. The team would try and establish whether the customer is taking the name of another customer, acting as a "front", or acting on behalf of another person as trustee, nominee or other intermediary. Specifically, the identification of a trust should try to include the trustees, settlors/grantors and beneficiaries.
> o Investigate corporates that have nominee shareholders or shares in bearer form.

> o Where the owner is another corporate entity or trust, the team will try to undertake reasonable measures to look behind that company or entity and to verify the identity of the principals.
> o When a professional intermediary opens a client account on behalf of clients, then those clients must also be identified.
>
> - Periodic on-going monitoring of high risk accounts
> o Reviewing transactions (numbers and amounts) against projected estimates as provided at the time of application
> o Reviewing beneficiaries of outgoing payments (outgoing wires)
> o Reviewing the source of incoming funds (incoming wires)
> o Reviewing pattern of transactions
> o Reviewing any material change to type or ownership of customers/ business.
>
> This will be restricted to FCIB eBanking only and not ExactPay or Global Gateways. In addition, the scope of operations is not expected to include specification of KYC documents/initial documentation requirement and verification procedures (This is being presently handled between the Legal and Compliance teams). The team is not expected to monitor Bank's risk due to transactions e.g. Forex rate risk, Interest rate risk, Concentration risk etc."

263. In the memo Mr Kornitzer also proposed the initiation of enhanced due diligence ("**EDD**") not only when accounts were opened but also when a transaction of significance took place or there was any material change either in ownership or in the way an account was operated. He did not refer to T&C customers specifically. Mr Ganesh's evidence in cross-examination was that the plan was to hire an experienced person and then build a team around them. It was common ground that Mr Pardeep Kumar was the first Chief Compliance Officer ("**CCO**") and that he was in post between May and October 2005. Mr Parker explored this with Mr Ganesh and he accepted that Mr Kumar was not actually copied on any email traffic until early June 2005.

(vi) The EDD Master Plan

264. Between 11 April 2005 and 20 May 2005 Mr Ganesh and Mr Kornitzer produced a document entitled "EDD: Execution Plan, Policies and Procedures Version 1.0" (the "**EDD Master Plan**"). It set out three steps for the application process: (a) regulatory compliance, (b) a check against negative databases such as World Check and (c) client underwriting. It expressly stated that it was for senior management to decide whether all three steps had to be carried out before an application could be approved. The EDD Master Plan also envisaged that the RMC would carry out the following:

> "Client Maintenance: This involves monitoring of all approved customers to ensure that the transactional behavior is consistent with the stated customer business requirements as well as to ensure that there is no material change in the information verified during the initial KYC. The EDD team will need to fine-tune the initial customer profiles created during approval. The EDD team will verify the details of customers of MSBs (as provided by MSBs) against known watch-lists as provided by various International Organizations as well as in-house databases. Please note that, as described in Annexure K: Use of Field 50k Solution by MSBs, MSBs must provide FCIB with full KYC for all clients for whom they intend to process eBanking transactions (in order to receive FCIB's written approval). MSBs will only process payments for such approved clients.
>
> The EDD Team will also enforce this policy by conducting frequent randomly selected verifications of all outgoing wire transfers sent by MSBs on behalf of their clients (where the ordering customer - Field 50K does not contain the name of the MSB) to ensure that the MSB is only sending wires for approved clients. These are after-the-fact verifications, however, at some point in the near future, all outgoing wires will be scrubbed against negative and positive lists in real-time prior to the wires being sent out of the Bank.
>
> The EDD team will also be informed of any queries raised by the Bank's correspondent bank on outgoing wires for follow-up/additional investigation."

265. The EDD Master Plan also provided that T&C customers would be subject to "Level 2" EDD. This was required for customers with a high risk profile and involved not only verification of the customer's identity and data but also an "Analysis of overall customer's business" against public sources. Finally, it provided that a high risk customer should be monitored on a monthly basis for suspicious activity and it gave 21 different examples including the following:

> "Once identified, a "High Risk" customer will be monitored on a monthly basis. Transactions must be viewed in the context of the other activity in the customer account(s), and the KYC information that has already been received about the customer. Unusual transactions are those that appear to lack a reasonable economic basis or a recognizable strategy based on what the EDD team knows about the customer. Examples of suspicious activity may include:
>
> 1. Customer indicates unusual concern with the compliance requirements, particularly with regard to his or her identity, type of business and assets, or is reluctant to or refuses to reveal any information concerning his business activities, or furnishes unusual or suspect identity or business documents;
>
> 2. Customer seeks to engage in transaction(s) lacking business sense, apparent investment strategy, or inconsistent with the customer's

> previously stated business or strategy;"
>
> "8. Customer's account has sudden extensive wire activity where previously there had been little or none, without any apparent business purpose;
>
> 9. Customer makes a deposit of funds followed by an immediate request that the funds be wired out or transferred to a third party or another firm with no apparent business purpose;"
>
> "11. Customer has multiple accounts, with no apparent business purpose, and makes frequent inter-account or third-party transfers;"
>
> "15. Customer exhibits inappropriate lack of concern regarding risks or commissions and other transaction costs."
>
> The recommendation of ongoing monitoring will also be sent to Ms. Deuss. The recommendation could include a modification of the "Risk" status / category of customers."

266. Finally, the EDD Master Plan also provided for staffing requirements of five individuals consisting of a compliance manager with 10 years relevant experience, two MBAs, one lawyer and one accountant. There was an issue when FCIB began to recruit these individuals. Unsurprisingly, Mr Ganesh could not be certain. But it was his evidence that FCIB began to recruit in May and June 2005 and that by June 2005 the team was in place. It was also his evidence that he anticipated that the plan would take a long time to put in place but that it was accelerated and that by December 2005 10 or 12 members of the RMC had been recruited:

> "Q. Can you help with why then you're now -- your proposal is now that you manage the team until December? A. I think, at that time, again, the expectation when we started creating the master plan was it would take a long time to evolve, but we did accelerate this. Actually, I think the number of people we had by December probably was not even five; we went to -- I don't know exactly, but probably ten or 12 people, my guess would be. That was because we understood that we had to accelerate transaction monitoring and so on, so we hired more people by then. So while this was the thinking at the start of RMC, things evolved as we understood more about the compliance risk, so that we could invest more and take proportionate actions."

267. Towards the end of his cross-examination Mr Parker also took Mr Ganesh to a series of documents which evidenced the rapid expansion of the RMC. They showed that from January 2006 a need for new staff was identified, that in February 2006 either six or eight new members were recruited, that in April 2006 Mr Ganesh identified a need for a further ten people, that by 23 June 2006 the RMC had 25 staff members together with Mr Sharma

and Mr Ganesh and that two new members had just been recruited. This accorded with Mr Ganesh's general recollection.

268. Mr Ganesh's evidence was that Mr Deuss and Mr Ulrich decided that step (c) (client underwriting) did not have to be carried out before an application was approved and his evidence was supported by the minutes of a meeting which took place on 6 June 2005 and an email dated 7 June 2005 which Mr Ganesh sent to Mr Deuss and copied to the other participants. The minutes contemplated that FCIB would also introduce a risk scoring model and in the email Mr Ganesh stated as follows:

> "The overall process of application approval consists of the following three steps:
>
> 1. Regulatory Compliance
> 2. Check against negative databases (World Check, etc)
> 3. Client underwriting (EDD)
>
> It is intended that applications would require the successful completion of all 3 steps, (a), (b) and (c), before being approved in Curacao. The RMC team needs to determine whether the documents are sufficient or not (A procedure for risk scoring and to determine whether the EDD documents will be circulated later this week). This is the process that will be followed once the enclosed EDD procedures are approved and implemented.
>
> As per the enclosed procedures, a "Master List of applicants" will be circulated by the RMC team with the status of each application on Step (2) and Step (3) above. Based upon this, Curacao can approve the application if they have received the full KYC documentation.
>
> In the interim, the following procedure would be followed:
>
> 1. Applicants will be approved provided they satisfy the full KYC requirements; and
>
> 2. World-check and other databases do not show any "hit" against these applicants. (In case a hit is registered, the applicant will be approved only after the full EDD documents have been received).
>
> All such approved applicants must supply all EDD documents within 60 days from the date of approval. In all such cases the applicant will be requested the EDD documents as per the current checklist(s) defined in the AML manual.
>
> Once I receive your and Ms. Deuss's approval/ feedback on the above draft procedures, I will circulate the same to all the recipients of the minutes of meeting held at Bangalore."

269. In April 2005 FCIB had instructed Deloitte & Touche LLP New York ("**Deloitte**") to perform a review of its AML procedures. By email dated 28 April 2005 Ms Natasha Taft of Deloitte sent the executive summary of the report to Mr Ulrich stating that: "the Bank's

AML Program appears to be satisfactory, however some areas might need additional enhancements". On 22 May 2005 Mr Kornitzer circulated the EDD Master Plan and in his covering email he stated: "Lastly, in the next version of the document, we will incorporate best practices information provided by Deloitte, namely with regards to verification of customer identification, risk factors by product, and suspicious activity monitoring rule classes."

270. By email dated 29 June 2005 Mr Vallerey responded to the EDD Master Plan on behalf of TWPS. Unsurprisingly, he was concerned about its effect on the ability of the TWPS marketers to sell FCIB's services. Mr Parker focussed on the following features of this email:

> "EDD profile enhancement
>
> Further to a discussion with JCMAMD, he suggested that I contact you with our input on enhancement of the EDD profile attachment. The objective of this modification is to reduce the number of times Risk Management is going to stop an incoming transfer or an outgoing transfer in order to collect additional information from the client so as to let the transaction go. Because of the time critical element in the transactions conducted by our B2B clients, we all know that this is a very sensitive point and one where proper planning can improve the security of our operations while maximizing the quality of service for our clients.
>
> The starting point for this review is that some transactions that are seen as extraordinary in terms of amounts for regular customers are routine for some of our B2B customers. We should let them inform us ahead of the transaction and provide the required information at this stage in order for there [sic] operations to flow seamlessly.
>
> In this respect, you should have received by now, directly from JCMAMD the current version of the EDD profile attachment and how we proposed to modify it to meet about objectives. Of course this will only work if you agree with the approach and put in place the appropriate relays. I look forward to receiving your comments on this proposed modification.
>
> Backdoor monitoring
>
> It has been agreed that it is the marketer's duty to identify among prospects, the ones who fall under the category requiring EDD and to make sure the required EDD information is provided. The same applies to customers applying for private accounts, even though, technically, the accounts will be used for professional purposes. We also discussed the fact that if a private or non EDD account has above average activity in terms of transactions then it will be flagged and the decision made whether the account should be subject to EDD."

271. By memo dated 14 July 2005 Mr Ulrich wrote to Mr Deuss taking a rather different

position and sounding a note of caution about the T&C sector. It is also clear from his memo that this was not the first occasion on which he had raised the issue. He stated as follows:

> "At the risk of covering old ground, I believe the bank is promoting a policy with a high degree of risk of a bad ending. Let me make a few observations:
>
> ▪ The business success of the bank appears to be heavily dependent on two high risk categories of customers: MSB's (links to money laundering) and Telecom Traders (possible links to terrorist financing and tax abuse). Only with careful, rigid adherence to KYC and AML policies and procedures can the bank hope to be able to continue with these businesses before US/UK regulators force correspondents to close accounts."
>
> "▪ If a MSB or other IFI is a good client then setting up named cell companies does not on its face have a legitimate business purpose. I think there is also some "risk of contagion" but bringing risky business into Bermuda via Global Gateways. Global Gateways is supposed to conduct the same level of KYC/AML that BCB does for new banking clients; yet I don t believe we would bring any of this business to BCB. If not to BCB, then how can it be brought into Global Gateways?"
>
> "Finally, in part as a result of evidence I've recently seen in some of the Carousel Fraud cases, in part based on the SEC vs. Sterling case, and in part based on ongoing consideration of KYC/AML matters in general, I'm more often reminded of the adage "where there's smoke there's fire". While the US/UK governments may not be right all the time, neither are they wrong all the time. It is well established that they've expressed concerns about both MSBs and Telecom Traders while FCIB doesn't have to wholly accept/share those concerns, it would be imprudent to ignore them and take the view that all of this is noise from over zealous regulators and we'll be clever enough to find the lawful solution."

(vii) The Risk Scoring Model (the Drafts)

272. On 27 July 2005 Mr Ganesh sent Mr Deuss a generic risk scoring model which had been prepared by PwC Singapore and asked for feedback and then on 23 August 2005 Mr Ganesh circulated a draft of a specific risk scoring model designed to accompany FCIB's EDD program (the "**Risk Scoring Model**"). Mr Ganesh's evidence was that Mr Kumar, Mr De Wijze and Mr Smulders were the authors of the document. The model provided that the risk associated with each customer should be scored by reference to the following risks: country, business, entity and product or transaction risk. The country and business risks were weighted 20% each, the entity risk was weighted 50% and the product or transaction risk weighted 10%.

273. For the purpose of scoring business risks, businesses were divided into three categories: high (100%), medium (50%) and low (20%) and in the accompanying spreadsheet "Telecom & Computer equipment businesses" were classified as medium risk. The model also recommended approval for a customer with an overall score of 60, further investigation for a customer with an overall score of between 60 and 80 and that the application be declined for a customer with a score of over 80.

274. On 23 August 2005 Mr Ganesh sent a "status note" to Mr Deuss, Ms Deuss and Mr Ulrich. It recorded that a team of two MBAs were scrubbing applications against WorldCheck on a daily basis and that a team of two (a lawyer and a cost accountant) were working on defining the procedures for analysing EDD documents. It also stated that RMC had received 214 sets of EDD documents from the London office (of which 174 were applications and 40 were customers) and that the process of analysing these documents was behind schedule. Finally, it stated that the BSA reporter system was being implemented to facilitate transaction monitoring. BSA reporter was described in the EDD Master Plan as follows:

> "BSA Reporter detects, analyzes and reports suspicious transaction activity that may be present, utilizing a powerful rules engine and customer profiling techniques. Determining potential suspicious activity requires establishing a baseline of legitimate business activity for each customer. BSA Reporter accomplishes this task with Customer Profiles, which capture the normal activity for legitimate customer transactions. Suspicious activity is presented to the compliance officer as a case. Through a review process, compliance officers and account officers can collaborate, via integrated e-mail facilities, to reach a final determination regarding the validity of the reported suspicious activity."

275. By email dated 25 August 2005 Mr Ulrich replied to Mr Ganesh's email describing the draft of the Risk Scoring Model as an "excellent first draft" but making a number of recommendations. He commented that the business risk table (which included the classification of T&C businesses as medium) required considerably more work. By email dated 26 August 2005 Mr Kornitzer also expressed his views and under cover of an email dated 30 August 2005 Mr Smulders passed on his detailed comments. He pointed out that the business risk table did not "correspond to the "Nature of Business" list as currently maintained in FCIB" and he suggested that this classification be adopted instead.

276. By email also dated 30 August 2005 Mr Smulders wrote to Mr Deuss attaching what he

described as an updated version of the "BSA Implementation Plan". It is clear from this email that the implementation of BSA Reporter was dependant on the finalisation of the Risk Scoring Model because it was to be used to calibrate the risk classes for the digital tool. The plan which accompanied the email was in the form of a table which showed that Mr Deuss, Mr Ulrich, Ms Deuss and Mr Kornitzer would be asked to approve the risk classes and Mr Ganesh confirmed in cross-examination that Mr Deuss ultimately did so.

277. On 12 October 2005 an updated version was released. It was signed off by Mr Ratna Shankar, who was the accountant member of the RMC team, rather than Mr Kumar. Mr Sharma confirmed that Mr Shankar signed it off because he had taken over as CCO by then and Mr Shankar was a member of his team. Mr Parker took Mr Sharma through a number of changes made to the Risk Scoring Model including a reduction in the weighting of the entity risk from 50% to 40%. Mr Sharma also confirmed that in the updated version the T&C sector remained classified as medium risk.

(viii) Letters of good standing

278. Mr Lemer took me to the standard form letter of good standing in Appendix IV.c-v of the AML Manual in his oral closing submissions. The manual permitted a letter to be provided by an EPR or MCI:

> "The following is a sample of an acceptable form of EPR/MCI reference letter. It should be noted that in order for an EPR/MCI reference letter to be acceptable the EPR/MCI must ACTUALLY KNOW THE PROPOSED CLIENT and that it not sign the letter in a pro forma manner. Thus, its letter must (i) be addressed to FCIB, (ii) identify the client, and (iii) confirm the basis on which it knows the client. The letter should be acceptable even if it does not exactly follow this format."

279. By email dated 19 February 2005 Mr Ulrich wrote to Mr Kornitzer stating that he had revised the AML Manual at the direction of Mr Deuss. He summarised the relevant changes which included the requirement that there had to be a letter of good standing in lieu of a banker's reference and it was not sufficient for the EPR simply to provide their reference number:

> "Following direction from JCMAMD I have revised the Corporate and Personal eBanking Application emails for FCIB to incorporate changes made in the new Anti-Money Laundering Manual. In summary these are:

> 1. added a National Identity Document as acceptable proof of ID;
>
> 2. added that a Letter of Good Standing can be supplied in lieu of a Bankers Reference (just the MCI or EPR number is no longer sufficient);
>
> 3. added to the end of the application forms a Beneficial Owner Declaration in the form mandated by the Curacao Regulations.
>
> When the first versions of these forms was produced in June, 2003 we endeavored to keep the Source of Funds Declaration and signature box on one page. With the addition of the Beneficial Owner Declaration that still works for the Personal application, but it doesn't work for the Corporate Application."

280. In July 2005 Ms Neuman raised a number of concerns about the AML Manual and whether FCIB was complying with its terms. By email dated 14 July 2005 she wrote to Mr Ulrich (copying Mr Deuss in) setting out a number of those concerns in detail. In relation to reference letters she stated as follows:

> "Reference letter:
>
> The standard approved practice was, that a bank reference letter was to be submitted by an applicant, unless he was being recommended by a MCI or EPR, in which case the insertion of the MCl/EPR number in the application would be considered sufficient reference. A Letter of Good Standing was never submitted nor requested.
>
> Even though the AML Manual and the checklist for account opening documents requirement both clearly state that a Letter of Good Standing from a FCIB recognized MCI/EPR is to be submitted, this is in practice not being done.
>
> Lastly, even though the AML Manual and the checklist only allows for certification of documents by a banker, notary or a bank's recognized MCI/EPR, we are now receiving documents certified by employees in the London/Miami office. When we questioned this procedure, Daniel Maurice Vallerey obtained authorization from JCMAMD to have certain employees certify documents.
>
> Tim, what I am trying to tell you in this elaborate e-mail is that the AML Manual, although a terrific tool for the Compliance staff, is not, as it is supposed to be, being followed by all parties concerned in all its entirety.
>
> We have a list of multiple applications (a copy was sent to you recently) for which we miss documents; if we are to require a beneficial owner declaration (which does not appear on the requirements, as explained above), a Letter of Good Standing from the marketers, correctly signed Corporate Secretarial Certificates and ID Documents individually marked as mentioned on the Manual, we will not be able to approve any accounts within a time frame considered reasonable.
>
> In order to fully comply with the Manual, the checklist has to be adjusted, the marketers have to be properly trained, the Compliance Officers have

> to follow the reporting rules to the letter and all other regulations mentioned need to be followed. Or the Manual itself has to be updated yet again, within the spirit of the law, but with certain flexibility so that it can be enforced."

281. At the end of July 2005 Mr Ulrich approved changes to the standard form documents to address some of Ms Neuman's concerns. He also introduced "Marketing Guidelines" for TWPS marketers which provided as follows:

> "In advancing the business of TWPS, marketers who are either employed by TWPS or who have a contractual relationship with TWPS must take care that they only provide information and make prospective clients of FCIB, BCB, ExactPay or Global Gateways aware of the Financial Services, and in doing so insure that TWPS does not act as a bank or expressly or impliedly indicate it is carrying on a banking business. Accordingly, to further clarify the role of TWPS, the following basic rules should always be followed:
>
> ▪ When visiting any country your purpose should be for "relationship calls" on existing or prospective Clients, and to provide general information about the Financial Services. You are not there to "sell" anything or to open accounts.
>
> ▪ At no time should you "market" or "sell" banking services; "open or establish" banking, card or other financial accounts; or accept deposits into any financial accounts. When asked you must explain that you are in the business of providing information about the Financial Services, developing a network of intermediaries and/or visiting for "meetings" with prospective with prospective Clients to provide information about the Financial Services and for no other purpose.
>
> ▪ You may leave with the Clients or prospective Clients information about each of the banks, ExactPay and Global Gateways, including financial statements; brochures, print materials or CD-Roms containing information about the banks, ExactPay or Global Gateways and the Financial Services they offer, including samples of account opening forms and requirements. It is acceptable to demonstrate and explain the account opening process, but the Client should be referred to the relevant web site for actual forms and procedures to open an account. You may assist the client in completing an online application form or otherwise completing his account opening forms.
>
> ▪ You may send or otherwise provide to prospective Clients the URL's where they can find information about the Financial Services, and you may also provide demonstrations of the function of any of the Financial Services. If requested, you may also provide information summarizing the information and documentary requirements which would need to be provided to any of FCIB, ExactPay, BCB or Global Gateways to establish a relationship with them.
>
> ▪ You should not ask a Client to complete account opening documentation

> and hand it to you while you are in the country. A Client who desires to establish a relationship should contact the relevant bank, ExactPay or Global Gateways via phone, email, the web site or fax to obtain the full set of account opening forms and instructions.
>
> ▪ You may "certify" copies of passports and other Know-Your-Customer documents for the Client and/or certify translations of documents for Clients.
>
> • Generally, you should not accept account opening documentation from the Client but should require them to send it directly to the relevant bank, ExactPay or Global Gateways. In no case are you authorized to reach agreement with a Client on the terms of any financial dealings with FCIB, BCB, ExactPay or Global Gateways, or to enter into any memorandum, letter of intent or other written document evidencing any such agreement. Moreover, in no case are you authorized to promise any financial service; modify the terms of any agreement, fee schedule or other document relating to FCIB, BCB, ExactPay or Global Gateways; or otherwise act in a manner which may expressly or impliedly indicate that you are an authorize representative of any of FCIB, BCB, ExactPay or Global Gateways. REMEMBER, YOUR SOLE RESPONSIBILITY IS TO PROVIDE INFORMATION AND MAKE PERSONS AWARE OF THE PROCESSING SERVICES."

282. By email dated 15 August 2005 Mr Ulrich wrote to Mr Kumar with a copy to Mr Ganesh (and others) rejecting an application by Appliances World UK Ltd on the basis that the individual behind the company was a known fraudster. He also stated as follows:

> "Finally, kindly insure that in our KYC files that we receive either a Banker's Reference Letter or an EPR/MCI Letter of Good Standing for each applicant and advise me of any discrepancies. In the past I understand Martha would approve an account based on an EPR number only. Here is a good case where Bart's EPR number was used on the application; Bart does not know the person; and it turns out the applicant is wanted by Interpol."

283. The contemporaneous documents suggest that Mr Ulrich's instructions were followed for the most part. Mr Parker and his team referred in Cs, S5 to an email chain dated 5 December 2005 between Mr Bailey, Mr Oliver Reeve of TWPS and Ms Ellyanne Salas, who was a compliance officer in Curaçao. Ms Salas was chasing Mr Bailey for the letter of good standing in relation to TCG and the following exchange took place:

> "Please kindly send us your letter of good standing for the above mentioned in order to continue with the approval of the additional signatory request."
>
> (**Ms Salas to Mr Bailey**)

> "Can you speak with Ellyanne. This client was signed ages ago... .... and if they are adding an authorized signatory at a later date independently of me then why do I have to provide a letter of good standing for the new signatory who I may not know? Surely my responsibility ended when the initial application was approved. If this is not the case then you may have to ask the client to provide a bankers ref for the new authorized signatory."
>
> (**Mr Bailey to Mr Reeve**)
>
> "I spoke with Ellyanne, the letter of good standing is required as one was not received with the original application."
>
> (**Mr Reeve to Mr Bailey**)
>
> "This was because at that time they were happy for me to just enter my code against the checklist box on the front of the application rather then completing a letter of good standing. (around 300 were done in this way)… so if they are retrospectfully [sic] going to go through all the old apps without a letter of good standing then we have a big job on our hands!! If you want to prepare one with the clients details and give it to Laurent — I will sign it and give back to Laurent to pass to you so you can forward on to FCIB."
>
> (**Mr Bailey to Mr Reeve**)

284. Further, by email dated 21 December 2005 Ms Neuman wrote to Mr Vallerey and Mr Sanchez reminding them to ensure that all of the TWPS marketers were aware that a letter of good standing was required to be submitted with each application. She also stated: "This to avoid unnecessary delays in approval of the application as is now the case." On the same day Mr Partridge forwarded this email on to the TWPS marketers stating: "Please note the directive from FCIB to include a letter of Good standing for Each EP or EB application."

(ix) Mr Deuss's concerns about the T&C sector

285. By email dated 31 August 2005 Mr Deuss wrote to Mr Ganesh copying in Ms Deuss and Mr Ulrich. The subject line of the email was "Monitoring of Telecom Traders Accounts" and Mr Deuss attached a spreadsheet. He stated as follows in the body of the email:

> "Please find hereby attached a spreadsheet which I would like you to organize for the highest volume telecom accounts in order to get some sense that account activity is related to meaningful activities i.e. profitable trading. In examining some of the trader account transaction information I noticed that very often transfers in are equal to the amount of transfers out and that the end of the day book balance from day to day changes very little begging the question what is the commercial purpose of these transaction activities. The attached spreadsheet gives an example of Duck

Trading for the first of April 2005."

286. On 19 September 2005 Mr Deuss's PA circulated notes to Ms Deuss and Mr Ganesh in which he raised a number of questions about the T&C sector and the nature of the transactions which they undertook. In cross-examination Mr Ganesh accepted that the context in which Mr Deuss prepared and sent these notes was that duplicate payment instructions were given to Rabobank and had to be withdrawn very quickly. More generally Mr Deuss stated as follows:

> "**Analyze Telecom Trader Account Movements and Transaction Activities**
>
> 1. Identify those accounts, where incoming funds leave the account: a. Within 1, 2 and 3 hours by means of: (i) intra account transfer, also showing frequency of intra account transfers to same intra bank beneficiary (ii) wire transfer, also showing frequency to same beneficiary b. Within 24-hours (> 3 hours) same format as per (i) and (ii) hereabove.
>
> 2. For carousel Intra-account transfers, establish: a. Which client initiated the carousel b. The ultimate beneficiary of the carousel payments: (i) name client at intra-account carousel end point (ii) beneficiary if intra-account carousel ends with wire transfers c. How many clients were involved in cash carousel trade.
>
> 3. What is the purpose of nearly identical incoming and outgoing wire transfer amounts and why do Telecom traders need to break-up the transfers, particularly if two incoming transfers are made by the same ordering party and for the same beneficiary. Could it be a design to intentionally cause errors by the remitting banks for the purpose of defrauding the banks out of "duplicate" payment amounts. We need to consider instructing our clients that they must inform ordering parties NOT to make payments in near identical amounts during any 48 hour period.
>
> **QUOTE**
>
> Subject: Avoidance of delays in crediting incoming wire transfers to your account
>
> Please instruct ordering parties to avoid making wire transfers into your account during any one 48 hour period if the difference in the amounts is less than USD200 (or the equivalent thereof in other currencies). Our processing rules for incoming wires could otherwise delay the timely crediting of your account with the second and subsequent payments.
>
> **UNQUOTE**"

287. On 19 or 20 September 2005 Mr Deuss also produced a second set of notes which dealt with a number of discrete banking issues. But he also raised the question directly whether T&C customers were engaged in carousel fraud. He also stated that expert assistance was

required to review FCIB's existing policies and procedures:

> "**EDD Telecoms**
>
> What is the status of EDD on telecom customers? With particular emphasis on the most active ones we need to perform an analysis of the inbound and outbound transfers (wire transfers and intra account transfers). We need to examine if there is a commercial and economical purpose for all the transfers performed. If amounts coming in and going out are identical many times a day and over many days the question is emerging is there an economic purpose to this type of telecom trading or is everyone part of a huge carrousel activity designed to commit tax fraud?"
>
> "**Outside Expert Assistance**
>
> Outside auditors such as PWC or Deloitte need to review the policies and procedures which are currently available and are currently in use. They need to advise us what we need and compare it to what we have. The differences between "the gap" determines what we need to remedy. PWC or Deloitte is to perform a gap analysis by examining what is required and assist us with the creation of the required policies and procedures, work flow and [sic]. Victor Farag in Berg en Dal has already started this process and there are also process notes from Dennis. We need to gather everything that is already in existence to be the starting point for PWC or Deloitte. Emphasis needs to be on PAYMENTS. Confirm outside experts capabilities to carry out the assignment. We need outside experts who are deeply qualified in this particular domain."

(x) October 2005: TWPS and RMC meetings

288. On or about 8 October 2005 Mr Vallerey produced a document headed "Types of Fraud" explaining why the UK was the leading T&C market and why the T&C sector was one of the industries most hit by fraud. He expressed the view that if VAT fraud were to be eliminated, FCIB would lose market share.[8] By email dated 18 October 2005 he wrote to Mr Deuss stating: "It seems that the only remaining active high street bank active in the Telecoms Traders industry in the UK (RBS) is starting to send 28 days notices of closure of accounts to some of its customers." He also informed Mr Deuss that there was a "wave of rumours" about FCIB having to terminate its activities. By email dated 20 October 2005 he wrote to TWPS marketers about the rumours:

> "Following your input, I just had a discussion with Mr Deuss regarding the rumours they reported and the actions we should take. There is absolutely no substance behind these rumours, there are just that: wild rumours. It comes with the territories: news move fast in the telecoms world. You need

[8] The document is undated but the Claimants pleaded that it was created on or around 8 October 2005 and the Defendants did not challenge this dating.

> to use your communication channels with: Large clients Introducers RA Intermediaries Web sites Associations to communicate the reality about FCIB's solidity and commitment to this market segment in particular and to ebanking in general. FCIB is the bank that is servicing the T&C market segment, it is a strategic direction we will always maintain. If you are a legitimate customer with legitimate business you will keep your account with FCIB If you are not a legitimate customer or your business is not legitimate, you will not keep your account with FCIB. Our commitment to the trading community is strategic and unchanged."

289. On 16 October 2005 Mr Deuss met a number of TWPS marketers in Kuala Lumpur. A document was produced which set out the principal action points to come out of the meeting and it recorded that the priorities for TWPS were to diversify from the T&C sector to other market segments. But it also recommended that the marketers should engage in the "cross-engineering" of accounts to attract the other members of a network. The meeting also identified the following risk management and compliance issues:

> "**3. Cross engineering of transactions**
>
> We need to leverage the information we have on the flow of incoming and outgoing wire transfers to identify the companies that are not current clients of FCIB and that send or receive a significant number of wire transfers to/from FCIB. The initial successes need to be generalized. The incoming and outgoing cross-engineering campaign will be reactivated."
>
> "**5. Risk Management**
> Marketers need to exercise the utmost care in dealing with the prospect. In visiting the place of business of the clients, they need to establish the substance of the activity. In the course of the interview, they need to establish the financial substance of the applicant. Typical questions include:
>
> - how long have they been in business
> - what are the current bank(s)
> - asking for references from banks and reputable counterparts
> - availability of audited financial statements and identity of the auditors
> - evidence of the prospect have fulfilled all the tax, regulatory and financial reporting requirements to operate in its jurisdiction
> - copy of the tax returns
> - situation of stocks
> - trade references
> - turnover of the business for the period not covered by the current financial reports (trend over the past 3 months or past 6 months)
>
> In their own jurisdiction, the marketers must develop a form/check list that will be used to establish the financial substance of the applicant. By definition, this form must be jurisdiction specific.
>
> **6. Ultimate Beneficial Owner**

> Marketers need to be particularly sensitive to accounts that are owned by one trader but are operated by a totally unrelated person/entity, as this might prove there is a beneficial owner that is not properly identified.
>
> **7. Risks associated to the Telecoms segment**
>
> The risks associated to the telecoms segment exist at client level (legitimacy of the client) and at transaction level."
>
> "**11. Bart Van Laarhoven**
>
> Introductions made by Bail van Laarhoven need to be reviewed at JCMAMD level as they require special scrutiny."

290. Longer minutes of the meeting were also taken and they record that Mr Mallaburn gave a presentation about TWPS's activities in Dubai. He gave the following explanation of the way in which local traders operated in which he used the expression "closed loop networks":

> "The traders in Dubai work in small circles. 85% of the traders are Asians: Indians and Pakistani nationals. One way to depict the T&C trading market are the Olympic Rings, as the rings are independent but there are parties active in multiple rings. Saf is regarded as an influential trader. He has brought over 100 accounts. He has contacts with traders, brokers and businesses. He trades but mainly is a dealmaker facilitating transactions between buyers and sellers. James has not identified cases where the accounts are operated by a person that is not known by the bank (Director, Signatory, B.O.). One issue faced is how to prioritize the accounts. The current approach is to increase the level of pre-qualification to increase the number of useful meetings. At the same time, we need to recognize the importance of the small players in building closed loop networks. The continuation of creating the closed loop network will lead to the natural expansion and diversification of our portfolio. The market is found to be of a fluid and unstructured nature. James is confident that he can maintain the current level of booked new accounts and transactions for the foreseeable future."

291. In October 2005 the quarterly meeting of TWPS marketers also took place in London. Following the meeting a document was prepared recording a series of "main points and action items" for TWPS. A version dated 21 October 2005 was sent to Mr Deuss and Mr Thanki and his team accepted that he was either present or shown the note. It recorded as follows under the heading "Risk Management":

> "In the environment in which we operate compliance and regulatory issues are of the utmost importance. The risks associated with Trading in general and Telecoms & Computers Trading (TCT) in particular are tremendous. We have a proven business; we need to take risk management very

> seriously to protect this business. The regulators are aggressively on top of the money centre banks. The regulators are equipped with the ability to instantly detect high risk transactions. This is why we need to keep our correspondents comfortable about how we protect them. On our portfolio, we had, up to now:
>
> - 8 freezing orders (with 50 associated companies)
>
> - 8 freezing orders (with 50 associated companies)
>
> - 12 insolvency cases
>
> Even though the number of these problem accounts is less than 1%, they are attracting the attention of the regulators. There are only a small percentage of the participants that are bad apples. These need to be identified before they join our system. This is the role of the marketer, our first line defence. There are two types of "bad" participants we need to be concerned about:
>
> - Account holders who commit fraud.
>
> - Account holders who are incompetent and are at risk of being dragged into a fraudulent transaction.
>
> If any trader is turned down by a marketer (because he fails the questionnaire or because the activity/company is not old enough), it needs to be reported immediately to Compliance (Curacao or India) for recording in our negative database. This must be done at company level and/or individual level."

292. On 11 to 14 October 2005 the regular meetings of the RMC took place in Bangalore which Mr Deuss, Ms Deuss and others also attended. On 19 October 2005 Mr Ganesh sent the minutes of the meetings to Mr Deuss recording as follows:

> "**High Level Policy**
>
> 1. The eBanking revenues are growing between 150-180,000 USD per month. We have 23 marketers and each one of them is expected to bring 5 additional customers each doing 400 transfers a year. The marketing methodology is so well established that a "cookie cutter" approach can be adopted to adding and training new marketers. This will generate even higher transactional volumes."
>
> "**Operations**
>
> 1. UBS is "crème de la crème" i.e. Category 1 in terms of importance in terms of correspondent banks. No MSB business should be routed via UBS. Customer wires will be routed via UBS only after being 100% sure that we are dealing with genuine customers (EDD and other inquiries). Telecom traders would be routed to UBS only after EDD and all other inquiries have been completed."

(xi) Meetings with UK solicitors

293. On 4 October 2005 and 2 November 2005 Mr Ulrich and Mr Smulders met a number of English solicitors. On the first occasion they met Ms Frances Coulson and Mr Richard Saunders of Moon Beever and Mr Christopher Potts and Mr Nick Oliver of Blake Lapthorn LLP ("**Blake Lapthorn**"). Mr Deuss's evidence was that he understood them to be acting for HMRC although they were in fact acting for firms of insolvency practitioners including most, if not all, of the members of the IP Group. Mr Ulrich's note of the two meetings recorded as follows:

> "October 4 2005
>
> Frances Coulson and Richard Saunders (of Moon Beever law firm), and Chris Potts, David Marshall and Lucy Edwards (of Blake Lapthorn law firm) inform me that HM Customs can't meet directly with me because of "internal legal and political problems". However, HM Customs are interested in a dialogue and would like us to meet with the law firms which represent them. They explained that FCIB is now identified as principal banker to the telecom traders. HM Customs are reluctant to disclose to us what they know about these traders, the trading patterns, the carousel fraud patterns, etc. They prefer that we meet with their outside lawyers to describe our KYC/EDD procedures for telecom traders, following which they will revert with comments relayed via their lawyers.
>
> Meeting November 2 2005; Connaught Hotel
>
> • Present: T. Ulrich, J-W Smulders and B. Partridge. For the Moon Beever law firm: Frances Coulson and Richard Saunders. For the Blake Lapthorn law firm: Nick Oliver, Chris Potts.
>
> • T. Ulrich gave overview of history of FCIB and its products and services. B. Partridge gave a robust demonstration of ebanking, global clearing, corporate clearing and exact pay.
>
> • T. Ulrich explained: FCIB's KYC/EDD policies and procedures in detail; our considered use of additional outside resources including Kroll, Baker & McKenzie, Ernst & Young, the FTI and the Tax Exchange; data base searches don't reveal who are the "bad guys"; we've signalled intention to cooperate not only with HM Customs but similarly in the US with the SEC, CFTC, Fin Cen; we only want squeaky clean client base, but we don't know how to identify the "bad actors" or how to stop it; voluntary freezing of accounts has subjected us to much criticism from clients, but it is the right thing to do; etc."
>
> • UK Lawyers recommended/discussed the following:
>
> o FCIB KYC/EDD look very thorough and effective; their only suggestion is we should ask for a copy of the VAT Registration Application as part of our KYC — it shows intended turnover in first year and bank details. We could them compare actual volume vs. what they told Customs; we could also see who prior bankers are.
>
> o They would like FCIB to consider freezing accounts/sharing information

> with them on the basis of an Affidavit from HM Customs but before their cases go to court — they would use our information to build their case (they later phoned to drop this request since HM Customs did not want to give us advance notice of their investigations of suspected tax cheats).
>
> o They would like FCIB, when a freeze order is received, to merely "block" accounts so that incoming funds can be received but outgoing funds are blocked — they say there are numerous instances where traders continue to send funds to an account subject to a freeze order because they don't know the freeze order is in place — HM Customs want to capture these funds.
>
> o Asked how FCIB could speed up the process of complying with Freeze Orders — we agreed that so long as they are all in the usual, standard form (both freeze orders and insolvency orders) that they could be scanned and emailed directly to T. Ulrich, Saurabh and Martha: upon receipt we would act quickly."
>
> "Overall the meeting went very well and we established a cordial, cooperative working relationship. We reiterated our request to meet directly with HM Customs which they said they would pass on; we also agreed to meet periodically when I was in London."

294. On 17 November 2005 Mr Ulrich met Ms Coulson and Mr Saunders again. His attendance note of the meeting stated: "UK lawyers advised that without FCIB this trade would be dead. They think FCIB has over 90% of this business." It also recorded that: "They said the process of sending Court Orders directly to Saurabh and Martha was working well. Also, the process of "blocking" rather than freezing accounts was appreciated."

295. On 19 January 2006 Mr Deuss himself met Mr Potts and Mr Saunders at the Connaught Hotel in London. By email dated 8 February 2006 he wrote to Mr Potts copying in Mr Ulrich, Mr Sharma and others Mr Deuss enclosing a paper headed "Approach to effectively tackle VAT Fraud without violating Free Trade Principles" and a copy of the new site visit report. In the covering email he stated that:

> "We have further ideas on how to effectively tackle VAT fraud without violation free trade principles. Please find a copy hereby attached as well as the latest version of a site visit and reference letter report which we are now using to screen initial applicants."

(xii) Mr Barrs and Ms Van Dijk

296. On 4 November 2005 a telephone conversation took place between Mr Danny Barrs of TWPS and Miranda Van Dijk, whom the Claimants allege was seeking to open an

account. The Claimants specifically pleaded this conversation and a transcript of it records as follows:

> "MD: Oh well that's not too good, you're going to be working with that for a while I guess, unfortunately. Yes, I got your message and l understood from your message that you will be dealing with our accounts... DB: Yes, that's right MD:. ..well, what has happened to Bart because I have lost track of him and I'm ..... DB: Well he has gone, he has just left... MD: ...I heard some stories that he was fired but through, through other contacts because I don't know, it was a bit of a funny story, I never could get hold of him anyway. DB: ...yes well he was a mmm, I mean he is the nephew of the guy that owns the bank so... MD: Ah, o.k. DB: So, if you like, if you are the nephew of the guy that owns the bank getting fired is quite a difficult thing to do... MD: Yes DB: But I mean he basically, to my mind, he wasn't really a professional in the sense that.... MD: I think he put forward too many dodgy clients, I think he was basically, in the sense, that he was accepting anybody he could get the hold of. DB: Yes. MD: That was the impression he was giving me. DB: Yes that's right."
>
> "DB: Let me just come back to one other thing that I think you'll appreciate and I'll tell this to you but I wouldn't tell it to the bank is that eight out of ten accounts that I'm opening at the moment are new companies... MD: Yes. DB:...for whom that EDD would be impossible to answer, absolutely impossible. MD: Of course."
>
> DB: What we are doing is cheating the system really. I mean we are an offshore bank, we've got a banking licence in Curacao but thanks to people like me we are actually operating... MD: Yes DB: ...illicitly in Luxembourg, for example, or in the Netherlands.... MD: Yes."
>
> "DB: and I think we have done very, very well. We done it, you know when we talk about legitimacy it makes me laugh a little bit... MD: Yes DB: ...you know the bank is no more legitimate than you're business is... MD: No, no, true DB: ....for exactly the same reason, somewhere in the washing machine where we are washing all this money around and around in circles obviously the bank is profiting from it. MD: Yes of course."

(xiii) Mr Vallerey's analysis

297. By email dated 3 November 2005 Mr Vallerey wrote to a Mr Dominic Thorncroft of Checkpoint UK MTA whom he met at the "Global Money Transfers" conference. MTA is an acronym standing for "Mail Transfer Agent" and MTAs provide security gateways for banks such as FCIB. Mr Vallerey stated as follows:

> "In the UK, our approach has allowed us to capture, in 15 months, a very significant share of the UK Telecoms and Computers traders and import market, as these businesses were looking for a banking solution as the High Street Banks were closing their accounts. This has been done in

> collaboration with some of the Associations in the fields, such as the Federation of Technologies Industries http://www.fti.org.uld. Based on our experience of MT, the specific approaches we have developed to process their transactions and the indications you gave me about the current situation of some of the MT businesses in the UK, I am very confident we can provide a solution to these members of the MTA."

298. On 10 November 2005 Mr Vallerey sent Mr Deuss an email in which he attempted to analyse the T&C sector stating that the source of the information was "the market, consultants and accounting firms":

> "As indicated to you over the phone, here are the elements we have gathered from the market, consultants and accounting firms as regards the economic justification for the trades being done by our Telecoms and Computers traders:
>
> - There are a number of traders involved between the producer or the large distributor with exclusive agreements with the producer and the retailer (5-7 layers is the commonly accepted number).
>
> - The goods sold by the manufacturer have an official price: virgin price.
>
> - The involvement of traders in the official/white market is limited as there are a limited number of players on the manufacturing and operators side and they deal directly with each other.
>
> - The traders we are dealing with are involved in the grey market which represents 30% of the overall market.
>
> - The grey market is particularly strong for pre-paid users.
>
> - Traders mark up between 1% and 2.5% each.
>
> - The total margin available to traders is between 7% and 15% of the virgin price.
>
> - Retailers' margin is around 35% of the virgin price.
>
> - The market price (price at which retailers sell to the end user — outside of packages) is 50% above.
>
> - There are 800 million units sold on a yearly basis, the average cost is estimated at 100$ (virgin price).
>
> - The revenues available to traders from this activity can be estimated at: 800 millions units * 30% as grey market * 100 $ per unit * 10% average margin = $ 2.4 Billion.
>
> - Mobile phones are a whole unit, ready to work, contrarily to computer chips or memories, - There are no issues with standards or regulations (only some exceptions for hardware moved between Asia and Europe).
>
> - Official channels (the white market) are not as efficient as the unofficial channels (grey market) to service certain areas or to deal with certain products (hot products or products being discontinued).

> - The mobile phones have become fashion items with fluctuating prices and seasons".
>
> "- Mobile phones are perceived by traders as being safer than other commodities because there is this feeling that if you cannot sell a lot in the trading market, you can always go and sell it to the end users.
>
> - The market will grow in developed markets as a result of 3G and in developing markets as the result of the introduction of entry-level phones priced at between $ 30 and $ 50."

299. The Claimants pleaded the contents of this email and also an email dated 15 November 2005 in which Mr Deuss responded by asking Mr Vallerey to follow his original analysis up:

> "Please try to obtain written submissions from market consultants and accounting firms supporting the economic justification of the mobile phone market in addition to any other publicly available information supporting same. Obviously the written submissions I am asking for must be those which already exist and need not to be prepared specially for FCIB."

300. On 15 November 2005 Mr Vallerey corresponded with Mr Laurent Grandin of TWPS, who spoke to EY, and forwarded on to him two surveys which they had provided. By email dated 17 November 2005 Mr Vallerey wrote to Mr Grandin stating that he would add them to a database in Bermuda. On 11 November 2005[9] a document was produced headed: "Opportunities for FCIB around refunds for traders and import/export companies with a focus on Telecom Traders/Computer Parts dealers (T&C traders)". In it the author set out the way in which HMRC produced refunds and identified this as an opportunity for FCIB:

> "In countries that have VAT in place, the UK in particular, Exporters are reimbursed for the VAT they have paid. This reimbursement is made on a monthly basis. This short period is designed to avoid the VAT from penalizing the treasury position of the exporting companies, for competitiveness reasons.
>
> Customs & Excise reimburses VAT on the basis of the declaration made by the exporter. In the instance where the trader deals domestically, the VAT claim will be for the net amount of the VAT paid and received. The first time an exporter makes a VAT claim, he will subject to an audit where the invoices and the exporting documents will be checked. If the inspection is satisfactory, C&E will pay the VAT amount by cheque or WT to the

[9] The document itself is undated but this is the date given in the trial bundle. The Claimants pleaded that it was created in late October 2005.

> traders account. Future reimbursements will no longer require an inspection providing these payments are in line with the general activity demonstrated over time by the organization. The payment to the trader has to be under the name of the trader. It is a domestic wire transfer in most cases, a cheque otherwise. It is accompanied with supporting documentation. Please see attached the sample cheque and cover letter. In some cases the payment can be made to the VAT agent designated by the trader."
>
> "**Opportunity**
>
> The opportunity is for FCIB to accept VAT reimbursement cheques, or credits, into an FCIB designated account for funding of accounts of T&C held at FCIB."

(xiv) Personal, dormant and "other" accounts

301. On 11 to 13 April 2005 the quarterly meeting of TWPS marketers took place. After the meeting an action list was circulated summarising the main points arising from the meetings. One of the action points was a "Strategy regarding inactive accounts":

> "Inactive accounts have the following consequences:
>
> Tying up of resources
> Generating debit revenues that we are not certain to recover
> Creating potential risk as they could have been set up for fraudulent purposes
>
> An alternative observation is that these accounts can easily be activated by the account holder and could be potentially play an essential part of the Corporate Clearing accounts pyramid/community set up.
>
> We need to determine policies that address the issues raised by inactive accounts without losing the potential benefits they present for FCIB (as an example no funding of the accounts 3 months after the account approval, would be frozen, which means that the first transactions would be blocked and subject to investigation). We will develop a document for JCMAMD dealing with the issues related to inactive accounts and what actions are required (London Office)."

302. By email dated 13 June 2005 Mr Vallerey wrote to Ms Deuss, Mr Kornitzer, Mr De Wijze and Mr Ganesh identifying an issue relating to customers applying for private or personal accounts instead of corporate accounts:

> "One issue we are facing is that of customers applying for private accounts (ebanking or ExactPay) even though they technically qualify as corporate users, in particular if they are B2B customers (traders). One of the consequences is that these prospects would not be subject to the stringent EDD process we now apply to B2B clients. It is even worse if this

> approach was to be chosen by clients whose company would not have qualified under our current terms.
>
> To avoid the existence of a backdoor into our system, we propose, based upon a discussion held with Mr Deuss, to put a place a process along the following lines:
>
> - on the online application for Private customers (eb or EP), add a mandatory account activity box to let the customer indicate the expected number of yearly transactions
>
> - if (i) the figures provided in the application, (ii) the prospect indicates to the marketer or somebody else in the organization that the account is in fact a professional account or (iii) the analysis on the activity of the account after it has been activated shows levels of activity more in line with those of a corporate account, the personal account will have to satisfy all the KYC and EDD if the customer had applied for a corporate account."

303. By email dated 9 November 2005 Mr Deuss wrote to Mr Ganesh copying in Ms Deuss, Mr Ulrich, Mr Vallerey, Mr Sharma and others. It is clear that he remained concerned about dormant accounts which had still not been used:

> "If after 90 days from the date of the account approval the customer has not yet funded his account we need to deactivate the account for risk management reasons. Customer support should, 30 days prior to the deactivation of the account, communicate with the client with the objective of getting the account funded and used. Once an account has been deactivated, it can be reactivated, at the request of the customer with an explanation of the delay in funding of the account and a review of the customer file by the compliance department."

304. A closely related issue was whether the potential customer had been classified correctly for the purposes of the Risk Scoring Model. By email dated 17 January 2006 Mr Sharma wrote to Mr Brian Partridge of TWPS raising this issue:

> "Brian: we circulate the masterlist each week - however, we note that the "business category/sector" for a number of the customers that we know (Dhalomal Ramchand PTE and for Dhalomal Kishore) is "Other"/ "Combined Technology" while we know that he is primarily performing "Telecom" trading. He should therefore have been categorized accordingly. Similarly, there are a number of customers that are marked as "Other" on the masterlist. Could you please go through it once and update the masterlist business sector to ensure it reflects the current categorization (or ensure someone goes through the masterlist and gets this done). This is required urgently to provide to JCMAMD to categorize customers via different correspondent banks. Also, on an ongoing basis for all new customers we should be able to categorize them into business sectors correctly."

305. On 7 February 2006 Mr Sharma produced a draft of a "Procedure for Dormant Accounts" and on 30 March he signed off version 1.0. It provided that every quarter a list of dormant accounts would be circulated and that the RMC would suspend those accounts which had been dormant for 90 days and notify the customer although it would deal with customer responses on a case by case basis. By email dated 16 May 2006 Mr Ganesh also wrote to Mr Sharma in relation to "Personal accounts being used for telecom trading":

> "I discussed the emerging trend where newly approved "personal" accounts are being increasingly used for T&C trading activities. Mr. Deuss has instructed that we do the following: - Suspend all such personal accounts that are involved in T&C - Give them 30 days to open a Corporate account and then close the "private" account. Please note that the above process is to be followed only for High Risk customers (T&C). For all other personal accounts, we will seek clarifications when the monthly turnover in an account exceeds USD 1 million (not USD 3 million as per the current process)."

(xv) The Chiltern Presentation

306. On 14 November 2005 Mr Don Mavin, a director of Chiltern plc, an investment firm specialising in B2B sectors, gave a presentation to TWPS marketers (the "**Chiltern Presentation**"). The Claimants pleaded that this presentation highlighted the indicia of VAT and, in particular, third party payments. The slides identified the following risk areas: large turnover in short time period, little knowledge of trade, change of trade, non-standard transactions, few trading partners, third-party payments, little or no insurance cover, poor or non-existent due diligence, no inspection of stock, trading premises on short leases, UK companies trading through off-shore bank accounts, overseas companies trading through UK bank accounts and frequent links to missing trader supply chains.

(xvi) "Closed Loops"

307. In two emails dated 1 December 2005 Mr Deuss wrote to Mr Ganesh copying in Mr Vallerey and the first of these emails was the only document to which I was taken in which Mr Deuss used the term "closed loop" or "closed loops". The emails stated as follows:

> "We need to dynamically expand "closed loop" intra account GBP settlements between telecom traders. For all telecom traders, by customer;

> we need to identify the ordering parties of incoming wires and the beneficiaries of out-going wires in GBPs. This information is urgently required to support a most vigorous marketing effort to bring all telecoms onto FCIB's closed loop settlement network. Please advise by return (also in coordination with Susan Corbett) how we can accomplish this soonest."
>
> "Further to my earlier e-mail on GBP intra account settlements we need to particularly identify those clients of ours who have a high occurrence of GBP wire transfers coming in and as soon as the funds are received going out again by means of wire transfers (i.e. "high velocity" GBP incoming/ outgoing related wire transfers)."

(xvii) Mr Deuss's instructions

308. By early December 2005 FCIB's compliance officers were requiring a declaration to be made by the ultimate beneficial owner of a company. However, by email dated 8 December 2005 to Mr Sharma, Mr Ganesh and others Mr Deuss relaxed that requirement at least temporarily:

> "As the UBO declaration is not yet part of the documentary requirements for the opening of corporate accounts as per the PDF file and as the applicant has no knowledge of this requirement necessitating us to send a separate e-mail, after consultation with Tim Ulrich I hereby approve that all pending eBanking applications can be approved without waiting for the UBO declaration. Of course we will continue to ask our clients, existing ones and the newly approved ones alike, to provide the UBO declarations which we accept to receive by e-mail or fax as well. After the UBO declaration is included in the PDF file listing the documents required for the opening of a corporate bank account then the above temporary procedure will no longer be necessary."

309. By email also dated 8 December 2005 Mr Deuss wrote to Mr Smulders copying in Mr Ganesh, Mr Sharma, Mr Vallerey and Mr Ulrich instructing him to start a forensic investigation to determine the economic substance of transactions involving T&C customers:

> "Ganesh earlier this week prepared a report showing for each Telecom customer the ordering party and frequency of incoming wire transfers and the beneficiary and frequency of outgoing wire transfers. This report should be the starting point for a forensic investigation starting with the Telecom clients with the highest volume of incoming and outgoing wires. Particular attention should be given to the amounts of incoming and outgoing wires by using the time stamp of when the amount comes in and the time stamp of the like or identical amounts going out. The purpose is to determine the economic substance of the transactions. For instance if it were so that there would be a high occurrence of identical amounts coming

> in and almost instantaneously going out that would be the starting point for a discussion with the Telecom clients to ask for an explanation for such movements.
>
> Whilst in India, time permitting I would like you to start this exercise. Also Saurabh has done similar work and for instance is questioning the high turnover on certain accounts and the discrepancy of the turnover observed with the financial statements submitted by the client."

310. By email dated 15 December 2005 Mr Deuss next wrote to Ms Salas giving her instructions that FCIB could accept faxed or electronic documents:

> "I have reviewed with Tim the missing documents for each of the pending eBanking applications and considering the confirmation of the Central Bank of Curacao authorizing us to accept faxed or electronic (scanned) copies of documents, I hereby clarify the implementation of our policy as per our KYC and AML manual (which requires "original documents") that based upon special authorization from undersigned we can accept in lieu of original documents faxed copies or electronic/scanned copies to clean up all missing documents of the pending eBanking and ExcatPay applications as they appear on the list Ellyanne sends daily until the end of 2005. All concerned need to make a maximum effort to clean up the pending applications. Saurabh needs to draft amendments to the procedures to update our KYC and AML manual accordingly."

311. By email dated 16 December 2005 he then wrote to Mr Sharma (copying in Mr Ulrich, Ms Deuss and Mr Ganesh) setting out his understanding of the way in which the T&C sector operated:

> "We are aware that UK banks are in the process of getting out of the business of servicing the telecom market segment. As we understand their cost and time of the compliance staff to monitor transactions, report suspicious transactions, administer freeze instructions and administer Court issued freeze orders are not worth the commercial benefits.
>
> FCIB fully adheres to its commitment to combat the use or abuse of its facilities for the purpose of financial crimes, including money laundering. Our Anti Money Laundering manual and policy statement (latest version 2.3 November 19, 2005) and our vigorous implementation of our KYC and AML policies and procedures are a testament of the banks policy of dealing exclusively with legitimate clients engaged in legitimate businesses. FCIB's servicing of the telecoms market segment is not inconsistent with our policies as stated hereabove. Whilst the telecom market segment is classified as high risk we have implemented appropriate Enhanced Due Diligence procedures to make sure that we only deal with legitimate Telecom clients.
>
> The trading of telecom equipment and the high velocity of trades and trade settlements is consistent with the view that telecom communications

> equipment has become a fungible commodity, actively traded between market participants in the chain between manufacturers and consumers. The trading pattern is not unlike what we saw in the oil markets where cargoes of Brent crude oil at times changed hands as often as fifty times, representing a "Quasi futures market". Margins per barrel were small and for every trader who made a penny there was often a counterpart which lost. Not all trades were profitable.
>
> We have now reached a point that there is enough transaction history for Telecom Clients that we can begin the process of validating in the aggregate the economic purpose of telecommunications equipment trading. Whilst it is recognized that active trading accounts demonstrate high volumes of turnover we need to examine if for individual clients over a sufficiently long period of time the economic purpose of their activity can be confirmed.
>
> Our review of transaction history should amongst others identify:
>
> 1. Turnover information
>
> 2. Profitability information
>
> In order to further enhance our understanding of the industry and to go "the extra mile in confirming legitimacy" we should consider seeking following additional information from high volume clients as appropriate:
>
> 1. Copies of sales and purchase confirmations for each transaction
>
> 2. Copies of invoices (for purchases and sales)
>
> 3. Audited or at least internal income statements
>
> 4. Copies of the documents for each transaction evidencing the transfer of title/ownership
>
> 5. Any other relevant documents as may be determined.
>
> Our KYC manual defines "unusual transactions" as transactions which are inconsistent with a client's known legitimate business or "normal" for that type of account. Our EDD should include the establishing of a "base line" for each client to identify what is usual for that client.
>
> The Senior compliance officer must review all complex unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose and should prepare a report for any unusual transactions that he believes should be reported externally. The report should be submitted to senior management for review for compliance with existing regulations prior to submission to the Unusual Transactions Reporting Center (MOT).”

(xviii) Mr Sharma’s report

312. By memo dated 22 December 2005 Mr Sharma wrote to Mr Ganesh stating that a large number of freezing orders and correspondent bank queries had been observed in the previous week. He also explained to Mr Ganesh that Mr Smulders and Mr De Wijze had

visited Bangalore, that they had carried out the following investigations and that the team at Berg en Dal was evaluating an alternative to BSA Reporter called Mantas:

> "■ Telecom traders: During Jan-W and Victor's visit to Bangalore, RMC discussed the different fraud scenarios (for VAT/Missing traders etc) to get an understanding of what to analyze in the telecom traders accounts. Top 5 telecom traders' transaction accounts and EDD was collated for analysis.
>
> • Preliminary findings note has not been completed and would be completed post Christmas break.
>
> • However, the RMC team is analyzing the telecom traders (whose accounts were frozen) transaction history for any patterns and these findings will be published next week."
>
> "• BSA Reporter
>
> o Team at BED is evaluating another product `Mantas'. A web-based demo of Mantas was held. Jan-Willem / Rajul to send out a note on issues faced with BSA Reporter."

313. On 4 or 5 January 2006 Mr Sharma sent Mr Deuss and Mr Ulrich a report dated 30 December 2005 and headed "Report on the Analysis of the Accounts Frozen for VAT Carousel Fraud in United Kingdom". In the introduction Mr Sharma explained MTIC fraud and carousel fraud before setting out a detailed and sophisticated analysis of each of the frozen accounts. In the Executive Summary he gave the following final summary and recommendation:

> "**Summary:**
>
> • The pattern indicates clearly that the next companies that could be frozen are 'Callender Group' and 'K & S Communications' (the importer 'traders' in UK).
>
> • The sole purpose of the company 'Hi-tec Electronics' Denmark is to feed goods to the Cyprus based companies.
>
> • The 4 Cyprus based companies depicted in the diagram above are selling goods to a trader in UK.
>
> **Recommendation:**
>
> • The following companies should be closed for compliance reasons:
>
> o Cyprus based companies: Artlons Trading (marketer: Paul Bailey), CK Communications (marketer: Bart), E and I Trading (marketer: Bart), Rezaco Trading (marketer: Bart).
>
> o UK based Importer' traders: Callender Group (marketer: Paul Bailey) and K & S Communications (marketer: Bart).
>
> o Denmark based: Hi-tec Electronics (marketer: Bart).

> o Retro Jeans (UK) (marketer: Roy Nixson): this company has only traded with other UK companies frozen for carousel fraud.
>
> • Balmoral Ltd. (marketer: Bart) and First Touch Communications financial activity data is not sufficient to recommend any compliance steps as of now. This account will be monitored on an ongoing basis.
>
> • Export Company UK's (marketer: Paul Bailey) proportion of trading activity (based on transaction amounts) is 30% with the frozen accounts. The customer has a mix of genuine trading activity and activity with frozen accounts. However, since this is the second largest trader with the bank (with EDD score of 53), although our recommendation would be to weed out this customer since we believe that the pattern is structured to create such a mix of transactions, we should discuss the further course of action for this customer.
>
> **Next steps - re-using what we have learnt:**
>
> • Monitor patterns of companies trading between UK and EU based regions for possible cases of 'missing traders'.
>
> • Compile statistics of transactions on a weekly basis (amount and count of transactions: Intra-account and Wire Transfers) and notice the amount /number of transactions each week for the year 2005 for all customers. Based on freeze order served to a trader, map out if any trader account has a sudden jump in their activity indicating they might be the trader replacing the frozen trader."

314. Mr Sharma had also prepared a draft of a report to be submitted to the Curaçao Unusual Transaction Reporting Centre (the "**MOT**") (and I will refer to reports made to the MOT as "**MOT Reports**"). Mr Sharma's draft MOT Report identified a number of unusual customers based on a pattern analysis of the freezing orders including an analysis of the trading of both TCG and Mr Callender himself. By email dated 5 January 2006 Mr Deuss wrote to Mr Ganesh, Mr Sharma and Mr Ulrich in the following terms:

> "FCIB's reputation and the integrity of all FCIB clients who are participants in the buying and selling of mobile phones is being seriously threatened because of the increasing number of FCIB clients being involved in VAT Carousel Fraud in the UK. At the same time H.M. Customs and Excise is shifting the burden of tackling carousel fraud from the tax authorities to the banks. Therefore there is the need for continuous review of "Telecom" clients to ensure and confirm that the "business" is not a facade created for the purpose of facilitating and undertaking the fraudulent evasion of VAT. All approvals of corporate account applications are subject to satisfactory completion of EDD.
>
> EDD backlog on existing corporate clients to be cleared by March 31st, 2006. Prioritize based on turnover (aggregate of wire transfers and intra account transfers). If clients don't timely provide requested information, account privileges will be suspended (15-days to provide requested

> information, 10-day follow-up reminder. If by that time no confirmation from the client has been received about dispatch of missing documents suspend account privileges until documents received and satisfactorily processed)."

315. Mr Sharma accepted in cross-examination that six of the seven companies, which were the subject of freezing orders and of his report, had not filed EDD documents. He also gave a very clear description in cross-examination of the challenges which the RMC faced on trying to clear the backlog and introduce transaction monitoring at the beginning of 2006:

> "Q. In fact, the backlog might be said to consist of three elements: new accounts had been taken on between April and October on the basis that EDD was supposed to be supplied but wasn't being reviewed, because we see in the preceding (indecipherable) -- A. I'm sorry, I'm confused. Between April and October 2005? Q. Sorry. Before you arrived -- A. Yes. Q. -- the EDD review procedure hadn't been finalised? A. That is correct. And we were not asking the applicants to submit EDD documents. Q. No. A. Which is why we had to go back to them and ask them for documents. You are right. Q. But they were being onboarded? A. That is correct. Q. Their accounts were being opened? A. That is correct. Q. So we had -- you had people who had been onboarded between April and October; you had to get their EDD? A. That is correct. Q. You then had the problem that there were delays in them providing the EDD. And, at the same time, there's the new applicants who were making applications after October? A. That is correct. Q. And what I put to you is that with all -- with trying to cope with that backlog, but there wasn't, at that time, bandwidth, as you call it, for there being a continuous review -- the wording Mr Deuss uses in his e-mail -- a continuous review of telecom clients to ensure and confirm that the business is not a facade? A. Sorry. Do you mean continuous review of existing customers? Q. Well, I'm just -- you see, Mr Deuss, in his e-mail, you see the third paragraph: "There is the need for continuous review of telecom clients to ensure and confirm that the business is not a facade created for the purpose of facilitating and undertaking the fraudulent evasion of VAT." Now, sorry, did you understand that simply to be a reference to what was already happening with EDD? A. Your Honour, I understood that to be that we should implement a mechanism by which we can -- it's not a one time effort but an ongoing continuous process where we could review the telecom traders or the clients of the bank. I do recall telling Mr Deuss that we need to get through this backlog first. And I recommended March -- it was end of March, as Mr Deuss states in this e-mail, that around that time frame we can start transaction monitoring as a continuous process; and, second, that we were increasing our team so that we can do all of these processes in parallel."

316. On 9 January 2006 a meeting took place between Mr Sharma and Mr Ganesh. The

minutes record that they discussed a number of issues: changes to the EDD checklist, classification of customers on the eBanking system, the set of rules to be used for BSA Reporter and an annual review checklist. The minutes then record as follows:

> "9. Follow-up of EDD documentation:
>
> a. ALL follow-ups to be done by RMC-Bangalore. Miami + London to be involved only for the last follow-up round (in case they need to if the customer is important) for the most important customers only.
>
> b. We need to MAKE SURE that the EDD documentation and review process is completed. We cannot be in a situation where our manual speaks of lots of processes but in reality there is a gap.
>
> c. RMC to follow a `Missing Docs' report for EDD.
>
> d. Saurabh to raise alarm with JCMAMD if the EDD documentation and application approval gap is increasing. The mission is that we need to deal with legitimate customers only and we need to work intelligently towards that.
>
> 10. Analysis of Frozen Accounts Report:
>
> a. Report the customers to MOT that are recommended to be `closed' in the report. When we report to MOT we do not close the customers.
>
> b. Send a copy of MOT report to JCMAMD."

317. Under cover of an email dated 17 January 2006 Mr Sharma sent the draft MOT Report to Ms Neuman who replied stating that the report would be filed that day. On the same day Mr Sharma sent it to Mr Deuss passing on the information that it would be filed that day (and copying in Mr Ganesh).

(xix) The 8 February 2006 board meeting

318. On 8 February 2006 the quarterly meeting of the combined Supervisory and Management Board of FCIB took place at which Ms Neuman, Mr Deuss, Mr Ulrich and Ms Deuss were all present and at which Mr Deuss took the chair. The minutes record that FCIB had a net income of a little over US $3 million for the period ended 31 December 2005. Item 5 then recorded as follows:

> "As part of the recent operating performance of the bank, Mr. Deuss comments that there is a concern regarding the large portion of the bank's customers that are considered high risk, popularly referred to as the telecom business. That sector is of a high risk nature and therefore requires more than the mandatory KYC requirements. The bank has increasingly become aware of these requirements and there is a massive effort underway throughout the entire organization to deal with the management

of the risk associated with businesses servicing and providing banking services to this market segment. This is clearly a working process and in progress. A lot of the on-line capabilities such as the scrubbing of names and so on, have been satisfied and are happening. The incoming/outgoing wires are all screened using all the lists available to identify any parties which should not have access to financial settlement networks. Increasingly the bank already knows at the inception of the customer relationship, when the marketer first meets the prospective client, if the customer is legitimate and involved in a legitimate business. But nevertheless there is still a lot of work to be done in this area. Risk Management and Compliance has been transferred to Bangalore; policies and procedures have been established. Additional staff is being added in order to deal with this process. Last year a requirement for additional information was introduced, in addition to the regulatory requirements, called Enhanced Due Diligence (EDD), as well as mandatory site visit reports. To an extent EDD documentation has been obtained from certain customers; from others it has been obtained but is not complete and is presently being asked for. Everybody in the organization is working very hard to obtain the documents still missing and to process those already received. With the additional eight employees hired in Bangalore for compliance, there is hope that in six months from now the backlog will be smaller than it is now."

"Tim Ulrich asked if there was any reaction by the clients to the letters sent requesting the additional due diligence documents. Mr. Deuss replied that the reaction was mixed; there are clients that have submitted partial documentation and others that have not yet submitted any documents. The clients are being called by the staff in London, Bangalore and Miami; follow-up e-mails are being sent. Clients that do not respond receive an e-mail notifying them that if they do not respond within a certain date, their account privileges will be suspended. The bank is actually in full compliance with the regulatory requirements. On the one hand there is always the concern for productivity and income and on the other hand the requirement to satisfy the bank's enhanced due diligence, which is self-imposed. The bank is actively looking for ways to better scrub and monitor all transactions without engaging in unwarranted expenses. It needs to be investigated, if once a client becomes suspicious, the relationship can be simply terminated. A report has to be filed without tipping the client but once the account is closed, the client is indirectly tipped off. How does the bank deal with that, what is expected; does the bank keep the account going to give the investigating authorities the opportunity to use the ongoing activities as a way to detect what is really going on or is the account closed? Mr. Deuss asked Lucius Halley for his comments but he had none. Tim Ulrich confirmed that the bank has a reporting obligation.

Mr. Deuss commented further that he suspects that reports filed with the MOT end up in a drawer. Recently, two specific cases of probable telecom fraud in progress were reported to the MOT and when the lawyers of Customs and Excise in London were contacted, they were unaware of the matter. Martha Neuman mentioned that it is well known in the banking community that the reports filed are not always acted upon due to the fact

> that the MOT has a problem with understaffing but what they do with the reports filed is their concern, not the bank's. The only responsibility of the bank is to report as required by law."

(xx) The EDD Backlog

319. By email dated 5 January 2006 Mr Sharma responded to the concerns which Mr Deuss had expressed about the EDD backlog. He stated that as at that date there were 606 EDD documents in total of which 236 were for customers of the London office (of which 45 had been reviewed). He also stated that 168 EDD documents had been reviewed in total leaving 123 either to be approved or declined. He expressed the hope that this could be completed by 31 January 2006.

320. In early 2006 Mr Deuss engaged a company called RISC Management Ltd to assist FCIB in communicating with the National Crime Intelligence Service ("**NCIS**"). By email dated 15 February 2006 Mr Cliff Knuckey, its Operations Director, wrote to Mr Ulrich (who later copied the email to Mr Deuss) recording his discussions with the NCIS. In his original email to the NCIS Mr Knuckey had stated as follows: "FCIB operates a global electronic banking platform and operates accounts, albeit a minor percentage of its total accounts, on behalf of approximately 90% of telecoms b2b traders in the UK."

321. By email dated 16 March 2006 Mr Ganesh wrote to Mr Sharma raising a number of RMC issues. He raised concerns about the quality of the team and also the number of applicants with high risk scores who were being approved:

> "b. There seems to be an issue with the amount of knowledge that the team possesses. Yesterday, Shruti and Rosy pointed out that people do not know how to interpret wires, BM+ account statements, etc. Today there was a "by hand" application and Pradeep does not seem to know where to find it (as only Shikha knows this apparently). Similarly, the way the team is organized we are going to have problems when people go on leave as their applications/cases are pending.
>
> c. Lastly but most importantly it seems that Pavan was discussing with Rosy about approving an application with a score of 84+? Based upon an analysis, Rosy came back and told me that there are at least 8 customers who have a score of 70+ and they have been approved without analysis. Once again, I think we have a problem with the quality/ control here. She also mentioned that there are some obvious issues that have not been considered. I am meeting her and Pavan later today. Shruti also mentioned that although her team is supposedly independent, they are asking all queries to her with the result she is reviewing all the documents."

(xxi) Transaction monitoring

322. On 21 to 23 June 2005 a meeting was held at Berg En Dal at which Mr Deuss, Ms Deuss, Peter and Mark Deuss and Mr Ganesh were present. On 23 June 2005 Mr Ganesh circulated the minutes. They recorded that the RMC was tasked with developing procedures to identify specific transactions which were suspicious:

> "9. The RMC team must:
>
> Develop procedures to identify common directors across customers.
>
> Develop procedures to understand customers business where funds flow out instantly as soon as funds are received. A report is to be developed to provide transactions which satisfy the following criterion: i. Amounts greater than a defined value ii. Outgoing funds are within a defined variance (amount) iii. Outgoing funds are within a defined time window.
>
> Develop procedure to identify the daisy-chains (apparently related intra account transfers between different customers) as this could be an indication of VAT evasion.
>
> MOT reporting must include transactions where customer does multiple transactions to stay below the reporting requirements at Curacao or at the originating country."

323. On 16 to 18 February 2006 a further series of meetings took place and on 27 February 2006 Mr Sharma sent Mr Deuss a memo copying in Mr Ulrich. In the memo Mr Sharma dealt first with EDD before moving on to what he called "**Transaction Activity Monitoring**" but I will call "**transaction monitoring**":

> "o We should monitor the transactions by frequency and by amounts. We need to find fingerprints in the transaction activity that triggers questions → analyze the information gathered for the questions → the analysis will lead to either clearing the suspicion or to a suspicious transaction. We should be careful that no matter at what stage of investigation we are, we are mindful of the relationship with the customer. We need to have a procedure to analyze transaction activity — what would frame the questions? — and perform the analysis of responses and the investigation leading to clarity or suspicion.
>
> o We need to perform random documentary checks of transactions (transaction checklist). The underlying philosophy is to identify the genuineness of the transactions. We should develop queries to perform transaction validations: to identify duplets, triplets etc and analyze them. As a last resort, in case we are unable to conclude from the information received during monitoring of transactions, we should require supplementary site visit (which is a costly process).
>
> o Transaction monitoring: we should proceed to implement monitoring

based on slabs of transaction amounts such as:

• Transaction amount more than USD 2mn = mandatory review of underlying documentation.

• Transaction amount between USD 1 mn and USD 2mn = review of 5% of transactions for underlying documentation.

• Transaction amount between USD 500,000 and USD 1mn = review of 4% of transactions for underlying documentation.

• Transaction amount between USD 250,000 and USD 500,000 = review of 3% of transactions for underlying documentation. Etc.

o We need to develop requirements for transaction monitoring and submit them to JCMAMD for approval. We need to ensure that reporting database is put in place on a priority basis."

324. By email dated 6 March 2006 Mr Deuss's PA, Fontella, wrote to Mr Vallerey under the subject line "FTI Best Industry Practices" and asking for a copy on behalf of Mr Deuss. On the same day Mr Vallerey replied attaching the requested document, which had been published on 9 September 2005 by the FTI with the title "Traders Best Practice Guide" (the "**FTI Best Practice Guide**"). The front page stated that its purpose was "to provide a top level-guide for use by members of the FTI who are traders of IT components and mobile telephones". It also set out a number of disclaimers. Section 14 was headed "Possible Pitfalls" and in section 14.1 it reproduced certain guidance notes published by HMRC. Sections 14.2 to 14 set out the following guidance:

"**14.2 Third Party Payments**

HMRC believe that third party payments are strong indicators of fraud. The best way to explain what is meant by a third party payment is by means of the following example:-

• A sells B some goods;

• A instructs B to pay C, D and E for the goods;

• The payments by B to C, D and E are third party payments because B is not paying its supplier but other third parties.

Notice 726 states that there must be a commercial reason for third party payments. As to what is meant by "a commercial reason" you should take legal advice. You should also ask yourself the question if, in the above example, B is paying all of the purchase price including the VAT element to C, D and E, how is A going to be able to meet its VAT liabilities?

You should note the following:

• Avoid third party payments unless where strictly necessary.

• Third party payments are viewed by HMRC as the precursor to potential VAT fraud and have been described by HMRC as "the footprint of fraud".

• Third party payments may lead to HMRC appointing a provisional liquidator who would put the company into liquidation.

• This could lead to the liquidator freezing bank accounts and assets of any companies which have traded with the company in liquidation.

14.3 Cloning Of Companies

• Known within the Industry as "hijacked VAT numbers" this involves trading with an organisation who is using another company's details.

• Provided adequate checks are made a Trader should be able to determine whether or not the company they are dealing with is genuine or not.

• As part of normal trading, traders fax their company details to many other traders each day. As a result it could be that a trader's details fall into the wrong hands and their company is `cloned'. An indication of this could be unsolicited calls/correspondence verifying your details. If a Trader has any suspicions in this area they should seek professional advice immediately.

14.4 Check Stock Before Making Payments

• Check stock to ensure it is what it was described to be.

• Beware of counterfeits.

• Be careful of releasing goods prematurely as monies can be diverted to other jurisdictions. This will require freezing orders in the UK, and possibly abroad to rectify. This is a costly exercise.

14.5 Releasing Goods

• Great care should be taken to ensure goods are fully paid for before they are released.

• If the sale/export is part of a chain of transactions it is essential that the goods are fully released to the exporter before the exporter releases to the customer.

• Special arrangements are required between the trader and the freight forwarder to ensure fraudulent release does not occur (i.e. a freight 'forwarder needs to speak to a trader and not just accept fax instructions which could be forged, or special release codes are required etc).

14.6 Unusual Transactions

• If a trader regularly buys and sells large quantities of mobile phones or CPUs then their bank will be used to seeing large receipts and payments.

• On the other band if a trader only trades wholesale once or twice a month and the rest of the month they trade retail then the large transactions could fall into the category of "Unusual Transactions"

• If a bank sees an unusual transaction they are obliged to report it to NCIS who may in turn report to HMRC. This could result in funds being held in the account until NCIS and or HMRC are satisfied to the validity of the transaction.

• To try and avoid this action it is advisable to keep the bank informed of any unusual transaction and provide them with documentation (purchase

> orders/sales invoices etc) and validation of the transaction before payment is received from the customer.
>
> • Unusual transactions may lead to a report to NCIS/Customs by your bank even where the transaction is innocent; e.g. sending money back from where it came. To ensure suspicions are not raised, as a precaution it would be wise to send a written explanation to the bank with documentary evidence before making such a payment.
>
> **14.7 Too Good to be True Offers**
>
> • During the course of each day a busy trader will receive offers which are too good to be true.
>
> • It is quite likely the offer is just a wind up in order to stimulate the traders interest and eventually offer proper stock at a proper price.
>
> • However, if it appears the `too good to be true' offer is a genuine offer and stock exists and is available then caution should be exercised as it could be an enticement into a fraudulent activity."

325. By email also dated 6 March 2006 Mr Sharma reported to Mr Deuss that the RMC had not yet started transaction monitoring but that he was putting the relevant procedure in place and that the process was to begin later that week. He also indicated that the RMC had begun to analyse a few sample cases:

> "The transaction monitoring has not been started yet for the randomly selected top 100 customers. I am putting down the procedure and the tracking mechanisms in place for the team regarding the same. Last week on a priority we were addressing the clearing-up of pending application to be online in terms of processing EDD for applications. We have started performing the "full EDD" (along with scoring, as discussed during your visit) for "all" applicants. We are also reviewing the site visit reports (that are available for all applications) and indicating the ones that did not have and. although the application was processed, we would require the site visit report in 90 days (but in no less than 180 days). One resource has been dedicated on the forensic analysis. As part of forensic analysis, he has been seeking underlying documentation for a few customers. The above was to provide you a snap-shot of activities performed in the last week. The plan is to start the transaction monitoring for randomly chosen top 100 customers by the end of this week. I will keep you updated regarding the progress made on this activity."

326. By email dated 18 April 2006 Mr Sharma reported to Mr Deuss again this time confirming that the review of EDD documentation was underway, that the RMC had suspended a number of accounts for third party payments and that transaction monitoring was the way to test the legitimacy of customers:

> "1) The customers send us documentation as requested and in fact they

> send us more documents (that would come under our request of "Any other document that supports the transaction") at times that enforces the authenticity of the transfer, for example the VAT verification of the supplier done by the customer before purchase of goods, consignment note that provides the tracking number of the goods shipped.
>
> 2) We have also identified some customers that instruct third party payments and we have proceeded to suspend their accounts right away and notified them to close the accounts.
>
> 3) In my opinion, transaction monitoring along with the rest of the analysis of the customer (EDD documentation, industry, projected activity, analysis that Ganesh has done in the last one week etc.) is the way to confirm the authenticity, economic value of the transaction and proceeding to review these documents is the only real way in which we can for a certainty confirm that a customer is a clean customer, making genuine transfers.
>
> 4) We are following the seven day rule, however, we made an exception to extend the deadline from this weekend to coming Thursday to suspend some of the accounts (in top 100 ranked customers) that had not provided the documentation due to the Easter holidays and their request for extension. Apart from this one exception, we are following the process and it is one of the fastest way for us to confirm the legitimacy of the transactions and obtain a complete view of the customer.
>
> 5) I am compiling the statistics on this process and I will send the MIS report that you have requested tomorrow - indicating number of customers suspended, closed, documentation provided - reviewed and confirmed, suspicious transactions based on documentation review etc.
>
> 6) We have also noted that if the customer is performing authentic, genuine transactions they do not have any issues in providing us the documentation in relation to the transfers."

(xxii) Site Visit Reports

327. By email dated 26 January 2006 Mr Deuss wrote to Mr Vallerey approving a new procedure for site visit reports. By email dated 2 February 2006 Mr Calderon wrote to other TWPS marketers complaining about their introduction and about AML and KYC checks more generally. The subject line of the email was "RE non telecom sectors bank distribution channels" and he stated as follows:

> "Hi Friends, You know what has been my position regarding this issues of EDD, Visit Reports, Risk Management, etc, from the beginning. But after to make more than 15 Visit Reports this week and get the feed-back from the clients, I really think that now is time to finish this discussions. Probably, some of you are surprised to read this from me, but I am going to explain why: If you compare the documents requested in the KYC and EDD with the ones that the real traders request to the new clients, you will see that they are totally different. The EDD has been designed by people

> that never meets a Telecom Trader and for sure they do not know nothing about "Shark Companies", "8 Payments System", 'Company Chain Structures", etc. They are only Risk Managers, sitting in their offices and their main function is to keep the Bank safe of legal problems. And I am 99% sure that the main functionality of the KYC and EDD is that. If there is a problem with any of our clients, the Bank is able to provide a full folder with all the documents required by the International Regulators and keep the licence without problems… For these reasons I have assume that FED and Visit Report are only "tools" to keep the licence of the Bank and it does not matter which type client we are working with. We do not have to forget where is based the Bank, because of its jurisdiction he can get clients that they will never open bank accounts in their own countries for the purposes that they are using FCIB, and this is nothing to do with Telecom Traders, It is for everybody. I really think that this is the environment where we are working and we have to deal with it in the safest way for the bank if we want to working in the company for a long, long, time... if we do not get a heart attack before."

328. Nevertheless, by email dated 16 February 2006 Mr Vallerey wrote to all of the TWPS marketers explaining the new procedure to them under the heading "Confirmation of the rating process in the Site Visit Reports" and encouraging them to comply with it:

> "As we want the Site Visits to be a very effective process, please find below a reminder of the codes to be used (and their implications) as part of the rating of the applicants or clients you visit:
>
> Green: Legitimate customers doing legitimate business. The standards are higher for high-risk businesses than they are for low-risk businesses. Within this Green category we can find the best managed companies as well as regular companies, but what they share is that their activities will not expose the bank. A Green rating means that no further investigation is triggered by Compliance on the basis of the results of the Visit Report (beyond the regular KYC and EDD).
>
> Amber: Based upon the judgement of the person signing the Visit Report, further investigation is immediately required, by TWPS, the Bank or a Third Party. This investigation will always take place. The decision on the nature of the investigation and who is going to perform it is made by Compliance. In the case of an application, approval of the application might be delayed.
>
> Red: The application should not be approved. In the case of an existing account, the account should be terminated immediately. Compliance will act upon the conclusion from the person having made the visit, without further review."

329. Mr Vallerey also explained that when an application was declined an "Early Warning List Entry" or "EWL Entry" should be registered against the applicant to prevent them obtaining an account "by the back door" and he gave two examples. However, he also

stated that although a flag would be raised, this did not necessarily mean that the applicant could not get an account or be associated with a company which already had an account with FCIB. On 10 March 2006 a conversation took place between Mr Vallerey and Matt Jones (who may have been a TWPS marketer) about the new procedure. The record of the call shows that the following exchange took place (although Mr Vallerey's name was misspelt throughout the transcript):

> "[17:11] Daniel Vallery: what is your request? [17:11] matt: I am happy to show him anything he needs [17:11] matt: ok [17:11] matt: i sent email about cancelled on arrival site visits [17:11] Daniel Vallery: pls call him on the phone to do so [17:11] matt: I am filling in the report like Antonio has done [17:12] Daniel Vallery: your email [17:12] matt: to say they are unco-operative [17:12] Daniel Vallery: I need to look into it [17:12] Daniel Vallery: pls send angeline and me the report before it is filed – tks [17:12] matt: should these be red or amber? [17:13] matt: also, where I am comfortable with the company but their due diligence is not very detailed, should that be amber or green? [17:14] Daniel Vallery: green, but you could suggest additional steps or info to receive. [17:15] matt: good [17:15] matt: ok [17:15] matt: what about red or amber with the no shows? [17:15] Daniel Vallery: if absolute lack of cooperation or avoidance tactiques = red [17:16] matt: ok [17:16] Daniel Vallery: not serious, genuine = amber [17:16] matt: ok that sounds sensible [17:16] matt: thanks [17:16] matt: I will call Lee."

(xxiii) March 2006: FCIB meetings

330. On 21 and 22 March 2006 meetings of FCIB management took place at Berg En Dal to discuss operational issues. On 29 March 2006 Mr Ulrich circulated a note which he had prepared on 23 March 2006. He identified three options for FCIB: "Continue Business As is", "Modify Business" and "Get out of banking business before being forced out". Mr Ulrich was severely critical of the internal operations of the bank and Mr Parker and his team described this memo as the other "bookend" to the facts upon which their case was based. Mr Ulrich's criticisms included the following:

> "9. FCIB "reputation" as banker to the telecom traders; ;while we may not be concerned about this reputation risk, clearly it troubles correspondents."
>
> "11. Record of high risk, problem clients:
>
> ▪ Horizon Bank
> • Red Sea Management
> • Blount et al.
> ▪ Sterling Trust
> • Telecom traders

> • "Jimmy"
> • Moustaffa and the £832,000 problem
> • Numerous insolvency court orders
> • Dutch Court Orders
> • Vanderbilt
> • Medical Risk Insurance
>
> 12. Weak Management — aside from JD, TD and TU we are very weak at the top. Time after time we witness instances of shallow thinking, poor judgment and lack of experience. We can't run a billion dollar business with one or two people running everything. How can we grow under this structure?
>
> 13. High Risk Clients are too Dominant:
>
> • Telecoms
> • MSBs (including unlicensed)
> • Use of cell companies to layer true identity; use by MSBs (we've not stopped it yet).
> • earning — not adequately understood by marketers or managed (See e.g. use of our payment instructions on gaming web sites and recent misunderstanding of what constitutes consumer payments via aggregators)
> • FSPs — e.g. Red Sea and Sterling
>
> 14. Telecom Traders
>
> • We have no evidence to support theory that a futures market exists.
> • If there is a cell phone futures market why don't we see one in the U.S., Canada or other jurisdictions that don't have a VAT regime?
> • How does the market justify billions per day in trading?
> • U.K. Government interest in stopping it.
> • Major UK banks won't deal with it."

(xxiv) The Risk Scoring Model (Final)

331. On 30 March 2006 Mr Sharma signed off version 1.0 of the Risk Scoring Model (entitled "Procedure to Review EDD Documents"). The final weightings were as follows: country (25%), business (25%), entity (45%) and product or transaction risk (5%). Within the category of business risk, the final weightings were as follows: high (100%), medium (75%) and low (40%). It is unclear from the document whether the T&C sector was still classified as medium risk for the purposes of the business risk category. But within the category of entity risk, the model also incorporated the following weightings for "General/Telecom Equipment business": "Corporate structure" (2%), "Age of the business" (2.5%), "Financial statement analysis" (7.5%) "Quality of Documentation, References & Ability to verify documents independently or using third-party sources" (10%) and "Coherence of business strategy and operations" (20%).

(xxv) Mantas

332. By email dated 12 April 2006 Ms Dominique Smith of BCB wrote to Mr Ulrich forwarding an email from Mr Mark Deuss stating that he had terminated the contracts for BSA Reporter for both banks and that he had purchased a licence for both banks for a new product called Mantas (which Mr Sharma had mentioned in his email dated 22 December 2005 (above)). Mr Sharma confirmed in cross-examination that BSA Reporter had only been used for a very short period of time. He also explained to me what Mantas was:

> "MR JUSTICE LEECH: Can you just describe Mantas to me. Was it a bespoke system? Or was it a sort of, you know, off the shelf kind of package that you could buy? A. It was a package that you could buy and integrate with your systems, so that it could monitor -- it was an ML and transaction monitoring system; and it could monitor and flag, based on certain rules, what the -- what would -- it could consider would be transactions you could focus on. MR JUSTICE LEECH: Right. And why was it superior to BSA Reporter? A. It's a great question. I do not recall that exactly, your Honour. MR JUSTICE LEECH: But you remember it being better, do you, at the time? A. I remember it being better because of two reasons. I think one I recall from Mark Deuss and Rajul that it was the number 1 transaction monitoring tool that was being used by a lot of European banks. MR JUSTICE LEECH: That was going to be my next question. Where did you get these packages from? So they were being used in other banks, were they? A. That's my recollection, your Honour."

(xxvi) Bell Pottinger

333. Under cover of an email dated 12 April 2006 Mr Ulrich sent a memo and some emails to Lord Bell of Bell Pottinger, the communications firm which was acting on behalf of FCIB. From the covering email the context appears to have been an allegation by Moon Beever that FCIB had leaked information about freezing injunctions to T&C traders. By email dated 18 April 2005 Mr Anthony Fisher of Bell Pottinger asked Mr Ulrich to explain why FCIB was so popular with T&C traders. By email dated 21 April 2006 he replied giving the following explanation and in doing so using the expression "closed loops":

> "1. FCIB offers a very easy to use, efficient on-line electronic payment system.
>
> 2. FCIB's system is particularly for businesses which operate in what is referred to as a "closed loop". That is where there is an industry (e.g.

> telecom traders, freight forwarders, etc.) which regularly and frequently trade with the same partners, if all members of the industry maintain accounts at FCIB, then "intra account" transfers can be made electronically, 24 hours per day, 7 days per week, even outside the trading hours of the Central Banks. For example, one cannot make an international US Dollar wire transfer when the Federal Reserve system is not open. But, if two clients both have USD accounts at FCIB, then our closed loop system allows transfers between them 24/7.
>
> 3. Telecom traders, being a high risk segment, have been pushed out of other banks. Because of our rigorous KYC and EDD procedures and our Risk Management Staff, FCIB has been willing to devote the necessary resources to managing the risk of high risk clients, which other banks have not.
>
> 4. The 80/20 ratio of income to clients is quite typical in our experience in banking as well as the other commercial activities in which our companies are engaged. To have a disproportionate percentage of revenue and income come from a small percentage of clients is common.
>
> 5. Telecom traders have been only one industry where FCIB's closed loop system has found traction. We are also finding that freight forwarders, web masters and money services businesses similarly find the system to be efficient for their needs.
>
> 6. FCIB does not charge premium rates for its services. FCIB's rates compare favorably to alternative ways of making cross border international payments.
>
> 7. While FCIB's $25 intra account transfer fee is higher than what other banks charge, it is less than the cost of an international wire transfer (which is really the service with which it competes). Considering the tremendous software developments costs incurred by FCIB, plus the significant marketing costs of creating a world-wide TWPS marketing organization (with offices in Holland, the UK, Bangalore, Kuala Lumpur, Miami, etc.) this intra account fee is reasonable."

(xxvii) Foreign currency transactions

334. By email dated 3 December 2005 Mr Bailey wrote to Mr Deuss informing him that Lloyds had complained to a customer called Corporate FX (which provided forex services to a number of T&C customers) that it no longer wished it to use its FCIB account. Under cover of an email dated 9 December 2005 Mr Vallerey sent Mr Deuss a memo headed "Choice of account and trading currency by the T&C clients". In it he proposed the following:

> "In order to decrease our dependency on GBP in the field of Telecoms and Computers Traders, we propose to apply the following rules straight away:
>
> 1) Every client operating in the Euroland will be asked to always open an

> account in Euros (mandatory).
>
> 2) Customers will be influenced to settle in Euros or $ instead of GBP: a. When the customer is not certain about the currency of the account, we will strongly suggest Euros or USD (indifferently). b. The promotion of Euros or $ can take place to favour this currency by indicating that payments can be processed quicker than in GBP. c. Euros/$ funding instructions will systematically be provided over the GBP ones and the benefits of funding in Euros/$ will be highlighted d. The support/project teams will be told to favour $ when speaking with clients.
>
> 3) For traders not based in the UK, we will insist to have them trade in Euros or Dollars, explaining to them that the high visibility of GBP transactions could negatively impact their ability to make trade related bank payments in this currency in the future and that it would be better to shift right now."

335. By email dated 19 December 2005 Mr Vallerey also wrote to Mr Mallaburn suggesting that the fewer the incoming transactions in sterling the less it was necessary for FCIB to depend on correspondent banks in the UK:

> "The less GBP incoming or outgoing transactions we have, the less we depend on correspondent banks in the UK. These banks happen to be in a country where the government is not very much in favour of telecom traders and we know very well that a government can very well influence the behaviour of banks. The combination of the currency in which the traders trade being from a country that does not like this type of trading is not good. Our objective is to reduce the outgoing or incoming volumes in this category."

336. In January 2006 Mr Vallerey produced a revised version of his memo dated 9 December 2005 but in the same or substantially the same form. On 2 March 2006 Mr Partridge of TWPS wrote to Mr Vallerey stating as follows:

> "just received a call from Mr Raj of Best Buy computers in Singapore who has expressed his joy at being able to perform a cross currency transaction at a competitive rate and at T+0 (thanks to Dennis help) The functionality of T+0 and competitive exchange rates internally will gain us further business and adds to the value proposition of using FCIB."

337. Mr Vallerey replied stating: "I do not understand the reason why we do this. I thought that we said that the special calls to Dennis were to be dropped? What is the strategy?" Mr Partridge replied stating that this was first occasion on which such a transaction had been successful, that FCIB had a functionality and that TWPS should use it. Mr Vallerey replied as follows inserting his responses into Mr Partridge's email:

> "JD does not want to do it anymore. The reason is that if we do it and actively shift clients away from GBP, it will not portray the bank in the right way with UK authorities (changing currency to reduce scrutiny... even though we know this is not the reason)."

338. By email dated 5 April 2006 Mr Vallerey wrote to Mr Deuss enclosing a draft letter to be sent to T&C traders informing them of changes in FCIB's terms and conditions. In the covering letter he stated as follows:

> "The approach consists of targeting the GBP accounts of the Telecoms traders throughout the world. This is consistent with the transactions where we currently incur additional costs and with our strategy of moving away from GBP because of our excessive visibility in this area. If the measure is implemented, we can expect an increase in EMEAA revenues of 27.7% (23.7% increase in overall revenues). We also know that Telecom traders have no option in the short term and that loyalty in not high in the industry. On the negative side we cannot ignore the fact the because of the implementation of extended due diligence (EDD and associated documentation, site visits, transactions checking) and of the time it takes to process applications, the image of the bank is not good in the industry at the moment. We also need to take into account the fact that even though no competitor has been able to make significant inroads and create any critical mass, the industry seems to be attracting a fair level of potential competitors at the moment."

(xxviii) The action plan

339. On 23 and 24 April 2006 meetings were held in Bangalore to prepare an action plan to deal with a number of issues: processing applications, lost documents in Curaçao, acknowledgement of receipt of parcels, faxes and emails, duplicate or multiple requests for the same information and poor coordination with compliance. The action plan identified a number of difficulties between the RMC and the TWPS marketers but it also proposed a number of solutions. For example, it provided that from 1 May 2006 it would be mandatory to complete a site visit report ("**SVR**"), that no application would be processed without it and that from 2006 Q3 an annual review was required for each customer including a new site visit. Mr Sharma was enthusiastic about this plan in cross-examination:

> "Q. And compliance is listed on page {F/1384/3}. Again a whole source of -- a whole list of problems. A. Your Honour, actually, I think this is a great document, which shows that we were reviewing all the issues that came up. You set up procedure and you do not expect it to work seamlessly out of a box where you have a team, where you have hired new people,

> you're training them up, the volume of applicants is increasing. And it's great that, you know, showing this document -- thank Mr Parker. We were very clear of the problems we had, but also there are solutions and that we were learning and improving through that. So, again, I'm not worried or perturbed by seeing this. It's literally any operational activity does not start by being 100%. And if you are able to -- the first thing is identifying the problem. That's only when you can solve it."

(xxix) April 2006: The TWPS meeting

340. In April 2006 the quarterly meeting of the TWPS marketers took place. It is likely that Mr Sharma and Mr Ganesh were present because the list of action points from the meeting referred to them both. There is, however, no reference to Mr Deuss. Mr Parker took both Mr Sharma and Mr Ganesh to the following extract from the list of action points:

> "Progress review
>
> The current level of activity can be summarized as follows:
>
> - $ 11.6 million revenue for the first 3 months in 2006
>
> The yearly trend is $50 to $55 million (profit target = $25 to $30 Million)
>
> - 85% of the income is derived from GBP accounts
>
> - 80% of the revenue is derived from traders involved with an element of T&C trading
>
> Most of the income is eBanking related, ExactPay lags
>
> Our e-banking activity is almost exclusively in the high risk segment
>
> TWPS payment engine depends on FCIB having access to the clearing banks. There is 0 tolerance for reputational risk. The policy is to only take on board legitimate clients engaging in legitimate business."

341. The list also stated that the main issues which TWPS was facing were "managing reputational risk", "maintaining and managing our correspondent bank relationships" and "reduce our dependency upon one particular source of income". It then stated: "Our objective is to grow our business in the highest contribution sector (cross border multicurrency global payments) while managing the reputational risk and correspondent bank relationships." It continued as follows:

> "Whilst the position of the UK banks was to decide that they could not manage the risk associated with the Telecoms wholesale business, FCIB's position is that it can manage the risk associated to this industry and will use its position in this industry as a launch into the other international trade segments.

> Maintaining our presence in the T&C market is important. We cannot pull out of the market solely to absorb the applications backlog and to weed out the bad accounts. These actions need to take place in parallel."
>
> "- The issue is to remove any "bad accounts" while preserving the economic situation of the bank.
>
> - We initially brought clients on board who should not be with the bank. Our challenge is to weed out these accounts.
>
> - FCIB has become the bank of the Telecom traders. Because of the negative image of the Telecoms, this results in a negative image for FCIB. Any bad transaction or bad account has a negative impact on the bank.
>
> - We always need to validate the economic basis for the existence of the activity of the client, when visiting the client.
>
> With the current pursuit of a good client base and with the current level of activity, we can be more discerning about whom we deal with.
>
> - Other banks are following the same path as relates to extended due diligence (the Citibank application is a very detailed questionnaire, and it takes 3 months to get the account).
>
> - The role of the marketer is essential in the initial screening of the customers. If there is any doubt, it is better not to initiate the relationship (legitimacy of the client and its business)."

342. Under cover of an email dated 11 May 2006 Mr Vallerey sent a memo to Mr Deuss intended to summarise a discussion between them about "the rules that could apply for the bank to consider applications from Telecoms and Computer traders, when the company is more than one year and less than three years old." The memo itself contained detailed requirements for account opening and transaction monitoring. But it also referred to the "closed loop network we created for the industry":

> "The current rule is that no T&C application will be processed unless the company can provide accounts (audited or management accounts depending on the jurisdiction) for 2004 and the following years or unless the company is directly related to an existing account (sister companies). This approach is required from a risk management perspective but we need to leave the door open for some absolutely legitimated companies in order (i) to allow important but young players to join and reinforce the de facto closed loop network we created for the industry and (ii) to prevent such key players from being instrumental in the creation of a competitive hub.
>
> 1. Full documentation set for High Risk Applicants (KYC and EDD). In-depth EDD documentation if required by the Bank.
>
> 2. Satisfactory Kroll Phase 1 and Phase 2 Audit + Phase 3 Audit if required based upon the results of the initial Audit. The cost for such Audits will be fully paid for by the Applicant, in advance. The contents of the Kroll Audit are detailed below. A similar Audit program might be put in place with

> another bank approved security firm (RISC Management).
>
> 3. During the first year of operation of the account, all the outgoing payments made must be intra-account transactions. There will be no restriction on incoming transactions.
>
> 4. During the first year of operation of the account, the account holder must provide full transaction documentation a week maximum after the transaction has taken place (this comes on top of the Bank's real time Transaction Monitoring programme). This applies to all the transactions (incoming and outgoing). As a reminder, the current set of documentation to be provided for each transaction includes:
>
> Purchase Order sent to Supplier
>
> Goods Inspection Report
>
> Purchase Invoice from Supplier
>
> Purchase Order from Buyer
>
> Sales Invoice to Buyer
>
> Shipping Instructions to Freight Forwarder
>
> Stock Release Instructions to Freight Forwarder
>
> Proof of Export (if applicable)"

343. By email dated 26 May 2006 Mr Deuss wrote to Mr Sharma copying in Mr Ganesh, Ms Deuss, Mr Vallerey and others. The subject line of the email was "Various Compliance issues" and later that day Mr Deuss forwarded it to the TWPS marketers. He stated as follows:

> "I refer to the e-mail from Daniel Maurice-Vallerey copy of which hereby attached. After consultation with Tim, we hereby adopt the policy that there is no need to ask applicants for evidence of the Source of Funds other than the client's Declaration itself when the amounts are below $10,000. In the case of the Hong Kong company, we should not hold up the approval of the application if the only outstanding issue is the source of funds of $300 paid in capital. A similar rule applies to the application of Ideation Hotel, already an existing client of our bank, involving the GBP1,000 in the ICICI account statement. Please pay close attention to the feedback we get from the market, to help us develop sensible rules in the interpretation of our KYC requirements and when in doubt, ask Tim or undersigned."

(xxx) Mr Ulrich's memos

344. On 17 June 2006 Mr Ulrich sent a memo to Mr Deuss headed "Review of 5 recent KYC/ EDD Reviews by RMC". He stated that according to Mr Ganesh, Mr Deuss had approved the risk ranking of the T&C sector as medium risk and that T&C customers had been treated as medium risk in the risk assessment sheets completed by the RMC. In the margin the memo is annotated: "Change to High Risk". In his review of the five files Mr

Ulrich concluded that only two files "look OK". Mr Parker also described this memo as a "bookend" to the events upon which the Claimants based their case.

345. On 23 June 2006 Mr Ulrich sent Mr Deuss a memo setting out his observations on the RMC operations after a visit to Bangalore. He made a number of criticisms of the management structure including the comment that Mr Ganesh was the de facto CCO not Mr Sharma and directed both him and the RMC staff. He continued as follows:

> "• While we have over 4,000 clients, most of these continue to be telecoms (over 3,300 by Ganesh's estimate). Moreover, we are not seeing a diversification. Most of the new account applications continue to be from telecoms. The applicants often state they are engaged in textile or other businesses so they pass KYC/EDD. But once the account is opened it is evident they are telecoms.
>
> • Ganesh and Saurabh are overwhelmed with the task before them. Typical work days are from 10:30am till well after midnight. They both say their spouses/families are complaining that it is not worth it. Both seem loyal and dedicated, and neither hinted at leaving. They are both enjoying the challenge but clearly are subject to pressure at home. I know they are well compensated, but without some balance in their lives you may find trouble down the road."

(xxxi) UBS

346. In September or October 2005 FCIB opened a correspondent account at UBS AG ("**UBS**"), the Swiss Bank. On 4 November 2005 a meeting took place at the Stamford branch of UBS at which Mr Deuss, Ms Deuss, Mr De Wijze and Mr Farag met Ms Susan Stadeli, a Director of the Global Services International division. A UBS attendance note of that meeting records as follows:

> "We have gained a favorable impression of the management team as. well as their systems. We have also been assured that their staff is regularly trained to keep up with the ever changing regulatory environment as well as the new system functions and applications. The Compliance officers are continuously visiting the staff in Curacao as well as Bangalore where the respective KYC, EDD and exceptional reports are reviewed and investigated. As a matter of fact, the compliance officer is about to spend two months in India for this purpose.
>
> The frank and open exchange previously experienced with Mr. Deuss, President and owner of the Bank, was also evidenced with our hosts during our today's discussion. They are fully aware that they cannot allow themselves to be remiss in maintaining the highest standards. They realize that any mishap on their side will affect their correspondents and it would

> be to their detriment if a bank like ours would cut off their access to the various international payment systems."

347. From the end of 2005 Mr Deuss intended to "migrate" customers to UBS. In practice, this meant that FCIB would route electronic payments made by those customers to external accounts (known as "**wire transfers**") through FCIB's correspondent account at UBS rather than through its correspondent account at the Dutch co-operative bank, Rabobank. By email dated 23 December 2005 Mr Vallerey wrote to Mr Deuss to inform him that 36 T&C traders had been identified for this purpose:

> "Further to your request earlier today, please find attached the first list of 36 selected Telecom Traders sent to Ganesh, as per his request, for their outgoing transactions to be routed via UBS (password = Champagne). The following Marketers have provided clients for this list: Kevin Bullman, Antonio Calderon and Frederic Vernet. We will send other selected Telecoms Traders to Ganesh as soon as we get the related input from the other Marketers."

348. However, by early to mid-2006 the proposed migration of customers to UBS had also placed an additional burden on the RMC. By email dated 11 May 2006 Mr Deuss wrote to Mr Ganesh with an urgent request:

> "I need your urgent input as to the incoming GBP wires for certain clients which are immediately followed by corresponding outgoing wires. I am meeting with UBS in New York on Monday and this is a pattern we need to discuss with them before hand and thus the urgent need for this information. I also need your urgent advice on the status of revalidation of our entire GBP customer base. We must be absolutely certain that we will present UBS both for GBPs, Euros and US dollars with squeaky clean customers only."

349. By email also dated 11 May 2006 Mr Ganesh replied setting out his analysis of the wire transfers of customers. He stated that there were less than ten customers whose pattern of trading was to receive a wire transfer and then transfer the funds out within 24 hours and that almost all incoming wire transfers were followed by an intra-account transfer. He continued as follows:

> "With regards to migration of the customers from Rabobank to UBS:
>
> 1. We have created a list of customers making wire payments using Rabobank
>
> 2. The list has been prioritized based upon the no. of outgoing wires being sent by the customers.

> 3. The initial focus is on customers from United Kingdom (approx. 700 active customers from UK who are making outbound transfers).
>
> 4. The customers have been allocated to the RMC team with a view to: - Ensure completion of EDD (if not done already) - Analyze site visit report (if available) - Review credit rating (Experian) - Review transaction statement for known fraud patterns (I have trained the team on this as I would be traveling next week to UBS Zurich (15th to 19th) and then to NBOC - 23rd)."

350. By email dated 22 May 2006 Mr Ulrich wrote to Mr Sharma about delays in filing MOT Reports and Mr Sharma replied dealing with this issue. On 25 May 2006 Mr Sharma and Mr Ulrich had the following exchange:

> "I'd like to talk by phone briefly. I sense that you and the RMC team may becoming overwhelmed with the burden of work. While I am impressed with the quality of the work I see, I also am seeing a pattern of increasing delays in getting things done. If this is a real (and not imagined) problem we should identify it, discuss with JCMAMD and work on a solution. We can not afford either a pattern of ongoing delays or that you and the team become burned out."
>
> (**Ulrich** to **Sharma**)
>
> "1) Migration of customers from Rabo bank to UBS Zurich => Part of the team is working on a large number of UK customers and ranking /reviewing them on the following parameters to ensure if we could move them to UBS or do we need to suspend/close them: EDD review, Site Visit Review, Account Statement Review, Transaction Monitoring Review, Experian Credit Rating of the customer(s). While all of them were aware of how to perform the EDD/Site Visit Reviews we had to spend time in training them on concepts of account statement reviews particularly with trying to spot patterns of money-in/out, third party transfers, UK exporters not paying their suppliers for the VAT amounts etc so that they could independently review customers on all of the above factors.
>
> 2) Sudden deadline imposed to shift the Miami customers at the same time to UBS NY which will be done on a similar review process as per above. We had to plan our existing resources to work on this full-time and hand-over their current follow-up EDD cases to other team members.
>
> 3) Amex not processing our wires suddenly implied we have to daily (until we shift the customers to UBS) go through each wire and determine to return the funds (not process the wire), or route via UBS or compliance performs Transaction Monitoring on these wires to determine to route/return the wires.
>
> 4) The KYC team is fairly new and so are the three new people in transaction monitoring who have joined us. With the above pressures, we also need to clarify the issues they come-up with, train them and provide them guidance, resources/tools to perform their tasks etc. There are currently a large number of escalations from our teams/marketing teams

> (to try and have an application re-reviewed etc.) which all adds-up to absorb the time.
>
> These are not excuses but I am trying to give you a picture of what the team is busy with, and why currently we are facing delays."
>
> (**Sharma** to **Ulrich**)

351. On 7 June 2006 Mr Ganesh sent a memo to Mr Deuss copying in Ms Deuss and Mr Sharma (amongst others) on the topic of "migration of customers from Rabobank to UBS". He stated that FCIB had about 100 customers ready for migration on 12 June 2006. He also stated as follows:

> "The high level plan to migrate the customers from Rabobank to UBS in eBanking is as follows:
>
> 1. We suggest that we use Hypo bank to route all payments in SEK and JPY (as they are insignificant).
>
> 2. We use UBS for routing GBP and EUR payments (in addition to USD).
>
> 3. The payments in CAD would continue to be routed via NBOC.
>
> 4. We continue to use UBS Zurich for routing payments in CHF (they are very few in number)."
>
> "The focus of the initial RMC exercise is on all the UK customers (for their possible involvement in VAT fraud — 700 customers) and the top 160 customers. We would finish our analysis by 17th June to finalize migration of these approximately 160 customers and about 450 UK customers.
>
> We also recommend that the 820 customers doing less than 100,000 GBP be migrated to UBS. Although the RMC exercise has not been completed on these customers, it is essential that we move them to UBS to avoid unnecessary operational errors/issues. I believe that we are unlikely to get Correspondent bank queries on such customers. We plan to run daily reports to ensure that these customers do not exceed the amount thresholds (100,000 GBP)."

352. By email dated 21 June 2006 Mr Vallerey wrote to the TWPS marketers copying in Mr Sharma and Mr Ganesh. The subject line of the email was: "fine tuning of the transaction monitoring process following the shift to UBS". In the body of the email he stated as follows:

> "The shift from Rabo to UBS for clearing of Euros and GBP transactions and the fact that straight through processing at UBS can only take place for clients who passed EDD and Transaction Monitoring resulted in delays and problems for our clients. Indeed, when the client is not vetted for UBS, the transaction is systematically investigated and the transfer does not take

> until the required documentation has been provided and reviewed. Clients who are investigated and do not meet the requirements for UBS processing will have their accounts closed as we no longer have a solution to process their transactions (as an indication there were 14 such notifications sent since the shift to UBS for USD, a month ago).
>
> At the moment, 875 clients are UBS grade, 2200 clients require systematic transaction monitoring (T.M.). Since the shift (Friday) 301 outgoing transfers were made by 202 clients. Out of these, around 50% are from UBS grade clients. The rest had to be subject to T.M. This situation created a lot of client related problems."

353. On 29 June 2006 Mr Vallerey gave a presentation to TWPS marketers in which he set out TWPS's corporate objectives on Slide 3 and its activities on Slide 4, which stated as follows:

> "The business of TWPS is to: (1) directly provide information and make prospective clients of FCIB and prospective members of the ExactPay Global Payment System, aware of the Financial Services; and (2) to develop a network of intermediaries who, in turn, may make interested parties aware of the Financial Services."

354. The Claimants pleaded this slide as evidence that the role of TWPS was to onboard customers of FCIB. Mr Vallerey went on to deal with TWPS's collaboration with FCIB and its compliance requirements in Slides 7 and 8:

> "Transworld Payment Solutions Collaboration with FCIB
>
> • TWPS payment solutions powered by FCIB
>
> • FCIB want to make available the best platform for international payments
>
> • FCIB's platform is based upon three equally important pillars:
>
> • Second to none international payments solution,
>
> • First class customer service,
>
> • Effective compliance, ensuring that the integrity of the bank is preserved while providing its clients unfettered access to the financial networks and global trading community.
>
> Transworld Payment Solutions FCIB Compliance requirements
>
> • To avoid that FCIB becomes a victim of illegal activities and to protect the reputation of the bank while preventing the illicit use of its banking services, FCIB has adopted ever more stringent policies and procedures to "Knowing Customers" and "Monitoring of Transactions" to detect suspicious activities in a timely manner.
>
> • To this end, FCIB will not be a party to, or in any manner process funds which may be proceeds of unlawful activities.

> • FCIB's Risk Management and Compliance processes include:
>
> • To confirm the legitimacy of its customers and their activities through a rigorous account application process, including strict information verification procedures
>
> • Real time monitoring of customer payments against expected transaction profiles
>
> • To request transaction documentation for selected payments
>
> • Compliance audits at the client's place of business"

355. On 3 July 2006 Mr Vallerey followed up with an email in which he stated that: "This is day one of a new phase in the life of TWPS and FCIB." He also stated that the new strategy involved: "Methodical, dynamic and aggressive on-going review of the existing client base" and "Starting July 1, the sole focus is on Low Risk accounts and we are not interested anymore in pro-actively pursuing High Risk accounts." Finally, he informed the marketers that they would be receiving a new definition of High Risk customers in the next few days which included the T&C sector.

356. However, by the beginning of August 2006 UBS had informed Mr Deuss that it was terminating the correspondent relationship. On 7 August 2006 a meeting took place between Mr Roland Bandelier and Mr Deuss in New York at which Mr Bandelier explained the reasons for the decision:

> "**J. Deuss**: Started the meeting by bluntly asking "what happened and how did we get to where we are with our longstanding relationship"? He concluded that it must be related to the telecom payments but he emphasized several times that he has been extremely open and informative with us. He mentioned many times that if we had any problems with the payment activity that we should let him know. He is extremely concerned that the next bank is going to ask 'what happened" to the UBS relationship?
>
> "**B. Bandelier**. Reiterated that what triggered the decision is mainly related to the clearing business — from an operational point of view things worked quite well but Mr. Deuss needed to recognize that his payment business/client segment is being considered as "high risk". We received a great deal of feedback, directly and indirectly, and people were asking as to why were we doing that type of business. We received certain anonymous messages informing us that the VAT payments were very high risk. This action triggered a rigorous review by our Risk Committee that overseas [sic] these issues. The committee is composed of very high executives of our bank, led by compliance and their job is to regulate and protect our reputation because any negative news would have a dramatic impact on our business. Their decision was taken after a very thorough review of FCIB files of information. It is also not a secret that there are

> other banks in the market such as the National Bank of Canada who do not feel comfortable about FCIB's clearing business. We, at UBS, never implied or said that there was anything illegal, the question has always being "can you adequately control what you do with your clients?" When analyzed independently within our own bank, we came to the conclusion that it is not a business we can support due to its high risk and that it was a matter of time before it hit the newspapers. Other side issues came up such as the IPOC Fund which has aggravated the situation. That is the foundation of our decision. The recent Vance report also shows some weaknesses that FCIB needs to work on."

(xxxii) HMRC

357. By letter dated 6 July 2006 Mr Ian Watson of HMRC wrote to Mr Deuss suggesting a meeting to discuss potential cooperation and setting out the kind of information to which HMRC would want access. On 7 July 2006 that meeting took place at which Lord Bell and Mr Fisher of Bell Pottinger met Mr Watson and his colleagues from HMRC. The minutes of the meeting record as follows (and "LTB" is a reference to Lord Bell):

> "LTB: opened the discussions by explaining that he had acted for John Deuss (JD) on various occasions for at least 10 years. The reason for requesting the meeting was that JD was concerned about his banking reputation due to the continual closure of his corresponding accounts. FCIB would be unable to operate if it was not able to get a corresponding account. Due to this JD would like to offer assistance to HMRC re MTIC fraud but has been frustrated that HMRC lawyers have been communicating with him and has therefore not been able to gain direct access to the appropriate people in HMRC. JD is not involved in MTIC fraud and would like HMRC to accept that he is a fit and proper person. This was the reason JD had hired LTB and he in turn hired Penumbra."
>
> "LTB: was aware the JD had a "chequered history" and was named and associated with breaking oil sanctions. JD has a significant oil business called Transworld and FCIB was initially set up to deal with his oil transactions. JD also set up an extremely effective ebanking system. JD would like HMRC to know that he is legitimate. He would also like a reference from us so that he could prove to his corresponding banks, that he is an honest businessman. JD would also like to know whether HMRC would like to prosecute him."

358. Mr Watson informed Lord Bell and his colleagues that HMRC wanted unfettered access to FCIB. By memo dated 13 July 2006 Mr Ganesh and Mr Sharma wrote to Mr Deuss answering queries raised by HMRC and by letter also dated 13 July 2006 Mr Deuss wrote directly to HMRC providing that information. He began his letter by setting out the background to this information:

> "By way of background, about 2,300 of FCIB's existing accounts would fall into the category of Telecoms/Combined Technology/Computer Traders. Approximately 60% of these accounts are in the UK. More than 280 Telecom accounts are presently under suspension/closure either because of Court Freeze Orders or our own compliance requirements. Moreover, more than 1,000 applications are presently pending but have not yet been approved and the vast majority are unlikely to meet our current KYC and EDD requirements. FCIB may have unwittingly become a banker to "carousel VAT Fraud" which is hidden within the market segments referred to hereabove and recognizes that the proportion of illegal to legitimate businesses within these sectors is subject to debate. Whatever the opinions on this matter, FCIB has a clear policy with respect to any illegal activity using its accounts and continuously enhances it KYC and EDD standards and requirements to ensure that its policies on KYC and AML are fully met. Our business philosophy is only to do business with "legitimate clients engaged in legitimate business". Making those distinctions has become an increasing challenge for us and all bankers."

359. By letter dated 3 August 2006 Mr Watson wrote back to Mr Deuss stating that after taking legal advice, he did not consider it appropriate to continue or extend the relationship between HMRC and FCIB. By letter dated 8 August 2006 Mr Deuss wrote to Mr Watson expressing his disappointment. At the end of his letter he stated as follows:

> "Accordingly, I wish to inform you that we have taken the decision to discontinue providing banking services to clients which are engaged in what is known as the telecom and computer trading sector. We will be giving notice of this decision to our clients and we anticipate that within a short period of time all of their accounts with us will be closed. In this process we will continue to apply our strict compliance rules and any suspicious activities will be reported to the Netherlands Antilles MOT with the specific request that the content and supporting documentation be forwarded to the UK SOCA for forwarding and dissemination to HMRC, if we think that such materials may be of benefit to HMRC."

(xxxiii) Western Union

360. On 7 August 2006 Mr Kornitzer met Mr Marcus Cudina and Mr Wolfgang Fenkart-Froeschel of Western Union International Bank ("**Western Union**") in New York. In a memo dated 9 August 2006 he wrote to Western Union (copying in Mr Deuss and Mr Ulrich) stating that there was a significant business opportunity in "leveraging" its brand and global presence with the knowledge, expertise and infrastructure of FCIB and TWPS. The Claimants pleaded the following statement as evidence that the role of TWPS was to onboard FCIB's customers:

> "TransWorld Payment Solutions and TransWorld ICT Solutions (referred globally as TWPS) provide the development, deployment, hosting and marketing of products and services designed to expedite the processing of electronic global payments. TWPS, in conjunction with FCIB, offers a complete multi-currency transaction solution that makes cross-border payments both simple and secure."

(4) The prevalence of MTIC fraud

(i) Was there a legitimate T&C sector?

361. Based on my findings in section G (above), the breaches of duty which the MTIC directors committed all took place between February 2005 and June 2006. The Claimants adduced no evidence to prove just how widespread MTIC fraud was during that 17 month period and the contents of the Committee Report was the only evidence before me apart from the anecdotal evidence illustrated by the contemporaneous documents. HMRC gave evidence to the Committee that in the financial year 2005 to 2006 the scale of MTIC fraud was £3.5 billion to £4.75 billion. Given that this financial year falls evenly in the period with which I am concerned, I find that between February 2005 and June 2006 MTIC and carousel traders defrauded HMRC of approximately £5 billion to £7 billion.

362. On 10 November 2005 Mr Vallerey sent Mr Deuss the email at [298] (above) in which he attempted to analyse the T&C sector. The Claimants recognised the importance of this email by pleading its contents but contended that Mr Vallerey had provided no economic justification for his conclusions. They also pleaded Mr Deuss's email dated 15 November 2005 in which he asked Mr Vallerey to follow up his analysis but contended that Mr Vallerey failed to obtain any written submissions from market consultants or accounting firms which supported his conclusions.

363. Mr Thanki and his team disputed this and drew my attention to the email chain passing between Mr Vallerey and Mr Grandin on 15 November 2005. But neither of the documents which Mr Grandin sent him related to the legitimacy of the grey market or the prevalence of MTIC fraud and by email dated 17 November 2005 Mr Vallerey wrote to Mr Grandin stating that he would add them to a database in Bermuda. This appears to have been the limit of his attempt to obtain further expert analysis.

364. The Claimants described Mr Vallerey's email dated 10 November 2005 as a self-serving document upon which I should place little weight because it implied an overall market

of £24 billion and this was a very low estimate. In his oral closing submissions Mr Wright took me to a spreadsheet headed "EB Customer rankings" and recording the transactions on the accounts of 2,263 companies during March and April 2006 in order of volume. He drew my attention to row 237 where @tomic was ranked and pointed out that it recorded a total volume of transactions of £204,964,906.37. Mr Wright submitted that this demonstrated that Mr Vallerey's figures were completely unreliable.

365. Mr Parker and his team also submitted that Mr Deuss recognised "the wholly unsatisfactory nature of DMV's 10 November email" because he asked Mr Vallerey to obtain written evidence from market consultants and accountants to support the economic justification which he had given and Mr Vallerey never obtained such any external support for his analysis: see Cs, O347.

366. Mr Thanki submitted that Mr Vallerey was correct and that there was a legitimate T&C sector. He placed particular reliance on a number of documents submitted to the Committee by the FTI, PwC and the Law Society. He also relied on the following passage from the oral evidence which the Committee received from a number of witnesses:

> "**Q285 Chairman**: Good morning, to you all, and may I in particular welcome Angela O'Hara from Vodafone, Dr Mike Cheetham from Bond House Limited, and Fred Howarth from the Federation of Technological Industries. You are aware that we are looking into the question of missing trader fraud and we would like to ask you some questions. There are three of you so I am not going to invite each one of you for a statement; your submissions have given us a start and our questions, I am sure, are going to elicit the things we want to know. Can I begin by asking all of you, what has caused your industry to be targeted by MTIC fraudsters? *Mr Howarth*: If I can begin on that, I think our industry is typical but not unique in being targeted in as much as we trade in high volume/high value commodities. Similarly the pharmaceutical industry has a very similar problem; if not as bad as our problem it is working its way towards that. So I would say it is the value of the product we deal in and the demand for the product. *Ms O'Hara*: I think I echo those comments; it is really high value/high volume. It is a very fast-moving consumer goods market and I think that is really why it has been targeted. *Dr Cheetham*: There was a legitimate market, and still is, which trades in chips and phones which are such high value. The grey market and parallel market, as it is called, are there to find excesses of product and fill demand for product, and it has to move very fast. If there are people building computer systems they need the chips the next day; if there is a production line running and it has run out of stock, those chips are needed for the next day. Thus it is a very fast, reactive market and this is ideal for the fraud."

367. I accept Mr Thanki's submissions on this issue and I find as a fact that there was a legitimate grey market in the T&C sector and that Mr Vallerey correctly identified it in his email dated 10 November 2005. I do so because Mr Vallerey's conclusion was supported by the Committee's own findings and the evidence which was given to them even though the report itself was not published until eighteen months later.

(ii) How prevalent was MTIC fraud in the T&C sector?

368. It is more difficult to assess the size of the legitimate market and to compare it with the volume of trading which was fraudulent. The only figures which were in evidence are those given by the Committee and Mr Vallerey's own analysis in his email dated 10 November 2005. The Claimants submitted that his figures implied a total annual grey market of £24 billion and I accept this submission. If this total market is compared with the £3.5 billion to £4.75 billion losses which HMRC calculated for the 2006 tax year, this leads to the conclusion that between 20% and 25% of the market was fraudulent.

369. Mr Thanki accepted that Mr Vallerey was referring to goods in circulation rather than to transactions in the market and that the same goods would have been traded several times in the legitimate market. He also accepted that Mr Vallerey had relied on the figures for 2005 and that the figures for 2006 would have been much greater. I agree with him. But once one makes that assumption it is difficult to draw any reliable conclusions from the available data. Even if one were to assume that goods in the legitimate grey market were traded two or three times each and that goods which were the subject matter of MTIC or carousel fraud were traded twice as often as good which were legitimately traded (or even more), this would not necessarily lead to the conclusion that most of trading in the market was fraudulent.

370. I am prepared to accept that MTIC fraud was widespread in the T&C sector. But I cannot be satisfied on a balance of probabilities that every trader in the T&C sector was engaged in MTIC fraud or even that more than one in two traders was a fraudster. I am prepared to extrapolate from the figures in the Committee's report and Mr Vallerey's email and to draw the inference that between a third and a half of T&C traders were fraudsters on the basis that total goods worth £24 billion were being traded in the market, that those good would be the subject matter of multiple trades and that goods which were the subject matter of MTIC fraud would be traded far more frequently that trades which were

genuine. In my judgment, this inference is one which is favourable to the Claimants. They could and should have adduced expert evidence in relation to this issue to establish that more than one in two traders was a fraudster and they could not realistically expect the Court to go that far without it.

(iii) How prevalent was MTIC fraud amongst FCIB customers?

371. The parties could not agree either about a number of basic facts in relation to FCIB's banking customers. In particular, they could not agree the number of FCIB's customers during the relevant period, how many were in the T&C sector and how many of those T&C customers were engaged in MTIC fraud. Mr Thanki and his team relied upon a number of internal records which contained the following data:

(1) *2004:* FCIB's eBanking statistics record that as at February 2005 FCIB had 1,468 customers of which 827 were corporate customers. A memo dated 5 July 2006 headed "Overview of Evolution of FCIB's Compliance History" contains a table which records that as at the end of 2004 FCIB had 205 customers in the "Telecoms", "Combined Technology" and "Computer" categories. I have assumed that all three categories made up the T&C sector and on that basis, T&C customers represented 13.96% of total customers and 24.78% of corporate customers.

(2) *2005:* FCIB's eBanking statistics record that as at December 2005 FCIB had 4,323 customers of which 3,204 were corporate customers. The table in the memo dated 5 July 2006 records that as at 31 December 2005 FCIB had 1,440 customers in all three categories and on that basis, T&C customers represented 33.31% of total customers and 44.94% of corporate customers.

(3) *2006*: A spreadsheet entitled "Frozen Accounts Summary" and dated 24 November 2006 records that when FCIB ceased to trade it had a total of 5,539 customers of which 2,978 were in the T&C sector. This represents 53.76% of FCIB's total customers. The table in the memo dated 5 July 2006 also records that as at the end of Q1 2006 FCIB had approved a total of 2,137 T&C customer accounts and that the total number of T&C customer applications and approvals was 3,182. These figures demonstrate that the number of T&C customers effectively doubled in early to the middle of 2006.

372. Mr Parker challenged these figures. He relied on a report dated 21 June 2006 prepared by Vance on behalf of Visa International Ltd on FCIB's systems and controls (the "**Vance Report**") and upon which Mr Bandelier relied at the meeting with Deuss on 7 August 2006: see [356]. On page 20 the authors stated that FCIB had 3,008 "account relationships" which were mainly concentrated in the T&C Sector. Mr Parker also relied upon Mr Ulrich's memo to Mr Deuss dated 23 June 2006 in which he stated that FCIB had over 4,000 client of which Mr Ganesh estimated 3,300 to be in the T&C sector: see [345]. Finally, he relied on the memo dated 13 July 2006 which formed the basis for Mr Deuss's letter to HMRC of the same date: see [358]. In that memo Mr Ganesh and Mr Sharma recorded that the total number of FCIB customers was 4,170 of which the total number of T&C customers was 2,570.

373. In my judgment, there was no real inconsistency between the figures upon which Mr Parker and those upon which Mr Thanki relied. It is clear from the eBanking spreadsheets (upon which Mr Thanki relied) that FCIB calculated the number of its customers in a number of different ways (and, in particular, by reference to accounts, clients and corporate customers) and these differences explain the variations between the figures. I adopt the figures upon which Mr Thanki and his team relied and which are taken from FCIB's internal records. I find, therefore, that between January and December 2005 FCIB's T&C customers grew from 13.96% to 33.31% of its total customer base and that between January and July 2006 FCIB's T&C customers grew from 33.31% to 53.76% of its total customer base.

374. These figures are consistent with the oral evidence given by both witnesses. Mr Ganesh gave evidence that when the RMC was set up, the primary focus was on MSBs (or Money Service Bureaus). Mr Sharma's evidence was that when he joined FCIB he did not remember the majority of accounts being T&C accounts but that later on in 2006 the majority of accounts had become T&C accounts. He accepted, however, that by April 2006 the T&C sector was providing 80% of FCIB's revenue:

> "Q. If we go back to page {F/1326/1}. We see, under "Progress review", consideration of the current level of activity. The fourth bullet point highlights the profitability of the T&C: "80% of the revenue is derived from traders involved with an element of T&C trading". And at the bottom of the page -- sorry, pausing there. You see this -- this identifies the economic imperative, doesn't it, not to weed out the fraudsters from the T&C sector that you've -- that FCIB is servicing? A. My Lord, I don't see

> how this shows that we should not weed out. This is an update being given -- and, again, I'm assuming Daniel Kornitzer and Daniel Maurice-Vallerey were both present in this meeting. They are both giving this update to Mr Deuss. Compliance is completely different and irrespective of what revenue those customers are bringing or applicants are bringing."

375. Further, the figures which I have adopted are consistent with Mr Vallerey's emails dated 28 April 2005 and 26 June 2005 which the Claimants themselves pleaded in support of their case: see [255]. The first email demonstrates that TWPS had 525 applications and 306 accounts in the entire B2B sector and the second records a total of only 20,000 booked transactions. Moreover, the Claimants relied on these emails as evidence that Mr Deuss was kept informed about the volume and nature of the transactions. These figures would have confirmed the 2004 figures upon which Mr Thanki relied and would have told him that although the trend was upwards, it was not significant by the middle of 2005.

376. The Claimants relied on a number of key documents in support of their case that whatever the overall position in the market, almost all of FCIB's T&C customers were fraudulent. In his oral closing submissions Mr Parker took me to four documents which span almost the entire period:

(1) On 1 October 2004 a meeting took place at which Mr Thanki and his team accepted that Mr Deuss was present: see [248]. Under the heading "Market Segmentation" the minutes recorded as follows: "Mobile Traders (UK) - due diligence contract that traders need to sign Telecom Eqpt (UK) - significant risk management issue in terms of potentially losing corresponding banking relationships - as these companies are basically evading VAT (value added taxes)".

(2) In early October 2005 a meeting of the TWPS marketers took place and following the meeting a list of action points was prepared. I have set out the relevant extracts from the version dated 21 October 2005 which was sent to Mr Deuss and Mr Thanki and his team accepted that he was either present or shown the note: see [291]. It recorded as follows under the heading "Risk Management": "The risks associated with Trading in general and Telecoms & Computers Trading (TCT) in particular are tremendous."

(3) On 2 November 2005 Mr Ulrich and Mr Smulders met Ms Frances Coulson and

Mr Richard Saunders of Moon Beever and Mr Potts of Blake Lapthorn: see [293]. On 17 November 2005 Mr Ulrich met Ms Coulson and Mr Saunders again: see [294]. His attendance note of the meeting stated: "UK lawyers advised that without FCIB this trade would be dead. They think FCIB has over 90% of this business."

(4) In his email dated 15 February 2006 to the NCIS (at [320]) Mr Knuckey of RISC Management Ltd stated as follows: "FCIB operates a global electronic banking platform and operates accounts, albeit a minor percentage of its total accounts, on behalf of approximately 90% of telecoms b2b traders in the UK."

377. Mr Parker submitted that the words "these companies are basically evading VAT" was a recognition by Mr Deuss that most, if not all, of FCIB's T&C customers were evading VAT. He also submitted that I should interpret the words "the T&C sector was based on VAT fraud" in the note dated 21 October 2005 in the same way. Finally, he submitted that I should accept as accurate the statement by Ms Coulson or Mr Saunders that FCIB had 90% of "this business" and that she or he was referring to those fraudsters engaged in MTIC fraud. He also relied on Mr Knuckey's email as evidence that Mr Deuss accepted that this figure was accurate.

378. I reject these submissions. I cannot be satisfied to the civil standard of proof that from February 2005 until June 2006 90% of FCIB's T&C customers consisted of traders engaged in MTIC fraud on the basis of four short statements in four documents and without any lay or expert evidence to support them. In particular:

(1) I attribute little weight to the statement made by a solicitor who was not called to give evidence. Further, Mr Potts (who was present at an earlier meeting) was called to give evidence about the meetings in November 2005 but he did not confirm that he believed this statement to be true in his witness statement or, indeed, explain basis for that belief. I see no reason why the Claimants could not have called the maker of this statement to prove their case or at the very least asked Mr Potts to confirm it.

(2) Further, it is unclear from the attendance note whether Ms Coulson or Mr Saunders was referring to the whole sector or the fraudulent element of it. It is clear that Mr Knuckey was referring to the whole sector in his email and he also told the NCIS that the T&C sector represented "a minor percentage of its total accounts". Mr

Parker and his team conveniently ignored this statement and tried to prove the opposite. This was, therefore, a clear example of the Claimants attempting to quote selectively from documents to prove their case.

(3) I also attribute little weight to the meeting note dated 1 October 2004. It was made at a time when FCIB had very few T&C customers at all and provides no reliable guide to the position between February 2005 and June 2006. I am prepared to accept that Mr Deuss told the TWPS marketers that T&C customers were evading VAT. But he did so in the context of a discussion about correspondent banking relationships. The natural inference (and the one which I draw) is that Mr Deuss was explaining to the marketers the position which HMRC was taking and why there was a risk of FCIB losing correspondent banking relationships if it moved into the T&C sector.

(4) But in any event, there is conflicting evidence from other sources. In particular, on 19 August 2004 Ms Bello wrote to her colleagues stating that PwC have not seen evidence to suggest that MTIC fraud was as prevalent as HMRC were suggesting and Mr Deuss's evidence was that when Mr De Wijze reported his conversation with PwC this was the first occasion on which he learnt about MTIC fraud: see [245].

(5) Mr Parker did not challenge this evidence (and I accept it). But he tried to play down the significance of Mr De Wijze's conversation with Ms Bello by submitting that the real emphasis of the conversation was that there was a widespread problem and that HMRC believed MTIC fraud to be prevalent. I also reject that submission. Mr Deuss may well have drawn the opposite conclusion and taken comfort from what Mr De Wijze had been told by Ms Bello. Indeed, he may have formed no view at all at this stage given that this was the first occasion on which anyone had told him about MTIC fraud.

(6) Finally, I attribute even less weight to the notes from the meeting on 21 October 2005. Although they state that the risk associated with the T&C sector was "tremendous" they also stated that "the number of these problem accounts is less than 1%". Mr Thanki submitted that the reason why the risk was labelled as "tremendous" was not because it was widespread but because the problem

accounts were "attracting the attention of the regulators". I accept that submission. Mr Thanki's interpretation of the document is more probable than Mr Parker's interpretation that MTIC fraud was widespread because Mr Parker could not explain the apparent inconsistency between the risk of fraud being tremendous and the number of fraudulent accounts being less than 1%. The debate about these documents illustrates the difficulty for the Court in trying to draw an inference about the prevalence of MTIC fraud from isolated statements in a small selection of documents which were created 20 years ago.

379. I am prepared to draw the inference that by June 2006 as many as one in two of FCIB's T&C customers were fraudulent on the basis of the anecdotal evidence in the documents that FCIB was attractive to many networks of MTIC fraudsters. But I am not prepared to accept that 90% of FCIB's T&C customers must have been fraudulent in the absence of any direct evidence to that effect. Again, in my judgment, this inference was favourable to the Claimants. They could and should have instructed an expert to analyse all of FCIB's T&C accounts and present the evidence to the Court and they could not realistically expect the Court to go any further without it.

(iv) Was the belief that MTIC fraud was prevalent in the T&C sector widely held in the banking industry?

380. The Claimants did not rely on any expert evidence or any documents in which any banks expressed the view that MTIC fraud was "prevalent" in the T&C sector or in which third parties reported that this was the view of the banking industry. Indeed, the only document to which I was taken in which the word "prevalent" was used, was Ms Bello's report of her conversation with Mr De Wijze in which she was describing the views of HMRC. Further, the key documents upon which the Claimants relied as evidence of the views held by the banking industry, invariably described the T&C sector as "high risk" rather than fraudulent. I refer, in particular, to Barclays' note of the meeting on 11 April 2005 which I consider below. I, therefore, dismiss this allegation.

(v) Did Mr Deuss know or shut his eyes to the fact that MTIC fraud was believed to be prevalent in the T&C sector?

381. I find that from early September 2004 onwards Mr Deuss was aware that there was a risk of MTIC fraud in the T&C sector and that T&C traders were using the sale of mobile

phones and computer components to defraud HMRC. I also find that he understood the basic method by which they committed MTIC fraud, namely, by importing goods into the UK, transferring them through a network of traders and then reclaiming unpaid VAT from HMRC. This information was provided to him by Mr Bailey in his briefing note dated 31 August 2004 and by Mr Vallerey in the press articles which he sent to Mr Deuss on 3 September 2004.

382. The real issue between the parties was whether Mr Deuss honestly believed that there were legitimate traders operating in the T&C sector when he was introduced to MTIC fraud for the first time and, if so, whether he continued to hold this belief until November 2005 (on the Claimants' case). His evidence about his understanding in August and September 2004 was as follows:

> "Having looked at the documents which I was sent by Victor de Wijze and Daniel Maurice-Vallerey they reflect my recollection of my understanding at the time which was that I was aware that there were issues with VAT fraud in the telecom sector but did not know it was a widespread issue. I understood that HMRC was trying to clamp down on the fraud by making legitimate traders equally liable with fraudsters, and also by pressuring UK banks to exit the sector. This meant that there were a significant number of legitimate telecom customers who were looking for banking services and that we could provide services to them so long as we had appropriate compliance procedures in place."

383. It was also Mr Deuss's evidence that he based his belief that there were a significant number of legitimate T&C customers on an analogy which he drew from oil trading. He gave the following evidence in Deuss 1 about his understanding in November and December 2005 (when he instructed Mr Ganesh and the RMC to carry out an analysis of a sample of FCIB's top T&C accounts):

> "When I reviewed the transaction patterns of the accounts, I recognised the trading patterns and economics as being similar to those of the oil markets, which I had more than 35 years of experience in at this stage. Oil and petroleum products were often traded in both physical markets and unregulated markets created by traders themselves, both of which were perfectly legitimate. In the unregulated oil trading markets, trades can be very large, and cargos of oil can be traded multiple times between a limited number of parties, often within days or hours in the case of intra-day trading. The trades would eventually be settled between traders directly, by offsetting the trades against one another. Further, since multiple trades could (and often would) take place for the same cargos of oil, the scale of trading would often be unrelated to product supply and demand

> economics. When I reviewed the transaction patterns of the accounts, I recognised the trading patterns and economics as being similar to those of the oil markets, which I had more than 35 years of experience in at this stage. Oil and petroleum products were often traded in both physical markets and unregulated markets created by traders themselves, both of which were perfectly legitimate. In the unregulated oil trading markets, trades can be very large, and cargos of oil can be traded multiple times between a limited number of parties, often within days or hours in the case of intra-day trading. The trades would eventually be settled between traders directly, by offsetting the trades against one another. Further, since multiple trades could (and often would) take place for the same cargos of oil, the scale of trading would often be unrelated to product supply and demand economics."

384. Mr Thanki and his team placed significant reliance upon the fact that this was not an explanation which Mr Deuss had come up with purely for the purposes of this litigation and that it was an explanation which he put forward contemporaneously. They placed particular reliance upon his email dated 16 December 2005 to Mr Sharma: see [311]. Mr Parker cross-examined Mr Sharma about this email at some length and he began by asking him about the context:

> "Q. Now, if we look at the -- if we look at the final full paragraph beginning: "We have now reached a point ..." Do you see that that? "We have now reached a point that there is enough transaction history for Telecom Clients that we can begin the process of validating in the aggregate the economic purpose of telecommunications equipment trading. Whilst it is recognized that active trading accounts demonstrate high volumes of turnover we need to examine if for individual clients over a sufficiently long period of time the economic purpose of their activity can be confirmed." Now, could you tell us what you would have understood by that. A. My understanding of this is that we -- "we" as in FCIB -- would have, by then, at this time, when Mr Deuss sent out this memo or this e-mail -- that we would have sufficient transaction history of some of these telecom traders that we could go and start reviewing their account statements, their overall financial transaction activity and then evolve transaction monitoring to see: was there an economic basis to do that transaction? That's my understanding. Q. And if we look at the bottom of the page, we see that: "Our review of transaction history should amongst others identify: "1. Turnover information "2. Profitability information". Now, that was 16 December. That review never took place, did it? Because you were told to review the freezing orders instead. Let me just ask that question again. A. Sure. Q. That review never took place, because Mr Deuss asked you to review the freezing orders and you were then focused on reviewing the freezing orders? A. Your Honour, I do not recall if Mr Deuss told me 'do not do this activity'. That's not my recollection. And I'll state what my recollection is. As far as I recollect, in December as well I think we got some freeze orders. And there was a pattern of missing

trader/carousel fraud that was mentioned in the freeze orders. And I did take it upon me to review those freeze orders to figure out: are there any patterns here that we could learn from? Is there an analysis that I could do? So that that could, in turn, apply to our compliance function and help us identify the -- I should say -- probable or suspicious telecom traders from the ones that we thought were genuine and -- which is why I took that analysis on. There's a second point here that, at this time, we were going back to do EDD documentation; and that itself -- for the customers, and we have catched up on this -- that itself was building up substantial documentation that we had to review that I did not think that -- that we should initiate another transaction monitoring exactly at that time. Plus I recall that I went back to Mr Deuss to ask for more resources, because definitely there was a need to expand the team. MR JUSTICE LEECH: Does this document go over the page? Or does it just finish there? It does. {F/886/2}. Are you coming on to the second page? MR PARKER: My Lord, in fairness, we can look at it, but I didn't have any questions arising out of the second page. There is obviously the reference then to Mr Sharma at the last paragraph: "[Mr Sharma] must review all complex unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose and should prepare a report." So, again, it's part of your parcel of -- you're to do this report based on the history of the trading to date. But, as you say, you've got many other things to do including, as we will come on to, the freezing orders? A. I -- your Honour, I do want to state that we did start this in March of 2006, if my recollection is correct. MR JUSTICE LEECH: Can you just tell me whether you actually understood how, at least in rudimentary form, carousel fraud worked at this stage? So you understood -- did you understand about chains of traders and that there would be a missing trader who -- who wouldn't pay the VAT? A. When this e-mail came out, your Honour, I did not understand that. And I do not think we had that understanding within the bank at that stage. But I do recollect I did an analysis of the freeze orders; and I do not recollect the exact date -- maybe it was end of December or early January 2006 -- where I highlighted how this process worked, how a missing trader -- there's a probable suspicion of somebody that would go missing. Could we identify it? And by March is when we automated some of this so that we could actually start doing focused review of some of these customers. MR JUSTICE LEECH: It's just if we go back to the previous page, {F/886/1}, I mean, what Mr Deuss is instructing you to do is to look at the underlying economic purpose of a -- A. That is correct. MR JUSTICE LEECH: But if you look at a single transaction, as you say, you will find the purchase order and the invoice and the payment. So it's only by -- if you're able to connect up a number of different transactions -- A. Exactly. You are correct, your Honour. But manually to do that we did not really have -- like, you could pick up customer and spend an entire day and figure out that there's no real pattern here and then go to the next. And therefore what -- and I recall Ganesh and I both worked on this -- Ganesh took the lead -- is we tried to automate how could we identify chain transactions and then later -- and then -- and I think it was April 2006, we also identified how we could get probable third party transfers. And this is something that we automated on the

> banking system. So, because we had the transactions and we had most of the transactions transacting with each other, we were able to automate some of this."

385. Mr Parker returned to Mr Deuss's email dated 16 December 2005. He suggested to Mr Sharma that futures or commodities trading was not an accurate comparison with the T&C sector because there was no volatility in price or netting off between traders. He also suggested to Mr Sharma that he unquestioningly accepted this explanation from Mr Deuss:

> "Q. And then if you go to paragraph 37 of your witness statement, which is {C2/1/13}. You say in the second sentence: "I recall from various investigations I did into the sector shortly after I joined ... that the business model of companies the telecom sector was broadly comparable to futures trading, whereby the company would not necessarily have physical custody of the commodity but would transact on its value in a futures market". And then you say: "ie, large volume of sales of small units, which made economic sense at scale". Now, large volumes of small units isn't the definition of a futures market, is it? A. So here with the small units I meant the size of the -- of the commodity, rather than the number of the commodities being traded. Q. And if items are being bought and sold on the same day, that's not a futures market, is it? A. In a way, it is, because what -- what this communicated was that the goods are exchanging hands and there could be shillings, pence, pennies worth of margins, but on a higher number of commodities which are exchanging hands. Although there isn't -- there's no physical exchange of that commodity that is happening. So that's why it was -- MR JUSTICE LEECH: It's often in a container somewhere in the middle of the Pacific or something? A. That's right, which was the parallel that Mr Deuss drew with the oil trading activity, that the oil is on a container somewhere and before it even lands it has already exchanged hands multiple times. MR PARKER: But the futures market makes sense because the contracts allow for movements in price before delivery. So you fix -- you fix a price to buy or sell and then the obligation to deliver is at a later date, and you gamble with what happens with the price in between, informed gambling? A. That's right. Q. But if you've got an item bought and sold on the same day there's no real time period, is there, for movements in the price? A. There is, because there is -- I am thinking the price will move here and somebody else is thinking the price will move here. So there is a relative appreciation of where the price will move and that's why there would be a buying and selling of that commodity. Q. But if you're speculating -- A. Yes. Q. -- you're speculating. You purchase an item. And then if you think the market is going to go up, you're going to hold on to it for a while, aren't you -- A. Sure. Q. -- before you sell. You would only immediately sell if you made a bad call and you suddenly thought the market has gone against you? A. Yes. Q. So you wouldn't have a pattern, would you, of the money always going in and out? A. It's not necessary that everything that we saw was

> always going in and out, but what we saw indicated that the traders were betting on the price and therefore it's changing hands. MR JUSTICE LEECH: Just following up on Mr Parker's point, isn't that the same volatility? You don't know, suddenly one day, having -- I mean, the oil price has plummetted over the last week, hasn't it, because of the announcement of the US government of the tariffs. But it's difficult to see the price of iPhones changing in the same way, especially if they've already been purchased by the initial trader in the chain? So it doesn't have the same volatility which means that you, can as you say, speculate on the futures market? Because you're looking forward, aren't you, to this price that it ultimately will be sold when, I don't know, coffee beans or sugar or oil is landed in Europe, let's say, or in the States. But difficult to see that in quite the same way with sort of mobile phones or chips because, you know, it's going to be some kind of cost plus, isn't it? There's going to be a cost to buy it off the manufacturer. And then there's going to be a profit to the middleman. So it's sometimes difficult to see how it's going to go through so many different hands, isn't it, before -- or why it would do before it reached the end-user? Mr Thanki took me to the House of Lords report, so there are some economic justifications, but it does seem to me a fairly -- it's not an exact analogy, is it? A. And again I'll repeat, this was our understanding at that time; and it was also -- we also based it off understanding that, from the time of ownership to the time it lands and it is sold there could be price movements in the market. And that's what we based it on, rightly or wrongly. MR PARKER: And you say it is your understanding at the time. It was Mr Deuss' understanding at the time, as relayed to you in the e-mail we just looked at? A. Yes. Q. But he's the origin of this hypothesis, isn't he? A. Our understanding was shaped by Mr Deuss' inputs, that is correct. Q. Because you've never worked in the oil markets, have you? A. No, I have not. Q. And Mr Deuss said that the trading where it's a futures market involves the netting off of the transactions. So you don't pay for each transaction, as it occurs. At the end of the month you look to see whether you've made a profit or a loss as against the person you've been transacting with and you only pay that amount. That's netting off, isn't it? A. I understand what netting off is, but I do not recollect this exact statement. Q. I think I would suggest that Mr Deuss told you this hypothesis in his December e-mail and you didn't challenge it or give it a great deal of thought; you just accepted it because it was coming from the top man? A. I would restate that. I wouldn't directly put it that way. I would restate that, my Lord, to say when we looked at the transactions, we thought that there are pennies being made off -- off the phones or shillings or whatever that may be. It kind of got confirmed, in a way, by what Mr Deuss was saying, that this is how he has seen it in the oil business so he can correlate it to that in the telecom business. MR JUSTICE LEECH: So to you it had a logic, did it? A. We had a logic, but we had no visible proof; but I would say -- we had no industry proof because we had not worked in these industries. So I would say, yes, the confirmation came from Mr Deuss, but we definitely had that logic."

386. Mr Ganesh also gave evidence about the commodities or futures analogy when I asked

him some questions about Mr Deuss's note dated 19 September 2005: see [286]. I put it to Mr Ganesh that Mr Deuss clearly had a good understanding of how MTIC fraud worked by that date. Mr Ganesh pointed out that Mr Deuss was dealing with two issues in his note dated 19 September 2005 and the following exchange then took place:

> "MR JUSTICE LEECH: I'm going to come back to this technical issue in a minute. But just looking at paragraph 3. Can you extract -- tell me something about the understanding in the bank of carousel fraud by the date of this memo. A. So this was around September? MR JUSTICE LEECH: Yes. A. So around September my recollection is that we had probably three or four freeze orders; and our -- and I think by -- I think close to -- my recollection is around end of 2005 we had nine freeze orders. So -- and I think the freeze orders started coming in, again my recollection is April, May, something like that, the first one or two freeze orders we got. And then around October, November -- MR JUSTICE LEECH: Slow down a little bit because the stenographer has got to take a note -- A. Sorry. I think the first two freeze orders were around April, May. And I think another few came in I think around October, November. My recollection is the overall numbers that we had gotten by end of December was around less than ten. And the -- there was of course trading going on in the accounts where the money was coming in and going out. But it wasn't clear what the modus operandi was and, like, which was legitimate and which was not legitimate. But the thinking always was this is similar to the oil trading -- Mr Deuss always referred to his experience in oil trading where people would buy and sell oil for very small change in price and they would sell it. And the idea was: okay, but we should get to the bottom of what's going on; we should establish the commercial viability and we should dig deep. Starting around October, I think there was a whole set of activity around trying to understand what these transactions are, beginning it was like one-off, where people looked at, okay, these patterns and tried to understand what the questions were, like asking for some documentation to understand what's going on. And then slowly that evolved into random transaction monitoring, to understand what the -- why transactions are happening. And in parallel around November, December we got, I think, like eight, nine, I think, freeze orders. And then we started looking into it in detail. That's when we understood this notion of third party payments, which was a big indicator of VAT fraud; and we started developing custom algorithms to detect those. And then, similarly, we also -- so Saurabh had done this analysis around the carousel trading, where money went in and around and it was strange; and I think one MOT report was filed for one client, which was the starting where we started understanding this. Then -- this was like one-off to begin with, end of December. Starting 2006 then this was converted into a structured process, where it was like almost the RMC team -- a separate team was created to do transaction monitoring, who would then randomly check for documentation and a whole set of procedures were evolved. MR JUSTICE LEECH: Thank you. Unless you want to pursue that, can I just ask another question about this memo, which is, if we turn the page. {F/648/2}. I mean, if you look at this, this looks a

> workaround, it looks as if he is saying, "We don't want to stop these payments", where there are endless repeated payments, but what he's saying is, "Well, we need to find a way for the customers to get around the 48 hour rule". A. So that's what I was saying. So this part, unfortunately, is dealing with the technical problem; but of course it doesn't give the right context. But here the idea was: how do we prevent two wire transfers for the same amount going out technically, because it's exposing the bank to commercial risk. And the rule Mr Deuss was proposing if the amounts are exactly the same we pause one of them and therefore tell the customers, "Don't do exactly the same amount because our systems are going to stop this duplicate payment because we are exposed commercially". So this -- I mean, I can see it now when reading it might appear related to the telecom aspect of it, but this particular message was related to the technical issue. MR JUSTICE LEECH: So you say this is unrelated to the -- A. Unrelated. MR JUSTICE LEECH: It's not saying, "Well, the problem for our T&C traders is that they're sending the same amounts, passing through very quickly; we've got to find a way to help them to make these payments"? A. No."

387. Mr Parker and his team submitted that Mr Deuss could not have believed in the analogy with commodities or futures trading and must have appreciated that MTIC fraud was a widespread issue. He also submitted that Mr Deuss's analysis did not "withstand a moment's scrutiny" because there was no evidence of any netting off between individual traders. Finally, he relied on that fact that in his memo dated 23 March 2006 Mr Ulrich was extremely sceptical about the analogy: see [330]. In that memo, Mr Ulrich stated: "We have no evidence to support theory that a futures market exists." He also asked rhetorically: "If there is a cell phone futures market why don't we see one in the U.S., Canada or other jurisdictions that don't have a VAT regime?"

388. I accept Mr Deuss's evidence on this issue and I find that between August 2004 and December 2005 he did not know or turn a blind eye to the fact that MTIC fraud was believed to be prevalent or widespread in the T&C sector. I also find that during that period he believed that there were a significant number of legitimate telecom customers who were looking for banking services and that FCIB could provide services to them so long as it had appropriate compliance procedures in place. I have reached this conclusion for the following reasons:

    (1) Mr Deuss's evidence is supported by the contemporaneous documents and, in particular, his email dated 16 December 2005 to Mr Sharma and Mr Ulrich's memo dated 23 March 2006. Although Mr Ulrich did not agree with this analogy, his memo provides clear evidence that the analogy with a futures market was the

subject of internal debate within FCIB at the time.

(2) Both Mr Sharma and Mr Ganesh gave evidence that Mr Deuss expressed this view to them on a number of occasions. In particular, I accept Mr Ganesh's evidence that "the thinking always was this is similar to the oil trading" and that "Mr Deuss always referred to his experience in oil trading where people would buy and sell oil for very small change in price and they would sell it."

(3) The real problem for Mr Parker was that there was no reason why Mr Deuss would have sent the email dated 16 December 2005 far less invited Mr Sharma to investigate the business of T&C traders unless he believed that this hypothesis might well be true. In his oral closing submissions Mr Parker was driven to submit that Mr Deuss's email was an attempt to lay a false paper trail:

> "Now, we say this is a document that must have been written by Mr Deuss with an eye to protecting himself, if people started picking over the documents in the way that we are doing now."

(4) I reject that submission. Mr Parker adduced no evidence to suggest that Mr Deuss believed that FCIB was about to be investigated or that he needed to lay a false paper trail for the future. Moreover, Mr Parker did not put this directly to either Mr Sharma or to Mr Ganesh and it was clear from their evidence that they considered this to be Mr Deuss's sincerely held view. Mr Sharma confirmed unequivocally that the email dated 16 December 2005 reflected Mr Deuss's understanding and that this understanding shaped "our inputs".

(5) Furthermore, it was the evidence of both Mr Sharma and Mr Ganesh that they implemented Mr Deuss's instructions. It was their evidence that before December 2005 the RMC did not have a real understanding of how to identify suspicious transactions and that they only began to understand how to spot individual transactions which were fraudulent and to put the necessary safeguards in place when Mr Sharma began to analyse the frozen accounts at the end of December 2005.

(6) I accept that evidence. Both witnesses were remarkably consistent in their evidence both with each other and with the contemporaneous documents, which establish that from 22 December 2005 onwards there was intense activity in the RMC to

complete the EDD program, to introduce transaction monitoring and to weed out the fraudulent accounts. Moreover this activity coincided with the expansion of the RMC itself. If Mr Deuss had known or believed that there were almost no legitimate traders in the T&C sector, it is highly improbable that he would have instructed Mr Sharma to carry out the review of frozen accounts or to introduce transaction monitoring at all.

(7) Furthermore, I do not find their evidence inconsistent with Mr Bailey's memos and the press articles explaining MTIC fraud in August and September 2004. It is one thing to understand that networks and chains exist for the purpose of defrauding HMRC into paying a "refund" to the broker of VAT which the defaulter never paid. It is quite another to develop the systems and expertise to identify individual buffers and transactions which are intended to disguise the connection between the defaulter and the broker.

(8) Indeed, this is an issue on which I would have welcomed expert evidence. As it was, I found it particularly useful to undertake the analysis of Eliyon's bank statements for its BOS account for the period between April to November 2005, which Mr Thanki carried out in opening. It was possible to tell with the benefit of hindsight that Eliyon was engaged in MTIC fraud. But it is also clear that BOS had not identified either that Eliyon was engaged in MTIC fraud or that any individual transactions were fraudulent.

(9) I attribute little weight to the fact that there was no evidence of "netting off" in the T&C sector. Mr Parker pressed Mr Sharma very hard on this issue in cross-examination. But it is important to note that Mr Deuss did not mention "netting off" in his email dated 16 December 2005 but only in Deuss 1 (where he was describing how individual oil traders were able to trade such high volumes with a small margin). It is unsurprising therefore that Mr Sharma did not recall any discussion about it.

(10) For reasons which I have set out, the Claimants failed to persuade me that there was no legitimate market in the T&C sector and although I was prepared to accept that one in two of FCIB's T&C customers were engaged in MTIC fraud (after making a number of favourable assumptions in the Claimants' favour), I have also

found that T&C customers made up only 33.31% of FCIB's total customers for 2005. Applying Calver J's guidance in *Suppipat v Narongdej*, I have not made any findings of primary fact which would justify the inference that Mr Deuss was dishonest when he composed his email dated 16 December 2006 or that the evidence in his witness statement was untrue.

(11) I can also illustrate this point in the following way. I am prepared to accept that Mr Deuss would have been aware of the relevant statistics which were put before me. But even if he had made the same assumptions which I have made, he would have drawn the conclusion in November 2005 that there was a significant risk that about 17% of FCIB's customers were fraudulent but the remaining 83% were legitimate. In deciding how to meet this risk, he would also have borne in mind there had been a huge increase in customers from the T&C sector and that on 28 April 2005 Mr Vallerey was reporting that only 306 accounts had been opened. In that context, I am not satisfied that it was dishonest for Mr Deuss to take the view that FCIB could continue to service the T&C sector if it improved its AML and KYC procedures.

(12) Finally, as Mr Thanki reminded me, the question is not whether Mr Deuss was right to draw an analogy with commodities or futures markets or whether with the benefit of hindsight this analogy provided a reasonable justification for concluding that there was a legitimate T&C market. The question is whether Mr Deuss believed in such an analogy and, on this issue, Mr Parker and his team were unable to point to any evidence or documents in which Mr Deuss expressed a contrary view.

(vi) Was the T&C sector designated "high risk" as a result?

389. There appears to be no dispute that FCIB initially designated or treated the T&C sector and the accounts of T&C customers as "high risk" and, if there is any doubt, I find that it did so. On 22 December 2004 FCIB adopted version 2.1 of its AML Manual which designated the following category of clients or applicants for accounts as high risk: "Companies involved in the sale/distribution of telecommunications or computer equipment in the UK". However, I am not satisfied that the T&C sector was designated high risk because Mr Deuss knew or believed that MTIC fraud was prevalent in the T&C sector (or that this was the appreciation of the banking industry) or that the "high risk"

designation is evidence of Mr Deuss's dishonesty. In my judgment, FCIB designated the T&C sector high risk in the same way as other banks such as Barclays: see, for example, the memo dated 11 April 2005 at [260].

390. Indeed, the Claimants' pleaded case that the T&C sector was designated "high risk" because Mr Deuss knew that MTIC fraud was prevalent in that sector was inconsistent with the case which they ran at trial, namely, that the classification of the T&C sector was downgraded to "medium risk" in the Risk Scoring Model because Mr Deuss was dishonest and wanted to relax the compliance required for T&C traders. I consider that case below when I address the allegation that Mr Deuss only intended to pay lip service to the need for transaction and business monitoring.

(vii) Conclusion

391. For these reasons I dismiss the allegation that Mr Deuss knew or shut his eyes to the fact that MTIC fraud was believed to be prevalent amongst the T&C sector by the banking industry and that as a result such accounts were designated as "high risk": see paragraph 11(2). The Claimants failed to establish on the facts that MTIC fraud was prevalent in the T&C sector generally or that almost all of FCIB's customers were engaged in MTIC fraud or that the banking industry held this belief and that Mr Deuss knew that it did or shut his eyes to this fact. They also failed to establish that this was the reason why FCIB designated T&C sector accounts "high risk" in the AML Manual.

(5) The UK High Street Banks

(i) Did UK High Street banks continue to provide services to T&C customers?

392. The Claimants relied on a number of documents which stated that UK High Street banks were refusing to accept customers in the T&C sector or closing their accounts: see Cs, C53. They also asserted that given that the Court was concerned with Mr Deuss's knowledge, the precise extent of UK banks' withdrawal from the T&C sector was not in issue. Mr Thanki and his team accepted both that Mr Deuss was aware that UK banks were reducing their exposure to the T&C sector and, indeed, that Mr Bailey saw this as a market opportunity. But he submitted that it was wrong to state that UK banks had ceased to act in the T&C sector.

393. In my judgment, the extent to which UK banks were withdrawing from the market is relevant to the issues which I have to determine for two reasons: first, it goes to the Claimants' pleaded case that many reputable banks had ceased to provide financial services to T&C customers and that Mr Deuss knew that "many if not all of the UK High Street banks had refused to provide accounts to" its T&C customers: see paragraphs 11(3) and 35(1). Secondly, it is relevant to the question whether I should accept Mr Deuss's evidence that he took comfort from the presence of other banks in the market. I reject Mr Parker's submission that it was unnecessary to decide this issue and I proceed to do so.

394. I accept Mr Thanki's submissions and I find that although many banks were reducing their exposure to the T&C sector, the principal UK High Street banks and reputable foreign banks were continuing to provide banking services to customers in that sector during the period between February 2005 and June 2006. I make this finding of fact for the following reasons:

(1) The Claimants' produced Cs, S7 to compare the throughput on the FCIB accounts of the MTIC Companies and the throughput on their other accounts. S7 showed that all of the MTIC Companies (and Mr Walker) had accounts at UK High Street banks which, in many cases, they continued to operate after FCIB had gone into Emergency Measures. Those banks included Barclays, HSBC, Lloyds, BOS, UBS, the Royal Bank of Scotland plc ("**RBS**"), the National Westminster Bank plc ("**NatWest**"), Yorkshire Bank plc (the "**Yorkshire Bank**") and Abbey National plc (or Santander plc) (the "**Abbey National**").

(2) In opening Mr Thanki took me to the transaction enquiry report for ACEL which showed that over £20.5 million in credits were received into its FCIB account from other banks. He also took me to Eliyon's bank statements for a BOS account for the period from April 2005 to November 2005. The statements showed that substantial VAT refunds passed through the account including one payment of £1,300,000.

(3) Mr Parker put Mr Vallerey's email dated 18 October 2005 to Mr Sharma and his statement that RBS was the only bank left and that it was now leaving the sector: see [288]. Mr Sharma did not accept this:

"Q. So if you look at {F/718/1} and go -- this is an e-mail from TWPS'

> Mr Vallerey to Mr Deuss on 18 October. And if we go to page {F/718/2}. You see at the top of the page there, he says: "It seems that the only remaining active high street bank active in the Telecoms Traders industry in the UK (RBS) is starting to send 28 days notices of closure..." A. I see that. Q. When you joined RMC in October, did no one discuss with you what was happening with the UK banks and the T&C sector? A. Your Honour, I do not recall this specific instance being discussed with me. I do recall Mr Deuss' e-mail or a memo that said a number of UK banks are rethinking their risk appetite on the telecom trading activity. But he, as well as -- and I had just joined so I did not have too much opinion right then. But he did feel that our risk measures and the investment we were making and now doing enhanced due diligence and then progressing to doing transaction monitoring was commensurate with the risk that that sector had."

(4) Mr Sharma also gave evidence that in his experience certain UK banks did not consider withdrawing services from T&C customers until late 2005 and but that there were still many UK banks operating in the T&C sector in April 2006:

> "Now, Mr Sharma, if you turn to paragraph 36 of your witness statement {C2/1/12}. You say, I think in the fifth line -- fourth line: "I recall that at some point in late 2005, certain banks in the UK began re-evaluating their risk appetite and investment and considered withdrawing services from customers operating in the telecom sector in order to reduce the associated operational burden of compliance and due diligence." So I'm highlighting the fact that you say they began re-evaluating and considered withdrawing because the knowledge within FCIB was that by late 2005 most of the UK banks had already left, wasn't it? A. My Lord, I do not recall that all of the banks had already left. My recollection is exactly what I had written: that they had began evaluating whether they would service telecom traders or not. I do want to add, Mr Parker, to what you just said: I recall this very clearly -- I think it was April 2006 or it may have been May 2006, now memory fades me -- I did about 30-odd freeze orders review. And I remember compiling -- and this is not 2005. So this is April 2006. And I compiled what banks were listed on the freeze orders. So, obviously, because FCIB received them, on all 30 FCIB was present. But I recall that total number of accounts with other banks in the UK was about 40 plus. So while it's being stated that banks had already withdrawn in 2005, as far as me, who was sitting and reviewing these freeze orders, that's not the information that I was getting, because I was seeing other accounts at Barclays and Lloyds; and I don't recollect the other banks that were listed on the freeze orders, as late as April 2006. And there must be an e-mail or a memo that I would have sent on this analysis as well. Q. Well, those banks weren't doing anything like the level of trading that FCIB was seeing? A. I cannot comment on that because I've no insight into those banks and -- Q. In terms of what you saw? A. I just saw the accounts listed. Q. Yes? A. Yes. Q. That's all? A. That's all. So if they

> had withdrawn those accounts should not have been present; they should have been closed."

(5) I accept Mr Sharma's evidence which was consistent with the Claimants' own evidence in Cs, S7. For example, it was their evidence that ACEL had accounts at seven different banks with a throughput of £48.1 million all of which remained open in January 2006 and five of which remained open after FCIB had gone into Emergency Measures.

(6) Mr Thanki and his team submitted that it was necessary for companies to have a UK bank account in order to obtain a VAT refund. He drew my attention to correspondence between QE and HMRC which appeared to confirm this to be correct for a UK registered company (although HMRC had not retained a copy of the policy in force between the relevant dates). But in any event, this was consistent with the contemporaneous documents and Mr Parker and his team did not challenge this proposition.

(ii) Barclays

395. On 18 March 2005 Barclays terminated its correspondent banking relationship with FCIB: see [260]. Mr Deuss gave evidence in Deuss 1 that when he saw that letter, he thought that it must have been Barclays intention to terminate the relationship all along. He also pointed out that the letter did not say that Barclays was terminating the relationship because of FCIB's involvement in the T&C sector (although he thought at the time that this might have been a reason for the decision). He continued as follows:

> "…It was surprising to me that Barclays had taken issue with FCIB providing services to the telecoms market segment given they had said in their meeting with us that they were involved in the market segment as well.
>
> 143. The loss of a correspondent banking relationship is a very serious matter, especially for a bank such as FCIB, which specialised in receiving, maintaining and sending deposits. Without correspondent banks, FCIB would be out of business because we would not be able to make transfers outside the bank on behalf our clients.
>
> 144. I reached out to John Demaine, who was a contact that I had in Barclays, to see if he could help fix the situation. The next month, in April 2005, I travelled to London with Tim for a meeting with Mr Croot at Barclays' offices in Canary Wharf. We went through the same points that Tineke had discussed with them in Berg en Dal. Barclays refused to change

> their mind, and did not give any additional reasons.
>
> 145. FCIB took Barclays' termination of its correspondent banking relationship very seriously, and my recollection is that in the months afterwards the bank took steps to improve its compliance. One of the motivations for doing so was to ensure that FCIB was able to maintain its correspondent banking relationships."

396. Mr Deuss also gave evidence about the meetings with Barclays in the context of the general allegation that he knew that High Street banks had refused to provide accounts to T&C customers:

> "160. I understand that the Claimants have alleged that I knew that "UK high street banks had refused to provide accounts to companies in the telecoms sector because of the risk that such companies were involved in carousel fraud".
>
> 161. As I have explained above, I first became aware around August or September 2004 that some UK banks were exiting the telecoms sector. My understanding was that they were doing so under pressure from HMRC, and because they were not willing to devote the necessary resources to build up their compliance procedures to deal with the risks of the market segment.
>
> 162. However, my understanding was that there were always UK banks servicing the telecoms sector during the period that FCIB provided services to it. As I have explained above, Barclays informed Tineke at their meeting in March 2005 that they were continuing to service clients in the telecom market segment. I also remember that even after March 2005, FCIB continued to receive wire transfers from Barclays and other UK banks to accounts of FCIB's customers which were in the telecoms sector. I understood from this that they continued to remain in the sector."

397. Mr Parker and his team submitted that Mr Deuss was willing to lie to Barclays about the compliance measures which FCIB had in place in the agenda which he prepared for Ms Deuss to use at the meeting on 9 March 2005 and that he lied to Barclays at the meeting on 11 April 2005 by stating that TWPS's marketers "visit every customer the world over" and that "major attention" was paid to AML and KYC. They also submitted that Mr Deuss would not have introduced the EDD Master Plan if Barclays had not terminated the correspondent banking relationship and that he was motivated solely by a concern to maintain correspondent banking relationships. I quote the relevant passage from their closing submissions:

> "Barclays termination of the relationship appears to have been the catalyst for Mr Deuss to instigate the steps set out below: without that, it seems that

> FCIB would have continued for many months more with effectively no compliance at all. The response to Barclays' intervention was not a concern that FCIB had been facilitating VAT fraud in the T&C sector, but simply a consideration of what was needed in order to be able to preserve correspondent bank relationships without which servicing of T&C sector couldn't continue."

398. Mr Deuss accepted that one of the motivations for improving its compliance was the maintenance of correspondent banking relationships but he also gave evidence that he had been discussing the introduction of an EDD program with Mr Ulrich since December 2004. I accept that evidence. I find it highly improbable that Mr Deuss could have produced the detailed proposals set out in his email dated 21 March 2005 within three days after Barclays' letter dated 18 March 2005 or that Mr Kornitzer could have followed them up so quickly with his email dated 6 April 2005: see [261] and [262]. It is obvious from those documents and the EDD Master Plan itself that it had been in preparation for some time. I, therefore, reject Mr Parker's submission that Barclays' termination of the relationship was the catalyst for Mr Deuss to introduce EDD and that he would not have established the RMC or introduced EDD if Barclays had not terminated the relationship.

399. I also reject the submission that Mr Deuss was not concerned that FCIB might have been facilitating MTIC fraud in the T&C sector and was solely motivated by a desire to preserve correspondent banking relationships. In his memo dated 21 March 2005 Mr Deuss stated in terms that FCIB's golden rule was to deal only with legitimate customers engaged in legitimate business and this memo was circulated widely to all of the senior management of both FCIB and TWPS. If Mr Deuss had been motivated solely to preserve correspondent banking relationships, then in my judgment he would have said so. Mr Parker offered no reason why he would resort to a cynical ploy to mislead his colleagues.

400. I also address the submission that Mr Deuss was willing to lie to Barclays in the agenda which he prepared for Ms Deuss and that he lied to Barclays on 11 April 2005. This was not a pleaded issue and Mr Deuss did not address it directly in Deuss 1. But in any event, I reject it. FCIB had introduced the AML Manual Version 2.1 in December 2004 and although site visits were a marketing exercise and did not become a part of FCIB's due diligence until 19 January 2005, there is no dispute that TWPS marketers were conducting site visits in March 2005. Indeed, the Claimants' case was that TWPS carried out site visits for all of the MTIC Companies including the following (all of which took place before 11 April 2005): Blue Fox, Eliyon, Gold Digit, Notebook and Star: see Cs,

S6.

401. Further, I find that Barclays did not terminate its correspondent banking relationship with FCIB solely because FCIB was accepting T&C customers (although I accept that this was one of the reasons). The principal reasons which Mr Croot gave to Ms Deuss and Mr Deuss were that the bank had been the victim of money laundering and fraud which was unrelated to the T&C sector. I accept that the reasons which Barclays gave demonstrate that there were significant weaknesses in FCIB's procedures and controls but they do not demonstrate that Barclays terminated its relationship for the reasons which the Claimants submitted, namely, that "the T&C sector in which FCIB is operating is extremely risky" or because "Barclays is scathing in its assessment of FCIB's business model and, in particular, its reliance on high risk T&C clients with inadequate compliance". In my judgment, the Claimants significantly overstated the significance of the T&C sector to Barclays' decision.

402. Finally, I find that Barclays did not inform Ms Deuss or Mr Deuss that it was refusing to provide accounts to companies in the T&C sector and that what Barclays told Ms Deuss (and she relayed to Mr Deuss) was that although the bank had some T&C business itself, it was only willing to rely on its own due diligence. Moreover, this finding is supported by the evidence which the Claimants collected in Cs, S7 showing that Barclays continued to maintain accounts for a number of the MTIC Companies between February 2005 and June 2006.

(iii) Rabobank

403. The Claimants also pleaded that once Barclays had terminated its correspondent banking relationship with FCIB, Mr Deuss simply moved it over to the Dutch bank, Rabobank. The Defendants produced evidence that in August 2003 FCIB established a correspondent banking relationship with Rabobank, that it did not terminate the relevant agreement until 1 March 2006 and that it gave no reason for doing so (although Mr Deuss speculated in an email dated 30 November 2005 that the T&C sector might be the reason for its action). The Claimants did not pursue this issue in their opening or closing submissions. I, therefore, dismiss this allegation.

(iv) UBS

404. Mr Parker and his team opened their case on the basis that by April 2006 FCIB was no longer making an effort to identify fraudulent accounts: see Cs, O405. They closed their case on the basis that on 14 October 2005 Mr Deuss and FCIB came up with a strategy to separate customers into two tiers in order to persuade UBS to grant correspondent banking facilities: see Cs, C149. They then traced through the period from that date until August 2006 to demonstrate that FCIB undertook compliance measures in relation to some customers for the purpose of convincing UBS provide correspondent banking services: see Cs, C150 to C158. Finally, they criticised Mr Sharma and Mr Ganesh for failing to deal with UBS in their witness statements: see Cs, C152.

405. The Claimants did not plead the case which they advanced in relation to UBS and Mr Thanki objected to this and submitted that it was not surprising that the witnesses did not address it. I accept those submissions and I make no criticism of Mr Deuss, Mr Sharma or Mr Ganesh for failing to deal with the proposed migration to UBS in their evidence. I also accept that this was not a pleaded issue and that the Claimants did not apply for or obtain permission to raise it. Nevertheless, I address this issue because Mr Parker put the proposed migration to UBS to both Mr Sharma and Mr Ganesh.

406. Mr Parker cross-examined Mr Sharma on the basis that FCIB was not trying to weed out those T&C customers engaged in MTIC fraud and close their accounts but rather just to segregate them so that it could keep them away from UBS. Mr Sharma's response was that Mr Parker had an "amazing imagination":

> "Q. And if we look at {F/1326/2} again. If you look at the eighth bullet point under "risk management". You see: "With the current pursuit of a good client base and with the current level of activity, we can be more discerning about whom we deal with." Now, that is -- that is identifying as a reason why FCIB can be more discerning with the people they deal with is because they're doing -- were doing very nicely from their existing clients, isn't it? A. I do not understand what you mean by doing very nicely from their existing clients. Q. That they are now a profitable, financially successful company, as a result of the level of activity that they have from their existing clients? A. My Lord, that's not my area or domain to comment on. Q. Well, what did you -- well, what would be your understanding when you see their current level of activity? A. Okay. You're asking for the existing clients current level of activity? Q. Current level of activity is a reference, is it not, to the business that they currently have as at the date of this document, April 2006? A. Okay. Thank you for clarifying the question. It's more clear now. My Lord, the way I interpret this is we were seeing a number of freeze orders and, therefore, there was

> a comment made: will we be able to identify from the current activity who we should deal with and who are bad apples? And that's the comment that was made here. And given that we were able to automate third party transfers and we were just starting to review how we could find chain transactions or the carousel fraud, our take was we should be able to identify that. So that's my take. I don't read "current level of activity" as revenue or anything else. That's not my domain; and I did not interpret it in that manner. Q. If we look on the same document, at the third bullet point: "The issue is to renumber of any bad accounts while preserving the economic situation of the bank". So isn't that saying: we don't want to strip out all of the bad accounts if it means it's going to threat the profitability of the bank? A. I think you're trying to -- you have amazing imagination Mr Parker. What it is saying is we do not want to exit the telecom customers yet because we only want to weed out the bad accounts. We still thought, and still today think, that there were genuine customers whom the bank should service. So that's my take, my Lord, that the economics mandates that we should not weed out bad accounts."

407. Mr Parker put this point to Mr Sharma a number of other times by reference to documents which showed that FCIB was concerned to ensure that it only used its UBS's correspondent account for customers whom it had fully investigated. Each time Mr Sharma's answer was the same. The following question and answer illustrates Mr Sharma's evidence:

> "Q. So what we can see here, particularly that -- let's look at that first paragraph numbered 1, there's now a concerted effort, isn't there, to identify the clients where there are no indicia of fraud in their trading? A. I will re-frame what Mr Parker has stated, my Lord. The mandate that we were given is any customer that we are migrating to UBS, we need to -- compliance needs to put a stamp of approval that all of them are squeaky clean customers. We were still identifying bad apples from our transaction monitoring, from our chain transfers. And, therefore, what Mr Deuss instructed is: take a holistic review, from EDD review, site visit reports, transaction monitoring. And, before you migrate, confirm that you have reviewed the customer, again if required. So, again, if we had already reviewed it in January, Mr Deuss wanted us to review it again. So this was the effort. I do not state it as: well, now, finally, the bank is trying to weed out the bad apples. It was always an ongoing effort for the ten months that I was part of compliance team."

408. Mr Parker also put it to Mr Ganesh that FCIB was not interested in removing the bad apples and that Mr Deuss was motivated by a concern to prevent UBS finding out that FCIB was facilitating fraudsters. Finally, he suggested to Mr Ganesh that the review of customer accounts which took place for the migration to UBS was the first time in which FCIB had reviewed customer accounts for fraud patterns:

"Q. Well, if we look at {F/1326/1}, because this is certainly a clear statement of the position that's been adopted by, shall we say, the management of FCIB. So from the "Progress review", we see: "The current level of activity can be summarized as follows: "$11.6 million revenue for the first 3 months in 2006". The fourth bullet point: "80% of the revenue is derived from traders involved with an element of T&C trading". So 80% of 11.6 million, for the first three months, is all down to T&C trading; yes? A. Possibly. Like I said, I didn't have much to do with the revenue or marketing side. I don't know. Q. And if we go over the page to page {F/1326/2}. You see the third item: "The issue is to remove any bad accounts while preserving the economic situation of the bank". And that suggests, doesn't it, that FCIB wasn't that interested in removing the bad apples because it would impact on their profitability? A. I don't -- again, I don't know the context of this meeting. I was not there. But, from a compliance perspective, the mandate was always compliance -- we need to ensure squeaky clean customers. And every time we had interaction, it was never discussed or debated whether commercial aspects would overrule compliance, where compliance would take a back seat. That was never the way that we ever worked, at least from a compliance perspective. I was not in this meeting so I have no idea what the context of these statements are."

"Q. And the first item, asking about in and out payments by wire activity, this isn't because Mr Deuss wants to find out whether FCIB is assisting fraudsters, it's because he wants to make sure that UBS don't discover that FCIB is facilitating fraudsters? A. Again, in my mind, my interpretation of that is, again, it's an incorrect characterisation, because, even though UBS was not involved, the incoming wires and outgoing wires were going through mainstream banks. You know, we had Barclays and Rabo and others. So it was just that UBS was considered the premier correspondent banking relationship, we couldn't risk losing them at all. So it wasn't like those transactions or the customer base was being hidden from the correspondent banks; it's just that UBS -- commercial risk of losing the UBS relationship was much higher than the other correspondent banks."

"Q I put to you that what is happening here, for the very first time, is a review of the transaction statements for known fraud patterns? A. I think, again, that's completely incorrect characterisation. Here what was happening here is just to double-check and be doubly sure that the customers we are moving to UBS are squeaky clean and, therefore, repeat and double-check all the things that have happened."

"Q. And then if we look at {F/1496/1}. This is you to Mr Deuss. See the title: "Migration of customers from Rabobank to UBS", 7 June. States: "The high-level plan to migrate the customers from Rabobank to UBS in eBanking is as follows". Then the final third of that page: "The focus of the initial RMC exercise is on all the UK customers (for their possible involvement in VAT fraud ...)" And that's because you are focusing, for the first time, on all the UK customers for their possible involvement in VAT fraud, which is not something that you have actually been doing previously? A. Again, like I said, I think in the past the way we were doing transaction monitoring was based on these targeted patterns for different

things that we had identified and random transaction monitoring. Right now, because we are migrating customers from Rabobank to UBS, we wanted to be doubly sure everyone was, you know, squeaky clean. So this was just an extra scrutiny to ensure that that goal was met. I don't think it's correct to say that no checks were being done before. Q. So I think you're -- the evidence you're giving is, shall we say, wholly unreliable on this topic. There's no suggestion here that you're responding saying: well, we've looked at it once already; we will have another look if we assist? A. I think it was clear that we wanted to be doubly sure; and that's what we did. I mean, this -- there are lots of reports we can see where we have MOT reports that were filed based on transaction monitoring; customer accounts that were suspended. I'm sure you would have found e-mails and -- Q. This is all happening urgently, isn't it? Mr Deuss sends you an urgent e-mail: how are you getting on with re-validation? If you had already looked at a large number of UK customers for their possible involvement in VAT fraud, you would say to Mr Deuss, we've already looked at this. There's a number of customers we've still to do, but we've done a large number already". That's what you would have said not: "The focus of the initial RMC exercise is on all the UK customers (for their possible involvement in VAT fraud ...)" A. Again, I think that's not the intent of what is written here. Here the intent is we wanted to be doubly sure and triply sure that we are not risking our UBS correspondent banking relationship. That's why we are doing this analysis. But I don't think anyone -- Mr Deuss, of course he already knew that we were doing all these reports and analysis because we've been sending him weekly and daily reports on what's going on and to Tim. So they knew that we were doing this. Q. And then you carry on: "We also recommend that the 820 customers doing less than 100,000 GBP be migrated to UBS. Although the RMC exercise has not been completed on these customers, it is essential that we move them to UBS to avoid unnecessary operational errors/issues. I believe that we are unlikely to get Correspondent bank queries on such customers." So you're telling Mr Deuss that it's okay to move the small customers because they're not going to cause any compliance -- they're unlikely to cause compliance problems with UBS? A. Sorry, again, I'm not sure what the question is. Q. According to you that the reason why you're recommending the 820 customers doing less than £100,000 can be migrated to UBS is because they're unlikely to cause any problems with UBS from a compliance point of view? A. Sir, I'm still not clear what the question is. Q. And the concern of FCIB is not with having a clean client base for the sake of having a clean client base, it's only because if you send clients to UBS who aren't clean, UBS is going to pick up on that and it will damage the correspondent banking relationship? A. I think, again, that's an inaccurate characterisation of the problem. Mr Deuss told, I think in multiple meetings, "If you all believe that the telecom segment in general was" -- you know, we believed was not the right segment to be in, he said he's happy to exit the business completely. Because, for him, being in the banking business, and ensuring that correspondent banks were, you know, retained was more important. And that's why we are transparent with all the correspondent banks, including all our clientele, we had shared the complete list. It was not that anything was hidden."

409. I accept the evidence of both Mr Sharma and Mr Ganesh and I find that Mr Deuss instructed Mr Sharma and his team to conduct a holistic review of all customer accounts (including accounts which it had already reviewed) for the purpose of the migration to UBS and that this review involved looking at EDD documents, site visit reports and transaction monitoring. I also accept Mr Sharma's evidence and I find that the RMC was genuinely trying to weed out fraudulent customers for the ten months in which Mr Sharma was part of the compliance team. Finally, I accept Mr Ganesh's evidence and I find that Mr Deuss never instructed him that the commercial importance of customers to the bank and, in particular, the commercial importance of T&C customers should be treated as more important than compliance.

410. I make these findings because I found both Mr Sharma and Mr Ganesh to be honest and reliable witnesses and their evidence was consistent with the documents to which they were taken. I also agree with Mr Thanki that the case which Mr Parker put to Mr Sharma and Mr Ganesh (i.e. that the migration to UBS was the first time in which FCIB genuinely attempted to weed out the bad apples) was inconsistent with the case which the Claimants advanced in opening (i.e. that by April 2006 FCIB had concluded such efforts as it had been making to identify existing fraudulent accounts). In my judgment, this demonstrated the speculative nature of the case put to the witnesses and the lack of solid evidence to support it.

(v) Conclusion

411. For these reasons, therefore, I dismiss the allegations in paragraphs 11(3) and 35(1). In particular, I dismiss the allegation that Mr Deuss knew or turned a blind eye to the fact that many reputable banks had ceased to provide financial services to the T&C sector and that many (if not all) of the UK High Street banks refused to provide accounts to the companies in the T&C sector because of the risk that they were involved in MTIC fraud. In the light of the specific findings which I have made in (i) to (iv) above about the continued presence of UK High Street banks in the T&C sector and Barclays' termination of the correspondent banking relationship with FCIB, I accept Mr Deuss's evidence that he believed that Barclays was continuing to operate in the T&C sector despite the termination of the relationship. I also accept his evidence that he believed that there were always UK banks servicing the T&C sector during the relevant period.

412. I also dismiss the specific allegation that Mr Deuss, TWPS and FCIB were not interested in whether their clients' trading was legitimate because of the way in which they responded to Barclays' termination of the correspondent banking relationship: see paragraph 31(1). I should also record that the Claimants' case (as pleaded) was that Barclays drew FCIB's attention to unusually large transactional activity by its customers because of an increase from £60 million to £1 billion per month. But the Claimants did not pursue this allegation at trial and sought instead to run a different case, namely, that Mr Deuss lied to Barclays and cynically introduced EDD to create or preserve the relationship with Rabobank and other correspondent banks. Although this was not their pleaded case, I dismiss that allegation too.

(6) Networks and Closed Loops

(i) "Capturing" the T&C market

413. The Claimants alleged that Mr Deuss "dishonestly determined to capture" the T&C market by offering eBanking services "without imposing any effective AML procedures": see paragraph 11(4). They also alleged that he was dishonest from 2004 onwards and, if not, by November 2005 at the latest. I was not taken to any documents in which Mr Deuss himself expressed the desire or intention to "capture" the market and the source of this phrase appears to have been Mr Vallerey's email dated 3 November 2005 to Mr Dominic Thorncroft of Chequepoint UK MTA: see [297].

(ii) Closed loops and network heads

414. The Claimants also pleaded that Mr Deuss decided to make FCIB attractive to fraudsters by emphasising the benefits of "closed loops" which enabled traders in a network or cell to make transfers to each other through FCIB accounts. They relied on a series of documents which provided evidence that the TWPS marketers targeted networks of traders often in Dubai. The principal documents were as follows:

(1) *22 September 2004*: Mr Nixson's attendance note of his meeting with Jimmy;

(2) *4 October 2004*: Mr Calderon's attendance note of his meeting with Mr Elliott-Square;

(3) *12 November 2024*: Mr van Laarhoven's memo of his meeting with Jimmy and

Mickey;

(4) *December 2004*: the "Trading segment action plan (December 2004)" which used the terms "cells" and "closed loop environment";

(5) *25 February 2005*: Mr Van Laarhoven's email referring to dormant accounts and using the term "cells";

(6) *26 April 2005*: Mr Mallaburn's email using the term "trading loop";

(7) *8 October 2005*: Mr Vallerey's memo "Types of Fraud";

(8) *16 October 2005*: the action points of the meeting of TWPS marketers in Kuala Lumpur referring to "cross-engineering";

(9) *16 October 2005*: the minutes of the meeting referring to "closed loop networks" in Dubai;

(10) *4 November 2005*: the transcript of the telephone conversation between Mr Barrs and Ms Van Dijk;

(11) *11 November 2005*: the memo "Opportunities for FCIB around refunds for traders and import/export companies with a focus on Telecom Traders/Computer Parts dealers (T&C traders)";

(12) *1 December 2005*: Mr Deuss's emails to Mr Ganesh using the term "closed loop";

(13) *21 April 2006*: Mr Ulrich's email using the expression "closed loops"; and

(14) *11 May 2006*: Mr Vallerey's memo to Mr Deuss referring to the "closed loop network we created for the industry".

(iii) The evidence

415. Mr Deuss did not address the issue of "closed loops" in Deuss 1 which is, perhaps, surprising given that it was a pleaded issue. He did, however, address the significance of network heads and the other pleaded documents:

"Network heads

> 165. I understand that the Claimants have alleged that I "knew that many applications from T&C customers were organised by the same persons, known as "network heads", who vouched for the applicant." I do not recall knowing that there were applications from different customers which were being organised by the same persons, known as "network heads", or that these individuals vouched for the applicants.
>
> 4 October 2004 meeting between Mr Elliot-Square and Mr Calderon
>
> 166. I understand that the Claimants have made certain allegations relating to a meeting held on 4 October 2004 in Dubai between Mr Anthony Elliott Square and Mr Antonio Calderon. I do not recall attending a meeting with Mr Elliot-Square and Mr Calderon in Dubai on or around 4 October 2004. I also do not recall being aware that such a meeting took place, or what was discussed at that meeting."
>
> Danny Barrs
>
> 168. I understand that the Claimants have made several allegations in relation to a recorded telephone conversation between Danny Barrs and "a person who was wishing to open an account with FCIB who did not wish to comply with the enhanced due diligence procedures". I have read paragraph 33 of the Re-Amended Particulars of Claim. I was not party to this telephone conversation, and was not aware of its contents until I learned about it in the context of the investigation by the Dutch FIOD and the Dutch criminal proceedings. I do not agree with Mr Barrs' characterisation of FCIB's operations and its compliance measures, which do not reflect my view or the compliance policies and procedures which FCIB worked tirelessly to put in place."

416. Mr Parker put Mr Deuss's emails dated 1 December 2005 to Mr Ganesh in cross-examination. He did not suggest to Mr Ganesh that Mr Deuss intended to refer to a network of fraudulent MTIC or carousel traders by using the term "closed loops" or that Mr Ganesh understood the term in this way. But he did suggest that Mr Deuss intended to identify those traders who would arouse suspicion with correspondent banks:

> "Q. And then if we could move on to the topic of cross engineering, starting with {F/827/1}. We see what's there said. Now, that's because what Mr Deuss wants to know -- wants to identify is accounts where there is a lot of wire activity for the purposes of trying to get the people sending the money in by wire or receiving the money, to try to get them to open an FCIB account? A. Yes, that's correct. That was an initiative to create a sales lead -- a pipeline. Q. Now, the fees for wire transfers were higher, weren't they, than for intra-account transfers? A. That's correct because the bank, FCIB, also had to pay money to the correspondent banks and the fees were higher ...Q. But the effect also -- the transfers are bought in-house, as it were, then they're not subject to scrutiny by a correspondent bank, are they? A. Well, I think the money that -- so -- I mean, because FCIB was an offshore bank it was the only way money could come into the system was by a wire transfer. So there would have always been

> scrutiny of the first payment into the bank and the last payment out of the bank. Q. The same sentiment is expressed on the same day at {F/830/1}. He's identified -- as we've said, he's identified the need to try and get the wire activity placed into FCIB accounts "should be a vigorous marketing effort to bring that about". Then if we look at the {F/830/1}, he says further to that e-mail "we need to particularly identify those clients of ours who have a high occurrence of wire transfers coming in and as soon as the funds are received going out again ... (ie high velocity sterling incoming/ outgoing related wire transfers)". And he's particularly identifying those accounts, those transfers, because those are the ones that would raise suspicion with the correspondent banks, isn't he? A. I don't remember correspondent banks ever raising questions, even prior to that, on any of the wire transfers that had come in or gone out which were related to telecom. So I don't believe that this would have either added or removed risk from that. And, again, like my recollection is like, when we did this analysis on the freeze orders that we'd got, till December 2005, I think, like, most -- many -- half or maybe more than half of the frozen accounts that were listed in those freeze orders were not FCIB clients. So I don't believe that this was necessarily an attempt to bypass correspondent banks or scrutiny by correspondent banks. It was, I thought, an initiative to grow the business while we wanted to ensure; it was again relied on the same principle that we had: we want to grow the business but we want to have a squeaky clean customer base and RMC should do its work."

(iv) The submissions

417. Mr Parker and his team submitted that it was plain that Mr Deuss was "motivated by profit above all else" and "willing to sacrifice compliance to commerce". Mr Parker also submitted that Mr Deuss understood that networks or cells of traders operated in closed loops using FCIB accounts to carry out multiple trades buying and selling mobile phones and computer components. For example, when Mr Parker took me to Mr Vallerey's memo dated 11 May 2006 in his "virtual" cross-examination, he placed particular significance on the reference to "sister companies" and suggested that the term "closed loop network" was a euphemism for carousel fraud. He also described these documents as showing "little glimpses of them knowing the reality of what's going on".

418. In their closing submissions Mr Parker and his team also equated closed loops or closed loop networks with carousels of traders engaged in MTIC fraud. They submitted on a number of occasions that traders organised in cells with a network head could not be trading legitimately:

> "Mr Deuss clearly had good knowledge of both the scale of the problem of MTIC fraud in the T&C sector from these documents, but also of how

> such frauds operated. They highlighted and explained a number of features of MTIC fraud such as:
>
> (1) Closed loops or "cells" of traders: i.e. the same traders dealing consistently or exclusively with one another. It is difficult to reconcile such trading with legitimate commercial trading, wherein participants would seek the best price;
>
> (2) Similarly, circular trading patterns and carousels, with goods being traded multiple times, often between the same parties;
>
> (3) Large volumes, which are a feature of carousel trading (and an explanation for, as we will see, volumes of trade which far, far exceeded anything that might be expected from a legitimate 'grey' mobile phone market);
>
> (4) That is especially the case for traders with no experience or expertise in the market who were able to generate enormous trading volumes in no time at all;
>
> (5) Back to back trading, with identical or near identical amounts going in and out of accounts in rapid succession; and
>
> (6) Third-party payments."

419. Mr Thanki and his team submitted that the expression "closed loops" should not be equated with carousels and he drew my attention to a number of documents in which it was used perfectly innocently. For example, he relied on an article on PayPal's website showing that it was in common usage to describe a common platform or infrastructure for making payments. He also relied upon an interview which Mr Partridge of TWPS gave to Dutch investigators in 2012:

> "Q. I understand. I have almost come to my last question. Going to page 11, there was a general agreement that FCIB wanted only legitimate customers. Can you elaborate on that? A. This was a new business initiative that was being looked at and I believed it was being set up for the long term. The product was technologically advanced. If you look today to be able to make closed-loop payments in the right environments, this is something really powerful. I am sure that everybody has heard of e-Bay with PayPal for instance, this is a business which has grown and it is the same sort of concept within a smaller way. So, our focus was trying to attract the type of clients or business, which would grow exponentially but was in legitimate circles."

(v) Conclusions

420. Paragraph 11(4) is not happily pleaded and it is not clear to me whether the words "without imposing any effective AML procedures" is intended to plead Mr Deuss's state of mind (i.e. that he intended not to impose any effective AML procedures or did not care

whether FCIB did so) or whether they are intended to plead a state of facts (i.e. that FCIB did not in fact impose any such procedures). However, it was clear from the Claimants' closing submissions that the case which they advanced was the former and that they invited the Court to find that Mr Deuss was determined to capture the T&C sector by sacrificing compliance with FCIB's AML procedures.

421. I accept that between August 2004 and November 2005 Mr Deuss intended to attract the T&C sector by offering it eBanking services and that he was successful in attracting customers in the T&C sector during that fifteen month period. It is clear from his emails dated 1 December 2005 that Mr Deuss was still keen to attract customers and to take advantage of "cross-engineering" if FCIB could do so. However, this is not evidence of dishonesty and I prefer not to use the word "capture" because of any suggestion implicit in the use of that word that Mr Deuss was dishonest.

422. I might have been prepared to draw the inference that Mr Deuss was dishonest because he was determined to capture the T&C sector by sacrificing compliance for profit if there had been clear evidence of a motive for him to do so. But I am not prepared to draw the inference that Mr Deuss was motivated solely by profit or prepared to put profit before compliance for the following reasons:

(1) The Claimants did not adduce any evidence of the profits which Mr Deuss could have expected FCIB to make from capturing the T&C sector or compare them with Mr Deuss's accumulated wealth. The only contemporaneous evidence was contained in the action points for the April 2006 quarterly meeting of the TWPS marketers which recorded that revenue for the first three quarters of 2006 was US $11.6 million of which 80% was derived from the fees paid by T&C traders for eBanking services (i.e. wire transfers and intra-account transfers). The audited accounts of FCIB's parent company for the year ended 31 December 2005 also showed that its income from FCIB (i.e. the profit earned by FCIB) was US $2,356,128 compared with total shareholder's equity in the holding company of US $220,776,745.

(2) It is impossible for me to draw an inference from these figures that the T&C sector would have been so attractive to Mr Deuss that he would have prepared to take the risk that FCIB would be liable to HMRC for assisting T&C traders engaged in

MTIC fraud or the reputational risk and financial risks for FCIB associated with a finding of dishonesty. As Mr Thanki and his team pointed out in their closing submissions, FCIB's profit for the year ended 31 December 2005 was only 0.6% of the total sums which the MTIC Companies claimed from FCIB. Moreover, the rewards which Mr Deuss could have expected to earn by capturing the T&C sector would not have justified the potential damage to the value of the bank itself.

(3) Mr Parker and his team also had to accept that in order to operate at all, Mr Deuss was acutely aware that he needed to preserve FCIB's correspondent banking relationships without which FCIB could not survive. Mr Thanki submitted in his oral closing submissions that this was a very powerful motive for Mr Deuss not to facilitate fraud:

> "Now, before we move on to the detail, we do submit that there are several overarching conceptional problems with the claimant's case theory. The first point, Mr Deuss's obvious concern about maintaining correspondent banking relationships, which he accepts in his witness statement, rather cuts across the profit at any cost theory. That's point one. Point two, the existential importance of the correspondent banking relationships strongly suggests that Mr Deuss' overarching interest was in preserving FCIB as a viable bank, including the real value ascribed to the genuinely cutting-edge e banking platform. Point three is that once that overarching imperative is recognised, it underlines that entering a risky market sector armed with a compliance function which you know is inadequate or woeful, in the claimant's words, knowingly woeful, would be suicidal for Mr Deuss and the bank. The fourth point is that the claimant's repeated emphasis on the importance attached to maintaining correspondent banking relationships is in fact a point heavily in our favour. It provides a strong motivation not to knowingly facilitate fraudsters. My Lord will be aware that the correspondent banking relationships all pre-dated engagement with the T&C sector, and provided a strong motivation to have, as Mr Deuss repeatedly put it, a squeaky clean client base. In our submission, the much more realistic explanation of the period 2004 to 2006 is that Mr Deuss thought that FCIB's compliance was, as he says in his witness statement, commensurate with the perceived risks as he understood them from time to time."

(4) I accept those submissions. They are consistent with Mr Deuss's conduct at the time and, in particular, his instructions to carry out a review of all customers for the purpose of the migration to UBS and then his ultimate decision to withdraw from the T&C sector as set out in his letter to Mr Watson dated 8 August 2006. Mr Parker portrayed this as a cynical decision which FCIB had only taken once UBS

had made it clear that it was terminating the relationship. But both Mr Sharma and Mr Ganesh gave evidence that Mr Deuss had taken this decision in June 2006. Mr Sharma's evidence was as follows:

> "In June the -- as far as I recall, Mr Deuss by then had instructed us to exit the telecom business and focus only on low business -- on low risk businesses. The procedures we had put in place, and there must be a documented procedure which called out how we should treat the low risk businesses. As soon as we approved, we should monitor their first five transactions and review that they are not telecom trades and, if they are, we should immediately freeze and then close them."

(5) I accept that evidence. Mr Ganesh gave evidence to similar effect and it is consistent with Mr Vallerey's email dated 3 July 2006 in which he stated that FCIB was entering a new phase and that starting on 1 July 2006 the sole focus was to be is on low risk accounts. I find as a fact that Mr Deuss decided to withdraw from the T&C sector in June 2006 and that one of his motives for doing so was to preserve FCIB's correspondent banking relationship with UBS (although it did not ultimately have the desired effect).

(6) Finally, both Mr Sharma and Mr Ganesh gave evidence that Mr Deuss was not prepared to sacrifice compliance to commerce. Indeed, Mr Ganesh gave evidence in terms (in the passage which I have quoted above) that it was never suggested to him that "commercial aspects should overrule compliance" and that the "mandate was always compliance". I have already accepted that evidence and it directly negates the inference that Mr Deuss was prepared to put commerce or profit before compliance.

423. Again, I might have been prepared to draw the inference that Mr Deuss was dishonest if I had been satisfied that he used the term "closed loops" as a euphemism for networks of traders involved in MTIC or carousel fraud. However, I am not prepared to draw that inference either for the following reasons:

(1) I am satisfied that it is possible to use the term "closed loops" innocently to describe the kind of platform or infrastructure which Mr Partridge was describing in his interview. But I am also satisfied that it could equally be a tell-tale sign that Mr Deuss and the TWPS marketers fully understood that they were dealing with carousels of MTIC traders (especially in the context of the features which the

Claimants set out above). It all depends on the context.

(2) I am not persuaded that the term "closed loops" was used in any of the documents quoted above as a synonym or euphemism for a carousel of traders engaged in MTIC fraud. I note, in particular, that Mr Ulrich used the term "our closed loop system" in an email to Mr Fisher of Bell Pottinger. It is clear from the context that he did not intend to refer to a network of fraudulent traders and it is highly improbable that he would have done so in an email to Bell Pottinger instructing Mr Fisher to defend FCIB's reputation. I am not prepared, therefore, to draw any inference of dishonesty simply from the use of this term (or similar terms) even in a significant number of documents.

(3) Further, Mr Deuss was the author of only one of the documents upon which the Claimants relied in support of their case that he was targeting networks of fraudulent traders and he used the term "closed loops" only once (and then in inverted commas). If the Claimants are correct and the authors of all of those documents were referring to networks of fraudsters, then it must follow that not only Mr Deuss but all of the other authors and recipients of these documents were fully aware of this fact too. But the Claimants did not allege that any individual was dishonest apart from Mr Deuss and Mr Vallerey and they did not pursue the dishonesty allegations against Mr Vallerey at trial (even though he was the author of the email dated 11 May 2006 and, on their own case, the "Trading segment action plan").

(4) Mr Parker did not suggest to Mr Ganesh that he understood Mr Deuss to be referring to networks of MTIC fraudsters in his emails dated 1 December 2005. What he put to Mr Ganesh was that Mr Deuss wanted to identify accounts where there was a lot of wire activity to get the senders of the funds to open an FCIB account. This was no doubt a considered position and I am satisfied that when he was cross-examined, Mr Ganesh understood the term "closed loops" innocently and answered Mr Parker's questions on that basis.

(5) But even if it is appropriate to focus on Mr Deuss's intentions alone, these documents provide no basis for drawing an inference that he intended to target networks of fraudulent traders as opposed to legitimate customers. Mr Parker and

his team made great play of the meetings with Jimmy and relied on them as showing that Mr Deuss was prepared to take on network heads as MCIs or MMCIs. But he did not refer to the decision taken in Kuala Lumpur on 16 October 2005 that Mr Deuss would review all introductions made by Mr Van Laarhoven personally. Indeed, the conversation between Mr Barrs and Ms Van Dijk on 4 November 2005 strongly suggests that Mr Van Laarhoven had been dismissed for trying to introduce "dodgy clients".

(6) Further, even though Mr Mallaburn described his activities in Dubai to the same meeting on 16 October 2005 and the list of action points referred to "cross engineering of transactions", those action points also required TWPS marketers to "exercise the utmost care in dealing with the prospect" and set out the basic precautions which they were required to take. These two examples demonstrate the danger of taking a single document out of context and cherry-picking individual statements from it.

(7) Finally, in reaching this conclusion I place significant weight on Mr Deuss's reaction to concerns about the legitimacy of the T&C sector and, in particular, the memos and emails which he sent between September 2005 and December 2005 when the number of T&C customers had grown very considerably. Between 19 September 2005 and 16 December 2005 Mr Deuss gave instructions both for the existing accounts of T&C customers to be analysed, for expert advice to be taken on FCIB's existing policies and for new policies to be introduced. Indeed, it is clear from his notes dated 19 September 2005 that Mr Deuss wanted to know the answer to the question: "is everyone part of a huge carrousel activity designed to commit tax fraud?"

(8) This was the reaction of an honest banker to the increase in the number of accounts and the volume of transactions and also to the heightened risk of fraud which he recognised. Mr Parker had no answer to these documents other than to submit that they were window dressing in case of future investigation or that Mr Deuss was going through the motions to preserve FCIB's correspondent banking relationships whilst continuing to facilitate fraud. In my judgment, the instructions which Mr Deuss gave to the RMC and, in particular, his email dated 16 December 2005 to Mr Sharma reflected his genuine concerns and were not window dressing or a

cynical ploy to lay a false paper trail.

424. I therefore dismiss the allegations in paragraphs 11(4) and (5), namely, that Mr Deuss dishonestly determined to capture the T&C sector by sacrificing compliance in favour of profit and that he decided to make FCIB attractive to fraudsters by emphasising the benefits of eBanking and enabling them to transfer funds round closed loops organised by network heads.

(7) Mr Deuss's inquiries

425. The Claimants also alleged that Mr Deuss knew that there was a serious or real possibility that companies in the T&C sector were engaged in MTIC fraud but failed to make enquiries to see if that were the case: see paragraph 11(6). The time period which this allegation covers is not specified. But in the Claimants' response to Mr Deuss's request for further information dated 21 December 2022 the Claimants' pleaded that Mr Deuss had this knowledge in light of the matters set out in paragraphs 11(2), (3) and (5). In those paragraphs, their case was that Mr Deuss had the relevant knowledge by October or November 2005 at the latest.

(i) Mr Deuss's instructions

426. Between 31 August 2005 and 16 December 2005 Mr Deuss gave instructions to the RMC and others to investigate the business of T&C traders beginning with a query about Duck Trading. It was common ground that the investigations which the RMC carried out did not really begin until 22 December 2005 when Mr Sharma began to look at those companies who were subject to freezing orders and that the RMC did not commence transaction monitoring until March 2006. The issue for the Court, therefore, is what (if any) inference to draw from the delay in carrying out Mr Deuss's instructions.

(ii) The evidence

427. *Mr Deuss*: gave evidence that he gave instructions to Ganesh and the RMC team to carry out various investigations and that they carried them out. He referred to Mr Sharma's report and expressed the view that Mr Sharma might have carried this out on his own initiative. He also referred to a discussion about MOT reports:

"97. I do not recall these particular emails or memos, but they reflect my

> recollection of the developments at the time, which is that following the receipt of two freeze orders from the English High Court in or around June to August 2005, Tim and I reviewed the wire transfer activity of the companies mentioned in the freeze order documents (whose accounts we had frozen) and noticed certain transaction patterns.
>
> 98. Based on these observations, I asked Ganesh and the RMC team to carry out an analysis of a sample of FCIB's top trading telecoms customers, to investigate whether there was a commercial justification for the transaction patterns we had observed in the frozen accounts. I also sent these observations to Daniel Maurice-Vallerey, and asked for his input and for him to carry out further research on the market so we could establish the commercial justification for the transaction patterns we were observing. Tim and I were trying to establish whether the transaction patterns we had observed were in fact indicative of fraud, or if they just reflected the trading patterns in the market segment."
>
> "100. I asked Ganesh and the RMC team to carry out further investigations of the transactions of FCIB's telecom customers and any freeze orders which the bank received, to try and identify fraudulent transaction patterns. My recollection is that the RMC team carried out this analysis over a period of months, and this work eventually led to specific account opening measures and transaction monitoring tools being put in place to deal with the risks of VAT fraud in 2006.
>
> "I have been shown an email from Saurabh to me and Tim on 4 January 2006, which attaches a report and a summary analysis of VAT fraud, based on the patterns of accounts which FCIB had received freeze orders in respect of. I remember receiving this report, but do not recall if I asked Saurabh to carry out this investigation or prepare this report. It is likely that it was the product of the aforementioned investigation which the RMC had been carrying out, although I would not be surprised if he did so of his own initiative following discussions with Tim and me in the broader context of dealing with the risks of the telecom sector and maintaining a squeaky clean customer base."

428. *Mr Sharma*. Mr Parker suggested to Mr Sharma that it was significant that Mr Smulders and not he was originally tasked with transaction monitoring and that he was not aware of the results. Mr Parker also put it directly to Mr Sharma that Mr Deuss countermanded the instructions in his email dated 16 December 2005. Mr Sharma did not accept this and I have set out the exchange between them in full at [384]. Mr Parker also asked Mr Sharma the general question why FCIB had not closed accounts once Mr Deuss had raised the high turnover on those accounts and the discrepancies with their financial statements in his email dated 8 December 2005. Mr Sharma's evidence was that this put in train the kind of investigations which ultimately led to transaction monitoring:

> "Q. Well, let's just go back. Mr Deuss has raised the question as to the

> legitimacy of the accounts where money is coming in and leaving in short order? A. Correct. Q. That is, if I use the word -- phrase again -- because that's a red flag? A. I think that's a compliance question: why is a similar amount coming in and a similar amount going out, your Honour. I think, Mr Parker -- that's your name; right? Q. Yes. A. I think what Mr Parker is pushing for is to say this analysis should have given me insights to change the EDD documentation or the procedure. And I still maintain the EDD procedure was developed to -- for the incoming applicants primarily. Yes, we were going back and applying it to the existing customers. The -- the reason we would have wanted to do this investigation would have been to look at the underlying documentation, to determine what's the economic -- what is the economical reason for doing this kind of activity. So this, in my mind, was the beginning of us questioning and trying to figure out the activity of the telecom traders. And here is where we started enhancing and thinking of transaction monitoring for those customers. Q. Thank you. If we look -- stay with 875 and we look at the final paragraph there. There's reference to the fact that you questioned "the high turnover on certain accounts and the discrepancy of the turnover observed with the financial statements submitted by the client". Now, that's obviously about existing clients? A. That is correct; and I think this is directly in relation to the previous -- you know, the evidence that you had submitted where I had questioned based on the analysis the high turnover of some of the customers. Q. But those accounts that you had spotted this high turnover and discussion of financial statements, those accounts weren't closed, were they? A. Is your question: were they already closed? Or did we close them after the question? Q. No. Did you, in the course of reviewing the accounts and seeing the high turnover and the discrepancy with the financial statements -- did you recommend that those accounts be closed? A. Your Honour, I do not recall that I recommended those accounts be closed. I do want to add to that, to say on those accounts we went back to ask for underlying transaction documentation. And I think that was our first beginning of the transaction -- underlying transaction monitoring and documentation. We reviewed those and did not really find anything to be suspicious. That was one. And two was because this is now eBanking, where the transactions are much faster, so if you use intra-comp transfers, you can -- this is happening within minutes, rather than wire transfer, which could take up to 48 hours. That itself allowed our customers to do more transactions than they normally would and therefore their turnover was higher. So it did make sense to me as a compliance person; and, therefore, I did not file any -- I do not recall having filed a suspicious transaction report."

429. Mr Parker took Mr Sharma briefly through his report on the frozen accounts and the draft MOT report which he had prepared including the information about TCG and Mr Callender. Mr Parker asked him why FCIB had not closed its account following this report:

> "MR PARKER: Mr Sharma, just before the enforced break, we were

> talking about the incident with Callender Group, where you recommended that The Callender Group's account be closed, but it wasn't until after a freezing order had been received and the freezing order was dated 23 February. Now, I asked you a question, but I'll ask you, if I may -- withdraw that question to ask a more focused one. Paragraph 45 of your witness statement. Page {C2/1/15}. You deal with the fact that your recommendation wasn't followed, the second half of paragraph 45. Do you see that? Are you able to recollect why that was thought to be the best course of action? A. Yes. Yes, I recall that I had a call, your Honour, with Mr Deuss on a memo that I had sent or this analysis that I'd done. And Mr Deuss first appreciated the effort, the analysis and identifying the pattern; but he also then told me that we don't just close accounts on suspicion. That if we have a suspicion we go ahead and work with the regulatory environment, we file the MOT reports. And that's exactly what I did. My understanding was that Mr Deuss was also working with -- if I recollect his name correctly -- Dr Tromp of the Central Bank of Curaçao, to see how those MOT reports could also make their way to HMRC. That's my recollection. Q. And did you have any idea as to what the regulatory authority would do upon receiving an MOT report? A. I did not. The only input I had was: that's the regulation and that's the environment in which we should work."

430. Mr Parker also put it to Mr Sharma that T&C customers were able to avoid providing the required EDD documentation by opening personal accounts (as indeed Mr Walker did in the case of Northdata). Mr Sharma's evidence was that the RMC ultimately picked this up and introduced a new policy:

> "This is where it starts. You see Mr Partridge sends you an e-mail in respect of Movil 2000. Then if we go up the e-mail, so back to {F/2368/2}. We see at the bottom of that ... if we carry on, I'll -- sorry, please carry on. Go to the top. "Brian: we circulate the masterlist each week - however, we note that the 'business category/sector' for a number of the customers that we know ... while we know that he is primarily performing 'Telecom' trading. He should therefore have been categorized accordingly. Similarly, there are a number of customers that are marked as 'Other' on the masterlist. Could you please go through it once and update the masterlist business sector to ensure it reflects the current categorization (or ensure someone goes through the masterlist and gets this done). This is required urgently to provide to [Mr Deuss] to categorize customers via different correspondent banks. Also, on an ongoing basis for all new customers we should be able to categorize them into business sectors correctly." So your EDD is only being applied to the high risk customers, as identified in the AML manual which had telecoms as high risk, the AML manual. But that, as you recognise, is being evaded by individuals trading as such even though it's a corporate trading activity, and also by the corporate applicants simply not declaring that they're T&C. Now, having been aware of the problem, there's no real solution provided to that, is there? A. So I think you have -- what you have brought up here, your Honour, is the personal

> accounts. So if you have a personal account you would obviously not have done enhanced due diligence. It's not a corporate account. But what we identified was some personal accounts were actually involved in trading activity and therefore, in a way, would have bypassed the corporate requirements of enhanced due diligence. To answer the question, we did come up with a procedure, and it should be in one of the documents, that said personal to corporate account conversion or monitoring of personal accounts for corporate reasons. One of the two. I don't remember the exact name now. And we implemented that so that any personal account that we could monitor was doing trading activity, they had to be converted to a corporate account and, therefore, they would undergo the enhanced due diligence process. So that was step 1. And this was probably March -- February or March 2006. I don't recall exactly when. And then we came up with the process for monitoring low risk segments and then monitoring their first five transactions, as I called out earlier, and making sure that they are not indulging in any telecom trading activity. So yes, we addressed both of them, but at different points in time."

431. Mr Parker also took Mr Sharma to Deloitte's report and the Chiltern Presentation and suggested that there was a very significant delay in the implementation of transaction monitoring:

> "Q. So you've identified the need for transaction monitoring. But, as at the middle of February, you're just wondering what are the fingerprints you should be looking for? A. That is correct. Q. Now, had you been shown the suggestions from Deloittes that had been made in June 2005? I will show you the document. The document is at {F/1993/2}, it starts at. And if we go to -- you see that's -- obviously you weren't there at this time. This is June 2005. If we go to page {F/1993/4}, we can see this is Deloitte, "Account Opening. Verification of Identification Process. Best Practices ". And there's an Appendix A. Best practices in verification is what we're looking at. So if you go to page {F/1993/9}. Sorry. If you turn to page 9, one sees it is headed: "Suspicious Activity Monitoring Rule Classes". And we see from the left-hand column "Rapid Movement of Funds": "(That is, quick turnover in an account or high velocity that is uncharacteristic or does not make business sense, based on customer profile.)" And then if we go across to the next column, we see what is said at RMF1 and RMF2. And we see also, just above that, they've identified the problem with dormant accounts. A. Yes, I see that. Q. Is this the first time you've seen this document? A. In my recollection, yes. Q. And then could we also look at the presentation by Chilterns which is at page {F/731/1}. Now, this is a presentation that Chilterns gave, as we can see, on 14 November 2005, where certain fingerprints of MTIC fraud were set out in bullet point form. If we go to page {F/731/3}. You see items identified: "large turnover", you yourself had already picked up on that one: "Little knowledge of trade. "Change of trade". Then: "Few trading partners" -- few trading partners would be consistent with FCIB's closed loop network, wouldn't it? A. I do not know the answer to that question because I do not recall, on an average,

> how many other trading partners they were interacting with. I don't know if it was two or three or if it was 30 or 40. Q. So far as you can recollect, you didn't attend the Chilterns presentation? A. Not that I recollect that I attended, no. Q. And you haven't seen -- you haven't seen this document before? A. I do not recall."

432. Finally, Mr Parker suggested to Mr Sharma that FCIB ought to have implemented a software package to carry out transaction monitoring but failed to install BSA Reporter and then changed very late to Mantas. Mr Sharma accepted that BSA Reporter was only used very briefly and also that it was not suitable for identifying fraudulent MTIC transactions:

> "Q. And we see that, don't we, if we go to {F/883/1}. A process that you were involved in. You see Mr Deuss' request. Requested you, Ganesh and Mr Smulders to send him a report on the pros and cons of using BSA and Mantas. And there's a draft note underneath about BSA. And if we go down to that note, the second half of the page, we can see that BSA Reporter is installed and running at the office in Holland. But the office in Holland had nothing to do with enhanced due diligence or transaction monitoring, did it? A. That is right, but the office in Holland was our IT back end systems, as far as I recall, which is why there might be a reference to it being installed in Holland, your Honour. Q. Well, then, if we go to {F/888/2}. This is your note that we looked at this morning. And if we go to page {F/888/3}. It's the second bullet point. At this point, which is 22 December, you note the team in Holland is evaluating another product, Mantas. MR JUSTICE LEECH: Sorry, where is the reference to Mantas? I can't see it at the moment? I see, middle of the page. MR PARKER: Sorry. MR JUSTICE LEECH: The second black bullet point. MR PARKER: So BSA hasn't been implemented in Bangalore. And, at this point, it's being recognised that BSA is not the way forward; and you're starting -- starting to look at the possibility of using Mantas instead. A. Your Honour, I'd like to clarify that I don't think there was a need to implement BSA Reporter in Bangalore. The backing systems and the systems of record that had the transactions were either in Holland or in Curaçao. So implementing the BSA reporter or Mantas in those places made sense. We should have had access to those systems. But what you're calling out is right. And this is my recollection because I wasn't leading the implementation of these nor mapping of these requirements to what BSA or Mantas was offering. But I recollect from Rajul, who was a business analyst in Bangalore, who was leading this implementation, and Jan-Willem is that there were a number of rules that FCIB wanted to implement in BSA Reporter; and I do not know the exact -- exactly what they came back with, but BSA came back with like the amount of time it would take them to implement that and the cost seemed prohibitive. And Jan-Willem and Rajul were also evaluating Mantas in parallel. I do think, to correct you Mr Parker, that BSA Reporter in the existing shape was already -- was implemented but wasn't proving to be useful. It was not

> identifying patterns that we wanted to monitor. And that's why the team was reviewing Mantas. So that's the clarification on this that I recall. Q. Well, as I understand the documentation, BSA has been installed in Holland? A. That's right. Q. And it's -- the consensus has been arrived at that it isn't suitable for your purposes? A. That's right. Q. So it isn't rolled out in the RMC department; and, as we've seen, around December that dissatisfaction is leading to consideration of whether or not Mantas should be used? A. Your Honour, while Mr Parker is right on most of points, the fact that whether it's rolled out or not, I think that's incorrect. It was rolled out, but was it useful? No. Which is why the team was looking at another product. And, second, it wasn't really useful because the kind of patterns we wanted to monitor, more specific to telecom trading, the BSA Reporter did not really provide us any of those patterns or did not cater to those patterns. Q. Well, when you say it was rolled out, what was it being used for? A. It was -- so the BSA Reporter would have flagged, based on the rules it had, certain transactions to be reviewed. But we did not find any patterns in those transactions. Q. Well, we saw -- we saw that the transaction -- the transaction monitoring -- not the high value 2 million limit, the transaction monitoring was starting in the middle of February. A. My recollection is March, but, please, go ahead. Q. Yes. And are you suggesting -- well, let's look at {F/1296/1} to get a precise time frame on this. 1296. This is Mark Deuss. This is 12 April "As you are probably aware and seen yesterday we terminated the contracts for BSA Reporter for FCIB and BCB. "The system as bought at the time did not suit the needs for both of us". And then they start talking about Mantas. So the transaction monitoring starting in February/March. The BSA Reporter is terminated on 12 April. If it was used it could only have been used for a very, very short length of time, couldn't it? A. You're right."

433. *Mr Ganesh.* Mr Parker put a number of the same or similar points to Mr Ganesh. He could not recall Duck Trading but he was clear that transaction monitoring was developed to address the kind of issue which Mr Deuss had mentioned in his email dated 31 August 2005 (see [285]):

> "Q. And you see that Mr Deuss has identified Duck Trading -- Duck Trading's account as showing these in and out payments. Nothing happened to Duck Trading's account, did it, at that time? A. Sorry, I don't remember -- Q. If you're able to say. A. I don't remember a specific customer. It's so long ago. Q. You can take it from me that Duck Trading's account was not suspended until April 2006. Are you able to explain why that was so? A. Again, like, I think there was a procedure that Tim had developed, which was for accounts like for transaction monitoring, so it would start -- I think I've written it in my witness statement as well, where people would do the analysis. Then there would be a question. And then we had to follow through a series of checking with customer and seeking documentation which would either result in okay or not okay. The next stage was filing MOT reports. And the final stage was closing accounts. And basically the idea was to follow these procedures. Q. We don't see any

> trace of this exercise of writing to all the customers whose accounts who demonstrate in and out transfers asking for some explanation as to their business model? A. But there was -- there was this transaction monitoring where -- including one that was around carousel trading. I think there was one analysis where Saurabh did on a specific set of customers; and then that was expanded into a carousel trading. There was another Pardeep, a Pardeep Nair, who was doing this transaction monitoring for these customers. That, I think, was early 2006."

434. Mr Parker took Mr Ganesh to Mr Vallerey's email dated 29 June 2005 (see [270]) and suggested to him that Mr Deuss and Mr Vallerey were concerned to prevent or avoid any investigation into T&C customers. Mr Ganesh rejected that suggestion:

> "Q. And if we can go back, please, to {F/507/1}. Just to remind you of Mr Vallerey's e-mail of 29 June. This e-mail is about avoiding a situation where customers' transactions are investigated on the basis that they appear extraordinary because Mr Vallerey and Mr Deuss want those transactions to be treated as ordinary, isn't it? A. I think -- I think I already clarified that. That wasn't the intent here at all. It was just to improve the operational aspects of how the documents are reviewed. So instead of the bank seeing the wire transfer and then asking for documentation, the request was to create a procedure where the customer goes to Barclays, for example, initiates a wire transfer and he immediately can send documentation to the bank, so that the money is not held up for process. It was just an operational improvement. None of the policies or procedures were being asked to be changed. It was just a question of instead of you getting a wire transfer from Barclays and then the bank saying, "Hey, I've got more than 2 million, why did you do this transaction?" Their request was the customer proactively saying, "Hey, I've sent you 2 million and here is the documentation so you can process it quickly". That was only change that was being proposed here. Q. And I put to you that when they're referring to these customers, the extraordinary transactions, they are -- they have in mind the T&C customers? A. Well, no, I don't think it was referred -- specifically targeted at T&C. It was in general. I don't -- again, my recollection is I don't remember how many transactions -- large volume transactions we got from T&C, but they were all subject to the same rules. It wasn't different at all for any customer."

435. Mr Parker also suggested to Mr Ganesh that before October 2005 there was no plan to review EDD documentation and that customers were evading the requirement to provide EDD documentation by opening personal accounts. Mr Ganesh did not accept that there was no plan to review EDD documentation until that date and his evidence in relation to personal accounts was as follows:

> "Q. Then looking at ways in which EDD was evaded. At {F/1881/2}, an e-mail of 13 June 2005 that you were copied in on. You see there it

identifies one: "One issue we are facing is that of customers applying for private accounts ... even [though] they technically qualify as corporate users ..." And this is back on 13 June. He says: "One of the consequences is that these prospects would not be subject to the stringent EDD process we now apply to B2B clients." So this is a problem that's identified back on 13 June 2005. And it's been identified because it's a back door into FCIB evading EDD. Now, that doesn't appear to have been acted upon, because if you look at {F/1437/1}, 16 May 2006, you're e-mailing Mr Sharma. "Personal accounts being used for telecom trading: "I discussed the emerging trend where newly approved personal accounts are being increasingly used for T&C trading activities. "Mr Deuss has instructed that we do the following: "Suspend all such personal accounts that are involved in T&C. "Give them 30 days to open a corporate account ..."Please note that the above process is to be followed only for high risk customers ..." Now, it's not an emerging trend, is it? I don't know what -- it's been something he's identified back in June 2005? A. I don't know -- because if you go back to the earlier one I don't know if I was copied on that or anyone from RMC was copied on that. Q. The previous one was at {F/1881/2}. A. Yes. So I think, at that time, it was like in June, I think, 2005, that was when RMC was being set up. So this was listed to Tineke Deuss. I don't know between then and, you know, like, the other one that you showed, what happened. I don't recall actually. But I think what we had done was we were looking for -- because this was something that within the RMC -- the people in the RMC team had come back and said, "Hey. Look we're finding people who are using personal account for telecom trading"; and then we started running reports to see how big the problem was. That's when we started escalating to Mr Deuss. Q. Looking at the content of {F/1437/1} again. It is only identified as being a problem for T&C trading, isn't it? A. Yes, because I think the report that we ran showed that there were people who were -- who had personal accounts the biggest area of problem was that they were working -- they were trading with telecom customers. Q. But you see this is -- this is a high risk -- it says in this e-mail itself, it's a high risk trading sector and it is only in that high risk trading sector that people are using this device for the purpose of evading EDD? A. Sorry, but I'm not sure what the question is. Q. Yes. On the basis of that, it is obviously dishonest of the people engaged in this high risk T&C trading to be pretending not to be a company? A. So I think -- I think that's exactly what this e-mail is saying. So it's dishonest, that's why we should suspend their accounts. Q. Well, except they're then -- the account is suspended but they're given 30 days to open a corporate account. They're not told: that's it; you're dishonest; we don't want your business. They're told: would you please close your personal account and open a corporate account. A. So I think maybe -- I mean, the question here is -- I don't remember what the discussion was. The question really is did the people do it intentionally, like in a fraudulent behaviour, or it was like they did not know what the right procedure was? But if they had opened a corporate account they would have gone through all the EDD and all the procedures; we would have known whether they were legitimate or not. That was the whole premise of the RMC, that you can underwrite these customers and know that they are in legitimate business. Q. So why are you bothering?

> Why are you making them open a corporate account if they're going to (overspeaking) to anyway? A. Because when they had opened their personal account we did not get the EDD documentation and all the procedures that were put in place."

436. Mr Parker then moved on to ask Mr Ganesh about accounts where the company failed to specify the nature of is business and was therefore designated as "other" and also about dormant accounts. He put to Mr Ganesh that the difficulties with each of these issues had been identified long before the RMC acted upon them:

> "Q. It's the same point for those people who haven't actually said what their business is. You just -- A. So there was also a rule for people who had specified "Other"; they had to say exactly what their line of business was and so that it could be matched against the EDD policy, so that was also a rule in the approval process. Q. And if you look at dormant accounts. Dormant accounts had long been recognised as suspicious. We can see that at {F/350/1}. This is April 2005. I'm not saying that you would have been privy to this, but FCIB clearly recognised the problem with dormant accounts. Go to page {F/350/7}. In the middle of the page: "Strategy regarding inactive accounts. "Inactive accounts have the following consequences", the third one: "Creating potential risk as they could have been set up for fraudulent purposes". There's a strange observation: "An alternative observation is that these accounts can easily be activated by the account holder and could potentially play an essential part of the Corporate Clearing accounts pyramid/community set up". But going on: "We need to determine policies that address the issues raised by inactive accounts without losing the potential benefits they present for FCIB." And that a document is supposed to be developed dealing with the issues. So, back in April 2005, FCIB have recognised that dormant accounts create a risk that they are set up for a fraudulent purpose. And then we see an e-mail -- Mr Deuss raises this with you, 9 November 2005, at {F/787/1}. Once again, do you read that there? A. Sorry. Q. Have you read that? A. Yes. Q. Yes. Yes. You see, once again, it's on the basis Mr Deuss is saying, "Well, we're not going to just close the account on the basis this is highly suspicious", the customer is going to be given the account -- given the option of keeping that account open? A. Again, like the earlier, again my reading of Daniel's memo was it's never clear. I don't think Daniel is even saying just because an account is dormant it is necessarily fraudulent; right? So this policy, again, was based on the premise that we have an account that's not been activated. We don't know if the ownership has changed or, you know, it could potentially be used for fraudulent activity; and therefore we should be careful, even if customers want to fund, we should review the customer file again before it's activated. Q. You don't see a draft policy on this produced until 7 February 2006. That's {F/1213/2}. I put to you that this all takes so long because RMC is just swamped with work? A. That's not -- I don't think that's an accurate characterisation; there was definitely a lot of work in RMC. I think there was a road map for RMC where we started with EDD and ensuring the

> procedures were set up; and then started the transaction monitoring and putting in place a whole set of policies and procedures. So if you really look at the -- my view on that is, if I step back and look at it, in the course of one year we went from roughly zero people to 25 people in compliance. We went from no transaction monitoring to something like -- we had some transaction monitoring in Berg En Dal to a lot of telecoms specific transaction monitoring. And we -- we implemented all these policies and procedures. Plus we implemented two big systems which was directed for compliance, the BSA and Mantas. So actually in the course of a year we had to build this whole organisation and policies and procedures to deal with a variety of issues."

437. Finally, Mr Ganesh also gave evidence about BSA Reporter. His evidence was that on 30 August 2005 a high level project plan was prepared for BSA Reporter but that it was only implemented in May or June 2006. He also gave evidence that there were technical problems with the software and that it was of limited use:

> "So this is making the same point that we've seen before: that the classifications that are to be used for the risk scoring model will feed into the BSA Reporter. The risk score from the EDD model -- A. Yes. Q. -- goes in unaltered for the purpose of the transaction monitoring? A. So I think there are two kinds of transaction modelling. The BSA was a system that we planned to use to look at projected volumes versus actual volumes. That was a system for which we would have used the risk scores. But that was not implemented until mid-2006, even it was actually under implementation at that point in time, because we had technical problems. By that time, the risk score for telecoms had been fixed. But we had a whole set of specific transaction monitoring which was designed for telecoms which was not based on BSA. BSA actually, when we spoke to them, they had no idea about VAT fraud. They had no modules, no capabilities, no transaction monitoring for telecom fraud. And the same was true with second system which we bought, which was called Mantas. Mantas was used by very large banks globally. BSA was typically used by mid-sized banks. And both of them had no modules or no understanding even of telecom fraud. So our conclusion at that time was telecoms require specific transaction monitoring, which we had to develop based on our own understanding of the data."

(iv) Conclusions

438. I begin my analysis by reminding myself of the test which the Court must apply. It is necessary for the Claimants to prove that Mr Deuss suspected that anyone in the T&C sector who applied for an account at FCIB was engaged in MTIC fraud and deliberately abstained from inquiry in order to avoid certain knowledge of what he suspected. It is not enough that he suspected that many T&C customers might have been engaged in MTIC

fraud but negligently refrained from making further inquiries. The Claimants have to prove that he made a conscious decision to refrain from taking any step to confirm that they were.

439. There is no single document or series of documents which provide direct evidence that Mr Deuss took such a conscious decision. Mr Parker put it to Mr Ganesh that Mr Vallerey's memo dated 29 June 2005 provided evidence of such a decision. But in my judgment, this was not an accurate interpretation of Mr Vallerey's email. But in any event, Mr Ganesh gave evidence that he did not understand it in that way and I accept that evidence. Further, if Mr Vallerey was passing on Mr Deuss's instructions to ignore or turn a blind eye to fraudulent transactions, both Mr Vallerey and Mr Ganesh would have been dishonest to follow those instructions. But the Claimants did not pursue the dishonesty allegation against Mr Vallerey and Mr Parker did not put this to Mr Ganesh.

440. It follows, therefore, that I have to consider the contemporaneous documents, Deuss 1 and the oral evidence of Mr Sharma and Mr Ganesh as a whole and decide whether it is appropriate to draw the inference that Mr Deuss made a conscious decision not to carry out any inquiries into FCIB's customers or applicants in the T&C sector in case he discovered that they were engaged in fraudulent activity. Having carefully considered that material, I am not satisfied that it justifies such an inference for the following reasons:

(1) I have found that between August 2004 and December 2005 Mr Deuss believed that there were a significant number of legitimate telecom customers looking for banking services. In my judgment, this finding does not preclude the Court from finding that he suspected any T&C customer of being dishonest and made a conscious decision not to investigate. But it does make such an inference more difficult to draw.

(2) Mr Parker suggested to Mr Sharma that Mr Deuss countermanded the instructions which he had given in his email dated 16 December 2005 and stopped him from carrying out any transaction monitoring. In my judgment, this suggestion distorted the contemporaneous documents and I reject it. On the contrary, I accept the evidence of both Mr Deuss and Mr Sharma and I find that Mr Sharma exercised his own initiative to investigate accounts which were subject to freezing injunctions

as a matter of priority before undertaking wider transaction monitoring. I do so because it was logical, he was able to produce a report quickly and because that report informed the wider investigation which the RMC later undertook.

(3) Nevertheless, I accept that there were significant delays in implementing the EDD Master Plan and that the RMC did not begin to review the relevant documentation until October 2005 (as Mr Sharma accepted) and that a significant backlog developed. I also accept that in June 2005 Deloitte drew attention to transaction monitoring but that the RMC did not implement it until March 2006. Finally, I accept that in April 2005 FCIB first identified dormant accounts as a risk and that on 9 November 2005 Mr Deuss raised it again but also that no policy was introduced until 7 February 2006. Mr Ganesh accepted all of these points when they were put to him in cross-examination.

(4) I also accept that on 30 August 2005 FCIB produced a project plan to implement BSA Reporter, that it was not implemented until May or June 2006 and then only for a matter of months (even though Mr Parker and his team accepted that Mr Deuss had approved it on 26 January 2006: see Cs, C100(1)). However, in my judgment these delays do not justify the inference that Mr Deuss consciously chose not to investigate the T&C sector. Such an inference would only have been justified if the Claimants had called expert evidence on banking practice that these delays were so unreasonable that they could not be explained in any other way.

(5) In my judgment, the obvious inferences to draw (and which I do draw) is that the RMC struggled to cope with the implementation of the EDD Master Plan and to carry out Mr Deuss's instructions as applications from T&C customers hugely increased in the second half of 2005 and that Mr Sharma and his team did not understand or appreciate the scale of the problem until Mr Sharma prepared his report at the end of December 2005. Finally, I also accept the evidence of both Mr Sharma and Mr Ganesh that there were technical and functional issues with BSA Reporter and that this was the reason why FCIB chose to replace it with Mantas.

(6) In any event, it is unnecessary for me to decide whether these delays were unreasonable because, whether they were or not, they are consistent with the conclusion that Mr Deuss acted honestly throughout the period between August

2004 and November 2005. Indeed, I do not necessarily reject Mr Ganesh's evidence that it was a real achievement to "build this whole organisation and policies and procedures to deal with a variety of issues" within the course of a year.

(7) I place little weight on the example of Duck Trading which Mr Parker put to Mr Ganesh because this issue was not pleaded and it was not identified as an MTIC Company. The Claimants accepted in opening that in April 2006 Mr Deuss gave instructions for its account to be frozen and an MOT Report filed. The account was then closed. The reason for the delay between 31 August 2005 and April 2006 was not explored before me and I make no findings in relation to it.

(8) However, I place greater weight on Mr Deuss's failure to act on Mr Sharma's advice in January 2006 and to close down a number of suspicious accounts. By 8 December 2005 he had identified suspicious trading patterns and instructed Mr Sharma to investigate rather than close any of the relevant accounts immediately. But when Mr Sharma advised him to submit an MOT Report and close the accounts, he did not follow that advice.

(9) Even so, I am not satisfied that it is appropriate to draw the inference that Mr Deuss knew or suspected that customers in the T&C sector and, in particular, TCG and Mr Callender were engaged in MTIC fraud (or any form of fraudulent activity) and made a conscious decision not to enquire into those activities. Mr Deuss's reaction to Mr Ganesh's report on the frequency of incoming and outgoing wire transfers was not to look the other way but to initiate a "forensic investigation". It may be that with the benefit of hindsight Mr Deuss ought to have acted more robustly and closed the relevant accounts immediately (as Mr Parker put to Mr Sharma). But, as I have found above, this was the conduct of an honest man.

(10) Moreover, on 19 January 2005 the MOT Report in relation to TCG and Mr Callender was submitted to the Central Bank. Mr Deuss could not recall this sequence of documents in Deuss 1. But it is clear from the contemporaneous documents that on the same day Mr Sharma informed him that Ms Neuman was about to submit the report and he did not take steps to stop her doing so. Again, this was consistent with him being honest.

(11) The minutes of the board meeting on 8 February 2008 record that Mr Deuss raised

the question whether FCIB should close the accounts which were the subject matter of the MOT report and the board did not decide to do so because of the risk of tipping off and because the board considered that FCIB had complied with its regulatory obligations. Indeed, Mr Deuss asked this question directly of Mr Halley, who was a member of the Supervisory Board and an experienced lawyer. Again, it may be that with the benefit of hindsight Mr Deuss ought to have taken a stronger line. But in my judgment, his conduct in raising the issue was that of an honest man. If he had taken a conscious decision to look the other way and not to investigate TCG and Mr Callender and other T&C traders, he would not have raised the issue at all.

(12) Mr Parker relied on Mr Deuss's comment that the MOT reports were put in a drawer and not acted on as evidence of cynical behaviour. But Ms Neuman shared that view and Mr Ulrich was satisfied that FCIB had complied with its regulatory obligations. If Mr Deuss was dishonest in failing to order the accounts of TCG and the other companies named in the MOT report to be closed, then so were they. But no such allegation is made.

(13) I have also weighed in the balance Mr Deuss's conduct in relation to personal accounts. In June 2005 FCIB identified the risk that T&C customers were opening personal accounts in order to avoid providing the relevant EDD documentation and Mr Ganesh accepted in cross-examination that this was fraudulent behaviour. However, almost a year later FCIB was still permitting T&C traders to open personal accounts and when this was drawn to Mr Deuss's attention, he did not order the relevant accounts to be closed but permitted the customers to apply for corporate accounts.

(14) On balance, however, I do not accept that Mr Deuss's conduct was dishonest by permitting customers like Mr Walker of Northdata to apply for corporate accounts. Mr Ganesh's evidence was that their personal accounts were suspended and even if they applied for corporate accounts in the 30 days grace period which Mr Deuss was prepared to give them, then they would have to provide the necessary EDD documentations and comply with FCIB's improved procedures. Mr Ganesh also expressed the view that if they were not legitimate, their applications would be refused. I accept that evidence and the inference which I draw is that Mr Deuss was

prepared to give customers a final opportunity to prove that they had a legitimate business before terminating their relationship with FCIB.

(15) The conclusion which I have reached is supported by Annexes II and III to FCIB's opening submissions which contains a table of examples of applications for accounts which it declined and a table of examples of accounts which were frozen. None of these examples support the inference that Mr Deuss looked the other way whilst T&C traders who were engaged in MTIC fraud and all of the examples are consistent with Mr Deuss's instructions to investigate fraudulent transactions being genuine (even if they took some time to implement).

(16) For example, on or before 4 July 2006 FCIB turned down the application of Phones2u Ltd despite the protestations of both Mr Nixson and Mr Vallerey. This was an application by a trader to convert a personal account to a corporate account in the 30 day grace period. This example corroborates the evidence of Mr Ganesh in relation to this issue. It also demonstrates again the danger of relying on one or two isolated emails as evidence of dishonesty.

441. For these reasons I dismiss the allegation that Mr Deuss provided eBanking facilities to companies in the T&C sector without making enquiries to see if they were engaged in MTIC fraud: see paragraph 11(6). I, therefore, dismiss all of the allegations of dishonesty in paragraph 11.

(8) TWPS marketers: their role

442. The Claimants alleged that Mr Deuss "formally charged" TWPS to monitor customer activity for any unusual transactions or volumes knowing that it would not do so and that this failing was "all the more disreputable" given that the substantial majority of FCIB's customers were in the T&C sector and MTIC fraud was known to be prevalent in that sector. They also alleged that if he had been honest, Mr Deuss would have been concerned to understand their business model and to satisfy himself that they were legitimate: see paragraphs 17 and 18.

(i) AML and KYC checks

443. I was not taken to any documents in which the directors or officers of FCIB delegated

any functions of the bank to TWPS and in their closing submissions the Claimants referred only to two documents in support of their case that Mr Deuss had charged TWPS with performing AML or KYC checks or transaction monitoring: see Cs, C167 and C168. The first was the presentation by FCIB to marketers on 27 September 2004 and the second was the action point list from the quarterly meeting of marketers in April 2006.

444. The Claimants also pleaded a number of documents in support of their case that TWPS had the role of onboarding clients all of which I have set out in the narrative in Section H(3) at paragraphs [237] to [360] (above). In particular, they pleaded that the formal position was set out in Mr Vallerey's presentation dated 29 June 2006 ([353]), Mr Kornitzer's memo dated 9 August 2006 to Western Union ([360]) and Mr Ulrich's Marketing Guidelines ([281]). They alleged that those guidelines "reflected the fact that TWPS was dishonestly presented as not discharging any of the functions involved in banking but simply marketing the services of FCIB (by persons known as "marketers")."

445. The Claimants also pleaded Mr Deuss's emails dated 8 December and 15 December 2005 and 26 May 2006 ([308], [310] and [343]) and Mr Vallerey's email dated 16 February 2006 ([328]) as evidence that Mr Deuss deliberately relaxed the procedures which TWPS was required to carry out. Finally, the Claimants also pleaded Ms Neuman's email dated 21 December 2005 ([284]) which Mr Vallerey forwarded on to TWPS marketers and Mr Calderon's email dated 2 February 2006 ([327]) in support of their case that the TWPS marketers were performing "merely a tick box exercise as a form of window dressing": see paragraph 16.

446. Mr Deuss addressed the allegation that he had charged TWPS with carrying out AML or KYC checks or monitoring accounts. His evidence was that TWPS marketers were involved in "prequalification" or "pre-screening" of customer account applications but did not approve them or monitor accounts. Both Mr Sharma and Mr Ganesh gave evidence to the same effect. Mr Deuss's evidence in Deuss 1 was as follows:

> "53. I understand that the Claimants have alleged that TWPS UK was involved with FCIB's compliance activities, and in particular that I charged TWPS UK with (a) onboarding FCIB's customers by carrying out KYC and AML checks, and approving their accounts; and (b) monitoring the account activities of FCIB's customers.
>
> 54. The Claimants' allegations are not correct. My recollection of the TWPS UK marketers' role is as follows:

> 54.1. TWPS UK marketers did not carry out KYC and AML checks, nor did they approve or deny customer account applications. They were expected to carry out 'prequalification' or 'prescreening' of potential customers. This helped ensure that the applications which clearly would not meet the bank's compliance requirements were filtered out. The marketers received some training to help them carry out this task.
>
> 54.2. TWPS UK marketers did not monitor customer accounts. This activity was first carried out by TWOCC in Berg en Dal (which, as I have explained above, was providing back-office compliance support to FCIB), and later by the RMC in Bangalore.
>
> 54.3. TWPS UK marketers also provided some assistance in helping the RMC collect documents for the account opening procedures or supporting documents for transactions, as well as certifying true copies of some documents."

(ii) Letters of good standing

447. The AML Manual version 2.0 prescribed that a customer should produce a banker's reference or an EPR or MCI should complete a letter of good standing in a standard form which required the signatory to confirm that: (1) the customer was "personally known" to the signatory for a number of years, (2) the customer's residential address and (3) that the customer was an honourable person in good standing in their personal and business community. The Claimants produced an analysis of the AML and KYC checks carried out in relation to the MTIC Companies in Cs, S5. The documents to which they referred showed the following:

(1) Bankers references or letters of good standing were provided by independent third parties for five companies (@tomic, ACEL, Comveen, Kingswood and Wood Works). The checklist for a further three companies (Eliyon, Gold Digit and Xicom) had been ticked to show such a letter had been received.

(2) No letter of good standing had been received for seven companies and instead an EPR number had been inserted instead (385 North, Blue Fox, ETP, MTL, Notebook, Star and TCG).

(3) A letter of good standing had been provided by a TWPS marketer (either Mr Bailey or Mr Nixson) for five companies (JDG, Leeds Smith, MML, Northdata and Wood Works). In the case of Wood Works it appears that a letter of good standing was signed both by a third party and by a TWPS marketer and in the case of Gold Digit

it is unclear whether such a letter was received at all.

448. Mr Lemer pointed out in his closing submissions that each application was reviewed and approved by a member of FCIB's compliance team. He also took me to the letter of good standing signed by Mr Bailey for JDG and dated 5 August 2005. He drew my attention to the fact that Mr Bailey did not certify that he had known Mr Bhatia of JDG for any length of time. However, he did certify that Mr Bhatia was "an honourable person with good standing in their personal and business community" and the he had "met with this person and certified all of the documentation presented to me".

449. The Claimants pleaded that Mr Deuss was aware that the TWPS marketers were not concerned with the contents of the documents required to meet FCIB's onboarding requirements and in support of this allegation they relied on ACEL's application and, in particular, that Mr Shakil Ahmed had made the application even though he was not a director at the time, his identification had not been certified and the letter of good standing provided by Barclays was sent from the offices of ACEL rather than directly by Barclays itself: see paragraph 15.

(iii) Site visit reports

450. Both Mr Sharma and Mr Ganesh gave evidence that until 2005 site visit reports were not a mandatory requirement of EDD but that in January 2006 Mr Deuss introduced a new procedure whereby marketers would be asked to visit customers and confirm their legitimacy. Mr Ganesh explained this as follows in Ganesh 1:

> "67. I have been shown the following documents: (i) an email chain dated 24 November 2005 [QE_0000018885]; (ii) an email from Mr Deuss to Mike Sanchez and Daniel Maurice-Vallerey dated 26 January 2006 [QE_0000021751] and (iii) a draft procedure for review of site visit reports [QE_0000022744]. Having reviewed these, I set out my recollection below.
>
> 68. Until 2005, site visit reports were not a part of mandatory requirements of EDD; they were a tool used by TWPS' management to keep track of and review the activities and performance of the marketers, including lead generation, initial contact with prospective as well as target customers, presentation of products to the prospective customers and so on. On 26 January 2006, Mr Deuss informed Mike Sanchez and Daniel Maurice-Vallerey that moving forward, all new applications had to be submitted along with completed site visit reports; this email was forwarded to me by Daniel Kornitzer. At that stage, the RMC became involved in developing

> procedures for reviewing the site visit reports.
>
> 69. My recollection is that Mr Deuss explained to us that the rationale for making the site visit reports mandatory was that the marketers were the first line of defence for the bank, and therefore they should visit the customers to confirm their legitimacy. This did not imply that they were responsible for compliance, they were not able to approve or reject a new customer and were simply providing the RMC with more information to help it filter out illegitimate customers."

451. Mr Lemer took me to an example of the site visit report used before January 2006 for Notebook. It was dated 20 January 2005 recorded that Mr Bailey met Mr Russell Williams, who was described as a director of the company, and that he collected and certified documents but did not carry out any further due diligence:

> "REFERRAL FROM RAPID GLOBAL LTD. COMPANY ESTABLISHED SINCE 1998 AND TRADES UK TO UK AND EXPORTS IN COMPUTERS. MET AT THE HOLIDAY INN HOTEL HEATHROW. FULL EBANKING DEMO PROVIDED AND ALL DOCS CERTIFIED. WILL ALSO COMPLETE A PERSONAL EXACTPAY APPLICATION."
>
> "SIGNED UP. ANNUAL T/O 450M ANNUAL COMPLETE PERSONAL EXACTPAY APPLICATION."

452. Mr Lemer also took me to an example of the second kind of site visit report for TCG dated 24 January 2006. It was completed by Mr Grandin and required him to collect detailed information about both the company and its pattern of trading. It also required him to verify that he had reviewed the company's KYC and vetting procedures and that they were enforced. Finally, it required him to certify whether "this applicant is a suitable prospect for evaluation by FCIB" and to grade the application by the traffic light system of green, amber and red.

(iv) Submissions

453. Mr Parker did not challenge the evidence of Mr Sharma and Mr Ganesh in relation to either the pre-screening of customers or site visit reports in cross-examination. Indeed, in their closing submissions he and his team submitted that the new mandatory site visits were not introduced until April 2006. He and his team submitted, however, that FCIB relied on TWPS marketers for transaction monitoring even though it was obvious that they could not carry it out (footnotes omitted):

> "168. In at least two respects, reliance was placed on TWPS marketers for compliance activities:
>
> (1) Letters of Good Standing. In January 2004, Martha Neuman Rovira wrote to Mr Deuss updating him on meetings with the Curacao central bank, and the requirement for a "Bank Reference" from their clients. Mr Deuss had confirmed to the central bank that FCIB was complying with this requirement but it is clear from the fax that in fact it was not doing so (one of many examples of Mr Deuss overstating FCIB's compliance efforts). Responsibility for providing such letters was ultimately placed on TWPS marketers, notwithstanding that they were obviously in no position to provide such letters. The requirement that the marketer attest to the client's honesty based on his having known him for a number of years was obviously something that could not honestly be attested to.
>
> (2) Site visits, which were part of Mr Bailey's recommendations in September 2004, were supposed to be mandatory from as early as June 2004, but were designed with commerce and not compliance in mind. As at November 2004 Mr Deuss' concern was still that the marketers carrying out the site visits should communicate the "right things" to the traders, promoting FCIB's services rather than rooting out potential fraudsters. Site visits were then abandoned before being announced as 'mandatory' on 26 January 2006; in fact, the process was not mandatory until April 2006. The site visits included a 'traffic light' system (a) which appears to have been highly influential in the decision to approve an applicant for an FCIB account but (b) for which the marketers appear to have had no training or expertise.
>
> In short, the marketers were charged with "validat[ing]the economic basis for the existence of the activity of the client, when visiting the client". But it was obvious that they could not do that. They were marketers: they were ill equipped to carry out any compliance tasks. Given their primary function was to grow the business, and that they were remunerated on that basis, it would never have been appropriate to rely on them in that way."

(v) Conclusions

454. I accept the evidence of Mr Deuss, Mr Sharma and Mr Ganesh in relation to the role of TWPS marketers in relation to carrying out AML and KYC checks and I find that Mr Deuss did not charge TWPS with monitoring customer activity for unusual transactions. I make this finding of fact for the following reasons:

(1) Neither of the two documents upon which the Claimants relied in their closing submissions supported the finding or inference that Mr Deuss had charged TWPS with this task and both were consistent with his evidence. The presentation to TWPS marketers was intended to give them some basic training about KYC and AML and Slides 4 and 12 made it clear that primary responsibility for carrying out

those checks lay with the compliance department. Moreover, the action point list for the quarterly meeting of TWPS marketers in April 2006 stated in terms: "The role of the marketer is essential in the initial screening of the customers."

(2) The contemporaneous documents provide clear evidence that it was not the role of TWPS marketers to carry out AML or KYC checks. Indeed, Mr Ulrich's Marketing Guidelines made it absolutely clear to the TWPS marketers that their role was limited to providing information and making potential customers aware of the processing services, that they could only certify copies of passports and other KYC documents or translations and that they could not accept account opening documents.

(3) The Claimants were forced to allege that these guidelines (together with other documents which were consistent with them such as Mr Vallerey's presentation and Mr Kornitzer's memo) dishonestly masked their role: see paragraph 13(b). But they did not pursue this allegation at trial either in their opening submissions or their closing submissions or the narrative chronology. The highest they put it in opening was that TWPS marketers did not follow the rules and that Mr Vallerey must have known this: see Cs, O221 and O222.

(4) I reject the Claimants' pleaded case that the Marketing Guidelines were intended to mask the true position and I find that Mr Ulrich issued them with the intention that the TWPS marketers would follow them. I also reject the Claimants' submission that the TWPS marketers ignored the Marketing Guidelines in practice and I find that they did no more than carry out initial screening as described in the action point list for the quarterly meeting in April 2006. I do so because the contemporaneous documents provide clear evidence that FCIB and TWPS observed this demarcation in practice.

(5) In particular, in Annex II to their opening submissions Mr Thanki and his team provided a number of examples where FCIB's compliance department had refused an application even though it was strongly supported by the TWPS marketer. For example, UTL Enterprises Ltd was recommended by Third Dimension (an MCI) and Mr Mallaburn processed its application but FCIB declined it on three separate occasions. In one email dated 26 April 2005 Mr Mallaburn also stated: "He was

referred from a client of Bart's and they are in the same trading loop."

(6) I also accept the evidence of Mr Ganesh and Mr Sharma in relation to site visit reports and I find that before January 2006 they did not form a mandatory part of EDD at all. I also find that in January 2006 Mr Deuss gave instructions for them to become mandatory but for the limited purpose set out by Mr Ganesh, namely, that they provided the RMC with more information to help it filter out illegitimate customers.

(7) Mr Ganesh's evidence is supported by the form and content of the original site visit reports. Moreover, it is clear from Annex II (above) that FCIB's compliance department continued to reject applications after January 2006 and whether or not TWPS marketers had supported the application. For example, FCIB compliance declined the application of Phones 2u Ltd despite Mr Nixson stating in an email dated 3 July 2006: "This client met the criteria that I use to prequalify the application."

(8) Mr Calderon's email dated 2 February 2006 and Mr Vallerey's email dated 16 February 2006 ([327] and [328] above) provide no support for the inference that Mr Deuss deliberately relaxed FCIB's AML or KYC procedures or reduced them to a "tick box exercise". Mr Calderon's reaction to the new site visit reports demonstrates that they involved a significant change to the responsibilities placed on TWPS marketers and that they were reluctant to assume it. Mr Vallerey's email also demonstrates that he gave them careful and detailed instructions on how to complete them.

(9) I attribute little weight to Mr Deuss's emails dated 8 December and 15 December 2005 because the instructions which Mr Deuss gave were not directed to TWPS marketers but to FCIB's compliance department. I accept that Mr Deuss was prepared to delay the introduction of UBO declarations, to accept faxed and scanned documents. But these instructions provide no evidence that he had instructed TWPS marketers to carry out the relevant due diligence or that he relaxed the relevant procedures to enable them to do so.

(10) Finally, I attribute no weight to Mr Deuss's email dated 26 May 2006 because it was not possible to appreciate the context or the significance of the specific change

in policy to which he referred. But in any event, this email was sent only a few weeks before Mr Deuss took the decision to withdraw from the T&C sector altogether. It provides no basis for an inference that Mr Deuss dishonestly used TWPS to facilitate the onboarding of T&C customers engaged in MTIC fraud.

455. But even if I am wrong to accept Mr Deuss's evidence that TWPS's role was limited to "pre-screening" applicants and that it extended to "onboarding" them (as the Claimants submitted), I find that Mr Deuss did not know or suspect that they were onboarding T&C customers engaged in MTIC fraud and did not turn a blind eye to this fact. Again, my reasons for reaching this conclusion are as follows:

(1) I deal with the activities of TWPS marketers in greater detail when I address the question whether they provided assistance to Mr Deuss or FCIB. But the principal reason why the Claimants invited me to draw the inference that Mr Deuss must have known (or turned a blind eye to the fact) that they were onboarding fraudsters was because the TWPS marketers signed letters of good standing for the MTIC Companies and other T&C customers or inserted their EPR number into the account opening checklist in lieu of a banker's reference or a letter of good standing.

(2) In my judgment, the simple answer to the Claimant's case is that FCIB's policy to accept letters of good standing signed by an EPR or an EPR's reference number in lieu of a letter of good standing originated long before Mr Deuss became aware of MTIC fraud or the T&C sector. It is clear from Mr Ulrich's email dated 19 February 2005 that in June 2003 the original forms which permitted an EPR to provide a reference number were issued to marketers. Mr Thanki and his team also took me to an email chain dated 21 July 2005 which showed that the original form contained the following wording:

> ""Please provide a reference letter from a Bank for yourself (and any joint applicant) confirming that you are known to such Bank and that you have maintained your relationship with that Bank in a satisfactory manner. NOTE: if you were introduced to FCIB by (i) an Intermediary, or (ii) a representative of FCIB, then a Bank reference letter is not required provided you can supply the "MCI Number" for the Intermediary or "EPR Number" for the FCIB representative, as applicable, on your application."

(3) It may be said with the benefit of hindsight that it was very unwise to accept a reference from either an MCI or an EPR whether in the form of a letter of good standing or simply a reference number. It may also be that this was in contravention of guidance given by the Central Bank (see below). But whether or not this criticism is justified, it does not support the inference which the Claimants invited me to draw because of the date on which the practice was introduced.

(4) Furthermore, in February 2005 Mr Ulrich changed the policy and in July 2005 Ms Neuman raised a concern that the policy was not being followed. I am also satisfied that by July 2005 FCIB's compliance department was strictly observing the change to the AML Manual introduced earlier that year. This is clear from the email chain dated 5 December 2005 between Mr Bailey, Mr Reeve and Ms Salas (see [283]) and FCIB's decision to decline the application of Appliances World UK Ltd (see [282]). In my judgment, these actions are inconsistent with the Claimants' case that Mr Deuss turned a blind eye to the failure of TWPS marketers to perform AML or KYC checks adequately.

(5) I reject the pleaded allegation that TWPS marketers were performing a tick-box exercise as a form of window dressing (or that Mr Deuss knew they were). Neither Ms Neuman's email dated 21 December 2005 nor Mr Calderon's email dated 2 February 2005 provide support for such a conclusion and, if anything, they corroborate Mr Deuss's evidence. I have addressed Mr Calderon's email above and I am satisfied that the new site visit reports involved far more than a "tick box exercise". I am also satisfied that Ms Neuman's email demonstrates that she was genuinely attempting to police TWPS marketers to ensure that they complied with the AML Manual. The inference which I draw is that her email was prompted by the exchange between Mr Bailey, Mr Reeve and Ms Salas on 5 December 2005.

(6) I also reject the pleaded allegations based on the ACEL application. The account opening documents show that although Mr Shakil Ahmed was not a director of the company, he was a founding shareholder and the company secretary and that Jalil Ahmed was the sole director and beneficial owner. Further, although Mr Shakil Ahmed's passport was not certified, Mr Jalil Ahmed's passport had been certified by a solicitor. Finally, although the reference from Barclays was faxed from ACEL's offices, it was addressed to FCIB and it was on Barclays' notepaper and

signed on the bank's behalf.

(7) The Claimants did not allege or seek to prove at trial that the allegations in paragraph 15 involved either breaches of FCIB's account opening procedure or that those breaches were committed by TWPS marketers. The opening of the account was approved by Ms Romina de Lannoy on 30 August 2005 and there was no suggestion that she was employed by TWPS rather than by FCIB. At their highest, these allegations supported a finding of negligence not dishonesty.

456. The Claimants also alleged that in January 2004 Mr Deuss misled the Central Bank and they relied on a fax dated 16 January 2004 from Ms Neuman to Mr Deuss. However, that fax confirms that the practices upon which the Claimants relied to draw an inference of dishonesty significantly pre-dated Mr Deuss's knowledge of both the T&C sector and VAT fraud:

> "During the ExacPay/EBanking demonstration for the CB staff, Mr Veldhuizen inquired whether we required a Bank Reference from our clients, to which you replied in the affirmative. Mr. Veldhuizen made a written notation of this.
>
> This needs to be implemented as we are now only requiring an EPR or MCI reference which is not been supplied by the EPRs or the MCIs. Only a mention of the EPR/MCI number on the application is being made in lieu of a Bank reference and only for the company or individual applying for the account No references whatsoever are being submitted for the individual signatories. Reference letters for the signatories do not form part of our present application requirements."

457. This was not a pleaded allegation and Mr Deuss did not have an opportunity to answer it. In particular, he was not given a chance to explain whether he made the statement and, if so, what the context was and I note that the fax was annotated in manuscript: "Nor are they required by law." But in any event, this fax provides clear evidence that the practice of accepting a letter of good standing or the reference number of an EPR or MCI was unrelated to the marketing of eBanking services to T&C traders engaged in MTIC fraud. It may have been bad banking practice and it may even be that Mr Deuss misled the Central Bank. But it provides no evidence that he dishonestly assisted the MTIC Directors to commit MTIC fraud.

458. I therefore dismiss the allegation that Mr Deuss charged TWPS marketers with monitoring FCIB's customers for unusual transactions or volumes knowing that they

would not do so: see paragraph 17. I also dismiss the allegation that this alleged lapse of AML procedure was all the more disreputable because MTIC fraud was thought by many including reputable banks to be prevalent in the T&C sector: see paragraph 18. I do so for the reasons which I have set out in detail in dismissing the allegations in paragraphs 11(2) and (3): see [391] and [411] to [412].

459. Finally, paragraph 18 contains the only pleaded allegation in which the Claimants alleged that Mr Deuss was dishonest because he knew that MTIC fraud was thought by HMRC both to be prevalent and to have no legitimate economic expectation. The Claimants did not develop this case at trial. But in any event, I dismiss it. I accept Mr Deuss's evidence that he understood that HMRC was trying to clamp down on the fraud by making legitimate traders equally liable with fraudsters and also by pressuring UK banks to exit the sector: see [382]. I also rely on the cooperation which FCIB offered to HMRC and the firms of solicitors acting on behalf of the IPs which I consider in further detail below.

(9) Lip service

460. The Claimants alleged that Mr Deuss paid lip service to the need to understand the business model of FCIB's customers and did not cause steps to be taken to understand them: see paragraph 19. Mr Parker put a number of points to Mr Sharma and Mr Ganesh to make good this allegation the most significant of which related to the Risk Scoring Model. I address those points in turn.

(i) The Risk Scoring Model

461. Mr Parker put to both Mr Sharma and Mr Ganesh that the T&C sector was originally classified as high risk in the AML Manual and in the first draft of the Risk Scoring Model but that in August 2005 the sector was downgraded to medium risk and that it remained classified as medium risk in the versions produced in October 2005 and March 2006. Mr Parker also put to both witnesses Mr Ulrich's memo dated 17 June 2006 as evidence that the T&C sector remained medium risk even at that date. Mr Parker and his team attributed huge significance to these changes in their closing submissions (again footnotes omitted) both in relation to the reliability of Mr Sharma and Mr Ganesh as witnesses and in relation to the honesty of Mr Deuss:

> "93. Most striking of all, in the risk scoring model that was implemented,

> T&C was graded as "medium risk". There is no justification for this whatsoever. The risk of VAT fraud in the T&C sector had long been acknowledged (and described by FCIB as being 'tremendous').
>
> 94. Not only was this categorization plainly wrong, it was contrary to FCIB own categorization of T&C trading in the AML manual. This discrepancy appears to have been identified at the time; but no action was taken.
>
> 95. Worse, despite everything he knew about VAT fraud in the T&C sector, Mr Deuss approved the designation of T&C as 'medium risk' in the risk scoring model. Mr Vallerey openly recognized in May 2006 that to FCIB, 'high risk' meant T&C – no more, no less; a communication that must have been approved by Mr Deuss. And yet at the time of this of this admission, FCIB's risk scoring model rated T&C as medium risk for EDD purposes.
>
> 96. Both Mr Sharma's and Mr Ganesh's evidence on the designation of T&C as medium risk was deeply unsatisfactory (albeit revealing). Each made the same mistake, maintaining that the designation was changed to high risk in early 2006 (Mr Sharma, for example, specifically said in January or February). Mr Sharma further sought to claim, falsely, that this designation did not affect anything – and in doing so made something like an admission that these customers would have been approved anyway even if they were above the threshold for further consideration under the risk scoring model. Perhaps even more extraordinarily, Mr Ganesh sought to suggest that the view of the bank in October 2005 was that T&C was not a high risk sector, contrary to all of the documentary evidence at the time.
>
> 97. In fact, it is clear from Mr Ulrich's memo of 17 June 2006 (the second 'bookend') that the designation of T&C as medium risk persisted until at least that date; the document contains a manuscript instruction to change the designation. When the error was eventually spotted, there was no shock or even surprise registered; no scramble to undo the damage that would undoubtedly have been done by this false designation. In fact, there is no evidence of anyone at FCIB (including RMC) taking any steps whatsoever even to investigate the impact on any EDD carried out to that point."

462. With the very greatest of respect to Mr Parker and his team, I do not attribute very much weight to the changes made to the Risk Scoring Model over the course of its development between March 2005 and March 2006 or to Mr Ulrich's memo dated 17 June 2006 and I reject these submissions. I do so for the following reasons:

(1) I accept that the decision to change the designation of the T&C sector from high risk to medium risk was taken by Mr Deuss and that it was a considered decision. Mr Ganesh accepted that it was deliberate in cross-examination. He also explained the reason for it, namely, that the Risk Scoring Model had three levels of risk and the AML Manual had only two levels of risk. A fresh decision on how to classify the sector had to be taken.

(2) With the benefit of hindsight, it is clear that the T&C sector should always have been designated as high risk. But I am not satisfied that it would necessarily have appeared so at the time. But in any event, by October 2005 the difference between a designation of high risk and a designation of medium risk was 6.75 points, as Mr Sharma pointed out in evidence. If Mr Deuss had deliberately changed to designation to allow more applications from T&C traders, it is difficult to see why the change had such a limited effect.

(3) Further, by March 2006 a whole series of additional factors had been added to the Risk Scoring Model all of which would have reduced the score of T&C traders engaged in MTIC fraud. I have set out those factors above. Mr Parker put it to Mr Sharma that there was no real change to the final version of the model in March 2006 and in my judgment, that was not an entirely fair question:

> "Just confirm that. If you look at page -- if you look at {F/1236/1}. You're the author of the version in March 2006 "Modified for consistency and added the pre-qualifier checklist". And I think it's right the only changes you made in March -- I think we established this -- the only changes in March were the changes that you made in the tracked - the one change you made which is tracked in the November edition is now in the March edition, obviously without the tracking. There's no major changes made, were there? A. If I read what is written in the box of description, it says more about pre-qualifier checklist. So there must have been other changes. And, again, I do not recollect exactly what. Someone comparing the documents can clear that up."

(4) But in any event, Mr Ganesh picked this up and pointed out that further changes were made. The relevant changes were general/telecom equipment business, corporate structure, age of the business, financial statement analysis, quality of documentation and references and coherence of business strategy and operations: see [331]. In my judgment, those changes were significant and substantially reduced the risk of applications by fraudulent T&C traders being accepted.

(5) I attribute little weight to Mr Ulrich's memo dated 17 June 2006 for two reasons. First, FCIB had already taken the decision to accept no new T&C customers by that date and so it is unsurprising that it had not been acted upon. Secondly, it is yet another example of fairly blunt criticism by Mr Ulrich. I agree with Mr Thanki that if Mr Deuss had been dishonest, it is unlikely that he would have been willing to accept Mr Ulrich voicing these criticisms far less circulating them widely (as he

did on this occasion).

(6) In the absence of any expert evidence about the weight which a reasonable banker would give to the risks associated with the T&C sector in 2005 and 2006, I am not satisfied that downgrading the T&C sector from high to medium risk is consistent only with dishonesty on the part of Mr Deuss. The Risk Scoring Model was the product of input by all of the senior management of FCIB in Curaçao, Berg En Dal and Bangalore. If no honest or reasonable banker would have made such a change, then Mr Ulrich or Mr Smulders and Mr De Wijze were bound to have pointed this out. They did not.

(ii) The Backlog

463. Mr Parker put it to both Mr Sharma and Mr Ganesh that a backlog of EDD built up and that Mr Deuss had unrealistic expectations about the time which it would take to clear it. Mr Sharma's evidence was as follows:

> "Q. In fact, the backlog might be said to consist of three elements: new accounts had been taken on between April and October on the basis that EDD was supposed to be supplied but wasn't being reviewed, because we see in the preceding (indecipherable) -- A. I'm sorry, I'm confused. Between April and October 2005? Q. Sorry. Before you arrived -- A. Yes. Q. -- the EDD review procedure hadn't been finalised? A. That is correct. And we were not asking the applicants to submit EDD documents. Q. No. A. Which is why we had to go back to them and ask them for documents. You are right. Q. But they were being onboarded? A. That is correct. Q. Their accounts were being opened? A. That is correct. Q. So we had -- you had people who had been onboarded between April and October; you had to get their EDD? A. That is correct. Q. You then had the problem that there were delays in them providing the EDD. And, at the same time, there's the new applicants who were making applications after October? A. That is correct. Q. And what I put to you is that with all -- with trying to cope with that backlog, but there wasn't, at that time, bandwidth, as you call it, for there being a continuous review -- the wording Mr Deuss uses in his e-mail -- a continuous review of telecom clients to ensure and confirm that the business is not a facade? A. Sorry. Do you mean continuous review of existing customers? Q. Well, I'm just -- you see, Mr Deuss, in his e-mail, you see the third paragraph: "There is the need for continuous review of telecom clients to ensure and confirm that the business is not a facade created for the purpose of facilitating and undertaking the fraudulent evasion of VAT." Now, sorry, did you understand that simply to be a reference to what was already happening with EDD? A. Your Honour, I understood that to be that we should implement a mechanism by which we can -- it's not a one time effort but

> an ongoing continuous process where we could review the telecom traders or the clients of the bank. I do recall telling Mr Deuss that we need to get through this backlog first. And I recommended March -- it was end of March, as Mr Deuss states in this e-mail, that around that time frame we can start transaction monitoring as a continuous process; and, second, that we were increasing our team so that we can do all of these processes in parallel."

464. I accept that the existence of a large backlog might point to a lack of concern about EDD and transaction monitoring on Mr Deuss's part or even a deliberate decision to go slow in implementing it. But in my judgment it is equally consistent with Mr Deuss's honesty. Indeed, it helps to explain how FCIB onboarded so many T&C customers engaged in MTIC fraud. I find that during the second half of 2005 there was a significant increase in applications to FCIB but that the RMC did not have the expertise or the manpower to vet these applicants properly. I also find that from 31 August 2005 onwards Mr Deuss became increasingly concerned about the quality of the customers but that it took until the middle of the following year to recruit sufficient members of the RMC and for Mr Sharma to develop the expertise to identify MTIC fraud by which time it was too late (although FCIB took steps to mitigate the position from June 2006 onwards).

(iii) Annual reviews

465. Mr Parker also put it to both Mr Sharma and Mr Ganesh that no annual review of T&C customers was in place by November 2005. Mr Sharma's evidence was that the plan was in place:

> "Q. Now, moving on to what you say, paragraph 32.1 {C2/1/10}. You say: "By November 2005, the general framework of RMC operations was broadly in place" -- obviously we don't accept that. But focusing, for the moment, 32.1: "collecting, verifying and analysing customer information (including EDD documentation) to ascertain the legitimacy and risk profile of existing customers of the bank and new applicants (and later, for high risk customers refreshing such information on an annual basis)". But there was no annual review in place at any time of T&C customers, was there? A. Your Honour, the -- there was a plan to do the annual review. If you look at the timelines -- and Mr Parker has already pointed this out -- in January we were doing all the EDD documentation backlog. Our next annual review was planned to be January 2007. The bank of obviously came into emergency measures in September or October 2006, so that never materialised. Q. Yes. So I think it's fair to say, given you gave a date, in your witness statement, of November, we see reference to the annual review in the document we just looked at {F/1384.1/1}. And if we go to {F/1384.1/6}, at the bottom of page 6. You there see: "Annual review of

> the accounts For risk management purposes, the Annual review of the accounts", is to start in the third quarter. And, as you rightly say, FCIB didn't make it into that third quarter. Just -- but none of this is happening in November 2005, is my point, is it? A. I think what this is saying is for 2006 the annual reviews will start in Q3 of 2006. Q. Yes. A. What we started in January 2006, which was all of the backlog of the customers, that was a first review. And the next annual review would therefore happen in January 2007, which we did not hit the timelines for. Q. Yes. A. There was -- so if you're pushing on whether in November 2005, as on page 10 of my statement, 32.1, were we refreshing such information on annual basis? The plan was in place; and we started with the January 2006 EDD review. We never touched the January 2007 EDD review. Q. Well, I think -- I think, for present purposes, it is probably sufficient to clarify that in November 2005 there was -- no actual programme for refreshing existing information on an annual basis was being operated? A. It was not being operated. There was a plan to -- for us to do that. I do recall Mr Deuss had sent out an e-mail -- whether it was November or December 2005, I do not recall exactly. But there is an e-mail from Mr Deuss which had said we should do annual review of refresh the EDD documentation annually. So, yes, the plan was in place."

466. Again, I attribute little weight to the fact that FCIB did not conduct annual reviews for T&C customers which it had taken on in 2004. The RMC had only been in existence for approximately six months when the first T&C accounts became a year old and, as Mr Sharma pointed out, a review of the EDD for these accounts was already taking place. This is another allegation of negligence not dishonesty.

(iv) Foreign currency transactions

467. The Claimants also alleged that Mr Deuss also paid lip service to the need for compliance by encouraging T&C customers to trade in foreign currencies to avoid scrutiny by FCIB's correspondent banks. Mr Deuss's evidence in relation to this issue was as follows:

> "I understand that the Claimants have alleged that I "tried to avoid the involvement in any wire transfers of other banks and for that reason sought to persuade [FCIB's] clients not to transact in sterling…for fear of any other bank questioning the legitimacy of the transactions". I do not recall trying to persuade FCIB's telecoms customers to transact in other currencies, whether to avoid the involvement of other banks in wire transfers or because I was afraid of other banks questioning the legitimacy of transactions."

468. Mr Parker and his team submitted that I should disbelieve this evidence on the basis that the contemporaneous documents told a different story. In both opening and closing

submissions they relied on Mr Bailey's email dated 3 December 2005, Mr Vallerey's email dated 19 December 2005 and both versions of his note: see [334] to [336]. Finally, they relied on his email dated 5 April 2006 ([338]) as evidence that: "This strategy was communicated to FCIB's T&C customers in or around April 2006."

469. Mr Thanki and his team submitted that I should accept Mr Deuss's evidence because the strategy was never implemented and because Mr Vallerey's email dated 2 March 2006 ([337]) provided clear evidence that Mr Deuss had given instructions not to implement it and that he did so because it would not portray FCIB in the right way with the UK authorities such as HMRC. They referred to this email in both their opening and closing submissions.

470. I accept Mr Deuss's evidence on this issue and I find that Mr Deuss gave instructions not to implement the strategy in Mr Vallerey's note. I also dismiss the allegation that he tried to persuade FCIB's customers not to transact in sterling for fear of any other bank questioning the legitimacy of the transactions. Mr Parker and his team did not deal with the email dated 2 March 2006 in their closing submissions and I do not accept that Mr Vallerey's email dated 5 April 2006 shows that he later changed his mind.

471. In particular, I could not find the attachment to that email in the trial bundle (although I made an attempt to do so) and I cannot be satisfied that trading in foreign currencies had any relevance to the change in the terms and conditions to which it was referring. The only evidence to support the Claimants' contention was the use of the phrase "our strategy of moving away from GBP because of our excessive visibility in this area" and this could easily have been taken out of context. Furthermore, Mr Parker and his team produced no evidence of the volumes of trading in foreign currencies to show that in 2006 there was a significant increase.

(10) The FTI Best Practice Guide/the Chiltern Presentation

472. The Claimants alleged that Mr Deuss did not have FCIB or TWPS conduct any investigation or make any proper enquiries to establish whether reputable banks had grounds for refusing to service companies in the T&C sector or carry out any proper enquiries or monitoring to discover whether its customers were engaged in MTIC fraud either by (a) considering the business model of its clients or (b) by assessment of the nature and transactional activity against the FTI Best Practice Guide and the Chilterns

Presentation: see paragraphs 29(1) and (2). They also alleged that Mr Deuss's failure to do so was "commercially unacceptable and dishonest": see the last sentence of paragraph 29. The Claimants also relied on both the Chilterns Presentation and the FTI Best Practice Guide as particulars of Mr Deuss's dishonesty: see paragraph 35(4).

(i) The FTI Best Practice Guide

473. Mr Deuss accepted in Deuss 1 that he received and read the FTI Practice Guide although he could not recall doing so. Mr Sharma and Mr Ganesh did not refer to the guide and Mr Parker did not put it to either of them. The Claimants referred to the guide very briefly in their opening submissions but did not refer to it at all in their closing submissions. I, therefore, deal with it very briefly.

474. The FTI Best Practice Guide was published in September 2005 and the Claimants adduced no evidence that any officer or employee of FCIB other than Mr Deuss saw or read it or that he saw or read it before 6 March 2006. I accept that he did not instruct Mr Sharma or Mr Ganesh to assess the activity of FCIB's customers by reference to the guide but I find that his failure to do so was not dishonest. By March 2006 the RMC had already introduced transaction monitoring and on the same day that Mr Vallerey sent the guide to Mr Deuss (at his request), Mr Sharma wrote to him stating that he was putting the procedure in place that week to start transaction monitoring. By email dated 18 April 2006 he later reported to Mr Deuss that the RMC had already suspended a number of accounts for third party payments.

(ii) The Chilterns Presentation

475. Mr Deuss gave evidence in Deuss 1 that he could not recall receiving or hearing about the Chiltern Presentation and Mr Sharma and Mr Ganesh did not refer to it at all in their witness statements. Mr Parker asked Mr Sharma about it in cross-examination and he could not remember seeing it or attending the presentation. The Claimants accepted in their closing submissions that Mr Sharma had no awareness of it but submitted that it was obviously material to his work. I accept Mr Deuss's evidence that he did not receive or hear about the Chilterns Presentation and I find that he did not instruct Mr Sharma or Mr Ganesh to assess the activity of FCIB's customers by reference to it. But I find that his failure to do so was not commercially unacceptable or dishonest because he was unaware of it.

476. It may be that FCIB would have acted more quickly to undertake transaction monitoring if Mr Deuss, Mr Sharma or Mr Ganesh had seen the FTI Practice Guide on publication or the Chilterns Presentation. But there was no real dispute that they did not do so. But even if they should have done so, this is an allegation of negligence not dishonesty. I, therefore, dismiss the allegations in paragraphs 29 and 35(4). Apart from the specific allegations relating to the FTI Best Practice Guide and the Chilterns Presentation, paragraph 29 largely repeats paragraphs 11(2), 11(3) and paragraph 18. For the reasons which I have given in dismissing the allegations in those paragraphs I also dismiss the remaining allegations in paragraph 29.

(11) MOT Reports

477. The Claimants alleged that FCIB continued to operate accounts for companies whom the RMC recommended should no longer be given such facilities and for companies for whom MOT Reports had been filed: see paragraph 35(5). In Mr Deuss's request for further information dated 21 December 2022 the Claimants were specifically asked to identify the accounts and MOT Reports upon which they were relying. But in their response dated 13 January 2023 they declined to do so. Instead, they relied on the judgment of the Dutch Criminal Court:

> "These requests are not necessary for Mr Deuss to understand or meet the case against him. Further or alternatively, they are requests for evidence and are inappropriate. Without prejudice to that position, it was recorded in the judgment of the Dutch criminal court that Mr Deuss received money laundering reports with recommendations for the closure of accounts but that such recommendations were not actioned. The companies in question were not even subject to further scrutiny or enhanced due diligence. The request for documents is inappropriate. No document is mentioned."

478. The only MOT Report which Mr Parker put to either Mr Sharma or Mr Ganesh was the report filed on Mr Sharma's recommendation by FCIB in relation to TCG on 19 January 2006. Mr Deuss did not accept his recommendation to suspend or close TCG's account until a freezing injunction was served on FCIB in February 2006 and I have set out my reasons in detail above for finding that Mr Deuss did not act dishonestly in doing so. In Appendix B to their opening submissions Mr Thanki and his team identified the relevant documents from which they had calculated how many applications were turned down and how many accounts which were suspended and closed. They summarised their conclusions in D2, O147:

> "(1) 861 applications out of 2,511 received were turned down for compliance reasons. A failure rate of approximately 34%.
>
> (2) 110 accounts were frozen due to receipt of freezing orders and 33 following receipt of insolvency orders.
>
> (3) 164 accounts were suspended and/or closed following the application of FCIB's transaction monitoring process.
>
> (4) 158 accounts were suspended or closed due to other compliance monitoring, including VAT deregistration, personal account misuse, dormancy, red site visit reports and failure of EDD.
>
> (5) 757 accounts were reported to the MOT for unusual transactions."

479. Mr Parker and his teams did not challenge any of these calculations in their closing submissions. Moreover, they accepted in Cs, C145 that a large number of accounts were frozen or closed once FCIB had submitted MOT Reports to the Central Bank (footnotes omitted). Indeed, they only identified two categories of case in which there was no record of suspension following the filing of an MOT Report (see (6) and (7) below):

> "(1) The earliest MOT reports and account suspensions expressly connected to MTIC fraud (which were prompted by receipt of freezing orders) are in September 2005 (Nariman Intertrade Ltd, Orincano Ltd Dipal Ltd, Mohammed Maktari, Wandcall Ltd). There are subsequently further MOT reports connected to pattern analysis in January 2006 (Artlons Trading Limited, CK Communications Limited, E and I Trading Limited, Rezaco Trading Limited, Hi-Tec Electronics, The Callender Group Limited).
>
> (2) The earliest MOT reports citing third party payments are in February 2006 (in respect of Electron Global Ltd, Murgai Anjan, Puri Susheel, Murgai Richa). Thereafter there are MOT reports filed in March and April 2006 which lead to account suspensions.
>
> (3) The earliest MOT reports for failure provide EDD (in respect of Middlebrook UK Ltd, The Brokerage Company Ltd and Zetec SARL) and suspensions (Zetec SARL) are in April 2006.
>
> (4) The earliest MOT reports based on personal accounts being used for business (which also noted high volume) (Luis Archer De Carvalho, Ismail Rafiuddin, Imtiyaz Ahmed Patel) are in April 2006 and associated suspensions in May 2006.
>
> (5) The earliest account suspension for a dormant account is late April 2006 (Bayshore Bank and Trust Barbados Corporation). No MOT reports have been located for dormancy.
>
> (6) The earliest (and only) MOT report based on back to back trading is on 30 May 2006 (Safeguard Insurance Company AD, Lucas Reinsurance Company, Genstar Inc, Porta Like Company, Berth Reinsurance Company Ltd, Rise Reinsurance Company Ltd); there is no record in the frozen

summary report of that being a basis for account suspension.

(7) The earliest MOT reports based on circular trading are on 30 May 2006 (Euro Trading Assets Ltd, Ali Taher); there is no record in the frozen summary report of that being a basis for account suspension.

(8) The earliest MOT reports and account suspensions for invalid VAT numbers are in July 2006 (Cherry tree co. Ltd, Joseph Patrick Connolly)."

480. I am not prepared to draw the inference that Mr Deuss was dishonest from the failure to suspend or close the eight accounts identified in categories (6) and (7) above. I accept the submission of Mr Thanki and his team that the fact that FCIB did not suspend or close an account does not mean that the system failed (let alone that Mr Deuss was dishonest) because there could perfectly properly be cases in which FCIB conducted an investigation but did not consider it appropriate to do so. They also referred to detailed guidelines which Mr Ulrich prepared in July 2006. In the absence of any detailed examination of the underlying documents, I cannot be certain that any of the seven companies and the one individual whom the Claimants identified in paragraphs (6) and (7) were engaged in MTIC fraud or that FCIB could and should have suspended or closed their accounts. I, therefore, dismiss the allegation in paragraph 35(5).

(12) Freezing Orders

481. The Claimants pleaded that from April 2005 a number of FCIB's customers in the UK had been made the subject of freezing orders and relied on this in support of the allegation that Mr Deuss was not interested in whether FCIB's customer' unusual trading was consistent with legitimate trading: see paragraph 31(2). There was no dispute between the parties that FCIB had been either served with freezing orders or sent copies of them because Mr Deuss accepted in Deuss 1 that in early February 2005 FCIB received two orders from the English High Court. The issue is whether Mr Deuss's reaction to the receipt of freezing orders justifies the inference which the Claimants invited the Court to draw, namely, that he did not care whether FCIB's customers were trading legitimately.

482. Mr Deuss's evidence in Deuss 1 was that he was unaware of the first two orders, that Mr De Wijze gave instructions to freeze one account but that Mr Deuss himself later lifted the suspension pending investigation. However, he also gave evidence that in June 2005 there was a change of policy after Mr Ulrich met with the SEC:

"<u>Change in FCIB's policy for freeze orders</u>

111. In around June or July 2005, FCIB received a freeze order issued by the English High Court from lawyers in the United Kingdom. I do not remember which company was involved, but do remember that it concerned a telecoms client and that HMRC was involved. With Tim's meeting with the SEC in Washington fresh in my mind, I suggested to Tim that he should seek contact with the UK authorities as well to see if we could reach or achieve similar cooperation with them.

112. This led to a change in FCIB's policy for dealing with court orders issued from outside the Netherlands Antilles, whereby FCIB would act on a freeze order if it received sufficient information to put it on notice of potential criminal activity. My recollection is that thereafter, when FCIB received a freeze order from the English High Court and the supporting documents contained information that put FCIB on notice of potentially fraudulent activity, FCIB would voluntarily take action by freezing the relevant customer accounts mentioned in the freeze order and filing MOT reports in respect of them.

FCIB's cooperation with UK law firms

113. As I have stated above, following the successful meeting with the SEC in Washington, I discussed with Tim in or around June 2005 seeking contact with the UK authorities as well to see if we could reach or achieve a similar level of cooperation. The end goal was to establish a cooperative working relationship with HMRC, which I understood was carrying out its own investigations to prevent VAT fraud. Tim and I had in mind, for example, being alerted by HMRC of the names of suspected fraudsters, which we could input into our monitoring systems such that any involvement in transactions involving the bank could be detected immediately. As with other matters for which he was responsible, I left this to Tim, and he kept me informed of his meetings and discussions.

114. My recollection is that during the course of the second half of 2005, Tim was in contact with lawyers from two law firms. The names which I recall are Frances Coulson and Richard Saunders, both of Moon Beever, and Chris Potts of Blake Lapthorn. These were the firms who had been faxing freezing orders to FCIB.

115. Tim had established a cooperative working relationship with them when implementing FCIB's new policy for freeze orders received from the English High Court. Tim met the lawyers from these firms between October and December 2005. I did not attend those meetings, but, as usual, Tim kept me informed afterwards. My recollection of this engagement and these meetings is based on Tim's reports to me.

116. I understood from Tim that the lawyers had indicated that HMRC wanted to engage with us, but could not meet or speak with us directly, and so they wanted us to meet with and talk to the lawyers instead. I do not recall if I ever found out what why they did not want to speak with us directly. Given our understanding of the lawyers' role and since they seemed to be offering a cooperative approach going forward (which was what we wanted), we took them at face value. As I explain below, I found out some months later that these lawyers from Moon Beever and Blake

> Lapthorn were not in fact representing HMRC. We were given the impression that HMRC was appreciative of FCIB's efforts to cooperate and wanted to establish further cooperation such as changing the way in way in which FCIB froze accounts (to allow incoming funds only) and also to try and freeze accounts more quickly.
>
> 117. After his meeting with the lawyers, Tim and I discussed how we could cooperate more with HMRC. We discussed the possibility of trying to establish a Memorandum of Understanding between Curaçao and the UK to set up a channel of communication that would allow the Curaçao authorities to share unusual transaction reports with the UK authorities. My recollection is that FCIB held a meeting with the Curaçao authorities in around March 2006 to discuss this possibility.
>
> 118. In mid-January 2006, I met with Frances Coulson of Moon Beever in London. Tim was unable to attend. I do not remember everything that was discussed at the meeting. I remember that Frances Coulson told me that HMRC was appreciative of FCIB's cooperation by freezing and suspending accounts. Despite these positive messages we had not been able to speak to HMRC directly, which was what we really wanted as that would have better allowed us to develop a cooperative relationship like the one that FCIB had with the SEC. After the meeting, I sent Frances Coulson and Richard Saunders of Moon Beever a paper which I had prepared on the flight back from London to Bermuda, which laid out the benefits of HMRC working with FCIB. [QE_0000021395] I also updated the Central Bank and contacts at various correspondent banks of FCIB of our ongoing engagement with the UK lawyers."

483. Mr Potts of Blake Lapthorn (and then Blake Morgan) gave evidence about FCIB's cooperation with his firm and his dialogue with Mr Ulrich. He accepted in cross-examination that there was no obligation upon FCIB to freeze accounts as a result of a freezing order made by an English Court but that it was welcome to him that it chose to do so:

> "Q. You've not given a date as to when you started sending freezing injunctions to FCIB, but, presumably, it was some point in 2005. Does that sound about right to you? A. Yes. Q. And you say, in that passage we looked at, in the hope that FCIB would comply. And, in circumstances in which you had only obtained an English freezing order, you, presumably, mean there that there was no obligation on FCIB to freeze accounts; correct? A. Correct. Although the freezing injunction we obtained, we were able to enforce in Curaçao. Q. There was no obligation on FCIB to freeze accounts as a result of an English court's freezing order? A. Correct. Q. And it must have been a welcome outcome to see that FCIB did, in fact, freeze accounts, notwithstanding that? A. Yes."

484. Mr Thanki also took Mr Potts to a number of contemporaneous documents in which he expressed gratitude to FCIB for its cooperation and, in particular, its cooperation in

"filtering" accounts, i.e. freezing the contents of an account whilst permitting the account holder to continue to pay into the account. He also accepted that he got greater co-operation from FCIB than from English banks. He then described an approach which he received from Mr Ulrich for a meeting:

> "Q. And then: "The purpose of the meeting would be to discuss the carousel fraud matter, including to provide us with an understanding of these transactions so that we can implement further changes to our client Enhanced Due Diligence requirements for opening and maintaining bank accounts for clients who are involved in trading telephones, computers, etc." Yes? A. Yes. Q. And Mr Ulrich was explaining to you that FCIB wanted to meet with HMRC in order to improve its understanding of VAT fraud as an issue; is that right? A. That's what it says in the e-mail. Q. And it was a repeated theme of Mr Ulrich at this time to try and arrange a meeting with HMRC. Do you remember that? A. Yes."

485. Mr Thanki took Mr Potts carefully through Mr Ulrich's attendance note of the meetings with Moon Beever and Blake Lapthorn (see [293]) and for the most part he accepted that it was accurate. In particular, he accepted that Mr Ulrich was given the impression that HMRC did not wish to meet FCIB because it did not wish to be seen to be putting pressure on banks. He also accepted that Mr Ulrich might have gained the impression that both firms were acting for HMRC without understanding all the complexities. Finally, he also accepted that it was in the interests of the law firms and their clients (the IPs) for T&C traders to continue to bank with FCIB:

> "Q. I'm just really asking you whether it's possible that the internal political and -- internal legal and political problems might have been alluding, at least in part, to the acquisition that HMRC were keen to avoid being levelled at them? A. I accept that's certainly possible. Q. Thank you. And the suggestion appears to be that HM Customs understood it wasn't appropriate to force banks not to deal with the telecoms market and so they didn't want to be seen -- seen to be doing that; correct? A. Again, that's what the note says. Q. That's what appears to have been conveyed in the November 2005 meeting; yes? A. Yes, that's what it appears."
>
> "MR THANKI: Yes. And I think we've discussed why FCIB might have come away with that impression, particularly based on what Frances Coulson was expressing about HMRC's views. But I don't want to go back to that discussion. It's not the biggest point in this case. So you're not aware of any reason why Mr Ulrich would not record what was discussed at the Connaught accurately, are you? A. No. Q. No. And we discussed yesterday that FCIB was freezing accounts -- A. Apologies. Can I change a bit? Because -- in answer to your previous question -- there was not a misunderstanding but not a full understanding by Mr Ulrich of the process by which we came in. Because you start with HMRC with a provisional

> liquidation and then we come in piggybacking on all that evidence, and all our evidence to get the freezing injunction when the claims comes from HMRC officers. So, to answer your previous question, that -- his misunderstand -- it's not so much misunderstanding, but his -- the fact that he doesn't appreciate all of the complexities of the various relationships might be a reason why his note is not accurate. Q. That last comment is really focused on whether Mr Ulrich fully understood the role that the UK solicitors were playing; correct? A. Yes."
>
> "Q. And wasn't it in the interests of the UK -- the various UK lawyers and their clients, the insolvency practitioners, for telecom traders to continue to bank with FCIB, that is a bank that was continuing to cooperate with them? A. I -- yes, I accept in circumstances where we're running these claims against MTIC fraudsters it is easier -- and also, my Lord, with doing them on a contingent basis, because there's usually no assets in the company. So, in that context, I accept that there is an advantage to us that MTIC fraudsters continue to act with -- use a bank that's cooperating with us, rather than go and use a Cyprus bank or something else. MR JUSTICE LEECH: Or a Latvian bank I think, as well. A. Yes, which they were doing. There were other banks they were doing. And -- I'll leave it there. MR THANKI: Thank you, Mr Potts. Not at all. Certainly, I think we can agree that you never told Mr Ulrich, or FCIB, that it should exit the telecoms sector. A. I certainly wouldn't have said that."

486. Mr Ulrich's note recorded that FCIB's KYC and EDD looked very effective and Mr Potts accepted that it was likely that this was said although his evidence was that the comment related to FCIB's policies rather than to their application. He also accepted that in all probability Ms Coulson telephoned Mr Ulrich to terminate the dialogue:

> "And if we go back to the meeting note of November 2005, please. If you look at the second white bullet on that page, you see what is said is: "They would like FCIB to consider freezing accounts/sharing information with them on the basis of an Affidavit from HM Customs but before their cases go to court -- they would use our information to build their case ..." So this is what Mr Ulrich is recording was said to him. And then you will see in brackets, he says -- he records: "(they later phoned to drop this request since HM Customs did not want to give us advance notice of their investigations of suspected tax cheats)". You see that? A. I see that. Q. So it looks like your -- A. So I remember that I did not call Mr Ulrich after the meeting. And, as I explained before, it's Frances Coulson who -- and then also after the meeting I did not convey what had happened at the meeting to HMRC because that was left to Frances Coulson and maybe Nick Oliver. So, therefore, where -- that part in brackets will refer to probably Frances Coulson. Q. So the "they" is probably a reference to Frances Coulson -- A. Yes. Q. -- in that passage in parentheses. So you've got no reason to doubt the note that -- and probably you'll say it is likely to have been Frances Coulson, was suggesting that FCIB freeze accounts and share information on the back of affidavit evidence only, at this stage?

> A. Yes, no reason to doubt. Q. Thank you. And certainly, as we see from this note, that request was not rejected by FCIB, was it? A. No. Q. Instead, as we see, the point doesn't appear to have been pressed because HM Customs decided they didn't want to pursue it; yes? A. Hmm, hmm. Hmm, hmm. Q. Sorry, Mr Potts, if you say "hmm, hmm", it doesn't go on the transcript. A. Oh sorry. Yes. Q. Thank you. So it looks like Ms Coulson certainly was in regular dialogue with HM Customs at this point in time? A. Yes, that is correct."

487. I accept Mr Deuss's evidence in relation to his reaction to the receipt by FCIB of freezing injunctions granted by the English Court. In particular, I accept his evidence that in June or July 2005 he suggested to Mr Ulrich that he should contact the UK authorities and see if FCIB could cooperate with them. I also accept his evidence that his goal was to establish a cooperative working relationship with HMRC and that he had in mind the kind of measures which would enable FCIB to detect fraudulent transactions immediately. Finally, I accept his evidence about his own meeting with Ms Coulson in London in January 2006.

488. Mr Deuss's evidence is consistent with the contemporaneous documents and also with Mr Potts' evidence. I find that from June 2005 onwards FCIB cooperated fully with Moon Beever and Blake Lapthorn to enable them to enforce freezing injunctions granted by the English Court. Indeed, Mr Potts accepted frankly in answer to a question from me that he had never encountered a bank in this country which was prepared to cooperate so fully. I also find that FCIB could not implement the measures which Mr Deuss proposed because HMRC was not prepared to give advance notice to FCIB of the customers which they were investigating. In my judgment, therefore, Mr Deuss's response to freezing injunctions granted by the English Court does not support the inference that he did not care whether the trading of FCIB customers was legitimate or not.

(13) Mr Ulrich's meetings with UK lawyers

489. The Claimants also pleaded Mr Ulrich's meetings with Moon Beever and Blake Lapthorn in November 2005 as particulars of the allegation that Mr Deuss was not interested in whether FCIB's customers' unusual trading was consistent with legitimate trading: see paragraph 31(3). They also pleaded in paragraph 31(4):

> "Whilst TWPS, FCIB and Mr Deuss may have preferred that FCIB's customers were legitimate, they had no genuine concern about whether or not they were and they proceeded on the basis that all that mattered was

the revenue being generated from the customers' transactional activity."

490. Mr Potts did not accept that Mr Ulrich was correct to record that the UK lawyers were acting for HMRC. But subject to this point, he accepted that Mr Ulrich's attendance note accurately recorded what was said at the two meetings. As Mr Thanki suggested to Mr Potts, the identity of his clients was not a major point. But in case there is any doubt I accept that Moon Beever and Blake Lapthorn were not acting for HMRC but I also accept Mr Deuss's evidence and I find that at the time of the meetings both he and Mr Ulrich believed that they were. Mr Potts accepted that Mr Ulrich might have gained that understanding and I find that he did so. As Mr Thanki put to Mr Potts, the UK lawyers communicated information about and from HMRC to Mr Ulrich and, in my judgment, it was reasonable for him to assume that they had HMRC's authority and instructions to do so.

491. I also accept Mr Deuss's evidence that Mr Ulrich approached the UK lawyers and met with them after discussions with him and with his authority and that after those meetings he discussed with Mr Ulrich how FCIB could provide greater cooperation with HMRC and to try and agree a memorandum of understanding. Mr Deuss's evidence is consistent with the attendance note of the meeting and with Mr Potts' evidence. In my judgment, therefore, neither the fact of the meetings between Mr Ulrich and the UK lawyers nor the content of their discussions supports the inference that Mr Deuss did not care whether the trading of FCIB customers was legitimate or not. Indeed, both support my earlier conclusions that he behaved honestly.

492. Paragraph 31(4) does not plead any additional facts. Indeed, in substance it is an attempt to repeat or paraphrase paragraph 31 itself. But insofar as it was intended to plead a further inference which the Court was invited to draw from the primary facts pleaded in paragraphs 31(1), (2) and (3) relating to the termination of the Barclays correspondent relationship, the receipt of freezing injunctions and the meetings between Mr Ulrich and the UK lawyers, then I am not prepared to draw such an inference for the reasons which I have already stated. Accordingly, I dismiss that allegation.

(14) The Dutch Judgment

493. The Claimants pleaded that Mr Deuss dishonestly incorporated FCIB in the Dutch Antilles to pretend to be an offshore bank in order to operate outside the regulatory

regime of the Netherlands. As particulars of this allegation, they relied on the fact that Mr Deuss and Ms Deuss had been convicted of a criminal offence by a Dutch Court: see paragraph 9. They also alleged that FCIB processed transactions for companies which it knew to be of an unusual nature without filing a report at the Dutch Financial Intelligence Unit (the "**FIU**") as required by Article 9 of the Dutch Disclosure of Unusual Transactions (Financial Services) Act 1993: see paragraph 34(6). They pleaded 11 transactions between October 2005 and June 2006 which were performed through FCIB accounts. But none of those accounts were in the name of any of the MTIC Companies.

494. The only translation of a judgment by Court in the Netherlands to which I was referred was an uncertified translation of an anonymised version of a judgment which did not even identify Mr Deuss by name. Nevertheless, I will assume that it was an accurate record of the judgment against him and I will refer to it as the "**Dutch Judgment**". Under a heading "the facts" it set out the 11 transactions which the Claimants pleaded in paragraph 34(6) and under the heading "the assessment by the Court" it set out the following findings:

> "The Court is of the opinion that the transactions mentioned in the charges, given the pattern of these transactions, have to be qualified as "unusual", in this sense that they (should) create a suspicion of money laundering. The pattern of these transactions is that large amounts are transferred to accounts of the companies involved, which are subsequently transferred to other FCIB accounts within a few hours or even faster, divided into partial payments. Of course, FCIB N.V. also recognized that the companies mentioned in the charges were involved in unusual transactions, evidenced by the fact that it filed MOT reports with the FRI Curacao concerning all these companies, whether or not concerning specific, earlier transactions."

495. Mr Deuss's evidence in Deuss 1 was that he was found guilty of failing to file unusual transaction reports but that it had filed MOT Reports in Curaçao. It was also his evidence that the reason why FCIB did not file any unusual transaction reports in the Netherlands was because FCIB did not see itself as banking in the Netherlands and so did not think it needed to do so. He then continued:

> "171. If I had known that FCIB needed a license for the work which TWOCC was assisting with, I would have made sure that FCIB applied for a license and would have filed the unusual transaction reports with the Netherlands authorities as well, not just in Curaçao. Nevertheless, FCIB and I were found guilty of the second and third charges and the court imposed a fine of €327,000. In relation to the third charge, we were only

> fined in respect of instances in which FCIB did not file a unusual transaction report for customers or specific transactions in either Curaçao or the Netherlands.
>
> 172. FCIB and I filed appeals against the second and third charges on which we were found guilty. The Dutch prosecutor filed appeals against the charges we were acquitted on. After filing the appeals, the parties entered into a settlement. The details of the settlement terms are confidential, but what is public is that the case was settled between me and the Dutch prosecutor without any agreement on the facts or admission of guilt or wrongdoing."

496. Mr Parker and his team did not pursue this allegation at trial either in their opening or closing submissions or take me to the Dutch Judgment or any evidence in support of this allegation or to the relevant legislation. Moreover, they did not call any formal evidence to prove Mr Deuss's convictions or any expert evidence on Dutch law to prove the mental element for the offences which Mr Deuss was alleged to have committed. Mr Thanki and his team submitted that the Dutch Judgment was irrelevant to the substance of the claims in this action and it was inadmissible as evidence that FCIB or Mr Deuss committed breaches of Article 9 under the rule in *Hollington v Hewthorn*.

497. I accept Mr Thanki's submissions and I hold that the findings made by the Court in the Dutch Judgment in relation to the failure to file reports at the FIU is inadmissible on the question whether Mr Deuss is liable for dishonest assistance in the present claim. I also accept Mr Deuss's evidence that his appeal against his conviction on this charge was settled on terms that he made no admission of wrongdoing and, therefore, that the findings made by the Court at first instance are irrelevant in this action. The Claimants did not adduce any other evidence to prove that Mr Deuss incorporated FCIB dishonestly and to pretend it was an offshore bank and I therefore dismiss that allegation.

498. Finally, I also accept Mr Deuss's evidence that FCIB did not file unusual transaction reports at the FIU because he did not believe that it needed to do so. Mr Parker did not challenge that evidence and I am satisfied that it is not appropriate to draw the inference that Mr Deuss was dishonest from FCIB's failure to file unusual transaction reports at the FIU in relation to the 11 pleaded transactions. I, therefore dismiss the allegations in paragraphs 9 and 34(6).

(15) Misrepresentations to third parties

(i) The memo dated 13 January 2006

499. Mr Parker submitted in the course of his virtual cross-examination that Mr Deuss misled Mr Potts and Ms Coulson in the memo which he sent to them following the meeting on 19 January 2006. That memo was dated 13 January 2006 and headed: "Approach to effectively tackle VAT Fraud without violating Free Trade Principles." In this memo Mr Deuss stated that FCIB faced a choice of exiting the T&C sector altogether or to continue its program of increasingly vigorous screening of customers and transaction monitoring and further enhance its KYC and due diligence policies. He sought to persuade Mr Potts and Ms Coulson that it was in their clients' interests to continue to service the T&C sector:

> "3. If FCIB were to discontinue to serve the Telecoms market, the traders will bank elsewhere and are likely to end up in jurisdictions and with banks which may exhibit a less "co-operative" attitude than FCIB. They would probably also lack in the human resources and understanding of the complexities to deal effectively with the challenges of the Telecom market segment. After all it took FCIB the better part of 9-months to reach its today's level of understanding.
>
> 4. FCIB with its establishment in Bangalore, India (presently employing over 130 people) can meet the massive resource requirements needed to implement, manage and operate highly sophisticated and otherwise digitized KYC and AML procedures. processes and procedures. TWPS's marketing presence around the world facilities one-on-one client interviews and the detailed site visits. Banks in more remote locations are unlikely to have access to resources. FCIB has demonstrated that it can manage effectively the cost/benefit ratio of the Risk Management of the Telecoms market by a combination of charging additional "compliance" costs by increasing monthly account maintenance and transaction fees and the availability of human resources at affordable costs in India."

500. Mr Parker submitted that paragraph 4 was a thoroughly misleading statement because only 25 to 28 people were engaged in the RMC in Bangalore and because Mr Deuss knew that FCIB's AML and KYC procedures were inadequate:

> "Now, obviously TWICTS did other things other than RMC. But this is a thoroughly misleading statement when in fact only 25 to 28 people are engaged on RMC activity. And your Lordship —— your Lordship has seen how Vance, doing a report that goes to UBS, report on the basis that Mantas is already in use; and that is then trumpeted to Mr Bandelier at UBS. And we would say that Mr Deuss fails to present the compliance position accurately when addressing third parties because he knows full well that the reality is inadequate, given the market sector that FCIB is

servicing. But, despite that, he carries on servicing that sector."

(ii) The briefing paper dated 2 February 2006

501. Further, in their opening submissions the Claimants submitted that FCIB misled HMRC in a briefing paper which Baker & McKenzie sent to them on 2 February 2006 (copying in Moon Beever): see Cs, O412. That briefing paper contained the following extracts:

> "● Using the "fingerprints" of known fraudulent transactions, First Curacao analyses trading patterns of its clients to identify potentially suspicious transactions, which will trigger further investigation. First Curacao passes such information on to the local money laundering and proceeds of crime agencies.
>
> ● "Baseline transaction profiles" are being established for all clients, monitoring payments and transfers into and out of accounts. Exceptions to the norm will prompt further investigations, and any suspicious transactions will be reported.
>
> ● First Curacao requires its clients to explain any third party payments they make. Those clients who make frequent third party payments without explanation are promptly reported to local regulatory agencies."
>
> "● Software is being developed which will automatically extract the supply chain for each transaction by "following the money trail". This will help identify any and all parties related to suspicious transactions enabling further investigation potentially leading to the filing of suspicious activities reports. These systems are at a minimum on par with similar systems used by leading financial institutions, including WorldCheck, SIDE Safewatch, BSA Reporter (transaction monitoring rules under development) etc."

502. The Claimants alleged that these statements were inaccurate in a number of respects. They did not assert that Mr Deuss deliberately misled HMRC although they did assert that he was "apparently careful" not to say what he understood to be the economic basis for trading mobile phones. They alleged as follows at Cs, O411 and O412 (again footnotes omitted):

> "412. The B&M briefing paper stated that "[FCIB] considers its current system to be "state of the art" " and "sophisticated" and claimed that:
>
> (1) "Using the "fingerprints" of known fraudulent transactions [FCIB] analyses trading patterns of its clients to identify potentially suspicious transactions, which will trigger further investigation". In fact, there was only "random" transaction monitoring in March (see paragraph 209 above);
>
> (2) "Baseline transaction profiles" are being established for all clients,

> "monitoring payments and transfers into and out of accounts". No such profiles have been disclosed; nor is there any internal reference to them or their use.
>
> (3) "[FCIB] requires its clients to explain any third-party payments they make. Those clients who make frequent third-party payments without explanation are promptly reported to local regulatory gencies". The true position appears from paragraph 396 above.
>
> (4) "Software is being developed which will automatically extract the supply chain for each transaction by "following then money trail" insider FCIB". There is nothing to indicate the statement was true and no such software was ever used.
>
> (5) An economic basis for trading in mobile phones exists. Mr Deuss was apparently careful not to say what he supposedly thought it was."

(iii) The email dated 28 July 2006

503. Mr Parker also submitted that Mr Deuss misled Mr Roland Bandelier of UBS in an email dated 28 July 2006 in which he stated that he wished to share the contents of the Vance Report on a confidential basis. In that email he stated: "The Bank has recently implemented an automated software system of transaction monitoring (Mantas) that is risk base focused." In his oral opening submissions Mr Parker stated as follows:

> "Obviously, in our submission, given what they knew about their existing client base, it is commercially unacceptable to the point of dishonesty not to be adopting methodical, dynamic and aggressive review of that client base for the purposes of weeding out the fraudsters. Again, we say one is hard pressed to find any details about how this methodical, dynamic and aggressive ongoing review was actually being undertaken. And we also say that Mr Deuss is well aware that even the compliance, as it existed in 2006, wouldn't pass scrutiny by outsiders. And one particular example of that, again with reference to the Vance report, on which the defendants rely, is that when Mr Deuss was having problems convincing UBS to maintain their correspondent banking relationship with FCIB, he wrote to them, on 28 July 2006 –– and we have that at {F/1999.1/1}. If we go down, that's a coversheet from October. Sorry. Next page. {F/1999.1/2}. MR JUSTICE LEECH: That's a fax, is it? Or is it an e–mail? It's hard to tell what it is actually. MR PARKER: This is –– this is the –– this puts the date of the e–mail from Mr Deuss –– MR JUSTICE LEECH: So 28 July. MR PARKER: Mr Bandelier is at UBS. MR JUSTICE LEECH: Yes. MR PARKER: And he –– Mr Deuss sets out findings from the Vance report. And if you go to page {F/1999.1/7}. We should hopefully –– MR JUSTICE LEECH: Well, that's saying its strengths include all these programmes have been put in place. MR PARKER: Yes. And in there there's a reference –– sorry, there's a statement that the bank uses Mantas, the software, for transaction monitoring. Have we got the right page? Yes. Thank you. It's third bullet point from the end: "The bank has recently

> implemented an automated software system of transaction monitoring (Mantas) that has risk base focused". MR JUSTICE LEECH: Yes. MR PARKER: But Mr Deuss, we say −− Mr Deuss knew that wasn't true, if one compares that with what he said when he was writing to HMRC on 13 July, very shortly before, as we have at {F/1606/1}. This is to Mr Watson at HMRC. And on page {F/1606/2} one sees there item 2: "Mantas Information. "FCIB has licensed Mantas software to replace it semi-automated transaction capabilities with fully automated transaction monitoring software ... the Mantas software installation and implementation is expected to be complete by September 30, 2006." My Lord, we say, obviously, this is not a case of Mr Deuss doing his honest but inadequate best. We say that he knew that his decision to service the T&C sector could only be justified if he had −− to use his words −− state−of−the−art compliance. And that is how he sought to justify FCIB servicing the T&C sector."

504. Mr Thanki and his team submitted that the Claimants should not be permitted to advance any of these allegations because they were not pleaded in the Particulars of Claim. I accept that submission. The first and third of these allegations were clearly advanced by Mr Parker in his oral submissions on the basis that Mr Deuss fraudulently misled Ms Coulson, Mr Potts and Mr Bandelier. The Claimants did not state in terms that the second allegation was advanced on the basis that Mr Deuss deliberately made untruthful statements in the briefing paper. But they had no relevance otherwise. The Claimants should not have advanced allegations of fraud without permission to amend and without giving Mr Deuss a full opportunity to address them.

505. I, therefore, dismiss these allegations and decline to make any findings of fact in relation to them. But if is necessary for me to do so, I do not accept that Mr Deuss made misleading statements or that they provide a basis for drawing the inference that Mr Deuss acted dishonestly for the reasons set out by Mr Thanki and his team in their closing submissions (which I adopt): see D2, C278 to C280. I have already dealt with a number of other misrepresentations which Mr Deuss is alleged to have made to third parties and which were not pleaded. Although I have addressed those allegations, my comments apply equally to them.

(16) Conclusion

506. For these reasons I dismiss the pleaded allegations of dishonesty against Mr Deuss in relation to the Direct Claims. I do so both because the specific allegations about Mr Deuss's state of mind which the Claimants advanced in the Particulars of Claim were not

made out on the facts and because the documents upon which the Claimants relied in support of those allegations were consistent with Mr Deuss's honesty and, in those circumstances, it is not open to the Court to infer dishonesty: see *Suppipat v Narongdej*. Despite the number of ways in which the Claimants attempted to put their case and the documents upon which they relied, those documents did not support a finding of fact that that Mr Deuss knew or suspected that most of FCIB's customers trading in the T&C sector were engaged in MTIC fraud and that he made a deliberate decision not to investigate whether this was true.

507. Indeed, much like SIB in *Stanford* the Claimants elevated a claim for "gross neglect on a grand scale" into allegations of dishonesty against Mr Deuss himself. With the benefit of hindsight it can be seen that FCIB was an easy target for MTIC fraudsters between February 2005 and March 2006 when the RMC was fully staffed and reasonably experienced at transaction monitoring. The Claimants may have expected that the publicity surrounding the investigation into FCIB and the subsequent criminal proceedings in the Netherlands would give them a fair wind to persuade the Court to find dishonesty. But for the detailed reasons which I have given the contemporaneous documents do not justify such a finding especially when no allegations of dishonesty were made against any other officers or employees.

I. Limitation

(1) Emergency Measures

508. The Claimants and FCIB very helpfully agreed a schedule of agreed facts in relation to Emergency Measures, its purpose and application in the present case. I, therefore, set it out in full:

> "1. The statutory regime was imposed by a Court order (Art. 28(1)) dated 9 October 2006 at a public hearing (the "Order"). FCIB and the Bank of the Netherlands Antilles (the "BNA") (renamed the Central Bank of Curacao and Sint Maarten or CBCS on 10 October 2010 ("the Central Bank")), had the opportunity to be heard (Art. 28(3) and (5)).
>
> 2. The Order was made on 9 October 2006 to protect the interests of the joint creditors in the winding up of the business of FCIB (Art. 28(1)).
>
> 3. The official press release of the BNA dated 11 October 2006 stated that, "As a result of several criminal investigations in the United Kingdom and the Netherlands related to alleged VAT-fraud involving numerous FCIB

clients, a few FCIB clients undertook legal action and subsequently embargoed FCIB funds. As a consequence thereof and after a few banks discontinued their correspondent banking relationship with FCIB, FCIB became unable to make payments…… " and "In light of the emergency measure and the subsequent unwinding of FCIB's activities, the Central Bank will do its utmost to achieve that all depositors rightfully entitled to their deposits will receive said deposits after a due investigation."

4. The Court made the Order as it agreed with the BNA's assessment that the situation which FCIB had found itself in could result in a negative solvency and liquidity position for FCIB (which is closely analogous, to the English law concept of being balance sheet and cash flow insolvent) and that the interests of the joint creditors in the winding up of FCIB demanded special provision.

5. The emergency measures included that the powers of management and supervisory directors of FCIB rested exclusively with the BNA.

6. The Order was not subject to any appeals (Art. 28(8)).

7. The substance of the Order was published in the newspaper in which official notices are published nationwide (Art. 28(7)).

8. A. By the Order and the national ordinance Art. 28(2), when declaring emergency measures, the Central Bank was authorized, to: a. transfer all or part of the obligations of FCIB (the credit institution which it has assumed in the course of its business as a credit institution to obtain funds), or b. wind up all or part of FCIB (the credit institution's business); c. (since 2015) restructure FCIB;

B. As long as it has not yet become apparent to the Central Bank that the credit institution (FCIB) has negative equity (which is closely analogous, to the English law concept of being balance sheet insolvent), the authorisation shall also serve to liquidate the credit institution's assets (Art. 28(2)).

9. Upon emergency measures being pronounced the Central Bank assumed all the powers of the directors and supervisory directors of FCIB to the exclusion of all others (Art. 30(1)).

10. The directors and supervisory directors came under an obligation to render all cooperation requested by the Central Bank in the exercise of those powers (Art. 30(3)).

11. The Central Bank was authorized, notwithstanding the provisions of FCIB's articles of association, to issue and collect all payments not yet made on the shares in the subscribed capital of FCIB (Art. 30(9)).

12. The Central Bank had the power to dismiss the directors (Art. 30(5)).

13. The Central Bank was tasked with looking after the interests of the joint creditors (Art. 30(2)).

14. No transfer of FCIB's rights and obligations by the Central Bank that would have prejudiced the rights of the remaining creditors was permitted (Art. 34).

15. The Central Bank could make payments to creditors to the extent justified by the liquidity position of FCIB (Art. 31(2)).

16. Once it becomes apparent to the Central Bank that the credit institution has a negative equity and (it is a cumulative requirement) either: a. the objective to be achieved with the emergency measures has been or can no longer be achieved, or b. if the emergency measures were not previously declared - there is no longer a reasonable prospect that the objective to be achieved with the emergency regulation can still be achieved; the credit institution must be placed under bankruptcy (Art. 37(1)) where the curator and the judge commissioner would be responsible for the further liquidation of the institution under bankruptcy whereby the unsecured assets of the company are realised and the companies debts are discharged in accordance with their ranking in the insolvency.

17. Upon the credit institution being declared bankrupt, the emergency measures come to an end (Art. 37(3)).

18. Upon bankruptcy the acts performed by or on behalf of the Central Bank during the emergency measures are treated as having been acts by the bankruptcy liquidator and debts incurred during the emergency measures are treated as expenses of the bankruptcy (Art. 37(3)(c)).

19. The Central Bank is to report to the Minister of Finance after the termination of the emergency measures (or during the emergency measures if requested to do so) (Art. 38).

20. No enforcement for payment on an unsecured claim could be brought against FCIB (Art. 31(1)) and the running of limitation periods for such claims was suspended (Art. 31(1) incorporating Art. 32 of the Bankruptcy Decree 1931 mutatis mutandis).

21. There is no prohibition under Curacao law or a moratorium preventing claims being brought against the credit institution (FCIB) whilst it is subject to the emergency measures.

22. Upon FCIB's entering into emergency measures; (1) the relevant time for the assessment of mutual dealings and set-off was the date that emergency measures were imposed; (2) the Central Bank could terminate the contracts of FCIB's employees; and (3) the Central Bank could terminate hire-purchase leases and any lease of which FCIB was a tenant (Art. 32)."

509. The Claimants also produced a machine translation of Article 32 of the Bankruptcy Decree 1931 which applied to claims against FCIB whilst in Emergency Measures: see paragraph 20 (above). It provided as follows:

"**Article 32**

1. In the event that a limitation period, relating to a legal claim as referred to in Article 22, would expire during the bankruptcy or within six months of its end, the period shall continue until six months have elapsed after the bankruptcy has ended.

> 2. The first paragraph shall apply mutatis mutandis to automatically commencing limitation periods."

510. The parties adduced no evidence to explain whether FCIB has remained in Emergency Measures and, in particular, to prove that it was placed into bankruptcy under Article 37 of the Bankruptcy Decree 1931. The agreed Case Memorandum merely stated that it was currently in a "statutory winding-down process". However, the Curaçao Judgment strongly suggests that FCIB had not still not come out of Emergency Measures in 2024. The judge stated as follows at [4.7]:

> "The reason for this is that it should have been evident to the liquidators and the other parties involved in the settlement agreements, as also appears from the correspondence, that the intention of those agreements was for a final resolution to be reached to the dispute and the emergency measure that had been dragging on for many years. The purpose of the settlement agreements was clear to all those concerned: after (at least) 10 years since the discovery of the MTIC fraud and eight ears since the imposition of the emergency measure in respect of FCIB under the supervision of the Central Bank, a final settlement had to be reached."

(2) The General Rolling Stock principle

511. I have held that the *General Rolling Stock* principle applies only to claims against companies in liquidation under the IA 1986 and not to foreign companies put into a foreign insolvency process. I hold, therefore, that the principle does not apply to a company placed into Emergency Measures under Article 28 (above) and, therefore, to the Direct Claims.

(3) Modified universalism

512. Mr Parker also invited the Court to exercise its common law power to provide assistance to the Claimants under Dicey's Rule 192(3) (above) and in order to give effect to the principle of modified universalism. He invited me to do so by disapplying section 21(3) of the LA 1980. I decline to do so for the following reasons:

(1) The Direct Claims are not brought by the liquidator of a foreign company asking the Court to assist them to carry out unitary winding up proceedings. They are English law claims brought by the liquidators of a number of insolvent English companies in an English Court. In my judgment, the principle of modified universalism has no relevance at all. But in case I am wrong, I go on to consider

whether I should provide assistance under Dicey, Rule 192(3) on the assumption that the Court has a discretion to do so.

(2) The Claimants accept that the Direct Claims are claims for dishonest assistance under English law. They also accept that the *lex causae* is English law and that the English limitation period of six years applies subject to the *General Rolling Stock* point: see Cs, O452. In my judgment, the present case is on all fours with *Kireeva* or, if not, there is a very close analogy. The Claimants are effectively inviting the Court to ignore S.1 of the FLPA 1985 and apply a foreign limitation period, namely, Article 32(1) of the Bankruptcy Decree 1931 in place of S.21(3) of the LA 1980.

(3) There is no reason why the Claimants need the assistance of this Court to bring claims against FCIB. There is no prohibition under Curaçao law or a moratorium preventing claims being brought against FCIB whilst it is subject to Emergency Measures: see paragraph 20 (above). The Claimants could have brought the Direct Claims against FCIB in Curaçao at any time since 2006. Indeed, in 2008 Mr Hunt brought proceedings against FCIB as liquidator of RS Sales Agency Ltd: see NC457.

(4) Furthermore, there is no reason why the Claimants could not have commenced the Direct Claims in the English Court any time since 9 October 2006. Indeed, FCIB was in Emergency Measures when they issued the Claim Form in this action on 21 September 2020. Mr Parker's only explanation for the failure to bring proceedings in either Curaçao or, for that matter, in England is that there was no point in doing so if enforcement was not available:

> "And of course the ordinance itself setting out the provisions of emergency measures expressly says that time ceases to run for claims brought against a company in emergency measures. And we submit the principle of modified universe should be applied so as to respect that and not to have a situation where the validity of claims in an insolvency regime depends upon where those claims are brought. The second point is that if the principle that time periods are suspended is a corollary of claims for the enforcement of debts not being permitted, so that there's no free for all, as suggested, we submit, by Lord Justice Nugee in *Khan v Singh-Sall*, then that aspect is present here, for the proceedings for the enforcement of claim are prohibited by the ordinance and the assets are therefore protected. We say it is nothing to the point that proceedings

> as such are not prohibited, since there's no point in bringing proceedings where an enforcement cannot follow. And there's no need to bring such proceedings where the assets are fully protected. Anomalous situations such as this aside. And third, my third point is that the relevant debts upon a subsequent distribution for FCIB are those that existed at the time of the imposition of the emergency measures; and subsequent debts are expenses of the emergency measures. And that's apparent from the agreed schedule {L1/2/18}. And therefore, as we sought to say, the logic that we just looked at for *General Rolling Stock* applies."

(5) I find those submissions wholly unconvincing. The Claimants and their funders clearly thought that it was worthwhile commencing proceedings against FCIB in 2020 and to pursue the Direct Claims to judgment even though they will be unable to enforce a judgment against FCIB in Curaçao under Article 31(1) (above) either because FCIB is still in Emergency Measures or because it has been put into bankruptcy in the meantime. There has been no legal impediment to them doing so since FCIB first went into Emergency Measures.

(6) Even if I had the power to disapply S.21(3) of the LA 1980, I am not satisfied that Emergency Measures are properly analogous with insolvent liquidation under the IA 1986 and I accept Mr Scott's submission that the closest analogy is with administration. I say this because it is clear from the schedule of agreed facts that there is an entirely separate bankruptcy regime and that Emergency Measures come to an end when the credit institution is declared bankrupt: see paragraphs 16 and 17 (above). Moreover, there is no suggestion that Emergency Measures give rise to a statutory trust or any arrangement which might be regarded as the equivalent of such a trust. Indeed, it is clear that the obligation to realise the unsecured assets of the company and discharge its debts only arises when the credit institution has been declared bankrupt: see paragraph 16.

(4) Conclusion

513. I hold, therefore, that the Direct Claims are all barred by S.21(3) of the LA 1980. Even if I had found that Mr Deuss was dishonest and that FCIB had dishonestly assisted the MTIC Directors to commit the breaches of their fiduciary duties which I have found that they committed, I would have dismissed the Direct Claims on the grounds that they were barred by limitation.

III. The Indirect Claims

J. Dishonest Assistance

514. I have dismissed eight Direct Claims on the basis that the MTIC Companies were not liable for the VAT Claim to HMRC or that FCIB did not assist them to incur those liabilities because the receipts or payments relating to the trades which gave rise to the VAT Claim did not pass through the MTIC Company's FCIB account. I consider below whether the Court is bound by Mr Hunt's decision to admit the Indirect Claims against TWPS to proof. But subject to this point, I dismiss the eight Indirect Claims of the MTIC Companies against TWPS for the same reasons. If the MTIC Companies are not liable to HMRC or the relevant receipts and payments did not pass through their FCIB accounts, TWPS cannot be liable to the MTIC Companies for dishonest assistance. I, therefore, limit my consideration in this section to the remaining eleven Indirect Claims.

(1) The Claimants' Case

515. The Claimants pleaded case was that Mr Deuss was at all material times both a de facto director and a shadow director of TWPS and that he exercised strategic and tactical control over its activities. They pleaded the following particulars of this allegation in paragraph 3(2):

> "(a) He set management objectives and marketing priorities.
>
> (b) He gave direct instructions to TWPS marketers about site visits.
>
> (c) He received TWPS marketing reports. If reports were not forthcoming when the marketer at fault would be chastised by using Mr Deuss' name.
>
> (d) He received TWPS performance data.
>
> (e) He reviewed individual business plan objectives for the marketers.
>
> (f) He held scheduled meetings with the marketers.
>
> (g) He set and controlled the bonus plan.
>
> (h) He set TWPS' marketing priorities.
>
> (i) He attended TWPS quarterly meetings world-wide.
>
> (j) Daniel Maurice-Vallerey ("Mr Vallerey"), TWPS' President, reported to Mr Deuss and not to the de jure directors of TWPS (who were Martina Deuss, Mr Deuss' sister ("Ms Deuss") (who was also referred to as "Tineke Deuss"), and Charles Geerts).
>
> (k) Unlike Mr Deuss, neither of TWPS' de jure directors were included on emails about TWPS' operational and marketing decisions."

516. It was also the Claimants' case that Mr Deuss was the directing mind of TWPS and that the knowledge of both Mr Deuss and Mr Vallerey should be attributed to TWPS when considering the liability of TWPS to the MTIC Companies: see paragraphs 3(3) and (4)(b). Mr Deuss served a Request for Further Information in relation to paragraph 3(2) (above) but the Claimants did not provide any additional particulars of either allegation. Mr Deuss denied both allegations in his Defence:

> "21. The first sentence of paragraph 3(2) is denied:
>
> 21.1. Mr Deuss was not a de facto director of TWPS. Any participation by, or concern of, Mr Deuss in the affairs of TWPS was in his capacity at FCIB (to which TWPS was a service provider) set out at paragraphs 19.3 and 19.4 above and/or as the UBO of TWPS, as to which paragraph 19.6 above is repeated.
>
> 21.2. Mr Deuss was not a shadow director of TWPS:
>
> 21.2.1 Mr Deuss did not give directions or instructions to the directors of TWPS on which they were accustomed to act within the meaning of the applicable legislation at the relevant time.
>
> 21.2.2 Alternatively, any directions or instructions given to directors of TWPS by Mr Deuss were given by him in his capacity at FCIB (to which TWPS was a service provider) set out at paragraphs 19.3 and 19.4 above and/or as the UBO of TWPS, as to which paragraph 19.6 above is repeated."

517. The Claimants' case in relation to the dishonest assistance claim against TWPS was principally set out in the Particulars of Claim, paragraphs 32B, 35 and 38. I have set out paragraph 35 (above) and, although the Particulars of Claim are not entirely clear, I understood the allegation of dishonesty in that paragraph to be made in relation to both the Direct and Indirect Claims of dishonest assistance. In paragraphs 32B and 38(3) the Claimants advanced the following case under the heading "Dishonest Assistance":

> "32B. The claim relies on the assistance of FCIB in providing bank accounts that facilitated the MTIC trading of the MTIC Companies (and TWPS pre-screening/on-boarding and failure to monitor) as pleaded in paragraph 6 above and/or in the following ways: -
>
> (1) Transactions giving rise to the VAT liabilities were processed through the FCIB account of the MTIC Company, including where the evidence is that the transactions of the MTIC Company were predominantly through its FCIB account so that it should be inferred that the transactions giving rise to the VAT liabilities were processed through the FCIB account of the MTIC Company;
>
> (2) Money in respect of the transaction giving rise to the VAT liability was

> paid into the MTIC Company's FCIB account;
>
> (3) The MTIC Company gave third party payment instructions for money to be paid to other MTIC fraud companies (who had been pre-screened/ onboarded by TWPS and whose accounts were not monitored) and the money was paid into their FCIB accounts;
>
> (4) The unpaid VAT liability arose as a result of the failure of the MTIC Company to be able to claim for input VAT paid on purchases prior to export sales as part of the MTC fraud, which purchases and sales were processed through its FCIB account."
>
> "38. (3) TWPS is liable to the MTIC Companies in the amount of their undischarged VAT liabilities as a result of its dishonest assistance by promoting FCIB's services and onboarding them as customers of FCIB and/or failing to monitor their trading activity (alternatively under s213 or the Civil Liability (Contribution) Act 1978)."

518. Finally, the Claimants alleged in paragraph 6(1) that Mr Deuss used TWPS to create, facilitate the creation of, and/or to enable FCIB to profit from the existence of networks engaged in MTIC fraud including the MTIC Companies and in paragraph 6(2) that the MTIC Companies were onboarded or, alternatively, pre-screened as customers of FCIB by TWPS. Paragraph 6 continues as follows:

> "(3) Furthermore, (a) TWPS failed to alert FCIB to the indicia of illegitimate trading of the MTIC Companies that would have been apparent to TWPS and/or FCIB had either monitored the trading activity of FCIB's customers in the T & C sector as evidenced by their FCIB accounts (particularly when compared with the onboarding information provided) in circumstances where Mr Deuss formally charged TWPS with doing so (knowing that it would and/or could properly not do so);
>
> (b) Had TWPS notified FCIB in writing of such "red flags", given that TWPS was, in that respect, acting as FCIB's compliance department, FCIB would have had no choice but to suspend the operation of the accounts of the MTIC Companies;
>
> (4) (a) In breach of his fiduciary duty as a director of TWPS, Mr Deuss caused TWPS thereby to participate and assist the directors of the MTIC Companies in their MTIC fraud as a result of which TWPS has suffered loss and damage, namely its liability to the MTIC Companies;
>
> (b) Mr Deuss is liable to TWPS for breach of fiduciary duty in the amount of such VAT liabilities;
>
> (5) TWPS, FCIB and Mr Deuss (whether or not a director of TWPS) thereby dishonestly assisted the breaches of duty by the directors of the MTIC Companies. TWPS and FCIB and are all liable for such dishonest assistance to the MTIC Companies in the amount of their unpaid VAT liabilities (the MTIC Companies' claims in dishonest assistance against Mr Deuss being time barred);…"

(2) The Law

(i) De facto directors

519. I have set out the relevant law in relation to dishonest assistance in deciding the Direct Claims and it is not necessary for me to refer to any further authority here. I deal with two issues of limitation which arise in relation to the Indirect Claims separately in section L below. This leaves the issue whether Mr Deuss was a de facto or shadow director which I address here. The present case is what I will call a "multiple hats" case in which the issue was whether Mr Deuss acted not only in his capacity as the ultimate beneficial owner and sole shareholder of TWPS but also as a de facto or shadow director.

520. The Claimants and Mr Deuss both relied on the decision of the Court of Appeal in *Smithton Ltd v Naggar* [2014] EWCA Civ 939, [2015] 1 WLR 189. In that case the issue was whether the director of a parent company who introduced investors to a subsidiary was either a de facto or shadow director. The judge at first instance decided that he was neither for reasons to which I return. The Court of Appeal upheld her decision and Arden LJ (as she then was), with whom both Elias and Tomlinson LJJ agreed, gave the leading judgment. She analysed the leading "multiple hats" case (*Revenue and Customs Comrs v Holland* [2010] 1 WLR 2793) before identifying the critical issue at [28] to [32] and setting out the principles which applied to determine it at [32] to [45]:

> "28. But another issue that may arise is whether the acts relied on are actually the acts of a director at all. *Holland's* case did not address the question what actions make a person a director, save in so far as the majority clearly make it clear that the court should ask whether the defendant formed part of the corporate governance structure of the company. However, that is merely to restate the question. The real issue in some contexts will be whether the acts demonstrate the assumption of acts as a director. That question was not explored in this case. There was simply no argument as to whether the acts on which Hobart relied lacked the quality of directorial acts.
>
> 29. In *Holland's* and *Jones's* cases, the acts in question were plainly directorial in nature. In *Holland's* case, the corporate director was the sole director: there was no evidence of any other person taking management decisions on its behalf or on behalf of the composite companies.
>
> 30. In this case, Hobart challenges the judge's failure to make findings about its corporate governance structure. This case raises the fundamental point of why the court needs to undertake that exercise and (in consequence) what makes a person a director.

31. The *Companies Act* definition does not elucidate that matter. Provisionally it seems to me that that term is to be tested against the usual split of powers between shareholders and directors under Table A, i.e. on the basis that the powers of management of the company's business are delegated to the directors and the shareholders cannot intervene except by special resolution. On that basis it means a person who either alone or with others has ultimate control of the management of any part of the company's business. In the usual case, in my judgment, it would not include a purely negative role of giving or receiving permission for some business activity.

32. The role of a de facto or shadow director need not extend over the whole range of a company's activities: see *In re Mea Corpn Ltd* [2007] 1 BCLC 618; *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340. A person may be both a shadow director and a de facto director at the same time: *In re Mea Corpn*.

Practical points: what makes a person a de facto director?

33. Lord Collins JSC sensibly held that there was no one definitive test for a de facto director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of *Holland's* case and the previous cases which are of general practical importance in determining who is a de facto director. I note these points in the following paragraphs.

34. The concepts of shadow director and de facto are different but there is some overlap.

35. A person may be de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.

36. To answer that question, the court may have to determine in what capacity the director was acting (as in *Holland's* case).

37. The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.

38. The court is required to look at what the director actually did and not any job title actually given to him.

39. A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.

40. The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances "in the round" (per Jonathan Parker J in *Secretary of State for Trade and Industry v Jones* [1999] BCC 336).

41. It is also important to look at the acts in their context. A single act

> might lead to liability in an exceptional case.
>
> 42. Relevant factors include: (i) whether the company considered him to be a director and held him out as such; (ii) whether third parties considered that he was a director.
>
> 43. The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.
>
> 44. Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the relevant period.
>
> 45. In my judgment, the question whether a director is a de facto or shadow director is a question of fact and degree. The principles of appellate review are well established. I need only summarise those applicable here. Where the decision depends on the judge's assessment of weight to be attached to various facts, the test to be satisfied on appeal is that in most cases the judge was plainly wrong. Where the appellant contends that the judge misdirected herself as to the law, the court must determine what the law is and whether the judge applied it."

521. The judge at first instance had approached the issue as one of "hat" identification and on the basis that she had to decide what the Defendant had done and which hat he was wearing at any given time. She also accepted that it was important to examine the way in which the company was governed. The first ground on which the Claimant appealed was that she had failed to do so. Arden LJ addressed this at [59] to [62]:

> "59. Mr Marshall's first submission is that the judge failed to make findings about the corporate governance structure of Hobart and to take it into account. She was right to say that the Hobart board did not make the important decisions. As in the *Mumtaz* case [2012] 2 BCLC 109, Hobart's business had been run informally and major corporate decisions had been taken by Mr Naggar and Mr Townsley, who had operated like partners in Hobart's business. There was only one board minute. There was not even a board meeting to deal with the interim dividend. There were meetings of a board committee called Exco. That was set up before Hobart was incorporated and while it was still a division of DD Brokers. But, submits Mr Marshall, that committee did not deal with any important matters.
>
> 60. Mr Marshall submits that the de jure directors of Hobart did not make any significant decision, whether as to IT, investment, staffing, premises or otherwise, without Mr Naggar's agreement. Mr Naggar received regular information and gave regular instruction concerning the day-to-day operation of Hobart's business. Mr Naggar for instance exercised considerable control over the hiring and firing of staff.
>
> 61. In my judgment, Mr Marshall is correct to say that the judge focused on "hat identification" rather than on ascertaining the corporate governance system of Hobart. He is also correct in his submission that

> determining whether Mr Naggar was part of the corporate governance system was an important step in deciding whether he had assumed the responsibility of a director. The corporate governance system will vary from company to company. Therefore in the normal course, it is vital that the trial judge makes findings about the role which the defendant played in running the company in question.
>
> 62. However, in this case, Mr Naggar did not at trial dispute that he performed directorial acts. He sought to run his defence on the basis of "hat identification" i.e. that he had multiple roles and that he had acted in a different capacity at all times from that of a Hobart director. In those circumstances, there is no material error of law on the judge's part in not seeking to meet a defence which was not run."

522. The Claimant's second ground of appeal was that the judge had approached the question of "hat identification" in the wrong way and instead of asking herself whether the Defendant's conduct could be explained by his hats as a director of the holding company or as a major client, she should have asked herself in what capacity he was acting. Arden LJ also rejected that ground for the following reasons:

> "64. The judge's conclusion was not in terms that at the material times Mr Naggar acted as chairman of DDI or as an investor but rather that nothing which the judge had seen "goes beyond the involvement one would expect to see from a person who combined the roles of major client and chairman of the majority shareholder": judgment, para 125.
>
> 65. Mr Marshall interprets this as a holding that all the acts were ones to be expected of a client and chairman of the major shareholder and that they were to be attributed to that capacity without considering whether they were actually done in that capacity. While I accept that those words read on their own can be interpreted in this way, in my judgment they have to be read in the context of the judgment as a whole. In particular the judge took the view that in the light of the JVA and the need for directors of Hobart to be authorised by the FSA it was unlikely that Hobart would have permitted Mr Naggar to act as a de facto director: judgment, para 73. In other words, the passage on which Mr Marshall relies is to be read as saying that she had considered Mr Naggar's involvement objectively against the conduct to be expected of a major client and chairman of the majority shareholder, that his involvement was consistent with that conduct and that he had in fact acted in that capacity. So read, her conclusion is in my judgment unassailable.
>
> 66. The assessment of the capacity in which a person acts is one of fact and degree and all the circumstances must be taken into account. Mr Marshall relies on this appeal on passages in his closing submissions in respect of a considerable number of specific categories of acts or specific episodes as showing that the judge came to the wrong conclusion. He does not contend that the judge was not entitled to come to the conclusion to which she came, and so it is clear that the challenge is in reality a

> disagreement with the judge's findings. As such, it does not amount to a good ground of appeal."

523. In *Re UKLI Ltd* [2013] EWHC 680 (Ch), [2015] BCC 755 Hildyard J also gave a useful summary of the characteristics of a de facto director. It is in quite similar terms to the summary set out in Arden LJ's judgment above. However, one additional feature to which he drew attention was that the de facto director's role may relate to part of the affairs of the company only, so long as it is the part of which complaint is made. Mr Parker and his team also relied on the decision of Linden J in *Bishopsgate Contracting Solutions Ltd v O'Sullivan* [2021] EWHC 2103 (QB) as authority for the proposition that there is no requirement that a de facto director be held out as a director: see [152]. In that passage the judge referred to *Re UKLI Ltd* (above) where Hildyard J stated that it is relevant to ask whether the individual was held out as a director by the company to third parties or internally or was claimed by himself or others to be one. *Bishopsgate* is a strong decision because Linden J held that the Defendant was not a de facto director even though he held himself out to be its managing director.

(ii) Shadow directors

524. Before the Companies Act 2006 came into force on 1 October 2007 the term "shadow director" had a statutory definition (as it does now). Section 741 of the Companies Act 1985 provided as follows:

> "(1) "In this Act, 'director' includes any person occupying the position of director, by whatever name called". (2) In relation to a company, "shadow director" means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. However, a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity."

525. In *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340 Morritt LJ (as he then was) set out the following propositions at [35] to assist the Court to determine whether an individual is a shadow director in any given case:

> "35 I propose to express my conclusions on these and other issues in a number of propositions, (1) The definition of a shadow director is to be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used. In particular, as the purpose of the Act is the protection of the public and as the definition is used in other legislative contexts, it should not be strictly

> construed because it also has quasi-penal consequences in the context of the Company Directors Disqualification Act 1986. I agree with the statement to that effect of Sir Nicolas Browne-Wilkinson V-C in *In re Lo-Line Electric Motors Ltd* [1988] Ch 477, 489. (2) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities. I agree with the statements to that effect of Finn J in *Australian Securities Commission v AS Nominees Ltd* 133 ALR 1, 52-53 and Robert Walker LJ in *In re Kaytech International plc* [1999] BCC 390, 402. (3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence. In that connection I do not accept that it is necessary to prove the understanding or expectation of either giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence. Evidence of such understanding or expectation may be relevant but it cannot be conclusive. Certainly the label attached by either or both parties then or thereafter cannot be more than a factor in considering whether the communication came within the statutory description of direction or instruction. (4) Non-professional advice may come within that statutory description. The proviso excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover the concepts of "direction" and "instruction" do not exclude the concept of "advice" for all three share the common feature of "guidance". (5) It will, no doubt, be sufficient to show that in the face of "directions or instructions" from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. But I do not consider that it is necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are "accustomed to act" "in accordance with" such directions or instructions. It appears to me that Judge Cooke, in looking for the additional ingredient of a subservient role or the surrender of discretion by the board, imposed a qualification beyond that justified by the statutory language."

(iii) Pleading issues

526. In *Re Hydrodam (Corby) Ltd* [1993] BCC 161 the liquidator of a company in liquidation pleaded a wrongful trading case against two individuals who had not been de jure directors of it in the following way: "The individual respondents also personally acted as de facto or shadow directors of the company as hereinafter pleaded in relation to them respectively." Millett J (as he then was) held that this pleading was embarrassing and struck it out. He stated as follows at 163B-C:

> "I would interpose at this point by observing that in my judgment an allegation that a defendant acted as de facto or shadow director, without

> distinguishing between the two, is embarrassing. It suggests - and counsel's submissions to me support the inference - that the liquidator takes the view that de facto or shadow directors are very similar, that their roles overlap, and that it may not be possible to determine in any given case whether a particular person was a de facto or a shadow director. I do not accept that at all. The terms do not overlap. They are alternatives, and in most and perhaps all cases are mutually exclusive."

527. The judge then went on to state what a claimant had to plead in order to make good either the allegation that a person was a de facto director or a shadow director in the following terms at 163D-F:

> "A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level. A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such.
>
> A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is, first, a board of directors claiming and purporting to act as such; and, secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others."

528. Although Morritt LJ held that someone could be a shadow director without "lurking in the shadows" in *Secretary of State for Trade and Industry v Deverell* (above) at [36], this does not in my judgment affect the authority of *Re Hydrodam* for the facts which a claimant must plead and prove. In particular, to establish that a defendant is a shadow director it is necessary to give particulars of the directions which they gave to the *de jure* directors of the company and the particulars of the statements of overt acts upon which the claimant relies in support of the allegation that those directors were accustomed so to

act.

(3) Assistance

(i) Onboarding

529. Before considering the facts of each individual claim, I must resolve a number of general issues which were argued before me. I begin with the question whether TWPS marketers onboarded clients as opposed to screening or pre-screening them. I have found that Mr Deuss did not charge TWPS with monitoring customer activity for unusual transactions: see [454] and [455]. For the same reasons I dismiss the pleaded allegations that from 2004 it was the role of TWPS marketers to onboard FCIB's customers in the sense that they were either instructed to perform FCIB's KYC and AML procedures or did perform those procedures or checks for and on behalf of FCIB.

530. In reaching this conclusion I place significant weight upon Mr Ulrich's Marketing Guidelines circulated in July 2005. They provide contemporaneous documentary evidence that TWPS marketers were expressly told not to carry out that role. The Claimants did not pursue their pleaded case that this was a dishonest document and I find that it reflected the actual practice of the TWPS marketers. I make that finding on the basis of my examination of the individual account opening documents for the remaining eleven MTIC Companies below.

531. I accept that from January 2006 TWPS marketers were instructed to complete the new form of site visit reports, to grade FCIB's customers green, amber or red, to make an EWL recommendation and to set out their conclusions. I also accept that this went further than "screening" or "pre-screening" of customers and formed part of FCIB's due diligence. To that extent, therefore, I find that the Claimants' have made out their case that TWPS onboarded customers (although all of the site visit reports to which I was taken involved visits to existing customers rather than new customers).

532. However, I reject the Claimant's case that it was the role of TWPS to carry out AML or KYC checks exclusively on behalf of FCIB. I have accepted the evidence of both Mr Sharma and Mr Ganesh that the RMC performed transaction monitoring and that it did so after January 2006. Based on this evidence and the account opening documents to which I was taken and to which I have referred in this judgment I find that it was not the

role of TWPS marketers to decide whether to open, suspend or close an account and the ultimate decision remained throughout with the FCIB compliance department and the RMC. I also find that the site visit reports were intended to supplement or provide additional information to the RMC and FCIB's compliance department not to replace their functions. Finally, I find that the RMC and FCIB's compliance department used this information not only to decide whether to open, suspend or close accounts but to decide what further due diligence to carry out (e.g. EDD or transaction monitoring) and the order in which those investigations should be prioritised.

533. I have looked carefully at the examples of the new form site visit report for the MTIC Companies to which I refer in this judgment. Each one was completed by a different TWPS marketer and involved answering a number of detailed questions and the collection of a number of documents. It may well be that it was unwise to ask TWPS marketers to complete these reports and to rely on them. But I am not satisfied that they were doing no more than going through the motions or saw them as a "tick box exercise". But in any event, I have placed much greater weight on these site visit reports in assessing the Indirect Claims than I have on any other documents. I placed significant weight on the report for Eliyon submitted on or after 20 January 2006 and the report dated 18 April 2006 for JDG.

(ii) Screening

534. Even though I have found that it was not the role of TWPS to onboard customers as opposed to screening them, I am not persuaded that this is sufficient by itself to dismiss the claims for dishonest assistance against TWPS. In my judgment, TWPS marketers provided material assistance to the MTIC Directors by introducing them to FCIB and its eBanking service and providing guidance through the account opening process. Furthermore, it was the Claimants' pleaded case that TWPS assisted the MTIC Directors whether or not the TWPS marketers were screening or onboarding customers and I must address that case.

535. Where I draw the line, however, is at the certification of documents. In one case, the TWPS marketer did no more than certify copies of documents and, in my judgment, this was no more than minimal. There is no allegation that any of the documents which TWPS marketers certified were forgeries or that they involved identity theft and the MTIC

Directors could have taken the originals to a solicitor who could have certified them for a small fee. In the event, none of the individual claims turned on this distinction.

(iii) Internal correspondence

536. Further, I place little weight on internal correspondence between the TWPS marketers and FCIB unless the information which they supplied was significant. For the most part, TWPS marketers were chasing up queries either from the customer or from FCIB's compliance department and Mr Thanki and team referred to a spreadsheet which showed that in April 2006 TWPS was involved in assisting FCIB to calculate risk scores under the Risk Scoring Model. In one case, Kingswood, I was not satisfied that the internal correspondence was of more than minimal assistance to the MTIC Director.

(iv) Dishonesty

537. Finally, Mr Lemer argued that none of actions taken by TWPS marketers gave rise to actionable claims by the MTIC Companies because there is no allegation that the marketers were acting dishonestly, e.g., by certifying copies of documents or completing visit reports. I reject that submission. It confuses the mental element of the cause of action with the actionable conduct. There is no reason why innocent acts by an agent or employee cannot give rise to an actionable claim provided that the principal or employer dishonestly instructs the agent or employee to perform them or even stands by and watches them being performed. The critical issue in relation to both the Direct and Indirect Claims was whether Mr Deuss had that state of mind.

(4) Assistance: the individual claims

(i) Kingswood

538. There is no evidence that TWPS assisted Mr Duddy to open an FCIB account. The Claimants' case was that Mr Elliott-Square of First Dimension certified copies of all of the relevant documents: see S5, p.51. By email dated 16 November 2004 Ms Angeline Cheng of TWPS chased Ms Neuman in relation to Kingswood's application and by emails dated 14 and 15 March 2006 Mr Reeve of TWPS supplied EDD documentation supplied by Mr Duddy to FCIB's compliance department. TWPS was also involved in computing a risk score for Kingswood. By email dated 11 May 2006 Mr Carl Crisostomo

wrote to Mr Duddy trying to arrange a site visit. But the Claimants accept that no such visit took place.

539. I have found that Mr Duddy committed the relevant breaches of fiduciary duty between 18 November 2005 and 23 November 2005. I find on a balance of probabilities that TWPS did not assist him to commit those breaches. On the evidence before me, TWPS had no involvement in screening Mr Duddy and I am satisfied that Ms Cheng's email dated 16 November 2004 was de minimis. The only other involvement which TWPS had with Kingswood occurred later between March and May 2006. I, therefore, dismiss Kingswood's claim against TWPS for dishonest assistance.

(ii) MTL

540. On 24 May 2005 Mr Bailey visited MTL. He also certified copies of MTL's account opening documents including its Memorandum and Articles of Association, the passport of Mr Abrahamovitch and a bank statement. Finally, he supplied his EPR number in lieu of a bank reference or letter of good standing. By email dated 2 November 2005 Mr Jones wrote to Mr Abrahamovitch inquiring why he had not so far used the account. In April 2006 TWPS was involved in discussions with FCIB in computing a risk score and by email dated 26 May 2006 Ms Cheng wrote to Mr Abrahamovitch to arrange a site visit which took place on 1 June 2006. By email dated 2 June 2006 Ms Catalina Pinilos of TWPS tried to persuade Mr Sharma to re-activate MTL's account which had been suspended for making third party payments.

541. I have found that Mr Abrahamovitch committed the relevant breaches of fiduciary duty on or shortly before 27 April 2006 because that was the date on which all of the relevant payments were all made. I find on a balance of probabilities that TWPS assisted Mr Abrahamovitch to make those payments by introducing him to FCIB and certifying the account opening documents. In my judgment, TWPS gave Mr Abrahamovitch more than minimal assistance by its actions even though there was an eleven month time lag between the date on which the account was opened and the date on which the relevant payments were made.

(iii) MML

542. On 27 October 2005 and 28 November 2005 Mr Nixson visited MML. He also certified

MML's account opening documentation including the driving licences of both directors, Mr Hussain and Mr Junaid, and a bank statement. On 27 October 2005 he also provided a letter of good standing. On 7 February 2006 Mr Hussain contacted Mr Nixson about changing the signatories on MML's accounts and he raised this with FCIB. In April 2006 TWPS was involved in discussions with FCIB in computing a risk score and by email dated 27 April 2006 Mr Jones wrote to FCIB's compliance department asking for further time for MML to supply documents.

543. I have found that Mr Junaid and Mr Hussain committed the relevant breaches of duty between 12 December 2005 and 9 November 2006. I find on a balance of probabilities that TWPS assisted both directors to make payments through its FCIB account or accounts throughout that period by introducing him to FCIB and certifying the account opening documents.

(iv) 385 North

544. On 19 August 2004 Mr Bailey visited 385 North and certified copies of the passports of both Ms Tindall and Mr Coglan. He also provided his EPR number in lieu of a letter of good standing and assisted them in answering certain queries raised by Ms Neuman before the account was opened on 24 August 2004. Between January 2005 and October 2005 TWPS chased 385 North for KYC and EDD documentation and Mr Bailey raised a query about the lack of activity on the account.

545. I have found that 385 North traded through its FCIB account or accounts for the longest period, namely, 18 February 2005 to 7 April 2006 during which it incurred liability to HMRC of £40,513,355.34. I have also found that Ms Tindall, the sole director, committed breaches of fiduciary duty by exposing 385 North to that liability. I find on a balance of probabilities that TWPS assisted her to make payments through the company's FCIB account throughout that period by introducing her to FCIB, certifying the account opening documents and helping her to answer FCIB's queries.

(v) Eliyon

546. On 18 February 2005 Mr Bailey visited Eliyon and on or before 28 February 2005 Mr Van Laarhoven certified copies of the passports of Mr Kamlesh Gathani and his wife, a bank statement and the Memorandum and Articles of Association of the company and

faxed them to FCIB. On 20 January 2006 (or possibly later) Mr Grandin carried out a second site visit and completed the new site visit report marking Eliyon as green under the new traffic light system. In April 2006 TWPS was involved in discussions with FCIB in computing a risk score.

547. I have found that Mr Gathani committed breaches of fiduciary duty by causing Eliyon to incur liability of £455,360.09 to HMRC in relation to transactions taking place between February 2006 and June 2006 and that the relevant receipts and payments passed through its FCIB account. I find on a balance of probabilities that TWPS assisted him to make those payments during that period by introducing him to FCIB, certifying account opening documents and conducting a second site visit. I place particular reliance upon the second site visit report and Mr Grandin's evaluation.

(vi) Gold Digit

548. On 13 March 2005 Mr Nixson visited Gold Digit and certified a copy of the passport of Mr Jones, who was then the sole director of the company, and his wife, Ms Samantha Jones (or Ridge). He also certified copies of a bank statement and their signed corporate secretarial certification (after FCIB had requested this). On 7 April 2005 Mr Nixson followed up a request from Mr Jones to chase for his ID and password. In April 2006 TWPS was involved in discussions with FCIB for calculating a risk score. TWPS did not provide a letter of good standing and the account opening checklist records that a banker's reference was provided.

549. I have found that Mr Jones committed breaches of fiduciary duty by causing Gold Digit to incur a liability of £1,231,524.20 in relation to an assessment and two returns relating to periods 01 to 03 of 2006 and that he did so by using an FCIB account. I find on a balance of probabilities that TWPS assisted him to make payments through the company's FCIB account during that period by introducing him to FCIB, certifying account opening documents and chasing FCIB for his ID and password.

(vii) Northdata

550. On 14 September 2005 Mr Nixson visited Northdata and certified copies of Mr Walker's passport and a utility bill. He also provided a letter of good standing for the company. I have found that Mr Walker committed breaches of fiduciary duty by causing Northdata

to incur liability of £7,913,255.00 in relation to transactions taking place between 1 September 2005 and 30 November 2006 and that the relevant receipts and payments passed through his FCIB account (or other FCIB accounts). I find on a balance of probabilities that TWPS assisted him to make those payments during that period by introducing him to FCIB and certifying account opening documents.

(viii) ETP

551. There is no record of a visit to ETP taking place. However, on 30 June 2005 Mr Barrs certified copies of Mr Field's passport, a bank statement and the Memorandum and Articles of Association of the company. In early July 2006 Mr Atkins tried to contact ETP to carry out a site visit but his assistant (who had tried to call a number of times) recorded in an email "constant answer phone". The account opening checklist records the EPR number E76413 against "Reference Letter" and the account opening documents contain no bank reference or letter of good standing. The corporate eBanking account application also records that ETP was referred by E76413.

552. I have found that Mr Field committed breaches of fiduciary duty by causing ETP to incur liability of £7,913,255.00 in relation to transactions taking place between 1 September 2005 and 30 November 2006. But I have also found that his commission payments only passed through its FCIB account. I held that this was sufficient to satisfy the legal test for assistance in relation to FCIB and, after some hesitation, I am also satisfied that TWPS provided more than minimal assistance to Mr Field. Mr Barrs' certification of the documents recorded that his EPR number was E76413 and I find that he introduced Northdata to FCIB and provided his EPR number in lieu of a letter of good standing. I also find that he met Mr Field in person because he certified that a copy of Mr Field's passport was a true copy of the original.

(ix) Wood Works

553. On or before 1 September 2005 Mr Nixson visited Wood Works and certified copies of the passport of Mr Cutts and the Memorandum and Articles of Association of the company. He also provided a letter of good standing. In August and September 2005 Mr Nixson and Mr Reeve responded to queries from Ms Salas in relation to the address of the company. In December 2005 Mr Vallerey identified Wood Works as a customer who should provide EDD documentation and in April 2006 TWPS was involved in the process

of calculating a risk score for the company. In early July 2006 Mr Atkins' assistant tried to contact ETP to carry out a site visit but she recorded that "both telephones switched off".

554. I have found that between October 2005 and July 2006 Mr Cutts committed breaches of fiduciary duty which caused Wood Works to incur a VAT liability of £9,004,904.84. I find on a balance of probabilities that TWPS assisted him to make those payments during that period by introducing him to FCIB, certifying account opening documents and answering queries from FCIB.

(x) JDG

555. On 5 August 2005 Mr Bailey visited JDG, he certified copies of the passport of Mr Deepak Bhatia, Ms Suman Bhatia and Ms Joti Bhatia, a bank statement, utility bill and tax return and also the Memorandum and Articles of Association of the company. He also provided a letter of good standing. On 18 April 2006 Mr Murat Cakir also visited JDG and completed a site visit report in the new form grading JDG as green under the new traffic light system.

556. I have found that between 1 March 2006 and 31 May 2006 and in breach of his fiduciary duties Mr Bhatia caused JDG to incur a VAT liability of £1,246,736.17 and that the relevant receipts and payments passed through its FCIB account. I find on a balance of probabilities that TWPS assisted him to make those payments during that period by introducing him to FCIB, certifying account opening documents and in conducting a second site visit. I place particular reliance upon the second site visit report and Mr Cakir's evaluation of JDG in that report.

(xi) @tomic

557. @tomic was referred to FCIB by Mr Elliot-Square of First Dimension. The account opening documents contain a certified copy of Mr Harpal Bahia's passport and, although it was not possible for me to identify the individual who certified it, the parties were agreed that Mr Nixson did so. On 14 April 2006 TWPS sent a standard form letter to the company requesting EDD documentation and during the same month TWPS was involved in calculating its risk score. On 19 May 2006 Mr Atkins visited @tomic and completed a site visit report in the new form marking it as green. He also stated that he

was able to recommend it as a suitable prospect for evaluation by FCIB.

558. I have found that between 10 May 2006 and 17 May 2006 and in breach of fiduciary duty Mr Bahia engaged in a series of transactions which exposed @tomic to a VAT liability of £2,083,422.86. I found that FCIB assisted Mr Bahia to commit this breach or these breaches of fiduciary duty because the relevant receipts and payments passed through its FCIB account. Indeed, I relied on Mr Atkins' site visit report in support of this finding of fact. However, I am not satisfied that TWPS provided more than minimal assistance to Mr Bahia. TWPS did not introduce or refer him to FCIB. Nor did it provide a letter of good standing and Mr Nixson's only involvement in the account opening process was to certify his passport.

559. I have considered whether I should find that Mr Atkins provided material assistance to Mr Bahia by completing a "clean" site visit report which classified @tomic as green and recommending it as suitable prospect. However, Mr Atkins visited Mr Bahia and completed the report two days after the last relevant transaction and there was no evidence that @tomic suffered any further loss because the clean site visit report enabled the company to continue to trade after 19 May 2006. Even if Mr Atkins had marked @tomic as red and FCIB had suspended or closed its account immediately, all of the relevant funds had already passed through its account. It is possible that HMRC would have denied @tomic's claim for input tax of £7,300,683.47 much earlier than they did. But there is no reason to conclude that Mr Bahia would not have appealed or that any funds would have been available to meet the VAT Claim when the company was wound up and put into liquidation. I, therefore, dismiss @tomic's claim against TWPS.

(5) Dishonesty

560. I found the Claimants' case on dishonesty obscure. As I understood it, the Claimants' case was that the TWPS failed to alert FCIB to the "red flags" of MTIC fraud in the T&C sector in circumstances where they had responsibility for onboarding those customers and transaction monitoring and that Mr Deuss was dishonest because he knew that they had been given this responsibility but also that they were not carrying it out: see paragraphs 6(3) and 32B where the Claimants allege "TWPS pre-screening/onboarding and failure to monitor". In my judgment, this case was highly artificial and was also an attempt to elevate an allegation of negligence into dishonesty. But in any event, I am

satisfied that the Claimants' case fails on the facts for the following reasons:

(1) I have found that it was not the role of TWPS to onboard clients to the limited extent that the new form site visit reports formed part of the onboarding process after January 2006: see [529] to [533].

(2) I have also found that Mr Deuss did not instruct TWPS marketers to perform transaction monitoring based on the documents: see [454]. But in any event, it is highly improbable that he would have done so given that the function of TWPS was to market FCIB's eBanking services to new customers and that they had little to do with existing customers until early 2006 when they were enlisted to help gather EDD information and make site visits.

(3) It is wholly unsurprising, therefore, that Mr Deuss knew that TWPS marketers were not onboarding clients or performing transaction monitoring or reporting the risk of MTIC fraud to the RMC or to him directly. But this is not evidence of his dishonesty because it was not the function of TWPS marketers to do so. It was the function of the RMC.

(4) I have also found that even if the TWPS marketers were responsible for onboarding T&C customers with a high risk of MTIC fraud, Mr Deuss did not know that they were or turn a blind eye to this fact: see [455]. The Claimants needed to persuade me that Mr Deuss knew that they treated account opening as a "tick box exercise" and, in particular, that they ignored the requirement for a banker's reference or a letter of good standing from a third party. They failed to do so.

561. Finally, I dismiss the allegation that Mr Deuss used FCIB and TWPS to create, facilitate the creation of and/or to enable FCIB to profit from the existence of networks of companies engaged in MTIC fraud (including the MTIC Companies): see paragraph 6(1). This was not simply an allegation of blind eye dishonesty but an allegation that Mr Deuss deliberately used FCIB and TWPS as instruments to facilitate fraud. Based on my earlier findings in relation to his conduct, I am satisfied that there was no basis for this allegation. The Claimants pleaded only two documents in support of their case that Mr Deuss intended TWPS to have this role, namely, Mr Vallerey's email dated 19 February 2004 and Mr Sanchez's memo dated 9 December 2004: see [239]. Neither document contained any material upon which the Court could properly draw the inference that Mr Deuss

intended to use TWPS as an instrument to facilitate fraud.

(6) Was Mr Deuss a de facto or shadow director?

(i) The Claimants' case

562. Mr Thanki and his team complained in their closing submissions that the Claimants had still not made it clear whether their case was that Mr Deuss was a de facto director or a shadow director. But they did not invite the Court to strike out paragraph 3(2) on the basis that it was embarrassing and, after some reflection, I consider that they were right not to do so. In my judgment, the particulars under paragraph 3(2) plead sufficient facts to enable the Court to make a finding of fact that Mr Deuss was a de facto director. They do not, however, plead the necessary facts to enable the Court to make a finding that he was a shadow director. It may be that the Claimants intended the particulars in paragraphs 3(2)(j) and (k) to support such a finding. But if they did, this was wrong as a matter of law. Mr Vallerey's job description was the "President" of TWPS but he was not a director of the company.

(ii) The evidence

563. The Claimants' case was based on extracts from 54 electronic documents or files including "Batch 54" which consisted of 250 pages and from which the Claimants relied on a number of isolated pages which consisted of an agenda for one of the TWPS quarterly meetings and a few emails. None of the documents upon which the Claimants relied consisted of formal company documents or resolutions or minutes of meetings of either the board of directors or general meetings.

564. Mr Deuss's evidence was that he left the management of TWPS to Ms Deuss, Mr Vallerey and Mr Partridge and that his involvement in the company's affairs was as the ultimate shareholder of the TWPS group and because TWPS was providing services to FCIB:

> "55. TWPS UK was a small company within the larger Transworld group, and one of a few Transworld Payment Solutions or 'TWPS' companies. I mostly dealt with it at a high level. Although I was the ultimate owner of TWPS UK, I was not a director of the company, nor was I involved in its management or day-to-day affairs.
>
> 56. During the relevant period (i.e. 2003 to 2006), the directors of TWPS

UK were my sister, Tineke, and my cousin, Charles Geerts. Daniel Maurice-Vallerey, who was the President of TWPS EMEAA, was in charge of TWPS UK's day-to-day affairs, and he was helped by Brian Partridge, until Brian moved to head TWPS Malaysia. I left the management of TWPS UK's affairs to Tineke, Daniel and Brian. I was involved with TWPS EMEAA because I was the ultimate shareholder of the companies, and they were providing marketing services to FCIB.

57. I was sent several types of reports from those working at the various TWPS entities, including marketing reports, business plans and performance reports. As I have explained at paragraph 33 above, the reports were primarily a management tool, and whether or not I read a particular report, and how detailed my review of it would be, would depend on its importance or relevance. I was mainly copied to ensure that the company's employees were doing their jobs properly; the reports were largely intended for the TWPS executives, such as Daniel-Maurice Vallerey in the case of TWPS UK and Mike Sanchez in the case of TWPS Miami. I understand that the Claimants allege that if these reports were not forthcoming from the marketers, those at fault would be chastised using my name. I do not remember there being such a practice, although whether others did it without my knowledge is not something I can speak to.

58. As with most companies in the Transworld group, TWPS UK held quarterly meetings. My recollection is that sometimes these were held together with TWPS Malaysia, as TWPS EMEAA meetings. These meetings would usually have been held in London. I would generally attend these meetings. The agenda would have been circulated in advance of the meeting and action points afterwards. I would often not read either of these; if there was something which needed to be brought to my attention, I would be briefed at the meeting and I would participate accordingly. This included running through individual business plans with individual marketers and Daniel Maurice-Vallerey, although I would not usually follow up on these afterwards. It is possible that during these meetings I discussed the importance of site visits with the marketers and while doing so I may also have given them instructions about site visits, but I do not recall any specific instances of doing so. My recollection is that such direct instructions to TWPS UK marketers would have been given by Daniel Maurice-Vallerey. I understand that the Claimants have made allegations about a TWPS UK meeting held on 7 October 2005. I do not have any specific recollection of this meeting.

59. I understand that the Claimants have alleged that I approved new recruits for TWPS UK. My recollection is that I would not usually get involved in the hiring of employees at the level of marketers. I may have been informed and have approved the positions which needed to be filled. This is something I would have done for all companies within my group. I do not recall having participated in the decision as to the individuals who were eventually hired (or not) to fill those positions.

60. I understand that the Claimants have alleged that I "set and controlled" bonus plans of TWPS UK marketers. I do not recall setting and controlling bonus plans. My recollection is that the bonus plans would have been set

> by the relevant company's executives (in the case of TWPS UK, Daniel Maurice-Vallerey), although they would have been escalated to me for my approval as the ultimate owner of the company."

565. The Claimants pleaded two emails dated 28 April 2005, an email dated 26 June 2005 from Mr Vallerey to the TWPS marketers and an email dated 5 October 2005 from Mr Vallerey to Mr Deuss himself: see paragraph 26. I have set out the principal text of the first three emails at [255] and [269]. In the fourth email Mr Vallerey wrote to Mr Deuss as follows:

> "Please find attached the O3 Quarterly meetings documents:
>
> - YTD performance analysis (per client and per marketer)
>
> - Q3 Actuals vs. targets transactions on a per marketer and per product line (eb and EP) basis
>
> - B2B segments (% by segment and countries)
>
> - Referrals made and received by marketers
>
> - Trends analysis
>
> In addition to the above, the YTD financial results (eb and EP) referred to in the Meeting Agenda are the documents sent by Susan on Monday."

566. I accept Mr Deuss's evidence that he did not consider himself to be a director of TWPS and that he was not involved in its management of day to day affairs. I have reached this conclusion for the following reasons:

(1) The Claimants did not allege or seek to prove that Mr Deuss held himself out as a director of TWPS either to TWPS marketers or to third parties. Moreover, he had no reason to disguise his involvement in TWPS and he could have become a de jure director if he had wanted to direct the company's affairs. I, therefore, attribute significant weight to the fact that Mr Deuss did not seek appointment as a director or hold himself out as a director of TWPS.

(2) There was no evidence that Mr Deuss attended meetings of the board of directors of TWPS or received management information. I attach little weight to the fact that Mr Deuss was sent figures recording the performance of TWPS marketers. Mr Deuss had an obvious interest in their performance as a director of FCIB. Indeed, the Claimants' reliance on the email dated 26 June 2005 is misplaced. The 20,000 transactions to which Mr Vallerey was referring were eBanking transactions

performed by FCIB. Mr Vallerey was informing the TWPS marketers about FCIB's performance not Mr Deuss about their performance.

(3) There was no evidence that Mr Deuss was directly involved in the recruitment of individual staff members or negotiated or contracts on behalf of TWPS either with third parties or with TWPS marketers. Indeed, the Claimants relied upon on an email dated 1 July 2004 from Mr Vallerey to Ms Deuss copied to Mr Van Laarhoven in which he dealt with detailed contractual matters relating to key employees including Mr Barrs and Mr Calderon. Mr Vallerey did not copy in Mr Deuss but relied on the single statement: "Mr Deuss is against any incentive plan for marketers at our current stage of development". This document does not support their case and clearly demonstrates that Mr Vallerey and Ms Deuss dealt with detailed employment matters on behalf of the company.

(4) There is no evidence either that Mr Deuss conducted any HR activities on behalf of TWPS such as performance reviews of the TWPS marketers and, although the Claimants were able to point to documents which showed that he had one to one meetings with TWPS marketers, none of those documents suggests that he was doing so in his capacity as a director of their employer rather than as a director of FCIB interested in their new leads and actual customers.

(5) The Claimants place significant reliance on the fact that Mr Deuss approved the first template for site visit reports. But Mr Partridge's email dated 28 July 2004 ([240]) does not demonstrate that Mr Deuss designed or approved the format but rather that he had "indicated" to Mr Vallerey that the TWPS marketers should insert "the relevant business facts as discussed during your visits, including an indication of the type of client business, potential areas of interest and the follow-up required". Again, this was information which FCIB would wish to have about its potential customers.

(6) The Claimants also placed reliance on the fact that Mr Deuss set strategy for TWPS marketers. For example, under cover of an email dated 25 April 2005 Mr Vallerey sent them a one page document prepared by Mr Deuss and headed "B2B Strategy". It was in the most general terms and he asked them to move away from T&C traders and MSBs and to identify new industries and segments. Again, wearing his "FCIB

hat" Mr Deuss had an interest in directing the strategy of TWPS marketers towards particular potential customers.

(7) Taking all of the documents upon which the Claimants relied in the around I am satisfied that Mr Deuss honestly believed that his involvement in TWPS did not go beyond the involvement of its ultimate beneficial owner or a director or officer of its sole trading partner and customer, FCIB. He may well have played down his involvement in the activities of TWPS to some extent in Deuss 1. But I accept his evidence that he did not believe that he was a director of the company and that he was not involved in its day to day management.

(iii) De facto director

567. I accept that the question whether Mr Deuss was a de facto director is an objective one and that it is open to the Court to find that was a de facto director even if he did not believe himself to be one. I, therefore, test Mr Deuss's evidence by reference to some examples of the documents upon which the Claimants relied. Having reviewed those documents, I take the view that the strongest evidence in support of the Claimants' case that Mr Deuss was a de facto director related to his involvement in fixing salaries and introducing the bonus scheme. In particular:

(1) By email dated 8 December 2003 Mr Van Laarhoven forwarded an email to Mr Deuss in which he stated that Mr Vallerey and he (and not Mr Deuss) were meeting a prospective employee in London on the following day. Mr Deuss's response was to tell him to proceed with the meeting stating: "Examine what "deal" they can offer if we retain them to recruit for us 5-10 marketers with base salary of £50,000. We will not include any incentive compensation in the fee entitlements for Page."

(2) As the Claimants point out, in 2003 and 2004 Mr Deuss appears to have been against the introduction of a bonus scheme for TWPS marketers: see Mr Vallerey's email dated 1 July 2004 (above). However, on 10 June 2005 he sent a memo to Mr Sanchez and Mr Vallerey copied to Ms Deuss, Mr Ulrich and Mr Kornitzer in which he set out detailed proposals for introducing a "formal incentive compensation plan for marketers".

(3) By email dated 15 December 2005 Ms Rebecca Lanigan, a TWPS marketer, wrote

to Mr Vallerey stating that she was disappointed to be excluded from the bonus scheme. On the same day Mr Vallerey replied stating that the bonus was discretionary and "the decision always rests with Mr Deuss."

568. My difficulty with assessing whether these documents provide clear evidence of directorial activity is that the Claimants provided no context for them. They would provide strong evidence that he was acting as a director if the Claimants had also established that the employees of TWPS (or whichever Transworld company handled HR matters) simply implemented his instructions. But they would carry a very different complexion if there were minutes of a meeting of the board of directors showing that they considered Mr Deuss's proposal for a bonus scheme and exercised their powers in good faith for the benefit of the company to implement it. This would show no more than that he as the ultimate shareholder of both TWPS and FCIB wanted TWPS to adopt the scheme and that the board of directors exercised their independent judgment to do so.

569. Moreover, I have no further evidence about Ms Lanigan's bonus. It may be that Mr Vallerey was doing no more than sheltering behind Mr Deuss's name to avoid paying her a bonus and that her remuneration was considered by the Transworld HR team and then approved by the board of directors. Either way, there was no evidence whether she received the disputed bonus or not. In my judgment, this lack of context explains why it was so important for the Court to make findings about the corporate governance structure of TWPS.

570. In *Smithton Ltd v Naggar* (above) the Court of Appeal held that determining whether the individual was part of the corporate governance system was an important step in deciding whether he had assumed the responsibility of a director and that in the normal course it is vital that the trial judge make findings about the role which the defendant played in the running of the company in question: see [61]. In the present case, it is impossible for me to conclude that Mr Deuss's email dated 8 December 2003 and his memo dated 1 July 2004 were directorial acts because there was no evidence about the corporate governance of TWPS at all. I was not even taken to the Memorandum and Articles of Association.

571. In summary, the Claimants' case was based on a series of documents which showed that Mr Deuss had a significant influence on the activities of TWPS but principally at a very general level. But they did not undertake the additional analysis necessary to demonstrate

that Mr Deuss could not have been acting in his capacity as the ultimate shareholder or a director of FCIB and was acting in his capacity as a director. This would have required a detailed comparison between his actions and statements and those of the de jure directors. The email dated 1 June 2004 (above) strongly suggests that TWPS had normal corporate governance and that the directors and Mr Vallerey directed its detailed operations. I therefore dismiss the allegation that Mr Deuss was a de facto director of TWPS.

572. But even if I am wrong and Mr Deuss was a de facto director of TWPS, I am satisfied that he did not give directions to any of the marketers who marketed TWPS's services to the eleven MTIC Companies who had surviving claims against TWPS. I find, therefore, that he did not have a role in relation to that part of the affairs of TWPS about which the Claimants complain: see *Re UKLI Ltd* at [41](7). In my judgment, he cannot be held liable as a de facto director for TWPS introducing or referring individual customers to FCIB if he had no oversight or control over the individual conduct of the TWPS marketers who did so.

(iv) Shadow director

573. As I have stated, the Claimants did not plead or seek to prove that Mr Deuss gave instructions to the two statutory directors of TWPS or that they were accustomed to act at his directions. In their closing submissions, Mr Parker and his team complained that Mr Deuss did not adduce evidence from his sister, Ms Deuss, and relied on Mr Vallerey's relationship as evidence that Mr Deuss was a shadow director. Even then they did not properly distinguish between the two concepts:

> "Overall, the Claimants submit that a shadow director is someone whose wishes the directors as a board are accustomed to act upon, whereas where a person is giving instructions to the directors otherwise than as a board such that he acts as the boss, the appropriate concept is that of de facto director. Mr Vallerey was in no doubt that Mr Deuss was in charge of TWPS: see (1) 17 June 2005 email from Mr Vallerey which states that in relation to TWPS London and Miami "the two groups are now run in parallel by Mr Deuss" (Document List #37), and (2) a note of a Mr Deuss/ Mr Vallerey meeting on 16 October 2005 which records, under '12. Organisation', "TWPS Miami and TWPS London are two separate entities, each reporting directly to [Mr Deuss]" (Document List #45)."

574. I dismiss the allegation that Mr Deuss was a shadow director of TWPS because the Claimants advanced no case that he gave directions to Mr Geerts and Ms Deuss or that

they were accustomed to act on those directions and adduced no evidence from which I could properly draw that inference. Moreover, they made no attempt to distinguish between those documents which were intended to prove that he was a de facto director and those which were intended to prove that he was a shadow director. Finally, I attribute no weight to the decision not to call Ms Deuss given that she was not the subject matter of the pleaded case.

K. S.213

(1) The Claimants' Case

575. The Claimants advanced three S.213 claims: first, against TWPS for knowingly participating in the business of the individual MTIC Companies; secondly, against FCIB for knowingly participating in the business of TWPS; and, thirdly, against Mr Deuss also for knowingly participating in the business of TWPS. In the first claim the Claimants alleged that the MTIC Companies were carrying on business with intent to defraud creditors or for a fraudulent purpose and in the second and third claims they alleged that TWPS was carrying on business with intent to defraud creditors or for a fraudulent purpose.

576. By Application Notice dated 21 September 2020 Mr Hunt applied for relief under S.213 against FCIB and Mr Deuss but no such application was issued against TWPS. In any event, Mr Hunt had no authority to issue such an application because Freedman J held that the claims of the MTIC Companies could not be assigned. It follows, therefore, that the only place in which the Claimants have articulated the S.213 claim against TWPS is in the Particulars of Claim. There, they plead as follows in paragraph 7:

> "(1) The business of each of the MTIC Companies has been carried on with intent to defraud the creditors of, inter alia, those companies and/or other companies and for a fraudulent purpose and TWPS, FCIB and Mr Deuss were knowingly parties to its carrying on business in that manner.
>
> (2) Mr Hunt has accepted that TWPS is liable to make a contribution to the assets of each of the MTIC Companies but has not adjudicated on the proofs of debt of the MTIC Companies submitted in TWPS' liquidation."

577. No further particulars of these allegations are set out either in the body of the Particulars of Claim or in any of the individual Schedules for the individual MTIC Companies. As I understand their case, therefore, the Claimants relied on the same factual allegations and

the same evidence in support of their case against TWPS under S.213. Mr Parker and his team certainly presented the case that way.

(2) The Law

578. Chapter X of the IA 1986 contains a number of provisions relating to "Malpractice before and during liquidations", "penalisation of companies and company officers" and "investigations and prosecutions". S.213 is headed "Fraudulent Trading" and it provides as follows:

> "(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect. (2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

579. In *Morris v State Bank of India* [2003] BCC 735 Patten J identified three elements of the claim which had to be established in a passage which is widely quoted at [11]:

> "There are therefore three elements to be established: (1) that the business of the company in liquidation has been carried on with intent to defraud the creditors of the company or for any other fraudulent purpose; (2) that the defendant sought to be made liable (in this case SBI) participated in the carrying on of the business of the company in that manner; and (3) that it did so knowingly: i.e. with knowledge that the transactions it was participating in were intended to defraud the creditors of the company or were in some other way fraudulent."

(i) carrying on business

580. S.213 is aimed at the carrying on of a business and not at individual transactions: see *Re Gerald Cooper Chemicals Ltd* [1978] Ch 262 at 267. It follows that not every creditor who is defrauded in the course of carrying on a business has a remedy under S.213: see *Morphitis v Bernasconi* [2003] EWCA Civ 289, [2003] Ch 552 at [46] (Chadwick LJ). In *Harrington & Charles Trading Co Ltd v Mehta* [2022] EWHC 2960 (Ch) Edwin Johnson J cited that passage before continuing as follows:

> "358. What I take from this extract is that Section 213 can be engaged in a situation where a creditor or creditors are shown to have been defrauded

> by a single transaction. This however has to occur in a situation where the business of the relevant company is being carried on with an intention to defraud creditors. It is not sufficient for a fraud to occur in the course of the business of a company. The pre-condition to the exercise of the power under Section 213 is that the business of the company has been carried on with intent to defraud creditors of the company.
>
> 359. All this however begs the question of what was the business of the Claimant Companies in the present case. Were the Claimant Companies engaged in legitimate business activities, in the course of which they happened to be used as vehicles for the Alleged Fraud? Can it be said that the business of the Claimant Companies was to engage in the Alleged Fraud? These are related questions which are also fact sensitive questions, for trial. As matters stand it seems quite clear to me that the Claimants (specifically the Liquidators) have a good arguable case that they are entitled to claim contributions from each of the Respondents pursuant to Section 213 of the 1986 Act."

(ii) Intent to defraud creditors or for any fraudulent purpose

581. In *London Capital Finance plc v Thomson* [2024] EWHC 2894 (Ch) Miles J cited a number of the relevant authorities and stated that the case law does not seek to define or delimit the concept of fraud. He also stated that liability requires that a person has acted dishonestly and that the words "for any other fraudulent purpose" are broad in reach: see [1537] to [1545].

(iii) parties to the carrying on of business

582. There is no requirement that the defendant must exercise a managerial function or control over the company or be an "insider". In *Bilta (HK) Ltd v Tradition Financial Services Ltd* [2023] EWCA Civ 112, [2023] Ch 343 the Court of Appeal held that the words "any persons who were knowingly parties to the carrying on of the business" were not limited to those persons exercising management of control over a company. Lewison LJ (with whom Stuart-Smith and Falk LJJ agreed) held that outsiders or third parties could carry on the business of the company and he gave the following example at [93]:

> "What must be established is that the company's business (or a discrete part of that business), taken as a whole, had been carried on fraudulently. Whether that is established in any particular case is a question of fact. Mr Scorey submitted that if the defendant was carrying on his own business, he could not be said to be party to the carrying on of a different business. I do not agree. The extent to which a counterparty must be involved in the carrying on of the fraudulent business may depend upon the facts. Suppose that a manufacturer regularly supplies counterfeit designer clothes to a

> retailing company, knowing that the retailer will pass them off as genuine. It is, in my judgment, no misuse of language to describe the manufacturer as "party to the carrying on" of a fraudulent business, even though he exercises no managerial or controlling role within the retailing company; and the manufacturer may have other business activities that are not fraudulent. The manufacturer knows about the retailer's fraudulent business and is actively participating in it in the sense of furthering and facilitating it. In my judgment, the allegedly odd results are more apparent than real."

583. Lewison LJ also accepted that it was a precondition of liability that business had been carried on with fraudulent intent and that incidental frauds committed in the course of a business were not enough: see [112]. The Supreme Court dismissed an appeal against the decision: see [2025] UKSC 18, [2025] 2 WLR 1015. Lord Briggs JSC stated as follows at [25] and [26]:

> "25. We note certain features of the language which limit the circumstances in which liability may be incurred under section 213. First, the person to incur liability must be a party to the carrying on by the company of a fraudulent business and not merely involved in a one-off fraudulent transaction, unless the fraud is sufficient evidence on its own of the carrying on of a fraudulent business: *In re Murray-Watson Ltd* (unreported) 6 April 1977, Oliver J; *Morphitis v Bernasconi* [2003] EWCA Civ 289; [2003] Ch 552, Chadwick LJ para 46. Secondly, being party to the carrying on by the company of a fraudulent business does not extend to a mere failure to advise: see *In re Maidstone Buildings Provisions Ltd* [1971] 1 WLR 1085, in which Pennycuick V-C held that the failure of a company secretary to give advice to the company's directors did not bring him within the ambit of section 332 of the Companies Act 1948, a predecessor of section 213 the IA 1986: p1092. Thirdly, the person liable must have had an active involvement in the carrying on of the fraudulent business by the company: *In re Maidstone* (above); *R v Miles* [1992] Crim LR 657.
>
> 26. Subject to those limitations, there is nothing in the language of section 213(2) which restricts the scope of the provision to directors and other "insiders" who were directing or managing the business of the company. The natural meaning of the statutory words – "any persons who were knowingly parties to the carrying on of the business" of the company for any fraudulent purpose – is wide enough to cover not only such "insiders" but also persons who were dealing with the company if they knowingly were parties to the fraudulent business activities in which the company was engaged. Such persons could include those who transacted with the company in the knowledge that by those transactions the company was carrying on its business for a fraudulent purpose.

584. Nevertheless, some positive acts of assistance are required for participation although a

person may participate by involvement in a transaction which is not itself fraudulent: see *London Capital Finance plc v Thomson* at [1548]. For example, in *Bilta (UK) Ltd v NatWest Markets plc* (above) Snowden J (as he then was) held that traders were liable for turning a blind eye to MTIC fraud whilst causing RBS to enter into lawful carbon credit trades with them: see [192].

(iv) knowingly a party

585. It is not necessary for the liquidator to prove that the participant knew that a fraud was being carried out or the details of that fraud and knowledge in this context includes blind-eye knowledge. It is also enough for the liquidator to prove that the participant knew that their conduct was connected with a fraud (such as assisting the company to cover it up). Finally, it is necessary for the liquidator to establish that the participant had either the subjective intend to defraud or reckless indifference whether the creditors have been defrauded: see *London Capital Finance plc v Thomson* at [1550] to [1559] citing *Re JDG Group plc* [2023] EWHC 775 (Ch).

(v) on the application of the liquidator

586. In *Re Overnight Ltd* [2009] EWHC 601 (Ch), [2009] Bus LR 1141 the issue for the Court was whether time for bringing a claim under S.213 ran for the purposes of limitation from the date of presentation of the winding up petition or from the appointment of a liquidator or from some later date. By coincidence, the liquidator in that case was Mr Goldfarb and Sir Andrew Morritt C accepted his argument that time ran from the date of the winding up order for the following reasons at [22] to [24]:

> "22. Section 213 creates a statutory cause of action. As I have indicated, it is conceded that section 9 of the Limitation Act 1980 applies to that cause of action. It follows that if the application issued on 30 November was more than six years after the statutory cause of action accrued, then it was out of time. The ingredients of the statutory cause of action must be ascertained from the statute. It appears to me that section 213 imports two essential conditions quite apart from the need to prove that the business of the company had been carried on with intent to defraud creditors. Those two essential conditions are: (1) that the company is in the course of being wound up and (2) that the application is made by the liquidator.
>
> 23. The need to satisfy the first condition is clear from the opening words of subsection (1) and the decision of the House of Lords in *R v Schildkamp* [1971] AC 1, a decision on the comparable provisions of section 332 of the Companies Act 1948. The need to satisfy the second, namely, the

> application is being made by the liquidator, is apparent from the express term of section 213(2). Counsel for Mr Andreous contends that the terms of 129(2) show that the first condition was satisfied as from the time the petition on which the order was made was presented, that the date of presentation is the date of the winding up is deemed to have commenced.
>
> 24. I do not accept that submission. The need to deem the commencement of the winding up to be the date when the petition is presented arises from the terms of, for example, sections 127 and 128 of the 1986 Act. Without some such provision, the presentation of a petition would invite a race by creditors to grab such assets of the company as they could find which is the exact opposite of the purpose of a winding up. But the very fact that it is necessary, for some purposes, to deem the winding up to commence at a time before the winding up order is made shows clearly that as of that date for other purposes the company is not "in the course of being wound up" for the purposes of section 213."

587. The judge also rejected the argument that "liquidator" included a provisional liquidator: see [25] to [34]. In *Bilta (UK) Ltd v Transition* Lord Briggs confirmed that his analysis was correct and that the limitation period for a claim under S.213 is six years from the date of the winding up petition. He stated as follows at [17]:

> "Because the application under section 213 can be made only by a liquidator in the course of the winding up of the company, the six-year limitation period under section 9 of the Limitation Act 1980 runs from the date of the winding up order or when the company goes into voluntary liquidation. As the winding up orders of Bilta, Weston and Vehement were made more than six years before the claim form was issued on 8 November 2017 the claims by their liquidators under section 213 are statute-barred, while the claims of the liquidators of Nathanael and Inline are not, because their winding up orders were made on 19 March 2012 and 8 June 2015."

588. Mr Scott submitted that whatever the merits of the S.213 claims by the MTIC Companies, TWPS is not liable to them because none of them have issued an application under S.213(2) and that is one of the two conditions of liability. He argued that the cause of action was not complete until or unless the liquidators had issued an Application Notice in accordance with S.213(2) and that since time began to run when each of the MTIC Companies was ordered to be wound up or went into voluntary liquidation (and the last to do so was in 2015) all of the claims were hopelessly time-barred and the MTIC Companies could not cure this defect by issuing an Application Notice now. This gave rise to the Application Issue (as I have termed it above).

589. Mr Parker contested these submissions on the basis that they involved a logical

inconsistency. How could time begin to run for limitation purposes, he asked rhetorically, if the cause of action was not complete until the issue of an Application Notice? He relied on *Zedra Trust Co (Jersey) Ltd v THG plc* [2024] EWCA Civ 158, [2024] Ch 318 and *Re Farmizer (Products) Ltd* [1997] 1 BCLC 589 (Blackburne J) as authority for the proposition that the cause of action under S.213 was complete and the MTIC Companies were entitled to relief once the facts upon which they relied had taken place and their cause of action did not depend either on the issue of an Application Notice or the Court making a declaration under S.213(2).

590. On the Application Issue I accept Mr Scott's submissions and I reject those of Mr Parker. Whether one characterises the issue of the Application Notice as an element of the cause of action or a condition which must be satisfied before a liquidator may bring a claim for a contribution under S.213 probably does not matter much. Either way, it is a statutory condition which must be satisfied before the Court may make a declaration under S.213(2). *Overnight* (above) is clear authority for that proposition and I follow it.

591. Moreover, there was no inconsistency in Mr Scott's argument. The issue of the Application Notice and the satisfaction of the condition in S.213(2) is the event which stops time running and entitles a liquidator (as opposed to the company itself) to claim relief. It is the statutory equivalent of the issue of a Claim Form under CPR Part 7 and the Insolvency Rules 2016 provide for the issue and service of an Application Notice. Indeed, rule 12.1 provides that the Civil Procedure Rules shall apply with any necessary modification. But it is still a condition which must be satisfied before a claim can be made.

592. In *Overnight*, Mr Goldfarb had issued an Application Notice just before the sixth anniversary of the winding up order: see [3]. The reason why Sir Andrew Morritt C considered the condition in S.213(2) to be relevant to the issue which he had to decide was because it showed that only liquidators can bring a claim under S.213 and then only when they have issued an Application Notice. It followed, therefore, that as a matter of purposive construction time could not begin to run until the company had been wound up and put into liquidation.

593. Furthermore, I gain no assistance from either *Zedra Trust* or *Re Farmizer*. In *Zedra Trust* the Court of Appeal held that the limitation period in section 9 of the LA 1980 applied to

an unfair prejudice petition under section 994 of the Companies Act 2006 and, as such, it could be said to be entirely consistent with *Overnight* where it was conceded that section 9 applied to S.213: see [22] (above). But in any event, *Overnight* was not cited to the Court or referred to Lewison LJ (with whom Arnold LJ agreed) or by Snowden LJ who gave a concurring judgment. Furthermore, in *Overnight* itself Sir Andrew Morritt distinguished *Re Farmitzer* but held that it supported his conclusion: see [29] to [31]. I do not, therefore, consider it further. Accordingly, I find in favour of the Defendants on the Application Issue.

594. Mr Scott also submitted that the claims by the liquidators of the MTIC Companies were not debts provable in the liquidation of TWPS because none of them had issued Application Notices or complied with the condition in S.213. He and his team developed a complex argument in their opening submissions: see D1, O121 to O128. They took this point in anticipation of an argument which Mr Parker and his team might take the point that the *General Rolling Stock* principle stopped time running for the purpose of S.213 claims. But Mr Parker and his team did not take that point and it is unnecessary for me to decide it.

(3) Findings

(i) The MTIC Companies

595. I find that all of the MTIC Companies were carrying on business with the intent to defraud their principal creditor, HMRC, with the exception of JDG. I make this finding based on the individual findings of breach of fiduciary duty which I have made in section G (above). In the case of JDG I have found that Mr Bhatia turned a blind eye to MTIC fraud and based on this finding I also find that JDG was carrying on business with intent to defraud its principal creditor, HMRC. I note that in *Re JDG Group Ltd* [2023] EWHC 775, [2023] BCC 748 Sir Anthony Mann upheld the decision of ICC Judge Agnello KC that Mr Bhatia had actual knowledge of the MTIC fraud. I take some comfort from this decision. But my decision was based on the evidence presented to me alone.

(ii) The TWPS marketers

596. However, I dismiss the allegation that TWPS was a party to the carrying on of the MTIC Companies business. I do so based on the individual findings of assistance which I made

in section J(3) and J(4) (above). This issue must be examined on an individual basis in relation to each MTIC Company and I am not satisfied that TWPS participated in the business of each MTIC Company by introducing it to FCIB, certifying documents, providing letters of good standing or their EPR numbers in lieu of such a letter (if, indeed, they did so) or making visits to their premises and completing site visit reports.

597. There was no contractual relationship between the individual MTIC Companies and TWPS and there was no evidence that the TWPS marketers were involved in any of the individual trades which gave rise to the VAT Claims. I have also dismissed the allegation that TWPS marketers were involved in any ongoing monitoring of the MTIC Companies (other than chasing for EDD documents). I am prepared to accept that it would be possible for an introducer to be held liable under S.213 and that it could be held liable even if the only active steps which it took were entirely innocent ones. But the issue is one of fact and degree to be decided on the individual facts and in the present case I am not satisfied that the TWPS marketers had sufficient involvement in the activities of any of MTIC Companies to be held liable under S.213.

(iii) Mr Deuss

598. But even if I am wrong, I find that Mr Deuss did not know that the MTIC Companies were carrying on business with the intent to defraud HMRC or turn a blind eye to them doing so. Again, I base this conclusion on the individual findings which I have made in relation to Mr Deuss's state of mind in section H (above). In particular, I have dismissed the allegations that Mr Deuss dishonestly incorporated FCIB to pretend that it was an offshore bank and that he used FCIB and TWPS to create or facilitate the creation of the existence of networks of companies engaged in MTIC fraud: see [497], [498] and [561]. These were allegations of a fraudulent design and deliberate dishonesty and, in my judgment, there was no evidence to support them. As Mr Scott submitted in closing, the Claimants had to put their case this high to get their S.213 claims off the ground and they signally failed to prove these allegations.

599. In any event, I have held that Mr Deuss was not a de facto or shadow director of TWPS and even if I had found that he turned a blind eye to the fraud of the MTIC Companies, I would not have held that his state of mind should be attributed to TWPS. Since no allegations of dishonesty were made against the TWPS marketers and the allegation

against Mr Vallerey was not pursued, I dismiss the Indirect Claims of the liquidators of the MTIC Companies under S.213 because I find that TWPS did not knowingly participate in the business which they carried on with intent to defraud HMRC.

(iv) The Application Issue

600. Finally, I have accepted Mr Scott's argument on the Application Issue and I hold that no valid claims were made against TWPS by the liquidators of the MTIC Companies under S.213 because they failed to issue Application Notices seeking a declaration under S.213(2) on behalf of the individual MTIC Companies at any time during the six years after each company went into liquidation and have still not issued such Application Notices. Because no Application Notices have ever been issued, it is unnecessary for me to decide whether the *General Rolling Stock* principle applies to S.213 claims brought by the liquidator of one company in liquidation against another company in liquidation and the liquidation of TWPS stopped time running for those claims because, in my judgment, no valid claims have ever been made.

L. Limitation

(1) The Claimants' Case

601. Both Defendants took a limitation defence in their Defences and in the Reply dated 20 April 2023 the Claimants relied on S.32 in respect of all of their claims. As Mr Scott pointed out to Mr Hunt in cross-examination, the Claimants had relied on their case to obtain an order for service out and Mr Hunt had made a witness statement verifying it. However, by amendments dated 13 September 2024 the Claimants amended the Particulars of Claim to advance the case set out below and by amendment dated 4 December 2024 they amended to strike out their original case from the Reply. By trial their case was set out in the Particulars of Claim at paragraphs 42 and 43:

> "42. (1) No limitation defence has been or is being taken by TWPS or its liquidator in respect of the claims against it by the MTIC Companies, and it is not open to the Defendants themselves to raise a limitation defence to the claims of the MTIC Companies and their liquidators on TWPS; and (2) In the circumstances set out below, none of the MTIC Companies discovered or could with reasonable diligence have discovered TWPS' fraud prior to 22 September 2008, 6 years prior to the date of TWPS' liquidation.

43. (1) The MTIC Companies went into liquidation on dates between 22 July 2005 and 15 June 2015. At the time of their liquidation, none of the MTIC Companies had the requisite knowledge to bring any claims against TWPS.

(2) The knowledge of the dishonest directors of each of the MTIC Companies is not to be attributed to that company.

(3) It follows that in respect of those companies which went into liquidation after 22 September 2008, they could not have discovered TWPS' fraud before 22 September 2008;

(4) As regards those MTIC Companies which went into liquidation prior to 22 September 2008, those liquidators could not with reasonable diligence have discovered TWPS' fraud prior to 22 September 2008:

(a) Save for the limited instances adverted to in the Schedule for each of the MTIC Companies, a review of the company's books and records would not have revealed TWPS' involvement or revealed only that TWPS had a role in the opening of the MTIC Company's FCIB account;

(b) The liquidator of the MTIC Company could not have known and could not with reasonable diligence have discovered: (i) that TWPS knew that MTIC fraud was prevalent in the T & C sector nor that TWPS was targeting companies in that sector despite in that sector despite such knowledge; (ii) that TWPS knew that once onboarded such clients' activities were not being monitored properly or at all, as set out above;

(iii) that Mr Deuss had any connection to TWPS (let alone as set out above that he was a de facto director of TWPS, still less the degree of control he exercised over TWPS (as set out above));

(5) Such facts were only discovered following the receipt by Mr Hunt of CD-Roms from HMRC, described below. Mr Hunt was appointed as liquidator on 17 November 2014;

(6) On 25 September 2015, Mr Hunt received three CD-Roms of documents belonging to TWPS from HMRC. Based on the information contained on those CD-Roms, Mr Hunt prepared an annual progress report to the creditors of TWPS on or around 16 November 2016 regarding the status of his investigations and the potential claims against TWPS, FCIB and Mr Deuss;

(7) (a) Until at the earliest the receipt of the three CD-Roms from HMRC, TWPS and the Griffins MTIC Companies did not have, and could not with reasonable diligence have obtained, the requisite knowledge to bring any claims;

(b) Until Timothy Bramston's appointment as liquidator of Notebook Express Limited ("Notebook") on 6 October 2015, Notebook did not have, and could not with reasonable diligence have obtained, the requisite knowledge to bring any claims;

(c) Until receipt of the annual progress report dated 16 November 2016, the non-Griffins MTIC Companies other than Notebook did not have, and could not with reasonable diligence have obtained, the requisite

> knowledge to bring any claims;
>
> (8) Accordingly time did not start to run for the claims of the MTIC Companies against TWPS until at the earliest on 25 September 2015, less than 6 years prior to the issue of these claims."

602. I understood the Defendants to accept paragraphs 43(1) and 43(2). I also understood them to accept paragraph 43(3) subject to one qualification, namely, that three of the remaining companies (Eliyon, Gold Digit and JDG) had Uninvolved Directors who were not involved in the MTIC frauds committed by the MTIC Directors themselves. Those directors were as follows:

(1) *Eliyon*: Ms Breitenfeld.

(2) *Gold Digit*: Ms Samantha Jones.

(3) *JDG*: Ms Joti Bhatia and Ms Suman Bhatia.

603. The Claimants' answer to this allegation is set out Schedules A7, A9 and A10. In summary, the Claimants pleaded that Ms Breitenfeld knew about or was complicit in the relevant MTIC fraud and that Ms Jones and Ms Joti Bhatia were not active directors. No case is pleaded in relation to Ms Suman Bhatia. In their closing submissions Mr Parker and his team made the blanket submission that: "The 'Uninvolved Directors' were not "innocent" and that any director of an MTIC Company was either "(a) involved in perpetrating the fraud or (b) entirely abrogated their duties as a director".

(2) The Law

(i) The Standing Issue

604. The famous decision of the House of Lords in *Government of India v Taylor* [1955] AC 491 is generally cited as authority for the proposition that claims by a foreign state to recover taxes due under its own laws are unenforceable in an English Court. However, as Mr Scott and his team pointed out in their opening submissions, the issue arose because the liquidator of an English company had refused to admit the relevant claims to proof. Viscount Simmonds (with whom Lords Reid and Morton agreed) stated as follows at 509:

> "I conceive that it is the duty of the liquidator to discharge out of the assets

> in his hands those claims which are legally enforceable, and to hand over any surplus to the contributories. I find no words which vest in him a discretion to meet claims which are not legally enforceable. It will be remembered that, so far as is relevant for this purpose, the law is the same whether the winding up is voluntary or by the court, whether the company is solvent or insolvent, and that an additional purpose of a winding up is to secure that creditors who have enforceable claims shall be treated equally, subject only to the priorities for which the statute provides. It would be a strange result if it were found that the statute introduced a new category of creditors to compete with those who alone, apart from it, could enforce their claims."
>
> "I am, on the other hand, satisfied that the case of a statute barred debt presents a very close analogy and that in concluding that the present claim cannot be admitted your Lordships are assisted by such cases as *In re Lorillard* and *In re Art Reproduction Ltd* which were in my opinion rightly decided."

605. Lords Keith and Somervell delivered concurring judgments. In *Re Art Productions Ltd* [1952] Ch 89 (which Viscount Simmonds cited above) a liquidator in a solvent voluntary liquidation rejected two claims on the basis that they were statute-barred. On appeal to the High Court it was argued that different rules should apply to compulsory and voluntary liquidations. Wynn-Parry J rejected that argument and upheld the liquidator's decision. In doing so he cited and relied on *Re General Rolling Stock*. He stated as follows at 94:

> "In *In re General Rolling Stock Co,* James L.J. quoted section 98 of the Act of 1862 and proceeded: "A duty and a trust are thus imposed upon the court, to take care that the assets of the company shall be applied in discharge of its liabilities. What liabilities? All the liabilities of the company existing at the time when the winding-up order was made which gives the right. It appears to me that it would be most unjust if any other construction were put upon the section." Mellish L.J. said: "It appears to me to be the clear meaning of that section, that the assets should be applied in satisfaction of all the liabilities which existed at the time of the winding-up order."
>
> In Buckley on the Companies Acts (12th ed.), at p. 634, in the notes to section 316, it is said: "But, of course, a debt barred at the date of the order cannot be proved"; and for that proposition there is cited *Mitchell's Claim,* which, in my judgment, bears out that proposition; for in that case it appears that the proposition to the contrary was not even argued. The note continues: "and, *semble,* cannot even in a solvent voluntary liquidation properly be paid against the wishes of the contributories." Mr. Sykes, for the liquidator, contended that that statement in its present form was, if anything, too cautious, and ought to read: "and, *semble,* cannot even in a solvent voluntary liquidation properly be paid unless the

> contributories consent." In my judgment, that would be a correct statement of the law."

606. In my judgment, therefore, Mr Hunt had no power to admit to proof claims barred by limitation and it is not an answer to say that none of the creditors of TWPS objected to his decision or took legal proceedings to challenge it. Moreover, the issue is not whether Mr Hunt acted reasonably by admitting the claims to proof. It might well be difficult for a liquidator to decide whether a claim is statute-barred and quite reasonable to admit the proof and value it at £1 for voting purposes. But that does not turn an unenforceable claim into an enforceable one, if the matter ultimately has to be determined by the Court on the facts. The Court cannot be bound by a decision which Mr Hunt had no power to make.

607. In *Re RJH Stanhope Ltd* [2020] EWHC 2808 (Ch) His Honour Judge Saffman (sitting as a Judge of the High Court) reached the same conclusion. In that case the liquidators of a company adjudicated on a claim against two directors and assessed the claim at £87,231. They obtained judgment in default against one director and there was no challenge to the adjudication itself. They then brought misfeasance proceedings against the second director under section 212 of the IA 1986. The judge rejected the argument that he was bound by the adjudication on the basis of the rule in *Hollington v Hewthorn* and also because the function of the Court was different. After reciting the liquidators' arguments he set out his reasoning at [90] to [92]:

> "90. All these are powerful arguments for concluding that the adjudication is indeed determinative and binds the court. However, it appears to me that it if I were to conclude that it was, that would be contrary to the case law. Indeed, in this case it is not a question of the court not being bound by the decision of a previous judge who has heard evidence. This is a case where the adjudication has been made essentially as an administrative step without necessarily the benefit of any representations by a person directly affected, namely John. If the position is as stipulated in *Rogers* I asked myself rhetorically how much more so it must be the position where the decision in issue is not one by judge after a trial but merely an administrative step taken by a liquidator?
>
> 91. Furthermore, I do not think that concluding, as I do, that the adjudication is not determinative undermines the importance of Rule 14.8 and the need for people to comply with it. The position in this case is that I am presented with a specific claim under section 212. That requires a consideration of what it is just to order to be repaid, if anything. In my view, that means looking at the matter on a clean slate basis. The jurisprudence does not point in favour of treating the adjudication of

> £87,000 odd as the starting point and simply considering what it is just to deduct from it, if anything. That it seems to me would be to undermine the integrity of the principle which requires me to apply a judicial independent assessment as to what loss has been sustained by the Company by virtue of John's breaches.
>
> 92. Further, the purpose of the liquidators' adjudication and the courts obligation are different. The adjudication represents what the liquidators (and perhaps Ms Birkhead) accept is the extent of the Company's debt to Ms Birkhead. The court's obligation is to assess the loss to the Company. In short, the adjudication may be binding on the Company and Ms Birkhead but the question of whether it is binding on the court is a different one."

608. Mr Parker was forced to submit that *Stanhope* was wrongly decided. But it is consistent with the general principle set out in *Government of India v Taylor.* It is also consistent with the decision of the Supreme Court of South Australia in *The Duke Group Ltd v Arthur Young (No 2)* (1991) 9 ACLC 380 (affirmed at (1991) 9 ACLC 599). In that case the defendants in an accountants negligence case brought by a company in liquidation applied for permission to amend to allege that certain debts upon which the liquidators relied as evidence of their loss were not liabilities of the company. Perry J held that the defendants were entitled to challenge the claims (even though the partnership was a creditor in the liquidation for a small sum). He held that the way in which the liquidator discharged his responsibilities was *res inter alios acta* at [53] to [55]:

> "53. The manner of discharge by the liquidator of his responsibilities with respect to admission or rejection of proofs of debt is, for the purposes of these proceedings, res inter alios acta.
>
> 54. Observations such as that made by Kitto J in *Motor Terms Co. Pty. Ltd. v. Liberty Insurance Ltd. (in liquidation)* (supra) that "a creditor's right to recover his debt by ordinary legal proceedings is taken from him at sequestration ..." (116 CLR p 180) must be regarded correctly to identify the exchange of a right of action at the suit of a creditor against the debtor for a right to prove in the debtor's liquidation. But that exchange of rights does not speak to the question whether or not the debt continues to exist at Common Law.
>
> 55. It seems to me that the fact that the Court may, pursuant to s.137(1) of the Code, give leave to a creditor to proceed by way of ordinary action in the Courts against a company in liquidation, points very strongly to the fact that the existence of a debt at Common Law survives an order for liquidation."

609. The judge also went on to consider the argument that the ability to quantify their own damages would place liquidators in a position of conflict and although he did not determine this issue it is helpful to look at the way in which he framed the argument at [56] and [57]:

> "56. Mr Lander submitted that to yield to the plaintiff's argument would result in a situation where the liquidator of the plaintiff could, by his own decision, determine the quantification of this part of the damages, and that this would place him in a position of conflict of interest. 57. There is much to be said for that contention, and it is not answered by reference to the fact that the liquidator is obliged to act judicially. On the contrary, it is highly desirable that, given that he is obliged to act judicially, the appearance of impartiality is not affected by the creation of a situation in which he is faced with an apparent conflict of interest. However, I do not determine this aspect of the matter by reference to that consideration."

610. In my judgment, *Stanhope* was correctly decided for both of the reasons which the judge gave. It is trite law that a decision by another tribunal between different parties is not binding on a third party. A liquidator's decision is not binding on this Court or parties who are not creditors either as a matter of precedent or by any form of issue estoppel. It follows, therefore, that it will only bind this Court and the Defendants as matter of insolvency law or if the rules for assessing equitable compensation or a contribution under S.213 require the Court to assess damages by reference to a liquidator's decision to admit a claim to proof.

611. The Claimants cited no authority for the first proposition and, in my judgment, it is inconsistent with the general principle in *Government of India v Taylor*. I agree with both His Honour Judge Saffman in *Stanhope* and Perry J in *Duke Group Ltd v Arthur Young* that the Court is not required to accept the correctness of a liquidator's adjudication as a matter of law even in an action brought by or against a creditor. In particular, I agree that since the third party defendants in a claim for damages or equitable compensation or for a contribution under S.213 are not seeking to challenge the liquidator's decision it should be regarded as *res inter alios acta* or legally irrelevant and the Court should start with a clean slate. Perry J placed particular reliance on the fact that the relevant insolvency legislation preserved the right of a creditor to bring proceedings at common law with the leave of the Court and so do I: see S.130(3).

612. Finally, the Claimants cited no authority for a rule or principle for the assessment of

damages, equitable compensation or a contribution that the Court must accept a claimant's own assessment of his damage even if it is made by a liquidator in deciding whether to admit a claim to proof or adjudicating upon that claim. I am prepared to accept that the Court could accept such an assessment if satisfied that it is reasonable in the same way that the Court may accept that a sum paid by a claimant to a settle a third party claim is the measure of their loss, if it is reasonable. *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314 is still the leading authority for the proposition that where a claimant in subsequent proceedings has made a payment to settle a claim "they can recover this amount as damages from the now defendant provided that the settlement represented a reasonable figure": see *McGregor on Damages* 22nd ed (2024) at 22—058.

613. It follows from this analysis that I reject the Claimants' case that it is not open to the Defendants to raise a limitation defence or, more accurately, to challenge Mr Hunt's own decision not to take a limitation defence and to ask the Court to determine whether TWPS had a limitation defence to any of the Indirect Claims. However, I also accept that it is open to the Court to accept Mr Hunt's decision not to take a limitation defence as a short cut to determining that is provided that he is able to satisfy the Court that this decision was a reasonable one. When I come to decide the facts below, I consider that issue first before going on, if necessary, to decide the S.32 Issue.

(ii) The S.32 Issue

614. S.32 is headed: "Postponement of limitation period in case of fraud, concealment or mistake." For the purposes of this action, the only relevant part of the section is S.32(1) and it provides as follows:

> "(1) Subject to subsections (3) , (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either— (a) the action is based upon the fraud of the defendant; or (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or (c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."

615. In *Upham v HSBC plc* [2024] EWHC 849 (Comm) Bright J described the law as both

simple and well-established. Subject to one qualification, I accept that this is correct and I gratefully adopt his summary of the law at [586]:

> "(1) The burden of proof in establishing their case under section 32 was on the Claimants: *Paragon Finance plc v D B Thakerar & Co* [1998] EWCA Civ 1249; [1999] 1 All ER 400, per Millett LJ at p. 418b-d. This is a passage cited as "authoritative" by the majority in the Supreme Court in *Test Claimants in FII Group Litigation v HMRC* [2020] UKSC 47, at [203] per Lord Reed PSC and Lord Hodge DPSC; see also [209(2)], [213(16)].
>
> (2) Discovery of the fraud, for the purposes of section 32(1), means knowing that there is a worthwhile claim, i.e., having sufficient confidence in the facts it is necessary to allege to justify embarking on the preliminaries to issuing proceedings: *Gemalto Holdings BV v Infineon Technologies AG* [2022] EWCA Civ 782, per Sir Geoffrey Vos MR, in particular at [45] and [53], applying in the context of fraud the reasoning in Test Claimants in FII Group Litigation v HMRC (above) at [192]-[193], [196] and [213(14)].
>
> (3) The requirement of "reasonable diligence" for the purposes of section 32(1) means that the Claimants (the burden being on them) must show that they could not have discovered the fraud (in the sense just explained) without "exceptional measures which they could not reasonably have been expected to take": see again the "authoritative" passage from the judgment of Millett LJ in *Paragon Finance plc v D B Thakerar & Co*.
>
> (4) Although not necessary, it can be useful to consider whether, and if so when, something happened to put the Claimants on notice of a need to investigate: *OT Computers v Infineon Technologies* [2021] EWCA Civ 501, per Males LJ at [47]. This is sometimes referred to as the "trigger" for investigations, and in many cases can be identified when it is objectively apparent that something has gone wrong, which ought to prompt the Claimants to ask "why?" and investigate accordingly: *Granville Technology Group Ltd v Infineon Technologies AG* [2020] EWHC 415 (Comm), per Foxton J at [48]."

616. The one qualification which I would make to this summary concerns proposition (2). There are conflicting decisions whether the test for fraud is the "**statement of claim test**" rather than the "**worthwhile claim test**" above. In *Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd* [2023] EWHC 2759 (Comm) Cockerill J described the debate at [150] to [152] (original emphasis):

> "150. Discovery can in some cases create a debate. Two different "tests" or points in time have been discussed in the authorities, namely the point at which the claimant had (or would acting with reasonable diligence have had): (a) sufficient knowledge to plead its claim ("the Statement of Claim Test"); and (b) sufficient knowledge " *to justify embarking on the preliminaries to the issue of a writ* " or " *in the sense of recognising that a*

> *worthwhile claim arises* " ("the Worthwhile Claim Test").
>
> 151. The cases in which there is a difference between the two will be rare: In *Gemalto Holdings BV v Infineon Technologies* [2022] EWCA Civ 782 Sir Geoffrey Vos MR observed at [45]: " *there is unlikely in most cases, as in this case, to be a real difference between the application of the statement of claim test and the [worthwhile claim] test. Indeed, the statement of claim test is, perhaps, little more than a gloss on the [worthwhile claim] test* ".
>
> 152. The Statement of Claim Test which the parties have agreed that I should apply in this case requires that the claimant is in a position (i.e. has sufficient actual or constructive knowledge) to plead a complete cause of action, which in fraud cases entails the critical allegations that a representation has been made, that it was false and that the representor knew it to be false: see *Barnstaple Boat Co. v Jones* [2007] EWCA Civ 727 at [34] ; *Bilta (UK) Ltd v SVS Securities plc* [2022] BCC 833 at [31(7)(h)]."

617. Cockerill J also addressed the question of which version of the case must be known in order to trigger the running of time and, after considering the decision of the Court of Appeal in *Seedo v Gamal and Salfiti* [2023] EWCA Civ 330, she concluded that the issue was not cut and dried: see [153] to [155]. In *Super Fast Trading Ltd v The Governor and Company of the Bank of Ireland* [2025] EWHC 871 Dame Clare Moulder DBE noted that Sir Geoffrey Vos MR had left open the question whether the statement of claim test applied in fraud cases, *Seedo* had not been cited to Bright J and that she was bound by authority to apply that test rather than the worthwhile claim test. She stated as follows at [98] and [99] (original emphasis):

> "98. However it appears that the judge in *Upham* was not referred to *Seedo v El Gamal* [2023] EWCA Civ 330 and referred only to *Gemalto.* Further I note that in *Gemalto* it was said that *"if the putative claim would be struck out as not disclosing a cause of action, it would be right to say that the claimant had not discovered that it had a worthwhile claim".* Accordingly when Bright J referred to a " *worthwhile claim* " as being *"having sufficient confidence in the facts it is necessary to allege"* that would mean having sufficient confidence to allege that a representation has been made, that it was false and that the representor knew it to be false. It is for that reason that there may not be a difference in most cases. However on the authorities which are binding on this Court I proceed on the basis that the appropriate test is the Statement of Claim test.
>
> 99. I further note that in order to plead fraud: "… <u>The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an</u>

> inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact 'which tilts the balance and justifies an inference of dishonesty'. At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge…". (Flaux J in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20] referred to in the White Book at 16.4.4) [emphasis added]."

618. In almost all of the authorities (including *Gemalto* and *Super Fast Trading*) the Court has observed that in most cases it makes no difference which test applies. However, until the issue is resolved by the Court of Appeal, I prefer to follow *Super Fast Trading* on this issue and to apply the statement of claim test. I also apply the test for pleading fraud which the judge adopted at [99]. Finally, this is not a case analogous to *Loreley*, where the claimant has brought some good and some bad claims. This is a case in which I have dismissed the entire claim but have nevertheless gone on to decide the limitation issue. In my judgment, the appropriate course is to assume that the Claimants had succeeded on the facts on both the dishonest assistance and S.213 claims and I adopt this course.

619. Further, one question which Bright J was not required to address in his summary but which arises in the present case is what assumptions (if any) the Court should make about the directors or officers of companies which go into administration or liquidation. In *OT Computers Ltd v Infineon Technologies AG* [2021] EWCA Civ 501, [2021] QB 1183 the Court of Appeal held that S.32 did not require the Court to treat the company as if it had been continuing to trade when it had gone into liquidation. After citing *Adams v Bracknell Forest BC* [2004] UKHL 29, [2005] 1 AC 76 Males LJ stated the following principles at [59] to [61]:

> "59. In my judgment a similar approach applies to section 32. The section requires an objective standard (what the claimant could have discovered with the exercise of reasonable diligence) but what assumptions are appropriate in the case of a claimant from whom wrongdoing has been deliberately concealed and the degree to which they reflect the actual situation of that claimant will depend upon why the law imports an objective standard. Here, the purpose of the section is to ensure that the claimant—the actual claimant and not a hypothetical claimant—is not disadvantaged by the concealment. In achieving that purpose it is

> appropriate to set an objective standard because it is not the purpose of the law to put a claimant which does not exercise reasonable diligence in a more favourable position than other claimants in a similar position who can reasonably be expected to look out for their own interests. Rather, claimants in a similar position should be treated consistently. However, a claimant in administration or liquidation which is no longer carrying on business is not in a similar position to claimants which do continue actively in business and it is unrealistic to suggest otherwise.
>
> 60. Mr Jowell protested that it is necessary to treat a claimant in administration or liquidation as if it were still carrying on business in order to achieve certainty, and thereby avoid injustice, for defendants who might otherwise be exposed to claims by companies in administration or liquidation many years after the event. However, as I have explained, an element of uncertainty is inherent in section 32. It is, moreover, unnecessary to be too sympathetic to defendants who have committed fraud (section 32(1)(a)) or who have deliberately concealed wrongdoing (section 32(1)(b)) and who, if they wish to ensure that the limitation period begins to run, can always make a clean breast of their wrongdoing by contacting their victims. This latter consideration does not apply in the case of section 32(1)(c) (relief from the consequences of a mistake) where the running of limitation may be postponed without wrongdoing by the defendant. However, as the facts of *FII* demonstrate, it may be many years before a mistake comes to light and, even then, there may be considerable uncertainty as to precisely when time begins to run.
>
> 61. For these reasons I conclude that there is nothing in the language of section 32 which requires the claimant to be treated as if it were still carrying on business at the time when facts concerning the wrongdoing begin to emerge and that achieving the purpose of the section does not require any such assumption to be made. As Lord Hoffmann NPJ put it in *Peconic* [2009] 5 HKC 135, it does not follow that because an objective standard is applied, the claimant must be assumed to have been someone else."

620. In *Bilta (HK) Ltd v Tradition Financial Services Ltd* the issue was what assumptions to make about a company which had been restored to the register. Lord Briggs JSC approved this decision and observed that the Court must take the company as it finds it. He stated at [69]:

> "The question whether a claimant could not with reasonable diligence have discovered the fraud (or concealment or mistake) is plainly an objective one, at least so far as the identification of reasonable diligence is concerned. But, generally speaking, the court will take the facts about the fraud (including how deeply it may have been concealed) as read. It will in an ordinary case where the claimant is a company which has not during

> the relevant period been dissolved also take the company as it finds it, rather than construct some equivalent company the affairs of which are presumed to be in the hands of reasonably competent, honest and properly resourced officers, if that is not the case: see *OT Computers Ltd v Infineon Technologies AG* [2021] EWCA Civ 501; [2021] QB 1183."

621. This passage provides support for the approach which I propose to adopt, namely, that the Court should take the fraud as read for the purpose of considering section 32. It also confirms that the Court should take each MTIC Company as it finds it for the purposes of assessing whether it could with reasonable diligence have discovered the fraud or dishonesty of TWPS. This means that I must consider what information was available to those in control of the company before the Cut Off Date whether they were the Official Receiver, a liquidator or the Uninvolved Directors and also consider whether something happened or whether there was a reason for them to commence an investigation (to which I will refer as a "trigger"). Finally, I have to consider what reasonable diligence required of the individual concerned bearing in mind their personal characteristics and circumstances (as in *Adams*).

(3) The Witnesses

(i) Mr Hunt

622. *Remuneration.* Mr Hunt gave evidence in Hunt 6 that his remuneration was agreed at 50% of the realisations and he confirmed in answer to a question from Mr Scott that this was agreed at a creditors' remuneration meeting which took place on 30 September 2015. He accepted that it took place at Griffins offices and that the only persons present apart from himself were Mr Andrew Fatherly and Mr Raymond Khan of Griffins and Mr James Latham of Moon Beever. He suggested that Mr Latham was attending as a representative of HMRC although the minutes of the meeting clearly show that he was attending as the representative of TC Catering. The following exchange then took place:

> "We see that you, as Chairman, had the vote as to 6.61% of the creditors by value; is that right? A. They were -- yes, so they are -- as the "type" says "special", so it's a special proxy, giving me no discretion. So I voted in the way as directed. Q. And those were the Kingston Smith claims, weren't they? A. I assume so. I think they are, yes. Q. And Mr Latham, he had the vote as to the remaining 98.39%, based on the TC Catering assigned debt that Griffins had paid for? A. Yes. Q. And we see that the resolution passed unanimously? A. Yes. Q. Mr Hunt, if we can just stand

> back on this meeting. It's a meeting chaired by you, about your remuneration, at which the vast majority of the votes are held by a company under the control of one of your partners, based on a judgment debt that your firm paid for, and the proxies are held either by you or Mr Bramston's appointee at a law firm with whom you have a well-established relationship. With respect, how is that a process driven by compliance? A. Well, it's order and compliance for sort of the same reasons, but this is probably articulated in a different way. The remuneration had to be fixed and so a meeting had to be called. Then, having considered that, we turned our mind to the special circumstances of the case, where we would have a conflict agreeing our own remuneration? And so what we did was we made sure that others would decide our remuneration instead of ourselves. Q. Those others were effectively Mr Latham of Moon Beever? A. Representing HMRC's interests in all the estates -- essentially all the estates -- TC Catering, but essentially all the MTIC cases. Q. Isn't the reality, Mr Hunt, that the process we see here did nothing whatsoever to address your conflicted position? It was a process that was designed to achieve your preferred outcome, being remunerated at 50%? That's the reality, isn't it? A. Absolutely not. Everyone was available to vote any which way they wished. It follows exactly the standard procedure in every other insolvency, taking into account the conflicts in this particular case."

623. In the Reply, the Claimants denied that allegation that Mr Hunt stood to receive 50% of all realisations in TWPS's liquidation. However, in a letter dated 21 February 2025 Gowling wrote to Jones Day stating that it was not unusual for a liquidator's remuneration to be set by reference to recoveries. They then continued:

> "Without prejudice to that position, it will be appreciated that there is a difference between remuneration being set at an amount which is calculated by reference to a percentage of the realisations, and there being sufficient realisations remaining to pay that amount after all prior claims on those realisations have been discharged. While it is correct that the resolution for Mr Hunt's remuneration provides for his remuneration to be calculated at a rate equal to 50% of realisations, you will also be aware (for example from issues around security for costs) that there are numerous other calls and claims which the realisations will have to meet, including funder costs and the costs of insurance. There is (without waiving confidentiality as to its content) a hierarchy of claims before any part of the realisations can be paid to Mr Hunt. The Defendants do not require, and are not entitled to, any further information or detail in that respect."

624. Mr Hunt agreed in answer to a question from Mr Scott that his remuneration was set gross of the costs of the insolvency. He also agreed that the "numerous other calls and claims" to which Gowling were referring in their letter were the expenses of the

liquidation which he himself had authorised. Mr Scott then put an example to him which he was originally reluctant to answer but which I told him I would like him to answer. In amongst a great deal of prevarication, I understood his answer to this question to be as follows:

> "Q. And if we can go back to a question I asked a moment ago. Let me pose it again. And I think the answer is "yes". Have I correctly understood that if one takes the total value of the calls and the claims they will be more than 50% of the realisations in TWPS' insolvency? A. What was the word you used there, something and claims? Q. The calls and the claims. A. The calls and the claims? Q. I mean, I'm using the language from your letter. A. From my letter? Q. The letter that we have on screen in front, from your solicitors. A. Oh, I'm sorry. Yes. I see so they've used "calls and claims", I would use "expenses". Sorry. What was the question again? Q. The question is: have I correctly understood that the total value of these calls and claims was more than 50% of the realisations in TWPS' insolvency? Whatever those realisations may be. A. You have to have a number for that question to make sense, don't you? If the realisations are one figure, it's a different percentage to another. So greater than 50% of a number. MR JUSTICE LEECH: Well, let's say that your claim is entirely successful. 220 million. A. Yes. MR JUSTICE LEECH: What proportion of that will be calls and claims? A. Approximately half. Maybe just under. MR JUSTICE LEECH: So if there is any recovery at all -- A. Yes. MR JUSTICE LEECH: Let's say you absolutely recover in full in these proceedings. A. Yes. MR JUSTICE LEECH: Will any money go to HMRC? A. Yes, but for slightly different reasons; but, yes. MR SCOTT: Well, how much will go to HMRC? A. The general position is that whilst I may have an entitlement to remuneration, what tends to happen is there are subsequent discussion about making sure creditors benefit from the claims that you bring. So it's slightly more voluntary but you have a discussion about paying a dividend and in effect waiving some of your fee. Again, that depends on the outcome. So if I recovered 100 million it would be quite difficult to retain that in the face of creditor claims from other IPs and things like that. So we would negotiate; and that's what tends to happen. Q. Can we go back to his Lordship's question and let's put to one side, for one moment, the possibility of this voluntary discussion. The position, is it not, that once the numerous calls and claims have been paid and you get your 50%, there's nothing left for HMRC, is there, unless you choose to give it to them? A. Well, no, the claim includes interest, for example. So the claim is not 225 million; it's substantially more. But that's just the number that we've just been discussing. So there are any tens of millions possibly in excess of 100 million, depending on the judgment on interest, depending when it runs from, what rates etc, etc; recoveries of costs, all of that is part of the calculation."

625. Although it was not entirely clear from his evidence, my understanding is that if the Claimants recovered in full in these proceedings, most of the proceeds of any judgment would be used to pay the expenses of the liquidation (of which the largest figure would be the cost of funding it) and Mr Hunt's remuneration and that HMRC would recover almost nothing unless Mr Hunt volunteered to pay some of his remuneration to them. Having heard this evidence, I took (and take) the view that the Claimants were bringing these claims primarily for the benefit of Mr Hunt personally, his partners and the funders of the litigation and that I should approach his evidence with the greatest of caution in relation to three factual enquiries to which his evidence was relevant, namely, the Standing Issue, the S.32 Issue and the IPSA negotiations. He had a very powerful reason to give favourable evidence on these issues.

626. *Credibility.* Leaving aside his financial interest in the outcome, Mr Scott and his team also submitted that Mr Hunt's evidence was dishonest, false, evasive, and argumentative in material respects. They advanced this submission primarily on the basis of Mr Hunt's evidence about the IPSA negotiations and I set out my findings in relation to his evidence below. The principal evidential issue which I had to consider was whether Mr Hunt was a candid witness who openly accepted in evidence that he had made things up in an email to persuade a colleague or whether his account in evidence in Court was false. Mr Scott and his team submitted that it was the latter and I agree. This was an example of a witness making up a story to explain away a difficult or inconvenient document.

627. More generally, I found Mr Hunt to be an unreliable witness and attached very limited weight to his evidence. He was vague and evasive when both Mr Scott and Mr Thanki cross-examined him and he attempted to keep to the increasingly indefensible position that the trigger for the Indirect Claims against TWPS was the receipt of three CD-Roms from HMRC (as the Claimants had pleaded) and not his own suspicions about TWPS and Mr Fatherly's internal investigations. However, I do not accept that he set out to mislead the Court either in relation to that issue or to any of the relevant issues.

628. *Standing.* By email dated 28 September 2015 Mr Raymond Khan of Griffins wrote to Ms Hall attaching a copy of a progress report and referring to a meeting of creditors which was due to take place shortly. Mr Khan copied in both Mr Hunt and Mr Fatherly and stated as follows:

> "I refer to your conversation with Steve and attach a copy of our recent progress report which incorporates the documentation for a meeting of creditors due to be held this Wednesday at 11.15 a.m. at which we are seeking to fix the basis of the Liquidator's remuneration. Can you please confirm which of your appointments are creditors in the liquidation of Transworld? As suggested, this could be all MTIC companies with VAT losses who traded through FCIB and whose date of liquidation is after 22 September 2014. The proxy and proof of debt forms are at appendices E and F respectively, should you wish to complete these."

629. Mr Hunt accepted that the proof of debt which Ms Hall submitted arose from a conversation with himself. But he would not accept that Ms Hall submitted the proof at his suggestion. Nor would he accept that it was contrary to the fiduciary duty of loyalty which he owed to TWPS to suggest that claims be brought against it. Nor would he acknowledge that he had accepted the claims of the MTIC Companies (even though this was expressly pleaded in the Particulars of Claim):

> "Q. Now, as liquidator of TWPS, you decided to accept all of the proofs that I've mentioned: your own for the ten Griffins companies, Mr Bramston for his three MTIC companies and Ms Hall for her six companies. You accepted all of them; correct? A. No. Q. What do you mean "no"? A. My recollection is that we -- we -- having received the proofs, I had no evidence to adjudicate on whether or not they were proper claims or not. So the -- the creditor could make the claim, but that wasn't, on behalf of Transworld, something we could accept. So the position, I think, is under the Act, at the time, that you could accept the contingency or the possibility; and so, effectively, accept them for £1 but make no admission as to the validity of the claim. Q. Mr Hunt, as you know, the question wasn't about adjudication; it was about your acceptance of the claim. Can we get up {B/3/6}, please. This is your particulars of claim? A. Yes. Q. Which carries a signature of truth from you. A. Yes. Q. Can I just ask you to, please, read sub-paragraph (2) of paragraph 7. A. Yes. Q. And that's correct, isn't it? You have accepted that TWPS is liable to contribute to the assets of each of the MTIC companies? A. That's a completely separate exercise, in a different context in a different period. There's no equivalence between the two in any way, shape or form. Q. When do you say you did this acceptance? A. The acceptance was the end of last year, I think, just limited to the 19 companies. Q. Mr Hunt, with respect, that cannot be right, because these particulars of claim date back to when you issued the proceedings in September 2020. As at that point in time, you had accepted these claims? A. Sorry, I'm misreading it. What are we talking about here: "Mr Hunt has accepted that TWPS is liable to make a contribution ... but has not adjudicated on the proofs of debt ..." Q. I'm just asking, at the moment, about your acceptance that TWPS is liable to make the

> contribution? A. So I misunderstand the word "acceptance". Q. It's in your particulars of claim, Mr Hunt. If you didn't understand the word, why did you sign the statement of truth upon it? A. The word "acceptance" doesn't -- sorry, "has accepted that TWPS is liable to make a contribution", yes. But that is not the same as acceptance of the proof of debt. I'm confused. We may be at cross purposes."

630. Mr Hunt accepted that there was an actual conflict between the interests of the MTIC Companies of which he was a liquidator and the interests of TWPS. He also accepted that he could have appointed another liquidator. When he was asked why he did not do so, his evidence was that he managed the conflict another way. Mr Scott then asked him how he managed it and his evidence was as follows:

> "Q. How did you manage the conflict, Mr Hunt? A. By instructing another firm of solicitors to go through the process (indecipherable) the proofs of debt. It's quite a long series of steps up to 2020, but there's quite a lot of different examinations of the process and the conflict. Q. Can we go, please, to your trial witness statement at {C1/6/37}. A. Yes. Q. And you tell us there, in the final sentence of 127: "Later on, when the Respondents raised questions about the claims, I decided that the Proofs of Debt should be reviewed by independent legal advisers, and so Enyo Law was engaged by the MTIC Companies to carry out this review." Do you see that? A. That's correct, yes. Q. Now, I think the respondents that you intend to refer to here, that's the defendants, FCIB and Mr Deuss; correct? A. Yes. Q. Because it is only when the defendants in the action raised concerns about these proofs that you took this step that you describe in the witness statement? A. I was alive to the point, but, yes, the -- the order of events was that -- that I think the defendants had raised issues about it pre-issuing the proceedings. And so we were -- we were alive to it anyway, but we were looking at it further. Q. And it's similar, is it not, to the situation with your progress reports for TWPS, where it was only when my solicitors chased you to comply with your duty that you filed those progress reports at Companies House towards the end of last year? A. That's not correct. Q. I see. A. That was a -- it's another unfortunate document here. Companies House had all the documents on the right dates, at the right time, but Companies House refused to file them because there was a redaction in the public version; and Companies House took the view that they could police the wording of the report. So we spent, effectively, three or four years arguing with then. And, as it happens, in the week that you wrote a letter saying: where are these documents, companies House had, coincidentally, released them. So I sent an e-mail to my lawyers saying: you're about to get some grief from the other side because they think -- they're going to think that one caused the other, but it didn't. It's entirely coincidental. Q. I see. Very well. Now, Enyo Law, to whom you refer here, they were not

> independent legal advisers, were they, Mr Hunt? They were legal advisers engaged by the MTIC companies? A. Yes. Q. And it would have been the duty of Enyo Law to act in the interests of their clients, the MTIC companies, not in the interests of TWPS, for which they did not act? A. That's correct, yes. Q. Now, given that the MTIC companies are in liquidation, presumably, they were unable to pay Enyo Law for their services in reviewing the proofs? A. I think that's right, yes. Q. Did Griffins pay Enyo Law for their services? A. No. Q. Do you know who did pay Enyo Law? A. I think it was paid for by the litigation funders -- I think. Q. You don't suggest, Mr Hunt, in your witness statement that TWPS ever instructed independent legal advisers to review the proofs. Is that because TWPS has not done so? A. No, I think -- I think my lawyers have reviewed the proofs as part of the claim. Q. And that's your lawyers acting in this litigation? A. That's right, yes."

631. Mr Hunt agreed with Mr Scott that he had originally accepted in his second witness statement dated 20 December 2020 that there was a legitimate debate about TWPS's limitation defence to some of the Indirect Claims but that the position which he had now adopted was not to rely on them because they had no substantial merit. He would not accept that it was incumbent upon him to take any arguable limitation defence or that his conflict of interest disabled him from making a neutral decision. But he finally accepted that if the Court concluded that TWPS had a limitation defence, he would take it and follow the Court's guidance:

> "Q. Let me suggest this, again in lay terms: surely if TWPS UK had an arguably -- arguably legitimate limitation defence to claims against it then you should, as the liquidator of TWPS UK, want to take that defence rather than simply trying to remove it from the court's consideration? A. No, because ultimately that question comes down to my knowledge and the knowledge that was available to me. So if -- if I did defend it then essentially it would be me versus myself in those -- in those sort of conceptual proceedings. But, in the alternative, I agree with myself. I agree that the knowledge of myself, but also with the other liquidators in the other cases is substantially the same. Q. So I think you recognised a moment ago your potential conflict in this context; yes? A. In the context of agreeing it as a proof of debt, which is my sort of statutory -- the procedure I'm familiar with. I'm less familiar with this procedure, which is a form of acceptance which sits slightly outside my sort of statutory remit. I'm not normally required to accept a claim except within the governing structure of a proof of debt. Q. So recognising the potential conflict, can I suggest to you that the reason you've chosen to try to prevent the limitation defence being considered is because you simply wouldn't want it to succeed, would you? A. Well, that's the danger in the conflict: is that I

> would have an incentive for it not to be heard. Q. Hmm. A. But I've -- I'm effectively not conflicted with regard to, say, Ms Hall's claim. So I am effectively being neutral on the point. Q. I mean, you wouldn't want a limitation defence to succeed, would you? Because if it did TWPS' claim would be reduced and so would your consequential fees; correct? A. That's correct; but also the recoveries to the creditors, so our position, wearing that particular hat, is we are in accord with each other. Q. You have a number of hats, don't you? A. Yes, I do. Q. Let me ask you this: if the court were to conclude that TWPS has a limitation defence for some of the claims by the MTIC companies, would you still not take that defence? A. No, I would take the defence. Q. You would follow the court's guidance on that matter? A. Absolutely, yes."

632. *MTIC Fraud.* Mr Hunt's evidence was that in 2001 he first became aware of MTIC fraud when he worked on a case with Mr Goldfarb and that in 2003 he was first appointed as the liquidator of a company which had been put into liquidation as a result of MTIC fraud. His evidence about this and later appointments was as follows:

> "14. My first MTIC fraud appointment came in October 2003, when I was appointed as liquidator over a company called Amitel Ltd. The particular fraud in that case involved trading in mobile phones and computer processing units where Amitel Ltd acted as the 'broker', receiving large amounts of VAT refunds. The liquidation involved aspects of European law and the evolving understanding of how MTIC fraud might be tackled. My firm invested heavily in modelling the fraud to prove the lack of commerciality of the transactions. The company was one of a number of cases given to a group of IPs on the same point of law and my recollection is that my firm was the only one to succeed in making a recovery (which was against the defendant directors).
>
> 15. Another significant case that assisted in the development of my understanding of MTIC fraud was a case called Fresh-n-Clean (Wales) Limited, which was brought against the company's sole director, Mr Miah, for breach of his duties to the company, and against others for dishonestly assisting Mr Miah in that breach. It involved a newsagent business in Birmingham that was trading millions in a carousel fraud. Having reviewed Griffins' case management system, I am reminded that I was appointed as the provisional liquidator in that case in January 2005, and appointed as the liquidator in March 2005.
>
> 16. By 2005, the IPs who had been appointed by HMRC on MTIC fraud work formed an informal group to liaise with HMRC about it (the "IP Group"). The IP Group was made up of Kevin Hellard at RSM Robson Rhodes (later merged with Grant Thornton), who I had first met in around 2002, along with David Ingram at Chantrey Vellacott (now merged with Moore Stephens and then based in the same building as Griffins), Tim

> Bramston who was then at Kingston Smith, Louise Brittain at Baker Tilly, and lawyers Frances Coulson at Moon Beever (now merged with Wedlake Bell), Chris Branson at Boyes Turner, and Nick Oliver and Chris Potts at Blake Lapthorn (now Blake Morgan) ("Chris Potts"). We were all involved in discussions with HMRC, which I recall would have been facilitated by Frances Coulson, who had very good connections with HMRC having acted for them for some years. The earliest meeting that I recall was at Somerset House sometime in 2005, where a senior figure from HMRC (I believe it was Bob D'Cruz but cannot specifically recall) had asked us to attend to 'pick our brains' on how HMRC could best utilise and work with the private sector (being IPs).
>
> 17. Shortly after the IP Group was formed, in 2005-06, there were meetings between some of the IPs of account holders and representatives from FCIB including Tim Ulrich and Mr Deuss. Others in the IP Group were involved and would share any results with the IP Group. I do not recall specific events from any of these meetings but I would have listened to the information coming out of them, for example who in the IP Group was getting the most work from HMRC and how the other IPs were approaching their cases.
>
> 18. By this stage, I had some experience of MTIC fraud mainly through the Amitel case but was not particularly into the mechanics of the fraud to the same extent that some of the other IPs were. That said, I would have understood the basic principles of the chains of transactions that were a necessary part of the fraud and would have understood terms such as 'misser', 'broker' and 'buffer'. I cannot now recall I cannot now recall how much I knew about the Telecoms & Computing ("T&C") sector as a whole, or when I became aware that UK banks were closing accounts of customers in that sector: the role of the banks had not been a significant factor in my cases. In 2005, others in the IP Group such as Frances Coulson and Richard Healey (of Gateley LLP (now PLC)) would have had greater knowledge and experience in their direct dealings with HMRC."

633. *TWPS.* Mr Hunt stated in Hunt 6 at paragraph 103 that: "When I was first appointed, I did not have any idea what TWPS's role had been." In cross-examination he accepted that this evidence was incorrect:

> "Q. I've already addressed with you most of the points you make in paragraph 103, but there is just one of them I need to explore further. If I can ask you to look at the third sentence in paragraph 103. It begins on the sixth line. You say: "When I was first appointed [first appointed to TWPS] I did not have any idea what TWPS's role had been ..." A. Yes. Q. That's not true, is it, Mr Hunt? And you must have known that it was not true when you gave this witness statement. A. In what sense? Q. It was false to state that you did not have any idea upon appointment what TWPS'

> role had been. You did have an idea about that, didn't you? A. Yes, to be fair, I knew what was in the criminal judgment. So I knew that it was involved in the marketing. Q. If I ask my question again, this part of your statement, where you say you did not have any idea what TWPS' role had been, it is untrue, and you must have known it was untrue when you signed the statement? A. But I think it's sloppy language on my part. The –– what I mean is that I didn't know the role that came to learn that they took is what I'm intending."

634. *Mr Deuss.* Mr Hunt accepted in Hunt 6 that he would have known about the meetings between Mr Deuss, Mr Ulrich and the IP Group and their solicitors. In cross-examination he accepted that that FCIB accounts of companies over which he was the liquidator had been frozen before it went into Emergency Measures (although he sought to play this down by saying that it was only one or two companies) and that he himself had brought proceedings against FCIB. He also accepted that by 2007 he knew that FCIB had been accused of involvement in MTIC fraud, that raids had been carried out in London offices associated with it and that Mr Deuss and other directors of FCIB had been accused of money laundering offences:

> "Now, before FCIB went into emergency measures in 2006 –– in the autumn of 2006, it was often the case that FCIB accounts over companies, over which you were the liquidator, had already been frozen; yes? A. Yes. Could you take me to that statement, please. Q. Paragraph 23, page 8 of the same statement. A. I recall when I was reviewing my witness statement yesterday, paragraph 23 I had difficulty with the language. That's what I wanted to check. Because, again, I think it's generalised, it's not very specific. And I just wanted to re–read it. I think in terms of the accounts had often been frozen, we may be talking about one, possibly two. So I think it's –– it –– Q. Some companies. A. Some. It just didn't feel quite right. Thank you. Q. Before it went into emergency measures. A. I think I detail elsewhere, but I think I can recall one freezer but the other one may have been simultaneous with the emergency measures or very –– Q. Or shortly before. A. It's just literally one or two companies. Q. Okay. We'll look at that –– A. Yes. Q. –– with you and other witnesses. In late 2007, Mr Hunt, do you remember you brought proceedings against FCIB in Curaçao in your capacity as a liquidator for a company called V2 UK Limited? A. Yes, I do. Q. And that was to force the payment of account balances; yes? A. Yes. Q. So it's fair to say, isn't it, that you were well aware of FCIB and its involvement in companies being accused of MTIC fraud by at least 2007; yes? A. Yes. Q. And you were aware that raids were carried out in London offices associated with FCIB in 2006; yes? A. Yes. Q. And you were aware that the raid was at the behest of the Dutch authorities; yes? A. I assume that I knew at the same time, but I became

> aware of it some time in that period. Q. Some time in that period. Thank you. And in 2007 you were aware that Mr Deuss and other directors of FCIB had been accused of money laundering offences and were awaiting trial in the Netherlands; is that right? A. Yes. Yes."

635. Finally, Mr Thanki took Mr Hunt to an article in the Guardian newspaper published on 21 September 2006. He accepted that anyone reading that article would have known of the raid on TWPS's Knightsbridge office, that it vetted customers for FCIB and that Mr Deuss was connected with the company:

> "Q. Thank you for that. If we go then, please, to {F/1739.1/1}. This, you will see on the page, Mr Hunt, is an article from The Guardian of 21 September 2006. Do you see that? A. Yes. Q. And if we go to the top of page {F/1739.1/2}, second line. Do you see it says: "The results could not have been more spectacular: this month the bank's offices on the first floor of an office block in Curaçao were raided by officials of the Dutch Ministry of Justice and local police ." Do you see that? A. Yes. Q. And then on the third page, {F/1739.1/3}. Do you see, halfway down, there's a heading, "Customers vetted"? A. Yes. Q. Yes. You see under that heading it says: "Simultaneous raids were carried out at the offices in Knightsbridge, London, of Transworld Payment Solutions UK"; yes? A. Yes. Q. –– "which vetted potential British customers of FCIB". And then "at a farmhouse in Monmouthshire, which Ms Deuss used as a holiday home. Dutch officials are now You see that? A. Yes. Q. And anyone reading this article would have known that it was understood or being reported that TWPS UK vetted FCIB's potential British customers? A. Yes. Q. Point (a); but their London offices were raided in relation to MTIC fraud, point (b); yes? A. Yes. Q. And that Mr Deuss and Ms Deuss were in some way connected; yes? A. Well, they're brother and sister. Q. No, no, no, with the underlying events, MTIC fraud. A. I don't see it from that paragraph. Are you saying from the overall article ? Q. I 'm saying that anyone reading this article would appreciate that raids had been carried out at the offices of Transworld Payment Solutions UK, that that company had vetted potential customers of FCIB, and that Ms Deuss and Mr Deuss were connected with the enquiries being made? A. Yes. Yes. Q. Right. And anyone reading this article would have known that it was at least being reported that TWPS –– TWPS UK vetted FCIB's potential British customers; yes? A. That's what it says, yes. Q. And you would agree with me that The Guardian is a major UK newspaper; yes? A. Yes. Q. And this is the type of article that your policy of keeping track on FCIB related articles would have or could have been identified; yes? A. If we'd seen it, yes, we would have. Q. Well, it's the type of thing your searches, for example in relation to FCIB or MTIC fraud, should have detected. Surely you agree with that, Mr Hunt? A. Yes; and we would have saved a copy of it."

636. *The Trigger.* Mr Hunt's detailed evidence about the trigger for the Indirect Claims was that the first time he took any notice of TWPS was when he received the translation of the Dutch Judgment in March 2014:

> "74. When TWPS was mentioned in the Dutch Judgment, the Griffins team looked into it further. I suspect (based on usual practices when first looking to obtain some information on a company) Andrew or his team would have done a company search and identified that Martina Deuss ("Ms Deuss") was one of the directors, and noted the connection to Mr Deuss. I was keen to obtain the data on the FCIB main server (and improve upon the failed attempt to information gather (described at paragraph 31(b) above)) and I thought that TWPS might be an avenue for this, as it was not one MTIC company applying for all the data about all the companies (cf. XYZ 8), but an agent of FCIB. If TWPS had access to the entire server then I thought it might fall legitimately within the bounds of s.234 or s.236 of Insolvency Act 1986. I do not recall planning to make claims through TWPS at this point.
>
> 75. I recall suggesting (to whom I cannot recall, but likely Andrew or Chris Potts) that we see whether we could restore TWPS and become appointed as liquidator. Chris Potts then located a County Court Judgment against TWPS from a company called Chubb Fire Alarms. This debt was assigned to TC Catering Limited Document 43 {GOW_00014034}, which was a company Tim Bramston was the appointed IP over, who then petitioned for TWPS to be restored to the register and wound up on 6 August 2014 Document 62 {GOW_00011492}."

637. Mr Hunt claimed that he had very limited involvement in Mr Fatherly's investigation or knowledge about TWPS until November 2015 when Mr Fatherly showed him documents from 3 CD-Roms which HMRC had supplied. As Mr Fatherly confirmed in evidence, those contained copies of scanned material which HMRC had taken in a raid on TWPS's Knightsbridge office on 5 September 2006 at the request of the Dutch Ministry of Justice: see NC443. Mr Hunt's evidence in Hunt 6 was as follows:

> "81. In around November 2015, Andrew's team were starting to go through the CD-ROM documents. During the course of that review (which spanned at least a few months) I recall quite clearly Andrew showing me several documents over a period of a few days. It was obvious he was getting quite excited about what he was finding, and I recall seeing 3 documents in particular. The documents that stand out in my memory are:
>
> (a) A document about using a currency other than GBP to effectively hide the fraudulent transactions from HMRC. I was able to recall the purpose and content (at an overview level) of this document nearly 10 years after

> having seen it, because the content was so striking – that a bank was identifying solutions to allow account holders to hide suspicious transactions from HMRC. Document 40 {GOW_00005731};
>
> (b) A document that summarised discussions at a TWPS meeting in London which showed that TWPS and FCIB recognised that T&C customers were unable to bank with other banks Document 41 {GOW_00012344}; and
>
> (c) A document evidencing a big TWPS meeting in Kuala Lumpur at which Mr Deuss was shown to be heavily involved in the running of TWPS Document 42 {GOW_00012334}.
>
> 82. It was not until after receipt of the CD-ROM documents and some of their contents being shown to me during the course of late 2015/2016 that I became aware of the following points in relation to TWPS:
>
> (a) Mr Deuss was actively involved in the management decisions and running of TWPS. He attended and gave presentations at key meetings, and took responsibility for strategic decisions such as TWPS employee remuneration;
>
> (b) TWPS (and FCIB, given Mr Deuss' heavy involvement with TWPS) was not only aware of the risks posed by T&C traders but also the fact that UK banks were unwilling to deal with T&C account-holders;
>
> (c) TWPS was actively targeting T&C traders despite the recognition of the risks that they were engaged in MTIC fraud. FCIB was aware of and encouraged the targeting of this sector;
>
> (d) TWPS was responsible for monitoring customers' activity but did not do so properly; and
>
> (e) TWPS had a clear understanding of how MTIC fraud worked – the description of Olympic Rings was as good an explanation as I had heard, and it was designing its policies (such as delaying transfers in GBP and requiring all traders to have their primary account in a foreign currency Document 40 {GOW_00005731}) to permit MTIC fraudsters to hide suspicious transactions from HMRC.
>
> 83. I did not know about TWPS' true role, and its fraud, until the CD-ROM documents were reviewed, which significantly post-dated 22 September 2008. It was when I instructed Andrew to send some of the key documents to Chris Potts (I cannot now recall exactly when this was), that I first considered that I had evidence (indeed good evidence) which would support claims against FCIB and/or Mr Deuss."

638. However, Mr Hunt made a number of important concessions in cross-examination. He accepted that his evidence in support of the application to serve out of the jurisdiction that he did not have knowledge of facts which would have triggered an investigation into

FCIB and Mr Deuss was wrong. Mr Thanki also suggested to him that this was a serious error:

> "Q. What happens in your witness evidence in support of your application to serve out, you'd said you didn't even have any knowledge of facts that could have triggered an investigation into whether FCIB or Mr Deuss had been involved in fraud until 2015, following the receipt of the CD Roms. But you now accept that that wasn't correct, on a fuller review? A. Yes, I had a suspicion at that stage. Q. Well, we'll look, in a few minutes, at when you in fact found out about possible claims against FCIB or could have found out about such claims. But, to be clear, you must now accept that what you said in your second witness statement was wrong and you, in fact, knew about the possibility of claims against FCIB before you received the CD Roms. That's right, isn't it ? A. Yes. Q. And that's quite a significant error, isn't it, in the evidence you gave to the court in support of your application to serve out? A. I don't –– I think the difficulty I had at the time –– sorry, (indecipherable) answer the question. I don't know –– Q. Yes, if you would just answer the question and then if you need to amplify –– A. I don't know the seriousness of the consequence of that. Any mistake is obviously –– Q. Well, in lay terms, would you accept that when you're giving evidence to the court it's quite a serious error? A. Any error is serious; and I've tried to (indecipherable) –– Q. Well, there are errors and there are errors; but this is quite significant, isn't it, when you're giving evidence to the court? A. I –– I –– yes, but I don't understand what I'm measuring against, but I accept it's an error. I don't know (indecipherable) seriousness, but ... Q. Presumably, you were advised about –– I think you accepted with Mr Scott –– the duty of full and frank disclosure on this type of application? A. Yes; and the document will be put together with the genuine intention to give disclosure of absolutely everything, based on every document that I've –– Q. So it's a general intention to give full and frank disclosure and –– A. Exactly; so that was the intention of the document, so not a deliberate error."

639. By letter dated 24 March 2015 Blake Morgan had written to HMRC on behalf of Mr Hunt in his capacity as liquidator of TWPS requesting the records which HMRC had taken from its Knightsbridge office. Mr Thanki put it to Mr Hunt that this letter prompted the disclosure of the CD-Roms and that in it Blake Morgan were already intimating claims against TWPS:

> "Q. If we go to {F/2575/1}, please. Moving on in time. 21 A. Yes. Q. This is a letter sent by Blake Morgan, your solicitors; yes? A. Yes. Q. Well, you can see it in the first paragraph. A. Yes. Yes. Q. And you will see it's a letter to HM –– HM Revenue and Customs. And Blake Morgan was writing to request TWPS UK's books and records from HMRC. Do you

recall that? Let's look at the final paragraph of the letter on page 2. A. I don't recall that Blake Morgan were involved in that exercise, so ... Q. Let's look at the last paragraph on the second page, {F/2575/2}. A. Yes. Q. Yes. And then if we go to the –– back to the first page, {F/2575/1}. If we go to the bottom half of the page. Do you see the penultimate paragraph says: "Transworld was closely linked with FCIB. The directors of Transworld from 2005 onwards were Martina Deuss and Charles Geerts. Martina Deuss is the sister of John Deuss who owns FCIB." Do you see that? A. Yes. Q. And in the bottom half on that page you say it appears –– Mr Potts says –– well, Blake Morgan say: "It appears that the function of Transworld was to collate applications and undertake due diligence visits to companies applying for FCIB e–banking accounts." A. Yes. Q. "In some instances, Transworld certified the suitability of applicants (who were involved in MTIC fraud) to open bank accounts with FCIB." A. Yes. Q. And, as I understand it, this was the letter that requested documents that resulted in the CD Roms being provided to your clients by HMRC. Does that accord with your recollection ? A. No, my recollection is that Mr Fatherly did it directly with HMRC; so I didn't –– I don't recall this letter. Q. Well, we will take this up with Mr Fatherly, but I suggest that's wrong. It was this letter which prompted the CD Roms to be produced, but it doesn't matter, particularly, for present purposes. A. That's just my recollection. Yes. Q. And then if we go to –– back to page {F/2575/2}. You see at the top of the page Blake Morgan write that: "We are aware from media coverage (including the enclosed article from the Guardian dated 21 September 2006) that HMRC officers raided Transworld's offices in Knightsbridge, London in 2006. It appears that during the raid, Transworld's books and records were seized by HMRC. Copies of the books and records were then provided to the 25 Dutch authorities." A. Yes. Q. Do you see that? A. Yes. Q. The reference to the media coverage is to at least one of The Guardian articles that we looked at previously; yes? A. I think that's right, yes. Q. Yes. And in the penultimate paragraph on this page, do you see it says: "It may be that through investigating the affairs of Transworld, claims could be established that could be brought by the liquidator or Transworld itself for the benefit of creditors. Given Transworld's close affiliation with FCIB and its involvement with companies which committed MTIC fraud, it is possible that HMRC could benefit as a creditor from such claims if brought." Do you see that? A. Yes. Q. Now, for TWPS UK or its liquidator to have been able to bring claims, as this –– as this passage suggests, it would, presumably, have been necessary for there, first, to be claims against TWPS UK; yes? A. Sorry. Can you just repeat that? I was reading. Q. My fault. I probably asked the question too quickly. But for TWPS UK or its liquidator to have been able to bring claims, as this passage we just looked at suggests, it would presumably have been necessary for there, first, to be claims against TWPS UK? A. I think that's right. I can't think of (overspeaking) –– Q. (overspeaking) so here the suggestion being made is that TWPS UK was

> closely connected to FCIB and companies involved in MTIC fraud? A. That's what it says, yes. Q. And these points were being made before the CD Roms had been obtained; yes? A. That's correct."

640. On 1 April 2025, and whilst Mr Hunt was giving evidence, Gowling disclosed an ethics checklist completed by Mr Hunt in November 2014 before he accepted the engagement as TWPS's liquidator. Mr Thanki put this document to him on the following morning and he accepted that when he completed it he was anticipating the possibility of claims against TWPS by other Griffins liquidators. Mr Thanki also put a series of time entries to Mr Hunt and he accepted that before he saw either the English translation of the Dutch Judgment or the CD-Roms Griffins were aware from FCIB's KYC material that TWPS was providing referees for MTIC traders. He also accepted that Griffins were investigating the role of TWPS in relation to those MTIC traders. Finally, Mr Thanki put some time entries to him which showed that Griffins was investigating individual TWPS marketers:

> "Q. And if we go to row 2, we can see that the entry, this time, is for 7 March 2014. Do you see that? A. Yes. Q. And column E shows that this is an entry for Mr Benjamin; yes? A. Yes. Q. And column H shows that Mr Benjamin spent six and a half hours working on –– in respect of this work A. Yes. Q. –– that's described across the page at row –– column M. And you see that's refers to: "reviewing FCIB 'KYC' [documents] to obtain details of referees for each [account] [Griffins cases and 3rd party claims]"; yes? A. Yes. Q. "Referees include agents of Transworld Payment Solutions Ltd [[Company Secretary] Martina Deuss]"; do you see that? A. Yes. Q. So this entry shows that a review which took six and a half hours was carried out over FCIB's KYC documents; and that led Griffins to consider that TWPS UK was providing referees for accounts. That's what it looks like; yes? A. Yes. Q. And the review was being conducted of FCIB's KYC material. And it must have been conducted on or before 7 March. That must follow; yes? A. It probably was on the date. It is effectively a day's work, by the looks of it. Q. Okay. And this was certainly before you saw a translated copy of the Dutch judgment; yes? A. Yes. Q. And before you saw the CD Roms; yes? A. Yes. Q. And so this understanding of TWPS UK's role must have been arrived at using documents that Griffins already had in its possession by this point; correct? A. Yes. Q. If we go down to row 5. You will see this relates to an entry for 11 March 2014. And if you look across at column E, you see it's a reference to Mr Fatherly; yes? A. Yes. Q. And column H shows that Mr Fatherly spent just under six hours working on this; yes? A. Yes. Q. And then, if we look across to the narrative, we see it says: "Internet/[Companies House]/deep web/searching on Transworld Global Payments/Bart

> .../James Mallerun/various companies to identify evidence that those giving references from Transworld link"; yes? A. Yes. Q. The reference to James Mallerun is presumably a reference to James Mallaburn; yes? A. I was going to ask who James Mallerun is; I don't recognise the name. Q. So he is –– from the dramatis personae, he was a marketer at TWPS. Do you remember anything about him? A. I 'm not familiar with the name, no. Q. Okay. It looks like if –– it looks like a typo for his name. Do you want to see the dramatis? A. No, I'm fine; it's just a list of names. Q. And I suggest that this shows that your investigators at Griffins must have been aware of and looking at specific TWPS marketers. That's what it looks like; yes? A. I don't know why those names are in his time sheets; so I don't know if they have more or less or what the reference is. Bart Van –– is Bart Van Laarhoven mentioned in the criminal judgment? No, that's why they're looking for it. I don't know James Mallerun or –– Q. I don't think James Mallaburn is though. A. I 'm sure there's effectively an audit trail to why –– what they're actually looking at, so ... Q. At this point in time that audit trail would be focused on documents already held by Griffins. I think we can agree on that? A. Yes and it –– depending which company he's actually looking at will tell you when we received a particular document in a particular way. And you will see, from column E, that this is work relating to Mr Benjamin. You see that, MDP? A. Yes. Q. And column H shows that he spent 2.7 hours working on this; yes? You see that? A. Yes. Q. And then if we look at the narrative at column M it refers to: "Prepare i2 charts, outlining links /interaction between entities –– including FCIB, Transworld ... and identified MTIC traders". Yes? A. Yes. Q. And you can't help me with what "i2 charts" means? A. No, i2 was a –– I think it may have changed its name now, but it was owned by IBM and it was the industry standard chart. You will be familiar with those charts with lines and pictures of heads of people and the accountant had glasses and things like that. That's an i2 chart. Q. Ah, okay. Thank you. So this entry suggests to you, presumably, that Mr Benjamin was looking at links interactions between FCIB and Transworld and identified MTIC 24 traders; yes? A. Yes. Q. And it suggests that Griffins investigators were investigating role of TWPS in relation to MTIC traders; yes? A. Probably I would say, yes."

641. When Mr Scott cross-examined him in relation to the proof of debt submitted by Ms Hall, Mr Hunt accepted that her proof had been submitted on 28 September 2015 and that Ms Hall had divided up the claims of the companies of which she was liquidator into those which went into liquidation before the Cut Off Date and those which went into liquidation after it. He also accepted that this division had been made for limitation reasons and that where the date of liquidation was less than six years before 22 September 2008 the limitation position was stronger:

> "Q. Can we turn to {F/2352/1}, please. A. Yes. Q. And you've seen -- Mr

> Scott has taken you to some of these documents. If we go to {F/2352/4} in this clip. You'll recall this is the proof of debt that was submitted by Ms Hall in relation to TWPS UK? A. Yes. Q. We saw that this proof of debt Mr Scott took you to, it's not dated. But if we look at the previous page, page {F/2352/3}, do you see this is a proxy form that Ms Hall signed to allow the Chairman of the meeting of TWPS' creditors to vote? A. Yes. Q. And do you see that document is dated 28 September 2015? A. Yes. Q. So it looks likely that the proof of debt is likely to have been lodged on or before 28 September 2015; correct? A. My expectation is that they would be filed at the same time. Q. Yes. Now, if we go back to the proof of debt at {F/2352/4}, you'll see that in relation to the name of the creditor, point number 1 says "various (per attached schedule)". You see that? A. Yes. Q. And then, in relation to the total claims, in box 3 it says "see attached"? A. Yes. Q. And in relation to details of documents by which the debt can be substantiated, at box 4, it says "Supporting HMRC VAT claims". Do you see that? A. Yes. Q. And if we look at the schedule, which is on page {F/2352/5}. We see that the -- the heading is "KINGSTON SMITH AND PARTNERS LLP". And that's Ms Hall's firm; yes? A. Yes. Q. And below it, it says "SUMMARY OF ALL OUTSTANDING FCIB CASES WITH A VAT DEBT AS AT 22 SEPTEMBER 2014"? A. Yes. Q. 22 September 2014 is the date that TWPS UK went into liquidation; correct? A. Yes. Q. And so what is being set out in the schedule is a list of companies that Ms Hall was a liquidator for and who had outstanding VAT liabilities as at the date of TWPS UK's liquidation? A. Yes. Q. And you can see, Mr Hunt, that the list is broken into two parts? A. Yes. Q. The first part is FCIB cases more than six years; yes? A. Yes. Q. The second part is FCIB cases less than six years? A. Yes. Q. And the relevant dates for the first group are all more than six years before 22 September 2008; is that right? A. Yes. Q. We can't see a full list of the second group, but for all the -- for all of the relevant dates that we can see, the date is less than six years before 22 September 2008? A. Yes. Q. And can you help me with this: in the column headed "RELEVANT DATE", is the date the date on which the VAT debt was assessed or the date on which the company went into liquidation? A. I'm sure it's the date the company went into liquidation. Q. Okay. Thank you. And, either way, the six year distinction is, presumably, being set out there for limitation reasons; yes? A. That would be a logical starting point for any question like this, yes. Q. Yes. And presumably it was thought that where the relevant date is less than six years before 22 September 2008, the limitation position, from your perspective, was stronger? A. Yes."

(ii) Mr Potts

642. *Credibility.* Mr Potts and his firm had a significant financial interest in the outcome of this action and he accepted that his firm stood to be paid "many hundreds of thousands" of pounds if the Claimants were successful. For this reason I also treated his evidence

with caution and I tested it against the documents before accepting it. Although he had very limited recollection and could add little to the documents, I am satisfied that he was an honest witness trying to do his best to assist the Court. Mr Potts was also highly experienced in MTIC fraud cases and between 2005 and 2015 they made up the vast majority of his practice. Mr Scott cross-examined Mr Potts about his workload in the context of his ability to recall the IPSA negotiations and I consider his evidence again in that context. But in relation to the S.32 Issue I attribute significant weight to Mr Potts's expertise as a lawyer who specialised in MTIC fraud and that he had been acting for Mr Hunt for a number of years before the Cut Off Date.

643. *MTIC fraud.* Mr Potts confirmed that Hunt 6, paragraph 16 (above) was accurate in cross-examination. Mr Thanki also took him to the Committee Report and he accepted that in July 2007 it was a matter of public record that the majority of fraudsters seeking to defraud the UK tax authorities used FCIB. He confirmed, therefore, that in 2005 the IP Group had been formed, that it had very good connections with HMRC and that in 2005 the IP Group had met a senior figure from HMRC.

644. *TWPS.* On 8 February 2006 Mr Deuss sent Mr Potts an email attaching two documents, a memo about tackling MTIC fraud and the new site visit report: see [295]. Mr Thanki cross-examined Mr Potts about this email and he accepted that it was apparent to him that he was aware that TWPS was involved in carrying out KYC for FCIB and that he would have communicated this information to Mr Hunt:

> "Q. But don't worry about that reference to the meeting. If we go to page {F/1082/4}. You see at the bottom of the page there's a reference to FCIB's establishment in Bangalore. Do you see that? A. Yes. Q. And then, if we go to the next page, {F/1082/5}. Do you see there, at the top of the page, a reference to "TWPS's marketing presence around the world" -- A. Yes, I see that. Q. -- "facilitates one-on-one client interviews and the detailed site visits". A. Yes. Q. So, from this document that was sent to you, it would have been apparent that TWPS was involved in this part of the process, involving FCIB; yes? A. Yes. Q. And then if we go to {F/1083.1/1}. This is the blank site visit report that Mr Deuss attached. A. Hmm, hmm. Yes. Q. And the reference letter. And you can see in the top left-hand corner, we can just blow that up, the Transworld -- Transworld -- you can read it -- A. I can read it. Q. The Transworld Payment Solutions logo; yes? A. Yes, I can see that. Q. And then at the bottom left-hand corner of this document, if we can go down the page, we see a reference to "Transworld Payment Solutions"; yes? A. Yes. Q. You can take it from me that that

> appears at the bottom of every page of this document. And you will see the type of information, if we just glance through this document. If we go to the next page. I'm not asking you to concentrate on the detail. {F/1083.1/5}. But you'll see the type of information. And you'll see on the final page, page {F/1083.1/7}, "Remarks" and then a box for recommendations? A. Yes, I see that. Q. And if this document had been sent to you by Mr Deuss, it's something -- it's material which you would have looked at? A. Yes. Q. Yes. And it would have been apparent to you that a company called TWPS was involved in -- in relations with FCIB's customers? A. Yes. My recollection is that there were a large number of -- I probably only knew this later -- there were a large number of companies that were called TWPS something; so I wouldn't necessarily have known which one it was. Q. No, but you would have appreciated that a company TWPS was involved in the KYC, for example -- A. Yes. Q. -- process involving FCIB. Thank you. And the e-mail dated 8 February, from Mr Deuss, presumably was regarded as quite a significant e-mail from the owner and a director of FCIB? A. It's -- so, yes, but it's part -- there's been a continuing dialogue between me and -- starting between me and Mr Ulrich; and then I have meetings with Mr -- or meetings with Mr Ulrich that I'm at and Frances Coulson is at. Then there's meetings with Mr Deuss. And then this e-mail comes after that. So it's in that context. Q. It's a process? A. Yes. Q. But you would have attached a degree of significance to a communication from Mr Deuss personally to you? A. Yes. Q. And the aim of the e-mail we can see was to allow you to better understand FCIB's approach to tackling VAT fraud; yes? That's what it looks like, isn't it? A. That's what the e-mail says. Q. And if, as you say you did, you would have looked at the e-mail and the attachments, you would have shared whatever you gleaned from that documentation with -- with Mr Hunt? A. Yes, I would have. I would have forwarded the document to him."

645. *Mr Deuss*. On 21 June 2007 Mr Potts made a witness statement in the Dutch criminal proceedings. He accepted in cross-examination that from before this date he was aware that both FCIB and Mr Deuss were being investigated by the Dutch authorities. Mr Thanki did not go so far as to ask Mr Potts whether he understood Mr Deuss to have a management role in TWPS. But as he stated above, Mr Potts accepted that he would have attributed a degree of significance to a communication from Mr Deuss.

646. *The trigger*. On 4 June 2014 Blake Morgan sent the Letter of Claim to Spigt, who were acting on behalf of FCIB. They sent the letter on behalf of Mr Hunt and Mr Bramston in their capacity as liquidators of a number of companies but not at that stage on behalf of TWPS (which had not yet been restored to the register). In the Letter of Claim Blake Morgan stated as follows:

> "FCIB was aware in 2005 that it was being used by companies allegedly involved in the trade in mobile phone and CPU's to conduct MTIC fraud. For example, in June 2005 Mr Chris Potts, a partner at Blake Lapthorn who acts for our clients, spoke at length with Tim Ulrich, the General Counsel at FCIB, about MTIC fraud and the claims being brought against companies with accounts at FCIB."

647. Blake Morgan also referred to another article from the Guardian newspaper dated 26 October 2006 and stated as follows: "The suspicions relating to the conduct of the bank were widely reported in the public press. They also referred to the Committee Report and then stated as follows:

> "It was therefore a matter of public record in July 2007 that the majority of MTIC fraudsters seeking to defraud the UK tax authorities used FCIB. Further the part played by FCIB can be seen quite graphically from the estimates in the Report (at page EV15) of missing trade associated with MTIC fraud in the UK. In the period Jan - Mar 06 it was GBP11.6 billion, rising to GBP14.3 billion in the period April - June 2006. FCIB was forced to cease trading in August 2006. The estimate of trade related to MTIC fraud dropped to GBP2.2 billion in the period July - Sept 06 and to just GBP0.6 billion in the period Oct - Dec 06."

648. Mr Potts accepted that he was responsible for the Letter of Claim. He also accepted that he believed that he had a solid basis in evidence for making the allegation that FCIB was an active participant in MTIC fraud:

> "Q. And I'm sure you'll agree with me, but what is clear from this letter is that you were alleging on behalf of your clients that FCIB was an active participant in MTIC fraud? A. I say actively facilitating the fraud. Q. Yes, knowingly and actively. A. Knowingly and actively facilitating the fraud. Q. It's an allegation of fraud? A. Yes. Q. And it's not an allegation which any lawyer can put their name to lightly, is it? A. Correct. Q. And you must have believed that you had a solid basis in evidence for making such a serious allegation? A. Yes."

(iii) Mr Fatherly

649. *Credibility.* From 1990 to 2011 Mr Fatherly was employed by HMRC and from 2000 or 2001 until 2005 or 2006 he was a case officer investigating MTIC fraud. From 2011 until 2021 he was employed by Griffins managing its team of insolvency investigators. In early 2023 he agreed to provide consultancy services to TWPS in a self-employed capacity. He accepted that he had a financial interest in the outcome of the action and

that he was owed £450,000 for the work which he had already carried out on a contingency basis. In general, I found Mr Fatherly to be an honest witness although I also treated his evidence with caution and on certain key issues I found him to be evasive. For these reasons, I attributed little weight to his evidence when making certain findings of fact (as I explain below).

650. *MTIC fraud.* Mr Fatherly gave evidence that it was standard practice for an investigator acting for a liquidator to obtain account opening information. He also accepted that in a matter of weeks or months he made the connection between Mr Deuss and TWPS and TWPS and the raid in London. Finally, he accepted that in theory at least his investigation could have been started at any time:

> "Q. Now, Mr Fatherly, you began working at Griffins in 2011; yes? A. That's correct, yes. Q. So, as a result, you're not able to say what was known by people working at Griffins before that date? A. Generally, no. Q. Generally, no. Thank you. Now, in terms of your processes, Mr Fatherly, it's correct to say, isn't it, that if you discovered a company you were investigating had a bank account, it was standard practice to request statements, confirmation of any account balances and account opening information? A. That was the process that was used in Griffins, yes; and would be the same process when I was a financial investigator for HMRC. That would be the same process. Q. Yes, it was standard practice that that's really the first port of call, isn't it? A. Absolutely. Q. That type of material? A. Yes. Q. And a failure to take that very basic step of requesting those bank documents, including account opening information, would -- would, I assume -- would mean the investigators weren't doing their job properly? A. Yes. Q. Thank you. And, having received that type of information, an investigator would obviously look at it? A. They would schedule it normally; put it into an Excel spreadsheet, my Lord. Q. And look at it carefully? A. Relatively carefully. It depends exactly what they're looking for. Q. Well, it's your starting point for further investigation, isn't it? A. It's one starting point, yes. Q. Well, okay. Thank you. You certainly thought it was a useful -- useful source of information. We can agree on that, I think? A. Yes, I mean, in terms of liquidations where you're looking for money and assets then looking at the bank account is always a good place to start. Q. Indeed."
>
> "So I would like to ask some questions about the process by which you came to look at the position in relation to TWPS UK. On 27 February 2014 you attended a meeting in Curaçao to discuss account balances; yes? A. That's correct. Q. And following that meeting you asked your team to look at the account opening and statement disclosure packs that you had on file for FCIB; is that right? A. That's correct, my Lord, yes. Q. And during that process you came across documents that referred to TWPS UK? A. Yes.

> Q. You can't remember what specific document that was? A. No. Q. No. A. I mean, I think there were probably a number of them that came later. Q. More than one? A. Yes. Q. So it's plainly a document that Griffins already had within its files; yes? A. That's correct. Q. Yes. You didn't need to go to any third party to obtain such documents? A. No, sir. Q. Having found reference -- a reference or references to TWPS UK, you or one of your companies did a Companies House search? A. Yes. Q. You then did a Google search that resulted in your connecting TWPS UK to Mr Deuss? A. That's correct, through ownership, yes. Q. And you also made the connection between TWPS UK and the raid in London, which you considered significant; correct? A. Yes, it was a fact, that struck me, yes. Q. So a significant fact in your mind? A. Yes. Q. The process that we've discussed of looking through account opening statements, identifying TWPS UK, making the connection between TWPS and Mr Deuss, is a process that you could have started at any time; yes? A. I think, in theory, it could have been started at any time. However, you merged two things there: the statements themselves were dealt with by the investigator. That's what they were interested in. The account opening documents, they were looking for other leads, perhaps to other bank accounts, if there was a reference to another bank account, it could be a home address, some other -- there could be a copy driving licence, a passport with a name and address on that they would be looking – looking for. So I don't think they -- when they were -- when the material was coming in, they were primarily interested in what does the bank statement, not what -- how much detail is in the other documents. Q. With respect, Mr Fatherly, we are talking about periods before 2011 you're not able to comment, are you? A. That's correct. Q. So you're speculating? A. I'm -- based on what happened post 2011, I think that's what my investigators did, yes. Q. And so far as TWPS is concerned, you may not have started that process until after your Curaçao meeting. But I think we can agree that was nothing to stop you having done it sooner; correct? A. If there was a reason to, yes."

651. Mr Fatherly accepted that Griffins' focus was on account balances and this explained why they did not investigate account opening material any sooner. He accepted that on 27 February 2014 he attended a meeting in Curaçao to discuss account balances (the "**Curaçao Meeting**") and he started to look at account opening and statement disclosure packs and that he came across documents referring to TWPS. He gave the following evidence about that meeting in answer to a question from me:

> "MR JUSTICE LEECH: Why schedule the -- you know, gather all the information about the individual referees? What was the target, if you like, of that exercise? A. For me, my Lord, it went back to the meeting in Curaçao. I thought was -- my view was very slightly different, I suspect, to Mr Hunt's and Mr Bramston's and what have you. I thought it was very

> strange that the curator and his lawyer, appointed by the Central Bank, were saying: we're a victim. FCIB is a victim. You know, this is -- there's -- there's nothing there. We're a victim in all this. And I thought that seemed really quite odd that we knew there had been a Dutch judgment; and, in fact, just prior to the meeting, we had heard about the -- that there was a criminal judgment. And it -- it didn't tie up for me. So my thought process was: has FCIB been duped by someone else? Is there referees in the middle who have however profited and fooled FCIB? Or does FCIB have a major compliance issue? So that was my thought process, was to start looking at T -- go through the account papers that we had and start to see: well, is it possible that FCIB actually was duped? So a very -- a slightly different way of looking at it."

652. *TWPS.* Mr Thanki then took Mr Fatherly in detail through a series of time entries which recorded the work which he and other Griffins investigators had carried out in relation to the investigation of TWPS. He confirmed in cross-examination that Griffins received a translation of the Dutch Judgment on 26 March 2014. He also confirmed that by 28 March 2014 the Griffins investigators knew that there was "a service level agreement between TWPS UK and FCIB" and that "Mr Deuss sat behind FCIB and also sat behind TWPS". The key evidence which he gave, therefore, related to the period before 26 March 2014.

653. Mr Fatherly accepted that by 7 March 2014 Griffins investigators were working on a specific project to identify from the KYC documents which they held (and any public information) those TWPS marketers who had provided references for the companies of which Griffins were the liquidators. He also confirmed that before they had received the Dutch Judgment they were aware of Mr Nixson, Mr Bailey and Mr Mallaburn:

> "Thank you. And if we go to row 2, you will see an entry for 7 March 2014. A. Yes. Q. And you'll see this relates to Mr Benjamin -- A. Yes. Q. -- it's six and a half hours; yes? A. Yes. Q. And you'll see the narrative there -- A. Yes. Q. -- for Mr Benjamin's work: "Reviewing FCIB 'KYC' documents to obtain details of referees for each [account] [Griffins cases and 3rd party claims] Referees include agents of Transworld Payment Solutions [[Company Secretary] Martina Deuss]". Yes? A. Yes. Q. So this shows, doesn't it, a review that took some six and a half hours, being carried out over FCIB's KYC documents; yes? A. Yes. Q. And that led Griffins to consider that TWPS was providing referees for accounts? A. Yes. Q. Yes. And we can see that the review was being conducted of FCIB's KYC material; yes? A. Yes. Q. And it had been conducted on or by 7 March; yes? A. It was on; it wouldn't be by. The date is when the work is actually completed. Q. So these are daily entries? A. Yes. Q. I see.

> Thank you. And I think we can agree this is before you saw the Dutch judgment in translation; yes? A. Yes. Q. And certainly long before the CD Roms were received from HMRC? A. Yes. Q. Yes. So, again, the understanding of TWPS' role recorded here would have been arrived at using documents that Griffins had in its possession already or, as you clarified to me a moment ago, publicly available information? A. Yes."

> "MR JUSTICE LEECH: Just before we go further down. I'm just looking at 7 March. A. Yes. MR JUSTICE LEECH: So ADF. That's you? A. That's correct. MR JUSTICE LEECH: "FCIB update to SJH" -- A. Yes. MR JUSTICE LEECH: -- "re lists and work being undertaken/tasking MB re Transworld Global Payments". So it looks as if the project was specifically related to Transworld Global Payments. Was that -- is that a fair interpretation of that entry, that you were asking them to do something specifically in relation to Transworld Global Payments, rather than in relation to FCIB? A. Yes. It was to look at the referees and see what information we could glean from the papers that we already held. MR JUSTICE LEECH: And that seems to be supported by the next one down which is: "Reviewing tribunal decisions, for further info re involvement of Transworld and its agents". And there you've just identified Mr Nixson and Mr Bailey, whose names we've encountered before? A. Yes. MR JUSTICE LEECH: So the first task you set yourself on 7 March or asked Mr Benjamin to carry out is to identified, from whatever sources you could find, the referees who had given references by TWPS to FCIB; is that right? A. Yes, from the liquidation estates that we held. MR JUSTICE LEECH: Yes. A. Yes. MR JUSTICE LEECH: Thank you. MR THANKI: Thank you, my Lord. And James Mallerun is, presumably, a reference to James Mallaburn; yes? A. That's me typing with thumbs again, I'm afraid; yes, Mallaburn. Q. And he was a marketer at TWPS? A. Yes. Q. And this suggests, doesn't it, that Griffins investigators, including you, were aware of specific TWPS marketers; yes? A. Once we started this exercise, yes."

654. Mr Fatherly also gave evidence that by 11 March 2014 a colleague, Mr Benjamin, would have been preparing a report about TWPS and a chart which would have shown the connections between individuals and companies and also the MTIC chains:

> "Q. 2014. And you'll see column M refers to: "Continue work on drafting Transworld report". Do you see that? A. Yes. Q. And can you help me with this: what was being drafted in relation to Transworld? A. I have no idea. Based on what my time entries say I would have thought I was probably pulling together Companies House information and any articles I could find on the internet. But I cannot remember the report itself or whether it was even finished. I have no idea now. Q. So it refers specifically to a Transworld report. It looks as if a report was being drafted on Transworld; Yes? A. It certainly looks as though that was my attention at the time, yes. MR JUSTICE LEECH: There's a reference to a chart, two entries

> immediately above. MR THANKI: Can you help my Lord with what Transworld chart refers to? A. That -- that would be -- I think Mr Hunt referred to i2 charts (overspeaking) -- MR JUSTICE LEECH: (overspeaking) refer to an i2 chart, yes. A. And it's a schematic chart. MR THANKI: And can you remember that? Or does that just sound like a likely explanation? A. No, that's what it will be, a chart, because the individual who is named there, MB, is Mark Benjamin; and Mark was one of the people who knew how to use iBase to produce those charts. MR JUSTICE LEECH: And when you say it was schematic, what the connections between the company? A. Yes. MR JUSTICE LEECH: Common directors, employees, that kind -- reporting lines; that would be the kind of thing? A. Yes, it uses symbols for people, companies, locations, so you could link a person. I mean, it was quite often -- sorry, my Lord, it was quite often used to map links between trading counterparties. So you'd have money, you know, A trading with B, trading with C -- MR JUSTICE LEECH: And presumably the chains; you could do that in chains -- A. That's correct. MR JUSTICE LEECH: -- in the same software? A. Yes."

655. Mr Thanki took Mr Fatherly to another time entry made by Mr Benjamin and he accepted that by 12 March 2014 an investigator called Mr Potter had identified TWPS as a UK limited company. He also gave evidence that the Griffins investigators had come to the view that TWPS had a role in relation to specific MTIC traders and that there could not be any doubt that it involved potential fraud:

> "Q. And the narrative refers to i2 charts. "... interaction between entities -- [including] FCIB, Transworld [Van Laarhoven] and identified MTIC traders"; yes? A. That's correct. Q. If we go to row 9, please. Sorry. My fault. In terms of the identified MTIC traders, it suggests, this entry, doesn't it, that Griffins had come to the view that TWPS UK had a role in relation to specific MTIC traders; is that right? A. Could -- could it just be moved slightly further to the right so I can see the full entry. Sorry. Sorry. Could you repeat the question. Q. Yes. It shows that there was a view within Griffins that TWPS UK had a role in relation to specific MTIC traders? A. Yes. Q. And once we've introduced the reference to MTIC here, there can't be any doubt that one is talking about potential fraud; yes? A. Yes."

656. Mr Fatherly also accepted in answer to some questions from me that by 19 March 2014 he was investigating whether a TWPS marketer, who had given a reference for one company which had been found to have committed MTIC fraud, had also given references for other companies:

> "Q. Thank you, Mr Fatherly, that's very helpful. If we go, please, to line 1383. You'll see an entry for 19 March 2014? A. Yes. Q. And if you look

> at the narrative it says: "Checking MB progress on chart for Fresh N Clean to identify where Transworld gave referee/adverse judgment/and same referee continues to produce FCIB account recommendations." A. Yes. Q. Mr Hunt was a little bit unclear in relation to this entry. And he referred to Fresh N Clean as being slightly a confusing part of this possibly. Can you help us with what this entry relates to? A. I'm afraid I can't. If -- it could be an error, but I -- I honestly don't know. I can't recall what Fresh N Clean was about. Q. Well, what we can see here is Transworld -- references to Transworld giving references; yes? A. Yes. Q. And in connection with FCIB account recommendations. We can see that much from this entry, can't we? A. Yes. MR JUSTICE LEECH: The way I understood this entry and perhaps -- so I don't know whether Fresh N Clean was an MTIC company. So what you've got is identify where Transworld have given a reference. A. Yes. MR JUSTICE LEECH: There was an adverse judgment, presumably a published judgment, in relation to an MTIC case. And then the same referee who gave the judgment in that -- in relation to that particular company was then -- you were then checking to see whether that same referee also gave a further FCIB account recommendations. Does that sound a fair assumption -- a fair interpretation of that entry? A. That's correct, my Lord. MR JUSTICE LEECH: So you're chasing down -- where somebody has given a reference for -- someone from Transworld has given a reference for an MTIC company, that company is then found to have committed a -- a VAT fraud. And then you're checking to see what other account recommendations that individual has given. A. Cross-checking, yes, my Lord."

657. Mr Thanki also put an email dated 27 June 2014 to Mr Fatherly in which he had described TWPS as a "creature" of Mr Deuss. Because of its importance I set out this email in full. It was addressed to Mr Goldfarb but copied to Mr Hunt (and Mr Scott also asked him some questions about it). It was headed: "Payment from office account" and in it Mr Fatherly asked Mr Goldfarb to sign off on a payment to fund the assignment to TC Catering of a judgment debt against TWPS:

> "We have this morning received confirmation that the judgment debtor against Transworld has signed the deed of assignment to TC Catering (TCCAT01). The assignment will now allow us to apply for the restoration and winding up of Transworld. Transworld was, you may recall, the agent through which accounts were opened with FCIB. The company was a creature of Mr Deuss. The value of the judgment debt, assigned at face value, is £1,833.06. I am currently waiting for details of the account to which the assignor wants the funds transferred. Once I have those details I will ask CPT to raise a requisition. TCCATO1 is unfunded and therefore it will be necessary for Griffins to fund the payment."

658. When Mr Thanki originally asked Mr Fatherly what he meant by describing TWPS as the creature of Mr Deuss, he said that he meant only that he was the ultimate owner and not that he controlled the company. However, he later accepted that he could not be certain what he had in mind:

> "Q. Can you just focus, for a moment, on your use of the word "creature". A. Yes. Q. Have you seen that in the e-mail? A. Yes. Q. In your witness statement you say, when you wrote the e-mail, you only understood Mr Deuss as the ultimate shareholder? A. Yes. Q. Yes. But I suggest to you that when you describe a company as the creature of a person, that really means only one thing; it means that the person is in complete control of the company? A. It can mean two things. It can mean in control of or belonging to. And factually it belonged to, the extent to which it was controlled by, well, there was an SLA -- service level agreement -- between FCIB and TWPS, which is what it says in the document. So the extent to which Mr Deuss was involved day-to-day, I had no idea. Q. It's your e-mail. I'm just trying to understand your intentions. It's a rather pejorative term, isn't it "creature"? A. It's the one I've used before. Q. It means subservience to a person, doesn't it? Suggesting complete control over -- A. I said before it can be belonging to or control of. Q. Okay. A. And Transworld Oil owned TWPS UK and Mr Deuss owned Transworld Oil. Q. Are you suggesting that Mr Deuss was more than just a shareholder? A. I didn't know. Q. You didn't know? A. No. Q. And you've not explained in your witness statement how you came to have that knowledge about Mr Deuss? A. It's from the Dutch judgment, my recollection would be, where it describes a similar situation for one of the other companies where his sister and someone else are directors but I think the Dutch judgment says he controlled it. Q. Let me -- A. It appeared to be similar circumstances, so ...Q. Can we just go back, briefly, to the spreadsheet we looked at, {F/2511.1/1}. And go up the page to row 9. We looked at this a moment ago. It was Mr Potter. And we're talking about the reference in the narrative column to individuals behind Transworld. A. Yes. Q. Can you help me with who was being referred to there. A. Could I see what date that entry is, please? Q. Yes. A. 12 March. We didn't have the Dutch judgment by then so I still think it's the referees, so people -- Q. You really -- that's your answer to what "individuals behind Transworld" meant? A. That's what I think it means, but it's Mr Potter's entry, so ... MR JUSTICE LEECH: Well, having looked at your e-mail, having looked at that entry, is it possible that you instructed Mr Potter to look into who the directors and shareholders of TWPS and its ultimate beneficial owner were? A. I think we knew that the day before, on 11 March, when we were looking at Companies House, at line 5. It is a possibility, my Lord, that that that's what I add asked Mr Potter to do, but I can't recall."

659. *The trigger.* Finally, Mr Fatherly gave evidence in his witness statement that he had found

numerous documents on the CD-Roms which established that TWPS had acted in a fraudulent manner. He also stated that on "being shown a privileged document" he had identified eight such documents. Mr Thanki took him to three of those documents which did not mention TWPS at all and a fourth which only referred to a "twps.com" address. Mr Thanki took him through the remaining documents and put it to Fatherly that none of the remaining documents pointed to fraud:

> "Q. Thank you. So the documents we've just been looking at, referred to in paragraph 61 of your witness statement, to the extent that you believe that you had a fraud claim against TWPS UK, it can't have been because of any of these individual documents, can it? A. I'm afraid I can't answer to what the claim would or wouldn't be. All I could point out is what I perceived or saw from the documentation and the conclusion that I reached. In terms of framing a claim, I'm afraid that's something I would have handed over. MR THANKI: Very well. Thank you very much, Mr Fatherly. My Lord, I don't have any further questions. MR JUSTICE LEECH: Do you have any re-examination, Mr Parker? MR PARKER: No, my Lord. MR JUSTICE LEECH: Could I just ask you one question about paragraph 61, please, Mr Fatherly. A. Yes, my Lord. {C1/4/127}. MR JUSTICE LEECH: You identify eight documents there? A. Yes. MR JUSTICE LEECH: And your evidence is that you found numerous documents which established, among other things, that TWPS had behaved in a fraudulent manner? A. Yes. MR JUSTICE LEECH: But I think the answer that you gave to Mr Thanki was that you couldn't remember which documents produced that response? A. No, there were certainly more than eight. I – in proofing I was shown eight documents. There were a whole raft more documents -- MR JUSTICE LEECH: Well, that was my question. You didn't actually read through the entirety of the documents on the CD Rom to identify these eight documents; is that correct? You were given a selection of documents to look at? A. Yes. Yes, that were attached to -- MR JUSTICE LEECH: Don't tell me about what's in the -- A. No, no, no; they were attached to another document. MR JUSTICE LEECH: And who made that selection of documents for you to look at? A. That was produced by Gowling."

(iv) Ms Hall

660. On 4 April 2014 Ms Hall was appointed as the liquidator of Blue Fox, ETP and Wood Works and on 28 November 2014, 18 March 2015 and 9 May 2016 she was appointed the liquidator of JDG, Comveen and @tomic. I attached no weight to her evidence because it was clear that the proof of debt which she submitted for the claims of her MTIC companies against TWPS were prompted by discussions between Mr Neil Bacon,

her manager, and Mr Fatherly. Furthermore, she was not even prepared to say that she believed those claims to be legitimate.

(v) Mr Defty

661. Between 2001 and 2014 Mr Ian Defty was either an employee or partner of MKS. In 2017 he moved to DDJ Insolvency which later merged with CVR Global and which was later acquired by the Begbies Traynor Group. He served as a partner of the Begbies Traynor Group from 2021 to 2023. On 26 August 2008 he was appointed as liquidator of ETP, on 13 January 2011 he was appointed as liquidator of Wood Works and on 16 November 2011 he was appointed as liquidator of Blue Fox. On 31 May 2014 he retired as a partner at MKS and transferred his appointments to Ms Hall.

662. Again, I attach little weight to the evidence of Mr Defty because he had very limited evidence to give about the period before the Cut Off Date. He accepted that he could not speak to what the Official Receiver knew before his appointment as liquidator of ETP. However, he did accept that he knew that HMRC had appointed him because they believed that ETP was engaged in MTIC fraud and that by October 2017 his firm had identified an FCIB account and was writing to FCIB. He also confirmed that the KYC material of Blue Fox contained a site visit report dated 10 April 2005 and prepared by Mr Nixson and that any of the three liquidators (including Mr Gordon Johnston appointed on 22 July 2005) could have obtained a copy of this report.

(vi) Mr Reynolds

663. *Credibility.* Mr Mark Reynolds is a director of Valentine & Co ("**Valentine**") and in 2005 he joined the firm. On 4 April 2006 he was appointed the joint liquidator of TCG with his principal, Mr Robert Valentine, following a creditors voluntary liquidation. On 5 August 2008 he was removed as the liquidator. He was a candid witness and I found his evidence useful because he was in office as a liquidator of an MTIC Company when FCIB went into Emergency Measures and he remained in office almost until the Cut Off Date.

664. *MTIC fraud.* Mr Reynolds gave evidence that he was pretty sure that he was appointed by Mr Callender himself. Mr Lemer, who cross-examined him, took Mr Reynolds through the detailed events following the liquidation of TCG until Mr Callender's

disqualification as a director in 2008. He accepted that by 17 January 2007 a reasonably diligent liquidator would have been able to work out that TCG was involved in MTIC fraud:

> "Q. Can we turn to {F/2941.3/1} and can we go to page 8 {F/2941.3/4}. So this is a letter from the Insolvency Service dated 17 January 2007. And you will see the first paragraph says: "The Callender Group Limited was placed into liquidation on 4 April 2006, and Robert Valentine and Mark Reynolds of Valentine & Co were appointed joint liquidators". Do you see that? A. I do. Q. And can you read the second paragraph of the letter for me. A. "Under the provisions of Section ..." Q. You don't need to read it out loud; read it to yourself. A. Oh, sorry. Q. Let me know when you've finished with it. A. Finished. I've finished reading. Q. So that second paragraph makes clear that you sent a report to the Official Receiver? A. It would appear so, yes. Q. And that seems to be a reference to the report that was referred to in the Griffins' note that we saw earlier, the annual progress report. That seems to be a reference that we saw in the annual progress to the ...? A. If you would ping back to it, please. Q. So that's at {F/2941.4/1} -- sorry, {F/2941.5/4}. The reference is {F/2941.5/4}. So we saw this earlier: "The computerised records maintained by the former office holder indicates that a report has been submitted to the Insolvency Service ..." Do you see that? A. Yes. Q. So that seems to be a reference to that report that's referred to in the computer records that were passed on to Griffins? A. Yes, it does. Q. Okay. Sorry. Can we go back to the document we were just looking at, which is {F/2941.3/4}. We don't have a copy of that report. Do you recall sending it? A. No. Q. And do you recall what was in the report? A. No. Q. Now, the wording in bold in the middle of that letter, it says: "Please note that the Official Receiver has identified this as a possible Carousel enquiry." Do you see that? A. I do. Q. And then, if you look over the page, {F/2941.3/5}, it sets out the information that is being sought. Do you see that? A. Yes. Q. So it's clear that the Official Receiver considered that there may have been MTIC fraud. That's right, isn't it? A. It would appear that way, yes. Q. And if the Official Receiver was able to work that out then a reasonably diligent liquidator would also have been able to work that out, wouldn't they? A. Yes."

665. Mr Reynolds also accepted that it was standard practice for a reasonably diligent liquidator to write to both the director and the bank of the company to ask for account opening information:

> "Q. And can we turn to paragraph 20 of your witness statement, which is {C1/1/5}. What you say is: "As part of my investigations, I would write to the director for the books and records of the company I was investigating and I would then write to the bank to seek copies of bank statements and a

> copy of the mandate." Do you see that? A. Yes. Q. So that's a standard part of what you would do as a liquidator, isn't it? A. Correct. Q. And any reasonable -- any reasonably diligent liquidator would have done that, wouldn't they? A. Yes."

666. Mr Reynolds received various documents from Mr Callender which he supplied to the Official Receiver when he left office. These included invoices from TCG which would have included FCIB's details and the payment instructions. He also accepted that he would have investigated these payments:

> "Q. And we have some invoices from the TCG group. If we could turn to one at {F/2098/33}. This is an invoice from The Callender Group. You will see it's an invoice sent to MG Components Limited. Do you see that? A. I do. Q. And it's for the sum of -- the total at the bottom, 184,988.48. Do you see that? A. Yes. Q. And if we turn over to the next page, {F/2098/34}. These are payment instructions. And we can see that the customer is instructed to pay IQ Trading to an account FCURANCUXXX; do you see that? A. Yes. Q. And then also instructed to make a payment to Barclays; do you see that? A. Yes. Q. If we turn to just one more invoice at page {F/2098/37}. It's another invoice to MG Components. Do you see that? A. Yes. Q. And this time for £632,000-odd. Do you see that? A. Yes. Q. And if you turn over the page, {F/2098/38}, you will see payment instructions. And we see that the payee is being told to pay £606,000 to IQ Trading. And we've got that FCURANCU swift code again. Do you see that? A. I do. MR JUSTICE LEECH: Could you go back to the invoice again, the previous page, {F/2098/37}. It says "HOW TO PAY THIS INVOICE", do you see there? There's a reference to First Curaçao International Bank NV. And then it's got the same swift code. It just looks as if there's a typo on the actual payment instruction, but it does look as if that's the correct swift code. And if we go back to the -- go to the following page, {F/2098/38}. You see again -- Mr Lemer took you to this. So it does look as if that was a -- even though the First Curaçao number looks as if it is a typo, it does look as if it's the correct swift code. MR LEMER: Do you see that? A. I do. Q. There are other invoices, I won't take you to all of them, but these show very large sums of money that were owed to TCG being paid to other specific bank accounts. You've seen that, haven't you? A. I've seen that now, yes. Q. And surely, as the liquidator, you would have wanted to understand what had happened to TCG's assets; correct? A. Yes. Q. And so, surely, that would have led you to investigate these payments, wouldn't it? A. One would assume so, yes. Q. But you don't recall doing that, do you? A. I don't. Q. And you don't know if Mr Valentine did that, do you? A. I don't."

667. Mr Reynolds accepted that by 22 March 2007 the Insolvency Service had discovered that

TCG had an FCIB account and had asked for its records. He also accepted that a reasonably diligent liquidator could have found out about FCIB and its connection to TCG. Finally, he also accepted that on 2 April 2007 (i.e. within 10 days) FCIB had provided all of the KYC information for TCG. Mr Lemer put the two Guardian articles and an article from the BBC website to Mr Reynolds and he then gave the following evidence:

> "Q. So if you had seen this article, you would have known that it was being reported that FCIB was suspected to be involved in MTIC fraud, wouldn't you? A. Yes. Q. And you would have known that it was understood that TWPS UK vetted potential British clients for FCIB, wouldn't you? A. Yes. Q. And you would have known that TWPS UK's offices had been raided, wouldn't you? A. That's what the article says, yes. Q. And, again, this is an article that anyone looking for information about VAT fraud and FCIB could have found, couldn't they? A. If it was online, for sure. Q. And you don't recall whether you saw this article, do you? A. I'm as certain as I think I can be that this is the first time I've seen it. Q. But you don't know what Mr Valentine has seen, do you? A. No, I don't."

> "Q. These are not obscure publications, are they, Mr Reynolds? A. Not at all. Q. So in September 2006, when you were liquidator of the company, any competent liquidator -- sorry. In September 2006 you were the liquidator of a company; and any competent liquidator would have known that they had an FCIB account and that it was being alleged that they were involved in MTIC fraud. That's correct, isn't it? A. That would appear to be the case, yes. Q. Yes. And any liquidator with that knowledge could have and should have conducted basic searches for relevant news articles, shouldn't they? A. I wouldn't say they could or should have. They certainly could have, yes. Q. And had they done so, they would have discovered these articles that we've looked at, wouldn't they? A. If they're online, for sure."

(4) The Standing Issue

668. The Claimants submitted in their closing submissions that because the Defendants had not challenged Mr Hunt's decision not to take a limitation defence either by an application in the liquidation or by alleging that the Claimants failed to mitigate their loss, they had no standing to challenge that decision. Nevertheless Mr Parker and his team sought to defend that decision:

> "197. With respect, this analysis is wrong. It is a fact (not disputed by the Defendants) that Mr Hunt has not taken a limitation defence against the claims of the MTIC Companies. The issue is properly to be framed as

> follows: (1) Has Mr Hunt's decision not to take a limitation defence been challenged and if so how? (Question 1) (2) If it has, what are the consequences? (Question 2)
>
> 198. As to Question 1, the Defendants complain about Mr Hunt's decision (see the conflict of interest section) but do not challenge it, either by an application in the liquidation of TWPS or by alleging a failure to mitigate TWPS's loss. Question 2 does not therefore arise.
>
> 199. It is easy to see why Mr Hunt did not raise a defence of time-bar and why the Defendants have not challenged his decision as an unreasonable one. The matter is addressed in detail at Section I.4.3. Mr Hunt was plainly correct not to force the MTIC Companies to incur the time and cost of defeating a limitation defence by reliance on s.32, unnecessarily adding to the costs of bringing these proceedings against dishonest defendants.
>
> 200. As with any litigant, the Court should recognise and respect the decision of the liquidator of TWPS that, in view of the MTIC Companies' ability to rely on s.32 of the Limitation Act ("s.32"), there were good reasons for not taking the six year limitation period as a defence. The Court does not second-guess a person's decision not to take a limitation defence (subject to any argument on failure to mitigate) and the liability to those MTIC Companies which rely on s.32 is not therefore extinguished. The Court cannot raise of its own motion a limitation defence and nor can the Defendants. Had it been thought that Mr Hunt's decision to accept that the limitation period was extended by s.32 was unreasonable, then his decision should have been challenged as a failure to mitigate TWPS's loss."

669. I reject this analysis. For the reasons which I have already set out, Mr Hunt's decision is not binding on the Court. I have accepted that it would be open to him to persuade the Court that it is unnecessary to decide the S.32 Issue on the facts because his decision to admit the Indirect Claims to proof was reasonable. But Mr Hunt did not plead such a case or to argue it with any great conviction. But in any event, I find that his decision not to take a limitation defence in answer to the Indirect Claims was unreasonable for the following reasons:

(1) On any view the Indirect Claims were very stale and it was or should have been obvious to him even without legal advice that the primary limitation period for <u>all</u> of them had expired. FCIB went into Emergency Measures more than six years before TWPS had gone into liquidation and stopped time running for the purposes of the *General Rolling Stock* principle. In my judgment, a reasonably competent liquidator would have carefully considered this issue after taking legal advice before admitting them to proof. There is no suggestion that Mr Hunt did so.

(2) I reject Mr Hunt's evidence that he did not solicit the Indirect Claims from the liquidators of the MTIC Companies and I find that he not only encouraged them to make those claims but that he orchestrated those claims himself. He tied himself in knots when Mr Scott asked him to explain when and in what sense he "accepted" those claims. It was obvious that he never made a separate and independent decision to accept them and then admit them to proof.

(3) Mr Parker and his team submitted that there was no conflict between the interests of the MTIC Companies and the interests of TWPS because a decision to admit the Indirect Claims to proof increased the assets of TWPS and matched the corresponding claims against the Defendants. My difficulty with that submission is that Mr Hunt freely accepted that he had a conflict of interest when Mr Scott put it to him in cross-examination.

(4) Moreover, Mr Parker's submission failed to recognise or acknowledge the real reason for the conflict of interest which Mr Hunt faced. What he faced was a conflict between his duty to act judicially in his capacity as an office-holder and the liquidator of TWPS and his personal interest in pursuing the Indirect Claims. As I understood his evidence, this action has been brought principally for his own benefit and the benefit of his partners in Griffins and the other liquidators of the MTIC Companies and there is only a remote possibility that HMRC will recover any of the proceeds of this litigation (unless Mr Hunt agrees to give up some of his share to them).

(5) I fully accept that in order to fund litigation office-holders often have to obtain outside funding and both they and their legal advisors frequently act on a contingency fee basis. I also accept that it is not unreasonable that both they and their funders should take a significant percentage of any proceeds to reflect the risks which they take. But the arrangement which Mr Hunt described was by any standards extraordinary. The claims were being brought ostensibly for the benefit of HMRC, which is almost the only creditor of the MTIC Companies, but HMRC would have seen almost none of the proceeds even if it had been successful.

(6) In any event, Mr Hunt's position was very different from the usual position of an office-holder in litigation. He was in a position of conflict because he was not only

the liquidator of many of the MTIC Companies but also of TWPS itself. Furthermore, I am satisfied that Mr Hunt took no steps to manage that conflict. He could not explain why he did not avoid the conflict altogether by ensuring that an independent liquidator of TWPS was appointed and he took no steps to undertake a legal review of the Indirect Claims until the Defendants raised the issue and even then he chose to instruct Enyo Law, who were acting for the MTIC Companies, to conduct that review.

670. I have found as a matter of law that the Court is not bound by Mr Hunt's decision to admit the Indirect Claims to proof. I also find that his decision (whenever it was taken) was not a reasonable one and that it is not appropriate to treat the proofs of debt submitted by the liquidators of the MTIC Companies as a fair and reasonable assessment of the loss which they claim to have suffered or to use it as a basis for fixing a contribution under S.213. It is, therefore, necessary for me to go on and consider the S.32 Issue with a clean slate (as His Honour Judge Saffman put it in *Stanhope*).

671. Finally, as Mr Scott pointed out in his closing submissions, FCIB had pleaded in its Defence that Mr Hunt's decision to admit the claims of the MTIC Companies to proof broke the chain of causation: see paragraph 116A.3. This met Mr Parker's point that the Defendants had failed to challenge Mr Hunt's decision in this action. In this context there was no real difference between an argument based on failure to mitigate and an argument based on a breach in the chain of causation. If it was necessary for the Defendants to challenge the reasonableness of Mr Hunt's decision, then I am satisfied that they did so.

(5) The S.32 Issue: general

(i) The trigger

672. I reject Mr Hunt's evidence in Hunt 6 that he did not know about TWPS' true role and its alleged fraud until the documents on the three CD-Roms were reviewed by Mr Fatherly. I also reject his evidence that it was only when he instructed Mr Fatherly to send key documents to Mr Potts that he first considered that he had evidence to support claims against FCIB and Mr Deuss. My reasons for rejecting this evidence are as follows:

(1) I found Mr Hunt to be an unreliable witness and I could attach very little weight to his evidence on the S.32 Issue in Hunt 6. He conceded that the statement in Hunt

6, paragraph 103 that he did not have any idea what TWPS's role had been when he was first appointed was inaccurate and I reject his explanation that this mistake could be put down to sloppy language. In my judgment, Mr Hunt deliberately exaggerated his ignorance of TWPS's role in order to try and make good his case on S.32.

(2) I attach no weight to Mr Fatherly's evidence that he found numerous documents on the CD-Roms which established that TWPS had acted in a fraudulent manner because, as he had to accept in cross-examination, none of the specific documents to which he referred provided any basis for that conclusion. Further, it is clear that they were provided to him by Gowling to lend colour to a statement made to support Mr Hunt's evidence without access to the CD-Roms themselves and almost 10 years after he had first had access to them.

(3) I find as a fact that Mr Fatherly began to investigate TWPS in late February or early March 2014 and that within a month the Griffins investigators had produced a report and schematic chart, they had identified Mr Bailey, Mr Nixson and Mr Mallaburn as TWPS marketers and were investigating whether TWPS marketers had provided references to any of the Griffins companies (including the MTIC Companies of which Mr Hunt was a liquidator).

(4) I also find that on 11 March 2014 Mr Fatherly was aware that Mr Deuss was the ultimate beneficial owner of TWPS and that Mr Geerts and Ms Deuss were its directors and that on 12 March 2014 he instructed Mr Potter to investigate the individuals behind TWPS. I am also satisfied that when he used the words "individuals behind Transworld" in his time entry for that day, Mr Potter was referring to the individuals who controlled the company. I reject Mr Fatherly's evidence that he was referring to the ultimate beneficial owner because, as Mr Fatherly accepted himself, he had learnt the identity of the ultimate beneficial owner on the day before.

(5) I also find that when he used the words "creature of Mr Deuss" to describe TWPS in his email dated 27 June 2014, Mr Fatherly meant that Mr Deuss had complete control of TWPS, as Mr Thanki put to him. I found his answers evasive in relation to this issue and he finally accepted that the expression could have referred to

control rather than ownership. In my judgment, this was the obvious meaning and the word "creature" is often used by lawyers and lay persons alike to describe a limited company over which a natural person exerts complete control.

(6) On the Claimants' own case, HMRC did not deliver the CD-Roms to Griffins until 25 September 2015: see paragraph 43(6). But it is clear from Ms Hall's proof of debt dated 28 September 2015 that Mr Hunt and the liquidators of the MTIC Companies had already identified and invited claims against TWPS. Moreover, they had already identified the Cut Off Date as being significant for limitation purposes. I consider it highly improbable that they could have identified the significance of the Cut Off Date within three days and the inference which I draw is that they had been working on the claims against TWPS for some time.

(7) Finally, I find that the real trigger for Mr Fatherly's investigation into TWPS was the Curaçao Meeting on 27 February 2014 and that once the Griffins investigators began to investigate TWPS they established within a month the facts which I have set out above. Indeed, I find that by 12 March 2014 the Griffins investigators had reached the conclusion that TWPS's role involved potential fraud. Mr Fatherly's evidence in relation to his scepticism about the position of FCIB at that meeting and his subsequent wish to investigate other possible participants in MTIC fraud rang true and, in my judgment, that was the real trigger for the investigation.

673. Accordingly, I dismiss the Claimants' case in paragraphs 43(5) to 43(8). Mr Scott and his team pointed out in their closing submissions that the Claimants had called no evidence from the Official Receiver or the liquidators at the time of nine of the ten MTIC Companies which went into liquidation before 22 September 2008 and that they had called no evidence from Mr Valentine who was the joint liquidator with Mr Reynolds of the tenth MTIC Company (TCG). They submitted that if I rejected Mr Hunt's evidence in relation to the trigger, the Court should find that the Claimants had failed to discharge the burden of proof on the S.32 Issue given these gaps in the evidence.

674. Although I was tempted by this shortcut, I do not accept this submission. The Claimants called evidence to discharge the burden of proof on the S.32 Issue and they adduced sufficient evidence to enable me to decide the issue on the merits for each of the MTIC Companies which went into liquidation before the Cut Off Date. In each case, therefore,

I must ask whether there was a trigger which would have led a reasonably diligent liquidator to carry out investigations before then deciding whether the statement of claim test was or would have been satisfied before the Cut Off Date.

(ii) Mr Hunt's knowledge

675. I find that Mr Hunt fully understood the mechanics of MTIC fraud by the date on which FCIB went into Emergency Measures. He accepted that from 2003 he had been appointed liquidator of at least two companies engaged in MTIC fraud and that he had some experience of the issue. Furthermore, he had already been appointed the liquidator of some of the MTIC Companies. I reject his evidence that he "was not particularly into the mechanics of the fraud to the same extent that some of the other IPs were": see Hunt 6, paragraph 18. In my judgment, this was another example of Mr Hunt trying to downplay his experience.

676. I also find that by 2007 Mr Hunt knew that FCIB had been accused of involvement in MTIC fraud, that raids had been carried out on Transworld's London offices, that Mr Deuss and other directors of FCIB had been accused of money laundering offences and that TWPS had vetted potential customers of FCIB. He accepted that he was aware of all of these facts in cross-examination.

677. Finally, I find that Mr Potts forwarded on Mr Deuss's email dated 8 February 2006 to Mr Hunt and that he was aware that TWPS was carrying out KYC for FCIB and he had seen an example of a site visit report. I draw the inference that Mr Hunt knew that Mr Deuss was involved in the management or control of TWPS from the contents of his email. But even if he did not know this, I find that a reasonably diligent liquidator would have reached this conclusion from a careful reading of the email and its attachments and discussing them with Mr Potts.

(iii) Publicly available information

678. I find that in 2007 a reasonably diligent liquidator would have known that there was a solid basis in evidence for advancing a case that FCIB knowingly and actively facilitated MTIC fraud based on publicly available information alone. The Letter of Claim was principally based on publicly available information (the Committee Report and the Guardian article dated 26 October 2006) and Mr Potts accepted in cross-examination that

he would not have advanced such an allegation consistently with his conduct obligations without a solid basis in evidence.

679. The Letter of Claim made reference to Mr Potts' meeting with Mr Urich and the Dutch Judgment and I have considered whether they made a material difference to Mr Potts' state of knowledge by the date of the Letter of Claim. In my judgment, he would still have been able to advance the case against FCIB without reliance on this additional information because he did not qualify his evidence in cross-examination and he was not re-examined on that basis either. But in any event, Mr Hunt would have had the benefit of Mr Potts' advice about his meeting with Mr Urich.

(iv) The MTIC Companies books and records

680. I find that in 2006 to 2008 it was standard practice for a reasonably competent liquidator to obtain account opening information from the banks at which the company in liquidation had accounts. Mr Reynolds accepted this in terms in cross-examination and Mr Fatherly's evidence also supported this conclusion even though he only joined Griffins in 2011. Further, I find that if the liquidator of any of the MTIC Companies had asked FCIB to provide the account opening documents for their FCIB accounts, FCIB would have provided this information promptly. Mr Reynolds' evidence was that FCIB provided the KYC material for TCG within 10 days.

681. I find that between 7 March and 19 March 2014 Mr Fatherly and his team of Griffins investigators reviewed the KYC material for the companies over which Griffins partners had been appointed liquidators and were able to prepare a report and schematic chart into the activities of TWPS. I also find that the purpose of the report was to identify TWPS marketers who had provided references to FCIB for companies engaged in MTIC fraud and that they had identified Mr Nixson, Mr Bailey and Mr Mallaburn as providing references. Finally, I find that by 19 March 2014 the Griffins investigators were investigating whether the TWPS marketers whom they had identified had given references to other companies engaged in MTIC fraud by looking at FTT judgments.

682. I also find that by 11 March 2014 Mr Fatherly had identified Mr Deuss as the ultimate beneficial owner of TWPS and that Mr Geerts and Ms Deuss were its statutory directors and had formed the view that TWPS had a specific role in relation to traders who were involved in MTIC fraud. Finally, I find that by 12 March 2014 Mr Fatherly had formed

the view that TWPS had a specific role in relation to traders involved in MTIC fraud and that it involved potential fraud on the part of TWPS. Mr Fatherly accepted all of these propositions in cross-examination.

683. In my judgment, in 2007 a reasonably diligent liquidator could have obtained the publicly available information and the MTIC Companies' account opening documents within a couple of weeks and established the facts set out above within a month or six weeks depending on the contents of the KYC material for each MTIC Company (which I consider individually below). I, therefore, dismiss the Claimants' case that a review of the books and records of the MTIC Companies would not have revealed TWPS's involvement in MTIC fraud or revealed only that it had a role in the opening of the MTIC Companies' accounts: see paragraph 43(4)(a).

(v) The statement of claim test

684. *The test.* The Claimants pleaded that the liquidators of the MTIC Companies could not have known and, therefore, pleaded: (a) that TWPS knew that MTIC fraud was prevalent in the T&C sector and that TWPS knew that FCIB was targeting companies in the T&C sector, (b) that TWPS knew that once onboarded such clients' activities were not being monitored properly or at all and (c) that Mr Deuss had any connection with TWPS. Mr Scott and his team did not accept that it was necessary for the liquidators of the MTIC Companies to plead these allegations to meet the statement of claim test and, in particular, the need to prove (c).

685. *MTIC fraud.* In my judgment, from May 2007 (at the latest) all of the liquidators of the MTIC Companies could have pleaded that MTIC fraud was prevalent in the T&C sector and that FCIB was targeting that sector by relying on the conduct of the individual MTIC Company, the Committee Report and the shared knowledge of the IP Group. However, I am not satisfied that the individual liquidators of the MTIC Companies would have been able to plead that TWPS was aware of this unless there were account opening documents from which this inference could be drawn. In particular, such an inference could be pleaded either from a completed site visit report or a letter of good standing and even from the TWPS marketer inserting their EPR number (as I find in relation to ETP below).

686. However, I am also satisfied that Mr Hunt himself could have pleaded that TWPS knew that FCIB was targeting the T&C sector on the basis of Mr Deuss's email dated February

2006 and its attachments. In the first attachment Mr Deuss set out his intention to continue to service the T&C sector and he also stated: "TWPS's marketing presence around the world facilities one-on-one client interviews and the detailed site visits." Moreover, the site visit report itself identified the inquiries which the TWPS marketers would be required to make. On the Claimants' case, Mr Deuss was wholly disingenuous in this email and the accompanying memo in expressing the intention to combat MTIC fraud.

687. *Monitoring*. In my judgment, the individual liquidators could have pleaded a case that FCIB did not properly monitor the accounts of the MTIC Companies from the information which FCIB had provided or would have provided if requested to do so promptly. The Claimants produced a "red flag analysis" as Cs, S9 to their closing submissions in which they set out in tabular form all of the red flags which, on their case, the TWPS marketers, the FCIB compliance department and the RMC ought to have spotted. This analysis was exclusively based (or almost exclusively based) on account opening information and bank statements.

688. However, I am not satisfied that the liquidators of the MTIC Companies could properly have pleaded that FCIB knew that the MTIC Companies had not been properly monitored unless they could rely on documents which showed that TWPS marketers introduced the MTIC Company to FCIB. In my judgment, it was not necessary for the liquidators to plead that the TWPS marketers knew that the MTIC Companies were not being monitored after the account had been opened. It would have been sufficient to allege that the TWPS marketers knew that FCIB had not carried out any proper analysis of the companies' trading patterns for the purpose of approving the application. The red flag analysis would have been sufficient to plead such a claim.

689. *Mr Deuss.* I accept the Defendants' submission that it would not have been necessary to plead a case against Mr Deuss personally in order to satisfy the statement of claim test. Indeed, the obvious reason why the Claimants have advanced such a case against him is because they wish to obtain a judgment against him personally. But in any event, I am satisfied that there was sufficient publicly available information to plead that Mr Deuss had a connection with TWPS. Mr Fatherly established by a simple Companies House search that he was the ultimate beneficial owner of FCIB and it was obvious from its name that TWPS was one the companies in the Transworld group which he ultimately

controlled. The liquidators of the MTIC Companies would also have known well before the Cut Off Date that Mr Deuss had been an active director of FCIB and was still a member of the Supervisory Board.

(6) The S.32 Issue: individual claims

690. Mr Scott and his team identified ten MTIC Companies which went into liquidation before 22 September 2008. They were in order of timing: Blue Fox, TCG, Northdata, Kingswood, MTL, ACEL, ETP, Leeds Smith and 385 North. I deal with each one in turn. In considering whether the liquidators could with reasonable diligence have discovered TWPS's fraud, I consider the individual documents which were available to them against the background of the general conclusions which I have reached about the statement of claim test and on the assumption that the liquidators of those MTIC Companies would not have been looking at the relevant documents in a vacuum but would have had the public information available to them and the pooled knowledge of the IP Group (including Mr Hunt himself).

(i) Blue Fox

691. The Claimants' case was that the liquidator of Blue Fox could not have discovered TWPS's fraud because its books and records did not contain any reference to TWPS. They pleaded in the Particulars of Claim at Schedule A4:

> "Glover resolved to place Blue Fox into creditors' voluntary liquidation on 22 July 2005 due to the fact that Blue Fox could not, by reason of its liabilities, continue to trade, less than 4 months after trading commenced. On 22 July 2005, Gordon Johnstone was appointed as liquidator. Mr Johnstone filed a return dated 23 October 2007 for the final meeting of creditors showing no realisations had been made. Blue Fox was dissolved on 27 January 2008. Mr Johnston could not with reasonable diligence have discovered TWPS' fraud by 22 September 2008, the date 6 years before TWPS went into liquidation on 22 September 2014. The books and records of Blue Fox do not contain reference(s) to TWPS prior to Blue Fox's dissolution on 27 January 2008. In addition, Mr Johnston's files for Blue Fox do not contain any material obtained prior to 22 September 2008 which is relevant to the matters pleaded at paragraph 43(4)(b) above."

692. I am not satisfied that this is correct. The Claimants referred to the site visit report of Mr Nixson dated 21 March 2005 in their red flag analysis in Cs, S.9. Moreover, Mr Defty,

who ultimately became the liquidator, accepted that he could have obtained a copy of the site visit report at any time. The Claimants did not call Mr Johnston or seek to prove why he did not carry out any investigations given that the company only traded for four months, it had assets of £133 and its only creditor was HMRC to whom it owed £18,432,107. The inference which I draw is that Mr Glover put Blue Fox into creditors voluntary liquidation to avoid an investigation rather than to facilitate one. On the assumption that my findings of fact in relation to the dishonesty of Mr Deuss are wrong and in the absence of any evidence from Mr Johnston himself, I find that he could with reasonable diligence have discovered the fraud of TWPS before the Cut Off Date.

(ii) TCG

693. Mr Reynolds was one of the joint liquidators of TCG from 4 April 2006 until 5 August 2008. It was the Claimants' case that the books and records of TCG did not contain any reference to TWPS in the period up to the Cut Off Date. They pleaded as follows in the Particulars of Claim at Schedule A5:

> "TCG went into a CVL on 4 April 2006 and Mark Reynolds and Robert Valentine were appointed liquidators. They could not with reasonable diligence have discovered TWPS' fraud by 22 September 2008, the date 6 years before TWPS went into liquidation on 22 September 2014. The books and records of TCG do not contain reference(s) to TWPS in the period up to 22 September 2008. In addition, the liquidators' files for TCG do not contain any material obtained prior to 22 September 2008 which is relevant to the matters pleaded at paragraph 43(4)(b) above."

694. Again, I am not satisfied that this is correct because the KYC material for TCG contained a site visit report dated 24 January 2006. Mr Reynolds accepted that by 2 April 2007 FCIB had provided TCG's account opening information and he did not suggest that this document was not sent to him. Moreover, the Claimants themselves relied on it as KYC material in both Cs, S5 and Cs, S9. I am satisfied that Mr Valentine and Mr Reynolds had ample time to determine whether TCG had a claim against TWPS. Finally, Mr Reynolds accepted that by 17 January 2007 a reasonably diligent liquidator would have been able to work out that TCG might have been involved in MTIC fraud and, in my judgment, that ought to have been the trigger for an investigation. On the assumption that my findings in relation to the dishonesty of Mr Deuss are wrong, I find that Mr Reynolds and Mr Valentine could with reasonable diligence have discovered the fraud of TWPS

before the Cut Off Date.

(iii) Northdata

695. On 13 February 2006 Mr Bramston was appointed the provisional liquidator of Northdata on the application of HMRC and on 12 April 2006 he was appointed as the liquidator of the company. The Claimants' case was that the company's books and records and his files did not contain any material obtained before the Cut Off Date which was relevant to the S.32 Issue:

> "Northdata was compulsorily wound up on 5 April 2006 and Mr Bramston was appointed as liquidator by the Secretary of State (having previously served as provisional liquidator from 13 February 2006). Mr Bramston could not with reasonable diligence have discovered the fraud of TWPS by 22 September 2008, the date 6 years before TWPS went into liquidation on 22 September 2014. The books and records of Northdata do not contain reference(s) to TWPS prior to 22 September 2008. In addition, Mr Bramston's files for Northdata do not contain any material obtained prior to 22 September 2008 which is relevant to the matters pleaded at paragraph 43(4)(b) above (as opposed to material which is consistent with TWPS having a role in the opening of Northdata's FCIB account)."

696. Again, I am not satisfied that this is correct. Mr Nixson provided a letter of good standing dated 14 September 2005 and this was included in the account opening pack. Moreover, Mr Bramston's files contained the transcript of an interview by him of Mr Walker on 28 February 2006 pursuant to S.236. In the course of that interview Mr Bramston referred to Mr Rajkumar's affidavit sworn on 13 February 2006 upon which I relied in finding that FCIB assisted Mr Walker to commit the relevant breaches of fiduciary duty. On page 89 of the transcript Mr Bramston asked Mr Walker about his introduction to FCIB and the transcript records as follows:

> "How did you get introduced to Curacao? JASON WALKER: Just by talking to people. They said to me that you know, are you into First Curacao and I said, "What is that?" It's something that I'd never even heard of. TIMOTHY BRAMSTON: But which people? JASON WALKER: Just one of the companies perhaps. TIMOTHY BRAMSTON: Could it be the Lets Talk IT? WARREN HEYMAN: It could have been anybody. JASON WALKER: I can't remember. TIMOTHY BRAMSTON: And did it -- were you given an introduction, or did you approach them yourself? How did -- TIMOTHY BRAMSTON: And did it -- were you given an introduction, or did you approach them yourself? How did -- JASON WALKER: He gave me a number. Whoever I spoke to gave me a number of a guy called Roy, Roy Nixson, who I contacted. I thought, "Oh well, that's great

> anyway", because I couldn't get a bank account, I couldn't continue to use my personal bank account. TIMOTHY BRAMSTON: Okay, and why was the account put in your name as opposed to the company name? JASON WALKER: Because I hadn't got any paperwork. I needed a -- like a lot of paperwork, you know, to say I'd been trading for a while, which I hadn't got at the time. But I set the First Curacao Bank account up, so he said to me, what I'd have to do is same again, put it in your own personal name until you start building a business up and then when you've got records, paperwork and things, then we'll transfer it into a business account, which will be round about February time, which is something that I was originally doing. TIMOTHY BRAMSTON: Okay. Did you set up two accounts at the same time? JASON WALKER: No I didn't. TIMOTHY BRAMSTON: Right. So remind me the name of the other account? It was -- JASON WALKER: It was ExactPay. TIMOTHY BRAMSTON: Yes. When did that get set up? Months later? JASON WALKER: Yes, a few weeks later, yes. TIMOTHY BRAMSTON: Okay. JASON WALKER: I set this one up and then Roy explained to me about that one. TIMOTHY BRAMSTON: Right. The purpose of this account is what, as you saw it? JASON WALKER: Which account, sorry? The ExactPay? TIMOTHY BRAMSTON: No, not the ExactPay, the main account. JASON WALKER: This one? TIMOTHY BRAMSTON: Yes. JASON WALKER: To run it as a business account. TIMOTHY BRAMSTON: Right, so it is to carry on the business of the company? JASON WALKER: Yes."

697. If my findings of dishonesty in relation to Mr Deuss are wrong, then in my judgment Mr Bramston had actual knowledge of TWPS's fraud on 28 February 2006. He was provided with direct evidence of this conduct by Mr Walker, namely, that Mr Nixson was willing to introduce him to FCIB even though he could not get a bank account himself and that he was prepared to advise Mr Walker to trade on behalf of a limited company through a personal bank account. This was one of the signs of fraud upon which the Claimants placed significant reliance.

698. Mr Bramston did not give evidence before me and the Claimants did not disclose when FCIB provided the account information to him or to Griffins. But even if he did not have the letter of good standing available to him on 28 February 2006, I am satisfied that he could have obtained it within a matter of days from FCIB. In my judgment, the transcript of the interview with Mr Walker and the letter of good standing itself would have enabled Mr Bramston to satisfy the statement of claim test and to advance an allegation of fraud against TWPS whether or not he also chose to allege fraud against Mr Deuss. I find, therefore, that Mr Bramston could with reasonable diligence have discovered the fraud of TWPS before the Cut Off Date.

(iv) Kingswood

699. On 31 July 2006 Mr Hunt was appointed to be the liquidator of Kingswood. His evidence in Hunt 6 was that on 10 November 2006 Mr Sharma provided Griffins with the KYC material for Kingswood. He also exhibited the email which had been sent the day before. His pleaded case was that these documents and his own files did not contain any material which was obtained before the Cut Off Date and which was relevant to the S.32 Issue:

> "(vii) Kingswood entered administration on 12 May 2006 and Gagen Sharma was appointed as administrator. On 31 July 2006, Kingswood's creditors approved a resolution to place the company in liquidation and to appoint Stephen Hunt as liquidator. The CVL commenced on 30 August 2006.
>
> (viii) Neither Mrs Sharma nor Mr Hunt could with reasonable diligence have discovered TWPS' fraud by 22 September 2008, the date 6 years before TWPS went into liquidation on 22 September 2014. The books and records of Kingswood do not contain reference(s) to TWPS in the period up to 22 September 2008. In addition, Mr Hunt's files for Kingswood do not contain any material obtained prior to 22 September 2008, including any material received from Mrs Sharma, which is relevant to the matters pleaded at paragraph 43(4)(b) above (as opposed to material showing that TWPS appeared to help FCIB to apply its purported 'enhanced due diligence requirements' to Kingswood)."

700. I find in favour of the Claimants on this issue. I have found that TWPS did not assist Mr Duddy to commit the relevant breaches of duty because it did not introduce Kingswood to FCIB. Even if this finding and my findings on dishonesty in relation to Mr Deuss are wrong, I am not satisfied that Mr Hunt could have discovered TWPS's fraud by the Cut Off Date even with reasonable diligence. I accept Mr Hunt's evidence that the only TWPS document on the file was an email dated 11 May 2006 and that it would not have put him on notice of fraud or dishonesty.

(v) MTL

701. On 17 April 2008 a meeting of creditors took place at which they resolved to put MTL into liquidation and on 18 April 2007 Mr Hunt was appointed to be the liquidator of the company. The report to the meeting stated that Mr Abrahamovitch attributed its failure to the refusal of HMRC to allow monthly instead of quarterly returns, the suspension of its bank account by FCIB and an assessment of approximately £570,000 by HMRC. Mr Hunt accepted in evidence that on 17 May 2007 FCIB provided him with MTL's account

opening information. But his pleaded case was that these documents and his own files did not contain any material which was obtained before the Cut Off Date and which was relevant to the S.32 Issue:

> "MTL was placed into CVL on 18 April 2007. Stephen Hunt was appointed as liquidator on the same date. Mr Hunt could not with reasonable diligence have discovered the fraud of TWPS by 22 September 2008, the date 6 years before TWPS went into liquidation on 22 September 2014. The books and records of MTL and the liquidator files include material dated prior to 22 September 2008, and obtained by Mr Hunt before that date, which (1) concerns the suspension of MTL's FCIB account because of third party payments on two transactions, and (2) shows that MTL's KYC documents were certified by a TWPS employee (although the individual concerned is not identified as such). Taken together, that material is, on its face, consistent with TWPS assisting in the carrying out of a bona fide compliance function, and consistent with post-account-opening monitoring. None of the material obtained by Mr Hunt prior to 22 September 2008 is relevant to the matters pleaded at paragraph 43(4)(b)(i) and (iii) above."

702. Again, I am not satisfied that this is correct. Mr Hunt accepted that the material which FCIB sent to him contained a letter dated 1 June 2006 from Mr Abrahamovitch to Ms Pinillos of TWPS complaining about the suspension of MTL's account because of third party payments. In this letter he stated that he was introduced to a supplier, MediaWatch 360 Ltd by a trader in Dubai and at their suggestion MTL paid their suppliers directly. He then continued:

> "I had absolutely no idea until the recent email from Compliance that third party payments contradicted your terms and conditions, and had I known I would, of course, found a different way of transacting the business. I now know that FCIB do not like these transactions, and that they are considered an indicator of a potential missing trader. I must point out that I did not know this at the time, but I do know that our supplier is not a missing trader and is, at the time of writing, still very much in business, and offering me stock daily. They have also told me that although they have no relationship with FCIB, they are happy for your representatives to visit them at their offices in Wembley London to discuss these transactions.
>
> With reference to EB000000859784: This is a commission payment to Network Trading in Dubai, the company that introduced us. There has been some confusion on my part as to whether this transaction will attract VAT in the UK, and my accountants are currently investigating the situation. It's my belief that it will not attract VAT and therefore it is very likely that the commission invoice that you have will be credited by Mediawatch360 Ltd, and I will hold an invoice with no VAT liability from

> Network Trading FZE for the transaction."

703. Mr Hunt did not refer to a site visit report which Ms Pinillos of TWPS completed on the same day and in which she stated: "Please note I was at the customer [sic] premises he did not know 3rd party payments were not allowed by the bank. He gave me all the paperwork regarding all 3rd party payments he has done – he is willing to stop straight away." She also rated MTL amber on the basis that MTL had made third party payments but the client had agreed to stop them. Mr Hunt did not suggest that this site visit report was not included in the material which FCIB provided to him on 17 May 2007 and the Claimants relied on it in both G14 and Cs, S9.

704. But even if the site visit report was not included in the account opening material, Mr Abrahamovitch referred to her visit in the first line of his letter and, in my judgment, Mr Hunt could have obtained this site visit report by writing to FCIB for a copy. If he had done so, then he would have had sufficient material to satisfy the statement of claim test in relation to MTL. Indeed, he had the documents on which he relied at trial in support of the Indirect Claim against TWPS and a clear example of a TWPS marketer trying to persuade FCIB to keep open the account of a T&C customer, which was part of a network and making third party payments. In my judgment, he could have advanced an allegation of fraud against TWPS whether or not he also chose to allege fraud against Mr Deuss. I find, therefore, that Mr Hunt could with reasonable diligence have discovered the fraud of TWPS before the Cut Off Date.

(vi) ACEL

705. On 25 July 2007 ACEL was wound upon the petition of HMRC and the Official Receiver was appointed as liquidator. The Claimants' case was that FCIB's account opening information would not have revealed TWPS's fraud:

> "ACEL was placed into liquidation on 25 July 2007 on the application of HMRC and the Official Receiver was appointed. The Official Receiver gave notice that the winding up was complete on 15 April 2008 at which date he would not have and could not with reasonable diligence have discovered TWPS' fraud. For example, a review by the Official Receiver of the KYC material collected by FCIB, had it been available to him, would have revealed only that TWPS had a role in the opening of ACEL's FCIB account."

706. It appeared to be common ground that TWPS did not provide a letter of good standing or a site visit report and I would have been prepared to find in favour of the Claimants on this issue but for one factor. The Claimants pleaded that three documents contained in FCIB account's opening information were an example of the allegation that Mr Deuss was aware that the TWPS marketers of TWPS "were not concerned with the contents of the documents that were needed in order to meet FCIB's onboarding requirements and that they did not subject them to any scrutiny to see if there was anything unusual that was revealed by such information": see paragraph 15.

707. I found against the Claimants in relation to this allegation and, in my judgment, this allegation demonstrates how artificial the case against Mr Deuss was. But if I am wrong in relation to that allegation, then in my judgment the Official Receiver could with reasonable diligence have obtained and analysed those three documents before the Cut Off Date and discovered that Mr Deuss and TWPS were turning a blind eye to ACEL's fraud. I am also satisfied that there was a trigger to request those documents and investigate that conduct. The Official Receiver was appointed by HMRC and on 4 December 2007 and 1 April 2009 interviewed Mr Shakil Ahmed under S.236. In his second interview he stated that he had given copies of all bank statements for ACEL's FCIB account to the Official Receiver.

(vii) MML

708. On 27 February 2008 MML was wound on the petition of HMRC and the Official Receiver was appointed as liquidator. The Claimants' case was that FCIB's account opening information would not have revealed TWPS's fraud:

> "MML was struck off for failing to file accounts on 29 May 2007 and dissolved on 5 June 2007. By an order dated 27 February 2008, on the petition of HMRC, MML was to be restored to the Register of Companies (which occurred on 26 July 2008) and compulsorily wound up. The Official Receiver was appointed as liquidator. He gave notice that the winding-up of MML was complete on 25 September 2008. The Official Receiver could not with reasonable diligence have discovered the fraud of TWPS by 22 September 2008, the date 6 years before TWPS went into liquidation on 22 September 2014. For example, a review by the Official Receiver of the KYC material collected by FCIB in October 2005, had it been available, would have revealed only that TWPS had a role in the opening of MML's FCIB account. Otherwise, the books and records of MML do not contain reference(s) to TWPS prior to 22 September 2008."

709. Again, I do not accept that this is accurate. On 27 October 2005 Mr Nixson certified the account opening documents provided by MML and provided a letter of good standing for MML and the Claimants recorded in Cs, S5 that he completed a site visit report. In my judgment, the Official Receiver could with reasonable diligence have obtained and analysed FCIB's account opening documents before the Cut Off Date. I am also satisfied that there was a trigger to request those documents and investigate that conduct. The Official Receiver was appointed by HMRC and on 4 April 2008 and 17 June 2008 respectively Mr Hussain and Mr Junaid were interviewed under S.236. Both mentioned MML's FCIB account. Indeed, Mr Junaid stated that all payments were made to suppliers by bank transfer from the FCIB account. I find, therefore, that the Official Receiver could with reasonable diligence have discovered the fraud of TWPS before the Cut Off Date.

(viii) ETP

710. On 16 April 2008 ETP was restored to the register and wound up on the petition of HMRC and the Official Receiver was appointed to be the liquidator. On 26 August 2008 Mr Defty was then appointed to be the liquidator of ETP. The Claimants case was as follows:

> "(vi) ETP was struck off under section 652(5) of the Companies Act 1985 on 2 October 2007 and dissolved on 9 October 2007. On 16 April 2008, on the application of HMRC, the court ordered that ETP be restored to the register (which occurred on 29 May 2008) and be compulsorily wound up. The Official Receiver was appointed as liquidator. The Official Receiver could not with reasonable diligence have discovered the fraud of TWPS by 22 September 2008, the date 6 years before TWPS went into liquidation on 22 September 2014. For example, a review by the Official Receiver of the KYC material collected by FCIB in June 2005, had it been available, would have revealed only that TWPS had a role in the opening of ETP's FCIB account. Otherwise, the books and records of ETP do not contain reference(s) to TWPS prior to 22 September 2008.
>
> (vii) Ian Defty was appointed as liquidator by the Secretary of State on 26 August 2008. He could not with reasonable diligence have discovered TWPS' fraud before 22 September 2008, the date 6 years before the liquidation of TWPS. Mr Defty's files for ETP do not contain any material obtained prior to 22 September 2008, including any material received from the Official Receiver, which is relevant to the matters pleaded at paragraph 43(4)(b) above."

711. On 21 July 2008 Mr Field was interviewed under S.236 and I have already set out the admissions which he made to the Official Receiver: see [204]. Mr Defty accepted that

when he was appointed he knew that ETP was thought to be involved in MTIC fraud and within two months Blake Lapthorn were writing to FCIB to request KYC information and bank statements. In my judgment, Mr Field's admissions were the trigger for the Claimants to obtain that material and the Official Receiver could with reasonable diligence have obtained and looked at that material before the Cut Off Date.

712. I have also held that TWPS assisted Mr Field to commit the relevant breaches of duty by introducing him to FCIB and in doing so I relied on the documents which showed that Mr Barrs certified copies of various documents giving his EPR number E76413 and that the checklist recorded that number against "Reference Letter". The Official Receiver would have had these documents available if FCIB had been asked to provide them promptly after the interview on 21 July 2008. Moreover, the obvious inference to draw from the checklist was that Mr Barrs had provided a reference for ETP even if that letter was not on the file. I find, therefore, that the Official Receiver could with reasonable diligence have discovered the fraud of TWPS before the Cut Off Date.

(ix) Leeds Smith

713. I dismissed both the Direct and the Indirect Claims for Leeds Smith on the basis that there was no evidence to support allegation that the receipts or payments relating to the relevant transactions passed through its FCIB account and that the findings in the FTT decision were not admissible. Given that there was no evidence to support either claim, I am not satisfied that the administrator or the liquidators could with reasonable diligence have discovered TWPS's fraud even assuming that my findings on dishonesty were wrong (and even though Mr Nixson provided a letter of good standing to support the application).

(x) 385 North

714. On 3 September 2008 385 North was wound up on the petition of HMRC and the Official Receiver appointed as liquidator. Given that there were less than three weeks between this date and the Cut Off Date, I am satisfied that the Official Receiver could not have discovered TWPS's fraud or dishonesty before that date with reasonable diligence. If there had been a longer time between the appointment of the Official Receiver and the Cut Off Date I would have reached a similar conclusion to the one which I reached in relation to ETP (above) and for similar reasons.

(7) The Uninvolved Directors

(i) Eliyon

715. Between 30 March 2006 and 1 January 2007 Ms Janine Breitenfeld was the sole director of Eliyon and in his statement to the Official Receiver dated 15 February 2011 Mr Gathani stated that she was his partner and kept the paperwork. Further, in 2013 Mr Hunt and Mr Bramston brought a claim for breach of fiduciary duty against her in in their capacity as liquidators of Eliyon alleging that she was complicit in the MTIC fraud carried out by Mr Gathani. The inference which I draw is that Ms Breitenfeld was the stooge or puppet of Mr Gathani and was either complicit in the relevant MTIC fraud or turned a blind eye to it. In those circumstances, I find that Eliyon could not have discovered TWPS's dishonesty with reasonable diligence during the seven months during which she was the sole director.

(ii) Gold Digit

716. Ms Samantha Jones was the wife of Mr Jones and on 29 February 2008 she was appointed to be a director of Gold Digit although Mr Nixson certified a copy of her passport as part of the account opening process. She is also described as a co-director in a VAT audit report dated 17 August 2004 although it described her as "non-active". There is no evidence to suggest that she had any involvement in the MTIC fraud of the company. But in my judgment, it is unrealistic to suggest that she should have discovered TWPS's fraud between 1 March 2008 and the Cut Off Date far less taken legal advice or any other action to establish the existence of a worthwhile claim which satisfied the statement of claim test. I, therefore, find that Gold Digit could not with reasonable diligence have discovered TWPS's fraud by the Cut Off Date.

(iii) JDG

717. Ms Joti Bhatia and Ms Suman Bhatia were the sister and mother of Mr Deepak Bhatia and directors of JDG at all material times until 30 June 2008 and 24 October 2008 respectively. In his statement to the Official Receiver dated 5 May 2015 Mr Bhatia admitted that Ms Joti Bhatia was an active director. By contrast, there are no documents which shed any light on the role of Ms Suman Bhatia. The Claimants specifically pleaded that Ms Breitenfeld and Ms Jones could not with reasonable diligence have discovered

TWPS's fraud. But for some reason they did not plead such a case in relation to the Bhatias. I could have held, therefore, that the Claimants failed to plead or prove their case on S.32 in relation to JDG.

718. On reflection, however, I find that JDG could not with reasonable diligence have discovered TWPS's fraud by the Cut Off Date. Mr Deepak Bhatia committed the relevant breaches of duty between 1 March 2006 and 31 May 2006 and I must take the company as I find it. As with Gold Digit, it is unrealistic in my judgment to suggest that family members should have discovered TWPS's fraud far less taken legal advice or any other action to establish the existence of a worthwhile claim which satisfied the statement of claim test. In reality none of the Uninvolved Directors were truly independent and none of them occupied an executive role.

IV. The TWPS Claims

(1) Mr Deuss

(i) Breach of fiduciary duty

719. The Claimants argued in their closing submissions that if Mr Deuss was a de facto or shadow director and was dishonest as alleged, then he was "liable for ensuing liability to the MTIC Companies": see Cs, C417. I understood them to accept, therefore, that the claim for breach of fiduciary duty depended on the findings of fact which I have already made. Given that I have found that Mr Deuss was not a de facto or shadow director and that he did not dishonestly assist the MTIC Directors to commit breaches of fiduciary duty or know that they were carrying on business with intent to defraud HMRC, I dismiss this claim.

(ii) S.213

720. The Claimants submitted that there could be "little argument" that TWPS was carrying on business for a fraudulent purpose: see Cs, C413 to C416. However, HMRC was not a creditor of either FCIB or TWPS and they did not identify any creditors (other than the MTIC Companies themselves) whom TWPS was said to have had the intention to defraud. I have also dismissed the pleaded allegations that Mr Deuss deliberately set up and used FCIB and TWPS for a fraudulent purpose: see [49], [498] and [561]. The

Claimants did not plead or attempt to rely on other fraudulent purpose. But in any event, I have found that TWPS was not a knowing participant in the MTIC fraud of the MTIC Companies based on Mr Deuss's state of mind and his state of knowledge and I find that he himself was not a knowing participant in TWPS carrying on business with intent to defraud creditors for the same reasons. I, therefore, dismiss this claim.

(2) FCIB

721. The Claimants accepted that the question whether FCIB was liable under S.213 was identical to the question whether Mr Deuss was liable under S.213 and, again, the Claimants were relying on the Court to attribute his state of mind to both TWPS and FCIB. I, therefore, dismiss this claim too.

V. The Curaçao Judgment

(1) The Defendants' Case

722. I have dismissed all of the Direct, Indirect and TWPS claims on the merits and it is strictly unnecessary, therefore, for me to consider the Defendant's contention that the Claimant were bound by an issue estoppel. However, because it was fully argued, I express my views on this issue as briefly as possible. FCIB pleaded its case in its Defence at paragraph 98A (and Mr Deuss pleaded a similar case):

> "On 29 July 2024, the Court of First Instance of Curaçao handed down a judgment in proceedings in Curaçao, to which the Claimants in these proceedings are party. In that judgment, the Court of First Instance of Curaçao finally and conclusively determined on the merits that the Claimants have forfeited their right to assert claims against FCIB, by virtue of the *rechtsverwerking* principle. In the premises, the Claimants are unable to pursue their claims in these proceedings by virtue of the doctrine of issue estoppel."

(2) The Law

723. It was common ground that four conditions must be satisfied before a foreign judgment could give rise to an issue estoppel and that they are accurately set out in *The Good Challenger* [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep 67 and cited in *Hulley Enterprises Ltd v The Russian Federation* [2025] EWCA Civ 108. In that case Males LJ referred to *The Good Challenger* and set out the principles at [36] to [38] and [41] to

[42]:

"36. The requirements for an issue estoppel to apply were summarised by Lord Justice Clarke in *The Good Challenger* [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep 67:

> '50. The authorities show that in order to establish an issue estoppel four conditions must be satisfied, namely (1) that the judgment must be given by a foreign court of competent jurisdiction; (2) that the judgment must be final and conclusive and on the merits; (3) that there must be identity of parties; and (4) that there must be identity of subject matter, which means that the issue decided by the foreign court must be the same as that arising in the English proceedings: see, in particular *Carl Zeiss Stiftung v Rayner C Keeler Ltd (No 2)* [1967] 1 AC 853 ("the *Carl Zeiss*" case), *The Sennar (No 2)* [1985] 1 WLR 490, especially per Lord Brandon at p 499, and *Desert Sun Loan Corporation v Hill* [1996] 2 All ER 847.'

37. Lord Justice Clarke continued, with particular reference to the position where, as in that case and in the present case, the issue estoppel is said to arise from the decision of a foreign court:

> '54. The authorities establish that there must be "a full contestation and a clear decision" on the issue in question. That is made clear in the speech of Lord Wilberforce in the *Carl Zeiss* case and (as the judge observed in paragraph 36) was echoed by Lord Brandon in *The Sennar (No 2)*. The cases also underline four further important features of the approach of the courts to issue estoppel, which I will consider in turn. They are as follows:
>
> i) It is irrelevant that the English court may form the view that the decision of the foreign court was wrong either on the facts or as a matter of English law.
>
> ii) The courts must be cautious before concluding that the foreign court made a clear decision on the relevant issue because the procedures of the court may be different and it may not be easy to determine the precise identity of the issues being determined.
>
> iii) The decision of the court must be necessary for its decision.
>
> iv) The application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice.'

38. Although Lord Justice Clarke said that it was irrelevant that the English court may form the view that the decision of the foreign court was wrong, it is worth pointing out that the result of giving effect to an issue estoppel may be that the English court will never reach the stage of deciding what it would have decided on the issue in question in the absence of the foreign court's decision. Issue estoppel, when it applies, renders this legally irrelevant. That will be the position in the present case if the plea of issue estoppel is upheld. One reason for ordering a preliminary issue in this case was that, if issue estoppel does apply, the delay and expense of a lengthy

> hearing to decide the no agreement issue will be avoided."
>
> 41. A qualification must be added to the conditions identified in *The Good Challenger*, which is that issue estoppel will not apply if 'special circumstances' are established (*Arnold v National Westminster Bank Plc* [1991] AC 93), although this may be simply another way of saying that issue estoppel must work justice and not injustice, a point also made by Lord Upjohn in the *Carl Zeiss* case at p.947:
>
> > 'As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reason have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation and see Lord Maugham's observations in the *New Brunswick case [New Brunswick Railway Co v British and French Trust Corporation Ltd* [1939] AC 1, 21]. All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.'
>
> 42. As Mr Justice Foxton observed in *Czech Republic v Diag Human SE* [2024] EWHC 2102 (Comm) at [224], this exception has generally been invoked when new evidence not discoverable by due diligence becomes available, but is not limited to such circumstances. Indeed, *Arnold* was not such a case."

724. There was an issue between the parties whether a foreign judgment which is subject to an appeal is final and conclusive for the purposes of issue estoppel. Mr Parker and his team accepted that an English judgment would be treated as final and conclusive until overturned on appeal. But they did not accept that a foreign judgment which was subject to appeal would also be treated as final and conclusive in the same way or, at least, not automatically. Mr Scott and his team submitted that a foreign judgment is just like an English judgment and binding until set aside on appeal.

725. There is surprisingly little recent authority on this point. In *Nouvion v Freeman* (1885) 15 App Cas 1 all of the members of House of Lords agreed that the decision of a Spanish Court on a claim under a form of summary enforcement procedure was not binding and conclusive because it could be challenged in a court of equivalent jurisdiction. However, Lord Herschell LC and other members of the panel all expressed the general principle in terms that a decision which is binding subject only to an appeal would be treated as conclusive and binding by an English Court. He stated this at 11:

> "The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where

> according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal."

726. The various formulations of the principle in *Nouvion v Freeman* were *obiter dicta* but in *Colt Industries Inc. v Salie (No. 2)* [1966] 1 WLR 1287 the Court of Appeal followed it and held that a decision of the Supreme Court of the State of New York was binding even though an appeal was pending. I regard that decision as binding authority on this issue. However, I note that Russell LJ also stated as follows at 1287:

> "If there were a stay on the New York judgment it would not be possible, while that stay persisted, to sue on that judgment in this country, because present enforceability is relevant to the question of the finality and conclusiveness of a foreign judgment; but on the question whether a judgment lacks finality or conclusiveness for lack of enforceability, regard can only be had to the system of law applied by the court whose foreign judgment is in question, and not to other systems of law."

727. Finally, both parties referred to *The Sennar (No 2)* [1985] 1 WLR 490 where Lord Diplock stated the principle in the same terms as the House of Lords in *Nouvion v Freeman* even though it was not in issue in that case because an appeal had already been determined by the Dutch Court. He stated this at 494A-B:

> "It is often said that the final judgment of the foreign court must be "on the merits." The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction."

(3) The Curaçao Judgment

728. FCIB issued two sets of proceedings in the Curaçao Court of First Instance. In the first action Defendants 1 to 4 were Mr Hunt, Mr Bramston, Ms Hall and TWPS, Defendant 25 was Star and Defendants 7 and 69 to 85 were companies in liquidation of which Mr Hunt, Mr Bramston and Ms Hall were the liquidators including ten MTIC Companies (385 North, ACEL, Kingswood, MML, MTL, Northdata, Eliyon, Gold Digit, Xicom and

Wood Works). In the second action FCIB brought a separate claim against Mr Hunt alone and in his capacity as the liquidator of TWPS.

729. In the Curaçao Judgment the Judge began by setting out a number of definitions. They included the term the "**English Claimants**" by which he referred to Defendants 7 and 69 to 85 in the first action. In section 1 he set out the procedural history and in section 2 he set out the facts primarily focussing on the negotiations between the IPs and FCIB. In section 3 he set out the claims incorporating certain amendments which had been made (and which I reproduce below):

> "3.2. In the actions with numbers CUR201601573 and CUR201601574 (through which latter proceedings the failure to also involve Hunt in his capacity as liquidator of defendant number 4 TWPS in the first proceedings was rectified), FCIB, by provisionally enforceable judgment, still claims as follows:
>
> I. ~~principally~~ (i) to rule that, under the so-called TWPS claim, to the extent based on an unlawful act with regard to facilitating or assisting in the MTIC fraud, nothing is owed by FCIB to TWPS, nor to Hunt as liquidator of TWPS, to the extent that this claim does not relate to the claim pursuant to section 213 Insolvency Act (in respect of which the court does not have jurisdiction) and
>
> (ii) to order TWPS and Hunt as liquidator of TWPS to confirm in writing to FCIB, within two days from the date of the judgment, that the letter referred to above in 2. r. above, to the extent based on an unlawful act, has been revoked and that they have no claim whatsoever against FCIB and/or "FCIB entities", to the extent based on an unlawful act, subject to a periodic penalty payment;
>
> ~~in the alternative to order the English Claimants, as well as Hunt, Brampton and Hall, both in their capacities as such and in person, to indemnify FCIB and hold that party harmless from and against the TWPS claim for any amount that FCIB may turn out to owe to TWPS;~~
>
> II. to rule a) that the English Claimants, as well as Hunt, Bramston and Hall, ~~both~~ in their capacities as such ~~and in person~~, have been in breach of their obligations towards FCIB ~~and/or have acted unlawfully towards FCIB,~~ and b) that they and Hunt, Bramston and Hall in person have acted unlawfully towards FCIB;
>
> III. to order the defendants to comply with the settlement agreements and to refrain from any conduct towards FCIB and "FCIB entities" in breach of the provisions of article SECOND (1) of those agreements, subject to a periodic penalty payment."

730. I will refer to the three claims above as "**Claim I**", "**Claim II**" and "**Claim III**". In section 4 the Judge set out his assessment of all three. In relation to Claim I he set out FCIB's

interest in obtaining a negative declaration that it owed nothing to TWPS in relation to the "so-called TWPS claim". He then set out the basis of that claim:

> "4.2. According to FCIB, the liquidators, TWPS and the English Claimants have nothing to claim from it, both on substantive grounds and because they are bound by the settlement agreements, or in any case have forfeited their rights, if any, in the matter of the TWPS claim.
>
> 4.3. FCIB argues in this regard, in summary, that the purpose of the settlement agreements, as also follows from the preceding correspondence with the liquidators and with the UK tax authorities HMRC, was that `total peace' would be achieved and that the entire dispute between FCIB, its account holders, the liquidators and HMRC would be permanently resolved. This concerned not only the account holders` balances, but also their liquidators' complaint against FCIB that FCIB had facilitated the MTIC fraud committed by the account holders, HMRC's claims, and FCIB's allegation that, by taking part in the fraud, the account holders had caused harm to FCIB. According to FCIB, the MTIC fraud had, in the view of HMRC, been settled as far as FCIB was concerned, through the settlement agreements and the payments received by HMRC as a result from these, meaning that HMRC no longer asserts any claims against FCIB or its account holders. According to FCIB, the liquidators had by means of a trick, prior to the settlement agreements, while not disclosing this to FCIB, revived FCIB's sister company TWPS, which had been liquidated years earlier, and, as liquidators of the English Claimants (who had no or hardly any balances with FCIB and whom they failed to name as account holders on whose behalf the settlement agreements were entered into) had constructed claims against TWPS in respect of HMRC debts on account of the involvement of TWPS in facilitating the MTIC fraud, which claims were subsequently indiscriminately accepted by Hunt as liquidator of TWPS and presented to FCIB by him (up to an amount of approximately GBP 182.5 or GBP 415 million), all this while, according to FCIB, HMRC no longer has any interest in the case and considers it closed as a result of the settlement agreements, including in respect of the English Claimants.
>
> 4.4. According to FCIB, all that the liquidators are now still out for is their own gain only, pointing out that - as has not been disputed by the defendants and, according to them, is nothing special in the English system - the liquidators receive 50% of what TWPS collects from FCIB by way of `remuneration', and subsequently another 50% of what the English Claimants receive from TWPS."

731. The Judge then made it clear that he was not expressing a view on the merits of the TWPS claim: see paragraph 4.5. He went on next to rule in FCIB's favour in relation to forfeiture of rights. Because his reasons were fairly short I set them out in full:

> "4.6. The court agrees with FCIB that rights have been forfeited and that the liquidators cannot, after the conclusion of the settlement agreements,

approach FCIB after all and present it with a claim from the revived TWPS in respect of claims by the English Claimants.

4.7. The reason for this is that it should have been evident to the liquidators and the other parties involved in the settlement agreements, as also appears from the correspondence, that the intention of those agreements was for a final resolution to be reached to the dispute and the emergency measure that had been dragging on for many years. The purpose of the settlement agreements was clear to all those concerned: after (at least) 10 years since the discovery of the MTIC fraud and eight years since the imposition of the emergency measure in respect of FCIB under the supervision of the Central Bank, a final settlement had to be reached. This is reflected in so many words in the waiver provision SECOND (1) of the settlement agreements. The words 'total peace' do not appear therein, but they do appear in the correspondence preceding it, and it was clear— it had to be clear – to all parties that 'total peace' was the objective. In line with this, it must have been clear to all the parties that the 'deal' was concluded on the assumption that everything known to the parties and interested parties at that time would be covered thereby. This is not consistent with the fact that the liquidators, who were also liquidators of TWPS and the English Claimants at the time, came up afterwards with alleged claims on behalf of TWPS and account holders not mentioned in the annexes to the settlement agreements. Account holders who, please note, had no significant balances, and, therefore, were not likely to have any relevance in terms of the envisaged amount of the settlement.

4.8. The liquidators did not mention and involve the English Claimants in the settlement agreements, nor did they notify FCIB that they had revived TWPS. Meanwhile, however, in their capacity as liquidators of the English Claimants and TWPS, they did take note of the negotiations that they themselves, in their capacity as liquidators of the Settlement Companies, were conducting with FCIB. The liquidators negotiated with FCIB/the Central Bank in their capacity as liquidators of the Settlement Companies, but at the same time, in that same capacity, also acted in their capacity as liquidators of the English Claimants/TWPS. As such, (in part in their capacity as liquidators of the English Claimants) they also learned of the aim envisaged by FCIB (and by the Central Bank's) of bringing about 'total peace' between FCIB, its account holders and HMRC, which 'peace' would also benefit all FCIB-affiliated entities (such as TWPS, see below). The liquidators, TWPS and the English Claimants saw all this happening, so to speak, and allowed FCIB to believe that a final settlement was reached, only to subsequently present their TWPS claim, after the settlement amount had been paid. Even if, contrary to FCIB's contention, there was no preconceived plan and this was not done in bad faith, the liquidators, in their capacity as liquidators of the English Claimants, must nevertheless have realised that the negotiations would have looked very different if the claims of hundreds of millions alleged by the English Claimants/TWPS had been involved in those negotiations and that, in that case, these claims would have been expressly included in any settlement.

4.9. By failing to disclose their capacity as liquidators of the English Claimants/TWPS in the negotiations and when entering into the settlement

> agreements, they have, in view of, in particular, the circumstances outlined in the two preceding paragraphs, forfeited their right to nevertheless hold FCIB liable for wrongful conduct in the matter of facilitating, or assisting in, the MTIC fraud. Holding FCIB liable for the TWPS claim, as happened with the letter quoted under 2.r. above, is unacceptable by the standards of reasonableness and fairness as referred to in article 2 of Book 6 of the Curacao Civil Code, due to its being incompatible with their attitude during the negotiations and when concluding the settlement agreements. FCIB was entitled to be confident that the liquidators would not afterwards come forward with claims in their previously undisclosed capacity. Moreover, FCIB is unreasonably disadvantaged by this. It was entitled to consider the dispute with HMRC and its account holders in connection with the MTIC fraud as settled after the execution of the settlement agreements. A further claim relating to the same dispute defeats the completion envisaged by the settlement agreements and hinders the winding down of the emergency measure.
>
> 4.10. The foregoing entails that the declaratory decision claimed by FCIB under (i) is admissible."

732. Claim II is the only other claim which is relevant for present purposes and, in particular, Claim II(a) which involved the argument that the English Claimants were parties to the IPSAs. The Judge rejected this argument for the following reasons:

> "4.14. The court does not concur with FCIB in its view that the English Claimants should be deemed to be parties to the settlement agreements. The English Claimants are not named as parties to those agreements and the agreements were not co-signed on their behalf. Nor were these English Claimants named as parties, or intended parties, in the preliminary stage. There is no provision in the agreements that these are also entered into on behalf of all other, unidentified, account holders whose liquidators were the liquidators. The fact that FCIB assumed that the liquidators had listed all their companies is not, in the court's view, sufficient to consider the unlisted companies as contracting parties as well.
>
> 4.15. Therefore, the English Claimants were under no obligation to perform the settlement agreements, which implies that it cannot be ruled that they have failed in the performance of these. However, all this does not affect the possibility, as also held above in respect of TWPS, that the settlement agreements and the acts and omissions of the English Claimants and their liquidators preclude claims by the English Claimants against FCIB."

733. Having dealt with Claim II(b) and III (which are not relevant for present purposes) the Judge then set out his decision in both sets of proceedings in section 5. I have set out his ruling at [40] but for ease of reference I repeat it here:

> "The Court 5.1. rules that nothing is owed by FCIB to either TWPS or

> Hunt as liquidator of TWPS by virtue of the so-called TWPS claim, insofar as it is based on an unlawful act in respect of facilitating or assisting in the MTIC fraud, to the extent that this claim does not relate to the claim under section 213 Insolvency Act - in respect of which the court does not have jurisdiction…5.3. dismisses all other applications; 5.4. sets off the costs between the parties in such a way that each party will pay its own costs."

(4) Expert evidence

734. The Claimants called Mr Bart van der Weiel, who is a partner at Houthoff and head of the Supreme Court Litigation team, and was a Deputy Judge of the Arnhem Court of Appeal between 2011 and 2021. He made an expert report on 15 October 2024 (" **van der Weiel 1**") and on 14 February 2025 added an addendum to it ("**van der Weiel 2**"). FCIB called Professor Jan Biemans, Professor of Law at Utrecht University and a substitute Justice at the Court of Appeal of Arnhem-Leeuwarden. Professor Biemans made an expert report dated 16 October 2024 ("**Biemans 1**") and a second expert report dated 13 February 2025 ("**Biemans 2**"). Mr Deuss called Professor Riemert Tjittes, a partner in the law firm BarentsKrans Coöperatief UA and a deputy Justice of the Netherlands Commercial Court. He made an expert report dated 16 October 2024 ("**Tjittes 1**").

735. Mr van der Weiel and Professor Biemans dealt with the question whether the Curaçao Judgment was final and conclusive in their second reports. There was an issue between them about the doctrine of *res judicata* and whether a judgment was binding. Professor Biemans stated as follows in Biemans 2:

> "17. Before I deal with res judicata and the general principles of civil procedure, I would like to stress that under Curaçao law, while a judgment decided at first instance which is the subject of an appeal does not carry res judicata effect, it nonetheless qualifies as a final judgment at first instance where the entire claim is the subject of the proceedings decided upon by the Curaçao court and the proceedings in first instance have come to a final end.
>
> 18. A judgment in which a court (either the Curaçao First Court of Instance or the Joint Court of Appeal) terminates the proceedings with regard to any part of the claim by an explicit operative part, qualifies as a final judgment *(eindbeslissing*). Because of such final judgment, the proceedings in that instance (either first instance or appeal) come to a final end. No additional procedures are necessary, and in principle the court cannot alter its reasoning and decision(s) in that judgment anymore (except for third party opposition and revocation).

> 19. Although the term 'conclusive' does not have a distinct or independent legal meaning under Curaçao law, given that a final judgment is a judgment that represents a final determination of all the matters raised during the proceedings in that instance and determines the rights and obligations of the parties to these proceedings, on these grounds a final judgment can also be considered to be a conclusive judgment.
>
> 20. Whereas a final judgment does not have to be irreversible, in the sense that the parties cannot affect it anymore by taking recourse to a legal remedy through the appeals process (as explained below with respect to res judicata), such judgment is still final and conclusive in the sense that it is not subject to additional proceedings before the same court that rendered the judgment. It should be noted that a final judgment of the Curaçao Court of First Instance consisting of a negative declaration, for example that one party owes nothing to the other party (as is the case in the Curaçao proceedings), and which has been appealed (as is also the case as between FCIB, Mr Hunt and TWPS), will remain in force during the appeal, and this would only change if (and only if) the Joint Court of Appeal would set aside such final judgment on appeal. The appeal does in particular not suspend the decision with the negative declaration in the operative part of the final judgment (as it would, if it would have been a condemnatory order). Also, should the final judgment be set aside on appeal, the final judgment will always have been in force between the parties from the date of the final judgment of the Curaçao Court of First Instance until the date of the judgment of the Joint Court of Appeal in which it would have been set aside."

736. Mr Scott cross-examined Mr van der Weiel at length about this passage and subject to some differences in terminology he accepted it. In particular, he accepted that the decision of the Court of First Instance had legal force as soon as it was handed down in the sense that it concluded the proceedings at that level and that it could only be challenged on appeal. He also accepted that although in theory it was permissible to re-litigate the same issue by starting new proceedings, it would be an abuse of process and he had never seen it done in 20 years of practice.

(5) Findings

(i) Court of competent jurisdiction

737. I find that the Court of First Instance was a court of competent jurisdiction. The Claimants submitted to the jurisdiction of the Curaçao court and they have appealed against the decision. Mr Parker and his team did not argue that it was not competent to hear the dispute. But in case there is any doubt, I am satisfied that it was.

(ii) Final and conclusive

738. I accept Professor Bieman's evidence that the Curaçao Judgment was final and conclusive subject to the appeal and cross-appeal. Mr van der Weiel did not really disagree with Biemans 2, paragraphs 17 to 20 (above) other than in very minor respects and it became clear that the only issue between them was whether the decision prevented the Claimants from bringing a new action to re-litigate the same issues as a matter of substantive law or whether it would be struck out as an abuse of process. Either way, I am satisfied that the decision is final and conclusive.

(iii) Identity of parties

739. I find that there was identity between the parties to the Curaçao Judgment and the parties to the present action. TWPS and Mr Hunt and were parties to both actions in Curaçao and Mr Hunt was a party in his capacity as liquidator of TWPS (and in his capacity as liquidator of a number of other companies). TWPS and Mr Hunt in his capacity as liquidator of TWPS are the Claimants in the present action.

(iv) Identity of subject matter

740. However, I am not satisfied that there is an identity of subject matter or a sufficient identity of subject matter to give rise to an issue estoppel. I have reached that conclusion for the following reasons:

(1) In the Letter of Claim Mr Hunt threatened to bring proceedings under S.213 against FCIB. Before the Court of First Instance it was common ground that the Court did not have jurisdiction to grant any relief in relation to that claim. The Curaçao Judgment was, therefore, limited to the "so-called TWPS claim, to the extent based on an unlawful act with regard to facilitating or assisting in the MTIC fraud": see Claim I (i) (above).

(2) Mr Scott argued that this extended to all of the claims which TWPS had brought in these proceedings because they were all essentially based on assisting or facilitating the MTIC Companies to commit MTIC fraud. I reject that submission. I can see no reason why the Curaçao Judgment prevented Mr Hunt or TWPS from advancing their factual case against FCIB and Mr Deuss under S.213 whether or not the fact

pattern upon which they relied in support of those claims was identical to the fact pattern upon which they relied in support of the dishonest assistance claim against Mr Deuss.

(3) But in any event, the only way in which I have found it possible to decide both the Direct Claims of the MTIC Companies is on an individual basis. Although there are a number of similarities between them and they had been assigned to the Claimants, they were always separate claims and the Claimants had to plead and prove each element of each one against FCIB or TWPS. The Judge's negative declaration in relation to Claim I(i) extended to the English Claimants only and, therefore, only ten of the MTIC Companies. Star and the remaining eight MTIC Companies were not the subject matter of that declaration and I see no reason why the Curaçao Judgment prevented Mr Hunt or TWPS the Claimants from pursuing the Direct Claims of those MTIC Companies against FCIB.

(4) Finally, I bear in mind Clarke LJ's direction to exercise caution in relation to this issue in *The Good Challenger* and repeated by Males LJ in *Hulley Enterprises Ltd v The Russian Federation*. It is not easy to discern exactly what rights the Judge considered Mr Hunt or TWPS to have forfeited in relation to Claim I(i). What he appears to have had in mind was a claim for dishonest assistance brought by TWPS against FCIB although he later referred to claims brought by both TWPS and the English Claimants: see paragraph 4.9. But in the present action, the only equitable claim which TWPS pursued was against Mr Deuss personally. It was the MTIC Companies who pursued the Direct Claims for dishonest assistance against FCIB.

(6) Special Circumstances

741. Finally, whatever the correct analysis, I am satisfied that there are special circumstances in the present case which make it inappropriate to give effect to an issue estoppel and I decline to do so. In my judgment, the following factors or circumstances bring the present case within the exception:

(1) Although *Colt Industries Inc. v Salie (No. 2)* is binding on me, both that decision and *Nouvion v Freeman* involved the enforcement of debts. It was important, therefore, for an English Court to enforce the foreign judgment whether or not it was subject to appeal. The Curaçao Judgment involved a negative declaration and

the principal purpose of obtaining such a declaration was to prevent the litigation of the same issues by an English Court. But the Curaçao Judgment has not prevented that litigation taking place.

(2) The obvious way to deploy the Curaçao Judgment was to apply to strike out TWPS's claims or to apply for a preliminary issue. I did not explore why this course was not taken although I note that the Curaçao Judgment was only handed down on 29 July 2024 and well after the trial of this action was fixed. But the fact that the Defendants took the issue estoppel at trial presented both the Court and the parties themselves with a problem. If the Court decided that the Claimants were bound by an issue estoppel and the Claimants succeeded on appeal, it would have been necessary to retry the whole case.

(3) The parties took the sensible course and invited me to decide all of the issues. Indeed, it was clear from Mr Thanki's remarks in closing that Mr Deuss positively wished me to decide the dishonesty question to clear his reputation as much as for any other reason. Having invited the Court to do so – and the Court having accepted that invitation – I decline to decide this action by reference to an issue estoppel. I have not found in the Claimants favour on the substantive issues but it would have been "odious" for me to decide in favour of the Defendants if I had found against them on the question of dishonesty.

VI. The IPSAs

M. The Terms

742. On 6 February 2015 FCIB and the IPs entered into eight separate IPSAs. The first agreement (the "**Hunt IPSA**") was made between FCIB (1) and Mr Hunt (2) solely in his capacity as liquidator of the companies set out in Exhibit A which were defined as "**Griffins Companies**". The recitals to the Hunt IPSA recited the cross-claims between FCIB and three categories of clients and between the Griffins Companies. The clients in Categories #1 and #2 were those with account balances at FCIB and the clients at Category #3 were those against whom the Griffins Companies were creditors.

743. The First operative section of the IPSA recorded that FCIB had agreed to pay and Mr Hunt to accept single payments of £758,722.46 and €205,197.94 (the "**Single**

Payments") in respect of the Category #1 and Category #2 clients together with 82.5% and 80% of their account balances respectively (subject to certain deductions). It also provided a mechanism for Mr Hunt to claim the account balances of Category #3 clients by bringing claims against them. In clause (5) of the First section Mr Hunt and the Griffins Companies warranted and represented "the correctness of Exhibit A" as set out below. The Second section then provided as follows:

> "**FIRST**
>
> …(5) The Liquidator and the relevant Griffins Company represent and warrant the correctness of Exhibit A and, save for the account balances, Exhibits B and C."
>
> "**SECOND**
>
> (1) Except for the enforcement of the IP Settlement Agreements, the Liquidator and the Griffins Companies (together the "Griffins Entities") "unconditionally and completely release, remise and forever discharge, and covenant not to sue, any of FCIB, CBCS, the Curators and any person responsible for or involved in the management of FCIB after 6 October 2006, and any corporation or other person or entity controlling, controlled by or under common control with any of them, and each of their respective present and former officers, directors, employees, agents, their heirs, executors, administrators, predecessors, successors and assigns (collectively the "FCIB Entities") of and from any and all claims, demands, obligations, actions, causes of action, suits, controversies, proceedings and liabilities of any nature whatsoever which have been asserted or could have been asserted, including but not limited to those in connection with (a) the Account; and (b) any account applications, account activity, account statement and any other agreement, document or instrument at any time signed by or agreed to by any of the FCIB Entities, the Clients or the Griffins Entities; and (c) any and all transactions at any time executed by any of the FCIB Entities for the Clients or the Griffins Companies; and (d) the remaining balance in any and all Accounts of the Clients or the Griffins Companies.
>
> (2) Except for the enforcement of this IP Settlement Agreement, FCIB unconditionally and completely releases, remises and forever discharges, and covenants not to sue, the Griffins Companies in respect of which a Settlement Payment is made hereunder, and the Liquidator (together the "Griffins Entities") of and from any and all claims, demands, obligations, actions, causes of action, suits, controversies, proceedings and liabilities of any nature whatsoever which have been asserted or could have been asserted, including but not limited to those in connection with (a) one or more Accounts of the Clients; and (b) any account applications, account activity, account statement and any other agreement, document or instrument at any time signed by or agreed to by any of the Clients, the Griffins Entities or FCIB."

744. In the Eighth section the parties agreed that the Hunt IPSA expressed their complete understanding and superseded any prior proposals, agreements, representations and understandings. It also provided that no variation would be effective unless in writing and signed by or on behalf of the parties. The parties also agreed in the Ninth section that it was subject to Curaçao law and they agreed to submit to the jurisdiction of the Curaçao Court. Exhibit A contained the list of 22 companies of which Mr Hunt was the sole liquidator (including Star but none of the other MTIC Companies). Exhibit B contained two tables which identified a series of FCIB accounts for Category #1 and Category #2 clients, the account name, the account balance, the amount to be paid by FCIB under the IPSA and the identity of the claimant. Exhibit C contained a similar table for Category #3 clients.

745. FCIB entered into a further seven IPSAs with (2) Mr Bramston on behalf of Griffins Companies, (3) Ms Hall on behalf of "Kingston Smith Companies", (4) Ms Hall and Mr Jamie Taylor on behalf of "KS/BT Companies", (5) Ms Hall and Mr David Ingram on behalf of "KS/GT Companies", (6) Mr Hunt and Mr Hellard on behalf of "Griffins/GT Companies", (7) Mr Bramston and Mr Hunt on behalf of other Griffins Companies of which they were the joint liquidators and (8) Mr Hunt and Mr Hellard on behalf of Owl Import and Export Ltd. All eight contained the same terms in the Second, Eighth and Ninth sections. Where I refer to these sections I intend to refer to the sections in each IPSA unless I state otherwise.

N. Forfeiture of rights

(1) The Statements of Case

(i) FCIB's case

746. FCIB's case was that the purpose of the IPSAs "was to put an end to all (purported) claims by or against FCIB so that it could be wound down and so that HMRC, through the Insolvency Practitioners, would receive payment of (part of) the taxes alleged to have been evaded by the account-holders through the MTIC fraud" see FCIB's Defence, paragraph 100. After pleading the eight IPSAs FCIB's Defence continued as follows:

> "102.1 FCIB made clear to the Insolvency Practitioners that FCIB was seeking a settlement which would release totally, amongst others, FCIB from any future claims from the Insolvency Practitioners in their capacity

> as liquidators of FCIB's account-holders and/or of companies who had claims against FCIB account-holders, and thereby achieve total peace.
>
> 102.2. FCIB understood that it was entering into a full, final, and global settlement with all entities which the Insolvency Practitioners were able to represent. FCIB held that understanding in particular because the Insolvency Practitioners held themselves out to FCIB as acting on behalf of all account-holders at FCIB for whom they had been appointed in that capacity and thereby represented that they had authority from them to negotiate and enter into the IP Settlement Agreements on their behalf.
>
> 102.3. The Insolvency Practitioners were aware that this was FCIB's understanding and did not suggest to FCIB that it was wrong.
>
> 103. On the basis of such understanding, induced by such representation, and to achieve the purpose referred to at paragraph 100, FCIB entered into the IP Settlement Agreements.
>
> 103.1. Pursuant to section SECOND (1) of the IP Settlement Agreements, the parties agreed to: [see section N above].
>
> 103.2. Pursuant to section NINTH of the IP Settlement Agreements, the parties agreed that the IP Settlement Agreements would be governed by Curaçao law and that the parties would submit to the jurisdiction of the Curaçao Court.
>
> 103.3. Pursuant to section FIRST (5) of the IP Settlement Agreements, the Insolvency Practitioners warranted to FCIB that they had included all parties for whom they were acting in the lists attached to the IP Settlement Agreements (see section FIRST (5) IP Settlement Agreements)."

747. FCIB then pleaded the Ninth section of the IPSAs and that the effect of the new claims made by TWPS and the MTIC Companies was to frustrate the wind down of FCIB because the IPs insisted that there would be no distribution of FCIB's assets until TWPS's claims had been resolved. FCIB's Defence then continued (amendments omitted):

> "106. TWPS and the MTIC Companies (except for (1) @tomic, (2) Comveen, and (3) Notebook) knew through their agents, namely their respective liquidators, of the negotiations taking place between FCIB and the Insolvency Practitioners culminating in the IP Settlement Agreements and of FCIB's desire for total peace in those negotiations in line with the purpose and understanding pleaded at paragraphs 99 and 102 above.
>
> 107. TWPS and the MTIC Companies (except for (1) @tomic, (2) Comveen, and (3) Notebook) nonetheless failed to inform FCIB (including through their agents, namely their appointed liquidators, who were involved in the negotiations and conclusion of the IP Settlement Agreements) that they had, asserted, or intended to assert, claims against FCIB.
>
> 108. This gave rise to a legitimate expectation on the part of FCIB that TWPS and the MTIC Companies would not assert any claims against

> FCIB. In addition, the failure of these MTIC Companies to inform FCIB that they asserted, or intended to assert, claims against FCIB caused detriment because, had TWPS and these MTIC Companies informed FCIB, that would have affected the terms of the IP Settlement Agreements and the negotiations taking place. As a result of the failure of these MTIC Companies, the opportunity to affect the terms of the IP Settlement Agreements and the negotiations was lost."

(ii) The Claimants' case

748. Mr Deuss's case was pleaded in very similar terms to FCIB's case and in the Reply the Claimants replied to both of their cases together. The Claimants pleaded to the factual allegations made by the Defendants as follows:

> "55.1. It is admitted that during the negotiations for the IP Settlement Agreements (of which no particulars whatsoever are pleaded by the Defendants), representatives of FCIB at certain points in the negotiations made reference to, and sought to negotiate, a final global settlement with all parties that Mr Hunt did and could possibly represent that would result in total peace. However, FCIB did not respond to Mr Hunt's queries as to how such a settlement might be achieved and at no time made any offer to such companies (other than those which were seeking payment of their account balances) such that the negotiations that ultimately led to the IP Settlement Agreements, were conducted by Mr Hunt only on behalf of companies over which he was appointed which had significant bank balances with FCIB.
>
> 55.2. It is denied that the IP Settlement Agreements were ultimately concluded on the basis of total peace with all the companies which Mr Hunt did and could possibly represent rather than a total peace with all companies that Mr Hunt represented that had a significant bank balance with FCIB. FCIB ultimately did not pursue settlement agreements based on the meaning of "total peace" as expressed at the meeting in Curacao but sought instead and (for a lower sum than a settlement agreement for "total peace" would have required) agreed to pay certain sums in respect of claims for account balances only with companies which were bringing such claims. In particular in this regard:
>
> 55.2.1. The recitals in the IP Settlement Agreements record the categories of company which are affected by the agreement, described as categories 1, 2 and 3, of which categories are limited to and explicitly defined as companies with balance claims;
>
> 55.2.2. The schedules, which are warranted as accurate, set out the people and entities to be bound by the IP Settlement Agreements;
>
> 55.2.3. In the IP Settlement Agreements, the relevant insolvency practitioner is stated as acting solely in his or her capacity as a liquidator of the named companies;
>
> 55.2.4. Pursuant to the terms of the IP Settlement Agreements, specifically

> clause 'Second (2)', FCIB only waived its claims against companies to which it made a payment pursuant to the IP Settlement Agreements. In other words, FCIB did not release the MTIC Companies (save for Star Telecommunications) from liability pursuant to the IP Settlement Agreements;
>
> With one exception (addressed below) the MTIC Companies did not have or pursue claims against FCIB for account balances."

(2) The Law

749. It was common ground that the Rome II Regulation determined whether English or Curaçao law applied to the pre-contractual conduct of the IPs. The Claimants argued that the negotiations for the IPSAs were governed by English law rather than the law of Curaçao in reliance on Article 4 which provides as follows:

> "1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
>
> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
>
> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

750. Mr Parker and his team submitted that under Article 4, English law applied because the MTIC Companies were registered in, operated in and were "habitually resident" in England, the negotiations were conducted almost entirely in London and neither of the Claimants was a party to an IPSA. Mr Scott submitted both orally and in writing that this submission was wrong because Article 4 was subordinate to Article 12, paragraph 1 which provided as follows:

> "1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into."

751. Mr Wright submitted in his oral reply that Article 12 had no application in the present case because the Claimants and the MTIC Companies were not named as parties to any of the IPSAs and, in effect, because there were no relevant contract for the purposes of Article 12. I reject that submission and I accept Mr Scott's argument. The negotiations between the IPs and FCIB for the IPSAs clearly fall within Article 12, paragraph 1 as "dealings prior to the conclusion of a contract". Moreover, for these purposes it makes no difference whether a binding contract between FCIB and Mr Hunt in his capacity as liquidator of TWPS came into existence as the remaining words of Article 12 make clear. All of the IPSAs were expressly governed by the law of Curaçao and I hold that it governs the question whether the conduct of Mr Hunt and the other IPs gave rise to a forfeiture of rights.

(3) Expert evidence

752. The experts were agreed both about the doctrine of forfeiture of rights under Curaçao law and also how it was to be applied. In their Joint Statement dated 11 November 2024 they agreed as follows:

> "**1. Construction and interpretation of the IP Settlement Agreements**
>
> **i. The 'limiting function of reasonableness and fairness'**
>
> Second, the so-called 'limiting function of reasonableness and fairness'. The limiting function of reasonableness and fairness entails that a holder of a right (including a claim) is not, or is no longer, entitled to rely on a right or claim because that will be held unacceptable according to standards of reasonableness and fairness (Article 6:2 (2) and 6:248 (2) DCC) (BvdW 7.2.1; JB 85; RJT 123, 127-132).
>
> **j. Precontractual duty to disclose**
>
> The DSC holds under Curaçao law that already when parties start negotiations regarding a contract, a legal relationship will arise that is governed by reasonableness and fairness (Art. 6:2 (1) CCC) which entails other's reasonable interests.
>
> The principles of reasonableness and fairness in the negotiating phase are also the general basis for a duty to disclose information to arise. The basic requirements to accept a duty to disclose information according to Curaçao and Dutch law are: (i) a party knew or ought to know the correct state of affairs, (ii) that party knew or ought to know that the relevant fact is relevant for the other party, (iii) that party must take into account that the other party is not aware of the correct state of affairs, and (iv) that party should in the given circumstances according to generally accepted views in society (in Dutch '*verkeersopvattingen*') enlighten the other party. A duty to disclose entails the disclosure of the correct state of affairs as far

as is relevant for the other party. He who neglects his obligation to disclose information regarding the (in his opinion) correct meaning of a term or clause may be bound by the interpretation that the other party reasonably could give to that term or clause (JB 57, 78; RJT 69-74)."

"**2. Forfeiture of rights (*rechtsverwerking*)**

a. Legal framework for forfeiture of rights in general

The legal concept of forfeiture of rights is an application of the restrictive effect of reasonableness and fairness, laid down in articles 6:2(2) and 6:248(2) CCC (BvdW 7.2.2, JB 85, RJT 122).

The concept of restrictive effect of reasonableness and fairness is discussed in general in par. 1(i) above. As forfeiture of rights is based on the restrictive effect of the reasonableness and fairness, a party can only forfeit its rights if this party acted in a manner that cannot be reconciled according to the standards of reasonableness and fairness with the subsequent enforcement of the right in question. The concept of forfeiture of rights must be applied restrictively and can only be applied if enforcement of the right in question is unacceptable (BvdW 7.2.2, 7.2.5, JB 87-89, RJT 122-123, 132, 139-142).

b. Applications of forfeiture of rights

In inter alia its Bab/Cordial judgment the DSC held that a mere lapse of time is in itself insufficient to reach the conclusion that the rights holder forfeited its rights. According to the DSC, inaction (*stilzitten*) on the part of the rights holder can only lead to forfeiture of rights if, based on the circumstances of the case, a certain action by the rights holder could reasonably have been expected (BvdW 7.2.5(a), JB 89, RJT 142, 145).

Reliance on forfeiture requires special circumstances on the basis of which (i) the other party has a legitimate expectation that the rights holder will no longer pursue its right or (ii) the position of the other party would be unreasonably aggravated or disadvantaged if the rights holder were to enforce its right. If one of these grounds are fulfilled, the requirement of the existence of special circumstances to invoke forfeiture of rights is met (BvdW 7.2.3-7.2.4, JB 89, RJT 142-143).

The question whether the aforementioned requirements have been met depends on all the circumstances of the case and is thus case-specific (BvdW 7.2.5-7.2.6)."

(4) Findings of fact

(i) The context in which the IPSA negotiations took place

753. I find that the IPSA negotiations took place in the following circumstances. FCIB went into Emergency Measures in connection with alleged VAT fraud, HMRC had appointed IPs to various English companies implicated in that fraud, FCIB and those IPs were in dispute and asserting claims against each other and, in order to bring the Emergency

Measures to an end, FCIB wanted to settle all of those claims. I also find that Mr Hunt, Mr Potts and the IPs who had been appointed by HMRC knew and understood this background.

754. I make these findings of fact on the basis of Hunt 6, paragraphs 21 to 30 and 84 and, in particular, Mr Hunt's admission that he was aware of a letter dated 22 November 2013 from the Central Bank to HMRC inviting a global resolution of all relevant issues relating to those customers of FCIB who had used their accounts for unlawful activities. I also rely on Mr Fatherly's letter dated 14 February 2014 to HMRC stating that representatives of FCIB and the Central Bank were prepared to meet with Griffins for a confidential discussion on possible settlement.

755. When Mr Scott put Mr Fatherly's letter to Mr Hunt, he gave evidence that Mr Fatherly was on a frolic of his own in trying to put pressure on HMRC to agree to settle the claims and he refused to accept that Griffins were being invited to discuss a settlement of all of their claims:

> "Q. The suggestion made on the basis of a letter sent for and on behalf of Griffins. I'm just trying to understand your answer that this is a Mr Fatherly letter. Are you suggesting he was on a frolic of his own? A. To some extent, yes; but there are no claims against HMRC, so it doesn't sound like (indecipherable) me. I don't quite see what your point is, but that's a more Mr Fatherlyism than myself. So it's not the house style, no, is the answer to your question. Q. Right. You see in the fifth paragraph Griffins or Mr Fatherly, whoever it may be, they say: "We have, today, received a message from Curaçao that representatives of FCIB and the Central Bank are prepared to meet with Griffins for a confidential discussion on possible settlement." A. Yes. Q. And you must have known that Griffins was being invited to Curaçao to discuss settlement of all claims by companies represented by Griffins? A. No, or being, at its highest, we were going to meet with FCIB about our claims, including a global settlement as referred to in their letter in November. Q. And "our claims" for those purposes, that is the claims of the Griffins represented companies, all of them? A. Well, that wasn't our intention; and then, at the meeting, I think we clarified exactly what the scope of the meeting was. So the meeting was talks about talks, I suppose is probably the best way of describing it."

756. I reject that evidence. It was obvious to Mr Hunt from the letter dated 22 November 2013 that FCIB wanted to achieve a global settlement and this is consistent with the position which it adopted at the Curaçao Meeting. Further, I do not accept that Mr Fatherly would not have sought Mr Hunt's authority before sending the letter dated 14 February 2014 to

HMRC or following it up.

(ii) The IP Group co-ordinated with one another and with HMRC in relation to the IPSA negotiations and Griffins took a leading role in the negotiations

757. I find that the IP Group co-ordinated with one another and with HMRC in respect of the settlement negotiations and Griffins took a leading role in them. I make this finding of fact on the basis of the correspondence both before and after the Curaçao Meeting. But I place particular reliance upon two important documents: first, the composite note of the Curaçao Meeting prepared by Mr Hunt, Mr Bramston and Mr Potts together immediately after the meeting. In that note they recorded that Mr Hunt and Mr Potts informed FCIB as follows:

> "SJH said that Griffins there to settle. We had a meeting with HMRC and had spoken to lawyers for other IPs, and that we had been working out how to put in place a structure for a settlement. We did not intend going into the merits of the various claims and counter claims. CP said that was "perfect"."

758. Secondly, I place particular reliance upon a briefing note which Mr Hunt sent to Mr Bramston at 01.03 on 3 September 2014 immediately before a further meeting in London (below) with Mr Peterson who had been appointed by the Central Bank to exercise the powers of FCIB. It is apparent from this note that Mr Hunt and Mr Bramston had recently spoken and that Mr Bramston was acting independently of Mr Hunt. Mr Hunt stated in terms that HMRC had asked Griffins to act on behalf of all of the IPs and stressed the benefits of him doing so:

> "HMRC has contacted just Griffins to act on behalf of all the IPs in negotiating a settlement. HMRC want closure and have plans for an agreement involving the CPS as well. It may be that there are Dutch angles and international relations going on that we have not awareness of. There could be Russian money or terrorist money going through Curacao and we are a small cog in a very big wheel. Whatever the game is, we have been given a steer as to a percentage recovery and HMRC are taking a pragmatic view on the their recovery. HMRC want a bigger deal and settlement with all the IPs is a big part of that.
>
> You then have all the other IPs. They have their own WIP and reputations to guard and are at different levels of awareness of the bigger game and their own lack of knowledge. We should take note that the person with probably the most information is Richard Healey and he is advising his client to stay well away from us. GT did Softwarecore and so have some direct experience of the Dutch political angle.

> If you put this together then it seems that an individual IP doing a deal is of very little consequence and is of no help to HMRC. In the case of Griffins, we have fought to be at the forefront of the FCIB problem and we are known by HMRC, the other IPs and the lawyers as having achieved this. If we settle we get some cash and abandon HMRC and the other firms to start from scratch, incur costs and delays which harm HMRC. We gain some fees but lose all our political capital with HMRC and probably the group.
>
> There are many problems for Petersen. The IPs care about their money but can't do a deal blind. They never do it in normal cases and they will certainly not cut and run when they are in competition with other IPs. This is a practical example of the 'Prisoner's dilemma' game, where people will not act rationally even where it is in their interests to do so. They would rather go to court and lose than do a weak deal with this audience. Petersen is trying every variation on a very basic strategy of trying to dictate a range without offering to provide any verifiable proof of anything he says. If the bank can't pay out in full then all he has to do is get us to sign up to confidentiality agreements and show us the numbers. If that's too hard, show HMRC and their lawyers. If he doesn't, we will pack his bags for him as he is insulting our intelligence. On the other hand, if FCIB is solvent, what is this pantomime about???"
>
> "If Petersen plays the bigger card of the desirability of a deal to save the reputation of Curacao then he needs to read his own legislation. The Central Bank can absorb the assets and liabilities of FCIB and pay its debts in full now. It can collect the other assets over time and even make a profit. It has a balance sheet of over $1.6bn in net assets."
>
> "I see my job tomorrow as making these points without making it appear as if he is losing face. He needs to understand that there is a trick to getting all these parties together and that is politics not litigation. If he misunderstands us then he is going to fail. If he is trying to pull a fast one he is going to fail. If he gets found out he is going to fail and we are going to carpet bomb is [sic] little crooked island and make sure everyone on that island knows that it was because he lied to do a deal. We are going to find out one day what the solvency position was during the 8 years and now and if he has lied we will come after him."

759. When Mr Scott put this briefing note to Mr Hunt, he attempted to distance himself from it and its contents. He accepted that he had reviewed it before he came to give his trial witness statement and that there was no mention of it in Hunt 6. Mr Scott then put the first line of the passage above to him:

> "Q. Let's have a look at it. You say in the second sentence: "This is not a conventional negotiation where we can make a claim and settle for a good sum. It is all politics." And in the next paragraph you elaborate on that sentiment. Can I ask you to read the third paragraph, please. It's the one that begins: "HMRC has contacted just Griffins to act on behalf of all the IPs in negotiating a settlement." A. Yes. Q. And you don't mention in your

trial witness statement, do you, that HMRC had contacted just Griffins to act on behalf of all the IPs in negotiating a settlement? A. I don't, no. Q. Because you are at pains in the witness statement to suggest that you were only negotiating for yourself? A. That's correct. Q. And that is a false account given to the court, is it not? A. No, this is a false document. Q. Sorry. It's a false document. It's your document, Mr Hunt. It's your e-mail. Were you lying to Mr Bramston in it? A. Yes. Q. Can you explain why you were lying to Mr Bramston. A. I have some sympathy for you in terms of this unusual document, but allow me to explain. It's sent, I believe, after a late night phone call from one of the other IPs or actually, I think, their lawyer, to complain to me about Mr Bramston's behaviour. Mr Bramston had a -- decided that he -- he came up with some scheme where he was going to settle, for a very small amount of money, his estates because it benefited him personally. And everyone was upset with Mr Bramston. so I knew that I had the meeting with Mr Bramston first thing in the morning. And this e-mail is essentially an exercise in gobbledygook. It's to discombobulate him so that he has no idea what I'm talking about. So the whole of it is performative. Tim was -- the way to stop Tim when he got a sort of tunnel vision was to overload him with facts, give him information that he couldn't cope with. So the whole of this stream is an exercise in nonsense, to be honest, to completely discombobulate him, so that when we went in the meeting first thing in the morning he didn't quite know what the lie of the land was. So it's a fairly extraordinary document. I'd completely forgotten it. It would have been in my partner filing sent items. It wasn't in the case file. So it was -- and it was -- it was a device between -- that I used to rein Tim in, I suppose, on behalf of all of the IPs who were complaining about his behaviour in the negotiations. So I accept it's a very unusual document. Q. And is this generally how partners at Griffins treat one another, discombobulating and so on? A. No, I mean, Tim did resign the following year; and he -- I had received a further complaint against him, so we put him on gardening leave, for the same reason. He was starting to sort of not make good decisions. So, without airing too much of his position, we -- that -- this was my attempt to rein him in, late at night, having received a phone call. I had completely forgotten the incident, to be honest, until I saw the document. But that's its function; so ... Q. And when you say Mr Bramston wasn't making good decisions, do you mean he was making decisions for his own personal benefit, rather than -- A. Exactly that. He seemed to be more interested in his fees and Griffins' fees, than he was in the interests of the creditors. So I took it very seriously. But I did it in a fairly unusual way because it was late at night; and I didn't want -- and there was a series of communications going on where Tim was talking to Mr Peterson and the other IPs were unhappy with Mr Bramston. Q. And you thought it would be enough to send him this two page e-mail to get him back on the straight and narrow? A. At that time of night, the purpose was simply I didn't know what conversations were happening in what context. So the idea was simply to send him a note that would confuse him; so he didn't quite know what the position was. And that, in my experience, was how you sort of stopped Tim. Tim would like to plan and understand strategies and bits of pieces. So giving him some strange information would cause him to pause; and that's how you sort of slowed

> him down. Q. I see. Mr Hunt, in fairness to you, I will be inviting his Lordship to conclude that the account you have just given of this e-mail is a false account and you know it to be false. I should give you the opportunity to comment on that. A. I accept it's an extraordinary document, but it's the sort of thing I do. I have sent one with a similar sort of intention in January this year, where it's sort of like a strategy to -- to ex -- to change or anchor a conversation a different way, for someone, the recipient, to react to, to create a different angle. So this -- this -- this is an extraordinary document but its intention is purely to -- to shock Tim into sort of reminding him that there's -- there's more than just simply fees involved in this case. Q. Where you said a moment ago that you've done the same sort of thing before, do you mean sending a document which you know contains lies? A. No. No, it's more -- as I say, it's more anchoring. So you are sending a -- an unconventional document -- I suppose an unconventional position -- so taking a position, in a particular way, to create the (indecipherable) in a particular direction. So I see it as a form of that. In this particular case, it was just simply a word soup of as many concepts -- there's a reference, I think, to game theory, I think in here. It is literally a dump of every word I could think of that Tim would just be confused by. Because Tim was a strategic thinker, but he would slow when he reached an obstacle; and that was the purpose of it. It's an extraordinary document, I accept."

760. I reject Mr Hunt's evidence that the briefing note was a false document created by him to shock or confuse Mr Bramston. I find his explanation for this document wholly implausible and internally inconsistent. He accepted that the motivation for sending this document was "to rein Tim in, I suppose, on behalf of all of the IPs who were complaining about his behaviour in the negotiations". But if Mr Hunt was acting only for himself in those negotiations, he would not have been trying to "rein in" Mr Bramston on behalf of the other IPs. I accept Mr Scott's submission that the explanation which Mr Hunt gave in evidence for the briefing note was false, that Mr Hunt knew it to be false and that he had invented it to explain away a highly damaging document.

761. I also find that the briefing note accurately reflected the true position on 1 September 2014. In particular, I find that HMRC had appointed Griffins to act on behalf of the IP Group in the settlement negotiations, that Mr Hunt had accepted that appointment and that he was co-ordinating those negotiations on behalf of all of them. I also find that he was taking a very aggressive line in those negotiations and, as he put it, to raise the temperature:

> "Q. When you say: "If he gets found out he is going to fail and we are going to carpet bomb [his] little crooked island ...", you're referring there to Mr Peterson? A. Yes. Q. And when you say "if he gets found out",

> presumably you mean found out for trying to pull a fast one, as you put it in this paragraph? A. That's what it says, yes. Q. And what you were contemplating here is that Mr Peterson might lie to you; yes? A. I'm not -- I'm not really forming those sort of thoughts, I'm afraid. It's entirely a story. It's got to have a basis in truth, otherwise it would be nonsensical. So it has to have a meeting. It has to have broad structure. But the purpose of it is just simply to -- as I've reached the end of the e-mail, to raise the temperature. Q. You're presumably aware, Mr Hunt, that neither in these proceedings, nor in Curaçao, have you ever alleged that Mr Peterson told lies in the IPSA negotiation or acted at all improperly? A. I think that's right, yes. Q. Isn't the reality here that if anyone was trying to pull a fast one, it was Griffins, by entering the IPSAs without telling FCIB that Griffins had a roster of other companies that may have claims against it? A. That's not correct. Q. Can you just go back to the e-mail, your phrase "little crooked island". Presumably that's intended as a reference to Curaçao? A. Yes. Q. And, reading on, you say in the penultimate paragraph: "If Peterson runs away I will tell Duncan that the man is an idiot who was ill-prepared and his stance came apart under even basic questioning." A. Yes. Q. Do you see that? Now, the aggression that we see on display here, threatening to tell HMRC that Mr Peterson is an idiot, threatening to carpet bomb a crooked little island, is that how the partners at Griffins generally communicated about FCIB? Or was it just you? A. No, as I say, it's a -- it's performative. It is exactly that. It's an exaggeration. None of that came to pass. The meeting didn't run in that way. None of those conversations actually happened. Those weren't the allegations. So that's how I, having initially come across this e-mail and forgetting about it, I suddenly realised what it was; it's entirely an exercise in discombobulation of Mr Bramston. Q. Looking back on these words now, are you satisfied that the language is what the court would expect of its office holders? A. I don't think it's -- I don't think it's very good -- it's very good language, but it's not intended to -- its purpose was to (indecipherable) say very narrowly focused on Mr Bramston; so ... Q. Mr Hunt, do you want to take the opportunity to apologise for threatening to carpet bomb Curaçao and calling it a crooked little island? A. No."

(iii) <u>The Griffins IPs knew during the IPSA negotiations that the companies of which they were liquidators had potential claims against FCIB and TWPS other than for the recovery of account balances</u>

762. I also find that Mr Hunt and the Griffins IPs, who were acting on behalf of the IP Group as a whole, knew during the IPSA negotiations that the companies of which they were liquidators had potential claims against FCIB and TWPS other than for the recovery of account balances. There are three key documents which provide clear contemporaneous support for this finding of fact upon which I rely. Moreover, when they were put to Mr Hunt in cross-examination, he acknowledged that he was aware of the potential claims for fraud against FCIB and TWPS and that TWPS might be used as a vehicle to make

claims against the officers of FCIB.

763. First, in the Letter of Claim Blake Morgan asserted that FCIB knowingly and actively facilitated fraud. Mr Potts accepted in cross-examination that this was an allegation of fraud against FCIB and that he had a solid basis for making it. When Mr Thanki put the letter to Mr Hunt, he accepted that he was looking at using the allegation of fraud against FCIB and his appointment as liquidator of TWPS in the negotiations:

> "Q. Okay. But we can see what Blake Lapthorn are doing here is making a very serious allegation here against FCIB? A. That's in 2014, where a —— there's a whole raft of events that would lead up to that. But essentially they're taking into account what was known up to that point, including the criminal conviction, essentially. Q. Perhaps, I think my Lord was interested in this and he asked you about —— asked about this a little while ago. But if it's not the material we've been looking at, I 'm struggling to see on what material this allegation is based. Perhaps it's not stated in the letter. A. My recollection of the letter is it's, along with the appointment of TWPS is one of the threads that we were looking at in terms of negotiations, could TWPS be used, could essential —— and yes, there's a letter in late August essentially putting claims to FCIB and whatever else was essentially putting claims to FCIB and whatever else was going on at the time. I can't remember. But the whole point was to state, at its highest, our suspicions that the defences by FCIB to paying the balances was not right in that they insisted that FCIB was a victim."

764. Secondly, by email dated 6 October 2014 Mr Hunt wrote to Mr Fatherly setting out a form of words to be used in writing to the Official Receiver to justify the appointment of Mr Hunt as the liquidator of TWPS:

> "Transworld acted as an agent for an offshore company against who TC Catering has a number of claims. In July 2012 a Dutch criminal court handed down a decision which seems to suggest that Transworld was party to conduct which affects those claims although Transworld is not specifically named. The Liquidator wishes to appoint Stephen Hunt to attempt to recover records that belong to Transworld that may assist in establishing the relationship between the entities. This may gave rise to further claims against Transworld but without an investigation it is not possible to express a firm view."

765. Mr Hunt was unable to say whether this explanation was provided to the Official Receiver. But he accepted in cross-examination that what he must have had in mind was a Direct Claim against FCIB:

> "Q. And do you see your proposed text begins: "Transworld acted as an

> agent for an offshore company against TC Catering has a number of claims." A. Yes. Q. And the offshore company you had in mind here was FCIB, wasn't it? A. Yes. Q. And the claims you had in mind in this first sentence, they were claims by TC Catering against FCIB, weren't they? A. Presumably. Q. And they would have been claims arising out of your suspicion that FCIB and TWPS were involved in MTIC fraud, wouldn't they? A. I don't know specifically, but that would be logical. Q. Well, what other claims would you have been contemplating here? A. Exactly (indecipherable).”

766. Thirdly, I have already referred to the ethics checklist which the Claimants disclosed during Mr Hunt’s cross-examination: see [640]. That checklist stated that Blake Lapthorn had introduced the appointment. It also included the following handwritten comments: “Creditors may included [sic] MTIC S213 Claims from Griffins Liquidators”; “Keep eye on intercompany claims although they are likely to pass through Transworld and on to officers. Transworld has no outside creditors beyond MTIC”; and “Blake Morgan will keep an additional eye on this. We anticipate other IP assistance will be available if required.” Mr Hunt accepted in terms that he was already contemplating S.213 claims to be brought by the MTIC Companies against TWPS:

> “Q. And if we look over the page, the top of page 4. You see in the box providing details, it says: "Self review. Creditors may include MTIC section 213 claims from Griffins liquidations." Do you see that? A. Yes. Q. So in November 2014 can I take it you're already anticipating the possibility of section 213 claims against TWPS from other Griffins liquidations; yes? A. Yes, the purpose of the box is to think of every conceivable conflict.”

(iv) The IPs held themselves out as negotiating on behalf of all of their companies which had potential claims against FCIB

767. The principal issue between parties in relation to forfeiture of rights was whether Mr Hunt, Mr Bramston and Mr Potts held themselves out as negotiating on behalf of all of the companies in liquidation of which they themselves were liquidators and all of the companies of which the other IPs were liquidators or whether they held themselves out as negotiating on behalf of a sub-set of those companies only.

768. *The Curaçao Meeting.* In their composite note of the Curaçao Meeting Mr Hunt, Mr Bramston and Mr Potts recorded that Mr Hunt told FCIB that four categories of case had been identified (and I will refer to them as “**Category 1**”, “**Category 2**”, “**Category 3**” and “**Category 4**”):

> "1) 75% already paid out;
>
> 2) protocol cleared and no monies paid out;
>
> 3) broader category where claims by the group of IPs pending or awaiting resolution, including protocol pending through to cases where claims just identified. This includes claims where there is English and overseas litigation not yet concluded.
>
> 4) everything else i.e. everyone else involved in mobile phone trading."
>
> "SJH proposed that proceed on the basis that FCIB not in negative asset position otherwise would be in bankruptcy and proposed that FCIB pay all (1) and (2) + (3) in full, but that the content of (3) could be for further discussion. SJH said that he was aware some IPs had more (3) cases than Griffins, and that there may be special circumstances/commercial positions on each of those in (3)"
>
> "SJH said that the bank cannot benefit from the fraud. If the banks takes all the account balances, he questioned who gets the money?
>
> MW said that if you took the legal costs, the charges incurred by the bank, and the admin costs, that is close to the value of the total balances on the effected accounts.
>
> SJH suggested that we could issue against the banks and then stay. We would then wait to see if the cat (4) accounts brought a claim.
>
> C Potts then explained that the bank has its existing procedures and an ability not to pay out to companies involved in MTIC fraud. A discussion on Cayenne then ensued.
>
> TJB said the group of liquidators may hold useful data to assist the bank defeat cat (4) claims.
>
> TJB said that we do not know what their costs, or the account balances of the cat (4) claims [which FCIB would keep]. TJB said we were working on an assumption that cat (4) cases had enough in them to cover the bank's costs. If that was not the case we would re-consider the level of settlement to reflect the commercial reality."

769. The Defendants' case was that Categories 1 to 3 contained all of the companies in liquidation whom the IPs represented and Category 4 contained "everyone else", i.e. all those companies who might have a civil claim to account balances or for any other relief and whom the IPs did not represent. In support of their case the Defendants relied on the fact that FCIB maintained throughout the negotiations that it wanted "total peace". In the course of his oral submissions Mr Scott produced a list of twenty-one documents dated between 9 October 2014 and 7 November 2014 in which the parties used the term "total peace" or the following expressions were used: "finality", "final settlement", "Tidy & End", "Global Offer", "Global settlement" and "All encompassing agreement".

770. The Claimants admitted that during the negotiations FCIB sought to negotiate a final global settlement with all of those parties whom Mr Hunt could possibly represent which would result in total peace: see the Reply, paragraph 55.1 (above). However, Mr Hunt's evidence was that the four categories represented four different categories of accounts rather than four different categories of customers. His evidence in his witness statement was as follows:

> "88. At the meeting we discussed structures and ideas for how FCIB might pay out the account balances, and we came up with categories of accounts. I independently recall these being:
>
> (a) Category 1 – accounts where FCIB had already paid out 75% of the account balance, and there was the remaining 25% to be discussed/paid;
>
> (b) Category 2 – accounts where a request had been made for payment of the 75% under the Protocol but no payment had yet been made;
>
> (c) Category 3 – accounts that had been identified as being processed for payment in the future – i.e. a request was still to be made under the Protocol but the companies were in liquidation and IPs were appointed;
>
> and (d) Category 4 – all the other T&C accounts.
>
> 89. I recall us discussing how FCIB would deal with Category 4 claims if they wanted to achieve finality, as there were potentially thousands of accounts that would fall within this category. The category had been loosely anticipated in the HMRC meeting of September 2011 (referred to at paragraph 32) when it was explained to us that FCIB intended to pay out the balances of all remaining non-insolvent account holders. We proposed to FCIB that one solution would be to give me a list of all the account holders, and then I, along with the other IP's could work it out between us by winding up the companies and taking the appointments between us all, and recovering the FCIB balances. This would leave the legitimate non-fraudulent account holders. We explained a bit about the iBase software that we had, and how we could play a role in managing Category 4, if FCIB were prepared to share that information of accountholders with us.
>
> 90. FCIB said that they were not interested in dealing with Category 4, and did not want to accept the offer of help in exchange for the information. They said that they had their own strategy and had done their own 'data mining' for dealing with Category 4, so this was not a concern and the remainder of discussions focussed on Categories 1–3 only. My understanding was that FCIB had their own plan for finality and I (and the other IP's) were just a piece in that puzzle. That was the end of discussions regarding finality (in a global sense), as that would need to involve dealing with Category 4 and FCIB were clear they did not want our help in dealing with that."

771. Mr Scott cross-examined Mr Hunt at some length about the difference between the various categories and, in particular, the difference between Category 3 and Category 4.

In particular, he asked Mr Hunt to explain his suggestion that the IPs could issue claims against FCIB and wait to see if the Category 4 account holders brought a claim against it. Mr Scott had to put his question three or four times before he finally got an answer (my emphasis):

> "Q. Yes. The point I understand you to be making is that the IP group could bring their claims, category 1, 2, 3, claims –– A. Yes. Q. –– they could be stayed. And then you would see whether the claims of everyone else, the category 4 cases, would be brought? A. I think that paragraph is saying –– it's not very long, but I –– but I think what that's saying is that if we identify balances then –– Q. If I can just stop you there. No mention of balances in this paragraph, is there? No. No, but we're only talking about balances. We would then wait to see if the category 4 accounts brought a claim. I think what we're trying to do is to attach to the balance in a some way. So imagine there was £1 million that wasn't in category 3. So Official Receiver in some way. So it seems to be a contemplation of attaching to a balance and then see effectively in the owner of the account then disputed it in some way. So we're trying to work out how –– how do you deal with the rest of the list and give them –– because of course what would happen is they would just sit there; they wouldn't be closed, they wouldn't be open. Someone could come along later and claim it. So we were trying to work out how to do it. And we suggested –– having first offered effectively forensics, we're then trying to say: maybe we could claim it in some way with their –– a bit like there's a Harvey attachment. So there's a Harvey attachment, same sort of thing. So register sort of a generic claim, maybe HMRC a claim in fraud and then see who claims. It was about trying to sort of ring–fence the balances and how that would work. Q. And the point I'm putting to you, Mr Hunt, let me try one more time, is that we have, on the one hand, the category 1, 2, 3 claims –– A. Yes. Q. –– which are claims of the IP group. Now we have category 4, which are the claims of everyone else. That's –– that's the distinction that you are drawing (overspeaking) –– A. (overspeaking) no, the category 4 was anything that's not in category 1, 2 and 3 (overspeaking) –– **Q. So are you suggesting that there could be category 4 cases where the companies in question were represented by Griffins? A. No, I don't think we've contemplated that.** I don't –– well, I'm trying to think. There was –– what we were contemplating –– so, for example, a –– an MTIC company with no balance, didn't have a claim to a balance, so we weren't thinking about –– it's surprising in hindsight, but neither side were talking about claims against FCIB in fraud. We just weren't in that space. We were trying to –– we were trying to resolve the emptying of the balances; that was the start, beginning, end of the negotiations. Not because of any artificial line; it's just why we were there and why the bank wanted to deal with its balance liabilities. I don't think the bank was thinking about claims at all. It didn't consider it had done anything wrong; and, therefore, it didn't need to worry about claims, to some extent."

772. Mr Potts accepted in cross-examination without any qualification that at the Curaçao

Meeting he was acting for Mr Hunt and Mr Bramston in their capacity as liquidators of companies which had potential claims against FCIB. When he was asked about the four different categories of case his evidence was as follows:

> "Category 4 we see is "everything else ie everyone else"? A. Hmm, hmm. Q. And that means everyone who is not represented by a member of the IP group, doesn't it? A. No, we're talking about the cases. So it's easier to understand as the cases, because category 1, 2, 3 and 4 –– so 1 and 2 are the ones we've already got to –– an ability to recover. Category 3 are the ones that we're working on or we've identified, because I had identified in my head that if we go into settlement negotiations and have a full and final settlement, we're waiving the right to pursue any claims. So category 3 is there to preserve those claims that the IP group have got so they can continue to appoint and we can recover the money. And then the 4 is everything else. Q. Just focus on the words. So it's "everyone else"? A. It says "everything else". Q. "Everything else, ie everyone else". That's what it says? A. Yes. Q. And the point I'm putting to you is that what "everyone else" is for the purpose of this category is everyone who is not represented by an IP group member? A. So that is correct in terms of what the word says, but what's envisaged in relation to the IP –– I mean what became the IP settlement agreement is everything outside category 1 to 3. So, for example, if an IP is appointed over a company but it's not in category 1 to 3 then that will be in category 4. Q. And that explanation that you've just given, do we find any trace of that in the composite note? A. I think this is the composite note. Q. Yes, it is. What I want to know is if the explanation that you have just given about an IP group member being appointed and that being a category 4 case, is that explanation to be found in this composite note? A. I presume –– no, because we didn't –– Q. And it's not an explanation that you ever gave to FCIB, is it ? You never suggested, "I'm here to negotiate for the IP group, but some of my clients may have claims in category 4 and we're not settling those". You never said that, did you? A. The conversation was –– Q. Did you ever say that or not, Mr Potts? It's a straightforward question. A. No. I 'm so sorry. No."

773. Mr Parker asked Mr Potts in re-examination about the answer which he had given to Mr Scott's question about the identity of his clients and this time he qualified his answer in the following way:

> "MR PARKER: Could we possibly please pull up {DAY7/69:12} of this morning's transcript. It's a question, I think, that you'll find at line 12. You were being asked about the February 2014 meeting in Curaçao. A. Hmm, hmm. Q. And Mr Scott asked you a question -- sorry, at line 12. A. Yes. Q. "And your clients, for the purpose of this meeting, they were Mr Hunt and Mr Bramston, in their capacity as liquidators for companies that may have claims against the [claimant]?" MR SCOTT: I think that's the bank; I think it's a mistake on the transcript. It's claims against the bank. MR PARKER: Thank you. That may have claims against the bank. A. Hmm,

> hmm. Q. And you answered in the affirmative? A. Hmm, hmm. Q. Now, when Mr Scott was referring to "companies that may have claims against the bank", what sort of claims did you understand Mr Scott to be referring to? A. Balance claims. MR PARKER: Thank you."

774. I reject Mr Hunt's evidence in relation to the categorisation of the claims or companies which fell within Categories 1 to 3 and the claims or companies which fell within Category 4 and I find that Mr Bramston, Mr Potts and he intended Categories 1, 2 and 3 to include the claims of all of the companies of which members of the IP Group were liquidators (to which I will refer as the "**IP Companies**"). I also find that they intended Category 4 to include everyone else, namely, any companies or customers of FCIB of which members of the IP Group were not liquidators and over which they had no control ("**Non-IP Companies**"). Finally, I find that Mr Hunt explained this to FCIB at the Curaçao Meeting. I make these findings of fact for the following reasons:

(1) This is the obvious and natural meaning of the composite note which Mr Hunt and Mr Potts both had a hand in drafting. Mr Potts accepted that this is what it said and that he never explained to the representatives of FCIB that some members of the IP Group had claims in Category 4 which they never intended to settle.

(2) The distinction between IP Group companies split into three categories and everyone else was clear and simple. By contrast, I found the explanation which Mr Hunt gave, or tried to give, for the difference between cases in Category 3 and cases in Category 4 almost incoherent and, at the very least difficult, to follow. He was asked to explain the distinction three or four times and could not do so adequately. Moreover, in the middle of this explanation Mr Hunt conceded that the IP Group were not contemplating claims in Category 4: see the question and answer in bold (above).

(3) Mr Potts accepted in cross-examination that he was acting for Mr Hunt and Mr Bramston in their capacity as liquidators of companies which had potential claims against FCIB and he did not qualify his answer in any way. I reject the qualification which he tried to place on his answer in re-examination. Mr Scott did not mention account balances in his question and I am satisfied that Mr Potts understood clearly the first time what question was being put to him.

(4) If Mr Hunt, Mr Bramston and Mr Potts had intended to limit the settlement

negotiations to companies with account balances but to reserve their rights to bring claims on behalf of companies which had other claims against FCIB, Mr Potts would have made this clear at the meeting on behalf of his clients and confirmed it in writing in the course of the negotiations. If a solicitor is negotiating on behalf of one group of clients but wishes to reserve the rights of another group of clients, it would have been the obvious and natural course for him to take. He never did so.

775. *The London Meetings.* On 1 September and 3 September 2014 two meetings took place in London at which Mr Hunt and Mr Potts met Mr Peterson who was acting on behalf of FCIB (the "**London Meetings**"). No notes of that meeting were disclosed by either party although Mr Hunt accepted that he did not inform FCIB at either meeting that partners in Griffins were liquidators of companies with claims against FCIB for whom he was not conducting negotiations:

> "Q. And you would have known that FCIB was looking to meet the liquidators in London with the objective of reaching an overall settlement agreement? A. That's what it says, yes. Q. You would have known that that was the case at the time −− A. Yes. Q. −− when you read these e−mails? A. Yes. Q. And you would have known that HMRC was putting Griffins forward to participate in that meeting, to discuss overall settlement agreement with FCIB? A. Yes. Q. So far as concerns the September meetings, presumably you attended those meetings? A. Yes. Q. Do you recall who else attended on the Griffins side? A. Mr Bramston certainly. Presumably Mr Fatherly. Q. Anyone else? A. Not that I can recall. Q. Do you recall whether anyone on your side took notes of the meetings? A. I don't recall if Mr Potts was, then Mr Potts would have taken his own notes; if Mr Fatherly was there, Mr Fatherly would take his own notes, but that's normally it. Q. And at the September meeting, there was no suggestion from the Griffins side, was there, that there were Griffins represented companies with claims against the bank, that you were not negotiating on their behalf? A. Sorry. Can you just repeat the question again? Q. Yes. There was no suggestion from your side, was there, that there were Griffins represented companies with claims against the bank but that you were not negotiating on their behalf? A. That's correct. Q. Can we go, please, to {F/2236/1}. This is an e−mail from Mr Potts to Mr Welten on 2 September 2014. And we see it is sent the day after a meeting the day before. Can you read the first paragraph, please. A. Yes. Q. And can you see that Mr Potts writes: "I am in a position to make a global offer in relation to all of the cases of Griffins, Baker Tilly, Kingston Smith and Chantrey Vellacott." A. Yes. Q. And, presumably, you would have seen and approved of this e−mail before it was sent? A. Not necessarily, but possibly. Q. Presumably you would have given instructions to Mr Potts to send this e−mail on behalf of Griffins? A. Broadly, yes. I mean, I'm not trying to make a point on it, but broadly, yes. Q. And there's no suggestion, is there, in this e−mail

> that the global offer being made in relation to all of the Griffins, Baker Tilly cases, and so on, somehow excludes Q. And there's no suggestion, is there, in this e−mail that the global offer being made in relation to all of the Griffins, Baker Tilly cases, and so on, somehow excludes companies that they represented with claims against the bank? A. That's correct."

776. *TWPS.* Mr Hunt accepted in cross-examination that he did not inform FCIB about the deed of assignment of the debt owed by TWPS to TC Catering, the restoration of TWPS to the register, the winding up of TWPS and his appointment as liquidator:

> "Q. When the decision was taken in 2014 to have TWPS restored and a Griffins liquidator put in place −− A. Yes. Q. −− your side, the Griffins team and Mr Potts, you didn't inform FCIB about that decision, did you? A. That's correct. Q. And your side didn't inform FCIB about any Deed of Assignment, the petition to wind up and restore, any court order, your appointment as TWPS' liquidator −− none of that was disclosed prior to the IPSAs being entered into, was it? A. Only except by way of advertisement but not directly."

777. *The Letter of Comfort.* Mr Hunt relied on amendments which he made to a letter of comfort to be given by HMRC to FCIB (the "**Letter of Comfort**"). He gave the following evidence in Hunt 6 in relation to this issue (original emphasis):

> "105. On 9 December HMRC advised Chris Potts that they were in direct discussions with FCIB about the conditions attached to the proposed settlement. This ultimately resulted in a letter provided to FCIB from HMRC (the "Letter of Comfort"). I did not see a final copy of the Letter of Comfort, but Chris Potts and I had a hand in the drafting, as HMRC were concerned to ensure that nothing would be said by HMRC that contradicted the position taken by the IPs that were involved in the IPSA discussions. HMRC had a concern about one paragraph of the draft Letter of Comfort in particular Document 74 {GOW_00032231} which read:
>
> > "We understand that agreement has been reached between First Curaçao International Bank (FCIB) and UK Insolvency Practitioners who, acting to recover debts owed to HMRC as creditor, have been pursuing claims against FCIB, the Centrale Bank van Curaçao en Sint Maarten (CBCS) and against the balances of certain FCIB account holders. We confirm that HMRC supports FCIB and those IPs to enter into settlements providing for a complete release and settlement of all claims. That settlement includes (1) the retention by FCIB of a portion of the account balances of the certain account holders as compensation for its costs, losses and damages caused by the acts and omissions of such account holders and (2) the payment of the remaining balance to the IPs."
>
> 106. My immediate reaction was that this was too widely worded, and in particular it needed to refer to the IPs as the liquidators of the specific

> companies that were intended to be parties to the IPSAs, to reflect the limited nature of the agreement. The following changes were therefore suggested by our side:
>
> > "We understand that agreement **in principle** has been reached between First Curaçao International Bank (FCIB) and UK Insolvency Practitioners who act as liquidators of certain UK companies and trustees of certain bankrupts. The IPs, acting to recover debts owed to HMRC **and others** as creditors, have been pursuing claims against FCIB, the Centrale Bank van Curaçao en Sint Maarten (CBCS) and against the balances of certain FCIB account holders. We confirm that HMRC supports FCIB and those IPs to enter into settlements providing for a complete release and settlement of **all claims as set out in such agreements**. Such agreements includes (1) the retention by FCIB of a portion of the account balances of the certain account holders as compensation for its costs, losses and damages caused by the acts and omissions of such account holders and (2) the payment of the remaining balance to the IPs. HMRC does not object to any IP settling with FCIB on the terms described or assert any claim against FCIB for doing so." [my emphasis added]
>
> 107. I understood from HMRC that the initial drafting of the draft Letter of Comfort was provided by Mr Welten, and so the significance of the amendments (i.e. limiting the reference to "complete release" and "settlement" to those set out in the IPSAs) would have been apparent. I have not seen email exchanges between Mr Welten and HMRC, nor the various iterations of the draft Letter of Comfort. The amended response clearly confirmed (again) that a global settlement was not what was proposed or agreed."

778. I do not accept that the amendments demonstrate that a global settlement was not intended. All that they show is that Mr Potts and Mr Hunt amended the Letter of Comfort to limit its effect and tie it more closely to the IPSAs themselves. If the IP Group had intended to reserve the right to bring claims on behalf of the MTIC Companies and TWPS (which had been restored to the register by this date), it would have been easy to make it clear in the Letter of Comfort that the IP Group had reserved those rights and that the Letter of Comfort did not extend to those claims.

779. *The warranty.* Mr Parker also relied on the warranty in section 1(g) of each IPSA in his cross-examination of Professor Biemans. He put it to FCIB's expert that FCIB would have had a claim for damages for breach of warranty if Exhibit A had been incomplete (my emphasis):

> "Q. Well, can we look at —— maybe we can go back to the agreement in {I/1/3}. And you see the middle of the page there, clause one, sub−clause (5)? A. Hmm, hmm. Q. "The Liquidator and the relevant Griffins Company

Q. I'm saying clause 1 sub−clause (5) addresses that situation, doesn't it, by saying that the liquidator and the Griffins company represent and warrant that the list is correct? A. My Lord, I would love to say "yes" to this question, just to move on to the next topic, but I can't. It's −− you could say −− you could say that this warranty address −− could be read as certainly addressing this question, but it's not that easy. I 'm sorry to say that. Q. Well, you do need to answer the question, Professor Biemans, I put to you, because if you don't answer that question you can't then move on to the question of forfeiture of rights, can you? A. I think you can move on straight to the question of forfeiture of rights. If you work on the assumption that none of the parties listed on Exhibit A are not contract to the party then you can move on to that issue. Q. Staying with FCIB's complaint. FCIB says the list is incomplete. Yes? A. Yes. Q. Clause 1, sub−clause (5), on the wording −− I would put to you on the wording FCIB have agreed with the parties to the agreement that in that eventuality the warranty comes into play. And if the warranty comes into play FCIB can claim their losses on the companies on the list not bringing claims, can claim their losses from the Exhibit A companies? A. Okay. So if −− my Lord, if I understand the question correctly the question deals with who can be sued in the case that the list is incomplete. And I would say if you −− if you read the literal wording of this clause, it would be the liquidator and the relevant Griffins companies. Q. It ended up being a rather long question. I apologise for that. What I'm putting to you is clause 1, sub−clause (5) on its wording appears to assume that a company that's not on the list but should be can bring a claim against FCIB. A. So, my Lord, if I understand the question correctly, it says that if there's not a company on the list it should be able to bring a claim, right. And that would be the interpretation of this clause. I would say if you go for the interpretation of this clause you would need more than only this clause, so only on the face of it. It would be hard under Curaçao law to make that claim, but that could be a claim, yes. And it could also have been the reasonable expectation or an expectation of the −− of the liquidator entering into this agreement. Could have been. Yes. Q. I think we're all agreed the starting point −− the starting point under Curaçao law −− A. Yes. Q. −− is the literal meaning of the words of a clause? A. Yes. That's correct. Q. Yes. A. Yes. That's also in the report. **Q. So what else could it mean other than if companies aren't on the list that might cause a loss to FCIB that the Exhibit A companies are liable for? A. One explanation of this contract and this clause could be that you say the liquidator hereby guarantees, in person, that all the companies that he can enter into a settlement agreement with FCIB are listed in this list, so so it's a full disclosure of all the companies that he's representing at the moment and that have to be entered into the settlement.** Q. And if it isn ' t −− and if it isn't −− A. Hmm, hmm. Q. −− then FCIB can sue the Griffins −− the Exhibit A companies? A. FCIB would then also −− but that's my −− my reading of the contract also sue the liquidator for withholding all these names in person. And that −− but that would also be Curaçao insolvency law. Q. So, despite it twice being said that the liquidator is only contracting in his capacity as agent of the companies −− A. Hmm, hmm. Yes. Q. −− nonetheless you are saying he assumes a personal liability? A. Yes, my

> Lord. And there's a two step reasoning for that. The first one is that, despite the contract saying that you act only as a liquidator in that capacity, some clauses could be read as that you have the personal guarantee, because who else can guarantee that all companies are on the list? I don't think the Griffins companies can guarantee that. And the liquidator, as being a representative of the Griffins companies, cannot guarantee that is all the companies because it presumes it is more than the companies that are listed in the Exhibit A. So that's one thing. There's another thing under Dutch –– under Curaçao insolvency law. Even if you act in your capacity as a liquidator, you can be held personally liable. And if you exclude your liability under Curaçao law, it's only valid up to a certain point. So if you do things on purpose or there's gross negligence, it does not work. So that would be my answer. Q. But you would agree, would you, that under Curaçao law –– A. Hmm, hmm. Q. –– if the parties to the agreement have agreed that the claims of companies that should have been on the list remain and can be brought? A. Hmm, hmm. Q. That, in those circumstances, Q. That, in those circumstances, those claims can't be said to be forfeited? A. Oh, my Lord, if the question could be more specific then that would really help for me to say "yes" or "no", because forfeiture of rights is a very –– it's a very different principle; and then you need to take into account all the circumstances, as Bart van der Wiel also explained."

780. It is unnecessary for me to decide whether FCIB had (or has) a personal claim for breach of warranty against Mr Hunt or whether the IPSAs excluded that liability because no such claim was made in these proceedings and none of the experts suggested that the existence of such a claim excluded or prevented the Court from finding that the Claimants had forfeited their rights to bring any of the claims in this action. Professor Biemans stated this very clearly at the end of the passage from his cross-examination (above) and I accept that evidence.

781. Moreover, I do not accept that by agreeing to the warranty FCIB was in some way acknowledging or accepting that any other IP Companies which were not on the list in Exhibit A were entitled to pursue separate claims. In my judgment, FCIB was relying on Mr Hunt's express representation that the list in Exhibit A of the Hunt IPSA was accurate in the sense that it was a complete list of all of the IPSA Companies of which he was the sole liquidator. Although the construction of the warranty is a matter for the Court, I accept the answer which Professor Biemans gave in bold (above) and I rely on that evidence. In clause (5) of the First section of the Hunt IPSA, Mr Hunt expressly represented to FCIB, as Professor Biemans put it, that "all the companies that he can enter into a settlement agreement with FCIB are listed in this list" and that he had

disclosed "all the companies that he's representing at the moment and that have to be entered into the settlement".

782. Mr Parker and his team criticised Professor Biemans for expressing his views about the construction and effect of the IPSAs rather than limit himself to evidence of the law in contrast to Mr van der Weiel, who was careful not to express an opinion on this issue: see van der Weiel 1, paragraph 6.6.3. But Mr Parker chose to put the question to Professor Biemans and I am entitled to have regard to the answer which he gave in cross-examination. I found him to be a reliable witness and I found his evidence to be of assistance to the Court. I, therefore, place considerable weight on his evidence.

783. *Conclusion.* I find that at the Curaçao Meeting Mr Hunt, Mr Bramston and Mr Potts held themselves out as negotiating on behalf of all of the companies in Categories 1, 2 and 3, that those three categories included all of the IP Companies and that Category 4 included only Non-IP Companies. I also find that Mr Hunt continued to hold himself out as acting for the companies in Categories 1, 2 and 3 at the London Meetings and until the execution of the IPSAs and that he did not inform FCIB of his appointment as liquidator of TWPS. Finally, I find that in giving the warranty in the First section, paragraph (5) Mr Hunt represented that he had disclosed of all of the IP Companies (i.e. those in Categories 1, 2 and 3) of which he was the sole liquidator and that he was entering into the Hunt IPSA on their behalf.

(v) <u>During the IPSA negotiations, Griffins formed and implemented a plan to resurrect TWPS (UK) with a view to bringing claims against FCIB including claims for fraud</u>

784. Mr Hunt's evidence in Hunt 6 was that when he was appointed as liquidator of TWPS he did not have any idea what its role had been. He subsequently withdrew that evidence and I have set out the relevant extract from his cross-examination above. When Mr Scott suggested to him that it was in the interests of FCIB for him to reveal his appointment as liquidator of TWPS, he suggested that the reason why he did not do so was because the original motivation for restoring TWPS to the register was now irrelevant:

> "Q. Presumably you would agree that FCIB had a reasonable interest in knowing what you were up to in trying to have an affiliated company restored and you put in charge of it? A. I don't know if it was in their interests or not. Q. The question is: they would have had a reasonable interest in knowing that. Is your answer that they would or they would not? A. I don't know what their reasonable interest would be. Could you be

> more specific? It's a very straightforward, Mr Hunt. You seem reluctant to answer it. You were negotiating a settlement with the bank. In the course of that negotiation, you procured control of an affiliated company of the bank. I'm asking you: did the bank have a reasonable interest in knowing about that? Yes or no? A. No. Q. Why do you say "no", Mr Hunt? A. Because I don't think it was relevant to the negotiations that were going on at the time. Q. How was it irrelevant to the negotiation when the purpose of having TWPS restored was to shake the tree and find out whether there was something with which to leverage the negotiation? A. Because the tree had already been shaken, to use your phrase. And by the time events transpired and the appointment made, the negotiations were all but over. So –– Q. But the IPSAs hadn't been signed. A. Yes. Q. The IPSAs were signed in February of 2015. So you had ample time to tell them: by the way, I've been appointed a liquidator of one of your affiliated companies? A. Yes, but, as I said, sort of the majority of the reasoning in March/April 2014 looked like it was ending. So the appointment was becoming moot. If it had been signed, if the IPSAs had been signed then I'm not sure there would have necessarily been the purpose of the appointment. If it hadn't been started then I don't think we would have actually pursued it per se. But it's –– the idea or the circumstances in March changed in September when the negotiations became more live again. Q. Presumably, Mr Hunt –– MR JUSTICE LEECH: I'm not sure I understand that answer, Mr Hunt. Are you saying that it wouldn't have been necessary to restore TWPS to the Registry if the IPSAs had already been signed by that date? A. In 2014, I don't think it could be described as necessary at all, the entire exercise with Transworld. It was one of other –– several other ideas to try and advance negotiations. By the time –– I think the petition happens in August 2014, the –– the approach by FCIB to restart, essentially, negotiations or develop them a bit further happens at the end of that. So the petition is already running whilst the first week in September negotiations happen. So it's becoming sort of slightly redundant, the entire process, if we're going to do a deal. So we are effectively going through the motions of continuing with the expectation or hope that the IP settlements would be signed. So this is just happening on the same time line, but they're not related. So there's no –– there's no huge purpose –– well, the purpose in March is not really made good because other events have transpired in negotiations, if that makes sense."

785. I reject that evidence and I find that Mr Hunt intended TWPS to be a vehicle for claims against FCIB principally for the benefit of Griffins and that he did not disclose his appointment to FCIB for that reason. I have reached this conclusion for the following reasons:

(1) I have already referred to Mr Fatherly's email dated 27 June 2014 to Mr Hellard describing TWPS as a "creature of Mr Deuss". The purpose of that email was to inform him of the deed of assignment of the debt by Chubb to TC Catering. Mr

Fatherly's explained that the reason for taking an assignment of the debt was that TWPS was the agent through which accounts were opened with FCIB.

(2) Mr Hunt accepted that Griffins paid for the assignment of the debt and the expenses required to restore TWPS to the register. I am satisfied that Mr Hunt and Mr Hellard authorised this expenditure for the benefit of themselves and their partners. Mr Hunt tried to suggest that he was acting in his capacity as a liquidator and that the expenditure was a loan to TC Catering. But I reject that evidence. If it were true, Mr Hunt would have been able to remember which company made the loan and he could not identify it. He would also have been able to produce evidence of the loan.

(3) Mr Hunt accepted in cross-examination that the petition to restore TWPS to the register and the witness statement in support of it made by Mr Clark of Blake Morgan did not disclose that Griffins had paid for the assignment, that the firm had a personal interest in restoring TWPS to the register and that TWPS's COMI was not in the UK. Moreover, Griffins also failed to provide the Official Receiver with a reason for restoring the company to the register and asserted that no conflict of interest arose. Mr Scott put all of these points to Mr Hunt and gave him an opportunity to answer them:

> "Q. So far as you're aware, did Mr Bramston, or anyone else from Griffins, ever inform the court that TC Catering had petitioned on the false basis that TWPS had its centre of main interest in the UK when it was dissolved? A. I wasn't involved in that aspect, so I 've no idea. Q. If we can read on in Mr Dalglish's e−mail. We can see he answers the queries that Ms Webb had raised. If we can just either go down the page or over the page −− over the page, I think, {F/2621/26}. We see at paragraph 3 that he encloses TWPS' accounts as requested. He then says this: "Note the substantial losses. I am at a loss to understand why anyone would want to restore this company to pursue a debt (of £1,800?) given the state of the company's balance sheet." And if you read on, Mr Dalglish refers, at paragraph 4, to the position of the elderly former directors at TWPS. And he then raises a question of his own costs: "Could you also advise who is responsible for the time costs we incur in dealing with this matter? This all seems like a huge waste of time (and money) for all involved in my opinion." Do you see that? A. Yes, I do. Q. And, so far as you recall, Mr Hunt, was there any communication between Griffins and the Official Receiver about the purpose of restoring and winding up TWPS and of having you appointed liquidator? A. I don't believe there was. Q. Can we go, please, to page {F/2621/17} in the document. We have here an e−mail on 17 November 2014 from your partner, Mr Harris, to Ms Webb at the

> Official Receiver. Do you see he writes in the first paragraph: "Further to our conversation I confirm that Timothy Bramston as Liquidator of TC Catering ... would like to nominate Mr Stephen Hunt as Liquidator of the above named company" –– that's TWPS. And then this: "I confirm that we have reviewed the position internally and that no conflict of interest arises." Do you see that? A. Yes. Q. Now, do you recall the conversation with Ms Webb to which Mr Harris is referring in the first sentence of his e–mail? A. I –– no –– I'm unlikely to have been involved, but ... Q. Do you recall there having been a conversation with others at Griffins A. I assume it was Mr Harris. It would have been his role to deal with new appointments, so, yes. Q. And where Mr Harris refers to Griffins having reviewed the position internally, presumably such a review on an important matter such as conflict of interest would have been documented at the time by Griffins? A. Yes, we had a compliance officer who dealt with that procedure."

(4) The inference which I draw from the non-disclosure of these matters to the Court and to the Official Receiver is that Mr Hunt had already formed a plan to restore TWPS to the register for the purpose of bringing claims against FCIB primarily for the benefit of himself and his partners. Moreover, it was these questions from Mr Scott which prompted the disclosure overnight of the ethics checklist which provided clear contemporaneous evidence that on 17 November 2014 this was Mr Hunt's plan. I have set out the manuscript comments from the checklist above and, as I have stated, Mr Hunt accepted that he was contemplating S.213 claims against FCIB. Finally, the checklist falsely records that Blake Lapthorn were the source of the introduction as Mr Hunt had to accept.

(vi) It would have been material for the IPs to disclose that the MTIC Companies and TWPS had claims against FCIB in the negotiations and FCIB was unreasonably disadvantaged by their failure to do so.

786. FCIB called no witnesses to give evidence and the Court was given no real explanation why it could not have called any of the individuals who were involved in the negotiations for the IPSAs. Mr Parker and his team submitted, therefore, that I should dismiss FCIB's case for this reason alone. In particular, they submitted that FCIB could not prove that any of its representatives understood Categories 1 to 3 to include all of the IP Companies and Category 4 to include only Non-IP Companies or that they relied on this representation in any way.

787. I have carefully considered whether I should dismiss FCIB's case on forfeiture of rights for this reason despite the adverse findings which I have made against the Claimants.

With some hesitation, however, I am satisfied that FCIB did understood the Categories 1 to 3 and Category 4 in the way in which I have found and that it would have been material for Mr Hunt to disclose that the MTIC Companies and TWPS had potential claims against FCIB. I have reached these conclusions for the following reasons:

(1) The Curaçao and London Meetings took place well over a decade ago. It was clear from the oral evidence of Mr Hunt, Mr Potts and Mr Fatherly that the best evidence of what took place at those meetings was contained in the documents. Indeed, in making my findings of fact, I have relied on the clear and obvious meaning of the composite note and rejected the witness evidence of Mr Hunt and Mr Potts. It is not clear what any of the FCIB witnesses would have been able to add other than context.

(2) I find that FCIB relied on the representation or holding out because of the number of times FCIB used the expression "total peace" or similar expressions in correspondence. Mr Scott and his team collected all those references in the annex to his oral submissions and I rely upon those documents. Furthermore, this issue was important to FCIB because it required Mr Hunt and the other IPs to give a warranty that the list of companies was accurate and complete.

(3) If the Claimants had disclosed to FCIB that they had potential claims of in excess of £200 million, it is obvious in my judgment that those claims would have been material to FCIB's decision to enter into the IPSAs and that it would have refused to do so unless Mr Hunt and the IPs had agreed to place a value on those claims and to settle them. Indeed, Mr Hunt accepted that they were material in cross-examination himself:

> "Q. And the Curaçao judge is correct, isn't he, Mr Hunt? If you had disclosed that Griffins was office holder at TWPS and that other English companies may have claims against FCIB, the negotiations would have looked very different, wouldn't they? A. I didn't see that written down, that question, but, yes, they would have looked different if I had disclosed that I 'm not intended making claims against them. Q. And they would have looked different, because if you had disclosed those additional claims, FCIB would have sought to include them in the settlement that was being negotiated? A. If I had such claims at the time then, yes, and I'd disclosed them, yes, that's what would —— I presume that would have happened."

(4) Finally, I am satisfied that there was a real prospect that Mr Hunt and the IPs would have agreed to settle those claims for very significantly less than the claims which they made in this action. All of the IPs gave evidence that their principal focus was on recovering the account balances in the accounts of IP Companies and they were willing provide assistance to FCIB in meeting third party claims to do so. Moreover, they were uncertain about FCIB's solvency. In my judgment, FCIB had a real prospect of persuading them to settle the Direct, Indirect Claims and TWPS Claims for a small increase in the Single Payments to be paid under each IPSA.

788. I find, therefore, that it would have been material for Mr Hunt, Mr Bramston and Mr Potts to disclose to FCIB during the negotiations that the MTIC Companies and TWPS had potential claims against FCIB and that FCIB was disadvantaged by their failure to disclose these claims. In particular, I find that FCIB lost the opportunity to negotiate a settlement of the Direct, Indirect and TWPS Claims on reasonable terms.

(5) Findings of Curaçao law

(i) FCIB

789. Based on the findings of fact which I have made in (i) to (v) above, I find that Mr Hunt and the IP Group acting in their capacity as the liquidators of TWPS and the MTIC Companies (apart from @tomic, Comveen and Notebook) acted in a manner which cannot be reconciled according to the standards of reasonableness and fairness. I also find that their conduct gave rise to a legitimate expectation on the part of FCIB that the IP Group would no longer pursue any rights or claims on behalf of the IP Companies including TWPS and the MTIC Companies (apart from @tomic, Comveen and Notebook). Finally, based on the finding of fact which I made in (vi), I find that the position of FCIB was materially disadvantaged as a result of TWPS and Mr Hunt attempting to enforce any rights which they had either directly or as assignees of the MTIC Companies to bring claims against FCIB. In particular, FCIB lost the opportunity to extend the IPSAs to settle those claims and was forced to defend the claims in this action.

790. Accordingly, I hold that both TWPS and Mr Hunt in his capacity as liquidator of TWPS have forfeited their rights to bring the TWPS Claims against FCIB. I also hold that TWPS has forfeited its rights to bring the Direct Claims against FCIB as assignee of the MTIC

Companies. I have considered whether TWPS should be held to have forfeited the rights of @tomic, Comveen and Notebook since Mr Hunt and Mr Bramston did not represent those companies in the negotiations for the IPSAs. But since the Direct Claims were being brought primarily for the benefit of Mr Hunt and Griffins and those companies are not separate parties to this action, I hold that TWPS and Mr Hunt have also forfeited their rights to bring those claims against FCIB.

(ii) Mr Deuss

791. Based on the findings of fact which I have made I also find that the conduct of TWPS and Mr Hunt gave rise to a legitimate expectation on the part of Mr Deuss that TWPS and Mr Hunt would not pursue any of the TWPS Claims against him and that he was materially disadvantaged as a result of TWPS attempting to enforce any rights which it had against him personally. I make these findings for the following reasons:

(1) Professor Biemans gave evidence that Mr Deuss would be treated as one of the "FCIB Entities" and entitled to enforce the IPSAs as a matter of Curaçao law: see Biemans 1, paragraph 110. Mr van der Weiel accepted that there was no dispute in relation to these issues: see van der Weiel 1, paragraph 6.5.

(2) Mr Deuss gave evidence in Deuss 1 that he did not participate directly in the negotiations for the IPSAs but he was consulted about them. He also gave the following evidence in Deuss 1, paragraph 175 (which was not challenged and which I accept):

> "My recollection and understanding is that I had the same protection as FCIB under the IPSAs, which was that they settled any claims the insolvency practitioners, including Mr Hunt, could bring against the bank and me. FCIB used the phrase "total peace" to describe this state of affairs, and I understood it to mean that whatever claims had been threatened were thereby settled so that a line could be drawn underneath all issues between the bank and the insolvency practitioners. I did not ever conceive that the insolvency practitioners could come back with future claims. If I had known this, I would not have agreed with FCIB to the terms of the settlement."

(3) Mr Deuss was materially disadvantaged as a result of TWPS and Mr Hunt attempting to enforce any rights which they had either directly or as assignees of the MTIC Companies to bring claims against him. In particular, if FCIB had been

given the opportunity to extend the IPSAs to settle those claims (as it should have been), Mr Deuss would not have been forced to defend those claims in this action.

(4) Accordingly, I hold that both TWPS and Mr Hunt in his capacity as liquidator of TWPS have forfeited their rights to bring all of the TWPS Claims against Mr Deuss.

O. Other Curaçao law issues

792. Given my findings in relation to forfeiture of rights, it is unnecessary for me to decide whether TWPS or any of the MTIC Companies were parties to any of the IPSAs and also whether they committed unlawful group conduct. If it had been necessary for me to decide those issues, I would have held that they were not parties to any of the IPSAs and that they were not liable for unlawful conduct in the same way as the Judge did in the Curaçao Judgment. Although I have held that I am not bound by any issue estoppel, I would have reached similar conclusions and for similar reasons.

VII. Circuity of Action

793. It is also unnecessary for me to consider the defence of circuity of action which the Defendants advanced and I make no decision on this issue for the following reasons. This defence gave rise to a very complex issue of law, namely, whether the breaches of fiduciary duty committed by the MTIC Directors should be attributed to the MTIC Companies for the purpose of deciding whether TWPS had an equal and opposite claim against each of them. This issue turns on the scope of the decision of the Supreme Court in *Bilta No 2*. Given that I have dismissed the claims on the merits, upheld the Defendants' limitation defence (for the most part) and held that the Claimants have forfeited their rights as a matter of Curaçao law, it is better for a decision on this issue to await a case in which it has direct application.

VIII. Summary

P. The Direct Claims

(1) Liability

(i) Assistance

794. I have held that HMRC did not have valid VAT Claims against three MTIC Companies (Xicom, Notebook and Comveen) and that FCIB did not assist the MTIC Directors of a further five MTIC Companies (ACEL, Leeds Smith, Star, Blue Fox and TCG) to commit the breaches of fiduciary duty which gave rise to the VAT Claims against those companies. I have, therefore, dismissed the Direct Claims of these MTIC Companies.

795. Nevertheless, I have held that HMRC had valid VAT Claims against the following eleven MTIC Companies and that FCIB assisted the MTIC Directors of those companies to commit breaches of fiduciary duty which caused those companies to incur the following liabilities to HMRC:

(1) *Kingswood*: £387,864.87;

(2) *MTL*: £587,788.53;

(3) *MML*: £4,443,565.00;

(4) *385 North*: £40,513,355.54;

(5) *Eliyon*: £455,360.09;

(6) *Gold Digit*: £1,231,524.20;

(7) *Northdata*: £7,713,261.39;

(8) *ETP*: £2,735,986.82;

(9) *Wood Works*: £9,004,904.84;

(10) *JDG*: £1,246,736.17; and

(11) *@tomic*: £2,083,422.86.

(ii) Dishonesty

796. I have dismissed all of the allegations of dishonesty which the Claimants advanced against Mr Deuss. In particular, I have found that he did not know or suspect that MTIC fraud was prevalent in the T&C sector or turn a blind eye to this fact or deliberately choose not to investigate whether T&C customers of FCIB (including the MTIC

Companies themselves) were engaged in MTIC fraud. I, therefore, dismiss the Direct Claims on the merits.

(2) Limitation

797. I also dismiss the Direct Claims on the basis that all 19 claims were barred by S.21(3) of the LA 1980. In particular, I have held that the *General Rolling Stock* principle does not apply to a foreign insolvency process and, in particular, to the Emergency Measures of FCIB under Curaçao law. I have also held that the Court should not assist the Claimants and apply *General Rolling Stock* under the principle of modified universalism. Finally, FCIB also pleaded the doctrine of laches in its Defence. But it is unnecessary for me to decide that issue given my findings in relation to the statutory limitation period.

Q. The Indirect Claims

(1) Dishonest assistance

(i) Assistance

798. I have dismissed the eight Indirect Claims of Xicom, Notebook and Comveen and of ACEL, Leeds Smith, Star, Blue Fox and TCG for the same reason that I dismissed their Direct Claims, namely, that the HMRC did not have valid VAT Claims against the first three and that FCIB and TWPS did not assist the MTIC Directors of the remaining five companies to commit the breaches of fiduciary duty which gave rise to the VAT Claims against them.

799. I also dismiss the Indirect Claims of Kingswood and @tomic because TWPS did not assist the MTIC Directors of those companies to commit the relevant breaches of fiduciary duty. But I have found that TWPS assisted the MTIC Directors of nine MTIC Companies (MTL, MML, 385 North, Gold Digit, Eliyon, Northdata, ETP and Wood Works) to commit the breaches of fiduciary duty which caused those companies to incur the liabilities to HMRC set out in [795].

(ii) Dishonesty

800. I have dismissed the allegations of dishonesty which the Claimants advanced against Mr Deuss for the same or very similar reasons to those which I gave in dismissing the Direct

Claims. I have also dismissed the allegations that Mr Deuss was a de facto or shadow director of TWPS and that his knowledge and state of mind should be attributed to it for the purposes of imposing liability for dishonest assistance (or under S.213).

(iii) Limitation

801. Finally, I have found that the Court and the Defendants are not bound by Mr Hunt's decision not to take a limitation defence against any of the MTIC Companies both because that decision was *res inter alios acta* and not legally relevant and because it was not reasonable for the Court to rely on that decision in assessing the amounts (if any) for which TWPS is liable to the MTIC Companies. I have, therefore, approached the Indirect Claims "with a clean slate" and held that the claims of seven MTIC Companies (Blue Fox, TCG, Northdata, MTL, ACEL, MML and ETP) are barred by S.21(3) of the LA 1980. But I have also held that the claims of Kingswood, Leeds Smith, 385 North, Eliyon, Gold Digit and JDG are not barred by S.21(3) because the liquidators or Uninvolved Directors of those MTIC Companies could not have discovered the fraud alleged against TWPS with reasonable diligence before the Cut Off Date.

(2) S.213

(i) Declaration

802. I have found that the MTIC Companies were carrying on business with intent to defraud HMRC but I have also found that Mr Deuss did not know that they were doing so or turn a blind eye to this fact and that the TWPS marketers were not party to the carrying on of that business. Finally, I have found that Mr Deuss was not a de facto or shadow director of TWPS. For these reasons I decline to declare that Mr Deuss is liable to make a contribution to the assets of the MTIC Companies under S.213.

(ii) Application

803. I also dismiss the MTIC Companies' Indirect Claims on the basis that no Application Notice was issued by any of their liquidators and that this is an essential condition of liability. Furthermore, it is now far too late for any of the liquidators of the MTIC Companies to issue such an Application Notice.

R. The TWPS Claims

(1) Mr Deuss

804. I dismiss the claim for breach of fiduciary duty against Mr Deuss on the basis that he was not a de facto or shadow director of TWPS and did not owe fiduciary duties to the company. I also dismiss the claim on the basis that I have dismissed the allegations of dishonesty against him. Mr Deuss also ran a defence of laches in relation to this claim (as FCIB had done in answer to the Direct Claim). Given that I have dismissed the claim on the merits, it is unnecessary for me to consider that defence any further. Finally, I decline to declare that Mr Deuss is liable to make a contribution to the assets of TWPS under S.213 for the same reasons as I have dismissed the equitable claim. But I also do so because I have dismissed the Indirect Claims and found that TWPS was not liable to compensate the MTIC Companies for any of the VAT Claims. The Claimants did not allege that TWPS had any other liabilities (apart from to TC Catering and to fund this action).

(2) FCIB

805. I decline to declare that FCIB is liable to make a contribution to the assets of TWPS under S.213 for the same reasons. The Claimants relied on the Court attributing Mr Deuss's knowledge and state of mind to both TWPS and FCIB for the purpose of the S.213 claim by TWPS against FCIB and I have found that TWPS was not liable to compensate the MTIC Companies for any of the VAT Claims.

S. Curaçao Law

(1) Issue Estoppel

806. I have dismissed the Defendants' defence that the Claimants are bound by an issue estoppel based on the Curaçao Judgment both because there was not a complete identity of subject matter and because there were special circumstances which made it unjust to hold that the Claimants were bound by the findings of the Court of First Instance.

(2) Forfeiture of rights

807. Finally, I have found that the law of Curaçao applies to determine the effect of the Claimants' pre-contractual conduct under Article 12 of the Rome II Regulation and that the Claimants have forfeited their rights to bring the Direct Claims as assignee against

FCIB and the TWPS Claims against both Mr Deuss and FCIB as a matter of Curaçao law. I, therefore, dismiss all of the Claimants' claims in their entirety.