

Neutral Citation Number: [2026] EWHC 2847 (Comm)

Case No: CL-2019-000118

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 05/11/2026

Before:

MR JUSTICE JACOBS

- -

Between:

THE PUBLIC INSTITUTION FOR SOCIAL SECURITY

Claimant

-and-

(1) MUNA AL-RAJAAN AL-WAZZAN (in her capacity as representative of the estate of Mr Fahad Maziad Rajaan Al Rajaan (deceased))
(2) MUNA MOHAMMED ABDULAZIZ AL WAZZAN
~~**(3) BANQUE PICTET & CIE SA**~~
~~**(4) PHILIPPE BERTHIERAT**~~
(5) KAMRAN AMOUZEGAR
(6) PHOENIX INTERNATIONAL CONSULTANTS SARL
(7) ANTOINE NASRALLAH
~~**(8) PICTET & CIE (EUROPE) SA**~~
~~**(9) PICTET BANK AND TRUST LIMITED**~~
~~**(10) BANK PICTET & CIE (ASIA) LIMITED**~~
~~**(11) MIRABAUD & CIE SA**~~
~~**(12) PIERRE MIRABAUD**~~
~~**(13) THIERRY FAUCHIER-MAGNAN**~~
~~**(14) LUC ARGAND**~~
(15) MAN GROUP LIMITED (formerly MAN GROUP PLC)
(16) MAN STRATEGIC HOLDINGS LIMITED
(17) MAN INVESTMENTS LIMITED
(18) MAN INVESTMENTS AG
(19) MAN INVESTMENTS MIDDLE EAST LIMITED
(20) ANTOINE MASSAD
(21) MOHAMAD EL GHAZZI
(22) UNION BANCAIRE PRIVÉE, UBP SA

(23) UBP ASSET MANAGEMENT (BERMUDA) LIMITED
(24) ANNE ROTMAN DE PICCIOTTO
(25) DANIEL DE PICCIOTTO
(26) FRANCESCO MOMBELLI
(27) ICS INVESTMENT CONSULTING SERVICES SA
(28) SINTESI LIMITED
(29) METHIS MANAGEMENT LIMITED
(30) EFG BANK AG
(31) GILLES GUERIN
(32) THE ESTATE OF EDGAR DE PICCIOTTO
(33) GUY DE PICCIOTTO
(34) MARC DE PICCIOTTO
~~**(35) DANIELE DE PICCIOTTO**~~
(36) VP BANK AG
(37) VP BANK (SCHWEIZ) AG
(38) RENATO GHITTINI
(39) ELY MICHEL RUIMY
(40) AERIUM FINANCE LIMITED
(41) THE PENSÉE FOUNDATION
(42) KHALED AL RAJAAN
(43) FAWAZ AL RAJAAN
(44) FAJER AL RAJAAN (OR AL WAZZAN)
(45) FARAH AL RAJAAN

Defendants

-and-

(3) AUB TRUSTEES (GUERNSEY) LIMITED

Defendant to the Section 423 claim

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- -

Stuart Ritchie KC, Hugh Norbury KC, Anna Dilnot KC, Louise Merrett, Ruth Jordan, Christopher Burdin, Nico Leslie, Mark Belshaw, Jon Turnbull, Joshua Kimblin, Andrew Currie (instructed by **Stewarts Law**) for the **Claimant**
Tom Weisselberg KC, Harry Adamson, Rayan Fakhoury (instructed by **PCB Byrne LLP**) for the **First and Second Defendants**
Aidan Casey KC, Armando Neris (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Seventh Defendant**
Joe Smouha KC, James Collins KC, Leonora Sagan, Felix Wardle, Freddie Onslow (instructed by **Willkie Farr & Gallagher (UK) LLP**) for the **Fifteenth to Eighteenth Defendants**
Harry Matovu KC, Ben Woolgar (instructed by **Seladore Legal**) for the **Twentieth Defendant**
Rory Brown KC (instructed by **LK Law LLP**) for the **Twenty-Sixth to Twenty-Ninth Defendants**
Camilla Bingham KC, Amy Rogers KC, Harry Stratton (instructed by **A&O Shearman**) for the **Thirtieth Defendant**
Tim Penny KC, Emily McKechnie, John Grocott-Barrett (instructed by **McCue Jury & Partners LLP**) for the **Thirty-Ninth and Fortieth Defendants**

Philip Edey KC, James Mather, Ramyaa Veerabathran (instructed by **Fladgate LLP**) for the **Forty-First Defendant**
Timothy Sherwin (instructed by **PCB Byrne LLP**) for the **Forty-Second to Forty-Fifth Defendants**
Edward Cumming KC, Nick Daly (instructed by **Kingsley Napley LLP**) for the **Third Defendants to the Section 423 claim**

Hearing dates: 17-20, 24-27, 31 March, 1-3, 7-8, 10-11, 14-15, 29-30 April, 1-2, 6-8, 12-16, 19-21 May, 4-5, 9-12, 16-19, 23-27, 30 June, 1-4, 7-11, 16-17, 22-25, 28-31 July, 1 August, 6-8, 13-14, 16-17, 20-22, 31 October, 3-6, 10-14, 19-21, 24-27 November, 1-4, 8-9 December 2025, 19-22, 26-29 January, 2-5, 9-12, 16-19, 23-26 February, 2-5, 9-12 March 2026
Draft judgment circulated 19 October 2026

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JUDGMENT

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Mr Justice Jacobs:

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SECTION A: INTRODUCTION

A1: Summary of the claim

1. This case involves proven corruption on a breathtaking scale, involving many individuals who had reached senior positions in public office or the financial services industries of fund management and banking. It has also involved the longest Commercial Court trial for 20 years, occupying some 133 sitting days (excluding reading days) and a full legal year.[1] The length of trial is commensurate with the enormity of the wrongdoing revealed in the evidence. Despite its length, and the very large number of issues raised, the basic facts can be simply explained.

2. The Public Institution for Social Security ("PIFSS"), the Claimant in these proceedings, operates the state of Kuwait's social security system, which provides Kuwaitis with insurance for old age, disability, sickness and death. It has very substantial funds available for investment for the purposes of producing a return sufficient to meet the future needs of the population.

3. Mr Fahad Maziad Al Rajaan ("Mr Al Rajaan") was PIFSS' Director General, and thus the most senior employee of PIFSS, over a period of 30 years. He was appointed in 1984, and retired in January 2014, albeit that there was a period between May and November 2012 when he was suspended from office – because of concerns, then unproven, as to possible corruption. The decision to suspend was made by the then Kuwaiti Minister of Finance, who was also the Chairman of PIFSS.

4. As Director General, Mr Al Rajaan enjoyed considerable influence and control in relation to decisions as to how to invest PIFSS' funds. The case against him, which has been established at trial, is that he used that power and influence in order to procure the payment to himself, and his associates, of around USD 1 billion in commissions on the monies that PIFSS invested with various fund managers around the world, and that the payment of these commissions was secret and never disclosed to PIFSS. The placing of those investments generated the payment of fees by various fund managers to third parties, and these were the source of kickbacks to Mr Al Rajaan.

5. PIFSS' case, which has been demonstrated by the evidence at trial, is that unlawful corrupt payments were made at PIFSS' expense in respect of investments made by PIFSS and were received by Mr Al Rajaan in violation of his duties to PIFSS and of Kuwaiti public property and anti-bribery laws. PIFSS also contends that those who participated in the various schemes (described below) knew and intended that the payments to Mr Al Rajaan were payments made in connection with the position of trust which he held at PIFSS as Director General, and that these were sums to which he was not entitled and which were funded, in substance, by PIFSS.

6. Mr Al Rajaan is the central figure in the present litigation, but he died in September 2022, some 3 years after the present litigation was started. PIFSS claims around USD 1 billion from his estate. His widow, Ms Al Wazzan, is sued in her capacity as representative of that estate. In that capacity, she is the 1st Defendant ("D1"). She is

[1] The 2024/2025 *"Skat"* case was almost as long: 108 sitting days. The *Hewlett Packard v Autonomy* 2019/2020 main trial in the Chancery Division lasted 93 days. None of these cases, including the present, surpasses the *BCCI v Bank of England* case, which lasted 22 months and 256 trial days before the liquidators abandoned the case in 2005.

also sued personally as the 2nd Defendant ("D2"), albeit that no wrongdoing is specifically alleged against her. She is party to the proceedings as D2 in order to ensure that she was bound by the result of determinations at trial, including as to the true beneficial ownership of assets which are nominally in her name.

7. I shall hereafter use "D" references: e.g. D1, D2 etc rather than the "1st Defendant" or the "2nd Defendant".

8. There is no substantial dispute that around USD 1 billion was paid over the years, and that Mr Al Rajaan was the recipient of the lion's share of those monies. The routing of the payments involved a complex web of bank accounts and offshore corporate or trust entities. On PIFSS' case, which has been established at trial, this was a means of concealing the kickbacks that were being paid, including by breaking up the payment flows so as to disguise their ultimate source.

9. The balance of the USD 1 billion was retained by close associates of Mr Al Rajaan who were assisting him in the process of channelling the commission payments to him. Claims to be adjudicated at the present trial were made against three such associates: Mr Antoine Nasrallah (D7), Mr Mohamad El Ghazzi (D21) and Mr Francesco Mombelli (D26). Another close associate of Mr Al Rajaan is Mr Kamran Amouzegar (D5). A successful jurisdictional challenge by Mr Amouzegar in 2020 has meant that he was not a defendant to the claims to be adjudicated at this trial.

10. PIFSS' central claims in these proceedings are made under Kuwaiti law, and specifically Kuwaiti tort law. In broad summary, PIFSS claims compensation in the amount of the secret commissions which were received by or payable to Mr Al Rajaan and his associates. The largest claim is made against the estate of Mr Al Rajaan, for the full amount of approximately USD 1 billion which he procured for the benefit of himself and his associates. The claims against other Defendants were lower, and depended upon the extent to which they were involved in each of the particular "schemes" being operated.

A2: The Defendants

11. Apart from D1/D2, the other Defendants to the proceedings are individuals or organisations who, in one way or another, are alleged to have been complicit in Mr Al Rajaan's corruption, either paying bribes to him or laundering the proceeds of the secret commissions, or both. They can broadly be categorised as: intermediaries, fund managers, and bankers.

Intermediaries

12. The intermediaries were individuals (or their companies) who acted, or at least purported to act, as introducers of investment products to Mr Al Rajaan and thereby PIFSS. They were paid substantial commissions by fund managers for their successful introduction of PIFSS as an investor. It was those commissions which were then shared with Mr Al Rajaan and routed to the corporate or trust vehicles which he beneficially owned.

13. The Defendants who fall into this broad category are: Mr Nasrallah (D7) and his company Phoenix International Consultant SARL ("Phoenix") (D6); Mr El Ghazzi

(D21) and Mr Mombelli (D26) together with a number of companies through which Mr Mombelli operated (D27-29).

14. Mr Nasrallah had a broader role than Mr El Ghazzi and Mr Mombelli. The monies which he channelled to Mr Al Rajaan were not confined to a share of commissions on investment products which he claimed to have introduced to PIFSS. He also assisted more generally in laundering other secret commissions, principally payments made to and from companies associated with Mr Amouzegar.

15. Both Mr Nasrallah and Mr Mombelli (along with his companies) actively participated in the proceedings and trial. Mr El Ghazzi participated in the early stages of the case, but ceased participation following service of his defence.

Fund managers

16. There are two groups of defendants who were involved in the running of various funds from which the commission payments were derived: the Man group of defendants, and the Aerium defendants.

17. D15 – D19 comprise various companies within the Man group. I shall refer simply to "Man", except where it is necessary to draw distinctions between the different companies. Man had its origins in commodity (particularly sugar) trading carried out from the City of London, but by the 1990s had become a substantial international financial services organisation involved in hedge fund management. It is listed on the London Stock Exchange, and was at the material times and remains the largest publicly listed hedge fund manager. By the mid-1990s, Mr Al Rajaan had become attracted to hedge funds, and substantial PIFSS funds were invested with Man via its Middle East office which was run by Mr Antoine Massad (D20). Mr Massad and two other individuals at Man are alleged to have knowingly participated in paying bribes to Mr Al Rajaan, via commission payments made to Mr El Ghazzi.

18. PIFSS also made very substantial investments in "Aerium" funds. These were property-related funds managed by various companies in the Aerium group. Their founder, Ely Michel Ruimy (D39), played a substantial part in the operation of those Aerium companies. Commissions on the Aerium investments were paid to companies associated with Mr Amouzegar and another individual, Mr Hashem Khosrovani, who was Mr Amouzegar's business partner. A substantial part of those commissions was paid to Mr Al Rajaan. Ely Michel Ruimy is alleged to have knowingly assisted in paying these monies to Mr Al Rajaan, in return for PIFSS investing in Aerium funds.

19. Ely Michel Ruimy also paid monies more directly to Mr Al Rajaan. Around USD 10 million was paid from Ely Michel Ruimy's Swiss bank account at Mirabaud & Cie SA ("Banque Mirabaud") to an account of Mr Al Rajaan (in the name of his wife, D2) at the same bank. A company within the Aerium group, Aerium Finance Ltd (D40), is also sued in respect of those payments.

Bankers

20. These proceedings originally involved 4 Swiss banks, and individuals who worked for or with those banks: Banque Mirabaud (D11-14), Banque Pictet & Cie ("Banque Pictet"

or "Pictet") (D3, D4, D8-10), Union Bancaire Privée ("UBP") (D22-25, and D32-35) and EFG Bank AG ("EFG") (D30 and D31).

21. *Banque Mirabaud and Banque Pictet*, and other defendants associated with them, made successful jurisdictional challenges on the basis that the claims against them should be adjudicated in Switzerland: [2020] EWHC 2979 (Comm) (Henshaw J) and [2022] EWCA Civ 29 (Court of Appeal). Mr Amouzegar also successfully challenged jurisdiction, riding on the coat-tails of Banque Pictet, albeit that Henshaw J declined jurisdiction "with a degree of hesitation" (see para [479]). Had the full extent of his involvement in schemes well beyond those involving Pictet been known, it is doubtful whether that jurisdictional challenge would have succeeded. The upshot of the jurisdictional challenge was that Banque Mirabaud, Banque Pictet and a number of individuals – including Mr Amouzegar – were then sued in Switzerland.

22. *The Banque Mirabaud settlement*. Following the conclusion of the present trial in March 2026, a settlement was reached in May 2026 between PIFSS and Banque Mirabaud, Pierre Mirabaud and Thierry Fauchier-Magnan (D11 – D13). This settlement does not substantially affect the liability issues which I need to decide. However, it does potentially affect the quantum of the claims which can be made against some parties. The parties were broadly agreed that any submissions as to the impact of the settlement on quantum should await my judgment on the issues argued at trial, and should therefore be addressed in the context of the "consequentials" hearing: i.e. the usual hearing which takes place, following judgment, in order to deal with costs, permission to appeal and other matters consequential on the judgment of the court.

23. This means that the claim figures which are contained in this judgment are those which were advanced by PIFSS without taking account of possible adjustment because of the May 2026 Banque Mirabaud settlement. They therefore differ from the figures for which judgment will, in due course, be given. Another complication, relating to the figures, is that PIFSS' claims are based on payments made in a number of different currencies, including currencies, such as French Francs, which no longer exist. Issues as to the correct currency of a judgment in PIFSS' favour are also to be addressed at the consequentials hearing. In this judgment, I have consistently used US Dollar figures to indicate the quantum of PIFSS' claim. Those represent both claims for payments originally made in US Dollars, and also claims in respect of payments originally made in other currencies but converted to US Dollars at the applicable rate when the payments were made.

24. *UBP*. The involvement of UBP, and the individuals associated with that bank, came to an end during PIFSS' opening submissions, as a result of a settlement involving a substantial payment by UBP. Save for one point, there was no dispute as to the impact of this settlement on the claims made against the defendants. I deal with that separate point in Section T below, in the context of the topic of "recoveries". The figures in this judgment reflect the position after allowance for the UBP settlement.

25. *VP Bank*. A fourth bank, VP Bank, which is headquartered in Liechtenstein (D36) but with a Swiss subsidiary (D37), has been joined to the present proceedings, together with an individual (Mr Ghittini – D38) who worked for that bank. However, the proceedings against VP Bank and Mr Ghittini have not progressed beyond a jurisdictional challenge, which has yet to be determined. VP Bank and Mr Ghittini have therefore played no part in the present trial, and have not provided any disclosure. The dealings of Mr Al Rajaan

and Mr Nasrallah with VP Bank are, however, relevant to the claims made against them, and more generally to Mr Al Rajaan's modus operandi.

26. *EFG*. All of this means that following the UBP settlement the only bank which played any part in the trial was EFG. Unlike Banque Mirabaud and Pictet, PIFSS via Mr Al Rajaan did not invest in any funds managed by EFG, which is therefore not alleged to have paid bribes to Mr Al Rajaan. However, EFG is alleged to have assisted Mr Al Rajaan in laundering and thereby successfully concealing the secret commissions, or their proceeds, which were being channelled to him and others. The individual at EFG primarily responsible for doing so was a relatively senior employee, not part of EFG's senior management, called Gilles Guerin (D31). Mr Guerin participated in the early stages of the litigation, but ceased meaningfully to participate following service of his defence.

27. On 17 September 2026, some 6 months after the trial had concluded, and a month before this judgment was given to the parties in draft, PIFSS and EFG concluded a confidential settlement. This involved a significant payment by EFG to PIFSS. That settlement would, like the Mirabaud settlement, reduce the quantum of the claims for which PIFSS could seek to obtain judgment against other parties. PIFSS proposed that, as with the Mirabaud settlement, any issues as to the impact of the settlement on quantum should be addressed at the consequentials hearing. This was agreeable to, or not opposed by, the Defendants. Where this judgment refers to the quantum of PIFSS' claims, or the amount which I consider to be recoverable, those figures are given prior to the impact of the EFG settlement, as well as the Mirabaud settlement already described.

28. A further impact of the EFG settlement was that it was no longer necessary to determine issues as between PIFSS and EFG. PIFSS and EFG jointly invited the court not to make any findings in respect of EFG, or the claims advanced against EFG, save insofar as the court considered it necessary for the determination of claims against other Defendants. The claims against other Defendants included PIFSS' claim against EFG's employee Mr Guerin. That claim was not resolved by the EFG settlement. The claim against Mr Guerin is one of the claims made within the context of the EFG Scheme, which also involved claims against Mr Nasrallah and the estate of Mr Al Rajaan (D1). Accordingly, it is still necessary to address that claim in detail in Section J below.

29. In that context, I have retained the description of that scheme as the "EFG Scheme", notwithstanding the settlement with EFG. That was the description generally used by the parties at trial, albeit that it was sometimes referred to as the "Further Nasrallah Scheme". PIFSS' claim against EFG under Kuwaiti tort law was based exclusively on the conduct of Mr Guerin, for which EFG was alleged to have been vicariously liable. Mr Guerin's central involvement in that scheme, when working for EFG or its predecessor banks, means that "EFG Scheme" remains appropriate. However, the settlement means that it is not necessary for this judgment to contain any findings either for or against any individuals, other than Mr Guerin, who were officers or employees of EFG.

30. Where a case settles following full argument and prior to judgment, a judge does have a discretion to publish a judgment that has been prepared prior to the settlement: see *Jabbar v Aviva Insurance UK Ltd* [2022] EWHC 912 (QB). However, it is not appropriate to exercise that discretion so as to make findings against EFG which are unnecessary for the resolution of the claims against other defendants.

31. That said, it is necessary to address some significant arguments which were advanced by counsel for EFG, Ms Bingham KC, Ms Rogers KC and Mr Stratton. There are several reasons for this. Some of these arguments were applicable not only to the position of EFG, but also to the position of Mr Guerin. For example, this is the case in relation to arguments as to the applicable law of the torts which PIFSS alleged against EFG, which required consideration of the conduct of Mr Guerin for which EFG was said to be vicariously liable. Another example is factual: EFG made submissions as to the point in time at which there was evidence of wrongdoing on the part of Mr Guerin. Furthermore, on various issues in the case, the principal argument was advanced by Ms Bingham or Ms Rogers and this was then adopted or relied upon by other Defendants. An example is Ms Bingham's arguments as to limitation and contributory fault under Kuwaiti law. Even if arguments were not completely adopted by other Defendants, such as in relation to justiciability where EFG took a narrower line than some other defendants, it is nevertheless appropriate to consider the points that were advanced. Finally, on the issue of applicable law, the success or failure of EFG's argument could potentially affect the force of the case of various other Defendants (D1, Mr Nasrallah, and the Mombelli defendants) who were also contending that Swiss law, rather than Kuwaiti law, was the applicable law of their alleged torts. Accordingly, this judgment continues, where appropriate, to refer to the arguments of counsel for EFG.

Other Defendants

32. In addition to the claims against intermediaries and others, there are some Defendants who do not fall neatly into one of those categories, but had associations with Mr Al Rajaan.

33. *Pensée*. D41, the Pensée Foundation ("Pensée") is a Bahamian foundation formed in 2013 by Mr Al Rajaan, with the assistance of Mr Nasrallah and a Bahamian bank called Deltec Bank and Trust ("Deltec"). It was created after a Swiss criminal investigation into Mr Al Rajaan resulted in his deciding no longer to use payment routes which involved Swiss banks. Pensée then received a significant volume of secret commissions, and PIFSS makes various claims in that regard.

34. *The heirs*. D42-45 are the children of Mr Al Rajaan and Ms Al Wazzan, and (along with Ms Al Wazzan) are his heirs. A claim is made against them in order to ensure that they are bound by the result of the proceedings against D1/D2, and to stop relitigation of issues which are decided in this judgment. I dismissed a jurisdictional challenge in December 2024, and there was an unsuccessful appeal against that decision to the Court of Appeal: [2025] EWCA Civ 1505.

35. *AUB*. The claims made against the above Defendants were commenced by Claim Forms issued at different times. The proceedings under those various Claim Forms have been consolidated. In addition, separate proceedings have been commenced against D1, D2 and AUB Trustees (Guernsey) Ltd ("AUB") under section 423 of the Insolvency Act 1986 in relation to assets gifted to AUB to be held on the terms of an alleged trust called the "Myrose Trust". PIFSS contends that this was for the purpose of putting assets beyond the reach of PIFSS. The present trial is not concerned with the substance of this section 423 claim, save that certain preliminary issues in relation to that claim are to be determined. Those preliminary issues have been formulated so as to ensure that AUB is bound by the court's determinations of the principal issues in the claim against D1/D2.

A3: The "schemes" in issue

36. PIFSS divided the wrongdoing in issue in these proceedings into a number of separate "schemes". It is convenient to address the issues by reference to the schemes so identified, although the divisions between the various schemes are not hard and fast. Mr Al Rajaan is a common element, and central figure, in relation to all the schemes, but the money flows often take place across different schemes. In order to avoid duplication, PIFSS in its closing submissions identified the "unique" financial claim against each defendant made in respect of each scheme, and I use that description later in this judgment.

37. The schemes and the parties against whom claims are made in respect of these schemes are as follows.

38. The Mirabaud Scheme (Section G below): D1/D2. Although Banque Mirabaud and various individual Defendants successfully challenged jurisdiction, their conduct remains relevant to the claim against D1/D2.

39. The Pictet Scheme (Section H below): D1/D2 and Mr Nasrallah (D7). Although Mr Nasrallah's company (Phoenix – D6) features in this scheme, no separate claim was pursued against Phoenix, which has been dissolved. Again, although Banque Pictet and associated individuals successfully challenged jurisdiction, their conduct remains relevant to the claim against D1/D2 and Mr Nasrallah.

40. The VP Scheme (Section I below): D1 and Mr Nasrallah (D7). VP Bank and other individual participants in the VP Scheme (Mr Ghittini and Mr Amouzegar) are not taking part in this trial, because they have made jurisdictional challenges which have not been determined.

41. The EFG Scheme (Section J below): D1/D2, Mr Nasrallah (D7), and Mr Guerin (D31). As discussed, the claim against EFG (D30) has been settled.

42. The Aerium Scheme (Section K below): D1/D2, Ely Michel Ruimy (D39) and Aerium Finance Ltd (D40).

43. The Pensée Scheme (Section L below): D1/D2, Mr Nasrallah (D7) and the Pensée Foundation (D41).

44. The Man Scheme, which Man submits should be called the "MEG Scheme" (using Mr El Ghazzi's initials): (Section M below): D1/D2, the Man companies (D15-19), Mr Massad (D20), and Mr El Ghazzi (D21).

45. The Mombelli Scheme (Section N below): D1/D2, Mr Mombelli (D26) and his companies (D27-D29).

46. The UBP Scheme is very briefly addressed in Section O. However, this scheme no longer requires detailed separate consideration, either as to liability or quantum, in view of the settlement with UBP.

47. Each of the above schemes has its unique features, and each would – if dealt with alone – necessitate a trial of some weeks, with some (such as the EFG, Man and Aerium Schemes) requiring rather longer than others. Despite these unique features, PIFSS

identified in its pleadings the common features of the various schemes. This was set out in paragraphs 29 and 30 of the "10 RAPOC": this being the 10th iteration of the Re-Amended Particulars of Claim. I set out the material parts of those paragraphs below (paragraphs 48 – 54) since they provide a good overall description of the events with which I am concerned. It will also be apparent from my findings in this judgment that the material aspects of PIFSS' case, as set out in those paragraphs, have been proved.

48. From a date no later than about 1994 until about 2015 following his ceasing to act as Director General in 2014, in breach of his duties to PIFSS and without PIFSS' knowledge or consent, Mr Al Rajaan arranged for and/or procured secret commissions to be paid to him or others at his direction or parties otherwise connected with him in sums known to date of approximately USD 1.036 billion. While each Scheme enjoyed its own particular features, in general the schemes, at their core, operated as follows.

49. Under the control and/or influence of Mr. Al Rajaan, PIFSS made decisions, in Kuwait, to enter into arrangements for the provision of financial services to or for the ultimate benefit of PIFSS and to make investments, the investment capital being typically provided from PIFSS' bank account at the Ahli United Bank in London, of which Mr. Al Rajaan was Chairman at material times.

50. Fees were payable (including by deduction from PIFSS' investments) by PIFSS on financial services supplied to it or investments which it entered into.

51. Mr. Al Rajaan procured the banks and investment companies with whom he was dealing on behalf of PIFSS in his capacity as Director General to make secret commissions to him equating to an agreed proportion of the relevant fee.

52. The secret commissions were arranged between Mr. Al Rajaan and the relevant partner/executive or intermediary involved in broking the financial service or investment in question and were "fronted" and thus concealed by corrupt intermediaries who purported to contract with the bank or investment company to disguise the payment of secret commissions as legitimate retrocessions (rebates), commissions or introduction fees. As Mr. Al Rajaan arranged for and/or influenced PIFSS to enter into further investments, the purported contractual arrangements between the "front" and the relevant entity through which payment of secret commissions was made would be varied to accommodate the new "commissionable" investment.

53. To enable ultimately successful payment, without detection or regulatory scrutiny, the payments were routed through a number of offshore bank accounts and in part through corporate and personal accounts held in the name of Ms. Al Wazzan, acting as Mr. Al Rajaan's nominee.

54. This "routing" was facilitated by banks which were implicated in the corrupt schemes and which acted in concert with Mr. Al Rajaan and the corrupt intermediaries so as to assist Mr. Al Rajaan in: (a) the establishment of companies and bank accounts through which to route the funds, and (b) actioning and/or permitting payments to be made to (and by) Mr. Al Rajaan and on his behalf without challenge, or scrutiny, which they knew or believed (acting dishonestly and unconscionably) to be secret commissions or the traceable proceeds thereof.

A4: The defences

55. The various Defendants advance a large number of defences to the claims made by PIFSS. These are addressed in detail below, and what follows is a broad overview.

56. As far as concerns the legitimacy or otherwise of the monies that were being paid to Mr Al Rajaan, the Defendants fall broadly into two camps. Some Defendants acknowledge that the effect of the arrangements was that bribes were being paid to Mr Al Rajaan, and that this was illegitimate and inappropriate. A principal defence of those Defendants is that they did not know that this was happening, and that they were not complicit in this wrongdoing. This is essentially the position taken by Man, Mr Massad, and the Aerium defendants. It was also in substance the position of EFG, albeit that they did not dispute that, during the last few years of their banking relationship with Mr Nasrallah and Mr Al Rajaan (from around 2008 to 2012), Mr Guerin was aware that he was participating in the laundering of secret commissions. It is also in substance the position of Pensée, which contends that it is only permissible to have regard to the knowledge of various individuals within Deltec (in particular Mr Jean Chalopin), and that none of those individuals appreciated that secret commissions were being laundered.

57. By contrast, another group of Defendants contended, in different ways, that although they knew of the monies being paid to Mr Al Rajaan, there was nothing wrong with these payments being made, or at least that they did not understand that there was anything improper. The defendants in this group are D1, Mr Nasrallah, Mr El Ghazzi, and the Mombelli defendants. As part of that case, some of these Defendants appeared to contend that PIFSS had authorised the payments that Mr Al Rajaan was receiving, or at least that they genuinely believed that PIFSS had authorised the payments. By the end of the trial, it appeared that no Defendant advanced a positive case that there had been actual authorisation. In any event, I consider that there was no evidence of any such authorisation. For example, although there are many minutes of meetings of PIFSS' committees where investments were approved, and these meetings were attended by Mr Al Rajaan, there was no disclosure by Mr Al Rajaan of his personal interest in the investments being proposed.

58. Although there were differences in the positions taken by the Defendants as to the legitimacy of the payments made, there were other defences where there was more of a united front. Thus, all Defendants contended (again in different ways) that PIFSS' claims were not justiciable. Most of the Defendants advanced a case of contributory fault on the part of PIFSS. The principal, but not the only, basis of that argument was that PIFSS' internal procedures were very poor, and that this enabled Mr Al Rajaan's wrongdoing (if established) to be continued for many years. All Defendants also advanced limitation defences.

59. There were also substantial arguments as to the appropriate quantum of any compensatory claim by PIFSS. Again in broad summary, the Defendants contended that it was not permissible for PIFSS to base its claim on the amount of the secret commissions which had been procured by Mr Al Rajaan for the benefit of himself and his associates. Rather, PIFSS had to demonstrate the extent to which it actually suffered loss by reason of any wrongdoing. Accordingly, PIFSS needed to show that if Mr Al Rajaan had acted honestly and in accordance with his duties, the monies which he and his associates had received would have instead been received by PIFSS. It was submitted that PIFSS could not show that this was the case, at least to any substantial extent.

A5: The origins of the litigation

60. For some considerable time during the 2000s, allegations of corruption were made in Kuwait against Mr Al Rajaan. He appeared to live a luxurious lifestyle, well beyond the reach of the salary that he was paid as Director General. The allegations were made by various members of the Kuwaiti Parliament and others. Mr Al Rajaan always denied these allegations, as to which no documentary proof had been obtained.

61. In January and April 2015, however, significant documentary proof of Mr Al Rajaan's corruption did begin to emerge following the production of banking documentation by the Swiss authorities. There exist procedures whereby a state can request another state for assistance with potential criminal proceedings. In June 2011 the state of Kuwait had made a request for such "Mutual Legal Assistance" ("MLA") to Switzerland in connection with possible criminal proceedings against Mr Al Rajaan. Those possible criminal proceedings were the consequence of a criminal complaint which a former member of PIFSS' board, Dr Fahed Al Rashed, had filed with the Kuwaiti Public Prosecutor some years earlier, in 2008.

62. The banking documentation produced in early 2015 pursuant to the MLA request provided the starting point for revealing Mr Al Rajaan's corruption, and the complicity of others in that corruption, which has been established at this trial. The task of revealing that corruption was far from straightforward, not least because Mr Al Rajaan fought hard to prevent PIFSS obtaining proper access to relevant documentation.

63. Thus, PIFSS did not obtain access to important documents on the Swiss Prosecutor's file until 2017, and even then its representatives could not take copies of documents but were only permitted to make notes. Further details of this aspect of the story can be found in the interlocutory judgments in the present proceedings, when Mr Al Rajaan unsuccessfully resisted an application by PIFSS for a Worldwide Freezing Order ("WFO"): [2019] EWHC 2886 (Comm), paras [56]-[68]. That application was made in 2019, when the present proceedings were started.

64. Subsequently, Mr Al Rajaan (and, after his death in September 2022, D1/D2) strenuously but again unsuccessfully contended that he should not give disclosure of his copies of the documents which he had obtained from the Swiss Prosecutor's file. That aspect of the story, together with a detailed account of the developments in the proceedings in Switzerland, can be found in the judgment of Henshaw J: [2023] EWHC 1065 (Comm), in particular paragraphs [6] – [34].

65. Ultimately, through its access to MLA materials, the Swiss prosecutor's file, and disclosure made by D1/D2 and other defendants, PIFSS had a significant volume of documentation on which to base its case as to the corruption of Mr Al Rajaan and the involvement of various Defendants in assisting him.

A6: The trial

66. The trial started in March 2025, nearly 6 years after the present proceedings were commenced. During that time, there had been extensive interlocutory activity, including 10 Case Management Conferences, a pre-trial review, and judgments and rulings on specific issues.

67. Throughout that process, and indeed throughout the trial, there was considerable co-operation between the solicitors and counsel representing PIFSS and the various defendants. I wish to record my sincere thanks to the parties and their representatives for the co-operative manner in which the case was approached. This enabled an appropriate trial timetable to be agreed, and for the trial then to run broadly in accordance with that timetable.

68. Reflecting the different "schemes" in issue, and the fact that each had its unique features, the trial was divided into a number of phases. There were detailed oral openings at the start, followed by the evidence called by PIFSS. Each Defendant, or group of Defendants, then had a slot allocated for their factual witnesses, in the following sequence: D1/D2 (although in the event, no witnesses were called); Man/Mr Massad; Mr Nasrallah; EFG; Pensée; the Mombelli defendants; the Aerium defendants. This was followed by an expert phase: Kuwaiti law, Swiss law, and investment market experts. Finally, following exchange of written closings in December 2025, oral closing arguments took place over 8 weeks, concluding in March 2026.

69. The parties represented at trial were those identified in the previous paragraph. However, D1/D2 ceased to participate in the trial after it resumed in October 2025, following the long vacation. I was told that this was because of problems with the continued funding of legal representation. PIFSS did not accept that this was the case, but it is not necessary to explore or make findings as to the reasons why D1/D2 ceased to participate. D1/D2 did, however, provide relatively brief written closing submissions.

70. In addition to expressing my gratitude to the parties' representatives for the professional and co-operative manner in which the case was conducted, I would also wish to express thanks to others who assisted in making the trial run smoothly: Commercial Court listing, in particular Mr Michael Tame, who allocated additional Friday sitting days in order to ensure that the trial was completed on time; the court staff, in particular Mr Tariq Islam and Mr Stefan McLeish; the Opus 2 transcribers, in particular Ms Rhiannon Edwards who worked on the vast majority of trial days, and her colleague Lisa Minsky who did the same; Mr Wole Sawyer from Opus 2, who was responsible for the electronic display of documents during the trial; Chris Reed and Jordan Jacobs, also of Opus 2, who enabled the trial to be viewed remotely by a large number of individuals. I would also wish to thank my judicial assistant Adam Zahid, and my clerk Deborah Coverley, for their assistance throughout.

A7: Approach to the evidence

71. The parties were agreed that my summary of the relevant principles in *GI Globinvest Ltd and others v XY ERS UK Ltd and others* [2025] EWHC 740 (Comm) paras [87] – [99] was applicable in the context of the present case. My approach is therefore to consider the objective evidence, in particular the documentary evidence, as well as the inherent probabilities, and to test the accounts of the witnesses against those matters.

72. As in that case, I was also referred to the helpful summary by Calver J of the principles applicable to cases of fraud and conspiracy, in particular the drawing of inferences, in *Suppipat v Narongdej* [2023] EWHC 1988 (Comm) at para [904]:

> "I also bear in mind that as to inferring fraud or dishonest conduct generally:
>
> 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*: Three Rivers District Council v Bank of England* [2001] UKHL 16; [2003] 2 AC 1, [55]-[56] per Lord Hope and [184]-[186] per Lord Millett.
>
> 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: *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20] per Bryan J; *Surkis & Ors v Poroshenko & Anr* [2021] EWHC 2512 (Comm) at [169 (iv)] per Calver J.
>
> c. Although not strictly a requirement for such a claim, motive "*is a vital ingredient of any rational assessment*" of dishonesty: *Bank of Toyo-Mitsubishi UFJ Ltd v Baskan Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch) at [858] per Briggs J. 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: *Group Seven Ltd v Nasir* [2017] EWHC 2466 (Ch) at [440] per Morgan J.
>
> 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: *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch) at [858], [865] per Briggs J."

73. In approaching the evidence in this case, I bear in mind that the events with which the trial is concerned took place many years ago. Evidence as to what precisely was said at a particular meeting or discussion many years ago is unlikely to be wholly reliable, not least because of the passage of time and the fact that the participants will usually have been dealing with many matters unrelated to the events which form the focus of the present trial.

74. In the context of serious allegations, which are in substance deceit and conspiracy allegations, I also approach the case bearing in mind the following passage from *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) (which has been cited, with approval, by Sir Geoffrey Vos C in *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408 at paras [46] – [47] ("*Arkhangelsky*")):

> "[it] is well established that 'cogent evidence is required to justify a finding of fraud or other discreditable conduct': per Moore-Bick LJ in *Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at [73]. This principle reflects the court's conventional perception that it is generally not likely that people will engage in such conduct: 'where a claimant seeks to prove a case of dishonesty, its inherent improbability means that, even on the civil burden of proof, the evidence needed to prove it must be all the stronger', per Rix LJ in *Markel International Insurance Company Ltd v Higgins* [2009] EWCA Civ 790 at [50]. The question remains one of the balance of probability, although typically, as Ungoed-Thomas J put it in *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455 (cited by Lord Nicholls in *In re H* [1996] AC 563, 586H), 'The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it'. Associated with the seriousness of the allegation is the seriousness of the consequences, or potential consequences, of the proof of the allegation because of the improbability that a person will risk such consequences: see *R (N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605; [2006] QB 468, para 62, cited in *In re D (Secretary of State for Northern Ireland intervening)*, [2008] UKHL 33; [2008] 1 WLR 1499, para 27, per Lord Carswell."

75. In *Arkhangelsky*, Males LJ said at para [117]:

> "In general it is legitimate and conventional, and a fair starting point, that fraud and dishonesty are inherently improbable, such that cogent evidence is required for their proof. But that is because, other things being equal, people do not usually act dishonestly, and it can be no more than a starting point. Ultimately, the only question is whether it has been proved that the occurrence of the fact in issue, in this case dishonesty in the realisation of the assets, was more probable than not."

76. This does not mean that the more serious the allegation, the more convincing the evidence required. Ultimately, I must decide this case on the balance of probabilities.

77. In assessing the evidence of the various witnesses, I have endeavoured to take into account their evidence as a whole. It does not follow from the fact that the evidence of a witness on a particular issue is to be rejected, or that a witness gave a single bad answer or series of bad answers, that everything that a particular witness has said is to be rejected. The evidence of a witness as to one part of the case may be consistent with the documents or inherent probabilities, whereas his or her evidence on another area of the case may be otherwise.

78. Although judgments frequently contain a summary of the judge's views about each witness who gave evidence at trial, I do not consider it necessary to do so in the present case. Some of the evidence, on each side, was ultimately peripheral (at best) to the key issues which I need to decide. Furthermore, in the light of certain conclusions which I

have reached, some of the arguments advanced by the parties do not arise for decision, and therefore the evidence directed to those arguments is not important. In the detailed sections which follow, I therefore focus on witness evidence that I consider to be important in the context of the issues which really matter.

79. Similarly, I have not sought to deal with every point that has been raised, either by PIFSS or a Defendant. However, I have sought to address what I consider to be the most substantial points raised, including explaining why I have not accepted the evidence of particular witnesses: see *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413, para [46].

80. I was told at the start of the trial that none of the parties were taking any points that statements in documents, including for example statements made in interviews carried out by the Swiss prosecutor, were inadmissible because they were "hearsay". It was therefore common ground that I could treat what was said in documents as part of the evidence in the case. The weight, if any, to be attached to statements in the documents was a matter for me to assess.

A8: Applicable law

81. It was common ground between the parties that, in respect of the period after 1 May 1996, the applicable law of the torts alleged by PIFSS was not English law. English law does come into the picture in various ways. In particular, the court applies English conflict of laws principles to determine whether the applicable law of the alleged torts is either (i) Kuwaiti law, as PIFSS contends and some Defendants (Man/Mr Massad, the Aerium defendants and Pensée) agree; or (ii) Swiss law, for which other defendants (D1/D2, Mr Nasrallah, EFG and the Mombelli defendants) contended. English law is also applicable to the court's approach to the evidence, as discussed above. It also comes into play, in a brief way, because some of the torts alleged occurred prior to 1 May 1996, at a time when the English conflict of laws rules required "double actionability": so that an alleged tort had to be actionable in England, as well as the place where it took place. English law (or more accurately Bahamian law which is assumed to be the same as English law) is also relevant to one way in which the case is advanced against Pensée.

82. Against a background where the case concerns corruption on the part of the Director General of a Kuwaiti institution, where most of the Defendants are not English, and where the applicable law of any tortious conduct is not English, a question which can fairly be asked – and indeed which I have often been asked – is: why is this case being heard in England?

83. The main answer to that question lies in the fact that Mr Al Rajaan used his secret commissions to buy properties around the world, including in Knightsbridge, London. At some point not long after his departure from PIFSS in 2014, he came to live or at least spend substantial amounts of time at his property in Knightsbridge. The jurisdiction of the English court can be established by serving a person in England, and Mr Al Rajaan's presence in London meant that this was possible. It also enabled other parties, who were outside the jurisdiction, to be served as "necessary or proper" parties to the claim against Mr Al Rajaan. Most of the Defendants to the present proceedings, including Mr Al Rajaan himself when he was alive, did not dispute the English court's jurisdiction. Leaving aside Banque Mirabaud and Banque Pictet and associated

individuals, the only Defendants to challenge jurisdiction were the Aerium defendants. That challenge was unsuccessful: see [2023] EWHC 177 (Comm).

A9: The sections of this judgment

84. Following this introductory section, this judgment contains the following sections. The parties' written closing submissions were, at my direction, divided into specific topics to be addressed in different sections (Section A, B, C etc). The sections of this judgment largely reflect those sections.

85. Section B addresses issues of Kuwaiti law. PIFSS' tort claims were based on Kuwaiti law, and a claim in Swiss law was only advanced in the alternative. As between PIFSS and some Defendants, it was common ground that Kuwaiti law was the applicable law of the alleged torts. I also determine, in Section D below, that Kuwaiti law is in fact applicable to the tort claims against all Defendants.

86. Section C provides a high-level chronological narrative of some of the key events which have given rise to the present proceedings. When dealing with each individual scheme in later sections, a more detailed narrative specific to that scheme is provided.

87. Section D addresses the issues raised by a number of Defendants as to whether Kuwaiti or Swiss law is the applicable law of their alleged torts. The main argument in that respect was advanced by Ms Bingham for EFG. Mr Brown for the Mombelli defendants also addressed the point in some detail in his written and oral submissions.

88. Section E provides a description of the nature and organisation of PIFSS, and addresses issues raised (principally by D1/D2) as to whether and to what extent Mr Al Rajaan controlled or influenced its investment decisions.

89. Section F contains my overall assessment of Mr Al Rajaan and his credibility, and deals with some general aspects of the case advanced by D1/D2.

90. Section G addresses the Mirabaud Scheme. This is the first of a series of sections which deal with specific schemes.

91. Section H addresses the Pictet Scheme.

92. Section I addresses the VP Scheme.

93. Section J addresses the EFG Scheme.

94. Section K addresses the Aerium Scheme.

95. Section L addresses the Pensée Scheme.

96. Section M addresses the Man Scheme.

97. Section N addresses the Mombelli Scheme.

98. Section O addresses, very briefly, the UBP Scheme.

99. Section P was available to address any issues of fund flows and quantum of commissions, in so far as they have not been previously addressed.

100. Section Q addresses, briefly, defences based on PIFSS' conduct or knowledge.

101. Section R addresses limitation.

102. Section S addresses justiciability.

103. Section T addresses arguments concerning recoveries which may be made by PIFSS in consequence of proceedings in Kuwait and Switzerland, and a specific issue concerning the recovery made under PIFSS' settlement with UBP.

104. Section U summarises the relief which, in the light of the other sections, should be granted.

105. Section V addresses issues of interest.

106. Section W addresses the relevant principles of Swiss law if, contrary to my earlier conclusions, Swiss law is the applicable law of the torts alleged.

107. Section X addresses the position of the Mombelli Defendants, if Swiss law were the applicable law of their alleged torts. It also addresses, briefly, the position of other Defendants who have relied upon Swiss law as the applicable law of their alleged torts.

108. Section Y addresses the preliminary issues in the Section 423 claim against AUB.

109. The appendix contains a glossary of the principal abbreviations used in this judgment, including a separate glossary of the abbreviations used for the companies and other entities that feature in the case. Where appropriate, and for ease of reference, I have sometimes identified the abbreviation on more than one occasion in the text of the judgment.

SECTION B: KUWAITI LAW

B1: General approach to findings of foreign law

110. PIFSS contends that Kuwaiti law governs its claims against all of the Defendants. There are some relatively minor qualifications to this. In relation to claims arising before the introduction of the Private International Law (Miscellaneous Provisions) Act 1995, the court needs to consider English law as a result of the common law "double actionability" principle. Also, one important aspect of the claim against Pensée requires consideration of Bahamian law, which for present purposes can be taken to be the same as English law.

111. Man, the Aerium Defendants, and Pensée all accept that Kuwaiti law governs the claims made against them. All other active Defendants (D1/D2, Mr Nasrallah, the Mombelli Defendants and EFG) argued for Swiss law.

112. In consequence, this case does not to any substantial degree involve issues of substantive English law, although English law is critical in resolving the question of whether the applicable law is Kuwaiti or Swiss – an issue addressed in Section D below. Extensive evidence was given by experts in Kuwaiti and Swiss law. This section B deals with the evidence on the most significant issues of Kuwaiti law, save for limitation which is addressed in Section R below. I start with summarising the general approach which an English court takes to the resolution of disputes as to the substance of foreign law. This general approach applies to both Kuwaiti and Swiss law.

113. A number of recent authorities provide guidance as to the way in which I should approach the determination of issues of foreign law: see *Deutsche Bank v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm) paras [105] – [108] (Cockerill J); *Banca Intesa SanPaolo SpA v Comune di Venezia* [2022] EWHC 2586 (Comm) paras [120] – [127] (Foxton J) (although Foxton J's decision was reversed on appeal [2023] EWCA Civ 1482, the Court of Appeal did not criticise the judge's summary of principles); *Byers v Saudi National Bank* [2022] EWCA Civ 43 (CA); *Perry v Lopag Trust Reg* [2023] UKPC 16 (Privy Council). The issue is also addressed in *Dicey, Morris and Collins: The Conflict of Laws* 16th edition ("*Dicey*"), Chapter 3. The following matters, relevant to some of the foreign law issues in the case, emerge from the authorities.

114. (1) The task of the trial judge when there are disputed questions of foreign law is to determine what the highest relevant court in the foreign legal system would decide if the point were to come to it. It is therefore not sufficient for a party to identify a judgment of a foreign court of first instance which may be on point and assert that the task of the English court is simply to analyse that judgment. (See *Perry* at [11]).

115. (2) Where the foreign law is in the form of a provision in a code, statute or other written source, the task of the court is to determine how the foreign courts would interpret and apply it, based on the evidence of the expert witnesses. Generally speaking, the court's task is not to address how it would itself interpret and apply the provision; the wording of the provision is to be considered only as part of the evidence and as a help to decide between conflicting expert testimony. (See *Byers* at [104]; *Busto* at [105]).

116. (3) Where the foreign law draws upon judgments and academic writings, Dicey summarises the position as follows at paragraph 3-019:

> "Considerable weight is usually given to the decisions of foreign courts as evidence of foreign law, though such decisions can only, it seems, be referred to if in the evidence of an expert witness and, further, must be interpreted in the light of the meaning attributed to the decisions by the expert rather than according to the court's independent research involving material not referred to by the expert. But the court is not bound to apply a foreign decision if it is satisfied, as a result of all the evidence, that the decision does not accurately represent the foreign law. Where foreign decisions conflict, the court may be asked to decide between them, even though in the foreign country the question still remains to be authoritatively settled. The weight to be given to academic writings will depend on their status in the foreign country."

117. (4) Where the relevant foreign law is not based in any relevant aspect on the common law, there is less room for judges to apply their own legal training and experience to resolve relevant issues (*Perry* at [11] and [15]). Here, since neither Kuwaiti law nor Swiss law is based on the common law, the skill and experience of an English judge in domestic law has a minimal role to play in the ascertainment and application of the law. However, a judge's skill and experience in legal reasoning will of course be relevant to the task of evaluating the reasoning of the experts who have given evidence, this being an important matter in resolving disputed issues as to foreign law.

118. (5) Although a judge has to decide each disputed issue of foreign law separately, it is appropriate to have regard to all the evidence presented. The judge will reach a view based on an assessment of each expert having regard to each expert's evidence as a whole, and the way in which each expert answered the relevant questions to justify his or her opinions. A judge should therefore evaluate the experts' reasoning. (*Perry* at [14]).

119. (6) Civilian systems of law (such as those which I am here considering) do not operate on the basis of binding precedents. Nevertheless, even in the context of civilian systems, the decisions of foreign courts play an important role in ascertaining the content of foreign law. Thus, when the relevant issue is the interpretation of a foreign statute, the English court does not confine itself to construing the language but ascertains the effect of the instrument as shown by its exposition, interpretation and adjudication. The primary function of an expert witness in that context is to convey to the English court the meaning and effect which a court of the foreign country would attribute to it, if it applied correctly the law of that country. (*Banca Intesa* at [120] – [122]).

120. (7) It is, at least theoretically, open to the court to diverge from a decision of even the highest authority in the foreign legal system (here the Court of Cassation in Kuwait, or the Federal Supreme Court in Switzerland), if the court is satisfied that an authority, however eminent, does not represent the law. But the court should be astute to give full weight to the judgment of high authority, before concluding that this is the correct course and that in the future the relevant foreign court would diverge from that high authority. (*Busto* at [108]).

121. (8) It is not the role of the court to decide what the foreign law should be. The more senior the court which gives the relevant court decision, or the greater the number of

foreign court decisions to a particular effect, the more difficult it will be for the English court to conclude that those decisions do not reflect the law of the relevant jurisdiction. If there is a clear decision of the highest foreign court on the issue of foreign law, other evidence will carry little weight against it. (*Banca Intesa* at [125]).

122. (9) Difficulties can arise where the foreign law is in a foreign language, because the trial judge will often be dependent on translations of the relevant texts, which may or may not be precise and which may or may not be disputed, and on the evidence of the foreign law experts to understand the meaning and nuances of the foreign language in the relevant text. (See *Perry* at [13]).

123. In the present case, these difficulties were particularly apparent in relation to Kuwaiti law, where the texts are in Arabic and where there were two significant disputes as to the appropriate translation of the Kuwaiti legislation: specifically, Article 12 of the Kuwaiti Public Property Law ("KPPL") and Article 253 (2) of the Kuwaiti Civil Code ("KCC"). (This KCC abbreviation should not be confused with the Kuwaiti Court of Cassation, where case citations are sometimes preceded by "KCC"). Fortunately, such difficulties did not arise in relation to the Swiss law materials (which were in French or German).

124. In respect of the Kuwaiti statutory texts and case-law, and to some extent in relation to the Swiss materials, the parties had on many occasions prepared alternative translations, with some materials being certified professional translations. However, save in relation to the Article 12 and Article 253 (2) issues, the differing translations did not generally reveal any significant substantive difference in terms of the sense of what the statutory text provided or what a court was saying. In those circumstances, I have not followed any particular preference for the translation provided by PIFSS or the Defendants' side, and I do not generally identify in this judgment whose translation I am referring to. In short, for the purposes of resolving the essential issues, the general position is that either translation will do. Where, as was sometimes the case, one party's translation was more complete than another, I have looked at the more complete translation. Where, in the context of the Article 253 (2) limitation issues, it has been potentially relevant to consider differences between translations of some of the case-law, I have identified the party that provided a particular translation.

B2: The Kuwaiti law experts

125. Evidence was given by three experts on Kuwaiti law: Dr Amr A Abbas for PIFSS; Dr Karim A Youssef for a group of Defendants known as the Man + group, comprising Man, Mr Massad and EFG (and originally UBP, who settled at the start of the case); and Professor Chibli Mallat, on behalf of a group of Defendants known as the Participating Non-Man + group. The latter group comprised D1/D2, Pensée, the Mombelli Defendants and the Aerium Defendants. By the time that the Kuwaiti law evidence came to be given, however, D1/D2 were no longer effective participants in the trial, and therefore Professor Mallat was formally only called by the remaining Defendants.

126. The grouping of the Defendants into two camps was the consequence of case management directions which were designed to streamline, as far as possible, the Defendants' expert evidence. It is not necessary to describe the directions in detail, but one aspect (in broad summary) was that Professor Mallat would see the expert evidence

of Dr Youssef, and would only need to add to it where he disagreed or was addressing additional points raised by the Participating Non-Man+ defendants. With some relatively minor exceptions, he tended to agree with Dr Youssef's written reports.

127. There was some further streamlining, in practical terms, which occurred following D1/D2's departure from the trial prior to the oral expert evidence phase. Since D1/D2 were no longer effective participants in the trial, certain issues which they had specifically raised, and which were addressed by Professor Mallat, were not the subject of any cross-examination of Dr Abbas. There was also some correspondence, and brief submissions, as to the extent to which PIFSS would cross-examine Professor Mallat on issues covered by Dr Youssef. Fladgate (Pensée's solicitors) indicated in advance of calling Professor Mallat that he would not be preparing himself for cross-examination on such issues, and that therefore they would not be calling Professor Mallat on issues addressed by Dr Youssef and on which he had simply expressed his agreement. In addition, as Mr Edey explained in opening, Professor Mallat was not called to give evidence on three issues (one of which was no longer pursued) which had been raised by D1/D2 alone. There had been no cross-examination of Dr Abbas on these three issues.

128. In addition, there were other issues which had been addressed in some detail in Dr Abbas's reports – for example the issue of whether PIFSS needed to give credit for alleged recoveries resulting from the Kuwaiti criminal proceedings against Mr Al Rajaan and Ms Al Wazzan – which were not the subject of any material cross-examination. These did not therefore need to be explored with Professor Mallat, or indeed Dr Youssef.

129. The upshot of these matters was that the principal expert witness, on the defence side, was Dr Youssef, and he was cross-examined for just under 3 ½ days. The scope of the questions asked in cross-examination was shaped by the issues which the Defendants' counsel had identified in the course of their oral openings on Kuwaiti law issues, and by the issues on which Dr Abbas's evidence was challenged. By contrast, Professor Mallat was cross-examined for only around 1 ½ hours on a relatively narrow number of issues. Dr Abbas was also cross-examined for around 3 ½ days.

130. The time available for cross-examination allowed for full ventilation of the main issues between the parties, which turned out to be rather less extensive than the very large number of issues which had been addressed in the written expert materials. Most of the time in cross-examination was devoted to issues in which all or most of the Defendants were interested. These concerned, in broad summary:

    i) whether a Kuwaiti civil judge could determine (in the absence of a criminal conviction) that a criminal statute had been violated, for the purposes of deciding whether there was civil fault;

    ii) the nature of intention and knowledge in the context of Kuwaiti criminal law – albeit that the scope of the dispute here was narrow;

    iii) a fair number of issues concerning the KPPL, including its scope (an issue which involved the translation dispute concerning Article 12), questions as to the actus reus of the offences in Articles 11 and 12, and perhaps most importantly the

significance and effect of certain remedies provided for in that law in Articles 16 and 22;

iv) issues concerning the apportionment of fault as between a wrongdoer and a victim of a tort, in circumstances where a wrongdoer had committed an intentional tort but the victim's fault was non-intentional;

v) the meaning and effect of Article 253 (2) KCC, which is a critical point in relation to limitation arguments.

131. I address the first four issues in this section B, and the limitation issue is addressed in Section R. This section also addresses other principles of Kuwaiti law which are potentially relevant to the legal liability of the Defendants depending on the facts as I find them to be. There was, usually, less controversy as to these other principles of Kuwaiti law, with the main issue being how they applied to the facts of the case. I do not here address Kuwaiti law in so far as it relates to the issues on whether PIFSS should give credit for recoveries made by the State of Kuwait, but I address those in the context of recoveries.

132. I start by stating my overall views concerning each of the experts, and these are shaped by and need to be considered in the light of my more detailed consideration of the key issues.

133. All of the experts gave evidence in English, and had a most impressive command of the language. They each appreciated the import of, and any nuances within, the questions asked in cross-examination. Quite properly, their expert evidence was focused on the principles of Kuwaiti law, rather than how the law was to be applied to the facts.

134. Dr Abbas is currently, and has been since 2015, a partner and head of arbitration and co-head of competition at the Matouk Bassiouny Law Firm which originated in Egypt and now has offices in the Middle East and elsewhere. He represents clients in commercial and investment arbitrations as well as competition law and international trade and related disputes. He was a member of the committee established by the Egyptian Minister of Justice to propose amendments to the Egyptian Arbitration Law, and has advised on competition law amendments. He has previously worked for a number of law firms or organisations, including White & Case LLP in Washington, and in the legal department of the World Bank also in Washington. He studied law in Cairo, obtaining an undergraduate and master's degree at Cairo University. His PhD is from Queen Mary College, London University. Since 2001, he has taught and held other roles at the law faculty at Cairo University, and he has written extensively in relation to various areas, in particular arbitration and competition law.

135. He was in my view an excellent expert witness, who was genuinely seeking to assist the court in relation to the law. It is perhaps inevitable that a witness who is a practising lawyer in areas of dispute resolution will, to some extent, come across as an advocate for the points which he is advancing. Generally speaking, however, that was not the way in which Dr Abbas approached his task, or came across. More importantly, it seemed to me that, on the critical issues, he gave evidence which was consistent with a fair reading of the texts and case-law to which he was referring. Furthermore, it was apparent throughout his evidence that he was very familiar with the vast quantity of such materials, having obviously studied them carefully before writing his reports and

giving evidence. His answers were generally short and responsive to the questions asked, and where he gave longer answers in order to explain the position, that explanation was readily comprehensible and it was usually fair for a longer answer to be given.

136. Dr Youssef also has a distinguished academic and practising background. He is currently Chairman and international arbitration practice head of Youssef + Partners, a law firm based in Egypt and the UAE and operating regionally and globally. He is admitted to practice in Egypt and the UAE, and has the right to appear before Egyptian courts. He studied law at Yale Law School, Paris 1 (Panthéon-Sorbonne) University, and Cairo University. He was awarded a doctorate in the Science of Law (J.S.D.) at Yale Law School. Between 1999 and 2012, he was a member of the Civil Law Department in the law faculty at Cairo University. His private practice focuses on international commercial arbitration, complex cross-border litigation, investment treaty arbitration, complex high-value disputes and international law. He has been a member of the advisory board of the Harvard Law School Center on the Legal Profession since August 2023. He too has a fair number of publications to his name.

137. Despite his obvious qualifications, intelligence and talent as a practising lawyer, Dr Youssef was far from impressive as an expert witness, certainly when contrasted with Dr Abbas. Indeed EFG, which was one of the Man + group which had instructed Dr Youssef, recognised the problematic nature of his evidence under cross-examination and essentially abandoned reliance on his evidence in their closing submissions, instead inviting me simply to focus on the underlying materials.

138. Specifically, in their closing submissions, EFG no longer relied upon a key point, which Dr Youssef made and developed on many occasions in different contexts in his evidence: namely, that a civil judge could not consider or determine whether a defendant had contravened a criminal statute, for the purposes of a claimant establishing that the defendant was at fault for the purposes of establishing tortious liability. I address that issue in detail in Section B5 below, but in summary Dr Youssef's evidence in that regard was not supported by any of the materials which he had produced, and was inconsistent with a significant volume of case-law and academic writing. His attempts to explain difficult cases away were unimpressive and unpersuasive. His evidence was inconsistent: at one stage saying that a civil judge would never deal with a claim which in substance (not simply form) involved an allegation of criminal conduct, but also saying that a civil judge could consider it if the claim was somehow repackaged to assert a pure civil liability.

139. Nevertheless, and despite being shown ample material to indicate that his opinion was incorrect on this issue, he stuck to his guns. He was asked how many cases it would take "before you might change your opinion that you don't need to have a criminal conviction in order for a civil court to describe or to find an event as the commission of a crime". His answer was that: "I'm not convinced and it's my firm position. I'm entitled to my view. His Lordship will decide whether my view is right or wrong, but this is my view and I stand by it". This answer evidenced what in my view was the reality of much of Dr Youssef's evidence: that he had a case that he was going to advance, come what may, and that it was for the court to assess that case. That is the way in which advocates might approach their task of arguing a case, but an expert witness seeking to assist the court needs to take a different approach. Dr Youssef did not appreciate the distinction between being an advocate and an expert witness.

140. Another illustration of that approach was Dr Youssef's cross-examination on the question of contributory fault on the part of the victim of a tort. A central issue between the parties, in particular PIFSS and EFG, is the effect of the tortfeasor intentionally committing a tort, and whether this would preclude reliance on contributory fault on the part of the victim – essentially because intentionality would overshadow or absorb any fault on the part of the victim. There were substantial materials, relied upon by Dr Abbas and shown to Dr Youssef in cross-examination, which clearly showed that intentionality was highly relevant, to say the least, in the context of contributory fault. Dr Youssef expressed and maintained the view, despite these materials, that intentionality was completely irrelevant. I could not see how a fair-minded expert witness could express such an extreme view, rather than acknowledging its relevance but saying that it was not determinative.

141. Furthermore, Dr Youssef had clearly not prepared his reports, or considered the case-law, with anything like the care that was apparent from Dr Abbas's evidence. My strong impression during the evidence was that, as PIFSS submitted in closing, one or more of his team had researched and written his report, with an eye to what would assist the Defendants and not PIFSS, leaving Dr Youssef as a skilled advocate to argue the points despite their difficulties. When shown many of the key cases during cross-examination, Dr Youssef gave the impression that he was reading the cases properly for the first time, or at least that he was not very familiar with them.

142. In that context, there were statements made, and arguments advanced, in Dr Youssef's written reports, which could not have been made if Dr Youssef had read the relevant case-law. These arguments, described in more detail below, included assertions that: a Kuwaiti court could only make a repayment order under the KPPL Article 16 if an adhesive civil claim had been made in the criminal proceedings by the victim state entity; that in the limitation context, Article 253 (2) could not be relied upon, absent a criminal conviction; and, in the same context, that this Article could only be relied upon where a civil claimant had joined in the criminal proceedings as a civil claimant. All of those statements were squarely inconsistent with the authorities, but were maintained in Dr Youssef's written reports and in the joint memorandum. The proposition that a criminal conviction was required, in order for reliance to be placed on the extended limitation period for which Article 253 (2) provides, could not possibly be correct: a conviction would come, if at all, at the end of the criminal process, and it is obvious that any interruption to the running of time caused by that process must have occurred at an earlier time. It is true that the points referred to in this paragraph were corrected, but this was at a very late stage, very shortly before the expert evidence oral phase of the trial started in November 2025.

143. There were some other sloppy errors, including reliance being placed on the parts of a judgment which records the propositions advanced by a party, but failing to identify the fact that – in the sentence immediately after the passage relied upon – the court had rejected the argument advanced.

144. Against this background, I consider that Dr Abbas is a witness upon whom I can generally place reliance, whereas I approach Dr Youssef's evidence with considerable caution. In so far as the experts are opining on issues which have not been considered by the Kuwaiti Court of Cassation, it is more likely that Dr Abbas will have given me a fairer assessment than Dr Youssef. Nevertheless, I do not approach the Kuwaiti law issues in the case with an automatic preference for Dr Abbas's views. I consider each

of the important issues, and the relevant underlying materials, separately. But, in accordance with the principles identified in Section B1 above, I have regard to the whole of the evidence presented, including my assessment of each expert having regard to each expert's evidence as a whole, and the way in which each expert answered the relevant questions to justify his or her opinions.

145. Professor Mallat is a distinguished professor of law and practising lawyer, with an immensely impressive C.V. He is now (and has been for considerable periods of time) Principal at Mallat Law Offices, Beirut. He has been a member of the Lebanese Bar since 1983, and an avocat à la Cour d'Appel, Beirut, since 1991. He is also Presidential Professor Emeritus at the University of Utah's S.J. Quinney College of Law, specialising in Islamic and Middle Eastern Politics, Law, and International Human Rights Law. He has published extensively in these areas, particularly focusing on comparative constitutional law, Islamic law, and human rights litigation. Among his academic roles, he has held distinguished positions at several prestigious institutions, including Harvard Law School as the Custodian of the Two Holy Mosques Visiting Professor of Islamic Legal Studies, and Yale Law School as Oscar M. Ruebhausen Distinguished Senior Fellow. He previously served as the EU Jean Monnet Chair in European Law at Saint Joseph University in Lebanon, where the EU Commission recognised their programme as a 'Center of Excellence.' He has also been a practising international lawyer, leading groundbreaking cases involving jurisdiction and human rights accountability. He has appeared as pro hac vice lawyer in Washington DC, and has acted as legal expert in several Arab civil and commercial cases before common law courts in England and elsewhere.

146. Professor Mallat had written his report after having reviewed lengthy reports from Dr Abbas and Dr Youssef. His oral evidence was somewhat contradictory as to whether or not he had performed detailed ground-up research himself, prior to aligning himself on all or most of the key issues with Dr Youssef. PIFSS submitted that, in doing so, Professor Mallat had backed the wrong horse. In the light of my conclusions on the principal points made by Dr Youssef – in particular the need for a criminal conviction, and the limitation issues – that submission was correct.

147. In the run-up to the oral phase of the Kuwaiti law evidence, and in Mr Edey's oral opening, it was made clear that Professor Mallat was not preparing himself to give evidence on issues covered by Dr Youssef. One way in which this manifested itself was that Professor Mallat made no corrections to his own report in order to reflect points (such as those described above) which Dr Youssef recognised were no longer maintainable and which he corrected. I agree with PIFSS that Professor Mallat should, prior to confirming the accuracy of his written evidence, have considered the amendments which Dr Youssef had made in order to see whether he still agreed with Dr Youssef's original views, or whether he accepted that they were wrong.

148. Ultimately, however, I do not think that this point has any significant bearing on my approach to the resolution of the Kuwaiti law issues. This is because the contest on the issues addressed by Dr Youssef is to be resolved by my assessment of the evidence of Dr Youssef versus Dr Abbas. None of the parties suggested that this assessment should be affected by Professor Mallat's endorsement of Dr Youssef's views. However, in so far as Professor Mallat in his written evidence did endorse views of Dr Youssef which I consider to be unfounded or wrong, that does cause me to approach Professor Mallat's evidence with a degree of caution.

149. That said, Professor Mallat gave his oral evidence very well, and was obviously trying to assist the court in relation to Kuwaiti law rather than to advance arguments as an advocate. Indeed, Professor Mallat fairly agreed with many of the points that were put to him by Mr Ritchie in cross-examination on the subject of the KPPL, giving thoughtful evidence in that regard. (I summarise that evidence in Section L below). This meant that there was very little on which Mr Ritchie and Professor Mallat seemed to disagree, and (bearing in mind my conclusions on various issues) little which needs to be resolved as between Professor Mallat and Dr Abbas, save for the *actus reus* issues arising from Articles 11 and 12 KPPL.

B3: Overview of Kuwaiti law

150. There was no dispute as to the relevant sources of Kuwaiti law, the legal system which operates, and related matters. What follows is substantially based on Dr Abbas's evidence supplemented to some extent by points made by Dr Youssef or Professor Mallat.

Kuwaiti law – influences

151. The law of Kuwait mainly derives from Egyptian law. When Kuwait gained independence in 1961, Professor Al-Sanhoury (i.e., one of the most prominent Egyptian scholars and judges) drew up a commercial code, which was enacted as Law No. 2 of 1961. The second book of this law encompassed, in effect, the provisions on contracts found under the Egyptian Civil Code. The same can be said in respect of administrative law, which draws upon the Egyptian model. The Constitution of Kuwait of 1962 was substantially modelled on the Constitution of Egypt. Thus, Egyptian law is a historical source of Kuwaiti law, which can be referred to for the purpose of interpretation of Kuwaiti law.

152. Similarly, the Kuwaiti Civil Code (KCC) is largely drawn from the Egyptian Civil Code of 1948. The Kuwaiti judicial system is also based on the Egyptian model. This arises from the fact that Egyptian jurists were in charge of the codification process of Kuwaiti law, and the judiciary was composed of mainly Egyptian judges. Hence, judges in Kuwait make references to Egyptian textbooks and judgments when they face problems or issues that were not previously addressed under Kuwaiti law. Invariably, the judgments rendered by the Kuwaiti courts, including at the level of the Kuwaiti Court of Cassation, have been influenced by Egyptian law. Dr Youssef described Egyptian law as having a profound impact on Kuwaiti law and the legal landscape of many Arab nations.

153. A substantial influence on Egyptian law, and therefore Kuwaiti law, is the Napoleonic Code. In his oral evidence, Professor Mallat expressed a clear preference for the reasoning in common law as compared to civil law cases, and he bemoaned "the tragedy of the civil law system as imposed on us by the French since 1804". Dr Youssef referred to the "civil law tradition of Kuwait (and Egypt)". Aside from civil law, Professor Mallat's report also identified other sources of Kuwaiti law, including in particular Islamic law. Dr Youssef also described Kuwaiti law, like Egyptian law, as a hybrid system that combines elements of Islamic law, aspects of civil law, and traces of common law.

154. Kuwaiti law is based on the principle of codification. The main sources of law are the Constitution, legislation, and custom. Legislation consists of laws enacted by the National Assembly and decrees issued by the Emir or the Council of Ministers. Depending on their scope and subject matter, the laws are divided into codes and special laws. The codes are systematic collections of legal rules that regulate a specific area of law, such as the KCC or the Kuwaiti Penal Code ("KPC"). The special laws are more specific and deal with particular issues or sectors. The KPPL and the Kuwaiti Money Laundering Laws (Laws No 35 of 2002 and No 106 of 2013), which feature in this case, are examples of special laws. The codes and the special laws are generally consistent and complementary, but in cases of conflict, the special law prevails over the general code.

The judicial system

155. Article 3 of Law No. 23 of 1990 provides for the structure of the courts, which are composed of the Court of Cassation, the Court of Appeal, the Court of First Instance and the Partial Court. The Kuwaiti Court of Cassation is the supreme court that supervises the interpretation of law and its application. It also ensures the unity of judicial judgments and legal rules. It is thus the highest court in Kuwait. This directly mirrors the organisational structure of the Egyptian courts, where the Egyptian Court of Cassation is the highest civil and criminal court in Egypt.

156. Egyptian judges often act as judges in Kuwaiti courts. Many Kuwaiti legal professionals, including judges, lawyers, and academics, have received their legal education and training in Egypt and have maintained close professional and personal ties with their Egyptian counterparts. The original Kuwaiti drafting committees for the Kuwaiti civil and penal codes were predominantly composed of Egyptian legal experts. Egyptian jurists have also played pivotal roles over time as advisors, drafters, and members of various Kuwaiti academic, legislative and judicial bodies.

Legal effect and weight of court judgment and preparatory works

157. Although Kuwaiti law does not have a system of formal precedent, previous court judgments serve as guidance for other courts, especially if the judgments were from the Court of Cassation. Court judgments are therefore interpretative sources of Kuwaiti law. Whilst not binding, they carry weight and are respected. Kuwaiti and Egyptian courts tend to follow the previous decisions they render, albeit not being bound. This is confirmed by the case law relied on in the trial, and can be seen in the wording used by the Court of Cassation when it bases its judgment on the "established jurisprudence of this Court" (sometimes known as "jurisprudence constante"). I note that (unlike English judgments) few of the Kuwaiti Court of Cassation judgments which featured in the trial contain express reference to or citation of earlier cases. Rather, the court simply sets out the relevant principle, and the jurisprudence constante can be seen because the same principle is set out in more than one case.

158. Court judgments regularly rely on explanatory memoranda and preparatory works for legislation in their judgments. Explanatory memoranda serve as guidance to courts in interpretation, but they are not binding on them. In this judgment, I refer to and quote (for example) the Explanatory Memorandum concerning the KPPL. Dr Youssef described Explanatory Notes, which explain the laws' rationale, objectives and scope, as an official source of interpretation and guidance for judges in Kuwait. Kuwaiti courts

consider them authoritative and persuasive, especially when the wording is ambiguous or unclear. Explanatory Notes are an essential tool for understanding and applying Kuwaiti law, especially in complex cases.

159. Moreover, Kuwaiti courts often reference and adhere to the rulings of Egypt's Court of Cassation, which is a persuasive source of legal guidance.

160. Dr Youssef drew a distinction between the common law tradition and the approach of Kuwaiti courts to the facts of a case. He said that in the common law tradition, facts are often crucial for establishing precedents and distinguishing cases. But the civil law tradition of Egypt and Kuwait relies more on the application of general legal principles derived from the codes as interpreted by courts and scholars. The facts of cases are usually presented as background information and as illustrations of how the law applies, rather than as the basis for developing or modifying the law. Nevertheless, I consider that it is necessary for me (applying the general principles in Section B1 above) to consider the facts of the cases to which I was referred so as to understand how Kuwaiti law is applied, and therefore what Kuwaiti law is.

Value of commentaries

161. Commentaries are not considered to be one of the sources of law. Nevertheless, this does not exclude the important role of commentaries. Judges frequently rely on commentaries, especially in instances where the court's previous approach does not conform with current trends, or when the subject matter of the dispute is a matter which has not been addressed previously by courts. In consequence, commentaries are interpretive sources.

162. Dr Youssef described how Kuwaiti judges, attorneys, and scholars frequently consult works of Egyptian jurists, such as Abd al-Razzaq Al-Sanhoury, the principal architect of the Egyptian Civil Code, to guide their legal reasoning. Al-Sanhoury was himself instrumental in shaping the Kuwaiti legal system, serving as a key reference for the drafting of the Kuwaiti codes and explanatory notes through his foundational work on the Egyptian Civil Code.

B4: The key provisions of Kuwaiti laws relied upon

163. This section B4 contains the main sections of the KCC, the KPC, the Money Laundering Laws, and other legislation which featured most prominently in the parties' arguments. I do not include here the KPPL: a large number of Articles of the KPPL were referred to, and I have identified the main ones in Sections B10 and B11 below with additional Articles being referred to in Section L below (Pensée). I have not included, at the present stage, any commentary. For the KCC below, I have used Man's translation – save for the disputed Article 253 (2) where I have used Dr Abbas's translation, for reasons set out in Section R below.

The Kuwaiti Civil Code (KCC) No. 67 of 1980

> **Civil Law - Part One: Sources of Obligation - Chapter Three: Tortious Acts Section One: Liability for Unlawful Acts, First: Cases of Liability for Unlawful Acts: 1. Liability for Personal Acts**

Article 227

1- Any person who causes harm to another through their wrongdoing act shall be liable to compensate for it, whether he/she was direct in causing the harm or contributory to it.

2- The person shall be liable for compensatory damages caused by his/her wrongdoing, even if he/she lacks capacity.

Article 228

1- If the damage was realized due to the fault of multiple individuals, each of them is liable, before the aggrieved, to compensate all the damage.

2- The liability is distributed among the multiple responsible individuals according to each one's role in causing the damage. If this role cannot be determined, the liability shall be distributed equally among them.

Article 229

If the fault that caused the damage was committed by the perpetrator as a result of incitement or assistance, the damage is considered to have resulted from the fault of both the original perpetrator and the accomplices and they shall be jointly responsible for compensating it.

Article 230

The harm that the wrongdoer is obligated to compensate shall be determined based on the loss incurred and profits foregone as long as it is the natural consequence of the tort. The loss or opportunity foregone shall be deemed the natural consequence if it could not have been avoided with reasonable effort by a normal person in the same circumstances.

Article 231

1- The compensation for unlawful acts covers the damage, including moral damage.

[…]

Article 233

If a person establishes that the damage was due to a cause beyond his control, such as a force majeure, a sudden accident, the act of an injured person or the act of others, he is not liable to pay compensation, unless stated otherwise.

Article 234

1- If both a fault of a person and a fault of the injured party contributed together in causing damage that person shall only be obligated to compensate the damage proportionally to the contribution of his fault in causing the damage.

2- However, the contribution of a fault of the victim in causing the damage shall not affect the amount of blood money.

2. Liability for the Actions of a Third Party

Article 240

1- A principal shall be liable for the damage caused by an unlawful act committed by his subordinate, when the act was performed by the subordinate in the course, or as a result, of his employment.

2- The relationship of subordination between principal and subordinate exists even when the principle has not been free to choose his subordinate, as long as the principal has actual powers of supervision and control over his subordinate.

Second: Compensation for harm from unlawful act

Article 246

1- The Judge shall assess compensation in monetary form.

2- Upon request of the aggrieved party, the Judge may, in accordance with the circumstances, order restoration of the aggrieved party to his/her original status, or any other remedy as a form of compensation.

Article 247

1- The judge shall determine the compensation in the amount he deems sufficient to repair the harm in accordance with Articles 230 and 231, taking into account the personal circumstances of the injured party.

2- If it is not possible for the judge, at the time of judgment, to determine the amount of compensation definitively, he may reserve the right for the injured party to request a reassessment of the estimation within a period to be specified.

Article 253

1- The lawsuit for liability for the unlawful act shall lapse after three years from the day the victim became aware of the damage and who is responsible for it, or fifteen years from the occurrence of the unlawful act, whichever the two periods expire first.

2. If the tort liability claim is based on a crime, then it shall not prescribe as long as the criminal lawsuit remains available, even if the periods stipulated in the first paragraph have lapsed.

The Kuwaiti Penal Code (KPC) No 16 of 1960

Book one: General Provisions- Chapter one: Preliminary Provisions 1. Fundamental Principles

Article 1

An act is not considered a crime, and no penalty may be imposed for it, except based on a provision in the law.

Article 3

Felonies are crimes punishable by death, life imprisonment, or temporary imprisonment for a period exceeding three years.

Article 4

The criminal case in felonies shall lapse after ten years from the day the felony was committed.

Article 39

An act is not considered a crime if the victim consents to its commission, provided that at the time of the act, the victim is eighteen years old, not under physical or moral coercion, aware of the circumstances in which the act is committed and the reasons for its commission. The consent must be given prior to or at the time of the act. However, the victim's consent is not considered, and the act is deemed a crime if it is likely to cause death or serious harm, or if it is considered a crime regardless of the harm it may cause to the victim, or if the law stipulates that such consent is not valid.

4. Mens Rea (Criminal Intent or Negligence)

Article 41

The criminal intent “mens rea” is considered present if the intention of the perpetrator is proven to commit the act constituting the crime, and to achieve the result punishable by law regarding this crime.

The motive driving the commission of the act is not taken into account when determining the presence of criminal intent, unless the law stipulates otherwise.

Article 42

Ignorance of the text constituting the crime, or the misinterpretation of this text, does not prevent the presence of criminal intent, unless the law stipulates otherwise.

Article 43

'If an act is committed under the effect of misconception of the facts, the perpetrator's liability shall be determined based on the circumstances he believed to exist if such circumstances would extinguish his liability or mitigate it, provided that his belief was based on reasonable grounds and was established through investigation and inquiry.

Should the fault causing the perpetrator to believe he is not liability for his act arise from negligence and lack of precaution, he shall be liable for negligence if the law punishes the act as an unintentional crime.'

Chapter Two: The Crime

5. Attempt and Multiple Offenders

Article 47

Is considered as a perpetrator of a crime:

1.Whoever commits, alone or with others, the act constituting the crime, or commits one of the acts constituting it.

2.Whoever performs auxiliary acts during the commission of the crime or is present at the place where the crime was committed, or near it with the intention of overcoming any resistance or with the intention of strengthening the power of the offender.

3.Whoever instigates the commission of a crime by a person who is not criminally liability or a person of good faith.

Article 48

Is considered as an accomplice in crime before it occurs:

1-Whoever instigated the commission of the act constituting the crime, and it occurred based on this incitement;

2-Whoever agreed with another person to commit the act constituting the crime, and the act occurred based on this agreement;

3-Whoever assisted the perpetrator in any way, knowing that, in the preparations for the crime, and that the crime occurred based on this assistance.

Articles 35 – 43 of Law No. 31 of 1970 Amending the Kuwaiti Penal Code No. 16 of 1960

Crimes Against the Duties of Office and the Criminal Responsibility of Private Legal Persons -

Chapter One – Bribery and Abuse of Influence

Article 35

Any public employee who requests or accepts, for himself or for another, a promise or gift in exchange for performing or refraining from performing an act within his official duties shall be punished by imprisonment for a period not exceeding ten years and a fine equal to twice the value of what he received or was promised, provided that the fine is not less than fifty dinars.

The provisions of this article shall apply even if the act in question does not fall within the duties of the bribed employee's position but was falsely claimed or mistakenly believed to be within his authority. These provisions shall also apply even if the bribed employee intended not to carry out or refrain from the act.

Article 36

Any public employee who, after unlawfully performing or refraining from performing an act for another, accepts a gift or donation as a reward for such conduct, without prior agreement, shall be punished by imprisonment for a period not exceeding five years and a fine not exceeding five hundred dinars, or by one of these two penalties.

Article 37

Whoever requests, for himself or for another, a promise or donation under the pretence that it constitutes a bribe for a public employee – while intending to retain it, in whole or in part, for himself or to use real or alleged influence to obtain or attempt to obtain from a public authority any work, order, ruling, decision, medal, commitment, license, supply or contracting agreement, job, service, or any other benefit – shall be punished with the same penalty prescribed in Article 35 of this law.

Article 38

Any benefit obtained by the bribed person, or by another person designated by him for that purpose, or by any person who was aware of it and consented to it, regardless of its name or nature – whether material or non-material – shall be deemed a promise or gift.

Article 39

The briber and the intermediary shall be subject to the same penalty prescribed for the bribed person.

If the act performed or abstained from was a lawful right, the briber or the intermediary shall be punished by imprisonment for a period not exceeding five years and a fine not exceeding one thousand dinars, or by one of these two penalties.

In all cases, the briber and the intermediary shall be exempt from punishment if they report the crime to the public authorities, even after its completion.

[…]

Article 42

In all cases, a judgment shall be issued to confiscate the bribe paid by the briber or intermediary, in accordance with the preceding articles.

If the briber is exempt from punishment, the confiscated portion of the bribe shall be returned to him.

Article 43

For the purposes of this chapter, the following shall be considered public employees:

A- Employees, workers, and personnel in government departments or entities under government supervision or control.

B- Members of general or local parliamentary councils, whether elected or appointed.

C- Arbitrators, experts, religious representatives, liquidators, and judicial guards.

D- Any person entrusted with a public service.

E- Members of boards of directors, managers, employees, and workers of institutions, companies, associations, organizations, and establishments in which the state or a public entity holds a financial stake in any capacity.

The Evidence Law (No 39 of 1980) Article 54:

A civil Judge is bound by the criminal judgment only in the facts that were decided by the criminal judgment and where such a decision was necessary. However, the civil judge is not bound by an acquittal unless the acquittal was based on the finding that the act was not attributable to the accused.

Kuwaiti Criminal Procedures and Trial Law No 17 of 1960

Article 2

The criminal courts shall adjudicate those accused of committing felonies and misdemeanors, within the limits stipulated in this law, and in accordance with the procedures stipulated therein.

As for violations, they are determined by a special law, and this special law organizes the courts competent to hear them and determines the rules and procedures to be followed in the trial.

[…]

Article 111

Any person suffering harm/damage as a result of a crime may file a civil claim before the court adjudicating on the criminal case, at any stage thereof until the pleading is completed. In this case, he shall have, the status of a joined plaintiff in the criminal case if someone else filed it.

The civil plaintiff may claim his right during the preliminary investigation by submitting a request to the investigator where he shall be treated as a litigant party during the investigation.

Article 113

The criminal court shall decide on the compensation claims submitted by the parties in the same judgment it issues in the criminal case.

If the criminal court finds that ruling on the civil claim alongside the criminal case would result in a delay in resolving the criminal action, it may separate the two cases and rule on the criminal case lone, postponing the consideration of the civil action to another session, or refer it to the competent civil court.

Civil Service Law (CSL): Law No15 of 1979

Article 15

Public Offices shall be held by appointment, promotion, transfer or delegation.

Appointment shall be by a Decision of the competent authority or by Contract, except for Leading Public Offices, in which case Appointment shall take place via a Decree.

Non-Kuwaitis shall be appointed only temporarily and by contracts.

The provisions of this Law and the Civil Service Regulations shall apply to those appointed by contracts, insofar as there is no specific provision in the contracts concluded with them.

The Civil Service Board shall set forth the rules, provisions and forms of the said contracts.

[…]

Article 24

A Public Employee must:

1. Carry out himself the job entrusted to him, perform it with honesty and proficiency and treat citizens appropriately.

2. Allocate official working hours to perform the duties of his employment. He may additionally be assigned to work outside the official working hours if the interest or nature of the job so requires.

3. Carry out the instructions issued to him accurately and honestly, within the limits of the laws and regulations in force.

4. Abide by the provisions of applicable laws and regulations, preserve the State's property, and fulfil his obligations of honesty and integrity when spending the State's funds.

5. Maintain the dignity of Public Employment and conduct himself in a manner consistent with due respect.

Article 25

A Public Employee is prohibited from the following:

1. To purchase or lease, whether in person or through an agent, real estate or movable property from the Governmental Entity in which he is employed. Moreover, he is prohibited from selling or renting any of the same.

2. To have an interest, in person or through an agent, in businesses, contracts, tenders or entrepreneurships related to the works of any Governmental Entity.

3. To perform work for other people, with or without salary or remuneration, even outside official working hours, unless he has written permission from the Minister. Failure to obtain such permission shall be deemed a disciplinary breach that implies accountability.

However, the Employee may assume guardianship, custodianship or agency of absentees with whom he is related

in kinship or family ties to the fourth degree, provided that the Employee notifies the Governmental Entity to which he is affiliated of the same.

4. To exploit his Public Employment for any purpose whatsoever, or mediate for anyone or with anyone in any of the affairs of his Employment.

5. To provide any information about his office works which should be kept confidential in nature or in accordance with special instructions, or publish such information by any means, unless he gets a written permission from the Minister. This prohibition shall continue even after termination of the Public Employee's service.

6. To keep for himself the originals of any official documents or copies thereof, whether printouts, tapes, films or other forms, if they are related to the Governmental Entity in which he works, even if they are related to a job assigned to him personally.

[…]

Article 27

Final Provisions of this Article dated 14/01/1989

Any Public Employee who violates his obligations or disregards the prohibitions stipulated in the laws or regulations shall be subjected to disciplinary penalty, without prejudice to criminal or civil liability when necessary. The Employee will be exempted from disciplinary penalty if it is established that he committed the violation in carrying out a written order issued to him by his Superior despite being alerted of the violation, in which case the liability shall be on the Superior who issued the order. The Employee shall bear civil liability only for his own personal fault.

Original Provisions

Any Public Employee who violates his obligations or disregards the prohibitions stipulated in the laws or regulations shall be subjected to disciplinary penalty, without prejudice to criminal or civil liability when necessary.

The Employee will be exempted from disciplinary penalty if it is established that he committed the violation in carrying out a written order issued to him by his Superior despite being alerted of the violation, in which case the liability shall be on the Superior who issued the order.

Article 28

Disciplinary penalties that may be inflicted upon a Public Employee are as follows:

1. Warning.

2. Deduction of an amount from salary for a period not exceeding fifteen days at a time and not exceeding ninety days within twelve months.

3. Reducing the monthly salary by 25% for a period of not less than three months and not exceeding twelve months for one violation.

4. Reduction of his Grade in the Pay Scale by one step; and the decision issued to inflict the penalty shall specify seniority in this Grade and the salary of the Employee therein.

5. Dismissal from service.

As for Leading Public Employees, only one of the following penalties shall be inflicted upon them:

a. Caution in writing from the Minister.

b. Putting a blame.

c. Dismissal from service.

Article 29

Disciplinary penalties inflicted on an Employee may be erased in accordance with the criteria determined by the Civil Service Law.

Erasure of the penalty shall result in deeming it null and void for the future.

Article 30

A Public Employee shall be suspended from Civil Service in the following cases:

1. If the interest of the investigation or the Public interest so requires. Suspension from service shall take place via a justified Decision for a period of no more than three months, and may be extended for an equal period at the end of which he shall return to office. If the Employee's suspension from service is in the interest of investigations, the payment of half of his salary shall be withheld and shall be refunded to him only if it is established that he is free from liability, he was

penalised by Warning or by deduction from his salary for a period not exceeding one week.

2. If he is imprisoned in the State of Kuwait in pre-trial detention or in execution of a Court Ruling.

Payment of half of his salary shall be withheld in the case of pre-trial detention, provided that it is returned to him if the investigation for which he was imprisoned concludes that he is free from liability, otherwise he will be deprived of that payment!

In the event of imprisonment in execution of a Court Ruling, three quarters of his salary shall be withheld if the judgment is not final and shall be returned to him only if the trial concludes that he is free from liability.

In all cases, the Public Employee shall be deprived of his salary for the period of his imprisonment if it is in execution of a final judgment.

Article 31

Termination of the Public Employee's service for any reason shall not preclude his criminal and civil liability, when necessary."

Money Laundering Law No 35 of 2002

Chapter 1

Definition and Criminalisation of Money-Laundering Transactions

Article 1

Money laundering transactions are one or a set of financial, or non-financial, transactions that aim to conceal or disguise the illegal source of the funds or proceeds of any crime so that they appear to be funds or proceeds obtained from a legitimate source. Each act that contributes to a transaction that employs or transfers funds or proceeds resulting directly or indirectly from a crime or concealing or disguising their source is considered an instance of such transactions.

Article 2

Anyone who commits one of the following acts, or attempts to commit them, shall be considered a perpetrator of a money laundering crime:

1. Conducting a money laundering transaction with the knowledge that the funds were obtained from a crime or obtained from an act of participating in a crime.

2. Converting, transferring, possessing, acquiring, using, keeping, or receiving funds with the knowledge that they were obtained from a crime or obtained from an act of participating in a crime.

3. Concealing or disguising the true nature, source, location, disposition, movement, or ownership of funds, or rights pertaining thereto, with the knowledge that they were obtained from a crime or obtained from an act of participating in a crime.

Money Laundering Law No 106 of 2013

Article 2

Anyone who knows that assets are the proceeds of a crime and who has intentionally performed any of the following actions shall be considered to have committed a money laundering offense:

a. converts, transfers or substitutes such assets with the purpose of disguising or concealing the illicit origin thereof, or helps a person involved in the commission of the predicate offense evade the legal consequences of his acts;

b. disguises or conceals the true nature, source, location, disposition, movement or ownership of such assets, or rights pertaining thereto; or

c. Acquires, possesses or uses such assets.

A legal person shall be held liable for a money laundering offense if it is committed in its name or for its benefit.

Punishment of the perpetrator of the predicate offense shall not preclude conviction of that same person for a money laundering offense.

When establishing that assets are the proceeds of a crime, it is not necessary that a person have been convicted of committing the predicate crime.

B5: Proof of a crime in civil proceedings

The issue

164. An issue on which a great deal of written and oral expert evidence was tendered was whether Kuwaiti civil courts may find breaches of criminal provisions to establish civil liability without a criminal conviction. PIFSS contends that the civil courts can do so. The Defendants – or at least all of them apart from EFG, who abandoned the present argument in their closing submissions – contend that they cannot.

165. Kuwaiti law imposes general tortious liability on persons who wrongfully harm others. The key provision is Article 227 of the KCC, which provides as follows:

> "Any person who causes harm to another through their wrongdoing act shall be liable to compensate for it …"

166. The experts were agreed that this required 3 elements: fault, harm and causation, referred to by PIFSS as the "3 pillars" of tort liability. The experts were also agreed that this applied to any act of wrongdoing, whether intentional or negligent. The concept of "wrongful conduct" or "fault" is not defined in Article 227. As explained in the treatise of *Al Otaibi*, extracts of which appear below, the concept has been left to the courts to develop and apply.

167. This issue arises because – aside from the criminal case against Mr Al Rajaan and Ms Al Wazzan concerning the Mirabaud scheme – no criminal proceedings took place in Kuwait relating to any of the schemes or defendants with which I am concerned. There is therefore no criminal conviction in respect of those schemes or defendants.

168. Man and most of the other Defendants contended that it was not permissible for a civil judge to determine whether or not a crime had been committed, for the purposes of establishing the "fault" element of a tortious claim under Article 227 KCC. Only a criminal court could determine whether a crime had been committed. The argument in this regard was led by Mr Collins KC for Man. In his oral closing submissions, Mr Collins described this point as a "narrow" point, and the scope of the argument was much narrower than the points ventilated in the expert evidence directed towards this issue.

169. The narrow question was whether a Kuwaiti civil judge (and hence the English court applying Kuwaiti law) could determine that crimes had actually been committed, in the context of determining a claim in tort. Mr Collins submitted that this was not permissible. It was permissible for a party to allege facts which would amount to a crime, and these facts could then form the basis of a claim that there was sufficient "fault" for the purposes of a tortious claim based on Article 227 KCC. But in that context, it would not be permissible for a civil judge to consider the text of a criminal statute, or to find that a statute had been contravened.

170. That said, Man had no objection to PIFSS' decision voluntarily to set itself the standard of proving that crimes had been committed, for the purposes of showing that there was civil fault. However, that was not a necessary benchmark which PIFSS needed to surmount in order to establish civil fault, and it was not the way in which a Kuwaiti court would approach the issue. But if it was surmounted, then Man would accept that civil fault was established. On this basis, Man accepted that if any of the three Man individuals, alleged by PIFSS to have been involved in bribing Mr Al Rajaan, had personally assisted in the bribery, with the necessary knowledge and intent, they would be acting tortiously and Man would be vicariously liable for their torts. However, that

was not because the court would be determining, by reference to the criminal law provisions of the KPC or the KPPL, that crimes had been committed. Rather, it would be because the proven underlying facts would amount to civil fault for the purposes of Article 227, regardless of what the criminal statute might say or whether any statute had been contravened.

171. Mr Collins referred, in the context of this line of argument, to Dr Youssef's evidence that:

> "You can allege facts that would otherwise constitute a crime, but the violation of the duty cannot be by reference to a criminal text."

On this basis, it was permissible to plead the facts that could amount to a crime, but a civil judge does not use the criminal text in order to establish that a civil fault has been committed, and certainly does not take the extra step of determining that any crime has actually been committed. In short, a civil court cannot apply criminal provisions and determine criminal fault.

172. Mr Collins submitted that the case-law relied upon by PIFSS did not support the proposition that a civil court could determine that a crime had been committed. Rather, the cases showed that the court was examining underlying facts, and asserting that an incident occurred for the purposes of finding tortious fault. When considering the case-law, and the arguments advanced, it was critical to distinguish between the facts and their legal characterisation. There were no cases where a civil court was looking to a set of facts, applying a criminal text, and then determining that a crime had been committed. They were doing no more than establishing whether or not there had been a civil fault. Thus, a civil court can determine the facts, and it was not necessary or appropriate for a civil judge to do so through or under the Kuwaiti Penal Code.

173. If, however, a civil court were to embark upon an exercise of determining whether or not a crime had been committed, then Mr Collins maintained (relying on Dr Youssef's evidence) that a criminal conviction would be required for that purpose. But he submitted that this was not a necessary step in the route from the facts to civil liability, and it was not an essential part of Man's case.

174. In my view, Mr Collins' distinction between a Kuwaiti court (i) determining that a crime has been committed for the purposes of establishing civil fault, and (ii) determining that the facts of the case, showing that there has been criminal conduct, are sufficient to give rise to civil liability, is a very fine distinction. It might be thought that this was a distinction without a difference as a matter of substance. The essential reason that it was advanced was in order to defeat PIFSS' reliance on (i) the extended limitation periods applicable to civil claims based on crimes (an issue addressed in detail in Section R below), and (ii) the repayment remedies which exist under Articles 16 and 22 of the KPPL (addressed in detail in Section B11 below). Accordingly, Mr Collins' argument sought to break any link between criminal statutes and civil liability, at least absent a criminal conviction, and to do so, notwithstanding his acceptance that underlying facts alleging the commission of a crime would, if proved, be sufficient (certainly in the context of the bribery alleged in the present case) to give rise to fault for the purposes of civil liability.

175. PIFSS contended that it was permissible for a civil judge to determine fault by considering and determining whether there had been a violation of a criminal statute, and to do so in the absence of a criminal conviction. This was in summary because: (i) standards of behaviour proscribed in criminal legislation constitute a core part of Kuwaiti civil law, in that they set the standards, violation of which gives rise to the most serious forms of civil fault; (ii) civil courts have default jurisdiction to rule on civil liability; (iii) accordingly, civil courts will rule on such violations, where they are the basis for civil fault and thus for civil liability.

176. PIFSS also submitted that there was no Kuwaiti case or academic writing which identified the rule on which the Defendants and Dr Youssef relied. This was the case whether one was considering the "narrow" way in which Mr Collins advanced the case, or the wider points advanced by Dr Youssef as to the need for a criminal conviction. Furthermore, PIFSS submitted that there were a fair number of cases, both in Egypt and Kuwait, where there had been no criminal conviction, but where a civil court had determined that a crime had been committed for the purposes of establishing a civil claim, or had indicated that this was a permissible approach.

The expert evidence

177. The expert evidence on this area of the case was extensive, but it is only necessary to refer to a few paragraphs of each expert's written reports in order to see the essence of the debate.

178. In his reply report, Dr Abbas said that if no criminal claim was pursued, the civil court may award compensation based on torts constituting a crime. Referring to the writings of Saleh Al Otaibi: *The Review of the Court of Cassation on the Element of Fault in Tortious Liability,* Dr Abbas said that Kuwaiti civil courts can decide on civil claims based on a crime without need for a conviction, since they would not issue a judgment finding the defendant guilty or acquitting it of the crime. Rather, the civil court would rule on whether there has been a civil fault based on the facts of the case. This is based on the premise that a civil fault exists where a crime is committed, because all criminal acts necessarily violate a legal provision which obliges a person not to commit a certain act.

179. Civil courts are able, independently, to ascertain the existence of material and moral elements of a crime, so as to find a violation of the legal provision establishing a crime, which also establishes a civil fault in parallel. He referred in that context to a number of defamation cases. He said that Kuwaiti courts can establish the elements of the crime to establish a civil fault, separately and independently from the criminal court. If civil courts did not engage in such an exercise when faced with a tort claim connected to a crime, their judgments could be reversed by the Kuwaiti Court of Cassation.

180. Furthermore, it is an established principle that the injured party has the right to choose between the criminal and the civil route. The injured party is at liberty to file its civil claim for compensation resulting from the commission of a crime either before the civil courts or by pursuing the criminal route. This right of choice remains so long as both routes are available for the injured party to pursue. Indeed, the right of the injured party to resort to civil courts to claim compensation is the primary right stipulated by the

general principles, while resorting to criminal courts to obtain compensatory remedies is an exception to that general principle.

181. To say that there is a violation of a criminal provision does not require a criminal conviction. Rather, the commission of any act that constitutes a crime according to the law constitutes a violation of the provisions that stipulate the crime in question. Thus, referring specifically to Articles 47 and 48 of the KPC, which concern accessories to a crime, Dr Abbas said that these provisions, apart from being criminal provisions, are provisions setting out a legal obligation to refrain from certain acts. The violation of these obligations, just as it entails criminal liability, entails also civil tortious liability, which is triggered by any unlawful act that violates the law, regardless of the law that is violated. That is, of course, provided that all elements of civil liability, including harm, exist.

182. Dr Youssef's evidence, in his first report, was that a Kuwaiti civil judge does not have jurisdiction to determine whether a "crime" has been committed, as this falls within the exclusive competence of the criminal court. A civil judge can only adjudicate on tortious liability insofar as it is advanced in civil law recognised terms under the KCC alleging a breach of a civil law obligation. Where a civil court is faced with a claim that seeks to establish Article 227 liability on the basis of allegations of criminal conduct (as in this case), it will require a criminal conviction as proof of those matters. Absent such a conviction, the civil court will dismiss the claim, as only a criminal court has jurisdiction to adjudicate whether a crime has been committed (by reference to findings as to both the *actus reus* and the criminal intent or *mens rea*).

183. Kuwaiti lawyers, therefore, do not file civil tort claims said to arise from acts that could constitute a crime without the support of a conviction from a criminal court. He referred to 5 cases in support of the proposition that it was established by the Kuwaiti court that both civil and criminal courts reject tort claims based on alleged criminality where the fault or wrongful act has not been established by the criminal court. I have re-read all 5 cases, and the cross-examination upon them, and I do not consider that any of them support the proposition for which they were cited. I shall return to those cases below.

184. Dr Youssef said that it followed that if the claimant's allegations of civil fault or wrongful act cannot be established without a criminal conviction from the criminal court, the claimant will have failed to prove their civil claim as pleaded. He said that the Kuwaiti courts have confirmed that a decision on whether a crime has been committed is outside the jurisdiction of the civil court reviewing labour claims, and he referred in that context to Kuwaiti Court of Cassation Appeal No. 97 of JY 2012 (Third Labour Circuit). This is also one of the 5 cases to which Dr Youssef had referred, and I deal with that case below.

185. Dr Youssef went on to say that it was not in dispute that a claimant can advance a claim in civil law terms under the provisions of the KCC alone. Where it does so, it will be limited to the remedies provided in the KCC, and civil limitation periods will apply. The civil court will assess the facts pleaded as torts to determine whether the "*fault*" alleged by the claimant amounts to a breach of a civil obligation. A civil law obligation, not a criminal law obligation, must therefore be specifically cited and established, together with the facts said to establish a breach of it – and in such a case, if there is connected criminal conduct, a criminal conviction can serve as compelling evidence in the civil lawsuit and may influence the civil court's findings regarding liability.

186. Where a claimant has chosen to seek to establish the "fault" element under Article 227 by reference to alleged criminal conduct, for example bribery or a breach of a provision in the KPC or KPPL, a criminal conviction is a necessary prerequisite to liability and the different limitation periods and remedies available under Kuwaiti criminal law. The civil judge cannot apply the KPC or the KPPL, nor can the civil judge merely assume criminality. Dr Youssef accepted that the commission of a crime can form the basis of civil liability, but this required a conviction. If there was a conviction, then the defendant would be automatically deemed to have committed a civil fault for the purposes of Article 227.

Discussion

187. I have no doubt that the evidence of Dr Abbas on this issue is to be preferred. A civil court can, when determining the issue of "fault" in the context of tortious liability under Article 227, decide whether or not the defendant has in fact committed a crime and thereby contravened the standards of behaviour to which he should have adhered. This is the case whether or not there is a criminal conviction. There is in my view a considerable weight of legal authority which supports this approach, and there is nothing of any substance that supports Dr Youssef on this issue.

188. I was referred to a number of texts in this area, and some of these contain a detailed discussion as to the relationship between civil and criminal proceedings in the context of tort liability. If the proposition for which Man and Dr Youssef contend were correct, either in its wide or narrow form, then I would expect it to be clearly articulated in these texts. It would be a very important limitation on the approach which a civil court could take when determining whether there was fault for the purposes of civil liability. It would prevent the court from applying, or even referring to, a criminal provision in order to determine whether or not the defendant had acted wrongly and was therefore at fault. It would mean that a claimant, alleging fault, could not ground the claim on the sure footing of demonstrating the commission of a crime, but would need to hope that the judge would regard the underlying facts – without reference to the criminal law – as giving rise to fault independently of whether or not a statute had been contravened. The case would need to be advanced, on Dr Youssef's approach, solely by reference to a civil standard. Indeed, at one stage in his cross-examination, and as further discussed below, Dr Youssef also said that if the civil judge saw that – as a matter of substance – a crime was being alleged, then he would not deal with the civil case at all: he would not touch it. Dr Youssef also went as far as saying that a civil judge would not even have criminal codes "in their drawer", and thus could never be expected to refer to them.

189. If correct, all of this would mean that a civil claimant, and indeed a judge in a civil case, would have to approach a tort claim involving serious wrongdoing in a hamstrung manner. Considerable care would need to be exercised, in identifying the facts and fault relied upon, in order to avoid the civil judge declining to deal with the case on its merits. If correct, one would expect to see this explained in the leading texts which address the topic, and also to see that the only exception is where there is a prior criminal conviction. I do not see this either in the texts or in the case law, both of which in my view contradict the approach of Dr Youssef and support that taken by Dr Abbas.

190. *Al Otaibi*'s treatise is a text which contains the most detailed discussion of the nature of fault, and the interrelationship between criminal and civil proceedings, in the context of Kuwaiti law. Both parties referred to this treatise in their closing submissions, and I consider that it is of considerable assistance.

191. In the abstract (page 3), the author states:

> "Assessing the existence of a fault differs depending on whether there is a criminal judgment to convict, which is then considered a fault. However, acquittal does not mean that there is no fault; it depends on the reason for the acquittal. The matter also differs depending on whether there is an action which constitutes a breach of a given legal text. This is then considered a fault. Outside of these cases, ruling on a specific behaviour being a fault or otherwise is based on the standard of the ordinary person. All of this is in order to compensate the injured party." (My emphasis)

192. Accordingly, the author here – and in later passages – clearly saw no difficulty in identifying "a breach of a given legal text" as fault.

193. He then goes on to address the issue of fault in two sections, drawing a distinction between cases where there has been a criminal judgment, and cases where there has not. In dealing with the first category – where there has been a criminal judgment – *Al Otaibi* states (page 8):

> "There is no difficulty in stating some of the forms of fault. It is the state a person finds himself in when his conduct violates the provisions of a specific legal rule that orders specific behaviour to be followed or that orders refraining from specific behaviour, and he acts contrary to this. Not following the conduct established by law is considered a fault, regardless of the nature of this conduct, even if it does not contradict the rules of religion, morality or social habits. Legal rules are binding and breaching them means that the conduct is unlawful; in this case, it is considered unlawful conduct that entails tortious liability, as harm to others arises from it under what is provided in Article 227 of the Civil Code.
>
> At the head of these legal rules is the obligation in the Criminal Code to refrain from or to perform a specific behaviour, it is otherwise considered a crime which involves criminal liability which also constitutes civil tort liability with fault as its basis. The crime, regardless of type, means that we have a wrongful act. This does not mean that we are imposing two penalties for one offence; the two liabilities are different, each belonging to a separate branch of the law, with independent rules. Nonetheless, this independence is not absolute, as criminal liability has an influence on civil liability for various reasons, which reflect on the rules of evidence, which define the determinative effect of the criminal judgment over the civil case."

194. This discussion is valuable in identifying the nature of fault under Kuwaiti law, and specifically that contravention of specific legal rules does amount to fault. The obligations in the Criminal Code are described as being at the "head of these legal rules". Thus, the crime, regardless of type, means that there is a wrongful act. This shows that when a Kuwaiti court is considering the question of fault, it is necessarily looking not only at the underlying facts, but also whether the conduct evidenced by those facts is in contravention of specific legal rules including obligations in the Criminal Code. In other words, a court is not required to make a value judgment in the abstract on whether the conduct breaches a reasonable person standard, but rather it looks at the criminal law to identify whether it has been contravened. And although this passage appears in the context of a discussion of cases where there has been a criminal judgment, it is looking at the nature of "fault" under Kuwaiti law. There is nothing here, or in the rest of the treatise, that suggests that the concept of "fault", in the context of breaches of criminal statutes, differs when being considered by a criminal judge dealing with an "adhesive" civil claim brought by a claimant in the context of the criminal proceedings (see Article 111 of the Kuwaiti Criminal Procedures and Trial Law quoted above), or a civil judge dealing purely with a civil case.

195. *Al Otaibi* then goes on to discuss various issues arising from the interplay of criminal and civil proceedings, starting with a discussion of the effect of a criminal judgment on the civil court in assessing fault. This discussion begins with a paragraph (page 10) relied upon by Man in their written submissions:

> "If a crime takes place, and it results in harm to a third party, the principle is that the criminal case is brought before the criminal courts, and the compensation case is brought before the civil courts, as each case is independent of the other. What brings them together is that they both arise from a single incident and have similar causes. The cause of criminal liability is a breach of the legal rules stipulated in the Criminal Code, which is considered a crime, and the cause of civil liability is also a breach of legal rules, in this case Article 227 of the Civil Code."

Man emphasise the division between criminal and civil proceedings.

196. I do not consider that this paragraph provides any assistance to Man's argument, particularly when it is read in the context of the other parts of *Al Otaibi* which I discuss. It is uncontroversial that the "cause" of civil liability is Article 227. But this does not mean, and *Al Otaibi* is not saying, that a judge cannot look to breaches of the criminal law for the purposes of establishing fault. It is clear that *Al Otaibi*, correctly in my view on the evidence as a whole, considers that a judge can do so.

197. Nor do I consider that the analysis is affected by the division between criminal and civil proceedings, and the fact that criminal courts have jurisdiction over criminal cases: see Article 2 of the Kuwaiti Criminal Procedures and Trial Law, upon which Man relied. *Al Otaibi* makes the point that the independence of criminal and civil proceedings is not absolute, and that criminal liability has an influence on civil liability. When a civil judge is considering whether or not a defendant has violated a criminal statute, for the purposes of deciding whether he was at "fault", the judge is not in any way usurping the function of a criminal judge. The judge is not seeking to convict the defendant, or

to impose a punishment for a crime. Rather, the judge is fulfilling the function of a civil judge in determining whether there has been a relevant fault.

198. In relation to various aspects of the interplay between criminal and civil proceedings, the author explains that if criminal proceedings are started at a time when there is an ongoing civil case, the latter will be stayed to await the decision in the criminal case. This arises from the potential for the result of the criminal case to have a res judicata effect, pursuant to Article 54 of the Evidence Law. A claimant has the option to make an adhesive civil claim in the criminal proceedings, but need not do so.

199. The author then explains that a conviction in the criminal proceedings will in itself determine that the defendant is at fault for civil purposes. This will be binding on a civil court. After referring to a Court of Cassation ruling, *Al Otaibi* states:

> "It is clear from the ruling mentioned above that the civil court does not examine the substance of the conduct that constitutes the crime to consider whether it is a fault or not; but it suffices that the criminal court has ruled on the issue of the existence of the act considered a crime according to the legal qualification of it in the criminal law, and this is considered a fault simultaneously under the provisions of the civil law.
>
> This is what is meant by the common basis of the two cases. Proving that a specific crime was committed means that the defendant was at fault in breaching the criminal law which orders everyone to refrain from a specific conduct or obliges them to act in a specific way; the defendant acted contrary to this. The matter is the same with respect to the civil law; the legal qualification of any action that is in breach of a specific law, regardless of the law, even if it is the criminal law, is that the perpetrator has committed a fault that engages their tort liability."

200. Again, this passage reiterates the nature of criminal wrongdoing in a civil context: there is fault where a person acts in a manner specifically prohibited by the criminal law, a point which *Al Otaibi* makes again at page 14:

> "It is thus clear that the basis of criminal liability lies in the wrongdoing of the offender in breach of a provision of the Criminal Code. It is qualified as a crime and at the same time, it is qualified as a wrongdoing in the context of civil liability."

201. The author then goes on to consider the circumstances in which an acquittal, rather than a conviction, will be determinative. There is here a more nuanced approach under Article 54 of the Evidence Law. However, I do not think that it is necessary to discuss this in detail. In broad summary, an acquittal will be determinative if the criminal court decides that the defendant did not do the act in question; i.e. "based on denying the attribution of the incident to the defendant". But it will not be determinative in other circumstances, for example if the incidents giving rise to each case were different. An example of when an acquittal was not determinative is the case of the police officer shooting, discussed below.

202. *Al Otaibi* then goes on to address the scenario where there has been no criminal judgment for whatever reason. This may be because the defendant had died, or because criminal proceedings were never commenced in the first place, or because there has been an indefinite suspension of the criminal case. He deals with the position in some detail:

> "It has previously been stated that the default way to claim compensation for tort is by bringing a case before the civil court even if the fault constitutes a crime, provided that the criminal court has not made a final ruling on the civil claim, either to award compensation or to dismiss the claim. In some cases, a crime is committed and no criminal case is brought before the criminal court by the public prosecutor's office for any particular reason, and the victim chooses to resort to the civil courts to claim compensation for the harm they have suffered from this crime. This happens most often with crimes which require a complaint by the victim to trigger a criminal case. The main examples of this are libel and defamation cases, particularly as concerns the Press and Publications Law.
>
> So how does the civil court assess the existence of fault that engages the civil liability of the person who is liable when no criminal judgment has been made either to convict or acquit, which means the civil judge's freedom from the determinative effect of the criminal judgment under Article 54 of the Evidence Code even though he is dealing with a crime.
>
> There is no doubt that the civil judge will consider the incident that constitutes a crime in his capacity as a civil judge and not a criminal judge. In this case, do the provisions of the Criminal Code apply, particularly as concern the material element of the crime which is considered the common basis with civil fault which must be proved or negated even though the civil judge does not have the powers that are available to the criminal judge?
>
> In looking for an answer to this question in the case law of the court of cassation, we found among its rulings that the civil court's role is not to convict or acquit the defendant of having committed the crime; its purpose is to establish whether there is a civil fault as a result of this incident, or otherwise. <u>However, as the crime is the conduct that breaches the law that requires it not to be performed, this in itself is considered a civil fault. Consequently, if the material element of the crime is not sufficient for there to be civil fault, the civil court finds itself obliged to establish two elements of the crime: the material and moral, to ascertain whether it is considered a breach of a legal provision, even though it constitutes a crime, it at the same time is considered a civil fault</u>." (My emphasis)

203. This passage is in my view consistent with Dr Abbas's evidence as to Kuwaiti law, and inconsistent with the Defendants' case and the evidence of Dr Youssef. *Al Otaibi* is

making it clear that a civil judge, in a case where there has been no criminal conviction, may indeed decide whether or not the criminal law has been breached, in order to determine whether or not there is fault. There is no suggestion here that a prior criminal conviction is required for that purpose. Indeed, *Al Otaibi*'s treatise, from which I have been citing, occupies some 71 translated pages, and there is no such suggestion throughout.

204. It is true that *Al Otaibi* in the above passage contemplates that a civil judge may in certain cases not have to determine whether or not both elements of the relevant crime (*actus reus* and *mens rea*) have been established. It may be sufficient, to constitute civil fault, to establish the former (i.e. the "material element"). However, he also recognises that, in appropriate cases, the judge may have to decide whether both elements of the crime (i.e. including the "moral" element or *mens rea*) have been established, and there is nothing which suggests that the judge is prevented from doing so. Furthermore, even in a case where only the *actus reus* was being relied upon, this would in my view necessitate reference to the text of the relevant criminal statute. Accordingly, contrary to Mr Collins' oral submissions, I do not consider that this passage in *Al Otaibi* supports Man's argument.

205. The inter-relationship between civil and criminal law is dealt with in other texts, without any suggestion that a criminal conviction is necessary if the tortious element of fault is to be established by reference to the commission of a crime, and without any suggestion that a civil judge is hamstrung in his approach to the determination of fault when it is alleged that there has been criminal conduct.

206. Thus, Al-Sanhoury: *Al-Wassit in The Explanation of The Civil Law, Part 1, The Sources of Obligations* says (page 953) in the context of Egyptian law:

> "As for the element of fault, if the criminal judgment convicts, it necessarily addressed and established its existence; otherwise, a conviction would not have been issued. The civil judge is bound by the existence of the fault from a civil perspective, since every criminal fault is simultaneously a civil fault, though not vice versa."

207. The fact that every criminal fault is simultaneously a civil fault would indicate, in a rational legal system, that a civil judge would be permitted to determine whether or not there is criminal fault, rather than being hamstrung in the way suggested by the Defendants. (Indeed, I note that Swiss law, which is also a civil law system, permits a civil judge to determine such an issue, and no argument is advanced under Swiss law along the lines of the Defendants' argument here). The position would of course be otherwise if there was some clear rule to the contrary. However, the Defendants and Dr Youssef have not in my view identified any text or case which provides or supports that clear rule.

208. Another relevant text is Sorour, *Al-Wassit in Criminal Procedures Law*. This discusses (at paras 307 – 312), again in the context of Egyptian law, the claimant's right to choose to bring a civil claim in either a civil court or a criminal court. The criminal path is available if criminal proceedings have begun. As far as concerns the civil path, the author states at paragraph 311 that: "The rule is that the civil path is always open to claims for damages arising from a crime, unless it is closed for a special reason

attributable to the provisions of the law, or to waiver of the claim or damages". When dealing with the loss of the right to resort to the criminal courts, Sorour states that:

> "The law notes that the right of a civil plaintiff to resort to the civil judiciary is an inherent right imposed by the general rules and does not directly place specific conditions on this right. This is contrary to their right to resort to the criminal courts, which is an exceptional right, and therefore must be assessed within the limits required by this exception. Accordingly, the law decided in favour of the defendant that the right to resort to the criminal courts is forfeited if the plaintiff chooses the civil path, despite the criminal case having been filed before the criminal courts at the time of this choice.
>
> The conclusion is that forfeiture is only applicable to the right to resort to the criminal courts. As for the right to resort to the civil courts, it can never be forfeited because it is an inherent right, not an exceptional one." (My emphasis)

209. Although this passage is not dealing directly with the way in which a civil claimant can establish a civil claim, it is instructive in showing (as PIFSS submitted) that it is the civil courts which have default jurisdiction over civil claims. This is also explained by Elthufairi: *Criminal Protection of Public Property Through the Kuwaiti Law No 1/1993.* That author describes how the criminal legislator has affirmed the right of the victim to initiate a civil claim before the criminal court "contrary to the general rule regarding jurisdiction". Similarly, Sorour at paragraph 273 says:

> "The jurisdiction of criminal courts over a civil claim is contingent upon the harm having arisen directly from the crime and upon the criminal case having already fallen within the purview of that court. Should the harm result from an act other than the crime—regardless of any connection between the two—or from a crime in respect of which no criminal proceedings have been initiated before the same court, the claim for compensation must be brought as a regular civil action before the civil courts, not as an ancillary civil claim before the criminal courts." (My emphasis)

210. None of these passages suggest that civil claimants, in seeking to establish a tort claim in the civil courts which have default jurisdiction over civil claims, are in any way hamstrung in their ability to prove that there is fault because the defendant has committed a crime. Again, a rational legal system which gives default jurisdiction to civil courts in order to determine civil claims would, absent a clear rule to the contrary, enable claimants to prove to the civil judge that there has been fault as recognised by that civil law; i.e. including fault because there has been a contravention of a criminal statute. This is particularly the case bearing in mind that, as Al-Sanhoury says (paragraph 631) "a liability claim most often rests upon a criminal offence".

211. I also agree with PIFSS' submission, drawing upon Sorour (above) and other writers, that civil claimants have an option to pursue civil claims based on crimes either in standalone civil proceedings or by way of adhesive claims in criminal proceedings, and

that this is inconsistent with a legal rule which requires a prior criminal conviction before a civil court can rule on liability.

212. Furthermore, the fact that civil courts have default jurisdiction over civil claims means that Dr Youssef cannot be right in his evidence as to how a civil judge would react if he was presented with a civil claim which alleged, as a matter of substance, that a crime had been committed. That evidence, in cross-examination, was that the civil judge would not touch the case. In relation to civil claims based on, for example, bribery, or embezzlement, or fraud, he said:

> "Any crime, any allegation of a crime. If the pleading is a crime, it will be referred –– and even –– you know, I want to be 100% correct –– even in cases where the facts are just pleaded and they look like a crime, like someone, you know, took my money against –– you know, this person bribed X person, even without calling it a bribe –– it doesn't have to be described because the judge would give the proper description –– it would be a complete paralysis of the system."

In response to further questions from Mr Ritchie on this issue, he confirmed that this involved looking at the substance not the form of the claim. Thus, if the allegation was that a car had been stolen, he confirmed that this would put the civil justice system into paralysis, and the case had to go off to the criminal court, with the civil justice system stopping at that point.

213. I consider that none of this makes any sense at all, in the context of a civil justice system which has default jurisdiction over civil claims, and it is not supported by any academic writing or case-law. Furthermore, if correct, it would give rise to a fundamental injustice to a civil claimant in cases, for example, where criminal proceedings were not possible because the offender had died. No doubt it was in recognition of the difficulties presented by this evidence, and the unlikelihood of my accepting it, that in re-examination Dr Youssef was asked questions which elicited the answer that a civil claimant could reframe a claim so as to rely on purely civil matters. I thought that this evidence could not be reconciled with his earlier evidence as to how a civil judge would look at the substance rather than the form of the claim. But at all events, I do not accept any of this evidence, including the proposition that a civil claimant needs somehow to repackage a claim in order to avoid making an allegation (absent a criminal conviction) that a crime has been committed.

214. I now turn to a number of cases which, in my judgment, show clearly that Dr Abbas is right and that the Defendants and Dr Youssef are wrong. I shall look at both Kuwaiti and Egyptian cases, since there was no suggestion that there was any material difference between Kuwaiti and Egyptian law on the issues which I am now considering.

215. Kuwaiti Court of Cassation Appeal No. 49 of JY 2023 dated 9 July 2023 concerned, so far as material, an appeal by a judge who alleged that he had been defamed by a Kuwaiti (political) minister. The case is significant in the context of limitation, and I address it in detail in Section R below. For present purposes, however, it is sufficient to note that the judge's claim succeeded before the trial judge and in the Court of Cassation. There was no criminal conviction, and nothing in the judgment suggests that criminal

proceedings had even been commenced. This was a civil case, and the Court of Appeal had accepted the claimant judge's case "that the expressions used by the [minister] in his disqualification request …. constitute the crimes of defamation and libel under Articles 109 and 110 of the Penal Code [*sic*]." Accordingly, the lower court had looked to the Penal Code for the purposes of establishing fault. The Court of Cassation did the same, when rejecting the minister's argument that he was entitled to say what he had said:

> "This is because the legislature did not sanction the use of language that demeans or defames individuals in a manner that impairs their honor and reputation; and prohibited this under Article 210 of the Penal Code. Thus, if an expression contains statements which constitute, by their very nature, insults which impairs honor or reputation, then this constitutes a fault which necessitates compensation whenever the elements of tortious liability are satisfied, and this cannot be considered as a form of sanctioned critique, and accordingly the claim is unfounded."

216. I agree with PIFSS' analysis of this case: that although there were no criminal proceedings, and no criminal conviction, the Court of Cassation (and indeed the lower court) readily expressed the basis for civil liability in tort by reference to fault constituted in criminal offences. I was unimpressed by Dr Youssef's attempt to explain the case away by saying that defamation was a crime which required a complaint, and that if there was no complaint the criminal aspect of defamation fell away. That reasoning plays no part in the analysis of the Court of Cassation which, in its decision both on the limitation issue (see Section R below) and the issue of whether the minister's statements were justified, relied upon the existence of a crime.

217. In their written submissions, Man described this case as an "outlier". I see no basis for that argument: Man has not identified any cases which have taken a contrary position. Indeed, Dr Abbas was able to point to a number of cases in the defamation area where the court had considered whether the crime of defamation had been committed.

218. Thus in Kuwaiti Court of Cassation Appeal No. 44 of JY 2006 Civil, the headnote refers to "Crime – Liability", and "Crime of defamation". It then identifies the principle, setting out the Court's judgment that: "It is established that, in order to establish the crime of defamation, it is sufficient for the expressions to be directed in a manner whereby it is easy to understand the intended meaning thereof". The court was therefore looking, for the purposes of civil liability, at whether the relevant ingredients of the crime of defamation had been made out.

219. Similarly, in Kuwaiti Court of Cassation Appeal No. 21 of JY 2000, the court identified the principles relating to defamation claims. It referred to the prohibition in Article 26 of the Press and Publications Law No 3 of 1961: "anything that violates public morals or infringes upon people's dignity or personal freedoms is prohibited." The relevant principle, as expressed by the court, was that "if the publication or criticism goes beyond this limit, the responsible party must be held liable as the perpetrator of the crime of insult, defamation or offense, as the case may be" (my emphasis). The court's statement of the principle was therefore based on the existence of a crime, with express reference to the text of the relevant statute.

220. In oral submissions, Mr Collins submitted that defamation was sui generis, because there was a statute, the Press and Publications Law, where the prohibition in Article 26 would, if breached, give rise to tortious and potential criminal liability. However, I do not accept that this forms the basis of the defamation decisions. Indeed, in his reply report, Dr Youssef had acknowledged that the line of cases relied upon by Dr Abbas related to "crimes of defamation and slander", before going on to make various (in my view irrelevant) points related to the repeal of the relevant statute. Furthermore, the decision in the defamed judge case was based squarely on the Penal Code, and did not refer to the Press and Publications Law Article 26. There are also cases outside the defamation arena, as discussed below.

221. Appeal No. 36 of JY 89 Civil is a Kuwaiti Court of Cassation case arising from a civil claim by heirs of a man who had been murdered. The claim was for 20,000 dinars in compensation for the material and moral damages that the murdered man's wife and children had suffered because of his death at the hands of the alleged murderer. However, the murderer had died, and although he had been put on trial, there was no criminal conviction: the criminal case had lapsed with his death. The first instance court, dealing with the civil claim, awarded (against the murderer's heirs) the 20,000 dinars claimed. In describing the claimant's claim against the murderer's heirs, the Court of Cassation said that the trial court "based its judgment on its conclusions from the statements of the two prosecution witnesses and the Defendant's confession during the criminal investigations, thus establishing that he had committed the crime of murder and was liable for compensation for the damages resulting therefrom".

222. It is apparent, therefore, that the trial court had squarely addressed the question of whether the crime of murder had been committed, and felt no difficulty in doing so notwithstanding the absence of a criminal conviction. There is nothing in the judgment which suggests that the claimant had had to formulate a case which did not fairly and squarely assert that the crime of murder had been committed, or that the case was based on a breach of a standard of reasonable care rather than the crime of murder.

223. A number of points were taken on the cassation appeal. No point was taken that the trial court should not have determined that the crime of murder had been committed, or that a criminal conviction was required for that purpose. The Court of Cassation itself did not spot that point either. In my view, that is because the point has no validity. The relevant ground of appeal acknowledged that the victim had been murdered, but asserted that there had been provocation. The appellants' case was that "it was established from the criminal investigation that the ill-treatment by the Appellee's decedent [i.e. the victim], which affected his [i.e. the murderer's] reputation and standing, was the reason that the latter murdered him, which negates his liability for the damages resulting from this act in accordance with Article 234". This point was rejected by the Court of Cassation, holding that the victim had no role in causing the damage, and therefore rejecting the argument that the victim "caused their decedent's motive in killing".

224. Dr Youssef was cross-examined on this case. He said that this was not a case of a civil court awarding compensation in respect of a crime, because there was no conviction. It was, he said, a case where the award was in respect of "an act that could be a crime". The court had not, he said, found that there was murder. That could be seen from the fact that there was no reference to a criminal text. The court had found only "pure fault", and was applying a reasonable person standard. I found this evidence unimpressive and

I do not accept it. The simple explanation of the case is that the murderer was liable (and therefore his heirs were liable) because he had committed the crime of murder, and this was the basis of the decision of the lower court. The court would not need to refer to any criminal text for the purpose of establishing the obvious proposition that murder is a crime.

225. PIFSS' case, and Dr Abbas' evidence, also derives support from Court of Cassation Appeal No. 2207 of JY 2018. The terrible facts of the case were that, in a police chase, a police officer fired shots at a car and killed the victim, who was the Respondent's daughter. The officer was acquitted in criminal proceedings because of uncertainty as to the evidence, but the criminal court referred the civil claim to the civil courts. The trial judge held that the officer (the Appellant) was liable in tort. As the Court of Cassation report says: "The tortious liability of the Appellant and the Second Appellee in the first challenge was established from the papers of that misdemeanour, for firing their weapons toward the car in which the victim was riding". The basis of the tortious liability, as held by the trial judge, was therefore the commission of a criminal offence (a misdemeanour), notwithstanding acquittal.

226. The officer challenged the decision on various grounds, including reliance on his acquittal. The court rejected that argument, saying:

> "A criminal ruling issued to acquit does not possess *res judicata* effect regarding the negation that the accused committed the crime if the basis of the acquittal is merely the court's uncertainty regarding the evidence because it is not satisfied with it. This does not definitively mean that the crime was not committed, as an acquittal does not possess *res judicata* effect in this respect."

227. In reasoning that the acquittal did not mean that a crime had not been committed, the court was clearly indicating that it was permissible for the trial judge in that case to determine that a crime had indeed been committed in the context of establishing tortious liability. The court went on to uphold the trial judge's decision based on the evidence, saying that the merits court had full authority to understand the facts of the case and to assess the evidence and documents. There was therefore no criticism of the judge's conclusion that the misdemeanour had, for civil purposes, been committed by the Appellant.

228. I also consider that PIFSS' case derives further support from the existence of Article 22 of the KPPL, which is discussed in section B11 below. In short, Article 22 is concerned with civil remedies concerning repayment and unjust enrichment. It enables a criminal judge to award these civil remedies in circumstances where criminal proceedings have been commenced under the KPPL against an alleged wrongdoer, but where no conviction had resulted. This might happen, for example, if the wrongdoer had died. Article 22 indicates that there is no difficulty in principle in a court awarding a civil remedy arising from the contravention of a statute (here the KPPL), but where there is no criminal conviction.

229. Turning now to the Egyptian cases, there are in my view 3 authorities which are very clearly contrary to the case advanced by Man and Dr Youssef's evidence. In Egyptian Court of Cassation Appeal No. 12246 of JY 81 (Labor Chamber), an appeal was brought by an employer who had unsuccessfully defended a claim by a dismissed employee.

The employee had claimed certain sums consequential upon his dismissal, and the employer had sought to argue that the dismissal was justified because of his financial misconduct. A counterclaim was also advanced on that basis. The lower court had declined to entertain the employer's defence and counterclaim because the Public Prosecutor had closed a criminal case against the employee for lack of evidence. The employer argued that this did not preclude the court from "examining the elements of civil liability".

230. The employer's appeal was successful. The court distinguished between "criminal judgment, which could potentially bind the civil court, and other orders or decisions issued by investigative authorities which did not adjudicate on matters of guilt or innocence but only determine whether the conditions exist to refer the case to the competent court." Therefore the Public Prosecutor's decision to close the file did not affect the ability of the employer to prove her case. The court said:

> "Accordingly, such decisions acquire no binding effect before the civil court, which may establish the occurrence of the crime or its attribution to the accused, contrary to the investigative decision. Accordingly, the Public Prosecution's decision to close the file regarding the allegation that the respondent embezzled funds under his custody does not prevent the civil court from examining the appellant's contention that the respondent's dismissal was justified due to the embezzlement, his admission of the misconduct during the investigation and his liability to return the funds."

231. The Egyptian Court of Cassation was therefore clearly recognising that it was permissible for the employer to seek to prove, in the civil court, the occurrence of the crime of embezzlement. In cross-examination, Dr Youssef recognised that the case was inconsistent with his views, but he refused to change his view. In some relatively lengthy answers, he sought to explain the case away. His main point appeared to be that there had been no decision by the Court of Cassation that there had been a crime, but that the court was explaining the mandate of the lower court in relation to its consideration of the case. I did not think this affects or undermines the principle that is clear from the decision: i.e. that the employer was entitled to demonstrate in civil proceedings that the crime of embezzlement had been committed.

232. Egyptian Court of Cassation Appeal No. 3055 of JY 73 (a 2013 decision) concerned a railway accident resulting in the claimant falling under the wheels of a train and having his legs amputated. The case succeeded at first instance against one of three defendants. An appeal court then reversed the decision on the basis that the claim was barred by a 3-year limitation period, and the claimant appealed to the Egyptian Court of Cassation. The Court of Cassation held that the appeal court had erred in relation to the limitation point. This was because of the principle (which I discuss in detail in Section R below) that the limitation period is extended when a civil claim is based on a crime.

233. The Court of Cassation referred specifically to various specific regulations imposing duties on the railway authority. It said that "this incident – if established as described by the appellant – constituted the misdemeanour of unintentional injury by the subordinates of the first respondent under Article 244/1 of the Penal Code". That Article provided punishment for anyone who caused injury by failing to observe the relevant

regulations. Since there was, on the appellant's case, a criminal misdemeanour, the limitation period for a civil claim was extended. It will be noted that the court was referring to a specific provision (i.e. "text") of the Penal Code, as well as the underlying regulations.

234. The Court then addressed how the appeal court should have approached the issue in the context of deciding whether the 3-year period was applicable. The context was that this was a civil claim where there had been no criminal conviction. The court said:

> "Accordingly, the Court of Appeal – when the respondent Authority raised before it the plea of the three-year limitation – was required to determine the legal import of the appellants' submissions regarding the manner in which the accident occurred, and to examine whether such conduct amounted to a criminally punishable fault, as this affects the determination of the date from which the limitation period begins to run and the acceptance or rejection of the plea. The Public Prosecution's decision to archive the incident report administratively does not alter this …"

235. The Court is therefore clearly saying that the civil court had a duty to consider and decide whether there was a criminally punishable fault. This obviously means that it was necessary for the civil court to decide whether a crime had been committed, despite the absence of any criminal proceedings or conviction. Dr Youssef's evidence, that it is not permissible for a civil court to do this, cannot be reconciled with that approach.

236. It is also instructive to see how the Court of Cassation then dealt with the merits of the case. It looked at various statements made in the context of the investigation into the accident, was satisfied as to the evidence as to how the accident occurred, and concluded that there was "the misdemeanour of unintentional injury by the subordinates of the appellant authority as previously described". This meant that the claim was within time, since it was started within 3 years of the time of the prescription of the applicable criminal limitation period. Accordingly, the Court of Cassation was itself making a decision, as a civil court, that the relevant crime had been committed. It also went on to uphold the trial court's decision as to the quantum of the claim. I do not accept Dr Youssef's evidence, in relation to this case, that the court was only making a decision in relation to limitation.

237. A similar more recent case is Egyptian Court of Cassation Appeal No. 11586 of JY 85 (16 December 2021), involving the death of the victim of a railway accident, and a limitation point being taken. Again, as the court's judgment records, there had been no criminal prosecution. The Court of Cassation applied the same approach as in the 2013 case. The court held that the lower court had failed to consider when the criminal limitation period expired, as being the relevant start date for the 3-year civil limitation period. Addressing the merits of the time-bar issue, the court said:

> "The merits are fit for a ruling, and as discussed above, this Court shares the opinion [of] the court of first instance in its finding that the death of the Appellants' legator was the result of him falling from a train while it was moving … This incident

> constitutes misdemeanour manslaughter by the agents of the Appellant Agency as discussed previously."

238. Accordingly, the lower court had determined, in the absence of a criminal conviction, that there had been criminal manslaughter. The Court of Cassation endorsed that view. The case is therefore again inconsistent with Dr Youssef's evidence that a civil court cannot determine that a crime has been committed in the absence of a criminal conviction.

239. In my view, these authorities provide a substantial body of persuasive authority which supports the evidence of Dr Abbas. I do not accept Dr Youssef's evidence that there are no cases that support Dr Abbas's view. Nor do I accept that it is in any way surprising, or even relevant, that there are not more cases along the same lines. As some of the textbook writers indicate, a civil claimant will very often seek to advance a civil claim as an adhesive claim in criminal proceedings, rather than as a separate civil claim. In such cases, the present issue is most unlikely to arise. Similarly, if there is no adhesive claim, but there is a criminal conviction, it is reasonable to think that any separate civil claim would be settled in fairly short order. It is only in a case where there has been no criminal case brought to fruition – for example where criminal proceedings are not brought at all, or where they come to an end because the alleged offender has died or for some other reason – that the issue that I am here addressing could arise. Even in that type of case, the point would only arise if it were actually taken, in one form or another, by the defendant whose contravention of a criminal statute is alleged to have been the relevant fault for the purposes of Article 227. Since Dr Youssef's point is not sound, it is unsurprising that one does not see it advanced more frequently.

240. By contrast with the case-law which is positively inconsistent with Dr Youssef's evidence, I did not consider that there were any cases which provided support, let alone clear support, for his views. None of the cases to which Dr Youssef referred, either individually or collectively, addressed the present issue in any relevant way. Nor did they outweigh the weight of evidence, supporting Dr Abbas, to which I have referred.

241. As far as concerns the 5 cases referred to in paragraph 34 of Dr Youssef's report:

i) Kuwaiti Court of Cassation Appeal No. 1021 of JY 2015 is a case concerned with when civil proceedings should be suspended, pending the decision reached in criminal proceedings.

ii) Kuwaiti Court of Cassation Appeal No. 248 of JY 2019 is a criminal appeal concerning criminal proceedings where there was an adhesive civil claim. The defendant was acquitted of forgery in the criminal proceedings, and it followed that the civil claim based on the same facts also failed.

iii) Kuwaiti Court of Cassation Appeal No. 210 of JY 2013 was also a criminal appeal in a case where the defendant was acquitted of a criminal defamation charge in relation to certain published statements. It followed that the adhesive civil claim could not succeed.

iv) Kuwaiti Court of Cassation Appeal No. 588 of JY 2008 was similarly a criminal appeal in a case where the defendant was exonerated in criminal proceedings, and therefore the adhesive civil claim could not succeed.

v) Kuwaiti Court of Cassation Appeal No. 97 of JY 2012 is addressed below.

242. As far as concerns Kuwaiti Court of Cassation Appeal No. 97 of JY 2012 (Third Labour Circuit) referred to by Dr Youssef in paragraph 34 (footnotes 21 and 22): I do not consider that this supports the wide proposition for which it was being cited, namely that a criminal conviction is required for a tortious claim based on a crime. The facts of that case were somewhat similar to the Egyptian embezzlement case discussed above – a case which I consider squarely addresses the present issue. In the Kuwaiti case, an employee was similarly alleged to have embezzled funds, and this was being relied upon by the employer as a defence to an employee's claim in the labour court. In the Kuwaiti case (in contrast to the Egyptian case), there were existing criminal proceedings concerning an alleged misdemeanour committed by the employee who was the claimant in the Labour court. The issue before the court was whether the Labour court proceedings should be stayed (applying Article 90 of the Procedure Law) pending the outcome of the criminal proceedings. The Court of Cassation decided that the trial court had been correct to impose a stay, because "the conviction of the Respondent [i.e. claimant] in such misdemeanour should prevent him from receiving some of his labour entitlements claimed by him, including his end-of-service remuneration". The court therefore held that "settling the misdemeanour with a conclusive judgment is necessary for settling the present lawsuit". This appears to be the essential basis of the decision. The court did also refer to the breach of trust attributable to the Respondent beyond the "functional jurisdiction of the Labour Court", but it may be that this was a point specifically related to the jurisdiction of that court. It cannot in my view be read as support for the wide proposition that civil courts reviewing tort claims can never determine whether a crime has been committed.

Conclusion

243. Ultimately, Dr Youssef's evidence was not based on any specific text or case which specifically set out the rule on which he was relying, but upon an assertion that the "entire legal system" supported his argument. I do not accept that it does, and reject the case advanced by the Defendants on this issue.

244. Rather, I accept PIFSS' submission, based on Dr Abbas's evidence, that there is no rule or principle which requires a criminal conviction as a condition of establishing civil liability by reference to criminal fault. A civil judge can determine if there has been a violation of a criminal provision in order to find fault for the purposes of a civil claim under Article 227 KCC. Thus, Kuwaiti civil courts can decide on civil claims based on a crime without the need for a conviction, and in doing so would not issue a judgment finding the defendant guilty or acquitting it of the crime. Rather the civil court would rule on whether there has been a civil fault based on the facts of the case. This is based on the premise that a civil fault exists where a crime is committed, because all criminal acts necessarily violate a legal provision which obliges a person not to commit a certain act.

B6: Accessory Civil Liability under Articles 228 and 229 KCC

245. Articles 227 – 229 deal with the civil liability of perpetrators and accessories. The overall effect of Articles 227 – 229 was accurately summarised by Dr Abbas in his first report as follows. Article 227 of the KCC provides for the general principle that any

person who commits a fault that caused harm to others shall be liable for compensation. This fault is the violation of specific legal obligations, including criminal provisions, and also the violation of the general obligation to exercise care according to the reasonable person standard. Article 228 provides that all those persons who commit faults that cause a certain harm shall be jointly liable for compensation to the victim. Article 229 of the KCC provides that everyone who incites or assists a person to commit a fault shall be held liable for that fault as well. Thus, those persons will also be jointly liable under Article 228.

246. Although a number of expert issues were debated in the context of these Articles, there was ultimately no substantial issue between the experts which was likely to be relevant to application of these Articles to the facts in issue in these proceedings.

247. Thus, Man submitted in its written closing that the small number of disputes between the experts in relation to these articles were not going to make a difference to the Court's analysis of the claims brought by PIFSS against Man, since PIFSS accepted that it had to prove that one or more of Messrs Massad, Merville and Moeller knew of and intended the payment of bribes. Similarly, Aerium in its written closing agreed with a submission made by Mr Ritchie in opening: that in view of the route to civil liability on the part of assisters resulting from Articles 47 and 48 of the KPC, it was unlikely that Article 229 of the KCC would be of any great significance.

248. Nevertheless, since PIFSS' claim does involve an analysis based on Article 229 KCC (as well as Articles 47 and 48 KPC), and since the question of "assistance" in Mr Al Rajaan's corruption is an allegation made in one way or another against all of the other Defendants, I will set out the relevant principles here, identifying such disputes as existed between the experts.

249. The experts were agreed that Article 228 concerned liability arising from multiple faults that caused a single injury. In those circumstances, Article 228 provides that all of those persons who committed faults that caused a specific harm are jointly liable to the victim. The only dispute between the experts was whether a civil court could apply Article 228 to allegations of criminal conduct, particularly in the absence of a conviction. I have addressed that issue, essentially by reference to Article 227, in Section B5 above, and have rejected the case of Dr Youssef (concurred in by Professor Mallat) in that regard. The same conclusion applies to accessory liability under Article 228.

250. Article 229 identifies those people who will come within Article 228: the perpetrator, and those who have assisted or incited him. The Explanatory Memorandum of the KCC states the following:

> "Article 229 portrays one of the instances where harm is inflicted as a result of faults committed by several individuals. This … is where the harm is caused by a specific individual, and its fault is associated with vital faults occurring from others, as a result of incitement or assistance. It provides for the liability of all these persons, in the manner prescribed under Article 228, since harm would be caused due to the faults of all of them. Civil liability, just like criminal liability, is not solely based on the main perpetrator, but rather, it extends to accomplices."

251. The experts were agreed that: Article 229 concerns cases where harm is inflicted by one person as a result of incitement or assistance of another person or persons; that a person who incites or assists another to commit a fault that causes harm, in the meaning of Article 229 of the KCC, is liable for that fault; and that the determination of the accomplice by assistance or incitement is made pursuant to Article 229 of the KCC. Thus liability under Article 229 is a joint and several liability. Dr Youssef accepted that once accessory liability was established under Article 229, the consequences for the compensation claims are governed by Article 228.

252. Dr Abbas illustrated these principles, in his report, by the example of concealing the proceeds of crime. He said (and I accept) that the act of concealing the proceeds of crime is considered to cause the same harm as the crime itself, if those proceeds (by which I understand him to mean the obtaining or loss of those proceeds) are considered as harm to the victim, since the act of concealment precludes the victim from recovering them. He referred in that context to a decision of the Egyptian Court of Cassation in Challenge No 1006 JY 43, where the court held – in the context of a thief and a handler of stolen property – that:

> "Joint liability for compensation does not require a single act of negligence by all responsible parties. It is sufficient for each party to commit an act of negligence, even if different from their colleagues', as long as their combined faults caused a single harm to the victim, even if the faults were different or did not occur simultaneously. Consequently, as the robber's negligence in committing the robbery coincides in its consequences with the concealer's negligence in concealing the stolen property, both contributing to the victim's deprivation of its property, the judgement holding the petitioner, as the concealer of a portion of the stolen money, jointly liable with the robber for paying one piastre as provisional compensation is correct and valid. Based on the foregoing, the entire cassation petition is unfounded."

253. Dr Abbas concluded (again correctly in my view) that there will in such circumstances be joint and several liability, even if there was no agreement or relationship between the tortfeasors. Furthermore, there is no need for these faults to constitute a single act or a single crime, as made clear in the Egyptian case.

254. Dr Abbas also said that even if one of the acts is a crime, and the other is a mere civil fault, liability would also be joint and several. Dr Youssef accepted that this was possible in the case of civil liability under Article 228/229 for assistance. Thus, whereas knowledge and intent are required elements in the case of criminal liability, in a pure civil setting of assistance, liability could arise if there was deviation from the reasonable person standard and there was a causal link to the principal act. The position was, according to Dr Youssef, different in the context of incitement, where he said that knowledge and intent were required.

255. Dr Abbas also said (and again I accept) that if the tortious fault is a crime, the perpetrator or any other assister or accomplice will be jointly and severally liable for the following reasons: (i) the main perpetrator, the assister and the accomplices have committed a criminal fault; (ii) the existence of a criminal fault entails necessarily the existence of tortious fault (as indeed I have concluded in Section B5 above); (iii) Article

228 imposes joint liability for the harm inflicted, and where the harm is the same, they will be tortiously liable for the same inflicted harm; (iv) the joint and several liability of perpetrator, assister and accomplices for the whole compensation is established, irrespective of the division of responsibilities between them.

256. It appeared, at one stage, that there might be a dispute as to the nature of the causative impact that an assister's act was required to have. It was common ground that there needed to be a causal link between the third party who assisted or instigated, and the act of the perpetrator. Dr Abbas in his first report said that each fault did not need to be a sufficient cause of the harm, but that it needed to be an effective cause. He said in re-examination that it was sufficient for the actions of those involved to participate in causing the harm. Dr Youssef in cross-examination agreed that the question was whether the fault contributed to harm that was suffered. As he said, there are "scenarios where convergent effects occur". Ultimately, therefore, there was no material dispute between the experts on this issue: in short, the fault must contribute to the harm, but it is not necessary that it was the sole cause of the harm, nor that it would have been the sole cause of the harm if it had been the only act that caused harm.

257. Another matter on which there was ultimately no material dispute was the potential liability of a legal person (i.e. a corporate entity) in the context of criminal conduct. The general rule in Kuwaiti law is that legal entities cannot commit crimes, albeit that there is an exception to this principle in the context of money laundering.

258. A legal person can incur vicarious liability for the torts of individuals, and this can include liability where the individual has committed a crime and incurs tortious liability based on that fault.

259. As Dr Abbas explained in his first report and Appendix to that report, a legal person can also incur direct (rather than simply vicarious) civil liability in tort for assisting the perpetrator of a crime. Direct liability under Article 229 can result, because assistance in the commission of a crime would be considered as a civil fault, on the basis that it would be considered an act which contravened the obligation to act carefully according to the reasonable person standard. If that civil fault were committed by someone who was regarded as the "representative" of the legal person (a concept discussed below), then the representative's acts and knowledge would be attributed to the legal person, and would accordingly be considered a civil fault by the legal person. Joint and several liability of the legal person would then arise under Article 228, because Article 228 does not require the tortious faults to be of the same kind: one may be criminal and the other civil.

260. This section B6 has considered the civil liability of assisters and inciters arising from Articles 227 – 229. Another route to civil liability arises because of the application of Articles 47 and 48 of the KPC, and this is discussed separately below. In summary, if there is accessory criminal liability of an individual person under those articles, then that will itself constitute "fault", and thus give rise to a claim under Article 227 irrespective of the scope of Article 229. This means, as PIFSS acknowledged in opening, that in practical terms Article 229 has a limited role to play on the facts of the present case, where PIFSS' case against all Defendants is that they committed (as perpetrator or accessory) criminal acts, and they are therefore at fault for the purposes of tort liability.

B7: Civil Service Law No 15 of 1979

261. PIFSS relied upon breaches of the duties in the Civil Service Law No 15 of 1979 (the "CSL") in relation to the Kuwaiti law claim against Mr Al Rajaan. Breach of these duties also has potential relevance to the Swiss law claim based on Article 158 of the Swiss Penal Code. The duties owed are civil law duties, and PIFSS contended that breach could found a tortious claim against Mr Al Rajaan.

262. The issue of the CSL was addressed in some detail in Dr Abbas's reports, and there was no cross-examination in relation to what he had said. I therefore see no reason not to accept his evidence. Furthermore, none of the Defendants made any substantial reference to the CSL in their written or oral closing submissions, save for a brief reference in the submissions of D1/D2. This denied any breach, and asserted (contrary to the evidence of Dr Abbas, unchallenged in cross-examination) that the CSL deals only with the administrative liability of public employees and did not give rise to civil or criminal liability.

263. Against this background, I accept PIFSS' submissions, based on the evidence of Dr Abbas, as summarised below.

264. The rights and duties of public employees are regulated under Kuwaiti law by the CSL. This establishes a framework of duties to which public employees are subject while in office. The CSL is of general application, and "public employee" is defined broadly and would cover Mr Al Rajaan.

265. The relevant articles, which are set out in Section B4 above, can be summarised as follows. Article 24 requires a public employee to adhere to various statutory obligations, including to perform his job honestly and to abide by applicable laws and regulations, and fulfil his obligations of honesty and integrity when spending the State's funds. Article 25 prohibits employees from having an interest in business or contracts related to the works of any governmental entity, and from exploiting their public employment for any purpose whatsoever. Article 27 provides for liability for violation of these actions: the employee shall be disciplinarily sanctioned, without prejudice to criminal liability or civil liability where appropriate.

266. In his first report, Dr Abbas explained the nature of these three liabilities. One administrative sanction is suspension, but Article 30 limits the period of suspension to 6 months: a provision which explains why Mr Al Rajaan's suspension in 2012 only lasted that length of time.

267. As far as concerns criminal liability: this will arise if the violation of the CSL constitutes a crime as well. Civil liability (i.e. tortious liability) will arise because violation of the duties and prohibitions in the CSL is tortious fault, since it is a violation of legal obligations. Violation of legal obligations will therefore entail tortious liability if it causes harm, giving rise to a right on the part of the employer to make a tortious claim against the employee.

268. I see no reason to doubt Dr Abbas's view that breach of the CSL is civilly actionable. A point raised by Dr Youssef is that there is a distinction between "personal" and "administrative" fault, such that employees are individually liable only when their faults are categorised as "personal". There is some support in Kuwaiti law for this

distinction, but it is not relevant in the circumstances of the present case. Case-law cited by Dr Abbas supports the view that if the public employee's conduct constitutes a crime, it is regarded as personal fault.

269. Dr Abbas also said that the assessment of whether there is personal fault depends on several factors, including the nature, severity and circumstances of the fault. Where there is an intentional crime, and one involving grave faults or conduct aimed at achieving personal gain, this would be personal fault. I consider that this is very obvious, and see no reason to doubt Dr Abbas's evidence on this point.

B8: Criminal wrongs and mens rea

270. In relation to criminal intent, there was again ultimately very little between the experts or the parties. Article 41 KPC addresses the *mens rea* (sometimes called in Kuwaiti law the "moral element") of crimes in general. I look separately at the position of perpetrators and accessories.

271. *Perpetrators*: As explained by Dr Abbas in the context of the knowledge of a perpetrator: the moral element refers to the intent of the perpetrator, from a factual perspective, to commit the material acts that constitute the crime, while knowing the elements required by law for the existence of the crime from a factual perspective. Criminal intent requires both elements of knowledge and intent.

272. As far as concerns knowledge: the perpetrator must be factually aware of the nature of (i) the material element of the crime; (ii) the "presumed condition(s)" – a concept explained below; and (iii) the aggravating circumstances relating to the crime which are capable of changing the classification of the crime.

273. Knowledge of the material element of the crime involves the perpetrator being aware of the nature of the conduct it undertakes, and that this act would potentially infringe the right that the law protects. The perpetrator must only be aware that its act would infringe the right, but does not need to know that this infringement is considered by the law a crime. Furthermore the perpetrator must be aware of the end-result of its acts, which is the effect that its act will have, again from a factual perspective. In that context, anticipation of the occurrence of the end-result suffices.

274. If the crime has a "presumed condition", such as crimes requiring the capacity of a public servant, the perpetrator must be aware of their capacity as a public servant.

275. Knowledge of the sanction is not required for the establishment of the moral element, as it is not considered to be an element of the crime.

276. Finally, the perpetrator must be aware of any aggravating circumstances, which are capable of changing the classification of the crime. If the aggravating circumstances do not change the classification of the crime, knowledge of these circumstances is not required. Again, what matters is the perpetrator's awareness of the existence of that factor from a factual perspective. He does not have to know that this factor is considered by the law as an aggravating factor.

277. There was no material dispute on the expert evidence as to these requirements, as far as knowledge is concerned. It was ultimately common ground that what was required was

actual knowledge, and that I should not be importing into consideration of that question the English notion of "blind eye" knowledge. It was also common ground that constructive knowledge was not sufficient for knowledge in the criminal context.

278. As far as concerns intent, this needed to be directed towards the commission of the acts in question and the occurrence of the end-result. Dr Abbas's evidence was that the intent could either be direct or probable. Direct intent refers to situations where the perpetrator's intent was directed towards achieving a certain criminal end-result. Probable intent, or indirect intent, refers to situations where the perpetrator has attempted to achieve a certain purpose, anticipated the occurrence of an illegitimate end-result as a consequence of his acts, and yet accepted the occurrence of such conduct by proceeding with the act and not trying to avoid this illegitimate result. The difference was that for direct intent, the perpetrator intended to commit the acts and intended to achieve the end-result that the law criminalised. In probable intent, the perpetrator's intent was directed at the commission of the conduct, and he merely accepted the possible occurrence of the end-result in consequence of the conduct, without intending it *per se*.

279. There was a disagreement between the parties, and the experts, as to whether "probable intent" was sufficient in the context of the offence of bribery under the KPC. Dr Youssef accepted that Article 41 was a generally applicable standard for criminal intent. However, he advanced an argument, in relation to "probable intent" based upon bribery not being an "outcome-based crime". This was because the bribery offence could be committed by requesting/offering or accepting an undue advantage. It was not necessary for the advantage actually to be conferred. Dr Youssef did not cite any authority in support of his argument that probable intent was insufficient, and this argument was not advanced in relation to the KPPL or the money-laundering laws.

280. Ultimately, both PIFSS and Man were agreed that, in the context of bribery, an argument based on probable intent would not really assist PIFSS in terms of what it needed to prove. Mr Collins in his oral closing drew attention to the common ground that actual knowledge must be shown. He also referred to the agreed position, in the joint expert memorandum, as to bribery:

> "The material act and the corresponding criminal intent of the briber must be directed to the public official to solicit his conduct, which is the performance or abstention from an act of the job or an act that the public official wrongly believes or falsely alleges is part of his job.
>
> …
>
> The briber (and intermediary) must be: (i) aware that he is presenting a gift or a promise to the public official; and (ii) aware that the consideration of the bribe is to induce the public official to perform or refrain from performing an act that is within the competence of the public official, or that the public official falsely believes or alleges is within his competence."

Mr Collins submitted that, given the agreement as to what needed to be shown, including actual knowledge, the debate about probable intent was irrelevant, and that nothing would turn on it.

281. In his closing reply submissions, consistent with PIFSS' written closing, Mr Ritchie essentially agreed with Mr Collins, drawing attention to Man's acceptance in their written closing that if any of Messrs Massad, Merville or Moeller had the necessary knowledge of the payment of bribes, it would follow that they had the necessary intention. If, therefore, the relevant knowledge was shown, the necessary intention would follow. He submitted that "probable intent" was doctrinally correct, but it had no real space to operate in the context of bribery. In the context of the KPPL, there was no dispute that it did operate, but the extent to which it would make any practical difference was "pretty attenuated".

282. I accept Dr Abbas's evidence (which was not in dispute) that "probable intent" is applicable generally to crimes, and I also agree there is no exclusion for bribery. In practical terms, however, the debate does not matter. I consider that if any individual knew that bribes were being paid, it would be in practical terms impossible for him seriously to contend that he did not have the necessary direct intention for the purposes of bribery, or indeed for the purposes of the KPPL. Knowledge that bribes were being paid would be consistent only with intending to achieve the necessary criminal end-result.

283. *Accessories*: The position as far as concerns accessories was essentially the same as for perpetrators, and again there was no substantial dispute – apart from the issue of probable intent which I have already addressed. As far as concerns the knowledge and intention of an accessory, the agreed position as set out in the joint memorandum was that the required intent mirrored the intent required to be a perpetrator. Thus, the accessory must intend to assist or incite the perpetrator and know the material element of the crime and its criminal result, as per Articles 47 and 48 discussed below.

284. These points were fleshed out in greater detail in the report of Dr Abbas, whose evidence I again accept.

285. As far as concerns knowledge, he said that the accessory must be aware of the nature of the conduct it undertakes. For example, if the act is concealing it must be aware that it is concealing. Whoever provides assistance in the commission of the crime must be aware of the means through which it has assisted. The accessory must also know the end result of its participation, being the occurrence of the material acts of the crime committed by the main perpetrator.

286. In relation to intent, the accessory's intent must be directed towards the material conduct upon which the accessory participation takes place. The accessory's intent must thus be directed towards both (i) the activity that is regarded as being one of the participation means and (ii) its end-result. The end-result here is the commission of the acts constituting the main crime. Thus the accessory must have intended by his acts to participate in the commission of the material acts of the crime.

287. Intent could in this context include probable intent. Therefore, as Dr Abbas explained, if the accomplice (i) knew that the acts of the main crime would be committed as a result of his participation; and (ii) went on with his acts of participation, while being

indifferent whether the acts of the main crime would be committed, this would amount to probable intent to participate in the commission of the acts of the main crime.

B9: Accessory criminal liability: Articles 47 and 48 KPC

288. Having addressed (Section B8) above the issue of the *mens rea* required for both perpetrators and those who assist, I now address the questions related to (i) who are regarded as criminally liable for assistance, and (ii) related issues of causation. As indicated above (Section B6), there is a route to civil liability, on the part of those who assist tortfeasors whose tort is based on committing a crime, which does not involve the assistants themselves committing a crime. However, the more likely and obvious route for tortious liability on the part of accessories will be because the accessories will themselves have committed crimes, thereby acting at fault and rendering themselves tortiously liable. This was the principal way in which PIFSS advanced its case.

289. The relevant Articles of the KPC in this regard are Articles 47 and 48 (set out in Section B4 above). Subject to Dr Youssef's overarching point as to the need for a criminal conviction, he agreed with Dr Abbas's summary of the position which was as follows. Article 47 addresses, so far as relevant here, the perpetrator of the crime (i.e. the person who commits the material act), the person that assists in the commission of the crime during its commission and the person who assists through being in the place of the crime. Article 48 addresses persons that agreed with the perpetrator on the commission of the crime, or who instigated him to commit it, or who assisted him before the commission of the crime.

290. For simplicity, the parties agreed (in the context of Articles 47 and 48) to refer to Mr Al Rajaan as the "perpetrator", Article 47 accessories as "doers", and Article 48 accessories as "accomplices". I shall do the same in this section B9.

291. It was also agreed that knowledge and intent must be established for the application of Articles 47 and 48, and that there needed to be a causal link between an accessory's conduct and the commission of the crime. There was ultimately also no dispute that persons who are not "public employees" can be held liable for a crime under Articles 47 and 48 if they act as accessories to crimes committed by public employee perpetrators. Thus, the perpetrator of crimes sanctioned by Articles 11 and 12 KPPL, and the bribery offences under Articles 35 – 39 KPC, must be a public official. But those who are accessories to that perpetrator's crime, whether under Article 47 (as a "doer") or Article 48 (as an "accomplice") need not be.

292. The concept of assistance under Articles 47 and 48 was explained by Dr Abbas in his report as follows.

293. Assistance in the commission of a crime is the provision of support by any means to the perpetrator, resulting in the perpetrator's commission of a crime. Assistance could take two forms, namely: (i) providing the facilities and capabilities to the perpetrator that will assist in the commission of the crime, or (ii) removing the obstacles that would prevent the perpetrator from committing the crime.

294. Assistance could occur either prior to the commission of the crime, or during its commission. If provided before commission, it would be one of the preparatory works for the crime, and would come under Article 48. If it took place during the commission

of the crime, it would be either to facilitate its commission or complete its commission. This form of conduct falls under Article 47. For this assistance to be criminalised, the person does not need to be present at the place of the crime, if he commits acts that assist during that commission. Dr Abbas quoted from Sorour (page 795), who explains that what matters is the timing of the material effect of the acts of assistance, and not the time when the assister provides the means of assistance to the perpetrator:

> "Here, it's worth noting that assistance is divided into two stages in relation to the effect of the means of assistance, not the moment it is provided. One who gives his car to thieves for use in transporting stolen items before the theft is completed is considered an accomplice in the completing acts, even if the car was given prior to the crime.
>
> The difference between facilitating acts and completing acts relates to the effect these acts have on the execution of the crime. If this effect occurs early, it's considered a facilitating act, such as opening the house door before entering with intent to kill. If its effect occurs after the start of execution, it's considered a completing act, such as using a car to transport stolen items.
>
> Needless to say, the person committing facilitating or completing assistance becomes a co-perpetrator if he committed it at the crime scene during its execution, according to established Court of Cassation jurisprudence."

295. Since what matters is the time at which the assistance has effect, Dr Abbas said that there would be liability under Articles 47 or 48 if the effect took place before or during the crime commission. The question is therefore whether the act of assistance had its effect before or after the full commission of the crime. The "full commission" of the crime refers to the occurrence and fulfilment of the material elements of the crime. This issue is potentially relevant to arguments raised by Pensée and Aerium, in particular because there are issues as to the elements of the crimes in Articles 11 and 12 KPPL, and specifically whether an element of these crimes can be the gain made by the public official.

296. Dr Abbas accepted that if the assistance only takes place after the commission of the crime, the person is not liable for assistance. Nevertheless, if the assistance takes place, even where it is after the commission of the crime, based on an agreement made before the commission of the crime, then the assisting party will be liable for participation in the crime by way of agreement under Article 48 (2) of the KPC. He said in his report that if the parties agreed before the crime that one of them would carry out its acts and the other would assist in concealing the proceeds, this would be considered as an agreement on the commission of the crime. He referred in that connection to commentary that:

> "the individual can be considered as an accomplice even if his criminal activity took place after the conclusion of the crime if there was a prior agreement on the initiation of this activity. In this case, the individual will be considered as accomplice by agreement, and not assistance […]"

297. He also referred to another commentator who said that an example of subsequent assistance being criminalised is "when a person prepares the means of escape for the perpetrators or conceals the evidence of the crime after its commission based on a prior agreement on its commission".

298. PIFSS contend that this form of accessory liability is potentially relevant in the present case. This is because PIFSS alleges that, irrespective of whether a defendant's role was to procure payments to be made to Mr Al Rajaan, or acting as an intermediary, or facilitating the receipt or concealment or laundering, those roles were performed pursuant to a prior agreement with Mr Al Rajaan that this should be the case.

299. Dr Abbas said that agreement, in the context of Article 48 (2) required only the unity of the parties' wills to commit the agreed upon action. Thus, the Kuwaiti Court of Cassation had defined agreement (in Appeal No. 688 of JY 2001) as: "the unity of the parties' intents towards the commission of the agreed upon acts. This intent is an internal matter. It does not have an external appearance, and cannot be empirically ascertained. Thus, a judge can conclude its existence through implication and from evidence that is available". Accordingly, a formal agreement is not required.

300. Furthermore, if the parties agreed before the crime that one of them would carry out its acts, and the other would assist in concealing the proceeds, that would be considered as an agreement on the commission of a crime. Dr Abbas cited a number of texts in support of that latter proposition.

301. Specifically in relation to bribery under Article 35 KPC, Dr Youssef agreed that where a bribe is paid through an intermediary, both the bribe-payer and the intermediary would be considered accessories to the principal offence committed by the public official, provided the other elements of the criminal offence were satisfied.

302. As far as concerns causation: the causal link is established if it is proven that, if it were not for the conduct of the accessory, the crime would not have been committed in the same manner that it was committed. Furthermore, if it were proven that without the existence of the activity of the accessory, the crime would have been committed, but in a different form, causation would nevertheless be established. This is because the accessory in this respect had a role in framing the crime into a specific form.

303. PIFSS' case, based on Dr Abbas's evidence, as to the effect of Articles 47 and 48 as a matter of Kuwaiti law, was not the subject of detailed contrary submissions in the Defendants' closing. Man submitted that the only disagreement was the overarching issue, as to whether a civil court could apply those provisions to determine that crimes had been committed.

304. Aerium submitted that the act of assistance under Articles 47 and 48 must take place before or during the commission of the crime, and that any act after the commission of the crime could not give rise to liability. As discussed above, and indeed as Aerium accepted later in their submissions, this is only partially correct, because it ignores the impact of later acts of assistance based on prior agreement.

305. Thus, there are at least two important questions that arise in circumstances where a party (such as Aerium in the present case) alleges that acts of assistance occurred after the commission of the crime. The first question is whether there was a prior agreement.

The second is as to when the crime was completed. The latter question is the context for issues raised in particular by Aerium, as to whether the actus reus of offences under the KPPL, and Articles 35 – 39 KPC, extends to the time when bribes are paid or benefits received. I shall return to that issue below, when considering the KPPL and Articles 35 – 39.

B10: The KPPL – liability issues

306. A range of issues was addressed in the context of the KPPL. Section B11 below deals with important issues concerning harm and remedies. This section deals with other issues, essentially liability issues relating to the scope and application of the KPPL. The two provisions which were central to the parties' arguments are Article 11 and Article 12. In PIFSS' translation (which I use for reasons set out below), these articles provide as follows:

> "Article 11
>
> Any public official, employee or worker assigned to preserve the interest of one of the entities referenced in Article 2 in a transaction, operation, or a case, or assigned to negotiate, connect, agree or contract with any entity in the state or outside of it, concerning one of the matters of these entities, where it could lead to financial rights or obligations to the state or other referenced entity, and who deliberately conducts it in a manner that would harm the interest of these entities to obtain profits or benefits for himself or others, shall be punished by life imprisonment or imprisonment for a period not less than seven years. If the offender achieved his purpose, if his crime would have led to damage to the financial, commercial or economic status of the state, or if he committed the crime at a time of war, he shall be punished by life imprisonment.
>
> Article 12
>
> Any public official, employee or worker who has a connection with the management of works, supplies or affairs related to one of the entities provided in Article 2, or who has a role in overseeing them, and who obtains or tries to obtain a profit or benefit for himself, directly or through an intermediary, or for others, through unlawful ways, from any of the mentioned works, shall be punished by life imprisonment or imprisonment for a period no less than seven years."

Introduction to the KPPL and Articles 11 and 12

307. The protection of public property and public funds was, prior to the KPPL, the subject of Kuwaiti Law No 31 of 1970. That protection was enhanced in the KPPL. The overall context and rationale of the KPPL is explained in the Explanatory Memorandum to the KPPL as follows:

> "Recently, various forms of tampering with public funds have come to light. Particularly in relation to the investment of these funds abroad or domestically, it has become apparent that in numerous instances, those who misappropriate public funds, exploiting their influence and official authority, either resort to smuggling these funds abroad, where they enjoy the protection of secrecy that shields them from disclosure.
>
> To safeguard public funds and penalise any official who misappropriates them, this draft legislation has been prepared, founded on the desire to achieve the following objectives:… First: To afford maximum protection to public funds… Second: To adopt a preventative approach, rather than a remedial one… Third: To extend protective measures to investments made abroad… Fourth: To impose more severe penalties for the misuse of public funds… Fifth: To track misappropriated funds, domestically or internationally, in whatever form they may exist, and to seize them as security… to enable aggrieved parties to secure their rights and to prevent perpetrators or their accomplices from smuggling funds under any guise… Sixth: To grant the adjudicated funds, which are to be recovered from the assets of those convicted of crimes against public funds, priority over other privileged rights…"

308. Other provisions of the KPPL, and references to the Explanatory Memorandum are set out in Section B 11 (KPPL – remedies), and Section L (Pensée). For present purposes, it is sufficient to say (as PIFSS submitted) that the KPPL codified a series of amended and enhanced duties owed by public officials in connection with public property, breach of which amounts to criminal offences. Articles 9 and 10 deal with embezzlement, and Articles 11 and 12 concern profiteering: the attempt to obtain, or the successful obtaining, for the public official, or a third party, of personal benefits. Article 12 is similar in wording to the core CSL duty, proscribing profit from a public role (see B7 above).

Article 11

309. There was substantial common ground as to the requirements for a breach of Article 11 KPPL, and no dispute as to its translation. The experts were agreed that to establish a breach of Article 11 KPPL, the following must be demonstrated: (i) the individual must be a public official, employee, or worker; (ii) who is entrusted or assigned to perform a specific mission in relation to a public entity's affairs; (iii) who has committed, or attempted to commit, an act that is deemed a crime against public funds; (iv) the act or attempted act was carried out with the criminal intent to cause harm in order to receive a profit or benefit for himself or others; and (v) the funds implicated in the offence are public funds, as defined by Article 2 KPPL.

310. They were also agreed that the actual acquisition of the profit or benefit the public employee intended to make is not a necessary condition for the crime to occur – although there is a dispute as to whether the aggravated form of the offence has an *actus reus* which does require the acquisition of a profit. The experts were also agreed that the crime required a general *mens rea* and a separate special *mens rea*. The general

mens rea required knowledge and intent: the perpetrator must be aware of his status as a public official and he must know and intend that his actions constitutive of the material element of the crime will harm public funds, and must intend to commit these actions nevertheless. The special *mens rea* requires the criminal intent to receive a profit or benefit for himself or others.

311. Aerium submitted in closing that, applying the principles concerning the criminal liability of accessories under Articles 47 and 48 (see Section B 9 above), the intent required of an accessory mirrored that required of the perpetrator. Accordingly, it would be necessary to prove that an accessory (such as Mr Ruimy was alleged to be) knew and intended that Mr Al Rajaan's acts would harm public funds and intended that those acts be carried out nevertheless.

312. In her oral closing for Aerium, Ms McKechnie emphasised the importance, in the context of Article 11, of PIFSS being able to prove this point: i.e. that an accessory to an Article 11 offence (as Mr Ely Michel Ruimy was alleged to be) should intend to cause harm to the entity. There was no dispute as to this requirement. Dr Abbas' written evidence was that "an accomplice must be aware of the content of its act, know that its act would assist the perpetrator in concluding the abovementioned acts in a manner that would cause the abovementioned harm. It must intend this result or accept its occurrence as explained with respect to probable intent".

313. In explaining the concept of "harm" in this context, Dr Abbas said that the KPPL does not require a specific threshold of harm that the perpetrator's actions would cause for the crime to materialise. Accordingly, the intended harm can be severe or negligible provided that the criminal act was done with the intent of harming public funds. This approach to harm was not challenged, and was supported in *Al-Madkhal in the Explanation of the Anti-Corruption Law in Kuwaiti Penal Legislations* (page 120):

> "the legislator does not specify any particular consequence; it is a matter of indifference if the result of this activity is a loss of funds, a particular gain, or a deprivation from gain. The scale of the damage is also of no importance, as long as those activities were carried out with the purpose of harming public funds. Likewise, this crime does not require the profit or benefit to actually be obtained; the mere attempt to obtain a profit or benefit is enough, whether material or moral, and whether for the self or another."

314. Aerium also submitted that, applying Articles 47 and 48, knowledge and intention acquired after the material elements of the crime had been committed would not give rise to criminal liability. Again, there was no dispute as to this principle.

315. The only substantive legal issue concerning Article 11 related to the aggravating circumstances identified in the last sentence of Article 11. Those circumstances include where the offender achieves his purpose: i.e. actually obtaining the benefit. The issue was whether the fulfilment of those circumstances would form part of the actus reus of an offence under Article 11, or whether they are aggravated circumstances limited to sentence. As previously indicated, this issue is potentially important in the context of arguments as to when the offence under Article 11 is committed, and hence whether

any assistance (if not pre-agreed) or the acquisition of relevant knowledge (and therefore criminal intent) occurred after completion of the offence.

316. PIFSS submits that the aggravating circumstances, including actually obtaining the benefit, constitute elements of the actus reus of the aggravated Article 11 offences. If so, then the aggravated offence is not committed until the benefit is received. The focus of the argument of the Defendants interested in this issue (principally Aerium and Pensée) was upon the first point: do the aggravating circumstances constitute *actus reus* elements of the aggravated offence. It was not disputed that if the aggravated circumstances were elements of an offence, that offence would not be committed until the benefits were received.

317. In his evidence, Dr Abbas drew a distinction between (i) conduct and circumstances which are external, which affect the *actus reus* in aggravated forms of the offence; and (ii) internal or personal characteristics of the offender themselves, which are relevant to sanction. The first category would include committing a crime during a time of war (as provided for in the last sentence of Article 11), and the second category would include recidivism. Drawing on this distinction, Dr Abbas said that the actual obtaining of a benefit was an external circumstance which would form part of the *actus reus* of the aggravated offence.

318. I agree with PIFSS that Dr Abbas's approach is supported by Dr Fawzya Sattar *Commentary on the Penal Code: General Section*, paragraphs [437] and [440 (c)]. The author states:

> "[437] The facts which the criminal must know are those by which the crime is established. These are determined by the legal form of the crime. They include criminal activity, the consequence and a causal relationship which joins them. They also include the presumed condition and the subject of the right against which the transgression takes place, together with the features required by the law in the perpetrator or the victim. They also extend to the enhanced circumstances which alter the description of the crime.
>
> …
>
> [440 (c)] The aggravated circumstances which alter the description of the crime are deemed one of the components of the legal form of the crime. It is like the foundations and is taken into account. Therefore, the criminal's knowledge must extend to them. So if this knowledge is lacking, criminal intent is lacking. An example of this is the circumstance of force in the crime of theft, which changes its description from a misdemeanour to a felony. So if the criminal's knowledge is lacking that his act constitutes violence, as if he had collided casually during the search for the stolen articles with the victim, such that he fell on something hard and was injured, he did not have the intention of theft by force. Rather he is accountable for a minor theft and for unintentional injury. However, the effect of the circumstances which do not alter the description of the crime,

> are restricted to the penalty, and the law does not require knowledge of them. This is because it is not deemed to be one of the foundations of the crime."

319. Thus, it is clear from Sattar (consistent with Dr Abbas's evidence) that aggravating circumstances can alter the description of the crime. Applying Sattar's approach, PIFSS contend that the actual obtaining of the benefit alters the description of the crime, and these aggravating circumstances are one of the components of the legal form of the crime.

320. I consider that Dr Abbas's view, that this is the effect of the aggravating circumstances referred to in the final sentence of Article 11, is more persuasive than the contrary view expressed by Professor Mallat – somewhat belatedly, since his argument in this respect only clearly emerged in his reply report. Furthermore, although Professor Mallat in cross-examination adhered to his view that these matters only went to sentence, he also agreed that the distinction drawn by Dr Abbas – between external and personal circumstances – was a fair one. He also agreed that the three circumstances referred to in Article 11 were "objective" circumstances, and at one stage agreed that they were objective elements that went to the *actus reus*.

321. Pensée's written closing submissions addressed this particular issue in the greatest detail, and reference was made to a number of Kuwaiti law texts. I did not consider that these assisted or were powerful authority against Dr Abbas's view. They were not specifically addressing the issue which I am here considering, namely how to determine whether or not aggravating circumstances are a component of the actus reus of a crime. In so far as they address Article 11, they are essentially confirming, as was common ground between the experts, that an Article 11 offence does not require the successful receipt of a benefit. That does not assist on the question of whether, when that aggravating circumstance does exist, it concerns merely the punishment for the offence or the actus reus of an aggravated offence.

Article 12

322. This article requires that the profit or benefit concerned must be obtained, or sought to be obtained, through unlawful means (i.e. unlawful ways). PIFSS submitted in its written closing that the unlawful means would be constituted in a conflict between interest and duty and that this suffices, relying on the publication by the Kuwaiti Ministry of Justice: *Public Property Crimes in Law No 1 of 1993*. None of the Defendants submitted that this was insufficient to amount to unlawful means, and Ms McKechnie on behalf of the Aerium Defendants withdrew a written submission that PIFSS had not sufficiently pleaded its case in that regard.

323. The principal liability issue concerned the scope of Article 12, and whether it had no application to Mr Al Rajaan, because he was not involved in the management of construction projects, supplies or public works. Here, there was a dispute as to how the relevant part of Article 12 was to be translated. Dr Abbas's translation was:

> "Any public official, employee or worker who has a connection with the management of works, supplies or affairs related to one of the entities provided in Article 2 …"

By contrast, Dr Youssef's translation was:

> "Any public official, employee or worker who is involved in the management of construction projects, supplies or public works related to one of the entities provided in Article 2 …"

I have underlined, in the latter translation, the significant words that were in dispute.

324. In cross-examination and in their closing submissions, PIFSS and Man (who led the Defendants' argument on this point) made various points as to how the relevant Arabic words (which were transliterated) were to be translated. Perhaps the most contentious term was the Arabic "*ashgh'al*" which was translated by Dr Abbas as "affairs", and by Dr Youssef as "public works". It seemed to me that PIFSS had a powerful point that Article 12 does not use the Arabic "*ashgh'al amma*", which – as Dr Youssef said in cross-examination – is a term of art meaning public works. That term is not used either in Article 12 KPPL, or its predecessor Article 48 of the 1970 law. Nor is it used in the original Egyptian provision which is the equivalent of Article 12, namely Article 116 of the Egyptian Penal Code. However, *ashgh'al amma* is used in a different provision of the Egyptian Penal Code, originally enacted in 1962 as Article 116 *bis*. Article 116 *bis* is not the equivalent of Article 12 KPPL, and deals with intentional breaches of certain contracts. It is not limited to public officials. There was force in PIFSS' criticism of Dr Youssef's written evidence for failing properly to identify or explain the difference between the original Article 116 and Article 116 *bis* introduced later.

325. However, I do not consider it appropriate or necessary to discuss in any detail the views of the experts as to how particular Arabic words should be translated. I consider that a court that is dealing with a language with which it is entirely unfamiliar (as I am here), should generally be wary of basing a decision on a resolution of competing views as to the translation of words into English, and then using that resolution to determine what a particular statutory provision means in the context of the English meaning of the translated words. There is an obvious danger of divorcing the words from their overall context, and the sense in which they would be understood by Arabic speakers but more importantly by the courts applying the relevant statutory provisions.

326. Fortunately, in this case, I have the benefit of a body of authority, in the Kuwaiti Court of Cassation, which to my mind clearly shows that the scope of Article 12 is not limited in the manner proposed by Dr Youssef.

327. Kuwaiti Court of Cassation Appeal No. 47 of JY 2007 is the "Dubai Wire" case which I address in some detail in the following section (B11) in the context of remedies. It was a case where Article 12 breaches were alleged against a number of individuals involved in a Kuwaiti investment company. They had exploited their personal positions in order to make investments in the Dubai Wire company in Dubai. They were convicted under Article 12, and some of them were required to make repayment. The Kuwaiti company was an investment company, and there is nothing which suggests that it was involved in construction projects or public works.

328. Dr Youssef suggested in evidence that it is possible that the Dubai Wire company was itself involved in such projects or works. But there is nothing in the report which suggests that it may have been engaged in these activities, or that this forms any part of the court's reasoning. Indeed, as PIFSS submitted, the business of the Dubai Wire

company would be irrelevant to the question of whether or not the KPPL was applicable. What mattered was the nature of the investment company and the role of the defendants in it: three of the defendants had roles. This is clear from the court's rejection of an argument, advanced by the defendants, that Dubai Wire's funds were not public funds. The court said the following:

> "Regarding the accused's defence that the funds of Dubai Wire Company, headed by the fourth accused, do not qualify as public funds, this argument is rejected. In this specific crime, regardless of the extent of public funds in Dubai Wire Company's capital and contrary to the appealed judgment's findings, the nature of the company's funds is irrelevant. The first three accused are public officials employed by the International Investor Company, whose funds are public. These accused had supervisory authority over the investments and funds of their employer company in Dubai Wire Company. Therefore, the nature of Dubai Wire Company's funds is immaterial."

329. Kuwaiti Court of Cassation Appeal No. 229 of JY 1997 involved criminal allegations of embezzlement and profiteering against the CEO of a real estate company. The profiteering offence was contrary to Article 48 of the 1970 law: i.e. the predecessor law to Article 12 KPPL, but not materially different. The facts were that the defendant/appellant had procured the sale by the real estate company of property to a company in which he was interested. The sale was at an undervalue. There was an argument that he was not a public official to whom the relevant law (which was the 1970 predecessor law to the KPPL) applied. That argument was rejected by the Kuwaiti Court of Cassation. The appellant's conviction for profiteering was upheld, and this also meant that he was obliged "to return the value of the benefits obtained" (a point addressed in section B 11 below). Again, the appellant here worked for an investment company, and there is nothing which suggests that its business was construction projects or public works. The case cannot be distinguished on the basis suggested by Dr Youssef in his written report, namely that it was concerned with the definition of public official in Article 43 of the 1970 Law. Article 3 of the KPPL expressly provides that the term public official shall be construed as any of the persons stipulated in Article 43.

330. Kuwaiti Court of Cassation Appeal No. 336 of JY 2012 concerned a number of public officials involved in running the Kuwait Oil Tanker Company. This was a follow-on to the English case where the trial judge was Moore-Bick J. The defendants were convicted in connection with profiting from contracts of sale of ships and renting of oil tankers. Again, they were not involved in construction contracts or public works, but with an oil tanker business.

331. In the light of these cases, I consider that Dr Abbas's translation is more accurate than that of Dr Youssef, and that Article 12 is applicable to a person in Mr Al Rajaan's position.

332. The second liability issue concerning Article 12 was an *actus reus* issue similar to that which arose in the context of Article 11. Article 12 refers to a public official "who obtains or tries to obtain a profit or benefit for himself … or for others". PIFSS, relying on Dr Abbas, contends that the obtaining of a profit or benefit is criminalised, as well

as the attempt to obtain a profit or benefit. Thus, as Dr Abbas put it, "the crime of Article 12 … in one of its forms, occurs by taking or receiving a benefit. Thus, the crime is not considered as being fully committed until the full taking or receiving of the benefit." Professor Mallat's view is that there is only one *actus reus* under Article 12 "which is when a public officer unlawfully receives or attempts to receive a benefit. The offence is fully committed before receipt of the benefit".

333. Again, I prefer the evidence of Dr Abbas and the case of PIFSS on this issue. Article 12, on its language, clearly criminalises the actual obtaining of a profit or benefit. Professor Mallat's interpretation seeks to exclude the effect of the relevant words in the KPPL. As PIFSS submitted, as a matter of statutory interpretation under Kuwaiti law, where the words are clear and definitive, it is not open to the court to adopt a contrary, restrictive or expansive interpretation.

334. It would be surprising, particularly given the wording of the KPPL, if the actual receipt of profits was not criminalised. Taken to its logical conclusion, it would mean that the only criminal activity is the attempt to obtain a profit or benefit, and that therefore the actual obtaining of a profit or benefit is somehow lawful. However, as confirmed by the Explanatory Memorandum, the obvious legislative purpose is the avoidance of profiteering. In that context, it is understandable that the legislature would seek to criminalise attempts. But that does not mean that the successful obtaining of profits or benefits is not criminalised as well. Indeed, the existence of a remedy in respect of the amount of the benefit (see Section B 11 below) is consistent with, and sensibly explained by, the criminalisation of the actual obtaining of benefits.

335. Professor Mallat's argument also sits uncomfortably with Article 11, which (in my view) similarly creates an offence when a public official succeeds in achieving his purpose. But even on Professor Mallat's view of Article 11 (i.e. that there is no separate actus reus arising from the aggravated offence), there would be an oddity. Article 11 on any view provides for a more serious punishment when an offender achieves his purpose, thereby treating the obtaining of a benefit more seriously. It would be strange if Article 12 did not take the same approach, rather than treating as equal (as Professor Mallat's view posits) attempts and the successful obtaining of profits or benefits.

336. Furthermore, at the end of his cross-examination, Professor Mallat drew a distinction between Article 11 and Article 12, saying in respect of the latter that obtaining was part of the actus reus. I did not consider that his answer in that respect was successfully salvaged and reversed by his answers in re-examination. He agreed (and Dr Abbas accepts) that a form of the offence is an attempt, and that the *actus reus* of that offence is complete when there is an attempt. He was then asked a rolled-up question as to whether it made "a difference to the completion of that offence or any other offence if they later receive the money". That was not a very clear question, and his answer "No, absolutely not" may well have been an answer to the first part of the question. At all events, I consider that Dr Abbas's view on this issue is to be preferred.

B11: The KPPL – harm and remedy issues

The issues

337. A range of issues were debated in the context of "harm" and the remedy available under Article 246 for a tort whose underlying unlawfulness was profiteering contrary to the KPPL Articles 11 and 12. The broad shape of the arguments was as follows.

338. In summary, PIFSS was concerned to establish that, as a matter of Kuwaiti law, PIFSS would be entitled to a compensatory remedy in the amount of the benefits procured in breach of Articles 11 and 12: here, the amount of the benefits received by Mr Al Rajaan and those with whom he was working in concert. PIFSS relied in that regard on Articles 16 and 22 KPPL in the manner described below. PIFSS contends that a breach of Articles 11 and 12 KPPL, where benefits are received by a public official or procured for others, gives rise to a civil claim for repayment, reflecting harm suffered in the value of the sums repaid, being an example of specific performance/ performance in kind under Article 246 KCC.

339. The Defendants contended, however, that this was not a permissible approach under Kuwaiti law. Their case in this regard was led by Mr Collins KC and Ms Sagan for Man, and those arguments were generally adopted or (in substance) repeated by the other Defendants. (For simplicity, I will simply refer to the arguments of Man or Mr Collins/Ms Sagan).

340. Man argued that a successful claim for compensation under Articles 246 and 247 KCC required PIFSS to demonstrate that it had suffered harm and therefore loss. Where bribes had been paid and received, PIFSS could not simply and automatically claim the amount of the benefits or bribes. A successful claim for compensatory loss, in the amount of the benefits or bribes, would depend upon PIFSS being able to show that, as a matter of fact, they would have received the financial equivalent of the amount of the benefits or bribes; for example by successfully negotiating discounts or rebates on the amounts which it was paying to investment managers in order to invest in their funds. On this basis, a detailed 'counterfactual' analysis was required. This would necessitate PIFSS showing that in a counterfactual world, where Mr Al Rajaan was honest, PIFSS would actually have sought to obtain discounts or rebates, and that the fund managers would have granted them. Mr Collins submitted that, certainly in relation to Man, that counterfactual analysis would not be favourable to PIFSS, and would lead only to a small recovery at best.

341. This dispute as to how to approach the compensatory remedy in turn led to arguments as to the effect of Articles 16 and 22 KPPL. PIFSS' primary case was that it was not basing its case directly on the "repayment" remedy referred to in those Articles. However, PIFSS contended that a consideration of those provisions was instructive, and indeed determinative, as to how Kuwaiti law would approach the question of a compensatory remedy in the present case, and hence how Article 246 would be applied. PIFSS contended that it was clear, from those Articles, and the approach taken by Kuwaiti courts to those Articles (and by Egyptian courts in relation to equivalent provisions), that those remedies were, or reflected, ordinary civil remedies. The compensatory remedy available under Article 246 required consideration of the nature of the unlawful conduct relied upon to give rise to the tortious remedy: here breaches of the KPPL. It also required consideration of the rights of PIFSS which were thereby infringed. Bearing in mind all of those factors, it was clear that, as a matter of Kuwaiti law, the fruits of successful but unlawful profiteering – in other words the benefits obtained – are available to PIFSS in a case such as the present, (involving tortious

conduct whose unlawful element was breaches of Articles 11 and 12 KPPL) as an ordinary civil remedy that can be awarded by a civil judge.

342. It is important to note that PIFSS' argument in that regard was based upon tortious conduct which was unlawful because it was contrary to the KPPL. Mr Ritchie accepted, in his oral closing, that the same analysis would not be available in the event that PIFSS's case was based only on the bribery provisions of the KPC, or other ways in which the case was put. He accepted that if the court did not accept his argument that infringement of the rights provided under the KPPL gave rise to a repayment remedy, then PIFSS would have to prove what he described as "transactional damage": in other words, damage to the victim's business by reference to the disadvantageous nature or terms of the transaction for which the public official was responsible.

343. Man, relying on the evidence of Dr Youssef, contended that Articles 16 and 22 did not assist PIFSS for a variety of reasons. There were procedural/jurisdictional as well as substantive aspects of this argument.

344. An overarching point was Dr Youssef's evidence that it was not permissible to rely on breaches of the KPPL, to establish the requisite element of unlawfulness, in the absence of a criminal conviction. I have already discussed and dismissed that argument, but it is also clear that Man's argument, and Dr Youssef's evidence, did not depend upon it. As discussed below, I consider it likely that Dr Youssef's approach in this area has indeed been infected by his erroneous overarching point. However, I will consider the points raised on the basis that they were independent of that line of argument.

345. Man argued that Articles 16 and 22 were of no assistance at all in determining the approach to compensation under Article 246 KCC. That article of the KCC, and related articles including Articles 230 and 247, provided a self-contained code governing compensation for tortious liability. An important reason why Articles 16 and 22 were of no assistance was that they could not be applied by a civil judge dealing with a civil claim by PIFSS. They would only be relevant to, and could only be applied by, a criminal judge in cases where a criminal conviction had been obtained, when the Article 16 remedy would be potentially available; or in a case, addressed in Article 22, where existing criminal proceedings had been started but had come to an end, for example because the alleged offender had died. In the latter case, the criminal judge could, exceptionally, continue with a case for the purposes of deciding whether the remedies identified in Article 22 should be applied. However, these remedies could never be ordered by a civil judge dealing with a civil claim.

346. In addition to these jurisdictional-type arguments, the Defendants contended that Articles 16 and 22 did not in any event advance PIFSS' case as to the nature of the remedy available under Article 246 KCC. Those articles threw no light on how Kuwaiti law would approach the question of whether PIFSS had suffered 'harm' for the purposes of a claim in tort, and did not establish that harm would be assessed in the amount of the benefits which had been wrongfully obtained. It would therefore be necessary for PIFSS to establish its transactional loss: i.e. that it was worse off by reason of bribes having been paid, and this would require the counterfactual analysis described above.

347. I start by identifying the principal articles of the KCC and the KPPL which featured in the parties' arguments, and the extent to which there was some common ground about them.

The KCC

348. Articles 230, 246 and 247 of the KCC provide (in the Man translation) as follows:

> "Article 230
>
> The harm that the wrongdoer is obligated to compensate shall be determined based on the loss incurred and profits foregone as long as it is the natural consequence of the tort.
>
> The loss or opportunity foregone shall be deemed the natural consequence if it could not have been avoided with reasonable effort by a normal person in the same circumstances.
>
> Article 246
>
> 1- The Judge shall assess compensation in monetary form.
>
> 2- Upon request of the aggrieved party, the Judge may, in accordance with the circumstances, order restoration of the aggrieved party to his/her original status, or any other remedy as a form of compensation.
>
> Article 247
>
> 1- The judge shall determine the compensation in the amount he deems sufficient to repair the harm in accordance with Articles 230 and 231, taking into account the personal circumstances of the injured party.
>
> 2- If it is not possible for the judge, at the time of judgment, to determine the amount of compensation definitively, he may reserve the right for the injured party to request a reassessment of the estimation within a period to be specified."

349. It was agreed between the experts in the Joint Expert Memorandum as follows. Article 246 regulated the available remedies for injured parties in the context of tortious liability. Article 247 addressed how compensation should be assessed or quantified. Compensation must fully remedy the harm caused by the tortious breach. According to the first paragraph of Article 246, compensation for tort liability is monetary. However, according to the second paragraph, the court may, upon the request of the aggrieved party, order the restoration of the aggrieved party to his/her original status or any other remedy as a form of compensation. An order for restoration was to the position prior to the unlawful act.

350. Dr Abbas explained in his first report that compensation under Article 246 in its broad meaning encompassed the remedies of (i) restoration of the status quo, (ii) monetary compensation, and (iii) non-monetary compensation.

351. The first remedy, restoration of the status quo, was sometimes called in-kind compensation, and was commonly referred to as specific performance. This meant that the violation of the legal obligation should be reversed by restoring the status quo if this was possible. For example, the violation might take the form of an act that could be reversed in a manner that would wipe out its consequences. The second remedy, monetary compensation, was the remedy that was awarded in most cases of tortious liability. Thus, in all cases where specific performance through restoration was impossible or inadequate, and no non-monetary compensation was available, monetary compensation would be available. (It is not necessary to discuss non-monetary compensation, such as ordering the publisher of a defamatory article to publish a retraction).

352. Dr Youssef did not substantially dispute Dr Abbas's evidence in that regard, and in any event I accept it. The essential issue is not as to the general approach under Article 246, but how the remedies operate in circumstances where the tortious conduct is unlawful because of breaches of the non-profiteering Articles of the KPPL.

The KPPL

353. A number of provisions of the KPPL were referred to in the context of the parties' arguments, and each side produced its own translations of the KPPL and its Explanatory Memorandum. There was disagreement as to the translation of Article 12, but this disagreement did not materially affect the parties' arguments on the issue which I am here considering. Otherwise, the parties' arguments on the present issue did not focus on any differences in translation. I shall use the translation provided by PIFSS because, for reasons considered in Section B 10 above, this reflects the case-law on Article 12 and this in turn leads to my acceptance of Dr Abbas's evidence on the translation issue.

354. In the context of the present argument, the most important provisions are as follows:

> "Article 1
>
> Public property is inviolable, and its protection, support, and defence are the duty of every citizen.
>
> Article 2
>
> For the purpose of the application of the provisions of this Law, the term public property shall be construed as whatever is owned or statutorily under the administration of any of the following entities irrespective of where such funds are situated either within the country or abroad:
>
> (a) the State,
>
> (b) public entities and institutions,
>
> (c) companies and institutions in which the any of the preceding entities [under items (a) and (b)] are shareholders therein with a minimum shareholding of 25% of the share capital thereof, and such shareholding may be direct or indirect through companies

or institutions the state or public authorities or other public juristic persons own shares thereof. In determining the aforementioned share capital, the sum of the shares owned by the State and all other entities possessing a public legal personality, or the companies referred to [above]…

Article 5

…The Public Prosecutor's Office shall have exclusive authority to investigate, act on, and charge the felonies and misdemeanours stipulated herein as well as related crimes. Article 104 of the Code of Criminal Procedure shall not be applied in any case involving the crimes stipulated herein…[2]

Article 9

Any public official, employee, or worker who misappropriates money, documents, benefits, or other items entrusted to them by virtue of their position shall be punished by life imprisonment or temporary imprisonment of not less than five years. The punishment shall be life imprisonment or temporary imprisonment of not less than seven years if the crime is inseparably connected to another felony…

Article 11

Any public official, employee or worker assigned to preserve the interest of one of the entities referenced in Article 2 in a transaction, operation, or a case, or assigned to negotiate, connect, agree or contract with any entity in the state or outside of it, concerning one of the matters of these entities, where it could lead to financial rights or obligations to the state or other referenced entity, and who deliberately conducts it in a manner that would harm the interest of these entities to obtain profits or benefits for himself or others, shall be punished by life imprisonment or imprisonment for a period not less than seven years. If the offender achieved his purpose, if his crime would have led to damage to the financial, commercial or economic status of the state, or if he committed the crime at a time of war, he shall be punished by life imprisonment.

Article 12

Any public official, employee or worker who has a connection with the management of works, supplies or affairs related to one of the entities provided in Article 2, or who has a role in overseeing them, and who obtains or tries to obtain a profit or benefit for himself, directly or through an intermediary, or for others, through unlawful ways, from any of the mentioned

[2] This text was supplemented as from July 2003, but the supplement is not material to the present issues.

> works, shall be punished by life imprisonment or imprisonment for a period no less than seven years…
>
> Article 16
>
> Without prejudice to the sanctions for the crimes mentioned in Articles 9, 10, 11 and 12, the perpetrator shall be penalized with dismissal from the job, repayment, and a fine that is double the value of the money, benefits or profits that he has embezzled, misappropriated or facilitated to others…
>
> Article 21 bis
>
> Criminal actions for the crimes stipulated in this Law shall not be prescribed by the passage of time and shall not be subject to the limitation periods related to criminal actions or those related to the application of the sanctions stipulated in articles 4 and 6 of the Penal Code.
>
> Article 22
>
> The termination of a criminal lawsuit, for any reason, does not preclude the right of the injured entity to request repayment of the funds subject of the crimes stipulated under Articles 9, 10, 11 and 12 of this Law, and to request compensation if it has grounds to do so. The Court must order repayment and compensation vis-à-vis heirs and legatees and everyone who obtained a significant benefit from the crime, with the judgement of repayment and compensation applicable to all of their funds to the extent of their benefit.[3]"

355. In addition, there were a number of Articles of the KPPL (in particular Articles 23 and 28) which were the subject of particular focus in the context of the Pensée scheme. The text of those articles is set out in the Pensée section (Section L below), together with relevant extracts from the KPPL Explanatory Memorandum, as well as evidence from the experts as to the purpose and effect of the KPPL. In my analysis and conclusions below, I draw to some extent on those materials and evidence, but it is not necessary to repeat all the detail here.

The evidence

356. The written and oral expert evidence directed towards these issues was extensive, and what follows is a summary of what seemed to me to be the key points.

357. Dr Abbas described Articles 9 and 10 of the KPPL as dealing with embezzlement of state property, and Articles 11 and 12 as dealing with profiteering. The KPPL contained a regime specifying both punishment and civil remedies. The key civil remedies were contained in Articles 16 and 22, and were common to all of the offences in Articles 9 –

[3] This text was supplemented as from July 2003 but the supplement is not material to the present issues.

12. The remedies in those articles were civil remedies for the injured party of the crime for the harm these parties suffered as a result of the crime.

358. These civil remedies were compensation according to Article 246 of the KCC. They were an in kind compensation to the state entity in question, by returning its money that was embezzled (in the case of Article 9 or 10 crimes), or a form of monetary compensation by requiring the official to repay the price or value of the asset of the state entity that the official has received by means of profiteering from his job (in the case of Article 11 and 12 crimes), where the law provides that the job should be exercised only for the interest of the state entity and where it prohibits receipt of personal payments. This form of specific performance is ordered to make sure that the obligation to refrain from the prohibited acts is complied with. In the case of a breach of these articles, the unlawful act in question can be reversed. The remedy of repayment in Articles 16 and 22 was a tortious claim for compensation based on the tortious fault of committing the crime.

359. The repayment is ordered in favour of the victim entity and not to the maker of the payment, because the obligations not to receive the payments are owed to the victim entity. This is how the law enforces a return to the status quo, by ensuring that the official does not retain the prohibited payment. The notion of repayment is a form of compensation in the sense of the restoration of the status quo prior to the crime, and to compensate the victim for the money it was deprived of. The fact that the law allows criminal courts to award this remedy does not prejudice the original jurisdiction of civil courts to decide on claims for repayment. That was because awarding civil remedies (e.g. repayment) by a criminal court is an exception to the default rule: i.e. that civil courts have exclusive jurisdiction to hear civil claims.

360. Accordingly, drawing upon the repayment remedy in Articles 16 and 22, Dr Abbas addressed the question of recovery of profits or benefits from the relevant employee. He said that these articles provide for a civil compensatory remedy to the state entity as a result of committing the crime, which is a tortious fault. The repayment is the compensation claimed based on the harm that was suffered by the state-owned entity as a result of the profit obtained, which the law provides would exist as a result of the profit or benefit taken. This followed from the following matters: (i) the law called the claimant entity "the injured entity" (see Article 22), and made this remedy a mandatory remedy, including in cases where the crime exists by profiteering; (ii) the remedy of repayment, which is mandatory, is a compensatory remedy; and (iii) compensatory remedies, according to Kuwaiti law, aim at compensating an existing harm. The claim for compensation could also be advanced against those who have either jointly perpetrated or assisted in the employee's breach.

361. Dr Youssef's evidence was, in summary, that the KPPL could only be relied upon before the criminal courts of Kuwait, and that it did not include and could not be relied upon to establish civil liability under the KCC. The KPPL enforced public rights, while the KCC enforces private rights. Article 16 did not provide a civil remedy for the commission of crimes under Articles 9 – 12 KPPL.

362. Indeed, in his first report Dr Youssef went as far as saying that the repayment remedies in Article 16 could only be awarded when the victim had intervened as a civil claimant in criminal proceedings. This assertion was clearly wrong, and was deleted by Dr Youssef shortly before he gave evidence. He then accepted that restitution under Article

16 could be awarded without the need for the victim to join the criminal proceedings. He also accepted that restitution "shares certain features with civil remedies, most notably its compensatory and restorative effect in returning misappropriated funds to the victim entity". He said, however, that Article 16 was "fundamentally a penalty imposed by the criminal court as a consequence of a criminal conviction". In cross-examination, he said that the remedy had a "compensatory effect", but that did not mean that a civil judge would look at Article 246 and would consider it to be a pure civil remedy. The Article 16 and 22 remedies were only "tantamount" to civil remedies, and were best regarded as "sui generis".

363. He said that the KPPL was inherently penal, and drew attention to Article 5 which provided that the Public Prosecutor's Office had exclusive authority to investigate, act on, and charge the felonies and misdemeanours stipulated in the KPPL. The court referred to in Article 22 KPPL, and generally in that law, was the criminal court. Articles 16 and 22 were only available where criminal proceedings had been initiated. He emphasised that no authority had been produced in which a civil court had applied the provisions of Articles 16 or 22 of the KPPL.

364. Accordingly, when a party brought a suit seeking remedies under Articles 227 or 229 KCC for a breach of the KPPL, the only available remedies are those provided for in the KCC, primarily those under Articles 230 – 246.

365. A separate issue raised by Dr Youssef concerned the circumstances in which benefits deriving from a KPPL breach would be deemed public property under Article 2 of the KPPL. The focus of his evidence was upon Article 22 KPPL, and its effect, which, if correct, would place a significant limitation on the benefits that could be recovered under that article. Dr Youssef's point starts with the terms of Article 2, which refers to "whatever is owned or under the administration of" any of the entities referred to therein. He said that the benefits that could be recovered must "originate from an entity delineated within Article 2". The definition of public funds could not be extended to include benefits derived from a generalised breach of the KPPL. It was necessary to focus on the source of the property which was sought to be recovered, and determine whether it originated from the entities within Article 2 KPPL. If the benefits did not stem, either directly or indirectly from the entities specified in Article 2, they would not be public property, and this was so even if such benefits resulted from a breach of the KPPL. By way of illustration, if a public official received a personal gift or favour from a third party as a quid pro quo for an abuse of their official position, such a gift or favour would not be classified as public property. That is because its provenance is not traceable to any of the Article 2 entities. Accordingly, any right to restitution under the KPPL is confined to recovering the property actually misappropriated from the relevant public body and received by the relevant defendant.

366. Dr Abbas's response to this last point is summarised in detail when I deal with that particular issue below.

Discussion

367. For the reasons that follow, I consider that the evidence of Dr Abbas on these issues accurately reflects Kuwaiti law, and I prefer it to the contrary evidence of Dr Youssef. This is not simply because I consider that Dr Abbas was a far more impressive witness than Dr Youssef. It is also, and indeed primarily, because I consider that his analysis is

sound as a matter of Kuwaiti law, and that the Kuwaiti Court of Cassation would resolve the present issue in favour of PIFSS and Dr Abbas's arguments.

368. The central question with which I am concerned is how a Kuwaiti civil court would approach the issue of compensation under Article 246 in the context of a civil claim for a tortious wrong – where the underlying unlawful conduct is a breach of Articles 11 and 12 of the KPPL. This is not an issue which has directly arisen for decision in the context of purely civil proceedings in Kuwait.

369. Although Man placed great emphasis on the fact that there was no purely civil case where a court had applied the KPPL (including the repayment remedy in Article 16), I do not think that this is a significant point. The obvious reason for the dearth of purely civil cases in the present context is because Kuwaiti law enables a victim of crimes contrary to Articles 11 and 12 to file an adhesive claim in criminal proceedings, and indeed to benefit from Articles 16 and 22 even in the absence of an adhesive claim. A particular feature of those Articles, as determined in a number of cases, is that the criminal court is required to make orders for repayment even if a claimant has not filed an adhesive claim. This feature is illustrated in one aspect of the history of the present proceedings, which is potentially relevant in the context of separate arguments about recoveries: i.e. whether PIFSS should give credit for such recoveries as have been made by the Kuwaiti state in relation to criminal proceedings brought against Mr Al Rajaan (when he was alive) and his wife. He and Ms Al Wazzan were convicted of wrongdoing (including under Article 11 KPPL) in relation to the Mirabaud scheme. PIFSS was not an adhesive claimant, but nevertheless an order for repayment was made against both of these defendants pursuant to Article 16 KPPL. Against this background, a purely civil claim would be likely to be a rarity.

370. There are other notable features of those remedies, also serving to explain why the case-law in this area has concerned criminal rather than purely civil proceedings. In particular, an unusual feature of Article 22 is that once the criminal court is seised of the criminal proceedings, it will go on to determine the availability of the repayment remedy even if the criminal proceedings come to an end: for example, if the wrongdoer dies. As explained in the Explanatory Memorandum:

> "Article 22 is another expression of the firm desire to recover funds involved in crimes. A criminal complaint may end with the death of the perpetrator, for example, but nevertheless it is possible to pursue the property in possession of the individual's heirs and legatees as well as anyone who obtained a substantial benefit from the crime, as they are liable for those funds to the extent of the benefit they received from the crime."

371. Accordingly, if a civil claimant has not already filed an adhesive claim in a criminal case, in a case where the wrongdoer has died, it is not necessary to do so in order to ensure that a court makes a repayment order or to establish the claim against the wrongdoer's heirs and legatees or others who have substantially benefited.

372. At the heart of PIFSS' submission is the proposition that a Kuwaiti civil court would be guided, in the context of an Article 246 KCC compensation claim, by the approach taken to the repayment remedies in Articles 16 and 22 KPPL. Or to put the same essential point in a different way: that the repayment remedies in Articles 16 and 22

reflected the compensation that would be awarded under Article 246, in the context of tortious wrongs where the underlying unlawful conduct was a breach of Articles 11 or 12 KPPL. Either way, I consider that the point is sound, based on the expert evidence and materials which I have heard and seen.

373. The starting point here, in my view, is the nature of the repayment remedies in Articles 16 and 22. As I have said, it was ultimately common ground between the experts – and in any event it is clearly established on the evidence – that the nature of the remedy there provided is compensatory, and that it was intended to restore the status quo before the harm was inflicted. Thus, in the context of the issues concerning recoveries, Professor Mallat in his report (paragraph 155) said that restitution was not a punishment according to the Kuwaiti Court of Cassation:

> "Rather, it was compensation awarded *to the harmed entity* in order to ensure the restoration of its status before the harm was inflicted, i.e. before the misappropriation of the money." (emphasis in Prof Mallat's report).

374. It is notable that Professor Mallat was here accepting, correctly in my view, that the repayment remedy was compensating for harm which had been done to the harmed entity.

375. In cross-examination, Dr Youssef agreed that the cases and the authorities refer consistently to the remedy of repayment as being to compensate harm, and that therefore they must consider that there is harm. He agreed that the repayment to the victim entity was a restoration of the status quo, and that it had a compensatory effect. However, he also said that the rule that there should be repayment was "colour-blind" to the question of whether there was harm, and would not accept that harm was an "element of it at all".

376. It seems to me, however, that Professor Mallat (and Dr Abbas) are correct in their views that the compensatory remedy being ordered reflected the harm which the victim entity had suffered. Dr Youssef did not in my view have a persuasive explanation as to what the compensation was for, unless it was for the harm that the entity had suffered. Indeed, towards the end of his cross-examination on this issue, Dr Youssef came close to acknowledging that the rationale of awarding a compensatory remedy to the victim entity was that the victim had indeed suffered harm. As he said: "… it has this compensatory effect because it returns – it restitutes to the [aggrieved] entity the money that was lost". And at another point in his evidence, he said that: "restitution, in the majority of sources on the record, almost by definition is taking – is giving back to the [aggrieved] entity what was taken from her".[4]

377. Professor Mallat went on to agree specifically with Dr Abbas's analysis, in the context of Article 16. I have already summarised this, but I will give the full quotation in Dr Abbas's report to which Professor Mallat agreed:

> "This remedy is considered as an in kind compensation to the state entity in question by returning its money that was embezzled or misappropriated (in the case of Article 9 or 10

[4] The transcript refers to 'agreed' entity, but Dr Youssef was referring to the aggrieved entity.

> crimes), or a form of monetary compensation by requiring the official to repay the price or value of the asset of the state entity that the official has received by means of profiteering from his job (in the case of Article 11 and 12 crimes), where the law provides that the job should be exercised only for the interest of the state entity and where it prohibits receipt of personal payments."

Professor Mallat went on to refer to another point which in his view underlined that the nature of the restitutionary award is compensatory.

378. Given that an award under Article 16 is compensatory, it is natural and logical to conclude that when a Kuwaiti civil court is considering the question of the appropriate compensation under Article 246 KCC – in the context of tortious conduct where the unlawfulness consists of a contravention of Articles 11 and 12 of the KPPL – it would approach the issue with regard to how compensation is awarded under that very statute. Otherwise, there would be a surprising and, in my view, irrational divergence between (i) the compensation awarded directly under the KPPL for breaches of Articles 11 and 12, and (ii) compensation in cases of a civil tortious claim based on Article 246 where exactly the same breaches are in play.

379. The above conclusions are reinforced by a number of other considerations which are apparent on the Kuwaiti law evidence.

380. First, as Dr Youssef fairly accepted in cross-examination, a Kuwaiti civil judge has a very wide area of discretion as to how to approach the award of compensation under Article 246. He said that compensation was a "very broad concept" and that a judge had a "huge latitude" under Article 246. He agreed that the ultimate purpose of compensation was to wipe out the harm arising from the wrongful act. In my view, in exercising that wide discretion, it would again be natural and logical for a Kuwaiti civil judge to take the same approach, in applying Article 246 in the context of the present case, as is taken under Articles 16 and 22 of the KPPL.

381. Secondly, it is important to bear in mind the nature of the remedy that is awarded when Articles 16 or 22 are directly applied by a criminal judge. It is clear on the authorities that those remedies are civil in nature. For the purposes of that proposition, it is sufficient to refer to only two cases.

382. In Kuwaiti Court of Cassation Appeal No. 40 of JY 1995, the appellant had sought to enforce a judgment of a criminal court which had ordered the respondent to pay a very large sum to the appellant. The judgment had resulted from criminal proceedings against the respondent in respect of embezzlement. The appellant had not filed an adhesive claim in those criminal proceedings, and was not a party to them. The judge had issued the judgment pursuant to the provisions in earlier legislation which were materially identical to Article 16, namely Article 50 of Law No 31 of 1970. The critical issue in the case arose because this judgment had been given in 1985, and there was a subsequent Emiri decree which pardoned individuals who had received a final sentence before 2 August 1990 in relation to certain crimes. Article 1 of the relevant decree pardoned "from the execution of original, complementary and consequential penalties, without prejudice to civil rights or the enforcement of fines and financial penalties". The appellant challenged on cassation the ruling of the lower court, which had decided

that the judgment in the appellant's favour was unenforceable in light of the Emiri decree. The central issue concerned the nature of the judgment for restitution, and specifically whether it came within the exception relating to civil rights.

383. The Kuwaiti Court of Cassation decided in favour of the appellant, with the consequence that the earlier judgment was enforceable. The court said (in the PIFSS translation, which is materially identical to the Man + translation):

> "…it is evident that the restitution judgment is not intended for punishment or deterrence but rather to restore the situation to its state prior to the commission of the offense. While restitution may outwardly resemble a form of punishment, it essentially functions as civil compensation awarded by the criminal court to the victim for the financial losses caused by the offender. The victim is not required to file a separate civil claim. Therefore, the order for restitution is contingent upon the offender's continued possession of the misappropriated or stolen funds. As such, the restitution order does not fall under the pardoned penalties specified in the aforementioned Emiri Decree, instead it falls within the exception relating to civil rights, specifically relating to the financial rights of the victims. Therefore, the appellant is entitled to enforce the criminal judgment to recover the funds misappropriated by the appellee, even if she was not represented in the criminal case or did not file a civil claim."

384. The Court of Cassation also held that the appellant was entitled to obtain an enforcement order enabling the judgment to be enforced. It rejected an argument that she was not so entitled, because she had not been a civil claimant in the underlying criminal case and was not a party at interest. The court said, referring to the relevant provisions concerning enforcement orders that the party entitled to obtain such an order is:

> "… the party with an interest benefiting from the enforcement of the judgment, whether it involves criminal judgment with civil implications, restitution or costs."

The court therefore overturned the lower court's judgment which had held that the appellant was not entitled to an enforcement order, because she was not party to the criminal proceedings and had not asserted a civil claim. This was held to be a violation of the law and an error in its application.

385. In the light of this case, it is clear that Dr Abbas is right in his view that when a criminal judge orders restitution under Article 16, the judge is granting a civil remedy in respect of a civil right, and that it is a remedy which is designed to restore the status quo.

386. Dr Youssef disagreed with this analysis of the case, in that he drew a distinction between a remedy which was a civil remedy, and a remedy which was only "tantamount" to a civil remedy and which was sui generis. I was not persuaded that, in this or similar cases, the Kuwaiti courts were drawing that fine distinction, and I prefer Dr Abbas' straightforward analysis of this case: i.e. that the court is granting an ordinary civil remedy, whereby the status quo is being restored. However, Dr Youssef's fine

distinction, even if correct, is of no real relevance in the context of the present issue. The question which I am here considering is whether a Kuwaiti civil judge, applying Article 246, would be guided by the approach taken to compensation and restoration of the status quo in the context of the remedies under Articles 16 and 22 of the KPPL. The answer to that question is 'yes' whether one regards those remedies as being ordinary civil remedies (as I do), or remedies which are tantamount to civil remedies.

387. Two other aspects of this case should be noted. First, in the passage quoted above, the court referred to restitution being contingent upon the offender's continued possession of the misappropriated or stolen funds. In their closing written submissions, Man said that this meant that, in substance, an enquiry was required into whether the offender had disposed of the funds, in other words that a tracing exercise was required in order to see whether he still had those funds. I do not accept this. It is clear that the court was there referring to the continued possession of funds in the sense that the wrongdoer had not restored them to the person from whom they had been embezzled or misappropriated. Dr Youssef accepted in evidence that this was the correct approach, and that a tracing exercise was not required. That conclusion is also supported by Sorour, *The Compendium on the Law of Criminal Procedures* (2016), pages 536-7.

388. Secondly, it is somewhat remarkable that Dr Youssef's opinion, maintained at all times until corrections were provided just before he gave evidence, was that an Article 16 remedy was only available when a civil claimant made an adhesive claim in a criminal case. It is clear from this decision that that is not the case. Dr Youssef could not have properly considered the key case-law prior to writing his report, and this reflects on the reliability of his evidence. More generally, I consider that Dr Youssef's erroneous view – as to the necessity for a criminal conviction in order for reliance to be placed on contravention of a criminal statute in the context of a purely civil claim – infected his views on the issue which I am considering, and is a further reason for considering those views unreliable. Dr Youssef's mindset, which led to this erroneous view, reflected an approach which posited a rigid distinction between civil and criminal proceedings, when considering civil claims, unless there was a criminal conviction. In my view, that mindset further manifested itself in his evidence concerning Articles 16 and 22; i.e. that they were contained in a criminal statute, and therefore a criminal silo, and should therefore be disregarded when considering purely civil claims. For the reasons already given, I do not consider that this is correct, and I prefer the contrary evidence of Dr Abbas.

389. PIFSS submitted that the judgment was significant in a number of respects: (i) for the clear principle that the repayment remedy is for the violation of financial rights; (ii) that accordingly, it protected a victim's civil rights; (iii) in establishing that the award is enforceable as if a civil judgment; and (iv) as confirming the remedy's independence from the criminal process and criminal sanction. I agree with this submission.

390. Appeal No. 40 of JY 1995 is not an outlier. The Kuwaiti Court of Cassation took the same approach, and applied the same analysis, in Kuwaiti Court of Cassation Appeal No. 406 of JY 2006, holding that restitution (again under the earlier statute) was "civil compensation that the criminal judge will award to the victim for his money that the defendant wasted without the need for him to enter as a plaintiff in a civil right and therefore its ruling is accordingly linked to the money remaining in the possession of the perpetrator who embezzled or seized it, and this entails that the restitution penalty relates to the financial rights of the victim". There is therefore, as PIFSS submitted,

jurisprudence constante establishing that the repayment remedy is a civil remedy, and also that a judgment ordering repayment can be enforced by the victim even if they were not party to the criminal case.

391. It is also relevant to note, from both cases, the reference to the "financial rights of the victim". The Kuwaiti Court of Cassation was thereby recognising that the remedy gave effect to rights that the victim had, by reason of the wrongful conduct which had taken place. The existence and nature of the victim's rights that arose under the KPPL was addressed in cross-examination of both Dr Youssef and Professor Mallat, and their evidence is summarised and discussed in Section L7 below in the context of the Pensée scheme. For present purposes, it is sufficient to refer to Professor Mallat's evidence in that regard. He agreed that the proper interpretation of the KPPL as a whole was that it conferred rights on Article 2 entities; that this was because they were the entities that were going to be injured by the breaches of the KPPL; that the rights conferred by the statute arise on breach; and that the underlying right of the victim entities included the ultimate substantive right to recover repayment under the KPPL, or compensation, or both.

392. This analysis, which was to a large extent supported by Dr Youssef in cross-examination, highlights a number of matters which are relevant to the present issue.

393. First, since the Article 16 and 22 remedies are compensation for rights that have been infringed, it would again be illogical for a civil judge, applying Article 246 in the context of a tortious claim based on unlawful conduct consisting of breaches of Articles 11 and 12, to take a different approach to compensation to that taken under Articles 16 and 22. Dr Abbas' evidence, and PIFSS' case, result in a consistent and coherent approach to compensatory remedies when the same underlying conduct is in issue, whether being considered by a criminal judge applying civil remedies in an Article 16 or 22 context, or a civil judge in an Article 246 KCC context.

394. Secondly, Professor Mallat's evidence as to rights and remedies indicates that the KPPL cannot be viewed simply and purely as a criminal statute providing for criminal penalties. The Kuwaiti Court of Cassation decisions, discussed above, show this as well, when describing the Article 16 and 22 remedies as civil and giving effect to financial rights. Professor Mallat also expressly recognised the mixture of criminal and civil concepts in the KPPL as a whole:

> "The law is inconsistent because Article 5 vests the right to do all of this in the prosecutor and it says exclusively the prosecutor then in other places it talks about the aggrieved or injured entity having rights. There is a tension between the two that's not at all clear and which is the fact of the law. I don't know what the consequences are."

395. I consider that many of Man's arguments, to the effect that the KPPL is exclusively a criminal statute, and that only a criminal judge can order the remedies in Articles 16 and 22, fail to recognise the mixed or hybrid aspects of the KPPL. (This is relevant as well to the arguments of Man, and others, on justiciability which I will address separately).

396. Man's argument also fails to recognise that the repayment remedy in Articles 16 and 22 is a remedy, compensatory in nature, whereby the judge is restoring the status quo. Dr Abbas's evidence, which I consider to be correct, is that the existence of a criminal statute which enables a criminal judge to make repayment orders under Articles 16 or 22 does not detract from the ability of a civil judge to order repayment. This point is illustrated by an Egyptian case in an analogous context: Egyptian Court of Cassation Appeal No. 655 of JY 62. That case concerned a statute which prohibited a lessor from taking payments outside the scope of the lease contract. The relevant Egyptian statute, Article 25(2) of Law No. 136 of 1981, provided that "in addition to imposing the fines stipulated in these laws, the competent court shall annul the violating act and deem it null and void, restoring the status quo in accordance with the law, while obliging the violator to pay damages if required". In a civil action, the lessor argued that only the criminal courts had power to make orders, including for the restoration of the status quo. The Egyptian Court of Cassation rejected that argument:

> "And whereas this argument is incorrect, as civil courts are the original competent authority with jurisdiction to examine requests to restore the status quo ante or to seek compensation for the act, whether the act is considered a crime, in which case criminal courts have jurisdiction to penalize it, or not. Furthermore, whether the requested compensation is in-kind, by repairing the damages caused by the act to eliminate its effects and restore the prior status, or monetary. The jurisdiction of civil courts over claims for in-kind or monetary compensation is not excluded by legislation permitting the injured party to file a civil claim before the criminal courts where the criminal case is heard, nor by legislative provisions requiring such courts, in certain cases, to rule without awaiting the injured party's request, ordering restitution and restoration of the prior status, thereby depriving the defendant of the fruits of their wrongdoing. Even if such rulings fulfil the punitive purpose of deterrence, they also effectively include compensation for the actual damages suffered by the injured party."

397. In the present context, the civil aspects of the KPPL mean that a civil judge, applying Article 246 would necessarily be guided, and indeed take the same approach to compensation, by the approach to the repayment remedies in the KPPL.

398. Furthermore, I consider that it must follow – consistent with Dr Abbas's evidence – that there is no reason why a civil judge, ordering civil remedies, should not directly apply the repayment remedies in Articles 16 and 22. Indeed, there is every reason why a civil judge should be able to do that, bearing in mind the KPPL as a whole and its overall objectives. These objectives are discussed in more detail in Section L7 below, but overall I agree with Mr Ritchie's submission that KPPL envisages that for the abuses of public property and exploitation of public office or other crimes that have been committed, compensatory remedies are made available. There is also no reason, in my view, why a civil judge should not apply the remedies in Articles 23 and 28 KPPL, which are ancillary to the repayment remedy and which are aimed at enabling a victim entity to enforce the compensatory remedy (i.e. the *in personam* remedy) to

which it is entitled. (Again, this point is further discussed in Section L7 below, but does not require further exposition here).

Repayment and restoration of the status quo

399. I now turn to discuss in a little more detail the arguments of Man as to why PIFSS is unable to make a simple claim for the benefits wrongly obtained or procured by the public official, why PIFSS must establish that the receipt of such benefits reflects actual harm which it has suffered, and why repayment of the benefits obtained or procured would not necessarily result in a restoration of the status quo. I think that the argument is inconsistent with the approach of Kuwaiti law as discussed above, including the law reflected in the Emiri pardon case and the principles to which Professor Mallat agreed. Nevertheless, I will address the point in more detail, and in so doing will address Dr Youssef's related argument based on Article 2 of the KPPL and public property.

400. Man submits that the restoration of the status quo does not mean that benefits wrongly obtained by the public official, or that his wrongful conduct has enabled others to receive, should automatically be restored to the state entity. Mr Collins argued that giving the benefits to the state entity "victim" of the unlawful conduct would go too far, at least in many cases, in terms of restoring the status quo. He said that restoration of the status quo was about returning the parties to the position that they were in prior to the wrongdoing, or the position they would have been in but for the wrongdoing. Repayment was not designed to put the state entity into a better position than it would have been in if no unlawful act had been committed. The status quo ante in the present case is the position before the bribes are agreed or paid. Here, there is no status quo ante in which the bribes belonged to or were administered by PIFSS. If the bribes had not been paid to Mr Al Rajaan, they would not have been paid to PIFSS instead. They would not have been paid at all. PIFSS could not claim a repayment remedy that would put it in a better position than it would otherwise have been.

401. In the course of cross-examination of Dr Abbas, Mr Collins illustrated this point by positing the case of a bribe paid to a public official in return for the issue of a building permit, in circumstances where that building permit would have been issued in due course anyway. In that counterfactual world, the state entity employer could not show that it would ever have received the benefit of the money that the official had received.

402. Accordingly, Man submitted that PIFSS' case was not advanced by its reliance on a repayment remedy, or an argument based on restoration of the status quo. There was no shortcut which avoided the need for PIFSS to prove that it had actually suffered loss. The only relevant question was the counterfactual question: what would PIFSS have done if Mr Al Rajaan had been honest and had not been bribed. That was the appropriate approach to quantum in the present case.

403. A related issue is Dr Youssef's argument that if the benefits did not stem, either directly or indirectly, from the entities specified in Article 2, they would not be public property, and this was so even if such benefits resulted from a breach of the KPPL.

404. In my view, the case-law and commentaries show that there is a straightforward answer to these points. Restoration of the status quo means, quite simply, that the wrongdoer who has wrongly profiteered from his public office, must repay to the victim entity the benefits which he has obtained for himself and others. (Those who have intentionally

assisted him will be liable for the same compensatory remedy, as further discussed below). This does not necessitate a complicated counterfactual enquiry which Man (and others) suggest is necessary. Kuwaiti law clearly does not contemplate a situation whereby the restoration of the status quo would somehow result in (as Man's argument posits) leaving all or even some of the benefit in the hands of the wrongdoer who has wrongly profiteered. I have no doubt that if Man's arguments, as to how restoration of the status quo would work, were advanced before the Kuwaiti Court of Cassation, they would fail. I also consider that there is no substance in Dr Youssef's public property argument. I now expand upon these points.

405. Attia, *Explanation of Kuwaiti Law on Criminal Procedures and Trials* explains the nature of restitution in a section addressing a civil lawsuit. He says that the subject matter of a civil lawsuit is compensation in a broad sense:

> "Restitution – in its narrow sense – is the obligation imposed on the perpetrator to relinquish possession of any property acquired as a result of the crime and to deliver it to the plaintiff. For example, the refund of money acquired by the defendant through theft, fraud, or breach of trust is, in this context, deemed the penalty for infringing the proprietary right. However, restitution has a broader significance, where it means "restoring something to its condition prior to perpetration of the crime". In other words, "putting an end to the factual illegitimate position, which resulted from committing the crime, so that the legitimate position before perpetration of the crime is restored."

406. Although this is a general statement not specifically directed at the KPPL, it shows that restitution is concerned with putting an end to a factually illegitimate position. Applied in the context of Articles 11 and 12 of the KPPL, this would mean that a profiteering wrongdoer would not be permitted to retain the benefit of the monies that he has received in consequence of his wrongful profiteering.

407. Elthufairi: *Criminal Protection of Public Property Through Kuwaiti Law No 1 of 1993* (2006) pages 101-102 states, in the context of the KPPL (and specifically Article 22):

> "The order for restitution – as jurisprudence views it – is a form of specific (in rem) compensation for the very funds that were embezzled, misappropriated, damaged, or the perpetrator aimed to benefit from. While such restitution would normally fall within the jurisdiction of the civil court, the legislator has, in cases involving crimes against public funds, conferred jurisdiction upon the criminal court. The same applies to compensation that may be claimed by the aggrieved entity, where warranted. Although the adjudication of compensation – being of a civil nature – would ordinarily fall within the purview of the civil court, the legislator, through the Law on the Protection of Public Funds, has vested jurisdiction in the criminal court for the purpose of ensuring the most effective protection of public funds."

408. A number of matters are evident from this citation. First, Article 22 refers to all of the offences under Articles 9 – 12, and the author here refers generally to the different ways in which the offences under Articles 9 – 12 KPPL can be committed, stating that the repayment remedy applies to all of them: i.e. "the very funds that were embezzled, misappropriated, damaged or the perpetrator aimed to benefit from" (my emphasis).

409. Similarly, Al Kandary *Criminal Protection of Public Funds* states (at page 291):

> "The restitution/repayment stipulated in Article 16 of the Public Funds Protection Law is considered as a compensation. The court must automatically award it unless the item relating to the crime has been seized or the perpetrator has already returned it 2. The court must determine the amount to be returned, which is an amount equal to the value of the property embezzled, and, if it does not do so, then its judgment is defective." (My emphasis)

410. There is no commentary which suggests that the repayment remedy for profiteering operates any differently to repayment in the context of embezzlement: in all cases, the wrongdoer must return the benefit wrongly obtained to the victim entity. Thus, commentaries treat the various crimes collectively as embezzlement or misappropriation. For example, the Kuwaiti Institute for Judicial Studies, *Crimes Against Public Property within the Scope of Law No 1 of 1993* states, in explaining restitution:

> "This means the offender making restitution for the funds he embezzled or misappropriated. A ruling for restitution does not provide for punishment and rebuke but simply means restoring the situation to what it was before the commission of the crime. Even though it includes on the face of it the sense of punishment, it is nevertheless tantamount to civil damages adjudicated by a criminal judge in favour of the victim in respect of his funds that have been squandered by the accused without any need for him to intervene as a civil claimant."

411. All of these passages indicate that the compensatory remedy of repayment, in order to restore the status quo ante, involves a simple enquiry into the value of the benefits received as a result of the wrongful profiteering by the public official and therefore the abuse of the office in which he served. Similarly, in the Kuwaiti Court of Cassation Appeal No. 336 of JY 2012, which followed on from the English case involving Kuwaiti Oil Tankers, the Court said:

> "The penalty of restitution stipulated in Article 50 of Law No. 31 of 1970 amending certain provisions of the Penal Code is an obligatory supplementary penalty that embodies the idea of restoring the status quo ante. It is a specific penalty that takes into account the nature of the crime. It is fixed in amount, and is therefore imposed in the amount that the accused embezzled or obtained." (My emphasis)

412. There is also nothing in any of these materials – or indeed in any case to which I was referred – which suggests that the remedy depends, as Dr Youssef's argument posits,

on the source of the benefits being the funds of the victim entity itself. Indeed, as discussed below, the Dubai Wire case is in my view directly contrary to that argument, and it also confirms that the repayment enquiry is a simple one.

413. Secondly, the passage from Elthufairi confirms that it is usually the civil courts which deal with civil remedies, including a repayment remedy: "such restitution would normally fall within the jurisdiction of the civil court". This negates the notion, inherent in some of Man's arguments, that the repayment remedy in Articles 16 and 22 is some unusual sui generis remedy tied to a criminal statute. It is a standard civil remedy.

414. Thirdly, the passage explains why Article 22 has an unusual feature of giving a criminal court the power, indeed obligation, to deal with a civil claim even in the event of termination of criminal proceedings. In a situation where it applies, for example where the alleged wrongdoer has died and the criminal case therefore ceases, the criminal court can exceptionally nevertheless go on to adjudicate upon the civil remedy pursuant to Article 22. Accordingly, what is exceptional is not the repayment remedy itself, but the fact that the criminal court is required to adjudicate upon that civil remedy despite the termination of the criminal proceedings. Similarly, Dr Abbas explained in his first report (correctly in my view) that the fact that the law allowed criminal courts to award this remedy does not prejudice the original jurisdiction of civil courts to decide on claims for repayment. That is because awarding civil remedies (e.g. repayment) by a criminal court is an exception to the default rule, being the exclusive jurisdiction of civil courts to hear civil claims.

415. I also agree with PIFSS that the treatment of illicit profit as harm, which must then be repaid to the victim entity, is illustrated by the Dubai Wire case in the Kuwaiti Court of Cassation: Appeal No. 47 of JY 2007. In that case, public officials working for the International Investor Company ("IIC") (an Article 2 entity) had used their position to make private investments in the Dubai Wire company. There were 4 defendants to the proceedings; Defendants 1 – 3 (to whom I shall refer as D1, D2 and D3) worked in various capacities for the IIC itself: D1 and D3 were financial advisors, and D2 was an accountant. They were all tasked with overseeing the investment of IIC funds in Dubai Wire. They collaborated with the 4th Defendant (D4), who worked for Dubai Wire, to invest funds in Dubai Wire for their personal benefit, but without the knowledge or consent of IIC. D1 received US$ 787,500, D2 received US$ 202,500 and D3 received US$ 370,000, these monies being transferred by D4.

416. The trial judge convicted all of the Defendants, and he ordered D1 to repay the full amount of US$ 787,500, and D2 to repay US$ 202,500. The full benefit was repayable without any credit for the sums which D1 and D2 had provided for the original investment. No order for repayment was made against D3, because he had already repaid the monies received. D1 and D2 were also ordered, pursuant to Article 16, to pay fines of double the amount embezzled. An additional civil claim was made by IIC, in the sum of 5001 Kuwaiti Dinars, and this was referred by the judge to the competent civil court.

417. The Court of Appeal then reversed the trial judge's decisions, and acquitted all of the Defendants. This decision was in turn reversed by the Kuwaiti Court of Cassation, which restored the convictions and the orders for repayment. In doing so, the court said that the "law considers any profit or benefit obtained by a public official directly from his official duties to be inherently unlawful". Having reviewed the evidence, the court

found that D1, D2 and D3 had exploited their positions and obtained personal gain through their actions, prioritizing their personal interests over the public interest of their employer company and obtaining personal gain through actions that violated their legal and professional obligations and contradicted the rules and regulations of their employer company.

418. There are three aspects of the case which, in my view, are significant in the context of the issues that I am now considering.

419. First, the case was advanced, and succeeded, on the basis of contraventions of Article 12 KPPL, and the repayment remedy was ordered in consequence of those contraventions. The case was therefore a profiteering case, rather than an embezzlement case where the employer's funds had been stolen.

420. Secondly, the judgment is in my view contrary to Dr Youssef's argument that it is critical, for the purposes of the repayment remedy, that the benefit should somehow originate with the funds of the state entity. There is nothing in the judgment that suggests that D1 – D3 had used IIC's funds for the purposes of making their investments. On the contrary, it was the Public Prosecutor's case that D1 and D2 had used their own money for the purposes of the investment. Thus, in the context of criticising one aspect of the reasoning of the Court of Appeals, the prosecutor argued:

> "Furthermore, it is reasonable to expect that the transfers received by the respondents, resulting from illegal and unlawful activities, would not be recorded in the International Investor Company's records. These funds were personal and unrelated to the company's finances, therefore not requiring documentation in its records."

Similarly, the case of both D1 and D2 was that they had used their own funds for personal investments. Furthermore, D3's case was that he had not personally invested any monies at all, but rather had received US$ 370,000 in return for conducting a feasibility study.

421. Thus, it could not be said that the source of the benefit, obtained by D1 – D3, was the funds of IIC. They had received monies from a third party, here Dubai Wire, as indeed (as Mr Ritchie submitted) would usually be the case where there had been profiteering by reason of the misuse of a public official's position. The reason that they were convicted was that, as the court said:

> "They sought profit and benefit by exploiting their public positions, without which they would not have obtained these profits or benefits. Therefore their actions are inherently unlawful. The absence of harm to their employer company is irrelevant, as this crime is categorised as a crime endangering the integrity of public office, as previously explained."

(I shall return to this last sentence below.)

422. Thirdly, the Court of Cassation restored the orders for repayment which had been made by the trial judge. The judge, and the Court of Cassation, clearly took the view

(consistent with the approach in the materials to which I have referred, and the approach of Dr Abbas) that this did not involve a complex exercise. The court simply looked at the benefits which D1 and D2 had received, and that was the amount which was to be repaid. D3 was not ordered to make repayment, because he had already repaid "the illicitly obtained profits and benefits".

423. Some reliance was placed by Man on the final sentence in the above quotation ("The absence …"), as showing that the repayment order was made even though IIC had suffered no harm. I agree with Mr Ritchie that this is not the appropriate reading of the relevant passage in context. The court was not there deciding that IIC had in fact suffered no harm at all. Indeed, in addition to making a repayment order, the trial judge had referred an additional claim by IIC for compensation to a civil court. Rather, the court was emphasising the irrelevance of the argument that there was no harm, in the context of an Article 12 offence which (as the court had previously explained) could be committed by an attempt to profiteer, even if the profiteering was unsuccessful.

424. There was a lengthy period of cross-examination of Dr Abbas (occupying some 20 pages of the transcript) which, broadly speaking, was directed to the related questions of whether bribes procured by the public official were the property of the state entity, whether they were public funds, and more generally whether the repayment remedy really reflected harm which was suffered by the state entity in circumstances where a public official had wrongly profiteered. The cross-examination sought to challenge Dr Abbas's response to Dr Youssef's points concerning Article 2 of the KPPL (which I have summarised above).

425. In his written evidence on this issue, Dr Abbas said that it was necessary to read the KPPL, and specifically Articles 11, 12, 16 and 22 together. Articles 11 and 12 did not require the profiteered amount to originate in the state entity. Neither of those articles refers to property that originated from an entity described in Article 2 in the meaning advanced by Dr Youssef. If that were right, then Articles 16 and 22 would have no practical application in the case of profiteering, albeit that they were clearly intended to apply to Article 11 and 12 crimes. He also explained why the benefits obtained by the public official, which had to be repaid to the state entity in question, were the property of that entity according to Article 2 of the KPPL. The word "property" (or "amwal" in Arabic transliteration) meant all rights that a person had. The repayment remedy aimed to restore the status quo before commission of the crime. Repayment was a sort of specific performance of the obligation not to benefit at the expense of state entities, stipulated under Articles 11 and 12. There is an obligation owed by public officials not to benefit at the entities' expense. This obligation is at the same time a right of the state entity, since every personal obligation on a person is considered at the same time as a right to the creditor. That right was thus a part of the "amwal" or property of the state entity.

426. In cross-examination, Dr Abbas explained these points in greater detail in response to the questions asked. His evidence was fairly summarised by PIFSS in their written closing submissions. In summary, Dr Abbas said that the state is entitled to any fruits of the public office other than the salary or remuneration that it gives to the public official: if the public official obtains "fruits" of their breaches, they are not entitled to retain them. The right the state has against the public employee is that the employee is not to profiteer, and if the employee gains anything under the public service relationship, they should return it because it is harm against the state.

427. Dr Abbas explained the position in terms of the rights which the public entity owned, and the fact that Article 2 covered (in addition) whatever was statutorily under the administration of the public entity. He said that "what belongs to them is the right that the public employee dedicates his time and his effort and does not profiteer". He said that the existence of the repayment remedy in Article 16 showed that the right existed. When asked as to the basis on which the employer could say, "that the bribe belongs to me", Dr Abbas said:

> "So the employer in this case, I would say, would go and say: 'You had to dedicate your work for me… anything, any benefits under this relationship of the public office that you receive belongs to me. You should have returned it back'. This is the basis or part of the basis and obligation between the public employee and the public institution or the Government. So if they receive something, they should give it to the state. They should not receive something for their own person, but if they do, for any reason, this belongs to the state if it is because of the public office."

428. He went on to say that the public official should not accept it, but "if it's taken or if it's given, then I should return it to the state that I belong to because it belongs to the office, not to the person … of the public official."

429. It is fair to say that the Kuwaiti case-law does not address in any detail the analytical basis for the existence of the repayment remedy for profiteering, or why this is compensation for harm suffered by the entity. But that is clearly the effect of the case-law. The materials to which I have referred, including the Dubai Wire case, and the evidence of Professor Mallat, show that a straightforward and simple approach is taken, no doubt because the issue is perceived as a simple one. If deeper analysis were ever to be required by the Kuwaiti Court of Cassation, I have no real doubt that it would find Dr Abbas's views and analysis, as summarised above, to be persuasive (as do I).

The Egyptian cases

430. Before leaving this area of the case, I should finally refer to one further line of argument advanced by Man in their written submissions and in Ms Sagan's oral submissions. Man relied upon a number of Egyptian authorities in support of the proposition that jurisdiction in relation to Article 22 of the KPPL is exclusively for the criminal court. In her closing oral submissions, Ms Sagan referred to two authorities in this area.

431. I did not think that these cases significantly advanced Man's argument, or provided a reason to doubt the conclusions set out above. All of the authorities, and the statements relied upon by Man, were in the context of cases where there had been existing criminal proceedings. In such circumstances, the authorities establish no more than that where a criminal trial court has been seized with a case, it is the court with jurisdiction to assess restitution on the facts.

432. Thus, in Egyptian Court of Cassation Appeal No. 8829 of JY 84 (Hearing Date 9 June 2016), there was an appeal by the public prosecutor against a decision of the trial court in the context of criminal proceedings against a number of accused. One of the defendants had died during the course of the proceedings, and the trial court ruled that

the criminal case was extinguished with respect to him due to death. However, the trial court had not adjudicated on the matter of restitution, which the public prosecutor contended was a contravention of the provisions of Article 208 bis (D) of the Egyptian Code of Criminal Procedure. The public prosecutor contended that this provision imposed mandatory obligations on the court in relation to restitution, and that the trial court's judgment was therefore flawed.

433. I note that Article 208 bis (D) is the equivalent of KPPL Article 22, although there is at least one significant difference: it is applicable where the extinction of the criminal case by reason of death occurs "before or after referral to the court". It is therefore possible that, unlike the position in Kuwait, a criminal court would have mandatory jurisdiction even in circumstances where no criminal proceedings had been commenced at the time of death.

434. The Egyptian Court of Cassation agreed with the public prosecutor, and held that the trial court had wrongly failed to address the question of restitution. Having set out the relevant terms of Article 208 bis (D), the court said:

> "[T]his means that, although the death of the accused extinguishes the criminal action and renders it incapable of further examination, it does not alter the nature of the act itself, nor does it efface its criminal character, which remains attached thereto. The consequence of such extinction is limited to that alone, and not beyond. Accordingly, a judgment of restitution is mandatory and may be rendered only by a criminal court, which is obligated to do so ex officio against the heirs, legatees, and all who have derived a substantial benefit from the offence, so long as the funds generated by such crimes remained part of the defendant's estate up to the time of death."

435. Ms Sagan relied upon the statement that the restitution "may be rendered only by a criminal court". However, I agree with Dr Abbas' persuasive analysis of the case. As he said in cross-examination:

> "Again, the context, the reasoning – you have to look into the full reasoning and see that who has the original jurisdiction and then you can see that, if you are a criminal court who have a case in front of you where the perpetrator died, you have no other alternative, except if you find that the violations happened, except to rule restitution, you cannot rule – do not rule it. And if this the case, then other courts will not have jurisdiction at the time. You will have the jurisdiction. But this does not exclude the jurisdiction of other civil courts on the civil remedy. This is a civil remedy. There is no exclusion of the civil remedy. There is a mandatory obligation on the court if it's seized with the case by any reason to decide it, the criminal case in this case."

436. He went on to say that if there was no case before the criminal court, this would not exclude the option of the injured party to go to the civil court and say that: "Under this violation, I am requesting restitution". This too was, in my mind, a persuasive analysis, consistent with the approach in the Egyptian lessor case to which I have referred, as

well as the more general point (see Section B5) that civil courts have default jurisdiction over civil claims.

437. A similar analysis applies to the Egyptian Court of Cassation decision in Appeal No. 2944 of JY 79 (Hearing Date 10 April 2017). There, there had been criminal proceedings against a defendant arising from his embezzlement of funds from his employer company. The criminal proceedings were before the Port Said Criminal Court, and the defendant was convicted and sentenced, and ordered to make restitution of a substantial sum. Upon his death, as the court said, his estate became encumbered by this debt, and his heirs were "jointly liable to restitute the amount within the limits of what they inherited from him and was transferred to them during his lifetime".

438. The company then brought a civil claim against the heirs in the Giza civil court for payment of the restitutionary amount. The Court of Cassation ruled that the Giza civil court lacked the jurisdiction to adjudicate the claim "and jurisdiction instead lies with the criminal court that rendered the criminal judgment from which the restitution judgment against the heirs must be derived".

439. The case therefore establishes only that where a criminal trial court has been seized with a case, a claim to enforce a restitution order against heirs should be made in the criminal court which issued the restitution judgment. As PIFSS submitted, it does not follow that a civil court could never have jurisdiction to determine such claims or issue orders for restitution. It only stands for the proposition that, by virtue of the mandatory framing of Article 208 bis D, where the criminal court has jurisdiction, it must make the order and therefore retain the jurisdiction.

Conclusion

440. Accordingly, I accept PIFSS' case that the following is applicable to PIFSS' claim as a matter of Kuwaiti law. The repayment remedy which PIFSS seeks is a civil remedy for tort. The remedy is an example of an order of "in kind" performance pursuant to Article 246 KCC. That remedy is available jointly and severally against the public official as principal tortfeasor under Article 227 KCC and, pursuant to Article 228 KCC, against the doers and accomplices who have assisted him. In awarding a civil repayment remedy for breach of the KPPL provisions, as compensation for harm, the legislator is recognising and reflecting that the prescribed breaches result in harm to the victim entity in at least the value of the profits/benefits caused by the breach. It is open to a claimant in PIFSS' position also to claim any additional proven loss. The remedy is not exclusive to criminal courts: it can be awarded in civil courts, and the civil courts are the default jurisdiction for such an award.

Benefits obtained for others and the liability of those who assist

441. One issue raised by Man concerns whether the amount received by Mr Al Rajaan personally is the limit of the compensatory award or repayment remedy when there has been profiteering. PIFSS contends that the amount would include not only the monies received by Mr Al Rajaan, but also the monies which others received as a result of his profiteering. Applied to the concrete facts of the Man case, the issue here is whether the compensatory award would include the monies which were paid to Mr El Ghazzi as well as those received by Mr Al Rajaan. A related issue is the extent of the liability of

those who only assist the public official to profiteer, but are not public officials themselves.

442. The analysis in Dr Abbas's first report, paragraphs 550 – 571 and 578 – 579, explains Kuwaiti law on these points. In summary, Articles 11 and 12 both criminalise profiteering which benefits others, as well as benefiting the corrupt public official. Accordingly, the quantum of the compensatory or repayment remedy will extend to the entire amount which has been profiteered.

443. Applying the principles concerning joint and several liability discussed above in the context of Articles 228 and 229 KCC, and the liability of accomplices under Articles 47 and 48 KPC, a claimant will be able to make a full recovery from those who have jointly perpetrated or assisted in the public official's breach, if the same harm was caused by their acts. As Dr Abbas explains, if the assisting persons are criminally liable, there will be no need for Article 229; because in every case, every one of them will be committing a civil fault which is a crime. In such a case, the liability of each of them will be established under Article 227, and the joint liability of all wrongdoers will exist under Article 228. If the assisting persons are not criminally liable, then there is also the possibility of successfully contending that there was a violation of the general obligation to act carefully and avoid harming others, leading to liability by virtue of Article 229, and thence joint and several liability under Article 228.

444. A number of authorities support this approach. In an Egyptian case, ECC No 23389 JY 88, the court was considering the provisions equivalent to Article 228. The Court said:

> "[I]t is established that the refund penalty stipulated in Article 118 of the Penal Code, while outwardly comprising the meaning of refund, in truth … is not legislated to penalize or reprimand, rather it means returning the status quo to how it was before the crime and compensating the State for its funds lost by the defendant. This means that the more the number of people convicted of one of the crimes stipulated in said Article, the more they are collectively liable to return the funds, and the liability is equally divided between them, unless the judgment determines the refund share of each in accordance with Article (169) of the Civil Code. The penalty as well is given according to the amount that the defendant embezzled or obtained." (My emphasis)

445. Similarly, Al Kandary states (at 291) that: "Where there are multiple offenders, all the perpetrators and accomplices in the crime are jointly responsible for repaying the amount they were involved in embezzling or misappropriating. This is a general rule that applies in cases where a ruling is made for compensation and court costs". The same approach can be seen in the Kuwaiti Oil Tankers case, where the Court of Cassation said that "if there are multiple perpetrators, they are jointly and severally liable for restitution of the amount they jointly embezzled or seized and for payment of an equal fine".

B12: Bribery

446. The most relevant provisions here are Articles 35 and 39 of the KPC, which criminalise bribery. However, it is fair to say that the bribery offences are less significant, in terms

of the way that PIFSS advances its case, than the KPPL offences. Whilst the bribery offences (and resulting 'fault' for the purposes of Article 227 KCC) to some extent cover similar ground and therefore overlap with the KPPL offences, the latter offences are broader. They are also more important to PIFSS' case, because (i) there is no applicable criminal limitation period in respect of the KPPL offences, whereas there is a 10-year criminal limitation period for bribery offences and (ii) the approach to the compensatory remedy, for breaches of the KPPL which give rise to tortious remedies, is accepted by PIFSS (see Section B 11 above) to be different to the compensatory remedy that exists when the relevant breach concerns only Articles 35 and 39 KPC.

447. Apart from the issue of probable intent in the context of *mens rea* (see Section B8 above) there was very little in dispute between the experts and the parties. In the JEM, the experts agreed on the following:

i) The crime of bribery can be committed by the bribee in two ways. The first is accepting a bribe offer by the briber (or intermediary). The second is a public employee requesting a bribe from the briber.

ii) Article 39 KPC stipulates that both the individual offering the bribe (the briber) and any intermediaries involved shall incur the same penalties as the public employee who accepts the bribe.

iii) The criminal act of bribery is complete when the public official (the bribe taker) agrees to accept a bribe. This is the case regardless of whether the transfer of the bribe itself materialises. The public employee's agreement or acceptance of the bribe constitutes the consummation of the offence.

iv) For this criminal liability to be established on the briber (and intermediary), (i.e., under Articles 35 or 39), material and moral elements must be satisfied.

v) The material act and the corresponding criminal intent of the briber must be directed to the public official to solicit his conduct, which is the performance or abstention from an act of the job or an act that the public official wrongly believes or falsely alleges is part of his job.

vi) The nature of the benefit is irrelevant.

vii) The briber (and intermediary) must be: (i) aware that he is presenting a gift or a promise to the public official; and (ii) aware that the consideration of the bribe is to induce the public official to perform or refrain from performing an act that is within the competence of the public official, or that the public official falsely believes or alleges is within his competence.

viii) Article 11 KPC applies to acts committed wholly or partially in Kuwait, including influencing a public official in Kuwait.

448. Dr Youssef also agreed with Dr Abbas that a bribe-payer is an accessory to the principal bribery offence under Article 35 KPC (i.e. the request or acceptance of a bribe by the public official). Where a bribe is paid through an intermediary, both the bribe-payer and the intermediary would be considered accessories to the principal offence

committed by the public official, provided the other elements of the criminal offence were satisfied.

449. A point which featured heavily in Ms McKechnie's oral closing submissions was the proposition that since the bribery offence is complete when the public official agrees to accept the bribe, there is no separate further offence when the bribe is actually paid and received.

450. It did not seem to me that the Kuwaiti expert evidence addressed this specific point in clear terms. I am doubtful as to whether this is the position, since Article 35 identifies a number of different ways in which the offence can be committed, including where the public official "accepts, for himself or for another, a … gift in exchange for performing or refraining from performing an act within his official duties". Accordingly, there does appear to be criminalisation of the act of accepting a gift. For reasons similar to those discussed in the context of the actus reus issue under Article 12, it would be strange if an offence was only committed at the point of agreement to receive the bribe, and that the actual receipt of the bribe was not criminalised as well.

451. Mr Ritchie addressed this point in his oral reply closing, saying that PIFSS was not advancing a case based on the necessity for multiple subsequent acts under Articles 35 – 39. However, he said that ultimately I would have a view as to whether acts subsequent to the initial agreement to take a bribe were criminalised. My view is that they are, based on the wording of the statute. Ultimately, however, this conclusion matters little, since a claim can be advanced under the KPPL in relation to acts of receipt (see Section B 10 above). Furthermore, my factual conclusions in relation to Aerium mean that Ms McKechnie's legal point is of no real significance.

B13: Money Laundering

452. There was no significant dispute in relation to Kuwaiti law concerning money laundering, and the Defendants did not challenge the case advanced by PIFSS in its written closing. What follows substantially reproduces that case, which in my view accurately summarises the position.

453. The Kuwaiti Court of Cassation has provided a definition for the crime of money laundering. The crime of money laundering is:

> "[…] an operation, or series of financial or non-financial operations whereby the funds and returns obtained from a crime or one of the acts of participation in it [the crime] are converted to funds and returns that have legal and legitimate source, with the goal of concealing, denying or disguising the illegitimate source of these funds, while knowing that they are obtained from a crime or one of the participating actions."

454. Money laundering was criminalised in Law No 35 of 2002 ("The 2002 Money Laundering Law") issued on 26 March 2002. It was replaced in 2013 by Law No 106 of 2013 ("Money Laundering Law") on 26 May 2013.

455. The experts agree on the definition of money laundering as considered by the Kuwaiti Court of Cassation. They acknowledge the elements of the crime as set out in the Money Laundering Law of 2002 and 2013.

456. The experts agree that the perpetrator is required to know that laundered money derives from a crime but without needing to understand the legal classification of the act as a crime; the perpetrator only needs to be aware of the factual elements of the act from which the money was obtained.

457. Article 2 of the 2002 Money Laundering Law is set out in Section B4 above. The establishment of the material element or *actus reus* under the 2002 Money Laundering Law takes place whenever the perpetrator commits one of the actions prohibited under Article 2.

458. The Kuwaiti Court of Cassation has elaborated on the moral element under the 2002 Money Laundering Law:

> "[…] the moral element is fulfilled when the intent of the perpetrator is directed into committing any of these actions with the intent of laundering the money […] and making it appear in the form of funds or returns obtained from a legitimate source, whilst knowing that its source is a crime, or from the conduct of participating in it [the crime] […]"

459. The defendant must know that the source is a crime. However, ignorance of the law or mistake in its interpretation cannot be a defence. Thus, the requirement of knowledge that the laundered money proceeded from a crime does not mean that the launderer must know that the act from which the money-laundering proceeded actually constitutes a crime according to legal characterisation. Rather, as Dr Abbas explained, the launderer must merely be aware of the elements of this crime from which the money was obtained, from a factual perspective. For example, if the money is obtained as a result of the commission of the crime under Article 12 of the KPPL, the launderer must be aware that the money was obtained by a public official (or by a third party for a public official), and that this public official has obtained a benefit related to his job. It is not therefore necessary for the launderer to know that these acts legally constitute a crime under Article 12 of the KPPL.

460. It was common ground that legal persons, excluding joint stock companies, can be held criminally liable under the 2002 Money Laundering Law.

461. The position, so far as concerns the *actus reus* and *mens rea* under the 2013 law is, for the purposes of this action, materially the same as under the 2002 law, and was agreed. The material element in the crime of money laundering is described by the Court of Cassation as being as follows:

> "It is established that the crime of money laundering is established by any action which can convert, transfer or substitute the funds obtained from a crime with the intent to disguise, conceal, or assist whoever committed the original crime to hide these funds …"

462. It is possible for criminal liability to exist based on a crime that was committed, without the need for a conviction.

463. As held by the Kuwaiti Court of Cassation, the moral element in the crime of money laundering is established:

> "if the perpetrator was aware of the source of the funds, and that they originated from a crime, and if its [the perpetrator's] intent was directed to hide its source, conceal, or assist those who committed the crime to conceal these funds – this crime further requires a special intent, being the intent to hide or conceal the source of these funds […]"

464. The crime of money laundering requires that the perpetrator must be aware that the origin of the funds is illegitimate (arising out of a crime). The perpetrator must also intend to commit one of the acts prescribed under Article 2 of the Money Laundering Law (i.e., the material element of the crime). Additionally, the perpetrator must have the intent to conceal or disguise the origin of these illegitimate funds.

465. It is common ground that both natural and legal persons are equally liable under the 2013 Money Laundering Law.

B14: Vicarious liability

466. The topic was addressed in some detail in Dr Abbas's report, and there was no material cross-examination on the subject. The issue was addressed only briefly in the written and oral closings of the Defendants, principally by Man and by Ms McKechnie for Aerium in the context of Aerium Finance Ltd ("AFL"). The issue which emerged was not as to the nature of the test for vicarious liability under Kuwaiti law, but rather as to its application to the particular facts of the case.

467. Thus, in the context of the case against Man, it was accepted that one of the companies in the Man group, Man Investments AG ("MIAG"), would be vicariously liable for any torts committed by any of Messrs Massad, Merville and Moeller. However, PIFSS' claim against other companies could not succeed, since there was no relevant relationship of subordination between those individuals and the other companies. That issue raised a factual question, rather than a legal question of Kuwaiti law. Mr Collins accepted, in his oral submissions, consistent with Dr Abbas's evidence, that vicarious liability did require a relationship of subordination, but that this could be established even though the relationship was not employer/employee. Ms McKechnie's point on AFL also raised, at least principally, factual rather than legal issues.

468. Against that background, I can deal with the legal principles concerning vicarious liability briefly. It is convenient to start by setting out Article 240 of the KCC again:

> "1- A principal shall be liable for the damage caused by an unlawful act committed by his subordinate, when the act was performed by the subordinate in the course, or as a result, of his employment.

> 2- The relationship of subordination between principal and subordinate exists even when the principle has not been free to choose his subordinate, as long as the principal has actual powers of supervision and control over his subordinate."

469. In the JEM, the experts agreed that the key requirements for vicarious liability were: (i) the existence of a subordination relationship between the principal and the subordinate and (ii) the existence of the required link between the job or functions of the subordinate and the unlawful act giving rise to the tort.

470. As far as concerns subordination, the experts were agreed that a subordinate relationship, as defined by Article 240 KCC, its explanatory notes, and judicial interpretations, arises when the principal possesses the power to oversee, instruct, and discipline the subordinate in relation to the performance of their duties.

471. Dr Abbas's evidence was that what matters was the ability of the principal to exercise authority over the subordinate, rather than whether or not the principal actually did so. This was not controversial. Dr Abbas also drew attention to the wide circumstances in which courts (in Egypt and Kuwait) or commentators have said that there was a relationship of principal and subordinate. Examples of subordinates were the managers of a company, an executive director, and representatives including board directors and a chairman.

472. Dr Abbas also drew attention to the views of commentators that a subordination relationship exists irrespective of: whether the subordinate receives an income from the principal or not; whether the subordinate has a contractual relationship with the principal or not; whether the source of the authority of the principal was *de jure* or *de facto* – as long as actual authority exists; whether the subordinate was chosen by the principal or not; or whether the principal was aware of the existence of the illegitimate conduct or not. In this last case, a principal would still be liable even if he had warned the subordinate about the commission of illegitimate conduct, and the subordinate nonetheless committed it.

473. Dr Abbas's evidence also addressed the need for a link or causality between the tort and the subordinate's job or function. Since no Defendant took a point that such a link was absent, it is not necessary to expand upon this.

B15: Representative Liability

474. Kuwaiti law recognises direct liability of legal persons (e.g. a company) through attribution. This is a liability which is not the same as vicarious liability.

475. Dr Abbas explained in his written evidence how this applied in various contexts. For example, if a fault is committed by a legal person's representative, in assisting or participating in a crime, the representative's conduct would be tortious fault, and the acts and knowledge of a legal person's representative would be attributed to the legal person. That legal person will then be jointly liable with the crime perpetrator pursuant to Article 228 KCC. Liability can also arise if the relevant conduct does not amount to a crime.

476. There was no dispute as to the principles applicable in this area, and again the Defendants' written and oral closing submissions did not address the point in any detail, or challenge PIFSS' written closing submissions. The following summarises those submissions, based on Dr Abbas's evidence.

477. The following principles apply in determining whether a person is a "representative" for the purpose of direct liability.

a. A representative of a person is any person that is legally authorised to act on behalf of that person according to rules of representation.

b. Kuwaiti Court of Cassation authority establishes that the general rules of agency in the KCC provide that any acts concluded by an agent within the limits of its agency shall be binding on the principal and shall apply. Thus, the principal shall be liable vis a vis third parties for the fault of the agent according to rules of agency and also according to rules of tortious liability.

c. An agent is defined under Article 698 KCC as a person that is assigned or mandated by another person to conclude legal acts on its behalf.

d. Accordingly, any person that is assigned by a company to perform a legal act shall be considered as an agent of the company with respect to that act and shall be considered as being a representative of the company regarding that act. This includes members of the company's board of directors.

e. Representatives therefore include any person exercising legal acts on behalf of the company, including members of its board of directors, who are considered as agents, as well as any other persons that are assigned by the company to conduct legal acts on its behalf.

f. Agency by agreement requires intent to assign a person to perform acts on behalf of the company.

g. Any expression of will that shows such intent shall be sufficient, whether it takes place expressly or implicitly unless law or agreement or the nature of dealing requires an express will.

478. The law does not stipulate any formal requirements, save where the contract in question is a formal contract: the default rule in legal transactions is that they are consensual. They do not require a specific form. Thus, the default rule in agency is that it is also consensual. Thus, a representative of a company (or other legal entity) for whose acts the company or entity shall be tortiously liable, is any person that the company appoints to conclude any acts on its behalf, regardless of the means of appointment or its form.

B16: Causation and contributory fault

Introduction

479. Factual issues as to causation and contributory fault arose in the context of the Defendants' reliance on shortcomings in PIFSS' governance and internal procedures which permitted Mr Al Rajaan to remain in post effectively unsupervised for many years, and thereby to obtain massive secret commissions. The argument as to Kuwaiti

law, concerning contributory fault, was led by Ms Bingham on behalf of EFG, whose written and oral closing submissions addressed the issue in the greatest detail. In doing so, EFG made it clear that they were not relying on the evidence of Dr Youssef or Professor Mallat. Their written and oral argument therefore focused on the principles which, on their case, were to be derived from the underlying written sources, and to some extent on what they contended to be the effect of Dr Abbas's evidence.

480. EFG's contributory fault argument was adopted by other Defendants, but not by Man. This was, no doubt, because Man recognised that if the allegation of deliberate participation in bribery was made good, a case that PIFSS's procedures were deficient in failing to identify and stop it would be unattractive and unlikely to succeed. That approach of Man did not, however, commend itself to other Defendants who were alleged to have knowingly participated in bribery.

Effective and incidental causes

481. Although the written and oral argument of EFG focused on contributory fault, and in particular the effect of Article 234 KCC, there was a separate and related issue of causation on which PIFSS relied.

482. Causation is one of the three pillars of tort liability under Article 227 KCC. It was common ground that for an event to be eligible to be a cause of harm, it had to be an "effective" cause of the harm, rather than an "incidental" cause of the harm. The experts in the JEM identified the nature of an incidental cause in the context of an act of the victim. They agreed that for the act of the victim to be considered an intervening cause, it has to be productive and effective (rather than incidental) in causing the damage. It must not be merely an incidental cause that would not in itself, according to the normal course of things, cause the damage.

483. Dr Abbas's evidence on this issue, which I accept and was not seriously challenged, was that if a defendant's fault was considered as an effective cause, and other causes including the injured party's fault, are mere incidental ones, then issues of plurality of causes under Articles 233 and 234 KCC did not have any relevance. Commentators had confirmed that the effective cause is the familiar cause that usually leads, according to the normal course of things, to the harm. Therefore, even if there are multiple causes that led to the harm, the effective cause that actually led to the harm is what matters.

484. To illustrate the point, Dr Abbas cited a Kuwaiti Court of Cassation case (Appeal No. 87 of JY 2005) in which a person was subject to an assault by another person in an examination hall. The claimant sought compensation from the state on the basis that the security department with responsibility for the exam hall had acted negligently in failing to secure it, and this resulted in the claimant being assaulted. That claim against the state failed. The court said:

> "… causation in tortious liability can be based only on the effective and operative cause of the harm, rather than the mere incidental cause that cannot normally lead to the occurrence of this harm, even if it had contributed incidentally to the occurrence of the harm by accompanying the effective cause. It was proven that the appellant's injury was caused by the assault of …. Thus, this assault, not any other cause, is the effective and

> operative cause of the injury. Regarding the alleged negligence of the security department of the examination hall and the allegation that this negligence facilitated the entrance of the abovementioned assaulter into the hall and facilitated his assault, even if this were true, it is a mere incidental cause that cannot normally cause the injury according to its nature. Thus, there is no causal link…."

485. Dr Abbas also referred to an example given by commentators: a car owner is negligent and fails to secure his car, which is then stolen by a thief who drives at high speed injuring a pedestrian. In such a case, the effective cause is the act of the thief, and the car owner's failure to secure his car is only an incidental cause.

486. However, EFG cited a decision of the Egyptian Court of Cassation that could be said to have reached a different result. In Egyptian Court of Cassation Appeal No. 647 of JY 45, a prisoner was beaten to death by a gang of his adversaries. A claim was brought against the police, on the basis that they had negligently enabled the attack to be carried out, by sending the victim from the police station to the Public Prosecution's premises on foot, shackled, and without any armed escort to protect him against the anticipated revenge attack by those seeking retribution. The Court of Cassation overturned a judgment dismissing the claim against the police, on the basis that the attackers' fault overshadowed the negligence of the police. The court said:

> "the causal link in tortious liability is established upon the fault that produces the damage, and the productive fault is that whose contribution is necessary to cause the damage and is not merely the result of another's fault. Where multiple faults coexist, they are deemed independent yet interrelated causes, with liability apportioned among them collectively; the greater fault does not bear it exclusively.
>
> This Court has consistently held that, regardless of the gravity of the more serious fault, it does not absorb the other independent faults unless it is, by itself, sufficient to produce the result in the precise manner it occurred, without any need for contribution from the other faults.
>
> Accordingly, since the rules of tortious liability do not distinguish between intentional and unintentional fault, and as the challenged judgment concluded that the second Respondent in Cassation bore no liability for his unintentional fault based solely on the general proposition that intentional fault necessarily absorbs unintentional fault, and consequently dismissed the Claimant in Cassation's claim against the second and third Respondents in Cassation without examining the extent of the second Respondent's fault in causing the damage forming the subject of the action, the judgment — in addition to its error in the application of the law — is defective for insufficiency of reasoning, thereby necessitating its quashing."

487. The case was cited by EFG, in the context of contributory fault, rather than in the context of incidental versus effective causes. It does not appear that an argument was advanced by the police that their conduct was only an incidental cause; in other words that (applying the test identified by the experts) their conduct would not in itself, according to the normal course of things, cause the damage. I do not therefore regard it as a strong authority which contradicts the exam hall case, or casts doubt on the test for incidental causes which the experts have identified.

488. In relation to contributory fault, EFG cited the case in support of the proposition that intentional fault of the tortfeasor does not necessarily overshadow the fault of another party, including where the fault is that of the victim. However, the case in fact involved the fault of two tortfeasors (the attackers and the police), rather than an allegation that the victim had been at fault. The court's statement that the rules of tortious liability do not distinguish between intentional and unintentional fault should be seen in that context: i.e. that a tortfeasor can be at fault and therefore liable whether his conduct is intentional or unintentional.

Contributory fault: the issue

489. The central dispute between EFG and PIFSS concerned the significance of intentional fault in a contest not between tortfeasors (as in the Egyptian police case above), but between a tortfeasor and victim. PIFSS alleged, based on Dr Abbas's evidence, that the relevant provision is Article 234 KCC, and that a vital question which needed to be considered – prior to any application of Article 234 – was whether the fault of the defendant or victim had "absorbed" the fault of the other. They submitted that if there was such absorption, either the defendant alone would be liable (if its fault absorbed that of the victim), or the victim's fault (if it absorbed the defendant's fault) would be treated as breaking the chain of causation under Article 233. PIFSS submitted, as its central argument, that the criteria for outweighing/absorbing fault are (a) where one fault is much more serious than the other, which will only be the case where a fault is intentional or where consent has been given; or (b) where one fault is the result of the other (serious) fault. PIFSS contends that the former category is applicable here, in the context of all the Defendants. Their conduct and fault (whether in bribing or money laundering) was intentional, and this absorbed and outweighed any negligence on the part of PIFSS in relation to its governance procedures.

490. EFG acknowledged that the relevant provision was Article 234 KCC. They accepted that many of the Egyptian commentaries identify intentional wrongdoing as conduct which, when it comes to causation, will usually overshadow or absorb negligent wrongdoing. But they submitted that there was no hard-edged rule, and in that context relied upon answers of Dr Abbas in cross-examination. EFG relied upon the general proposition, which can be seen in the Egyptian police case, that tortious liability does not distinguish between intentional and non-intentional torts. In summary, they said that the words of Article 234 were clear. Fairly construed, they admit no carve out for defendants charged with intentional wrongdoing. Causal contribution was a factual matter assessed by the trial court alone, and there were no fixed rules for apportioning liability.

Contributory fault - discussion

491. In his first report, Dr Abbas identified three possibilities in relation to Articles 233 and 234. First, where the fault of the defendant totally outweighs the fault of the injured party, the defendant shall pay full compensation. Secondly, where the fault of the injured party fully outweighs the fault of the defendant, no compensation is awarded: this is the case addressed in Article 233. Third, where both faults contribute, there is an apportionment. He said that the fault of the defendant would fully outweigh the fault of the injured party, leading to full liability on the part of the defendant, in the event that the fault of the defendant is intentional, and the fault of the injured party is not.

492. The concept of one fault outweighing another is reflected in commentaries on which Dr Abbas relied, as well as in the Explanatory Memorandum which states that Article 234

> "addresses the situation in which the fault of the injured party contributes, together with the fault of the defendant, to the occurrence of the damage, each to a legally significant degree and without one wholly absorbing the other …"

493. Similarly, Article 294 KCC refers to the case where the fault of a creditor concurs with that of the debtor in causing the damage, "without either fault wholly absorbing the other". I did not consider that there was any material difference between the concepts of "absorbing" and "outweighing" or "overshadowing".

494. The question is therefore when one party's intentional fault will absorb or overshadow or outweigh the other party's negligent fault. There is, in my view, a substantial body of Egyptian commentary which supports the proposition that intentional fault will indeed absorb or overshadow unintentional fault. The consequence will be that a tortfeasor who has committed an intentional tort will not be able to rely upon his victim's negligence as contributory fault for the purposes of apportionment. This is clearly the view of Al-Sanhoury *Al Wassit in Explaining the Civil Code, Part 1, Book 2* (2021) paragraphs 593 – 594:

> "[593] **One of the faults outweighs the other fault:** If one of the two faults outweighs the other, the fault that has been outweighed has no effect. So, if the defendant's fault is the one that outweighed the injured party's fault, the defendant is fully liable and their liability is not reduced by the injured party's fault. However, if the injured party's fault is the one that
>
> outweighed the defendant's fault, then the defendant is released from liability due to the absence of the causal connection.
>
> One wrong overcomes the other wrong in two situations. First, if one of the wrongs is much more serious than the other, and second, if one of the wrongs is the result of the other wrong.
>
> [594] **First situation – One wrong is much more serious than the other.** No matter how much more serious one wrong is than the other, the more serious one only outweighs the other wrong in two situations. First, if one of the wrongs is intentional and, second, if one of the wrongs was a harm to which the injured

> party consented, which only occurs in a few certain circumstances.
>
> In the first situation, one party, whether the defendant or the injured party, intentionally wanted to cause the harm while the other commits an unintentional wrong. If the defendant is the party who intentionally wanted to cause the harm, he bears liability and must provide full compensation for the harm he caused even if the injured party's unintentional wrong was involved in causing the harm. This is because the defendant's intention to cause the harm is the only thing we consider as the cause of the harm. As for the injured party's wrong, it was only a circumstance that the defendant took advantage of in order to achieve his intention of causing the harm."

495. It was suggested in cross-examination that Al-Sanhoury's approach – which is adopted by a large number of other commentators – may be explicable because of the wording of the Egyptian Code, which is not exactly the same as Article 234. This was not a point that had previously been ventilated in the written expert evidence, which had referred to Egyptian and Kuwaiti materials in this context without suggesting a material difference. In any event, I do not consider that it is a significant point, bearing in mind that Al-Sanhoury's approach is also taken in a recent work of Ramadan Jamal Kamel, President of the Kuwaiti Court of Appeal: *The Kuwaiti Civil Code in Light of Jurisprudence and Court Decisions and the Kuwaiti Court of Cassation up to 2022*, para 574:

> "**One of the errors [overwhelming] the other error**
>
> 574. If both the defendant's error and the other party's error had a part in causing the damage, and one of the errors outweighs the other error, only the outweighing error is considered the cause of the injury. If the defendant's error outweighs the other party's error, the defendant alone is fully liable, and the error of the other party has no impact on liability. But, if the other party's error overwhelms the defendant's error, only the other party is fully liable, and the defendant's error has no impact on this liability.
>
> <u>One of the errors outweighs the other if the error was intentional</u> or if it is what caused the commission of the other error." (My emphasis)

496. There is therefore a substantial body of commentary which supports Dr Abbas's approach, and Ms Bingham accepted that there was no case-law which indicated that Article 234 would be applicable in a situation where there was intentional wrongdoing by a tortfeasor but where the victim was unintentionally also at fault. Ms Bingham referred to one Egyptian writer, Al Bakry, in support of the argument that apportionment would be available even in that situation. However, it is by no means clear that Al Bakry is addressing the situation where the victim, rather than another third party tortfeasor, is at fault. In any event, the weight of authority supports Dr Abbas on this point.

497. Furthermore, EFG did not, and indeed could not realistically, invite me to prefer the views of their own expert to those of Dr Abbas. Dr Youssef's evidence on this issue was particularly unimpressive. Despite Al-Sanhoury and other authorities, he steadfastly maintained the view that intentionality on the part of the tortfeasor was irrelevant in the context of Article 234. He had a very complicated and unpersuasive explanation of what Al-Sanhoury was saying, to the effect that the only question was causality. But that is not what Al-Sanhoury is saying.

498. EFG submitted, and it was put to Dr Abbas in cross-examination, that there was no difference in principle between a situation where (i) there are two tortfeasors, one of whom acts intentionally and the other does not; and (ii) an intentional tortfeasor and a victim who is at fault. It was common ground that, in the former situation, each tortfeasor would be liable to the victim, but there would be apportionment as between them. Dr Abbas thought that there was a difference in principle. It was the injured party who was the one that was harmed, and he was entitled to full compensation from all who contributed to his harm.

499. I agree that there is a distinction, not least because in the second situation the victim is not a tortfeasor. But even if there were some force in Ms Bingham's argument that there was no distinction, this is not the way that Al-Sanhoury and a large number of other commentators assess the position under Kuwaiti law.

500. Ms Bingham also referred to answers that Dr Abbas had given to her in cross-examination on Day 84. He was asked whether it was his position that even if the victim's conduct had contributed to the harm, there would be no deduction if the defendant's conduct was intentional. His response was that this was the position taken by the commentators:

> "and that's my position, except if you give me a very extreme example that this would not happen. But, generally, if the tort is intentional, as capable of itself to do the harm that happened, then even if the injured party by mistake did something negligently, this will not be –– will not overshadow the other party."

501. Dr Abbas was there contemplating the possibility of a "very extreme example" where there might be a deduction, and Ms Bingham argued that this showed that apportionment all depended on the facts. However, it is clear from the cross-examination on this issue, taken as a whole, that Dr Abbas considered that the views expressed by Al-Sanhoury and others, as to the effect of an intentional tort, represented the rule as a matter of Kuwaiti law. The commentaries upon which he relied said nothing about the rule not applying in very extreme cases, and I consider that the Kuwaiti Court of Cassation would adopt the rule as identified in the commentaries. I do not think that Dr Abbas's tentative acknowledgment of the possibility of a very extreme case, in which the rule might not be applied, affects my conclusion as to what Kuwaiti law is, in relation to this issue. In my view, the weight of evidence is that Kuwaiti law is as stated by Al-Sanhoury and Ramadan Jamal Kamel, and as stated by Dr Abbas in his reports.

502. Furthermore, even if there were an exception for very extreme cases, I do not think that the facts of the present case would fall into that category. It is true that there were

significant governance failures at PIFSS. However, those were not deliberate in any real sense, and indeed at one stage the management consultants Mercer effectively gave PIFSS a clean bill of health. As against those governance failures, however, one would be setting the intentional conduct of various defendants in corruption and money-laundering. This would be a situation in which Al-Sanhoury's explanation for the relevant rule (that intentional conduct by a tortfeasor overwhelms non-intentional fault by the victim) would apply with particular force. That explanation is that the injured party's wrong is only a circumstance that the defendant took advantage of in order to achieve his intention of causing the harm.

503. Ms Bingham also relied upon an answer given by Dr Abbas at the end of this line of cross-examination. He said, consistent with his evidence as a whole, that "if the tort is capable of itself to cause the whole injury, it's intentional, then there is no case for the negligence of the injured party. That's what I can see. If you give me an example, a clear example, where this is not the case, that's a different thing." It was then put to him that "it all depends on the facts". His response was that: "I just said the rule … we need to see the facts of course". Dr Abbas was there simply saying that he had identified the relevant rule, and that the application of that rule would depend on the facts. He was not agreeing that there was some different rule, or that the only thing that mattered in the context of Article 234 was an assessment of the facts.

B17: Mitigation

504. The applicable provision of the KCC dealing with mitigation is Article 230 (see B4 above).

505. The experts were agreed that there is a duty to mitigate under Kuwaiti law, and that the duty to mitigate aims at avoiding the occurrence of harm and its aggravation. The injured person who suffered harm cannot therefore just allow the situation to deteriorate. If it does not make a reasonable effort to mitigate its harm, it would not be entitled to compensation for the harm that it could have avoided by undertaking reasonable efforts.

506. The issue of mitigation was principally addressed in the written expert evidence in the context of the issue of credit for recoveries made by the State of Kuwait from Mr Al Rajaan. That issue, which I address elsewhere, appeared to recede in importance as the trial progressed, with Dr Abbas being asked only one question which was directed towards the overall issue, and with no cross-examination on his written evidence on the very large number of points raised by the Defendants and their experts.

507. Furthermore, it appears that the Defendants collectively may have somewhat lost interest in a mitigation argument, as distinct from the Article 234 contributory fault argument that I have just addressed. Thus, mitigation was not one of the topics addressed in the Defendants' oral openings on Kuwaiti law. Nor was there any, or any material, cross-examination of Dr Abbas on views that he had expressed on the topic of mitigation.

508. Thus, in the JEM (where the experts were really focusing on mitigation in the context of recoveries) Dr Abbas had said that the duty to mitigate relates to damage that could have been avoided, and that it could not be equated with damage that has already occurred. The duty to mitigate aims at preventing the escalation of damage or the

increase in the extent of damage that will affect the injured party. Thus, if the damage in question, for which compensation is claimed, has already occurred, there would be no room to mitigate that damage, because it had already occurred.

509. There was some suggestion in Dr Youssef's written evidence that mitigation might be relevant in the context of an argument that PIFSS should have done more to prevent Mr Al Rajaan taking bribes. However, this was not a point that was developed by any of the Defendants in their written or oral closings, save for brief references by the Mombelli Defendants and D1/D2. The Mombelli Defendants' argument appeared in substance to equate mitigation and contributory fault.

510. Given that Kuwaiti law as to contributory fault, discussed in Section B16 above, precludes an intentional tortfeasor from relying upon the non-intentional fault of the victim, it would be strange if the contrary result could be achieved by advancing the same argument under the heading of mitigation. The reality is that any argument on mitigation, concerning PIFSS doing more to prevent Mr Al Rajaan taking bribes, is in substance an argument based on contributory fault.

511. Against this background, I do not consider that it is necessary to discuss Kuwaiti law principles of mitigation at any further length.

B18: Consent

512. Article 39 KPC deals with consent to criminal conduct. Arguments as to consent played no significant part in the closings of the Defendants. This is, no doubt, partly because there is no serious factual basis for contending that PIFSS consented to the crimes which form the basis of its claims in the present proceedings, and also because the experts agreed that consent has no effect on any crime which harms the public interest. Dr Abbas was not cross-examined on his written evidence that, in light of the nature of the wrongdoing alleged, consent was not legally possible in any event. It is therefore not necessary to discuss this aspect of Kuwaiti law further.

B19: Harm and remedies

513. Harm is one of the 3 pillars of tort liability in Article 227. Kuwaiti law on the topic, and the related issue of remedies is addressed in the context of the KPPL in Section B 11 above.

SECTION C: HIGH-LEVEL FACTUAL NARRATIVE

514. This section contains a high-level factual narrative, so that the more detailed events described in later sections can be seen in the context of the overall picture.

515. PIFSS was established in 1976.

516. Mr Al Rajaan was appointed as Director General of PIFSS in 1984. His appointment was thereafter renewed at regular 4- or 5-year intervals, starting in 1988. He ceased to be Director General on 14 January 2014.

517. In 1985, Wafra Investment Advisory Group, Inc was established as a US-based subsidiary of PIFSS. It was later renamed Wafra Inc (and is hereafter referred to as "Wafra").

518. In 1987, an Internal Investment Committee ("IIC") was established at PIFSS, and it first met in May 1987.

519. In 1987, PIFSS invested in the Europhenix fund managed by Paribas Asset Management a division of the French bank Banque Paribas ("Paribas"). Mr Nasrallah was working for that company at that time, and he had established that fund. He had also known Mr Al Rajaan for many years by that stage.

520. In 1988 and 1989, PIFSS made investments in three companies, known as Omni, IFIL and Hartmann & Braun. The latter was an investment made via an investment fund run by Hentsch and Cie. I am not directly concerned with these investments, or any commissions paid on those investments, in these proceedings. They feature in the chronology because they were a focus of allegations of corruption which were made against Mr Al Rajaan in Kuwait in the 2000s. They also featured heavily in the complaint which Dr Fahed Al Rashed made to the Kuwaiti public prosecutor in September 2008. It was this complaint, and the public prosecutor's investigation which, eventually, led to the MLA request made by the state of Kuwait to Switzerland in June 2011. This in turn led to the disclosure of Banque Mirabaud and other documents which revealed Mr Al Rajaan's corruption.

521. In April 1994, Mr Nasrallah retired from Paribas, and later that year formed his company Phoenix International Consultant SARL ("Phoenix"). In 1995, Mr Nasrallah opened accounts at Banque Scandinave en Suisse, which later became Banque Edouard Constant, and subsequently EFG Private Bank AG. 1995 thus marked the start of the scheme described by PIFSS in these proceedings as the "EFG Scheme".

522. Another scheme which started in 1995 was the "Mombelli Scheme", with PIFSS making its first investment in 1995 in the Interfin Global Fund.

523. Two other schemes have their origins in the mid-1990s. In November 1996, PIFSS made its first investment in a Man product: a product known as IP 220. The arrangements for the Mirabaud Scheme were put in place in late 1996/early 1997.

524. In 1997/98, various other companies (additional to Phoenix) associated with aspects of the EFG Scheme opened accounts with (the predecessor of) EFG. These included Phoenix International Brokerage SAL, Wynacre Ltd, and Ozak Services Inc. Much later

on, in 2007, Golgen Property SA, another company associated with aspects of the EFG Scheme, was formed and opened an account with EFG.

525. In September 1998, PIFSS became a client of Banque Pictet. In March 1999, an agreement was signed between Banque Pictet and Phoenix (Mr Nasrallah's company), pursuant to which payments were to be made to Phoenix in connection with the introduction of PIFSS' investments. This agreement features in the "Pictet Scheme". Mr Amouzegar was then a senior individual at Pictet, and he remained there until late 2003.

526. Two other schemes were comparatively late starters in 2003: the UBP Scheme and the Aerium Scheme. The investment in the first Aerium fund was made in late 2003, at around the time that Mr Amouzegar left Pictet to work independently. VP Bank appears to be another late entrant on the scene, with Mr Al Rajaan opening an account with that bank only in 2006.

527. In the meantime, various questions had started to be raised in Kuwait about aspects of PIFSS' investments. Between 1997 and 2000, the Kuwait State Audit Bureau looked at various times into loss-making options trading carried out by PIFSS. And in 2001, questions began to be raised by Kuwaiti MPs about investments in Omni, IFIL, Fiat and Hentsch and Cie, including as to Mr Al Rajaan's involvement in those investments and whether commissions had been paid to him or others. Questions about both aspects (options trading and commissions) continued to be raised over the years.

528. In 2005, Dr Fahed Al Rashed was appointed to PIFSS' Board of Directors. He was a diligent board member, and there emerged a hostile relationship between him and Mr Al Rajaan.

529. In 2007, following further questions about possible secret commissions connected in particular with Omni, IFIL, Hartmann & Braun and Hentsch and Cie, proposals were sought and obtained from two leading accounting firms, Ernst and Young and KPMG, to investigate the matters raised. KPMG was subsequently selected by a 3-man committee to be engaged for that purpose. However, Mr Al Rajaan succeeded in watering down, and effectively neutering, KPMG's terms of reference so that, for example, they contained no reference to the allegations which had been raised in the Kuwaiti Parliament.

530. In 2008, Dr Al Rashed continued to raise his concerns regarding the KPMG investigation. At a board meeting in April 2008, Mr Al Rajaan said that:

> "If there are any documents that Dr Fahad [Al Rashed] believes are correct and reliable, that he has analysed and is convinced by them, he can submit them directly to the public prosecutor under the Law on the Protection of Public Funds."

531. The position at this time, in summary, was that Mr Al Rajaan had denied all allegations of corruption, and there was no documentary evidence which supported an allegation of Mr Al Rajaan's receipt of commissions in connection with the various companies and funds (Omni etc) which were the subject of allegations.

532. In September 2008, Dr Al Rashed's term of membership on PIFSS' board of directors expired, and was not renewed. In the same month, Dr Al Rashed did file a criminal complaint with the Kuwaiti public prosecutor. This did not refer to any of the schemes with which I am concerned, and which only came to light subsequently. Rather, it was focused on payments in relation to Omni and other companies, as well as options trading carried out between 1995 and 1997.

533. Throughout the period in the 2000s when questions were being raised as to possible corruption, Mr Al Rajaan continued to receive secret commissions generated by PIFSS' investments, opening further bank accounts for that purpose. For example, in 2008, Mr Al Rajaan opened an account in the name of the Thaxton Foundation ("Thaxton"), which he had established and beneficially owned.

534. Between 2008 and 2010, Mr Al Rajaan received around USD 10 million paid from an account at Banque Mirabaud which Ely Michel Ruimy had opened. This features in the context of the Aerium Scheme.

535. Following Dr Al Rashed's criminal complaint in 2008, the Kuwaiti public prosecutor then carried out investigations, including receiving statements from witnesses. In June 2011, the MLA request was made to Switzerland.

536. On 1 May 2012, Swiss domestic criminal investigations into Mr Al Rajaan's conduct began. This was shortly after Banque Mirabaud had sent a report of suspicion of money laundering to the Office for the Reporting of Money Laundering in respect of several persons, including Mr El Ghazzi. On 2 May 2012, a Swiss freezing order was imposed by the Swiss Federal Prosecutor over accounts associated with Mr Al Rajaan held at Banque Mirabaud, and documents were requested from that bank.

537. Mr Al Rajaan became aware of this order within a few days of its being made, and it led to a flurry of activity in Switzerland. In summary, Mr Al Rajaan took steps to close various Swiss bank accounts with which he was associated. As May 2012 progressed, Mr Nasrallah and his son Nadim did the same, as discussed in detail in Section J below. In broad summary, the involvement of the Swiss authorities in May 2012 led to the termination of arrangements whereby money was routed to Mr Al Rajaan's entities via Swiss bank accounts. Around USD 129.2 million, which was in various Swiss bank accounts, was paid away to other accounts: USD 69 million from Banque Pictet; USD 31 million from EFG; USD 3.9 million from UBP; and USD 25.3 million from VP Bank.

538. At around the same time (in May 2012), Mr Al Rajaan's association with Deltec in the Bahamas began, with funds being transferred to the account at Deltec of a company, Fyne Properties Ltd ("Fyne"), of which Mr Al Rajaan became the beneficial owner. Around a year later, some pertinent questions were asked by Deltec's compliance officer about the timing of the opening of the Fyne account, and the transfer of some USD 34 million to that account in June 2012. As discussed in Section L below, this led to the creation of the Pensée Foundation, and thus the "Pensée Scheme" relied upon by PIFSS.

539. On 21 May 2012, Mr Al Shamali – the Minister of Finance and Chairman of PIFSS – was informed by letter from the Kuwaiti Minister of Justice that the investigations initiated by Dr Al Rashed's complaint had raised substantial suspicions that Mr Al

Rajaan had committed criminal acts. At this point in time, however, there had been no charges against Mr Al Rajaan, and the letter from the Minister of Justice indicated that he had not been interviewed.

540. This led, on the same day, to Mr Al Shamali suspending Mr Al Rajaan from his role as Director General. Not long afterwards, also in May 2012, Mr Al Shamali resigned as Minister of Finance. At the same time, there were reports in the Kuwaiti media that Mr Al Rajaan's Swiss accounts had been frozen.

541. Under Kuwaiti law, the maximum period for which Mr Al Rajaan could be suspended was 6 months. In November 2012, he was reinstated.

542. In January 2014, however, Mr Al Rajaan's term as Director General of PIFSS came to an end, and was not renewed. He was replaced by Mr Hamad Al Humaidhi.

543. In October 2014, a fact-finding committee was formed in order to look into investments made by PIFSS with an Indian firm known as Brahma. This is further discussed in Section E below. In the context of the committee's work, Mr Al Rajaan came to Kuwait and was interviewed. The evidence indicates that he did not return to Kuwait after that interview. By no later than January 2015, Mr Al Rajaan and Ms Al Wazzan were living at their property in Knightsbridge, London.

544. On 13 January 2015, the first of two tranches of documents was provided from Switzerland to the Kuwaiti Judicial Authority pursuant to the June 2011 MLA request.

545. In February 2015, the state of Kuwait made an MLA request to England in respect of the criminal investigation by the public prosecutor initiated following Dr Al Rashed's complaint. This led to a criminal restraint order being made by HHJ Clarke in the Crown Court sitting at Blackfriars in London on 5 March 2015 in respect of the bank accounts of Mr Al Rajaan and Ms Al Wazzan in England, thereby freezing those accounts. There was an unsuccessful appeal against that decision to the (English) Court of Appeal Criminal Division. The leading, and very perceptive, judgment of the Court of Appeal was given on 23 March 2016 by Sharp LJ, later the President of the King's Bench Division: see [2016] EWCA Crim 96. As discussed in Section F below, the evidence of Mr Al Rajaan – relied upon in support of his case that the criminal restraint order should be discharged – can now clearly be seen to have been untruthful and dishonest. Fortunately, Sharp LJ and the other members of the Court of Appeal were not taken in by his lies.

546. In March 2015, PIFSS told the Swiss Federal Prosecutor that it wished to join the Swiss criminal proceedings as a victim/plaintiff. As discussed in the context of both Kuwaiti law and Swiss law, jurisdictions which apply civil law (as opposed to common law jurisdictions such as England) have procedures whereby a victim can join criminal proceedings as a plaintiff/victim. After an initial rejection, and opposition from Mr Al Rajaan and others, in May 2016 the Swiss Office of the Attorney General accepted PIFSS as a complainant in the Swiss criminal proceedings. Access to the prosecutor's file was granted subject to certain conditions. That decision was then subject to appeals, which were not resolved until July 2017.

547. In April 2015, PIFSS sent letters to various fund managers seeking certain confirmations, including that no payments had been made to officials or employees of

PIFSS. In May 2015, PIFSS' subsidiary, Wafra, began a review of PIFSS' real estate investments. This was known as Project Renaissance. These events, including later correspondence in 2015, feature prominently in the Aerium Scheme.

548. In April 2015, a further tranche of documents was supplied by Switzerland to the Kuwaiti Judicial Authority pursuant to the June 2011 MLA request.

549. In September 2015, the leading accounting firm EY produced a detailed report on PIFSS' governance. The aim of the report was to assist PIFSS to develop a robust corporate governance framework. The report identified significant gaps in PIFSS' internal governance systems, and made recommendations for reforms.

550. In December 2015, Wafra began work on "Project Milestone", which was a review of the investments made by PIFSS' Direct Investment Department. The majority of the investments, on which secret commissions were paid to Mr Al Rajaan, were dealt with in that department.

551. In January 2017, the Swiss Federal Criminal Court (Appellate Division) decided the appeal of Mr Al Rajaan and Ms Al Wazzan against the Office of the Attorney General's decision to permit PIFSS to have access to the Swiss prosecutor's file. PIFSS was granted access, but could only take notes, not copies. That decision was upheld by the Swiss Federal Court in a decision of July 2017.

552. In February 2019, PIFSS issued a Claim Form in England (CL-2019-000118) in respect of the Pictet Scheme. The defendants were Mr Al Rajaan, Ms Al Wazzan, Mr Nasrallah, Banque Pictet and a number of individuals and entities associated with that bank.

553. In March 2019, PIFSS issued a further Claim Form in England (CL-2019-000151) pleading the Mirabaud, Man, EFG, UBP and Mombelli Schemes.

554. On 27 June 2019, Mr Al Rajaan and Ms Al Wazzan were convicted in Kuwaiti criminal proceedings by judgment of the Plenary Court of the Criminal Circuit (10) of Kuwait. The court's judgment is lengthy, running to 81 pages in translation. It was given in absentia, with the court being satisfied that both defendants had been duly served. The case related to the Mirabaud Scheme, and did not address any of the other schemes with which I am concerned. Both defendants were sentenced to imprisonment for life with labour. They were also ordered to return the amount of USD 82,200,000, which was the amount which (the court concluded) Mr Al Rajaan had obtained for himself, his wife, and his company Galmir Advisory. Mr Al Rajaan was also ordered to pay a fine of twice that amount: USD 164,400,000. Ms Al Wazzan was ordered to pay a slightly smaller fine: USD 147,600,000. The court also ordered that:

> "The property, companies, stocks and movable property used in the commission of the crime of money laundering in the fashion detailed in the reasoning of the judgment on the supplementary penalty imposed on the two defendants shall be confiscated."

555. In October 2019, following a contested hearing and earlier undertakings provided by Mr Al Rajaan, I granted a WFO against Mr Al Rajaan: [2019] EWHC 2886 (Comm).

556. In December 2020, PIFSS issued a further Claim Form (CL-2020-000866) in respect of the Pensée Scheme and the Aerium Scheme.

557. In October 2021, PIFSS issued a further Claim Form (CL-2021-000597) in respect of the s 423 claim.

558. In September 2022, Mr Al Rajaan died.

559. The present trial began (following a period of 2 weeks for pre-reading) on 17 March 2025, and concluded on 12 March 2026.

SECTION D: PRIVATE INTERNATIONAL LAW – APPLICABLE LAW OF THE TORTS

D1: The shape of the arguments

560. PIFSS' case is that Kuwaiti law is the applicable law of the torts of all of the Defendants in the case. Kuwaiti law is accepted as the applicable law by the Man Defendants, Mr Massad, the Aerium Defendants, and Pensée. It has not been accepted by Mr Guerin or Mr El Ghazzi, although neither has participated in the trial or addressed any submissions to the issue. The application of Kuwaiti law was positively disputed by EFG, the Mombelli Defendants, D1/D2 and Mr Nasrallah. They all contend for Swiss law.

561. The most extensive argument at trial on the issue of applicable law, on the Defendants' side, was advanced by Ms Bingham KC on behalf of EFG. Mr Brown KC also addressed the issue, albeit more briefly, in his written and oral closing submissions. The closing written argument of D1/D2 did not advance any substantive argument as to why Swiss law applied, and it will be apparent from my discussion below that the point is unarguable. The closing written argument of Mr Nasrallah, and the oral submissions made on his behalf, similarly did not advance any substantive argument as to why Swiss law applied – albeit there was a reference back to Mr Nasrallah's written opening, where the issue was briefly addressed.

562. In Section A above, I have explained why it remains relevant to consider the arguments of Ms Bingham, advanced on behalf of EFG, notwithstanding the settlement that has been reached. One reason is that her arguments also apply to the question: what law is applicable to Mr Guerin's alleged torts, in circumstances where the claim against Mr Guerin has not settled? Another reason is that the resolution of the issue as to the applicable law of EFG's alleged torts will assist in resolving the question of the applicable law of the torts of other defendants who seek to rely on Swiss law, particularly D1/D2 and Mr Nasrallah who advanced little or nothing by way of substantive argument on the point.

563. A further reason is that resolution of the legal issues as to applicable law as between PIFSS and EFG, which were fully argued, raises issues of law of some potential general interest. This is a relevant factor when considering whether there is a public interest which, in a balancing exercise, warrants publication of a judgment notwithstanding a settlement: see *Jabbar* at [42] – [43]. A further relevant factor in the present case is that there are outstanding claims within these proceedings against VP Bank and Mr Ghittini, and questions of applicable law may arise in the context of those claims. Given these factors, and those identified in the previous paragraph, I consider it appropriate to address EFG's arguments on applicable law in full, notwithstanding the settlement. This does not require me to make any findings for or against EFG's witnesses, or to address the facts in any detail. I do not consider that there are any factors which weigh materially against the public interest in publication of the judgment on applicable law, by reference to the arguments advanced by EFG.

564. Given the shape of the arguments advanced in closing, I shall deal first with the issue of applicable law as between PIFSS and Mr Guerin, by reference to the arguments which were advanced by Ms Bingham on behalf of EFG. I shall therefore refer in this Section D to EFG's arguments, also bearing in mind that Mr Guerin did not participate in the trial and did not therefore make any submissions as to applicable law. I shall then address the position of the Mombelli Defendants, and then briefly the position of the other Defendants.

565. It was common ground (or beyond serious dispute) that: the conflicts rules of the law of the forum (i.e. English law) determine the applicable law; this required reference to the English conflicts rules relating to tort; and that there are 3 separate regimes that need to be considered. The three regimes and periods are, in broad terms: (i) prior to 1 May 1996, the common law rules – often referred to as "double actionability"; (ii) subsequent to 1 May 1996, and prior to 10 January 2009, the statutory rules set out in the Private International Law (Miscellaneous Provisions) Act 1995 ("PILA"); (iii) subsequent to 11 January 2009, the Rome II Regulation (Regulation (EC) 864/2007) ("Rome II").

566. The most extensive argument was addressed to the PILA period, followed by the Rome II period. This reflected the fact that the financial consequences of the claims against the various Defendants flow most heavily from torts allegedly committed during the PILA period, with less being attributable to the Rome II period and comparatively little attributable to the common law double actionability period. Although not chronological I will start (as did Ms Bingham in her oral submissions) with the PILA period, before moving to Rome II and then double actionability.

D2: PILA – general principles

567. The leading case on the selection of applicable law under PILA is *VTB Capital plc v Nutritek International Corpn and others* [2013] UKSC 5 ("*VTB*") where the principles identified by the Court of Appeal in the same case were endorsed. Newey J's judgment in *Constantin Medien v Bernard Ecclestone and others* [2014] EWHC 387 (Ch) ("*Ecclestone*") contains a very helpful summary of the important points established by *VTB*, and the following 11 paragraphs are drawn from his judgment.

568. Section 11 of the 1995 Act states that the general rule is that the applicable law is the law of the country in which the events constituting the tort in question occur. Section 11(2) explains that, where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being:

> "(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
>
> (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and

> (c) in any other case, the law of the country in which the most significant element or elements of those events occurred."

569. Section 12 of the 1995 Act provides for the general rule laid down by section 11 to be displaced in certain circumstances. It states:

> "(1) If it appears, in all the circumstances, from a comparison of—
>
> (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
>
> (b) the significance of any factors connecting the tort or delict
>
> with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
>
> (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

570. In *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808, [2012] 2 BCLC 437, the Court of Appeal set out a number of propositions which it considered to apply in relation to section 11 of the 1995 Act. It said (in paragraph [148]):

> "(1) Section 11 of the 1995 Act sets out the general rule for ascertaining the applicable law of a tort. It adopts a geographical approach to that question.
>
> (2) Where the elements of the events constituting the tort or delict occur in different countries and the cause of action relates to something other than personal injury or damage to property, then s 11(2)(c) requires an analysis of all the elements of the events constituting the tort in question.
>
> (3) In carrying out that exercise, it is the English law constituents of the tort that matter.

> (4) The analysis requires examination of the 'intrinsic nature' of the elements of the events constituting the tort. It does not, at this stage, involve an examination of the nature or closeness of any tie between the element and the country where that element was involved or took place. This latter exercise is only relevant if s 12 is invoked.
>
> (5) Once the different elements of the events and the country in which they occurred have been identified, the court has to make a 'value judgment' regarding the 'significance' of each of those 'elements'. 'Significance' means the significance of the element in relation to the tort in question, rather than trying to judge which involves the most elaborate factual investigation.
>
> (6) Under s 11(2)(c) (ie in relation to causes of action other than in respect of personal injury or damage to property where the elements of the events constituting the tort occur in different countries), the applicable law of the tort in question will be that of the country where the significance of one element or several elements of events outweighs or outweigh the significance of any element or elements found in any other country."

571. These propositions were accepted as correct when the case reached the Supreme Court: see *VTB Capital plc v Nutritek International Corpn* [2013] UKSC 5, [2013] 2 AC 337, at paragraph [199] (Lord Clarke).

572. As regards section 12 of the 1995 Act, the Court of Appeal said this in the *VTB* case (at paragraph [149]):

> "If s 12 has to be considered, we derive the following additional propositions from our consideration of the statute and the cases.
>
> (7) The exercise to be conducted under s 12 is carried out after the court has determined the significance of the factors which connect a tort or delict to the country whose law would therefore be the applicable law under the general rule.
>
> (8) At this stage there has to be a comparison between the significance of those factors with the significance of any factors connecting the tort or delict with any other country. The question is whether, on that comparison, it is 'substantially more appropriate' for the applicable law to be the law of the other country so as to displace the applicable law as determined under the 'general rule'.

> (9) The factors which may be taken into account as connecting a tort or delict with a country other than that determined as being the country of the applicable law under the general rule are potentially much wider than the 'elements of the events constituting the tort' in s 11. They can include factors relating to the parties' connections with another country, the connections with another country of any of the events which constitute the tort or delict in question or the connection with another country of any of the circumstances or consequences of those events which constitute the tort or delict.
>
> (10) In particular the factors can include: (a) a pre-existing relationship of the parties, whether contractual or otherwise; (b) any applicable law expressly or impliedly chosen by the parties to apply to that relationship, and (c) whether the pre-existing relationship is connected with the events which constitute the relevant tort or delict."

573. In the Supreme Court, Lord Clarke, having quoted this passage from the Court of Appeal's judgment, went on to refer to an "illuminating" discussion in *Dicey, Morris and Collins on The Conflict of Laws*, 15th ed. He said (in paragraph [204]):

> "The editors say that the application of the displacement rule in section 12 first requires, taking account of all the circumstances, a comparison of the significance of the factors which connect the *tort* with the country the law of which would be applicable under the general rule … and the significance of any factors connecting the *tort* with another country…. The word *tort* is italicised in the text in *Dicey*."

574. Lord Clarke continued (at paragraph [205]):

> "The editors note that the general rule has been displaced on very few occasions. They further observe that, although section 12 applies in all cases to which section 11 applies, it would seem that the case for displacement is likely to be most difficult to establish in the case of section 11(2)(c) because the application of that provision itself requires the court to identify the country in which the most significant element or elements of the tort are located. Importantly they stress the use of the word 'substantially', which they describe as the key word, and conclude that the general rule should not be dislodged easily, lest it be emasculated. The party seeking to displace the law which applies under section 11 must show a clear preponderance of factors declared relevant

> by section 12(2) which point to the law of the other country."

575. Although Lord Clarke was one of two dissenting judges in the *VTB* case, the majority judgments did not take issue with the paragraphs from his judgment quoted above, and they were adopted by the Court of Appeal in *Fiona Trust & Holding Corporation v Skarga* [2013] EWCA Civ 275 at [11]-[13].

576. The *VTB* case involved allegations that an English subsidiary of a Russian bank had been induced by fraudulent misrepresentations made by a company incorporated in the British Virgin Islands ("BVI") (but owned and operated from Russia) to lend money to fund the purchase from a Russian company of Russian businesses and companies. The claimant alleged both deceit and unlawful means conspiracy.

577. All the members of the Supreme Court concluded that the deceit claim was governed by English law. Lord Mance, for example, said (at paragraph [7]):

> "Both the alleged misrepresentations on which VTB relies originated in Russia, but they reached VTB in London (very probably via VTB Moscow), and were relied upon by VTB there when it gave formal agreement to the facility agreement and interest rate swap there. Further, VTB sustained its loss by disbursing money in and from London, although, as will appear, it was in fact covered by VTB Moscow against any loss which it might otherwise make on the loan. In these circumstances, I address the question of the appropriate forum on the basis that, contrary to the conclusion of the judge and Court of Appeal, the law governing the alleged tort of deceit is English rather than Russian law."

Lord Clarke said (at paragraph [201]):

> "The events constituting the tort of deceit are indeed the making of the misrepresentations which were known to be untrue, reliance on the misrepresentations and the loss sustained as a result. All those occurred in England. The misrepresentations were made to VTB in England, VTB relied upon them in England and incurred its loss in England. In my opinion that is plain. It is true in the case of both misrepresentations: even though the dairy representations were initially made in Russia, the critical representations which induced VTB to enter into the facility agreement were made in London and relied upon in London."

578. The Supreme Court was somewhat less clear about which system of law applied to the conspiracy claim. Lord Mance said (at paragraph [7]) that he was "content to proceed on the basis that the conspiracy was, like the deceit, governed by English law", and Lord Neuberger adopted a similar approach (see paragraph

[100]). In contrast, Lord Clarke, with whom Lord Reed expressed agreement, decided in terms that English law applied to the conspiracy claim. He concluded (at paragraph [210]) that "under the general rule in section 11(2)(c) of the 1995 Act the applicable law was English law and … the general rule was not displaced in favour of Russian law by section 12". A little earlier Lord Clarke said:

> "As to the alleged conspiracy, the essence of the case is that the representations were made as part of a common design. To my mind, it does not matter for the purposes of section 11(2)(c) because the essence of VTB's case remains based upon the representations made to it in London and relied upon in London by VTB entering into the facility agreement, together with the loss sustained in London."

579. EFG accepted that the *VTB* principles were applicable, whilst reserving the right to contend before a higher court that a different approach might be required in a case where the contest as to applicable law did not involve English law as a possible choice – as is the case here where the relevant contest is as between Swiss and Kuwaiti law. Such an argument, if advanced, will focus on whether – when English law is not a possible choice of applicable law – it is appropriate to look at the English law constituents of the tort, when carrying out the analysis of all of the elements of the events constituting the tort in question. However, subject to that reservation, it was common ground that I should approach the PILA analysis by considering the English law ingredients of the relevant torts: see proposition [3] in *VTB*.

580. PIFSS contended that there were three torts whose constituents needed to be considered when carrying out the section 11(2)(c) exercise: conspiracy to injure by unlawful means; dishonest assistance, and bribery. I agree that these torts are relevant to the analysis as far as concerns both EFG/Mr Guerin and the Mombelli Defendants, and indeed to the other Defendants as well; save that dishonest assistance is not applicable to D1/D2, because Mr Al Rajaan was the primary wrongdoer who breached fiduciary duties, and was not a person who assisted.

581. EFG submitted that where a number of English law torts were potentially in play as a result of the facts of the case, the section 11(2)(c) analysis should involve the court selecting the most appropriate English law tort responsive to the facts in issue. One reason for doing this is that the court's analysis was designed to produce only one law applicable to the events on which the claim is based. They submitted that, in the present case, the court's focus should be on dishonest assistance rather than the other two torts.

582. I agree with PIFSS that this is not the right approach. If the facts of the case give rise to a number of different torts under English law, then it is appropriate to run the analysis for all of the potentially relevant torts. This is apparent from *VTB*, where both the Court of Appeal and the Supreme Court looked separately at the torts of deceit and conspiracy, and contemplated that there might be different applicable laws for each tort. Whilst that was a case where the claimant was

contending for English law as the applicable substantive law, and had pleaded both of these torts, I do not think that the position is any different in a PILA case where no English law causes of action are in issue.

583. I also consider that it would be difficult to identify, in a case where there are a number of potentially relevant torts in play, which one should be selected as the most applicable. The essential reason why a number of different torts are in play is that whilst there is an overall common set of events giving rise to the claim, the relevant events constituting the tort in question will be different; because the torts have different constituents. For example, an important constituent of a claim for unlawful means conspiracy is the occurrence of loss. In *Ecclestone*, Newey J considered that, in the context of conspiracy, the occurrence of loss was an element on which to focus, because of the need to focus on the "intrinsic nature" of the elements of the events constituting the relevant tort. By contrast, dishonest assistance does not (at least as clearly) have the occurrence of loss as a constituent element, and hence it can be said that this aspect of the facts does not require focus in the context of the PILA analysis. It follows that a search for the most appropriate responsive tort is likely to elude a sensible answer, and that is the position in the present case. Here, for example, there is no reason to select dishonest assistance ahead of conspiracy, or indeed bribery, as the most responsive tort.

584. One potential result of running the analysis for different torts is the possibility that it will result in different applicable laws, and a question might then arise as to whether a claimant can select that which is most helpful to its case. Mr Ritchie reserved the right to say that this is the consequence, but he accepted that in practice, this scenario is unlikely to arise. As Mr Ritchie said, a court may well strive to avoid a result whereby there are different applicable laws. The identification of significance, and the weighing of significance (see principles (5) and (6) in *VTB*) is likely to assist in avoiding that result.

585. *VTB* and the earlier case-law refer to the need to examine the 'intrinsic nature' of the elements of the events constituting the tort. This expression derives from the judgment of Mance LJ in *Morin v Bonhams* [2003] EWCA Civ 1802, para [21], where it was used by way of contrast to the nature or closeness of any tie between those elements and the country where they occurred. Some further explanation of the concept is contained in paragraph [155] of the judgment of the Court of Appeal in *VTB*:

> "This must mean that the judge has to decide what is or are the most significant element or elements in relation to the tort of deceit (or conspiracy) on the facts of this case. In relation to the deceit, is it the making of the fraudulent misrepresentation that is the most significant element, or its transmission to VTB or its reception by VTB or is it the damage resulting? In relation to the conspiracy, what is the significance of the plot being hatched in Russia?"

586. In *VTB* itself, the Court of Appeal considered (at [157]) that "on the facts of this case", the most important elements of the facts constituting the tort of deceit

were "by their "intrinsic nature", the reliance on the misrepresentations by VTB and the loss suffered by VTB". In the Supreme Court, Lord Clarke agreed that this was so on the facts of the case, and he also considered that the same applied to the conspiracy case. The judgment of the Court of Appeal indicates that, in assessing the significance of the elements of a particular tort, it is necessary to consider the facts of the particular case. *Dicey* makes the same point at para 35-148, where the authors go on to identify the various steps in considering the facts of the case: (i) identification of the elements of the tort; (ii) location of those events; (iii) the making of a "value judgment as to the overall of these events", leading to the conclusion that the most important events, by their "intrinsic nature" were, in the *VTB* case, reliance and loss; and (iv) "combining the data gathered at the first three stages to reach a conclusion as to where the balance lies in the overall "significance" of the events occurring in each country."

587. I therefore agree with Ms Bingham that the authorities do not dictate that a particular element of a tort will in all cases (when that same tort is in issue) be regarded as significant, let alone that it will outweigh other significant elements in the balancing exercise. Decisions made in other cases may provide a degree of guidance, but inevitably the fact patterns – and potentially the weighing of significance – will differ.

588. There was some discussion as to the role that the pleadings should play in this exercise, albeit ultimately not a significant dispute. In some cases, such as *VTB* itself, a decision on applicable law may be relevant to issues arising prior to trial, for example, on a challenge to jurisdiction. In those circumstances, a court will likely proceed on the basis that the facts alleged in the claimant's case are assumed to be correct. Here, however, I am considering applicable law in a case where the facts (as I find them) are known, and it is therefore the actual facts which must guide the decision on applicable law. The important actual facts, for the purpose of the PILA exercise, are where particular events took place: i.e. the process, as described in *Dicey*, of identifying the elements of the relevant tort, and then locating those events.

589. For that purpose, it is not necessary or appropriate for the court's consideration of applicable law to be affected by its ultimate view as to whether a particular cause of action has been established on the merits. Thus, in *Ecclestone*, Newey J considered that loss was a significant element that needed to be considered and which affected his decision that the applicable law was German law (see [326] and [327]). However, his ultimate decision was that no loss had been suffered. Like *Ecclestone*, Andrew Smith J's decision in *Fiona Trust and Holding Corporation and others v Yuri Privalov and others* [2010] EWHC 3199 (Comm) involved a decision on applicable law in a judgment after trial. The result of the trial was that most of the claims failed because (see the decision of the Court of Appeal in *Fiona Trust v Skarga and others* [2013] EWCA Civ 275 at para [4]) the judge held that there was no conspiracy or relevant dishonesty, and no relevant causation or loss. Nevertheless, Andrew Smith J addressed applicable law by reference to the location of the facts, as established at trial, relating to the events relied upon by the claimants in support of their causes of action.

590. In their written closing, EFG submitted that it was appropriate, when considering the English law constituents of the tort, to consider whether or not the claim could succeed, as a matter of English law, in relation to the particular tort advanced. EFG's focus was on PIFSS' case that Mr Guerin was party, as a joint tortfeasor, to the bribery torts of Mr Al Rajaan and Mr Nasrallah. The background to EFG's argument is that the legal basis for PIFSS' case, applying English law principles, is accessory liability for the tort of another as explained by the Supreme Court in *Fish & Fish Ltd v Sea Shepherd* [2015] UKSC 10. In that case, Lord Toulson (part of the majority) said at para [21]:

> "To establish accessory liability in tort it is not enough to show that D did acts which facilitated P's commission of the tort. D will be jointly liable with P if they combined to do or secure the doing of acts which constituted a tort. This requires proof of two elements. D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort. I do not consider it necessary or desirable to gloss the principle further."

591. Lord Sumption, in the minority in that case, expressed the principle in similar terms at [37] and [38]:

> "that the defendant will be liable as a joint tortfeasor if (i) he has assisted the commission of the tort by another person, (ii) pursuant to a common design with that person, (iii) to do an act which is, or turns out to be, tortious.
>
> …
>
> It is now well established that if these requirements are satisfied the accessory's liability is not for the assistance. He is liable for the tortious act of the primary actor, because by reason of the assistance the law treats him as party to it…"

592. The argument advanced by EFG, based on the decision of the House of Lords in *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [2000] 1 AC 486, was that Mr Guerin could not, applying English law principles, be a joint tortfeasor in relation to the bribery torts of Mr Al Rajaan and Mr Nasrallah. However, in her oral closing, Ms Bingham made it clear that this was not a relevant point in relation to the PILA period, and that the argument was only advanced in relation to the double actionability period.

593. Ms Bingham was correct not to pursue this line of argument in relation to the PILA period. As both Mr Ritchie and Ms Bingham ultimately agreed, the PILA analysis is not concerned with intricate rules of English law as to how, for example, joint tortfeasorship works in the context of bribery claims, or indeed with what might be described as detailed rules of English law (such as accessory

liability) beyond identification of the intrinsic nature of the elements of the events constituting the tort. Thus, as Ms Bingham said (and Mr Ritchie agreed), the PILA analysis should be carried out in a "broad internationalist spirit".

594. Another area of common ground was that the PILA analysis had to be carried out on a defendant by defendant basis. Thus, the position between each pair of opponents needs to be considered separately.

D3: The English law constituents of the torts relied upon

595. The relevant English law torts that are relevant to the PILA analysis are (i) unlawful means conspiracy; (ii) bribery; and (iii) dishonest assistance. There was not much dispute as to the English law elements of those torts.

Conspiracy

596. The elements of unlawful means conspiracy are summarised in *Kuwait Oil Tanker Co v Al Bader* [2000] 2 All ER (Comm) 271, at para [108]:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

Bribery

597. In *Hopcraft v Close Brothers Ltd* [2025] UKSC 33, the Supreme Court adopted the following definition of a bribe (a definition originally given by Slade LJ in an earlier case):

> "For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent."

598. Under English law, the bribe is recoverable from the briber or bribee, and it is not necessary for the claimant to prove loss in the amount of the bribe. Although it might be said that loss is an element of the tort, albeit that loss is presumed, I shall proceed on the basis that loss is not one of the constituents of the tort.

599. Potentially relevant to the examination of the 'intrinsic nature' of the elements of the events constituting the tort, and the assessment of significance, are aspects of the approach of the courts to bribery. PIFSS submitted that in evaluating the

most significant elements of the bribery, it was important to recognise that the essential "evil" of bribery is: (i) the generation of the conflict of interest, and (ii) the secrecy attending the payment, namely the non-disclosure to the principal. On the latter point, Chitty LJ said in *Shipway v Broadwood* [1899] 1 QB 369, 373 that "the real evil is not the payment of money, but the secrecy attending it". On the former point, in *Novoship (UK) Limited v Mikhaylyuk* [2012] EWHC 3586 (Comm) at [106]-[110], Christopher Clarke J said:

> "[106] The essential character of a bribe is, thus, that it is a secret payment or inducement that gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal.
>
> …
>
> [107] The payments (or other benefits) do not have to be made directly to the fiduciary. Bribes may be paid to third parties close to the agent, such as family members or discretionary trusts, or simply to those whom the agent wishes to benefit. The test is whether the payment (or other benefit) puts the fiduciary in a real (as opposed to a fanciful) position of potential conflict between interest and duty.
>
> [108] The recipient of the bribe (or the person at whose order the bribe is paid) must be someone with a role in the decision-making process in relation to the transaction in question e.g. as agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal…
>
> [109] The payment need not be linked to a particular transaction … It is sufficient if the agent is tainted by the bribery at the time of the transaction between the payer of the bribe and payee's principal. If that is so, the agent's conflict of interest means that the principal has been deprived by the other party to the transaction of the disinterested advice of his agent and is entitled to a further opportunity to consider whether it is in his interests to affirm it.
>
> …
>
> [110] The underlying rationale for the strict approach taken by the cases is that a principal is entitled to be confident that an agent will act wholly in his interests."

600. Although these statements, as to the essential evil of bribery, have been made in English cases, I do not think that they represent a narrow parochial English law view as to why bribery is prohibited around the world, as reflected in the conventions which I discuss in Section S below. The particular remedies for

bribery, and the legal rules applicable to those remedies, are those given by English law. But the rationale, that a principal is entitled to be confident that an agent will act wholly in his interests, and indeed that corruption is to be deplored, is in my view universal and can be applied to PILA in accordance with the broad internationalist spirit to which I have referred.

Dishonest assistance

601. The ingredients of liability in dishonest assistance are set out in the judgment of Cockerill J in *FM Capital Partners Ltd v Marino and others* [2018] EWHC 1768 (Comm), paras 82 – 83. In summary:

i) There must be a trust or fiduciary obligation owed by the trustee/fiduciary to the claimant.

ii) Because dishonest assistance is a type of accessory liability, there must be a breach by the trustee/fiduciary.

iii) The breach by the trustee/fiduciary need not be dishonest; because liability of the third party is fault-based, what matters is the nature of their fault, not that of the trustee/fiduciary.

iv) The third party must have assisted in, induced, or procured the breach. It is necessary to show that the relevant assistance played more than a minimal role in the breach being carried out.

v) The third party must have acted dishonestly in providing the assistance.

602. The defendant's liability is not limited to the loss caused by their assistance, but extends to the loss resulting from the relevant breaches of fiduciary duty. An account of profits is in principle available against defendants held liable for dishonest assistance, regardless of whether a corresponding loss has been suffered by the claimant. Accordingly, unlike unlawful means conspiracy, it cannot be said that loss is an element of this tort.

603. Ms Bingham submitted, referring to the language used by Lord Nicholls in *Royal Brunei Airlines v Tan* [1995] UKPC 4, that the existence of a fiduciary obligation, and breach of that obligation, are not constituents of the tort of dishonest assistance. Rather they are pre-requisites of the tort. I do not consider that this attempt to draw a distinction between a pre-requisite and a constituent is sound. The use of the word "pre-requisite" in that case does not mean that it is not a constituent of the tort. It means that it is an essential element which needs to be established if the accessory is to be liable. It is, therefore, a constituent of the tort.

D4: Applicable law of the alleged torts of EFG/Mr Guerin under PILA: the parties' arguments

PIFSS' argument

604. PIFSS' primary claim against EFG was based on (i) Mr Al Rajaan's breaches of duty to PIFSS; (ii) an agreement by Mr Guerin to assist (and subsequent

assistance) in those breaches; and (iii) with the intention to cause and in fact causing harm to PIFSS in Kuwait. They submitted that there were three compelling features which pointed to Kuwaiti law as the law which was applicable under PILA. First, the central elements of the bribery and breach of duty which were being assisted took place in Kuwait. Second, the nature of the claim against EFG/Mr Guerin was based on the allegation of a combination between Mr Al Rajaan, Mr Nasrallah and Mr Guerin, the objects of which (corruption of Mr Al Rajaan, impact on the decision-making process and damage) played out and were experienced in Kuwait. Third, there was damage to PIFSS in the form of the sums which were concealed from it, routed into multiple accounts held worldwide often by companies in offshore jurisdictions, and not remitted to it in Kuwait.

605. The application of the test under PILA results in the application of Kuwaiti law, without detailed consideration of where the acts of assistance of Mr Guerin were carried out. Even if one focused only on those acts, there was not by any means a uniform picture of acts undertaken solely in Switzerland.

606. PIFSS said that both Mr Nasrallah and Mr Guerin regularly liaised with Mr Al Rajaan in Kuwait, and certainly Mr Nasrallah would often visit him there. Mr Nasrallah's acts of assistance were rendered principally in Lebanon where he was resident, including through his company Phoenix, but also regularly in France where he had property, from time to time in Switzerland and through offshore companies: Ozak and Wynacre in the BVI (the latter being managed from Jersey); Golgen in Panama; and Antheya in Liechtenstein. (These entities are described in detail in Section J below.) All of these entities were intended to move the focus of economic activity offshore. Similarly, although Mr Guerin principally rendered assistance in Switzerland, assistance was likely also rendered in Lebanon and elsewhere. He also assisted in establishing and/or liaising with the various offshore entities, as well as Thaxton in Liechtenstein and acted as a director of Antheya. Moreover, both Mr Nasrallah and Mr Guerin were involved in liaising with counterparties all over the world, and making payments to accounts in the Bahamas, Singapore, Lebanon and elsewhere.

607. Any attempt to focus primarily on where any particular act of assistance took place, as distinct from focusing on the centre of gravity of the overall wrongdoing which they were assisting, and its effect, would be impracticable and lead to inevitable and unnecessary fragmentation of applicable laws. Those acts were in one way or another targeted at the corruption of Mr Al Rajaan, causing harm to PIFSS in Kuwait: that is the essence of the torts relied upon. The fundamental essence of the scheme was abuse of Mr Al Rajaan's position in Kuwait, damage thereby caused, and facilitation of that scheme.

608. In his oral argument, Mr Ritchie identified, as a key area of dispute between the parties, the question of what was meant by saying that governing law had to be assessed separately for each defendant. That did not mean, he submitted, looking only at the conduct of each defendant in isolation. Thus, when looking at the conduct defendant by defendant, that may in a particular case extend to looking at the conduct of others as well. That was because of the nature of the wrong alleged. Here, PIFSS' case was based upon concerted wrongdoing from the outset, and consideration of Mr Guerin's conduct required attention to be

paid to the conduct of those with whom he was acting in concert. It was necessary to look at the intrinsic nature of the wrongdoing alleged. Here, the court should conclude that there was a conspiracy to procure bribes for Mr Al Rajaan and to corrupt thereby the investment process in Kuwait. That was part of Mr Guerin's role: he had his given role and there were bankers fulfilling that role in other places, because there needed to be tame bankers in order to enable the schemes to operate.

609. PIFSS also submitted that if the tort of Mr Guerin were subject to Kuwaiti law, then Kuwaiti law would also determine whether EFG was vicariously liable for Mr Guerin's Kuwaiti law torts.

EFG's argument

610. Ms Bingham in her submissions emphasised, as an overarching principle, the need to focus on the particular defendant's tort. She said that the essence of the claim against EFG ("essence" being the word used by Lord Clarke in *VTB*) was money-laundering. That was why EFG had been brought into the court room. It was because EFG permitted a flow of tainted funds into and out of the gateway accounts, giving rise to an accessory or secondary liability. All of the banking assistance provided by Mr Guerin and EFG was provided in Switzerland. EFG was a Swiss bank, incorporated in Switzerland and licensed and regulated there. Mr Guerin, and another more senior individual at EFG alleged to have become involved in money laundering, were living and working there.

611. In emphasising the need to look at EFG's tort, there were times when her submissions tended to suggest that this should be done independently of Mr Guerin's conduct, essentially by looking at the conduct of those who were in more senior positions and supervising Mr Guerin. Thus, she referred at times to the court needing to consider issues of negligence on the part of the bank. At the end of her submission on PILA, however, she accepted (correctly in my view) the need to look at Mr Guerin's alleged torts. As she said: "Mr Guerin's torts don't give us a problem. Everything that he did was in Switzerland", and EFG was not seeking to "drive a wedge between ourselves and him". Her principal concern was to avoid a result whereby the applicable law of the torts of Mr Al Rajaan and Mr Nasrallah would dictate the applicable law of Mr Guerin's torts.

612. Ms Bingham submitted that the key tort to consider was dishonest assistance. Building on her argument that the fiduciary's breach was not an element of the tort, but rather a prerequisite, she submitted (albeit somewhat faintly) that all of the relevant constituents of that tort were Swiss, and therefore it was not necessary to conduct the significance evaluation under PILA. However, her main point was that the most significant acts, in the context of that tort, were Mr Guerin's acts of assistance, and these were in Switzerland.

613. In relation to conspiracy, Ms Bingham submitted that any agreement (if there was any agreement made in around 1995, as the Claimant alleged) was likely, on the evidence, to have been made in Switzerland. That was where Mr Guerin was based, where Mr Al Rajaan had an apartment and a residence permit from as far back as 1990, and where Mr Nasrallah came from time to time. She

submitted that the acts in pursuance of the conspiracy were "insofar as EFG was concerned" in Switzerland. She submitted that loss was "tough", but if the focus was on EFG's banking assistance in Switzerland, it was at least strongly arguable that the loss was suffered in Switzerland; because that was where the opportunity to confiscate the funds in question was lost. That was the evil of money-laundering: it made detection and confiscation harder.

614. In relation to bribery, Ms Bingham acknowledged the intuitive appeal, as against the briber or bribe recipient, of looking at the place of the compromised agency: here, Kuwait. However, there was no reason why an accessory had to be sucked into that vortex. It was necessary to focus on the claim against EFG, and section 11 of PILA invited attention to the most significant elements of the tort vis a vis the particular defendant. In relation to the accessory to bribery, the focus should be on what the accessory is doing and where. Mr Guerin was not accused of paying bribes to Mr Al Rajaan: Mr Guerin was accused of money laundering.

615. In drawing the threads together on the PILA period, she said that the key events said to fix EFG with liability, via the alleged torts of Mr Guerin, were all events that took place in Switzerland. The events were the banking assistance that EFG rendered exclusively in Switzerland. Those were the events identified in the Particulars of Claim, and seen in the evidence. The complaint was that EFG laundered funds in and from Switzerland. Whichever English tort was looked at, the most significant elements were in Switzerland. On dishonest assistance: the assistance was in Switzerland. On conspiracy, the acts in pursuance of the conspiracy on the part of EFG were all in Switzerland. The essence of the case against EFG was that they laundered in Switzerland. The overall assessment required by section 11 (2) (c) therefore resulted in the application of Swiss law.

D5: Applicable law of the alleged torts of EFG/Mr Guerin under PILA: discussion

General

616. I start with a number of general points, before considering where the analysis on each of the relevant torts leads.

617. First, I consider that the relevant "events", when considering the elements of the events constituting the tort, do involve looking at the conduct of Mr Guerin, and that it is therefore not appropriate to seek to draw a distinction (or "drive a wedge") between him and "the bank". The torts alleged are in all cases intentional torts, in which Mr Guerin is alleged to have participated; whether as a conspirator, an assistant to bribery, or a dishonest assistant to Mr Al Rajaan's breach of fiduciary duty. I address below the extent to which it is relevant, in assessing Mr Guerin's conduct, also to look at the conduct of Mr Al Rajaan and Mr Nasrallah.

618. Secondly, in a case where vicarious liability is relied upon, I consider that the position is correctly stated in *Dicey* paragraph 35-141: that the law applicable under sections 11 and 12 will govern various issues, including "whether the claimant has a cause of action against the defendant, including (for example)

questions of vicarious liability". If Kuwaiti law governs Mr Guerin's torts, then Kuwaiti law would also govern the question of EFG's vicarious liability for those torts. This position has been made express under Rome II: see Article 15(g). But I do not consider that there is any real doubt as to the position under PILA. Indeed, other defendants in the case (for example the Man Defendants) accepted that since Kuwaiti law was the applicable law of their alleged tort, Kuwaiti law would also govern issues of vicarious liability. It is theoretically possible that a party could rely upon section 12 of PILA in order to displace that consequence, with the result that different laws govern the liability of the actual wrongdoer and the party vicariously liable. However, this is very theoretical, and there is no case which has gone down this route.

619. Thirdly, the parties' arguments ultimately recognised that, in practical terms in this case, section 12 of PILA (the displacement provision) has no role to play. Once the section 11(2)(c) exercise has been performed, including the weighing exercise, there is no real room for displacement to operate. Displacement is far more likely to operate in a personal injury case, as shown by the recent Supreme Court authority: *Zubaydah v Foreign, Commonwealth and Development Office and others* [2023] UKSC 50.

Conspiracy

620. The first element in the tort of conspiracy is a combination. Here, the combination relied upon involves 3 individuals: Mr Guerin, Mr Nasrallah and Mr Al Rajaan. I deal in Section J, when considering the facts of the case, with the question of when this combination was formed – there being no substantial dispute (and in any event the evidence clearly showing) that, at least from 2008, Mr Guerin knew that he was involved in assisting in the laundering of the proceeds of secret commissions for the benefit of Mr Al Rajaan. As discussed in Section J below, I conclude that Mr Guerin knew this at the outset of the laundering assistance that was provided, and that he did not switch from being an honest to a dishonest banker midway through his dealings with Mr Nasrallah and Mr Al Rajaan.

621. PILA requires me to consider where this combination was formed. Unsurprisingly, in circumstances where a combination of this kind is concealed, and involves a number of people who live in different places, the evidence does not enable me to reach a firm conclusion as to exactly what happened. I have not heard evidence from two of those involved (Mr Guerin and Mr Al Rajaan), and Mr Nasrallah is not a reliable witness for reasons explained elsewhere. Bearing in mind my findings in Section J below, I think it likely that the combination emerged from discussions between the three men which took place in different places over a period of time. I doubt that it can be traced to a single meeting or meetings in any one location. It was a multi-jurisdictional combination.

622. It involved people who, before it started to be put into effect, knew each other well. Thus, Mr Nasrallah and Mr Al Rajaan had become close during Mr Nasrallah's days at Paribas in France. There would no doubt have been discussion between them about what would happen if or when Mr Nasrallah left Paribas and started his own business (in the event Phoenix International

Consultant SARL). Those discussions might have taken place in a number of locations, for example Paris, Kuwait, Beirut or Switzerland. Mr Nasrallah's evidence was that, after he left Paribas, he was meeting Mr Al Rajaan in Kuwait, Beirut and Switzerland, and he denied the suggestion in Ms Bingham's cross-examination that he was meeting mostly in Switzerland. The two men would also have been speaking on the phone, and would likely have been in different countries when doing so.

623. Similarly, Mr Guerin knew Mr Nasrallah well. The EFG internal documents authored by Mr Guerin (discussed further in Section J) indicate that Mr Guerin had known both Mr Nasrallah and Mr Al Rajaan for some time prior to 1995. As evidenced by call transcripts which exist for the period after 2008, they were in very regular contact by phone. It is likely that Mr Nasrallah and Mr Guerin would have been speaking on the phone at the time, in the mid-1990s, when Mr Nasrallah was leaving Paribas and Mr Guerin was joining the bank (then called Banque Scandinave en Suisse) which ultimately merged into EFG.

624. Since Mr Guerin spent most of his working life in Switzerland, I think that it is more likely than not that he was in Switzerland when he was brought into the combination. However, even that is not particularly clear. Mr Guerin has not given evidence, and it may be that he was meeting with Mr Nasrallah elsewhere. In relation to the period after 1995, there is evidence of Mr Guerin attending at least one meeting in Paris with Nadim Nasrallah and attending the latter's wedding in the Lebanon in 1997.

625. Ultimately, however, as in *Ecclestone* – where the judge was able to make a clear finding as to where the corrupt agreement was made – I do not think that the place where the combination was formed is of real significance in the weighing exercise.

626. I next consider the unlawful action taken pursuant to the combination. This gives rise to a question which, as it seems to me, lies at the root of much of the dispute between the parties as to the assessment required under PILA section 11. That issue involves how to view or characterise the events with which I am concerned. In essence, PIFSS says that the "scheme" with which I am concerned cannot be atomised into separate compartments of "bribery" on the one hand, and "laundering" on the other hand. This was, as Mr Ritchie put it, a scheme to pay and receive bribes, in which secrecy was essential and laundering necessary to enable the bribes to reach their intended recipient, Mr Al Rajaan. Banking facilities, provided by tame bankers, were therefore essential to enable the scheme to work: the sums of money were so large that they could not simply be paid over in cash, or carried around in suitcases. EFG, on the other hand, says that since I must consider the case on a defendant by defendant basis, I must focus only on the acts which Mr Guerin/EFG carried out: i.e. the laundering of the monies.

627. I agree with PIFSS that it is not appropriate to "atomise" the overall conspiracy in the way proposed by EFG. It is usually the case with conspiracies that different people will have different roles, working together to bring about the desired result. As Mr Ritchie submitted, the fact that Mr Guerin's role in the scheme may have been in respect of opening accounts, running accounts,

receiving payments, and moving them on, all of which can be categorised as laundering, does not "make him any the less party to a bribery scheme than the get-away driver who agrees to take the body away at the end of a murder". The latter would be party to a murder scheme, not simply a driving scheme.

628. This means that the action taken pursuant to the combination does not simply take place downstream in Switzerland. Critical action, indeed the action which lies at the heart of the scheme, is taken in Kuwait by Mr Al Rajaan when he commits PIFSS, without any disclosure, to investment contracts pursuant to which the bribes are going to flow.

629. Each side sought, at a comparatively late stage in the argument, to derive support from the Supreme Court decision in *Zubaydah v FCDO*. The case involved facts far removed from the present case: the rendition of the claimant and torture by the CIA in 6 different countries, and an allegation that the UK had provided assistance in that regard. It was a personal injury case, and section 11 (2) (c) PILA was not engaged. The injuries had been sustained in 6 countries (not including the UK), and therefore section 11 (2) (a) was applicable, subject to possible displacement under section 12. The question was whether the law of those countries should be displaced by English law. The Court of Appeal (reversing the judge) had decided that there should be displacement, and the Supreme Court upheld that decision whilst rejecting an important aspect of the Court of Appeal's reasoning. The Supreme Court accepted (at [80]) a submission by counsel for the FCDO (who was arguing against displacement) that the Court of Appeal had wrongly conflated "the conduct of the UK services with the torts". The Supreme Court explained this in paragraph [81]:

> "In the unusual circumstances of this case, the elements of the torts alleged are not limited to the conduct of the UK services. In the case of misfeasance in public office, conspiracy, and negligence, the alleged torts are actionable only on proof of damage. While trespass to the person and false imprisonment are actionable without proof of damage, they are alleged here to have been committed jointly with the CIA. It can be seen from the pleaded case for the claimant, see paras 38—46 above, that in the circumstances of this case each alleged tort to which the exercise under section 12 relates is not co-extensive with the conduct of the UK services and that, by focusing solely on the conduct of the UK services which is said to have taken place in England and Wales, the Court of Appeal followed an unduly narrow approach. By equating the tort with the wrongful conduct allegedly committed by the UK services, the Court of Appeal's analysis failed to take account of the conduct of the US authorities which led to the infliction of injury and damage."

630. Mr Ritchie submitted that the case showed that where there were allegations of joint conduct or combined conduct, or an allegation of vicarious liability, it was appropriate and necessary for the court, in the weighing exercise, to look at all

the conduct that is alleged. It was, he said, a clear illustration of the fallacy of EFG's submission which was along the lines of: "You must look only at what we do and where we do it". I agree. In my view, much of EFG's submission did seek, wrongly in my view, to equate EFG/Mr Guerin's tort simply with EFG/Mr Guerin's alleged conduct. In doing so, their argument sought to disregard very significant aspects of the conduct that occurred in Kuwait, or at least to minimise it or relegate it as only being relevant to a section 12 analysis.

631. PIFSS also relied upon the fact that Switzerland was not the only place where acts pursuant to the combination took place. Mr Nasrallah lived in Beirut, and was giving instructions to Mr Guerin from there. According to one internal document prepared by Mr Guerin, they were speaking to each other every day. Some actions were taken in other jurisdictions, as identified by PIFSS in their arguments summarised above. I therefore agree that it cannot be said that the acts of assistance were exclusively in Switzerland. However, in the weighing exercise below, I do not think that this is a particularly important point, because it is clear that the main acts of assistance were indeed carried out by Mr Guerin in Switzerland.

632. The third constituent of the tort, identified by Ms Bingham in her submissions, is the requirement to show loss caused by the unlawful acts taken pursuant to the combination. PIFSS' case on loss is that it has suffered harm in one of two ways; in summary, either because of Mr Al Rajaan's failure to disclose and account in Kuwait for the benefits that he (and his associates) received as a result of his exploitation of his position, or because the transactions concluded were disadvantageous in terms of failing to secure for PIFSS discounts or rebates that an honest actor would have secured. Either way, that loss is suffered in Kuwait.

633. I agree with PIFSS. I do not accept Ms Bingham's submission that it is difficult to identify the place where the loss would be suffered by PIFSS. It is in my view very obviously in Kuwait, where PIFSS' subscriptions to the funds were signed and sent to the fund managers, and where instructions were then given (reflected in a number of "deal tickets" that I was shown during the trial) for payment out of monies for those subscriptions. It is also the place where Mr Al Rajaan failed to disclose to PIFSS the commissions that he was receiving, and to account for them.

634. I also consider it unrealistic and artificial to say, as EFG contended, that PIFSS' loss is only suffered downstream, as and when monies in Swiss bank accounts are paid away and are no longer subject to possible confiscation measures. That argument disregards what happened prior to that time. Furthermore, the argument is essentially based on the atomisation approach, which I have rejected; i.e. that the laundering aspect of the conspiracy should be viewed as entirely separate from the overall conspiracy.

635. Having identified the elements of events and the country in which they occurred, I turn to the value judgment which I must make regarding the "significance" of each of those elements; bearing in mind that significance means the significance of the element in relation to the tort in question, rather than trying to judge which involves the most elaborate factual investigation.

636. In my view, the most significant elements of the events constituting the conspiracy tort, on the facts of the present case, are (i) the acts carried out pursuant to the conspiracy in Kuwait, where Mr Al Rajaan's actions were influenced by corruption and where the investment contracts were made, and (ii) the loss that was suffered in Kuwait. In my view, these elements are more significant than the Swiss elements. I agree with PIFSS that, in the weighing exercise, the centre of gravity of the overall wrongdoing, which Mr Guerin was allegedly assisting, is very significant. That centre of gravity was Kuwait. As Mr Ritchie put it: the fundamental essence of the scheme was abuse of Mr Al Rajaan's position in Kuwait, damage thereby caused, and facilitation of that scheme.

637. My value judgment, as set out in the previous paragraph, is consistent with the approach taken, albeit on different facts, by Newey J in *Ecclestone*, when the judge was considering an unlawful means conspiracy case based on bribery. Newey J attached most significance to Germany where the corrupt individual who received a bribe was influenced to act, where he did then act, and where any loss would have been suffered: see [327]. I think that those factors are, in the present case, also of most significance.

638. My conclusion is also consistent with the approach of Lord Clarke and Lord Reed in *VTB*, where the most significant elements in the context of a conspiracy to deceive were the place where the claimant acted, and the place where the loss was suffered.

639. Contrary to Ms Bingham's submission, I do not accept that the decision in *Zubaydah* provides any assistance to EFG's argument that the elements of the tort which occurred in Switzerland outweighed those in Kuwait. It is true that both the Court of Appeal and the Supreme Court considered that Lane J at first instance had erred, in his section 12 analysis, by minimising the role and conduct of the UK in relation to the tort alleged. However, for reasons already given, the present case is not one where a section 12 analysis will be appropriate, once the section 11(2)(c) analysis has been carried out. It is the latter on which I am engaged, and I take into account the acts of assistance in Switzerland which are relied upon by EFG. However, I do not consider that, when they are put in the balance, they outweigh the significance of the elements found in Kuwait.

Bribery

640. EFG rightly acknowledged, in their oral submissions, that the court would intuitively look, in a bribery case, at the place of the compromised agency: the place where the corrupt individual acted so as to influence the conclusion of transactions from which he was secretly to benefit. Kuwait was the place where Mr Al Rajaan, and those who were paying bribes to him (here Mr Nasrallah) failed to disclose to PIFSS what was happening, and it was the place where the conclusion of the investment contracts was affected by the conflict of interest arising from the corruption. I consider it to be most unlikely, on the facts of a bribery case, that the court would – in carrying out the weighing exercise – look beyond the place where the corrupt individual was acting in this way. EFG did not suggest, for example, that it was of any significance in the weighing exercise to look at the place where a briber, such as Mr Nasrallah, was working. These

considerations are also relevant to the position of the Mombelli Defendants discussed below, and indeed to the arguments of D1/D2, Mr Nasrallah and Mr El Ghazzi.

641. EFG's only real point was that it was necessary, in a case where a party was alleged to have assisted the bribery, to look at where the acts of assistance took place. This is, at least to a large extent, the same core argument which I have already addressed and rejected in the context of conspiracy. It involves atomising and separating out the acts of laundering from the overall bribery scheme.

642. In any event, however, I consider that the weighing exercise comes down very firmly in favour of the applicable law being the law of the place where the corrupt individual at the heart of the bribery scheme, Mr Al Rajaan, was acting as described above. That conclusion is, in my view, consistent with the decision of the Court of Appeal in *Fiona Trust v Skarga*. In that case, one (but not the only) factor, which led to the application of Russian law to the bribery claim, was the employee's failure to disclose to his employer. That was a failure in Russia. My conclusion is also consistent with the analysis and result in *Ecclestone*, albeit that the tort of bribery was not relied upon by the claimants there, since neither the briber nor bribee had a fiduciary relationship with the claimant.

Dishonest assistance

643. The relevant fiduciary that Mr Guerin assisted was Mr Al Rajaan. His duties were owed in Kuwait. They were also breached in Kuwait, which is where there was a failure to disclose and account for the secret commissions, and where the relevant transactions affected by corruption were concluded. On the other hand, the principal acts of assistance on the part of Mr Guerin were in Switzerland. Since dishonesty is a component of this tort, and since Mr Guerin was based in Switzerland, it was said by Ms Bingham that that element of the tort occurred in Switzerland as well.

644. The weighing exercise here is somewhat closer than in relation to conspiracy, because I accept Ms Bingham's point that loss is not an element of the events constituting the tort. However, I do not think that the weighing exercise produces a different result. The existence of a fiduciary relationship, and the breach of that relationship, are key elements of this tort. Here, the acts of assistance were aimed at successfully and secretly channelling to Mr Al Rajaan the results of the breach of his fiduciary duties in Kuwait. It is not a case of an assister who has come along after the fact, and then helped to hide or transfer funds away. The assistance was taking place in real time, as and when monies were being received by Mr Nasrallah from fund managers. In my view, against this background, the Kuwaiti elements constituting the tort outweigh the Swiss elements, so that the applicable law is again Kuwaiti.

D6: Rome II – general principles

645. In relation to events giving rise to damage after 11 January 2009, the question of applicable law is to be decided pursuant to Article 4 of Rome II. This provides:

> "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.
>
> …
>
> 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 [paragraph] 1 … 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."

646. The general rule is explained by *Dicey* paragraph 35-024 as follows:

> "Article 4 (1) requires, as a general proposition, application of the law of the country in which the damage occurs. For these purposes, damage includes damage that is likely to occur. The law of the place of damage applies 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. The general principle therefore focusses on the place (or places) where 'direct' damage is suffered by the claimant, and ignores the fact that 'indirect' damage may be suffered by the claimant elsewhere. The distinctions between the place of damage and the place of the event giving rise to damage, and between direct and indirect damage, follow closely the scheme established by the European Court in interpreting the concept of 'harmful event' in what is now Art. 7(2) of the recast Brussels I Regulation, and that jurisprudence is likely to assist in interpreting Art. 4(1) of the Rome II Regulation in difficult cases."

647. Article 7 (2) of the Brussels Recast Regulation (Parliament and Council Regulation (EU) No 1215/2012), referred to in the above quotation, is the successor of or equivalent to Article 5 (3) of the 1968 Brussels Convention, the 1988 Lugano Convention, the Brussels I Regulation, and the 2007 Lugano Convention. I shall refer to these various provisions as "Article 7(2)/5(3)". The authorities show that a degree of caution is required when applying the case-law

on Article 7(2)/5(3) to Article 4 of Rome II. Article 4 refers only to the law of the country where the damage occurs, and does not encompass the place of the harmful event that gave rise to the damage. Furthermore, the application of Rome II is not affected by concerns, which arise under Article 7(2)/5(3), at departing from the general principle that defendants should enjoy the advantage of defending in their own country. These points are explained in greater detail in the judgment of Cockerill J in *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) ("Marino") paras [485] – [486] and [506] – [507].

648. The question of where damage occurs in a case involving economic loss is more difficult than in cases involving personal injury or property damage. A valuable summary of the position, drawing on case-law under Article 7(2), is provided by *Dicey* paragraph 35-026:

> "Where the claim is for the harmful consequences of an event not involving personal injury, death or damage to tangible property greater difficulty will arise. First, in principle, the place of damage should, normally be the place where the direct consequences of the relevant event giving rise to damage occurred. This test, however, is easier to state than to apply in practice, and will require the court to the examine more closely the nature of the specific claim or claims brought in a particular case. The need for uniformity in the Regulation's rules, and the desire for consistency with other European Union instruments, demand an autonomous approach to the location of the damage, taking due account of decisions of the European and English courts concerning what is now Art.7(2) of the recast Brussels I Regulation. The definition of 'damage' in Art.2(1) of the Regulation, as well as the stated need for foreseeability of court decisions and the need to strike a reasonable balance between the interests of the parties, suggest that the court should seek to identify and locate the outward consequences of the defendant's conduct—or of an event for which the defendant is claimed to be legally responsible—and then to treat as the relevant 'damage' those consequences which are closely and foreseeably linked to that conduct etc., which are in some sense irreversible and which do not simply reflect or follow from other consequences occurring in another country. In undertaking that analysis, the court should assess the essential factual and legal characteristics of the 'harmful event' underlying the claim or claims presented in order to identify the underlying interest or interests which the putative obligation(s) would seek to protect, and then to find an appropriate method of locating the harmful consequences resulting from interference with those interests."

649. Professor Adrian Briggs, in *Private International Law in English Courts,* 2nd edition, page 551, similarly refers to the decisive damage as being that which occurs where the damage or loss first materialises, rather than where it, or its consequence, is later experienced. The applicable law "is identified by the immediate damage, the immediate consequences arising out of tort/delict". He continues:

> "The question is what damage did the defendant actually do, or what did he actually damage, as distinct from asking what this damage then led to, and as distinct from asking which is the damage for which compensation is claimed."

650. In *Kwok v UBS AG (London Branch)* [2023] EWCA Civ 222, the Court of Appeal held at [45], in the context of Article 7(2)/5(3), and applying CJEU case law, that the place where the damage occurs is the place where the alleged damage actually manifests itself. At [51], the court said that this involved looking at substance not form:

> "An autonomous approach to article 5(3) requires an answer to the pragmatic questions of where the damage claimed by [the claimants] actually manifested itself …"

651. This approach was applied by Bright J in *Commercial Bank of Dubai PSC v Al Sari* [2023] EWHC 1797 (Comm). He described (at [123]) the search as being for the place where the harmful event directly had its effect on the immediate victim and where the original damage was manifested; not where indirect or more remote damage or consequential financial loss occurred. Care was required to identify and analyse the facts of the instant case: [124]. The labels and terminology of national law are not relevant or helpful, but it is necessary to look at the facts which the court should have in mind: [129] – [130].

652. The issue of applicable law was also addressed by Foxton J in a later decision in the same case: *Commercial Bank of Dubai PSC v Al Sari* [2025] EWHC 400 (Comm). At [33] – [36], Foxton J referred to the discussion in *Dicey* paragraph [35-026], and quoted later writing on the issue of damage by Professor Dickinson, the author of Chapter 35 of *Dicey* (and indeed of another valuable work, referred to below):

> "The central submission of this chapter is that the concept of 'damage' within EU private international law is an active one which fixes on the way in which the relevant event brings about its (claimed) effects upon the victim by adversely affecting a legally protected interest of that person to which the claim relates. This opens up the possibility of classifying different kinds of legally protected interests with a view to developing autonomous approaches for locating interference with them."

Foxton J said that assistance was to be derived from the nature of the legally protected right as a relevant factor when identifying what constitutes direct and immediate damage: [36].

653. The case-law contemplates that a claimant may suffer direct financial loss in more than one country: see *Dicey* at paragraph 35-028. This might then lead to the fragmented application of the laws of several countries. Mr Ritchie accepted in his submissions that it was appropriate in the present case to look at each of the ways that PIFSS put its case as to the torts of EFG/Mr Guerin: conspiracy, bribery as a joint tortfeasor, and dishonest assistance. He said that it was in theory possible that this would lead to a conclusion that damage for the purposes of Rome II occurred in more than one country. However, neither PIFSS nor EFG suggested that the application of the test should, in the present case, lead to different applicable laws. In *Commercial Bank of Dubai*, Bright J discussed this possibility at [133]-[139], stating that a court would be slow to arrive at a conclusion that there was more than one place of damage.

654. Much of the argument in the present case focused on the question of whether, in a dishonest assistance case, damage occurs in the place where the fiduciary acts wrongly, or in the place where the assistant performs the acts of assistance. The views of the authors of *Dicey* at paragraph 36-061, when dealing with dishonest assistance in a breach of trust or in breach of fiduciary duty, are as follows:

> "The place of damage for the purposes of Art.4(1) is the place where the accessory's assistance caused direct damage to the claimant. This may, but will not necessarily be, the same place where the trustee caused direct damage to the claimant. This may depend upon the form which the assistance took. If an accessory arranges to receive in State Y money misappropriated by the trustee in State X, it may be that State Y is the place where the damage caused by the assistance occurred. Insofar as trust assets are misappropriated with the defendant's assistance, the place of damage for the purposes of Art.4(1) of the Rome II Regulation may coincide with the *situs* of the trust assets at that time of the assistance. Since the character of the claim against the accessory to the breach of trust is patently different in character to that against the trustee, there is no reason why the law applicable to the trust should also apply to the claim against the accessory. Nevertheless, establishment of a breach of trust is a component of a breach of trust claim; and it is possible that this may on occasion lead to the conclusion that the law applicable to the trust should instead apply pursuant to the displacement provision in Art.4(3), particularly since this may not defeat the expectations of the beneficiary or the dishonest assistor."

655. As *Dicey* acknowledges (footnote 204), a different view is taken by Professor Andrew Dickinson: *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, paragraph 4.102. (Since Professor Dickinson was the author of Chapter 35 of *Dicey*, the difference may reflect the view of the general editors of *Dicey*.) Dealing with dishonest assistance, Professor Dickinson says:

> "For this type of claim, the country of damage should be considered to be the country in which the asset misappropriated by the defaulting trustee/fiduciary was situated at the time of the misappropriation facilitated by the defendant's conduct. That is the country in which relations between the claimant and the trustee/fiduciary are affected by the defendant's interference. Insofar as decisions of the English courts concerning Art 5(3) of the Brussels Convention may favour (without accepting as correct) the view that the place of 'dissipation' of the assets is the place of damage for these purposes, it is respectfully submitted that they should not be followed in the context of the Rome II Regulation. The laundering of assets appears to be an indirect consequence of the defendant's involvement in their misappropriation in the first place."

656. The question of the applicable law under Rome II, in relation to a dishonest assistant, arose directly in *Marino*, a case on which PIFSS placed considerable reliance. One defendant, Mr Ohmura, had assisted in frauds perpetrated by senior executives of the claimant, which was a UK company. The claimant had signed investment management agreements with a Libyan asset fund to manage those investments. In respect of investments relating to a Bank Julius Baer & Co. portfolio of investments, a substantial sum was paid from the Libyan entity's assets by way of secret commissions to two other defendants (Mr Marino and Mr Bessot), who were the senior executives of the claimant. A further sum was then paid on to Mr Ohmura: see paragraphs [2] and [3]. The claimant's case was that it should have been the recipient of those commissions: if the executives had acted honestly, the commissions would have been paid to the claimant. There was also a further fraud in which Mr Ohmura's entity was interposed as a fake introducer, and 90% of the commissions were then paid on to the senior executives, with Mr Ohmura retaining 10%: see paragraph [44 (i)].

657. Mr Ohmura contended that the immediate consequence of the harm was his receipt of payments which he should not have received, and that the non-receipt of these payments by the claimant was only the indirect consequence. The applicable law was therefore Swiss. The claimant contended that the complaint was, primarily at least, about commissions which should have been paid to the claimant, and profits which fall to be accounted for. The applicable law was therefore English.

658. Cockerill J preferred the claimant's argument. She held (paragraph [500]) that as far as compensatory remedies are concerned, the commissions paid to Messrs Marino and Ohmura "could and should have been paid instead to [the claimant]". She also asked what would have happened if Mr Ohmura had not

committed the various wrongs that he is alleged to have committed. She said that in that case, monies would have been paid, by Bank Julius Baer and its investment arms, and by various counterparty banks, to the claimant's bank account in England [501]. She rejected the submission that the loss suffered by the claimant was the receipt of the fees by the various defendants, holding that the receipt was not "damage or harm" to the claimant: see [500]. The test under Article 4 "does not focus our attention on gain, but on harm caused to the claimant" (see [503]). It was wrong to elide the wrong and the damage: [509].

659. Cockerill J also rejected an argument that, under Article 4 (3) of Rome II, English law should be displaced in favour of Swiss law. She said in that regard (at [518]):

> "Although it can be said that all that Mr Ohmura did was done in Switzerland, that reflects just a small part of what is alleged in relation to this course of wrongdoing. In particular the main head of claim against Mr Ohmura is a claim in dishonest assistance which is legally speaking parasitic on Messrs Marino and Bessot's breach of fiduciary duties and where his actions are a small part … of a much bigger factual whole. Further, that main claim is one in relation to a UK company, the duties it is owed by its directors are unquestionably governed by English law, their actions are almost entirely ones in London and it would suffer financial loss (through a failure to account, for example) in a bank account in England. A similar point could be made in relation to others of the heads of claim against him such as knowing receipt, conspiracy and bribery."

D7: Applicable law of EFG/Mr Guerin's torts under Rome II: the parties' arguments

PIFSS' argument

660. PIFSS contended that Kuwaiti law was the governing law in the case of both bribers and assisters. That is where the damage occurred, including where PIFSS ought to have received Mr Al Rajaan's unlawful commissions or an account thereof. Kuwait was also where PIFSS suffered loss as a result of the reduction of its assets and where it should have received any rebates.

661. PIFSS also submitted that the application of the law of wherever the bribes happen to have been paid would create an arbitrary result. Treating the place of payment as the determining factor would (i) ignore the significance of the concealment from PIFSS in Kuwait; (ii) place too much emphasis on a place of little relevance to the material dealings – even for those payments made in Switzerland, the proceeds were habitually routed all over the world; (iii) risk the capricious result that the governing law would be fragmented if a course of payments occurred in more than one jurisdiction; and (iv) create the arbitrary and artificial result that alleged parties to bribery can effectively shop for their governing law based on where they direct the initial payments.

662. This is not a case where the centre of gravity of the corrupt scheme was Switzerland. The fundamental essence of the scheme was abuse of Mr Al Rajaan's position in Kuwait, damage thereby caused and facilitation of that scheme.

EFG's argument

663. EFG submitted that the direct damage, relevant to PIFSS' claim against EFG, is the payment of bribes to Mr Al Rajaan out of accounts in Switzerland, his retention of those bribes in Switzerland (rather than disclosing and accounting to PIFSS), and in sending funds out of EFG in alleged laundering. On that basis, the immediate and direct damage done by EFG occurs in Switzerland, albeit with ramifications elsewhere, including in Kuwait. That PIFSS may ultimately have suffered loss in the place of its domicile does not render Kuwait "the place where the harmful event occurred" for the purposes of the Brussels I Regulation (or its predecessor). The irreversible burden on PIFSS' funds occurred in Switzerland, where the bribes were paid and laundered and the opportunity to confiscate was lost. There is no rule that the place of damage for the dishonest assister must replicate the place of damage generated by the defaulting fiduciary.

664. The fact that PIFSS may have felt the financial consequences of the direct damage in Kuwait is not decisive. The only alternative approaches, faithful to Rome II, did not point to Kuwait. First, the court could look at where PIFSS' relevant bank accounts were held, but no-one argued that this was appropriate. Secondly, whilst the court might look to where the relevant investment contracts, with their swollen fees, were concluded, this led "to confusion". That was because Mr Al Rajaan made investment decisions on his travels and then returned to Kuwait with decisions already made.

665. In her oral submissions, Ms Bingham said that it was relevant to ask where EFG had facilitated any misappropriation, or where was the loot when the accessory lent his assistance. The answer to those questions was Switzerland. It was not appropriate to look at the loss caused by Mr Al Rajaan committing PIFSS to disadvantageous investment contracts. That occurred upstream of EFG, and EFG was "not part of the bribery axis". There was nothing wrong in separating the damage caused by EFG from the damage caused by Mr Al Rajaan. Here, the Article 4 damage caused by EFG was different from the damage caused by Mr Al Rajaan. It was necessary to focus on EFG's tort, and what they did and what they damaged.

D8: Applicable law of EFG/Mr Guerin's torts under Rome II: discussion

666. I consider that PIFSS' submissions, as summarised above, are far more persuasive than those of EFG, and I accept them. I do not think that the answer to the "pragmatic questions" of where the damage claimed by PIFSS manifested itself requires, in the present case, a separate tort by tort analysis. The damage claimed by PIFSS is the same in respect of all of the torts alleged, and (as already noted) neither party contended that the application of the test would lead to different applicable laws depending on the tort under consideration.

667. Here, PIFSS claims that it has suffered harm in two respects which can be broadly summarised as follows: disadvantageous transactions, and Mr Al Rajaan's failure to disclose and account for benefits received. On the first way of putting the case, PIFSS became committed to transactions which were unfavourable in that they did not provide for rebates or similar allowances which an honest person in Mr Al Rajaan's position would have negotiated and obtained. On the second way of putting the case, PIFSS says that it did not receive disclosure and therefore payment of the unlawful secret commissions that Mr Al Rajaan was receiving.

668. I agree with PIFSS that, as far as concerns transactional disadvantage, the irreversible burden on PIFSS' funds arose when it became legally committed to investment contracts which were corrupted by agreements to pay bribes. That commitment occurred in Kuwait. It was clear from Ms Al Dakheel's evidence, and from much documentation shown during the trial, that Kuwait was the place where Mr Al Rajaan would actually sign the subscription agreements – and where on occasion Sheikh Abdullah Al Jaber Al Sabah ("Sheikh Abdullah") would sign if Mr Al Rajaan was not present in Kuwait. It may be, as EFG contended, that Mr Al Rajaan had sometimes decided on that course of action when he was on his travels. However, the commitments were only made on his return, when subscription agreements were signed. This then led to action being taken, in the form of the creation of relevant internal documents, such as deal tickets, to authorise the payment out of monies.

669. In a recent bribery case, *The Republic of Mozambique v Credit Suisse International* [2024] EWHC 1957 (Comm), Robin Knowles J concluded, applying Article 4, that the applicable law was Mozambique law, where the relevant government official had concluded the agreements which he had been bribed to deliver. I consider that this is analogous to the position in the present case.

670. As far as concerns the second aspect of PIFSS' damage, I agree that Kuwait was the place where Mr Al Rajaan failed to disclose and pay over to PIFSS the secret commissions that he was being paid. The relevant wrongs are concerned with non-disclosure and concealment from the jurisdiction where disclosure and accounting should have been made. That points very clearly, in my view, to the place of damage being the place where disclosure is not made and assets are not paid over.

671. I consider that Kuwait, as the place of damage, is confirmed by considering the nature of the legally protected interest of PIFSS to which the claim relates. In broad terms, this interest was to ensure that decision-making was not affected by corruption, and that individuals in senior positions carried out their duties in the interests of their employer rather than in their personal interest, and accounted to their employer if they exploited their position. Consideration of the protected interest serves to identify the place of damage as the place where the decision-making was corrupted, and where there was a failure to account: here, Kuwait.

672. I do not accept that the place of damage, given the nature of the case advanced and proved, can be separated into direct damage caused by Mr Al Rajaan and

Mr Nasrallah in Kuwait, and different direct damage caused by EFG/Mr Guerin in Switzerland. If one focuses on the conspiracy and bribery aspects of the case, there is in my view no basis for saying that different damage was caused by those individuals as compared to Mr Guerin, in circumstances where they were acting together. I do not think that a focus on dishonest assistance produces a different answer, as further discussed below.

673. I also reject EFG's argument that it is appropriate to look at the place where the bribes were received. I agree with PIFSS that this would produce an arbitrary result, for the reasons which they gave. It also seems to me that the *Marino* case points strongly away from that conclusion. In the context of an argument principally about dishonest assistance, Cockerill J did not look at the place where Mr Ohmura carried out his acts of assistance, or the place where he received payment, but rather at the place where the claimant would have received monies if Mr Ohmura had acted honestly. The essence of the claimant's case in *Marino* was that it suffered damage in the place where it should have received monies. That case succeeded in relation to the primary, compensatory, aspect of the case advanced: see paragraph [500]. Cockerill J also referred to the arbitrary result of looking at the place of receipt: see [503]. When considering the question of where damage to PIFSS occurred in the present case, I do not see that there is any significant difference between the position of the claimant in *Marino*, and the position of PIFSS here.

674. I also do not accept EFG's related argument that the direct loss to PIFSS occurs when EFG pays away monies to Mr Al Rajaan, so that they are no longer amenable to confiscation. It seems to me that this is very much a downstream indirect consequence of the direct damage that has already been suffered in Kuwait.

675. I have considered the question of damage by looking at the case in the round, whilst also bearing in mind that the damage is alleged to flow from Mr Guerin's involvement in a conspiracy and bribery and not simply from dishonest assistance. In view of EFG's reliance on commentary and cases relating to dishonest assistance, I have considered whether damage resulting from that tort occurred, or also occurred, in Switzerland.

676. I do not consider that my conclusion, as to where the damage occurred on the facts of the present case, is affected by focusing on dishonest assistance. *Dicey* indicates that the place of damage, as far as concerns the accessory, may or may not be the same place as where the trustee caused direct damage. *Dickinson*, dealing with a case of misappropriation, considers that the place of misappropriation is the place where the accessory's damage occurs, and that laundering is an "indirect consequence of the defendant's involvement in their misappropriation in the first place". Cockerill J's decision in *Marino* shows that, in a dishonest assistance case, the court is not confined to looking at the place where the assistant carried out his acts of assistance, recognising that the loss may be suffered elsewhere.

677. Here, I cannot see any logical or powerful reason for distinguishing between the place of damage in the context of the conspiracy and bribery claims, which is clearly in my view Kuwait, and the place of damage in the context of the

dishonest assistance claim. The damage is in my view the same, and occurs in the same place, whichever participant in the scheme one is looking at.

678. This is not a case involving an assister with no involvement in the fiduciary's wrongdoing, because he became involved only after the fact. It is possible, but by no means certain, that different considerations as to the location of damage might arise in such a case. However, as discussed in the context of PILA, the laundering aspect of the scheme was always an essential part of its overall operation, and so I am not dealing with an after the fact assister. On the present facts, there is much to be said for the view expressed by *Dickinson*, albeit in the context of misappropriation of assets, that the damage occurs – whether one is looking at the fiduciary or his assistant – at the place where the dishonest fiduciary has caused damage to his principal.

679. Furthermore, *Marino* is a case of dishonest assistance, and I think that it points clearly in the direction of PIFSS' argument. Whilst the facts are different, I do not think that they are so materially different that there should sensibly be a different result.

680. Nor do I consider that EFG's argument derives significant assistance from the decisions in *Dexter Ltd v Harley* [2001] Lexis Citation 1229 or *Casio Computer Co Ltd v Sayo* [2001] EWCA Civ 661 (decided a month after the decision in *Dexter*). Both cases were jurisdiction cases under the predecessor of Article 7(2)/5(3). Neither involved Rome II.

681. The *Dexter* case appears to have involved an "after the fact" assister, who had nothing to do with the original wrongdoing. On the facts of the present case, where arrangements for laundering were an important part of the overall scheme, I do not consider that it can be said (to use the words of Lloyd J) that "nothing which involved the Defendant" occurred in Kuwait. Also, the need for caution in applying, in the Rome II context, the case-law concerning Article 7(2)/5(3) is apparent from this decision. Thus, it was part of Lloyd J's reasoning (see paragraph [20]) that since jurisdiction could be established on the basis of the place of the harmful event giving rise to the damage, it followed that one was looking for the damage caused by the harmful event for which the defendant was responsible. This analysis is not applicable in the Rome II context. Here, I need to consider what the damage was, and where it occurred.

682. I do not consider it necessary to discuss the *Casio* case at length. The deputy judge (later Mann J) had decided that the court did have jurisdiction on the basis that the place of the event giving rise to the damage under Article 7(2)/5(3) was England. His decision on that aspect was upheld by the Court of Appeal. It was therefore unnecessary to decide whether jurisdiction existed on the basis of where the damage occurred. The deputy judge thought that this occurred when money was first extracted from Casio's accounts, which were presumably in Japan. Tuckey LJ said (at [23]) that he was "not at all sure that the judge was right to say that the damage to Casio only occurred when the money was abstracted from their accounts": i.e. from accounts not in London. He said that there "must be a strong argument for saying that damage was also caused when it was finally wrested from the Tsuru's control by the payment out of the Alpha account". Accordingly, Tuckey LJ was not disagreeing that damage had

occurred when the money was extracted in Japan, and was contemplating that damage may have occurred in London as well. However, it was not necessary for him to resolve the point, and I do not consider that the case provides assistance one way or the other.

683. In EFG's written argument, it was submitted that there should be displacement of Kuwaiti law (if applicable pursuant to Article 4 (1)) in favour of Swiss law pursuant to Article 4 (3). This argument was not pursued orally, where Ms Bingham's main concern was to emphasise the difficulty of displacement with a view to preventing displacement of EFG's chosen law (Swiss law), in favour of Kuwaiti law.

684. I do not consider that it would be appropriate to displace Kuwaiti law in favour of Swiss law, and I again consider that the reasoning of Cockerill J in *Marino* (rejecting displacement of English law in favour of Swiss law) is pertinent and applicable. In particular, it is important (for reasons already addressed in various contexts) to view EFG's conduct in the light of the whole scheme of which it formed a part.

685. Had I decided that Swiss law was applicable, then I would have needed to address what in my view is a reasonable argument by PIFSS in favour of displacement in favour of Kuwaiti law. But since that issue does not arise, I say no more about it.

686. Accordingly, I conclude that Kuwaiti law is the applicable law, in relation to EFG, in the Rome II period.

D9: The "double actionability" period: general principles

687. A very small part of PIFSS' claim against EFG concerns the position prior to the commencement of PILA on 1 May 1996. EFG calculated that this period was material to some USD 2.4 million of EFG's total alleged liability. By contrast, on EFG's calculation, some USD 331 million was referable to the PILA period, and USD 69.6 million was referable to the Rome II period. The figure for the PILA period was calculated by looking at all payments made between 1 May 1996 and 10 January 2009, together with payments made after that date by asset managers who only entered into investment agreements prior to 10 January 2009. I did not understand these figures, or this approach, to have been disputed by PIFSS.

688. The period prior to PILA is the "double actionability" period, because the common law required actionability under both English law and the law of another country. The common law can be found in *Dicey* Rule 248, and in cases such as *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 paras [167] – [171]. There was no dispute as to the legal principles. The alleged tort must be actionable under both (a) English law, and (b) the proper law of the tort. If so, English law will be applied to the extent congruent with the rights available under the foreign law: see *Dicey* para 35-110. By way of exception to the double actionability rule, a particular claim or issue in tort may be governed by the law of the country which, with respect to that claim or issue, has the most significant relationship with the occurrence and the parties. However, none of

the parties placed any reliance on this exception, and there was also no argument as to congruence.

689. I was referred to a number of pre-PILA cases where, in the context of bribery and conspiracy, the court had considered the proper law of the tort.

690. In *Arab Monetary Fund v Hashim* [1996] 1 Lloyd's Rep 589, a bribe had been paid by an English company to Dr Hashim in connection with the award of a contract to construct the headquarters of the Arab Monetary Fund ("AMF") in Abu Dhabi. Dr Hashim was the first President of the AMF. The trial judge, Evans J, decided that the relevant tort was committed in Abu Dhabi, so that the double actionability principle required consideration of that law. That decision was upheld by the Court of Appeal, where the main judgment on the issue was given by Saville LJ.

691. Saville LJ identified the issue as being where the alleged tort in substance was committed. He held that it had been committed in substance in Abu Dhabi. He said:

> "In my judgment the alleged tort was in substance committed in Abu Dhabi. The basis of the claim is that the AMF sustained loss through the bribing of Dr. Hashim to get the contract to build the AMF headquarters in Abu Dhabi. This basis has the closest possible connection with the tender for the building contract, the building contract itself (including the payments made under it), and the relationship between Dr. Hashim and the AMF. The tender was made by the companies in Abu Dhabi, the contract was awarded to BSME in Abu Dhabi (and was made expressly subject to the law of Abu Dhabi), it was in Abu Dhabi that Dr. Hashim (by abusing a relationship with the AMF governed by Abu Dhabi law) influenced the award of the contract to those who had bribed him, and it was in Abu Dhabi that the AMF made payments under the contract and suffered its alleged loss. The facts that the principal briber was an English company, that the bribe agreement was made (in part at least) in England, that the bribe was paid from England and that the alleged benefits from the bribe were enjoyed by the briber and (to some extent) Dr. Hashim in England, do not to my mind begin to counter-balance the Abu Dhabi factors that I have listed. Accordingly I agree with Mr. Justice Evans that the substance of the alleged tort occurred in Abu Dhabi."

692. *Kuwait Oil Tanker Company SAK v Al Bader* involved a conspiracy to defraud state-owned Kuwaiti oil companies. Moore-Bick J at first instance also applied the test: where in substance was the tort committed? He quoted the decision of the Court of Appeal in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette* [1990] 1 QB 391:

> "In our judgment, two points thus emerge fairly clearly from those cases. First, in deciding whether an alleged tort has been committed in this country or in some other country, our courts will look back over the series of events constituting it and ask themselves 'Where in substance did this cause of action arise?' Secondly, in answering this question, the courts will apply exclusively English law."

693. The contest in that case was between England (for which the claimants argued) and Kuwait (for which the defendants argued). The claimants relied upon acts carried out in execution of the conspiracy, and argued for England, where many of the essential arrangements were made, and where funds were actually removed from the claimants' possession into the possession of the defendants. The defendants argued for Kuwait relying upon matters such as: the claim was by companies ultimately owned by the state of Kuwait against two Kuwaiti officers and a resident of Kuwait; the operation of the conspiracy was organised and directed from Kuwait; the specific unlawful means relied on by the claimants mainly involved breaches of duties owed by the defendants to the claimants; the greater part of the money stolen by the defendants was drawn ultimately from the claimants' accounts in Kuwait.

694. When considering the question of conspiracy, Moore-Bick J said that although the foundation of conspiracy is combination or agreement, the execution of the conspiracy in a manner which causes damage to the plaintiff is an essential element. He concluded that the substance of the cause of action in that case occurred in Kuwait. His main reasons included that: (i) the combination between the defendants was formed in Kuwait, where all of them were resident and where for the most part they carried out their duties owed to the claimants; and (ii) the conspiracy was largely organised and run from Kuwait. He referred to the facts that: directions could be given from Kuwait; and that the real damage was done when gross payments (inflated by sums which were going to go to the defendants) left the claimant's account in Kuwait. On appeal, the Court of Appeal did not need to address whether or not the judge was correct on applicable law: see paragraphs [173]-[174].

D10: The double actionability period - discussion

695. PIFSS submitted that the substance of the torts alleged against EFG was committed in Kuwait, relying upon *AMF v Hashim* and the *Kuwait Oil Tanker* cases as analogies. They referred, broadly speaking, to the arguments as to the key events which they relied upon in the context of their PILA analysis. In particular, they submitted that Kuwait was the place where Mr Al Rajaan concealed, and failed to disclose or account for, the bribes to PIFSS; and the place where damage was suffered by PIFSS. The double actionability test was satisfied in the present case, because they were actionable under both English law and Kuwaiti law.

696. Similarly, EFG focused on essentially the same points as they relied upon in the context of the PILA analysis, again emphasising the need to focus on the place where its acts had taken place. They contended that Switzerland was therefore

the *lex loci delictus* for any acts of EFG, its agents and employees, whatever the position as to Mr Al Rajaan.

697. Neither side contended, as it seemed to me, that there should be a different result, as far as applicable law, to that reached in the context of the PILA analysis. I consider that the factors which have led me to conclude that Kuwaiti law is the applicable law in the PILA context lead to the same conclusion in relation to the double actionability period: i.e. that the substance of PIFSS' cause of action arose in Kuwait. The common law test requires consideration of the events which constitute the tort, and I reject EFG's argument in this context – as I have in the PILA context – that it is appropriate to focus only on the place where EFG's acts took place.

698. The two cases to which I have referred identify factors – leading to the law of Abu Dhabi and Kuwait in those two cases – which are of importance in the present case as well. Thus, in *AMF v Hashim*, the Court of Appeal attached importance to the fact that Abu Dhabi was (i) the place where AMF made payments, and where its losses were suffered, and (ii) the place where Dr Hashim abused his relationship with AMF. In *Kuwait Oil Tanker*, Moore-Bick J paid regard to the place where the damage was suffered, and the place from which the overall conspiracy was orchestrated. Also, he did not regard it as significant that monies extracted from the claimant had been ultimately obtained in London.

699. Accordingly, I reach the conclusion that, in applying the double actionability test, I should look at actionability under Kuwaiti law, rather than Swiss law; because Kuwait was the place where in substance the tort was committed.

700. EFG's arguments, in relation to their liability for torts during the double actionability period, encompassed a number of points under English law. I shall deal with those in Section J, when considering Mr Guerin's liability in respect of that period.

D11: Applicable law – the Mombelli defendants

701. PIFSS' primary claim against the Mombelli Defendants is based on (i) Mr Al Rajaan's breaches of duty to PIFSS; (ii) an agreement by Mr Mombelli to assist, and subsequent assistance, in those breaches; and (iii) with the intention to cause, and in fact causing, harm to PIFSS in Kuwait.

702. Similar to its case in relation to EFG, PIFSS contends that there are three compelling features which point to Kuwaiti law as the applicable law under PILA. First, the central elements of the bribery and breach of duty on which they were being assisted took place in Kuwait. Second, the nature of the claim against the Mombelli Defendants is based on the allegation of a combination between Mr Al Rajaan and Mr Mombelli, the objects of which (corruption of Mr Al Rajaan, impact on the investment decision-making process and damage) played out and were experienced in Kuwait. Third, damage to PIFSS was caused in the form of the sums that were concealed from it, routed into multiple accounts held worldwide, often by companies in offshore jurisdictions, and not remitted to Kuwait. As far as Rome II is concerned, PIFSS contends that the

fact of damage in Kuwait also disposes of the application of the governing law test under Rome II.

703. It will be apparent from my discussion of the position of EFG/Mr Guerin that I accept these submissions. I do not consider that there is any reasonable argument that the applicable law of the torts of the Mombelli Defendants, under PILA and Rome II, is anything other than Kuwaiti law.

704. Indeed, the Mombelli defendants are very obviously in a considerably weaker position than EFG/Mr Guerin, whose case for Swiss law (including displacement) I have rejected. Mr Mombelli was paying bribes to Mr Al Rajaan, thereby corrupting the decision-making process in Kuwait and (for reasons already explained) causing PIFSS to suffer loss there. Mr Mombelli, unlike EFG/Mr Guerin, is not in a position to contend that there were acts of assistance that can in some way be viewed separately from the acts of bribery. Indeed, Mr Mombelli recognised in his evidence that although physically present for the most part in Switzerland, he was operating and doing business in Kuwait. Thus, his evidence frequently relied upon what he alleged to be the acceptability in Kuwait of paying bribes. He agreed that such payments would be considered unlawful in Switzerland, in the UK or other regions; "but one I was operating in Kuwait, with the Kuwait practice and doing business for me, I was not feeling—really feeling to do something unlawful."

705. The Mombelli Defendants sought to rely on a number of matters in order to avoid a conclusion that Kuwaiti law governed.

706. At the forefront of those submissions was that Mr Mombelli was living and working in Switzerland, and that he was meeting Mr Al Rajaan regularly there. It was in Switzerland, at an early meeting, that the payment of bribes was agreed. That is all true as a matter of fact. However, I do not consider that these matters are of significance in relation to the PILA weighing exercise, when compared with the Kuwaiti elements of the events constituting the relevant torts as previously identified and discussed. Furthermore, they are of no significance in relation to Rome II, which looks at the place where the damage occurred.

707. The Mombelli Defendants sought to minimise, and perhaps exclude from consideration, anything other than the initial agreement in Switzerland to pay bribes. However, this is not the correct approach under PILA, which requires consideration of all of the events which constitute the relevant tort. The events may have started with that initial agreement, but they do not stop there. There are events constituting the torts over the many years that follow. Indeed, the initial agreement was made at a time when Mr Mombelli was working for Gesfinance. The bulk of his torts occurred thereafter, involving different companies that he was using.

708. Another way of attempting to restrict the scope of the enquiry was Mr Mombelli's argument that, under English law, a contract involving the payment of a bribe can be rescinded even if the bribe has not actually been paid. Hence, it was submitted that it was not relevant to look at the actual payment of bribes over many years. I do not accept this approach. The technical rules as to rescission under English law are not important in the context of the approach

required under PILA. In any event, it is appropriate and necessary under PILA to look at all the events constituting the tort in question, and the actual payment of bribes is clearly tortious, as Mr Brown correctly accepted in his submissions. The *Fiona Trust v Skarga* case shows that the place where a bribe is promised may be significant, bearing in mind that bribery includes the promise of payment as well as actual payment: see paragraph [13] referring to the decision of Andrew Smith J. However, the significance of the place of promise is a matter to be placed in the balance in the weighing exercise, and I do not consider that it is a significant factor, outweighing Kuwaiti factors, here.

709. The Mombelli Defendants also said that all of their acts of assistance took place in Switzerland. It is true that this was where many of their acts took place, but I agree with PIFSS that there is not a uniform picture of acts undertaken solely in Switzerland. Mr Mombelli's acts of assistance, in the later period, involved taking large amounts of cash to Mr Al Rajaan in London. Mr Mombelli's offshore companies, where used, were not Swiss. To the extent that Mr Mombelli did liaise with fund managers, to put in place investment contracts, he did so in Japan, England and elsewhere. Those investment contracts were then sent to Kuwait for PIFSS to subscribe. Payments of the bribes were not exclusively made in Switzerland, but were also paid to the accounts of Al Rajaan vehicles in the Bahamas (Evelyn) and Singapore (Dryden).

710. I also agree with PIFSS that any attempt to focus primarily on where any particular act of assistance took place, as distinct from focusing on the centre of gravity of the overall wrongdoing which they were assisting and its effect, would be both impracticable and would lead to inevitable and unnecessary fragmentation of applicable laws. Those acts were in one way or another targeted at the corruption of Mr Al Rajaan causing harm to PIFSS in Kuwait. That is the essence of the torts relied upon.

711. Mr Brown submitted that it was wrong to treat Kuwait as the place where Mr Al Rajaan breached his duties to PIFSS. He said that Mr Al Rajaan bore his duties to PIFSS wherever he travelled, and a breach of those duties – by entering into a corrupt arrangement pursuant to which his interest and his duty are conflicted – could therefore be committed anywhere, and were here committed in Switzerland. I disagree. The place where Mr Al Rajaan, as Director-General of PIFSS, owed his duty to disclose and account was Kuwait. Even if it could be said that he bore his duties wherever he went, Kuwait is on any view the most obvious significant place where Mr Al Rajaan failed to discharge those duties.

712. Mr Brown submitted, relying on a discussion in *Dicey* paragraph 34-007, that Rome II was not applicable at all, and that PILA would apply to all torts after its commencement in 1996. Since I have concluded that, applying the PILA analysis, Kuwaiti law is the applicable law, this argument does not assist the Mombelli Defendants and I need not address it in detail. It suffices to say that I was not persuaded that this is a case, as described by *Dicey*, of a "single continuing event or a sequence of events occurring over a period of time and giving rise to a single, indivisible set of consequences". EFG, who advanced a similar argument in their opening submissions, ultimately (and correctly in my view) did not pursue it in closing.

713. I therefore conclude that, save in relation to the double actionability period, Kuwaiti law is applicable to the claims against the Mombelli Defendants. In relation to the double actionability period, as with EFG, I look to actionability under English law and Kuwaiti law (not Swiss law). That said, I did not understand Mr Mombelli to advance any reasons why his liability in respect of that period would be any different to his liability in respect of later periods.

D12: Other Defendants

714. The other Defendants, who have either disputed or not formally agreed the application of Kuwaiti law, are: Mr Al Rajaan; Mr Nasrallah; Mr Guerin; and Mr El Ghazzi. I have already addressed the position in relation to Mr Guerin. Mr El Ghazzi is clearly in no different position to the Man Defendants or Mr Massad, and he has no serious argument that Swiss law should apply to his torts.

715. Mr Al Rajaan and Mr Nasrallah have positively asserted that Swiss law is the applicable law. However, their closing submissions contained no substantive argument as to why Swiss law should apply. I told Mr Casey KC, acting for Mr Nasrallah, that I would require some persuasion that Swiss law applied in his case. He advanced no oral submissions on that issue.

716. I do not consider that the other Defendants can sensibly argue that they are in a stronger position than EFG or Mr Mombelli, whose detailed arguments have failed. Indeed they are in an obviously far weaker position. Mr Al Rajaan was the Director General of PIFSS and was entering into the investment contracts in Kuwait. He owed duties in Kuwait, and was breaching them in Kuwait. Mr Nasrallah was living in Beirut, and was principally carrying out his acts of assistance from there. I see no rational basis upon which either can successfully contend that Swiss law is applicable.

SECTION E: THE NATURE AND OPERATION OF PIFSS

E1: Introduction and overview

717. PIFSS contends that Mr Al Rajaan was able to procure secret commissions as a result of various matters working in combination. A very significant factor was his substantial control of and/or influence over the investments which PIFSS made. PIFSS says that during the time of his tenure as Director General, and in particular during the period from the early 1990s when the secret commissions in issue started to be paid, he was the key decision-maker at PIFSS. He dictated its organisation and structure, and at all times exercised substantial control and/or influence over the investments which PIFSS made, without material challenge or scrutiny. This included control and/or influence over the IIC which formally approved some – but by no means all – of the investments.

718. PIFSS contends that this control and influence combined with other matters to enable Mr Al Rajaan to enrich himself, and the others who assisted him, namely: (i) the fact that the investments generated fees payable to third parties which could be used as a source of kick-backs to him; and (ii) the exploitation of his personal relationships with various individuals who were prepared to be party to and to commit the entities for which they worked to corrupt arrangements.

719. In its written closing submissions, PIFSS devoted some 62 pages to a careful analysis of the evidence which demonstrated Mr Al Rajaan's control and influence over the investment decision-making process. For that purpose, PIFSS drew on a number of strands of the oral and written evidence given during the trial.

720. Oral evidence as to Mr Al Rajaan's control and influence was given by Ms Lama Al Dakheel, who worked in PIFSS' Direct Investment Department, from 1996 to 2015, and thus during most of the period with which this trial is concerned. She worked closely with Mr Al Rajaan, who had a very high opinion of her. She was in a very good position to explain how decisions were being made. She was a most impressive witness and her evidence as to Mr Al Rajaan's influence and control was compelling.

721. Oral evidence as to Mr Al Rajaan's control and influence was also given by Mr Meshal Al Othman. He joined PIFSS in 2017 after Mr Al Rajaan's departure. He was appointed as PIFSS' first Chief Investment Officer, but was then rapidly promoted, becoming Director General in January 2019. Although he arrived after Mr Al Rajaan's departure, he had been one of three members of a fact-finding committee established in 2014 by the then Minister of Finance and Chairman of PIFSS, Mr Anas Al Saleh. The committee comprised three senior investment professionals, from outside PIFSS, who were tasked with looking into investments of USD 500 million which PIFSS had made with an Indian fund manager called Brahma Investments Ltd ("Brahma"). The committee produced a lengthy report. As a result of the extensive work carried out by the committee, Mr Al Othman acquired insight into the investment process at PIFSS while Mr Al Rajaan was Director General, including how investment decisions were made. He gained further insight from his senior colleagues after he had joined PIFSS, when he was involved in carrying forward a restructuring of

PIFSS' organisational structure. Mr Al Othman was also a most impressive witness. Indeed, his evidence as to PIFSS' organisational deficiencies, whilst Mr Al Rajaan was in post – including the extensive influence and control which Mr Al Rajaan exercised over the investment process – was heavily relied upon by EFG (and adopted by other Defendants) in their arguments as to contributory fault.

722. In addition to this oral evidence, PIFSS relied upon various strands of documentary evidence. These included: a report by Ernst and Young in April 2015 into PIFSS' governance; the report of the Brahma committee in early 2016; work carried out by PIFSS' subsidiary, Wafra, in 2015 into PIFSS' real estate investments and culminating in Wafra's "Project Renaissance" report in November 2015; further work carried out by Wafra in 2016, and culminating in Wafra's "Project Milestone" report in January 2017.

723. Another strand of the documentary evidence involved an analysis of the extent to which investments were approved by PIFSS' internal committees at all, and whether any approvals were given prior to the investment decision being made. This analysis, described in more detail below, revealed that many of the investments, with which this trial is concerned, were either never approved by the investment committees, or were only approved after the investment decision had been made. This evidence indicated that someone other than the investment committees had made the decision to invest, and that person was, very obviously, Mr Al Rajaan.

724. PIFSS submitted that there was also an obvious conclusion that could be drawn from the fact that Mr Al Rajaan procured the payment of around USD 1 billion of secret commissions, and that he enjoyed the lion's share of those commissions. PIFSS submitted that that fact, even taken in isolation, firmly indicates that Mr Al Rajaan, the highest ranked executive within PIFSS, had sufficient control over the selection of the investment managers used by PIFSS, and the particular funds in which PIFSS invested, to procure those commissions. I did not consider that there was any good answer to this point.

725. The oral closing submissions concerning the nature and operation of PIFSS, including as to Mr Al Rajaan's influence and control, were made by Ms Dilnot KC on Day 105 of the trial. Towards the start of those submissions, I said that I had read and re-read the relevant section of PIFSS' written closing, and that if anyone wanted to try to persuade me that Mr Al Rajaan had minimal influence, it was going to be a big uphill struggle; and that if they did want so to persuade me, they would need to grapple with what had been said in PIFSS' 62 pages of written submissions. In short, that was because I considered there to be an overwhelming case, on the evidence as a whole as summarised in PIFSS' written closing and summarised above, as to Mr Al Rajaan's influence and control.

726. In the event, none of the represented parties, save for EFG, devoted any material part of their closing submissions to the topic of Mr Al Rajaan's influence and control. None of the represented parties gave any reasons as to why I should reject PIFSS' case as to the control and influence which Mr Al Rajaan exercised in practice – albeit that some parties (in particular Man/Mr Massad, Mr

Nasrallah and Mr Mombelli) argued that this was not their perception at the time.

727. EFG was the only represented party who advanced any substantial closing argument on the topic of Mr Al Rajaan's actual control and influence. Their argument essentially endorsed the case that was advanced by PIFSS.

728. EFG thus contended that Mr Al Rajaan did indeed dominate decision-making during the relevant period. In that regard, they quoted from evidence given at trial by Ms Al Dakheel and Mr Al Othman. For example, Ms Al Dakheel said that Mr Al Rajaan was the person who found and chose investment relationships and new investments with new fund managers, and that no-one else was allowed to make any proposals or recommendations. She also said that PIFSS' internal investment committee would never reject or refuse a presentation made by Mr Al Rajaan: "there was zero chance of this. Who would dare to say no to him". Mr Al Othman had said that Mr Al Rajaan had absolute power in terms of the selection of investments.

729. EFG also quoted from a statement given to the Kuwaiti Criminal Court by a former Minister of Finance and Chairman of PIFSS, Badr Al Humaidhi (the brother of Hamad Al Humaidhi who succeeded Mr Al Rajaan as Director General of PIFSS). When asked how PIFSS operated when he was chairman of the board, Badr Al Humaidhi's response was:

> "There [was a] system in place but there were several loopholes. Investment decisions were made by a single person and no monitoring was there on the investments. The individuals within the circle of making the decision were unqualified personnel to handle the investment assessment. There was no higher committee operating then to execute the investments and approve them. Looking at the [PIFSS] there is a financial administrative structure in place but in practice it was a one man show, in reality it was only Fahad Al Rajaan making the decisions. The committee belonging to the board was also not activated."

730. It is fair to say that Badr Al Humaidhi then went on to explain steps that he had taken to improve this situation, but also that Mr Al Rajaan had not accepted his changes "gratefully". Mr Al Rajaan "wanted to control everything in the investment decisions".

731. Accordingly, EFG submitted that during Mr Al Rajaan's tenure, PIFSS was a "one-man show". Indeed Ms Al Dakheel had used a similar expression when explaining how some people in Kuwait had described PIFSS during Mr Al Rajaan's time there. This was an aspect of the case advanced by EFG, and supported or adopted by other Defendants, as to contributory fault. In their written closing, EFG identified 5 key points relevant to such fault: (i) Mr Al Rajaan was given the power to direct investments unilaterally; (ii) PIFSS' investment teams were underqualified and under-resourced; (iii) there was no investment process worth the name; (iv) there was no meaningful governance

or control structure; and (v) there was no investigation, and no proactive measures, in the face of manifold red flags. I shall return, albeit briefly, to the issue of contributory fault in Section Q.

732. The only party who raised something of a positive case as to the absence of Mr Al Rajaan's influence and control was D1/D2. In opening submissions, at the time when they were represented, D1/D2 argued that PIFSS had exaggerated the degree of influence which Mr Al Rajaan enjoyed. In his opening oral submissions, Mr Weisselberg KC emphasised the importance of the position occupied by the Minister of Finance, and the consequent "fragility" of the position occupied by the Director General. He accepted that it would be unrealistic to say that Mr Al Rajaan had no influence. His degree of influence was, he submitted, somewhere on the spectrum between no influence and complete influence.

733. In their written closing submissions, D1/D2 addressed the issue of Mr Al Rajaan's influence and control relatively briefly. They did not go so far as to suggest that he had no influence, or indeed no substantial influence, on the investment decision-making process. They did submit, however, that PIFSS had a robust committee process; that Mr Al Rajaan did not have "unlimited power or control over PIFSS", but was subject to the oversight and involvement of senior management. They also submitted that the terms on which PIFSS invested were reviewed by analysts and investment department managers, indicating that they were reasonable terms on which it was appropriate for PIFSS to invest. They also produced a schedule which identified, by reference to minutes of the IIC, and the Higher Investment Committee ("HIC") (described below), various discussions that had taken place on particular proposed investments. The documents showed, for example: that some investments were not approved; that committees had given consideration to some investments; that on occasions, the IIC had referred an investment to the HIC; that the HIC was not Mr Al Rajaan's puppet.

734. I did not think that these submissions by D1/D2 provided any significant counterweight to the weight of evidence as to the substantial control and influence that Mr Al Rajaan exercised. Indeed, it was by no means clear that D1/D2 were submitting that Mr Al Rajaan did not have substantial influence or control, even if his control was "not unlimited". Since D1/D2 did not make oral closing submissions, they provided no answer to the points made by PIFSS in their written closing. In particular, there was no answer to the obvious conclusion, as to influence and control, to be drawn from the fact that Mr Al Rajaan (and those who were assisting him) received in the region of USD 1 billion over the years.

735. In the following parts of this section, I shall explain the nature of PIFSS, and its decision-making process in more detail. This is relevant not only to the issue of influence and control, as to which my conclusions are as set out above. It also provides the backdrop to the various schemes and to some of the arguments which I shall address in later sections, including the contributory fault case which EFG took the lead in advancing. I shall describe the formal legal position under the various laws, regulations and decisions which applied to PIFSS, and will then turn to the way in which PIFSS operated in practice.

E2: PIFSS: legal status, constituent organs and decision-making powers

736. The social security system in Kuwait was established and is governed by the Social Security Law, No. 61 of 1976, as amended ("Social Security Law"). PIFSS was established as an independent public institution under the supervision of the Minister of Finance by Article 3 of the Social Security Law. PIFSS has its own legal personality and has power to bring and defend proceedings in its own name. By Article 4 of the Social Security Law, PIFSS was tasked with undertaking the application of the social security scheme created by that Law.

737. There are two principal aspects to PIFSS' activities: (1) the operation of Kuwait's social security system, which provides Kuwaitis with insurance for old age, disability, sickness and death; and (2) the investment of its funds to produce a return sufficient to meet the future needs of the population.

738. As far as the former activity is concerned, Mr Al Othman's evidence was that Kuwaiti citizens would receive an excellent service when they visited PIFSS' impressively large and opulent halls, and that there were very few complaints from Kuwaiti citizens whose funds PIFSS invested because the output they saw was first rate. The present proceedings are concerned with the latter activity. Mr Al Othman described the Brahma committee being shocked at how decisions were made and at how business was conducted. Kuwaiti citizens pay into PIFSS each month, and PIFSS was therefore dealing with Kuwaiti citizens' money. It is therefore not surprising that Mr Al Othman said that "whenever we see wrongdoing it goes straight to the heart, meaning the shock for us, the committee, was greater even than if we were simply looking at it from an investment position".

739. In addition to establishing PIFSS, the Social Security Law regulates PIFSS' structural and organisational hierarchy, as well as the role, within PIFSS, of any public officials.

The Board

740. Article 5 of the Social Security Law provides that PIFSS shall have a board of directors under the chairmanship of the Minister of Finance ("MoF"). That board is made up of: (i) the Director General; (ii) one representative from each of four organisations/government departments, nominated by the organisations/departments and the MoF; and (iii) three experts nominated by the MoF and appointed by Emiri decree. Board members appointed as (ii) and (iii) are appointed for three years, which term is renewable (Article 5(ii) and (iii)). Thus, the Director General, Mr Al Rajaan at the relevant times, was the only executive director on the Board.

741. Article 6 sets out the role of the Board, namely to draw up the "general policy" of PIFSS. It therefore provides high level oversight of the institution, including: (i) approving the budget and accounts and the annual general report; (ii) proposing and opining on drafts of laws, regulations and orders; and (iii) making orders for the regulation of the financial and administrative affairs of the

institution, including fixing the salaries of its employees and rules relating to their employment.

The Director General

742. Article 7 provides that "institutional management shall be undertaken by a Director General", who shall determine its departments and the specialisation of each of them. Article 8 supplies the powers of the Director General. This provides as follows:

> "The Director General shall represent the Institution in its relations with third parties and before courts …
>
> The Director General shall be responsible for implementing the policy set forth by the Board of Directors and shall be concerned with managing the Institution, as well as performing every act stipulated under a law or regulation as his specialization."

743. PIFSS submitted, correctly in my view, that those powers were extensive and resulted, both in law and practice, in the centralisation of power in the hands of the Director General, a responsibility and privilege which Mr Al Rajaan exploited and abused to profit personally from his position and to prevent scrutiny of that abusive conduct.

744. Thus, Article 8 provided Mr Al Rajaan with a wide power to structure and operate PIFSS as he thought fit. The first paragraph of Article 8 was a power which Mr Al Rajaan used to control PIFSS' responses to issues and enquiries raised by external government entities, such as parliamentarians, fact-finding committees, the State Audit Bureau ("SAB") and the Public Prosecutor.

745. Mr Al Rajaan also used Article 8 very effectively in 2007 and 2008 to neutralise the attempt by the then Chairman of PIFSS (Badr Al Humaidhi) and Dr Al Rashed to appoint a third party, KPMG, to investigate the suspected receipt of commissions on PIFSS' investments by a senior official of PIFSS. As described in Section C above, the focus at that stage was on Omni and other entities. No allegations were then being made about the schemes with which this trial has been concerned. Even after the extensive disclosure of Swiss banking documents and other materials in the present litigation, there is no documentation which establishes Mr Al Rajaan's involvement in those companies. In the light of the evidence now available as to the other schemes, it is highly probable Mr Al Rajaan had been receiving the commissions which were suspected. The absence of such documentation indicates that I cannot assume that every aspect of Mr Al Rajaan's wrongdoing has been uncovered and documented even now.

The Higher Investment Committee:

746. Article 9 provided for the MoF, subject to board approval, to set up a committee for the investment of PIFSS' funds, with the Director General being one member of that committee. It provided that the committee would have the

supreme authority in determining the investment rules and programmes for investing the funds of PIFSS and for passing the required investment resolutions in that respect. The final paragraph of Article 9 provided for the committee's resolutions and deliberations to be confidential and that they may not be disclosed. This was a provision which Mr Al Rajaan subsequently used to restrict access to and scrutiny of draft and final minutes of committee meetings by members of the committee and others.

747. The committee provided for by Article 9 was established by Ministerial Resolution No. (9) of 1977. By Article 2 of that Resolution, the committee was to have "the higher authority to identify the rules and programmes for investing [PIFSS's] funds; and it shall issue the necessary investment decisions in this respect". Article 2 of the Resolution then went on to identify 10 areas of competence of the HIC related to the investment of PIFSS' funds. These areas focussed on oversight of the investment process rather than decision-making in relation to specific investments (although that was not excluded by Article 2).

748. The first HIC meeting was held on 17 January 1978 (before Mr Al Rajaan's appointment as Director General in 1984), and it established a broad split of PIFSS' investments between: (i) a local real estate investment portfolio; (ii) direct investments in local companies; (iii) securities investment portfolios in Europe and the United States; and (iv) direct investments in real estate, companies, and projects.

749. During Mr Al Rajaan's tenure, the HIC comprised the MoF, Mr Al Rajaan himself and certain other board members. They were not employees of PIFSS, but they did have relevant experience, including investment experience. A Deputy Director General ("DDG") also often attended the meetings along with the heads of or managers in the investment departments, who gave oral presentations on performance and particular investments (as did Mr Al Rajaan).

750. The individuals who were on the HIC were people of equivalent seniority or status to Mr Al Rajaan. It was therefore no part of PIFSS' case that (as D1/D2 put it in their written closings) the HIC was Mr Al Rajaan's puppet. However, the HIC was not responsible for making or approving investment decisions, and certainly not on a day to day basis. This is well illustrated by the analysis of the investments which was annexed to PIFSS' written closing submissions. The present case concerns some 318 new investments made during Mr Al Rajaan's tenure as Director General. The available documentation, comprising not just committee minutes but a range of other documents which potentially evidence approvals, shows that there were only 2 of these investments where the HIC gave an approval.

751. At the first HIC meeting, the then Chairman stated that it would be preferable to have an internal investment committee that "followed up periodically" and was chaired by the Director General.

The Internal Investment Committee:

752. Following Mr Al Rajaan's appointment as Director General in 1984, he established a sub-investment committee, the "Internal Investment Committee"

pursuant to Director General Resolution No (73) of 1987. This Resolution appointed the Director General as the Head of the IIC, which first met on 5 May 1987. Over the course of Mr Al Rajaan's tenure as Director General, the IIC comprised him, one or more DDGs, the heads of department of PIFSS and a rapporteur (i.e. secretary). Accordingly, all members of that committee were subordinate to Mr Al Rajaan. Further, Mr Al Rajaan controlled the composition of the IIC and was the only person to sit on both the IIC and HIC.

753. Article 2 of the 1987 Resolution set out the role of the IIC as follows:

> "The Committee formed in accordance with the above Article shall be concerned with the following issues
>
> a- Considering and expressing opinions on the new fields of- investment available for the Institution after the concerned. Department researches them, whether such fields are related to the local market or foreign markets, all in accordance with the rules and general policies in force.
>
> However; the Director General may directly decide on some fields of investment set out in the above-stated Para either due to their nature or because of the urgent necessity of reaching a relevant decision.
>
> b- Expressing the opinions on the investment issues which the Director General may refer to it
>
> c- Proposing the agenda of the Investment Committee
>
> d- Discussing the periodical investment reports submitted by the Departments on their works and achievements."

754. Accordingly, this allowed the Director General to control both the investment issues referred to it and which matters were to be referred to the HIC. Article 2, as set out above, also permitted the Director General directly to decide on some fields of investment.

755. The documentary evidence, supported by the evidence of Ms Al Dakheel, showed that, certainly during the period up to around 2008/9, many investment decisions were taken by Mr Al Rajaan, either without ever being referred to the IIC, or only being referred to the IIC subsequent to Mr Al Rajaan having committed PIFSS to the investment in question. Again, PIFSS' statistical analysis is striking. In relation to the 318 new investments, there is evidence of approvals for less than half: 145. In addition to the 2 HIC approvals referred to above, there were 143 IIC approvals. The majority of those approvals, some 84, were given retrospectively, after the investment decision had already been made and a commitment by PIFSS made.

756. A broadly similar picture emerges from PIFSS' analysis of approvals for capital increases for existing investments. There were 430 decisions to increase capital for existing investments during Mr Al Rajaan's tenure. Of these, there was an HIC approval for 1 increase, and IIC approvals for 185. There were therefore 244 increases which were not, on the evidence available, approved by either committee. Of the 185 increases approved by the IIC, 103 were retrospective.

757. The above figures are based on the substantial documentation which does exist, although PIFSS accepted that the available documentation is not complete. Nevertheless, when viewed together with other evidence including that of Ms Al Dakheel referred to below, I consider that it provides a broadly accurate overall picture. That picture is, in summary, that a significant volume of investment decisions were taken outside of the investment committees, and that the investment process was not – as D1/D2 sought to suggest – a robust one, involving close scrutiny of Mr Al Rajaan.

758. Although D1/D2, and to some extent other Defendants (in particular Man) sought to suggest that other individuals (in particular Sheikh Abdullah and Mr Al Muraikhi) were involved in or responsible for making investment decisions, there was nothing in Article 2 (or indeed any other provision to which I was referred) which conferred upon any individual other than the Director General a direct power to invest PIFSS' funds. In any event, again looking at the evidence as a whole, it is fanciful to suggest that any individual other than Mr Al Rajaan was responsible for the investment decisions that were being taken. As Mr Badr Al Humaidhi said during the criminal investigation, as quoted above, Mr Al Rajaan wanted to control the investment decisions.

759. Mr Al Rajaan's power to decide which investments were made by PIFSS was subsequently expanded by (Ministerial) Resolution No (2) of 1998 and the Regulations for Investment Rules. Article 36 of that Resolution provided that the Director General was to undertake the "full supervision" of PIFSS' investments and their management and Article 36(2) provided that the Director General was to "take the resolutions needed on investment offers received by [PIFSS] after their analysis and study by the competent bodies …". Resolution No (2) of 1998 also laid down the original financial limits for investments above which HIC approval was required, namely: USD 100 million for securities portfolios; 5-10 million Kuwaiti Dinars ("KWD") for real estate; 7 million KWD for direct investments; and 10 million KWD for closed-end investments.

760. At the HIC meeting held on 29 May 2005, the HIC approved a resolution proposed by the then MoF, Badr Al Humaidhi, to standardise at USD 50 million the powers granted to PIFSS' "management". This was a reference to the IIC, subject to the Director General's direct powers previously described. Above that limit, the management was to obtain the approval of the HIC. Subsequently, at the HIC meeting on 23 March 2008, Mr Al Rajaan proposed that limit be increased to USD 100 million, which proposal was approved. In respect of real estate funds, the limit was increased to USD 150 million at the HIC meeting of 28 April 2009. Resolution No (1) of 2010 dated 23 June 2010 then formalised the increase to USD100 million for direct investments and open and closed-ended investments, and to USD150 million for new real estate investments. At the HIC meeting on 3 October 2010, the HIC decided that all relevant limits

were increased to USD200 million, following a recommendation by Mercer, a firm of financial consultants. Mercer had conducted a review of PIFSS' investment process and concluded that its investment decision making structure "generally strikes a good balance between responsiveness and controls".

761. The need for an investment to be of a substantial size before HIC approval was required explains why so few approvals of the HIC were in practice obtained. It was not difficult for Mr Al Rajaan to invest at levels which were below that at which the HIC would need to be engaged.

E3: The departments within PIFSS and their personnel

762. As described above, one of the Director General's powers was to decide the departmental structure within PIFSS. Prior to Mr Al Rajaan's appointment in 1984, a 1982 resolution of his predecessor had created the Technical Office for Investment. Shortly after his appointment, Mr Al Rajaan signed resolution 22 of 1984 (dated 25 January 1984) which set out the competencies of the departments and offices of the Technical Office for Investment. This resolution identified a number of departments and their remit: the Securities Department, the Direct Investment Department, the Real Estate Department, the Foreign Portfolios Department, the Banking Operations Department, the Investment Accounting and Information Department (essentially the IT department), and an economic research office.

763. This overall departmental structure remained substantially in place for the period relevant to the present proceedings, albeit that the Technical Office for Investment was abolished in 2004. Most of the investments which give rise to the present proceedings (such as the investments in Man funds and the funds proposed by Mr Mombelli) were in funds which were dealt with in the Direct Investment Department. These investments, and that department, were a particular focus of much of the evidence at trial. Some of the investments, in particular the Aerium Scheme investments, were dealt with in the Real Estate Department.

764. Overall, the present litigation concerns around 176 "open" funds, 70 "closed" funds, dealt with in the Direct Investment Department, and 64 real estate funds. The broad distinction between "closed" and "open" funds is that a "closed" fund will be more restricted than an "open" fund. The former is an investment for a fixed period of time, and may have a limited number of investors. The latter is open to a wider set of investors and, subject to liquidity, an investor can come in or leave at any time. These categorisations were not hard and fast: as Ms Al Dakheel explained in her evidence, the Man funds were regarded as "open", although there were redemption fees applicable in the early years of an investment which had the effect of encouraging an investor to stay in.

765. The period of time covered by the present litigation is substantial, and there were inevitably changes of personnel, and indeed investment approach, over the years. Amongst the individuals whose names featured in cross-examination and argument were the following.

766. The Direct Investment Department was headed, for much of the period, by Mr Sulaiman Al-Muraikhi as "Manager". He was succeeded in that role, in 2013, by Ms Lama Al Dakheel, who had previously worked in that department since December 1996. The manager of the Real Estate Department from the mid-2000s was Mr Adel Al Bader. Mr Khalid Al-Fawzan was for a long time the manager of the Banking Department, and later became Deputy Director General of Financial and Administrative Affairs. These heads of department were typically members of the IIC described above.

767. Above the managers (i.e. heads of department) were the DDGs. One of these, from 2002, was Sheikh Abdullah Al Jaber Al Sabah ("Sheikh Abdullah"). He was Mr Al Rajaan's nephew, and the son of the late Emir of Kuwait (one of whose wives was Mr Al Rajaan's sister). He became director of the Technical Office for Investment Affairs in May 2002. When that office was abolished in 2004, there were three DDGs then in place, and their job titles became as follows: Sheikh Abdullah became Deputy for Investment Affairs; Mr Hamad Al-Humaidhi became Deputy for Insurance Affairs; Mr Ahmed Al-Turki became Deputy for IT. Much later on, after Mr Al Rajaan's departure in 2014, Hamad Al-Humaidhi became Director General. (Mr Hamad Al-Humaidhi should be distinguished from his brother, Mr Badr Al-Humaidhi, who was Minister of Finance and Chairman of PIFSS for 3 years in the mid-2000s).

768. The organisational structure that was in place between 2004 and Mr Al Rajaan's departure in 2014 involved Mr Al Rajaan at its head, and the DDGs reporting to him. The direct responsibilities of Mr Al Rajaan, as set out in a decree signed by him in January 2004, involved oversight of the General Administrative Office, the Office of Studies and Research of Insurance and Actuarial Activities, the Legal Department, the Department of Administrative Affairs, Public Record Management, Audit and Tracking Office, Economic Research Development, Financial Management, Personnel Department, and Department of Public Relations and Media. The same decree identified the responsibilities of the DDG for Investment Affairs (i.e. Sheikh Abdullah) as the oversight of the following departments: Securities Management; Direct Investment Management; Banking Operations Management; Foreign Portfolio Management; Settlement Management; Real Estate Management.

769. Subsequent to the departure of Mr Al Rajaan and the Ernst & Young report on governance in April 2015, substantial changes were made to PIFSS' structure. These were explained in Mr Al Othman's evidence, and PIFSS' governance and investment decision-making procedures were substantially improved. It is not necessary to describe these changes in detail.

E4: Decision-making in practice – overview

770. There was ample documentary evidence to show, as PIFSS contended, that Mr Al Rajaan was the key decision maker at PIFSS in relation to investment decisions, certainly in so far as concerns the investments which are the subject of this trial. This conclusion is also supported by the evidence of Ms Al Dakheel.

771. As described later in the context of particular schemes, the documents evidenced a considerable amount of personal contact between Mr Al Rajaan and

fund managers who were hoping to obtain investment by PIFSS, as well as between Mr Al Rajaan and various bankers who were involved in laundering the secret commissions for his benefit. The documents also showed that, in the period up to 2008, there were relatively few occasions on which there were prospective approvals by the IIC of proposed investments; i.e. where approval was given by the IIC in advance of a commitment to the investment being made by PIFSS. There were therefore many examples of commitment letters being signed by Mr Al Rajaan personally, at a time when no IIC approval had yet been sought. Indeed in the 6-year period between September 2000 and June 2006, there is no evidence of the IIC giving a single prospective approval.

772. There was also no example of the IIC deciding not to approve an investment decision previously taken by Mr Al Rajaan, and there is nothing in the minutes of the IIC which suggests that there was a healthy or indeed any significant debate about the merits of the investments which were being retrospectively approved. This is unsurprising in circumstances where Mr Al Rajaan was the most senior person within PIFSS, and where all other members of the IIC were subordinate to him, and where he had been in post for a considerable time.

773. The picture after around 2008 changed, as a result of Mr Al Rajaan becoming more careful, no doubt because of (for example) the challenges from Dr Al Rashed and the events which led to the engagement of KPMG. It then became the practice for prospective approvals to be obtained from the IIC, but there is nothing to suggest that Mr Al Rajaan's influence on decision-making was diminished in any significant way. The members of the IIC did not then seek to challenge the investments which Mr Al Rajaan wished to make.

E5: Organisation and decision-making in practice – Ms Al Dakheel's evidence

774. Ms Al Dakheel joined the Direct Investment Department in December 1996, straight after university, where she had been an outstanding student. Her job title was "economic researcher", but her work was in fact focused on tracking the performance of assets in different categories across the department: local and foreign direct investments in companies, open-ended funds, and closed ended funds. Mr Al Rajaan was very impressed with her, and she worked closely with him over many years. An internal note of Mr Massad (of Man) in May 2002 records him being advised by Mr Amjad Sheikh of PIFSS to "strengthen my relationship with Lama Al Dakheel (Supervisor – Investment Dept) as now Fahad always consults with her on Fund investments".

775. She was cross-examined for 4 days, and she was a very impressive witness who gave honest evidence to the best of her recollection. One, but not the only, impressive feature of her evidence was the care that she took to try to distinguish the position at different points in time whilst she was working there. She was also highly intelligent, articulate, and professional in the work that she carried out. Mr Weisselberg put to her that she had a "strong character", to which she modestly responded "maybe".

776. Ms Al Dakheel was promoted to the position of "supervisor" within the Direct Investment Department in 2001, and she became the manager of the department in 2013 after Mr Al-Muraikhi's departure.

777. She left PIFSS in 2015, and her departure was related to the information then emerging as to Mr Al Rajaan's corruption, and the involvement of others who had facilitated or assisted it. In cross-examination by Mr Brown for the Mombelli Defendants, she said that she left because she no longer belonged in PIFSS. I asked her to explain this at the end of her evidence. At that stage, after having given measured and calm evidence over 4 days, responding directly and coherently to all the questions asked, Ms Al Dakheel was for a time unable to answer. She had to wipe away tears. She then said this:

> "It's just that I trusted the people that I worked with. At the end I felt like I was a puppet and that these things were going around, unacceptable things for me, that I didn't want to stay anymore, and that someone not only inside the institution but also the people who were outside. And at that time I didn't know about Man, whom I considered -- you know, I was happy that nothing was revealed about Man Investments at that time, and I thought that everything around me was a total lie. I thought that everything was honest and clean. It was ethically unacceptable for me to be part of it. And I felt that Mr Al Rajaan used me, used my work in growing what he had done and taking advantage of how I stand by him when he had those difficulties, to the point that I remember, when I went to the cardiologist because I felt so much pain, that 'This guy doesn't deserve the way he was treated', and at the end I was the only fool person in all of this. I'm a strong woman."

778. This answer revealed an important human side of the case with which I am concerned. It is relevant to, and reinforces, my views as to Ms Al Dakheel's evidence and her credibility. She was a witness who had left PIFSS some 10 years before the trial, and owed nothing to PIFSS, but had nevertheless come to give evidence over many days about the relevant events, having no motive either to assist PIFSS or to give evidence that was in any way false.

779. Her evidence also, in my view, destroyed any possible suggestion that Mr Al Rajaan was a person whose evidence, such as it was (D1/D2 placing reliance on statements of truth in pleadings served by him) could be relied upon. He had dishonestly lied to Ms Al Dakheel, with whom he had worked closely over the years, and who had believed his denials of wrongdoing. During that time, Mr Al Rajaan had maintained the pretence that he would not tolerate corruption. This was illustrated by an episode relating to an investment proposed by Mr Al-Muraikhi, the manager of the Direct Investment Department at the time. This episode also illustrates the degree of control that Mr Al Rajaan exercised over the making of investments. Ms Al Dakheel explained that there was one occasion when Mr Al-Muraikhi received a direct proposal (i.e. which was not made to Mr Al Rajaan) for a new investment that he thought seemed good. He did not give any commitment, but simply handed the proposal over to Mr Al Rajaan, and informed him that he had been presented with the information. Mr Al Rajaan's reaction was to shout at him and question why he was bringing this

proposal to PIFSS, and to ask whether he was getting anything in return or any commissions. When Ms Al Dakheel heard about this, it made her think that she would never make the mistake of recommending any investments, and that she would stay within the set boundaries of her duties.

780. Mr Al Rajaan behaved towards Ms Al Dakheel in a way that made her think that he was very open and transparent. He told everyone about his property in Geneva, saying that he funded it through a loan which he was paying off using personal investments he had made in options on Apple and in gold. On one occasion, when he was talking about his residency status in Geneva, Ms Al Dakheel asked him whether he had to pay taxes in Switzerland on all his holdings as part of the residency permit obligations. He said that outside Switzerland he only had his salary and house in Kuwait. This was, as the evidence in this case shows – and as Ms Al Dakheel only came to realise in the months before her departure – wholly untrue. Mr Al Rajaan's lie to Ms Al Dakheel in this regard is of a piece with the lies told by Mr Al Rajaan in the context of the English proceedings in 2015 concerning the Criminal Restraint Order which was successfully obtained against him. I deal with this separately in Section F.

781. Turning to the substance of Ms Al Dakheel's evidence, in particular as to the way in which PIFSS operated: she said that throughout her career, her work was focused on tracking the performance of open-ended funds, and she was responsible for preparing subscription documents for execution at Mr Al Rajaan's request whenever he decided on a new investment. There were a variety of subscription-related documents that she and her colleagues had to prepare. In terms of performance monitoring, she was responsible initially for around 10-15 open-ended funds, but this grew substantially over the course of her career to about 100 live investments by 2013. Her role did not involve choosing investments, or deciding how much was invested, and this did not change throughout her time at PIFSS until after Mr Al Rajaan departed in 2014. She also did not recall anyone else, whether in the open-ended investments team, the wider Direct Investment Department, or the other investment departments which invested in funds, being involved in choosing investments or deciding how much was invested during Mr Al Rajaan's time at PIFSS. As far as she was aware, it was only Mr Al Rajaan who did that.

782. Although she worked in the Direct Investment Department, and although she focused on open-ended investments, she experienced how things broadly worked across the department and was therefore aware of the general way in which investment decision-making was made. She could therefore see the process for choosing and deciding investments. It was her understanding that nobody apart from Mr Al Rajaan had a good understanding of the detail of investments, investment relationships or investment strategies entered into across the investment departments at PIFSS. Mr Al Rajaan was the only person with oversight.

783. The departmental set-up when Ms Al Dakheel joined in 1996 was that Amjad Sheikh was an accountant in charge of all fund accounting and administration in the Direct Investment Department. He was the main person keeping track of all the companies and funds transactions and valuation, and he supervised Ms

Al Dakheel's work and she was trained by him. There were various other departments on the investment side of PIFSS: the portfolio and securities departments, and various back-office departments (settlement, banking and investment accounts). At that time, real estate funds were included within the Direct Investment Department, which also included direct investments in local and foreign companies. Subsequently, a new real estate department was created.

784. As described above, Ms Al Dakheel was promoted to supervisor in 2001. Mr Al-Alwan focused on direct investments in companies, and Faisal Al Musallem on closed-ended investments. In 2002, Ms Safa Al-Mulla joined Ms Al Dakheel in her work on open-ended investments, and in 2013 the team grew to 4 or 5 people. Ms Al-Mulla had, like Ms Al Dakheel, joined directly from university.

785. Ms Al Dakheel did not receive any training in investments or analysis, but learnt on the job, including as a result of her interactions with Amjad Sheikh. A feature of Mr Al Rajaan's approach to running PIFSS is that there was no formal training of any of the individuals who joined Ms Al Dakheel's team.

786. After some years of her employment, Mr Sheikh began to take Ms Al Dakheel to his meetings with Mr Al Rajaan. In around 2004, Mr Sheikh became a financial advisor to Mr Al Rajaan, and he left the Direct Investment Department. Ms Al Dakheel's working relationship with Mr Al Rajaan then grew, and he would speak to her directly sometimes several times a day.

787. At the time Ms Al Dakheel joined, there was (in addition to Mr Sheikh) one supervisor (Salman Al-Alwan), and one other accountant (Faisal Al Musallem) and one secretary. Sulaiman Al-Muraikhi was at that point the manager of the department. Mr Al-Muraikhi was not happy about Mr Al Rajaan's management style: despite his position as manager, Mr Al Rajaan would bypass him, and go directly to Amjad Sheikh, and later on to Ms Al Dakheel and Mr Al-Musallem. Mr Al-Muraikhi was also critical of some of PIFSS' investments, for example investments in Russia. Mr Al-Muraikhi's complaints were consistent with what she heard from people outside PIFSS, sometimes socially, that PIFSS was a 'one-man show'.

788. Ms Al Dakheel described how Mr Al Rajaan was the person who found and chose investment relationships and new investments with new fund managers. He would travel a lot at weekends, and often come back with a list of investments which he had decided that PIFSS would invest in. He would sometimes have documents, such as prospectuses, for these investments, and would pass these to Ms Al Dakheel or her colleagues in the department. He would tell them how much to invest, in what currency and on what value date. Ms Al Dakheel never questioned his investment decisions in open funds, and trusted him completely. She assumed that he had satisfied himself on the background and quality of investment managers, had evaluated investment opportunities, and approved what he considered to be in the best interests of the institution. Nobody else was doing that work. Although the investment process underwent a degree of change over the years, the one constant feature was that whenever she received instructions from Mr Al Rajaan, he had already decided to invest. Investment relationships and new investments with new fund managers came through Mr Al Rajaan only. No-one else was allowed to make

any proposals or recommendations. She believed this was the same for the closed-ended investments within the Direct Investment Department, and more broadly across investment departments.

789. Since Ms Al Dakheel did not want to cross the boundaries applicable to her role, she only ever met with managers that PIFSS already invested with, and with the approval of Mr Al Rajaan. She never met anyone who had not been approved by him. Investment proposals from managers that PIFSS had existing relationships with normally went directly to Mr Al Rajaan. But sometimes, where there was an existing relationship, a manager would send an investment fund proposal to her team. The proposal would then be passed to Mr Al Rajaan. Whether the proposal went directly to Mr Al Rajaan, or had come via the team, it was Mr Al Rajaan who selected the open-ended investments and made decisions as to top-ups or redemptions.

790. In the later period of her career at PIFSS, after she had become more senior, Mr Al Rajaan would sometimes listen to her if she raised issues in relation to companies or funds that PIFSS was invested in. However, this was not always the case. She referred to raising an underperforming Mirabaud investment with him, suggesting that it should be replaced. Mr Al Rajaan did not like that she had raised this with him, and closed down the conversation.

791. As far as PIFSS' committees and investment processes were concerned, Ms Al Dakheel's evidence was in summary as follows. When she started, Mr Al Rajaan would give Amjad Sheikh an instruction telling him how much PIFSS was going to invest in a certain fund, in what currency and with which value date. Mr Sheikh would pass the instructions on to her verbally. After Mr Sheikh left the Direct Investment Department in around 2004, Mr Al Rajaan would give those instructions to her directly, either verbally or on a piece of paper. She saw him doing the same for closed-ended investments. After receiving instructions, she would start preparing the paperwork for Mr Al Rajaan to sign. At this time, she was not aware of the existence of the IIC, or of any requirement for Mr Al Rajaan to get approvals from the investment committee before an investment was made. She assumed that Mr Al Rajaan had authority to make investment decisions himself, which was what he was doing. She did prepare tables of open-ended investments which had already been made, and she understood that this was for a committee. She assumed that the committee was reviewing historical transactions.

792. At some point before 2008 – 2010, she became aware of the existence of the IIC, but she did not attend any meetings herself until a limited period of time in 2012, and then from July 2013. She described Mr Al Rajaan's power as being visible in the meetings. She said that his personality, leadership and knowledge all led to his control over the committee itself. All the other members were lower down in the hierarchy, and were appointed by him. His knowledge and expertise were way ahead of everyone else. Her perception at the time was that the IIC would never reject or refuse a presentation made by Mr Al Rajaan.

793. The position was different in the HIC, where from an early stage in her career she attended part of the meetings, giving an aggregate performance overview of open-ended funds. She described the members of the HIC as being independent,

and at the same level as or above Mr Al Rajaan. She referred in that context to one memorable meeting where there was a fight between Mr Al Rajaan and Mr Al Rashed, with the latter complaining of Mr Al Rajaan's management.

794. As already indicated, Ms Al Dakheel was an excellent witness, and I consider that her evidence contained a reliable account of how PIFSS operated during Mr Al Rajaan's tenure, and in particular the control and influence of Mr Al Rajaan in that context. I also agree with EFG, and indeed PIFSS, that the decision-making process was far from robust.

E6: The Brahma committee and Mr Al Othman's evidence

795. The absence of a robust decision-making process, and other problems in PIFSS' organisation and governance, were also clear from Mr Al Othman's evidence. I do not consider it necessary to summarise all of his evidence in detail, but his work on the Brahma committee is illustrative. He described the extensive work that the committee had carried out, including interviewing a large number of people. That included Mr Al Rajaan himself, who was no longer in post, was living abroad, and returned to Kuwait to be interviewed.

796. The committee identified key failures in the investment process in the context of the Brahma investments. It was shocked at how hundreds of millions of dollars were invested in non-core markets, with managers who had almost no track record and almost no other investors. Mr Al Othman had, in 2014, some 16 years' experience in international markets, and he had never heard of Brahma. There was concern that the IIC included several members with very little to no background in or knowledge of investments. A number carried out back office functions.

797. Mr Al Othman described how the committee heard of really strange practices from the interviewees. Mr Al Rajaan, through the IIC committee's secretary, would not call an IIC meeting ahead of time with an official invitation, so meetings would take place with whoever was there. No agenda or documents were supplied prior to the meeting. Some members said that, when they attended IIC meetings, files would be placed on the desk in front of them without them having had prior access to them, and they were expected to read them and make a decision on the spot. He understood from interviewees that investment proposals were generally initiated by Mr Al Rajaan, or at least pre-approved before the committee meeting. When the meeting ended, the members were to leave the files on the desk.

798. He also learned that IIC meetings were short, about an hour long: an inadequate time, given the large number of investments and the significant amounts involved. There was no doubt in his mind, based on what he heard from IIC members, that Mr Al Rajaan had absolute power in terms of the selection of investments. Whatever he proposed to the committee got approved.

799. He said that he really remembered his shock and dismay. There was definitely mismanagement or under-management, out of line with industry standards. He said that this was "not how the country's social security should be managed".

800. I consider that this evidence fairly reflected how Mr Al Rajaan ran PIFSS at the time, and how the IIC worked. It chimes with much that is in the Ernst & Young and Project Renaissance and Milestone reports, which it is not necessary to describe in detail, and with the evidence as a whole.

E7: Conclusion as to Mr Al Rajaan's influence and control

801. I agree with PIFSS that there is compelling evidence that Mr Al Rajaan controlled PIFSS, and in particular its investment and governance processes, to a material degree. PIFSS identified 10 factors which enabled him to achieve this level of control. It is sufficient to refer to the following factors, which were apparent on the evidence.

802. First, Mr Al Rajaan's longevity. He outlasted all or nearly all of the Ministers of Finance, the non-executive directors, and the non-employee members of the HIC. Those employees at PIFSS who lasted as long or almost as long (such as Ms Al Dakheel) were his subordinates.

803. Secondly, he controlled the executive function of PIFSS through various means: extensive powers given by statute or subsequent resolution, to structure and manage PIFSS as he saw fit; being a member of the Board and the HIC; and heading the IIC, which he created and was staffed by subordinates. These appointments and powers gave him access to each level of the committee oversight and decision-making structure.

804. Third, he structured PIFSS so that all departments were subordinate to and reported directly or indirectly to him. Even though, after 2004, the Direct Investment Department nominally reported to Sheikh Abdullah, the latter reported to Mr Al Rajaan. Furthermore, the evidence was clear that Mr Al Rajaan controlled the selection and approval of the open and closed funds with which that department was dealing.

805. Fourth, the authority granted to Mr Al Rajaan by statute and internal regulations, and his creation and dominance of the IIC, allowed him extensive unilateral authority to make, increase or redeem PIFSS' investments. This is clear from the evidence described above, and also the evidence relating to the various schemes described below.

806. Fifth, he operated the IIC in such a way as to avoid effective scrutiny of PIFSS' investments, in addition to staffing it with more junior employees including people who had no investment experience. This is illustrated by the picture that emerged from the interviews and other work done by the members of the Brahma committee.

807. Sixth, Mr Al Rajaan made himself the only person who in practice was entitled to and did propose investments to be made via the Direct Investment Department. The evidence indicates that Mr Al Bader was not so closely restricted in the real estate department. But the evidence concerning the Aerium Scheme investments, which related to real estate, shows that Mr Al Rajaan was making key investment decisions in that area as well. Employees in investment departments, and in particular the Direct Investment Department, were

generally not permitted to propose investments, and they were not trained on how to select investment managers, or individual investments, or how to carry out due diligence or adequate performance monitoring. Mr Al Othman's evidence was that these departments were understaffed and that their employees were not properly trained, despite the fact that PIFSS had more than sufficient resources to employ qualified staff and train them. I have no doubt that these deficiencies were deliberate, and were an aspect of Mr Al Rajaan ensuring that he was not subject to significant challenge in his investment decisions.

808. Seventh, Mr Al Rajaan ensured that PIFSS' audit, risk and governance structures were weak and ineffective.

SECTION F: ASSESSMENT OF MR AL RAJAAN'S CASE AND CREDIBILITY

Mr Al Rajaan's pleaded explanation of the payments

809. D1/D2 relied upon statements of truth signed by Mr Al Rajaan, in relation to various pleadings which he had served, and submitted (in effect) that I should accept the evidence that Mr Al Rajaan had thereby given. That evidence included assertions that Mr Al Rajaan considered that he was entitled to receive the payments for a variety of reasons, and also that his receipt of the commissions was known to and approved by other senior individuals in Kuwait.

810. Thus, in paragraph 4.7 of his defence (as re-amended on a number of occasions), Mr Al Rajaan pleaded:

> "Mr Al Rajaan considered that he was entitled to receive monies from Swiss financial institutions and/or intermediaries in circumstances where (a) PIFSS's Supreme Investment Committee (and/or the Internal Investment Committee) had chosen those institutions for reasons unconnected to the possibility of payments to Mr Al Rajaan and based on internal investigations into those potential investments by staff other than Mr Al Rajaan; (b) Mr Al Rajaan did not personally authorise investments by PIFSS; (c) the financial institutions offered good value for money and sound investment advice; (d) Mr Al Rajaan had not asked to be given any money but had been offered payments by the Swiss financial institutions and/or intermediaries and understood that it was standard market custom and practice for Swiss financial institutions and/or intermediaries to do so in Switzerland and Kuwait; (e) Mr Al Rajaan understood that the financial institutions' terms and conditions provided that they could pay fees to intermediaries; (f) in some instances, he was providing services to Swiss financial institutions in helping them to establish valuable investment activities with third parties, and (g) Mr Al Rajaan received money into accounts in his or his wife's own name or their companies' names."

811. Paragraph 4.8 pleaded, amongst other things, that:

> "Further or alternatively, it was widely known (including by senior Government ministers, such as the Kuwaiti Minister of Finance and Chairman of the board of PIFSS (in 2006-2007), Bader Al Humaidhi ("Mr Bader Al Humaidhi")) and/or rumoured in Kuwait (from at least the early 2000s) that Mr Al Rajaan was receiving monies from financial institutions and/or intermediaries with whom PIFSS was investing. It was well known that from at least the late 1990s that Mr Al Rajaan spent a

> considerable amount of time in Switzerland, where he had a house in Rolle and later in Cologny (one of the most expensive parts of Switzerland) and that he travelled to Switzerland on at least a monthly basis."

812. Paragraph 4.9 pleaded that Mr Al Rajaan received the monies in circumstances where he understood it was standard market custom and practice in Kuwait for money to be given to senior individuals who were acting on behalf of Kuwaiti public authorities.

813. In August 2020, following service of his original defence in February 2020, Mr Al Rajaan responded to PIFSS' Request for Further Information. One question was asked concerning Mr Al Rajaan's alleged understanding as set out in paragraph 4.7. Mr Al Rajaan was asked whether he confirmed his belief and understanding with anyone at PIFSS; and if so, to give particulars of who he confirmed it with and when, and if not, why not. His answer was that he had conversations with numerous people over the years, and that his understanding was that it was common practice for senior government employees to receive payments from Swiss financial institutions or intermediaries. He also said that it was his case that his receipt of monies:

> "was known to, *inter alia*, the Kuwaiti Minister of Finance Bader Al Humaidhi (who was also Chairman of the board of PIFSS in 2006-2007) and to Bader Al Zrahan (who was a business associate of Mr Al Humaidhi). Indeed, in 1999/2000, Mr Al Humaidhi tried to give Mr Al Rajaan two cheques which he suggested were a share of commissions that Mr Al Humaidhi had himself received. Mr Al Rajaan did not cash these cheques and showed them to Mr Al Humaidhi's brother (Hamad) who also occupied a senior position in PIFSS.
>
> Consequently, the receipt of monies by Mr Al Rajaan was known to senior individuals in the Kuwaiti Government and at PIFSS and Mr Al Rajaan did not consider that there was any need to make further disclosure."

814. Apart from pleadings supported by a statement of truth, Mr Al Rajaan did not provide any witness statement for the purposes of these proceedings. I do not accept that his ill-health in later years was such as to prevent a statement being prepared. The present proceedings were commenced in 2019, and there was sufficient time for Mr Al Rajaan to produce a witness statement which set out his account of the events which formed the basis of the allegations against him.

815. Ultimately, however, I do not think that it is important that no witness statement was produced, because I have no doubt that Mr Al Rajaan was, at all material times, a thoroughly dishonest individual. In my view, no reliance can be placed upon any of the assertions in his defence, or upon his signed statement of truth, except to the extent that they contain admissions, or are uncontested, or are established by other objective evidence or the inherent probabilities. I also

reject, as wholly implausible and inconsistent with the evidence as a whole, the suggestion that Mr Al Rajaan understood that he was entitled to receive the payments which he received for any of the reasons which he gave. In that context, I reject his argument that the receipt of secret commissions was known to or approved by any of his superiors in the organisational structure of PIFSS, or senior government ministers outside that structure. There are many strands in the evidence which have led to these conclusions, and I discuss these below.

The position of other defendants

816. At the start of the trial, other defendants were more circumspect in espousing the reliability of Mr Al Rajaan as a witness. But it appeared that, nevertheless, some of them sought, in various ways, to support Mr Al Rajaan's case that his receipt of secret commissions was known and somehow approved.

817. Thus, a considerable amount of time was occupied by Man and EFG in exploring the minutiae of bonus arrangements which had been put in place by PIFSS' subsidiary Wafra. I could not see the relevance of this at the time, not least because those bonus arrangements had no similarity at all with the undisclosed and secret arrangements for the commissions on PIFSS' investments which were the subject of the claim against Mr Al Rajaan and those who assisted him. In closing submissions, however, the Defendants' earlier enthusiasm for these Wafra bonus arrangements had waned almost to vanishing point, with only D1/D2 and the Mombelli Defendants seeking to make something of these arrangements. However, Mr Brown for the Mombelli Defendants made it clear in his oral closing that he was not in fact submitting that PIFSS had consented to or approved the payments which Mr Al Rajaan received. Rather, he relied upon the Wafra bonus arrangements as an aspect of an argument as to PIFSS' contributory fault, which should therefore (in his submission) reduce the quantum of any liability on the part of his clients.

818. I consider that the Wafra bonus arrangements are of no relevance and provide no assistance in relation to the resolution of the issues in this trial. Rather, there are many powerful reasons for rejecting Mr Al Rajaan's case as to his understanding of the legitimacy of the payments which he procured for the benefit of himself and others, including his case that other senior people knew about the payments and the arrangements which surrounded them.

The English criminal restraint proceedings

819. I start by considering the English proceedings in 2015/2016 which resulted in a criminal restraint order against Mr Al Rajaan (and Ms Al Wazzan) in respect of some GBP 23.5 million in liquid assets which Mr Al Rajaan and his wife had in various bank accounts in the UK. The restraint order was originally granted *ex parte* (i.e. without notice) by HHJ Peter Clarke QC in the Crown Court sitting at Blackfriars, and he later rejected an application to vary or set it aside. That latter application was hard-fought on behalf of Mr Al Rajaan and his wife, as was the extensive appeal that was then pursued. It is not necessary to describe the course of those proceedings, and the arguments there advanced, in detail. They can be seen in the lengthy and comprehensive judgment, dismissing the

appeal, of the Court of Appeal (Criminal Division) (Sharp LJ, Edis J and HHJ Munro QC): [2016] EWCA Crim 96.

820. For the purposes of the set-aside application, Mr Al Rajaan initially provided a 24-page (first) witness statement. This contained a statement of truth, in which he declared that:

> "the contents of this witness statement are true to the best of my knowledge and belief and that I have made this statement knowing that, if it is tendered in evidence, I will be liable to prosecution if I wilfully stated in it anything which I know to be false or do not believe to be true."

821. In that witness statement, Mr Al Rajaan was responding to evidence provided, on behalf of the Director of Public Prosecutions ("DPP"), by Mr Chris Laiolo. Mr Laiolo was an Officer with the UK's National Crime Agency, and Mr Al Rajaan's first witness statement, dated June 2015, responded to three witness statements which Mr Laiolo had by then served. The substance of the evidence served by Mr Laiolo (which is summarised in detail in the Court of Appeal's judgment) was that, amongst other wrongdoing, Mr Al Rajaan had received substantial secret commissions on monies which PIFSS had invested. At the time of Mr Laiolo's first three witness statements (served in March 2015), Mr Al Rajaan had only recently lost (in December 2014) what the Court of Appeal described as:

> "a protracted, but ultimately unsuccessful legal battle in Switzerland against attempts made by the Kuwaiti authorities to restrain their assets in that jurisdiction, and to obtain orders for relevant disclosure."

822. Accordingly, at that time, the State of Kuwait, which had issued Letters of Request to the DPP requesting the restraint order, did not have, and certainly had not analysed, the full extent of the materials which are now available. The figures referred to in Mr Laiolo's evidence are therefore, to some extent, lower than the figures which could be put forward now. Reference was made by Mr Laiolo to: commissions of some USD 390 million; monies passing through accounts, associated with Mr Al Rajaan, of USD 235 million, a figure which excluded both a high number of internal transfers and also interest and profits on investments; statements made by Kuwaiti government officials that the amounts embezzled could be up to USD 1 billion; and to a sum of around USD 100 million which was understood to have been frozen in Switzerland. In addition, reference was made to some USD 23.5 million which had been identified in various bank accounts in the UK, as well as to a number of valuable properties, including a Knightsbridge property purchased for £ 6.69 million.

823. The case advanced by the Kuwaiti authorities, and thus by the DPP through Mr Laiolo's evidence, was summarised by Mr Laiolo in paragraph 58 of his first statement:

> "From all that is set out above, it is my belief that both Mr. ALRAJAAN and Mrs. ALWAZZAN are not legitimately wealthy to the value of the monies identified in the UK and Switzerland. I suspect that the majority of the funds in the bank accounts that I seek to restrain are derived from the criminal offences said to have been committed by Mr. ALRAJAAN."

824. Earlier in his statement (paragraph 16), Mr Laiolo made a similar point:

> "Enquiries by Kuwait, including generating additional information that seems to have come to them from Switzerland only as a result of the recent judgment of the Swiss Supreme Court, appear to show that Mr. ALRAJAAN and his family transferred parts of the monies generated by the illegal commission payments to other countries, including the United Kingdom. Given Mr. ALRAJAAN and his family's middle-class background and his employment as a public servant, and the State of Kuwait's belief that Mrs. ALWAZZAN does not work and has no other known sources by the Kuwaiti authorities of substantial legitimate income, in the Request it notes that Kuwait cannot find an alternative explanation other than the alleged criminal activity that may have generated such enormous amounts of funds and permitted him and his family to live a high-cost lifestyle."

825. The response of Mr Al Rajaan, and indeed his wife D2, was that all of their wealth had been legitimately acquired. The Court of Appeal summarised their case (see paragraph [66] of the judgment) as follows:

> "The evidence served by the appellants on 2 June 2015 consisted of over 550 pages of witness statements and exhibits. Its aim was to show that both appellants had legitimate ways of accruing their enormous wealth. It was said that the allegations made by the State of Kuwait were made in bad faith and that some of the information given by Kuwait to the Crown Court via Mr. Laiolo was untrue."

826. This was a fair summary of their position. Notably, in Mr Al Rajaan's first witness statement, after setting out "My Career and Professional Background" in Section A, there was a Section B (running to 7 pages). This was headed: "The Source of My Wealth is Legitimate". In that section, he addressed the case of the Kuwaiti authorities that his unusually high level of wealth "can only be explained by involvement in criminal activity". He described statements to that effect as inaccurate, and as not providing a true reflection of his or his family's personal circumstances. He said that, in addition to his salary, "I managed and grew my personal wealth through legitimate employment and investment activities. I expand on these further below".

827. There then followed two sub-sections in which he explained these "legitimate employment and investment activities". The first was headed "Employment/Board Positions", and this provided details of various board and other positions that he held, the remuneration that he received, and the fact that his board positions were well publicised and known to the authorities in Kuwait. The second section was headed "My Personal Investment Activities". He said that in addition "to the income received for my services on company boards, a large portion of my income came from my personal investment activities". He described himself as an investment professional, with a significant personal interest in the international and Kuwaiti markets, and said that he had been "very successful in this regard".

828. There was nothing in this statement which gave any indication at all that an enormous amount of his wealth had been derived from commissions on the investments that PIFSS had made. Indeed, there was no reference to any of the commissions, now clearly established and to a large extent admitted by Mr Al Rajaan, which are at the heart of the case advanced by PIFSS in this trial. It follows that there is no hint of the case, now advanced by Mr Al Rajaan (and, at least initially, supported by a number of defendants) that these commissions were in some way authorised or approved by senior individuals in Kuwait. Indeed, the witness statement refers expressly to the authorisation of Mr Al Rajaan's board positions, and how these were generally known, but does not advance the case that the position was the same in relation to the very substantial commissions that Mr Al Rajaan was receiving on PIFSS' investments.

829. Mr Al Rajaan's position at that time was to deny the receipt of any such commissions. Thus, in paragraph 41 of his statement, he refers to the various allegations of the Kuwaiti authorities, including that he:

> "received commission payments through entering into investments and business deals on behalf of the Public Institute for Social Security."

830. In paragraph 42 of his statement, he states:

> "I can say categorically that these allegations are false and without basis."

831. The case now advanced has therefore changed completely from that advanced before the Court of Appeal, with a statement of truth and an acknowledgment of the risk of prosecution if false, and which formed the basis for the arguments advanced in support of the discharge of the criminal restraint order. The documentary disclosure obtained by PIFSS, and which has become available for the purposes of this trial, has made the evidence and arguments advanced by Mr Al Rajaan in the criminal restraint proceedings untenable. Hence, it became necessary for Mr Al Rajaan to advance a different case, which is what he has done.

832. I have no doubt that a false and dishonest case was advanced by Mr Al Rajaan in his evidence and argument in the criminal restraint proceedings. I have received no satisfactory explanation as to how it could be said that the case there

advanced was an honest one. I consider that, notwithstanding Mr Al Rajaan's statement of truth, his first witness statement in the criminal restraint proceedings was fundamentally dishonest, to his knowledge.

833. Fortunately, neither HHJ Peter Clarke QC nor the Court of Appeal accepted that evidence or the case there advanced. The Court of Appeal, at paragraph [67], summarised the position of the Kuwaiti authorities and thus the DPP as follows:

> "The essential response by the respondents in broad terms was that though both appellants claimed to have legitimate sources for the monies that were the focus of the Kuwaiti investigation into corrupt benefits, and for the monies currently restrained, the evidence to support those claims did not provide a clear or full audit trail for the money, and failed to demonstrate (for example) how monies moved between different jurisdictions."

834. Ultimately, this was the case that was accepted both by the judge and the Court of Appeal, and the materials now available demonstrate the wisdom of the decisions then reached.

835. The above are not the only lies which Mr Al Rajaan advanced in support of his case. Allied to the case that he had not received commissions, and that all of his wealth was legitimately acquired, was the explanation that he put forward as to why the allegations were made. He asserted that his brother-in-law was behind the unfounded allegations. He also asserted that Dr Al Rashed was motivated by extraneous matters into making false allegations. He asserted that the allegations were being made by the Kuwaiti authorities in bad faith. None of these points, in my view, have any foundation in any reliable evidence. Had Mr Al Rajaan "come clean", and admitted the payment and receipt of the commissions which he now admits, or which are established by the evidence, none of these points could realistically have been made. Indeed, had he come clean, it is impossible to see how any application to discharge the criminal restraint order could realistically have been made at all; not least because the admitted receipt of very substantial commissions would have been completely at odds with the years of denial in response to the allegations to that effect which had been made over the years in Kuwait in response to questions raised by Kuwaiti parliamentarians and others.

836. It hardly needs saying that the giving of such dishonest evidence to English courts is extremely serious. In my view, it is sufficient in itself to destroy the credibility of Mr Al Rajaan generally, and more specifically of the very different case that he sought to advance in his defence as to his belief in the legitimacy of the receipts and the alleged knowledge of others.

837. I now turn to other strands in the evidence which in my view amply confirm the unreliability of Mr Al Rajaan as a witness, and indeed his fundamental dishonesty.

The complex web of companies, trusts and nominees

838. First, when one stands back from the detail, the arrangements made by Mr Al Rajaan, and his close associates, for the receipt and distribution of funds involved the use of an extensive and highly complex web of companies, trusts, and nominees which were plainly designed to conceal what was really happening. The banking arrangements, for example, involved Mr Nasrallah putting himself forward, and signing documents, which indicated that he was the beneficial owner of various companies and accounts, when it was known to Mr Al Rajaan (as well as Mr Nasrallah) that he was no such thing. The nature of these arrangements can be seen, for example, in the Pictet Scheme, the EFG Scheme and the Pensée Scheme discussed in the various sections below.

839. It suffices at this stage simply to refer to the Pensée Scheme as showing that concealment was the aim of the arrangements with which this trial is concerned. These were put in place in 2013, after investigations had started in Switzerland, and Mr Al Rajaan had to move his assets elsewhere. In 2012, Mr Al Rajaan had acquired, with the assistance of Deltec, a company called Fyne Properties Ltd ("Fyne"). As described in Section L below, addressing the Pensée Scheme, Deltec's records showed that this company was associated with Mr Al Rajaan. There is no obvious reason, other than concealment, which explains what subsequently happened. In summary, Fyne was not used for the receipt of the further monies which Mr Al Rajaan wanted to have transferred to Deltec. Instead, the Pensée Foundation was created, with false and misleading documentation being signed at a meeting in Paris attended by Mr Al Rajaan, Mr Nasrallah and Mr Chalopin of Deltec, and further false documents being signed thereafter. In particular, the documents purported to show that Mr Nasrallah was the beneficial owner of the monies that were to be remitted to the Pensée Foundation, and that his son Nadim Nasrallah was the sole intended beneficiary of the Foundation. None of that was true. Mr Nasrallah was simply a front, and the Pensée Foundation and its assets were always intended to be for the benefit of Mr Al Rajaan. Nadim Nasrallah was never intended to benefit.

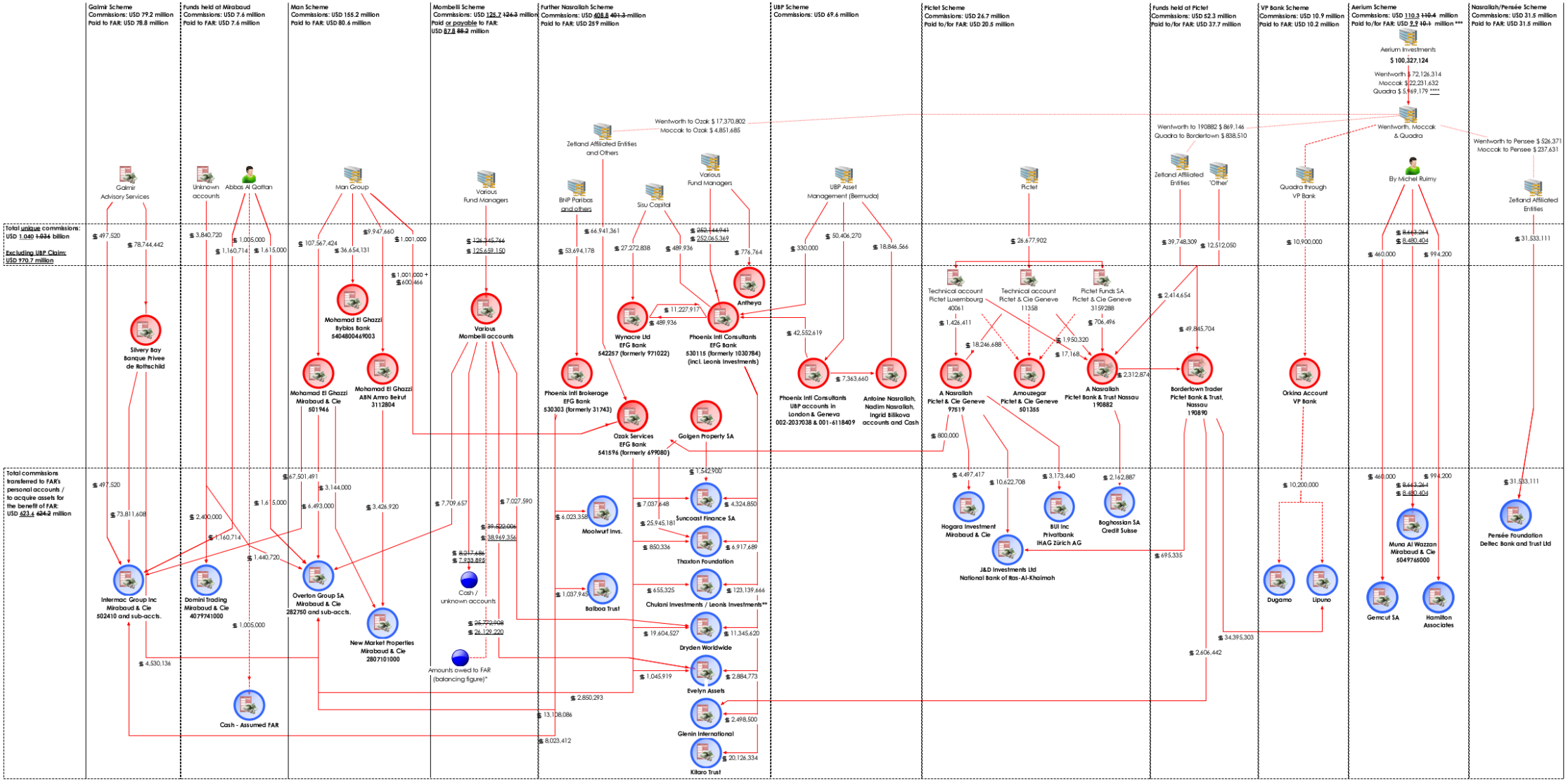
840. I accept that offshore companies or trusts can be used for legitimate purposes, such as (lawful) avoidance of tax or inheritance planning. However, this was plainly not what was happening here. If inheritance planning or tax avoidance was the aim, it could have been achieved with a small fraction of the number of companies and trusts that were involved in the arrangements which were used here. I have had no reliable evidence, indeed no evidence at all, that explains how or why it can be said that the web of corporate entities and trusts was for the purposes of tax or inheritance planning, rather than for the nefarious purposes of Mr Al Rajaan and his close associates. There is, for example, nothing that suggests that accountants or others with tax planning expertise were behind the structures that were created and used to channel monies to Mr Al Rajaan.

841. As part of its opening submissions, PIFSS produced a diagram which sought to identify, in a simplified form, the money flows which form the subject-matter of the trial. This was modified during the trial, as further information came to light or was analysed. It does not purport to cover all of the payment flows. Thus, further simplified diagrams were produced (and are reproduced in Section J) in order to explain the payment flows through the various EFG accounts.

842. PIFSS' overall diagram is reproduced below (Fig. 1). Standing back from the detail, the diagram has similarities with a diagram which might be created to present a complex industrial process. Given that Mr Al Rajaan's activities involved obtaining secret commissions on an industrial scale, the analogy is perhaps an appropriate one.

Summary of retrocessions and transfers to Fahad Al Rajaan's ("FAR's") personal accounts / transfers for his benefit

[September 2025]: ~~This~~ version 2 (served on 24 September 2025) updates the version annexed to PJSS's opening dated 28 February 2025. The changes are detailed in the note on page 2. In summary, the substantive changes are limited to the following: (i) update to the Al Qattan payments (to reflect amendments in the 8RAPOC approved by the Order dated 4 June 2025); (ii) update to the Aerium Scheme commissions (to reflect amendments in the 9RAPOC approved by the Order dated 4 July 2025); and (iii) update to amendments to Appendices 4.7A-C of the POC (as approved by the Order dated 22 September 2025).
[February 2026]: version 3 (served on 9 February 2026) updates version 2. The changes are detailed on the note on page 2.



Notes

* Calculated as the difference between the agreed upon amount payable to Fahad Al-Rajaan of USD 87,769,717 ~~88,049,847~~ as set out in Appendix 6.2, and the amount actually paid to Fahad Al-Rajaan of USD 61,640,497 ~~62,476,088~~ as set out in Appendix 6.3 [PJSS no longer pursue #6.3.139 and #6.3.141].

** Includes ten payments of USD 14,353,641 from Phoenix to Leonis, at least seven of which then flowed on to Chulani (see Appendix 4.2F).

*** The figure of USD 9.2 ~~10.1m~~ paid to FAR represents only the sums paid direct from Mr Ruimy's Mirabaud account to the Mirabaud account 504976. PJSS's case is that the further sums paid out from Wentworth, Moccak and Quadra via the network of accounts indicated above were also for the benefit of FAR, but for convenience and to avoid duplication in the chart, these are not included within this figure.

**** The figure of US$100,327,124 includes US$47,125,778 of payments accrued which PJSS no longer seeks to prove were paid to Wentworth, Moccak and Quadra but remains part of PJSS's claimed total as explained in PJSS's written closing at [2240]-[2243]. The amount PJSS seeks to prove was in fact paid is US$53,201,346 (see 10RAPOC Appendix 7B column "Sums Paid Per Cash Accounts or Retrocession Spreadsheet" (B2/1.7/477)).

Fig. 1

843. It is not necessary at this stage to explain all of the detail, much of which will become apparent from the discussion in later sections. I have therefore omitted some of the footnotes which accompanied the diagram. However, I will give an overview description of how the arrangements, as shown in the diagram, worked.

844. At the head of each column is the name of the scheme in issue in these proceedings, with an indication of the amount claimed which is unique to that scheme. The "Mirabaud Scheme" encompasses the first 2 columns, headed as the "Galmir Scheme" and "Funds held at Mirabaud". The Pictet Scheme encompasses the columns headed "Pictet Scheme" and "Funds held at Pictet". The "Further Nasrallah Scheme" is the scheme described in this judgment as the "EFG Scheme".

845. Each column then identifies the initial payment flows down to the accounts shown in red circles on the coloured version of the diagram. (The colours appear on the electronic version of this judgment). Broadly speaking, these are the payments of monies (fees or retrocession payments), in respect of PIFSS' investments, to accounts in the names of various intermediaries or their corporate vehicles. Those intermediaries or their corporate vehicles had introduced, or at least purported to introduce, PIFSS as an investor to the fund manager whose payment of fees was the origin of the payment flow shown. PIFSS referred to the accounts to which these monies were paid as "Gateway Accounts".

846. Thus, for example, as the diagram illustrates:

i) Commissions from Banque Mirabaud in the sum of USD 78.7 million were paid from Galmir Advisory Services Ltd ("Galmir"), a Bahamian company connected with Banque Mirabaud, to Silvery Bay Investments Ltd ("Silvery Bay").

ii) Commissions from Man in the sum of USD 155.2 million were paid to Mirabaud (and other) accounts in the name of Mr El Ghazzi, with USD 1 million of that being paid to an EFG account in the name of Ozak.

iii) Commissions in the sum of USD 26.7 million were paid to Pictet accounts in the names of Mr Nasrallah and Mr Amouzegar.

iv) Commissions in the sum of USD 125.7 million were paid or payable to Mr Mombelli or the companies with which he was associated.

847. None of these "Gateway" accounts were in the name of Mr Al Rajaan. However, Mr Nasrallah's evidence was that some of these accounts were held by him as Mr Al Rajaan's nominee.

848. The next stage of the payment flows was, broadly speaking, from the accounts in the red circles down to various entities or accounts shown in blue circles. Sometimes, there were transfers between two (red) Gateway accounts prior to money being sent to the entities or accounts in blue circles. The transfers, from red to blue, were to entities or accounts that were held for the benefit of Mr Al Rajaan, often in the name of Ms Al Wazzan or a corporate entity that held the account for Mr Al Rajaan's benefit. PIFSS

described these payment flows as being from the "Gateway Accounts" to "Secondary Accounts", and I shall use this terminology in the following paragraphs.

849. By way of example:

i) Mirabaud commissions were transferred from Silvery Bay to Mirabaud Secondary Accounts in the names of Overton (USD 4.5 million) and Intermac (USD 73.8 million). A further payment of USD 497,520 was made direct from Galmir to Intermac, thus bypassing Silvery Bay. (I give the full names of the various corporate vehicles, such as Overton, below.)

ii) Man commissions were transferred from Mr El Ghazzi's Gateway Accounts at Mirabaud to Mirabaud Secondary Accounts in the names of Intermac (USD 67.5 million), Overton (USD 6.5 million), and New Market (USD 6.6 million).

iii) Pictet commissions were transferred from Mr Nasrallah's Gateway Accounts at Pictet to Secondary Accounts in the names of Hogara Investments Ltd ("Hogara") (USD 4.5 million), J&D Investments (USD10.6 million), BUI (USD 3.2 million), and Boghossian (USD 2.2 million). Although shown in a blue circle, Boghossian was not an account held by Mr Al Rajaan, but rather was an account of the jeweller Boghossian to which a payment was made, via Mr Nasrallah, for diamonds.

iv) Commissions received by the EFG Gateway Accounts of Ozak, Phoenix, and Phoenix International Brokerage were transferred to various Secondary Accounts including in the names of Thaxton (held at EFG), Chulani, Dryden, Evelyn, Glenin (all held at Pictet), Overton (held at Mirabaud), and Suncoast (held at UBP).

850. The next stage of the payment flows comprised the further transfer of payments from Secondary Accounts to other accounts held beneficially by Mr Al Rajaan or others at his direction. PIFSS referred to these as "Tertiary Accounts". There is, however, no sharp distinction between Secondary Accounts and Tertiary Accounts, in that a particular account could be either a direct recipient of money from a Gateway Account, or an indirect recipient via a Secondary Account. PIFSS submitted, and I agree, that these further transfers essentially consisted of a reshuffling of assets already within Mr Al Rajaan's ownership and/or control, and were designed further to break up the payment trail and disguise the initial source of the funds.

851. There was ultimately no substantial dispute that the vast majority of the various companies and accounts in blue circles (leaving aside Boghossian) were beneficially owned by or held for Mr Al Rajaan. On the basis of admissions made in Mr Al Rajaan's First Affidavit responsive to the WFO, PIFSS sought (and I will grant) a declaration that the following companies or entities, and their accounts, were beneficially owned by or held for Mr Al Rajaan: Chulani Investments Inc ("Chulani"); Domini Trading SA ("Domini"); Dryden Worldwide SA ("Dryden"); Evelyn Assets SA ("Evelyn"); Fyne (i.e. Fyne Properties Ltd); Glenin International Ltd ("Glenin"); Intermac Group Inc ("Intermac"); Jesting Advisory Services SA ("Jesting"); Lipuno; Lulienne Ltd ("Lulienne"); New Market Properties Inc ("New Market"); Newcrest Consultant Inc; Northshore Properties SA; Overton Group SA ("Overton"); SCI Quo Vadis; Scopeset

Ltd ("Scopeset"); Suncoast Finance SA ("Suncoast"); Tawny Estate Ltd ("Tawny"); and Thaxton Foundation ("Thaxton").

852. Most of the above, in so far as they were companies, were incorporated in Panama. The exceptions were: Fyne (Bahamas); Glenin (BVI); Jesting (Switzerland); Lipuno (a Liechtenstein entity); Lulienne (Bahamas); SCI Quo Vadis (France); Scopeset (Cayman); Tawny (BVI); and Thaxton (a Liechtenstein Foundation).

853. The only area of dispute raised by D1/D2 concerned entities connected with the Mirabaud Scheme, namely Hogara Investments Ltd and SCI Cum Laude. Ms Al Wazzan, in her defence, denied ownership of those two entities, asserting that she was the owner of the properties owned by those entities. However, she served evidence that she had no recollection of Hogara or SCI Cum Laude, or the circumstances in which she came to own their properties. But that evidence was withdrawn at the start of the trial, and Ms Al Wazzan was therefore not called or cross-examined. There is therefore no evidence to support her alleged ownership of those entities. In the light of my conclusions on the Mirabaud Scheme, I accept PIFSS' case that these were Mr Al Rajaan's.

854. In summary, I have no doubt that the complex web of entities and transfers was for the purposes of concealment, rather than any legitimate purpose.

Attempts to prevent PIFSS acquiring full information as to the commissions

855. Secondly, Mr Al Rajaan's actions over many years were aimed at preventing, in so far as possible, the Kuwaiti authorities and PIFSS from seeing and obtaining documents which would have revealed the fact and extent of the monies that Mr Al Rajaan had received, and what he had done with them. Mr Al Rajaan's actions are, in my view, consistent only with a determination to conceal what had happened. If, as Mr Al Rajaan contended and D1/D2 now contend, the receipts were known about and approved by the relevant senior people in Kuwait, then there would have been no reason for Mr Al Rajaan not to have made that clear at the outset, and indeed to the English courts in 2015/2016. Instead, Mr Al Rajaan spent years – prior to the decision of the Swiss court in December 2014 – seeking to prevent disclosure of documents in Switzerland.

856. In subsequent years, Mr Al Rajaan (and later D1/D2) sought to make it as difficult as possible for PIFSS to see or obtain relevant documents, or to advance its case in these proceedings. Thus, PIFSS was not entitled to take copies of the documents made available to it by the Swiss authorities, but instead had to make notes of what the documents said. When it came to the giving of disclosure in these proceedings, Mr Al Rajaan and later D1/D2 advanced an extensive argument as to why the Swiss materials, which were in his possession and control (because copies had been made available to him) should not be disclosed in these proceedings: see [2023] EWHC 1065 (Comm) (Henshaw J). To my mind, none of this is consistent with the basic theme of Mr Al Rajaan's defence: that senior people in Kuwait, including some at the head of PIFSS, were fully in the picture, and knew what was happening.

857. Thirdly, and again referring to the Pensée arrangements: Mr Al Rajaan made no reference to the Pensée Foundation, or its assets, in his asset disclosure in response to the 2019 WFO in these proceedings. I have no doubt that this was dishonest concealment. Mr Al Rajaan cannot have forgotten about Pensée, or the substantial

assets which it held. He had had numerous and fairly regular meetings or discussions about Pensée with Mr Chalopin and Mr Turnquest of Deltec, over the years. He had given instructions as to how the Pensée Foundation's monies should be invested. He had been discussing the Foundation, and what he wanted to use it for, with Mr Turnquest only a matter of months before his asset disclosure. I deal with the detail below, when addressing the Pensée Scheme.

858. Fourth, I have no hesitation in accepting Ms Al Dakheel's evidence as to how Mr Al Rajaan presented himself to her, and other colleagues. In short, he had always pretended to be a man who was against corruption. He asserted to her, as indeed he asserted more widely including in the context of the criminal restraint proceedings, that there was no truth in any of the allegations which were being made against him in Kuwait. He explained to her that his family wealth was principally his wife's wealth, and he only had his salary and some successful investments which he had made. All of this was dishonesty towards a person who was a loyal and hard-working colleague.

859. Fifth, D1/D2 and (initially at least) other defendants place much reliance on the questions that were asked, and suspicions of corruption articulated over the years, by a number of Kuwaiti MPs and Mr Al Rashed. Throughout that time, however, Mr Al Rajaan maintained the same denials as he expressed to Ms Al Dakheel. None of that was honest.

860. Sixth, Mr Al Rajaan's case that other senior people knew about his receipt of commissions is unsupported by any documentary or other corroborating evidence, and I reject it. It is inconsistent with the case that Mr Al Rajaan maintained for many years, including before the Court of Appeal: i.e. that there was no substance in the allegation that he had received monies. The case was first articulated in his defence in these proceedings – a defence served in 2020. By that time, the Particulars of Claim had been served, there had been an unsuccessful attempt to resist the imposition of a WFO, and Mr Al Rajaan knew what the documents would show. So he recognised that his prior denials would not stand up to scrutiny, and so he had to invent a new line of defence.

861. However, even then, the defence makes no sense and is inconsistent with the contemporaneous documents. There is nothing in any contemporaneous document which shows Mr Al Rajaan making disclosure to any senior colleagues, and indeed Mr Al Rajaan does not assert that he made any such disclosure. There are many minutes of meetings, of both the HIC and IIC, at which PIFSS' investments are discussed. This is when one would expect a director or senior employee, with a financial interest in the investment under discussion, to disclose his interest. This never happened.

862. Furthermore, even when the present defence was articulated, there is a complete lack of detail as to the individuals at PIFSS, or in senior positions in Kuwait, who are alleged to have known about his receipt of commissions. His defence identified only Mr Badr Al Humaidhi as a senior person with knowledge. His Request for Further Information ("RFI") contained a reference to Mr Hamad Al Humaidhi seeing two cheques which his brother had allegedly tried to give Mr Al Rajaan in 1999/2000. His opening and closing submissions then sought to identify Mr Al Shamali as a person with knowledge.

863. However, Mr Al Rajaan's receipt of secret commissions started many, many years, before either Mr Badr Al Humaidhi or Mr Al Shamali were in senior positions at PIFSS. Mr Badr Al Humaidhi only became Minister of Finance in 2005, joining PIFSS' board

at that time and leaving in 2007. Mr Al Shamali only became Minister of Finance in 2007, joining the PIFSS board at that time.

864. Mr Hamad Al Humaidhi was there for much longer. He had a long career at PIFSS, but the alleged incident involving two cheques is alleged to have occurred in 1999/2000, with no relevant information having been given to Hamad Al Humaidhi in the many years, when Mr Al Rajaan was receiving secret commissions, prior and subsequent to that time. In any event, that incident is unevidenced by any documentation or corroborating evidence.

865. Accordingly, the only evidence of alleged knowledge, on the part of other senior people at PIFSS, comes from an individual, Mr Al Rajaan, who is thoroughly dishonest and whose word (even when supported by a statement of truth) is generally worthless in terms of evidence. There is abundant positive evidence of concealment and lies by Mr Al Rajaan over many years. There is no documentary evidence which suggests that there was any disclosure or authorisation. All of the evidence therefore points against the argument that the receipt of commissions was known by any relevant individuals.

866. As against that, D1/D2 (and, initially at least, other Defendants) invite the drawing of an inference, adverse to PIFSS, by reason of their failure to call witnesses to deal with the allegation that there was relevant knowledge on the part of senior individuals within PIFSS. The drawing of an adverse inference is not dependent on the application of rules, but is essentially a matter of common sense: see *Royal Mail Group Ltd v Efobi* [2021] UKSC 33. Here, in the light of the evidence as a whole, it would in my view make no sense to disregard all of the matters referred to in the previous paragraphs, and to base a conclusion that there was relevant knowledge on the fact that witnesses have not been called to deny it. I decline to draw any such inference.

Alleged belief of Mr Al Rajaan in the legitimacy of the payments

867. There is also no substance in Mr Al Rajaan's pleaded case that he considered that he was entitled to receive monies from Swiss financial institutions and/or intermediaries. This alleged belief in entitlement is falsified by the steps that Mr Al Rajaan took to conceal what was happening, and the lies which he has told, including in the context of the criminal restraint proceedings.

868. None of the matters alleged in paragraph 4.7 of his defence, as forming the foundation of his alleged belief, support the case advanced. Some of the points are neutral: for example, that the financial institutions paid money to intermediaries. Most of the main points are false or are otherwise bad. Thus, Mr Al Rajaan did personally authorise investments by PIFSS. Such decisions as were made by the IIC were heavily influenced by him. In so far as decisions were made by the IIC and HIC, they were (to Mr Al Rajaan's knowledge) made in the absence of any disclosure of his personal interest in the investments being considered. It was not standard market practice for Swiss financial institutions or intermediaries to make payments, in particular undisclosed payments, to senior individuals in the investor. (I return to this point below). As shown by Mr Mombelli's evidence discussed below, Mr Al Rajaan would at times make it plain that he expected to be paid, if PIFSS was going to invest. There is no evidence of Mr Al Rajaan providing services to Swiss financial institutions in helping them establish valuable investment activities with third parties. The monies that he received were not paid into accounts in his name in Kuwait, but through a network of nominees

and corporate and other entities, usually established in jurisdictions with little or no transparency. The complex payment routes, illustrated by the diagram above, were designed to conceal, and did not evidence the receipt of payments to Mr Al Rajaan, and to which he alleges that he thought that he was entitled.

869. Another theme, developed by Mr Weisselberg KC in his opening submissions for D1/D2, was an "honest bankers" argument. It is said that the payments at issue, and the companies and bank accounts through which they were routed, were arranged with respectable bankers, and that Mr Al Rajaan would have had no reason to think that they were illegitimate. I reject that argument. Most of these allegedly honest bankers have either successfully sought to remove themselves from these proceedings (Banque Mirabaud, Banque Pictet, Mr Amouzegar), or have declined to participate substantively in them (Mr Guerin). The only banker to have dealt directly with Mr Al Rajaan, and who has given evidence in the case, is Mr Jean Chalopin. For reasons explained in the Pensée Scheme section, his evidence revealed him to be a man who lacked integrity. Furthermore, the man at the helm of Banque Mirabaud, Mr Pierre Mirabaud, has agreed to plead guilty to serious criminal offences, and has now done so. (I return to this point in Section G below). As discussed in the context of the Mirabaud Scheme, the Pictet Scheme, and the EFG Scheme, the evidence indicates that other bankers – such as Mr Guerin and Mr Amouzegar – were strangers to honesty.

870. When the details of the various schemes are examined, there is no doubt in my view that Mr Al Rajaan knew throughout that he was dealing with tame bankers who lacked integrity and who were motivated by financial considerations to assist him. He had no belief in their integrity or honesty.

Alleged market practice

871. Many of the factual witnesses, including some of those called by the defendants in relation to the Man Scheme, readily accepted the impropriety of fees being shared with directors or other senior individuals of an investor. They were not aware of any market practice for such payments to be made. That is unsurprising, in circumstances where there is international agreement aiming to combat corruption: see Section S below. Nor is it conceivable that there could be any such practice in relation to sharing fees with directors of Kuwaiti financial institutions. As discussed in Section B above, there are (again unsurprisingly) laws in Kuwait which prohibit bribery and profiteering from public office, and there are a large number of cases where convictions have been obtained against those who have profiteered from their positions.

872. There was also some expert evidence directed towards this topic. The experts on international investment practices, and the parties calling them were: Mr Paul Smith (PIFSS); Dr Antti Suhonen (Man/Mr Massad); Mr Bassem Snaije (D1/D2 and the Mombelli Defendants); and Dr Mark Cecil (EFG).

873. One of the issues that was addressed by Mr Smith and Mr Snaije was the question: "Was there a standard market practice in a) Kuwait and b) Switzerland of financial institutions (either directly or through intermediaries and/or introducers) and/or intermediaries and/or introducers paying reasonable amounts to the directors of institutions investing in or through financial institutions?"

874. Mr Smith had experience of many countries. He said that his experience with the business of payments to third parties out of a manager's fees mainly dealt with products domiciled in the markets of Bermuda, Cayman, Luxembourg, Dublin, Hong Kong and Singapore and intermediaries located in London, New York and Hong Kong. Investors could be based anywhere, including Switzerland and Kuwait. He had worked as a fund director from 1998 to the time of the trial, and as a fund intermediary in his own company from 2007 to 2012 and had had extensive dealings with boards, intermediaries, fund managers and investor executives throughout the period 1995 to 2015. He had visited with many potential investors in Switzerland and in Kuwait both as a fund manager and as a sales agent. When he acted as a third party intermediary, he had a client based in Switzerland for a few years. He was never able to secure a client in Kuwait.

875. Mr Smith's evidence was that in all of the careers that he had had in the investment world – as an asset manager, as a third party sales person, as a custodian and administrator, as an independent board director and as a financial educator – he had never been involved in or had personal knowledge of directors of investing institutions being paid any sums at all by investment managers into whose products they have invested. So, this was not market practice in any of the markets that he operated in.

876. He acknowledged that his experience of Kuwait was limited. However, he said that he had no first-hand knowledge of any arrangements in Switzerland or Kuwait of investment managers paying commissions directly or through intermediaries to directors of investor institutions.

877. In my view, that evidence supports the common-sense view that there can have been no market practice to make payments to directors, still less a market practice to make payments which were undisclosed and which had not been agreed by the investing institution.

878. I did not consider that Mr Snaije, in his evidence, ultimately expressed a different view. In the joint memorandum, Mr Smith and Mr Snaije agreed that:

> "There was no market practice in Switzerland for financial institutions to make direct payments to directors of financial institutions who were investors."

879. They also included the following:

> "In the context of the market conditions in Kuwait, direct payments to Directors of Kuwaiti financial institutions by fund managers and financial institutions outside of Kuwait were made as it was in both parties interests to do so. The Director of the Kuwaiti financial institution was bringing managers to the Kuwaiti institution that it would not otherwise have had the opportunity to access. From the fund manager's perspective they gained access to investors that they otherwise would not have done. This practice is conditional on there being sufficient areas of disclosure to all parties."

880. Mr Smith made it clear that he did not have any experience of this, and he could not provide any personal evidence to say that it was incorrect. It therefore represented Mr Snaije's view. But Mr Snaije makes it clear that the practice was conditional on there being sufficient disclosure. In Mr Snaije's report, he also identified the need for explicit agreement of the investor (in the case of Switzerland), or the awareness of the institution (in the case of Kuwait). For reasons set out above, this is not a case where there was any explicit agreement, disclosure to PIFSS, or awareness by PIFSS. Accordingly, Mr Snaije's views as to market practice have no application to the present case.

881. In any event, I do not accept that Mr Snaije's evidence supports the existence of any market practice of payments being made to directors of investing institutions, even if such payments were disclosed. His evidence was that he had never made such a payment, and that he had not directly come across such a payment being made. He accepted the importance of complying with applicable corruption and money-laundering laws. His only personal experience was of a payment being made to a director in Switzerland, in circumstances where there was full disclosure.

882. I therefore reject any case based on an alleged market practice. I also agree with PIFSS' submission that the alleged market practice is inconsistent with the lengths to which Mr Al Rajaan and others involved in his schemes went to conceal his receipt of commissions and to keep them secret from PIFSS. Also, had there been such a market practice, Mr Al Rajaan could have been expected to have mentioned it in his witness statements in criminal restraint proceedings, rather than lying about his source of wealth.

SECTION G: THE MIRABAUD SCHEME

G1: Overview

883. The Mirabaud Scheme gives rise to a claim against Mr Al Rajaan.

884. There was no oral evidence tendered specifically in relation to the Mirabaud Scheme. Mr Al Rajaan had died, and D1/D2 did not adduce evidence from any witnesses. The facts relating to this scheme derive principally from the file of documents held by the Swiss prosecutor arising from the investigation into Mr Al Rajaan and Ms Al Wazzan which started in 2012. Documents relevant to that investigation were provided by Mirabaud & Cie SA ("Banque Mirabaud").

885. Banque Mirabaud is a Swiss bank. Between 1997 and 2012, PIFSS invested over USD 2 billion in investments which generated the payment of commissions to Galmir Advisory Services Ltd ("Galmir"). Galmir was a Bahamian company connected to Banque Mirabaud.

886. Pursuant to an agreement dated 1 February 1997, Galmir agreed (or as PIFSS would contend, purported to agree) to pay Silvery Bay Investments Ltd ("Silvery Bay") retrocessions from the income generated by clients introduced by Silvery Bay ("the Silvery Bay Agreement"). The payment of commissions, described in the previous paragraph, therefore purported to be consequential on the introduction of PIFSS by Silvery Bay to Galmir.

887. The individuals connected to Banque Mirabaud who primarily feature in the documentation are:

i) Mr Pierre Mirabaud, senior partner of Banque Mirabaud until 31 December 2009.

ii) Mr Thierry Fauchier-Magnan, who is Pierre Mirabaud's cousin and succeeded him as senior partner. The two men had oversight and management of the relationship between PIFSS, Mr Al Rajaan and Mirabaud entities.

iii) Mr Luc Argand, a Swiss lawyer, school friend and close associate of Mr Mirabaud. He operated Silvery Bay, in so far as it operated, pursuant to powers of attorney. He was also a director of Banque Privée Edmond de Rothschild SA which was Silvery Bay's bank. Silvery Bay's account at that bank was the recipient of the vast majority of the monies paid by Galmir.

iv) Mr Antoine Richard, who was another school friend and close associate of Mr Mirabaud, and who operated a business including as corporate fiduciary.

888. PIFSS' claim in respect of the Mirabaud Scheme concerns unlawful activities connected to the use of bank accounts at Banque Mirabaud. There are two broad categories of payments which are the subject of the claim.

Payments made by Banque Mirabaud (i.e. Galmir)

889. First, there are commissions which were paid by Banque Mirabaud to Mr Al Rajaan. It is common ground, as between PIFSS and D1/D2, that some USD 78,744,442 was paid

by Galmir to Silvery Bay. It was also common ground that at least the majority of this sum was then paid by Silvery Bay to accounts at Banque Mirabaud in the names of various companies beneficially owned by Mr Al Rajaan. The companies that received these payments, directly or indirectly, were, initially, Overton and New Market. Then, after 2003, the payments were made, directly or indirectly, to Intermac and Domini.

890. The majority of the payments (as shown in the diagram in Section F above) were made from Silvery Bay to Intermac: USD 73,811,608. A payment of USD 497,520 was paid directly from Galmir to Intermac.

891. The payments to Overton from Silvery Bay totalled USD 4,530,136. Overton then transferred monies to New Market. Since both companies were Mr Al Rajaan's, it is not necessary to decide exactly how much was transferred from one company to another.

892. The total amount received by Overton and Intermac, ultimately from Galmir and mostly via Silvery Bay, was therefore USD 78,839,264. This was, therefore, close to the full amount which Silvery Bay had received from Galmir: USD 78,744,442.

893. It was common ground that the substantial majority of the USD 79,241,962 (paid by Galmir to Silvery Bay and Intermac) represented commission on PIFSS' investments. PIFSS and D1/D2 were agreed that, of this amount, some USD 2.2 million represented commission paid by reference to Mr Al Rajaan's personal investments.

894. PIFSS contends that all of these payments were secret commissions paid pursuant to a corrupt agreement between Mr Al Rajaan and Banque Mirabaud.

895. D1's opening submissions explained that D1 denied the allegations, and contended in summary that: (i) Banque Mirabaud paid monies to Mr Al Rajaan in return for his support in establishing valuable investment activities with third parties; (ii) Mr Al Rajaan did not ask Mirabaud for payments and there was no agreement that a certain amount would be paid; (iii) Mr Al Rajaan considered it to be standard market custom and practice in Switzerland and Kuwait at the relevant time for financial institutions to make payments of this nature and did not consider that this undermined his relationship with PIFSS; (iv) Banque Mirabaud put in place an appropriate corporate structure for Mr Al Rajaan for inheritance and tax planning purposes; and (v) Mr Al Rajaan did not authorise or influence PIFSS's Mirabaud investments.

896. I have no hesitation in rejecting D1's case, including for reasons set out in earlier sections. Thus, Section E above explains the influence which Mr Al Rajaan had in relation to PIFSS' investments. Section F above explains why Mr Al Rajaan is a dishonest person, whose assertions have no credibility, except to the extent that they contain admissions, or are uncontested, or are established by other objective evidence or the inherent probabilities.

897. There is no objective or otherwise reliable evidence which supports Mr Al Rajaan's case. Nor do the inherent probabilities. Given the entirety of the evidence in the case, it is in my view absurd to suggest that the payments which were being made to Mr Al Rajaan were anything other than corrupt. They were not *ex gratia* payments which fell into the hands of Mr Al Rajaan unsolicited and by good fortune. They were payments made in return for his influence in investing PIFSS' monies in funds which generated

income for Banque Mirabaud. There is nothing to suggest that Mr Al Rajaan was providing any investment advice in respect of third parties or that this is why the payments were being made. The conclusion that the payments were corrupt is also supported by the evidence as to all the other schemes that are considered in this judgment.

898. D1 also relied, in opening submissions, upon transcripts of interviews which were carried out by the Swiss prosecutor in 2013 with a number of key individuals. In particular, the prosecutor interviewed Mr Al Rajaan, Pierre Mirabaud, Mr Argand and Mr Richard. Mr Al Rajaan said nothing of substance in his interview, maintaining a general denial of wrongdoing. In D1's opening submissions, particular reliance was placed on the interview of Mr Pierre Mirabaud, who was more expansive in interview. However, Mr Mirabaud was not called by D1 to give evidence at the trial, and I do not consider that any weight can be attached to any exculpatory statements that he made in interview. I see no basis for thinking that Pierre Mirabaud is, generally, an individual whose out of court statements, untested by cross-examination, can be relied upon.

899. In reaching that conclusion, I take into account the evidence (discussed in detail in the context of the Aerium Scheme) of Pierre Mirabaud's involvement in secretly channelling corrupt payments from Ely Michel Ruimy to Mr Al Rajaan. I also reach that conclusion on the basis of the facts, as described in this section, concerning the Mirabaud Scheme itself.

900. My conclusion, as to the unreliability of Pierre Mirabaud – and also that the payments to Mr Al Rajaan were corrupt – is reinforced by the settlement between PIFSS and Banque Mirabaud, Pierre Mirabaud and Mr Fauchier-Magnan in their agreement dated 26 May 2026. In that settlement, Pierre Mirabaud agreed to: "take all necessary steps to secure his timely conviction by the Federal Penal Tribunal for corruption and aggravated money laundering in the 2021 Swiss Criminal Proceedings". I have subsequently been provided with a copy of the short written decision of the Swiss court which records that conviction on counts of (i) bribery of foreign officials contrary to Article 322^{septies} paragraph 1 of the Swiss Criminal Code, and (ii) aggravated money laundering contrary to Article 305bis of the Swiss Criminal Code. There were guilty pleas to each of those counts on the indictment. Pierre Mirabaud was given a 2-year prison sentence, suspended for 2 years.

901. There is as yet no written judgment relating to reasons for conviction and sentence, although I was told that a written judgment had been requested by the public prosecutor. I requested a copy of the indictment, but was informed by Stewarts that they do not have a copy, that this is not publicly available, and requests made for a copy have not borne fruit. It is, however, apparent from widespread press reporting of the conviction and sentence, that the guilty pleas (as contemplated by the Mirabaud settlement agreement) related to substantial kickbacks paid to Mr Al Rajaan (in the sum of around USD 100 million). There can be no doubt that the matters that I am considering, in the context of the Mirabaud Scheme, were the subject of Pierre Mirabaud's guilty pleas.

902. There is a much-criticised decision of the Court of Appeal (Goddard LJ), now reversed by statute (in the case of UK convictions), which means that a conviction by a criminal court is not admissible to prove, in a separate civil case, the relevant wrongdoing: *Hollington v Hewthorn* [1943] KB 47. The rationale, as explained in the Court of Appeal decision in *Hoyle v Rogers* [2014] EWCA Civ 257, para [39] is that the decision

at a civil trial is to be made by the judge hearing that trial, not by another judge in an earlier case. However, this rationale – and indeed the principle established by *Hollington v Hewthorn* – has no application where a party is able to rely upon admissions made in, or in respect of, the proceedings. This was made clear by Goddard LJ in *Hollington* itself, at 599-600:

> "It may frequently happen that where bigamy or any other crime has to be proved in a civil proceeding, the prisoner on his trial had pleaded guilty. Proof of the confession by a witness present at the trial is admissible because an admission can always be given in evidence against the party who made it. In the present case, had the defendant before the magistrates pleaded guilty or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial."

903. Accordingly, I see no reason why Pierre Mirabaud's admission of guilt, to serious criminal offences, is inadmissible, or should be disregarded, when considering whether his arrangements with Mr Al Rajaan were corrupt. Furthermore, on any view, Pierre Mirabaud's plea of guilty to these serious offences is relevant to an assessment of his credibility, in circumstances where D1 seeks to rely upon what he said in interview and is in substance submitting that he should be considered a reliable witness.

904. Given Pierre Mirabaud's agreement to convictions for those serious offences, there is no realistic basis for a submission that he is a reliable witness, or indeed a person who was not engaged with Mr Al Rajaan in corruption. Given that Pierre Mirabaud has admitted his involvement in corruption, I can swiftly reject any suggestion that the payments to Mr Al Rajaan's entities were anything other than corrupt.

905. I should make it clear, however, that I would reach the same conclusions even in the absence of Pierre Mirabaud's guilty pleas. One obvious reason for those conclusions is that there is no credible evidence, or sensible explanation other than corruption, for the payments of USD 79,241,962 which were made to Mr Al Rajaan's entities by Banque Mirabaud's entity Galmir, principally via Silvery Bay.

906. Against that background, I do not consider it necessary to discuss the evidence relating to these payments in great detail. Rather, I will seek to identify the key aspects of the arrangements, and the key conclusions which I reach: see section G2 below.

907. There is a further reason for that approach in the context of the Mirabaud Scheme. PIFSS' written closing did address the evidence relating to these payments in detail, with full citation of the documents and other evidence which supported the case advanced. However, D1's written closing did not engage with those submissions at all, giving funding reasons as the reason for not doing so. Since D1 did not make an oral closing, there was no engagement with the detailed submission of PIFSS, or the evidence relied upon. Nor was there such engagement in the brief further written submissions provided by D1/D2 on 9 March 2026, towards the end of the trial and some time after Mr Ritchie's main oral closing had concluded. Thus, no persuasive reasons were given as to why that case should be rejected. D1's written closing instead relied upon assertions as to actual or perceived propriety of the arrangements, and the alleged

knowledge of senior people in Kuwait, and I have addressed (and rejected) these points in Section F above.

Other payments

908. The second aspect of the claim concerns payments which were laundered through Mirabaud accounts. PIFSS contends that Mr Al Rajaan used Mirabaud bank accounts to facilitate and conceal the payment and receipt of secret commissions from other unlawful schemes. Those schemes included the Man Scheme (USD 111 million), the Pictet, EFG or UBP Schemes (USD 28.5 million), the Mombelli Scheme (USD 7.7 million) and the Aerium Scheme (USD 9.9 million).

909. However, it is not necessary to discuss most of these payments in the context of the Mirabaud Scheme, because they are covered by the case advanced against Mr Al Rajaan in connection with those other schemes, and are addressed in that context.

910. Accordingly, and as further explained in the context of the Pictet Scheme (Section H), this Section G (as with other sections) focuses on what PIFSS described as the "unique" claims arising from the Mirabaud Scheme: i.e. those claims which are not covered by, and appropriately addressed in the context of, other schemes.

911. The claim for USD 79,241,962, discussed above, is the largest part of the "unique" claim against Mr Al Rajaan arising from the Mirabaud Scheme. There are two other "unique" claims made, for smaller amounts. These are for: (i) USD 3,780,714 paid from accounts in the name of Mr Abbas Al Qattan, and derived from PIFSS investments in various US based property funds; and (ii) USD 3,840,720 which PIFSS contends are secret commissions paid on PIFSS' investments, but which cannot be linked to specific investments or schemes.

G2: The Galmir payments

The inception of the arrangements

912. PIFSS submitted that the court should find, on the evidence, that Mr Al Rajaan reached an agreement with Banque Mirabaud, through Pierre Mirabaud and Mr Fauchier-Magnan, as to: (i) putting in place an off-shore corporate structure for Mr Al Rajaan's benefit through which secret commissions would be paid and concealed; and (ii) the payment of secret commissions from Banque Mirabaud in relation to investments which Mr Al Rajaan would authorise or influence PIFSS to make.

913. I consider that this fact finding is justified by the documentary evidence, and appropriate conclusions to be drawn from that evidence, as described below.

914. PIFSS' contractual relationship with Banque Mirabaud began on 20 January 1997. It is clear, however, that Pierre Mirabaud had met Mr Al Rajaan some time before then. Pierre Mirabaud's evidence to the prosecutor was that he had met Mr Al Rajaan in the 1990s, when Mr Al Rajaan was looking for a bank for the purpose of managing his assets. Although Pierre Mirabaud did not identify precisely when in the 1990s this happened, it is clear that a banking relationship between Banque Mirabaud and Mr Al Rajaan preceded (by some time) PIFSS' first investments with Banque Mirabaud in January 1997.

915. Thus, both Overton and New Market were incorporated by Banque Mirabaud in January 1995. New Market opened an account with Banque Mirabaud in January 1995, with Mr Al Rajaan identified, in the relevant Form A, as the "ADE" (l'ayant droit economique): in other words, in English terminology, its UBO or ultimate beneficial owner. As discussed elsewhere, Form A is an important banking document which identifies the ADE or UBO of a corporate entity.

916. In his evidence to the Swiss prosecutor, Pierre Mirabaud described PIFSS as having been introduced to Banque Mirabaud by Mr Al Rajaan, and that it was decided "by common agreement between the bank and Mr Al Rajaan, to pay him commissions".

917. I agree with PIFSS that this evidence of Pierre Mirabaud, given to the prosecutor, is likely to be true. However, in my view it is sufficient in itself to show that both Mr Al Rajaan and Mr Mirabaud were party, from the start, to a corrupt arrangement. I see no basis on which it could have been thought appropriate for honest bankers to pay commissions to the principal of the client counter-party. Mr Al Rajaan was the Director General of PIFSS, not a third party introducer of business. These were bribes, pure and simple, as confirmed by Pierre Mirabaud's guilty pleas.

918. Furthermore, the arrangements between Banque Mirabaud and Mr Al Rajaan were not based on any legitimate or necessary introduction of PIFSS to the bank. In 1997, Banque Mirabaud (and its subsidiary, Galmir) needed no introduction to PIFSS by Silvery Bay, since it was already dealing with its Director General. Nevertheless, in due course as described below, Silvery Bay became a contracting party under an introducer agreement.

919. As will appear from the other schemes described below, it was part of Mr Al Rajaan's modus operandi to insert unnecessary introducers and introducer agreements to front and conceal commission payments agreed for his benefit. That is what happened with Silvery Bay, which was incorporated on 14 January 1997, shortly before Banque Mirabaud first contracted with PIFSS.

920. It is significant that the critical machinery for facilitating payments of secret commissions was put in place before PIFSS made its first investments with Banque Mirabaud. Thus, Overton and New Market were incorporated in 1995, and their accounts were both opened by February 1996. Mr Richard, who was Pierre Mirabaud's friend and business associate, was appointed to manage the affairs of New Market and Overton, under powers of attorney dated January and March 1995 respectively. The fact that the arrangements predated PIFSS' first investments evidences the fact that, contrary to one of Mr Al Rajaan's arguments, he did not receive monies which were unsolicited by him. The arrangements were put in place because it was known that payments would be made to him, and indeed that the payments to him were a condition of any investments that PIFSS made.

921. Concealment of the true position was part of the arrangements at the start. Thus, the version of Form A which was given to Mr Richard showed, falsely, that Mr Mirabaud was the ADE of Overton. At a later stage, probably not earlier than 2003, Pierre Mirabaud added a handwritten note that identified Mr Al Rajaan as being "in fact" the ADE.

922. Another aspect of the initial arrangements was the incorporation of Silvery Bay on 14 January 1997, with a power of attorney being granted by that company to Mr Argand on 29 January 1997. The involvement of Mr Argand was another aspect of the arrangements designed to facilitate payments of secret commissions without detection.

923. At this point in time, Silvery Bay was a Mauritian company. Much later on a Seychelles entity, also called Silvery Bay, was incorporated and assumed the role previously performed by the Mauritian company.

924. Shortly after the incorporation of Silvery Bay, on 1 February 1997, Mr Argand signed the Silvery Bay agreement with Galmir, under which commissions were to be paid in respect of introductions made by Silvery Bay to Galmir. The agreement was signed by Pierre Mirabaud and Mr Fauchier-Magnan for Galmir. The agreement identified a number of funds where investments would be the subject of commission payments, and the rates payable. The Silvery Bay Agreement was, plainly, a front for the payment of secret commissions from Banque Mirabaud to Mr Al Rajaan. Mr Argand, and Silvery Bay, had had no involvement in introducing PIFSS to Banque Mirabaud.

925. The funds identified in the Silvery Bay Agreement were those in which it was anticipated that PIFSS' investments would initially be made. Indeed, on 30 December 1996, Pierre Mirabaud had written directly to Mr Al Rajaan, proposing investments in 4 of the funds which were later identified in the Silvery Bay Agreement. Pierre Mirabaud's letter was written on Banque Mirabaud's headed notepaper, and was sent to Mr Al Rajaan. There was therefore direct correspondence between the two men. No introducer was required, or indeed involved. This pattern, of direct correspondence between the investor (PIFSS) and the party seeking investment (here Banque Mirabaud), but with payments to be made to an introducer who had no relevant involvement in proposing the investments or corresponding with PIFSS, is a pattern repeated in many of the other schemes discussed in later sections.

926. I have no doubt that, contrary to evidence given to the Swiss prosecutor by Pierre Mirabaud and Mr Argand, and contrary to some of the documentation created at around the time of its incorporation, Silvery Bay was Mr Al Rajaan's company. That is the obvious explanation for the fact that virtually all the payments made to Silvery Bay were then transferred on to various companies beneficially owned by Mr Al Rajaan, in particular Intermac which was the recipient of the lion's share (around USD 73.8 million) of monies paid by Galmir. If Silvery Bay had some genuine business, independent of being used as a channel to send monies to Mr Al Rajaan's entities, then it is difficult to see why virtually all of its monies were being sent to those entities.

927. Furthermore, an internal Banque Mirabaud note, of a call about Silvery Bay with Mr Nicolas Mirabaud (Pierre Mirabaud's nephew) in October 2005, stated that Intermac and Silvery Bay had the same beneficial owners. Since Intermac was a company beneficially owned by Mr Al Rajaan (as he accepted in his 1st Affidavit responsive to the WFO), it follows that Silvery Bay was also his company.

928. Silvery Bay was not, therefore a company beneficially owned by Galmir or by Banque Mirabaud or individuals associated with that bank. In any event, the evidence of both Pierre Mirabaud and Mr Argand to the Swiss prosecutor was that the sole purpose of Silvery Bay was to receive commissions from Galmir and pass them through to Mr Al

Rajaan. If that was its sole purpose, then it is logical to conclude that Silvery Bay was Mr Al Rajaan's company.

The first investments

929. On 20 January 1997, PIFSS opened a custodian bank account with Banque Mirabaud. PIFSS subsequently made investments through that account, including investments in various funds made towards the end of January 1997. Thus, on 21 January 1997, Mr Al Rajaan confirmed to Banque Mirabaud that PIFSS would invest CHF 10 million in Lynx, and USD 10 million in Columbus. On 22 January 1997, Pierre Mirabaud acknowledged PIFSS' order for a USD 10 million investment in the FMG Miralt Sicav Global Quality Growth Fund.

930. It is notable that all of these investments were made before the Silvery Bay Agreement was concluded on 1 February 1997. This too is a familiar feature of the schemes which are the subject of these proceedings. There are many examples of commissions being paid under introducer agreements which had not been concluded at the time when PIFSS' investments were actually made. This in turn supports the conclusion that the Silvery Bay Agreement was no more than a front to facilitate the payment of secret commissions to Mr Al Rajaan, rather than a genuine or necessary introducer agreement.

1 February 1997: signature of the Silvery Bay Agreement

931. As indicated above, this agreement was concluded on 1 February 1997. PIFSS submitted that the ostensible basis on which Silvery Bay was paid to introduce clients to Mirabaud was a dishonest pretence for the purpose of concealing secret commissions paid pursuant to the corrupt arrangement between Banque Mirabaud and Mr Al Rajaan.

932. It will be apparent from what I have already said that I agree with that conclusion. It is supported by the following matters, already explained above:

i) Banque Mirabaud and Mr Al Rajaan had an existing direct relationship, without intermediation by Silvery Bay, and which pre-dated Silvery Bay's incorporation in 1997.

ii) PIFSS had already opened its custody account and committed to various investments by 21 and 22 January 1997. That was before Mr Argand's power of attorney was granted on 29 January 1997, and before the Silvery Bay Agreement was signed on 1 February 1997.

iii) Pierre Mirabaud's evidence to the Swiss prosecutor accepted that it was Mr Al Rajaan who brought PIFSS to Banque Mirabaud. Thus, on his own account, the basis for Silvery Bay's entitlement to receive commissions for introducing PIFSS was false.

iv) Article 1 of the Silvery Bay Agreement provided:

> "When Silvery introduces a new client to Galmir, or to one of its subsidiaries and/or affiliates within the Group Mirabaud, Galmir pledges to retrocede part of the income generated by

> this client according to the terms and conditions fixed in Article 2 below."
>
> Galmir's obligation to retrocede fees to Silvery Bay under Article 1 was therefore conditional on Silvery Bay having introduced a new client. However, Silvery Bay did not introduce PIFSS. I also accept, as confirmed by the evidence to the Swiss prosecutor referred to above, that it was not at any stage an active trading company performing any genuine commercial function.

v) In his evidence to the Swiss prosecutor, Mr Argand said that he thought that the Silvery Bay arrangements were "perhaps a way of discreetly redistributing certain commissions to business providers". This is a euphemistic way of acknowledging the nature of the Silvery Bay Agreement as simply a mechanism for channelling money back to Mr Al Rajaan.

933. PIFSS submitted that I should also find (amongst other things) that Mr Al Rajaan knew that: (i) Silvery Bay did not perform any or any valuable services under the various agreements with Silvery Bay (as discussed below, further agreements were concluded after 1 February 1997), and that it fulfilled no legitimate commercial purpose at all; (ii) it was never intended that the commissions payable would be paid to Silvery Bay in return for services supplied to Galmir; and (iii) the Silvery Bay Agreement was, as was always intended, used as a front for the payment of Secret Commissions by Mirabaud to Mr Al Rajaan.

934. I consider that, on the evidence, these findings are appropriate.

Later agreements

935. The Silvery Bay Agreement listed 8 funds on which Silvery Bay would receive retrocessions. That agreement was supplemented over time by agreements to add further PIFSS investments to those on which Galmir would pay an agreed rate of retrocessions to Silvery Bay. It is not necessary to describe these in detail. In short, the new agreements upheld the pretence that Silvery Bay had introduced PIFSS, and they were put in place so as to be more or less in line with the further investments that PIFSS was making. As with the initial agreement in February 1997, they often bore dates which were subsequent to PIFSS' commitment to invest. These further agreements were all part and parcel of the corrupt arrangements which were put in place at the start.

The payment flows

936. I have already described (in Section G1 above) the payment flows from Galmir to Silvery Bay, and the monies received by Mr Al Rajaan's entities. There is a small difference between the amounts paid by Galmir to Silvery Bay and Intermac (USD 79,241,962), and the amounts received by Overton and Intermac (USD 78,839,264). However, since I have concluded that Silvery Bay, as well as Overton and Intermac, were beneficially owned by Mr Al Rajaan, this small difference does not matter. The claim against Mr Al Rajaan is for the higher amount.

937. PIFSS' closing submissions also addressed the circumstances of the switch from Overton and New Market to Intermac and Domini in 2003; the reaction of Banque Mirabaud, Mr Argand and Mr Al Rajaan to the Swiss prosecutor's investigation in May

2012, including the termination of the agreement between Galmir and Silvery Bay; the reincorporation of Overton and New Market in July 2012, also following the commencement of that investigation; and the change in Silvery Bay from a Mauritian company to a Seychelles company in 2010 (referred to above). However, since the corrupt nature of the payments is clearly established by the matters already described, I do not consider it necessary to address the detail of any of these events.

Personal investments

938. The payments by Galmir to Silvery Bay were predominantly in respect of PIFSS' investments. However, it is common ground that Mr Al Rajaan also made some personal investments, and that these generated payments to Silvery Bay which the parties agreed should be quantified at USD 2.2 million.

939. PIFSS contends that, for the purposes of quantifying Mr Al Rajaan's liability, it is not necessary to disaggregate commissions paid on his personal investments from those paid on PIFSS' investments. Both were unauthorised benefits received through the unlawful exploitation of his official position. I agree that, as a matter of Kuwaiti law, disaggregation is not required for that reason. That conclusion is supported by the *Dubai Wire* case discussed in detail in Section B above.

G3: Payments made via Mr Al Qattan

The payments

940. A further source of payments into Overton and Intermac was payments from an account at Mirabaud in the name of Mr Abbas Al Qattan. His account number was 243510. Payments totalling around USD 2.5 million were made from that account to Overton and Intermac between 2001 and 2006. A single payment of USD 300,000 was made to Overton on 20 February 2002 from a separate personal account of Mr Al Qattan (account 405813).

941. In addition to the above payments of around USD 2.8 million, the account statements for account 243510 show a number of cash withdrawals between May 2000 and May 2001. These withdrawals total USD 1,005,000, and PIFSS contends that these monies were also paid to Mr Al Rajaan.

942. PIFSS says that all of these payments, totalling USD 3,780,714, were secret commissions on PIFSS' investments, routed through Mr Al Qattan. The explanation of Mr Al Rajaan (and now D1) was that Mr Al Rajaan served on the board of an Islamic company set up in Kuwait with Mr Al Qattan to invest in real estate in London. Mr Al Rajaan said in his second Affidavit, served in January 2020, that he received USD 2.8 million in compensation from Mr Al Qattan for his position on the board between 2001-2006, and also in respect of some other business dealings that were entirely separate to PIFSS. He could not recall the name of the Kuwaiti company.

943. I reject Mr Al Rajaan's explanation for these payments, which is unsupported by any contemporaneous documents, and indeed inconsistent with the banking documents which do exist, as described below. I have no doubt that these were further secret commissions which were being paid to Mr Al Rajaan or his entities, with Mr Al Qattan as the conduit. Mr Al Qattan was another ostensible introducer who in fact played no

real introductory role, but was simply a front for the payment of monies to Mr Al Rajaan.

944. Again, I do not consider it necessary to discuss the evidence relating to these payments in immense detail. Rather, I will seek to identify the key aspects of the arrangements, which support the conclusion which I have reached. It is also the case here, as with the payments discussed in Section G2 above, that D1 did not address the detail of the evidence relied upon by PIFSS in their written closing submissions, and explained orally by Mr Ritchie in his closing argument.

The opening of account 243510

945. D1's defence admits PIFSS' case that Mr. Al Qattan's Mirabaud account (243510) was opened on about 15 January 1996. It is also admitted that: this was pursuant to instructions given by Mr. Al Rajaan to Banque Mirabaud, on 4 January 1996; that it would operate as a 'pass through' account, to be funded monthly with the proceeds of retrocessions and from which cash withdrawals would be made every three months to be remitted to the bank for the benefit of Mr. Al Rajaan's New Market account (280710); and that, on or about 26 February 1996, when opening his account in the name of Overton (282750), Mr. Al Rajaan instructed Banque Mirabaud that it would receive funds from Mr. Al Qattan's account (243510).

946. These admissions, as to the purpose of the account and the monies that were to be received, show that the explanation given by Mr Al Rajaan in his 2nd Affidavit is not true. Once it is acknowledged that account 243510 was opened as a pass through account in respect of retrocessions which were going to be paid, it is clear that the account was not concerned with an Islamic company set up to invest in real estate in London.

947. At the time of the opening of account 243510, Banque Mirabaud completed a client information profile document. This identified the origin of the funds to be paid into that account as retrocessions on USA funds. It also identified the Mirabaud account contact as 280710. That number was the account number of New Market, which was Mr Al Rajaan's company. Subsequent internal documents show that Pierre Mirabaud was dealing with Mr Al Rajaan in connection with account 243510.

948. The fact that Mr Al Rajaan was responsible for the opening of the account, and that he was thereafter dealing with Pierre Mirabaud in relation to that account, shows that this was an account which was held for his benefit. That is also the obvious explanation for the payment flows, through that account, to Overton and Intermac.

949. Another Banque Mirabaud document, completed at the time of the opening of account 243510, was headed (in translation): "Report on the Opening of the Account". This recorded the purpose of the account as explained by Mr Al Rajaan. It states that:

> "According to a meeting with Mr Al Rajaan on 4 January 1996, this account will be funded monthly for the benefit of the beneficiary: the latter will come regularly every 3 months and withdraw the account balance in cash, which he will then hand over to us [i.e. Banque Mirabaud]. This amount will then be credited in cash to the Newmarket account (280710)."

950. That document shows that the purpose of the account was to fund another of Mr Al Rajaan's accounts, with the method of funding intended to be cash transfers. This is another feature of Mr Al Rajaan's modus operandi apparent in other schemes; for example the "Mirabaud" payments made by Ely Michel Ruimy to Mr Al Rajaan discussed in connection with the Aerium Scheme. I agree with PIFSS that this bears the hallmark of dishonesty, with cash transfers used to conceal the payment flows to Mr Al Rajaan.

The subsequent operation of the account

951. Having been opened, Mr Al Qattan's account 243510 was then operated under the control of Mr Al Rajaan, who was and was treated by Banque Mirabaud as the true beneficiary.

952. Thus, there is evidence that originating instructions for transfers did not start with Mr Al Qattan. There are documents where Banque Mirabaud writes to Mr Al Qattan, seeking confirmation for particular transfers. No doubt the instructions had initiated with Mr Al Rajaan.

953. There is also evidence that, in meetings with Pierre Mirabaud, Mr Al Rajaan used to discuss and deal with multiple accounts on the same occasion. Thus, Banque Mirabaud's internal documents include various reports evidencing contact by Pierre Mirabaud with the "mandataire" (i.e. representative) of account 243510. These were obviously meetings with Mr Al Rajaan, since the contact reports show a pattern of Pierre Mirabaud meeting the "mandataire" of the accounts of Overton, and later Domini and Intermac, on the same day. The mandataire of those latter 3 accounts was Mr Al Rajaan.

The source of the payments into account 243510

954. PIFSS detailed, in its closing submissions, the source of the payments into account 243510. Consistent with the client information profile, these were commissions paid by various managers in respect of investments that PIFSS made in US real estate funds. This is evidenced, for example, by the Banque Mirabaud credit advice documentation which was available in the hearing bundles.

955. As with other intermediaries who feature in this trial, there is no evidence of any intermediation by Mr Al Qattan in connection with these investments. The documents show direct correspondence between the investment providers and PIFSS, usually Mr Al Rajaan personally. D1 has not called Mr Al Qattan to explain his alleged involvement in effecting introductions to PIFSS, or to justify or explain the payments which were being made. In any event, there is no evidence that PIFSS knew about these payments, which were therefore secret commissions paid as a result of Mr Al Rajaan's unlawful exploitation of his position as Director General.

G4: Other payments to Overton and Domini

956. PIFSS advances a claim in respect of further sums, amounting to USD 3,840,720, which were paid to Overton and later Domini. These were set out in Appendix 1.5 to the 10RAPOC, and the claim was pleaded in paragraph 111g thereof. PIFSS has been

unable to match these payments to specific PIFSS investments. The largest individual payment was USD 2.4 million to Domini in June 2003.

957. Given that Overton was being used extensively for the receipt of secret commissions, as described in Sections G2 and G3 above, and that secret commissions were the principal source of Mr Al Rajaan's income, it can reasonably be inferred – in the absence of any other persuasive explanation – that these other unmatched payments were also referable to PIFSS' investments. I do not consider that D1 has provided any explanation for these payments, and certainly D1 has not provided a persuasive explanation.

958. As far as concerns the payment to Domini: the evidence shows that Domini was incorporated at around the same time as Intermac, when the payment route (for the monies discussed in Section G2 above) switched away from Overton and New Market. This indicates that Domini was part of the overall scheme to route secret commissions to Mr Al Rajaan. Again, given that Mr Al Rajaan's income was predominantly the result of secret commissions, it can be reasonably inferred that the USD 2.4 million paid to Domini is also referable to commissions on PIFSS' investments, albeit that such investments have not been capable of identification. No alternative persuasive explanation has been advanced.

G5: Further assistance facilitating secret commissions

959. PIFSS invites the court to find that a number of further offshore companies and Mirabaud accounts were set up with the agreement and for the benefit of Mr Al Rajaan, for the purposes of facilitating the transfer of secret commissions and their proceeds (i) pursuant to the Mirabaud Scheme, and (ii) pursuant to other schemes.

960. I consider that this finding is justified, on the basis of the evidence submitted by PIFSS.

961. However, I can deal with these companies and entities briefly, because PIFSS acknowledges that the precise transfers between these accounts are unlikely to be significant, because they are already covered by other schemes. Also, PIFSS says that the relevance of these entities and accounts mainly goes to the methodology which supports the concealed and interconnected operation of Mr Al Rajaan's money laundering arrangements. However, this is a point which is well established by my findings in relation to other schemes.

Hogara Investments Ltd

962. Hogara was incorporated in the BVI in April 2004. In the same month, it opened Mirabaud account 502951 with Ms Al Wazzan identified as its economic owner. It was then used to purchase a villa in Thailand. Hogara was one of the few pleaded entities that Ms Al Wazzan claimed was hers, but she withdrew her evidence at the start of trial and was therefore not tendered for cross-examination.

963. In my view, the evidence shows that this was Mr Al Rajaan's company. The money which was used to pay for the villa was received from Pictet account 97519, which was a nominee account held by Mr Nasrallah for Mr Al Rajaan: see Section H below. Mr Al Rajaan was the person with whom Pierre Mirabaud dealt in relation to Hogara. Pierre Mirabaud thus had meetings with the client for various Al Rajaan entities, such as

Domini and Intermac, at the same time as meeting the client for Hogara. He was meeting Mr Al Rajaan in respect of all of these companies. I agree with PIFSS that there is no basis for thinking that Hogara was singled out as the one account, which was not Mr Al Rajaan's, when Pierre Mirabaud was dealing with a package of other accounts which were all Mr Al Rajaan's.

SCI Cum Laude

964. This was incorporated in France on 9 May 2005. It was used to purchase two chalets in France, one of which was purchased through a subsidiary. Both Mr Al Rajaan and Ms Al Wazzan signed the statutes and were identified as signatories and beneficial owners of the company's Mirabaud account 507720. It was funded from the account of Hogara, which was Mr Al Rajaan's company. It was used by Mr Al Rajaan to borrow from Banque Mirabaud and for options trading. This evidence shows that it was Mr Al Rajaan's company.

965. Ms Al Wazzan, in her withdrawn witness statement, gave no explanation as to how this borrowing, and options trading, could have occurred if this was indeed her company. In fact, her withdrawn evidence was that she had no recollection of hearing about various companies, including Hogara or SCI Cum Laude, before the commencement of the present proceedings. She also had no recollection of circumstances in which she allegedly came to own the Thai villa, or the French chalets. There is therefore no evidence, and certainly no substantial or reliable evidence, in support of the argument that either Hogara or SCI Cum Laude were hers, rather than Mr Al Rajaan's.

Tawny Real Estates Ltd ("Tawny") and Bernabeu Invests Ltd ("Bernabeu")

966. Tawny was incorporated in the BVI in November 2006. Mr Al Rajaan's 1st Affidavit acknowledged that this was his company.

967. Bernabeu was incorporated in the BVI on 11 November 2008. Although Banque Mirabaud's internal documentation identified Ms Al Wazzan as the ADE, she accepted in her defence that it was not her company. The conclusion that this was Mr Al Rajaan's company is supported by a letter from Genevan lawyers to Nicolas Mirabaud on 6 July 2009, in connection with the incorporation of that company. The letter is headed: "Concerne: Monsieur Fahad Al Rajaan". I conclude that this was Mr Al Rajaan's company.

Ms Al Wazzan's account 504976

968. Account 504976 was used to receive the Mirabaud payments from Ely Michel Ruimy described below in the context of the Aerium Scheme. This account was ostensibly opened by Ms Al Wazzan, and was in her name. Mr Al Rajaan accepted in his 2nd Affidavit, however, that this was the account that he used to receive the payments from Ely Michel Ruimy, and that he used it "as my own".

969. The evidence in relation to this account shows that the court should approach with caution any arguments by D1/D2 that particular accounts or companies were beneficially owned by Ms Al Wazzan, rather than her husband. The use of nominees, such as his wife and Mr Nasrallah, was part of Mr Al Rajaan's modus operandi. The money being paid into companies and accounts, and which forms the subject matter of

the present proceedings, was the – entirely illegitimate – income of Mr Al Rajaan derived from secret commissions. Against that background, I attach no weight to the fact that accounts were in the name of Ms Al Wazzan, or that companies receiving the secret commissions or their proceeds, were apparently associated with her.

G6: Conclusions on the liability of Mr Al Rajaan (and therefore D1) under Kuwaiti law

970. I have decided, in Section D above, that Kuwaiti law applies to PIFSS' claims in tort against Mr Al Rajaan and therefore D1. The principles of Kuwaiti law are discussed in Section B above. On the basis of the facts set out in this section, and because I reject elsewhere D1's other defences (including contributory fault, limitation and justiciability), I conclude that Mr Al Rajaan was – and D1 now is – liable to PIFSS under Article 227 KCC.

971. The essential basis of that liability is because Mr Al Rajaan agreed with Mirabaud and Mr Al Qattan that they would pay him secret commissions. These were in fact paid in relation to the investments that he caused or influenced PIFSS to make. This caused harm in the value of the commissions received, entitling PIFSS to orders for compensation in the amount of the benefits obtained by Mr Al Rajaan. Mr Al Rajaan intended to harm PIFSS, and to enrich himself in circumstances where harm to PIFSS was the obvious corollary of that primary intention.

972. The particular unlawful acts which form the basis of Mr Al Rajaan's tort liability are breaches of: Articles 11 and 12 of the KPPL; the CSL; Article 35 of Law No 31 of 1970, amending the KPC; and the Kuwaiti Money Laundering Laws described in Section B 13 above. The unlawful acts, and Mr Al Rajaan's relevant *mens rea*, were as follows.

973. *Article 11 KPPL:*

i) Mr Al Rajaan was a public official entrusted or assigned to preserve the interests of PIFSS in relation to: seeking and receiving investment opportunities for PIFSS; advising PIFSS in relation to the same; entering into investment contracts from time to time; and supervising and managing the investments which he influenced or caused to be made.

ii) Mr Al Rajaan intentionally (and in any event with probable intent) harmed the interests of PIFSS for the purpose of seeking profits or benefits for himself and others, by seeking out investment opportunities from which he could secure secret payments: (i) calculated by reference to the fees payable by PIFSS on its investments and thus at its expense (including by precluding it from negotiating better terms); and (ii) fronted by purported introducers (Silvery Bay and Mr Al Qattan) whom it was not necessary to pay in respect of PIFSS's investments and through whom payments were diverted to Mr Al Rajaan.

iii) The aggravated form of the offence was committed because Mr Al Rajaan in fact obtained profits or benefits, including by payments into accounts in the name of Ms Al Wazzan as his nominee.

974. *Article 12 KPPL*:

i) Mr Al Rajaan was a public official concerned with the management and oversight of PIFSS' affairs, including its investment activity.

ii) Mr Al Rajaan sought and obtained a profit for his own account and others (in so far as monies were paid to Ms Al Wazzan), with the intention of seeking and obtaining a profit or benefit from his job, in conflict with his duties to PIFSS, and through bribery.

iii) This includes any commissions paid in respect of his personal investments.

975. These conclusions are sufficient in themselves to give rise to tort liability in the sum of USD 86,863,396, subject to the potential adjustments to which I have referred. For completeness, however, I address the other bases of tort liability.

976. *CSL:* Mr Al Rajaan committed fault by breaching his CSL duties in that he arranged for the payment and receipt of secret commissions, failed to disclose or to pay over to PIFSS those secret commissions, failed to negotiate the fees payable by PIFSS, and in all the circumstances failed to act honestly or loyally to PIFSS.

977. *Bribery - Article 35 of Law No 31 of 1970:* Mr Al Rajaan sought and obtained bribes from Mirabaud and Mr Al Qattan in return for exercising his influence to commit PIFSS to investments that generated fees for Mirabaud and Mr Al Qattan, knowing that the payments requested and accepted were being offered in return for his exploitation of his role as Director General of PIFSS in relation to its investment activity.

978. *Money laundering:* The payment flows described above were transfers of property orchestrated by Mr Al Rajaan between accounts under his control derived from criminal acts, which concealed and disguised the true nature of the sums he received, with the intent of laundering the money and making it appear to be funds obtained from a legitimate source – while knowing the source to be criminal conduct.

979. In addition to these main bases of liability for the "unique" claim arising under the Mirabaud Scheme, there were also unlawful acts consisting of Mr Al Rajaan's assistance in relation to other schemes. But it is not necessary to elaborate upon this, or overcomplicate the analysis, because Mr Al Rajaan is also tortiously liable, as principal tortfeasor, for the unlawful acts under those other schemes.

980. PIFSS' closing submissions, as originally served, also asserted that Mr Al Rajaan's heirs (D2 and D42-D45) were jointly and severally liable for the above sums. However, PIFSS does not pursue that claim at the present time, but may do so in the future.

981. In the following sections dealing with other schemes, where the liability of D1 is in issue, I do not consider it necessary to repeat the analysis of the relevant unlawful acts and *mens rea* as set out above. The tort liability, of Mr Al Rajaan (and now D1) in respect of other schemes, arises for essentially the same reasons as his liability in respect of the Mirabaud Scheme. There were, of course, different investments, different payments, different payment routes, and different people. But the Kuwaiti law route to liability is essentially the same.

G7: Conclusions as to the quantum of compensation

982. PIFSS is entitled to compensation in a sum representing the value of the benefits procured by Mr Al Rajaan for his benefit, including any benefits procured for others such as his wife, namely USD 86,863,396 as alleged by PIFSS. That sum is the total of: the Mirabaud commissions (Section G2 above); the Al Qattan payments (Section G3 above); and the other payments to Overton and Domini (Section G4 above). However, the court's final judgment is likely to be in a lower sum, by reason of the payment made under the Mirabaud settlement. Issues as to the currency of payment also remain for decision. The sum of USD 86,863,396 also strips out, in order to avoid duplication, benefits received by reason of the laundering of monies from other schemes.

SECTION H: THE PICTET SCHEME

H1: Overview

The payments

983. The Pictet Scheme gives rise to claims against Mr Al Rajaan and Mr Nasrallah.

984. Banque Pictet & Cie (after 2014 Banque Pictet & Cie SA) is a Swiss bank, and part of a group of Pictet entities which includes Pictet & Cie (Europe) SA ("Pictet Europe"), Pictet Bank and Trust Ltd ("Pictet Bahamas") and Bank Pictet & Cie (Asia) Ltd. For the purposes of considering the claims against Mr Al Rajaan and Mr Nasrallah under this scheme, it is generally not necessary to distinguish between the various Pictet entities, and so I will usually refer simply to "Pictet" unless it is necessary to identify a particular entity. Pictet itself is no longer party to the present proceedings, having succeeded on a jurisdiction application.

985. The individuals at Pictet who primarily feature in the documentation, and the events with which I am concerned, are: (1) Mr Philippe Bertherat, a partner from at least August 1998 to December 2014, who was a primary senior contact for Mr Al Rajaan and had oversight and management of Pictet's relationship with PIFSS; (2) Mr Kamran Amouzegar, an employee of Pictet from 1997 to 2003, during which time he acted as a primary senior contact and relationship manager for Mr Al Rajaan, Mr Nasrallah and Ms Al Wazzan; (3) Mr Michael William, who assisted Mr Amouzegar as relationship manager for Mr Al Rajaan and Mr Nasrallah from 1999 to 2003; and (4) Mr Yves Bruggisser, who was Pictet's relationship manager in Geneva for Mr Al Rajaan and Mr Nasrallah from 2009 to 2012.

986. The claims against Mr Al Rajaan and Mr Nasrallah concern two categories of payment, which PIFSS contend to have been corrupt. In broad summary, and to some extent simplifying the complex arrangements that were put in place, the overall factual position is as follows.

987. First, there were payments which flowed from PIFSS' investments which were managed by Pictet. PIFSS was a client and account holder of Pictet from 1998 until 2018. As of June 2014, PIFSS had invested around US$ 16.7 billion with Pictet. In fact, the vast majority of that figure only attracted a relatively small fee payment to Pictet, as custodian of substantial assets rather than as their active fund manager, and hence relatively small onward payments to Mr Al Rajaan.

988. The commission payments to Mr Al Rajaan were routed through Pictet accounts which were in the name of Mr Nasrallah. The Nasrallah accounts at Pictet used for that purpose were: account 97519 in Switzerland, which received payments up until 2011; and account 190882 in the Bahamas which was used in 2011 – 2012. In 2012, the Swiss investigation into Mr Al Rajaan led to the closure of the Swiss bank accounts, including accounts with Pictet, which had previously been used by Mr Al Rajaan and Mr Nasrallah in connection with the commission payments.

989. Mr Nasrallah was, according to the documents that he signed, the beneficial owner of those accounts. In fact, these accounts were operated simply for the benefit of Mr Al Rajaan, as Mr Nasrallah himself accepts and indeed asserts. The underlying basis for

Pictet making payments to Mr Nasrallah was a Business Introducer agreement which was signed in March 1999 ("the March 1999 agreement") by Mr Nasrallah, and by two representatives of Pictet: Mr Kamran Amouzegar, and Mr Philippe Bertherat. Mr Nasrallah accepts, and indeed asserts, that he had in fact made no introduction of PIFSS to Pictet, and that in relation to these payments he was simply acting as Mr Al Rajaan's nominee. The evidence discussed below establishes that that was indeed the case: the introduction of PIFSS to Pictet, and their business relationship, predated the agreement signed by Mr Nasrallah. It was an introduction that came about through Mr Amouzegar.

990. Mr Al Rajaan advances defences, to the claim in respect of these payments, which are along the lines of his defences generally to the claims, in particular: that he did not solicit the payments, which were made by Pictet of their own volition; that the payments were authorised; that the payments were customary.

991. None of these defences have any substance, and can be swiftly rejected, essentially for the reasons in Section F above. The payments made were clearly a quid pro quo for Mr Al Rajaan placing investments with Pictet, as all participants (including Mr Amouzegar, Mr Bertherat, Mr Al Rajaan and Mr Nasrallah) knew. The payments had not been authorised by anyone at PIFSS, as Mr Casey KC for Mr Nasrallah accepted in the course of his closing submissions. Mr Al Rajaan did not believe that they had been authorised. There is no custom which permits such payments to be made.

992. Mr Nasrallah's principal defence to the claim is that his participation as Mr Al Rajaan's nominee was honest. He contends that he believed at the time that it was customary for such payments to be made, and he also believed that the payments had been authorised – and was assured by Mr Al Rajaan on many occasions that this was the case. To support his case as to the honesty of the nominee arrangements, he relies upon the fact that he signed the March 1999 agreement at the offices of Pictet, a respected Swiss banking institution, with express or implied assurances to the effect that the arrangements then being put in place were usual, lawful and permissible. He says that the meeting at which he signed the agreement, as well as other agreements such as account opening documents and a Form A in respect of account 97519, was attended not only by bankers from Pictet, but also by a large number of lawyers, and Mr Ghittini of another bank, VP. Their presence assured him that what he was doing was permissible.

993. It is that defence, and other defences advanced by Mr Nasrallah, upon which this section focuses. I conclude that Mr Nasrallah fully appreciated that what he was doing was dishonest, and that he had no honest belief that the arrangements which he was concluding, in order to facilitate payments to Mr Al Rajaan, were legitimate.

994. The second category of payments were those which flowed through Pictet bank accounts consequential on commissions payable on PIFSS investments which were not managed by Pictet itself, but which emanated from other fund managers. The most relevant bank account and payment stream for these purposes was an account at Pictet Bahamas established in February 2006: account 190890 in the name of a BVI company called Bordertown Trader Ltd ("Bordertown"). The vast majority of this payment stream represented commissions payable by various fund managers to companies managed by a Hong Kong service company named Zetland Corporate Services Ltd ("Zetland"). The Zetland companies included companies which were involved in payments under the Aerium Scheme: Wentworth and Moccak (see Section K below). Payments were in turn made by Zetland companies to Bordertown, and thence to

accounts or vehicles associated with Mr Al Rajaan. The Zetland companies, as well as another company called Quadra which was also involved in payments under the Aerium Scheme, were associated with Mr Amouzegar and another individual called Hashem Khosrovani. By 2006, Mr Amouzegar had left Pictet and was working for himself, albeit whilst maintaining connections with Pictet.

995. Mr Nasrallah's principal defence to this claim, based on the assistance provided by Bordertown for the routing of commissions to Mr Al Rajaan, is that he had no involvement with those payment flows. His case is that he did not know that he was, or was being portrayed as, the beneficial owner of Bordertown. He only discovered that fact, to his surprise, in 2012 – at which point he arranged for Bordertown's account, as well as his own account 190882, to be closed. The money remaining in Bordertown's account was transferred to 190882, and the monies in that account were then transferred to an account of Mr Nasrallah in Lebanon. In short, he submitted that Bordertown had nothing to do with him, even if it was used to channel monies to Mr Al Rajaan.

996. In terms of the quantum of the claims advanced in respect of the Pictet Scheme, it is simplest to describe and to deal with these by reference to what PIFSS submitted were the "unique" claims referable to the Pictet Scheme. This approach sought to avoid duplication of monies claimed under other "schemes". Thus, the payment flows that I have so far described above were not the only monies that were passed through Pictet bank accounts. However, other payment flows, and the claims against Mr Al Rajaan and Mr Nasrallah in relation to those flows, are more simply addressed in the context of other schemes, namely the EFG and Mombelli schemes. It should be borne in mind, however, that (as PIFSS submitted) the various payment flows were all interconnected. Accordingly, evidence in relation to one scheme involving Mr Al Rajaan and Mr Nasrallah is highly relevant to the court's conclusions in relation to other schemes as well.

997. In terms of the figures involved in these "unique" claims, it is simplest to use the US Dollar figures which PIFSS put forward in its written submissions, rather than specifying the different currencies in which the payments were made. The US Dollar figures are based on converting those currencies to US Dollars on the date of payment. It is likely to be necessary, in due course, to give judgment in the amounts of the underlying currencies. In respect of some of PIFSS' claims in the overall proceedings, it will not be possible to do this, because some payments in the present case preceded the abolition of individual European currencies with the introduction of the Euro. However, that complication does not arise in the context of the Pictet Scheme, where the payments were made in US Dollars, Euros, and Swiss Francs.

998. Using those US Dollar figures, the total "unique" claim against Mr Al Rajaan is USD 77,230,604. This comprises USD 22,775,959 in respect of payments made under the March 1999 agreement with Mr Nasrallah (including variations thereof); USD 3,901,942 in respect of payments made under a separate introducer agreement with Mr Amouzegar; and USD 50,552,703 in respect of commissions paid via Bordertown.

999. The unique claim against Mr Nasrallah is the same (USD 22,775,959) in respect of the payments under the March 1999 agreement and variations; the same (USD 3,901,942) in respect of the payments under the agreement with Mr Amouzegar; and slightly higher (USD 52,260,359) in respect of the Bordertown payments. The reason that it is slightly higher is that some of those payments are, as against Mr Al Rajaan, claimed under the

Aerium scheme, and therefore need to be stripped out in order to avoid duplication. No financial claim is made against Mr Nasrallah in relation to the Aerium Scheme.

1000. As discussed in Section A above, the above figures represent PIFSS' claim prior to the impact of the Mirabaud and EFG settlements.

H2: Mr Nasrallah as a witness

1001. I start by setting out my assessment of Mr Nasrallah as a witness. This draws upon, and therefore needs to be read together with, some of my findings of the detail of the schemes in which Mr Nasrallah was involved: not simply the Pictet Scheme, but also (in particular) the EFG Scheme (giving rise to the bulk of the claim against Mr Nasrallah) and the Pensée Scheme. Mr Nasrallah's conduct in the context of the Pictet Scheme does, however, provide a good testing ground for a general assessment of his evidence, including his honesty and reliability. In short, if Mr Nasrallah's conduct was not honest in relation to his involvement in the Pictet Scheme, and if his evidence was not reliable in relation to that scheme, then it is improbable that different conclusions could or should be reached in relation to other schemes in which he was involved.

1002. Mr Nasrallah's background is as follows. He was born in Beirut in 1940 and was therefore in his mid-80's when he gave evidence at trial. He graduated from the American University of Beirut in business and economics in 1964. He then studied at the London Institution of Banking and Finance, becoming a fellow of that institution. Returning to Beirut, he started his professional career in banking at Banque Sabbagh, and then worked for the Arab Finance Corporation in Beirut, Tokyo and Kuwait in the mid 1970s. When working in Kuwait, he met Mr Al Rajaan. Mr Nasrallah stayed in contact with Mr Al Rajaan over the years.

1003. Mr Nasrallah then relocated to Paris when still working for the Arab Finance Corporation, and joined Paribas in 1977. He spent the rest of his career there, until he established his own company, Phoenix International Consultant SARL ("Phoenix"), in 1994. Phoenix plays a significant role in relation to the EFG Scheme, but the company had no significant involvement in the Pictet Scheme.

1004. Whilst at Paribas, Mr Nasrallah rose rapidly through the ranks, working on some of the most significant finance deals between France and the Middle East over the following 18 years. He said, in his witness statement, that Mr Al Rajaan "helped me with my career throughout my time at Paribas", at the same time as Mr Al Rajaan himself steadily rose in prominence and influence in Kuwait. Mr Nasrallah described Mr Al Rajaan as a close friend.

1005. By 1980, following the conclusion of a very successful deal with the Kuwait Investment Company, Mr Nasrallah was promoted by Paribas and then had responsibility for their entire Kuwait book of business. He retained that responsibility until his departure in 1994. After the conclusion of a successful deal in 1985, the French Minister of Finance (Mr Jacques Delors, later President of the European Commission) ensured that Mr Nasrallah was granted French citizenship. In 1987, Mr Nasrallah established the Paribas Europhenix Fund, and persuaded nearly all the major financial institutions in Kuwait to invest. By the early 1990s, he had a number of very close connections within Kuwait at most of the major institutions, including with Mr Al Rajaan. Mr Nasrallah retired

from Paribas in April 1994, in his mid-50s. At the time of his retirement, he held the title of Deputy Director which was a very senior position.

1006. Shortly after his retirement from Paribas, he agreed with Paribas Asset Management to introduce potential investors from the Middle East to their funds known as "Parvest" funds. He obtained a substantial investment from PIFSS in Parvest, and he said that this was the beginning of his financial intermediary business.

1007. Accordingly, Mr Nasrallah was a highly experienced and, in his heyday, a dynamic banker. He was clearly a very intelligent man who achieved a considerable amount when he was at Paribas. Prior to giving his evidence, his legal team expressed concerns as to his ability to answer questions over a long period, in view of his age and prior serious illness. Steps were taken to accommodate these potential difficulties, including longer morning sessions and shorter afternoon sessions. In the event, Mr Nasrallah proved to be a robust witness, able to answer questions over an extended period. He did so in English, only rarely turning to the interpreter for assistance. Even on the afternoon of the fifth day of his cross-examination, Mr Nasrallah was responding to the questions asked with vigour and in a combative fashion. Although he said that he had short-term (but not long term) memory issues, a feature of his answers in cross-examination was that he was readily able to identify that he had been asked questions on a particular issue earlier that day, or on a previous day.

1008. A less impressive feature of Mr Nasrallah's evidence was that he would decline to engage properly when difficult questions were asked. He sought to stay firmly in a comfort zone, frequently repeating – including when it was not apposite to do so – some stock answers: in particular, an account of his quarterly meetings with Mr Amouzegar in the George V Hotel, Paris, where he said that he signed a large number of documents at Mr Amouzegar's request. These documents were those designed to facilitate the payments to Mr Al Rajaan, and Mr Nasrallah's account of the circumstances of their signature was aimed at distancing himself from responsibility for what was happening, blaming it on Mr Amouzegar.

1009. Even if I were to accept, which I do not, Mr Nasrallah's account of these meetings, Mr Nasrallah's conduct was not that of an honest man. He said that these were short meetings, once every 3 months, with Mr Nasrallah not reading any of the pile of documents that he was asked to sign, and Mr Amouzegar then posting the documents back to Switzerland so as to avoid having them on him when he returned there. An honest man would take an interest in what he was signing, making enquiries if he did not understand what the documents were. He would not return time after time to sign documents which he did not understand, and about which he said that he had no opportunity to make enquiries.

1010. I have no doubt that Mr Nasrallah knew full well that he was signing documents which were part of schemes, to which Mr Nasrallah was party with Mr Amouzegar and Mr Al Rajaan, to facilitate the transfer of secret commissions to Mr Al Rajaan. Indeed, at one stage in his evidence, Mr Nasrallah accepted that the reason for his meetings with Mr Amouzegar was "to effect the arrangements to transfer commissions from these companies that he [i.e. Mr Amouzegar] controlled through accounts that you [i.e. Mr Nasrallah] controlled to Mr Al Rajaan". He also knew that this was part of a secretive process: hence Mr Amouzegar ensuring that he did not have the documents in his possession on his return to Switzerland.

1011. It is also clear, on the evidence as a whole, that Mr Nasrallah and Mr Amouzegar came to know each other extremely well. Not only were there very many meetings over the years, but Mr Nasrallah's defence also included reference to meetings on social occasions including a skiing trip together. Mr Nasrallah knew that they were working together in furtherance of Mr Al Rajaan's commission-sharing schemes, and Mr Nasrallah was more than happy to assist, given the huge sums of money that he obtained as part of that process.

1012. The case overall is fairly littered with documents which were false to the knowledge of their signatory, Mr Nasrallah. These documents frequently related to the setting up of banking arrangements necessary to enable funds to flow to Mr Al Rajaan. They involved, in summary, false statements as to Mr Nasrallah being the beneficial owner of the relevant entity or its assets, or of the monies in bank accounts. This is illustrated by both aspects of the Pictet Scheme, addressed in more detail below. It can also be seen in the EFG Scheme, where false documentation was signed in relation to Ozak and Golgen. It can be seen very clearly in the Pensée scheme, where false documentation was signed both as to Mr Nasrallah's beneficial ownership of the Pensée Foundation or its assets, and as to his son Nadim Nasrallah being an intended beneficiary of Pensée.

1013. A further example of Mr Nasrallah signing documents that he knew to contain false representations, were documents that confirmed that Mr Nasrallah had not been making payments as inducements for contracts. One example is a supplemental agreement between Mr Nasrallah's company, Phoenix, on 31 December 2010, and Cheyne Capital International Limited ("Cheyne Capital"). This contained a clause, false to Mr Nasrallah's knowledge, whereby Phoenix represented warranted and covenanted that it:

> "has not and will not pay any money or provide any other consideration or advantage, whether in cash or in kind, directly or indirectly, to any person or entity as an inducement to or in consideration for or as a reward for obtaining investments in the Funds, and it is in compliance with, and will continue to take all reasonable measures to remain in compliance with, all laws, rules and regulations applicable to it in connection with its obligations hereunder [including without limitation, laws regarding the payment of commissions or inducements to public officials or otherwise such as the UK Bribery Act 2010, the US Foreign Corrupt Practices Act (whether or not these two Acts are specifically applicable to the Introducer), or similar other regulations]."

1014. The second page of this document is not available. However, it is clear – from a similar provision in an agreement signed by Mr Nasrallah with Cheyne Capital in 2013 – that the missing words are those which I have inserted in square brackets above. That 2013 agreement also contained a further representation/ warranty/ covenant that Phoenix was in compliance with, and would take reasonable measures to remain in compliance with, all applicable laws.

1015. Mr Nasrallah's evidence, when cross-examined as to the falsity of the statements in these documents, was that the document was "made by Mr Lourie [of Cheyne Capital] to protect himself, and what I do with the money I receive is not his problem". That is

not an answer to the point that this was a deliberately false statement, but it reflected Mr Nasrallah's attitude at the time: that he would sign any document which was needed to preserve the money flow, and it was none of Mr Lourie's business if monies were being passed to Mr Al Rajaan.

1016. Mr Nasrallah was also asked specifically, on a number of occasions, whether these statements were true. In short, he declined to answer the question. He said: "Every time I was signing a contract, the clause 65%/35% applies". When it was put to him that this was not an answer to the question, he said: "this is the answer and this is my only answer". This approach was a theme in Mr Nasrallah's evidence: he sought to stop difficult questions by declining to answer them, and saying that he had already given his final answer.

1017. Another way in which Mr Nasrallah sought to shut down cross-examination was a frequent refusal to engage with the transcripts of calls between himself, or his son Nadim, with Mr Guerin or the more junior members of Mr Guerin's team at EFG. I could well understand a witness who said that he could not remember the details of what was discussed, and that he could not add to what was on the transcript, but who nevertheless was willing to respond to questions concerning relevant passages in the transcript. However, that was not Mr Nasrallah's approach. He would often refuse to engage with questions based on the transcripts, and would also deny what the transcripts clearly showed. One example was the destruction of documents referred to below ("I did not ask anybody to destroy anything, even if it was made in this recording"). Another involved the notorious financial criminal, Bernie Madoff. Mr Nasrallah's explanation, on the transcript of the call with Ms Beltrametti, for not having dealt with Mr Madoff was that he would not pay commissions. In contrast, his evidence in the witness box was that he thought that there were question-marks as to the results being reported by Madoff.

1018. Mr Nasrallah also said that he did not know that conversations, using Mr Guerin's phone line at the bank, were being recorded. I reject that evidence. One transcript shows clearly that Mr Nasrallah did understand that recording was taking place. This knowledge also explains why the call transcripts, which only date from 2008, do not record the totality of the conversations that were taking place: calls also took place using Mr Guerin's mobile phone, which was not recorded.

1019. Mr Nasrallah was also party to arrangements to destroy material documents. He gave a clear instruction to that effect to Mr Guerin in September 2012, after the Swiss investigation started. That instruction to destroy documents was recorded in one of the transcripts of the calls between Mr Guerin and has no innocent explanation. The documentary picture that I am seeing is incomplete in consequence. In terms of Mr Nasrallah's dishonesty and unreliability, the actual instruction for destruction is compounded by Mr Nasrallah's insistence, despite the evidence of the transcript, that he had never destroyed documents.

1020. The incomplete documentary picture also results from the very inadequate disclosure that Mr Nasrallah has given. I was told that only 365 documents have been disclosed, notwithstanding a relationship between Mr Nasrallah and Mr Al Rajaan that lasted well over 20 years, and despite an operation involving the payment of hundreds of millions of dollars over the years. There has been scarcely any disclosure from Phoenix, save for a handful of introducer agreements. There has been no disclosure of documents

relating to Mr Nasrallah's Lebanese bank accounts, or indeed from any accounts in France, Lebanon or the Bahamas.

1021. Overall, and taking into account my conclusions on the evidence concerning Mr Nasrallah in this Section H, and other sections, I have no doubt that Mr Nasrallah is and was a thoroughly dishonest man. I therefore treat his evidence with considerable scepticism, and reject much of it. That is not to say that it was all invented and unreliable. There are some things which he said, including on important matters, that have the ring of truth, when the documents and inherent probabilities are considered. For example, I have no doubt that Nadim Nasrallah was never intended to be a beneficiary of Pensée. I also have no hesitation in accepting Mr Nasrallah's evidence that he was not responsible for the introduction of PIFSS to Pictet; not least because that is what the documents clearly show. I also accept that his role in relation to the receipt of monies emanating from Pictet was as nominee for Mr Al Rajaan – a matter which is important on the issue of Mr Nasrallah's honesty.

1022. With that background, I turn to the details of the Pictet Scheme.

H3: Payments pursuant to the March 1999 Agreement (and its variations)

Background to the March 1999 agreement

1023. I start by looking at the first aspect of the claim, which concerns payments made by Pictet pursuant to the March 1999 agreement, and flowing from monies earned by Pictet on PIFSS' investments. Most of the core documents, and much of the story that emerges, result from disclosure of an internal report (plus attachments), dated September 2014, which Pictet prepared for the Swiss regulator, FINMA. This report followed an extensive internal investigation by Pictet. That investigation itself was consequential upon the commencement of investigations into Mr Al Rajaan, and other steps taken in 2012 by the Swiss Federal Prosecutor, leading to a request from FINMA to Pictet.

1024. As stated in the FINMA report, the relationship with Mr Al Rajaan began with his introduction to Pictet by Mr Amouzegar in 1997. Mr Amouzegar had been recruited from Citibank, Geneva in September 1996, and had known Mr Al Rajaan for many years. I have no doubt that this is an accurate account of how Pictet's relationship with PIFSS and Mr Al Rajaan started, and it is consistent with Mr Nasrallah's evidence (which I accept) that he did not make the introduction. Mr Amouzegar had not only known Mr Al Rajaan for many years, but he maintained a close relationship with him following his departure from Pictet in 2003.

1025. At around the time of the introduction, there existed a joint venture initiated by Pictet through a wealth management company called Albait SA. This was owned as to 40% by Pictet, and 60% by a Kuwaiti Islamic finance company called The International Investor. Mr Al Rajaan, Mr Amouzegar and Mr Bertherat were directors of Albait. Albait delegated management to Pictet. PIFSS became a client of Albait, which then managed PIFSS' investment in a fund called the Al Dar Islamic Fund. The details of these arrangements are not significant, and need not be described in detail. The important point for present purposes is that the introduction of Mr Al Rajaan and PIFSS to Pictet had nothing to do with Mr Nasrallah.

1026. Mr Nasrallah first makes an appearance in March 1999. Prior to that time, in 1998, PIFSS had become a client of Pictet and opened an account, and later a further account. In September 1998, Pictet wrote a letter to Mr Al Rajaan at PIFSS, referring to a reduced asset management fee of 3/8 % (i.e. 0.375%), given the size and the potential of the relationship being developed between Pictet and PIFSS. This 0.375% fee was then referred to in later documents.

1027. In January 1999, one of Mr Al Rajaan's many companies, Chulani Investments Inc ("Chulani") was incorporated. It opened an account at Pictet, with Mr Al Rajaan identified as the beneficial owner. It was in due course to receive very substantial amounts of secret commissions (around USD 123 million) from various sources, including via the EFG scheme.

1028. Chulani's bank account (188076) was one of a number of accounts described by PIFSS at trial as secondary or tertiary accounts: see Section F above. This meant that it was downstream of accounts, which PIFSS described as "gateway" accounts, which were the initial recipients of the commissions paid by various fund managers. At Pictet, as shown in the chart in Section F, the monies sometimes passed through certain "technical" accounts, which were accounts of the bank used for internal purposes. These are not of any relevance to the story.

1029. A feature of these gateway accounts was that they were not in the name of Mr Al Rajaan. Thus, the two "gateway" accounts relevant to the present aspect of the Pictet Scheme were in the name of Mr Nasrallah. As Mr Ritchie made clear in his closing, PIFSS' claim against Mr Nasrallah was advanced and calculated by reference to the monies which passed through gateway accounts in the name of (or purportedly in the name of) Mr Nasrallah, and was not based on receipts by Mr Al Rajaan in his secondary or tertiary accounts such as those in the name of Chulani or similar entities.

1030. By this time, January 1999, the contemporaneous documents contain no reference to Mr Nasrallah in connection with Pictet. That is because he had no prior relationship with Pictet, and had not introduced Mr Al Rajaan or PIFSS to Pictet. By contrast, PIFSS' relationship with Pictet was already established, with bank accounts in place and nearly USD 90 million invested.

1031. Also by this time, prior to Mr Nasrallah's entry on the scene, a commission sharing agreement had been arrived at between Pictet and Mr Al Rajaan. On 11 August 1998, an internal Pictet memorandum, authored by a Mr Chappuis, was sent to Mr Bertherat and "Direction" (i.e. Pictet's management). The memorandum referred to the PIFSS' account numbers and administration fees. It referred to the negotiated fees of 3/8% (i.e. the figure of 0.375% given to Mr Al Rajaan in September 1998), and stated how these were to be split.

> "2/3 payable into account 500765.00.02
>
> 1/3 payable into an account to be defined later of which the economic beneficiary will be Mr Fahad Al Raja'an."

It also stated that the first payment, in respect of fees for the second quarter of 1998, should be made as soon as possible.

1032. The account to which the 2/3rds was payable was an account of Albait. The remaining 1/3rd was to go to Mr Al Rajaan. The document recording that arrangement was an internal bank document which was never intended to see the outside light of day. Neither the document nor the arrangement was ever shared with PIFSS.

1033. PIFSS submitted that the internal memorandum and the chronology only make sense on the basis that: (i) there was an agreement between Mr Al Rajaan, Mr Amouzegar and Mr Bertherat in 1998 that secret commissions would be paid to Mr Al Rajaan in return for him causing PIFSS to invest with Pictet, for which purpose an account structure would be set up to receive and conceal the receipts; and (ii) the purported introduction by Mr Nasrallah pursuant to the March 1999 agreement, discussed below, was a fabrication. I agree. That is the only sensible interpretation of what happened, in the light of all the evidence in this case.

The March 1999 agreement

1034. What then transpired was that Mr Nasrallah was brought into the picture in March 1999 to serve as a front for the purposes of paying secret commissions to Mr Al Rajaan. As already indicated, I agree with his account that he performed no function as a business introducer to Pictet – whether in relation to PIFSS or indeed anyone else. I also agree that the payments which he was to receive were as nominee for Mr Al Rajaan, for onward transmission to him.

1035. Accordingly, Mr Nasrallah went to Geneva, and assisted in putting these arrangements in place. There was, as Mr Nasrallah said, a meeting at Pictet's offices at which various documents were signed. One of those documents was headed: "Contrat – cadre avec les Apporteurs d'affaires", which translates as "Framework contract with Business Finders" or "Business Introducers". The contract was between Pictet and Phoenix. Its preamble provided that:

> "The parties to this agreement have established a commercial relationship. The Business Finder shall, as his principal activity and on a regular basis, introduce Pictet to potential new clients who are likely to open accounts and securities deposits and/or entrust Pictet with a management mandate. Pictet shall receive remuneration for its activities in accordance with its rate."

1036. Clause 1 provided that the sole purpose of the agreement was retrocession by Pictet to the Business Finder of the income generated by the business relationships introduced by the Business Finder. Clause 2 provided for the basis of calculation. It provided for payment either each quarter or each year, and "each year" had been struck out in manuscript. There were other small manuscript changes to the agreement, including to the final page which contained the retrocession rates, where the additions are made in Mr Nasrallah's handwriting. The rates were for 4 different categories of investment: (a) Fees charged by Global Custody – 25%; (b) Pictet brokerage fees – 30%; (c) Securities lending (on the remaining commissions acquired for Pictet) – 25%; and (d) Albait – as a % of the amount of the assets deposited in accounts managed by Albait – 0.125%. It was signed by Mr Amouzegar and Mr Bertherat for Pictet, by Mr Nasrallah as the Finder, and was dated 11 March 1999 at Geneva. The last of these rates – 0.125% for Albait accounts – was the rate (1/3rd of 0.375%) which had been agreed with Mr Al Rajaan 6-7 months earlier, as reflected in the August 1998 memorandum.

1037. The March 1999 document was, in my view, a dishonest document which was designed to provide a basis for payments to be made to Mr Al Rajaan, but with Mr Nasrallah/Phoenix falsely identified as the introducer – notwithstanding that they had had nothing to do with the introduction.

1038. Mr Nasrallah's evidence was that he had been asked to act as Mr Al Rajaan's nominee in respect of the Pictet arrangements over a dinner with Mr Al Rajaan and Mr Amouzegar some 10 days earlier, on 1 March 1999 at Mr Al Rajaan's villa in Cologny. He says that this was his first introduction to Mr Amouzegar and Pictet. He was asked by Mr Al Rajaan to attend Pictet's offices to sign paperwork in respect of the 1/8th % custodian fee payable to Mr Al Rajaan by Pictet. He agreed that in return for acting as a nominee, he would receive USD 500,000 as an annual fee. He could not recall what explanation was given as to why Mr Al Rajaan needed a nominee. But Mr Nasrallah asked for an assurance during the dinner that what he was being asked to do was legitimate, and he was assured by both Mr Al Rajaan and Mr Amouzegar that there was nothing to be concerned about. Mr Nasrallah wanted to help Mr Al Rajaan, because the latter had helped him in his career at Paribas.

1039. Mr Nasrallah also gave evidence about the meeting at Pictet's offices. He said that there were at least 6 individuals present: Mr Amouzegar, Mr Bertherat, Mr Renato Ghittini of VP Bank, and three others, who introduced themselves as lawyers for Pictet and VP Bank. There could even have been 5 or 6 lawyers present. The meeting was short, and he was given some documents to sign. They were not explained to him, and he did not review them in any detail during the short meeting. He was acting and intended to act only as a nominee, and did not intend or purport to act as a business introducer to Pictet. He believed that he was told by Mr Amouzegar and Mr Bertherat that the purpose of the documents was to open accounts in his name, and that Pictet would pay commissions to those accounts, where they would be held for Mr Al Rajaan, until he was directed to pay them to Mr Al Rajaan. It was submitted on his behalf that although he was not a business introducer to Pictet, there was no deception, concealment or subterfuge; because all present knew that he was not an introducer. It was also submitted that Mr Nasrallah genuinely believed that these arrangements were legitimate and authorised.

1040. There are some aspects of this account which were not substantially disputed by PIFSS, and which I accept. There may well have been a dinner. There was certainly a meeting at Pictet's offices where documents were signed by Mr Nasrallah. Mr Amouzegar and Mr Bertherat were present at that meeting. Mr Nasrallah was going to act as nominee for Mr Al Rajaan, with an account to be opened in Mr Nasrallah's name to receive funds on behalf of Mr Al Rajaan. I accept that all present at the meeting knew that Mr Nasrallah had had no involvement in introducing Mr Al Rajaan/PIFSS to Pictet.

1041. I do not accept other aspects of this account. I do not accept that Mr Nasrallah sought or obtained assurances that the arrangements were legitimate and authorised. For the reasons given below, he knew that they were not. I do not think that Mr Ghittini was there: there is nothing in the documents at that time to indicate that he was present, and VP's involvement appears to have begun some years later in around February 2006, when Mr Al Rajaan's Lipuno account was opened. I do not accept that 3-6, or indeed any, lawyers were present. There was no obvious need for any lawyer to be present at a meeting where the parties were ostensibly entering into a commercial introducer agreement, and Mr Nasrallah was signing account opening documents. It is all the more

improbable that lawyers would be attending a meeting where the ostensible commercial agreement falsely represented the factual position. No honest lawyer could have countenanced advising his client (i.e. Pictet) that it was legitimate for a document to be signed which falsely recorded Mr Nasrallah as an introducer entitled to be paid substantial commissions in respect of an introduction that he had never made.

1042. I also do not accept that Mr Nasrallah simply signed, without any consideration of their contents, the documents that were given to him at the meeting. In particular, Mr Nasrallah accepted in evidence that he knew that he was signing a business introducer agreement, in circumstances where he knew that he had made no introduction to Pictet. The handwritten changes to the text of the March 1999 agreement, some of them in Mr Nasrallah's handwriting, show that he paid attention to its terms relating to payment. I do not accept that there was any "trap" that was laid by Mr Amouzegar, into which Mr Nasrallah fell. Mr Nasrallah knew what he was doing.

1043. I have no doubt that Mr Nasrallah was fully aware that this was an entirely illegitimate arrangement. One obvious question was: why did Mr Al Rajaan need a nominee at all, if this was a customary or legitimate or authorised arrangement? If that were the case, then there would be no difficulty in Mr Al Rajaan receiving the money himself, in an account in his name, without a false introducer agreement.

1044. Towards the start of his evidence, under cross-examination by Mr Weisselberg KC for D1/D2, Mr Nasrallah gave what seemed to me to be some unguarded and reasonable evidence as to why he was needed as a nominee. He said that "all of this was arranged by Pictet to be, myself, the person who was getting the commissions so that Mr Al Rajaan would not be accused of anything." This was an obvious reason for the arrangements: Mr Al Rajaan could not be seen to be receiving these commissions, because it would be perceived as straightforward bribery and exploitation of his position at PIFSS. That perception would have been entirely accurate. I have no doubt that Mr Nasrallah, as a highly intelligent man and experienced banker, knew that at the time. I reject as implausible the argument, advanced on Mr Nasrallah's behalf, that this was not what Mr Nasrallah realised at the time, but that he has only come to realise this at a much later stage.

1045. The answer as to not being "accused of anything" was, naturally enough, taken up by Mr Ritchie in cross-examination. So was the question of why Mr Al Rajaan needed a nominee. Mr Nasrallah could not give sensible answers to the questions asked. He was asked what it was that Mr Al Rajaan could be accused of. After failing to answer the question twice, his response was: "I cannot answer this question, I don't know". In my view, he knew perfectly well. It was then put to him that he could answer, but didn't want to, and that the answer was "bribery". He said that it didn't come into his thoughts that there was bribery. I reject that evidence as untrue.

1046. Later on, he was pressed on his understanding of what a nominee was, and why Mr Al Rajaan needed a nominee. At the start of this line of cross-examination, Mr Nasrallah agreed that his "accused of anything" answer meant that if he "didn't do this for Mr Al Rajaan, then he would be accused of something". He agreed that a nominee was someone who acted for someone else, and that this was something that he understood. He said that the Pictet agreement was "to allow Pictet to make funds, to serve Mr Al Rajaan, and to make commissions as much as possible for Mr Al Rajaan". He said that

he was helping Mr Al Rajaan to be his nominee, and that he (Mr Nasrallah) "signed on his behalf".

1047. He was then asked why he had signed on his behalf, and why Mr Al Rajaan needed to ask him to do so. His answer was that Mr Al Rajaan had asked him, because he trusted him as a friend. He was asked why Mr Al Rajaan needed any friend, even someone as trusted as Mr Nasrallah. Mr Nasrallah's response, repeated a number of times, was that he did not know. He denied that it was to conceal the true arrangements. I reject that evidence without hesitation. The obvious, and only, reason for Mr Nasrallah's involvement in these arrangements as a nominee was to conceal the true arrangements: i.e. that money was flowing to Mr Al Rajaan.

1048. The concealment and dishonesty inherent in these arrangements is borne out by the amount of money that, on Mr Nasrallah's evidence, was promised to him for performing his role: an annual fee of USD 500,000. This is obviously a very significant sum, and it was only payable because of the illicit and unlawful nature of the arrangements in which Mr Nasrallah was engaged. Since Mr Nasrallah has not given disclosure of his banking records, there is no documentary evidence of who paid this money or where or when it was paid. There is some evidence, on one of the transcripts of EFG's calls with Mr Nasrallah, that USD 125,000 was paid each quarter. I think it likely, on the evidence as a whole, that it was paid by Mr Amouzegar, not Pictet. That conclusion is supported by a transcript of a call between Mr Nasrallah and Ms Likhotal of EFG in April 2011, which indicates that the payment was made, or at least sometimes made, to Ozak from Mr Amouzegar's Zetland companies.

1049. I also think it likely that the USD 500,000 was not referable to, or at least not solely referable to, Mr Nasrallah's agreement to act as nominee under the March 1999 agreement. It was part of wider arrangements with Mr Nasrallah involving Mr Amouzegar and his Zetland companies, whereby Mr Nasrallah was paid for acting as a conduit for payments of commissions to Mr Al Rajaan. Indeed, at one point in his evidence, Mr Nasrallah agreed that the USD 500,000 was money paid by Mr Amouzegar to launder commissions "which he is taking on behalf of his companies for Mr Al Rajaan".

1050. The nature of the Pictet arrangements, and the way they were put in place – and indeed the other arrangements in which Mr Nasrallah was involved – are inconsistent with any belief on Mr Nasrallah's part that they were authorised. Put simply, if they were authorised, then there was no need for a false introducer agreement, no need for a nominee, and no need for monies to be routed through an account in Mr Nasrallah's name. Looking beyond the Pictet Scheme, and more generally to Mr Nasrallah's involvement in various schemes, there was no need for the complex web of different companies or other entities which were involved in the arrangements.

1051. It was put to Mr Nasrallah in cross-examination, in the context of the EFG scheme addressed in Section J below, that the "natural instinct" was that the arrangements were "naturally unlawful". He agreed: "Of course, because I don't want to do any mistake by paying him commissions. I asked him if he is authorised and he said, "Yes, I am"". I do not accept that Mr Nasrallah ever asked that question, or ever received a credible answer from Mr Al Rajaan that they were authorised. I agree with Mr Ritchie's submission that this case involves serious people from serious organisations: Mr Al Rajaan as the Director General of a major Kuwaiti governmental entity which can be

equated with or which is comparable to a sovereign wealth fund, and Mr Nasrallah who worked at senior levels at a major European bank. I also agree that it is entirely improbable that the Kuwaiti state pension fund, or any other equivalent entity, could have granted authorisation to its most senior figure to corrupt his own independence, including to receive monies pursuant to an introducer agreement when there was known to have been no relevant introduction. An intelligent and experienced individual such as Mr Nasrallah would have appreciated that. If he had been genuinely concerned to be satisfied that there had been authorisation, he would never have been satisfied by the say-so of the individual who was receiving monies which would naturally be considered to be unlawful. As Mr Ritchie also submitted, anyone who was seriously concerned to avoid entering into an unlawful arrangement would want a clear documentary record – most probably from the board of the organisation – that the arrangements with the Director General were permitted and authorised.

1052. In addition to the March 1999 agreement, a number of other documents were signed in Geneva on 11 March 1999. Mr Nasrallah signed a request to open account 97519. The account opening document contained a declaration that Mr Nasrallah was "acting on their own behalf". In the light of the fact that Mr Nasrallah's role was purely as Mr Al Rajaan's nominee, this was a false, dishonest, statement by Mr Nasrallah. He also signed a "Form A" in respect of this account. This confirmed Mr Nasrallah's declaration as to his beneficial ownership of the account. This too was a false, dishonest, statement, as Mr Nasrallah must have appreciated. There was expert evidence called by EFG which emphasised the importance of Form As in the context of banking, including that there are criminal consequences for false statements in such documents.

1053. Accordingly, as far as concerns the March 1999 agreement, I make the findings proposed by PIFSS. That agreement was created pursuant to the agreement of Mr Al Rajaan, Mr Nasrallah and Pictet (through Mr Amouzegar and Mr Bertherat) as a front to conceal Mr Al Rajaan's prior agreement to receive secret commissions in respect of investments and commissionable services entered by PIFSS under the control or influence of Mr Al Rajaan. An account was set up at Pictet for the benefit of Mr Al Rajaan, but in Mr Nasrallah's name, to conceal Mr Al Rajaan's identity as the beneficiary of secret commissions under the March 1999 agreement.

1054. Over the years that followed, payments were made to Mr Nasrallah's accounts (described below) in Geneva, and later the Bahamas, representing retrocessions of monies payable to Pictet in respect of a large number of PIFSS' investments. It is not necessary to describe those investments in detail. The total amount payable or paid was in the order of USD 22.8 million, although this figure includes a small VAT element in respect of which there is a dispute. Mr Al Rajaan was the person who had authorised or influenced PIFSS to enter into these investments, and all participants knew that the arrangements were corrupt. All the payments made to Mr Nasrallah exclusively related to PIFSS' investments. Mr Nasrallah's only purported client was PIFSS, and there is no suggestion that he introduced anyone else or provided any other relevant services.

March 1999 – May 2011

1055. During the period up to May 2011, payments were made by Pictet to Mr Nasrallah's account 97519. There were then onward payments to a number of accounts which were held for Mr Al Rajaan: Hogara Investment, BUI Inc, and J&D Investments Ltd. There was also a payment of USD 800,000 to Ozak, which (as Mr Nasrallah accepts) was an

EFG account which was in Mr Nasrallah's name, but held for Mr Al Rajaan. When Pictet made these transfers, it took instructions from Mr Al Rajaan, but there is also evidence that Mr Nasrallah authorised the transfers. In written closing submissions, it was accepted by Mr Nasrallah that he operated account 97519, and that as nominee he authorised transfers to accounts he understood were beneficially owned by Mr Al Rajaan. It was also accepted that Mr Nasrallah would receive regular calls from Mr William of Pictet to request confirmation of instructions for payments to be made to accounts in accordance with Mr Al Rajaan's instructions. From around 2004, Mr William provided draft letters of instruction that reflected Mr Al Rajaan's instructions. The hearing bundle contained formal instructions for some transfers: for example, a transfer from account 97519 to Hogara of USD 3.2 million in 2004.

1056. The payments that were made by Pictet were retrocessions of fees which it had received in relation to the various categories of investment referred to in the March 1999 agreement. It was argued on Mr Nasrallah's behalf that, in effect, Pictet should not have paid as much as it did to Mr Nasrallah's account. One reason for this line of argument was that Mr Nasrallah understood that the nominee arrangements were only related to the 0.125% retrocession payable in relation to the Albait investments (i.e. 1/3rd of 0.375%). Another reason is that there were variations to the March 1999 agreement, such as increasing the retrocession rate on certain investments to 40%, to which Mr Nasrallah did not agree.

1057. I do not consider that there is substance in these points. The terms of the March 1999 agreement, signed by Mr Nasrallah, clearly extended beyond the Albait arrangements. Mr Nasrallah made handwritten amendments on the relevant page, and therefore must have seen that this was the case. Further, that agreement was not a genuine introducer's agreement which the parties intended to be strictly interpreted in accordance with its terms. It was simply a necessary document to facilitate the transmission of monies out of Pictet and ultimately to Mr Al Rajaan. It was that enterprise on which Mr Nasrallah was willingly engaged, and it was of no interest to him to compare the amounts being paid into the account in his name with the strict terms of the March 1999 agreement, or to see whether there had been relevant variations. Mr Nasrallah understood the position to be that the true counterparty to Pictet, in relation to the commission arrangements, was Mr Al Rajaan. Since that was the true nature of the agreement, there could be no objection – and Mr Nasrallah had no objection – to Pictet and Mr Al Rajaan adjusting the amounts payable between themselves, effectively on a principal to principal basis. Since Mr Al Rajaan was the true principal to the March 1999 agreement, he was in a position to agree variations. These matters also explain why Pictet was casual about obtaining Mr Nasrallah's signature to amendments. Similarly, and consistent with Mr Al Rajaan being the true principal, Pictet treated account 97519 as though it was Mr Al Rajaan's, acting at various times (as shown in the FINMA report) on his instructions in relation to transfers from that account.

1058. In any event, I do not see how any variations to the March 1999 agreement, even if made without Mr Nasrallah's knowledge, can affect his liability under Kuwaiti law or the quantum thereof. From the start, Mr Nasrallah agreed to assist Mr Al Rajaan to receive secret commissions from Pictet, and to do so by signing documents which falsely represented the true position. The essence of the agreement was that Mr Nasrallah was a front for dealings between Pictet and Mr Al Rajaan, and thus for the payments made from the former to the latter. Mr Nasrallah is in no position to criticise

the conduct of Pictet and Mr Al Rajaan in agreeing to variations which facilitated the payments which Mr Al Rajaan wanted to receive, and which Mr Nasrallah wanted to help him to receive. As discussed above, Mr Nasrallah's understanding was that the Pictet agreement was "to allow Pictet to make funds, to serve Mr Al Rajaan, and to make commissions as much as possible for Mr Al Rajaan".

1059. During this period, internal Pictet documents reveal or reflect Mr Al Rajaan's overall modus operandi, and the secrecy of what was happening. Mr Al Rajaan was given a pseudonym – "JR", after the character in the 1970s TV series Dallas. In the internal Pictet documents, he was not, generally, referred to by his name.

1060. On 18 March 2009, a file note was prepared of a meeting between YB (Mr Yves Bruggisser) and Mr Al Rajaan. The subject of the file note was "YB introduction to JR". The file note does not refer to Mr Al Rajaan by name, and it describes account 97519 (the "friend's account") as one of a group of accounts of the "client". Another account, for which Mr Al Rajaan wanted to receive information, was 190890, which was the Bordertown account discussed below.

1061. Mr Bruggisser was at this time (March 2009) taking over as relationship manager in Geneva for Mr Al Rajaan and Mr Nasrallah. The note refers to the client wanting to see all statements for all accounts every time that Mr Bruggisser met him. The only exception was the Bahamas account 190882 (see below), which Mr Al Rajaan said that he did not care about. The request included account 97519, reflecting the fact that Pictet treated that account as Mr Al Rajaan's. The same is true of the Bordertown account.

1062. The file note then goes on to say the following:

> "Never bring him statements in Kuwait. We should never say the name Nasrallah (his friend) over the phone. He is nervous about that."

Mr Al Rajaan's nervousness, at the possibility that Mr Nasrallah's name might be mentioned over the phone, reflects a significant aspect of his modus operandi. He wanted to keep in the shadows, and away from any possible questions being raised in Kuwait, those such as Mr Nasrallah who were, supposedly, intermediaries and were responsible for routing commissions to him. This is a point of some relevance generally, including in relation to other intermediaries such as Mr El Ghazzi: see Section M below.

1063. Also relevant is Mr Al Rajaan asking that bank statements should never be brought to Kuwait. It was part of his modus operandi to ensure that there were no potentially incriminating documents that could be found in Kuwait. In that regard, he proved to be very successful. None of the incriminating documents, relied upon by PIFSS in the present case, were found in Kuwait. In June 2012, Mr Nasrallah commented on the fact that, as he had been told by Mr Al Rajaan, there was nothing against Mr Al Rajaan in Kuwait. The documentary trail which led to the present proceedings only began when Swiss banking documents were released following Kuwait's request for Mutual Legal Assistance.

May 2011

1064. On 2 May 2011 Mr Nasrallah signed an instruction to Pictet for the closure of account 97519, and the transfer of all assets to account 190882 held by Pictet Bahamas. On the same day, Mr Nasrallah and Pictet signed a new business finder/ introducer agreement and a remuneration agreement. The first payment into account 190882 was made on 17 May 2011.

1065. Account 190882 had been opened in 2006, and one of Pictet's internal documents (prepared by Mr William) indicates that it was Mr Amouzegar who made the request for the account to be opened. However, the formal application for the opening of the account was a document signed by Mr Nasrallah on 19 January 2006. The fact that Mr Amouzegar made the request for the account to be opened, but that Mr Nasrallah signed the account opening documents and Form A, shows the two men working closely together.

1066. On the same date, Mr Nasrallah signed a Form A headed "Establishment of the Beneficial Owner's Identity". It contained, in my view, a false representation that the assets were beneficially owned by Mr Nasrallah. Mr Nasrallah signed as the "contracting partner". It did not identify anyone other than Mr Nasrallah as the owner of the assets in the account. I do not attach any significance to the fact (relied upon in Mr Nasrallah's written closing) that the identity of the contracting partner was not identified in another part of the form. It is fair to say, however, that the document was not carefully prepared: Mr Nasrallah did not tick the box stating that he was the sole beneficial owner of the assets concerned, but instead ticked the box saying "that the beneficial owner/s of the assets is/are" but did not then identify any other beneficial owner. However, I do not consider that this affects the substance of the representation made by Mr Nasrallah, when the document is considered as a whole.

1067. Retrocessions from Pictet then started to arrive in account 190882 after May 2011, and account 97519 was closed in August 2011. After arriving in account 190882, monies were then routed to Mr Al Rajaan's vehicles. There is, again, evidence of Mr Nasrallah signing formal documentation to that end. For example, Mr Al Rajaan had purchased a diamond and emerald ring from the jeweller, Boghossian, in December 2011. The invoice was addressed to Mr Nasrallah. In March 2012, Mr Nasrallah signed a letter instructing Pictet to make payment of the second instalment of CHF 1 million for the "second part of my purchase at Boghossian".

1068. Mr Nasrallah argued that, in relation to this account – as well as in relation to account 97519 – he did not authorise all the payments that were made to Mr Al Rajaan. There was no dispute that Pictet treated these accounts as being Mr Al Rajaan's. Pictet thus acted on Mr Al Rajaan's instructions, sometimes without reference to Mr Nasrallah. I do not consider, however, that this provides any defence to Mr Nasrallah in relation to the claim based on his acts of assistance to Mr Al Rajaan. Both accounts were set up, to Mr Nasrallah's knowledge, as nominee accounts whereby Mr Nasrallah was fronting for Mr Al Rajaan. The purpose of those accounts was to enable monies to flow to Mr Al Rajaan, which is what happened. Whilst Mr Nasrallah may not have specifically authorised every single transaction, he provided relevant and important assistance at the outset, knowing that the real principal was Mr Al Rajaan and that the accounts would be used to facilitate the transfer of monies to him. As with similar arguments advanced in relation to the variations to the March 1999 agreements, Mr Nasrallah was not in a position to object – and did not object – to Pictet dealing with the person (Mr Al Rajaan) who was understood by all parties to be the true principal. In circumstances

where there was a dishonest arrangement from the start, and where all the transfers to Mr Al Rajaan fulfilled the intended purpose of the arrangement, there is no substance to the argument that each transfer needed the specific authorisation of Mr Nasrallah in order to establish Mr Nasrallah's liability for a particular amount paid.

May – September 2012, and the closure of the Swiss accounts

1069. I now describe events in 2012, when Mr Nasrallah assisted in the closure of accounts held by Pictet, and other Swiss banks, previously used to channel or receive monies being paid to Mr Al Rajaan. These events are relevant to the issues of Mr Nasrallah's honesty, including the question of whether he believed that Mr Al Rajaan was authorised to receive the payments being made to him.

1070. In May 2012, Mr Al Rajaan became aware of criminal investigations into his conduct. The background is that the Swiss prosecutor initially wrote to Banque Mirabaud, subject to confidentiality, on 11 April 2012. The prosecutor wrote again on 2 May 2012, this time lifting confidentiality. On the same day, the prosecutor imposed a block on Mr Al Rajaan's Mirabaud accounts (in the names of Domini, Intermac and Tawny), and requested disclosure relating to his accounts and any retrocessions. Mr Al Rajaan learned about the prosecutor's order on 7 May 2012.

1071. Once Mr Al Rajaan had found out about the criminal investigation, he informed Mr Nasrallah and Mr Bertherat (and probably some others) and a plan was clearly agreed to cover up the Pictet arrangements and transfer funds out of Switzerland. Parallel plans existed in relation to other Swiss banking operations in which Mr Al Rajaan and Mr Nasrallah had been involved.

1072. Mr Nasrallah was very concerned about these developments. A recorded conversation took place on 7 May 2012 between Nadim Nasrallah and Mr Guerin of EFG. The conversation opens with a discussion about past transfers and a possible future transfer of funds. Nadim describes his father as "freaking out", although he (Nadim) expressed the view that there was nothing to worry about. Nadim's rationale was that it was Mr Al Rajaan who bore responsibility for receiving the commissions which had been paid to him:

> "In any case, our client … We, we cannot be involved personally, we have nothing to do with it.
>
> The fact that we do this … kind of... of transactions and that we get commissions, it's our business. It's no one else's business.
>
> And even, that we distribute, it's no-one's business.
>
> It's the other one who shouldn't accept it.
>
> We have nothing to do with it
>
> Because he, he worried my dad … with his comments. So that's why he, he's talking nonsense. That's why."

1073. The conversation concluded with Mr Guerin telling Nadim Nasrallah to get a good lawyer in Switzerland. Although the conversation was with Mr Nasrallah's son, rather

than Mr Nasrallah himself, it evidences Mr Nasrallah's thinking at that time. He clearly understood that he was implicated in the matters being investigated by the Swiss prosecutor. He was freaking out and worried. This must have been because he knew that he should not have assisted in the payment of commissions to Mr Al Rajaan. There is nothing here, or in any of the other recorded conversations in 2012, which indicates that Mr Nasrallah thought that the payments had been authorised. On the contrary, the statement by his son that it was "the other one who shouldn't accept it" was a reference to Mr Al Rajaan, and it recognised that Mr Al Rajaan had acted wrongly in accepting these monies.

1074. The line of defence that was identified by Nadim was not based on authorisation, but upon the idea that it was up to the Nasrallahs to decide what to do with their money, and it was no-one else's business. This is the untenable line of argument that Mr Nasrallah deployed when cross-examined about the false statements made to Cheyne Capital, as described in Section H2 above. The conversation also evidences the knowledge and involvement of Nadim Nasrallah in the payments being made to Mr Al Rajaan; a matter that is relevant to issues relating to Phoenix International Brokerage in the context of the EFG Scheme, and further discussed in Section J below.

1075. Mr Nasrallah accepted, in his witness statements, that he proceeded to close accounts and send money to Lebanon as a reaction to the criminal investigation. He said that this was to avoid becoming unnecessarily and unfairly caught up in the ongoing investigation into Mr Al Rajaan. I do not accept that this was the reason. Mr Nasrallah knew that he had been knowingly involved in corruption, which was the subject of the Swiss investigation. As he knew, there was nothing unnecessary or unfair about him becoming caught up in that investigation. The closure of the Swiss banking operation was for several reasons: to avoid a continuing relationship with Swiss banks, in circumstances where the public prosecutor was investigating; to cover up tracks, as far as practical; and to enable the commission flow to continue elsewhere, beyond the reach of the Swiss investigation. Indeed, in 2013, Mr Nasrallah became party to the Pensée arrangements, which continued one of the streams of commission payments to Mr Al Rajaan which had previously gone through accounts at Pictet – principally the Bordertown account discussed below. Thus, although Mr Nasrallah professes to have been concerned about becoming unfairly caught up in the prosecutor's investigation, he did not seek thereafter to distance himself from Mr Al Rajaan or the corrupt payments that were flowing to him.

1076. On the same day as the conversation with Mr Guerin described above, Mr Bertherat sent an internal email confirming that the agreement between Mr Nasrallah and Pictet was to be terminated with immediate effect. The March 1999 agreement had in fact by this time been replaced by a later agreement, but it is not necessary to describe the latter. I agree with PIFSS that further evidence, that everyone concerned knew that the arrangements were corrupt and unlawful, can be seen in the fact that Pictet did not simply terminate the agreement with Mr Nasrallah, but also sought to reverse payments made to Mr Nasrallah in 2012. This was, no doubt, an attempt to break the link between the termination of the agreement and the breaking news in May 2012 of the Swiss criminal investigation.

1077. On the following day, instructions were given for various Pictet accounts associated with Mr Al Rajaan to be closed. On Sunday 13 May 2012, Mr Nasrallah signed a letter to Mr Bruggisser stating that he wanted to close his personal account and the

Bordertown account in the Bahamas. The stated reason for the closure of these accounts was: "in view of the election results". There had indeed recently been a presidential election in France. But the election of Francois Hollande was not Mr Nasrallah's reason for the closure of the accounts. The true reason was the Swiss investigation. This was therefore yet another false statement by Mr Nasrallah.

1078. Mr Nasrallah also gave instructions for the cash in the Bordertown account to be transferred to his "Antoine" account (i.e. 190882 in the Bahamas), and then for the money in that account to be paid to an account in Lebanon at Banque Audi. That Banque Audi account was in the joint names of Mr Nasrallah and Nadim. These instructions were then implemented by Pictet, and Mr Nasrallah's Bank Audi account received € 1.4 million and € 3.7 million during May 2012. Accordingly, despite Mr Nasrallah's case that he had had no involvement in Bordertown, and no knowledge that this was an account with which he was associated, Mr Nasrallah received very substantial monies from that account.

1079. Simultaneously with the closure of Mr Nasrallah's accounts, Mr Al Rajaan closed various Pictet accounts, with monies being transferred elsewhere. One of these transfers was € 34 million from Chulani to an account at Deltec in the Bahamas in the name of Fyne. This transfer, and the involvement of Fyne, features in the events relating to the Pensée scheme, discussed in Section L below.

1080. Following these events, Mr Nasrallah kept a close interest in developments in relation to Mr Al Rajaan. On 27 June 2012, there was another recorded conversation with Mr Guerin. Mr Nasrallah asked him whether he had "any news". Mr Guerin said that he looked every day, and there was nothing. He said that when all calms down, "you're going to send it all back to me": i.e. return the funds which had been removed in May. Mr Nasrallah said that "he" had been at the Prime Minister's very recently. The "he", not referred to by name, was Mr Al Rajaan. Mr Nasrallah then continued:

> "Yes, he told me they don't have anything against him, in Kuwait, absolutely nothing."

1081. As discussed earlier, it was part of Mr Al Rajaan's modus operandi: there should be nothing incriminating in Kuwait. It is also clear from the conversation that Mr Nasrallah was breathing a sigh of relief at that, and more generally that things seemed to have calmed down. He said: "yes, but he got us scared". He and Mr Guerin then agreed that they would be more cautious. Again, there is nothing here to suggest that Mr Nasrallah thought that there was no problem, because Mr Al Rajaan's actions had been authorised and that the arrangements had been honest. Had that been the case, then there would have been no need to mention or breathe a sigh of relief because there was nothing against Mr Al Rajaan in Kuwait, nor any need to be more cautious in the future.

1082. There were other relevant conversations between Mr Nasrallah and Mr Guerin in 2012, none of which are consistent with honesty on the part of Mr Nasrallah. Since they include discussion of various companies associated with the EFG Scheme, I will deal with them when addressing that scheme.

H4: The parallel Amouzegar agreement

1083. On 21 October 2003, Pictet and Mr Amouzegar entered into a retrocession agreement. Mr Amouzegar was described in that agreement as the "Business Finder". It was concluded at around the time that Mr Amouzegar left Pictet's employment. The agreement entitled Mr Amouzegar to 30% of fees earned by Pictet in respect of any investments or business of PIFSS (excluding Global Custody) generated after 31 October 2003. A revised agreement was concluded in April 2006, whereby the retrocession rate on PIFSS' accounts was varied to 5% irrespective of the date when each account was opened.

1084. The effect of these agreements was that commissions in respect of certain PIFSS' investments were being paid both to Mr Nasrallah and Mr Amouzegar for purportedly introducing PIFSS' business to Pictet. There was, very obviously, no commercial rationale for this. The amounts payable under the agreements, as shown in an internal Pictet spreadsheet, were CHF 4,148,667, which is the equivalent of USD 3.9 million. Three issues arise in relation to this claim. The first issue concerns Mr Nasrallah's liability. The other issues concern Mr Al Rajaan's liability.

1085. First, Mr Nasrallah contends that he cannot be liable for these sums, because there is no evidence linking him to them. I think that this is a good point, and that there is an insufficient basis for making Mr Nasrallah liable for these specific sums. There is no allegation that he was responsible in some way for these agreements with Mr Amouzegar. The monies payable went to an account in Mr Amouzegar's name, and it is not alleged that they passed through any of the accounts associated with Mr Nasrallah.

1086. Secondly, I was not shown any direct evidence that these monies, or some proportion of them, were passed to Mr Al Rajaan. In all probability, given the general nature of the dealings between Mr Al Rajaan and Mr Amouzegar, they were either passed to Mr Al Rajaan, or shared between Mr Amouzegar and Mr Al Rajaan. The precise destination of these monies does not in fact matter, as far as concerns Mr Al Rajaan's liability. He either received the monies himself, or allowed Mr Amouzegar to keep some of them, as part of the latter's reward for assisting in paying secret commissions to Mr Al Rajaan, resulting from Mr Al Rajaan's profiteering from his position. Under Kuwaiti law, and specifically the KPPL, a claim can be made against a wrongdoer who has benefited others. Here, even if these particular monies did not flow in whole or part to Mr Al Rajaan himself, he profiteered from his position in order to benefit Mr Amouzegar.

1087. Thirdly, there is a small point on quantum, in that Pictet's internal calculations show a deduction for VAT. I consider that Mr Al Rajaan's liability extends to the full amounts payable under the agreements with Mr Amouzegar, without deduction for VAT. It was the gross amount payable under Mr Amouzegar's agreements that was facilitated by Mr Al Rajaan's profiteering.

1088. I reach the same conclusion in relation to a VAT point also raised in the context of the payments to Mr Nasrallah. Indeed, the argument against any deduction of VAT is even more powerful in circumstances where Mr Nasrallah did not provide any introducer services at all. The headline figure in the internal Pictet spreadsheet, which is the source for the figures claimed, is CHF 26,674,948, prior to deduction of any VAT element. This corresponds to the USD 22.8 million in round terms, to which I have already referred.

H5: The Bordertown/Zetland arrangements

Introduction

1089. As introduced in Section H1 above, a claim is made against Mr Al Rajaan and Mr Nasrallah, in the context of the Pictet Scheme, in connection with a stream of payments separate from those made under the March 1999 agreement and its successor agreement. These payments had their origin, at least very substantially, in commissions received, in respect of PIFSS' investments, by a large number of "Zetland" companies associated with Mr Amouzegar and Mr Khosrovani. These companies were generally managed by a Hong Kong based service company called Zetland Corporate Services Ltd. The Zetland companies then made payments through various accounts, and Mr Al Rajaan or his vehicles were the recipients of a substantial proportion of these payments. The accounts through which some payments were routed included an account of Bordertown: account 190890 at Pictet Bahamas. PIFSS alleges that Bordertown was nominally owned by Mr Nasrallah, although its real beneficial owner was Mr Al Rajaan, and that the account received monies on behalf of Mr Al Rajaan.

1090. The principal Zetland companies associated with Mr Amouzegar and Mr Khosrovani were: Garibaldi Management Investment Corp ("Garibaldi"); Gold Coaster Holdings Ltd ("Gold Coaster"); Monaro Properties Development Enterprise Inc ("Monaro"); Benton Consultancy Ltd ("Benton"); Berwyn International Ltd/Berwyn Management Ltd ("Berwyn"); Breakers Management ("Breakers"); Dalton Financial Group Ltd ("Dalton"); Dalmeny Real Estate Inc ("Dalmeny"); Hillows Management Real Estate Corp ("Hillows"); Treadmore Global Corporation Ltd ("Treadmore"); Moccak Management Ltd ("Moccak"); Wentworth Development Corp ("Wentworth"); and Caradoc Consulting Ltd ("Caradoc"). The evidence is unclear as to whether or not Quadra Properties SA ("Quadra") was a company managed by Zetland, but it was clearly a company associated with Mr Amouzegar and Mr Khosrovani and the Aerium Scheme payments.

1091. These companies were involved in various aspects of the events concerning Mr Nasrallah, albeit that not all of them made the payments into Bordertown which form the basis of the present aspect of PIFSS' claim in respect of the Pictet Scheme. Thus, the payment flows emanating from these companies, and then to Mr Al Rajaan, are also addressed in the context of the VP Scheme (specifically payments to a company called Orkina), the EFG Scheme (specifically, Ozak), and the Pensée Scheme. Also, very significant sums, in excess of USD 50 million, were paid under the Aerium Scheme. Some money also flowed into Mr Nasrallah's account 190882.

1092. For present purposes, however, the focus is Bordertown and Mr Nasrallah. The central issue which arises, as between PIFSS and Mr Nasrallah, is whether Mr Nasrallah knew that he had any connection with Bordertown at the time when monies were flowing through its Bahamas account. Mr Nasrallah contends that he did not understand that he had any such connection, or that he was or purported to be Bordertown's beneficial owner, until he was told about it by Pictet at the time that Swiss bank accounts were closed in May 2012. He therefore cannot be held responsible for assisting Mr Al Rajaan with this aspect of the flow of secret commissions. PIFSS contends, by contrast, that he knew of his connection, and was involved with Bordertown, long before May 2012.

The Bordertown documentation and related issues

1093. On 23 February 2006, Mr Nasrallah signed (as "Principal") a Pictet mandate for the creation and administration of a legal entity. The name of the entity identified in the mandate was Bordertown Trader Ltd, a BVI company. This name was inserted in the standard form in handwriting, which was not Mr Nasrallah's. The activity of the company was identified as holding a bank account at "PBT": i.e. Pictet Bahamas. Clauses 4 and 5 of the standard form provide:

> "4. The Principal confirms that it is the beneficial owner of the legal entity within the meaning of the Swiss Banks' Due Diligence Agreement. He undertakes to communicate to the Bank spontaneously any change in this state of affairs.
>
> 5. The Principal shall instruct the Bank to appoint, in accordance with its internal rules, the organs of the entity legal.
>
> These bodies carry out their functions on behalf of the Principal in a fiduciary capacity. They undertake to comply with the instructions of the latter, within the limits imposed by law, commercial practice and, where applicable, the internal rules of the Bank."

1094. Other bank records, at this time, record Mr Nasrallah's connection with Bordertown. For example, the account opening memorandum refers to his having been introduced by Mr Amouzegar, and that he was the ex-head of Paribas' Middle East division. Again, therefore, one sees Mr Amouzegar and Mr Nasrallah working together.

1095. I reject Mr Nasrallah's evidence that he did not know, prior to the closure of the bank accounts in 2012, of his involvement as the purported beneficial owner of Bordertown. Mr Nasrallah signed the mandate described above. The fact that the name of the company, Bordertown Trader Ltd, was inserted in manuscript, presumably by someone at Pictet, does not mean that it was not on the form at the time when Mr Nasrallah signed. Equally, if Mr Nasrallah did sign a form which did not have the name included, it simply shows that he was content to be identified as the beneficial owner of whatever legal entity was then created and administered by Pictet. He would have been content to do that because he wanted to assist Mr Al Rajaan to receive secret commissions, and was doing whatever he could to assist that process, in conjunction with Mr Amouzegar.

1096. It is true, as Mr Casey's submissions for Mr Nasrallah emphasised, that Mr Nasrallah's signature does not appear on other documents, including account opening documents, created in around February 2006. Thus, by way of example, on 24 February 2006, the day after Mr Nasrallah signed the mandate, a company called Miakunal SA signed a Form A for Bordertown. This stated that the beneficial owner of the assets was Mr Nasrallah, giving his address in Beirut. Miakunal was a corporate director associated with a number of Al Rajaan vehicles, including Bordertown. There is material to indicate (as PIFSS asserted in its "request for payment" from Pictet) that Miakunal was under Pictet's control. Clause 5 of the mandate envisaged that Pictet would appoint the legal organs of Bordertown, and this was no doubt the reason why Miakunal came into the picture.

1097. It is improbable that Miakunal would have inserted Mr Nasrallah's name on the Form A without obtaining his approval, or at least receiving confirmation from Pictet that Mr

Nasrallah was the person to be identified in Form A. The completion of Form A followed immediately after signature of the mandate, and the two documents were closely connected temporally as well as in substance. Mr Nasrallah's identification in the Form A is consistent with, and follows on from, Clause 4 of the mandate signed by Mr Nasrallah, in which he identified himself as the beneficial owner of the relevant legal entity. Mr Nasrallah would have had no objection to being identified in the Form A, and would have approved if specifically asked. Mr Nasrallah was throughout willing to be portrayed as the beneficial owner of entities or accounts which in reality were those of or held for the benefit of Mr Al Rajaan: see for example accounts 97519 and 190882 described above, and the Pensée scheme described below.

1098. Furthermore, there are other documents, created in the months following the incorporation of Bordertown, which confirm Mr Nasrallah's knowing involvement with the business of Bordertown. Two introducer agreements signed by Mr Nasrallah in July 2006 have survived and have been disclosed by EFG, albeit not by Mr Nasrallah. The documents were given by Ms Beltrametti of EFG to a colleague in an envelope. In an email to her colleague, Ms Beltrametti referred to Mr Nasrallah as the "ADE" of the party to the agreements, i.e. Bordertown. An "ADE" is the French acronym for "Ayant Droit Economique", with a meaning equivalent to ultimate beneficial owner or UBO. Accordingly, it was not only Miakunal who understood that Mr Nasrallah was, or at least purported to be, the beneficial owner of Bordertown, but also Ms Beltrametti with whom Mr Nasrallah was dealing regularly.

1099. The two introducer agreements were each with a Zetland company: Hillows, and Dalmeny respectively. They promised remuneration for Bordertown's marketing services, as non-exclusive marketing representative for the Middle East. It is likely that similar documents would have been signed by Mr Nasrallah for other Zetland companies, but they have not survived or been disclosed. In cross-examination, Mr Nasrallah said that he would most probably have signed other agreements with companies associated with Mr Amouzegar, and that they may have been included in the documents which Mr Amouzegar presented for signature in the George V Hotel.

1100. The obvious purpose of the two agreements which have survived, and others that would likely have been concluded, was to provide a front for the payment flows from Zetland companies into Bordertown. Their function was therefore essentially the same as the March 1999 agreement, and other introducer contracts discussed later in the context of the EFG Scheme. Mr Nasrallah, who signed those contracts, would have known this. He knew that he was not providing introductory services to Mr Amouzegar's Zetland companies. The documents therefore show that he knew from early on that Bordertown was part of the scheme to channel monies to Mr Al Rajaan.

1101. In his oral closing, Mr Casey submitted that those agreements made no sense, because Mr Nasrallah was not a director of Bordertown, so there was a question as to why anyone would have thought that this was a meaningful thing to do. It is true that Mr Nasrallah was not a director, but in my view there is an obvious purpose, described above, why these documents would have been created.

1102. Mr Casey also relied on Mr Nasrallah's evidence that the introducer agreements would likely have been signed as part of the package of documents presented by Mr Amouzegar at the regular meetings at the George V Hotel, and that he would not have been considering them very carefully. I do not consider that this provides an answer to

the case against Mr Nasrallah. Mr Nasrallah was not an innocent dupe signing documents that he did not understand on a regular basis in Paris. He knew what he was doing: assisting, together with Mr Amouzegar, the payment flows to Mr Al Rajaan. The two introducer agreements show Mr Nasrallah's knowledge of Bordertown shortly after its creation, and their purpose and the role of Bordertown would have been obvious to Mr Nasrallah. If Mr Nasrallah did not bother to read the documents, or notice the names of the companies for which he was signing, that was because he did not care what they said or which companies were involved: he was working with Mr Amouzegar, and was happy to do whatever was needed to assist in the payment flows to Mr Al Rajaan.

1103. There is also other evidence which supports Mr Nasrallah's knowledge of Bordertown, as well as that payment flows were emanating from Mr Amouzegar's companies for the purpose of passing monies to Mr Al Rajaan. Thus, in a transcribed conversation with Ms Beltrametti of EFG in May 2014, Mr Nasrallah referred to how he had "been sending the commissions to other accounts under my name", and he then specifically referred to Bordertown. I do not accept he said this because of what he discovered in 2012: he was describing what he knew that he had been doing in the past.

1104. Furthermore, when the Swiss accounts came to be closed in 2012, Pictet moved substantial monies, some USD 2.9 million, from the Bordertown account to Mr Nasrallah's account 190882. The funds in the latter account were then transferred to Mr Nasrallah's Bank Audi account in Lebanon. These transfers were made with Mr Nasrallah's approval, under the letter of instruction signed by Mr Nasrallah referring to the recent election. If Mr Nasrallah had no prior knowledge of his connection with Bordertown, it would be most surprising if he then thought it appropriate to treat some USD 2.9 million in its account as his own.

1105. Subsequently, in 2013, Mr Nasrallah assisted in the Pensée scheme. This essentially moved the payment flows which had previously gone from the Zetland companies to Bordertown and thence to Mr Al Rajaan, to payment flows from the Zetland companies to Pensée, again for the benefit of Mr Al Rajaan. Since Mr Nasrallah was willing to assist in the payment flows from Zetland to Mr Al Rajaan in 2013, it is in my view obvious that he was equally willing to assist with the same payment flows (then via Bordertown) in earlier years.

1106. During the period when Bordertown was used, a significant amount of money (some USD 34,395,303) was transferred from Bordertown to Lipuno, which was an Al Rajaan vehicle. Lipuno's account was at VP Bank. When cross-examined about that payment route, Mr Nasrallah said that: Mr Ghittini of VP Bank was asking him from time to time to transfer money to the Lipuno account; that he recalled that payment route; that Mr Ghittini was asking him to make the transfers at Mr Al Rajaan's request; and that he agreed to do so. Again, this shows – prior to 2012 – Mr Nasrallah's knowledge of Bordertown, its role, and Mr Nasrallah's connection to it.

1107. Mr Nasrallah's oral evidence as to his lack of knowledge of Bordertown was unreliable, as indeed was much of his evidence on contested issues, and I do not accept it. Although the main thrust of his evidence was that he only found out about his ownership of Bordertown in 2012, there was certainly a time in his evidence when he went further. In response to questions from Mr Weisselberg, he was reluctant to accept that it was his signature on the Bordertown mandate document described above: he said that it could be his signature, or it could be a forged signature, he could not tell. In my view, it was

very obviously his signature, and Mr Nasrallah should readily have accepted that fact in cross-examination. He was then asked: "you knew that Bordertown existed before 2012, didn't you". He said that he didn't know, referring back to the meeting with Pictet in 1999 when there were 5 or 6 lawyers and he did not have time to read the documents.

1108. This denial of any knowledge of Bordertown, prior to 2012, was unsustainable on the documents. Those documents included not only the Bordertown introducer contracts, but also a bank instruction – handwritten by Mr Nasrallah – for the making of a payment of € 1.3 million from account 190882 to Bordertown. Mr Casey's closing submissions implicitly acknowledged the unsustainability of Mr Nasrallah's denial of knowledge of Bordertown prior to 2012. He submitted, however, that Mr Nasrallah's evidence, viewed as a whole, was a denial of knowledge of his ownership of Bordertown, rather than a denial of knowing its existence. I accept that a denial of knowledge of ownership was something that Mr Nasrallah did say. But, as described above, his evidence went further, and is plainly unreliable.

1109. Furthermore, the handwritten instruction to pay a significant amount of money from Mr Nasrallah's 190882 account to Bordertown, shows not only that he knew about Bordertown, but also that he knew of the purpose of Bordertown. Account 190882 was an account which was set up to receive monies on behalf of Mr Al Rajaan. Mr Nasrallah therefore regarded the money in that account as Mr Al Rajaan's. There could have been no reason, other than to channel monies to Mr Al Rajaan, for the handwritten instruction to pay € 1.3 million to Bordertown.

1110. Mr Nasrallah's answer, denying knowledge of Bordertown prior to 2012, involved a theme that he developed repeatedly in his evidence. The substance of his evidence was to assert that all of the payments, that passed through accounts with which he was (or was allegedly) associated, emanated from Pictet and were referable to the March 1999 agreement. He thus sought to link everything to the March 1999 meeting, to the trap that Mr Amouzegar had laid for him, to the reassuring presence of bankers and lawyers, and his failure to read the documents presented at that meeting.

1111. Mr Casey's closing submissions again recognised that, on the facts, it was unrealistic to contend that all monies passing through Mr Nasrallah's accounts were Pictet monies paid pursuant to the March 1999 agreement. The evidence showed that very significant payments, including the payments into Bordertown (but also to other companies such as Ozak addressed in the context of the EFG Scheme), had no connection to monies being paid by Pictet pursuant to the March 1999 agreement. Furthermore, any contract between Mr Nasrallah and Pictet, relating to payment of retrocessions, did not survive the termination of the Swiss bank accounts in May 2012. Thus, contrary to Mr Nasrallah's evidence, Pensée was not set up in order to receive Pictet commissions, but rather to continue the receipt of monies from the Zetland companies.

1112. I do not consider that Mr Nasrallah's repeated evidence, that the monies were Pictet commission payments referable to the events of March 1999, was an error on his part, understandable because of his advanced years and the passage of time since the relevant events. Mr Nasrallah knew, at the time when monies were being received, that payments were being made from Zetland entities associated with Mr Amouzegar. Indeed, there were times in his cross-examination by Mr Ritchie that Mr Nasrallah accepted this: for example, his acceptance, to which I have already referred, that the USD 500,000 remuneration was for laundering monies paid to Mr Amouzegar's companies.

1113. Nor is there any difficulty in understanding why it was that monies, emanating from the Zetland companies, were to some extent channelled through accounts associated with Mr Nasrallah. That is because Mr Nasrallah and Mr Amouzegar were co-operating to bring about the secret flow of commissions to Mr Al Rajaan. That co-operation is evident from the evidence as a whole, beginning but not ending with the March 1999 agreement. It is also clearly set out in a remarkably frank internal document of VP, which was never intended to see the light of day, and upon which PIFSS placed considerable reliance at trial.

1114. That document was a note prepared by Mr Ghittini of VP Bank on 30 May 2010. It recorded what was said at a lunch meeting with VP Bank held at Mr Al Rajaan's villa in Cologny. It has a memorable final line, referring to the consumption of 3 bottles of a divine Chateau Margaux, and saying that the VP needed to watch out when Mr Al Rajaan came to visit the bank; i.e. to make sure that their hospitality matched Mr Al Rajaan's.

1115. The participants in the meeting were Mr Al Rajaan, Mr Nasrallah, Mr Amouzegar, Mr Khosrovani, Mr Ghittini, and Mr Langenauer (a lawyer working for Allgemeines Treuunternehmen ("ATU") who had been introduced by Mr Ghittini to Mr Al Rajaan and managed some of his companies). After a description of the roles of Mr Al Rajaan, Mr Nasrallah and Mr Amouzegar, the note says:

> "Mr. Langenauer, ATU. I introduced Mr. Langenauer as their lawyer for the different foundations they have opened. He has no direct contact with the clients, but has to sign the transfer orders they give me. As these clients do not want to have direct transfers from one account to another, every transfer of money is done through cash transactions. Of course Langenauer has all sorts of problems to explain this to his auditors (and I do, too).
>
> This was the main purpose of this meeting: make everyone at ease with the transactions done and with the regular inflow of money.
>
> We will receive a copy of the detailed report from this meeting from ATU.
>
> Basically the incoming funds are produced by the sale of the different investment funds that Mr. Kamran and Mr. Antoine are representing to the banks and institutions that Mr. Fahed represents.
>
> Kamran and Antoine are splitting their commissions with Fahed.
>
> Now in order to satisfy our compliance they are ready to show us the contract they have with the investment fund, but they are not willing to allow us to make any copies of them. Between Kamran, Antoine and Fahed there is a gentlemen's agreement and no contracts. The money we receive comes from Pictet Bahamas through a company called Border Town which collects the retro.

> …
>
> Mr. Fahed who until now has not yet been in our bank, asked me for the first time to meet with the general manager of the bank as he will be in ZH on Thursday, Jürg, do you have any time to have lunch with him? I think it could be a good opportunity to ask what his requirements are in order to manage some funds of the Kuwaiti pension fund and see if we can sneak this in.
>
> General comment:
>
> My impression was that all the participants are extremely satisfied with our services and probably they would not mind to expand their business with us. Particularly appreciated was the flexibility of our institution."

1116. The note of the meeting, with its reference to a gentleman's agreement between Mr Al Rajaan, Mr Nasrallah and Mr Amouzegar, shows what was going on between the 3 individuals: the arrangements between the 3 of them for the routing of commissions to Mr Al Rajaan. This is evident, too, from the facts relating to the Pictet Scheme and the other schemes involving these individuals discussed below. In summary, as PIFSS submitted, the fund flows through various companies, associated with these three individuals and Mr Khosrovani as well, are simply explained by the "gentleman's agreement" that existed between them. It is also to be noted that there was specific reference to Bordertown in the context of the fund flows, again affirming Mr Nasrallah's knowledge of that company and its role prior to 2012.

1117. Accordingly, I conclude that Bordertown was set up for the benefit of Mr Al Rajaan pursuant to an agreement to which at least Mr Al Rajaan, Mr Nasrallah and Mr Amouzegar were party. The purpose of the Bordertown account was to launder and facilitate the transfer of secret commissions and their proceeds, for the benefit of Mr Al Rajaan, diverted from PIFSS investments through the Zetland entities associated with Mr Amouzegar and/or Mr Khosrovani. Furthermore, Mr Nasrallah did know that he was purportedly the beneficial owner of Bordertown, and that he was thereby seeking to assist and did assist Mr Al Rajaan to receive secret commissions, routed through Bordertown, from Mr Amouzegar's Zetland companies.

Fund flows via Bordertown

1118. The fund flows through Bordertown (and through account 190882) amounted to USD 52,260,359 (including conversion from other currencies). The payments from the Zetland companies to Bordertown started to flow in April 2006.

1119. Although nominally owned by Mr Nasrallah, Bordertown was used exclusively for the purpose of routing commissions to Mr Al Rajaan. It was treated internally by Pictet as one of Mr Al Rajaan's accounts, and Mr Al Rajaan can fairly be described as the ultimate beneficial owner or UBO of Bordertown.

1120. The largest recipient of funds from Bordertown was Mr Al Rajaan's Lipuno foundation. Lipuno had been set up, and its bank account at VP was opened, at around the same time as Bordertown. This was clearly part of a package of bank accounts that were

intended to operate in tandem, for the purposes of routing secret commissions to Mr Al Rajaan. Payments from Bordertown to Lipuno also started to flow in early 2006. The total amount received by Lipuno from Bordertown was nearly USD 35 million.

1121. At the same time as payments were made by various Zetland companies to Bordertown, other Zetland companies were making payments to Ozak. This was done on a quarterly basis, as shown in a helpful table prepared by PIFSS showing the timing of payments. Ozak is addressed in more detail in the context of the EFG Scheme, but Mr Nasrallah accepts that Ozak was an account operated for Mr Al Rajaan. The payments to both Ozak and Bordertown were clearly part of a synchronised scheme to enrich Mr Al Rajaan from commissions paid in respect of PIFSS investments.

H6: Conclusions as to the liability of Mr Al Rajaan (and therefore D1) and Mr Nasrallah under Kuwaiti law

1122. I have decided, in Section D above, that Kuwaiti law applies to PIFSS' claims in tort against both Mr Al Rajaan (and therefore D1) and Mr Nasrallah. The principles of Kuwaiti law, including the principles applicable to those who assist in the commission of crimes, are set out in Section B above. On the basis of the facts set out in this section, and because I reject elsewhere the other defences (including contributory fault, limitation and justiciability) of D1 and Mr Nasrallah, I conclude that Mr Al Rajaan was – and D1 now is – liable to PIFSS under Article 227/228 KCC, as is Mr Nasrallah.

1123. The essential basis of that liability is because Mr Al Rajaan and Mr Nasrallah agreed with Pictet and Mr Amouzegar/Mr Khosrovani that secret commissions would be paid for the benefit of Mr Al Rajaan. These were in fact paid, into accounts at Pictet held for Mr Al Rajaan's benefit, in relation to the investments that he caused or influenced PIFSS to make. This caused harm in the value of the benefits received, entitling PIFSS to orders for compensation in the amount of the benefits obtained by Mr Al Rajaan. Mr Al Rajaan intended to harm PIFSS, and to enrich himself in circumstances where harm to PIFSS was the obvious corollary of that primary intention. The harm caused to PIFSS, and PIFSS' entitlement to compensation, extends to benefits which Mr Al Rajaan obtained both for his own account and for the benefit of the intermediaries who received a share of the secret commissions.

1124. The unlawful acts on the part of Mr Al Rajaan, and his *mens rea*, are essentially the same as set out in relation to the Mirabaud Scheme, and it is not necessary to repeat the analysis.

1125. The unlawful acts on the part of Mr Nasrallah, and his *mens rea*, giving rise to his tort liability under Kuwaiti law, are as follows.

1126. *Articles 47 and 48 of the Penal Code in the context of Articles 11 and 12 of the KPPL.* Mr Nasrallah committed offences under Articles 47 (as a doer) and/or Article 48 (as an accomplice), by knowingly and intentionally assisting in Mr Al Rajaan's breaches of Articles 11 and 12 of the KPPL, by agreeing with Mr Al Rajaan and Pictet to enter the March 1999 agreement and subsequent variations thereto, and to hold accounts at Pictet as Mr Al Rajaan's nominee, and to receive payments into those accounts pursuant to his agreement with Mr Al Rajaan, Pictet and Mr Amouzegar/Mr Khosrovani. This was for the purpose of fronting, facilitating and concealing the payment of secret commissions for Mr Al Rajaan's benefit in respect of PIFSS' investments. The steps

which Mr Nasrallah took to facilitate the payment of commissions to himself or his companies, and then on to Mr Al Rajaan, constituted preparatory acts to Mr Al Rajaan's breaches of Articles 11 and 12 of the KPPL. Mr Nasrallah thereby:

i) agreed to receive, transfer and conceal the proceeds of Mr Al Rajaan's criminal acts and subsequently did so;

ii) assisted by way of acts preparatory to breaches of Articles 11 and 12 of the KPPL;

iii) assisted in and facilitated the effective transfer of commissions into Mr Al Rajaan's control, by signing relevant documents and authorising necessary transfers on a regular basis.

1127. On the basis of my findings above, Mr Nasrallah had the relevant knowledge and intent at all material times. He was aware that: (i) he was assisting Mr Al Rajaan as set out above; (ii) that the result was that Mr Al Rajaan was in a position to cause or influence PIFSS to continue to make investments in order to obtain bribes/secret commissions, and to continue secretly to receive the bribes/ secret commissions that were in fact paid; and (iii) that this caused harm to PIFSS, which harm he intended directly or as the probable consequence of enriching at least himself, Mr Amouzegar/ Mr Khosrovani and Mr Al Rajaan. Mr Nasrallah is therefore a doer for his role in providing assistance to Mr Al Rajaan under Article 47 (2) KPC and an accomplice pursuant to an agreement to do so under Article 48 (2) or under Article 48 (3) KPC.

1128. *Article 48 of the KPC in the context of bribery – Articles 35-39 of Law No 31 of 1970.* Mr Nasrallah assisted Mr Al Rajaan to seek and obtain bribes in return for exercising his influence to commit PIFSS to investments that generated fees for Pictet and others, with both men knowing that the payments were being offered in return for Mr Al Rajaan's exploitation of his role as Director General of PIFSS in relation to its investment activity. Mr Nasrallah therefore committed breaches of Article 48 KPC by assisting Mr Al Rajaan's breaches of Article 35 KPC as an accomplice. Mr Nasrallah knew that Mr Al Rajaan was a public official, and that the bribe or secret commission was in return for Mr Al Rajaan performing or refraining from performing activities in his public position, namely causing PIFSS to make investments that generated fees for Pictet and others.

1129. *Money laundering*. The payment flows described in this section were transfers of property orchestrated by Mr Al Rajaan and Mr Nasrallah between accounts under their control derived from criminal acts, which concealed and disguised the true nature of the sums being received, with the intent of laundering the money and making it appear to be funds obtained from a legitimate source – while knowing the source to be criminal conduct.

1130. There were also unlawful acts consisting of Mr Nasrallah's assistance in relation to other schemes, but it is not necessary to address those here.

1131. In later sections where Mr Nasrallah's liability is in issue, I do not consider it necessary to repeat the analysis of the relevant unlawful acts and *mens rea* as set out above. Unless otherwise stated, Mr Nasrallah's tort liability arises for essentially the same reasons as his liability in respect of the Pictet Scheme.

H7: Conclusions as to the quantum of compensation

1132. Prior to taking into account the impact of the Mirabaud and EFG settlements, and after stripping out claims made under other schemes, the quantum of PIFSS' successful claim for compensation against D1/Mr Al Rajaan in relation to the Pictet Scheme is as follows: USD 22,775,959 (Pictet commissions paid to Mr Nasrallah); USD 3,901,942 (Pictet commissions paid to Mr Amouzegar); and USD 50,552,703 (other payments into or via account 190882 and Bordertown). The total compensation awarded against D1/Mr Al Rajaan, subject to later adjustment for the effect of the settlements and possible conversion to other currencies, is therefore USD 77,230,604.

1133. The equivalent figures for Mr Nasrallah are respectively: USD 22,775,959, nil, and USD 52,260,359. The total compensation, subject to later adjustment and conversion to other currencies, is therefore USD 75,036,318.

SECTION I: THE VP SCHEME

I1: Introduction

1134. VP Bank AG ("VP Liechtenstein") is a Liechtenstein bank and VP Bank Schweiz ("VP Switzerland") is its Swiss subsidiary. I will simply refer to "VP" unless it is necessary to distinguish between the two entities.

1135. Claims are made against Mr Al Rajaan and Mr Nasrallah in relation to the VP Scheme. The "unique" monetary claims are, however, comparatively modest in the context of the overall claims against them. The claims are for USD 5,769,331 against Mr Al Rajaan, and USD 10,900,000 against Mr Nasrallah.

1136. VP itself is not a party involved in the present trial. PIFSS has commenced proceedings against VP (as well as Mr Ghittini and Mr Amouzegar), but there is a jurisdictional challenge which has not yet been determined.

1137. PIFSS did not invest in VP funds, and indeed it had no relationship with VP. There is therefore no claim against VP or others for the actual payment of bribes to Mr Al Rajaan in connection with investments. Rather, the VP Scheme is a scheme of assistance through concealment and laundering of secret commissions and their proceeds. The claim made against Mr Al Rajaan and Mr Nasrallah is concerned with the steps taken by Mr Al Rajaan, with the assistance of Mr Nasrallah and also Mr Amouzegar, to facilitate the transfer of secret commissions using VP bank accounts. PIFSS contends that, between 2006 and 2012, Mr Al Rajaan used accounts he held at VP to assist in the payment and concealment of secret commissions for his benefit and at PIFSS' expense. As discussed below, that contention is borne out by the evidence.

1138. The total amount laundered was around USD 45 million. However, the majority of these sums were paid to VP bank accounts by Bordertown: just under USD 35 million was paid to Mr Al Rajaan's foundation, Lipuno. The claims relating to Bordertown are addressed in the context of the Pictet Scheme: see Section H above. As Mr Ritchie said in closing, the VP Scheme operated downstream of other "upstream" schemes. Issues of liability and quantum of participants in "upstream" schemes are best and more simply addressed in the context of those "upstream" schemes. They do not therefore need to be considered again in the context of a "downstream" scheme. However, evidence as to participation in a downstream scheme may be relevant to establishing liability and quantum in relation to the upstream schemes. Thus, for example, when considering (in Section H) Mr Nasrallah's knowledge of and involvement in Bordertown, I have referred to aspects of the payments made to Lipuno at VP.

1139. The monetary claim that does arise in the VP Scheme concerns a payment stream alleged to have started with Quadra, which was one of the companies associated with Mr Amouzegar and Mr Khosrovani. Quadra is a company which features in the Aerium Scheme: see Section K below. The payment stream allegedly involved USD 10,900,000 (converted from payments of € 8 million) paid by Quadra to a Liechtenstein foundation, Orkina. Orkina is alleged by PIFSS to have involved Mr Nasrallah and Mr Al Rajaan, with Mr Nasrallah nominally the owner of the foundation, but Mr Al Rajaan being the ultimate

beneficial owner. Orkina is then alleged to have paid monies to one or both of two other foundations owned by Mr Al Rajaan: Lipuno, which features in the Bordertown story, and Dugamo.

1140. The Defendants' arguments concerning this payment stream start by challenging the sufficiency of the evidence that it happened. Mr Grocott-Barrett, on behalf of the Aerium Defendants (specifically Ely Michel Ruimy) submitted that it was not established that the Quadra company that made this alleged payment was the same Quadra company that was involved in the Aerium scheme. He submits that the paying Quadra was a Bahamian company, whereas the Quadra involved in the Aerium Scheme was a BVI company. Mr Nasrallah does not take this particular point, but submits more generally (as do the Aerium Defendants) that the evidence is not sufficient to enable the court to find that this payment stream existed.

1141. It is true that the evidence in relation to this payment stream is far less extensive than the evidence in relation to other schemes. This is because the payment stream involves a number of entities whose documents are not available to the court. Disclosure has not been obtained from the companies managed by Zetland, or from Quadra. Some documents relevant to the payment stream are on the Swiss prosecutor's file. In particular, there is a memo from Dr Beat Graf of VP, referring to Orkina and other matters, on which PIFSS heavily relies. However, Orkina is a Liechtenstein foundation, as indeed are Lipuno and Dugamo. The documents of VP Liechtenstein are not generally available from the Swiss prosecutor's file, and VP Liechtenstein declined Mr Nasrallah's request for disclosure of documents. Accordingly, the full banking records of those entities are not available.

1142. In addition to the argument based on the absence of sufficient evidence to establish the payment stream, Mr Nasrallah's principal argument was that he had no involvement in Orkina. He says that he had no connection with this entity, and did not purport to be its ultimate beneficial owner.

1143. Although I will focus in this section on the issues relating to the Quadra – Orkina – Lipuno/Dugamo payment stream, it is relevant to look more generally at the factual background which led to Dr Graf's detailed compliance note. PIFSS contends that the VP Scheme provides a useful exposition of Mr Al Rajaan's modus operandi, including the steps he took to conceal his receipt of secret commissions using a premeditated web of bank accounts in secretive jurisdictions, outside of the sight of PIFSS and the reach of the Kuwaiti investigatory authorities. PIFSS also contends that VP's compliance process provides a useful window through which to assess the real-world reaction to the relevant banking arrangements, namely that they appeared to be unlawful.

1144. I agree with both points. However, it is not necessary to explore the VP Scheme in great detail. Mr Al Rajaan's modus operandi, and the involvement of Mr Al Rajaan, Mr Nasrallah and Mr Amouzegar in the payment of secret commissions, and the dishonesty of the participants, are already established by my findings in relation to the Pictet Scheme, and indeed other schemes.

I2: Factual narrative

VP personnel

1145. A number of individuals connected to VP feature in the relevant events. They have already been introduced in Section H above, in the context of Mr Ghittini's May 2010 note.

1146. Mr Renato Ghittini was friendly with Mr Amouzegar, who introduced him to Mr Al Rajaan. He became the primary contact at VP for Mr Al Rajaan, Mr Amouzegar and Mr Nasrallah.

1147. Mr Christopher Langenauer was a lawyer at Allgemeines Treuunternehmen ("ATU"). ATU was a Liechtenstein trust company, and a sister company of VP. In opening, Mr Casey KC described it as a captive or in-house trust services company, with a compliance function. Mr Ghittini's May 2010 note (see Section H above) describes Mr Langenauer as the lawyer for the different foundations that the clients attending that meeting had opened. Mr Langenauer had no "direct contact with the clients, but has to sign the transfer orders they give me". As discussed below, this created problems.

1148. Dr Beat Graf was head of compliance at ATU, and also a director of VP. He was the author of the compliance note, apparently prepared in 2012, on which PIFSS' case as to the Quadra-Orkina-Lipuno/Dugamo payment stream is based.

2006

1149. Mr Nasrallah described Mr Ghittini attending the March 1999 meeting at Pictet. The evidence indicates that money did indeed flow from Pictet to VP for the benefit of Mr Al Rajaan, and it can therefore be said that the Pictet Scheme and the VP Scheme were to a large extent interwoven. However, I was not persuaded that this started as early as 1999. The documents indicate that the banking relationship with Mr Al Rajaan, and the routing of commissions to VP, and thence to Mr Al Rajaan in VP accounts, started in early 2006.

1150. Accounts were opened at Pictet in early 2006: the Bordertown account, and Mr Nasrallah's account 190882 at Pictet Bahamas, described in Section H above. At around the same time, accounts were opened at VP. Mr Al Rajaan opened a personal account at VP Switzerland (account number 10.401.901) in February 2006, and in due course this received money from Lipuno that passed through Bordertown's account at Pictet Bahamas. Lipuno itself was established, and an account opened at VP Switzerland, in February 2006. It began to receive transfers from Bordertown in 2006, with some USD 35 million transferred between 2006 and 2012.

1151. An internal VP document concerning Lipuno, dated 2 April 2009, stated that Mr Al Rajaan did not want to receive correspondence from the bank. Original correspondence should be sent to ATU. This was said to be for "reasons of discretion" – "discretion" being a word that is used elsewhere in VP's documents. This shows the secrecy that was intended to apply to the Lipuno account, with Mr Al Rajaan not wanting evidence of that account sent to him. This secrecy was part of his modus operandi. I have no doubt that this was the

position from its inception in 2006, not simply at the date of the document in 2009.

1152. Another account opened in February 2006 was a personal account of Mr Amouzegar at VP Switzerland. He also opened an account at VP Liechtenstein in the name of an entity called Kyma. It is not clear when exactly this was opened, but it was certainly open by August 2006, when an internal note of Mr Ghittini's refers to Kyma's account – in the context of saying that Mr Al Rajaan was working very closely with Mr Amouzegar.

1153. I agree with PIFSS that it is no coincidence that these accounts, including the Bordertown account, were opened at around the same time. This was the implementation of a co-ordinated scheme between Mr Al Rajaan, Mr Nasrallah, Mr Amouzegar and Mr Khosrovani for the purpose of receiving and concealing the proceeds of secret commissions through Pictet and VP accounts for the benefit of Mr Al Rajaan derived from PIFSS' investments.

2008 - 2009

1154. Two further accounts were opened at VP Switzerland in 2008 and 2009 by Mr Al Rajaan. These were account 10.503.397 in the name of Silvermoon, an Anguillan company, and account 10.204.768 in the name of Ms Al Wazzan. The documents for the Silvermoon account falsely recorded its beneficial owner as Mr Al Rajaan's son, Khaled. Silvermoon was thereafter the recipient of substantial sums (USD 22.2 million) from Lipuno. It was clearly an account operated for the benefit of Mr Al Rajaan.

Mr Nasrallah

1155. The VP Switzerland documents do not show that Mr Nasrallah opened a personal account at VP. However, Mr Ghittini's May 2010 note, as well as Dr Graf's 2012 compliance note, shows that Mr Nasrallah was regarded as a client of VP. A fair reading of both documents is that he is identified as the owner of Orkina.

1156. In his written pleadings, Mr Nasrallah accepted that he was in regular contact with VP. His defence said that Mr Ghittini contacted him from time to time, requesting him to make payments. In his response to a request for further information, Mr Nasrallah described Mr Ghittini as the primary point of contact at VP for himself, Mr Al Rajaan and Mr Amouzegar. He said that Mr Ghittini's requests for payment were in accordance with instructions given to him by Mr Al Rajaan, and that he understood that the payments were "to be made to various accounts for the benefit of Mr Al Rajaan" including accounts at VP. He repeats this in his trial witness statement, but also makes the point that these were payments under the "Pictet Arrangements"; i.e. the March 1999 agreement. In cross-examination (and as already discussed in Section H above) Mr Nasrallah agreed, in relation to the transfers and the conversations with Mr Ghittini, that the route was from Bordertown to Lipuno.

1157. This evidence confirms Mr Nasrallah's knowledge of Bordertown, and his role in making transfers from Bordertown to Lipuno at VP. However, I have no

doubt that Mr Ghittini's requests for payment embraced payments to be made by Orkina to Lipuno. In circumstances where Orkina's account was held at VP – in contrast to Bordertown's account which was held at Pictet Bahamas – it would have been more natural for Mr Ghittini to have requested Mr Nasrallah to make payments from the Orkina account rather than simply the Bordertown account.

The 28 May 2010 meeting

1158. The background to the meeting was explained by Mr Ghittini in his 30 May 2010 note. Having described Mr Langenauer, who had to sign transfer orders that the clients gave to Mr Ghittini, he says:

> "As these clients do not want to have direct transfers from one account to another, every transfer of money is done through cash transactions. Of course Langenauer has all sorts of problems to explain this to his auditors (and I do, too).
>
> This was the main purpose of this meeting: make everyone at ease with the transactions done and with the regular inflow of money."

1159. PIFSS identified, in their written closing, examples of compliance flagging issues about the Lipuno transfers. One type of compliance flag, to which Mr Ghittini referred in his note, concerned substantial withdrawals booked as cash. Cash transfers totalled USD 3.9 million between 2006 and 2012. I consider it unlikely that such large volumes of cash were actually handed over. Rather, transfers from one account to another were booked as cash in order to conceal or break up the payment flow.

1160. This use of supposed "cash" transactions, in order to break up the payment flow, with a view to concealing what was happening, can be seen in other schemes, and was a feature of Mr Al Rajaan's modus operandi. For example, in the Aerium Scheme, payments from Ely Michel Ruimy's account to Ms Al Wazzan were shown as cash withdrawals from Mr Ruimy's account. Cash transfers also feature in the Mirabaud Scheme, in the context of the Al Qattan payments discussed in Section G above.

1161. One of a large number of compliance concerns that remained after the May 2010 meeting was, as recorded in a VP memo dated 23 July 2010, that there were: "regular high outflows in cash as customers wish to interrupt the paper trail". I do not think that there is any honest explanation for seeking to interrupt the paper trail by booking transactions as cash, or indeed by receiving very large amounts of cash. Mr Ritchie identified this feature, indicative of dishonesty, on a number of occasions in the course of his submissions. This was a point well made, and to which none of the Defendants in the proceedings had any answer.

1162. The other main type of compliance query concerned the scale and origin of the payments from Bordertown. This seems to be the reason why, at the 28 May 2010 meeting, there were requests from VP to see relevant agreements.

1163. Mr Ghittini's meeting note is important for a number of reasons.

1164. First, it is a rare example of a documented meeting between the main protagonists who feature in many of Mr Al Rajaan's schemes: Mr Al Rajaan, Mr Nasrallah, Mr Amouzegar and Mr Khosrovani. It is also frank in identifying the gentleman's agreement whereby Mr Amouzegar and Mr Nasrallah were paying Mr Al Rajaan a share of commissions emanating from PIFSS' investments.

1165. Secondly, Mr Nasrallah is clearly identified as the beneficial owner of Orkina. At the start of the note, Mr Ghittini identifies, separately, (i) the beneficial owner of Lipuno and Dugamo, and (ii) the beneficial owner of Orkina. The note goes on to say that "Mr Antoine … has the account Orkina Foundation in Vaduz". It is most improbable that Mr Ghittini, who by this time had worked with these clients for some years, made a mistake in that regard. Mr Nasrallah's association with Orkina is also clear from Mr Graf's note described below. It is true that Mr Al Rajaan is also identified, in Mr Ghittini's note, with "Lipuno, Orkina VP Vaduz and 3 other personal accounts". However, the reference to Orkina is likely to have been intended as a reference to Dugamo, as stated (in the context of Mr Al Rajaan) earlier in the note. In any event the association with Mr Nasrallah is clear. That association is also very plausible, in the light of the evidence as a whole. In particular, the use of Orkina, nominally owned by Mr Nasrallah, fits with the fact that VP's clients wanted to interrupt the paper trail, and that Mr Nasrallah was happy to act as a nominee and conduit for payments to Mr Al Rajaan.

1166. Thirdly, Mr Nasrallah's attendance at the meeting is readily explained by the fact that he was a client of VP, and had an involvement in the payment flows which were giving rise to the compliance concerns. It seems improbable that he would have attended a meeting to discuss the matters recorded in the note, including payment flows coming in from Bordertown, if he was neither a client nor someone with any knowledge of either Bordertown or Orkina.

1167. In that context, I reject Mr Nasrallah's oral evidence that the lunch was purely a social occasion where no business was discussed. Mr Ghittini's note shows that business was discussed, and this is confirmed by a shorter note of the meeting prepared by Mr Langenauer. More generally, even leaving aside my general adverse view of Mr Nasrallah's evidence, I do not consider that any reliance can be placed on his evidence as to this meeting. His original position was to deny attending the meeting at all. He then appeared to accept that he was at the meeting, but indicated that he had no real recollection of it.

1168. Fourth, there was a discussion about Bordertown, and in that context a request by VP to see contracts. The secrecy of the arrangements is underlined by VP being told that the contracts would be brought to Switzerland in September, but that copies could not be taken.

July – November 2010

1169. After reviewing the note prepared by Mr Ghittini of the May meeting, and the shorter note written by Mr Langenauer, VP's compliance department wrote a

memo which indicated that compliance concerns had not been resolved. The note identified the following matters of concern: regular high inflows based on a "gentlemen's agreement"; regular high outflows in cash as customers wish to interrupt the paper trail; the copy of the "submitted contract is neither signed nor can the contracting party be verified by us since it is obviously a BVI domiciliary company"; the customers "want absolute discretion with regard to this fund business and submit the documentation only for inspection"; their client "is responsible for the state social security in Kuwait"; the business can "neither be verified nor estimated with the information available".

1170. A meeting was then held on 10 November 2010. The attendees are not identified, and it is not clear whether Mr Nasrallah as well as Mr Al Rajaan attended. The latter produced two contracts with Mr Nasrallah's company, Phoenix. It is not clear what they were. A VP memo prepared on 10 November 2010 suggests that they may have been contracts with UBP and Cheyne Capital. A later memo produced by VP's compliance department, on 1 December 2010, is more specific. It says that Mr Al Rajaan had shown contracts between Bordertown and Phoenix, but not allowed copies to be taken. This December memo also refers to the "retro-agreement between Phoenix International/Mr Antoine and Bordertown Trader/beneficial owner."

1171. Thus, VP were shown contracts between these two companies, and it can be inferred that they were signed contracts. The bank understood that Mr Al Rajaan was the beneficial owner of Bordertown, and so it may be that he signed on behalf of that company. No doubt Mr Nasrallah signed for Phoenix. The signed contracts have not been produced by either Mr Al Rajaan or Mr Nasrallah in their disclosure in these proceedings. If, as appears to be the case, there was such a signed contract, then it would have been a false document. Bordertown was receiving monies from Mr Amouzegar's Zetland companies, not from Phoenix. The only apparent reason why there might be a contract between Phoenix and Bordertown would be an attempt to show VP how Bordertown was earning the significant sums of money then transferred to Lipuno.

1172. The memo expresses concerns that the arrangements might give rise to possible criminality in Switzerland, but it was not possible to check whether there was a violation of the legal system of Kuwait.

Dr Graf's memo

1173. Since VP Liechtenstein's documents are not generally available, it is not clear whether, or how, matters were resolved by the VP or ATU compliance department at that stage. It would appear, however, that matters were not satisfactorily resolved. Dr Beat Graf's memo to his colleagues, headed "Clarifications related to Lipuno, Orkina and Dugamo" begins by saying that:

> "In the above-mentioned case, various questions have not been conclusively clarified or checked for plausibility for a long time by the VP Bank Group, but also by ATU. The following set of questions, prepared by VP Bank and ATU, will serve as a basis for a meeting to be held as soon as possible."

1174. Dr Graf then divides his memo into five sections: A – Basic questions about the construct; B- Orkina; C- Dugamo; D – Lipuno; E – Bordertown/Quadra; F – Silvermoon. It is obvious, from the detail in the memo, that Dr Graf had access to VP's documents, and had looked at them carefully. For example, he had looked at Mr Ghittini's May 2010 note, with Dr Graf commenting on the inflows from Bordertown to Lipuno, but saying that there was "no documentation for this, only the reference to a gentleman's agreement".

1175. There are a number of features of Dr Graf's memo which are significant in the context of the parties' arguments.

1176. First, Dr Graf was looking at three Foundations: Lipuno, Orkina and Dugamo. His first question in Section A asked whether a foundation "in some cases with different beneficial owners" formed the right structure for the transactions. He could therefore see, from the documents in the file, that the apparent beneficial owners of these foundations differed. It is also clear, from his discussion in Section B, that Mr Nasrallah was recorded as the beneficial owner of Orkina, and that Mr Al Rajaan was recorded as the beneficial owner of Dugamo. Dr Graf asked various pertinent questions in that section:

> "2. Why are the amounts withdrawn mainly in cash? Are there contractual arrangements between beneficial owner Orkina and Dugamo that would justify the cash disbursements?
>
> 3. Obviously, the beneficial owner of Dugamo (A.R.) is entitled to about 90% of the inflows from Orkina. The question arises as to whether the beneficial owner of Orkina was correctly identified in the light of this.
>
> 4. There is remarkably little information available in public sources on the beneficial owner of Orkina, the contact person for the Orkina mandate and its asset management company Phoenix International Consulting in Beirut."

1177. Secondly, Dr Graf identifies (under Section B, question 1) the role of Orkina: it was "not used for the investment and management of assets but primarily as a conduit company". He also identified the amount of inflows and outflows to and from Orkina. The inflows were € 8 million, and the outflows were € 7.5 million. It was in this context that he asked, in question 2 above, why the amounts were withdrawn mainly in cash. It is therefore clear that he could see the bank records showing movement of funds, including the manner in which withdrawals had taken place.

1178. Thirdly, as far as the destination of the outflows is concerned, Dr Graf identifies these as Mr Al Rajaan: "the beneficial owner of Dugamo". He refers to him being entitled to 90% of the inflows from Orkina. This appears to be a percentage derived from an inflow of € 8 million, and outflows to Dugamo of € 7.5 million.

1179. Fourth, he identifies generally the source of the monies coming into Orkina and Dugamo. When dealing with Bordertown/Quadra in Section E of the memo, he says that "almost all of the inflows into the aforementioned foundations come from these two companies". He also states that:

> "It is not acceptable not to receive further detailed information about Bordertown and Quadra, especially as they are Bahamas offshore companies and we do not have any information on where and from whom the money going there comes."

1180. If Dr Graf had had more complete information, he might have appreciated that Bordertown was in fact a BVI company. It is clear, however, that the Bordertown company to which he was referring was the same Bordertown company that I have hitherto described: he refers specifically to "Bordertown Trader Ltd" in Section D of the memo. He probably assumed that it was a Bahamas company because the money coming into Lipuno was from the Bahamas. He also thought that Quadra was a Bahamian company. It is possible that he was looking at documents that showed Quadra paying money from the Bahamas, or he may simply have equated Bordertown and Quadra. Either way, and contrary to Mr Grocott-Barrett's submission, I do not think that it is remotely probable that the "Quadra" company identified by Dr Graf is anything other than the Quadra company that was associated with Mr Amouzegar and Mr Khosrovani, and which received commissions on the Aerium Scheme. The documents in the case contain no reference to any different Bahamian company called Quadra. It is in my view unrealistic to think that, in a scheme in which Mr Amouzegar was clearly participating, the payments by Quadra into Orkina were being made by some entirely different unidentified Quadra entity, other than the Quadra clearly involved in the payment of secret commissions.

1181. Fifth, Dr Graf – particularly in Section A of the memo – identifies many questions which show that he recognised the unlawful nature of the arrangements that he could see, or at least the strong likelihood that they were unlawful unless there were good answers to his questions. Amongst his questions were:

> "5. Who is behind the investment funds and which funds are brokered? What is the level of brokerage commissions?
>
> 6. Are such commissions permitted under the provisions of the Pension Fund and under the law of Kuwait?
>
> 7. Would it be possible for the pension fund's insured persons to be disadvantaged by excessive commission payments (retros)?
>
> 8. Why do investors only come to these funds through brokerage?

> 9. What is the reason for such high requirements for discretion?
>
> 10. What precise functions does the beneficial owner (H.R.) perform in the Social Security Fund? Did he have decision-making powers?"

1182. The memo as a whole also shows how a banker, involved in transfers of funds in Switzerland and Liechtenstein, would not be confining his gaze to those countries, but would be looking at them in the context of Kuwait – including unlawfulness in Kuwait – as being a critical aspect of the arrangements as a whole.

Other events

1183. There is no evidence as to what happened in relation to Dr Graf's memo. What is clear is that in May 2012, at the same time as Mr Al Rajaan and Mr Nasrallah were shutting down other Swiss accounts, Mr Al Rajaan gave instructions to close the Lipuno and Silvermoon accounts. In June 2012, Mr Amouzegar instructed VP to close his accounts.

I3: Conclusions

1184. In the light of the above matters, I conclude that Mr Nasrallah did purport to be the beneficial owner of Orkina, albeit that he was doing so as Mr Al Rajaan's nominee. Both Mr Ghittini (who knew the clients well) and Dr Graf (who was looking carefully at the documents) understood that Mr Nasrallah was or purported to be the beneficial owner of Orkina. I reject Mr Nasrallah's evidence that he had nothing to do with Orkina.

1185. Mr Nasrallah was therefore involved in both aspects of the payments being made into VP accounts for the benefit of Mr Al Rajaan: Bordertown and Orkina.

1186. I also conclude that € 8 million (converted to USD 10,900,000) was paid into Orkina, with some € 7.5 million then being paid into Mr Al Rajaan's foundation, Dugamo. That is what Dr Graf could see from the documents that he was considering. It is also entirely plausible that such transfers were made.

1187. It can reasonably be inferred, in my view, that the € 8 million was paid to Orkina by Quadra, rather than by Bordertown. The Graf memo is not explicit on this issue, referring generally to "almost all" the inflows into Orkina and Dugamo coming from Bordertown and Quadra. However, the payment flows from Bordertown are known, including the transfer of around USD 35 million to Lipuno. Since there is nothing to suggest that Bordertown was paying Orkina, it can be concluded that Orkina's funding was coming from Quadra. This ties the payment, at least in part, to the Aerium Scheme.

1188. The payment flows in the VP scheme – looking both at the Bordertown payments into Lipuno, and the Quadra payments into Orkina and then to Dugamo – can readily be explained. They took place because Mr Al Rajaan, Mr Nasrallah, Mr Amouzegar and Mr Khosrovani agreed that secret commissions

would be paid and concealed for Mr Al Rajaan's benefit. Those secret commissions were paid in relation to investments that Mr Al Rajaan caused or influenced PIFSS to make. Mr Nasrallah knowingly assisted in the process whereby these commissions were paid into VP bank accounts, including by acting as his nominee on both Bordertown and Orkina, and effecting transfers for the benefit of Mr Al Rajaan from both entities to accounts at VP. The agreement between the above participants encompassed making transfers between bank accounts through the use of cash transfers and nominees in order to conceal the routing and destination of the funds, and therefore the corrupt nature of the payments.

1189. In the light of those findings, there can be no doubt that both Mr Al Rajaan (and now D1) and Mr Nasrallah are both liable to PIFSS under Kuwaiti law, on the basis of the same analysis set out in Sections G and H above

1190. Subject to possible adjustment in consequence of the Mirabaud and EFG settlements, the quantum of compensation in respect of that liability in relation to the "unique" aspects of the VP Scheme is (using dollar converted sums): USD 5,769,331 (D1/Mr Al Rajaan), and USD 10,900,000 (Mr Nasrallah). The difference arises because, as far as concerns D1/Mr Al Rajaan, there is an overlap of USD 5,130,669 with amounts claimed in respect of the Aerium Scheme. There is no overlap as far as concerns Mr Nasrallah, because no financial claim is made against him in relation to the Aerium Scheme.

SECTION J: THE EFG SCHEME

J1: Introduction

1191. The claim in respect of the EFG Scheme was made against 4 parties: Mr Al Rajaan, Mr Nasrallah, Mr Guerin and EFG itself. The claim against EFG has now been settled, but there has been no settlement of the claim against the other parties. In accordance with my conclusions in Section D above, the claims are to be determined in accordance with Kuwaiti law. However, there is a very small claim in the double actionability period. This requires consideration of English law, as well as Kuwaiti law.

1192. As with VP, PIFSS did not invest in any EFG funds, and therefore no commissions on such funds were routed to Mr Al Rajaan. Rather, the claim is made in respect of secret commissions, originating with payments by a large number of fund managers, which were then routed to Mr Al Rajaan (including accounts and entities associated with him), via various accounts which were held at EFG. The accounts through which the money flowed were associated, in one way or another, with Mr Nasrallah.

1193. The arrangements by which this was accomplished were complex. In this introductory section, I will endeavour to explain the arrangements, and the central issues between the parties. In so doing, I recognise that a general description of what happened will often involve some exceptions. In so far as any exception matters, I will address it later in Section J.

The Phoenix International Consultant payments

1194. The most significant bank account, giving rise to the most substantial element of the claim, was an account opened in July 1995 (and closed on 24 May 2012) in the name of Phoenix: i.e. Phoenix International Consultant SARL. which features in the Pictet Scheme previously described. This EFG account was numbered, ultimately, 530115; and previously 030784 and 1030784. The (unique) claim against all 3 remaining parties in respect of the monies passing through the Phoenix account is USD 252,842,123. This figure includes conversions from 7 other currencies which were involved in the payment flows. As with other claim figures in this judgment, it takes no account of the Mirabaud and EFG settlements.

1195. Broadly speaking, there was no dispute between PIFSS and Mr Nasrallah (and also EFG) as to the origin and destination of these payments into and out of Phoenix's account. The payments originated in commissions paid by various fund managers, including some well-known financial institutions such as AXA and Paribas. The monies were then shared between Mr Nasrallah and Mr Al Rajaan, with the overall sharing arrangement – at least from 2004 onwards – being in the region of 35% (Mr Nasrallah) and 65% (Mr Al Rajaan).

1196. The payment flows into and out of Phoenix were summarised in a helpful spider diagram (or "spidergram") that was prepared by PIFSS and as to which there was ultimately only relatively minor dispute on the part of Mr Nasrallah. A large amount of documentary material underlay this spidergram, and other

spidergrams referred to in this section, most of it emanating from EFG's disclosure. The figures and documentary material relating to the fund flows involved in the EFG Scheme, and indeed all of the various schemes, were contained in detailed schedules annexed to the various versions of the Particulars of Claim. The schedules contained references (and hyperlinks) to the banking documentation on which they were based, thereby enabling the defendants to navigate and consider the figures. The defendants helpfully sought, in the light of the material, to narrow the disputes between the parties on fund flows. Such disputes as existed in relation to the payment flows narrowed both prior to and during the course of the trial. This meant that it was not necessary for there to be expert evidence as to the figures. It also proved unnecessary to utilise trial days which had been set aside for argument on fund flows, with the parties taking the view that the limited remaining disputes could be addressed in their closing arguments.

1197. This Phoenix spidergram is reproduced below (Fig. 2), and readers of this judgment may find it useful to look at the electronic version which shows the colours of the different inflows and outflows. This and other spidergrams are the best way of explaining the fund flows, and they avoid the need for a textual description of numerous payments which would not be easy to follow. Generally speaking, the fund flows in the schedules, and then reflected on the spidergrams, were not disputed by EFG, or substantially disputed by Mr Nasrallah. Some discrete issues were raised, I shall deal specifically with those. However, the general position is that the fund flows, as reflected in the spidergrams, are established on the evidence.

1198. The (pink) "bubbles" at the top of the chart identify the various fund managers making payments to Phoenix, and the amounts paid. In the course of the trial, PIFSS made one amendment to the figures shown on this spidergram: adjusting the Paribas/Parvest figure from USD 27.2 million to USD 26.8 million, as a result of reallocating certain payments. This reduces the total payments by the fund managers at the top of the page from USD 252.5 million to USD 252.1 million (or more precisely USD 252,067,870).

1199. On the top right-hand side of the chart, there are two (pink) bubbles which identify payments made by UBP, which was also a fund manager. UBP paid USD 42.9 million. UBP was originally a party to the proceedings, but settled at the start of the trial. The settlement made by UBP means that PIFSS has been compensated in respect of those payments, which therefore do not feature in the quantum of the claim against the 3 defendants sued in respect of the EFG Scheme.

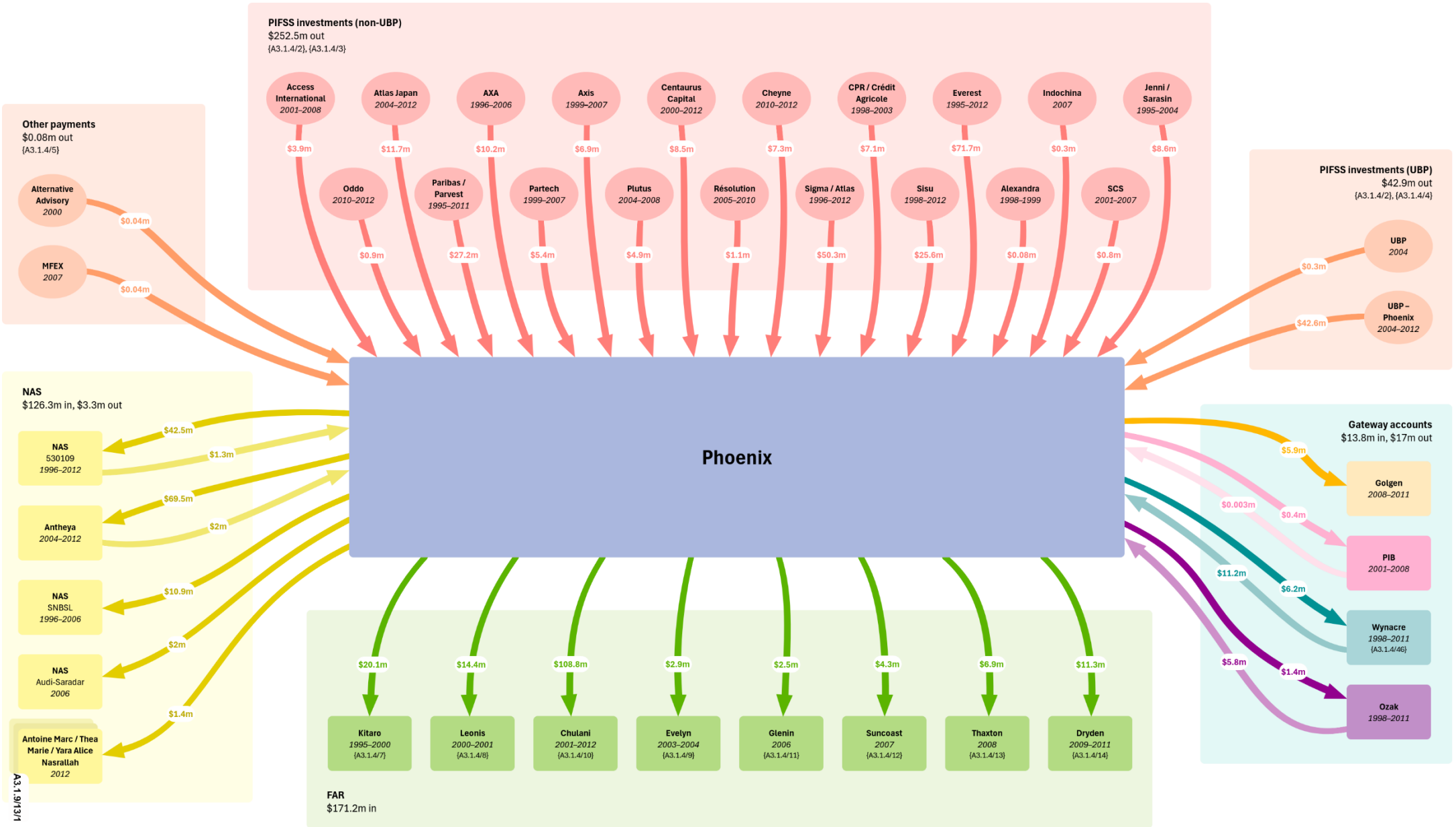

PIFSS investments (non-UBP)
$252.5m out
{A3.1.4/2}, {A3.1.4/3}
Access International 2001–2008
$3.9m
Atlas Japan 2004–2012
$11.7m
AXA 1996–2006
$10.2m
Axis 1999–2007
$6.9m
Centaurus Capital 2000–2012
$8.5m
Cheyne 2010–2012
$7.3m
CPR / Crédit Agricole 1998–2003
$7.1m
Everest 1995–2012
$71.7m
Indochina 2007
$0.3m
Jenni / Sarasin 1995–2004
$8.6m
Oddo 2010–2012
$0.9m
Paribas / Parvest 1995–2011
$27.2m
Partech 1999–2007
$5.4m
Plutus 2004–2008
$4.9m
Résolution 2005–2010
$1.1m
Sigma / Atlas 1996–2012
$50.3m
Sisu 1998–2012
$25.6m
Alexandra 1998–1999
$0.08m
SCS 2001–2007
$0.8m
Other payments
$0.08m out
{A3.1.4/5}
Alternative Advisory 2000
$0.04m
MFEX 2007
$0.04m
PIFSS investments (UBP)
$42.9m out
{A3.1.4/2}, {A3.1.4/4}
UBP 2004
$0.3m
UBP – Phoenix 2004–2012
$42.6m
Phoenix
NAS
$126.3m in, $3.3m out
NAS 530109 1996–2012
$42.5m
$1.3m
Antheya 2004–2012
$69.5m
$2m
NAS SNBSL 1996–2006
$10.9m
NAS Audi-Saradar 2006
$2m
Antoine Marc / Thea Marie / Yara Alice Nasrallah 2012
$1.4m
A3.1.9/13/1
Gateway accounts
$13.8m in, $17m out
$5.9m
Golgen 2008–2011
$0.003m
$0.4m
PIB 2001–2008
$11.2m
$6.2m
Wynacre 1998–2011 {A3.1.4/46}
$5.8m
$1.4m
Ozak 1998–2011
FAR
$171.2m in
$20.1m
Kitaro 1995–2000 {A3.1.4/7}
$14.4m
Leonis 2000–2001 {A3.1.4/8}
$108.8m
Chulani 2001–2012 {A3.1.4/10}
$2.9m
Evelyn 2003–2004 {A3.1.4/9}
$2.5m
Glenin 2006 {A3.1.4/11}
$4.3m
Suncoast 2007 {A3.1.4/12}
$6.9m
Thaxton 2008 {A3.1.4/13}
$11.3m
Dryden 2009–2011 {A3.1.4/14}

Fig.2

1200. The two (orange) bubbles towards the top of the left-hand side can be disregarded, since PIFSS no longer pursues that element of the claim.

1201. The (green) boxes at the bottom of the page show payments made to various vehicles of Mr Al Rajaan. The entity receiving the greatest amount of money was Chulani, a Bahamian entity (USD 108.8 million). The (yellow) boxes towards the bottom of the left-hand side show payments made to various accounts or vehicles associated with Mr Nasrallah.

1202. Finally, the (differently coloured) boxes towards the bottom of the right-hand side involve payments into and out of various entities – Golgen, PIB, Wynacre, Ozak – which feature, and are specifically addressed, in other parts of this section J. The following is a brief introduction to those entities.

1203. Golgen Property SA ("Golgen") and Ozak Services Inc ("Ozak") were companies whose accounts at EFG were opened by Mr Nasrallah for the benefit of Mr Al Rajaan. It was common ground between PIFSS and Mr Nasrallah, and indeed clear on the evidence, that these were indeed nominee accounts. Ozak features significantly in the payment flows to Mr Al Rajaan.

1204. Phoenix International Brokerage SAL ("PIB") was a Lebanese company which was involved in options trading. It was run, at least principally, by Mr Nasrallah's son, Nadim Nasrallah ("Nadim"). Prior to starting his company, he had worked in options trading at Paribas. PIB also paid substantial amounts to Mr Al Rajaan. There is a dispute between PIFSS and Mr Nasrallah as to whether the latter can have any liability in respect of the amounts received by PIB and then shared with Mr Al Rajaan. Mr Nasrallah's main argument is that this was Nadim's company, and that he had nothing to do with it, or with assisting with any payment flows from PIB to Mr Al Rajaan.

1205. Wynacre Ltd ("Wynacre") is a company which received a significant payment from a fund manager called SISU, as well as some other payments. Mr Nasrallah contends that Wynacre was his investment company. There is a significant dispute about that.

1206. Having outlined the payment flows into and out of Phoenix, I summarise the parties' principal arguments.

1207. *Mr Nasrallah:* Mr Nasrallah's principal argument, in resisting PIFSS' claims concerning the Phoenix payments, is that there was no impropriety on his part in participating in the arrangements whereby he was paying the majority of the commissions received by Phoenix to Mr Al Rajaan. In his oral closing submissions, Mr Casey said that the "golden thread", that ran through Mr Nasrallah's case, was that he genuinely believed that Mr Al Rajaan was authorised to receive the monies that were being paid to him. In his written closing, he submitted (realistically) that the court's assessment of whether Mr Nasrallah is liable or not will turn in large part on its findings as to what Mr Nasrallah knew and intended at the material times, and that an important aspect of that assessment will be whether the court accepts Mr Nasrallah's evidence at trial in that respect.

1208. As will be apparent from my assessment of Mr Nasrallah as a witness in Section H above, and his participation in the Pictet and VP Schemes, I do not accept his evidence on the key issues. My conclusions in that regard are reinforced by many aspects of the EFG Scheme discussed below. I have no doubt that he did not believe for one moment that his payment of a share of fees to Mr Al Rajaan was authorised by PIFSS, nor that he was told by Mr Al Rajaan that authority had been given. Nor did he believe that any of the arrangements in which he was participating was lawful. These conclusions apply whether I am looking at the payments that went through Phoenix, or the other payments, such as those that went through Ozak and Golgen and PIB, described later in this section.

1209. An aspect of Mr Nasrallah's case in relation to the Phoenix payments, disputed by PIFSS, was that he made genuine introductions to at least the vast majority of the various fund managers who were paying commissions to Phoenix. It was submitted by Mr Casey that PIFSS' case against Mr Nasrallah necessarily involved allegations of impropriety against all the fund managers involved in making the payments, and that it was not permissible for PIFSS to advance such a case without clearly pleading that impropriety on the part of others, and then establishing that pleaded case against those others at trial. I address that argument below, and reject it.

1210. *Mr Guerin:* Mr Guerin was originally represented in these proceedings by solicitors, Brown Rudnick LLP. He served a defence, signed by leading and junior counsel. This said very little – allegedly because of concerns about Swiss banking secrecy – but denied the claims. He did not plead in any detail to the facts alleged. In October 2023, Brown Rudnick ceased to act. In their letter notifying that Mr Guerin would be acting in person, Brown Rudnick advised that the costs of Mr Guerin's defence were no longer being covered by external funding. Mr Guerin himself later referred to the fact that his external funding had ceased. Although the external funder was not identified, it is a reasonable inference, as Mr Ritchie submitted, that the external funder was EFG. Brown Rudnick's letter also indicated that Mr Guerin would serve an amended defence, would provide witness evidence, and would participate in the trial.

1211. A year later, Mr Guerin's position changed. In a brief e-mail to Stewarts (acting for PIFSS) in September 2024, he said that he was on his own, having lost his sponsor the previous year. He had no witness statement to produce. He strongly denied the accusations, and maintained that "I didn't know Mr Nasrallah was acting as a proxy to Mr Al Rajaan over those years". He sent a further short email in March 2025, in which he repeated that he did not know that Mr Nasrallah acted as a front for Mr Al Rajaan. He said that he did not know Mr Al Rajaan before 2008, when he was told by the "Latsis Group to take him as a new customer". He referred to being caught in a maelstrom which he did not understand; that he was 76 years old, with limited financials and health problems after suffering a stroke in 2023 when he lost his sponsor.

1212. As will become apparent, I do not accept that Mr Guerin was ignorant of the fact that Mr Nasrallah was acting as a front or proxy for Mr Al Rajaan. This was clear, for example, from the Ozak arrangements, where Mr Al Rajaan was receiving the vast majority of the monies paid into Ozak. It was also clear from the Phoenix arrangements, where Mr Al Rajaan was also receiving the majority

of the monies received into Phoenix. Also, Mr Guerin did know Mr Al Rajaan before 2008: he wrote to him in 2006 referring to various discussions which he had had with him. Furthermore, internal Client Information Profile (or "CIP") documents that Mr Guerin signed in 2008 and 2009, in connection with bank accounts being opened for Thaxton Foundation and Mr Al Rajaan, referred to Mr Al Rajaan being an important prospect or customer and a "relation of GIG for the last 20 years".

1213. A feature of the evidence concerning Mr Guerin was the existence of a large number of transcripts of calls made on a recorded EFG line after 2008. In her closing submissions, Ms Bingham for EFG said that the transcripts of the calls between Mr Guerin and Mr Nasrallah strongly suggest that, at least by 2009, Mr Guerin was knowingly assisting Mr Nasrallah in channelling funds to Mr Al Rajaan covertly. She said that EFG could never have put Mr Guerin forward as a witness of truth. Mr Guerin had, she said, lied to EFG about the purpose of various bank accounts. On the evidence as a whole, I agree with all of that, and indeed have no doubt that at least by 2009 Mr Guerin was knowingly assisting Mr Nasrallah to channel monies to Mr Al Rajaan. An issue raised by EFG was whether this was also the position prior to 2009. That issue remains important in the context of the extent of Mr Guerin's tortious liability. As set out below, I consider that it was the position prior to 2009 as well.

1214. *EFG:* As foreshadowed above, EFG acknowledged the strength of the evidence against Mr Guerin, and therefore his tortious conduct under Kuwaiti law, in the position after 2009. EFG advanced no positive case as to Mr Guerin's state of mind prior to that time. However, Ms Bingham submitted that I needed to look carefully at the evidence to see whether it really did establish relevant knowledge on the part of Mr Guerin prior to that time, and in particular in the early years of the operation of the various bank accounts. She submitted that PIFSS had not proved its case as to relevant knowledge on the part of Mr Guerin in those early years.

1215. I agree that I need to consider with care the evidence, as to Mr Guerin's state of mind, at all times including the early years of the relationship. Having done so, and taking into account the evidence as a whole, I have no doubt that Mr Guerin knew what he was doing throughout: i.e. assisting Mr Nasrallah to channel payments to Mr Al Rajaan. He also knew that this was improper, which is why the internal banking documents that he created never expressly explained the commission sharing arrangements which existed, and why there is a trail of false statements which can be traced back long before 2009.

1216. *Mr Al Rajaan*. The written closing submissions of D1 did not address the evidence relating to the EFG Scheme. I have rejected in earlier sections, in particular Section F above, the general arguments of Mr Al Rajaan (and now D1) as to why he was entitled to act as he did.

Ozak

1217. The second largest aspect of the claim against all 3 Defendants concerns Ozak. The monies flowing through the Ozak account at EFG were, converted in US Dollars, USD 69,342,827. That is the amount of the claim against Mr Guerin.

There is a small overlap with the Pictet Scheme claim as far as concerns Mr Nasrallah. The unique claim against him, eliminating duplication, is USD 68,542,827. There are larger overlaps with other schemes in the claim against Mr Al Rajaan, so that the unique claim against him, in respect of Ozak, is USD 44,718,874. Again, all these figures are prior to the impact of the Mirabaud and EFG settlements.

1218. PIFSS' spidergram in relation to the Ozak payments is reproduced below (Fig. 3).

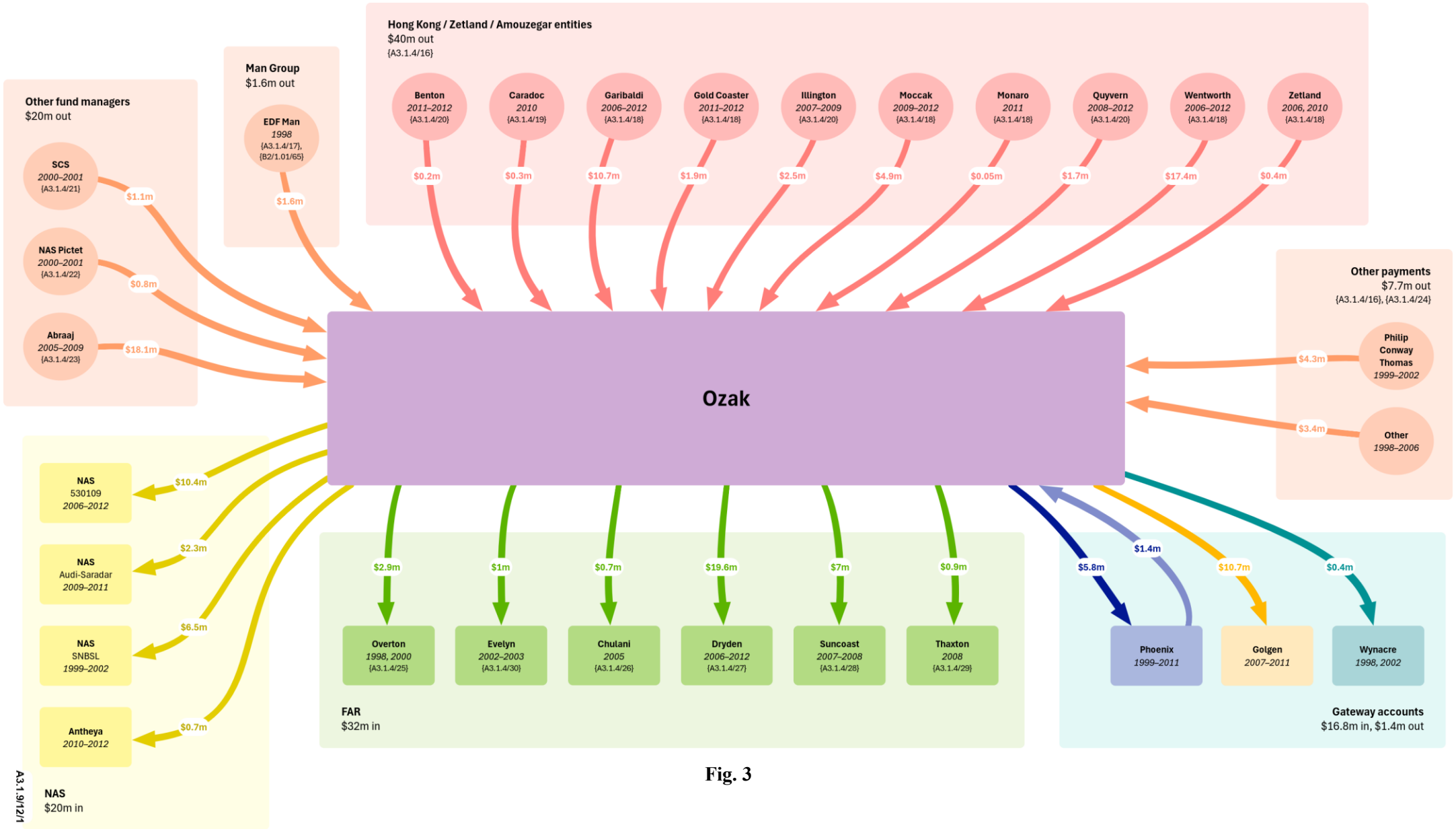

Hong Kong / Zetland / Amouzegar entities
$40m out
{A3.1.4/16}
Benton 2011–2012 {A3.1.4/20} $0.2m
Caradoc 2010 {A3.1.4/19} $0.3m
Garibaldi 2006–2012 {A3.1.4/18} $10.7m
Gold Coaster 2011–2012 {A3.1.4/18} $1.9m
Illington 2007–2009 {A3.1.4/20} $2.5m
Moccak 2009–2012 {A3.1.4/18} $4.9m
Monaro 2011 {A3.1.4/18} $0.05m
Quyvern 2008–2012 {A3.1.4/20} $1.7m
Wentworth 2006–2012 {A3.1.4/18} $17.4m
Zetland 2006, 2010 {A3.1.4/18} $0.4m
Man Group
$1.6m out
EDF Man 1998 {A3.1.4/17}, {B2/1.01/65} $1.6m
Other fund managers
$20m out
SCS 2000–2001 {A3.1.4/21} $1.1m
NAS Pictet 2000–2001 {A3.1.4/22} $0.8m
Abraaj 2005–2009 {A3.1.4/23} $18.1m
Ozak
Other payments
$7.7m out
{A3.1.4/16}, {A3.1.4/24}
Philip Conway Thomas 1999–2002 $4.3m
Other 1998–2006 $3.4m
NAS 530109 2006–2012 $10.4m
NAS Audi-Saradar 2009–2011 $2.3m
NAS SNBSL 1999–2002 $6.5m
Antheya 2010–2012 $0.7m
NAS
$20m in
Overton 1998, 2000 {A3.1.4/25} $2.9m
Evelyn 2002–2003 {A3.1.4/30} $1m
Chulani 2005 {A3.1.4/26} $0.7m
Dryden 2006–2012 {A3.1.4/27} $19.6m
Suncoast 2007–2008 {A3.1.4/28} $7m
Thaxton 2008 {A3.1.4/29} $0.9m
FAR
$32m in
$5.8m
$1.4m
$10.7m
$0.4m
Phoenix 1999–2011
Golgen 2007–2011
Wynacre 1998, 2002
Gateway accounts
$16.8m in, $1.4m out
A3.1.9/12/1

Fig. 3

1219. This shows, in the (pink) bubbles at the top of the page, that the largest contributors to Ozak (around USD 40 million) were various Zetland companies. These are the companies, already described in the context of the Pictet Scheme, which were associated with Mr Amouzegar and Mr Khosrovani. The largest contributor, among those companies, was Wentworth. That company is also the most significant contributor involved in the Aerium Scheme.

1220. In addition, there were other contributors, including (see the orange bubbles on the top of the left-hand side) a fund manager called Abraaj: i.e. Abraaj Capital Ltd, subsequently Abraaj Investment Management Ltd. ("Abraaj").

1221. The outflows are shown on the bottom half of the page. These included, in the green boxes, substantial sums being paid to various entities associated with Mr Al Rajaan. Those entities included the Liechtenstein foundation called Thaxton, which was created and whose account at EFG was opened in 2008 with the assistance of Mr Guerin.

1222. However, the Ozak monies did not flow exclusively to Mr Al Rajaan. The yellow boxes on the bottom part of the left-hand side of the page show that Ozak monies were also passed to accounts and an entity associated with Mr Nasrallah. That entity was the Antheya foundation, which was also created – along with its bank account at EFG – with the assistance of Mr Guerin, in 2004.

1223. Mr Nasrallah's argument in relation to Ozak differs from his argument in relation to Phoenix. In relation to Ozak, he says that this was a nominee company and (unlike Phoenix) it was not carrying out any of his business. Thus, he does not allege that he had any introducer agreements with any of the fund managers who were paying monies into Ozak. He said in cross-examination:

> "Ozak was asked by Mr Al Rajaan for his own business. It has nothing to do with my business.
>
> …
>
> Al Rajaan development was stated from the beginning, 65/35, and whatever he asked me to do, he asked me to open the Ozak account, I open it. He asked me to open the Golgen account, I open it. That's all I can say."

1224. This means that Mr Nasrallah's case, concerning Ozak, in reality comes down to the "golden thread" of alleged authorisation: a case which I reject.

1225. EFG's factual case in relation to Ozak was no different to its case on Phoenix, or indeed the other fund flows: namely, the necessity of looking carefully at the question of the time when Mr Guerin was knowingly participating in the flow of funds to Mr Al Rajaan.

Phoenix International Brokerage ("PIB")

1226. The next most substantial element of the claim concerns PIB. The claim here is USD 53,694,178 against each of the 3 parties. There is no overlap here with

other schemes, and therefore no figures which need to be taken out to avoid duplication.

1227. PIB was a company which Nadim Nasrallah used, following his departure from Paribas, to conduct an options trading business. PIFSS' spidergram showing the inflows and outflows is as follows (Fig. 4):

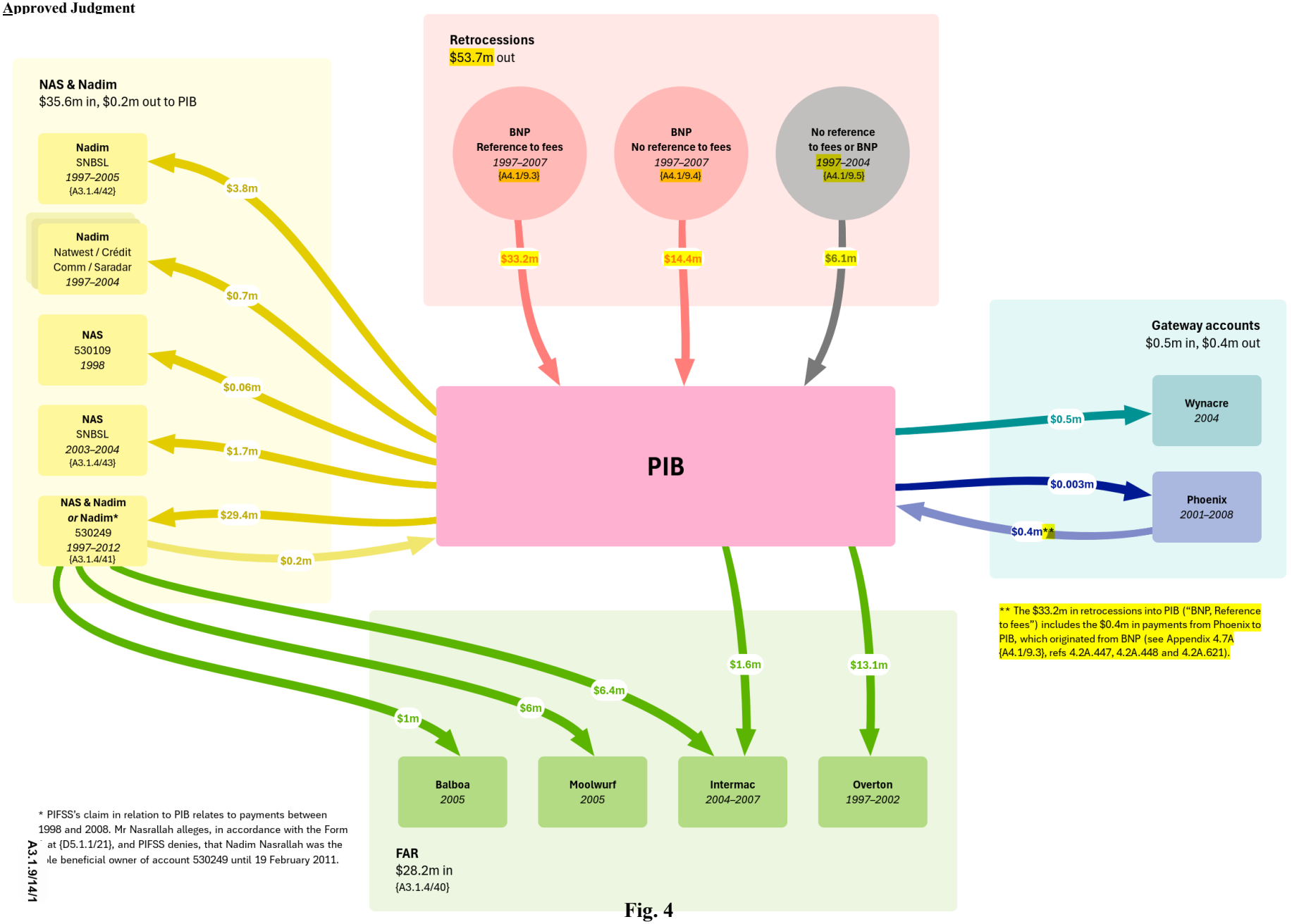

Retrocessions
$53.7m out
BNP
Reference to fees
1997–2007
{A4.1/9.3}
BNP
No reference to fees
1997–2007
{A4.1/9.4}
No reference
to fees or BNP
1997–2004
{A4.1/9.5}
$33.2m
$14.4m
$6.1m
NAS & Nadim
$35.6m in, $0.2m out to PIB
Nadim
SNBSL
1997–2005
{A3.1.4/42}
$3.8m
Nadim
Natwest / Crédit Comm / Saradar
1997–2004
$0.7m
NAS
530109
1998
$0.06m
NAS
SNBSL
2003–2004
{A3.1.4/43}
$1.7m
NAS & Nadim
or Nadim*
530249
1997–2012
{A3.1.4/41}
$29.4m
$0.2m
PIB
Gateway accounts
$0.5m in, $0.4m out
$0.5m
Wynacre
2004
$0.003m
Phoenix
2001–2008
$0.4m**
** The $33.2m in retrocessions into PIB ("BNP, Reference to fees") includes the $0.4m in payments from Phoenix to PIB, which originated from BNP (see Appendix 4.7A {A4.1/9.3}, refs 4.2A.447, 4.2A.448 and 4.2A.621).
$1.6m
$13.1m
$6.4m
$6m
$1m
Balboa
2005
Moolwurf
2005
Intermac
2004–2007
Overton
1997–2002
FAR
$28.2m in
{A3.1.4/40}
* PIFSS's claim in relation to PIB relates to payments between 1998 and 2008. Mr Nasrallah alleges, in accordance with the Form at {D5.1.1/21}, and PIFSS denies, that Nadim Nasrallah was the le beneficial owner of account 530249 until 19 February 2011.
A3.1.9/14/1

Fig. 4

1228. The pink and grey bubbles at the top of the page reflect PIFSS' analysis of monies that were paid to PIB. The total of the first two pink bubbles is USD 47.6 million. This sum has been calculated by reference to payments which contain a reference to BNP or Paribas: i.e. Paribas (which became BNP Paribas following a merger in 2000). Paribas was the counterparty to transactions with PIFSS, under which the latter sold various equity options in return for premiums received. The overwhelming majority of the transactions, giving rise to payments to PIB, relate to the sale of such options. These first two bubbles reflect the figures, shown in EFG's documentation, in so far as they refer either to Paribas and fees, or simply to Paribas. The third (grey) bubble is a residual category of payments (USD 6.1 million) which were made to PIB, but where the banking documentation contains no express reference either to fees or to Paribas. PIFSS contends, however, that it can safely be inferred that these payments to PIB were made in relation to PIFSS contracts, essentially because there is no evidence that PIB had any business other than transactions concerning PIFSS.

1229. The destination of the monies, as far as concerns entities connected to Mr Al Rajaan, is shown at the bottom of the page in green boxes. It includes vehicles, Intermac and Overton, which received payments under the Mirabaud scheme. The total amount received is USD 28.2 million. This is around 60% of the USD 47.6 million, being the total of the two pink boxes. It is around 53% of the three pink and grey boxes at the top of the page. PIFSS contends that these figures are not far off the percentages paid to Mr Al Rajaan under the Phoenix sharing arrangements. They submit that this PIB scheme was a sharing scheme, relating to options, which was proceeding in parallel with the main Phoenix arrangements which related to investment funds.

1230. Mr Nasrallah's central argument in relation to these payments is that they had nothing to do with him. As he said in evidence:

> "I told you from the beginning I did not have anything to do with my son's business. He was on his own, I was on my own. He doesn't know anything about what I was making, I don't know anything what he was making. And this is my final answer."

1231. PIFSS' position, by contrast, is that the arrangements with Phoenix ran in parallel with the arrangements concerning PIB. This was a family commission sharing business.

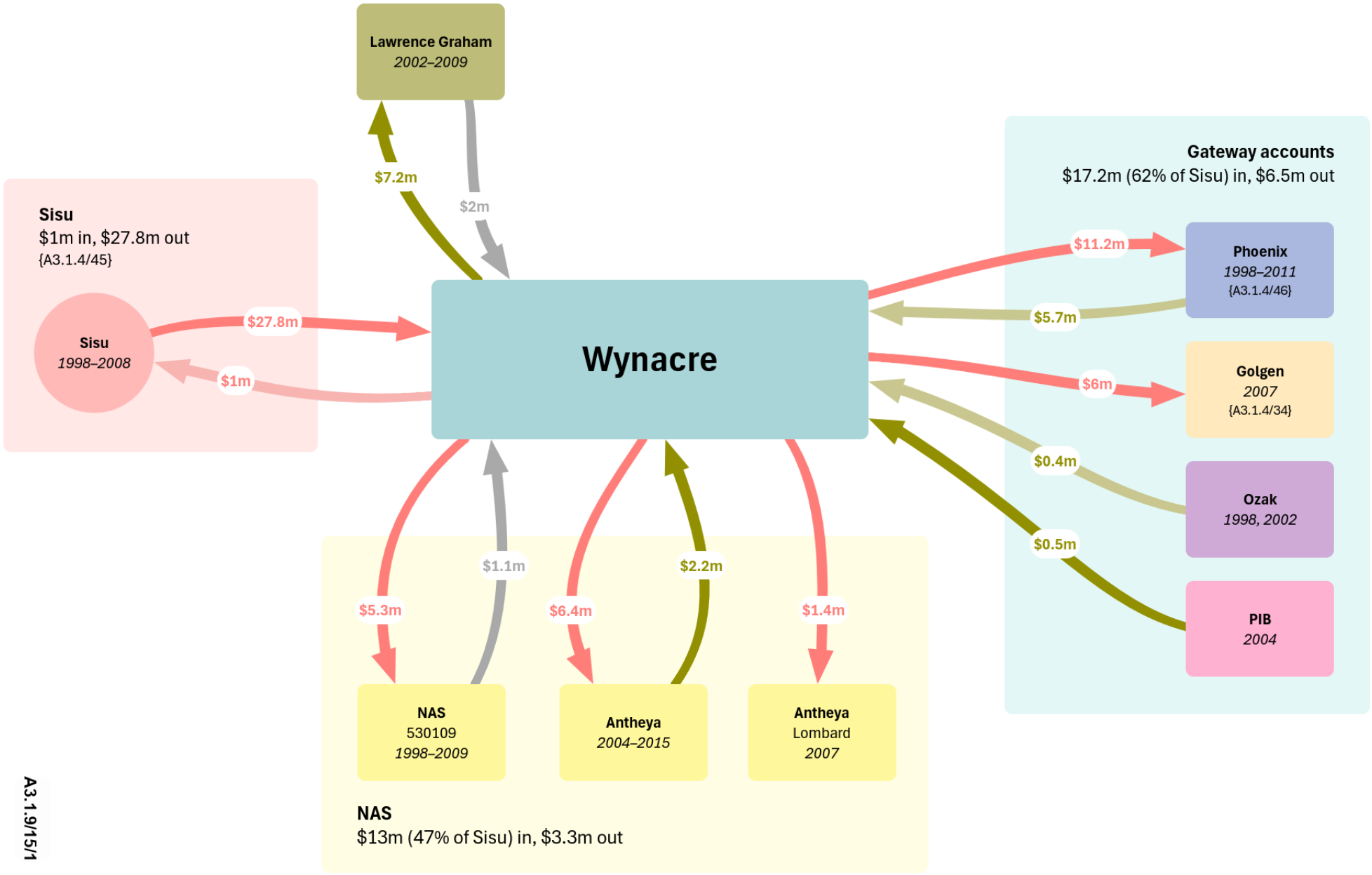
1232. Some other arguments were also advanced by Mr Nasrallah, principally that the options business was carried out on a day-to-day basis by Sheikh Abdullah, not Mr Al Rajaan. Accordingly, any payments made to Mr Al Rajaan could not have been made in connection with decisions to enter into options agreements.

Wynacre

1233. The Wynacre aspect of the claim is USD 27,762,774 against all parties. The Wynacre claim can be viewed as an aspect of, or an adjunct to, the claim in

respect of the Phoenix commissions. The spidergram in relation to this aspect of the case is Fig. 5.

1234. The main contributor of funds to Wynacre was a fund manager, SISU. SISU also, separately, made payments of USD 25.6 million to Phoenix. PIFSS contends that the USD 1 million, shown on the left-hand side of the spidergram as being paid by Wynacre to SISU, was derived from commissions that Phoenix was receiving as commissions on PIFSS' investments: commissions paid by other fund managers, not SISU itself. Those commissions were in turn used to fund a USD 1 million investment in a SISU company. In a relatively short space of time, this investment returned a handsome investment return amounting to USD 27.8 million.



A3.1.9/15/1

Fig. 5

1235. PIFSS contends that Mr Al Rajaan was the principal person behind this investment, and that the opportunity was never offered to PIFSS. Mr Al Rajaan was therefore profiting from his position, and was doing so using monies which were themselves derived from PIFSS investments; i.e. the commissions that were being paid to Phoenix.

1236. Mr Nasrallah's case is that Wynacre was his own investment vehicle reflecting his personal equity stake in SISU. Returns received were returns on that stake, and it was for Mr Nasrallah to decide whether he wanted to share part of the returns on that stake with Mr Al Rajaan.

Golgen

1237. The claim here against all Defendants is USD 5,144,545. It relates to monies that passed through an account in the name of Golgen. The spidergram for the inflows and outflows is Fig. 6.

1238. The claim here arises from the profit made on an investment made with Abraaj: the difference between the USD 8.5 million investment and the USD 13.6 million redemption shown at the top of the spidergram.

1239. Mr Nasrallah accepts, as with Ozak, that this was a nominee account held for Mr Al Rajaan. He says that it was established for Mr Al Rajaan for the purpose of making a specific personal investment on his behalf. The defence, as with Ozak, is that Mr Nasrallah believed that the operation of these accounts was lawful.

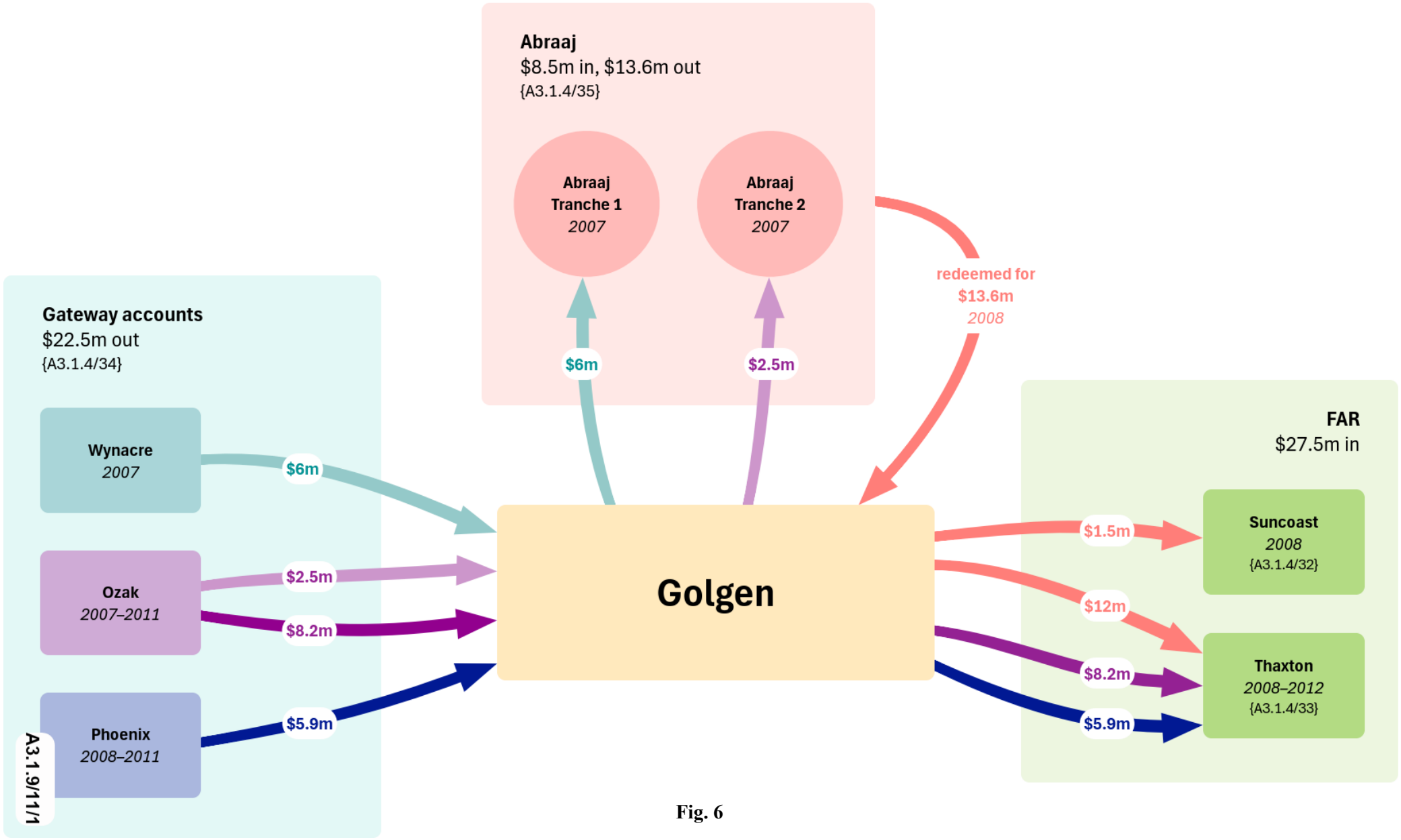

Abraaj
$8.5m in, $13.6m out
{A3.1.4/35}
Abraaj Tranche 1
2007
Abraaj Tranche 2
2007
redeemed for $13.6m
2008
$6m
$2.5m
Gateway accounts
$22.5m out
{A3.1.4/34}
Wynacre
2007
$6m
Ozak
2007–2011
$2.5m
$8.2m
Phoenix
2008–2011
$5.9m
Golgen
FAR
$27.5m in
$1.5m
Suncoast
2008
{A3.1.4/32}
$12m
$8.2m
Thaxton
2008–2012
{A3.1.4/33}
$5.9m
A3.1.9/11/1

Fig. 6

J2: Factual narrative

1240. This section gives an overview of the important events giving rise to the fund flows and arguments identified above. It is not necessary or appropriate to describe the entirety of the parties' dealings over a period of around 17 years (from 1995 to 2012). Rather, I focus on significant matters in the context of resolving the arguments advanced by the parties. The section does contain some of the conclusions which I have reached as to the knowledge and honesty of Mr Guerin and Mr Nasrallah in relation to the events which I describe.

1994-1995: the opening of the Phoenix account and the start of the business

1241. Mr Nasrallah formed Phoenix in August 1994. The company was constituted and registered in Beirut.

1242. In July 1995, Mr Nasrallah opened two accounts at Banque Scandinave en Suisse ("BSS") in Geneva. BSS was a Swiss private bank, which changed its name in January 1997 to Banque Edouard Constant SA ("BEC"). In June 2003, BEC merged with EFG Private Bank AG. In February 2005, the merged bank changed its name to EFG Bank AG (D30).

1243. The two accounts opened by Mr Nasrallah were in the names of (1) Phoenix, and (2) Mr Nasrallah, his wife Mona, and Nadim. The Form A for Phoenix, which verified the beneficial owner of Phoenix, was signed by Mr Nasrallah. It identified the beneficial owners as being himself, Mona and Nadim, with interests respectively of 70%, 15% and 15%. Phoenix's account number ultimately became account 530115 at EFG. The other, personal, account became, in due course, account 530109 at EFG. Hereafter, I shall give the EFG account numbers, rather than those at BSS or BEC.

1244. Mr Guerin joined BSS at around the time when these accounts were opened. His contract of employment, for the role of Senior Portfolio Manager, was signed on 27 June 1995, and it provided for a start date of "1 October 1995 or earlier". Thereafter, he was promoted and occupied various roles: "Sous-directeur" of BEC as of 1 January 1998; "Directeur adjoint" of BEC as of 1 January 1999; "Directeur" of BEC as of 1 July 2000; Customer Relationship Officer (or "CRO") with the rank of Senior Vice President at EFG as of 1 April 2004; and Client Relationship Officer with the rank of Senior Vice President as of 1 November 2014.

1245. Mr Guerin was responsible for the introduction of Mr Nasrallah to BEC. In 1996, he was the person who signed the bank's KYC (Know Your Client) document for Phoenix. This was a type of document referred to during the trial as a "CIP" or "Client Information Profile": the latter being the designation on EFG's version of these documents. I shall refer to this type of document as a "CIP".

1246. The original CIP for Phoenix said that the client had been introduced by Mr Guerin, and that Mr Guerin was the "lead manager". In relation to the box on the form which required identification of the "origin of wealth/source of funds deposited – economic background", Mr Guerin wrote: "Commissions on Listed

Funds sold by Paribas, Sarasin, Axa in Kuwait". Accordingly, Mr Guerin knew that Mr Nasrallah's Phoenix business was focused on Kuwait.

1247. Mr Guerin had, by the time that the Phoenix account was opened, known Mr Nasrallah for a long time. As the person primarily responsible for the Phoenix account, he was required to update the CIP if there were relevant changes. A number of updates were made over the years. In a 2004 update, Mr Guerin referred to knowing Mr Nasrallah for 30 years, and that the relationship between Mr Guerin and Mr Nasrallah was "friendly".

1248. According to CIP's that Mr Guerin signed in 2008 and 2009 in connection with Thaxton and Mr Al Rajaan, Mr Guerin said that he had had a relationship with Mr Al Rajaan for 20 years: in other words, well before Mr Guerin had joined BEC, and Phoenix's account had been opened. As will become apparent, the information provided by Mr Guerin in CIPs was inaccurate, and in my view deliberately so, on many material issues.

1249. That said, I think that it is credible that Mr Guerin had known Mr Al Rajaan for some time, and that there was indeed a relationship between them, certainly by the time that payments from the Phoenix commissions started to flow in late 1995. Mr Nasrallah's evidence (discussed below) was that Mr Guerin always knew that payments were being made to Mr Al Rajaan. Indeed, he said that Mr Guerin sometimes knew, before Mr Nasrallah knew, where payments were to be made. That was because Mr Guerin had been speaking to Mr Al Rajaan. Furthermore, since Mr Guerin clearly knew Mr Nasrallah very well by 1995, and since he knew that Phoenix's business was focused on Kuwait, there can be little doubt that Mr Guerin would also have known that Phoenix's business involved PIFSS and Mr Al Rajaan. Mr Nasrallah would not have hidden from Mr Guerin the fact that he was dealing with Mr Al Rajaan, the senior person at PIFSS.

1250. Mr Nasrallah's evidence was that the only client of Phoenix was PIFSS. He ascribed this to Mr Al Rajaan wanting Mr Nasrallah to work exclusively with him. There is no evidence of Mr Nasrallah or Phoenix introducing funds or other investments to any client other than PIFSS, over the many years that Phoenix was operating. In my view, it is also highly likely that Mr Guerin knew at this early stage, as was the case, that Phoenix's business involved only PIFSS. He certainly knew this by July 1997, when he signed the Ozak CIP describing the beneficial owner as Mr Nasrallah, and his business as an introducer having only one client, an institution in the Gulf.

1996: opening of further accounts

1251. In January and April 1996, further accounts were opened (530218 and 530249) in the names of Mr Nasrallah and Nadim.

1252. Generally speaking, the particular account numbers of the accounts held by Mr Nasrallah, or the wider Nasrallah family, are not of great significance in the context of the issues between the parties. However, an issue between PIFSS and Mr Nasrallah did arise in connection with account 530249. This is an account potentially relevant to the issues concerning PIB. That is because it was an

account to which some USD 29.4 million was sent by PIB as shown on the PIB spidergram. A portion of that money was then sent to various Al Rajaan entities, but some was retained. If this was a joint account of Mr Nasrallah and Nadim, or if Mr Nasrallah was a beneficial owner of this account, that would indicate that Mr Nasrallah was personally benefiting from monies remitted by PIB. This in turn would be relevant to Mr Nasrallah's case that PIB had nothing to do with him. PIFSS contended that this account could properly be associated with Mr Nasrallah as well as Nadim, rather than just Nadim.

1253. The documents show that account 530249 was an account where the request to open an account, dated 17 April 1996, was made and signed jointly by Mr Nasrallah and Nadim. It was therefore a joint account, and Mr Nasrallah was a co-signatory on this account. He also signed the Form A on 17 April 1996 (and again later), and this indicates that it was indeed a joint account. However, the 1996 Form A signed identifies only Nadim as the ADE (Ayant Droit Economique): i.e. the ultimate beneficial owner or UBO. I agree with PIFSS, however, that this appears to have been an error. In response to points raised by compliance at EFG, Mr Guerin in September 2008 promised that a new Form A would be signed "by both ADE (The father and the son)". Mr Guerin therefore understood at that time that they were both ADEs. A new Form A was eventually signed by both Mr Nadim and Nasrallah in 2011, identifying both of them as ADEs. This followed correspondence sent by Mr Guerin in 2010, requesting signature.

1254. There can be no doubt that Mr Nasrallah and Nadim knew what they were signing in 2011. The new Form A, signed in 2011, confirms – consistent with the fact that they were both account holders – that they were the beneficial owners of that account. I consider that this reflects the position as it always was. I do not accept Mr Casey's point that the 2011 form can in effect be disregarded because it was signed after the relevant PIB activity involving PIFSS (1997 – 2007) had ceased.

Commissions start to flow to Phoenix, and to Mr Al Rajaan

1255. In late 1995 (in a very small way), and 1996, commission payments started to flow into Phoenix. Thereafter, there was a continuous flow until 2012, when the EFG accounts were closed down. The overall position is illustrated by two charts which were prepared by PIFSS showing the constituent elements of the claim against EFG. This is reproduced below (Fig. 7), and it again avoids the need for a detailed textual explanation. (Readers will again benefit from seeing the colours in the electronic version of this judgment.)

1256. The total amount shown in the chart is USD 446 million, since this includes the claim originally made in respect of monies paid by UBP. The settlement between PIFSS and UBP means that the claim against Mr Guerin, before taking into account the Mirabaud and EFG settlements, reduced to USD 408.8 million.

1257. The chart shows that, at the beginning, the Phoenix payments were the only relevant payments. In 1997, the PIB payments begin. In 1999, the Ozak payments begin. In the following years until 2002, the claim is a mixture of

Phoenix, PIB and Ozak payments. In each year to 2012, the Phoenix payments are in the majority.

1258. A further chart (Fig. 8) produced by PIFSS in the course of closing submissions sought to illustrate the significance of the EFG Scheme (referred to as "Further Nasrallah") in relation to PIFSS' claim in these proceedings as a whole. This shows that, in the period up until 2000, the EFG Scheme payments form the substantial majority of the claimed amounts, and that they remain in the majority until around 2006.

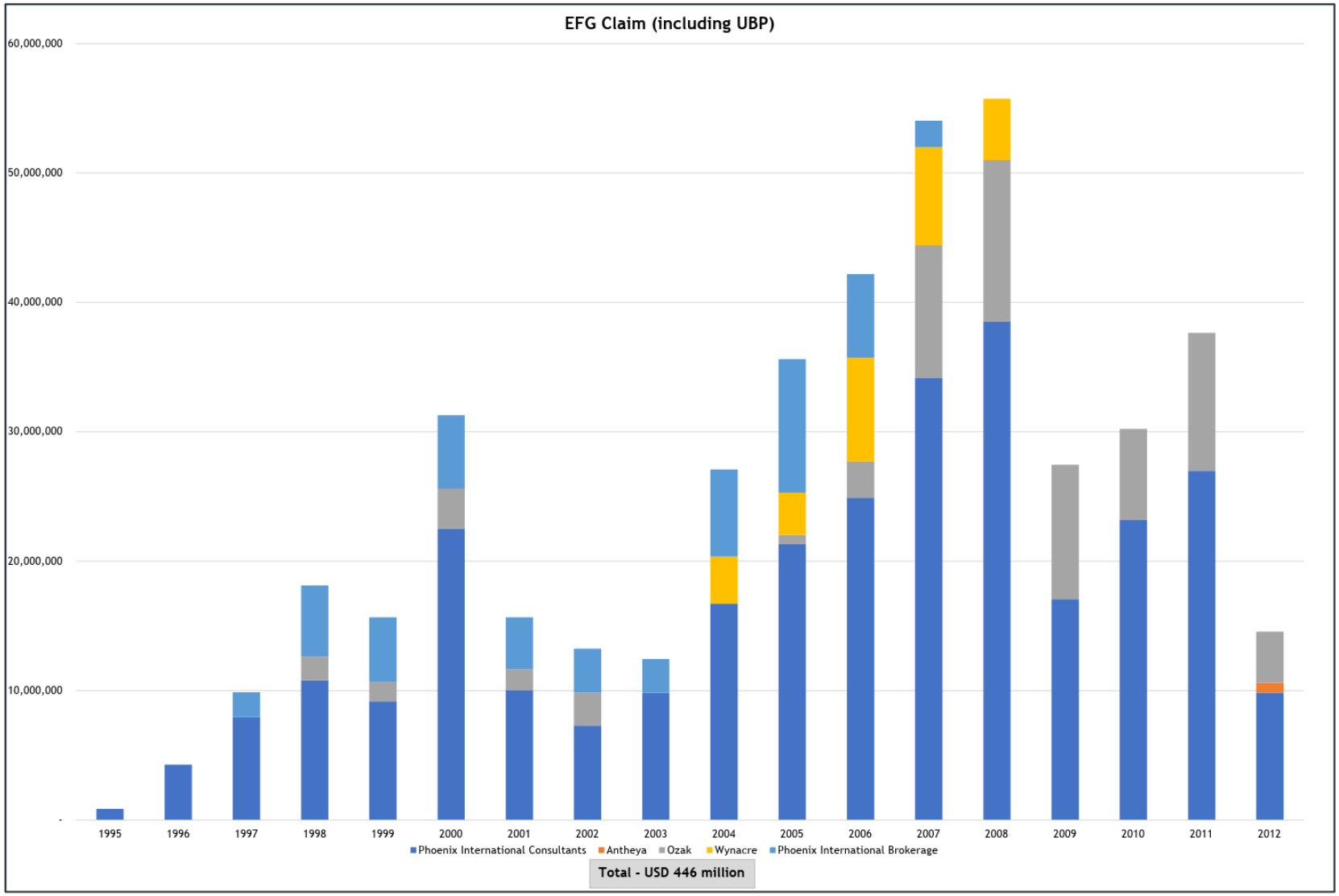

EFG Claim (including UBP)
60,000,000
50,000,000
40,000,000
30,000,000
20,000,000
10,000,000
-
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
Phoenix International Consultants
Antheya
Ozak
Wynacre
Phoenix International Brokerage
Total - USD 446 million

Fig. 7

A4.1.1/2/1

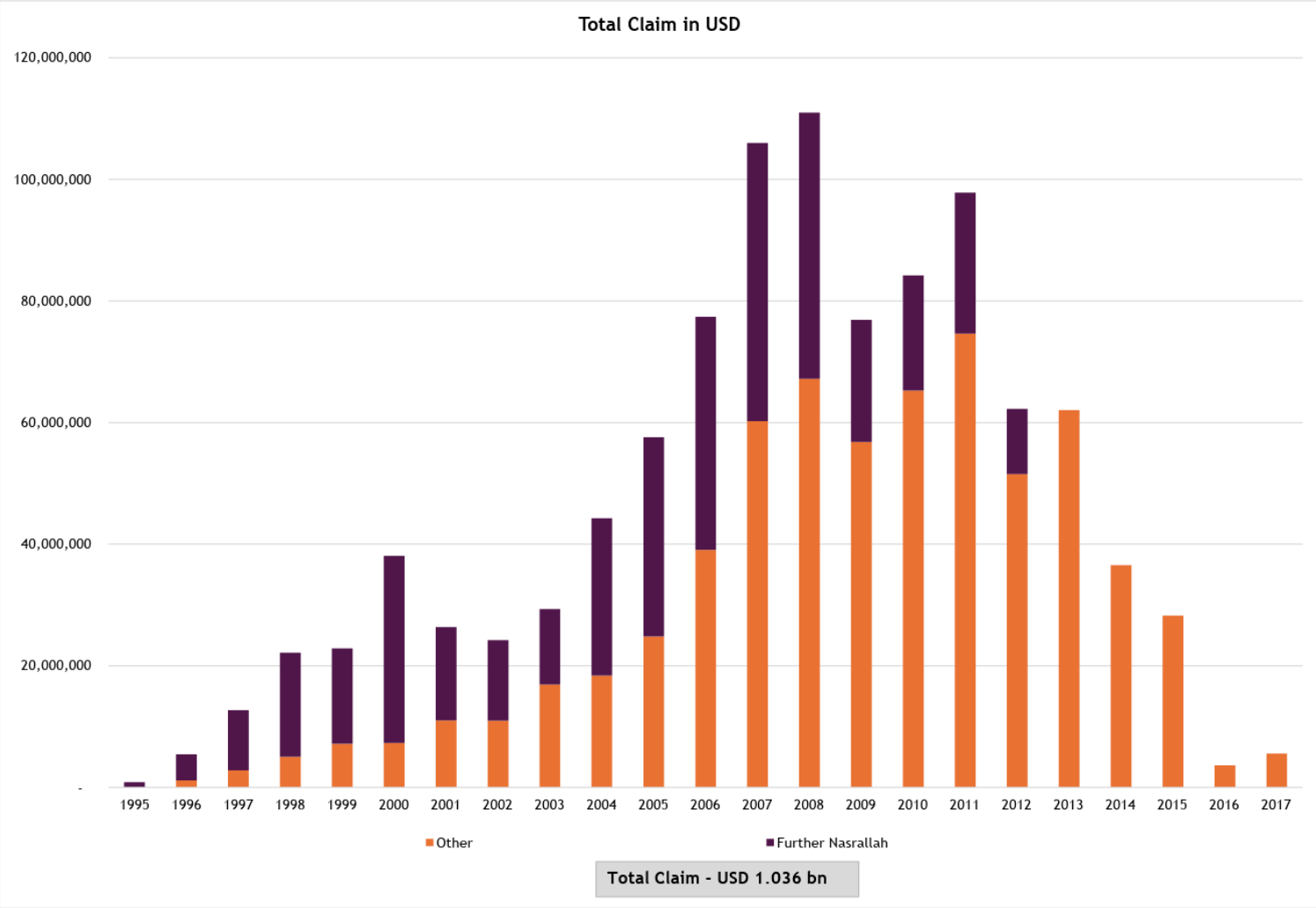


Fig. 8

A4.1.1/18/1

1259. There was no dispute that, at all material times from 1995 onwards, Mr Nasrallah was sharing his Phoenix commissions with Mr Al Rajaan. From 1995 to 2000 (as shown in the first (green) box at the bottom of the Phoenix spidergram), payments were made to an Al Rajaan vehicle, Kitaro Trust, which had an account at Credit Suisse. Some USD 20.1 million was transferred during those years.

1260. Mr Nasrallah's evidence, in his trial witness statement was that at some point in 1995, he agreed to share a portion of his introducer fees with Mr Al Rajaan. He believed that this was initially a fixed amount, but it then became a 50% share, then 60%, and then 65%. A Phoenix bank statement for January 1998, further discussed below, refers expressly to "35%", being the balance of 65%. In his oral evidence, he described the arrangements as a "gentleman's agreement".

1261. In that statement, Mr Nasrallah also explained how the payments operated. He said that his interactions at EFG were generally with Mr Guerin, or his associates Sara Beltrametti and Ekaterina Likhotal. He had known Mr Guerin for a very long time. He said that Mr Guerin was sometimes the person who told him where the Phoenix (and later the Ozak) payments were to be made, because he had already been in contact with Mr Al Rajaan to obtain those details. Mr Al Rajaan sometimes provided those details to Mr Nasrallah himself. He also said that "Mr Guerin at EFG was aware that I was making the Al Rajaan Payments, and yet continued to assist me in making such payments". The "Al Rajaan Payments", to which Mr Nasrallah was referring, were the Phoenix payments paid by fund managers pursuant (at least in some cases) to written agreements.

1262. Although I do not consider Mr Nasrallah to be a reliable witness generally, I consider as credible his evidence that Mr Guerin always knew that he was paying a share of his commissions to Mr Al Rajaan. Ms Bingham was not in a position to challenge Mr Nasrallah on his evidence as to how instructions for payments were made, or as to Mr Al Rajaan's dealings with Mr Guerin for that purpose. Nor was she in a position to challenge Mr Nasrallah's evidence that Mr Guerin always knew where the money was going. The reason that she could not do so was because EFG were not in a position to advance a positive case as to Mr Guerin's alleged lack of knowledge. Mr Nasrallah's evidence, as to how things worked and Mr Guerin's knowledge, therefore remained unchallenged.

1263. I accept that this does not mean that I should necessarily accept Mr Nasrallah's evidence. However, I consider that that aspect of his evidence is consistent with the inherent probabilities. Mr Guerin had a long relationship with Mr Nasrallah, and their relationship was a friendly one. Mr Guerin was a guest at Nadim's wedding in 1997. The transcripts of their conversations (which are only available from 2008) indicate that they were sufficiently close that they could discuss the intimate details of their personal lives. The formal instructions for payment out of Phoenix's account would have come from Mr Nasrallah, and there would have been discussion about these payments between the two men, as evidenced by many of the available call transcripts from 2008 onwards. The call transcripts also evidence some discussions about payment transfers with Ms Beltrametti and Ms Likhotal, but nevertheless discussions still took place with Mr Guerin.

1264. Since they were substantial transfers, and Mr Guerin was the person in charge of the relationship, he is likely (and in my view certain) to have understood where they were going. In that regard, it is instructive to follow the picture shown by the bank statement showing the January 1998 payment, with its express reference to 35%. The Phoenix account shows the receipt of USD 247,525 on 15 January 1998. The statement identifies the paying party: CPR (which later became part of Credit Agricole), which was one of the fund managers. It was therefore perfectly possible at that time for transfers to identify the paying party. The statement then shows that the amount is split 35%/ 65%. It has an express reference to 35% (USD 86,634) which is then debited to the Phoenix account, again with the CPR reference. The balance, representing 65% (USD 160,891) is then converted into Swiss Francs, and the resulting figure (CHF 238,119) is shown on a further statement. This is then debited to the Phoenix account. All of this occurred on the same day. A bank statement of Credit Suisse, Zurich, shows the money being credited on 20 January 1998 to the account of Kitaro Trust, which is an Al Rajaan vehicle. The Credit Suisse statement does not record who the sender of the money was: it simply refers to "payment one client". There is a similar "one client" designation in the Phoenix account documents which evidence the payment going out: a reference to the transfer being made "d'ordre d'un client". The "one client" designation meant that a person looking at the documents of the recipient bank, Credit Suisse, would not be able to identify the remitter of the payment. This was deliberate on the part of Mr Guerin, and was part of the concealment that took place.

1265. This episode illustrates some important points. There were a number of transactions on the same day. Mr Guerin was involved in these transactions. He could see the split of 35% and 65%. He could see that the 65% was going out, in Swiss Francs. He must have been responsible for the "one client" designation; so that the remitter's identification would not be apparent. He knew to which account the money was to be sent. In my view, it is entirely unrealistic to think that he did not know that it was going to Mr Al Rajaan, as part of Mr Nasrallah's commission sharing arrangement. At a much later stage in the story, in May 2012, there was an important conversation between Nadim Nasrallah and Mr Guerin which I describe below. This was after the Swiss investigation started, and Nadim Nasrallah was clearly concerned at the possibility that the documents of Mirabaud (to which certain payments were made in early years) would lead to payments to Mr Al Rajaan being traced back to PIB and the Nasrallahs. They discuss how, "back in the days", transfers would be made using the "one client" designation, with the consequence that tracing would not be possible.

1266. Furthermore, there is considerable documentary evidence showing that later in the story – when the available documentation is greater, not least because it includes the call transcripts – Mr Guerin was well aware of the sharing arrangements. For example, the Antheya CIP, signed by Mr Guerin in 2004, noted that Antheya would receive 35% of the revenue of the Phoenix 530115 account at EFG. A call in July 2009 has Mr Guerin asking what the percentage split should be in respect of monies recently received. Mr Nasrallah responds that it is 35/65 "as usual". He also says that there is an exception for SISU, where the split is 40/60. Similarly, in a call in August 2011 with Nadim, Mr Guerin referred to Mr Nasrallah's 35% in connection with funds expected from

Everest. And on 15 March 2013, Mr Guerin told Mr Nasrallah that "the 35, 65 it's over. We're not doing that anymore … It's over, finished".

1267. There is no doubt that, at the time of these calls, Mr Guerin knew that the money was going to Mr Al Rajaan. Mention of his name was generally avoided on the call transcripts – a sign of the secrecy that surrounded these arrangements. Instead, reference was made to "our friend", which was a reference to Mr Al Rajaan. I am in no doubt that, when the evidence is considered as a whole, Mr Guerin knew that this was the position all along. EFG did not call Mr Guerin to say otherwise. Ms Bingham submitted that this was understandable, because Mr Guerin was clearly not a man of truth. However, EFG also did not call either of the other individuals, Ms Beltrametti and Ms Likhotal, to give evidence as to knowledge of (what Mr Ritchie referred to as) "team Guerin" as to where these payments were going.

1268. Mr Guerin knew that Mr Al Rajaan was the senior person at PIFSS. His 2008 and 2009 CIPs for the accounts of Thaxton and Mr Al Rajaan say that he had known Mr Al Rajaan for many years. It is improbable in the extreme that Mr Guerin was unaware of Mr Al Rajaan's role at PIFSS. Since Mr Guerin knew that Mr Nasrallah was sharing his commissions with Mr Al Rajaan, Mr Guerin must have appreciated that he was dealing with payments which were corrupt. He was therefore knowingly participating in the process which facilitated the transfer of the proceeds of corruption to Mr Al Rajaan. Indeed, EFG did not seriously dispute that, at least by 2009, Mr Guerin was knowingly assisting Mr Nasrallah in channelling funds to Mr Al Rajaan covertly. This was, on any view, seriously improper conduct, giving rise to criminal liability in Switzerland where Mr Guerin lived and worked. It was conduct which continued for a number of years after 2009.

1269. EFG's non-admission as to whether Mr Guerin was dishonestly assisting at any earlier stage, prior to 2009, posits that there was or may have been some transition in the knowledge of Mr Guerin; so that he moved from being an honest banker to a person who, for at least the period 2009 – 2012, was prepared to engage in conduct which was criminal. And he was then, in 2012, prepared to assist in shutting down most of the EFG accounts associated with the corrupt payments, and the transfer of funds offshore – all without notifying the authorities. I do not accept that there is any credible evidence which suggests that there was any such transition from an honest to a dishonest banker. It is far more probable that Mr Guerin was acting with impropriety throughout, knowing what was going on. This is also borne out by other aspects of the chronology to which I now return.

1997 - 1998

1270. On 9 January 1997, Ozak was incorporated in the British Virgin Islands. Later that year, on or around 18 July 1997, an account at BEC was opened in the name of Ozak. The EFG number for this account was 541596. The Form A for that account identifies Mr Nasrallah and Nadim Nasrallah as beneficial owners. The Form A was not signed personally by those two individuals, but rather by the corporate director of Ozak, Genmanco Corporation. That corporate director also

executed a power of attorney in favour of Mr Nasrallah and Nadim in respect of Ozak's bank account at BEC.

1271. In his 3rd witness statement, Mr Nasrallah described Ozak as being a company in his name, but whose bank account was opened at Mr Al Rajaan's request and operated on his behalf. Mr Nasrallah said that he was identified as the beneficial owner, because "I had agreed to open the account, but the monies that were deposited into the account were for Mr Al Rajaan." Accordingly, Mr Nasrallah knew that he was being identified as the beneficial owner. That is consistent with the Form A for that account, which (as Ms Bingham correctly submitted) would not have identified Mr Nasrallah (and indeed Nadim) as a beneficial owner without his authorisation and approval. Since the monies deposited in the account were for Mr Al Rajaan, and if the account was to be operated on his behalf, Mr Nasrallah was plainly not the beneficial owner. The Form A was therefore a false document (one of many involving Mr Nasrallah), and was intended to conceal the true position. Mr Nasrallah appreciated that, in my judgment. However, Mr Nasrallah is telling the truth when he acknowledges that the Ozak account was a nominee account for Mr Al Rajaan, albeit that Mr Nasrallah did receive some payments from Ozak into his bank accounts or the account of Antheya: see the (yellow) boxes on the bottom left of the Ozak spidergram.

1272. Mr Nasrallah also said, in his 3rd statement, that he could not recall whether Mr Al Rajaan even told him:

> "specifically why he wanted to open the Ozak account, but I knew that he was very wealthy and understood he had substantial amounts of money coming to him. This arrangement meant that his money could be managed by someone he trusted, and it made sense to me given we were already working together and I was transferring money to him from the Introducer Fees paid to Phoenix. I must be clear that the account was not opened, however, for the purpose of receiving any Introducer Fees from the introductions which I made. It was opened to manage Mr Al Rajaan's money."

1273. Again, there is a mixture of truth and falsehood in this passage. The Ozak account was indeed opened with the principal purpose of receiving monies that were not passing to Phoenix. It is also true that it was opened to manage Mr Al Rajaan's monies. But I reject Mr Nasrallah's evidence that he was ignorant of the reason why Mr Al Rajaan wanted a trusted friend, or nominee, to manage his money. As discussed in the context of the Pictet Scheme, despite Mr Nasrallah's professed ignorance of why Mr Al Rajaan wanted a nominee, the reason was obvious: to conceal the true position, so that Mr Al Rajaan would not be accused of anything or (to use Mr Nasrallah's nice homophone used in his evidence) would not be "caught in court".

1274. Mr Guerin's CIP for Ozak referred to future receipts into the account as being commissions which would be "ventilées après réception"; i.e. broken down or split after receipt. The document does not identify what the split would be, or

where the commissions would go. However, it is clear that Mr Guerin knew that they were going somewhere else, and I have no doubt that Mr Guerin knew that they were destined for Mr Al Rajaan. There was, however, no reference to that on the CIP. There was certainly no reference to the fact that they were going to the Director General of Mr Nasrallah's "1 seul client" (i.e. only one client), the institution in the Gulf, which was referred to in the CIP. In my view, Mr Guerin deliberately avoided referring to Mr Al Rajaan. (At a later stage, in 2009, Mr Guerin prepared an updated CIP, described below. This gave very different, and false, information as to Ozak).

1275. Also in 1997, PIB was constituted and registered in Beirut in April, with Nadim recorded (in a letter to the Commercial Registrar in Beirut) as chairman of the board, general manager and sole signatory. In May 1997, Nadim left his employment at Paribas to run the brokerage business of PIB. On 11 May 1997, PIB opened an account at BEC (EFG account number 530303), with Nadim as the authorised signatory.

1276. In July 1997, Wynacre was incorporated in the BVI. Its account (542257) was opened in January 1998. The Form A, signed by the corporate director, identified Mr Nasrallah as the beneficial owner of the assets deposited at the bank. In 2010, an updated Form A identified Mr Nasrallah and Nadim as beneficial owners.

1277. As shown in the bar chart above, by 1997 monies were starting to flow through to Mr Al Rajaan via PIB. By 1998, and for the following 4 years, monies were also flowing through Ozak, as well as Phoenix and PIB. Monies started to flow through Wynacre in 2004.

1999

1278. In an email dated 28 June 1999, Mr Guerin provided information about the Phoenix and PIB accounts to his colleague Mr Martin-Achard, who had originally asked about a particular transfer:

> "The 030784 and 031743 accounts work together in our facility. These are the 2 billing company accounts of the father and son, who transfer after receiving their commissions - bank retrocessions - every month to their personal accounts with us 030754 for the father and 031542 for the son. In addition, they switch to Credit Suisse in Zurich and to Mirabaud in Geneva, because they don't want to keep everything with us. The father has 3 other accounts with us 699080-971022-031371- accounts over which the son has power.
>
> I have been working with them since 1979 and they are very serious.
>
> The father sells investment funds from AXA, Sarasin, CPR, Everest and many other institutions around the

> world. The son, on the other hand, only sells blocks of shares.
>
> The buyers are institutional investors from the Gulf. Some of them are former GIG customers. With this, the father generates USD 10 million per year and the son, who started later in his career, about USD 3 million per year.
>
> I've tried to get them to sell some of our funds, but on the one hand it doesn't fit with the investment philosophy of their buyers, and on the other hand they are very greedy on retros: 50pct..."

1279. This description was false, to Mr Guerin's knowledge, in a number of important respects. First, Mr Guerin knew that money was being transferred to Mr Al Rajaan, but he sought to portray the reason why Mr Nasrallah and Nadim were transferring monies away from EFG – to Credit Suisse and Mirabaud – as being for diversification; i.e. because they wanted to diversify their own assets. No mention was made of the fact that money was being transferred to Mr Al Rajaan. Secondly, Nadim was not selling blocks of shares. He was running a brokerage business, where his only client was the same client that his father had. Thirdly, Mr Guerin had no knowledge of any client other than PIFSS. Yet he sought to portray the investors as being more numerous. He referred to "institutional investors from the Gulf" and that "some" of them were former customers of Mr Guerin.

2000 - 2004

1280. The money flows in 2000 significantly increased, prior to falling back in the following years, and then rising again in 2004.

1281. In July 2004, Antheya, a Liechtenstein foundation, was established by a Liechtenstein service provider. Mr Nasrallah was listed as primary beneficiary, and Mona and Nadim as secondary beneficiaries. In due course, Antheya received very significant sums (just under USD 70 million) via Phoenix, and a more modest payment via Ozak.

1282. Mr Guerin was involved in the formation of Antheya. The board of trustees of Antheya enacted a regulation which provided in Article 6 that Mr Guerin would be the curator of Antheya. His function was to ensure the proper management of funds, and the application of the regulation. He could not be replaced by the trustees, but only by the present or future primary beneficiary. At the time of the formation of Antheya, this was Mr Nasrallah. An EFG account for Antheya was opened, also in July 2004. The Form A identified Mr Nasrallah as its beneficial owner. Mr Guerin was given power of management and administration over its account, and he was appointed to its board, also in July 2004. He remained on the board until 2012 when, as part of the steps taken following the start of the Swiss criminal investigation, he was replaced by Nadim.

1283. PIFSS submitted, and I agree, that Mr Guerin's involvement in the affairs of Antheya indicates that a considerable degree of trust existed between Mr Nasrallah and Mr Guerin, and that the degree of trust shows that Mr Guerin could not have been ignorant of how Mr Nasrallah was conducting his affairs. I think that it is most improbable that Mr Guerin would have had this involvement, in a foundation which was to receive very substantial monies from Phoenix, if he did not understand what was going on. It would have been far too risky to involve an honest banker in these roles in Antheya, since he or she may have asked difficult questions: for example, as to why Antheya was only receiving 35% of the monies that Phoenix was receiving.

1284. Also in 2004, there was an update to the Phoenix CIP by Mr Guerin. In response to the question: "What are the economic purposes of the account", Mr Guerin wrote: "Real Estate Investments and Stock Market Purchases". This was a false description of the purpose of the account. There was no reference to its use as an account to transfer large amounts of commissions to Mr Al Rajaan.

2005

1285. Mr Guerin promoted the idea of EFG using Phoenix as a possible route to obtaining investment by PIFSS in EFG's products. He wrote a Business Introducer Profile, describing Phoenix and Mr Nasrallah. In relation to the source of the business to be expected, he identified "One Public Institution in the Gulf". An agreement was signed by Phoenix and EFG, but no business eventuated.

2007

1286. Golgen was constituted by public deed in Panama, and it opened an account at EFG (533815). The Form A states that Mr Nasrallah was its beneficial owner. The document was signed by its President and Secretary, rather than by Mr Nasrallah. Mr Nasrallah's evidence was that this account was also operated for the benefit of Mr Al Rajaan. In his trial witness statement, he said that it had been opened for the purposes of making a personal investment on behalf of Mr Al Rajaan. The investment was in Abraaj, a private equity firm in Dubai which was seeking to acquire another business.

1287. I accept that Golgen's account was another nominee account, and that it was operated for the benefit of Mr Al Rajaan. The Form A, identifying Mr Nasrallah as the beneficial owner, was again false, to Mr Nasrallah's knowledge.

2008

1288. In January 2008, another Liechtenstein foundation, Thaxton, was established at the request of Mr Al Rajaan. Thaxton opened an account at EFG (534414). The Form A states that Mr Al Rajaan was its beneficial owner. Mr Guerin was granted a power of management and administration in respect of the account. The latter document was signed by Mr Al Rajaan. Thaxton's structure was almost identical to that of Mr Nasrallah's foundation, Antheya. The settlor for each of Antheya and Thaxton was Consilium Treuhand AG. The board of Thaxton shared directors with the board of Antheya: the directors of Antheya

were Mr Gerhard Meier and Dr Hans Eggenberger and Mr Guérin. The directors of Thaxton were Mr Meier and Dr Eggenberger.

1289. The transcriptions of calls involving Mr Guerin are available from 2008. However, the calls themselves reveal that Mr Guerin also used his mobile phone to speak on unrecorded lines. I discuss aspects of these transcripts below.

2009

1290. In July 2009, Mr Guerin prepared an updated CIP for Ozak. The original CIP, in 1997 (described above) had referred to the splitting of commissions. Mr Guerin must have considered that it was now too problematic to refer to this. His updated CIP contained falsehoods.

1291. Mr Guerin said that the account had been set up by Mr Nasrallah "with his son to receive various rents from Japan and fees from Dubai and Singapore on their family investments in private equity ventures". However, Ozak had nothing to do with rents from Japan, and fees were not being received on family investments in private equity ventures. Mr Nasrallah said in evidence that this was untrue: he said that he had not done any investment in Singapore or anywhere else.

1292. Mr Guerin went on to say that the Ozak account was "just a service account with no investments, except fiduciary deposits from time to time". Although there was reference to Mr Nasrallah selling funds "to Middle East investors against retrocessions from the issuers", there was no reference to what the Ozak account was really for: to pay commissions to Mr Al Rajaan on investments placed with PIFSS. This is one of the documents where, as Ms Bingham said in her closing submissions, Mr Guerin had lied about the purpose of various accounts.

1293. In October 2009, Mr Al Rajaan opened a personal account at EFG (536007). As previously described, the CIP written by Mr Guerin refers to Mr Al Rajaan as an important customer and a "relation" of Mr Guerin for the past 20 years. Mr Guerin studiously avoided, in quite a lengthy description of Mr Al Rajaan's work, any reference to his role at PIFSS.

2008 – April 2012 transcripts

1294. The clear picture which emerges from the call transcripts over this period can be summarised as follows. Mr Guerin and Mr Nasrallah were working together to channel secret commissions to Mr Al Rajaan. The relationship between the two men was extremely close. They were both well aware that what was happening was improper, and needed to be concealed. There is nothing in any transcript which suggests that Mr Nasrallah thought that Mr Al Rajaan was authorised to receive monies which were being channelled to him. Mr Guerin understood, as did Mr Nasrallah, that the impropriety of what was happening could give rise to problems with EFG's compliance department, and that they needed to exercise care – including by disguising the true position – to avoid such problems surfacing.

1295. This is illustrated by what was said in the following transcripts, and actions of Mr Guerin following these calls. The matters described below are illustrative, not exhaustive, and many more examples could be given.

1296. On 20 May 2011, Mr Nasrallah and Mr Guerin spoke about a transfer from Ozak. Having identified that there was € 2.92 million in Ozak's account, Mr Nasrallah instructed Mr Guerin to "do half and half. Bahamas and Singapore". This was, as both men knew, a reference to the accounts of Mr Al Rajaan's vehicles: Chulani, with an account at Pictet Bahamas, and Dryden, a Singapore company with an account at Pictet Singapore. The conversation then continued:

> "**Guerin:** Yeah. Why doesn't he leave a bit more here? We're going through Golgen again here?
>
> **Nasrallah**: Well he's getting on my nerves, what do you expect me to say?
>
> …
>
> He's, he's, he's really an … idiot
>
> **Guerin**: Really annoying, no but it's really annoying, really annoying, it's really annoying because one day we'll have a problem, we will … will not be able to do it anymore.
>
> **Nasrallah**: I know, I know, I know.
>
> **Guerin**: No no it's, it's […] too obvious. [...] I'll do it on Monday alright? I do half and half. 2 million 920 divided by two in euros, half and half.
>
> **Nasrallah**: No no keep, keep 120."

1297. The conversation shows that Mr Guerin was taking instructions from Mr Nasrallah as to the transfer of money from an account in his name to a third party. He knew that the third party was Mr Al Rajaan. He could see that the transfers, were problematic. So too could Mr Nasrallah, who concurred with Mr Guerin's view that one day they would have a problem.

1298. The conversation ended with agreement that there would be two transfers, of € 1.4 million each. Mr Guerin then, as indicated in the call, actioned those transfers on 23 May 2011. It is not clear why the conversation refers to money in the Ozak account; since the transfers which were in due course made (see below) were from Phoenix's account. However, whether one is looking at Phoenix or Ozak, it is apparent that Mr Guerin knew that the accounts were being used for the purpose of making transfers to Mr Al Rajaan.

1299. In accordance with EFG's compliance procedures, it was necessary for approvals to be obtained from a second signatory for transfers of that size. Mr Guerin drew up the necessary authorisation form, and was its first signatory. The transfer form, relating to the € 1.4 million for Dryden, falsely identified the

"beneficial relationship" as being "same BP". This was a typographical error for "same BO", in other words "same beneficial owner" which appears on many similar documents drawn up by Mr Guerin. The "transfer reason" was stated as: "personal treasury needs". Mr Guerin knew, however, that this was not a transfer from one beneficial owner to the same beneficial owner. The transfer was from Phoenix, which was (certainly from EFG's perspective) beneficially owned by Mr Nasrallah. The transferee was, as Mr Guerin knew, Mr Al Rajaan. This was not a transfer for the purposes of Mr Nasrallah's personal needs. It is one of many examples where Mr Guerin created similar documents with false information in order to disguise what was happening.

1300. The transfer form for the transfer of € 1.4 million to be sent to the Bahamas did not specifically identify Chulani. Instead, Mr Guerin identified the beneficiary as "one client". The relationship was again falsely represented as "same BO", and the transfer reason falsely represented as "personal treasury needs".

1301. Similar themes can be seen in a conversation that took place shortly afterwards on 6 June 2011. The conversation started by establishing that there was around € 2.4 million in Phoenix's account. Mr Nasrallah then instructed Mr Guerin to send € 1.4 million to the Bahamas, and € 1 million to Singapore. Mr Guerin then told Mr Nasrallah that:

> "soon we won't be able to do this anymore … Money coming in, going out, it's all over. It's … they call that bathtub accounts, we won't be able to do it anymore … In my opinion, we'll no longer be able to do it, no bank will do it anymore."

1302. Mr Nasrallah appreciates the difficulty, and asked "how long do we have to keep them". Mr Guerin replied by saying that they would have to keep the monies for several months, "even put them for 48 hours or make an investment or something because these bathtub accounts, that will be over … or he puts a bit more on ... Golge[n]". The conversation then includes the identification of the accounts which were in Mr Nasrallah's name: Phoenix, Ozak, Golgen and Wynacre. Mr Nasrallah then said that Mr Guerin would receive money in Golgen, in Swiss Francs. Mr Guerin said that this was "very good".

1303. The conversation shows that Mr Guerin fully understood that bathtub accounts – which were being filled and emptied in a short space of time – were being used for the transfer of monies to Mr Al Rajaan. He thought that steps needed to be taken by Mr Al Rajaan to change his ways, so that questions would not be asked about these transfers and to give them an appearance of legitimacy: for example, keeping the money for several months, or investing it. His suggestions included putting more money into Golgen. Mr Guerin there recognised that Golgen was in reality Mr Al Rajaan's account, albeit that he also knew (as shown by the later parts of the conversation) that Golgen was in Mr Nasrallah's name.

1304. Following that conversation, Mr Guerin prepared and signed the transfer forms for the two transfers. As with the earlier transfers, the Bahamas transfer did not identify Chulani as the beneficiary, but instead referred to "one client". Both

forms again falsely referred to "same BO" as the beneficial relationship, and "Personal Treasury Needs" as the reason for the transfer.

1305. A few months later, on 9 September 2011, there was a conversation about the amount of money in Ozak's account. Mr Nasrallah instructed the transfer of € 1,205,000 to Singapore. Mr Guerin knew in these conversations which transferee account was being referred to: he never asked for account details. On 9 September 2011, he prepared and signed the transfer authorisation form, falsely identifying the beneficiary relationship as the "same ADE", and the reason for the transfer as "investment". The money was sent to Dryden, as with the other transfers described above.

1306. There can be no doubt that Mr Guerin understood that these Ozak monies were going to Mr Al Rajaan, and that he understood throughout that the purpose of the Ozak account was to route monies to Mr Al Rajaan. Indeed, in earlier years, Mr Guerin appears to have been less cautious about the reasons for the transfers from Ozak. Some transfer authorisation forms in 2007 refer to "redistribution of commissions". However, at some stage thereafter, Mr Guerin recognised that this needed to be disguised. Thus, in 2009, he prepared the updated Ozak CIP form which I have already described.

1307. The calls also illustrate that Mr Nasrallah recognised that Mr Al Rajaan was the decision-maker at PIFSS; that the commissions that were being paid to Mr Al Rajaan were the reason for the investments being made; and that these commissions came at a cost to PIFSS.

1308. Thus, in a conversation on 7 May 2010, Mr Nasrallah described the person who had bought Sigma (one of the fund managers that was paying Phoenix) as a "pig". The background was that Sigma Asset Management, which was previously owned and run by Mr Hugues Lamotte and Mr Patrick Stevenson, had been taken over by Sciens Capital Management in 2008. The new CEO, Mr Rigas, had not signed an introducer agreement with Mr Nasrallah for some two years. Mr Nasrallah explained to Mr Guerin that no contract had been signed; that he had warned Mr Al Rajaan that "this one could be a phoney"; and that "Fahad" was now withdrawing gradually and putting money elsewhere. It seems that one reason why Mr Nasrallah regarded Mr Rigas as a phoney was his unwillingness to sign an agreement which would result in the payment of commissions to Mr Nasrallah, and that this in turn led to Mr Al Rajaan withdrawing PIFSS' investments from Sciens.

1309. In my view, this episode illustrates that Mr Nasrallah knew that the payment of commissions was highly influential, to say the least, in Mr Al Rajaan's willingness to commit PIFSS to investments. I reject any suggestion that Mr Nasrallah was unaware that the payment of secret commission to Mr Al Rajaan would influence Mr Al Rajaan's decisions as to which investments PIFSS should make.

1310. The overriding importance of commissions is also apparent from a conversation with Mr Guerin on 29 October 2010. Mr Nasrallah railed at the conduct of his former employer, Paribas, calling them bastards, stupid morons and worse, and saying that Paribas was no longer what it was. This was because they had gone

to "our favourite client": i.e. Mr Al Rajaan. They had proposed a transfer of assets from one fund to another, saying: "You'll pay less commissions". Mr Nasrallah complained that Mr Al Rajaan had said "yes" to this idea. Mr Nasrallah was clearly appalled at what had happened, notwithstanding that PIFSS would have benefited from their investment being subject to lower commission payments. Mr Nasrallah was also, clearly, surprised at Mr Al Rajaan's behaviour; because it was contrary to the way that matters had generally proceeded, with Mr Al Rajaan choosing investments which would generate high commissions that they could share, rather than reducing the monies that they could receive.

1311. The conversation demonstrates the falsity of Mr Nasrallah's evidence, in cross-examination, that "I always tried to bring to Mr Al Rajaan a reduced commission for his investment in these funds". Moreover, Mr Nasrallah's evidence was that he had no role once he had made the introduction of a fund manager to Mr Al Rajaan. Accordingly, it is (as Mr Ritchie submitted) impossible to see how he could have negotiated reduced commissions. There is no documentary evidence of him ever having done so.

The events of May 2012 onwards

1312. Mr Al Rajaan learnt of the Swiss criminal investigation in May 2012. A number of relevant transcribed calls occurred around this period. I will describe some of these below. Before doing so, I will briefly describe the account closures. The broad picture is that, with Mr Guerin's assistance, Mr Nasrallah embarked upon a process of removing assets from Switzerland into jurisdictions where they would be more difficult to locate, and also sought to conceal what had happened in the past. Mr Al Rajaan did the same. The amount transferred out of Switzerland, with Mr Guerin's assistance, was in the region of USD 31 million.

1313. There was thus considerable activity in terms of account closures at EFG. On 9 May 2012, Mr Al Rajaan instructed EFG to give instructions to dissolve Thaxton, and close Thaxton's account at EFG. On 10 May, Mr Nasrallah instructed Mr Guerin to close Golgen's account at EFG. On 11 May, Mr Guerin approved the account closing form for Mr Al Rajaan's personal account. On 16 May, Mr Nasrallah requested the closure of Phoenix's account, Ozak's account, and his personal account at EFG. On the same day, Nadim requested the closure of PIB's account and his personal account.

1314. Steps were also taken to change the position in relation to Antheya. On 14 June, Nadim was identified, on an updated Form A for Antheya's account at EFG, as the beneficial owner of Antheya. Antheya's account at EFG remained open until 2016. Another account which survived the May 2012 closures was Wynacre, which was closed in October 2015.

1315. PIFSS relied upon this sequence of events, and the call transcripts from this period, in support of its case that Mr Al Rajaan, Mr Nasrallah, Nadim and Mr Guerin each knew that the arrangements that they had been operating were unlawful. I am not concerned, in this trial, to make findings against Nadim, who is not party to the proceedings: I address this in more detail below, in the context of PIB. However, as far as the other 3 individuals are concerned, I accept PIFSS'

submissions without hesitation. Indeed, although PIFSS' case in relation to these events was spelt out in detail in its written closing, and also relied upon in their oral closing, there was scarcely any reasoned argument by Mr Nasrallah, still less by Mr Al Rajaan, as to why these conclusions should not be drawn. Indeed, Ms Bingham acknowledged the significance of the events of May 2012, and the transcripts, as evidencing Mr Guerin's assistance in impropriety.

1316. On 7 May 2012, Mr Al Rajaan called Mr Guerin, on an unrecorded line, to instruct him to close all option positions on the Thaxton account. He also instructed Fransabank in Lebanon to send details of his personal account for the purposes of transferring proceeds from his EFG account.

1317. On the same morning, Mr Nasrallah and Mr Guerin spoke. The brief transcript of the call has Mr Nasrallah asking whether Mr Guerin was on his mobile, or was calling from the bank. When learning it was the latter, Mr Nasrallah told him to call him from his mobile. This shows clearly, notwithstanding Mr Nasrallah's denials in evidence, that Mr Nasrallah knew that calls on the bank's phone system were recorded.

1318. Later that day, there is a brief recorded call between Mr Nasrallah and Ms Likhotal, in which Mr Nasrallah gave instructions for the transfer of € 340,000 and USD 790,000 from Phoenix to Antheya. It is apparent from the call transcript that, at the same time, Mr Nasrallah was speaking to Mr Guerin on an unrecorded line. At this time, Mr Nasrallah and Nadim thought that Antheya was a safe haven: in a call on 11 May, Mr Guerin advised that it was "untouchable".

1319. In the afternoon of 7 May 2012, there was a call between Nadim and Mr Guerin to which I have already referred: see the Pictet Scheme above. It was the call in which Nadim described his father as freaking out. It was also the call in which Nadim said they could do what they wanted with their money, and "it's the other one who shouldn't accept it". Mr Guerin's response to that comment is noteworthy: "Well, that's it, precisely. Precisely". He was therefore concurring with Nadim's view that it was Mr Al Rajaan who should not have been accepting the money. Clearly, neither man believed that Mr Al Rajaan had been authorised to do so. They both recognised that he had acted wrongly.

1320. The call also involves a discussion about transfers which had been made in the past. Nadim must have had in mind the transfers which had been made in connection with PIB: the direct transfers from PIB to Mr Al Rajaan's vehicles, and the indirect transfers from account 530249, as shown on the PIB spidergram. Nadim was concerned about traceability. The conversation begins:

> "**Nadim**: Tell me, back in the days when we made account to account transfers, without, without mentioning the ordering client … can we trace such things or not."

Mr Guerin responded by saying that they could not be traced, because there was no ordering client's number. However, that was "back in the days", and things were now much harder.

1321. This discussion of how things happened "back in the days", and whether transfers could be traced, is relevant to Mr Guerin's state of mind "back in the days". The transfers which they were recalling must have included the transfers made by PIB to Overton (in 1997 – 2002), and Intermac (2004 – 2007), both of them being directly to Al Rajaan vehicles at Banque Mirabaud. The Swiss investigation, which was underway, had started with Banque Mirabaud and both men would have been aware of that. Nadim's concern was that Banque Mirabaud's documents, which the prosecutor was looking at, might lead to his identification as the transferor. Mr Guerin was providing reassurance that this would not happen; essentially because neither the name of the client who had given the order, nor the account number, would be on the Mirabaud documents.

1322. Those Banque Mirabaud transfers were made at the start of the PIB relationship, and therefore in the period where EFG argued that PIFSS had not proved its case as to Mr Guerin's complicity. In the call, however, Mr Guerin was recalling the steps that he had taken, when these transfers were being made from 1997 onwards, to ensure that the transfers could not be traced back to PIB. That is consistent with the use of the "one client" designation to which I referred when looking at the detail of the 15 January 1998 transfer by Phoenix to Kitaro Trust.

1323. The conversation then turned to Nadim asking about whether he could transfer money from his account to Antheya. Mr Guerin initially said that it was complicated, but then said that it could be done in a click but that there was no urgency. There then followed the discussion about how worried Mr Nasrallah was, and how he was freaking out.

1324. A short while later, Mr Nasrallah called Mr Guerin to ask whether it was better that he should return the money he had received in Ozak. Mr Guerin said that this would look weird. The fact that Mr Nasrallah was thinking about returning that money is yet a further indication that he did not believe, contrary to the case advanced in these proceedings, that the Ozak payments were all authorised.

1325. On the following day, 8 May, various instructions for transfers were made. Mr Al Rajaan instructed the sale of equities held in Thaxton. Mr Nasrallah instructed the transfer of USD 1.5 million from Antheya to his account in Beirut. A portfolio of shares in account 530249, worth around € 4.8 million, was transferred to Antheya. In an email to Nadim, Mr Guerin advised him to keep his personal account open. Mr Guerin's reason was that this would assist in concealment of another account:

> "it's good to keep it to make OUT transfers where you will have to give your name. That way we don't reveal the other. The same goes for IN transfers. It will serve as a passage account."

1326. On the following days, there were instructions from Mr Nasrallah and Mr Al Rajaan for further transfers out to Lebanese banks.

1327. On 10 May, Mr Guerin filed an internal report on a dinner meeting with Mr Al Rajaan. This gave an explanation for the closure of Mr Al Rajaan's accounts:

> "Unfortunately as his entire family do not trust the swiss and european banks, they have decide to move their money to Lebanon. Their fears is that Kuwait will be the next arab spring after Bahrein. And a bit later Qatar and the Emirates. All the rich and ultra rich families are afraid that the swiss and european governments block their assets unilaterally, and they feel safer in an arab country to bank.
>
> He signed all the orders to close his accounts and transfer the money.
>
> This is unfortunate, thanks to the swiss government policy who scare our large non swiss customers."

This explanation was entirely false. The reason for the account closures was the Swiss criminal investigation.

1328. At this stage in the story, the Nasrallahs had not given instructions for their various accounts to be closed, save for Golgen. Indeed, on 11 May, there was a discussion between Mr Nasrallah and Mr Guerin about Ozak, and it was decided not to close that account, because further funds were going to be received.

1329. However, as PIFSS submitted, in mid-May the Nasrallahs became increasingly concerned about the possibility that the Swiss investigation may widen to include them. They therefore requested closure of their accounts at EFG, as well as the removal of Mr Nasrallah from Antheya – no doubt in order to try to preserve it as a safe haven. Mr Guerin actioned the requests made of him.

1330. PIFSS also submitted that, in the face of a Swiss criminal investigation, Mr Guerin's conduct in assisting corrupt funds to be transferred out of the jurisdiction, while concealing the reasons for the transfers and protecting those responsible for corruption and money-laundering, was consciously reprehensible. I agree. It is one of many reasons why I consider that Mr Guerin was, throughout, acting dishonestly in relation to the affairs of Mr Nasrallah and Mr Al Rajaan.

1331. On 14 May 2012, Mr Nasrallah told Mr Guerin that he was going to close the Phoenix account at EFG. Mr Guerin told Mr Nasrallah that monies had been transferred away from personal accounts, but not from Antheya. He said that since it was a foundation, it could not be seized.

1332. On 15 May 2012, Mr Nasrallah told Ms Beltrametti that he would send instructions to close his and Nadim's personal accounts, along with those of Phoenix and PIB. He said that he needed to cut ties between the accounts and Antheya, in order to preserve the foundation. He had discussed the position with an attorney friend, and understood that there would be no contagion. On the following day, Mr Nasrallah wrote to instruct the closure of the accounts of Phoenix, Ozak and account 530109. He gave a false reason for closure, namely "conjoncture politique", the political situation. On the same day, Nadim wrote in similar terms to close the PIB account and account 530249.

1333. On 18 May, Mr Nasrallah e-mailed Cheyne to re-direct Phoenix commissions to an account at a bank in Lebanon, Audi Saradar. PIFSS points out that no e-mails have been disclosed by Mr Nasrallah prior to this date, and that it is to be inferred that it was shortly before this that he conducted a document purge. I think that it is highly probable that this is what happened. It is clear from the conversation on 28 September 2012 (see below) that Mr Nasrallah was keen to destroy documents.

1334. On 21 May, Mr Guerin returned a call from Dr Eggenberger, a member of the board of trustees of Antheya. Dr Eggenberger wanted to understand the large incoming transfers to Antheya. Mr Guerin's false explanation was that this was to do with inheritance planning.

1335. On 22 May, Mr Nasrallah spoke to Mr Guerin, saying that he was now scared to send money. They discussed using the accounts of grandchildren, and this was done on the following day when a substantial payment came in from Cheyne.

1336. On 23 May, there was a call involving Mr Guerin, Mr Nasrallah and Nadim. Nadim was pressing for the accounts to be closed quickly: they were "worried because it's a bit of a shitty story". Mr Nasrallah had, clearly, not yet alighted upon his argument that everything was authorised and honest. There was discussion about removing Mr Nasrallah from Antheya. Mr Guerin then spoke to Mr Meier, another member of Antheya's board of trustees. He discussed Mr Nasrallah wanting to get out of the foundation because he was sick – another falsehood.

1337. Over the following days and weeks, Mr Guerin signed account closing forms with various untrue statements as to why accounts were being closed. Mr Guerin was required, in EFG's form for closing an account, to specify the reason for closing. In none of the forms did Mr Guerin identify the "political situation" which had been given by Mr Nasrallah and Nadim in their closing instructions. Rather, he gave different, deliberately false, explanations for closure. These were as follows.

PIB: Client retired and does not need his business account any more.

Account 530249: Client retired. Does not need account any more.

Phoenix: Concentration of assets on one account.

Account 530109: Concentration of assets on one account.

Golgen: Client is retiring.

Ozak: Client retired.

Thaxton: Client quits Switzerland.

1338. Mr Guerin knew that none of these reasons was true. Neither Nadim nor Mr Nasrallah had told him that they were retiring, and indeed Mr Guerin was hoping that they would bring their business back to him. There is also nothing

to indicate that Mr Al Rajaan was quitting Switzerland: at this time, he maintained his home there.

1339. By early June 2012, Mr Al Rajaan's suspension as Director General of PIFSS (on 21 May 2012) was being reported. This seems to have increased, or at least revived, Mr Nasrallah's panic. In a call on 7 June 2012, Nadim referred to them "panicking a little". On 14 June 2012, Nadim referred to Mr Nasrallah being worried enormously that there "would be names". On 15 June 2012, Nadim described his father having heard something yesterday, and that he was freaking out. On 22 June 2012, Mr Guerin described Mr Nasrallah as being "a raging madman, he's like a cat on a hot tin roof but he's mixing everything up". In that conversation, Nadim was asking whether the accounts of Mr Nasrallah's grandchildren could be seized in the event of an investigation.

1340. By 27 June 2012, Mr Nasrallah was calmer. In his conversation with Mr Guerin on that day, he was told that Mr Guerin looked every day for news, but that there was nothing at all. Mr Nasrallah said: so much the better. Later in that conversation, Mr Nasrallah told Mr Guerin that Mr Al Rajaan had told him that "they don't have anything against him, in Kuwait, absolutely nothing". I have already referred to this in the context of the Pictet Scheme, and I agree with PIFSS that it is a significant comment. The essence of the various schemes had been to conceal what was happening from PIFSS in Kuwait. Here, Mr Al Rajaan was saying that there was nothing against him there, and Mr Nasrallah was clearly very pleased that this was the position. Neither Mr Al Rajaan nor Mr Nasrallah was saying that there was no problem because everything had been authorised. Quite the contrary: Mr Al Rajaan was saying that there was no evidence against him in Kuwait, not that there was good evidence there that he had been authorised.

1341. The conversation on that day also shows that Mr Guerin was very keen for funds to be returned to EFG: "we'll wait a few months, and then when it calms down, you're going to send it all back to me". He then said that they would "set up other stuff". Mr Nasrallah agreed. Mr Guerin responded: "Otherwise, I don't get any bonus next year, I'm at minimum wage". They also discussed being more cautious in the future, with Mr Nasrallah saying that Mr Al Rajaan had "got us scared".

1342. Those comments are also significant. They indicate, contrary to some of the submissions made by Ms Bingham, that Mr Guerin had a financial motive to obtain and retain the business of Mr Nasrallah and Mr Al Rajaan. They also show that Mr Guerin was a willing participant in what had been happening. He was not someone who had, despite his better nature, been unfortunately caught up in the corruption and then been unable to extricate himself from it. Here, despite all that had happened over the previous weeks, and the Swiss criminal investigation, he was hoping to resume the prior business relationship with Mr Nasrallah and Mr Al Rajaan. Mr Guerin was not breathing a sigh of relief that those clients were departing. Indeed, in a later call on 20 September 2012, Mr Guerin again showed that he was keen to get the business back. That sentiment was reiterated in March 2013, when Mr Nasrallah said that he would repatriate everything once the storm blew over, and Mr Guerin said that was good:

because it had cost him USD 100,000 on his bonus that year. These matters support my conclusion that Mr Guerin was a willing participant from the start.

1343. This conversation, and indeed the events of the previous weeks, also serve to demonstrate the falsity of Mr Nasrallah's case that he had somehow been trapped into helping Mr Amouzegar to get commissions to Mr Al Rajaan. There is nothing in the documents that indicates that, despite the panic over the previous weeks engendered by the Swiss investigation, Mr Nasrallah thought it necessary to distance himself from Mr Al Rajaan in any way. On the contrary, in early August, he sent letters to a number of fund managers, on behalf of Phoenix, requesting them to pay their commissions to an account at Lombard Odier in the Bahamas. And in 2013, he assisted Mr Al Rajaan in relation to setting up the Pensée Foundation, which was to receive commissions derived from Mr Amouzegar's Zetland companies.

1344. Concern seems to have returned in late September. In a call on 28 September 2012, Mr Nasrallah asked Mr Guerin to destroy envelopes which had been in the EFG safe. Mr Guerin said that he did not know what was in the envelopes. Mr Nasrallah referred in the conversation to the envelopes containing contracts with Ozak. However, he also said that he wanted to destroy everything that was in the safe, and in that context referred as well to Phoenix and Golgen. In his evidence, Mr Nasrallah denied giving any such instruction. The transcript proves otherwise. It appears that Mr Guerin did destroy the envelopes: the documents to which I was referred at trial did not include contracts with Ozak or Golgen, save for one contract (discussed below) between Abraaj and Ozak. That appears to have survived because Ms Beltrametti had been given a copy of it. The documents in another envelope have also survived: that containing the two (false) contracts with Bordertown discussed in the context of the Pictet Scheme. It is likely, in my view, that the destroyed envelopes contained further false contracts, signed by Mr Nasrallah, from which in September 2012 he wanted to distance himself.

1345. At around this time, Mr Nasrallah was unhappy with Mr Al Rajaan. In a call on 28 September, he described him as a "jerk". Mr Nasrallah said that he had "made him a whole programme", made by serious people. In a call in October, he was describing Mr Al Rajaan as a scumbag. A call with Ms Likhotal in December indicates that Mr Nasrallah was still worried about his accounts in Switzerland being investigated.

1346. Viewing these events in the round, I agree with PIFSS that the factual position can be summarised as follows. On learning of the Swiss investigation:

i) Mr Al Rajaan closed down the Thaxton account because he knew that it was used to receive the proceeds of unlawful secret commissions which were of the same nature as those being investigated. He knew, as he had always known, that they were unlawful and not authorised;

ii) Mr Nasrallah and Nadim were worried and sought to close down various EFG accounts which they had opened, and move funds into Antheya. Antheya was viewed as a safe haven, and they understood that this would avoid contagion. They also moved funds offshore. Mr Nasrallah knew

that these accounts had also been the recipients of unlawful secret commissions.

iii) Mr Guerin assisted them in closing the relevant accounts, making transfers with false or misleading reasons to avoid scrutiny, and destroying documents at the request of Mr Nasrallah. This was because he knew that they had been the recipients of unlawful secret commissions.

1347. I also agree with PIFSS that the reactions of Mr Nasrallah and Mr Guerin were not the reactions of honest men of finance, who come to learn that they are dealing with assets of a man who was subject to criminal investigation into allegations of corruption. Rather, they are the reactions of people who were dishonest and who knew all along that the acts of Mr Al Rajaan were corrupt and criminal. Thus, rather than freeze the affected funds, they took steps to dissipate them.

1348. Having set out the facts, I now return to the areas of dispute between the parties.

J3: EFG's argument in relation to Mr Guerin

1349. As already explained, EFG did not advance a positive case as to Mr Guerin's knowledge, intentions and honesty in connection with his participation in the events described above. Nor did EFG engage, to any significant extent, with the various aspects of claim advanced: i.e. Phoenix, PIB, Ozak, Wynacre, and Golgen. Their main point was that I should look with particular care at the early period, submitting that PIFSS had not proved its case as to Mr Guerin's impropriety for the period prior to around 2008/2009. They referred to a handful of documents, including one call transcript, which they submitted were indicative of a lack of knowledge on the part of Mr Guerin.

1350. I do not accept that PIFSS has not proved its case. Mr Guerin was, on the basis of the facts described above, a thoroughly dishonest man in his dealings with Mr Nasrallah and Mr Al Rajaan. I do not consider that there is anything in the evidence which suggests that he was initially honest, but then either gradually or as a result of some transformative event, became dishonest.

1351. The call transcripts show, clearly in my view, that he was motivated by the financial benefits, in terms of bonuses, that he would enjoy from obtaining substantial business from Mr Nasrallah and Mr Al Rajaan. That business would also bring other benefits. It would no doubt contribute to his being perceived as successful within EFG, and indeed he received a number of promotions when at BEC and then EFG. These motivations were present throughout the period, and did not simply begin in 2008/2009. Furthermore, many individuals are also attracted to rich people, or powerful people, and it is likely that Mr Guerin was such an individual. In one of the call transcripts, he describes his regular visits to Mr Al Rajaan in Geneva, bringing him croissants and the newspapers in the morning, and staying for a discussion. These various motivations were present throughout the relationship.

1352. Had he attended for cross-examination, and sought to defend his conduct – for example by maintaining that he did not know that Mr Nasrallah was a front for Mr Al Rajaan – it is obvious that any such defence would not have survived cross-examination. Ms Bingham acknowledged that EFG could never have presented Mr Guerin as a witness of truth. She referred to the fact that he lied repeatedly, in the fund transfer forms, in his exchanges with compliance, and at least in the later period, in the CIPs. Her list can be supplemented with other documents, for example the false statements in the account closing forms in May/June 2012.

1353. I do not accept that it is only in the later period that there are falsehoods in the CIPs or statements to compliance. I have referred (Section J2 above), for example, to what was said in 1999 about the Phoenix and PIB accounts, and also what was said in 2004 about the Phoenix account. Furthermore, there is more than sufficient evidence to show that Mr Guerin knew, throughout, that Mr Nasrallah was sharing commissions with Mr Al Rajaan, as the Director-General of his only client. But this was never explained in the CIPs.

1354. I also consider that the obvious reason why Mr Guerin did not attend the trial to defend his position is that he recognised that he had no case that would stand up to scrutiny. It is appropriate to draw an adverse inference against Mr Guerin because of his non-attendance and failure to give evidence. I do not accept that Mr Guerin's age, alleged ill-health (as to which there is no medical evidence) or lack of funding, provides a reason why no inference should be drawn.

1355. Nor do I accept Ms Bingham's point that Mr Guerin's absence is rationally and sufficiently explained by the fact that he has no answer to PIFSS' case in relation to the period 2008/2009 onwards, and that the resulting claim for that period would be sufficient to wipe him out financially. I agree that he has no answer to that claim, but it does not follow that the adverse inference from his non-attendance should be confined to that period. There is no evidence which suggests that the reason for his non-attendance was related to the later time period. Mr Guerin has himself never advanced a case that he was only party to corruption after some particular date (e.g. 2008 or 2009), having been an honest man beforehand. That cannot be found in his original defence. His case was a denial that he had done anything wrong, at any stage. In my view, it is appropriate to draw an adverse inference, from his non-attendance, that no part of that case would have stood up to scrutiny.

1356. That said, the drawing of an adverse inference is a long way from being a decisive point in the present case, where the weight of evidence in any event shows Mr Guerin's participation in impropriety throughout. Mr Ritchie submitted that, particularly when looking at individual documents which were said by EFG to point away from a conclusion of Mr Guerin's complicity in the earlier period, it was important to keep in mind the whole picture. I agree.

1357. That whole picture includes, to summarise matters to which I have referred: Mr Guerin had known Mr Nasrallah and indeed Mr Al Rajaan for many years before 1995, when he joined BEC; Mr Guerin was dealing with Mr Nasrallah on a regular basis, with some evidence that they spoke every day; he knew the details of the accounts to which monies were being paid, and from which the monies

were being paid; he knew that Mr Nasrallah was sharing commissions, and that his only client was PIFSS; there was clearly considerable trust, as well as friendship, between Mr Guerin and Mr Nasrallah, as evidenced by Mr Guerin's appointments in 2004 in connection with Antheya; there was also similar trust by Mr Al Rajaan, as evidenced by Mr Guerin's appointments in connection with Thaxton in 2008, at the moment when EFG's banking relationship with Mr Al Rajaan began – it was not as though a period of time was required for Mr Al Rajaan's trust of Mr Guerin to develop; Mr Guerin lied repeatedly in EFG's internal documents such as CIPs and bank authorisation forms; he lied when the accounts were closed; he did whatever he could to assist Mr Nasrallah and Mr Al Rajaan in 2012, including sending large sums of money to other jurisdictions, when he knew about the Swiss investigation into corruption; he has never advanced a case that he was initially honest but became corrupted at a particular point in time; there is no evidence of any transformative event.

1358. All of these matters should also be seen in the context of a wider picture of corrupt arrangements being made to enable Mr Al Rajaan to receive secret commissions, with false documents put in place to conceal the true state of affairs. I agree with Mr Ritchie that, for the schemes to work, there needed to be "tame bankers", who were prepared to operate the system. The main participants, Mr Al Rajaan, Mr Nasrallah and Mr Amouzegar, could not afford in this system to have an honest banker who could at any time blow the whistle. That might result in a loss of control and the authorities becoming involved. It was a risk that could not be run. I have no doubt that Mr Guerin was, and was known from the start to be, a tame banker who could be trusted to facilitate the arrangements. It is, in my view, no coincidence that there were so many accounts of the Nasrallah family at EFG which were opened with the assistance of Mr Guerin, and that so much money flowed through them.

1359. Against this background, I consider that PIFSS has proved its case as to Mr Guerin's participation in impropriety throughout. Furthermore, Mr Nasrallah's evidence, in his witness statement, was that Mr Guerin did know what was going on, including that the monies were going to Mr Al Rajaan. Although Mr Nasrallah was, generally speaking, an unreliable witness, that does not mean that every aspect of his evidence should be rejected. His evidence as to the knowledge and participation of Mr Guerin is, in my view, consistent with the other objective evidence summarised above, and the inherent probabilities. It is reinforced by Mr Guerin's failure to attend the trial.

1360. Another reason for accepting that aspect of Mr Nasrallah's evidence is that EFG was unable to advance a positive case that it was wrong. Thus, although Mr Nasrallah was cross-examined by Ms Bingham for EFG, he was not challenged on his evidence as to Mr Guerin's knowledge and participation. Although, in their closing submissions, EFG relied upon a small number of documents, now in support of an argument that PIFSS has failed to prove its case, none were put to Mr Nasrallah.

1361. In any event, I did not consider that any of the documents, to which EFG referred in their written closing, were of any weight in counteracting the conclusions which I have reached.

1362. First, EFG referred to the fact that sealed envelopes were given to Mr Guerin, and that Mr Guerin said – in the call transcript where Mr Nasrallah asked for them to be destroyed – that he had not opened them. In my view, this only shows that there were certain documents which Mr Nasrallah wanted to be kept securely. It is of no weight in demonstrating that Mr Guerin had no knowledge of what was happening in relation to the fund flows.

1363. Secondly, EFG submitted that the initial fund flows to Mr Al Rajaan or for his benefit were limited. They referred to various bills relating to interior decoration, gardening, jewellery and hotel stays which were settled using funds in Mr Nasrallah's account at EFG. They contrast this with later evidence, derived from call transcripts, of payments to a mistress of Mr Al Rajaan.

1364. I did not consider that there was any force in this submission. The submission focuses only on specific payments for goods and services, from Mr Nasrallah's EFG accounts, which can be identified as being for Mr Al Rajaan. It does not take into account the fund flows to the bank accounts of Mr Al Rajaan's entities elsewhere: for example, the payment in January 1998 to Kitaro Trust, or the payments from PIB to Intermac and Overton "back in the days". Furthermore, the fact that other payments were being made for the benefit of Mr Al Rajaan, such as for his interior decoration, is not a positive point in favour of an argument that Mr Guerin did not knowingly participate in impropriety. In fact, the other payments are just further evidence of the fact that Mr Nasrallah's accounts were there for the purpose of benefiting Mr Al Rajaan.

1365. Thirdly, it was submitted that there are "hints" in the call transcripts that Mr Guerin's motivation was to maintain confidentiality and discretion over his clients' affairs, mindful that some overseas clients sought to avoid tax by opening accounts in Switzerland. I do not see how these "hints" are of any significance when considering – in the context of whether PIFSS has proved its case – the weight of evidence as a whole, including the fact that Mr Guerin has given no evidence that this was his only motivation. Furthermore, the alleged desire to maintain confidentiality is unconvincing in circumstances where the call transcripts evidence Mr Guerin freely discussing, with Mr Nasrallah, the conduct and business of Mr Al Rajaan.

1366. Fourth, EFG refer to the "elliptical" transcript discussions. They submit that some conversations cannot readily be explained if Mr Guerin was "in the know" as to the impropriety of Mr Nasrallah's arrangements. An example given, in their written closing, is a discussion about how the VISA card organisation was becoming more annoying, accusing a man of money laundering when all he had done is to use a card to withdraw money. I do not consider that this point, as to how VISA was allegedly acting, is of any weight.

1367. Another transcript relied upon by EFG is dated 13 August 2009. The background is that, as shown by a transcript on the previous day, a very large sum of money (USD 5.8 million) had come into Ozak from a fund manager, Abraaj. Mr Guerin told Mr Nasrallah to "tell him not to withdraw it right away. Otherwise there will be trouble". Mr Nasrallah was surprised at the amount, and told Mr Guerin to "look carefully". Mr Guerin confirmed that this was the

amount. When Mr Nasrallah suggested that it should be kept for 2 months, Mr Guerin said: "at least".

1368. The 12 August transcript shows, as EFG acknowledged, that at this point in time, Mr Guerin knew that Mr Nasrallah was fronting to some extent for Mr Al Rajaan. In my view, it shows that both men regarded this money paid to Ozak as Mr Al Rajaan's. It also shows Mr Guerin wanting withdrawal of the money to be delayed. This was in order to avoid questions being asked internally, and it was an aspect of the steps taken by Mr Guerin to conceal the fact that money was going to Mr Al Rajaan. There are a number of call transcripts where Mr Guerin expresses similar concerns as to avoiding rapid withdrawals of incoming funds.

1369. On the following day, 13 August 2009, there was a further very brief conversation between Mr Nasrallah and Mr Guerin. Mr Nasrallah says that he thought it would be indelicate to show him (i.e. Mr Al Rajaan) Ozak. He tells Mr Guerin to "tell him that … from memory there is that much". Mr Nasrallah then goes on to say: "If …you show him it's that … you know that it's for him and that …" Mr Guerin then replies: "I don't want to embarrass you towards him, no, no".

1370. This brief, and indeed elliptical, conversation in 2009 is relied upon by EFG as demonstrating that there was no money laundering arrangement dating back to 1995. They submitted that "if the three men had dirtied their hands with a full fat conspiracy to launder commissions back in 1995, and Mr Guerin had opened the Ozak account pursuant to that agreement, it beggars belief that Mr Guerin would be worrying about 'embarrassing' Mr Nasrallah by mentioning Ozak bank statements to Mr Al Rajaan in 2009. There would be no room for secrets."

1371. I do not consider that this brief and obscure exchange establishes that wide-ranging proposition at all. It says nothing about the position in 1995, and it is certainly of no weight when seen in the light of the other evidence to which I have referred. As to the detail of what is said: it is clear from the exchange, and contrary to EFG's submission, that Mr Al Rajaan must have known that Mr Guerin knew that Mr Nasrallah was fronting for him on Ozak. Thus, Mr Nasrallah and Mr Guerin are contemplating that Mr Guerin will be discussing Ozak with Mr Al Rajaan, and will be giving him figures "from memory". Their concerns at this time were not to give Mr Al Rajaan the document showing the large sum of money received from Abraaj. This was in the context of Mr Guerin (and indeed Mr Nasrallah) wanting to avoid Mr Al Rajaan withdrawing the money quickly. The reference to Mr Guerin not wanting to embarrass Mr Nasrallah may well arise from the fact that Mr Guerin was about to see Mr Al Rajaan, but Mr Nasrallah had not yet discussed the payment with Mr Al Rajaan. The thinking appears to have been that if Mr Guerin only gave the figures from memory, Mr Al Rajaan might not appreciate that Mr Nasrallah already knew the figures. Had it been clear that Mr Nasrallah already knew the figures, that might be embarrassing for him in circumstances where Mr Nasrallah had not told Mr Al Rajaan about the very large amount received.

1372. I have dealt with this conversation at length, because it seems to me to illustrate the difficulties with EFG's approach of inviting the court not to accept that

PIFSS has proved its case, and to do so on the basis of passages from transcripts which are obscure, and were not explored in evidence. EFG did cross-examine Mr Nasrallah. He was not asked about this transcript, and indeed (as I have said) there was no challenge to his evidence as to Mr Guerin's knowledge, throughout, of the arrangements being to channel monies to Mr Al Rajaan.

1373. I agree with EFG's submission that many of the transcripts are elliptical: the participants are aware that they are being recorded, and much is left unsaid. Given that much is left unsaid, I do not consider that EFG is in a position to contend, on the basis of elliptical transcripts, that Mr Guerin did not understand that there was impropriety, or that PIFSS has not proved its case in that regard. There were also, of course, conversations which were unrecorded, and the discussion (above) of the May 2012 transcripts evidence both Mr Nasrallah and Ms Beltrametti making it clear that they should not be speaking on a recorded line.

1374. EFG also refer to the fact that prior to 2008, when Mr Al Rajaan's Thaxton account was opened, Mr Guerin did refer – on fund transfer authorisation forms for payments from Phoenix or Ozak to Mr Al Rajaan's vehicles – to "distribution of brokerage commissions", or some variant thereof. Thereafter, the designations tended to be different: he gave explanations such as "same BO" or "transfer to client's own account" or "personal treasury needs". It was submitted by EFG that "this change of narrative may reflect a new-found appreciation on the part of Mr Guerin that Mr Nasrallah's sharing of commissions was improper, and best concealed."

1375. It may be that, after 2008, Mr Guerin became more guarded in what he put in the transfer forms. That may reflect the stronger compliance environment compared to what could escape scrutiny "back in the days". It may also reflect the fact that Mr Al Rajaan was now a client, and so greater care was needed. I do not consider, however, that it provides any basis for saying that PIFSS has not proved its case in relation to the earlier period. On any view, what Mr Guerin was putting down in the transfer forms after 2008 was false and dishonest. As already described, that was not the first time when Mr Guerin provided false information.

1376. Accordingly, I consider that PIFSS has proved its case, as to Mr Guerin's knowledge of and participation in impropriety, throughout the period from 1995 to 2012 when secret commissions were being channelled to Mr Al Rajaan.

1377. That conclusion establishes Mr Guerin's tortious liability to PIFSS, for reasons set out at the end of this Section J.

J4: Mr Al Rajaan

1378. The opening and closing submissions of D1/D2 did not engage at all with the evidence and detail of the EFG Scheme. In their opening submissions, 3 general points were made. None of them had any substance on the evidence.

1379. D1/D2 said that Mr Al Rajaan did not control or influence PIFSS' decisions to make the relevant investments. This is factually unsustainable, and is addressed in Section E above.

1380. D1/D2 said that Mr Nasrallah was entitled to the sums which he received for the provision of genuine financial intermediary services. I reject this. Mr Nasrallah did not contend that he provided genuine intermediary services for Ozak and Golgen. He did contend that such services were provided for Phoenix, and I address that below. However, even if such services were provided, it would not provide a justification for Mr Al Rajaan receiving commissions, thereby profiteering from his position at PIFSS.

1381. D1/D2 submitted that onward payments were made to Mr Al Rajaan in accordance with standard market custom and practice, and not at Mr Al Rajaan's demand. I have addressed this in Section F above. There is no evidence of a standard market practice. The monies paid by Mr Nasrallah were not gratuitous payments which Mr Nasrallah voluntarily decided to make. They were payments which were made because of the arrangements on which they mutually agreed for the channelling of commissions secretly to Mr Al Rajaan, both men knowing that the receipt of such monies was not authorised.

1382. Mr Al Rajaan's tortious liability under Kuwaiti law to PIFSS is therefore clearly established.

J5: Mr Nasrallah: Ozak and Golgen

1383. The Ozak and Golgen accounts were, on Mr Nasrallah's case, nominee accounts. The only substantive defence raised by Mr Nasrallah, concerning PIFSS' claim in respect of the monies passing through the Ozak and Golgen accounts, is that he believed that Mr Al Rajaan was authorised to receive them. For reasons already given, I reject that defence. Since this was the only defence to liability raised, I can deal briefly with these claims, principally in order to explain the background to the money flows.

1384. The claim in respect of monies passing through the Golgen account is USD 5,144,545, against all 3 defendants. This represents the return on an investment made in a fund manager, Abraaj: i.e. the amount received for the investment, less the amount which was paid for it.

1385. The funding for that investment was, as shown on the Golgen spidergram, two payment tranches. The funding came from secret commissions paid to Phoenix and Ozak. The first payment tranche was USD 6 million. This was derived from monies paid by SISU to Wynacre. I address that payment in Section J7 below, in the context of Wynacre. The monies paid by SISU to Wynacre were the fruits of secret commissions paid to Phoenix. The second tranche was USD 2.5 million derived from monies received by Ozak. The monies received by Ozak were secret commissions received from various fund managers (as shown on the Ozak spidergram), in particular the various Zetland entities. They were commissions paid in relation to PIFSS' investments.

1386. The return on the Abraaj investment, which passed through the Golgen account was therefore made by Mr Al Rajaan profiteering from his position at PIFSS: both in making the investment itself (rather than procuring it for PIFSS), and also in obtaining the commissions which were used to fund the original investment.

1387. The claim in respect of monies passing through the Ozak account is USD 69,342,827 in relation to Mr Guerin. De-duplication of amounts claimed elsewhere means that the claim is lower against Mr Al Rajaan (USD 44,718,874), and also marginally lower against Mr Nasrallah (USD 68,542,827).

1388. One aspect of the Ozak claim is noteworthy. Although the majority of monies received by Ozak were derived from the Zetland entities, there was a significant payment by Abraaj. Between 2005 and 2009, Abraaj made 10 payments to Ozak totalling USD 18.1 million. These payments were, clearly, secret commissions on various PIFSS investments with Abraaj, or financing provided to Abraaj.

1389. The Abraaj commissions paid to Ozak were fronted by Mr Nasrallah. He signed a letter from Abraaj dated 30 June 2005 from Mr Naqvi, the Vice Chairman and CEO of Abraaj. This letter purports to confirm commission arrangements in respect of Ozak's efforts in helping Abraaj to arrange funds from numerous investors throughout the Middle East. The letter has survived, and was produced on disclosure by EFG, because Mr Nasrallah sent it to Ms Beltrametti of EFG. The letter is unusual, in that it appears to be the only surviving contract which Mr Nasrallah signed on behalf of Ozak.

1390. In his evidence, Mr Nasrallah was adamant that he did not introduce Abraaj to Mr Al Rajaan. He said, correctly, that "Mr Al Rajaan knows Abraaj years before I knew about it". The Abraaj agreement was, therefore, clearly a false document, purporting to record payments for work that had not been carried out. Mr Nasrallah signed it, despite never having helped Abraaj to raise any funds. The relationship with Abraaj had come about because Mr Al Rajaan knew the key individual or individuals at Abraaj. This is a feature of the Phoenix arrangements as well, as discussed below.

J6: Mr Nasrallah: the Phoenix payments

1391. Mr Nasrallah's "authorisation" defence is also raised in connection with the monies derived from fund managers, and passing through the Phoenix account and then to Mr Al Rajaan. The authorisation argument is no better in that context than in any other area where it is relied upon by Mr Nasrallah. I reject that argument for reasons already given.

1392. A separate area of dispute between the parties concerned the genuineness of the introductions, of fund managers to Mr Al Rajaan, that Mr Nasrallah said that he had made. PIFSS' pleaded case, when looking at the schemes overall, was that Mr Nasrallah had "purported" to introduce fund managers, but that such introducer contracts as existed were no more than fronts for the purposes of transmitting payments to Mr Al Rajaan. This was disputed by Mr Nasrallah. His case and evidence was that he did in fact genuinely introduce fund managers to

Mr Al Rajaan, and those fund managers then made payments to Phoenix over the years, following those genuine introductions. He said that he was performing a legitimate and valuable service, and earned the money that he was paid; albeit that he paid the majority of it to Mr Al Rajaan.

1393. An initial question is: what is the relevance of this dispute? In his closing submissions, Mr Casey acknowledged that if the court concluded that there were genuine introductions and contracts, this would not provide a complete answer to the claim. Similarly, in his opening submissions, Mr Casey correctly accepted that the genuineness of the introductions would not say anything about whether or not the agreement between Mr Nasrallah and Mr Al Rajaan, to share commissions, was or was not corrupt. Mr Casey submitted, however, that if the court were to determine that the introducer agreements did not follow from genuine introductions, then the court would likely be more inclined to decide against Mr Nasrallah on his argument that he was acting honestly in his dealings with Mr Al Rajaan. In those circumstances, Mr Nasrallah would start "a couple of goals down" in terms of the issues about his mindset, and whether he was acting honestly or dishonestly.

1394. I have decided in a number of different contexts (the Pictet Scheme, the VP Scheme, and the aspects of the EFG Scheme which I have already considered) that Mr Nasrallah was not acting with propriety in his dealings with Mr Al Rajaan, whereby he facilitated the transmission of secret commission payments to him. I reach the same conclusion in relation to the Pensée Scheme, below. I also conclude that the payments made by Phoenix to Mr Al Rajaan were corrupt, and were not made honestly, whether in the belief that they had been authorised or otherwise. I reach those conclusions without needing to consider or determine the genuineness of the introductions allegedly made by Mr Nasrallah. Accordingly, even if I were to accept Mr Nasrallah's case as to the genuineness of the introductions which he/Phoenix made, I would not conclude that Mr Nasrallah was at any stage acting honestly or with propriety in his dealings with Mr Al Rajaan.

1395. However, Mr Casey also submitted that resolution of the issue, as to the genuineness of the introductions, would be relevant to the quantum of PIFSS' claim. He submitted that if I were to find that the introductions were genuine, then PIFSS would have difficulty in making good a case for the recovery of the entirety of the monies paid to Phoenix. The ceiling of the claim would then be the amount shared with Mr Al Rajaan. He referred to this in closing as the "remedial consequences" of the argument.

1396. I do not consider that, applying Kuwaiti law, this argument is sound. Mr Al Rajaan was abusing his position at PIFSS by using his influence to obtain benefits for himself, and for Mr Nasrallah. Mr Al Rajaan was thereby acting tortiously: for example, because his conduct would clearly be contrary to the KPPL Article 12, and therefore unlawful. Mr Nasrallah assisted in that process, and thereby acted tortiously as well. As far as quantum is concerned, the position under Kuwaiti law is that liability, on the part of both the corrupt public official, and those who assist him, extends to the benefits which the public official has obtained for himself and others through profiteering contrary to the KPPL. Those others include Mr Nasrallah.

1397. Accordingly, I do not consider that resolution of the issue – did Mr Nasrallah make genuine introductions to Mr Al Rajaan – is an issue which has any impact on either liability or quantum in relation to PIFSS' claim based on the Phoenix payments. I will, however, address that issue in this section.

1398. In its closing submissions, PIFSS devoted some 20 pages of closely reasoned submissions, supported by documentary references, as to each of the 19 fund managers who, collectively, paid USD 252.1 million in commissions to Phoenix. The proposition for which PIFSS contended was that Mr Nasrallah did not act as a genuine introducer in relation to the investment firms which paid commissions to Phoenix. Instead, he was in substance a frontman, inserted into the investment process in order to facilitate the payment of commissions to Mr Al Rajaan. They said that this was supported by the lack of any evidence of actual work done by Mr Nasrallah, and also by the lack of need for an introducer at all. It also chimed with Mr Al Rajaan's general modus operandi.

1399. I accept that the materials relied upon by PIFSS, in that detailed analysis, do show (as PIFSS contended) that, at least in respect of the vast majority of investments: (i) PIFSS already had a relationship with the investment manager, such that no introduction was necessary; (ii) retrocessions continued to be paid well after a strong direct relationship had been established, such that there was no legitimate commercial reason to continue to pay them; (iii) retrocession payments were made at a level and for a duration that was not commercially justifiable; (iv) documents appear to have been created after the event – i.e. after commissions had been flowing to Phoenix without any agreement being in place; (v) some documents give a false impression of the nature of the role played by Phoenix.

1400. The payments that I am concerned with here are shown at the top of the Phoenix spidergram described in section J1 above. Leaving aside UBP, there were 19 other fund managers (or groups of fund managers – for example Paribas and Parvest are treated collectively) who paid commissions to Phoenix. The payments were as follows (starting with the largest):

Everest: USD 71.73 million; 1995-2012.

Sigma/Atlas, later Sciens: USD 50.31 million, 1996-2012.

Paribas/Parvest: USD 26.8 million, 1995-2011.

SISU: USD 25.62 million, 1998-2012. (SISU also paid USD 27.76 million to Wynacre).

Atlas Japan: USD 11.71 million, 2004-2012. (Atlas Japan also paid USD 0.62 million to Antheya).

AXA: USD 10.24 million, 1996-2006.

Jenni/Sarasin: USD 8.6 million, 1995-2004.

Centaurus: USD 8.46 million, 2000-2012.

Cheyne: USD 7.31 million, 2010-2012.

Credit Agricole/CPR: USD 7.13 million, 1998-2002.

Axis: USD 6.89 million, 1999-2007.

Partech: USD 5.36 million, 1999-2007.

Plutus: USD 4.91 million, 2004-2008.

Access: USD 3.89 million, 2001-2008.

Resolution: USD 1.1 million, 2005-2010.

Oddo: USD 0.87 million, 2010-2012. (Oddo also paid 0.15 million to Antheya).

Banque SCS: USD 771,000, 2001-2007.

Indochina: USD 273,000, 2007.

Alexandra: USD 81,000 1998-1999.

1401. Mr Nasrallah's evidence was that the individuals that he introduced to Mr Al Rajaan were, with some exceptions, known to Mr Nasrallah from his Paribas days. Mr Al Rajaan liked to deal with people that he could trust, and Mr Nasrallah's experience enabled him to put Mr Al Rajaan in touch with good people. In cross-examination, Mr Nasrallah agreed, to some extent, with the proposition that his main introductory work involved passing names to Mr Al Rajaan, so as to put the fund manager in direct contact with him. It was clear that he did not allege that he attended meetings between the fund manager and PIFSS, either at the start of the relationship, or over the years. His written and, to some extent, oral evidence was to the effect that he would do some due diligence prior to the introduction, and this involved reviewing materials and prospectuses.

1402. I will look in due course at the detail of some of these alleged introductions. Before doing so, however, there are a number of general points which lead me to regard Mr Nasrallah's evidence on this issue as unreliable.

1403. First, Mr Nasrallah's case and evidence involves the proposition that there was a clear divide between: (i) his legitimate Phoenix business, where he was receiving financial reward for making genuine introductions, and (ii) the other aspects of his relationship with Mr Al Rajaan where his role was simply to act as a nominee or front-man. In the latter category are the Pictet introducer contract, Ozak, Golgen and Pensée. The Bordertown arrangements, where I have rejected Mr Nasrallah's evidence as to his lack of knowledge of Bordertown and what it was doing, also fall into the latter category.

1404. I do not accept that it is at all likely that there was this binary distinction between allegedly legitimate Phoenix arrangements, and the other clearly illegitimate arrangements which were aimed at channelling monies to Mr Al Rajaan. The Phoenix arrangements also involved channelling substantial monies to Mr Al

Rajaan, and I have rejected Mr Nasrallah's case that he was acting with propriety in that regard.

1405. I consider that it is appropriate to look at Mr Nasrallah's arrangements in the round. Their overall purpose was to facilitate the flow of monies to Mr Al Rajaan. In that regard, it is inherently probable that the Phoenix arrangements were not a separate category of a legitimate business, resulting from genuine introductions.

1406. Secondly, the evidence as to the genuineness of the introductions comes largely from Mr Nasrallah himself. However, he is not a reliable witness. No evidence has been called by any of the fund managers, to corroborate the valuable introductory work for those managers which Mr Nasrallah alleges that he was doing.

1407. Thirdly, Mr Nasrallah has produced introducer agreements with some of the fund managers. He has not, however, been able to produce contracts with all of them, even though one would have expected a person, who is making genuine introductions and then receiving substantial reward for doing so, to be able to do so. No introducer agreements have been produced for Jenni/Sarasin, AXA, Credit Agricole, Alexandra, Partech, Access, Resolution, Plutus, and Indochina.

1408. In other cases, no introducer agreements have been produced but statements in correspondence suggest that they might have existed. Thus, in the case of Everest, which is at the top of the table of paying managers, there is only a letter from Phoenix in August 2012, referring back to an agreement dated 1 August 2002, and later documents – none of which have been produced. In the case of SISU, there is a 2013 letter terminating "our Sales Agent Agreement", but this latter document has not been produced, and there is no indication of when it was concluded. SISU was the fourth highest paying manager in the table, and the second highest if the Wynacre payment is taken into account.

1409. Fourth, I turn to the introducer agreements that have been produced. Normally, I would accept that a signed introducer agreement between a fund manager and an introducer, and payments then made which are referable to that agreement, would be evidence which would corroborate Mr Nasrallah's evidence as to the genuineness of the introduction. However, I do not accept that it is reliable evidence in this case. I am dealing with a case where Mr Nasrallah was involved in making corrupt payments, pursuant to a variety of arrangements, to Mr Al Rajaan. There is substantial evidence that Mr Nasrallah would sign introducer agreements in circumstances where he had made no introduction at all, and whose purpose was to provide cover for payments to be routed to Mr Al Rajaan via Mr Nasrallah. The March 1999 agreement with Pictet (see the Pictet Scheme above) is a prime example. There are also the agreements, signed by Mr Nasrallah, with Bordertown, also discussed in the context of the Pictet Scheme. There is the surviving Ozak contract – the contract with Abraaj – where Mr Nasrallah says that he made no introduction. There are also numerous documents, signed or authorised by Mr Nasrallah, which contain statements which are untrue and which falsely record the position, for example: the various Form As referred to in this section, and in relation to the Pictet Scheme; the

Pensée documents described below; the false confirmations to Cheyne, also described above.

1410. Against this background, the fact that an introducer agreement exists, and is signed by a fund manager, even a well-known and apparently reputable fund manager, is not strong evidence as to the genuineness of the introduction – also bearing in mind that Mr Nasrallah is not a witness whose evidence is reliable, and that no fund managers, who made payments to Phoenix, have given evidence in the case.

1411. Fifth, in a very effective part of his cross-examination of Mr Nasrallah, Mr Ritchie asked Mr Nasrallah about Paribas, with whom PIFSS had invested since 1987. In summary, it was put to Mr Nasrallah that the various Paribas or ex-Paribas managers, that Mr Nasrallah introduced, were in most if not all cases already known to Mr Al Rajaan. Mr Nasrallah accepted that this likely was the case. He agreed that the connections which PIFSS had with Paribas were wide and across a number of important people during the 1990's before Mr Nasrallah retired. He said that Mr Al Rajaan "knew all the people of Paribas". He agreed that by 1995, PIFSS was regarded by Paribas as one of its most important clients, and that the relationship had gone from strength to strength over the years. He said that if you give a portfolio to Paribas to be run, of course you know the people at Paribas. He agreed that this extended to other Paribas related funds, including Partech and Parvest.

1412. The strength of the existing relationship between PIFSS and Paribas is evident from a letter written on 11 September 1995 by Mr Wohanka, the CEO of Paribas Asset Management ("PAM") to Mr Al Rajaan. The letter described how PAM greatly valued the relationship, which had gone from strength to strength over the years. Since Mr Al Rajaan was one of their most important clients, the Chairman of Paribas was to hold a dinner in his honour in Paris. The dinner would be attended by Mr Marc Raynaud, the head of the Middle East area, and Mr Olivier Huby, head of US equity management. The letter, which contains no reference to Mr Nasrallah, promoted a new US growth fund which Mr Huby could discuss with him.

1413. Accordingly, it is improbable that Mr Al Rajaan needed Mr Nasrallah to introduce him to anyone at Paribas. The senior people at Paribas knew Mr Al Rajaan, and were able to approach him directly, on the basis of the established relationship. Indeed, in his 3rd witness statement, Mr Nasrallah acknowledged the difficulty of saying that he introduced PIFSS to Paribas/Parvest, in the light of PIFSS' prior investments with Paribas. He said that he "re-introduced PIFSS to Paribas and Parvest".

1414. It is clear, on the evidence, that many of the other "introductions", to other fund managers, involved ex-Paribas individuals whom Mr Al Rajaan already knew well. I deal specifically below with AXA, CPR/Credit Agricole and Sigma, as illustrating this point.

1415. Since Mr Al Rajaan already knew the people to whom he was "introduced" by Mr Nasrallah, it is difficult to see how these introductions were genuine, or that Mr Nasrallah was performing any sort of valuable service. I accept Mr Casey's

point, in oral closing, that sometimes a reintroduction can be valuable: for example, because the people concerned had not maintained the relationship, or because an introducer wanted to bring some new fund to the attention of a potential investor. However, in my view, that was not what was happening with Mr Nasrallah. It is illustrated by the position of Mr Huby. He clearly maintained contact with Mr Al Rajaan during the period late 1995 - early 1998, when he was seeking investors for funds of Paribas, then AXA, and then CPR/Credit Agricole.

1416. Sixth, Mr Nasrallah could not justify, on the basis of alleged introductions, the payments made by all of the fund managers. Thus, in his witness statement, Mr Nasrallah said that he was not sure whether he had made any introduction of Resolution, Indochina, Alexandra and SCS. These managers paid, collectively, around USD 2.5 million, and so they are not very significant in terms of the amounts paid. However, there were no introducer agreements, and Mr Nasrallah could only speculate in his witness statement as to how he might possibly have been involved. In his oral evidence, he positively denied introducing Resolution.

1417. I conclude that Mr Nasrallah did nothing to introduce these 4 fund managers, but Phoenix was nevertheless paid monies which were then shared with Mr Al Rajaan. The absence of evidence of a genuine introduction to these 4 fund managers impacts Mr Nasrallah's case generally. Just like the clock that strikes 13, which casts doubt upon that strike and on all other strikes, so too the absence of evidence as to any introduction to these managers casts general doubt on Mr Nasrallah's case that Phoenix's business involved genuine introductions.

1418. Seventh, there is scant evidence of any communications between Mr Nasrallah and fund managers in the context of the work that he was allegedly performing. One might have expected to see communications between the fund manager and Mr Nasrallah, or at least to see communications between fund managers and PIFSS being copied to Mr Nasrallah so that he would be aware of, for example, the performance of the investments. However, there are only a very small number of references to Mr Nasrallah on the documents found on PIFSS' investment files, in the context of Paribas/Parvest, Everest, Sigma/Atlas, and SISU. In relation to the other 15 managers, there is no reference at all.

1419. Against that background, some examples of particular fund managers serve as case studies which illustrate what was happening.

1420. *AXA*. Mr Nasrallah's evidence, in his trial witness statement, was that Mr Claude Bébéar, the CEO of AXA, who sat on the Board of Paribas and whom he knew from Paribas, asked him whether he could introduce Mr Al Rajaan to a manager at AXA whose name Mr Nasrallah could not now recall. Mr Nasrallah said that he had no role in any later investments made by PIFSS with AXA, although he received introducer fees. This is hardly strong evidence to support a case of a genuine introduction, also bearing in mind that Mr Nasrallah has been unable to produce an introducers agreement for AXA.

1421. The factual position is that PIFSS invested in 4 funds managed by AXA from October 1996. Payments were made to Phoenix totalling USD 10.24 million from October 1996 to September 2006. Mr Nasrallah, in cross-examination,

appeared to know very little about the fund in which PIFSS initially invested. This was the AXA US Growth fund. The prospectus shows that it was run by Mr Huby, who had been at Paribas and who was one of the individuals who was to attend the Paribas dinner in Paris in September 1995 referred to above. PIFSS had invested in the US growth fund run by Mr Huby at Paribas, and Mr Huby had written to Mr Al Rajaan in March 1996 enclosing the results of that fund. It was Mr Huby who later wrote to Mr Al Rajaan in relation to this fund in September 1996, and he was the person to whom Mr Al Rajaan responded with the subscription documents shortly thereafter.

1422. The documents contain no reference to Mr Nasrallah in connection with this initial investment, or indeed with any of the investments with AXA. There is also no evidence of any involvement of Mr Claude Bébéar in relation to PIFSS' investments. There was no need for any "reintroduction" of Mr Huby to Mr Al Rajaan in September 1996. The relationship clearly existed already, with Mr Huby being able to write to Mr Al Rajaan in both March and September 1996.

1423. *CPR/Credit Agricole.* PIFSS' initial investment in funds managed by CPR Gestion (later taken over by Credit Agricole) was in January 1998. The correspondence at this time to Mr Al Rajaan comes from the same Olivier Huby who was previously involved in the Paribas and AXA US growth funds. The correspondence contains no reference to Mr Nasrallah.

1424. In his witness statement, Mr Nasrallah referred to his introduction of PIFSS to Mr Alec de Lezardière and Mr Huby. However, in cross-examination he accepted that it was Mr Huby who got the ball rolling on the Credit Agricole investments, with Mr de Lezardière only becoming involved when Mr Huby left.

1425. The evidence therefore again shows that Mr Al Rajaan needed no introduction or re-introduction to Mr Huby, and also that Mr Huby was able to correspond directly with Mr Al Rajaan. There is nothing in the documents to suggest that Mr Nasrallah was responsible for an introduction or re-introduction of Mr Huby to Mr Al Rajaan. There is also no signed introducer agreement between CPR/Credit Agricole and Phoenix.

1426. *Sigma/Atlas.* PIFSS invested in a series of 21 funds managed by Atlas Capital from January 1996. Atlas later became Sigma Asset Management and ultimately was acquired by Sciens Capital Management. Sigma is 2nd in the list of top payers to Phoenix. Atlas was a venture of Mr Patrick Stevenson and Mr Hugues Lamotte. In his trial witness statement, Mr Nasrallah describes introducing Mr Al Rajaan to both of those individuals. Mr Stevenson had been head of Paribas Capital Markets, and Mr Nasrallah described him as the force behind Sigma/ Atlas.

1427. It is clear that, at the time when PIFSS started to invest, Mr Stevenson had a direct relationship with Mr Al Rajaan. When Mr Al Rajaan first approached Deltec in 2012 (see the Pensée Scheme below), Mr Lamotte gave the CEO of Deltec a reference for him. He said that he had first met Mr Al Rajaan in 1995, when Patrick Stevenson became his partner at Atlas; and that "PIFSS had been actively dealing with Paribas for many years, and therefore, Patrick knew him

already quite well". (I understand "quite" in that context to be the American usage: i.e. "very"). He then described how PIFSS started dealing with Atlas shortly after Mr Stevenson became Mr Lamotte's partner. There is no reference to Mr Nasrallah in the letter.

1428. It is clear, therefore, that the introduction of PIFSS to Atlas did not involve Mr Nasrallah. Mr Stevenson had been dealing with PIFSS for many years, and knew Mr Al Rajaan very well. Mr Lamotte met Mr Al Rajaan via Mr Stevenson.

1429. The absence of a genuine introduction is also supported by the absence of any agreement at the time when PIFSS' investment was first made, and payments started to flow to Phoenix. PIFSS' initial investment in Sigma/Atlas was on 25 January 1996. Payments started to be made to Mr Nasrallah on 14 February 1996. It was not until 4 March 1996 that Mr Nasrallah wrote, to Mr Lamotte and Mr Stevenson at Sigma/Atlas, to record their arrangements. It was only in November 1996 that Mr Lamotte wrote a letter setting out his understanding of the agreement. There are other examples (Paribas/Parvest, and Centaurus) where the introducer agreement post-dates PIFSS' first investment and the start of the payment flows to Phoenix.

1430. *Atlas Japan.* PIFSS invested in 3 funds managed by Atlas Japan Partners Ltd, subsequently called Idera, from May 2004. Payments to Phoenix totalling USD 11.71 million were made from October 2004 to April 2012. It also made a payment of USD 623,637 to Antheya in July 2012, following closure of the Phoenix account at EFG. I deal with aspects of Atlas Japan below.

1431. *Cheyne.* In his witness statement, Mr Nasrallah said that he introduced Mr Al Rajaan to Mr Lourie of Cheyne. Mr Lourie had not worked at Paribas. Mr Nasrallah's evidence was that he had himself been introduced to Mr Lourie through Mr Nabil Debs. Mr Debs was involved with Plutus, with whom PIFSS had invested from 2004.

1432. Mr Nasrallah's alleged introduction of Mr Lourie is not evidenced in any document. It is clear, however, that there was a meeting between Mr Lourie, and others from Cheyne, shortly before a letter was sent directly to Mr Al Rajaan on 2 June 2009. There is no reference to Mr Nasrallah in that letter. There is also evidence of a relationship between Cheyne, and Wafra (which Mr Al Rajaan chaired) dating back to 2002. This was what Cheyne said in relation to the enquiries which Wafra were making in 2015, when asked about the first introduction of Cheyne to PIFSS. Wafra invested in 4 Cheyne funds over the years. Although Cheyne referred in that response to using third party marketers (not identifying Mr Nasrallah specifically), and being reconnected with PIFSS after 2008, I do not consider that there is any evidence that Mr Nasrallah was needed in order to introduce Mr Lourie to Mr Al Rajaan.

1433. These case studies show that, when one looks at the detail of Mr Nasrallah's case, he did not make the introductions which led to Mr Al Rajaan deciding to invest. In my view, this is likely to have been the position in relation to the vast majority, if not all, of the introductions relied upon by Mr Nasrallah. The likely scenario, on the evidence before me, is that the investments resulted from existing relationships between fund managers and Mr Al Rajaan.

1434. This leads to the need to consider a point much emphasised by Mr Casey in his closing argument. He submitted that PIFSS' case necessarily involved allegations that the various fund managers had been complicit in corruption, since PIFSS' case was that Phoenix did not make genuine introductions, and that Mr Nasrallah was inserted into the investment process to facilitate the payment of commissions. He submitted that it was not permissible for the court to make such findings, bearing in mind that a case of complicity had not been pleaded against the fund managers, and none of them were party to the proceedings. He drew attention to the fact that PIFSS had said, in a response to a Request for Further Information from EFG, that it was not alleging that the introducer contracts were shams. Accordingly, the court should proceed on the basis that all of the investment managers were acting honestly in relation to those agreements, and that therefore Mr Nasrallah must have been acting honestly as well.

1435. I do not accept this line of argument. It is open to a claimant, such as PIFSS in this case, to decide which parties it wishes to claim against. It is not bound to make a claim against all parties who were potentially involved in, for example, a conspiracy. A claimant does not have to make good a case against non-parties, in order to establish its case against a particular defendant who is a party. This is a point made by Foxton J in *4 VVV and others v Spence and others* [2024] EWHC 2434 (Comm) at paragraph [635] quoting his earlier judgment in *Hotel Portfolio II Limited v Ruhan and Stevens* [2022] EWHC 383 (Comm):

> "It is frequently argued by defendants in dishonesty cases that if the fraud alleged took place, various other persons not before the court must have been complicit in it. This can be a very effective means of bringing out the inherent improbability of a claim (see for example the comments of Mr Justice Tomlinson in *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm), [6]-[7]. I also accept that there are cases in which the success of the claimant's case necessarily involves a finding of dishonesty against a third party, and that, in such circumstances, the court may well take a view that it is appropriate to give that third party notice of the allegations being made and an opportunity to answer them…
>
> However, it is necessary to approach arguments of this kind with some care, particularly in cases where the claimants makes no direct allegation of dishonesty by the third party, and in which the claimant's case does not necessarily entail any such dishonesty. To do otherwise would involve the risk of already complicated litigation being expanded beyond manageable bounds, with judges asked to make findings about the conduct of a broad range of individuals in litigation in which only the parties will have given disclosure and adduced witness evidence. In very many cases, a claimant is entitled to be agnostic

> as to the position of a non-party who the defendant says would be implicated by the allegations of fraud advanced. That is likely to be the case when upholding the case advanced against the defendant(s) would not necessarily entail any dishonest activity on the part of someone not participating in the case (not least because the full evidential position in relation to that person will not be before the court). Thus, in *Boreh v Djibouti* [2017] EWCA Civ 56, [44], an allegation that the substance of the judge's findings as to the conduct of a solicitor in a case applied 'by parity of reasoning' to a barrister against whom no such findings were made was rejected by the Court of Appeal because:
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> > 'The judge was perfectly entitled to reach the conclusion that [the solicitor] had behaved dishonestly, and that, as a result, the freezing order should be set aside, irrespective of any need to make any findings to similar, or different, effect in relation to [counsel], whose knowledge and state of mind had not been investigated. The judge was entitled to conclude that the latter's state of mind had not necessarily been the same as the former's."

1436. I consider that PIFSS can remain "agnostic" in the present case. In closing, Mr Ritchie made no bones about the fact that PIFSS was sceptical and suspicious in relation to what all of the fund managers, involved in paying commissions to Phoenix, knew about what was actually happening. I can well understand that. However, I do not consider that the case against Mr Al Rajaan or Mr Nasrallah requires me to make any findings against any of the fund managers, and I do not do so. It is clear, from the evidence and argument in relation to the two fund managers who are party to the present proceedings – Man and Aerium – that resolution of issues of complicity involves the court potentially considering a great deal of documentation and witness evidence. I have none of that evidence here. Instead, I have an unreliable witness in Mr Nasrallah, very little relevant disclosure from Mr Nasrallah, no evidence from the relevant fund managers, and evidence in this case which leads me to the conclusion that he was not making genuine introductions. It is possible that, in proceedings against one or more fund managers, there would be different evidence, and in particular evidence which would not enable the court to find complicity in the corruption which clearly existed as far as Mr Nasrallah and Mr Al Rajaan were concerned.

1437. Mr Casey submitted that I need to consider whether the claim against Mr Nasrallah in relation to the Phoenix commissions is inherently improbable, given that it would require the complicity of the various fund managers. I will assume, for the purposes of considering this argument, that the premise (i.e. that complicity would be required) is sound. Even on that assumption, however, I do not consider that the argument has any force. Given the evidence in this case as a whole, there is a realistic possibility that – if the position of the fund managers were to be fully investigated at a trial to which they were parties –

some or all of them would be held to be complicit in the corruption to which Mr Nasrallah and Mr Al Rajaan were unquestionably party. The evidence which I have seen and heard is sufficient to raise difficult questions which the various fund managers would need to address, for example: as to why, in the case of most of the fund managers, there is no reference to Mr Nasrallah in any of their correspondence with PIFSS over many years; the extent of their existing relationship with Mr Al Rajaan prior to PIFSS making the investments which involved the payment of commissions to Phoenix; what work Mr Nasrallah was perceived to be doing; why, in circumstances where there was a direct relationship with PIFSS, very high rates of commission continued to be paid over many years, bearing in mind the expert evidence (from some of the international investment experts) that an intermediary would gradually be eased out.

1438. There would also be questions which are specific to some of the fund managers, in particular in relation to what Wafra were told in 2015 as part of the Project Renaissance work. One example is SISU, where Wafra's Project Milestone report indicates that they were told that no agent had been used. Another example is Atlas Japan, described below.

1439. Wafra's notes of the call in July 2015 with Mr Hirai, one of the founding partners of Atlas Japan, describe how the relationship with PIFSS started. There is no reference to Mr Nasrallah. Instead, the relationship started because PIFSS was already a partner of the Atlas Capital Group: i.e. the firm of Hugues Lamotte and Patrick Stevenson, described above. The notes go on to record that Wafra was told that "there were no placement fee arrangements".

1440. Atlas Japan's documents also illustrate a point which I have mentioned when summarising my fact findings above, namely that some documents give a false impression of the nature of the role played by Phoenix. Thus, PIFSS invested around USD 30 million in Atlas Japan's J Land Select Fund in 2004. An agreement dated 23 February 2004 provided for payment of fees to Mr Nasrallah for marketing and sales activity. In evidence, when asked about whether PIFSS' investment was the result of him marketing the fund to PIFSS, Mr Nasrallah said: "No, PIFSS was interested to invest in funds which are investing in land".

1441. There was an update to the J Land agreement in a letter dated 25 September 2010. This required Phoenix to attend meetings 4 times a year. However, there is no evidence of any such meetings taking place, and Mr Nasrallah's evidence (in response to questions from Ms Bingham) was that after he made an introduction, he had no ongoing role. The update also required Phoenix to provide "specific insight of the real estate investment strategy of various Middle East institutions". However, there was nothing in Mr Nasrallah's evidence that suggested that he had any expertise in that area.

1442. PIFSS submitted that these documents therefore set out services which were never intended to be performed, and that they did not reflect the true arrangement. Rather, they were intended to provide justification of payment of fees in the case of subsequent scrutiny. I agree that this is what the evidence before me shows, and it is therefore another "case study" relevant to Mr

Nasrallah's liability. But it also illustrates how Atlas Japan, were it to be a defendant to proceedings brought by PIFSS, would have potentially difficult questions to answer. .

1443. Furthermore, given the evidence in this case as a whole, there are other reasons why there is a realistic possibility that some or all of the fund managers were complicit in Mr Nasrallah's corruption, and why it cannot be said that this is inherently improbable. This trial has examined the position of a number of different financial institutions or businesses. These included 4 Swiss banks (Mirabaud, Pictet, VP and EFG), a Bahamian bank (Deltec, relevant to the Pensée Scheme), Man and Aerium. The evidence before me strongly points to complicity in corruption on the part of Mirabaud, Pictet and VP, and UBP has settled for a substantial sum. So has EFG. I reach in this judgment conclusions, as to complicity, adverse to Man, Aerium and Mr Chalopin, the main shareholder and at times CEO of Deltec. I have also had evidence as to the corrupt practices of Mr Al Rajaan, the head of a major institution in Kuwait, for a period of many years, and those who assisted him.

1444. All of this might have seemed inherently improbable in the abstract, but it happened. I have also had evidence from Mr Al Othman as to compliance departments of some institutions being unwilling to allow investments in PIFSS, because of suspected corruption on the part of Mr Al Rajaan. Mr Mombelli has given evidence that Mr Al Rajaan was quite clear that he expected payment, if PIFSS was to invest. It is entirely realistic, in my view, to think that other fund managers may well have been complicit in the corruption that lies at the heart of this case.

1445. Accordingly, I reject Mr Nasrallah's arguments related to the absence of other fund managers who are not defendants and that there is no specific pleaded case against those fund managers. More generally, for the reasons given, I reject his case as to the propriety of the payments made by fund managers to Phoenix. Mr Nasrallah is therefore liable in respect of the full amount of those payments.

J7: Mr Nasrallah: Wynacre

1446. The claim in respect of Wynacre, against the 3 defendants, is USD 27,762,774. This relates to a payment by SISU, which can be seen in the pink bubble on the left-hand side of the Wynacre spidergram. SISU was a fund manager which also (see section J6 above) made substantial payments to Phoenix. PIFSS was a cornerstone investor in SISU products. It was in fact the first investor in SISU funds, investing in 5 funds managed by SISU between May 1998 and April 2007. It held a large majority of many of the funds, including 100% of one of the funds and 98% of another. The Project Milestone report said that PIFSS played an important role as an early, large investor with SISU, but appears not to have received any seed economics: i.e. the benefits of being a large early stage investor.

1447. The USD 27.8 million, paid by SISU to Wynacre, was a return on an investment of USD 1 million which was paid out of commissions received by Phoenix. PIFSS' closing identified, by reference to underlying documents, the payments

made to Wynacre, and there was ultimately no challenge to the evidence that this was the source of the investment monies.

1448. Mr Nasrallah's case is that the monies received in return for this investment were beneficially his. They were returns, in the form of shared performance fees, on his personal investment in SISU through Wynacre. His case is that Wynacre was not an investment for Mr Al Rajaan, but rather his own personal investment. Similarly EFG submitted that the payments from SISU appeared to be returns on personal investments.

1449. PIFSS contended that these returns were no different in character to the Phoenix commissions (see J6 above). They were in substance commissions on PIFSS' investments to be split with Mr Al Rajaan. The arrangement was no more than a variant of the management fee route to extraction of commissions, and a second source of corrupt and concealed commissions in respect of the same investments.

1450. Mr Casey advanced essentially three points on Wynacre in his written closing. First, he invited me to accept Mr Nasrallah's evidence that Wynacre was an investment for Mr Nasrallah's own account. Secondly, he submitted that (as with other arrangements), PIFSS' case on Wynacre necessarily means that SISU must have entered a corrupt arrangement with Mr Nasrallah and Mr Al Rajaan, and therefore it was not open to PIFSS to make its allegation. I have already addressed the substance of that argument in Section J6. Thirdly, whilst accepting that the documentary evidence showed that a portion of the Wynacre funds derived from SISU were shared with Mr Al Rajaan, he submitted that the reasons for the monies being shared with Mr Al Rajaan were unclear. Accordingly, without more, that does not negate Mr Nasrallah's evidence that his investment through Wynacre was on his own account, and that he alone was entitled to the profits received by Wynacre.

1451. Turning now to Mr Nasrallah's main point, that this was his personal investment, I have no doubt that the returns on the investment in SISU represented, in substance, secret commissions received by reason of PIFSS having placed investments with SISU. The funding of the USD 1 million investment was, as I have said, the commissions received by Phoenix on PIFSS' investments. It was paid in four tranches. Mr Nasrallah repeatedly denied in his evidence that this was the case, stating on a number of occasions that he had paid £ 1 million in a single tranche – despite being shown the relevant financial documents which showed the contrary. The result of that USD 1 million investment was that Wynacre received a limited partnership interest in SISU Capital Limited Partnership, the investment manager of the SISU Capital Fund.

1452. PIFSS' closing carefully analysed how the returns were then paid back to Wynacre. In short, various payments were made between 2004 and 2006. The documents relating to these payments show that there was a 40/60 split between Mr Nasrallah and Mr Al Rajaan, including specific reference to 40%. There was, therefore, a 40/60 sharing arrangement between Mr Al Rajaan and Mr Nasrallah in relation to the investment returns. That split of returns is consistent with the split that operated more generally on SISU payments to Phoenix. The call transcript of 13 July 2009 has Mr Nasrallah telling Mr Guerin that, in

contrast to the usual 65/35 split, the 40/60 split was only for SISU. Payments of the 60% were made to Al Rajaan vehicles, Chulani and Glenin.

1453. Mr Al Rajaan was therefore sharing in the returns of an investment which, on Mr Nasrallah's case, was purely his own. This seems highly improbable. The sensible conclusion is that this was the split because it was an adjunct to, or aspect of, the Phoenix arrangements.

1454. A further payment by SISU to Wynacre was then made in March 2007. Wynacre received around USD 7.6 million at the end of March, and then USD 6 million was paid from Wynacre to the Golgen account. This was then paid out to Abraaj Capital on the same day with the reference "ANCIC Subscription". This payment is significant, because Mr Nasrallah accepts that Golgen was a nominee account for Mr Al Rajaan. Furthermore, in his witness statement, Mr Nasrallah said that Golgen was the vehicle for Mr Al Rajaan to make his investment in Abraaj. Again, this payment to Golgen cannot sensibly be explained by the SISU investment being purely Mr Nasrallah's.

1455. In April 2008, a further payment was made, and this was split between Mr Nasrallah and Mr Al Rajaan, with a payment being made to Phoenix and then passed to Chulani.

1456. I consider that the way in which these monies were dealt with shows that Mr Nasrallah's evidence, as to Wynacre being his personal investment, is false. If these were his personal investments, then there would need to be an explanation as to why he was splitting the monies received with Mr Al Rajaan, and why a substantial payment was made to Golgen, which was a nominee account which then proceeded to make the investment in Abraaj for Mr Al Rajaan's benefit. Mr Nasrallah had no sensible explanation in his evidence. When asked to explain why Wynacre's money was used to purchase Mr Al Rajaan's investment, his answer was that he could not say: he did not remember. In my view, the answer is, as PIFSS submitted, that the arrangement was just a variant of the management fee route to extraction of commissions on PIFSS investments.

1457. I therefore reject the arguments of EFG, and Mr Nasrallah, that the payment of the investment return by SISU, and the related investment in and return paid by Abraaj, can simply be regarded as returns on personal investments. The SISU investment was derived from secret commissions paid to Phoenix. That investment opportunity only existed as a result of Mr Al Rajaan's decision to commit PIFSS to making investments in SISU. The Abraaj investment was made with money derived from the SISU investment. Both investments were the consequence of Mr Al Rajaan exploiting his position as the Director General of PIFSS, with the assistance of Mr Nasrallah. There was therefore exploitation of his position in a number of respects: obtaining secret commissions, which were split with Mr Nasrallah, then using the commissions to purchase investments in SISU and then Abraaj, and doing so without giving PIFSS the opportunity to make the investments itself.

1458. It is in any event no answer under Kuwaiti law for EFG or Mr Nasrallah to say that these were personal investments. The *Dubai Wire* case shows that, as a

matter of Kuwaiti law, public officials, who have exploited their position, cannot avoid breaching the KPPL by contending that investments were made with their own money. Mr Nasrallah assisted that breach.

J8: Phoenix International Brokerage (PIB)

1459. The final aspect of the EFG Scheme claim concerns monies paid to Mr Al Rajaan, via EFG accounts, from PIB. PIB's income was derived from payments received for equity options trades that were carried out on behalf of clients. PIFSS contends that the only client was PIFSS, and certainly the substantial majority of money was paid by Paribas – the business for which Nadim had previously worked before starting PIB. The claim against all 3 defendants is USD 53,694,178.

1460. PIB was incorporated in Beirut on 7 April 1997, within 2 years of the start of the receipt of commissions by Phoenix. An account was opened by Mr Guerin on 11 May 1997, with Nadim Nasrallah identified as the beneficial owner.

1461. The payment flows through the PIB account are shown on the PIB spidergram: see section J1 above. They were made between June 1997 and May 2007, and totalled USD 53.69 million. The payments into PIB were divided into 3 categories. USD 33.22 million were payments from BNP Paribas, and they contain a reference to both BNP Paribas fees and/or brokerage or options in the payment advices. USD 14.41 million are payments which refer to BNP Paribas, but do not contain an express reference to fees. A further USD 6.06 million are payments which contain no reference to fees or BNP Paribas, but they include for example payments from ABN Amro.

1462. PIFSS contends that the payments into PIB were secret commissions, on trades carried out for PIFSS, which Mr Nasrallah and Nadim were sharing with Mr Al Rajaan. There is no dispute that a substantial number of option trades were carried out for PIFSS during the period when payments were made. An analysis of PIFSS' records shows that PIFSS conducted trades resulting in premium payments to PIFSS of USD 550.93 million between 1997 and 2007. In addition, PIFSS France BV, an ultimate subsidiary of PIFSS, conducted trades resulting in premium payments of USD 6.67 million.

1463. It is clear that Mr Al Rajaan received substantial amounts referable to the monies that PIB was itself receiving. Thus, his entities were paid some USD 28.2 million between 1997 and 2007, initially to Overton and Intermac, and later to Balboa and Moolwurf. That figure represents some 52% of the total payments into PIB (USD 53.69 million), or just under 60% of the total payments in the first two categories (i.e. excluding the USD 6.06 million). That figure of 60% is similar to the percentage received by Mr Al Rajaan on the SISU payments to Phoenix, and is not far off the 65% generally passed to Mr Al Rajaan on the Phoenix commissions.

1464. There can be no doubt that these monies were being received by Mr Al Rajaan in consequence of PIFSS engaging in the equity options trading previously described, thereby generating an income for PIB which was being shared with Mr Al Rajaan. No alternative explanation was provided in Mr Nasrallah's

evidence, which largely consisted of assertions that he knew nothing about the PIB business, and that Nadim had nothing to do with his Phoenix business. It was also clearly a concern of Nadim in 2012 that he had been making payments to Mr Al Rajaan: hence the phone call about the payments made "back in the days", and whether these could be traced back to himself/PIB.

1465. Mr Casey submitted that there was insufficient evidence that Mr Al Rajaan was influential in relation to PIFSS' equity trading. He referred to evidence that, on a day-to-day basis, Sheikh Abdullah was the person with whom Nadim liaised. Whilst it is true that Sheikh Abdullah appears to have been responsible for this business on a day-to-day basis, it does not follow that Mr Al Rajaan was not influential in causing it to happen. Mr Casey's submissions recognised that Nadim had had dealings with Mr Al Rajaan in relation to PIB. Mr Al Rajaan signed various contractual documents which provided the foundation for the trading. He was, of course, the influential person on the investment committees which decided what kind of investments or trading PIFSS was going to conduct. Moreover, the very fact that large sums of money passed to Mr Al Rajaan indicates, in the context of this case, that he was being rewarded for the influence that he could bring to bear to enable this business to be carried out.

1466. Mr Casey's main point was that there was no evidence that could connect Mr Nasrallah (as opposed to Nadim) to this payment flow. He submitted that PIFSS had not established that Mr Nasrallah was party to any tri-partite agreement involving Nadim or PIB. He relied on Mr Nasrallah's categorical denial that there was any tri-partite agreement with himself, Nadim and Mr Al-Rajaan, and on Mr Nasrallah's evidence as to the separation between his Phoenix business and Nadim's PIB business. Moreover, he repeated his argument about non-parties: Nadim is a non-party, and adverse findings should not be made in his absence.

1467. Dealing first with Nadim, I agree that I should tread carefully before making findings of impropriety against Nadim. PIFSS made it clear in their closing submissions that the court was not asked to make findings against him beyond what is necessary to determine the claim against the Defendants. I have sought to do so, and do not find it necessary to make any specific findings of dishonesty against Nadim.

1468. That said, it is important to record that there is no doubt that Nadim is aware of the case advanced by PIFSS in relation to PIB. Mr Nasrallah was staying with Nadim in London during his evidence, and – when warned that he should not speak to anyone about the case or his evidence overnight – asked whether that applied to Nadim. Furthermore, PIFSS have done whatever they could to make Nadim aware of the allegations made, in relation to PIB, in these proceedings. Mr Nasrallah refused to disclose his son's address for the purpose of Stewarts writing to him directly. A letter was then provided to Mr Nasrallah's solicitors, QE, to deliver to Nadim. It is not clear whether it has been delivered. Even if it has not been delivered, however, it is obvious that Mr Nasrallah will have told Nadim what is being alleged in relation to PIB. Their relationship is close, as shown by their involvement in the events of 2012 when accounts were simultaneously closed and conversations, in which one or both of them participated, were taking place with Mr Guerin.

1469. Against this background, I consider that there is no substance in Mr Casey's argument that the claim cannot succeed because Nadim is not a party. I have addressed this argument in the context of the position of fund managers, and Nadim's position is no stronger. Indeed, there would be no difficulty in making findings against Nadim, if it were necessary to do so, since he has known about the relevant claims and could have participated in the trial had he wanted to do so. I agree with PIFSS that if Nadim had any helpful evidence to give in relation to the claim in respect of PIB, he would have been called as a witness.

1470. However, the matters discussed in the previous two paragraphs are not critical to my decision. That is because the evidence sufficiently establishes Mr Nasrallah's knowledge of and participation in the payment flows to Mr Al Rajaan. I do not accept Mr Nasrallah's evidence that there was a rigid divide between the business of Phoenix and the business of PIB. To my mind, the following matters are significant on these points.

1471. First, there is the very fact that payments were made to Mr Al Rajaan. It is not a coincidence that PIB was making payments to Mr Al Rajaan at the same time as Phoenix was making payments to Mr Al Rajaan. The relationship between Mr Al Rajaan and Mr Nasrallah was very close: Mr Nasrallah was the person that Mr Al Rajaan trusted. The evidence does not suggest a similar close relationship between Nadim and Mr Al Rajaan, Mr Al Rajaan would therefore have been looking to Mr Nasrallah to make sure that the PIB payments to him ran smoothly.

1472. Secondly, it is instructive to look at the timing of when PIB was incorporated and started to channel payments to Mr Al Rajaan. This was in 1997, around 18 months after the Phoenix commissions channel started. Nadim left his job at Paribas to engage on the new venture. I draw the inference, as PIFSS submitted, that things had started well with Phoenix, and there was now a new opportunity for a further commission stream to Mr Al Rajaan, using equity options trading and PIB for that purpose. The two schemes then worked in parallel, in a broadly similar way; with monies being paid to Phoenix or PIB, and then shared with Mr Al Rajaan. It is obvious that Mr Nasrallah would have been involved, with Mr Al Rajaan, as well as Nadim, in setting up those parallel arrangements.

1473. Thirdly, Mr Nasrallah was himself the beneficiary of monies that were paid into PIB. The largest sums, some USD 29.4 million (as shown on the left-hand side of PIB spidergram) went to account 530249. This was a joint account of Mr Nasrallah and Nadim, where I have decided (contrary to Mr Casey's submission) that both individuals were ADEs or ultimate beneficial owners. Some of that money then flowed from that account to Mr Al Rajaan's vehicles, Balboa, Moolwurf and Intermac. In addition, monies were paid to Mr Nasrallah's account at SNBSL: i.e. Banque De Syrie & Du Liban. Money was also received in account 530109, which was another account in the joint names of Mr Nasrallah and Nadim, and where Mr Nasrallah was one of the ADEs.

1474. Following the money is likely to, and does in this case, identify those responsible for the steps originally taken to procure it: here, Mr Nasrallah and Nadim. Thus, the monies went into accounts of which Mr Nasrallah was the beneficial owner with his son, and one account which was Mr Nasrallah's own

account. Some, but not all, of the money then went out to Mr Al Rajaan. It is most improbable that Mr Nasrallah had nothing to do with these transfers, even if the payment instructions were given by Nadim. The likelihood is that Mr Nasrallah and Nadim were working together.

1475. Fourth, as PIFSS submitted, the father and son's operations were fully intertwined. At one stage in his evidence, Mr Nasrallah described Phoenix as a "family business". That accords with the documents. Nadim was a minority shareholder in Phoenix itself, and was identified in the Form A as one of the beneficial owners of the Phoenix account at EFG. The updated Ozak CIP dated 24 July 2009 recorded Ozak as beneficially owned jointly by Mr Nasrallah and Nadim, noting "Father and son in the same activity". That particular CIP contained much false information, but the association of father and son was correct. Nadim was also identified as a beneficial owner of the Wynacre account from September 2010. There was also documentary evidence that Nadim assisted Mr Nasrallah in sending and receiving faxes and emails. Mr Guerin's 1999 e-mail, dealing with the constellation of Nasrallah accounts, said that the Phoenix and PIB accounts "work together in our facility". This reflected the fact that father and son were working together, as Mr Guerin perceived it, in both businesses.

1476. Father and son were also closely involved in the steps taken in 2012 in reaction to the Swiss investigation into Mr Al Rajaan. PIB's account, and 530249, were both closed on Nadim's instructions sent on the same day and in the same terms as Mr Nasrallah's instructions to close Phoenix, Ozak and account 530109. Subsequently, Antheya was transferred into Nadim's name. It then received money from a number of fund managers who had previously paid Phoenix. Overall, Mr Ritchie characterised Phoenix and PIB collectively as a family commission sharing business. I agree with that characterisation.

1477. A number of other points were advanced by Mr Casey. There was no dispute that, where BNP Paribas was identified in relation to the monies paid to PIB, the amounts paid were referable to PIFSS' trading: i.e. the first two (pink) bubbles at the top of the PIB spidergram. Mr Casey submitted, however, that the amount in the third bubble, USD 6.06 million, which did not refer to BNP Paribas, should be excluded, on the basis that it had not been proved that those payments were referable to PIFSS' trades.

1478. I disagree. There has been no evidence in the case that PIB's business related to anything other than PIFSS. No evidence has been forthcoming from the defence as to these payments being referable to any client other than PIFSS. There is no evidence that PIB had any other client. If there was another client, it would have been easy for Mr Nasrallah to obtain documentary or oral evidence from his son to demonstrate that simple point.

1479. Furthermore, Mr Nasrallah's evidence, in relation to Phoenix, was that he was required by Mr Al Rajaan to work exclusively for PIFSS. This exclusivity is, in my view, explained by the need for the arrangements to be kept completely confidential. This would, as Mr Ritchie submitted, have been the same in relation to the PIB aspect of the arrangements.

1480. The percentage split, taking into account these payments, was just over 50%. That is broadly in line with Mr Nasrallah's evidence as to the percentage split in the early years, prior to 65/35 becoming the norm.

1481. Against this background, it can safely be inferred that these payments (USD 6.06 million) were of the same character as the BNP Paribas related payments; i.e. referable to PIFSS' investments.

1482. Mr Casey also submitted that PIFSS could not claim in respect of the trades referable to PIFSS' indirect French subsidiary, on the basis that this was not a loss suffered by PIFSS itself. Given the fact that these trades were so small, in comparison to the PIFSS trades, they can in my view be disregarded on the basis that they are de minimis. In any event, however, the secret commissions paid in respect of those trades are referable to Mr Al Rajaan's wrongful profiteering. For the purposes of the KPPL, and in particular Article 12, no distinction is to be drawn between benefits referable to trades carried out by PIFSS itself, or by a PIFSS' subsidiary.

1483. Mr Casey submitted that the court did not have the benefit of expert evidence concerning the manner in which Paribas calculated and applied its premia on options transactions, in order to establish whether ultimately Paribas paid a lower net premium to PIFSS as a result of PIB's involvement in the relevant transactions. I do not consider that this is necessary. Mr Al Rajaan was profiteering from his position at PIFSS. Under Kuwaiti law, as I have held, the benefits to Mr Al Rajaan and others are recoverable as representing the harm suffered by PIFSS.

J9: Quantum issues

1484. In his written closing, Mr Nasrallah raised a number of points on specific payments, where he denied that the source of the payments were commissions on PIFSS' investments. The submission also referred back to points taken in Annex C of his opening submissions. However, I did not identify any specific points raised there, which were additional to those raised in the written closing. A number of other points were also identified in "Amended Annex 9". This was a table of issues arising on the fund flow schedules which PIFSS had produced as annexes to its Particulars of Claim. Annex 9 was a document to which changes were made during the course of the trial, and those changes happily narrowed the issues considerably. It meant that a period of days, allocated for submission on fund flow issues, was not required. In relation to Mr Nasrallah, I was left with a relatively small group of quantum points. Some of these points involved adopting non-admissions by Mr Al Rajaan.

1485. I have already dealt with some of the points raised by Mr Nasrallah in his closing argument: the Abraaj investment return of USD 5.1 million; and the USD 6.06 million element of the PIB claim. Another point, relating to small payments from Europhenix, Alternative Advisors, and MFEX, was not pursued by PIFSS. The other points can be summarised as follows.

1486. It was submitted that the claim in respect of Ozak included USD 600,466.40 referable to a commission payment to Mr El Ghazzi (under the Man Scheme)

relating to an investment of KFAED, not PIFSS. This is a commission payment which I address below in the context of the Man Scheme. The letter signed by Mr El Ghazzi dated 26 March 1998 does refer both to a PIFSS investment of USD 25 million, and a KFAED investment of USD 15 million. Mr El Ghazzi's 4% commission on the latter amounts to the USD 600,466.40 referred to here.

1487. I consider that this is a fair point. There is some basis for thinking that the USD 600,466.40 may in fact have been referable to PIFSS' first and second investments with Man, but the position is uncertain and I consider that Mr Nasrallah is entitled to the benefit of the doubt. Accordingly, the claim in respect of Ozak is reduced by USD 600,466.40.

1488. Mr Nasrallah submitted that PIFSS had not sufficiently proved that a number of payments, made to Ozak or Phoenix, were referable to PIFSS' investments. Mr Nasrallah did not advance a positive case on these payments, and therefore did not provide any explanation of what the payments were. The case advanced was therefore essentially a non-admission. This is not a promising starting point, since one might have thought that Mr Nasrallah – who was dealing with the payments for Mr Al Rajaan, and was having regular conversations about them with Mr Guerin – should have been in a position to support his challenge to the payments with a positive case, if it existed.

1489. Furthermore, the evidence shows that the purpose of the Ozak account was to receive secret commissions on PIFSS' investments which were then passed to Mr Al Rajaan. That is clear from the way in which the account was in fact operated, receiving (as shown on the spidergram) payments from the various Zetland entities, payments from Abraaj, and a payment from Man which represented (at least in substantial part) a share of Mr El Ghazzi's commissions on PIFSS' investments. Against that background, it is probable, unless there is evidence to the contrary, that payments into that account represented such secret commissions. I take the same view in relation to the Phoenix account, where Mr Nasrallah said that Phoenix's business was exclusively PIFSS.

1490. Mr Ritchie addressed in some detail, in his oral closing, the fund flows issues which had been raised by Mr Nasrallah. I found the points which he made persuasive, and indeed Mr Casey did not devote any of this oral closing to dealing with Mr Ritchie's arguments or explaining why they were wrong. Against this background, I will deal with the points raised briefly.

1491. A payment of CHF 303,875 was made to Ozak by Credit Suisse Zurich in December 2008. The banking documents did not identify the paying company. PIFSS contended that it was a Wentworth payment. I accept that this is probable, based on the facts that (i) it came from the same bank which made payments on behalf of Wentworth, both before and after December 2008; (ii) it fitted into an overall pattern whereby payments were made every quarter by a number of Zetland companies, including Wentworth; (iii) call transcripts with EFG at around this time refer to a Wentworth payment; and (iv) no alternative explanation has been provided.

1492. A payment of USD 802,035 was made to Phoenix on 4 September 2007. There is a dispute as to whether this was a payment by one or other of two fund

managers, Access or AXA. As EFG sensibly recognised, the dispute is immaterial. Whichever company made it (and there was no dispute that it was made) it was a commission payment paid to Phoenix which was then shared with Mr Al Rajaan on the 65/35 basis. I accept that it is probable that the payment was, as PIFSS contended, from Access; because otherwise, there is an unexplained 2007 gap in the payments which that fund manager was regularly making over the years.

1493. A series of payments (amounting in total to less than USD 350,000) were received by BEC to the credit of Phoenix's account. The credit advices all refer to the payor as being Paribas. EFG itself has said that BNP Paribas was the source counterparty for these payments. The issue appears to be whether or not there is sufficient evidence that the payments were in fact from Paribas. In my view, the credit advices are sufficient to show this. Since Paribas was an important fund manager which paid money on PIFSS investments to Phoenix, I conclude that these are payments of commissions on PIFSS investments. No alternative explanation has been provided.

1494. A payment of CHF 700,000 on 20 October 1999 was made, according to BEC's credit advice, by Bank Sarasin, one of the fund managers that paid into Phoenix. I see no basis for disputing that this was a payment by Sarasin, nor that it was anything other than a commission payment on PIFSS' investments. There has been no explanation of what else it could be.

1495. A number of payments, totalling USD 4.3 million, were made to Ozak by Philip Conway Thomas: see the right-hand side of the Ozak spidergram. Philip Conway Thomas is an offshore law firm, which is likely to have been acting for a client or clients in making these payments. Also on the right-hand side is a bubble showing USD 3.4 million "other" payments. The latter was a grouping of payments made by a series of entities, including Eminent Marketing, Paribas Ventures and Northern Trust. In relation to these two payments, unlike with most of the payments to Ozak, PIFSS was unable positively to identify the source investments.

1496. However, the evidence is sufficient to show that these were commissions. The money was paid to Ozak, which was used for that purpose. Some of the incoming payments could be matched with payments out to Mr Al Rajaan. Mr Nasrallah, when asked about the payments on the right-hand side of the Ozak spidergram said that they were all payments from Mr Amouzegar's funds. PIFSS' closing referred to a number of responses from Mr Guerin to compliance queries relating to some of these payments. The responses indicated that the payments were retrocessions. There is nothing to suggest that they were retrocessions of commissions resulting from anything other than PIFSS' investments. There is no contrary evidence or explanation for the payments. It is also noteworthy that Philip Conway Thomas was paying money to Mr Nasrallah's 190882 Pictet account, which was also used for receiving retrocessions on PIFSS' investments.

1497. The above conclusion is also relevant to a Pictet payment made by Calmer Overseas which was also not admitted by Mr Nasrallah. In February 2006, Mr Nasrallah's 190882 account received three incoming payments from Philip

Conway Thomas, Wentworth and Calmer Overseas. The money was then paid out in a combined total of EUR 1,348,000 pursuant to a written instruction from Mr Nasrallah to make payment to Bordertown. Since Philip Conway Thomas and Wentworth are associated with paying commissions to Mr Nasrallah on PIFSS' investments, it can reasonably be concluded that the same is true of Calmer Overseas, which was one element of this combined payment out to Bordertown.

1498. Mr Nasrallah referred in his written closing to "certain Parvest and Partech payments" as being not referable to PIFSS investments. Mr Ritchie's oral closing showed that it was unclear as to what payments were being referred to, and Mr Casey's oral submissions provided no clarification. I am not persuaded that there is any substance in this point.

1499. Finally, a point was raised by Mr Nasrallah and Mr Al Rajaan in relation to bank charges. In my view, the claim should be assessed on the gross amount of the commissions that were taken or laundered by the Defendants. The fact that they may have incurred some bank charges in the process should not result in a reduction of the claim that is made.

J10: The double actionability period

1500. A very small part of PIFSS' claim in respect of the EFG Scheme – calculated by EFG to be USD 2.4 million – requires consideration of English law. This is because some of the acts giving rise to PIFSS' claim occurred before 1 May 1996 when PILA came into force. Given that any claim in respect of this early period is dwarfed by the claim in respect of later periods, the submissions of EFG and PIFSS on the double actionability period were relatively brief.

1501. The starting point is that the torts of Mr Al Rajaan, Mr Nasrallah and Mr Guerin are actionable under Kuwaiti law, for reasons discussed in this section. There is also no defence under Kuwaiti law of contributory fault, or limitation, for reasons discussed in later sections.

1502. However, the double actionability rule requires the relevant tort to be actionable under English law as well, and EFG submitted that there were defences which could be advanced to the claim based on Mr Guerin's conduct. The pleaded English law claims in respect of the double actionability period were joint tortfeasorship bribery and dishonest assistance. A claim in conspiracy had not been formally pleaded.

1503. There were arguments as to whether English law would recognise a claim in joint tortfeasorship bribery against Mr Guerin, in the light of the decision of the House of Lords in *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [2000] 1 AC 486. I do not consider it is necessary to address that debate, since Mr Guerin's conduct is clearly actionable under English law as a claim in dishonest assistance. EFG did not submit otherwise. The English law constituents of that claim are addressed in Section D above, and need not be repeated here.

1504. EFG submitted that, in the context of a claim for dishonest assistance, it would be necessary for PIFSS to demonstrate that it had suffered loss, and that English law would in that context not presume loss in the amount of the bribe paid. There appears to be some support for this in the decision of the Supreme Court in *Hopcraft v Close Brothers Ltd* [2025] UKSC 33, at [76], and I shall proceed on the basis that EFG's proposition is correct.

1505. If one leaves aside a presumption of loss in the amount of the bribe, the question of whether PIFSS has suffered loss depends essentially on the question of whether PIFSS would have been in a better financial position if Mr Al Rajaan had acted honestly in the performance of his duties. This involves consideration of what would have happened in the "counterfactual" world of an honest Mr Al Rajaan. PIFSS' case was that in an honest world, Mr Al Rajaan would have sought and successfully obtained for PIFSS the benefits which, in the dishonest world, he and his associates obtained for themselves. This is the case which, in the context of Kuwaiti law, has been referred to as "transactional" harm.

1506. PIFSS' basic point is that, in an honest world, the fees paid in relation to investments, in respect of which secret commissions were paid, were negotiable and would have been reduced had Mr Al Rajaan acted in PIFSS' interests and not been conflicted by his interest in secret commissions paid. The investment expert evidence showed, unsurprisingly in my view, that fees of fund managers were indeed negotiable, and that there were various factors which were relevant to a successful negotiation between investor and fund manager.

1507. There was a fair amount of written submission, in the opening and closing arguments of various Defendants, including but not limited to EFG, as to what would have happened in the counterfactual honest world. The Defendants generally were interested in this point, because it would potentially arise in the event that PIFSS failed on its "benefits as harm" argument under Kuwaiti law, and was therefore required to prove transactional loss across the board. In the event, I have accepted PIFSS' "benefits as harm" argument, and so the arguments about the counterfactual world are of much less significance. They do, however, arise in the present context of the claim under English law against a dishonest assistant during the double actionability period. They also arise on one aspect of loss claimed under the Aerium Scheme: see Section K below.

1508. I thought that the position, as to the counterfactual honest world, was much less complex and intricate than portrayed in the Defendants' submissions. Looking at the position simply and broadly, PIFSS was in a commanding position to negotiate fees, because of its size and profile, its status as a sole, majority or cornerstone investor in many of the pleaded investments, and the timing of its investments, which were often made when a fund was being launched and the investment manager was looking for funds. The evidence also indicates that many fund managers were very keen to do business with PIFSS, and were looking to meet Mr Al Rajaan for that purpose.

1509. I accept the point made by Ms Rogers in her oral submissions, and also by Mr Collins KC for Man in his oral submissions, that the ability successfully to negotiate fees may vary, depending on the facts. Ms Rogers sensibly acknowledged, and I agree, that where a particular fund manager has been

demonstrated to have been complicit in paying bribes, it would not be at all difficult to reach the conclusion that a negotiation in an honest world would have resulted in the amount of those bribes being rebated or paid to PIFSS. One reason for that conclusion is that if a fund manager is so keen for PIFSS' business that it is prepared to pay bribes in order to secure it, it is fanciful to think that he would have strenuously resisted allowing PIFSS to benefit from rebates in an equivalent amount if there had been a negotiation in an honest world.

1510. Ms Rogers submitted, however, that the question of what would have been produced by a successful negotiation is more difficult in the context of the EFG Scheme. That is because PIFSS has not set out to prove that the fund managers, who were paying commissions to Phoenix, were complicit in the payment of bribes. It could not therefore be assumed that there would have been a successful negotiation for rebates. She said that it would be appropriate to make an allowance for the uncertainty when assessing any transactional harm that might have been suffered by PIFSS. These submissions were directed at the claim made generally in the EFG Scheme, rather than the particular double actionability period that I am considering here. However, I do need to consider that argument in the context of the claim made in the double actionability period.

1511. As far as concerns Mr Guerin, the double actionability period up to May 1996 involved transactions with, and commission payments made to, Mr Nasrallah's company Phoenix: see Fig. 7 in Section J2 above. This period was the beginning of the operation of Phoenix's business following Mr Nasrallah's departure from Paribas. As can be seen from the list of payments in Section J6 above, there were a relatively small number of fund managers who were doing business with PIFSS, ostensibly via Phoenix, at that time. Those doing business in or prior to 1996 were Everest, Paribas, Sigma, AXA, and Sarasin. I have not thought it necessary to analyse whether all of them were doing business prior to May 1996, the start of the PILA period. I will assume that they all were.

1512. The evidence discussed in Section J6 above shows that Mr Al Rajaan already had established relationships with, at least, the individuals at Paribas, Sigma and AXA. It is likely that the position was the same in relation to Everest and Sarasin as well. No introducer agreement with Phoenix has been produced in relation to either of those firms. These matters, when taken in conjunction with the evidence discussed in Section J6 as a whole, indicate that no intermediary in the shape of Mr Nasrallah was necessary in order for the fund manager to deal with Mr Al Rajaan, and thereby obtain investments from PIFSS.

1513. In my view, this is a most significant point which means that the counterfactual analysis is not complex. Mr Al Rajaan knew that substantial commission payments to intermediaries were made by fund managers: that was the underlying basis of the various schemes that were operating. He must have known that these commission payments were negotiable. I am satisfied on the evidence at trial that, in relation to the fund managers who paid commissions during the double actionability period, there was no need for Mr Nasrallah as an intermediary, since there was an existing relationship with PIFSS. In an honest world, where Mr Al Rajaan was not conflicted and was carrying out his

duties properly, he should and would have requested rebates for PIFSS equivalent to the monies which were being paid to the unnecessary intermediary. Given the other factors, described above, which put PIFSS in a commanding position to negotiate fees, I consider that Mr Al Rajaan's request would have been met without any difficulty.

1514. Accordingly, applying English law, PIFSS can claim the amount of the commissions paid to Phoenix, in the double actionability period, as transactional loss. There is no need to discount that figure for the uncertainty of a successful negotiation. PIFSS can therefore recover that loss in its claim against the dishonest assistant, Mr Guerin. The claim equally succeeds, in respect of that period, against Mr Al Rajaan and Mr Nasrallah as well.

1515. A final English law point advanced by EFG, in relation to the double actionability period, is a limitation argument under English law. That argument turns on the application of Section 32 (1) (b) of the Limitation Act 1980. If there was deliberate concealment by Mr Guerin, the English law 6-year limitation period only starts to run when PIFSS discovered the concealment, or could with reasonable diligence have discovered it.

1516. In the recent decision of the Supreme Court in *Potter v Canada Square Operations Ltd* [2023] UKSC 41, the court disapproved earlier authority which had introduced complexity into the requirements of Section 32 (1) (b). It said at [109]:

> "What is required is (1) a fact relevant to the claimant's right of action, (2) the concealment of that fact from her by the defendant, either by a positive act of concealment or by a withholding of the relevant information, and (3) an intention on the part of the defendant to conceal the fact or facts in question."

1517. Here, the fact that commissions were being paid by Phoenix to Mr Al Rajaan, via EFG accounts, was relevant to PIFSS' right of action against Mr Guerin. That fact was concealed through positive acts of concealment by Mr Guerin described in this section. The documents which Mr Guerin produced or signed internally, such as the CIPs, deliberately concealed the true position, and never revealed that Phoenix was paying kickbacks to the Director General of its only client. As *Potter* makes clear, it is not relevant to enquire as to whether Mr Guerin had a duty of disclosure towards PIFSS. Nor, contrary to EFG's submission, is it relevant that Mr Guerin's acts of concealment were principally directed at his employer EFG.

1518. It cannot be argued that PIFSS had actual knowledge of the relevant concealed fact until, at the very earliest, 2015 when documents were produced pursuant to the MLA request. Even if one took 2015, rather than 2017 when PIFSS was given access to the Swiss Prosecutor's file, the 6 year limitation period was still running when PIFSS commenced proceedings against Mr Guerin.

1519. EFG submitted that PIFSS could with reasonable diligence have discovered the concealment. I disagree. The relevant fact could only come to light, as it did, if

there was a criminal investigation which led to Swiss documents being disclosed pursuant to an MLA request. Short of a criminal complaint, and an MLA request for Swiss documents, PIFSS could not have discovered anything about EFG's involvement in Mr Al Rajaan's corruption. Indeed, despite the allegations of corruption which were made in Kuwait, no-one uncovered any documentation which linked Mr Al Rajaan to the Ralmin Trust allegations which were the basis of the questions being asked in Kuwait by parliamentarians and others. The absence of anything against Mr Al Rajaan in Kuwait was a consequence of the care which Mr Al Rajaan, and others, had taken in order to conceal what was going on.

1520. The criminal investigation, leading to the MLA request by Kuwait, started as a result of Dr Al Rashed, after he had left PIFSS, making his criminal complaint in 2008. It then took some 7 years for documents to be produced, pursuant to the MLA, in 2015. Dr Al Rashed's criminal complaint, which led to the criminal investigation, had nothing to do with EFG, or indeed with any of the schemes with which I am concerned. It was fortuitous that his criminal complaint, and the MLA request, then led to the production of documents from Banque Mirabaud and the start of the trail which has led to the present proceedings. The complaint had not been focused on Banque Mirabaud.

1521. It is of course true that there were rumours and allegations in Kuwait of Mr Al Rajaan's corruption in Kuwait. But they were always denied by Mr Al Rajaan, and solid evidence was not obtained. Leaving aside Dr Rashed in 2008, no-one else, such as the Kuwaiti parliamentarians who raised questions about Mr Al Rajaan over the years, went to the public prosecutor. Notably, Dr Al Rashed did himself go to the public prosecutor whilst he was at PIFSS.

1522. Against this background, I do not think that it can be said that a reasonably diligent PIFSS should have initiated a criminal investigation with the Kuwaiti public prosecutor much earlier. In circumstances where Mr Al Rajaan was PIFSS' Director General, and no-one had been able to prove anything or come up with documents showing Mr Al Rajaan to be receiving corrupt payments, one would not expect PIFSS to initiate a criminal investigation. Reasonable diligence would, in my view, only require that kind of step if there was strong evidence, rather than as yet unsubstantiated rumour and allegation, of his corruption. Furthermore, even if PIFSS had gone to the public prosecutor earlier than Dr Rashed did, it is doubtful that this would have borne fruit substantially earlier than 2015 or 2017.

1523. The upshot is that PIFSS' claim against Mr Guerin succeeds in relation to the double actionability period.

J11: Conclusions as to the liability of Mr Al Rajaan (and therefore D1), Mr Nasrallah and Mr Guerin under Kuwaiti law

1524. On the basis of the facts set out in this section, and because I reject elsewhere the other defences (including contributory fault, limitation and justiciability), I conclude that Mr Al Rajaan was – and D1 now is – liable to PIFSS under Article 227/228 KCC, as are Mr Nasrallah and Mr Guerin.

1525. The essential basis of that liability is because Mr Al Rajaan caused or influenced PIFSS' investments in return for the payment of secret commissions, and that Mr Nasrallah and Mr Guerin agreed to and did assist this by putting in place fronting and banking arrangements to facilitate the payments to Mr Al Rajaan, including the arrangements whereby Nadim Nasrallah made payments through PIB.

1526. As far as concerns Mr Al Rajaan (and therefore D1), the analysis of his illicit acts, *mens rea,* and harm caused to PIFSS is materially the same as set out above in relation to the Mirabaud and Pictet Schemes.

1527. *Articles 47 and 48 of the Penal Code in the context of Articles 11 and 12 of the KPPL.* As far as concerns Mr Nasrallah and Mr Guerin: they knowingly assisted in Mr Al Rajaan's breaches of the KPPL, by agreeing with Mr Al Rajaan to facilitate the payments of secret commissions through: (i) establishing or assisting to establish corporate vehicles and opening and holding and managing accounts at EFG as Mr Al Rajaan's nominee in order to receive payments of the secret commissions; (ii) taking all necessary steps to secure payment of the commission; and (iii) by instructing, making or authorising transfers from those accounts. These acts of assistance were for the purpose of fronting, facilitating and concealing the payment of secret commissions for Mr Al Rajaan's benefit in respect of PIFSS' investments. They thereby:

i) Agreed to receive, transfer and conceal the proceeds of Mr Al Rajaan's criminal acts, and subsequently did so;

ii) Assisted in and facilitated the effective transfer of commissions into Mr Al Rajaan's control, by signing relevant documents and authorising and executing transfers on a regular basis.

1528. Both Mr Nasrallah and Mr Guerin had the relevant knowledge and intent at all material times. They were aware (i) that they were assisting Mr Al Rajaan in the ways set out above, (ii) that the result was that Mr Al Rajaan was in a position to cause or influence PIFSS to continue to make investments in order to obtain bribes/ secret commissions and to continue secretly to receive those bribes/ secret commission that were in fact paid and (iii) that this caused harm to PIFSS, which harm they intended directly or as the probable consequence of enriching themselves, Mr Amouzegar and Mr Al Rajaan. Mr Nasrallah and Mr Guerin are therefore doers for their role in providing assistance to Mr Al Rajaan under Article 47 (2) KPC, and accomplices pursuant to an agreement under Articles 48 (2) and/or 48 (3).

1529. *Article 48 of the KPC in the context of bribery – Articles 35-39 of Law No 31 of 1970.* With the assistance of Mr Nasrallah and Mr Guerin, Mr Al Rajaan sought and obtained bribes from Mr Nasrallah and Mr Amouzegar/ Mr Khosrovani in return for exercising his influence to commit PIFSS to investments that generated fees for Mr Nasrallah, Mr Amouzegar and Mr Khosrovani, or companies in their names or control. They did so knowing that the payments requested and accepted were being offered in return for his exploitation of his role as Director General of PIFSS in relation to its investment activity. They therefore committed breaches of Article 48 KPC by assisting Mr Al Rajaan's

breaches of Article 35 KPC as an accomplice. They both knew that Mr Al Rajaan was a public official, and that the bribe or secret commission was in return for Mr Al Rajaan performing or refraining from performing activities in his public position, namely causing PIFSS to make investments that generated fees.

1530. *Money laundering*. The payment flows described in this section were transfers of property orchestrated by Mr Al Rajaan, Mr Nasrallah and Mr Guerin between accounts under their control derived from criminal acts, which concealed and disguised the true nature of the sums being received, with the intent of laundering the money and making it appear to be funds obtained from a legitimate source – while knowing the source to be criminal conduct.

J12: Conclusions as to the quantum of compensation

1531. Save for USD 600,466.40 addressed in Section J9 above, PIFSS has established its claim for compensation in relation to all the amounts (Phoenix, Ozak, PIB, Wynacre and Golgen) set out in Section J1 above.

1532. Prior to taking into account the impact of the Mirabaud and EFG settlements, and after stripping out claims made against Mr Al Rajaan and Mr Nasrallah under other schemes, the quantum of PIFSS' successful claim for compensation, expressed in US Dollars and subject to possible conversion to other currencies, is therefore as follows:

i) D1/Mr Al Rajaan: USD 384,162,504;

ii) Mr Nasrallah: USD 407,385,992;

iii) Mr Guerin: USD 408,185,992.

SECTION K: THE AERIUM SCHEME

K1: Introduction

1533. The alleged "Aerium Scheme" concerns claims against Mr Al Rajaan and two other Defendants, Ely Michel Ruimy and Aerium Finance Ltd ("AFL"). The claim against Mr Al Rajaan is USD 110,261,728. That is also the amount of the claim against Ely Michel Ruimy. The claim against AFL is USD 9,934,604.

1534. This Section K focuses on the claim, and the defences to the claim, against Ely Michel Ruimy and AFL. The submissions on behalf of Mr Al Rajaan did not address the Aerium Scheme in detail, and I have already rejected his general defences such as authorisation and market practice. It will become apparent that there is no defence to the claim as far as Mr Al Rajaan is concerned.

1535. Ely Michel Ruimy was the co-founder, principal and chairman of a group of companies operating under the name "Aerium". One witness (Mr t'Serstevens) described "Chairman" as being Mr Ruimy's official title within the group, and that this role included receiving reports on the affairs of the group and involvement in strategic matters.

1536. In a witness statement served in relation to his unsuccessful challenge to jurisdiction, Ely Michel Ruimy described how he had founded the Leonard de Vinci Group ("LDV"), established in Paris in 1988, and had later co-founded the "Aerium group" in 2003. He said that the Aerium group provided independent investment management services for commercial real estate assets and funds.

1537. The investments giving rise to the claim in respect of the Aerium Scheme were, principally, investments by PIFSS in various "Aerium" funds. In his trial witness statement, Ely Michel Ruimy describes these funds as operating in a similar way to a franchise, with the name "Aerium" simply being used as an umbrella term to describe distinct funds operating under that name. Each fund was owned independently of each other fund, through a series of unconnected entities.

1538. The structures under which these funds were created and operated were complex. For the purposes of resolving the key issues between the parties, however, it is not necessary to describe the structures, or the fee arrangements, in detail. In broad summary, the various funds were managed by individuals, in particular Ely Michel Ruimy and his brother Franck Ruimy, who became the CEO of the Aerium group. They generated very substantial fees for the companies involved in the structures. PIFSS calculated that these fees were at least USD 432 million, and this figure was not disputed. A significant proportion of those fees was paid to (alleged) introducers, and specifically the "QWM" companies described below.

1539. In addition to the Aerium funds, PIFSS also invested in various "Aeriance" funds, but these play relatively little role in the present proceedings. The Aeriance group arranged financing and other services concerning commercial real estate, as well as managing funds under the Aeriance brand. The Aeriance

funds were also associated with the Aerium group: in 2015, Franck Ruimy was described as chairman of the Aeriance group, although its CEO at that time was a Mr Thaker.

1540. The parties helpfully agreed a series of tables which identified the various LDV and Aerium companies relevant to the case. The principal holding company was Aerium Holdings SA, a Luxembourg company which was formed in late 2003 at around the time when the first Aerium fund, Aerium Properties 1 (known as "AP1"), was to be launched. At its formation, the main shareholder in Aerium Holdings SA (99.71%) was Mr Alain Driancourt who ran a professional fiduciary firm called Driancourt & Cie. He took no part in the running of the Aerium funds, and he was a nominee for one or more other persons. Ely Michel Ruimy accepts that by January 2008, he was the beneficial owner of 100% of Aerium Holdings SA. There is a dispute as to his ownership interest at earlier times, and I address that issue below. In short, it is probable that, at its formation, Mr Driancourt held his shareholding for Ely Michel Ruimy, who remained (at least) a significant beneficial owner thereafter, and possibly for his brother as well.

1541. There were various companies in the Aerium group. One company, which is a defendant to these proceedings, is AFL, an English company with offices in London. At the times material to the events giving rise to the claim against AFL (which concerns the Mirabaud payments described below), AFL was a subsidiary of Aerium Holdings SA. Another English company in the Aerium group is Aerium LLP which was the "venture manager" (i.e. fund manager) of the first two Aerium funds, AP1 and Aerium Properties 2 ("AP2"). Its parent company was also Aerium Holdings SA. As further funds were launched, other companies were brought into existence and the venture manager companies changed.

1542. Since the issues in the case do not generally require distinctions to be drawn between the various Aerium companies, I shall simply refer to "Aerium" unless it is necessary to specify a particular company. Where I refer to Ely Michel Ruimy and AFL collectively, I shall use the term "the Aerium Defendants".

1543. The first of the series of real estate funds, branded under the name "Aerium", was launched in late 2003, and was known as Aerium Properties I or "AP1". A series of further funds were launched in subsequent years. PIFSS was a very significant investor in these funds. In most of the funds with which I am concerned, it was the sole investor. In others, such as AP1, it was the most significant investor in terms of the amount of money subscribed. It was also the first investor to subscribe to that fund.

1544. There were two aspects of the claim against the Aerium Defendants, which are also made against D1.

1545. The first aspect concerned payments made, between 2008 and 2010, into a Swiss bank account which Ely Michel Ruimy held with Banque Mirabaud. This money was paid into the account by Ely Michel Ruimy, but he did not then enjoy the use of any of it. Instead, all of it was paid over, in two different ways, to or for the benefit of Mr Al Rajaan. The majority was paid into a bank account,

also at Banque Mirabaud, which was held in the name of Ms Al Wazzan, but which Mr Al Rajaan accepted (in materials served on his behalf when he was alive) was held by her as his nominee. A smaller amount, but still a substantial sum of USD 1.5 million, was paid directly to two jewellers in Switzerland in settlement of two invoices. The total sum so paid for Mr Al Rajaan's benefit was USD 9,934,604 (representing a small reduction on PIFSS' claim as originally pleaded). That is the quantum of the claim made against Ely Michel Ruimy, AFL and D1.

1546. The original source of these monies was commissions paid on various of PIFSS' investments. These commissions included commissions paid to AFL on three particular investments, referred to at trial as the RMF, Tensyr, and Turquoise funds. It also included commissions paid on some Aeriance funds. The RMF, Tensyr and Turquoise funds were neither Aerium nor Aeriance funds, but commissions on those funds came into the Aerium group because AFL was paid as an introducer of those funds to PIFSS. One issue which was debated was whether AFL was or was not a genuine introducer of those funds, or whether it had simply been interposed to facilitate payments of monies which would, at least to some extent, end up with Mr Al Rajaan. Although I address that issue briefly below, it is not in my view critical to determining whether the Mirabaud payments were, as PIFSS contends, corrupt to the knowledge of Ely Michel Ruimy.

1547. When the proceedings against Ely Michel Ruimy and AFL were started, these Mirabaud payments were the only payments, alleged to emanate from the Aerium Defendants, which were known to have found their way to Mr Al Rajaan. As a result of disclosure in the proceedings, in particular disclosure provided during the course of 2025, it emerged that this was far from the full extent of monies which had found their way to Mr Al Rajaan from commissions paid in connection with Aerium funds. The provision of disclosure of documents by the Aerium Defendants in the present proceedings was problematic and seriously delayed. This was in part because of the disinstruction of both (i) the firm of solicitors (Latham & Watkins (London) LLP) which had acted for the Aerium Defendants at the outset of the proceedings and for a considerable time thereafter, and (ii) the firm (Ontier LLP) that briefly replaced them. Nevertheless, extensive disclosure was provided, with the considerable assistance of the Aerium Defendants' present solicitors, McCue Jury & Partners LLP. Disclosure was given of relevant documents from various companies and individuals within the wider Aerium group, without any point being taken as to whether these were documents under the control of the two defendants, Ely Michel Ruimy and AFL.

1548. The Aerium Defendants' disclosure revealed that very substantial sums of money, derived from commissions paid in respect of PIFSS' investments in various Aerium funds, had been paid to three companies over a period of many years. The three companies were Quadra Properties SA ("Quadra"), Wentworth Development Corp ("Wentworth") and Moccak Management Ltd ("Moccak"). I will refer collectively to these companies as the "QWM companies". They feature, to some extent, in earlier sections of this judgment: the Pictet Scheme and the VP Scheme.

1549. Mr Ruimy admits that USD 47,232,169 was paid to Wentworth and Moccak and USD 5,590,627 to Quadra in respect of PIFSS' investments: i.e. a total sum of USD 52,822,796. Other evidence, obtained by PIFSS for the purposes of these proceedings, showed that the QWM companies had in turn paid very substantial sums to or for the benefit of Mr Al Rajaan, or entities connected to him. This, too, was not disputed.

1550. Prior to the Aerium Defendants' disclosure, PIFSS had advanced a relatively small claim (for less than USD 1 million) against Ely Michel Ruimy, in respect of allegedly corrupt payments made by Aerium to one or more of the QWM companies. The disclosure resulted in that claim being increased to USD 100,327,124. That claim is made against Mr Ruimy and D1. That figure comprises the USD 52,822,796 which Mr Ruimy originally admitted had actually been paid to the QWM companies, and USD 47,504,328 which Mr Ruimy did not admit had been paid (for reasons explained below) but was payable under the various agreements with the QWM companies. In due course, Mr Ruimy admitted that a slightly higher figure, USD 53,121,419, had been paid.

1551. There was no dispute that the QWM companies were associated with two individuals, Mr Hashem Khosrovani and Mr Kamran Amouzegar. PIFSS contends that all three QWM companies were associated with both of them. Aerium contends that Quadra was Mr Khosrovani's company, not Mr Amouzegar's. It also contends that Wentworth was, at least originally, Mr Khosrovani's company.

1552. Both Mr Amouzegar and Mr Khosrovani and their companies have featured in earlier sections of this judgment (the Pictet Scheme, the VP Scheme and the EFG Scheme), Mr Amouzegar more extensively than Mr Khosrovani. Mr Amouzegar worked for Pictet until very shortly after PIFSS' investment in the first Aerium fund, AP1. Mr Khosrovani was a very wealthy man, appearing in the Sunday Times Rich List, and had apparently made his money in the oil industry. Both had Iranian origins, and both were clearly very close to Mr Al Rajaan. Thus, not only were they involved in channelling monies to him from the QWM companies, but they also both attended the 2010 meeting with VP (see the VP Scheme above) where there was open discussion of the "gentleman's agreement" concerning the payments by Mr Nasrallah and Mr Amouzegar to Mr Al Rajaan. Neither individual had, on the evidence before me, any particular expertise in real estate, or complex leveraged real estate funds such as those with which I am concerned. Indeed, Mr Penny accepted, in his closing submissions, that the key person with that expertise, and an ability to explain these funds to potential investors, was Ely Michel Ruimy.

1553. In relation to the QWM payments, Ely Michel Ruimy's case is that the key introducer of Aerium to PIFSS, in 2003, was Mr Khosrovani and his company Quadra. At that time, Mr Khosrovani was not, and has not been proved to be, corrupt. Mr Amouzegar only became involved at a later stage, in 2006, and it was only then that Mr Khosrovani possibly became party to corruption (as to which no formal admissions were made). In support of the case that Mr Khosrovani was not corrupt at the start, Ely Michel Ruimy relies upon the absence of banking records or other evidence showing payments being made to

Mr Al Rajaan prior to 2006. Since the arrangements were not corrupt at the start, Ely Michel Ruimy cannot have been complicit in corruption when payments to the QWM companies started. I discuss these points in Section K6 below. It will become apparent that I do not accept any of these aspects of Ely Michel Ruimy's case.

1554. There was, however, no real dispute (as between PIFSS and Ely Michel Ruimy) that at some point, when Mr Amouzegar did become involved, there were corrupt arrangements with Mr Al Rajaan. In Ely Michel Ruimy's written closing submissions, no admissions were made as to whether Mr Khosrovani ever became corrupted. However, I consider that the evidence of corruption is overwhelming; there is no other explanation of why it was that substantial payments were being made to Mr Al Rajaan from the QWM companies. Since Mr Khosrovani had an ownership interest in those companies, and since the QWM companies (including the payment flows into them) were being administered by his long-standing assistant, Ms Anna-Maria Rauf, there can be no doubt (on the evidence that I have heard) that Mr Khosrovani was party to the making of corrupt payments to Mr Al Rajaan. I address in Section K6 below the question of when he became party to the corruption.

1555. Although it was an aspect of Ely Michel Ruimy's factual case that both Mr Amouzegar and Mr Khosrovani were genuine introducers of the Aerium funds to PIFSS, with submissions being made as to how the initial introduction from Mr Khosrovani would likely have come about, and that (as discussed above) he was not initially corrupt, neither of these individuals were called to give evidence on Ely Michel Ruimy's behalf. It is perhaps unsurprising that Ely Michel Ruimy did not seek to call either of them as witnesses, because their honesty and credibility would (to say the least) be doubtful.

1556. However, again as further discussed in Section K6 below, their absence means that there is no clear or reliable evidence as to matters which formed a material aspect of Ely Michel Ruimy's factual case, including: that Quadra was purely a Khosrovani company; that Mr Khosrovani had effected the initial introduction of Aerium to PIFSS; and that he was not corrupt at the start.

1557. At all events, over a period of approximately 11 years (from 2003 to July 2014), very substantial sums of money were paid to the QWM companies, and substantial sums were then passed to Mr Al Rajaan. Payments to the QWM companies stopped as at July 2014, some 6 months after Mr Al Rajaan had finally left PIFSS. For a short time thereafter, Franck Ruimy dealt with some requests for further payment, but never giving a positive response to those requests and never authorising payment. In 2015, those attempts stopped, and there is no evidence of any attempt to obtain payment in the last 11 years, nor that payment has been made.

1558. PIFSS at one stage contended that it was likely that some or all of the unpaid (in round terms) US$ 47.5 million may in fact have been paid over to Mr Al Rajaan. However, by the end of the evidence, PIFSS were willing to proceed on the basis that the monies had not been paid. They contended, however, that the only sensible explanation – as to why nothing had been paid, in the period after July 2014 – was that Mr Al Rajaan was no longer in post, and that Ely Michel

Ruimy and his brother Franck knew that there was no reason to carry on paying monies to the QWM companies. This is one of the matters relied upon by PIFSS in support of their case as to the complicity of both men in corrupt arrangements with Mr Al Rajaan.

1559. By contrast, Mr Penny KC, on behalf of Ely Michel Ruimy, emphasised that payments were still being made to the QWM companies during the period after 2012, when the existence of Swiss criminal proceedings against Mr Al Rajaan became known to Aerium, and were still being made for 6 months after Mr Al Rajaan had left PIFSS. He submitted that this showed the improbability of any complicity in corruption, since a sensible person with knowledge of corruption would not have continued to make payments. I will return to this issue in due course.

1560. PIFSS' case, in summary, is that the payments to the QWM companies, and thence to Mr Al Rajaan, were bribes, and that Ely Michel Ruimy knew that Mr Al Rajaan was receiving these sums, or the benefit thereof, in return for bringing about PIFSS' investments in the Aerium funds. The claim in respect of the QWM payments is made only against Ely Michel Ruimy, and AFL is not a defendant to that claim. (I shall therefore generally refer to submissions in relation to the QWM aspect of the claim as being made on his behalf, rather than on behalf of the Aerium Defendants). Franck Ruimy is not a defendant at all, but PIFSS' case is that he too knew that these payments were corrupt. PIFSS also contends that Mr Amouzegar, Mr Khosrovani and Ms Rauf knew that they were corrupt, although none of them are defendants to the claim.

1561. Ely Michel Ruimy's case, in summary, is that he did not know that any of the payments made into his Mirabaud account were finding their way to Mr Al Rajaan. Similarly, he did not know that any of the payments made to the QWM companies were also benefiting Mr Al Rajaan. He was, therefore, never knowingly party to bribery and corruption. The central factual issue which I need to resolve is whether this evidence is true or untrue.

1562. Ely Michel Ruimy served 4 witness statements and was cross-examined for 3 days. Franck Ruimy served 3 witness statements and was cross-examined for 2 days. I also heard evidence from Mr David Smith, who was involved at the start of the Aerium venture. Evidence was also given by Mr Geoffroy t'Serstevens, a lawyer who worked for the Aerium group when in private practice and later became in-house General Counsel for the Aerium group. PIFSS had never alleged that Mr t'Serstevens was complicit in corruption. An allegation to that effect against David Smith was not pursued, following his evidence under cross-examination. It was, however, maintained against both Ruimy brothers.

1563. For the reasons set out below, I consider that much of the evidence of both Ruimy brothers on key issues was unreliable and indeed untruthful. I am left in no doubt that both men were knowingly complicit in the corrupt arrangements with Mr Al Rajaan. There are four particular areas of the evidence which have led me to that conclusion, and they are to some extent related. These are:

(1) The payments made by Ely Michel Ruimy to Mirabaud, and which were then channelled to Mr Al Rajaan, and my rejection of Ely Michel Ruimy's

case that these were repayments of a commercial loan which Mirabaud had made in respect of one of the Aerium ventures, namely "Bainbridge I" described below. As I conclude, Ely Michel Ruimy's evidence about these payments was untrue, to his knowledge.

(2) Lies which were told by Ely Michel Ruimy and Franck Ruimy in 2015, in response to specific questions from PIFSS' subsidiary Wafra (on behalf of PIFSS) concerning the existence of and payments to placement agents and introducers. These lies were told in order to cover up the fact that substantial payments had been made to the QWM companies.

(3) Lies which were then told by Mr Ruimy in the early stages of the present litigation, when questions were asked which – if answered truthfully – would have uncovered the payments, and the extent of the payments, to the QWM companies.

(4) The shifting and unconvincing explanations offered, in the evidence called by Ely Michel Ruimy, as to how PIFSS came to be introduced to the Aerium funds, combined with the absence of documentary or other reliable evidence that genuine introductions to the Aerium funds were being effected by Mr Khosrovani and/or Mr Amouzegar. In summary, the explanations started with the key individual, responsible for the introduction, being a Mr Andres Piedrahita who was associated with a US financial services group called Fairfield Greenwich Group ("FGG"). He was the only person identified in 2015 in response to Wafra's questions. That case, via various twists and turns, has now sought to relegate Mr Piedrahita's involvement, with the critical introducer now being said to be Mr Hashem Khosrovani.

1564. In addition, I consider that other aspects of the evidence support the conclusion that there was complicity in bribery. For example, there is powerful evidence of bribery in the context of money paid by Ely Michel Ruimy in relation to a holiday development in Morocco for a villa known as Villa 23.

1565. Before addressing each of these issues, I will set them into context by giving a chronological account of the dealings between the parties. It is not necessary to explain all of these dealings in immense detail, or to describe the complicated structures which were put in place to give effect to the various property-related Aerium funds which were created and in which PIFSS invested. Where I consider the detail to be important, I describe it in the context of the key issues which have led to my conclusions. The following section K2 therefore gives a high-level narrative overview of the Aerium funds, and the events which featured in the trial.

K2: Outline narrative

The commercial venture and its personnel

1566. A number of documents produced in late 2003 describe the nature of AP1. These documents give a sufficient flavour of the investment opportunity which was then created and the people behind it.

1567. A November 2003 slide presentation describes Aerium Properties as a "Muse Piedrahita Ruimy Fund". A later slide presentation describes it as: "A LDV Property Fund". Both presentations contain, at the start, extracts from an interview with Ely Michel Ruimy, described as President of the Leonard de Vinci Group, Principal of Aerium Properties, and member of the investment committee. He says:

> "our experience and track record in these markets have always made raising capital a very straightforward process, and our on the ground presence in critical areas has always placed us in an exceptionally strong position to identify attractive properties and execute-to-plan with a lot of speed. We bring these assets to all of our projects, and expect these capabilities to strengthen."

He identifies the factors which make Aerium's "value proposition today enormously compelling and promising": anticipated economic groundswell across Europe's commercial markets; historic low cost of capital; European investors wanting to realise cash through sale and leaseback transactions; and a differentiated fund strategy targeting properties too small for large funds, but too large for private investor groups.

1568. A Private Placement Memorandum ("PPM") for AP1, dated September 2003, goes into more detail. This document was contained in the disclosure of both Aerium and PIFSS, and I do not accept Ely Michel Ruimy's evidence that it was one of many drafts.

1569. In the PPM, the "Sponsor" of the proposed fund is the LDV. LDV is described as a real estate investment firm specializing in long-term financing, and a leader in the ownership and net-leasing of corporate properties. Since its founding in 1988, it had built a strong and consistent record of success, and had raised € 500 million in equity enabling it to acquire a portfolio of properties valued at over € 1.5 billion.

1570. The "Management Team" identified 5 individuals. Top of the list was Ely Michel Ruimy, described as a founder of the Leonard de Vinci Group and its President. He had been building the company since 1988 and had overseen all aspects of Leonard de Vinci Group's activities, including its strategy and investment policy. He was also currently running a commercial mortgage entity representative of a leading German commercial real estate lender.

1571. The second name was John R Muse, the President of Hicks, Muse, Tate & Furst. He had 23 years of experience in investment and merchant banking.

1572. The third name was Andres Piedrahita, who founded a firm which merged with FGG in 1997. He directed FGG's European and Latin American ventures, and had 15 years' experience in the investment business.

1573. The fourth name was David Smith. He was the co-founder and senior partner of Chester Investments, with 40 years' experience in the acquisition, development,

sale and management of residential properties, shopping centres and office buildings globally.

1574. The fifth name was Franck Ruimy, who in 1998 had joined W P Carey & Co LLC, a New York based real estate investment company, becoming a First Vice President in March 2003. A 2004 presentation for a later fund, Bainbridge I, described Franck Ruimy as a co-founder of Aerium, and also as being then responsible for operational management including investment strategies, structured financing strategies and acting as a special property advisor on new customised funds. His role as a co-founder of Aerium (along with Ely Michel Ruimy and David Smith) was also stated in the PPM for the Aerium IV fund described below.

1575. These 5 people already knew each other from various circles. The connections included the following. David Smith was an old friend of Ely Michel Ruimy's wife's family, and had known Ely Michel Ruimy for many years before the Aerium venture. He had also entered into a prior real estate venture with Franck Ruimy. David Smith's son worked for FGG. Mr Smith had introduced the Ruimy brothers to Andres Piedrahita and John Muse, who both lived in Chester Square where Mr Smith also lived. There had been an earlier venture, called Chester Investments, which was described in a September 2003 brochure concerning Aerium. Chester Investments was described as a € 150 million property fund managed by LDV in France, with Mr Piedrahita, Mr Smith and Mr Muse being principals along with Ely Michel Ruimy.

1576. The AP1 PPM description of "Management" included the following:

> "The Management operates under the direction of LDV Management SARL ... [which] is responsible for the management and control of the Venture's affairs. LDV Management SARL has retained AERIUM LLP to manage the day-to-day affairs and the acquisition and disposition of the Venture's real estate investments, subject to LDV Management SARL's supervision."

1577. It went on to say that LDV Management SARL would be "relying heavily on Aerium LLP". Each potential property investment would be submitted to the investment committee of Aerium LLP, and the board of directors of Aerium LLP had empowered the investment committee to authorise and approve those investments.

1578. LDV Management SARL was a Luxembourg company formed in 2003, at which point Ely Michel Ruimy was its sole director and 100% shareholder. In July 2004, Franck Ruimy became its second director, and also a 50% shareholder with his brother.

1579. LDV's offices were described as being headquartered in Paris, with regional offices in the UK, Germany and Switzerland. The address of the London office was in Grosvenor Place, c/o Hicks Muse.

1580. The PPM for the second fund, AP2, gave a broadly similar picture, save that the "Management Team" now comprised just 3 individuals: Ely Michel Ruimy, Franck Ruimy and Edouard Lacoste who had worked for LDV since 2000. Those same individuals were referred to in the PPM for the third fund, Bainbridge I. The PPM for that fund no longer referred to the Hicks Muse office. Thus, for AP2 and Bainbridge I, the second and third Aerium funds, there was no longer any reference to Mr Piedrahita, Mr Muse or Mr Smith.

1581. The PPM for AP2 identified LDV as the sponsor and Aerium LLP as the venture manager. For Bainbridge I, the sponsor was again LDV, and the venture manager was Bainbridge Asset Management SARL (described in more detail below, and which later became European Retail Asset Management (ERAM) SARL or "ERAM"). Since Mr Piedrahita was not mentioned in the PPMs for either AP2, or Bainbridge I, there was no reference at all to FGG. The PPM for Bainbridge I provided that any enquiries should be directed to Ely Michel Ruimy, and it gave his phone number and e-mail address.

1582. It is clear that Ely Michel Ruimy, with his company LDV, was the prime mover behind these three initial Aerium ventures. I reject the case that these were ventures of FGG, or that Aerium was an offshoot or European arm of FGG (as posited by some aspects of the Aerium Defendants' submissions and Ely Michel Ruimy's evidence). FGG is referred to briefly in the PPM for the AP1, but only to explain the career of Mr Piedrahita. He was involved in a personal capacity. FGG is not referred to in the PPM for AP2 or Bainbridge. FGG comes into the picture only with the 4th fund, Aerium Fairfield Real Estate, later known as Aerium IV, which launched in 2005.

PIFSS' first investment (AP1)

1583. PIFSS first became an investor in Aerium in late 2003, which was the year in which Aerium was founded. It invested € 25 million in the AP1 fund. The investors in AP1, as at September 2004, can be seen in a spreadsheet sent to Franck Ruimy on 30 September 2004 by Ms Martine Catoire of LDV. This listed the subscriptions received to date. It showed that the first, and largest, investor was PIFSS, and that a number of investments were received thereafter. This included two investments by Banque Pictet: one investment of € 5 million, with an individual (Holly Lev) identified as the investor. The other was € 3.25 million, with no individual identified. For reasons that will be discussed in due course, the fact that Pictet is shown as an investor is significant, because it points to the involvement at that early stage of Mr Amouzegar.

1584. There were also, by September 2004, a number of other investors, including two investments by Mr Khosrovani: € 1 million in February 2004 and another € 1 million in June 2004. Ms Dilnot described the other investors as "friends and family", since they included for example Mrs Piedrahita. The largest other investor was identified as LVMH (the luxury goods brand), and identified by Ely Michel Ruimy as being Bernard Arnault, the well-known Chairman and CEO of that company.

1585. Ms Catoire's email also identified the investors where funds had not yet been received. There was a further € 8 million, where documents had been sent to

Anna-Maria Rauf, and this included 2 further Pictet investments. There was also an investment described as "10 million euros (via a personal contact of Al Rajaan): the documents were transmitted by Michel". I have no doubt that this was a reference to Ely Michel Ruimy, and that he was therefore the person transmitting the investment documents. For that purpose, he would have been dealing with Mr Al Rajaan, who is referred to in the e-mail. In written closing submissions, it was acknowledged on behalf of Mr Ruimy that the € 10 million investment may well be a reference to what became an investment of € 8.1 million by Galba Anstalt in October 2004. I think that that is highly likely, not least because it was not suggested that there was another investor who subscribed a figure in the region of € 10 million after September 2004. In "Appendix C" referred to below, the € 8.1 million is the largest investment after June 2004.

1586. The € 8.1 million investment was made in the name of Banque Mirabaud, but a tax declaration sent by Mirabaud to Aerium in 2007 showed that this Mirabaud investment had been on behalf of an entity named Galba Anstalt, and also that this entity was entirely beneficially owned by Mr Al Rajaan. This Galba Anstalt investment, and Ely Michel Ruimy's knowledge of it, is relevant in a number of contexts, including the Mirabaud payments.

PIFSS' later investments

1587. Over the course of time, between 2003 and 2010, PIFSS invested over USD 1 billion in various Aerium funds. The trial focused on the following Aerium funds where (save in relation to AP2) commissions were paid to the QWM companies:

a. Aerium Properties I ("AP1"): € 25 million; 18 September 2003.

b. Aerium Properties II ("AP2"): € 75 million; 3 February 2004.

c. Bainbridge Capital Retail Properties Fund ("Bainbridge I"): € 100 million; 10 November 2004.

d. Aerium Fairfield Real Estate Fund (later Aerium IV) ("Aerium IV"): € 25 million; 26 September 2005.

e. Aerium Opportunities Fund 1 (formerly LDV Opportunity I) ("Aerium Opportunity I"): € 110 million; 24 May 2006.

f. Meigerhorn I fund ("Meigerhorn I"): CHF 100 million; 13 June 2006.

g. Bainbridge II fund ("Bainbridge II"): € 65 million; 29 February 2008.

h. Meigerhorn II fund ("Meigerhorn II"): CHF 100 million; 30 April 2008.

i. Glenn Arrow I ("Glenn Arrow I"): £ 90 million; 12 December 2008.

j. Glenn Arrow II ("Glenn Arrow II"): £ 60 million; 10 March 2010.

1588. There were some other Aerium funds in which PIFSS invested, but these have not given rise to the present claim. There were also investments in 4 Aeriance funds, amounting to over USD 600 million, but again no claim is made in respect thereof.

1589. In addition, there were the three non-Aerium/Aeriance funds which featured in the trial, where the documentation evidences introductions made by AFL. These investments were in the following funds: Class P2 Notes issued by RMF Four Seasons CFO Ltd (22 August 2006) ("RMF"); Tensyr Ltd (19 December 2006) ("Tensyr"); and Turquoise 4X Leverage Certificate (20 June 2007) ("Turquoise"). No claim is made in respect of these investments, albeit that they are potentially relevant to the issues concerning the Mirabaud payments.

The Finder's Fee agreements

1590. The PPMs for the various Aerium funds set out the fees which would be earned by the fund managers. A significant proportion of those fees was then payable, and paid, to the QWM companies, pursuant to various "Finder's Fee" agreements. The first such agreement was concluded with Quadra in relation to AP1. The actual agreement was not available in the trial documents, but it was common ground that it existed. It is referred to in an unsigned document headed "Appendix C – Updated List of Referred Investor's Capital Contributions". This set out a list of "initial capital contributions for our joint confirmation". There were columns identifying the date of subscription, the amount and the "subscribing bank". PIFSS' € 25 million investment was listed with Pictet as the subscribing bank. There were two other references to Pictet: the € 5 million and € 3.25 million investments to which I have already referred. The € 8.1 million investment was identified as Banque Mirabaud. Three investments, each of € 1 million, were identified with Mr Khosrovani.

1591. In around late 2004, a Finder's Fee agreement was entered into between Bainbridge Asset Management Sarl and Wentworth in relation to the Bainbridge I fund. A version of this agreement was executed by Ely Michel Ruimy no later than 8 October 2004. This was the second Finder's Fee agreement that was concluded with one of the QWM companies. There was no such agreement in relation to AP2, and it is not alleged that payments of commissions were made to any of the QWM companies in respect of AP2.

1592. The Wentworth agreement is the only Finder's Fee agreement which bears Ely Michel Ruimy's signature. The other agreements, in so far as they have survived, were signed by Franck Ruimy. In relation to each fund, there was a separate Finder's Fee Agreement.

Administration of the payments to the QWM companies

1593. The first payment of fees from Aerium Holdings SA to Quadra in relation to AP1 occurred in mid-2004. Payments to the QWM companies would continue in relation to AP1 and eight other Aerium funds until 2014.

1594. The day-to-day management of the QWM payments was overseen by Franck Ruimy (for Aerium) and Ms Anna-Maria Rauf (for Mr Khosrovani and Mr

Amouzegar). Ms Rauf gave an affidavit in the context of certain Maltese proceedings, which did not involve PIFSS and do not need to be described in detail. In her Affidavit, Ms Rauf states that she had worked for Mr Khosrovani for 36 years and for Mr Amouzegar for 13 years as of January 2017. This indicates that at least by January 2004, very shortly after PIFSS' first investment in AP1, Mr Khosrovani and Mr Amouzegar had joined forces and were using Ms Rauf. It may well be that the "13 years" was not precise and calculated to the exact month, so that it is possible that it was 13 years and a number of months. I come back to Ms Rauf's Affidavit, and other Affidavits sworn in that context, in Section K6 below.

1595. Ms Rauf's Affidavit refers to the two men as the two beneficial owners of Garibaldi Management Investment Corp and Gold Coaster Holdings Ltd, both of which feature in the Pictet Scheme. Her statement does not address the QWM companies. Ms Rauf is now deceased.

1596. It was Ms Rauf who kept a close eye on the payments that were being made, or which should be made, to the QWM companies. She would send emails and invoices requesting the payment of fees arising from the Aerium funds to Franck Ruimy, and these would then be dealt with internally within Aerium. An early example is an invoice sent by Ms Rauf on Friday 13 August 2004. Franck Ruimy emailed the invoice to Mr Philippe Cormier, an LDV Group employee, on 13 August, describing it as the invoice "due to Hashem Khosrovani for the Kuwait funds". The invoice itself requested payment of €74,000 for "Fees for marketing and sales support services" in accordance with the agreement between Aerium Holdings SA and Quadra. The e-mail string was then sent by Mr Cormier to Ely Michel Ruimy, asking him to sign the transfer instruction and return it to enable the transfer to be made.

1597. The episode shows Ely Michel Ruimy's involvement in the first payment that was made to Quadra. He was also the person who authorised a payment of € 7.4 million to Quadra in 2007. This substantial payment, arising from the closure and sale of AP1 investments, represents the bulk (94%) of known commissions paid to Quadra on AP1.

1598. Although it was generally Franck Ruimy who was dealing with payments and Ms Rauf, Ely Michel Ruimy was also involved in payments. Ely Michel Ruimy's involvement can be seen, for example, in Franck Ruimy's e-mails to his colleague Tiphaine Ternet. In February 2009, she had prepared a recap table of the payments made to Quadra and Wentworth, and Franck Ruimy told her that it was to be "passed to EMR". In September 2009, Ms Ternet asked Franck Ruimy about payments to Wentworth, which had been chased by Ms Rauf. His response was: "It's in the hands of EMR". In February 2010, Ms Rauf emailed Ely Michel Ruimy directly, about whether Wentworth's fees would be paid at 30% or 40% in respect of Aerium Opportunity I. She did this because Ms Ternet had told her that she needed to speak directly to Ely Michel Ruimy about this. In February 2014, when Ms Rauf was chasing fees, Franck Ruimy told Ms Ternet to "speak to EMR about it". I have no doubt that Ely Michel Ruimy was ultimately the decision-maker as to whether money should be paid to the QWM companies.

1599. Ely Michel Ruimy and Franck Ruimy also had meetings with Mr Khosrovani and Mr Amouzegar as PIFSS continued to invest over the relevant period. Examples are as follows. Ms Rauf emailed Franck Ruimy on 30 January 2006 recording a presentation given by Ely Michel Ruimy to Mr Amouzegar about the Bainbridge I fund in Paris the previous week. That presentation would likely have concerned the fees that Wentworth would earn, which were in some respects related to performance of the fund. It would not have been a presentation with a view to PIFSS investing: PIFSS had already invested in 2004, as described below.

1600. The documents contain other references to meetings. For example, Ms Sarah Jones, Franck Ruimy's PA, emailed Ms Rauf on 8 June 2009 to schedule a meeting between Franck Ruimy, Mr Amouzegar, and Mr Khosrovani. Franck Ruimy also emailed himself on 28 November 2007 to schedule a meeting with Mr Amouzegar for the next day.

1601. Ms Rauf chased Franck Ruimy for payments throughout the relevant period, and Aerium began to struggle to meet her demands by 2007. An internal Aerium spreadsheet tracking the payments to QWM from 2005 – 2010 records that as of 31 December 2007, Aerium owed around € 210,000 in outstanding fees. By 31 December 2010, that sum had grown to €19.2 million. At the time payments stopped in July 2014, the amount owed had more than doubled. Ms Rauf continued to chase intermittently for payment for around a year, but nothing is heard from her after 2015.

The Bainbridge Fund and the ownership structure

1602. The key involvement of both brothers in the management of the various Aerium funds can be illustrated by considering the detail of the Bainbridge I fund. PIFSS invested in that fund in November 2004. This followed a letter dated 19 October 2004 sent to Mr Al Rajaan by Ely Michel Ruimy. It was sent on the headed paper of Bainbridge Capital, and the wiring instructions for the proposed investment required payment to Bainbridge Capital SARL. The letter referred back to "our recent discussions and exchanges regarding the Venture under reference", and it enclosed the PPM, the subscription forms and some other documents. There was no reference to anyone else having introduced Bainbridge to PIFSS. Indeed, none of the contemporaneous exchanges between Aerium and PIFSS, relating to potential investment in funds, refer to anyone as having introduced the funds to PIFSS. These documents therefore contain no reference to Mr Khosrovani or Mr Amouzegar.

1603. Bainbridge Capital SARL was the company, within the Bainbridge I financing structure, which issued 100,000 loan notes to PIFSS in return for its investment. Each of the structures involved the issue of loan notes and shares. The majority of the investment in each fund was reflected in loan notes rather than shares. The PPM shows that Bainbridge Capital SARL was owned and managed by LDV Management SARL as sole manager. As at October 2004, LDV Management SARL had two directors: Ely Michel Ruimy and Franck Ruimy. Ely Michel Ruimy had been the sole shareholder on incorporation of the company in August 2003, and was identified in the company's constitutional document as the person appointed manager "for an indefinite period". By the

time of PIFSS' subscription, the shares were held by Ely Michel Ruimy and Franck Ruimy with 50% each.

1604. The venture manager of Bainbridge I was Bainbridge Asset Management SARL. It was that company which concluded the Finder's Fee agreement with Wentworth. The two directors of Bainbridge Asset Management SARL, from 2004 to 2014, were Ely Michel Ruimy and Franck Ruimy. The PPM for Bainbridge I describes the current managers as being Ely Michel Ruimy and Franck Ruimy.

1605. The shareholder in Bainbridge Asset Management SARL, from 2004 to 2014, was Aerium Holdings SA: i.e. the principal holding company of the Aerium group, as previously described. Ely Michel Ruimy admits that he was the 100% shareholder of that holding company after 15 January 2008. There are disputes as to the ownership of Aerium Holdings SA prior to that time, and it is convenient to deal with the point briefly here.

1606. The principal shareholder at the time of the incorporation of Aerium Holdings SA was Mr Alain Driancourt of Driancourt & Cie. He was acting as nominee for another person or persons. There was no dispute about this. It is likely, in my view, that he was nominee for Ely Michel Ruimy, and possibly for his brother. When HMRC (the UK tax authority) challenged various expenses which had been claimed by Aerium LLP, BDO Stoy Hayward LLP ("BDO") responded in a letter sent to HMRC in August 2008. The letter was dealing with an HMRC challenge to expenses claimed in the tax year 2005/06, and was therefore looking back in time. In that letter, BDO was seeking to explain, amongst other things, certain expenses claimed by Ely Michel Ruimy. BDO said:

> "Ely Michel Ruimy (EMR) is a major beneficial owner of the holding company that ultimately controls Aerium Holdings SA (Luxembourg), which in turn holds 99% of Aerium LLP.
>
> To this effect, he maintained the public relations between Aerium LLP and the investors into the various Aerium funds. He marketed the funds to investors on behalf of Aerium LLP and he advised on the property transactions of Aerium I, a fund managed by Aerium LLP."

1607. Accordingly, BDO were there acknowledging that Ely Michel Ruimy was "a major beneficial owner" of the company that controlled Aerium Holdings SA, and were also saying that it was in that capacity ("To this effect") that work had been carried out by Ely Michel Ruimy as there described. Since the letter was concerned with past events and expenses claimed, I do not accept Mr Penny's submission that BDO were only describing the position in 2008.

1608. The company which, in 2006, became the 100% owner of Aerium Holdings SA was Groupe LDV International SA. BDO clearly understood Ely Michel Ruimy to be a beneficial owner of that company, and this is hardly surprising. The LDV group had been founded by Ely Michel Ruimy, and various PPMs describe him

as overseeing all aspects of its activities. Mr Smith said, in evidence, that Ely Michel Ruimy was LDV.

1609. Ely Michel Ruimy does not appear, however, to have been identified as a shareholder of Groupe LDV International SA in that company's formal documentation. Thus, there is some evidence that, at the time when Groupe LDV International SA became the 100% owner of Aerium Holdings SA, the named shareholders of the former (parent) company were Franck Ruimy (50%), Alain Driancourt (25%) and David Smith (25%). Nevertheless, despite not being named as a shareholder, the above evidence shows that Ely Michel Ruimy was always a major beneficial owner of the Aerium structure, and I so conclude.

1610. Ultimately, however, this dispute as to ownership does not matter. The documentation clearly evidences that the Aerium funds were being managed by companies within the LDV and Aerium group, with Mr Ely Michel Ruimy and Franck Ruimy playing significant roles in relation thereto. The answer to the question of whether Ely Michel Ruimy knew that monies were being channelled to Mr Al Rajaan does not depend upon, and is not assisted by, consideration of the precise ownership structure of any particular company within the LDV or Aerium group.

2005

1611. The first payment to Wentworth was made in May 2005. The overall position at the time of this payment was as follows. (1) PIFSS had invested in AP1 which paid Quadra; (2) Mr Al Rajaan also had an investment of € 8.1 million in AP1, via Galba Anstalt and Banque Mirabaud; (3) PIFSS had also invested in AP2, although there was no specific introducer agreement or commissions paid in respect of that fund; (4) PIFSS had invested in Bainbridge I, which had an introducer agreement with Wentworth; (5) Mr Amouzegar and Mr Khosrovani had been working together since at least January 2004, and Wentworth was their company.

1612. In August 2005, Ely Michel Ruimy and Franck Ruimy stayed at a luxury hotel (Hotel Cala di Volpe) in Sardinia. BDO's letter to HMRC (in August 2008) sought to justify (part of) the expenses which had been claimed on the basis that the business purpose of the visit was to meet Mr Al Rajaan. I have no doubt, despite the Ruimy brothers' failure to recall meeting him on that occasion, that they did meet Mr Al Rajaan. In a meeting with HMRC in February 2009, Franck Ruimy said that Mr Al Rajaan had introduced them to other investors when meeting him at the hotel.

1613. Shortly after this meeting, in September 2005 PIFSS made its 4th investment in the Aerium Fairfield Real Estate Fund. This was later rebranded Aerium IV after the Madoff scandal. Unlike the documentation for the earlier funds, the documents for this fund showed that FGG had a role in the investment structure. The PPM identified two sponsors: LDV and FGG. The key personnel were Ely Michel Ruimy, Franck Ruimy and David Smith, who were also described as having founded Aerium. FGG was described, and various personnel were listed including Andres Piedrahita and Harold Greisman. Aerium IV had many investors, in contrast to many of the other funds where PIFSS was the sole

investor – as it was at that time in AP2 and Bainbridge. FGG's involvement in Aerium IV was therefore different to the earlier, and indeed subsequent, funds.

1614. Fairfield Greenwich Realty Partners LLC, a company in the wider Fairfield Greenwich Group, entered into an introducer agreement with Quadra, and was responsible for payment of the agreed fees. 50% were then invoiced back to Aerium.

2006-2007

1615. PIFSS invested in two further funds in the course of 2006, Aerium Opportunity I (originally called LDV Opportunity I) and Meigerhorn I. In contrast to Aerium IV, the documentation for these funds did not refer to FGG or its personnel. The sponsor was LDV. The personnel were Ely Michel Ruimy, Franck Ruimy and Mr Anthony Khoi. Mr Khoi was described as leading the acquisitions team. The commission arrangements were with Wentworth, with the introducer agreement post-dating PIFSS' subscription to Meigerhorn I and the confirmation of its intention to invest in Aerium Opportunity I.

1616. In April 2007, PIFSS signed a loan agreement with Bainbridge Capital for the provision of € 25 million to Bainbridge I, with an initial tranche of € 7.5 million. This loan features in the events concerning the possible admission of a new investor in Bainbridge I, which in turn features in the parties' arguments about the Mirabaud payments which started in early 2008.

1617. In May 2007, Banque Mirabaud subscribed € 7.5 million for an investment in Bainbridge I. This investment also features prominently in the events concerning the Mirabaud payments, discussed below.

2008

1618. PIFSS made 6 investments in 2008, and 3 of them feature in the case: Bainbridge II, Meigerhorn II and Glenn Arrow I. PIFSS was the sole investor in all of these funds. It was also in 2008 that Ely Michel Ruimy opened his account at Banque Mirabaud, and the Mirabaud payments started. The commission arrangements were with Wentworth for Bainbridge II and Meigerhorn II, with both agreements being concluded in January 2009 – well after PIFSS' investment had been made.

1619. The commission arrangements in relation to Glenn Arrow I were with Moccak. This was the first agreement with that company. It was also signed after PIFSS had confirmed its decision that it would invest in that fund.

1620. In 2008 – 2009, Ely Michel Ruimy was involved in arrangements for the purchase of Villa 23 in Morocco. PIFSS contends that Ely Michel Ruimy purchased this villa for the benefit of Mr Al Rajaan. I address the evidence relating to this villa in Section K7 below.

2010-2011

1621. The last PIFSS investment in an Aerium fund was made in the Glenn Arrow II fund in March 2010. The commission arrangement was with Moccak. The last PIFSS investment in an Aeriance fund was made in November 2011.

1622. By 2011, Aerium had begun to fall significantly behind in making payments to one or more of the QWM companies, and Ms Rauf sent various emails chasing payment. It appears that the understanding within Aerium was that when the investment structures lacked the cash to pay, the amounts would be booked as "FNP": "factures non parvenues" or "invoice not received". It is not clear to me that no invoice was actually received, since on any view Ms Rauf was chasing payment. However, whether or not an invoice was received, the money was not paid, in the hope or expectation that it would be paid at a later stage when a sale of assets might unlock significant cash.

Summary of payments made

1623. Payments were made under the various Finder's Fee agreements until July 2014. The following table summarises the various introducer agreements, the (in round terms) USD 52.8 million payments admitted by Mr Ruimy, and the terms relating to fee sharing with the QWM companies. The table was included in PIFSS' closing, and was not disputed.

PIFSS INVESTMENT	**QWM company party to agreement**	**FEE SHARING AGREEMENT**	**FEE SHARING TERMS**	**ADMITTED QUANTUM**
Aerium Properties I PIFSS invested **18** September 2003	Quadra	Mr Ruimy has not disclosed a documented fee sharing arrangement, but he admits that one was entered into.		US$5.4 million Mr Ruimy also admits signing off payments including a €7.4 million payment to Quadra in September 2007
Bainbridge I PIFSS invested 10 November 2004 PIFSS initially the sole investor	Wentworth (Mr Ruimy pleads that commission may also have been paid to Quadra.)	Mr Ruimy signed a draft fee sharing arrangement, and he admits that an agreement was entered in the same or substantially the same terms in October 2004.	40% of Management Fees; 40% of Performance Fees; and 25% of Acquisition Fees	US$19.2 million
Aerium IV	Quadra	Mr Ruimy has not disclosed a documented fee		US$202,654

PIFSS invested 26 September 2005		sharing arrangement, but he admits that one was entered into.		
Aerium Opportunity I PIFSS invested 24 May 2006 PIFSS sole investor	Wentworth	Fee sharing arrangement signed by Franck on 1 June 2006 and Mr Sutherland on 16 June 2006	40% of Management Fees; 40% of Performance Fees; and 25% of Acquisition Fees	US$9.7 million
Meigerhorn I PIFSS invested 13 June 2006 PIFSS sole investor	Wentworth	Fee sharing arrangement signed by Franck on 1 June 2006 and Mr Sutherland on 16 June 2006	40% of Management Fees; 40% of Performance Fees; and 25% of Acquisition Fees	US$3.8 million
Bainbridge II PIFSS invested 29 February 2008 PIFSS sole investor	Wentworth	Fee sharing arrangement signed by Franck on 13 January 2009 and Mr Sutherland on 19 January 2009	30% of Management Fees (payable quarterly); 40% of Performance Fees; and 25% of Acquisition Fees	US$0.5 million
Meigerhorn II PIFSS invested 30 April 2008 PIFSS sole investor	Wentworth	Fee sharing arrangement signed by Franck on 13 January 2009 and Mr Sutherland on 19 January 2009	30% of Management Fees; 30% of Performance Fees; and 25% of Acquisition Fees	US$0.7 million
Glenn Arrow I PIFSS invested 12 December 2008	Moccak	Fee sharing signed by Franck Ruimy on 13 January 2009 and Mr Sutherland on 19 January 2009	30% of Management Fees; 30/40% of Performance Fees;	US$13.3 million (Glenn Arrow I and II combined)

PIFSS sole investor			and 25% of Acquisition Fees	
Glenn Arrow II PIFSS invested 10 March 2010 PIFSS sole investor	Moccak	Mr Ruimy has not disclosed a documented fee sharing arrangement, but he admits that one was entered into		

2014 - 2015

1624. In July 2014, around 6 months after Mr Al Rajaan left PIFSS, the payments stopped and have never resumed.

1625. In 2015, PIFSS and Wafra made various enquiries concerning payments of fees. The answers given to those questions are significant in my assessment of the evidence.

1626. I now turn to the payments made to Banque Mirabaud. Although this is not the first chronological event relevant to the claims, it is where PIFSS' claim started and it is highly relevant to the issues as to Ely Michel Ruimy's alleged complicity in paying bribes to Mr Al Rajaan, and to his credibility more generally.

K3: The payments to Banque Mirabaud and the alleged Mirabaud loan

1627. For the reasons set out below, I have no doubt that Ely Michel Ruimy knew that the payments into his Mirabaud account were destined for Mr Al Rajaan, and that these payments were bribes in return for investments being made in Aerium funds. I have no hesitation in rejecting the extraordinary account which Ely Michel Ruimy gave as to the nature of these payments. Those conclusions also necessarily impact upon my conclusions as to Ely Michel Ruimy's knowledge of the nature of the payments being made to the QWM companies. In short, if Ely Michel Ruimy knew that he was paying, and was content to pay, bribes between 2008 and 2010, it is highly probable that he knew of and was party to the payment of bribes both prior and subsequent to that time.

The payments

1628. There was no dispute that substantial sums were paid into Ely Michel Ruimy's bank account at Banque Mirabaud between 2008 and 2010. There was also no dispute that all of these sums ended up with Mr Al Rajaan, or (in the case of the jewellery payments) paid for jewellery purchases which he had made.

1629. PIFSS submitted that the obvious conclusion was that these were monies paid as bribes for the purposes of obtaining PIFSS' investment in Aerium funds. They also submitted (although this was not crucial to their case that these

monies were bribes) that some of the payments could be traced back to commissions paid to AFL in relation to investments which PIFSS had made in three funds which were not property funds, but were hedge-fund related structured products: these products were the RMF, Tensyr and Turquoise products. The remainder of the monies could be traced back to commissions paid on other PIFSS investments.

1630. Ely Michel Ruimy's case was in summary as follows. He knew that monies were being paid into his Mirabaud account between 2008 and 2010. He understood that these monies would be leaving his account. But he did not know that they were finding their way to Mr Al Rajaan, and they were not payments which were intended to influence Mr Al Rajaan to invest PIFSS' monies in Aerium funds. In discussions that he had with Mr Pierre Mirabaud, the Chairman of Banque Mirabaud, he agreed and understood that the payments would be used to discharge a loan ("the Mirabaud loan") which Mirabaud had made to Bainbridge Capital SARL ("Bainbridge Capital"), a company within the corporate structure for the 3rd of the Aerium funds which had been launched: the Bainbridge I fund. Ely Michel Ruimy's evidence was that Mr Pierre Mirabaud told him that he would arrange everything in order for that loan to be repaid. He was told that Mirabaud would not accept faxed or telephone instructions relating to the payments that were to be made. It was therefore necessary for Ely Michel Ruimy to sign, in advance, a large number of incomplete forms so that Mr Mirabaud could take care of the transfers for the purposes of the loan repayment.

1631. At the heart of Ely Michel Ruimy's case was his evidence that he had no idea that the monies were not being used to discharge the Mirabaud loan, but were instead finding their way to Mr Al Rajaan. He did, however, suspect that Mr Al Rajaan was the individual who was behind the Mirabaud loan. It was Ely Michel Ruimy's concern as to Mr Al Rajaan's possible involvement in the loan that led him to want to repay it. That concern was the potential impropriety or conflict of interest of Mr Al Rajaan, as the Director-General of PIFSS, having some sort of personal interest in the Mirabaud loan arrangements, in circumstances where PIFSS was the majority investor in the Bainbridge I fund, and had originally been the only investor.

1632. All aspects of Ely Michel Ruimy's factual case were disputed by PIFSS, including two central aspects upon which PIFSS focused.

1633. Ely Michel Ruimy's case depended, first, on the proposition that there was a loan by Mirabaud in existence at the time when the alleged "repayments" of the loan were being made in 2008 – 2010. PIFSS submitted that Banque Mirabaud had never agreed, at that time, to loan money to Bainbridge Capital. Rather, Banque Mirabaud had invested, on behalf of Mr Al Rajaan, in the Bainbridge fund, on the same terms as PIFSS had itself invested. There was a subscription by Banque Mirabaud, not a loan. There was therefore, on PIFSS' case, no contractually agreed loan that needed to be repaid at all.

1634. The second central aspect of the factual case was the proposition that the payments made by Ely Michel Ruimy were by way of repayment of that loan. PIFSS contended that since there was no loan in existence, these could not have

been repayments. In addition, however, PIFSS contended that even if a loan had been made, there is no evidence that the payments made by Ely Michel Ruimy into his Mirabaud account had any connection with the repayment of that loan obligation. They submitted that any repayment of that loan would have been reflected in contemporary documents, and in reducing interest payments to Banque Mirabaud. However, there was no dispute that Bainbridge Capital SARL had continued to make interest payments to Banque Mirabaud on the full amount of the alleged 'loan' for many years, up to at least 2019, thereby indicating that the loan had not been repaid at all.

1635. I was helpfully taken through the contemporaneous documents at some length in Mr Penny's opening on behalf of Ely Michel Ruimy. By the end of the trial, and after extensive cross-examination, Mr Penny's closing submissions frankly acknowledged that the documentary record provided no support for the evidence which Ely Michel Ruimy had given, to the effect that the arrangements with Mirabaud were a loan. He recognised that there was a very stark contrast between the documentation and the evidence which Ely Michel Ruimy had given, namely that his understanding was that there was a loan. Mr Penny submitted that Ely Michel Ruimy may have misunderstood the arrangements, or that the discussions that had taken place with Pierre Mirabaud were of a very general or unspecific nature and that Ely Michel Ruimy may have, albeit wrongly, thought that there was to be a loan. He even submitted that Ely Michel Ruimy's evidence so starkly contradicts the documentary record that I should draw the conclusion that he was truthful when he said that he thought that there was to be a loan.

1636. I cannot accept a submission which posits that the greater the inconsistencies between a witness's evidence and the contemporaneous documents, the more likely it is that the evidence is true. That is entirely contrary to the approach reflected in the case law such as *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1 (discussed in the *GI Globinvest* case referred to above). If an account is starkly inconsistent with the documents, the conclusion is usually that the account is false. That is the appropriate conclusion here. I am left in no doubt that Ely Michel Ruimy's evidence, as to believing that there was a loan, and believing that he was repaying a loan, is simply untrue, and untrue to his knowledge. I shall now describe what to my mind are the most important documents which are relevant to the case, and their impact on my conclusions.

May - June 2007: Mirabaud's investment

1637. There is no dispute that, in May 2007, Mirabaud paid € 7,500,000 to two companies in the Bainbridge structure: Bainbridge Capital SARL and LDV Management Bainbridge Holding S.C.A. It is clear on the documents that Mirabaud understood that it was making an investment in the Bainbridge I fund, in the same way as PIFSS had invested in that fund. That investment involved the acquisition of shares, Preferred Equity Certificates ("PECs") and Convertible Preferred Equity Certificates ("CPECs").

1638. Ely Michel Ruimy's evidence was, in summary, that Mirabaud may have wanted to make an investment, but that it was not permissible to do that, at least without the consent of PIFSS as the existing main investor. Accordingly, in so

far as the documents purport to record Mirabaud thinking that it was making an investment, or giving monies by way of subscription, this was an error on their part. What had actually been agreed was an ordinary loan to Bainbridge, not a subscription.

1639. In my view, as Mr Penny's closing submissions recognised, this evidence is inconsistent with any sensible reading of the contemporaneous documents in 2007 and early 2008. If a loan had been agreed, one would ordinarily expect (as Ely Michel Ruimy said in evidence) that a bank such as Mirabaud would send out a loan document for signature by the borrower. Here, no such document was sent out by Mirabaud in or around May 2007, or indeed at any time close to that date. As described below, the first time that there was any clear suggestion by anyone at Aerium, to Mirabaud, that the parties should conclude a loan agreement, was in 2013; some 6 years after the payment had been made by Mirabaud.

1640. Furthermore, the absence of any draft loan agreement emanating from Mirabaud – and indeed any signed loan document prior to the advancing of the funds – is not the only extraordinary feature of Ely Michel Ruimy's case that there was a loan, or that he understood that there was a loan. There is no document, or reference in any of the contemporaneous documents in 2007, identifying the borrower under the alleged loan, the term of the loan, the interest rate, the security for the loan, or any of the usual important aspects of a loan.

1641. Instead, the documents show that on 11 May 2007, Mr Nicolas Mirabaud and Mr Pierre Fischer of Banque Mirabaud wrote to LDV Management Bainbridge Holding S.C.A. stating:

> "Following our meeting with [Ely Michel] Ruimy today, please find in the annex 3 copies of the certificate relating to <u>our investment</u> of EUR 7,500,000 in favour LDV Management Bainbridge Holding S.C.A." (my emphasis)

1642. The certificate referred to in the letter is itself significant in certain respects. It provided (in relevant part) as follows. (Certain text on the standard form was struck through and replaced, as indicated by strike-through and underlining below).

> ATTESTATION
>
> The undersigned:
> Name: MIRABAUD & Cie
>
> Declares and certifies that it <u>will subscribe</u> ~~is the final and real beneficiary of~~ the investment of seven million five hundred thousand euro (EUR 7,500,000) made by ……

> [name and details of the investor] in Ordinary Shares and convertible preferred equity certificates, with a par value of four euro (EUR 4,-) each, to be issued by **LDV Management Bainbridge Holding S.C.A.**, a partnership limited by shares … and preferred equity certificates to be issued by **Bainbridge Capital S.a.r.l** …
>
> x The undersigned declares furthermore that his contribution in relation thereto has not a fraudulent origin pursuant to article 506-1 of the Luxembourg Penal Code.
>
> This attestation is established in accordance with the law of 11/08/1998 relating to the fight against money laundering as amended and the law of 12/11/2004 relating to the fight against terrorism financing …
>
> Made in Geneva on May 10, 2007
>
> x On the basis of the due diligence process realized on the final investors.

1643. This document is significant, first, because it shows that this was an investment by way of subscription. Mirabaud was providing funds in return for ordinary shares, CPECs and PECs issued by the two companies. Instruments such as PECs and CPECs are sometimes viewed as being loan instruments, and to that extent it could be said that money was being loaned by Mirabaud. But this was the way in which all investments in the Bainbridge fund were to be made, and it does not assist Ely Michel Ruimy's argument that there was, or that he understood that there was, an ordinary loan agreement between Mirabaud and Bainbridge Capital.

1644. Secondly, it is significant because it is clear from the deletion of the words "is the final and real beneficiary", and the reference at the bottom of the page to the "final investors", that this was not an investment by Mirabaud on its own account. Indeed, at one point in his evidence (just before lunch on Day 75) Ely Michel Ruimy said that this triggered a suspicion that Mr Al Rajaan was behind this loan. In my view, it is obvious, and would have been obvious to Franck Ruimy (who clearly read the attestation) that Mirabaud was acting on behalf of someone else. That someone else was, deliberately in my view, left blank in the form which Mirabaud signed. However, I have no doubt that both Ely Michel Ruimy and Franck Ruimy knew that Mr Al Rajaan was the person for whom Mirabaud was fronting. Indeed, if new investment monies were to be forthcoming in the substantial sum of € 7.5 million, it would be natural for both of them to want to know who was investing.

1645. On the same day, 11 May 2007, Mr Nicolas Mirabaud e-mailed Franck Ruimy asking for bank details so that payment could be made. On 15 May 2007, Mr Florey of Mirabaud asked Franck Ruimy to send him "all the documents related to this investment" in order to complete his file. Franck then passed this on internally to Sylvie Lexa:

> "Sylvie: Thank you for following up with Geoffroy on the new subscription of the Mirabeau bank on Bainbridge. Ask Geoffroy to send you all the subscription documents to finalize your file." (my emphasis).

1646. This email shows that Franck Ruimy knew that the investment was by way of subscription, as confirmed by the further e-mails, referring to the "subscription" documents, passing between Mirabaud and Franck Ruimy later that month. Thus, on 22 May 2007, Mr Florey asked for the "subscription documents that we were supposed to receive last Friday". Mr Nicolas Mirabaud sent a chaser on 31 May 2007, asking about the "sending of the subscription documents". Franck Ruimy responded, saying that he was awaiting the subscription documents from their advisers. On 12 June 2007, Mr Nicolas Mirabaud advised that they had still not received the subscription documents.

1647. It is clear from these e-mails that Mr Nicolas Mirabaud understood that Mirabaud was making an investment, and that Franck Ruimy understood that too. I reject Ely Michel Ruimy's evidence that this was not what had been agreed between himself and Mr Pierre Mirabaud. If a loan had been agreed, then it is obvious that either or both Nicolas Mirabaud and Franck Ruimy would have been told that this was the nature of the transaction, and documents would not have been signed or written as they were. Ely Michel Ruimy sought to maintain in his evidence that he had told his brother that the transaction was a loan by Mirabaud at 6%, and that therefore there had been a misunderstanding on Franck's part. I reject that evidence. I do not accept that there was any misunderstanding, nor any agreement for a loan.

1648. I interrupt the narrative at this point to consider the origin of the € 7.5 million that was paid over by Mirabaud. It is clear that monies were paid by Mirabaud for the investment, and were received by Bainbridge. Beyond that, the evidence as to who funded that payment (whether Mirabaud itself or Mr Al Rajaan), and how it was funded, is unexplained and unclear. The documentary record raises more questions than it answers. The Mirabaud documentation indicates that, in 2007, funds in the amount of €7.5 million were credited into an account of Domini Trading SA, an Al Rajaan entity, on 15 May 2007. On 16 May, €7.5 million was debited from a Mirabaud bank account in favour of Bainbridge. However, it does not appear that the source of this payment was money from the Domini account. That account still showed a credit balance of € 7.5 million as at 12 June 2007, and the Domini account statement shows that the account was blocked until 30 April 2008, such that the €7.5 million held within the account could not have left until that time. There is no evidence indicating where the funds leaving the Domini account went to, or where the funds leaving the Mirabaud account for Bainbridge originated. Since the funds had not left the Domini account, it would appear that the source of the subscription was Mirabaud's money, rather than Mr Al Rajaan's.

1649. Thus, there is no clear documentary evidence that, when the payment of € 7.5 million was made for Mr Al Rajaan's investment, Mr Al Rajaan's funds were used for that purpose. There has been no evidence from either Mr Al Rajaan or Banque Mirabaud to explain what was happening. In a case where Mr Al Rajaan

was corrupt, and where there is substantial evidence of Pierre Mirabaud's complicity in corruption, I cannot draw conclusions as to what the financial arrangements were, as between Banque Mirabaud and Mr Al Rajaan, from the very limited documentation available. I therefore cannot conclude (as posited by Mr Penny in one of the scenarios which he advanced in closing submissions as an explanation of what happened) that the monies advanced by Mirabaud for the investment in Bainbridge were funded by Mr Al Rajaan.

1650. Returning now to the narrative: on 26 June 2007, two officers of Mirabaud (Mr Florey and Mr Frei) signed three "Declaration of subscription" forms. Each form was countersigned by Franck Ruimy. The forms recorded that Mirabaud irrevocably subscribed to (i) 1,875 ordinary shares to be issued by LDV Management Bainbridge Holding S.C.A., (ii) 7,022,608 PECs to be issued by Bainbridge Capital SARL, and (iii) 117,473 CPECs to be issued by LDV Management Bainbridge Holding S.C.A. It is clear that the contract actually concluded between Mirabaud and those companies was for a subscription in the instruments to be issued by those entities.

1651. Prior to these forms being signed by Banque Mirabaud, Franck Ruimy had sent a letter dated 18 June 2007 to PIFSS asking for their consent to the entry of a new investor. The letter set out the existing overall investment (€ 110 million), and PIFSS' share of that investment (€ 100 million), and referred to the entry of a new investor:

> "It is expected that a new investor may further subscribe to the same combination of shares, CPECs and PECs for the global amount of the Venture to reach € 117,500,008.
>
> We draw your attention on the fact that such new investor shall subscribe to the Instruments, without being requested to pay any share premium or any other kind of premium relating to its late entry in the Venture, although it shall benefit from the same rights as the existing Investors, with respect to the Venture.
>
> …
>
> We would be grateful if you could give us your approval on the entry of the new investor, under the conditions described herein, by returning this letter countersigned below."

1652. The letter confirms that Franck Ruimy understood that the new € 7.5 million funding was by way of an investment, not a loan. Indeed, as Ely Michel Ruimy said in evidence, there would have been no need to ask for PIFSS' consent to a loan. It was the fact that there was a new investor which meant that consent needed to be sought.

1653. In his evidence, Franck Ruimy sought to distance himself from any contemporaneous understanding of the nature of the payment that Banque Mirabaud was making. His evidence in his witness statement, and again in his

oral evidence, was that he had no recollection of the correspondence at around this time. He did not accept that, at the time, he understood that Banque Mirabaud was advancing monies as an investor, rather than as a lender by way of a loan agreement. When asked about the above letter to PIFSS, which he signed, his evidence was that it was a letter that was drafted by lawyers, and he would simply have signed without reading it. After being shown the terms of the letter, he would not accept that, at that point in time, he understood that Banque Mirabaud was subscribing for securities issued in the Bainbridge venture. He had not therefore understood that the € 7.5 million were new investment monies, and that money was therefore coming from a new investor.

1654. I found this evidence unimpressive, and I reject it. I can well understand, given the time that has elapsed since 2007, that Franck Ruimy would not have an independent recollection of the documents. However, the contemporaneous documents up to and around the time when this letter was sent, including the letter itself, show Franck Ruimy corresponding on various aspects of this investment, and always recognising that it was an investment by way of a subscription, and not by way of loan. In my view, an honest witness, seeking to assist the court, would accept, based on contemporaneous documents, that he had an understanding of the nature of the investment, and was under no misapprehension about it. Indeed, Franck Ruimy was anxious, in his evidence, to explain the importance to the Bainbridge venture of ensuring that additional funds were available, given the increasing costs that the venture was facing. He would therefore have taken the trouble to read the correspondence that he was signing at the time, and to understand it (it was not difficult), so that he was aware of how matters were developing.

1655. Franck Ruimy's unwillingness to acknowledge that he knew that the monies were paid by way of investment was one of a number of areas in his evidence where he feigned ignorance in order to lend support to, or at least not undermine, the evidence of his brother. Had he acknowledged what the documents clearly showed, it would have undermined his brother's evidence as to the money being advanced by way of loan, and that there was confusion on the part of Franck.

1656. The 18 June 2007 letter was simply addressed to PIFSS, rather than to any particular individual at PIFSS. It seems likely, given that the subscription forms were signed by Banque Mirabaud a few days after his letter had been sent (and were also countersigned by Franck Ruimy), that Franck Ruimy thought that obtaining PIFSS' signature to the letter would be a formality. If the letter had been addressed to Mr Al Rajaan, it may well be that his signature would have been forthcoming without any difficulty: after all, he was the new investor, and it is unlikely that he would have been unduly concerned to protect PIFSS' interest in ensuring that its investment was not diluted in a prejudicial way. He would likely have acted in his own self-interest.

1657. However, it was not addressed to Mr Al Rajaan, and it was Mr Al Bader who responded on 26 June 2007. Mr Al Bader's letter was faxed to Bainbridge Capital, for the attention of Ely Michel Ruimy, on the following day. In summary, Mr Al Bader was not agreeable to the terms proposed in Franck Ruimy's letter. He set out the terms on which he was prepared to agree to the new investor coming in: essentially putting a "hurdle" in place before the new

investor could share pro rata in distributions. He also asked for the new investor to be identified.

1658. Mr Al Bader's letter was addressed to Ely Michel Ruimy. It was a response to the 18 June 2007 letter sent by Franck Ruimy. A subsequent email from Franck Ruimy to Mirabaud referred to the response received from PIFSS. I have no doubt that both brothers saw that response. It is likely, in my view, that Mr Al Bader's letter came as a surprise to the Ruimy brothers. It therefore called for a re-think. There is nothing in the documents to indicate, as Ely Michel Ruimy said in evidence, that Franck Ruimy's letter to PIFSS should never have been sent, because there never was a new investor and there was only ever a loan. Certainly, Mr Al Bader was not informed that some error had been made in sending a letter referring to the new investment.

1659. Aerium's internal documents suggest that they did not really know how to deal with the situation which had arisen. Importantly, in my view, no response was sent to Mr Al Bader identifying the new investor. The obvious reason for the lack of response on this point was because the Ruimy brothers did not want to reveal to Mr Al Bader that the new investor was the Director-General of PIFSS, as they both knew. Indeed, no reply was sent to the letter at all.

1660. Similarly, no letter was sent to Mirabaud explaining the difficulty which had arisen, or offering to repay the € 7.5 million that by that time had been paid. Ely Michel Ruimy made the point, at various times in his evidence, that it was not possible for Banque Mirabaud to subscribe as an investor without the consent of PIFSS. He sought to draw the conclusion, therefore, that the payment had never been a subscription, but was always a loan. The premise may be correct: PIFSS' agreement was indeed required if the new investor was to come in, enjoying equal rights with PIFSS without having invested at the start, and thereby diluting PIFSS' interest in the fund. However, the conclusion is false: the intention, and indeed agreement with Banque Mirabaud on behalf of Mr Al Rajaan, was that Banque Mirabaud/Mr Al Rajaan would come in as an investor, not as a lender.

1661. At some point after the problem arose, rather than confronting the situation directly by explaining the problem to Mirabaud, the idea emerged of treating the € 7.5 million already paid as an ordinary loan, rather than a subscription. However, this was not an idea which was communicated by Aerium to Mirabaud at the time. Indeed, the documentary evidence indicates that it was not until 2013 that a draft loan agreement was passed to Mirabaud.

1662. Ely Michel Ruimy's case, as originally opened, was that there was general confusion at the time (i.e. 2007) as to whether the € 7.5 million was a subscription or a loan. That case was not pursued in Mr Penny's oral closing, where the thrust of his submission was that Ely Michel Ruimy may have wrongly formed the view that there was a loan. I reject both ways in which the argument was put. The documents are clear: this was a subscription. Banque Mirabaud and the Ruimy brothers knew that this was a subscription, and that it was a subscription on behalf of Mr Al Rajaan. No-one at the time thought that it was a loan. The idea of somehow converting the subscription into a loan came

into existence as a possible solution to the problem that had arisen as a result of Mr Al Bader's letter.

October 2007 – May 2013

1663. The idea of a loan seems to have first surfaced within Aerium, at least as far as its internal documents are concerned, at the beginning of October 2007. On 4 October 2007, Franck Ruimy sent an email to Sylvie Lexa. Ms Lexa was a personal assistant and later legal assistant at Aerium. Mr Geoffroy t'Serstevens worked at Arendt & Medernach, a Luxembourg law firm engaged by the Aerium Group to structure its entities and funds. Mr t'Serstevens later moved in-house at Aerium.

1664. Franck Ruimy's e-mail was a proposed response to Nicolas Mirabaud's email of 12 June 2007, requesting information about the subscription documents and regularising the payment that had been made in May. The proposed response to Mirabaud was as follows:

> "Gentlemen, I would like to come back to you about your client's subscription last May in the Bainbridge Retail Properties fund. We have submitted this new subscription to Bainbridge's lead investor for approval.
>
> The latter, a Gulf pension fund, holds 91% of the shares and would see its stake diluted to 85%. It requires you to know the identity of your client, and requires priority on dividends and profits made, with a minimum ROE of 50% before distributions to the other investors in the fund.
>
> We believe that their requirements are outside the scope of the placement memorandum. Our advisors therefore propose the following solution: issuance of a loan contract (Notes) in the amount of EUR 7.5 million using the same terms as the declaration of subscription.
>
> Please find attached a draft loan agreement.
>
> We are at your disposal for any further information."

1665. Neither this email, nor any draft agreement, was sent to Banque Mirabaud at that time: there is no evidence to suggest otherwise. The e-mail reveals a number of matters. First, there had been no contact with Banque Mirabaud on the issues raised by Mr Al Bader's letter of 26 June 2007 in the intervening months. Thought had, however, clearly been given as to how to address the problems raised by that letter.

1666. Secondly, even after months had passed since the issue had been raised, there is no suggestion that either Banque Mirabaud or Franck Ruimy were confused about the original nature of the transaction. The draft does not refer to any error having been made in the documentation signed in May/June 2007. On the

contrary, it refers to "your client's subscription"; a statement which recognised that there had been a subscription, and that it was understood that Mirabaud was acting for a "client".

1667. Thirdly, the e-mail referred to PIFSS' requirements, as set out in Mr Al Bader's letter, and that the issuance of a loan contract was a "solution", apparently suggested by some unidentified advisors. The solution was needed because of Mr Al Bader's response. It was not, therefore (as Ely Michel Ruimy maintained throughout his evidence) the position that it had always been agreed, from the time of his meeting with Mr Pierre Mirabaud, that there would be a loan. I reject Ely Michel Ruimy's evidence that the email "goes towards what I said. It was a loan from the beginning". Ely Michel Ruimy's responses to questions on this topic on Day 74 were evasive: he refused to accept the obvious point that the "solution" proposed was a response to the issues raised by Mr Al Bader's "hurdle" and desire to know the identity of the new investor.

1668. Fourth, the draft response evidences the unwillingness to respond to PIFSS' question as to the identity of the investor. It is obvious that Franck Ruimy, who would without doubt have discussed the position with his brother, was unwilling to tell Mr Al Bader that the proposed investor was Mr Al Rajaan.

1669. Fifth, the proposal was not for a straightforward ordinary loan agreement. Specifically, it was to use "the same terms as the declaration of subscription". What this contemplated – and as reflected in a draft loan agreement that was in due course prepared – was that the loan terms would provide the same economic benefit to the "lender" as the subscription that had been made. In other words, the "lender" would in practice be treated as an investor, but with the supposed advantage that it would not be necessary to respond to the conditions which Mr Al Bader had proposed for a new investor coming in. All of this was obviously being done because it was known by the Ruimy brothers that Mr Al Rajaan was the person behind the investment, and the Ruimy brothers wanted to place him in the same position as if an investment had been made.

1670. On 3 October 2007 (the day before Franck Ruimy's email discussed above), Sylvie Lexa of AML sent Franck and Antoine Lam Chok a draft loan agreement. Mr Lam Chok was Aerium's CFO. Ms Lexa asked for confirmation as to the duration of the loan, stating that the "previous one it was 18 months". That was a reference to a loan of € 25 million which previously PIFSS had agreed to provide for the Bainbridge venture, further discussed below. The position at this time was that € 7.5 million had been drawn down under that loan agreement, which was dated 6 March 2007. There was therefore € 17.5 million which could still have been drawn down.

1671. The existence of the loan agreement with PIFSS is of some relevance to the case which Ely Michel Ruimy sought to advance as to why it was necessary to enter into a loan agreement with Banque Mirabaud at all. That case, in summary, was that additional monies were required for the Bainbridge venture, because of the need for increased expenditure relating to the Carrefour stores, in various jurisdictions, which were going to be acquired for the purposes of that venture. Ely Michel Ruimy's case was that PIFSS refused to provide the additional funds

which were needed, and it was therefore necessary to find the monies elsewhere. Franck Ruimy put the point this way in his statement:

> "… as far as I remember we asked PIFSS to help us fund this gap and enable us to complete the transaction. PIFSS refused, which I thought was odd at that time because they had significant funds at their disposal and I understood we had a commitment from them to complete the investment programme for the Bainbridge Venture."

1672. This was false evidence. There is nothing in the documents which suggests that PIFSS was asked by Aerium for additional funds, beyond the € 25 million that they agreed to loan. Nor is there anything to suggest that they refused to provide such funds. Franck Ruimy accepted in cross-examination that he had no recollection of PIFSS' alleged refusal to provide funds. He therefore had no basis for including that evidence in his statement.

1673. The documents in fact show that Franck Ruimy wrote to PIFSS on 7 February 2007, asking for a loan of € 25 million. Very shortly afterwards, on 6 March 2007, Mr Al Rajaan signed a loan agreement for that amount. PIFSS was never asked to provide any more than € 25 million. The loan was drawn down, as to € 7.5 million, on 29 March 2007, pursuant to a request made by Franck Ruimy. Later on, in June 2008, the balance of the loan was drawn down. However, there was no need, in May/June 2007, for the Bainbridge venture to take out a loan from Mirabaud for an additional € 7.5 million for the purposes of the venture, since that sum of money was readily available from PIFSS under the documented loan concluded only a matter of weeks earlier.

1674. I reject the point made by Ely Michel Ruimy that the PIFSS loan agreement presented a difficulty, in terms of drawing down the funds required for the venture, because it could only be drawn down for the purposes of properties in Turkey, rather than elsewhere in Europe. It is true that the PIFSS loan agreement referred to properties in Turkey, in the context of the purpose of the loan. However, there was no material difference in that regard between the terms there set out, and the terms of the draft Mirabaud loan agreements which came into existence in October 2007 and May 2008. The draft Mirabaud loan agreements were clearly based upon the PIFSS loan, and largely replicated its terms.

1675. This is yet another reason for rejecting Ely Michel Ruimy's evidence and case that it was always intended that Mirabaud should provide monies by way of ordinary loan. In short, loan monies were available under the existing agreement with PIFSS. Furthermore, the reason that the money from Banque Mirabaud was coming in by way of subscription, not a loan, was that it would provide Mr Al Rajaan with a potentially valuable stake in the venture. It is most unlikely that Mr Al Rajaan would have been particularly interested in making a loan to the Bainbridge venture.

1676. Picking up the story as at October 2007, when the first draft Mirabaud loan agreement was prepared: in his evidence, Ely Michel Ruimy drew attention to the oddity of the fact that it was his organisation that was drafting the loan

agreement. As he said: "it should not have been done by us. It's a bank. The bank should have sent the loan. Since when you send your loan contract to a bank that you borrow money from?". I agree that this is very odd indeed. But it is a strong point against Ely Michel Ruimy's evidence that there was a loan. If it had been a loan, then the subscription documents signed by Mirabaud, and the absence of a loan agreement sent by the bank, make no sense at all. The obvious conclusion is that there never was an agreement for a loan.

1677. On 23 January 2008, Mr Florey of Mirabaud wrote to Franck Ruimy asking to know:

> "exactly why we have not yet received any information or confirmation of our investment of EUR 7,500,000 in the product mentioned above.
>
> In addition, and for external audit reasons, we kindly ask you to inform us of the procedure to be followed in order to regularize this investment by January 31, 2008."

1678. Accordingly, Mr Florey (correctly) understood that the funds had been advanced by way of an investment. Franck Ruimy then emailed Sylvie Lexa, saying that they should prepare the answer together. He then emailed on 30 January 2008 saying that they must "put an end to Mirabaud's subscription to Bainbridge", adding that he thought that they had been given a loan contract. In fact, no loan contract had been given to Mirabaud at that time. However, his email identified what, as Aerium had decided, needed to be done. This was somehow to change the agreement that had been put in place (putting "an end to Mirabaud's subscription"), and replace it with a loan. This was not because there was confusion as to what had been agreed, but rather because a solution needed to be found to the problem of Bainbridge having received € 7.5 million as a subscription, in the light of the issues raised by Mr Al Bader. One solution would have been to repay it to Mirabaud, but this was obviously not an attractive idea bearing in mind (as both Ruimy brothers emphasised in evidence) the funding needs of the venture.

1679. Some further correspondence followed, with Mr Florey chasing for documentation, or at least (in his email of 11 February 2008) an e-mail confirmation of the receipt of money. Mr t'Serstevens sent a response, confirming the receipt of funds "and that the interests started running from that date". No documents, such as a draft loan agreement, were then sent. There was no explicit statement that the money was now to be treated as having been loaned, rather than invested by way of subscription.

1680. It was at around this time, on 25 February 2008, that Ely Michel Ruimy signed documentation relating to the opening of his bank account at Mirabaud. I will return in due course to the significance of this. The account was opened during the time period when the Ruimy brothers were thinking about putting in place a loan agreement, albeit many years before any loan documentation had been sent to Mirabaud. It is possible that the opening of the Mirabaud bank account was in some way connected with the difficulties that the Ruimy brothers perceived to have arisen as a result of Mr Al Bader's letter. It is also possible that the

timing was coincidental. Given that Ely Michel Ruimy has not told the truth about what was happening, and that documentation evidencing his story is non-existent, I cannot say whether it was connected or coincidental.

1681. On 2 May 2008, Mr Raven of Banque Mirabaud sent an email asking for "confirmation from the Company for this investment of EUR 7.5 million, the distribution of assets and this by official written letter to be received as agreed next week by post". Later that day, Mr t'Serstevens sent Mr Raven (copying Mr Florey) a "statement of interest due as at 31 March 2008". He also said that he would send him "the contract for your investment on Monday". The attachment was a table, headed with Mirabaud as lender and Bainbridge Capital as borrower. It set out an interest calculation at a rate of 6%, showing € 7.895 million due, with no interest repayments having been made. The e-mail did not explain why there was an interest calculation, and also referred to the "contract for your investment" – which suggested an investment rather than a loan. No contract for the investment was sent on the Monday. Mr t'Serstevens' evidence was that he had no involvement in the creation of the table, and that it was produced by Aerium's accounting team in Luxembourg.

1682. As at this time no loan agreement had been sent to Mirabaud. Indeed, as late as 6 May 2008, Aerium had yet even to finalise internally the terms of the loan that they were going to propose. Thus, on that date Mr t'Serstevens sent Franck Ruimy and Mr Lam Chok a "draft loan agreement" between Bainbridge and Mirabaud for review. He specifically asked whether Franck was satisfied with the profit allocation clause (section 3.2) and whether he had any other comments on the document.

1683. There had clearly been a discussion involving Mr t'Serstevens and Franck Ruimy about a profit allocation clause referable to this loan. The draft loan provided for an interest rate of 6% payable to the lender, and in addition a share of any capital gain as set out in clause 3.2. That clause (which had not been included in the earlier draft created in October 2007) provided:

> "3.2 In addition, the Lender shall be entitled to a share of any capital gain which shall be realized by the SCA on the sale of the Properties, which shall be the net amount received by the SCA from its subsidiaries after the sale of the Properties, after deduction of costs and taxes incurred at any level of the Venture (the '**Capital Gain'**).
>
> The portion of the Capital Gain (the '**Lender Portion**') which shall be due By the SCA to the Lender shall be calculated in accordance with the following formula:
>
> **LP=60% * (CG—CE—L—FIA)**
>
> whereby:
>
> '**LP'** = Lender Portion; page 2/7

> '**CG**' = Any Capital Gain realized directly or indirectly by the SCA on the sale of the Properties;
>
> '**CE'** = Any expense incurred by the SCA or its subsidiaries at any level of the Venture in relation to the activity of the Venture;
>
> '**L'** = Loss of the SCA carried forward as at the date of the payment of the Lender Portion."

1684. This was an attempt to give Mirabaud (i.e. Mirabaud's investor, Mr Al Rajaan) the same economic benefits, as lender, as it would get from a subscription. Ely Michel Ruimy accepted that this was so, although his evidence was that this was not something that could possibly be achieved.

1685. The term of the draft loan was for an initial period of over 2 years, up to 31 December 2009. However, it could be extended by written notification by the borrower to the lender for a further period of up to 2 years: i.e. up to 31 December 2011.

1686. However, the draft loan agreement was not sent to Mirabaud at that time. Ely Michel Ruimy accepted in cross-examination the proposition that if, in May 2007, Mirabaud was loaning Bainbridge Capital € 7.5 million, it would have expected to have a loan agreement before May 2008. The first time that any loan agreement was sent to Mirabaud was on 24 July 2013.

1687. Although there had been no agreement (or even discussion) with Mirabaud as to a loan, it appears that a decision was taken internally at Aerium/Bainbridge, at some point in the February/May 2008 period, to treat Mirabaud's € 7.5 million subscription as though it were a loan, albeit that the terms of the loan were not decided. The decision that there should be a loan had become necessary because Mr Florey and others at the bank were chasing for documents. That decision to alter the basis of the subscription was not clearly communicated to, or agreed by, Mirabaud. Instead, the Ruimy brothers took a 'softly-softly' approach, with brief reference in documents to interest, and a loan, no doubt in the hope that the point would not be picked up. Also, at around this time, Bainbridge was about to produce documents which reported on the financial performance of the venture and which would go to PIFSS. In view of the fact that Mr Al Bader's terms for permitting the entry of a new investor had not been met, those documents could not show that a new investor was in place.

1688. Accordingly, Mirabaud's money was treated by Aerium internally as a loan. Much later on, in addition, a spreadsheet was prepared, and sent to Mirabaud for the first time by Mr t'Serstevens in November 2011. His covering email, and the spreadsheet, referred to a loan and identified the payments made in respect of that loan. The spreadsheet showed that: no payments had been made prior to 2008; a large payment was made in July 2008; interest was subsequently paid every quarter at a rate of 6%; no capital had been repaid, so that the "Capital Closing Balance" was always € 7.5 million.

1689. Moving forward in time: under cover of a letter dated 24 July 2013, Franck Ruimy sent Mirabaud a letter enclosing a loan agreement. The letter was headed: "Subject – Mirabaud Bainbridge Capital Subscription". The text of the letter was as follows:

> "We are acting on your request and confirm that the amount initially invested by Mirabaud on 16 May 2007 (the "Principal Amount") in the Bainbridge fund is indeed EUR 7'500'000 -.
>
> In February 2008, we confirmed to Mr. David Florey that this capital injection would be treated as a loan from Mirabaud to Bainbridge Capital (the "Loan Agreement") at a rate of 6% and for an initial renewable period of two years, under the terms of the attached Loan Agreement. To our knowledge, the Loan Agreement has remained awaiting signature by Mirabaud's representatives.
>
> Interest has been accrued since May 16, 2007 and we are attaching the Table of Calculation of such Interest as at June 30, 2013 for your reference.
>
> We remain at your disposal for any further information and we ask you to accept, dear Sir, the expression of our best wishes."

The loan agreement enclosed with the letter was similar to that which had originally been drafted in October 2007, and later amended by Mr t'Serstevens and sent to Franck Ruimy in May 2008. It did not, however, contain the "capital gain" clause set out above. The signature block bore the typewritten text "Signed on May …2008". The signature blocks for Bainbridge Capital and LDV Management Bainbridge Holding S.C.A had been signed by Franck Ruimy, but the precise date in May 2008 had not been inserted when he signed.

1690. The covering letter confirms, contrary to Ely Michel Ruimy's evidence, that the amount originally provided by Mirabaud was not a loan, but an investment or capital injection. It also indicates that it was only subsequent to the initial investment, allegedly in February 2008, that there was confirmation that "the capital injection would be treated as a loan". It is therefore inconsistent with the case that there was a loan from the start.

1691. That said, the letter contains a number of inaccurate statements. There is no evidence of any confirmation to Mr Florey in February 2008 that the injection would be treated as a loan at a rate of 6%. There is no evidence in the documents of any communication on that topic to Mr Florey at that time. Indeed, there is positive evidence that indicates that it cannot have been so confirmed at that time. The fact that Mr t'Serstevens prepared a draft in May 2008 shows that Aerium had not yet decided, at that time, what loan terms they were going to propose. Furthermore, the May 2008 draft provided not simply for interest at 6%, but also for the additional sums payable under Clause 3.2. Accordingly, there can have been no prior agreement for interest simply at 6%. It was also

not correct to say that the Loan Agreement had remained awaiting signature by Mirabaud's representatives: a draft was only sent, for the first time, in July 2013. It was therefore wrong for Franck Ruimy to say that there had been some prior agreement, and that the delay in finalisation was the fault of Mirabaud.

1692. I am also sure that the document was not signed by Franck Ruimy in May 2008. Signature by him at that date is difficult to reconcile with the suggestion in the letter that confirmation had been provided to Mr David Florey in February 2008. If that confirmation had been given at that time, Franck Ruimy would have signed the agreement then. Moreover, there is nothing in the documents to suggest that there was any internal response to Mr t'Serstevens' May 2008 email enclosing the agreement that he had drafted at that time, let alone that it was finalised and signed by Franck Ruimy at that time. Had that happened, one would have expected the draft loan agreement to have been sent across to Mirabaud in May 2008, promptly on signature. That did not happen.

1693. Pausing there, the position on the documents is in my view clear. There was no loan in existence as between the relevant Bainbridge companies and Mirabaud, in 2008 – 2010. Nor was there any basis for Ely Michel Ruimy to think that there was any such loan. No draft loan agreement was ever produced by Mirabaud (as one would ordinarily expect for a bank loan), and no draft was produced by the Ruimy brothers or their colleagues until 2013 at the earliest. The true position, as at 2008 – 2010 and indeed for some years thereafter, is that the only contractual documents relating to the € 7.5 million concerned an investment.

1694. It necessarily follows that, when Ely Michel Ruimy was making payments into his Mirabaud bank account between 2008 – 2010, he was not doing so with the intention of repaying a loan made by Banque Mirabaud to Bainbridge. Since there was no such loan at that time, these could not be repayments of the alleged loan. Ely Michel Ruimy's evidence as to the existence of a loan, and the nature of the payments that he was then making, was false and in my view deliberately untruthful.

1695. Accordingly, I conclude that Ely Michel Ruimy has given a false and untruthful account of the circumstances in which Banque Mirabaud's investment came to be made. There was no agreement reached in 2007 that a loan was to be provided by Mirabaud for the Bainbridge venture. The idea of a loan emerged well after Mirabaud's subscription had been made, and it was a reaction to the problem created by Mr Al Bader's letter containing the basis on which the new investor could come in. Ely Michel Ruimy's account is false in the light of the contemporaneous documents referred to above.

The alleged repayment of the Mirabaud loan

1696. I now turn to the second aspect of Ely Michel Ruimy's case: his evidence that the monies going from his account at Banque Mirabaud represented repayments of the Mirabaud loan, including the reasons why he made those repayments. In the light of the conclusions that I have already reached, including that there was no Mirabaud loan at the time the payments were made, this might seem to be an academic issue. Nevertheless, I consider it important to address the issue, not

least because of its relevance to the question of what Ely Michel Ruimy understood that the payments were (whether he knew that they were corrupt payments to Mr Al Rajaan) as well as his overall credibility and truthfulness.

1697. Ely Michel Ruimy's evidence was that the repayments of the loan were made because of his concerns that Mr Al Rajaan was behind the loan, and this created a conflict of interest which so concerned him that he took it upon himself to repay the loan. He says that he could not afford to do this by way of a full repayment, and therefore repaid the loan from time to time, when funds became available to him. He also says that when he came to close his Mirabaud account in 2010, he had in fact repaid the loan in its entirety. The payments (around USD 10 million) exceeded the amount of the € 7.5 million Mirabaud loan, and the excess represented payments of interest.

1698. There are many reasons for rejecting Ely Michel Ruimy's evidence that the payments in 2008 – 2010 were repayments of a loan, together with accrued interest.

1699. First, there is nothing in any contemporaneous document, emanating either from Aerium, Bainbridge or Mirabaud, which refers to the loan being repaid.

1700. Secondly, there is nothing in any contemporaneous document which suggests that there was ever any arrangement between Ely Michel Ruimy and anyone at Banque Mirabaud that Ely Michel Ruimy would be repaying a loan. If that had been the arrangement, then one would have expected it to be documented from the start. It would be an unusual arrangement for a loan to a company (here Bainbridge Capital SARL) to be repaid by an individual – at least unless that individual has given a guarantee in respect of the loan. However, if such an arrangement were to be concluded, there is no reason why it should not have been documented. The reason that it was not documented in the present case is because that was not the arrangement and was not the reason for the payments made by Ely Michel Ruimy.

1701. Thirdly, Franck Ruimy's July 2013 letter seeks to put a loan agreement into place. There is no sensible reason why Franck Ruimy would have been doing this if the position was that the loan had been repaid. At the very least, there would have been some mention of the fact that the loan, or at least a substantial part of it, had already been repaid by Ely Michel Ruimy some years earlier.

1702. Fourth, Franck Ruimy's July 2013 letter enclosed an interest calculation. The calculation was made on the basis of the full amount of the loan being outstanding, with interest continuing to accrue on the full sum. None of that is consistent with the idea that the loan had in fact been repaid. The interest calculation also shows no interest being paid in the period from May 2007 (when the loan was allegedly made) to April 2008. The reason that no interest was paid during that time was, as Ms Dilnot put to Ely Michel Ruimy in cross-examination, that Bainbridge did not know that there was a loan at that time. The period between May 2007 (when the funds were advanced by Mirabaud) and April 2008, when the first payment was made, was a period during which the Ruimy brothers were working out what to do, in the light of the problem created by Mr Al Bader's letter.

1703. Fifth, the evidence indicates that interest continued to be paid to Mirabaud until 2019. It can reasonably be said that the interest paid after 2014 was referable to a loan agreement. That is because in 2014, Mirabaud did enter into a loan agreement with the Bainbridge companies, on terms similar to those contained in the July 2013 draft. However, the continued payment of interest throughout the period, well beyond 2014, is not consistent with Ely Michel Ruimy's case that the loan had been repaid between 2008 and 2010.

1704. Sixth, there is nothing which can sensibly explain why Ely Michel Ruimy would have taken it upon his own shoulders to repay a loan for which he was never liable, and to do so without obtaining any documentation recording that he was making repayments, or that the loan had been repaid in full. Nor is there any sensible explanation as to why there was no documentation recording the alleged fact, or evidencing Ely Michel Ruimy's case, that the effect of the repayment arrangements was that he now stood in the shoes (vis-à-vis the Bainbridge companies) of Mirabaud's investor.

1705. Ely Michel Ruimy advanced an unlikely story that he had been motivated to make the repayment because of his discovery in 2008, as a result of tax declarations issued by Banque Mirabaud, that Mr Al Rajaan had been behind the € 8.1 million investment in AP I by Galba Anstalt. His concerns at Mr Al Rajaan's conflict of interest, in relation to this investment, caused him to feel it necessary to repay the Mirabaud loan which had been made to Bainbridge. This was on the understanding that he would step into the shoes of Mirabaud, or Mr Al Rajaan, and be entitled to claim from the Bainbridge companies the benefit of the loan obligations that they had to Mirabaud.

1706. I regard all of this as false and invented. As already indicated, Ely Michel Ruimy knew that Mr Al Rajaan was the person behind the Mirabaud € 7.5 million investment in Bainbridge I all along. There is nothing in the contemporaneous exchanges which suggests that he shared any concerns, with his brother or any others within Aerium, when he saw the tax declarations made by Mirabaud in relation to AP I.

1707. Ely Michel Ruimy's evidence, in his witness statement, was that he became concerned about Mirabaud fronting for Mr Al Rajaan on the € 8.1 million investment by Galba Anstalt in early 2008. He said that he was informed about the tax declarations made by Mirabaud by Francoise Durant in early 2008. These identified Mr Al Rajaan as the 100% beneficial owner of Galba Anstalt. He and Francoise were shocked to see this. The tax declarations suggested a hidden relationship between Banque Mirabaud and Mr Al Rajaan, and Ely Michel Ruimy then became worried about the loan from Mirabaud. He then resolved to take action by going to Banque Mirabaud and arranging to pay back the loan, so that he would "become the holder of the loan note in place of Mirabaud".

1708. This explanation is unsupported by any contemporaneous documents, and in my view is contradicted both by the documents and the inherent probabilities. I do not accept that it was in early 2008 that Ely Michel Ruimy knew about the tax declarations. The tax declarations were signed by Banque Mirabaud on 6 March 2007. In his closing submissions, Mr Penny correctly accepted that there was

evidence to show that they were faxed to Aerium at around that time. The Aerium Defendants' disclosure included a document, possibly prepared once the present litigation had started, which included considerable detail about the history of transactions with which I am concerned. No claim of privilege was made when the document was disclosed, and the Aerium Defendants accepted that the document was now part of the evidence in the case, even though (as they contended) it might have been possible to have withheld production for privilege. At all events, one of the entries was as follows:

> "Fax dated 6 March 2007 from Messrs. David Florey and Walter Baumgartner (Mirabaud) to Ms Catherine Durand, Managing Director of Aerium - entitled 'Declaration of beneficial ownership'. This is effectively a confirmation that the entity on whose behalf the Bank holds shares is 'Galba Anstalt' and that the end client is Mr Fahad Al Rajaan, a Kuwaiti client domiciled in Kuwait. (Necessary for 3% tax purposes)."

1709. It therefore appears that a fax was indeed sent on 6 March 2007 to Aerium enclosing the tax declarations: the entry above is specific as to the senders, recipient and date of the fax. I do not accept Mr Penny's argument that the author of the above entry may have been simply referring to the tax declarations themselves, rather than a covering fax. At all events, the fax has not been produced by the Aerium Defendants on disclosure. It is not necessary to decide whether or not that fax has been deliberately withheld by Mr Ruimy, on the basis that it would damage his case that he only learnt of Mr Al Rajaan's investment in AP1 via Galba Anstalt in 2008. That is because Mr Penny fairly accepted that it appears that the tax declarations were indeed sent in March 2007. Indeed, it is highly probable that the tax declarations would have been faxed over as soon as they were ready, not least because (as discussed below) Aerium was very keen to receive them in order to avoid a possible 3% tax charge.

1710. It is probable that, if anyone was shocked when these documents came across to Aerium, the shock would have manifested itself long before early 2008. There is nothing in any contemporaneous document that suggests that Ely Michel Ruimy communicated his alleged shock to any of his colleagues within Aerium, or to anyone else such as Banque Mirabaud. He certainly did not tell PIFSS about it. His evidence as to being shocked that the Director-General of PIFSS had a large personal interest in a fund where PIFSS was the anchor and major investor shows that Ely Michel Ruimy recognised the impropriety of an investment of that kind.

1711. I have no doubt that Ely Michel Ruimy was not shocked. Ely Michel Ruimy, and indeed his brother, knew all along that Mr Al Rajaan was behind the € 8.1 million investment via Galba Anstalt. Ms Catoire's September 2004 e-mail, discussed above, in my view shows Ely Michel Ruimy's involvement, with Mr Al Rajaan, in the investment being made. Furthermore, a matter of days before the tax declarations came to be signed, Franck Ruimy emailed Anna-Maria Rauf on 26 February 2007 as follows:

> "Anna Maria:
>
> I was mistaken. Funds for this investment (8100 units) came from Mirabeau. I need to speak urgently to Kamran but I don't have his mobile no. Would you please be kind enough to ask him to call me or pass me his no.
>
> Hope all is well, Franck."

1712. This exchange was related to the need to obtain the certificates to avoid the 3% tax charge, a matter on which Franck Ruimy had been receiving some advice. Franck Ruimy needed to speak to Mr Kamran Amouzegar urgently about the Mirabaud investment. In re-examination, Franck Ruimy said that he needed someone to provide information on who the beneficial owner of Galba Anstalt was. He said that he knew that Kamran had a relationship with Mr Al Rajaan. The significant point here, in my view, is that unless Franck Ruimy understood that the € 8.1 million was connected to Mr Al Rajaan, there would be no obvious reason to contact Mr Amouzegar. Franck Ruimy suggested that he might have thought that Mr Amouzegar was connected to Banque Mirabaud. I do not accept that: he knew that Mr Amouzegar had worked for Pictet, not Banque Mirabaud. In any event, whether Mr Amouzegar worked for Pictet or Banque Mirabaud, the reason for getting in touch with him was because of his connection with Mr Al Rajaan. Furthermore, the fact that urgent information was required as to the beneficial owner of Galba Anstalt suggests that, when the information did come on the signed forms on 6 March 2007, attention would have been paid within Aerium to the document that was received. It was significant in relation to the 3% tax charge.

1713. Thus, Mr Al Rajaan's ownership of Galba Anstalt was known all along, and certainly from early March 2007. There was then no evident concern as to the information received, and matters proceeded shortly afterwards with the € 7.5 million paid by Mirabaud on behalf of the new investor (Mr Al Rajaan) into the Bainbridge venture. Ely Michel Ruimy was clearly not shocked by that.

1714. Other evidence corroborates my view that Mr Al Rajaan was known to be the new investor in Bainbridge I all along. As indicated above, the Ruimy brothers would have been interested in who it was that was providing the injection of capital. The Banque Mirabaud attestation indicated that it was on behalf of a client. If they did not already know, they would have asked. Furthermore, when Mr Al Bader asked the question as to who the new investor was, there was plainly a reluctance to reveal that information. In addition, there was clearly a desire – as reflected in Mr t'Serstevens' May 2008 draft – to pay the lender under the proposed loan agreement an additional amount to make the loan equivalent to an investment. The motivation for that was, very obviously, a desire to benefit Mr Al Rajaan. There is no reason why the Ruimy brothers would have sought to benefit Banque Mirabaud, or an unknown investor, in that way.

1715. There are further difficulties with Ely Michel Ruimy's account. The tax declarations only related to AP I and Galba Anstalt. But no-one – neither Banque Mirabaud nor Mr Al Rajaan – was asked, following the tax declaration,

whether or not Mr Al Rajaan was the person behind the € 7.5 million paid into Bainbridge. One might have thought that Ely Michel Ruimy, prior to taking it upon his shoulders to repay the (alleged) Bainbridge loan, in very substantial sums, would at least have checked whether that was necessary, by asking for confirmation that Mr Al Rajaan was indeed the investor or lender. That was never done: in my view, because Ely Michel Ruimy, as well as Franck, knew all along that Mr Al Rajaan was behind the investment, and was not troubled by that fact (or Mirabaud's tax declaration) in the slightest.

1716. Furthermore, if Ely Michel Ruimy was going personally to shoulder the burden of the (alleged) Mirabaud loan, then one would have expected to see documentation showing this. One would not expect Ely Michel Ruimy to do it without a clear agreement from Mirabaud, and indeed the Bainbridge companies, that this was happening. It would have been most important to obtain documentation which explained that the companies remained liable for repayment of the (alleged) loan, but that their liability was now owed to Ely Michel Ruimy personally, if that was indeed the intention (as suggested by Ely Michel Ruimy's case). No such documents exist, because this is not what happened. Ely Michel Ruimy's evidence was that he was awaiting documents from Banque Mirabaud – he referred in evidence to Mirabaud's failure to transfer the 'note' to him: "I was asking to Pierre Mirabaud to transfer the note on my name when it was reimbursed". His reference to the 'note' was, presumably, to a (transferable) loan note. However, there never was any loan note in existence at any time. The loan was ultimately documented as a straightforward agreement with Banque Mirabaud, and this was never assigned or novated.

1717. There is nothing in the documents to suggest that Ely Michel Ruimy ever asked for any documentation of his alleged arrangement. There is no letter to Banque Mirabaud which sets out the alleged arrangement, and asks them to provide documents. There would have been no difficulty in Ely Michel Ruimy obtaining legal advice to enable such a letter to be written. The Aerium group had Mr t'Serstevens as an in-house legal adviser, and the documents show that he was involved in the drafting of the loan documentation. Franck Ruimy was keen to emphasise in his evidence that there was an array of lawyers providing advice to the Aerium group. If there were any difficulty in Mr t'Serstevens drafting an appropriate letter, external counsel could have been engaged. The amount of money which Ely Michel Ruimy allegedly repaid, around US$ 10 million, is very substantial indeed. The arrangements alleged by Ely Michel Ruimy, had they existed at all, would plainly have justified engaging a lawyer to draft an appropriate letter to Banque Mirabaud and indeed the Bainbridge companies explaining what the arrangements were, and demanding that Banque Mirabaud should produce the documents which (on Ely Michel Ruimy's case) they had failed to produce.

1718. In this context, it is also noteworthy that Ely Michel Ruimy closed his Banque Mirabaud account in 2010. He wrote a handwritten letter in 2010 in which he asked for the account to be closed. There was nothing in that letter which contained any reference to the (alleged) Mirabaud loan, or to any documents which Banque Mirabaud had failed to produce. I also note that when the account

was opened in 2008, there was no reference to its purpose being to repay the Mirabaud loan.

1719. There are other points as well. Ely Michel Ruimy's evidence, in his witness statement, was that the repayments started in early 2008, when the Mirabaud account was opened. At that time, according to Ely Michel Ruimy, Mr Pierre Mirabaud refused to give him a personal loan, and Ely Michel Ruimy begged Mr Mirabaud for time to repay. However, if there had been a loan on the terms set out in the draft produced in 2008, and later sent to Mirabaud in 2013, there was no need for Ely Michel Ruimy to beg for anything. The loan was not repayable until the end of 2009, and it could then be extended by another 2 years.

What were these payments?

1720. Although I reject, as untruthful, Ely Michel Ruimy's explanation as to the reasons for the payments made to his Mirabaud account, and then on to Mr Al Rajaan or for his benefit, I should still consider the reason why these payments were made.

1721. In addition to Ely Michel Ruimy's false evidence, I have some evidence from Mr Al Rajaan about why the payments were made, and I bear in mind that D1/D2 are defendants to the claim and that they rely upon his evidence. Statements made by Mr Al Rajaan in his pleadings, or witness statements, must be approached with a considerable degree of scepticism: Mr Al Rajaan was corrupt, and he was a liar. Generally, I am not inclined to accept any statement by Mr Al Rajaan which seeks to explain or excuse his own behaviour, unless clearly corroborated by other reliable documents or evidence or the inherent probabilities. However, at least to some extent, his evidence about Ely Michel Ruimy in his second witness statement does not do that. The evidence in that statement (served in response to the disclosure orders in the 2019 Worldwide Freezing Order) was that the payments were made to him by Ely Michel Ruimy, at Ely Michel Ruimy's instigation. He said that he did not know how Ely Michel Ruimy calculated the amounts paid, and that: "He offered these payments (after PIFSS had decided to invest) and I did not query or negotiate them". Mr Al Rajaan repeated this in his defence. He also said that he (Mr Al Rajaan) provided Ely Michel Ruimy with general investment advice and believed that the money he received from Ely Michel Ruimy was related to the provision of that advice.

1722. Most of those statements are untrue. Mr Al Rajaan would have made it clear that he wanted money. He was not being paid for consulting services. However, Mr Al Rajaan's evidence that Ely Michel Ruimy knew that he was making payments to Mr Al Rajaan is true, and consistent with the inherent probabilities and the matters to which I have referred. There is nothing here to support Ely Michel Ruimy's extraordinary story that he thought that he was repaying a Mirabaud loan.

1723. When looking at the question of why the payments were made, I am here considering events with three participants: the recipient, Mr Al Rajaan; the banker, Pierre Mirabaud; and Ely Michel Ruimy. Mr Al Rajaan is corrupt and a liar. Mr Pierre Mirabaud, who has not given evidence before me, was party over

a long period of time to the making of corrupt payments to Mr Al Rajaan, as now confirmed by his agreement (as part of PIFSS' settlement with Banque Mirabaud) to accept a conviction in Switzerland for corruption and aggravated money laundering in the 2021 Swiss criminal proceedings. I can place no reliance on any statements, in particular exculpatory statements, that he has made. (In fact, I was not shown any documents which suggested that he made any statements, exculpatory or otherwise, about these particular Mirabaud payments). Ely Michel Ruimy is a witness who, for reasons explained in detail in this judgment, has not told the truth to me.

1724. Against this background, I am not in a position to make findings as to the precise nature of the arrangements between these three men surrounding the Mirabaud payments, save that the payments were obviously corrupt. What is clear is as follows. The money was paid. Ely Michel Ruimy knew it was going to Mr Al Rajaan. Ely Michel Ruimy's account of why it was paid is untruthful. There is in my view no sensible explanation for the payments except for the obvious one: these were corrupt payments to Mr Al Rajaan made in return for the placing of PIFSS' investments in the Aerium funds.

1725. A further reason for reaching that conclusion is the source of the monies that were paid into the Mirabaud account. The evidence shows that these were commissions on PIFSS' investments in the RMF, Tensyr and Turquoise funds, as well as on Aeriance investments. They were routed through various accounts connected to Ely Michel Ruimy. Since the source of the payments was commissions on PIFSS' investments, and payments from those commissions were then made to Mr Al Rajaan, the obvious conclusion – bearing in mind all the evidence in this trial as to Mr Al Rajaan's modus operandi and corruption – is that these were corrupt payments.

1726. There was much argument about the introducer agreements which were put in place in relation to the RMF, Tensyr and Turquoise funds, and which resulted in payments made to AFL which were then used, in part, to fund the Mirabaud payments. PIFSS contended that these were not genuine introducer agreements, since PIFSS had no need for an introduction by AFL: PIFSS had long been an investor in RMF funds, and also in the "Sentry" fund run by Fairfield Greenwich Group (Tensyr being another such fund, and an anagram of Sentry). I accept that case. It is reinforced by documents which indicate that in mid-2006, it appears that another corrupt individual, Mr Mombelli, was initially in the frame to be the purported introducer in relation to the RMF investment, but a decision was later made that it should be AFL. But it is not necessary to discuss in detail the question of whether AFL were genuine introducers in relation to these 3 investments. For present purposes, the important point is that if the source of the funds was PIFSS' investments, and one can follow the money to Mr Al Rajaan, and if a false account has been given by Ely Michel Ruimy as to what was happening, the obvious conclusion is that the payments were corrupt.

1727. In his closing submissions, Mr Penny advanced three possible explanations as to the nature and circumstances of the payments, submitting that only one of the explanations involved possible corruption.

1728. The first possibility was that Ely Michel Ruimy was indeed, as he said, repaying the Mirabaud loan. I reject that case for reasons already given. Furthermore, the fact that Ely Michel Ruimy has given untruthful evidence on this issue is relevant to whether there is any reliable factual evidence to support the second possibility discussed below.

1729. The second possibility, and the one that Mr Penny really favoured, was that the payments were not to be regarded as gifts to Mr Al Rajaan, which would bring in the possibility that they were bribes. Rather, they were repayments to Mr Al Rajaan of the € 7.5 million that he had paid out to make the investment in Bainbridge I – which investment had been thwarted by Mr Al Bader's letter. Mr Al Rajaan was likely to have "hit the roof", and would have demanded his money back. Ely Michel Ruimy needed to deal with the situation, and did so by repaying Mr Al Rajaan via Mirabaud, thereby stepping into Mr Al Rajaan's shoes and becoming the beneficial owner of Mr Al Rajaan's former receivable. In that scenario, there was no gift and therefore no bribe. It was simply a commercial transaction, albeit an unusual one, arising from the mess resulting from Mr Al Bader's June 2007 letter. Mr Al Rajaan would, in that scenario, simply be getting his money back, and that could not be characterised as a bribe.

1730. There are many difficulties with this explanation. The starting point is that it was not the case advanced by the Aerium Defendants in their pleadings or in Mr Penny's opening, and it is not an explanation which Ely Michel Ruimy gave in his evidence. In cross-examination of Ely Michel Ruimy, PIFSS was dealing with an entirely different case (Mr Penny's first possibility). Against that background, I doubt whether this second possibility is one that I should even be considering. I accept that, at a trial, the evidence may turn out to be very different to the way in which a case was pleaded and opened, and that a judge evaluating that evidence might be inclined to make fact findings which reflect that evidence. However, that is not what has happened here. Ely Michel Ruimy has not given a different account to that which he originally gave, or to the case opened on the Aerium Defendants' behalf. Rather, the account which he has given does not stand up to scrutiny, and this second possibility is an attempt to meet that difficulty. In a case involving secret payments, dishonest individuals, and a false account given by the Aerium Defendants' principal witness, the court should be very wary of accepting a theory first raised in counsel's oral closing argument.

1731. The next problem is I do not consider that there is any reliable evidence to support the explanation. Ely Michel Ruimy gave no evidence along the lines of Mr Penny's second possibility, and there is nothing in the documents which shows that this was the reason for the payments. As discussed below, the payments were surrounded by secrecy and false banking documentation. Ely Michel Ruimy's evidence involved denials of any dealings with Mr Al Rajaan which led to the payments being made to him from the Mirabaud account, and assertions that it was his own initiative to make a repayment of the Mirabaud loan. This was then organised with Mr Pierre Mirabaud and without the involvement of Mr Al Rajaan. Ely Michel Ruimy therefore sought to distance himself completely from any suggestion that he knew that Mr Al Rajaan was

receiving the money that he, Ely Michel Ruimy, was paying to and from his Mirabaud account.

1732. There is therefore no evidence of a commercial arrangement between them, as posited by this second possibility. Nor has Mr Al Rajaan provided any evidence as to this being the arrangement. His defence, described above, is that the payments were made at Ely Michel Ruimy's behest, but there is no suggestion by Mr Al Rajaan that he was giving up and transferring any rights that he may have had in relation to the Bainbridge loan.

1733. There is also no evidence that enables me to conclude that Mr Al Rajaan was simply demanding his money back as a result of problems which arose from Mr Al Bader's letter. There are various possible explanations, as to why money was paid, which do not involve Mr Al Rajaan demanding his money back. It may well be that he was always expecting to be paid for the RMF, Tensyr and Turquoise investments, as well as the Aeriance investments, and that this was a way of doing it. That simple explanation may well be what happened. Another possibility is that Mr Al Rajaan had been expecting a profitable investment in the Bainbridge venture – indeed an investment which would dilute PIFSS and which would put him in the same position as someone who had invested at the start – but this had not been achieved. On this basis, Mr Al Rajaan had therefore lost out and wanted some kind of compensation for not having received a profitable investment – an investment that of course should never have been made in the first place.

1734. As Ms Dilnot said, without knowing the state of the accounts as between Ely Michel Ruimy and Mr Al Rajaan, the court cannot safely adopt a particular theory as to why payments were being made.

1735. Furthermore, the argument that Mr Al Rajaan was asking for his money back depends upon the proposition that Mr Al Rajaan had advanced his own money in the first place. There is no documentary evidence which satisfactorily demonstrates that this is what happened, as already discussed.

1736. Even if there were an evidential basis for Mr Penny's second possibility, I consider that it would nevertheless be analysed and characterised as a bribe, when the circumstances of the arrangement were viewed in the round. Those circumstances included the following. The reason that Mr Al Rajaan needed to be 'compensated' for having paid out money for a failed investment was that he and Ely Michel Ruimy had colluded at the outset to enable the former to make an investment in Bainbridge which, as Director General of PIFSS, he should never have been making. They both understood the need to conceal the investment from PIFSS, which was why no answer was ever provided in response to Mr Al Bader's question as to who the new investor was. In order to deal with (as Mr Penny submitted) Mr Al Rajaan having 'hit the roof' at the failed secretive investment, Ely Michel Ruimy considered it necessary to make secretive payments to him in a very substantial sum, without any documentation – or at least any documentation ever intended to see the light of day – which showed that such payments were being made. Ely Michel Ruimy had no pre-existing legal obligation to make these payments. The purpose of such payments would be to placate Mr Al Rajaan and keep him sweet, with a view to continuing

a relationship between PIFSS and Aerium with future investments being made by PIFSS.

1737. I should say something more about the secrecy of the arrangements. The payments were not properly documented, and the only documents that evidence the payments were internal Mirabaud documents, and these were never intended to see the light of day. There are no ordinary instructions (e.g. sent by fax) for payment from Ely Michel Ruimy's Mirabaud account to Mr Al Rajaan or Ms Al Wazzan. The payments were not made in a direct way, from Ely Michel Ruimy's bank account to Mr Al Rajaan's bank account, as might be expected with an ordinary arrangement for payment of monies between two individuals. Rather, the arrangements were designed to avoid the payments being identified with either Ely Michel Ruimy or Mr Al Rajaan. The documents produced by Mirabaud thus falsely record cash withdrawals by Ely Michel Ruimy, and then broadly equivalent sums being paid into an account in Ms Al Wazzan's name, or to jewellers.

1738. Whilst I accept that Mr Pierre Mirabaud is likely to have had a substantial part in structuring the payments to Mr Al Rajaan in this way, I have no doubt that Ely Michel Ruimy knew of the secrecy which was intended to surround these payments. This is the explanation for Ely Michel Ruimy's willingness to sign blank or partially blank documents with the details not fully completed, but which were intended to be used in connection with the transfer of monies to Mr Al Rajaan. It also explains why no documents relating to the transfers from his bank accounts, such as ordinary account statements (which would have shown very large withdrawals in cash) were sent to him, or (on his evidence) seen by him.

1739. In relation to the absence of ordinary instructions for the payments, whether by fax or by phone, Ely Michel Ruimy's evidence was that he was told by Mr Mirabaud that the bank would not accept phone or fax instructions. That evidence, like much of Ely Michel Ruimy's evidence, was untrue. The account opening documentation, signed by Ely Michel Ruimy, states clearly that fax and phone instructions can be given, and that these need not be confirmed in writing. That is how one would expect a bank to operate. The absence of fax or phone instructions in the case of these payments was so as to preserve the secrecy of what was going on. I accept that Mr Pierre Mirabaud may have said that he would handle things. On the evidence in this trial as a whole, he was a willing assistant to Mr Al Rajaan's corruption, as described in the Mirabaud scheme section of this judgment, and as now confirmed by his agreement to accept a conviction in Switzerland for corruption and aggravated money laundering. The things that Mr Pierre Mirabaud was handling, as both Ely Michel Ruimy and Mr Mirabaud knew, were corrupt payments that were being channelled to Mr Al Rajaan. Since Ely Michel Ruimy may not have had the money required to make a compensation payment in one lump sum, or possibly because doing so might have raised too much suspicion, he signed documents in advance which would enable Mr Mirabaud to do the business.

1740. Accordingly, I do not accept any of Mr Penny's arguments concerning this second possibility.

1741. The third possibility postulated by Mr Penny was that the payments were by way of a gift in return for continued future investments in Aerium. He submitted that it is only in that unlikely scenario that the payments could possibly be regarded as bribes. I do not think that transactions need to be analysed using the English law approach or an analysis of "gifts" in order to make them corrupt. A substantial and secretive payment made by Ely Michel Ruimy to the Director General of PIFSS, in order to ensure that PIFSS continued to place business with Aerium and to keep him sweet, is very obviously a bribe, whether or not it is analysed as a gift. Whenever there are bribes, there is inevitably a "quid pro quo" received in return for the payment (e.g. an agreement or promise to invest), so that a "gift" analysis is inappropriate.

1742. I also cannot see the relevance of Mr Penny's point that Mr Al Rajaan's investment in or loan to Bainbridge would have turned out to be valueless, in view of the poor financial outcome of that venture. The fact remains that the arrangements between Mr Al Rajaan and Mr Ruimy resulted in Mr Al Rajaan receiving actual payments of almost US$ 10 million.

Other consequences of the above findings

1743. The above findings have wider consequences than simply the corrupt payments routed via Mirabaud, and the financial consequences thereof. Ms Dilnot's excellent brief oral reply submissions identified those consequences, or (as she put it) the other dominoes that fell with the rejection of the case advanced by the Aerium Defendants about the Mirabaud payments. In summary, Ely Michel Ruimy has run a false case about the Mirabaud payments, giving evidence which is almost entirely false. He has falsely denied knowing of Mr Al Rajaan's involvement in the Bainbridge I investment in 2007 at the outset, and also knowing of his investment via Galba Anstalt in AP1. The facts also show a far greater proximity between Ely Michel Ruimy and Mr Al Rajaan than he was prepared to acknowledge: in relation to the Galba Anstalt investment, the Bainbridge I investment, and then the Mirabaud payments themselves. His signature of blank transfer forms shows his participation in arrangements knowingly intended to disguise the payment flows to Mr Al Rajaan. The Mirabaud payments, and Ely Michel Ruimy's involvement in making them, also indicate that he was trusted by Mr Al Rajaan to set up concealed Mirabaud payments without blowing the whistle.

1744. All of this, as Ms Dilnot submitted, bears heavily upon Ely Michel Ruimy's denial of knowledge of the destination of the QWM payments. This is not simply because that denial comes from a witness who has not given truthful evidence. Ely Michel Ruimy knew, from the Galba Anstalt and Bainbridge I investments, that Mr Al Rajaan was looking to benefit personally from Aerium funds, and he allowed him to do that. It is therefore inherently likely that Mr Al Rajaan would be seeking to do so more generally, as indeed was the case with the QWM payments. The fact that, at the very early stages of the Aerium funds, Mr Al Rajaan was making personal investments with the assistance of Mr Ruimy also puts into considerable doubt the suggestion that Aerium needed introducers in order to initiate or maintain the relationship between Aerium and PIFSS. His involvement in making the Mirabaud payments, and signing bank documentation intended to disguise the payment flows, all without blowing the

whistle, undermine arguments that he was not part of Mr Al Rajaan's trusted circle and that he would not have been told (by Mr Al Rajaan, or Mr Amouzegar or Mr Khosrovani) what was going on.

1745. At the start of his oral closing submissions, Mr Penny referred to Ely Michel Ruimy's unblemished career in business, and thus relied on his good character as a reason why the court should not make adverse findings against him. In the light of the conclusions that I have reached as to what happened, as well as my further conclusions below (in particular the lies told to Wafra and others) I do not consider that his previous good character is a matter of any weight.

1746. In the context of the QWM payments, Mr Penny also emphasised the absence of any document, in the thousands of documents produced on disclosure, which shows that Ely Michel Ruimy knew that monies were being paid to Mr Al Rajaan. The Mirabaud payments show why this is not a point of any great weight. There is no document in the Aerium Defendants' disclosure which shows that Ely Michel Ruimy knew that these payments were going to Mr Al Rajaan. It is only because the Banque Mirabaud documents have been obtained that it is possible to see that monies were being channelled to Mr Al Rajaan. Furthermore, those documents do not even show that directly, since attempts were made to disguise the payment flow: transfer forms were signed in blank, and purported to record cash transactions. As I observe below in the context of the participants in the Man scheme, I am here dealing with clever people who will be careful not to record in writing the actual corruption that is taking place.

1747. I agree with Ms Dilnot that all of this leaves very little, if anything, of Ely Michel Ruimy's case and evidence on the QWM payments.

1748. In argument, Mr Penny accepted that a finding against Ely Michel Ruimy in relation to the Mirabaud payments might well colour the court's conclusion as to what happened thereafter. He submitted that it could or should not colour its conclusions as to what happened before: i.e. in the period up to February 2008.

1749. I do not consider that this is logical. If a person is willingly party to corruption between 2008 and 2010, there is every reason to think that he would be willingly party to corruption both before and after that period; at least unless there was some evidence indicating that the period of corruption was an aberration. There is no such evidence here.

K4: The lies told to Wafra in 2015 in relation to introducers

Introduction

1750. This aspect of the case concerns lies told to Wafra in 2015 in response to questions aimed at eliciting information as to Aerium's use of introducers or placement agents. PIFSS' case, in summary, is that lies were told in order to cover up the fact that Aerium had been making substantial payments to the QWM companies.

1751. The background to this aspect of the case is that there was a great deal of common ground between PIFSS and the case advanced by Ely Michel Ruimy.

Thus, there was no dispute, and indeed it is clear on the evidence, that Ely Michel Ruimy and Franck Ruimy knew about the payments that were being made over the years to the QWM companies. It was also accepted that some of the monies paid to the QWM companies had been passed to Mr Al Rajaan. The sums involved were many millions of dollars. Ely Michel Ruimy accepts that around USD 25 million was paid to Mr Al Rajaan as follows: Wentworth paid some US$ 17.1 million to Ozak, US$ 0.87 million to Pictet account 190882, and US$ 0.53 million to Pensée. He also admits that Moccak paid US$ 4.85 million to Ozak and US$ 0.24 million to Pensée. Quadra paid US$ 0.84 million to Bordertown.

1752. There was also no dispute that both Mr Khosrovani and Mr Amouzegar were party to corrupt payments being made by the QWM companies to Mr Al Rajaan, albeit that there is an issue as to whether Mr Khosrovani was knowingly party to corruption when the initial investments were made in 2003. Aerium contends that there is insufficient evidence to support that conclusion, and that Mr Khosrovani can only be shown to have been corrupt from around 2006.

1753. The central issue is whether Ely Michel Ruimy participated in the commission arrangements pursuant to a corrupt arrangement, knowing that the arrangements were benefiting Mr Al Rajaan.

1754. The key answers, relied upon by PIFSS, were given to Wafra in the course of their investigatory work in 2015. In an e-mail sent on 8 August 2015, Wafra asked a number of questions. The response eventually came, some 2 months later. The most important questions and answers in that regard were as follows: (I have italicised the questions)

> "2. *Please reach out to Mr. Ely Michel Ruimy for clarification on how the relationship between PIFSS and Aerium started;*
>
> PIFSS has been introduced to Aerium by the Fairfield Greenwich Group in the person Andres Piedrahita, CEO of FGG. The first investment was Aerium Properties 1. We had over 50 investors in this fund.
>
> 4. *Please confirm with your CFO and Mr. El Michel Ruimy if any placement agents/ introducers/ solicitors were used with respect to PIFSS, and if yes, who is the agent how long they have been paid, whether PIFSS is aware of the payment, whether to your knowledge the agent shares its fees with another party, and if so, who the beneficiaries are;*
>
> As far as we are concerned, no fee was paid to placement agents/solicitors with respect to PIFSS except for Aerium Properties IV where FGG received a fee from the funds' custodian: Citco to introduce PIFSS to the fund. PIFSS was obviously aware of this payment as it is listed on all Citco statements."

1755. The evidence of both Franck and Ely Michel Ruimy was, in substance, that the answer to question 4 was inaccurate, and should not have been given in those terms. Franck Ruimy took full responsibility for the answer, contending that it was not a response which had been authorised by his brother. He gave various reasons for what he accepted was an inaccurate answer, denying that it was a lie or that it was given untruthfully with a view to concealing the payments made to Quadra, Wentworth and Moccak. Ely Michel Ruimy said that he would have given a different answer, if he had known what answer was being given, but he did not know.

1756. In order to consider these issues, it is appropriate to set the question and answer in the context of the enquiries being made by Wafra, and what the Ruimy brothers knew about them. Mr Al Rajaan had left PIFSS in January 2014, and by the summer of 2015 PIFSS, as well as Wafra on its behalf, were asking questions which were clearly directed towards the question of whether he had received corrupt payments.

April – July 2015

1757. By letter dated 8 April 2015 to Franck Ruimy, PIFSS requested AFL to provide a confirmation that:

> "You and your officers, directors, employees, placement and similar agents and related controlled persons ("Covered Associates") have acted and will continue to act in full compliance with all applicable laws governing ethical behavior in dealings with the Institution and understand that such provisions apply to persons doing or seeking to do business with the Institution. In addition, you and your Covered Associates have not knowingly made, and will not knowingly make, whether directly or indirectly any contribution or payment to any official, employee, staff, fiduciary or similar associate of the Institution in violation of applicable laws. You shall continue to maintain and operate processes and procedures compliant with, and shall promptly notify the Institution of any applicable violation with respect to, such laws."

1758. A separate letter was sent in relation to every PIFSS investment in Aerium or Aeriance funds. Franck Ruimy, by letter dated 21 April 2015, provided that confirmation in relation to these various funds.

1759. On 4 June 2015, Sheikh Abdullah on behalf of PIFSS wrote to Franck Ruimy, saying that PIFSS "would be grateful if you would accept this letter as authorization for your firm to discuss the Fund and our investment in the Fund with our affiliate Wafra Investment Advisory Group, Inc. ("Wafra"), and to provide all requested information to Wafra on our behalf". He requested Franck Ruimy to forward various documents to Mr Campagna at Wafra.

1760. As part of his explanation for the inaccurate information later given to Wafra in October, Franck Ruimy said that he was angry with Wafra for the way in which it had acted by way of competing for Aerium's business in the United States. I

do not accept this explanation for giving false information to Wafra. There is nothing in the documents which suggests that Franck Ruimy ever told PIFSS, or indeed Wafra, that he or Aerium was unwilling to provide any requested information to Wafra, or that he or Aerium would only deal with PIFSS directly. The evidence of Mr t'Serstevens, who had some involvement in the provision of information as matters progressed in 2015, was that as far as he was aware, Aerium responded to the information requests professionally. He was clearly not aware of any reason, relating to Wafra's activities in the US, which meant that information should not be given, still less that false answers should be given. Indeed in an early part of his cross-examination on this issue, Franck Ruimy said: "I never had any problem disclosing anything to anyone … at least in my mind".

1761. Following receipt of PIFSS' letter dated 4 June 2015, Mr t'Serstevens, on 24 June 2015, asked a question as to the funds in respect of which information was sought. Mr Campagna of Wafra told him, on 1 July 2015, that they were seeking information regarding all funds, investments, notes, and assets managed by the Aerium Group/Group Leonard de Vinci, and identified nine specific funds together with any other fund in which PIFSS held a beneficial interest.

1762. On 2 July 2015, in a letter copied to Franck Ruimy, Sheikh Abdullah wrote, saying that Aerium had not made contact with Wafra and had not provided the requested information. He asked Mr t'Serstevens (the addressee of the letter) to make contact with Wafra immediately, and provide the requested information.

1763. Mr t'Serstevens responded to PIFSS, by email, saying (correctly) that they had made contact, and that they would "send the information asap, but it will take some time, as we also have to work on Mr Al Bader's request". That was a reference to an email which Mr Al Bader had sent, marked urgent, requesting information and documentation set out in a list of some 45 questions. Included were questions relating to management fees, performance fees and incentive fees. Mr Lam Chok (the CFO) began providing the information on 11 July 2015. Franck Ruimy said that his instruction to Mr t'Serstevens, and Mr Lam Chok, was to provide all the information that Mr Al Bader and his team had requested.

1764. On 15 July 2015, Mr Al Bader e-mailed, thanking Mr Ruimy and others for complying with the first request for information, and setting out a further list of 32 questions on which PIFSS wanted answers. The questions covered, amongst other things, the basis for charging management fees, performance fees, acquisition fees and disposition fees.

August 2015

1765. On 6 August 2015, Mr Harin Thaker (who was the CEO on the Aeriance side of the business, rather than Aerium for which Franck Ruimy was CEO) had a call with Wafra. He sent a note of his call to Franck Ruimy, describing it as an "eye opener". Franck Ruimy would have known from this note the nature of the questions that Wafra was interested in: how was the relationship started with PIFSS; who had the relationship – to which Mr Thaker's answer was "both the founding partners/brothers FAR/EMR"; who at Aeriance has a relationship and maintains the same – to which his answer was "Franck Ruimy – Aeriance

Chairman"; whether any intermediaries were being paid in establishing or maintaining the relationship. Mr Thaker said that the question on who talked to PIFSS, and maintained the relationship "kept coming a few times".

1766. On the day after Mr Thaker's note was sent, Franck Ruimy, together with Mr Thaker and one other person, had a call with Wafra. Franck Ruimy would, having received Mr Thaker's note, have been anticipating the nature of the questions that would be asked. Wafra prepared a note of that call, which took place on 7 August 2015.

1767. The second question was: "How was the relationship with PIFSS established?" The recorded response was:

> "Would need to ask his brother. If there is a placement fee, it's usually a percentage up front.
>
> He will check with his CFO on whether placement fees were/ are paid.
>
> Despite follow up inquiries on our end – no response has given on their end."

1768. It appears from this answer that the note of the call was completed or updated at some point after the call itself. The reference to the follow-up inquiries, to which no response had been received, was to the written request sent on 8 August 2015 (referred to above and discussed below). That said, the recorded answers are consistent with the answers to the follow-up questions which were asked on 8 August 2015, and so there is no reason to doubt the accuracy of the note of those answers. Also, Franck Ruimy in cross-examination did not dispute that he had given the answers recorded in the note of the call. His evidence was that he did not give a full response to Wafra, but only gave them "half the information". This was because he had a personal problem with Wafra, which had made millions of dollars in the US in an investment strategy that was taken from them by Wafra. He accepted, however, that he had not told either Wafra, or PIFSS that he was not prepared to provide information.

1769. There are a number of aspects of Franck Ruimy's answers to Wafra on that call, in relation to question 2, which are significant.

1770. First, Franck Ruimy was not prepared to tell Wafra what he knew about the circumstances in which the relationship had been established, and he said that he needed to ask his brother. Franck Ruimy's evidence was that, at the time when the relationship with PIFSS started, he was still working in New York for W.P. Carey. His written evidence suggested that he did not know exactly how things started.

1771. I do not accept that evidence. Franck Ruimy was identified as one of the 5 members of the "Management Team" in the AP1 PPM. He was referred to in the Bainbridge PPM as a founder of Aerium. He knew how things had started, and did not need to ask his brother in order to give his own account. Moreover, his evidence in cross-examination was that he did know; that it was a long story,

involving Fairfield Greenwich, and that he was not going to provide that information on that initial call but would do so in due course.

1772. Accordingly, it was not Franck Ruimy's ignorance as to how the relationship started which lay behind his statement that he needed to ask his brother. The reason was that he did not know what account his brother would want to give as to how the relationship had started. Franck Ruimy therefore stalled, and said nothing about it. There was no reference to Fairfield Greenwich, Mr Piedrahita, Mr Khosrovani and Mr Amouzegar – all of whom feature, in one way or another, in Franck Ruimy's account in his evidence at trial, as to how the relationship started.

1773. Secondly, Franck Ruimy told Wafra that he needed to check with his CFO on whether placement fees were or are paid. However, the position is that Franck Ruimy knew full well that very substantial placement fees had been paid, over many years, to the QWM companies. He had dealt with Anna-Maria Rauf on many aspects of the accounting for those fees. He knew that the companies were associated with Mr Khosrovani and Mr Amouzegar. Franck Ruimy did not want to provide that information to Wafra, but this had nothing to do with Wafra having taken the benefit in the US of an Aerium business strategy. Provision of information as to how the relationship had started, or which introducers were involved, was not confidential information that would have given Wafra some sort of competitive or commercial advantage. And even if there were some difficulty in providing that information to Wafra, Franck Ruimy could have made it clear that he would provide that information to PIFSS directly.

1774. The reason why Franck Ruimy gave that response, indicating that he did not know about placement fees, was again that he did not know what line his brother would wish to take as to those substantial payments to introducers, including whether they should be revealed at all. He did not himself want to reveal them in the call (or indeed subsequently, as discussed below), because it was obvious that this would then lead to further investigation into the nature of those payments, including whether monies had found their way to Mr Al Rajaan. The answer given to Wafra at that stage, that he needed to check with his CFO, was not straightforward or honest. It was not a case of providing half the information, but of deliberately withholding information and lying as to the need to check with his CFO.

1775. Another question that was asked later on concerned "introduction of service providers/ outsourcing". The answer was: "Introduction initially through Fairfield Sentry and Citco". There was, therefore, a reference to Fairfield in the context of the introduction of service providers and outsourcing. There was no reference to Fairfield in the context of how the relationship started. And there was no reference to Mr Khosrovani or Mr Amouzegar or their companies.

1776. On 8 August 2015, Ms Alyssa Lin of Wafra, who had been on the call with Franck Ruimy, sent an email which asked seven questions, the most material for present purposes being questions 2 and 4 (already set out above). The full list of questions was as follows:

> "1. Please provide PIFSS' % AUM of Aerium, and also PIFSS' % AUM of each of the fund it is invested in;
>
> 2. Please reach out to Mr. Ely Michel Ruimy for clarification on how the relationship between PIFSS and Aerium started;
>
> 3. Kindly provide more clarity on the Platon and Stratton structure and whether fees have been paid relating to those entities and/or any other vehicles in which they feed or otherwise finance, and if so, please provide details;
>
> 4. Please confirm with your CFO and Mr. Ely Michel Ruimy if any placement agents/introducers/solicitors were used with respect to PIFSS, and if yes, who is the agent, how long they have been paid, whether PIFSS is aware of the payment, whether to your knowledge the agent shares its fees with another party, and if so, who the beneficiaries are;
>
> 5. Please also describe the due diligence conducted on the third-party agent;
>
> 6. Please provide to us the most recent IRR of the funds since inception, net and gross (please indicate as of date);
>
> and
>
> 7. What is the benchmark you use for your funds?"

Ms Lin also asked for copies of various documents relating to Aerium, such as any Code of Ethics and Anti Money-Laundering policy.

1777. On the following day, Sunday 9 August 2015, Franck Ruimy passed Ms Lin's email to his brother stating:

> "At Adel's request, I had a conference call with the Wafra team in NY
>
> They asked me a lot of questions. Below is the additional list of questions.
>
> We talk about it at your convenience."

1778. Ms Lin's email had specifically referred to the need, bearing in mind Franck Ruimy's answers in the call, for him to discuss question 2 with his brother and question 4 with the CFO and his brother. Franck Ruimy accepted, in his evidence, that he probably discussed the questions with his brother. He suggested in evidence, however, that he did not discuss the answers, to be given to those questions, with his brother. I reject that evidence as untrue and incredible. Any discussion of the questions would inevitably involve a discussion of exactly how the question was to be answered. I reject Franck Ruimy's evidence that he drafted the answers to Ms Lin's questions entirely

himself, and I reject Ely Michel Ruimy's evidence that he would have answered the questions differently if only he had known the answers being given.

1779. There must in my view have been very careful consideration, by both men, to the question of what Wafra was to be told. That explains why it took some two months for Aerium to give a response to this relatively short list of questions. Both Ruimy brothers knew that PIFSS, and Wafra on its behalf, were looking carefully at fees, and whether monies had found their way back to Mr Al Rajaan and possibly others at PIFSS. They knew that if the payments made to the QWM companies were revealed, that would potentially lead to further searching questions and investigation by PIFSS and Wafra. So they decided to lie.

1780. Indeed, in his oral closing submissions, Mr Penny realistically accepted that a decision was made to lie to Wafra. One issue which I need to consider is: why did the Ruimy brothers decide to lie? I address that question in more detail below, but in my view the answer is simple: they lied because they knew full well that the Aerium relationship with Mr Al Rajaan was corrupt, and they did not want to reveal any information that might lead to the QWM companies and thence to Mr Al Rajaan and thence to the Ruimy brothers themselves.

September 2015

1781. On 29 September 2015, Franck Ruimy sent Alyssa Lin a holding response, explaining the delay in providing information. The email was copied to the CFO, Mr Lam Chok, who wrote to Mr t'Serstevens:

> "Franck told me that this was the priority. The Pifss is very, very nervous that they didn't get an answer."

1782. Accordingly, Franck Ruimy knew that PIFSS was attaching importance to the information that had been requested by Ms Lin, and that this was the priority. He had likely been told that by Mr Al Bader. Accordingly, he knew that PIFSS was treating these questions very seriously.

1783. In his second witness statement, Franck Ruimy said that he was not minded to respond to Wafra's questions; they were asking for the disclosure of sensitive confidential information, which he was not going to disclose to them as a competitor; that he didn't tell them to go away, because Adel Al Bader called him, asking to give them a quick answer and that it was a formality; and that he felt bad for Adel, who had his own employees investigating him and his integrity. I do not consider that any of this was true, save that (see above) it is likely that Mr Al Bader did tell him that PIFSS was very nervous that they had not had an answer.

1784. In cross-examination, Franck Ruimy did not (as I understood his evidence) maintain the position that the information being requested was sensitive confidential information. It was information, as to how the relationship with PIFSS had come about, and what introducers there had been, which was historic. In any event, I cannot see how the information could have given Wafra any competitive advantage. Franck Ruimy agreed in cross examination that it would not give Wafra any competitive advantage to know that Aerium had paid fees

to the QWM companies. Furthermore, the idea that Mr Adel Al Bader asked for a quick answer, and that it was a formality, is wholly inconsistent with the correspondence as a whole, and in particular Mr Lam Chok's email as to what Franck Ruimy was saying at the time. It is also inconsistent with the length of time that it took Franck Ruimy to respond to Ms Lin.

October 2015

1785. On 6 October 2015, Hamad Al Humaidhi (by now Director-General of PIFSS) wrote to Mr t'Serstevens. The letter asked for various confirmations: in summary, that no monies had or would be paid to any officials or staff at PIFSS. The letter would have been discussed by Mr t'Serstevens with Franck Ruimy, who acknowledged in his evidence that it was likely that he would have realised that PIFSS was interested in the position of Mr Al Rajaan, and perhaps others.

1786. On 8 October 2015, Franck Ruimy responded by e-mail to Ms Lin's questions. The questions and answers have been set out at the beginning of this section.

1787. In relation to question 2, there was no reference to either Hashem Khosrovani or Kamran Amouzegar, notwithstanding that they were the individuals whose companies received many millions of dollars in retrocessions in relation to their alleged introduction of PIFSS to the various Aerium funds. The case being advanced at that stage – and again as discussed below when the Aerium Defendants responded to a similar question in the context of the present litigation – was that the introduction was the responsibility of one individual, Mr Andres Piedrahita, CEO of FGG.

1788. Ely Michel Ruimy's evidence, in cross-examination, was that Mr Khosrovani could and should have been referred to in response to this question, and that he would have referred to him if this had been his response. In my view, Mr Khosrovani clearly should have been referred to in response to question 2 – at least if the true factual position was that Mr Khosrovani (or indeed Mr Amouzegar) had had a real role in introducing PIFSS to the Aerium funds.

1789. Was the answer to question 2 true? As discussed in Section K6 below, there is no reliable evidence, adduced by Ely Michel Ruimy, as to how his introduction to Mr Al Rajaan actually came about. It is possible that Mr Piedrahita may, in a loose sense, have had something to do with it. He was involved in AP1 in his own capacity rather than on behalf of Fairfield Greenwich Group. The possibility of him being involved in the introduction arises from the fact that PIFSS had been an investor in an FGG fund, namely the Sentry fund, since the 1990s. Indeed, PIFSS remained an investor in that fund, which was a "feeder" fund for the infamous Bernard Madoff funds, until it collapsed in 2008 when Madoff's frauds were revealed. There is also evidence that PIFSS was invested in other FGG funds as well. Since Mr Al Rajaan would regularly meet fund managers who were hoping to attract PIFSS' investments, it is likely that he would have met Mr Piedrahita on one or more occasions. Since FGG is not party to the present proceedings, there has been no disclosure of their documents, although a limited number have been obtained from the public record of certain US proceedings. These include documentary evidence of a meeting between Mr

Al Rajaan and representatives of FGG in 2006, and this cannot have been the first meeting.

1790. Furthermore, the evidence of David Smith, in his first witness statement, was that:

> "At an early stage, around the time that the Aerium Group's first investment fund (Aerium Properties 1) was established, Andres Piedrahita introduced the Aerium Group to PIFSS. He introduced us in the sense that he arranged for us to make a presentation to PIFSS about the investment opportunities we were offering."

1791. Andres Piedrahita was one of the 5 individuals identified, in the AP1 PPM, as part of the Management Team of the proposed fund. He is also referred to in the slide presentations prepared at around the time that this fund was starting to be marketed. Mr Piedrahita therefore had knowledge of the proposed AP1 fund, and the company of which he was CEO (FGG) had a longstanding relationship with PIFSS.

1792. So it is possible that Mr Piedrahita had something to do with the introduction. Indeed, the evidence of Mr Smith in his first witness statement was to that effect. However, if Mr Piedrahita was the critical introducer, then this presents a significant problem for Ely Michel Ruimy's case; since he needs to explain why – if an introduction fee were to be paid – it did not go to Mr Piedrahita or possibly FGG.

1793. He also needs to explain why it was that substantial fees were then paid to companies owned and controlled by Mr Khosrovani and Mr Amouzegar. Mr Penny's submission as to their role was not that they were experts in real estate transactions, or that they could explain the detail of the Aerium fund to Mr Al Rajaan, but rather that they were gatekeepers who kept an eye out for interesting investment opportunities, and would then tell Mr Al Rajaan about them. This submission was made in order to explain the evidence (discussed further in Section K6 below) as to Ely Michel Ruimy's involvement in presenting the Aerium funds to Mr Al Rajaan. However, Mr Piedrahita would not have needed either Mr Khosrovani or Mr Amouzegar in order to fulfil that limited gatekeeping role. He knew Mr Al Rajaan through FGG's long-standing relationship with PIFSS. He knew about the Aerium fund because he was one of the principals behind the fund. He could introduce Ely Michel Ruimy to Mr Al Rajaan himself (as David Smith said that he did), and tell him that the Aerium fund was an interesting opportunity that he might consider and that he should discuss the detail with Ely Michel Ruimy.

1794. If the position were (as the Aerium Defendants now contend) that either Mr Khosrovani or Mr Amouzegar, or both, were key in introducing Aerium to PIFSS, then I do not consider that there is any reasonable explanation as to why they were not referred to in response to question 2.

1795. As far as concerns question 4, the position is more straightforward. The answer was untrue, and deliberately so. It identified only one fund where fees were paid

to placement agents/solicitors. However, as the Ruimy brothers knew, substantial fees had been paid to the QWM companies, and they were not mentioned.

1796. In his evidence, Franck Ruimy did not seek to defend the answer that was given. He accepted that those companies were paid as placement agents or introducers. He described his answer as a "partial answer". He took full blame for it, and said that it was a mistake. In my view, it was not a "partial answer": it stated that there was only one fund where a relevant payment was made. That was completely untrue. It was also not a mistake. It was a deliberate lie, in order to conceal the true position and avoid further potential investigation which would lead to Mr Al Rajaan and then the Ruimy brothers. As far as both brothers were concerned, that investigation was to be avoided, because it would reveal their participation in the bribery of Mr Al Rajaan.

1797. In his evidence, Ely Michel Ruimy emphasised that the answer to question 4 was not his answer, and he would have answered differently. For reasons already given, I reject the evidence that this was not his answer. He also made a half-hearted and unimpressive attempt to defend the answer, on the basis that no fees to placement agents had been paid out of PIFSS' monies. But question 4 was not directed to payments out of PIFSS' monies. The question was very obviously a general one, and did not refer to payments out of PIFSS' monies, and was certainly not confined to a question in relation to such payments.

1798. In cross-examination, Ely Michel Ruimy also said that Mr Al Bader knew about Mr Khosrovani's involvement as the introducer. That assertion had never previously been made in the pleadings or in his three witness statements. It is obviously false. If Mr Al Bader knew about Mr Khosrovani, then there was no reason to lie about the latter's involvement. Furthermore, it was Mr Al Bader who likely told Franck Ruimy how nervous PIFSS was at not having received answers to their questions. He clearly did not know, and this is a point to which I shall return in due course when considering whether Mr Khosrovani and Mr Amouzegar were genuine introducers. I reject the submission in written closing submissions that I should draw an adverse inference, as to Mr Al Bader's knowledge of Mr Khosrovani's role as introducer, from the fact that he had not been called to give evidence. Mr Penny sensibly retreated from that submission in his oral closing.

1799. In criminal trials, where the prosecution relies upon lies told by a defendant, a jury is given a *Lucas* direction which requires them to pause before coming to a conclusion that lies are indicative of guilt. The example direction given in the *Crown Court Compendium*, in a case where a defendant admits telling a lie, suggests that the jury should be told:

> "When you are considering this evidence, you must consider why D lied. In doing so, you must bear in mind that a defendant who tells a lie is not necessarily guilty; sometimes a defendant who is not guilty will tell a lie for some other reason."

Juries are told to consider the reason that a defendant gives for having told the lie; for example, that he panicked at the time. If the jury is satisfied that this was not the reason, then the jury may also be told to consider whether there may be some other reason why the defendant lied; for example, that the defendant was afraid to tell the truth, because it might incriminate a co-defendant. The concluding part of the direction is:

> "If, however, you are sure that D did not have this/these reason(s) for lying, you may use this as evidence which supports the prosecution's case. You must not convict D wholly or mainly because they lied."

1800. Whilst a judge in a civil case is not required so to direct himself, the *Lucas* direction provides useful guidance in considering the relevance of lies even in a civil context. A judge should obviously pause before reaching a conclusion that because Ely Michel Ruimy, and Franck Ruimy, lied to Wafra, it follows that they were knowingly party to corrupt arrangements. Having paused, I have no doubt that this was the reason for their lies. They are both highly intelligent and articulate men. They knew why Wafra was asking the questions, which were preceded by the correspondence to which I have referred. They thought long and hard about how to answer, and waited some 2 months before doing so. There is nothing to indicate that they lied out of panic or fear, as Mr Penny submitted in his closing argument. Rather, they took a carefully considered view as to how to deal with Wafra's questions. And even if they were both panicking or had something to fear, that would have been because they knew that they had been involved in corrupt arrangements. If the position were that they thought that the introducer agreements with the QWM companies were entirely legitimate genuine agreements, reflecting genuine introductions, and that they had no idea that they were connected with impropriety – which is the case which I am now invited to accept – then there was no reason for the Ruimy brothers to lie. They could simply have explained that they had ordinary introducer agreements with the QWM companies, and payments had been made for genuine introductions. In my view, they lied in order to attempt to cover up what had happened.

1801. That attempt was successful for a very long time: Ely Michel Ruimy and AFL were not sued until around 5 years after the answers to the Wafra questions, and even then it was not in respect of the payments to the QWM companies – which PIFSS only began to find out about later. PIFSS only discovered the very significant QWM payments in 2025 as a result of a protracted and difficult disclosure process.

1802. In his closing argument, as I have said, Mr Penny suggested that the reason for the lies was panic or fear. This argument was advanced in order to identify a plausible reason, consistent with "innocence", for the obvious lies. But the Ruimy brothers have never in fact said that they lied as a result of panic or fear. Instead, they have given a number of untruthful explanations for the lies: in particular Franck Ruimy's evidence that he did not want to give a full answer to a competitor, and Ely Michel Ruimy's evidence that he did not know about the answers given. They largely maintained those untruthful answers in cross-

examination. For reasons already given, I do not accept that panic or fear provides an innocent explanation for what PIFSS was told.

1803. The evidence as to the lies told to Wafra, and the false explanations later given in that regard, leaves me in no doubt that I cannot place any reliance on the evidence of Ely Michel Ruimy or Franck Ruimy, except in so far as their evidence is corroborated by reliable documentary evidence or the inherent probabilities. It is also additional evidence which points to their complicity in corruption.

K5: Lies by Ely Michel Ruimy in the early stages of the present litigation

1804. At the outset of the litigation, and for some time thereafter, the Aerium Defendants were represented by Latham & Watkins (London) LLP. They were instructed at the time when their defence was first pleaded and when answers were given to the Request for Further Information ("RFI") described below.

1805. PIFSS' case is that there was then further concealment by Ely Michel Ruimy as to the payments made to the QWM companies. This therefore continued the concealment in 2015 in response to Wafra's questions.

1806. This aspect of the case starts with the Aerium Defendants' original pleaded case. This pleaded:

> "The relationship between PIFSS and the Aerium Group began in or around 2003 when PIFSS invested in Aerium Properties 1. The investment by PIFSS was the result of an introduction to the Aerium Group by another fund with which both the Aerium Group and PIFSS had prior relationships."

1807. This led to a request for information as to the other fund there referred to. The response to the RFI (signed with a statement of truth by Ely Michel Ruimy and Franck Ruimy) was as follows:

> "The introduction was made through the management team of an asset management company called Fairfield Greenwich Group. Mr Ruimy cannot recall the exact date when the introduction was made but estimates that it was between 2000 and 2003. Mr Ruimy cannot recall the names of the individuals involved."

1808. Accordingly, there was here no reference to Mr Khosrovani or Mr Amouzegar. The introducer was the management team of the Fairfield Greenwich Group, with no specific reference to Mr Piedrahita. Nor was there any reference to Mr Smith.

1809. A further question asked in the RFI was whether the Aerium Defendants had "any dealings with any of the individuals and entities pleaded at paragraphs 14-28E (of PIFSS' then current RAPOC) in any way connected to PIFSS' investments?" There were a fair number of individuals and entities referred to

in those paragraphs. Amongst the individuals referred to was Mr Amouzegar. The Aerium Defendants' response was that they had had no such dealings. That response is, on any view, contrary to the abundant evidence in the documents and oral evidence at trial as to the dealings between both Ruimy brothers and Mr Amouzegar.

1810. Ely Michel Ruimy's evidence was that this answer was mistaken, and he referred to the fact that he also dealt with Pictet, which was one of the entities identified in the relevant paragraphs of the RAPOC. I acknowledge that the pleading refers to a large number of individuals and entities. However, Mr Amouzegar was on any view a central figure as far as the payment of commissions over many years was concerned, and Ely Michel Ruimy must have seen that he was squarely named as a party to corruption in the paragraphs of the RAPOC about which PIFSS was asking. The misleading answer to the question, which avoided an acknowledgment of any dealings with Mr Amouzegar, was not a mistaken answer. Rather it was of a piece with the lies told to Wafra, and was part of Ely Michel Ruimy's unwillingness to disclose the substantial commission payments that went to companies connected with Mr Amouzegar.

1811. That RFI response was served on 8 September 2023. Very shortly afterwards, Stewarts on behalf of PIFSS started asking questions relating to Quadra, Wentworth and Moccak. The questions were focused on a relatively small amount of money (just under USD 500,000), paid via one or more of those companies ultimately to Mr Al Rajaan, and which PIFSS could link to Aerium investments. Prior to that time, those companies, and their connection to Mr Amouzegar, had been referred to in PIFSS' RAPOC. However, the linkage to Aerium funds had not been pleaded. Stewarts asked a number of pointed questions about these payments, referring back to the answers to the RFI which had recently been served, including the denial of any dealings with Mr Amouzegar. Prior to a series of specific questions, Stewarts said:

> "absent compelling contrary explanation, payments made by the Aerium/Aeriance Group to the Hong Kong companies controlled by Mr. Amouzegar were Secret Commissions paid for the ultimate benefit of Mr. Al Rajaan."

1812. Latham & Watkins on behalf of the Aerium Defendants wrote a letter in response. That letter referred to Stewarts' letter concerning payments made to the QWM companies, and stated:

> "These are not matters that are within Mr Ruimy's current knowledge as he was never involved in the day-to-day management. Notwithstanding this, and in the spirit of co-operation, our clients are investing a significant amount of time and resources in looking into your client's assertions. However, they have not identified any of the Alleged Payments."

1813. The statement that these were matters not within Ely Michel Ruimy's current knowledge was, in my view, based on false instructions from him. He knew all about Quadra, Wentworth and Moccak, and the payment of substantial

commissions (USD 52.8 million) to those companies over the years. Consistent with his prior answers in 2015, and in the answers to the RFI served in September 2023, his position was that he knew nothing about any payments to introducers, and specifically Mr Amouzegar. It is also notable that, despite Stewarts having referred in their letter specifically to Mr Amouzegar and the relevant answer in the RFI response stating that the Aerium Defendants had not dealt with him in relation to the PIFSS investments, there was no application to amend the RFI response recently served. In fact, within a very short space of time, Latham & Watkins came off the record.

1814. These further lies reinforce the conclusions that I have reached in relation to the Wafra lies. Taken together, the matters addressed in Sections K3-K5 above leave me in no doubt that Ely Michel Ruimy was party to Mr Al Rajaan's corruption throughout.

K6: Who introduced PIFSS to the Aerium funds?

The issue, its relevance and the shape of the parties' arguments

1815. In this section, I address an issue which can be summarised as follows: were the three companies (Quadra, Wentworth and Moccak), or their principals (Mr Khosrovani and Mr Amouzegar) actually responsible for the introduction of PIFSS to the various Aerium funds, so as to justify the substantial payments? In other words, were they the genuine introducers of PIFSS to Aerium? I refer here to both Mr Khosrovani and Mr Amouzegar, although Ely Michel Ruimy's case was that it was Mr Khosrovani alone who was responsible for the initial introduction. In cross-examination, he said that Mr Amouzegar was not there at the beginning, and that to his knowledge Mr Amouzegar had not introduced Aerium to PIFSS. However, it was not disputed that, at least at some stage, Mr Amouzegar had an interest in either Wentworth or Moccak or both, and that Mr Amouzegar was financially interested in the commissions paid in respect of the later Aerium funds. It is therefore necessary to look at the position of both men.

1816. If they were not genuine introducers, and were not viewed as such, then that would provide strong, and indeed overwhelming, further support for PIFSS' case that Ely Michel Ruimy was complicit in corruption. That is because there would in those circumstances be no rationale, other than corruption, for making large commission payments to them. If, however, they were and were perceived as genuine introducers, that might assist Ely Michel Ruimy's case that he was not complicit, although it would not be determinative: corrupt payments could still be made even if there were genuine introducers and introductions. Furthermore, the very existence of corrupt payments is relevant to the question of whether there were genuine introducers and introductions which justified the payments that were made. Thus, if (for example) there is no substantial documentary evidence as to the involvement of Mr Amouzegar and Mr Khosrovani in making genuine introductions of Aerium funds to PIFSS, the very fact that corrupt payments were made would be a strong indication that they were not genuine introducers.

1817. PIFSS contends that the QWM companies were simply inserted as part of corrupt arrangements for the purposes of channelling money to Mr Al Rajaan.

They submit that there is no evidence that those companies, or the individuals behind them, had any significant role in making the original introduction of AP1, or the introduction of later funds. They draw attention to various inconsistencies in the case advanced; for example, if the introducer was Mr Khosrovani, why was Mr Amouzegar substantially involved, with payments being made to companies in which he was jointly interested with Mr Khosrovani? They also say that both of these individuals were clearly corrupt, as is indisputable once payments started to be made to vehicles or accounts associated with Mr Al Rajaan. PIFSS also relies upon inconsistencies in the way in which the case, as to who made the introduction, has developed. Thus, they say that the case for Mr Khosrovani's critical involvement only crystallised after a number of different attempts to explain how the relationship started. Included in the developing case are the answers given to Wafra in 2015, and in the pleaded case and RFI as described in Sections K4 and 5 above.

1818. Focussing on the original introduction to Aerium, Ms Dilnot submits that the likelihood is that there was simply a coming together of a number of individuals who had known each other for some time. No formal introduction from Mr Khosrovani was needed in order to get Mr Al Rajaan interested. The principals of Aerium already had various connections to Mr Al Rajaan. Ely Michel Ruimy told Paribas in 2010 that Mr Al Rajaan had been his interlocutor for nearly 10 years. Mr Piedrahita knew Mr Al Rajaan as a result of the FGG relationship. The principals behind Aerium were friends and had prior business dealings with each other. Some of them lived close to each other in or near Chester Square, and Mr Al Rajaan also had property in London. There was a direct channel for Ely Michel Ruimy to deal with Mr Al Rajaan, which he used at the start and continued to use as things developed. Both Mr Amouzegar and Mr Khosrovani were around at the start of AP1, but their role was not a genuine introductory role. Rather, as Ms Dilnot suggested to Ely Michel Ruimy in cross-examination when he denied any involvement of Mr Amouzegar at the start, it was Mr Al Rajaan who directed Ely Michel Ruimy to Mr Amouzegar and Mr Khosrovani in order to implement the channel for corrupt payments.

1819. There were a number of themes which were developed by Mr Penny in his written and oral closings. Prominent among them, in broad summary, were the following. The critical person responsible for the original introduction of Aerium to PIFSS was Mr Khosrovani. He had a genuine business which involved making introductions in return for commissions. There is nothing to suggest that he was corrupt at the start, and the court should be very cautious about saying that he was corrupt before 2006. 2006 is an important date, because that is when there is banking evidence showing that payments started to flow to Mr Al Rajaan's entities via Bordertown: see the Pictet Scheme above. There was no evidence of such payment flows prior to that time.

1820. Mr Penny did not strenuously argue against a finding that Mr Khosrovani was involved in corrupt payments after 2006. If the court were so to conclude, then he submitted that that was a consequence of the involvement of Mr Amouzegar. The evidence did not suggest that Mr Amouzegar was involved in AP1, but he was involved in 2006, when money did start to flow to Mr Al Rajaan. Like Mr Khosrovani, Mr Amouzegar was well connected, and had or appeared to have a

genuine introductory business, explaining the payment flows to Wentworth and Moccak. Together with Mr Khosrovani, he had a gatekeeper role assisting Mr Al Rajaan, identifying investments that Mr Al Rajaan might want to consider. However, there was every reason for Mr Khosrovani and Mr Amouzegar not to tell the Ruimy brothers about that, and to keep the information to themselves. Mr Al Rajaan would also keep matters close to his chest.

1821. The role of Mr Khosrovani and (later) Mr Amouzegar was not to give detailed explanations to Mr Al Rajaan about how the Aerium funds worked. They were not real estate men. It was Ely Michel Ruimy who could explain the funds, but Mr Khosrovani and Mr Amouzegar would identify interesting funds, and then put Ely Michel Ruimy in touch with Mr Al Rajaan for the purpose of explaining the detail. That is the explanation for Ely Michel Ruimy's involvement in correspondence with Mr Al Rajaan, and the occasional meeting with him. At all times Ely Michel Ruimy considered Mr Khosrovani, and (once he became involved) Mr Amouzegar to be genuine introducers.

1822. As to how the original involvement of Mr Khosrovani came about, the likely factual position was broadly as follows, in Mr Penny's submission. Mr Piedrahita at FGG used introducers to obtain business, and Mr Khosrovani was one of them. It could not have been Mr Piedrahita who got in touch with Mr Al Rajaan, because FGG had always used introducers. That was the case all the way back to 1998/1999, when Mr Khosrovani must have had something to do with introducing PIFSS' investments in Fairfield Sentry. It wasn't Mr Piedrahita's modus operandi to present a matter directly to Mr Al Rajaan. He would use a well-connected and bona fide introducer such as Mr Khosrovani. Mr Penny submitted that when one stood back and looked at the obvious inferences, it was not that Mr Piedrahita went to Mr Al Rajaan directly or could have done so. It is therefore likely to have been Mr Khosrovani who went to Mr Al Rajaan and opened the door with him as to the potential investment in AP1.

1823. Ely Michel Ruimy's case also placed reliance on the proposition that the relationship between FGG and PIFSS was "owned" by Mr Khosrovani. Since he owned the relationship, and since he was the person who had opened the door with Mr Al Rajaan on the first Aerium fund, he was entitled to be paid commission for the introduction which had been made. To that end, his company Quadra entered into the first introducer agreement.

1824. It was submitted that there is nothing surprising about this. It was accepted practice in the Middle East, including Kuwait, for introducers to be involved as intermediaries between investment funds seeking investment, and entities such as PIFSS who might be willing to be investors. Those commissions would be paid on an initial investment, and would then continue in relation to further investments made beyond that. Since the introducer owns the relationship, he is entitled to payment for all investments flowing from the original introduction. There was nothing surprising or improper, as far as Ely Michel Ruimy is concerned, in substantial monies being paid to (at least) Mr Khosrovani, or companies in which he was concerned, since he was the person who had introduced PIFSS to the Aerium Funds, and who owned the relationship.

Discussion - overview

1825. The oral evidence as to how the original introduction came about was given by David Smith, Ely Michel Ruimy and Franck Ruimy. I will address the detail of their evidence below. But taken as a whole, it does little or nothing to evidence Ely Michel Ruimy's case as summarised above. Indeed, the case that the critical introducer was Mr Khosrovani, and that Mr Amouzegar was not present as a corrupting influence until 2006, only seems to have emerged in the opening submissions on behalf of Ely Michel Ruimy.

1826. The overall picture painted in the initial rounds of witness evidence served on behalf of Ely Michel Ruimy was that David Smith was the key individual (or at least a key individual) who had dealt with the introduction of Aerium to PIFSS. That case did not survive cross-examination. The thrust of Ely Michel Ruimy's evidence is that since he was not dealing with investors, but focusing on property acquisition and finance, he did not really know how PIFSS had been introduced: that was a matter which others, in particular David Smith, were dealing with. Franck Ruimy's evidence was also that he was not initially involved, not least because he was still working in New York when AP1 was launched. I treat the evidence of the Ruimy brothers with considerable caution, and I do not consider that their evidence is credible.

1827. In considering the oral evidence from these 3 witnesses, I acknowledge that the events with which I am concerned happened many years ago, and that memories will have faded. However, PIFSS was plainly a very important client for Aerium, who received over a billion investment dollars over the years, generating very substantial fees for Aerium. One might therefore have expected Ely Michel Ruimy to be able to adduce reliable and consistent evidence as to how such a valuable introduction came about.

1828. In addition to the lack of reliable oral evidence to support Ely Michel Ruimy's case, there is no or no significant documentary support for his case, as summarised above, as to how the introduction came about. Rather, Mr Penny's submission sought to construct a narrative from a limited number of references in documents, but without any reliable witness evidence to support the case advanced. None of the critical witnesses who could have supported the narrative were called, or gave witness statements. Thus, by way of example, there was no evidence from Mr Piedrahita as to his modus operandi, or that this would have led him to decline to effect a direct introduction of Ely Michel Ruimy to Mr Al Rajaan, or that he decided that he would go through Mr Khosrovani rather than making direct contact. Mr Khosrovani was not called in order to explain his involvement in 2003, and nor was Mr Amouzegar called to explain his alleged lack of involvement until 2006. There was no evidence from either of them as to what they were actually doing, or their ownership or beneficial interests in the QWM companies or in the substantial commission income of those companies. It is, perhaps, understandable that neither Mr Khosrovani or Mr Amouzegar were called, because the evidence indicates that they were involved in corruption over many years, and it is doubtful whether their evidence, in particular any exculpatory evidence, would have been credible.

1829. Less understandable, however, is the fact that Mr Piedrahita gave no evidence, despite Ely Michel Ruimy's evidence that he had worked with him for many years. Instead, Mr Penny submitted that Mr Piedrahita was presumptively

honest, and that this assists in concluding that Ely Michel Ruimy was as well. Having had no evidence from Mr Piedrahita, I cannot conclude one way or the other as to whether he was honest. As with similar arguments advanced by Mr Nasrallah as to the presumptive honesty of fund managers, I consider that PIFSS is entitled to remain agnostic about whether or not Mr Piedrahita was or was not complicit in corruption. Even assuming that Mr Piedrahita was not complicit, that tells me nothing about Ely Michel Ruimy's knowledge and state of mind.

1830. I agree with Mr Penny that it is not appropriate to draw adverse inferences from the failure to call any of these witnesses, including Mr Piedrahita. However, their absence means that there is a large evidential gap, as to what happened, which Ely Michel Ruimy has not filled.

1831. Furthermore, there are many aspects of the evidence which in my view are positively inconsistent with, or cannot sensibly be reconciled with, the case advanced by Ely Michel Ruimy and which are contrary to the inherent probabilities. Thus, there is no evidence of any agreement between FGG and Mr Khosrovani which meant that he somehow "owned" the relationship with PIFSS, or that this ownership was then carried forward to the Aerium funds. FGG was operating hedge funds, not leveraged real estate funds. It is difficult to conceive that any agreement between FGG and Mr Khosrovani would somehow have entitled him to commissions on real estate funds which were not being run by FGG, but rather by a different organisation, the LDV group which was behind the formation of Aerium. No such agreement has been produced.

1832. In any event, as Ms Dilnot submitted, the "ownership" argument falls down in the light of the evidence. Thus, there was no introducer agreement with a Khosrovani company in relation to the second Aerium fund AP2, where there was no introducer agreement at all. If Mr Khosrovani owned the relationship, then one would have expected an introducer agreement there. Furthermore, the introducer agreements for RMF, Tensyr and Turquoise were with AFL, a company with which Mr Khosrovani had no connection. All of those funds were hedge funds, and Tensyr was an FGG fund. Accordingly, if there was any agreement which entitled Mr Khosrovani to commissions because he owned the relationship, one would expect to see it operating in relation to Tensyr.

1833. There is then the position of Mr Amouzegar. The submissions on behalf of Ely Michel Ruimy sought to distance the Aerium funds from any involvement of Mr Amouzegar, in particular when AP1 was being launched. This was because there was very considerable evidence as to Mr Amouzegar's involvement in corruption: not only in the post-2006 period of the Aerium funds, but also in other schemes already addressed (the Pictet Scheme, the VP Scheme and the EFG Scheme with the payments to Ozak). It was only by creating that distance that Ely Michel Ruimy could submit that there was no corruption at the start of the Aerium venture, and that they were dealing with a 'clean' individual in the form of Mr Khosrovani who only became corrupted at a later stage. This also fed into various legal arguments of Ms McKechnie as to Kuwaiti law; in particular that there would be no bribery offence committed by a person who assisted ongoing bribery with which he had not been involved at the start.

1834. However, it is clear that Mr Amouzegar was involved in AP1. As described above, there were a number of introductions by Pictet which were identified in Appendix C to the (unavailable) Quadra finder's fee agreement, as well as in the spreadsheet prepared by Ms Catoire in September 2004 and in her covering e-mail. Indeed, PIFSS itself is referred to in Appendix C in the context of Pictet. I do not consider that Mr Amouzegar's alleged absence from involvement in AP1 is consistent with these references to Pictet. Indeed, I did not detect in the written evidence of Ely Michel Ruimy, or Franck Ruimy, any clear statement that Mr Amouzegar had only arrived on the scene some time after AP1 was launched.

1835. Nor is Mr Amouzegar's belated arrival on the scene consistent with the inherent probabilities. As Mr Penny accepted, there was evidence of a relationship between Mr Amouzegar and FGG in relation to FGG's Sentry funds. The documents relating to VP Bank include reference to concerns of Mr Amouzegar about possible claims for commissions that he had received in relation to investment (via FGG) in Madoff funds. It is therefore likely that Mr Amouzegar had an existing connection with Mr Piedrahita.

1836. I also regard as baseless the suggestion that Mr Khosrovani was a 'clean' individual when AP1 started, but that he somehow may have been corrupted along the way by Mr Amouzegar. As Ms Dilnot submitted, if Mr Khosrovani was not complicit in corruption at the start, and Quadra was simply his vehicle and he owned the relationship with PIFSS, there is no sensible explanation as to why he then decided to share his (allegedly) legitimate commissions with Mr Amouzegar, in companies (Wentworth and Moccak) which they appear to have owned together. The evidence that they were both involved in Wentworth and Moccak makes it likely that they were both involved with Quadra as well. Indeed, the introducer agreement with Wentworth on Bainbridge I was signed in 2004 which was before, on Ely Michel Ruimy's case, Mr Amouzegar arrived on the scene. (I discuss the evidence as to the ownership and operation of the QWM companies further below).

1837. There is also no sensible explanation as to why Mr Khosrovani, as a 'clean' introducer, should, at any stage, share any of his commissions with Mr Al Rajaan. Furthermore, there is nothing in the evidence which would explain why it was that Mr Khosrovani became corrupt some way through the dealings involving the Aerium funds.

1838. There was also no force in Mr Penny's point that I should conclude, on the evidence, that corrupt payments only started in 2006 with Bordertown. Indeed I understood Mr Penny to recognise the difficulty with that argument in his oral closing. PIFSS were able to show that commissions were paid by Aerium to Wentworth in 2005, and that 60% of those sums were then paid to Mr Nasrallah's personal 190882 account with Pictet Bahamas in February 2006. That was, on Mr Nasrallah's evidence, a nominee account for Mr Al Rajaan. The commissions were relatively small in total (€ 266,010), and it is likely that they were being accumulated before a 60% share was passed on to account 190882, and then onwards on to Mr Al Rajaan's entities. This shows that there must have been a corrupt agreement in 2005; otherwise, why was Wentworth's money being accumulated, and then passed to account 190882?

1839. More generally, however, there is an absence of banking records of Quadra, which banked in Liechtenstein, and of Wentworth as well. The payment flow can therefore only be identified once monies hit accounts, such as 190882 and later Bordertown, where there has been disclosure of Swiss banking material, here from Pictet. No positive conclusion can be drawn that no monies were paid, for the benefit of Mr Al Rajaan, prior to that time. Indeed, the likelihood is that monies were paid, and it is the unavailability of all of the relevant banking records (e.g. Quadra's account in Liechtenstein) which prevents that from being definitively shown.

1840. A separate point, relevant by way of overview, is the position of Mr Al Bader. In closing submissions, Mr Penny referred to the fact that Mr Al Bader occupied a senior position as head of PIFSS' Real Estate Department, and that the documentary evidence showed that he carried out his work with professionalism. That work involved looking at each of the proposed investments in Aerium and Aeriance funds. These points were fairly made. However, there is no evidence of Mr Al Bader ever receiving any communication, or having any interaction, with either Mr Khosrovani or Mr Amouzegar in relation to the Aerium funds. I have already concluded that, contrary to Ely Michel Ruimy's belated assertion in cross-examination, there is no basis for saying that Mr Al Bader knew that Mr Khosrovani was the introducer of the funds. If Mr Khosrovani and Mr Amouzegar were genuine introducers, then it does seem somewhat surprising that PIFSS' Real Estate Department head appears to have had no contact with them at all, despite numerous investments amounting to well over USD 1 billion being made by PIFSS. That absence of contact is consistent with the evidence of Mr Al Rajaan's modus operandi more generally: his introducers operated in the shadows, and were unknown to others at PIFSS.

The documentary evidence

1841. As far as concerns the contemporaneous documents: there is, in my view, a complete absence of any documentation to support the suggestion that Mr Khosrovani, Mr Amouzegar, or any of the companies with which they were involved, did any introductory work at all in relation to Aerium and PIFSS. Whilst it is true that introducer contracts were concluded, and that Ms Anna-Maria Rauf administered the payments under those contracts, there is no evidence of any actual introductory work being performed by any of these individuals or companies.

1842. Had any of these individuals or companies actually been involved in the introduction, one would expect to see such introduction reflected in documents sent to PIFSS or held on its investment files. There are, however, no documents evidencing communications between Mr Amouzegar, Mr Khosrovani, or their companies, and Mr Al Rajaan, or anyone else at PIFSS.

1843. Nor is there any correspondence to or from these individuals and Aerium which evidences any introductory work. The case advanced as to the "gateway" function of Mr Khosrovani and Mr Amouzegar, in identifying appropriate investment opportunities for Mr Al Rajaan, before leaving the details to be explained by Ely Michel Ruimy, is unsupported by any documentary evidence,

or indeed oral evidence. For example, I was not shown any documents whereby prospectuses or other materials relevant to that gateway function were sent to Mr Khosrovani and Mr Amouzegar.

1844. Franck Ruimy gave, in his second witness statement, some general evidence as to the work and role of introducers. This included evidence that:

> "the problem is that in this world, the relationship with the investor belongs to the placement agent. You are not allowed to talk to the investor on new ventures without talking to the placement agent first, and before that investment is validated by the placement agent."

1845. There is, however, no documentation which evidences any communication between anyone at Aerium, and the alleged introducers (or their companies), prior to any of the new Aerium ventures which were launched and marketed to PIFSS. On the contrary, and as discussed below, the documents record and reflect only direct discussions between one or both Ruimy brothers and Mr Al Rajaan, and to some extent Mr Al Bader. There is no evidence, written or indeed oral, of the alleged introducers ever attending a meeting where either brother was presenting or explaining the funds to Mr Al Rajaan, or indeed to Mr Al Bader or anyone else at PIFSS.

1846. There are also curiosities about the introducer contracts, giving rise to question marks as to whether they were ordinary commercial arrangements. It is common ground that there was a contract with Quadra relating to the first investment (AP1), albeit that the signed contract was not available at the trial. Appendix C to that contract is available, but this indicates that it was a contract with Aerium Holdings SA (the holding company) whereas one would expect the contract to have been concluded with the venture manager, Aerium LLP. Other contracts appear to have been concluded only after commitments by PIFSS to make investments had been made. There is also no explanation as to why, if the relationship "belonged" to Quadra, there are later contracts with other entities.

1847. A key aspect of the case advanced by Ely Michel Ruimy, in his witness evidence, was reliance on the involvement of Mr David Smith as a key person in the introductory process and the relationship with PIFSS. In their pleading, PIFSS summarised that case (which the Aerium Defendants admitted in their response) as follows:

> "Mr David Smith was, on Mr Ruimy's case, one of the key individuals responsible for Aerium's relationship with PIFSS, and he was responsible for commission arrangements between Aerium and the entities associated with Mr Khosrovani and Mr Amouzegar."

1848. There are, however, no documents reflecting Mr Smith's alleged central role in these matters. In particular, there are no documents evidencing communications between Mr Smith and: (i) Mr Khosrovani; (ii) Mr Amouzegar; (iii) Mr Al Rajaan; or (iv) anyone at PIFSS, in relation to the Aerium investments; or indeed (v) anyone at FGG. As described below, when Mr David Smith came to

give evidence, the case that he was a key person in any aspect of Aerium's dealings with PIFSS, or with Mr Khosrovani or Mr Amouzegar, collapsed. I summarise that evidence below.

1849. By contrast, there are various communications passing directly between, or referring to meetings between, Aerium and PIFSS.

1850. In relation to PIFSS' first investment in Aerium Properties I, Ely Michel Ruimy wrote directly to Mr Al Rajaan on 8 August 2003 to "advise [him] of an opportunity to invest" in the fund. This was followed by Mr Ruimy sending Mr Al Rajaan subscription forms on 28 August 2003, and Mr Al Rajaan informing Mr Ruimy of PIFSS' decision to invest €25 million on 10 September 2003. There is no reference in these communications, which did not come from Mr Smith, to any introduction having been made by Mr Khosrovani, Mr Amouzegar or any of their companies. Indeed, there was no reference to Mr Smith, or to Fairfield Greenwich or to Mr Piedrahita of FGG. (I also note in passing that PIFSS' investment committee does not appear to have approved this investment). One might have thought that if any of these individuals were involved in the introductory process, Ely Michel Ruimy would have referred to them, at least in passing, in the letter to Mr Al Rajaan soliciting the investment. On Ely Michel Ruimy's case, there was no reason to keep quiet about the fact that one or more of these people were introducers, under ordinary commercial arrangements.

1851. In the case of Bainbridge I, Mr Ruimy wrote to Mr Al Rajaan on 19 October 2004 referring to "our recent discussions and exchanges" about the proposed new investment. There was no reference to the involvement of any of the alleged intermediaries. PIFSS' decision to invest was confirmed by Mr Al Rajaan to Ely Michel Ruimy by fax on 3 November 2004. (Again, the PIFSS investment committee does not appear to have approved this investment).

1852. In the case of Glenn Arrow I, Mr t'Serstevens wrote to Mr Al Bader on 19 November 2008 about the proposed new investment: "Further to the discussions held between Mr. Ruimy and Mr. Al-Rajaan". Franck Ruimy followed up on 20 November 2008, enclosing "the documents relating to the launch of our new Aerium-sponsored fund". PIFSS confirmed its decision to invest to Franck Ruimy on 2 December 2008. Again, there was no evidence of any involvement by the alleged intermediaries.

1853. All of this suggests that the dealings between PIFSS and the Ruimy brothers were direct, and that this was the position throughout, with nothing being done by the alleged intermediaries.

1854. A related, but unexplained, aspect of this story, on which I have already touched, is: why are there three different intermediary (QWM) companies? If the initial introduction of PIFSS to Aerium was through Quadra (allegedly Mr Khosrovani's company), then it is difficult to understand the basis for introducer fees later being paid to two different companies: i.e. Wentworth and Moccak, which are companies part-owned or at least operated by Mr Amouzegar. Indeed, if Mr Khosrovani was the original introducer, and owned the relevant

relationship, then there would appear to be no role for Mr Amouzegar (qua introducer) at all.

1855. All of these matters, unless satisfactorily explained (which in my view they were not) tend to indicate - consistent with the way that other schemes operated – that the introducers were not real introducers, but were simply being inserted into the structure in order to channel funds to Mr Al Rajaan. This would in my view have been apparent to Ely Michel Ruimy, who was the person who (as evidenced by the documents above) was actually speaking to Mr Al Rajaan about the funds. PIFSS was the most significant investor in AP1, and remained the most significant investor (usually the sole investor) in the subsequent funds. Ely Michel Ruimy was the most important person behind the Aerium funds. He would have known whether or not Mr Khosrovani or Mr Amouzegar had any actual involvement in introducing PIFSS initially, or in relation to subsequent funds.

The QWM companies

1856. The QWM companies are not party to the present proceedings, and there has been no disclosure of their documents. Neither Mr Khosrovani nor Mr Amouzegar has been called to explain their ownership, operation or the distribution of their substantial income. There is therefore very limited evidence to support aspects of Ely Michel Ruimy's case that Quadra was Mr Khosrovani's company, and that Wentworth also was (at least initially) Mr Khosrovani's company as well. There is, however, some (in my view rather limited) evidence on these issues which can be derived from affidavits which were sworn in the context of certain Maltese proceedings, which did not concern PIFSS. Those Affidavits were sworn by Mr Khosrovani, Mr Amouzegar, Ms Rauf, and Mr Sutherland of Zetland Corporate Services. That evidence does not provide any material support for the case advanced by Ely Michel Ruimy as to the lack of Mr Amouzegar's involvement in Quadra or Wentworth.

1857. In their Affidavits, both Mr Amouzegar and Mr Khosrovani say that they are business partners. They both refer to Zetland Corporate Services Ltd having provided corporate, administrative and fiduciary services "to us" since 2001. That predates the start of the Aerium funds by some time. Ms Rauf says that she had worked for Mr Khosrovani for the past 36 years, and for Mr Amouzegar for the past 13 years. Her Affidavit was sworn in January 2017, and it therefore indicates that both men were working together since around January 2004; i.e. shortly after AP1 was launched. However, it is reasonable to think that Ms Rauf's "13 years" was not necessarily a precise figure, and that it may have been (for example) 13 years and a few months; i.e. that she would have started working for Mr Amouzegar at around the time that AP1 was launched.

1858. The Affidavits deal with the position of two companies where Zetland had been providing corporate services, Gold Coaster Holdings Ltd and Garibaldi Management Investment Corp. Both of these were "Zetland" companies involved in paying monies to Mr Al Rajaan, as discussed in earlier sections (the Pictet scheme and the EFG Scheme). There is documentary evidence to show that Wentworth and Moccak were also Zetland companies, and they were very clearly involved in the payment of such commissions. Since they were both

Zetland companies, there is in my view no basis for concluding that Wentworth was, at the outset, purely a Khosrovani company.

1859. The position is not so clear in relation to Quadra, where there is no evidence as to whether it was or was not a Zetland company. It is possible that this company was owned, at the outset, by Mr Khosrovani: there is insufficient evidence to reach a conclusion as to whether or not that was the case. However, the evidence does indicate that Quadra was operated as part of the Aerium arrangements in which both men were participating. Thus, Wentworth, which was a Zetland company owned and operated for the benefit of both men, was the introducer under the Finder's Fee agreement for Bainbridge I in 2004. Quadra was used in the next Aerium fund, ultimately called Aerium IV. Since both men were clearly working together by 2004, it can reasonably be concluded that Quadra was being operated for the benefit of both of them in connection with Aerium IV. There is no reason to think that, for some reason, that was not the position in 2003, when AP1 was launched and Quadra was party to the relevant Finder's Fee agreement.

1860. There are other reasons for reaching the conclusion that Quadra was always operated for the joint benefit of both men, and ultimately as a means of benefiting Mr Al Rajaan. There is clear evidence that both men were working together, over a considerable period of time, in order to assist the flow of monies to Mr Al Rajaan. This can be seen not only in the flow of monies through Wentworth and Moccak. It can also be seen in the note of the meeting with VP Bank in 2010. It is also significant that, as already discussed, Quadra's income on the first investment, AP1 discussed in connection with the VP Scheme, was documented as involving substantial investments by Pictet. Pictet was the bank for which Mr Amouzegar worked for many years, and was still working at the time of PIFSS' first investment. It is inherently probable that if investments attributed to Pictet were generating income for Quadra, Mr Amouzegar would be sharing in the proceeds of that income.

1861. Accordingly, I reject the case advanced, on behalf of Ely Michel Ruimy, that the use of Quadra on AP1 shows that only Mr Khosrovani was involved at that stage.

The witness evidence

1862. In considering the (alleged) key roles of Mr Khosrovani (and later Mr Amouzegar), it is instructive to see how the introductory process was explained in the first round of witness statements served by the Aerium Defendants in September 2024. At that time, the pleaded case concerned only the Mirabaud payments, albeit that a case concerning Quadra/Wentworth/Moccak was in the offing in the solicitor correspondence, as described above. The initial pleading concerning the QWM companies was served by PIFSS in October 2024, shortly after the first round of witness statements had been served.

1863. Three witness statements were served by the Aerium Defendants, from Mr David Smith, Ely Michel Ruimy and Franck Ruimy. Each of them describes the events concerning the origin of the Aerium funds, and the relationship with PIFSS. None of them suggest that there was any significant role for Mr

Khosrovani or Mr Amouzegar. In fact, none of the first round of statements refer to those individuals at all.

Mr Smith's evidence

1864. Mr David Smith was the key individual identified by Ely Michel Ruimy in his first and second statements as having responsibility for the introduction and for dealing with PIFSS. By the time that he came to give evidence, Mr Smith was 84. However, he was still mentally sharp and clearly alive to the nuances of the questions asked in cross-examination, albeit that he made the fair point that he was giving evidence about events many years ago and that there was much that he had forgotten.

1865. Mr Smith described himself as a former founding member of the Aerium Group. He said that he had introduced Ely Michel and Franck Ruimy to two potential strategic partners for a real estate venture, Andres Piedrahita (co-founder of the Fairfield Greenwich Group) and John Muse (co-founder of a hedge fund). The idea was that these would be partnered, either personally or through the Fairfield Greenwich Group, with the Aerium Group, in the sense that they would bring capital into the Aerium Group.

1866. Mr Smith said in his statement that he was exclusively in charge of commission arrangements for the Aerium Group, albeit that he was not involved in formalising commission arrangements. As described below, this was not the evidence that Mr Smith gave in cross examination, and there was no documentary evidence to suggest that he was in charge of, or even significantly involved in, the commission arrangements – at least as far as concerned Quadra, Wentworth and Moccak and the relationship with PIFSS. It is true that he was not involved in formalising the arrangements, in the sense that he signed none of the introducer contracts with Quadra, Wentworth and Moccak. That was because, as far as those companies were involved, he had no material involvement in any negotiation or setting of commissions.

1867. In paragraphs 16 and 17 of his first statement, Mr Smith said that it was Andres Piedrahita who "managed his relationship with PIFSS", and that it was his [David Smith's] role to manage the relationship with Andres Piedrahita. He said that Mr Piedrahita "retained responsibility for managing the relationship with PIFSS throughout the period that PIFSS invested with the Aerium Group". There is, however, nothing in the documents which suggests that Mr Piedrahita had this role. There are no documents sent to PIFSS, or indeed internally within Aerium's disclosure, which suggest that Mr Piedrahita had such a role. Indeed, BDO told HMRC that it was Ely Michel Ruimy who maintained the public relations between Aerium LLP and the investors into the various Aerium funds, and that he marketed the funds to investors on behalf of Aerium LLP. The rationale for the deduction of expenses for the Sardinia hotel was that Ely Michel Ruimy and his brother were meeting PIFSS, and specifically Mr Al Rajaan.

1868. In cross-examination, Franck Ruimy confirmed the correctness of what HMRC had been told about Ely Michel Ruimy's role. The description of Ely Michel Ruimy maintaining public relations with investors, and marketing the funds to

them, is applicable to his involvement with PIFSS. It was not Mr Piedrahita who was doing this. Nor (as will become apparent from the discussion below) was it David Smith, albeit that I note that the HMRC letter also describes Mr Smith as a fund raiser and negotiator for Aerium LLP, and as being responsible for public relations and having various meetings with investors.

1869. In paragraph 17 of his statement, Mr Smith stated that at an "early stage, around the time that the Aerium Group's first investment fund … was established, Andres Piedrahita introduced the Aerium Group to PIFSS". He described the introduction as being in the sense that he arranged "for us to make a presentation to PIFSS about the investment opportunities that we were offering". Mr Smith did not recall attending any personal meeting or having contact with specific individuals at PIFSS at that time. He repeated that it was Andres Piedrahita's responsibility, not his, to manage the relationship with PIFSS. Accordingly, there was here no reference to any introductory role played by Mr Khosrovani or Mr Amouzegar or their companies, nor that Mr Piedrahita's arrangement of the presentation was or had to be arranged via Mr Khosrovani.

1870. As far as concerned PIFSS, Mr Smith's written evidence was that he only had brief interactions with Mr Al Rajaan, meeting him on a handful of occasions. He said in cross-examination, however, that he had not had any personal dealings with Mr Al Rajaan, and that he had no formal meetings between principals from FGG and PIFSS.

1871. Mr Smith also said in his first statement that since he was in charge of commission arrangements, he was aware that these existed. He did not, however, refer in that context to Quadra, Wentworth or Moccak.

1872. In his second statement, Mr Smith described how Aerium relied on FGG (which was his relationship) to be introduced to various investors. This included PIFSS, who had been an investor and done business with FGG for "quite a while". It was, he said, through FGG that they obtained the majority of money ultimately invested in "Aerium-Fairfield products". He said that FGG had a network of introducers, and "they took care of ensuring fees would be paid to their introducers".

1873. In that second statement, he did address the position of Quadra, Wentworth and Moccak. Mr Smith said that he (i.e. Mr Smith) was paid substantial fees by Wentworth, and was probably a partner there with Mr Khosrovani. He subsequently said, however, that this evidence was mistaken, and served a corrective statement. He said that he knew Mr Amouzegar, but could not remember whom he had introduced. He also knew Hashem Khosrovani, but could not remember who he introduced. He said that he could not recall who was the introducer for the PIFSS investments. He said that the relationship was a "Fairfield Greenwich relationship". That statement, as to his inability to recall who introduced PIFSS, was made in November 2024. It plainly provided no support for the case as to the crucial introductory role having been played by Mr Khosrovani, or indeed Mr Amouzegar.

1874. Surprisingly, at the start of his evidence at trial, Mr Smith sought to correct that statement. He had now remembered, or at least believed, that the introducer was

Hashem Khosrovani. It seemed to me that this change in evidence was designed to help bolster Ely Michel Ruimy's case as to the involvement of Mr Khosrovani as the critical introducer. I cannot accept that this is what Mr Smith knew or believed. His first witness statement does not refer to Mr Khosrovani at all, and his second and third witness statements do not refer to him as being the introducer of PIFSS. In the light of his evidence as a whole, I do not accept that he ever believed that Mr Khosrovani had introduced PIFSS, or that he had a sudden recollection of this fact shortly before he gave evidence. The last-minute change in evidence is simply not credible.

1875. Mr Smith was cross-examined, and his evidence did not begin to support the case that he was one of the key individuals responsible for Aerium's relationship with PIFSS, or that he had responsibility for commission arrangements between Aerium and the entities associated with Mr Khosrovani and Mr Amouzegar.

1876. In cross-examination, he said that he did not communicate with PIFSS in relation to Aerium. He maintained that Andres Piedrahita managed the relationship with PIFSS. He accepted that it was unlikely that this was the case in circumstances where there are no documents showing any communication between Andres Piedrahita and PIFSS. It was pointed out to him that there were indeed no documents showing any communication between Mr Piedrahita and FGG in relation to either Aerium or PIFSS.

1877. He sought, however, to maintain that it was FGG that had introduced PIFSS to the Bainbridge venture. Indeed, he maintained in his evidence that it was FGG, in the form of Mr Piedrahita, that had introduced Aerium to PIFSS. He said that he did not know, back in 2003, that Mr Khosrovani had been involved: there was nothing at that time that made him understand that Mr Khosrovani had introduced PIFSS. He said that he only learned about his involvement, as a result of subsequent events, in particular Anna-Maria Rauf's involvement in commission payments.

1878. He agreed that, at the time of his second statement, he could not remember Mr Khosrovani as an introducer of PIFSS. He agreed that he also had not said that in his third statement served in August 2025. He confirmed that, as far as he was aware, FGG managed the Aerium/PIFSS relationship, and that this was not Mr Khosrovani.

1879. He had no recollection of a company called Quadra. He did not know who the principal behind Quadra was, and did not know that it was Mr Khosrovani. He did not know that Quadra was paid retrocessions on AP1. He knew that Mr Khosrovani was being paid money, but did not know the funds or introductions in respect of which monies were being paid. He did not recall Aerium paying commissions to Mr Amouzegar in relation to PIFSS' investments. He did not know Moccak at all, and did not know whether Mr Amouzegar was involved with Wentworth.

1880. When asked about the first commission agreement with Wentworth signed by Ely Michel Ruimy in 2004, he said that it did not surprise him that Mr Ruimy was signing such agreements. He thought that it was natural that Ely Michel Ruimy would be the person agreeing the commission arrangements, because he

"was LDV". Mr Smith was not the person agreeing the arrangements, and would not have been telling Ely Michel Ruimy to sign. He said that he was not involved in the commission arrangements for any of the three companies, Quadra, Wentworth and Moccak.

1881. The upshot of this evidence from Mr Smith is in summary as follows. He was very far from a central figure in the relationship between Aerium and PIFSS. He had no formal dealings with Mr Al Rajaan. He gave no credible evidence as to Mr Khosrovani's involvement in the introduction. He ascribed no role to Mr Amouzegar in that connection. He had no responsibility for agreeing the commission arrangements with Quadra, Wentworth and Moccak, and he would have thought that it was natural for Ely Michel Ruimy to have done that. In so far as his evidence identified anyone who was involved in introducing PIFSS to Aerium, he identified Mr Piedrahita. But his evidence that Mr Piedrahita was the person managing the relationship with PIFSS is unsupported by any documentation showing that this was the case.

1882. Accordingly, Mr Smith's evidence provides no support for the case that Mr Khosrovani or Mr Amouzegar played any role, let alone a significant role, in the introduction of PIFSS to the Aerium funds. His evidence provides no support for the key features of Mr Penny's submissions in closing, as summarised above, as to the critical involvement of Mr Khosrovani at the outset. Indeed, Mr Smith's ignorance as to their involvement, and ignorance of their 3 companies, is positive evidence that they had no such role. His evidence, that he only became aware of the involvement of Mr Khosrovani as a result of payments being made and the involvement of Anna-Maria Rauf, also supports the case that he and his companies were inserted for the purpose of channelling monies to Mr Al Rajaan.

Ely Michel Ruimy's evidence

1883. In his first witness statement, Ely Michel Ruimy refers to neither Mr Khosrovani nor Mr Amouzegar. He refers to Mr Piedrahita only in passing, and not as the person who introduced him/Aerium to PIFSS. He said that he first heard about PIFSS from David Smith. But he did not have any personal contact with anyone within PIFSS at that time, because the investor relationship was being controlled and managed by David Smith and FGG. They, rather than Mr Ruimy, were taking care of fundraising.

1884. I do not accept this evidence. David Smith, on the documents and as reflected in the above evidence, had nothing to do with the relationship with PIFSS. It was Ely Michel Ruimy who wrote to Mr Al Rajaan in August 2003, inviting PIFSS to invest in the first fund. HMRC was told that Ely Michel Ruimy was the person who marketed the funds to investors. That is clearly a fund-raising role. Furthermore, in the letter to BNP Paribas dated 7 January 2010, Ely Michel Ruimy refers to Mr Al Rajaan as his "interlocutor, for nearly 10 years". This would place Ely Michel Ruimy's relationship with Mr Al Rajaan some time before the launch of the first Aerium fund. Ely Michel Ruimy's first statement represents, falsely in my view, an attempt to distance himself from involvement in fund-raising, PIFSS, and the arrangements with intermediaries. The reason that he was distancing himself was because he did not want to acknowledge his

knowledge of or involvement with the QWM companies, in an attempt to show that he was not complicit in their corrupt payments to Mr Al Rajaan.

1885. In his second statement, Ely Michel Ruimy sought, in different ways, again to distance himself from knowledge of the introduction of PIFSS to Aerium, and from the payments made to Quadra, Wentworth and Moccak. In that statement, he does not ascribe a significant role in the introduction to Mr Piedrahita. Ely Michel Ruimy emphasised that his own role at the start was (only) to identify investment opportunities and to facilitate debt financing. It was Fairfield Greenwich and David Smith who were responsible for bringing in investors. He said that PIFSS' investment in AP1 was because of PIFSS' relationship with Fairfield Greenwich. Mr Ruimy's name on the marketing document (a "Muse Piedrahitas Ruimy Fund") was to lend local credibility to a fund investing in French real estate. He described Aerium as Fairfield Greenwich's real estate arm.

1886. For reasons already discussed, I do not accept this evidence.

1887. Ely Michel Ruimy said that he did not know about FGG's payments of finder's fees in relation to PIFSS' investments, but they did use multiple introducers. He referred to Quadra as being one of the multiple introducers that FGG used. He said that he believed that the agreement with Quadra was entered into by David Smith or FGG. In my view, however, the suggestion that the Quadra agreement was entered into by these parties was contradicted by Mr Smith's evidence, and there is no documentary evidence of either Mr Smith or FGG concluding any of the introductory agreements with which I am concerned, save for the agreement on Aerium IV in which FGG was involved.

1888. Ely Michel Ruimy also said that he did not know which investors Quadra introduced, but that he inferred that they included PIFSS. The factual position, however, is that Quadra was the contracting party for AP1, where it was Ely Michel Ruimy who had written directly to Mr Al Rajaan. Ely Michel Ruimy was also responsible for authorising the substantial payments to Quadra on AP1. There was, therefore, no basis for Ely Michel Ruimy to "infer" that Quadra had introduced PIFSS.

1889. Ely Michel Ruimy said that he did not instruct Franck Ruimy to sign the various agreements with Wentworth and Moccak. He said that he (Ely Michel) was not involved in the negotiations or arrangements for the payment of a fee to introduction agents by entities within the Aerium-Fairfield Group: that was the prerogative of David Smith and FGG. The factual position, however, is that there was no "Aerium-Fairfield Group". Furthermore, Mr David Smith's evidence was clear and credible, in so far as he said that he would have expected Ely Michel to be involved in the agreements with introducers, as evidenced by his signature of the first Wentworth contract.

1890. Ely Michel Ruimy said that FGG and David Smith were responsible for negotiating and agreeing the fee payable to any agent that they used to make an introduction. In the light of the evidence to which I have referred, that evidence is not credible. Furthermore, if FGG had been responsible for negotiating and agreeing fees, one would expect the contractual relationship to be a

straightforward chain: a contract between Aerium and FGG, and a contract between FGG and whatever agent they had engaged.

1891. Ely Michel Ruimy said that he only rarely turned his mind to the fact of payments to Quadra, Wentworth and Moccak. He had only a very limited recollection of Fairfield Greenwich/Aerium's use of introducers and interactions with them. His statement referred to Mr Amouzegar, but without any suggestion that he was involved in introducing PIFSS to Aerium. He did not recall Quadra, and did not know who the beneficial owner of Quadra was: since that was a matter for Fairfield Greenwich and David Smith, and not Ely Michel Ruimy. He recalled Wentworth, but had always thought that this was a company owned by David Smith. He did not recall the name Moccak, and did not know who owned that company. More generally, Ely Michel Ruimy said that he was not following the use of introducers. He believed that the relationships with Quadra, Wentworth and Moccak were the continuation of arrangements that Fairfield Greenwich and David Smith had with those entities and those associated with them (namely Mr Khosrovani, Mr Amouzegar and Anna-Maria Rauf).

1892. I consider that there is no substance in Ely Michel Ruimy's attempt, in effect, to shield behind David Smith and FGG. I have already described Mr Smith's evidence, and his lack of involvement with PIFSS, Mr Amouzegar, Mr Khosrovani and their companies, and more generally his lack of involvement in agreeing commission arrangements. By contrast, the signed introducer agreements, in so far as they were available at trial, were the responsibility of the Ruimy brothers, principally Franck. The communications from Anna-Maria Rauf, in relation to payments, were principally with Franck Ruimy, but it is also clear that Ely Michel was involved in those matters. Her communications were not sent or copied, either regularly or at all, to Mr Smith, let alone to Mr Piedrahita. Furthermore, and leaving aside Aerium IV, the structure of the Aerium funds resulted in the economic benefits of the fees flowing to various companies associated with LDV and the Ruimy brothers, and to some extent thence to Mr Amouzegar, Mr Khosrovani and Mr Al Rajaan. There is no evidence to show that Mr Piedrahita or Mr Smith stood to benefit from those income flows. Mr Smith did eventually receive a payment of USD 5 million when he left the venture, and Mr Piedrahita's wife will likely have received some benefit from AP1 as a result of her investment. However, there is nothing to show that, otherwise, they – or indeed Mr Muse – were substantially rewarded.

1893. Furthermore, there is nothing in this evidence which goes beyond an assertion, unsupported by any contemporaneous reliable material, that FGG or Mr Piedrahita made the introduction of PIFSS to Aerium. Even if that assertion were correct, it would not explain, let alone justify, the contracts later concluded with Quadra, Wentworth and Moccak. I have already explained that Mr Piedrahita already knew PIFSS and Mr Al Rajaan in relation to non-property FGG related funds, and that he had no need of any introduction to Mr Al Rajaan or PIFSS by Mr Khosrovani or Mr Amouzegar or any of their companies.

1894. Thus, in my view, all of the key elements in the evidence of Ely Michel Ruimy as to the introducers and the commission agreements are false, and do not accord

with the contemporaneous documents, the inherent probabilities or the other evidence in the case. In particular:

(1) David Smith was not responsible for the introducer agreements, or deciding how much commission would be paid. That is a role which would naturally be filled by Ely Michel Ruimy, working in conjunction with his brother. That is evidenced by their signature of agreements, and their dealings with Anna-Maria Rauf.

(2) Ely Michel Ruimy's attempt to distance himself from the relationship with PIFSS, or the commission arrangements with the three companies, is not consistent with the contemporaneous documents (including the statement to HMRC) or the inherent probabilities. These were Aerium funds, PIFSS was the most important investor, and Ely Michel Ruimy was the most senior person in the Aerium group. He would naturally have been dealing with Aerium's most important client.

(3) There is no evidence that some unidentified person at FGG (leaving aside Mr Smith, who did not work there) had responsibility for these matters; or was telling the Ruimy brothers what to agree by way of introducer agreements; or that FGG had a relevant contract with Mr Khosrovani or Mr Amouzegar which entitled them to commissions on PIFSS' investments in Aerium, or that FGG had some ongoing contract with Mr Khosrovani or Mr Amouzegar.

1895. In cross-examination, Ely Michel Ruimy ascribed a greater role to Andres Piedrahita, as an introducer, than in his written evidence. He said that he thought that Mr Piedrahita had made the introduction of Aerium to PIFSS. He also said that Mr Piedrahita did know Mr Al Rajaan. (When I suggested to Franck Ruimy that Mr Piedrahita therefore did not need Mr Khosrovani to introduce him to PIFSS, he sought to suggest that Mr Piedrahita did not know Mr Al Rajaan). When pressed to state exactly who had introduced PIFSS to Aerium, whether it was Fairfield or Mr Khosrovani, Ely Michel Ruimy said that his guess was that "Fairfield introduced us to PIFSS through Hashem Khosrovani". He said that was his guess, but he did not actually know what Mr Khosrovani had done to introduce Aerium to PIFSS, or to make the introduction a reality. He said that Mr Amouzegar was not there, at the beginning; and that, to his knowledge, Mr Amouzegar had not introduced Aerium to PIFSS.

1896. Ely Michel Ruimy is, for reasons already given, not a reliable witness. He has not, in my view, given a clear or consistent account of how the introduction came about. His evidence provides no reliable support for the case advanced by Mr Penny in closing, or more generally for a case that there were genuine introductions.

Franck Ruimy's evidence

1897. Franck Ruimy's first statement contained a section headed: "Interactions with PIFSS and Mr Al Rajaan". This described PIFSS as one of the investors introduced by FGG. He did not remember meeting Mr Al Rajaan more than twice "because PIFSS was an introduction from Fairfield Greenwich Group and

I was told that PIFSS was an investor in their funds." There was no reference to any introduction by, or involvement of, Mr Khosrovani or Mr Amouzegar.

1898. In his second statement, Franck Ruimy said he came on board and joined Aerium after introductions were made and the arrangements originally set up by Fairfield Greenwich and David Smith. I do not think that this evidence is reliable: Franck Ruimy was identified in the PPM for AP1, and was described as a founder of Aerium. It is therefore probable that he was involved at the time when PIFSS invested in AP1, and would have known how Aerium's most substantial investor had come on the scene.

1899. That said, if it were correct that he only came on board after introductions had been made and arrangements made, it is difficult to see how he could be in a position to provide reliable evidence as to how the introduction had come about. Indeed, in cross-examination, Franck Ruimy said that he did not know whether Mr Khosrovani or Mr Amouzegar introduced PIFSS to any of the Aerium investments. He made an assumption that Mr Amouzegar was involved, but this was only an assumption.

1900. In explaining how he came to sign various introducer contracts with Quadra, Wentworth and Moccak, Franck Ruimy said in his second witness statement that he was following instructions from David Smith and Harold Greisman of FGG. I reject that evidence. Mr Smith's evidence was that he would not have been telling Ely Michel Ruimy to sign such contracts, and I see no reason why he would have been telling Franck Ruimy to sign them either. There is nothing to suggest any involvement of Harold Greisman in the negotiation of these contracts, still less an instruction to Franck Ruimy to sign introducer agreements. Mr Greisman's first appearance in the PPMs was in relation to Aerium IV.

1901. Franck Ruimy said that Quadra, Wentworth and Moccak had introduced PIFSS, albeit that Andres Piedrahita was in charge of those relationships. He also said:

> "My impression is that Quadra, Wentworth and Moccak were not typical one-man-band placement agents. They were smart people with a real team reviewing investments. They were not the old school placement agent, but were sophisticated, had a proper system in place and gave good feedback. They had a long-term relationship with Fairfield Greenwich."

1902. I do not consider that there is any evidence that these companies were anything other than two-man-band companies of Mr Khosrovani and Mr Amouzegar. Their principal work was to channel monies to Mr Al Rajaan. The amounts involved were so substantial that someone (Ms Rauf) was needed to assist with administration. This was also because the fee structures in the underlying funds were not straightforward, so that someone was needed to monitor whether the QWM companies were being paid in accordance with the written agreements. There is no evidence of a real team reviewing investments, and there is not a single document which shows any Aerium investment being analysed or recommended by any of the QWM companies or their principals. Nor is there

any evidence of a long-term relationship between these companies and Fairfield Greenwich.

1903. There is also no explanation as to how 3 separate companies could have introduced PIFSS. In his evidence, Franck Ruimy could not explain why, in December 2008, he was negotiating agreements with two separate introducers (Wentworth and Moccak) in relation to the introduction of the same investor, PIFSS.

1904. In his 3rd statement, he said that as far as he was concerned, the introduction was via David Smith and Andres Piedrahita from FGG. They had a long-term relationship with Mr Amouzegar and Mr Khosrovani. He believed that the negotiations between these individuals took place a long time before he joined the Aerium group in the summer of 2004. Accordingly, Franck Ruimy sought to distance himself from any direct knowledge of how the introduction of PIFSS had come about. His evidence as to discussions involving Mr Amouzegar is not consistent with the case, now advanced, as to his only becoming involved, and corrupting Mr Khosrovani, much later in the process.

1905. In cross-examination, he was asked about the various introducer contracts that he signed with Wentworth and Moccak. The substance of his evidence was that he did not know who was behind those companies, and he did not care. It was not his role to know that. The introductions had occurred before he joined, and all the agreements had been negotiated by Andres Piedrahita, David Smith and others. The contracts were prepared by reputable lawyers in Luxembourg, and he just signed them. When asked about the first contract which he signed with Moccak, in relation to the Glenn Arrow I fund in 2008, he said that he did not know who was behind it; that he signed numerous documents each week in Luxembourg; and that he did not know why they were paying a new introducer when previously there had been Quadra and Wentworth.

1906. I did not find any of this evidence credible or reliable. In particular, if Franck Ruimy was signing introducer contracts, he would want and expect to know who were the individuals involved in making those introductions.

How was Ely Michel Ruimy introduced to PIFSS?

1907. Accordingly, I do not consider that there is any reliable evidence to support the submissions of Mr Penny that the introduction of Aerium to PIFSS was the work of Mr Khosrovani, pursuant to his relationship with Mr Piedrahita.

1908. I consider that the shifting nature of the case advanced in the evidence adduced by Ely Michel Ruimy, when taken together with the documentary evidence and other matters to which I have referred, supports PIFSS' case that there was a direct relationship established at an early stage between Mr Al Rajaan and Ely Michel Ruimy as to prospective investment by PIFSS in the property fund that Ely Michel Ruimy was contemplating. Quite when or how Ely Michel Ruimy came to know Mr Al Rajaan is uncertain. If Ely Michel Ruimy's letter to BNP Paribas in 2010 is to be believed, he had known Mr Al Rajaan for some years before AP1 was launched in 2003. Since very little that Ely Michel Ruimy says can be relied upon, that may have been an exaggeration. Whether or not that

was an exaggeration, I accept Ms Dilnot's submission that the likelihood is that there was a coming together of people who lived close to each other or knew each other through different connections, and the idea emerged of a property fund in which PIFSS would be the investor. Mr Al Rajaan was on board with that idea, and Ely Michel Ruimy knew that he would have to be paid. Mr Khosrovani and Mr Amouzegar were identified by Mr Al Rajaan as the people who would organise that, and that explains the involvement of both of them at an early stage. As shown by the Mirabaud payments, Mr Al Rajaan thought that Ely Michel Ruimy was a man who could be trusted not to blow any whistle.

1909. I have hitherto focused on how matters started, and I do not accept that there was any genuine introduction of Aerium to PIFSS as a result of introductory work by Mr Khosrovani or indeed Mr Amouzegar. Nor do I accept that they performed any genuine role as introducers as matters developed. Once AP1 was launched, there was an existing relationship between Ely Michel Ruimy and Mr Al Rajaan. That relationship, rather than any introduction by Mr Khosrovani, was the reason why Ely Michel Ruimy allowed Mr Al Rajaan personally to invest in AP1 via Galba Anstalt. As matters developed, it was that existing relationship, and the accompanying corruption, which resulted in further investments.

1910. Furthermore, had there been a genuine commercial relationship, involving real introductions, there is no logical reason why any company other than Quadra would have entered the scene. And a genuine commercial relationship would, on the expert evidence, have at least seen a decline in the value of the original introduction, and payments made to an introducer, as the direct relationship between the principals (here PIFSS and Aerium) developed. That is not what happened.

K7: Other evidence indicating complicity in corruption

1911. The matters discussed in earlier sections provide (in my view) cogent evidence of Ely Michel Ruimy's complicity in the corrupt payments that were made to Mr Al Rajaan. I will here refer to four other aspects of the evidence which in my view support and reinforce that conclusion.

The disappearance of QWM from the scene

1912. In 2014, Aerium stopped paying the QWM companies. It is no coincidence that this occurred relatively soon after Mr Al Rajaan had left his post at PIFSS. In my view, payment stopped because the Ruimy brothers decided that there was no longer any reason for making the payments since Mr Al Rajaan was no longer of any use to them.

1913. Mr Penny made the point that payments had continued between 2012 and 2014, despite Aerium knowing in 2012 of the Swiss investigation. I do not consider that this is a strong point. Ely Michel Ruimy might well have thought that the Swiss investigation would not lead to Aerium, which still had the potential to benefit from Mr Al Rajaan procuring investments from PIFSS. Furthermore, Aerium itself had not been paying into Swiss bank accounts, but rather to

accounts of the QWM companies elsewhere. The most significant aspects of that trail were only revealed as a result of disclosure in the present proceedings.

1914. Complicity in corruption is, in my view, the best explanation for why there was no effort made to pay outstanding debts to the QWM companies after July 2014, including when Ms Rauf chased payments for around a year thereafter. If there had been ordinary commercial arrangements, with ordinary debts owed to the QWM companies, one might have expected Aerium to make some effort to pay, or at least ask for extra time.

1915. Complicity also explains why there appears to have been no surprise, on the part of either of the brothers, when QWM and the individuals with whom they had been dealing (Ms Rauf, Mr Amouzegar and Mr Khosrovani) simply disappeared from the scene, leaving vast amounts of unpaid monies to which the companies were notionally entitled. Communications with Anna-Maria Rauf just stop in 2015, with no evidence of any enquiry to Ms Rauf from Aerium as to what was happening.

Villa 23

1916. In the RAPOC, paragraph 338BBB(k), PIFSS alleges that:

> "a villa called 'Villa 23' was purchased for the benefit of Mr Al Rajaan in Morocco: (a) with the assistance of funds the payment of which was approved by Franck Ruimy, and which derived from Asset Management Luxembourg, an entity within the Aerium Group, upon its receipt of fees that derived from the proceeds of sale due to PIFSS when it sold its interest in Aerium Properties 2 in 2009; (b) with the assistance of a deposit in respect of which Mr Ruimy directed that the €549,000 sum pleaded at paragraph 338YY(b) above be transferred from Spiranese; and/or (c) as a result of Mr Ruimy agreeing to hold his beneficial interest in Summer V23 Limited to the order of Ms Al Wazzan (as nominee for Mr Al Rajaan)."

1917. There is no financial claim, against either D1 or Ely Michel Ruimy, in respect of the purchase of this villa. However, the purchase is relevant to whether there was a corrupt relationship between Ely Michel Ruimy and Mr Al Rajaan, and more generally as to how well they knew each other.

1918. In their defence, D1/D2 admit the above pleaded paragraph, save for denying that Villa 23 was held by Ms Al Wazzan on Mr Al Rajaan's behalf. D1/D2's case was that Ms Al Wazzan understood, from her husband, that Villa 23 was to be owned by her beneficially. In my view, whether or not the villa was purchased for Ms Al Wazzan on her own behalf, or on behalf of her husband, is immaterial. Either way, a purchase for her or his benefit is only explicable as a bribe.

1919. Ely Michel Ruimy's defence was that: Mr Al Rajaan had expressed an interest in buying Villa 23, which was part of a development at the Four Seasons Hotel in Marrakech; he (Ely Michel Ruimy) secured it using fees derived from the sale of AP2; but the sale did not take place in 2008 and he ultimately acquired it for his own benefit in 2018.

1920. There are documents from the 2008/2009 period which show that the Ruimy brothers were making payments in respect of Villa 23, and that this was for the benefit of Mr Al Rajaan. Thus, on 16 March 2009, Mr Braimer Jones of Ensof e-mailed Franck Ruimy in relation to two expected payments. Ensof was owned by Ely Michel Ruimy and it ran his private office. The two payments concerned "Villa 23 – Al Rajaan", and were for 50% of the purchase price and notary fees and registration expenses in connection therewith. There was obvious sensitivity about these payments. Mr Lam Chok asked a colleague to prepare payment orders, but they were confidential and no-one (apart from two individuals) was to know.

1921. Franck Ruimy then signed payment orders for the two payments with the reference "Villa 23- Al Rajaan". The sums involved were, converted from Moroccan dirhams, € 1,043,098 and € 32,863. The payments were made by Asset Management Luxembourg ("AML") which had received commissions on the sale of PIFSS' interest in AP2.

1922. The intention to benefit Mr Al Rajaan (or at least his wife) is also evidenced by a draft letter to Ms Al Wazzan which was prepared in May 2009. The letter, which was addressed to Ms Al Wazzan, said that "subject to completion, I henceforth hold my interests in the above to your order". The letter was unsigned.

1923. In cross-examination, Ely Michel Ruimy did not dispute an intention to benefit Ms Al Wazzan. He said, however, this was on the basis that she would reimburse the reservation payment that he had made. There is, however, nothing in the documents which suggests that this was the agreement with either Mr Al Rajaan or his wife. There was no request for reimbursement at or shortly after the time that the payments were made. There is no good explanation as to why, if they wanted a villa, Mr Al Rajaan or his wife could not have paid for the 50% deposit and the associated fees themselves. In my view, this was not a commercial arrangement whereby Ely Michel Ruimy was paying large sums in the expectation that they would be reimbursed. The payments for Villa 23 were benefits being conferred on Mr Al Rajaan, at the same time as the Mirabaud payments were being made as further benefits, in return for PIFSS' continued business. The payments made in respect of Villa 23, with a view to the property being held for Mr Al Rajaan's wife, were very obviously bribes.

1924. I do not consider that they lose this character because, as submitted in the Aerium Defendants' closing submissions, the benefits could not have been a quid pro quo for the original AP2 investment, which had been made some years earlier. The payments could be made, and in my view were indeed made, in order to maintain the relationship, with the likelihood that Mr Al Rajaan required them as a result of the successful outcome of the AP2 fund.

1925. In the event, there was no transfer of the property to Ms Al Wazzan. It is not entirely clear that a transfer of title was in fact intended to happen at some point. Given Mr Al Rajaan's use of nominees to hold assets for him, it may be that the plan was that the villa would remain apparently owned by Ely Michel Ruimy's company (Summer V23 Ltd and its subsidiary) referred to in his draft letter recording that the villa was held for the benefit of Ms Al Wazzan. There was ultimately no conveyance to Ms Al Wazzan, and it does not appear that she and her husband ever enjoyed the use of the villa. Construction delays and other problems meant that the balance of the purchase price was not paid until 2018, at which point there was no longer a reason for a transfer of the villa or a reason for Ely Michel Ruimy to allow them to use it. Mr Al Rajaan was no longer in post, and was subject to criminal investigation, and indeed criminal proceedings in Kuwait. However, those subsequent events throw no light on the fact that money was paid for the benefit of Mr Al Rajaan (or his wife) in 2009, and with no intention that it should be repaid.

1926. The above events also indicate that the relationship with Mr Al Rajaan was not as distant as Ely Michel Ruimy claimed in his evidence. Ely Michel Ruimy knew Mr Al Rajaan's wife, and was sufficiently close to Mr Al Rajaan as to discuss and arrange to give him a desirable holiday property.

Performance fee on sale of Portman Square property

1927. One of the properties in the Glenn Arrow I fund was a property in Portman Square, London. It was successfully sold at a substantial profit in 2011, and this gave rise to an entitlement on the part of the venture manager to a 30% performance fee. The venture manager was Golden Hawk Management SARL, an Aerium company. Under the introducer agreement, Moccak was entitled to a 40% share of that fee after various deductions and net of "all cost and expenses incurred or borne to the Venture Manager".

1928. In February 2011, Mr Lam Chok drew up calculations showing that Moccak was to be paid £ 1,250,586. This figure was calculated after making a deduction of "40% operating costs" from the performance fee. A deduction of operating costs was permissible under the introducer agreement if those costs had indeed been incurred. There is nothing in the documentation which indicates that 40% had not been correctly calculated – or estimated, if it was an estimate – by Mr Lam Chok. However, the calculation of the monies to be paid to Moccak included an "Additional contribution from Aerium" of £ 319,414. When added to the £ 1,250,586, this made for a total "Retro Moccak" of £ 1,570,000 on Mr Lam Chok's calculation.

1929. On 28 February 2011, Mr Lam Chok e-mailed Ms Rauf enclosing the calculation. He referred to the 40% fee payable, but then said that "following our discussions we are pleased to confirm that Aerium agreed to reduce its fees by £ 319,414 in order to pay you an amount of £ 1,570,000." The e-mail thus treats the additional sum as being a decision by Aerium to reduce its own entitlement to fees for the benefit of Moccak. The e-mail does not suggest that there had been any challenge to the 40% figure for operating costs.

1930. Mr Lam Chok's email also requested that Ms Rauf's invoice should be for "Advisory fee for Glenn Arrow funds". There was no justification for this description. There is nothing to suggest that anyone at Moccak had given advice in connection with the funds, or the sale that had taken place.

1931. Ms Rauf then drew up two invoices on 7 March 2011. One version was described as "Negotiation fee on the sale" and another as "Advisory fee". However, as Franck Ruimy acknowledged in his evidence, it was Aerium's people who had negotiated the sale. Moccak had not been involved. There was no justification for either description. The description was (as Franck Ruimy appeared to acknowledge in his evidence) just a way of getting money out to Moccak.

1932. The figure in both invoices was £ 1,777,000. This represented an increase of £ 207,000 over the figure which had been calculated by Mr Lam Chok. Franck Ruimy told Mr Lam Chok that the invoice needed to be paid, and he also e-mailed Ms Rauf to say that it would be paid.

1933. On 9 March 2011, Mr Lam Chok queried the increased amount of the invoice with Franck Ruimy. He had clearly not previously been told about the increase, or been given any rationale for the increase. Franck Ruimy's response was that he realised that there was an increase. His explanation was: "They have increased their fee again!!!". The reference to increasing "again" was to the original increase of £ 319,414.

1934. In cross-examination, Mr Franck Ruimy could not give a satisfactory explanation of these events, and why there had been the two increases. He sought to distance himself from involvement in the decision to increase the payment, indicating also that he could not recall what had happened and he did not know who had actually decided that the payments should be increased. He described the second increase as resulting from in hindsight "a terrible negotiation or admission from our side". He also began to suggest that it was related to the 40% operating cost. After being shown the introducer agreement in re-examination, his evidence firmed up as to why there had been increases. The 40% may have been an overestimate, and that was "the reason why we agreed to pay more". This was the point also made in the Aerium Defendants' written closing.

1935. I reject Franck Ruimy's evidence on this point. There is nothing to show that Mr Lam Chok had overestimated the operating costs at 40%, and nothing to suggest that Ms Rauf queried that figure. When Mr Lam Chok queried the second increase, Franck Ruimy did not explain the increase as referable to the 40% operating cost, or a negotiation on that issue with Ms Rauf. His explanation was that Moccak had simply increased their fee for the second time. The three exclamation marks indicate that he did not need to say any more as to the reasons why the additional money had to be paid.

1936. There was no commercial justification for either increase. The reason why Ms Rauf was demanding more money, increasing Moccak's fee twice, was that there had been a successful sale of the property, and Mr Al Rajaan wanted more. The obvious reason why it was decided that the two increases should be paid

was that the Ruimy brothers knew that Mr Al Rajaan was demanding more, and they had to meet his demand in order to maintain the relationship. The ultimate decision-maker in that regard would have been Ely Michel Ruimy.

1937. A point was taken by Mr Penny that it had not been sufficiently put to Franck Ruimy that he knew that payments were being made to Mr Al Rajaan. He accepted that, in the context of this Glenn Arrow payment, the point had squarely been put (as indeed it had been). He also accepted that it had been put in other contexts as well: in relation to the 2014 exchange with Mr de Crombrugghe referred to below, and in relation to the 2015 Wafra answers. On each of the three occasions, the point was squarely put, and was denied by Franck Ruimy. I do not accept Mr Penny's point that Ms Dilnot was required, in cross-examination, to put the same point when cross-examining about earlier events. The questions, which she did put, related generally to Franck Ruimy's knowledge of what was happening. They resulted in a denial that he ever knew that Mr Al Rajaan was receiving payments. Even if one were to regard those denials as relating to the period 2011 – 2015, they necessarily cover earlier periods as well: Franck Ruimy was denying that he ever knew this. The parties' cases were binary: PIFSS said he always knew, and Franck Ruimy said that he never knew. Neither side was arguing for a half-way house whereby he only knew/didn't know after a particular point in time. The cross-examination, which was subject to time restrictions, was thorough and fair.

February 2014 exchange with Brieuc de Crombrugghe

1938. Mr Brieuc de Crombrugghe was an employee of Aerium in Switzerland. In February 2014, he queried the calculation of his bonus. Franck Ruimy explained the deductions that went into the calculation, saying that: "for all the funds in which Kuwait has invested, we have business introducers who take between 30% and 50% of our fees, gross. It's huge but we have no choice".

1939. Franck Ruimy's description of the fees being paid to introducers as "huge" was accurate, and reflected his perception. Those huge fees persisted throughout. The investment expert evidence indicates, however, that this is not what would be expected in an ordinary commercial relationship, where the role of and fees payable to the original introducer would likely diminish over time as the direct relationship between investor and fund manager developed.

1940. Furthermore, there needs to be a sensible rationale for the huge fees which were being paid to introducers, and this needs to be considered in the light of the absence of evidence (see Section K6 above) of any introductory work being carried out, and with a direct relationship existing between Ely Michel Ruimy and Mr Al Rajaan from the start. As Ms Dilnot submitted, Ely Michel Ruimy would not have been giving away a very high proportion of his fee take without having a very good reason to do so. The obvious reason, in my view, is that, as Ely Michel Ruimy knew, Mr Al Rajaan needed to be paid.

1941. That point links to Franck Ruimy's statement in his e-mail that they had "no choice" but to pay huge fees, which also reflected his perception. The obvious reason why there was no choice is that Mr Al Rajaan needed to be paid if Aerium was to get and retain PIFSS' business.

K8: Liability of Ely Michel Ruimy under Kuwaiti law

1942. Ms McKechnie, in writing and orally, addressed in some detail issues of Kuwaiti law, and its application to the claims made against the Aerium Defendants. The written submissions of the Aerium Defendants seemed to indicate, rather surprisingly, that there would be no criminal or tortious wrong committed by the Aerium Defendants under Kuwaiti law, even if I were to reach the conclusion that Ely Michel Ruimy was complicit in paying bribes to Mr Al Rajaan. This seemed to me to be an entirely unrealistic submission, in the light of Kuwaiti law as described in Section B above.

1943. At the start of her closing oral argument, however, Ms McKechnie acknowledged that Ely Michel Ruimy's complicity in paying bribes would give rise to a possible, if narrow, route to tortious liability. That route would be, and would only be, a claim based on Article 12 KPPL – provided that the court were to conclude that Article 12 was not confined to construction projects, and subject to the overarching requirement that a criminal conviction was required in order to establish tortious liability where the fault element is based upon contravention of a criminal statute. Since I have concluded that Article 12 is not so confined, and since I have rejected the argument based on the need for a criminal conviction, there is a clear route to tortious liability, on the part of Ely Michel Ruimy, arising by reason of his acting unlawfully in assisting Mr Al Rajaan to profiteer contrary to Article 12. Indeed, Ms McKechnie accepted in her oral closing that "in its simplest frame, if Mr Ruimy entered into a corrupt arrangement with Mr Al Rajaan for the payment of secret commissions with the requisite criminal intent, then I think, if your Lordship was against us on that, we'd probably find that we were under Article 12."

1944. Against that background, I shall focus on Article 12, and will deal with other routes to liability more briefly.

Article 12

1945. In her oral closing, Ms McKechnie provided a helpful document which identified the "key legal framework" for the Kuwaiti law requirements for liability on the part of the Aerium Defendants. In relation to Article 12, she identified the requirements for contravention by Mr Al Rajaan as requiring consideration of the following questions: (1) Was Mr Al Rajaan a public official; (2) Is Article 12 KPPL limited to public officials involved in the management or overseeing of construction projects, supplies or public works; (3) In his role, did Mr Al Rajaan obtain or attempt to obtain profit/ benefit for himself or others; (4) Did Mr Al Rajaan obtain or attempt to obtain the said profit/ benefit through unlawful means; (5) Does the receipt of profit/ benefits give rise to an aggravated offence?

1946. I am satisfied that the answer to each of these questions is favourable to PIFSS' case. Thus: (1) Mr Al Rajaan was clearly a public official. (2) Article 12 is not so confined, as discussed in Section B above. (3) Mr Al Rajaan did obtain a profit/benefit for himself and others. (4) Mr Al Rajaan did obtain that profit/benefit through unlawful means, Ms McKechnie accepting in her closing submissions that the existence of Mr Al Rajaan's conflict of interest would

satisfy that requirement. (5) The actual receipt of profits/benefits does give rise to an aggravated offence, again for the reasons discussed in Section B above.

1947. As far as concerns Mr Ruimy's liability as an assistant including issues of criminal intent, Ms McKechnie identified the following questions: (1) Did Mr Ruimy (i.e. Ely Michel Ruimy) provide acts of assistance? (2) Was there a causal link between the said acts of assistance and the criminal conduct? (3) Did Mr Ruimy know that Mr Al Rajaan was a public official within the scope of Article 12 KPPL? (4) Did Mr Ruimy know and intend that Mr Al Rajaan was obtaining or seeking to obtain a profit/ benefit for himself or others? (5) Did Mr Ruimy know and intend that Mr Al Rajaan was obtaining or seeking to obtain the said profit/ benefit by unlawful means? (6) Did Mr Ruimy know and intend that he (Ely Michel Ruimy) was providing acts of assistance to Mr Al Rajaan?

1948. Given my findings in earlier parts of this Section K, I am again satisfied that the answers to each of these issues are favourable to PIFSS. In reaching that conclusion, I bear in mind my conclusions in Section B8 above as to the nature of the "moral element" or *mens rea* for a perpetrator or assister to commit a crime. That moral element refers to the intent of the perpetrator or assister, from a factual perspective, to commit the material acts that constitute the crime, while knowing the elements required by law for the existence of the crime from a factual perspective. It is thus no answer for Ely Michel Ruimy to contend that he did not know the terms of Article 12 KPPL, or that Mr Al Rajaan was a public official within the scope of that article. He clearly knew that Mr Al Rajaan was the most senior individual within PIFSS, a public institution, and thus knew that element required by the law for the existence of the crime from a factual perspective.

1949. The real battleground on these issues was whether, on the facts, Ely Michel Ruimy was complicit in the making of corrupt payments to Mr Al Rajaan. It was not seriously argued that if Mr Ruimy was complicit, he nevertheless had a good answer to a claim based on his tortious liability arising from that complicity. I do not consider that there is any good answer.

1950. I deal below with a large number of arguments which essentially concerned the quantification of Ely Michel Ruimy's tortious liability, as well as issues of liability and quantum that relate specifically to the claim against AFL in relation to the Mirabaud payments. Before doing so, however, I will briefly address whether there is also tortious liability based upon Ely Michel Ruimy's acts of assisting Mr Al Rajaan to breach Article 11 KPPL, and also in relation to the case based upon Articles 35 and 39 KPC.

Article 11

1951. Ms McKechnie submitted that PIFSS could not establish a tortious claim against Ely Michel Ruimy based on his assisting Mr Al Rajaan's contravention of Article 11 KPPL. She submitted (correctly) that an intention to cause harm was a necessary ingredient of a contravention of Article 11, whether by Mr Al Rajaan or an assister. Her principal argument was that PIFSS had not sufficiently pleaded a case that Mr Ruimy knew that Mr Al Rajaan's acts would harm public funds, and that he intended that those acts be carried out

nevertheless. She also submitted that PIFSS had not put to Ely Michel Ruimy a case of knowledge and intention, in relation to the harm to public funds.

1952. I do not accept either of these points. PIFSS specifically pleads, in paragraph 50 of the 10RAPOC, that "by their concerted, unlawful and intentional acts designed to damage PIFSS' interests PIFSS has suffered harm (including reputational harm) and loss, in the sum of, at least, the Secret Commissions paid which would otherwise not have been paid and for which all parties are liable." This appears in the context of Section C of the 10RAPOC, which is a section which generally describes the nature of the various schemes and their participants. Paragraph 50 is in my view a sufficient plea of an intention to cause harm to PIFSS' interests, and in context was an allegation made against all of the participants in the various schemes. If the Aerium Defendants considered the pleading to be inadequate, then further particulars could have been sought. In my view, further particulars were unnecessary, and so it is not surprising that none were requested. The case against the Aerium Defendants, in relation to the Aerium scheme, was pleaded in immense detail at a later stage in the 10RAPOC. The Aerium Defendants could have been left in no doubt as to the nature of the harm being alleged by PIFSS, and which was caused by the intentional acts designed to damage PIFSS' interests as pleaded in paragraph 50. That harm included what in my view is the very obvious harm that a person who pays bribes to a senior official will be intending to cause, in that money is being paid to the senior official instead of being used to benefit his principal.

1953. Nor do I accept that Ely Michel Ruimy was not sufficiently cross-examined. He was fairly and squarely cross-examined on the issue of his complicity in making corrupt payments to Mr Al Rajaan. His case that he was not involved in making such payments, and knew nothing of such payments being made, was challenged in many different ways. He had a full opportunity to respond, making clear his lack of involvement in or knowledge of corrupt payments. He never advanced a case to the effect that even if he had been complicit, or had known of the payments being made, he nevertheless did not intend to cause any harm to PIFSS. Accordingly, there was no reason to challenge him in respect of a case which he had never made, or evidence that he had never given. I do not accept that there was any unfairness in counsel not putting to Ely Michel Ruimy what would have been a hypothetical question along the following lines: "Do you agree that if you were involved in paying bribes to Mr Al Rajaan, you intended to harm PIFSS". His answer would, in the light of his evidence as a whole, have been along the following lines: "I wasn't involved in paying bribes, and so your question is irrelevant".

1954. Apart from the pleading and 'not put' points discussed above, I did not consider that Ms McKechnie identified any other reason why – given my findings in earlier sections – tortious liability would not arise by reason of Ely Michel Ruimy's acts of assisting Mr Al Rajaan's breaches of Article 11 KPPL.

Articles 35 and 39 KPC

1955. There were a number of themes in Ms McKechnie's argument as to why tortious liability based on contravention of Articles 35 and 39 KPC might not arise on the facts. In broad summary, these themes were as follows. It was necessary for

there to be positive acts of assistance by Ely Michel Ruimy. Thus, he would not act tortiously if he only learned about the corrupt scheme after it had started, and had done nothing to stop it. A bribery offence is committed, and is complete, at the time when the agreement to give or accept a bribe is made. The subsequent payments of bribes do not amount to further offences. Thus, it was necessary to show that Ely Michel Ruimy was positively involved in corruption in 2003, when AP1 was launched. If he had only become involved in the payment of bribes afterwards, then no criminal offence would be committed as and when those payments were made, and therefore no tortious liability would arise.

1956. These various arguments do not arise on the facts as I have found them. Ely Michel Ruimy was an active participant in corruption at the outset, when AP1 was launched. He remained an active participant at all times thereafter. Furthermore, even if Ely Michel Ruimy had not participated when AP1 was launched, there were further agreements to pay bribes as and when subsequent funds, usually involving different venture managers, were launched. I do not therefore accept that it is only relevant to look at the position in 2003. In any event, as discussed in Section B above, I have not accepted the argument that the actual payment of bribes, pursuant to an earlier corrupt arrangement, is not criminalised under the KPC as a matter of Kuwaiti law.

1957. Accordingly, the tortious claim against Ely Michel Ruimy can also be based on Articles 35 and 39 KPC.

K9: Quantification of Ely Michel Ruimy's liability

The issues

1958. The arguments as to the quantum of Ely Michel Ruimy's liability involved a number of major issues, as well as some smaller points on quantification. The major issues concerned the extent to which PIFSS could establish "harm" in relation to: (i) the Mirabaud payments; (ii) the monies actually paid to the QWM companies, but which were not passed on to Mr Al Rajaan; (iii) the "FNP" amounts which were owed to the QWM companies, but which were never paid.

1959. The background to all of these points is that PIFSS advanced its case on "harm", for the purposes of its tort claim, in two ways. These were summarised by Ms McKechnie as being the claim on the basis of "benefits as harm", and a claim on the basis of "transactional disadvantage".

1960. In Section B above, I have accepted that Kuwaiti law permits PIFSS to advance a case based on its "benefits as harm" analysis, and that PIFSS is not confined to a case based on showing transactional disadvantage. I have concluded that a repayment remedy is available jointly and severally against the public official as principal tortfeasor under Article 227 KCC and, pursuant to Article 228 KCC, against the doers and accomplices who have assisted him. In awarding a civil repayment remedy for breach of the KPPL provisions, as compensation for harm, the legislator is recognising and reflecting that the prescribed breaches result in harm to the victim entity in at least the value of the profits/benefits caused by the breach. I have also specifically addressed the issue of whether the compensatory remedy is limited to the amounts received by the public official,

and have concluded that it is not. In summary, Articles 11 and 12 of the KPPL both criminalise profiteering which benefits others, as well as benefiting the corrupt public official. Accordingly, the quantum of the compensatory or repayment remedy will extend to the entire amount which has been profiteered.

1961. I now turn to the application of those principles to the major arguments advanced, and I also consider the extent to which PIFSS can show transactional disadvantage in so far as it is necessary for PIFSS to advance a case on that basis.

The Mirabaud payments

1962. At first sight at least, it would appear that a simple claim can be made, applying the "benefits as harm" approach, to the payments made to or for the benefit of Mr Al Rajaan (including the jewellery payments) amounting to USD 9,934,604. He received money, and the discharge of debts owed to jewellers, in that total sum.

1963. Ms McKechnie submitted, however, that the position is more complex. She submitted that PIFSS itself had pleaded a more complex arrangement, and this involved giving a corrupt benefit in kind to Mr Al Rajaan in the shape of the € 7.5 million investment in the Bainbridge I fund. I do not consider that there is any substance in this pleading point. Paragraph 338BBB pleads, as a primary case, that the Mirabaud payments were "paid pursuant to a corrupt arrangement between Mr Ruimy and Mr Al Rajaan in return for Mr Al Rajaan causing or influencing PIFSS to invest in funds managed or introduced by the Aerium Group or the Aeriance Group".

1964. The substance of Ms McKechnie's argument was that Mr Al Rajaan did not in fact receive any benefit at all, because the circumstances of the payments made by Ely Michel Ruimy need to be considered in the light of the € 7.5 million that he had previously paid for the investment in the Bainbridge I fund, or the loan to Bainbridge I. She submitted that the investment had in fact proved to be of no value, in the light of the position shown in the most recent accounts of that fund. Mr Grocott-Barrett showed me those accounts in the course of his submissions.

1965. I do not consider that the position is complex, or that the matters relied upon by Ms McKechnie lead to the conclusion that Mr Al Rajaan received no benefit. The short answer in my view is that Mr Al Rajaan did receive benefits, from Mr Ruimy, to the tune of USD 9,934,604 between 2008 and 2010. It is possibly the case that, prior to the time when these payments started, Mr Al Rajaan had paid € 7.5 million for an investment in Bainbridge I. As discussed above, the evidence is unclear as to where the money for the investment came from. But even assuming that Mr Al Rajaan had paid out this money, the position in early 2008 – when the Mirabaud payments started to be made by Ely Michel Ruimy – was that Mr Al Rajaan was out of pocket. He then received substantial sums of money. Whether or not those sums were referable to his being out of pocket does not impact upon the simple fact that he received substantial benefits amounting to USD 9,934,604. That was then money that was in his pocket, or effectively in his pocket because it was paid to discharge his jewellery debts.

Whether or not his proposed investment in Bainbridge I was or would have been profitable, or loss-making, is neither here nor there: the profitability or otherwise of that investment does not impact on the question of whether he received benefits by reason of the monies which he received or the jewellery that was paid for.

1966. In any event, I do not consider that the question of whether a benefit was received should be assessed by reference to what happened, years down the line, when the results of an investment were known. Even if, contrary to my view, one were to regard the investment itself as the benefit (as opposed to the receipt of money and the payment of jewellery invoices), it would be more appropriate to consider the benefit at the time that the investment was received. At that time, the proposed investment in the Bainbridge I fund was potentially very valuable, which was no doubt the reason why Mr Al Rajaan wanted it. I cannot see that it would be assessed as being valued at anything below the amount that was proposed to be invested.

1967. I have certainly seen nothing in the Kuwaiti case-law or commentary which provides any support for the proposition that, for the reasons given by Ms McKechnie, the benefits received by Mr Al Rajaan would not be considered to be benefits for the purposes of Articles 11 and 12 KPPL.

1968. Accordingly, Mr Ruimy is in principle (and subject to any further arguments on quantum arising from the Mirabaud and EFG settlements, or applicable currencies) liable in the sum of USD 9,934,604.

Monies paid to the QWM companies but not paid to Mr Al Rajaan

1969. PIFSS claims the full amount of monies actually paid to the QWM companies, irrespective of whether the entirety of the sums were paid over to Mr Al Rajaan. Prior to oral closings, the amount admitted by Ely Michel Ruimy (in his response to PIFSS' Appendix 7) was USD 5,590,627 in respect of Quadra, and USD 47,232,169 in respect of Wentworth and Moccak: a total of USD 52,822,796. In Mr Grocott-Barrett's oral closing, an additional sum paid to Quadra, amounting to USD 298,623, was accepted as having been paid. Accordingly, the total sum of USD 53,121,419 was admitted as having been paid to the QWM companies.

1970. The only remaining disputed item, relating to the quantum of payments actually made to QWM companies, was the comparatively small amount of USD 79,930. Ely Michel Ruimy's case was that there had been no reimbursement by Aerium to FGG of a 50% share of a fee which had been paid to Quadra. I shall deal with this later in this section.

1971. The argument that PIFSS can only claim the monies actually paid to Mr Al Rajaan is similar to the argument that I have rejected when a similar point was made by Man, and which I also reject in the context of the Mombelli Scheme (Section N below). The monies paid to the QWM companies are recoverable from both Mr Al Rajaan and Ely Michel Ruimy, because Mr Al Rajaan was profiteering from his position in order to benefit both himself and the QWM companies, in the human form of Mr Amouzegar and Mr Khosrovani. I have

addressed in Section B11 the Kuwaiti law principles concerning the issue of liability for the benefits obtained by others.

1972. Another pleading point was, briefly, taken by Ms McKechnie in her closing submissions. She acknowledged Dr Abbas's evidence that there are crimes when a person in Mr Al Rajaan's position profiteers for his own benefit, and also when he profiteers for the benefit of others. However, Ms McKechnie referred to Dr Abbas's evidence that there are separate crimes in those circumstances, and she submitted that there was no separate crime pleaded against Ely Michel Ruimy: the pleaded crime concerned "benefits against Mr Al Rajaan".

1973. I do not consider that PIFSS' pleading can be read so narrowly. It is clear from the 10RAPOC that PIFSS advances a case in respect of Mr Al Rajaan's profiteering both for his own benefit and for the benefit of others who were allowed to share in the spoils. Indeed, it was clear throughout the trial that this was the basis on which PIFSS' claim, for "benefits as harm", was being made. No doubt that was one reason why Dr Abbas specifically addressed the point. I note that no pleading point along these lines was advanced by either Man or the Mombelli Defendants. As far as concerns PIFSS' pleading, I will not quote from the 10RAPOC at length. However, the fact that a claim was being made for benefits received by purported intermediaries is in my view clear from a number of paragraphs, including: 29; 31(h) (quantifying the amount of "Secret Commissions" on the Aerium Scheme at least USD 110 million); 248b; 338VV1; 338BBB1; 338BBB2; 338FFF; 351(a). In particular, paragraph 338FFF (b) is a quite general plea which asserts Ely Michel Ruimy's liability in respect of his role in relation to Mr Al Rajaan's breaches of Articles 11 and 12, and it is not solely confined to Mr Al Rajaan's breaches in respect of his own benefits. Paragraph 351(a) advances a claim for "the value of the Secret Commissions which, through his or her unlawful conduct under Articles 227 – 229 of the Civil Code were paid to Mr. Al Rajaan and/or to others at his direction" (my emphasis).

1974. I also do not accept Ms McKechnie's point that PIFSS has, at any stage, abandoned this way of advancing the claim. In a letter from Stewarts dated 10 December 2025, PIFSS did indicate that it would not be pursuing a claim pleaded under paragraph 351(b) of the 10RAPOC. However, the claim pleaded under paragraph 351(a) was not abandoned, and the letter makes it clear that PIFSS would be pursuing its claim for the "Secret Commissions paid" under the Aerium Scheme.

1975. Accordingly, the quantum of Ely Michel Ruimy's liability extends to all payments made to the QWM companies, irrespective of whether all such sums benefited Mr Al Rajaan personally.

1976. This means that Ely Michel Ruimy derives no assistance from the points which Mr Grocott-Barrett made about the Orkina foundation in the context of the VP Scheme, and whether the monies paid by Orkina to Mr Al Rajaan's vehicle had originated with the same Quadra that was involved in the Aerium Scheme. Quantum includes sums paid to the Quadra that was involved in the Aerium

Scheme, irrespective of whether or not the monies were then paid to Mr Al Rajaan.

The amounts not paid to the QWM companies

1977. PIFSS' claim for USD 100,327,124 is in part made up by the sums actually paid to the QWM companies. The balance – amounting to around USD 47.1 million – comprises monies that were payable under the various finders fee agreements, but which were not paid. Principally, that was because payments stopped in 2014.

1978. I think that there is force in Ms McKechnie's point that PIFSS' claim to the unpaid USD 47.1 million is pleaded on the basis of transactional disadvantage, rather than "benefits as harm". Thus, in paragraph 16 of Appendix 7 to the 10RAPOC, PIFSS states "even if unpaid, PIFSS relies on the accrued retrocessions for the purposes of its damages claim at paragraph 354." Paragraph 354 of the 10RAPOC is the plea of loss relating to transactional disadvantage. I can see that there may be an argument, based on Kuwaiti law, that unpaid amounts owed to the QWM companies are no different in substance to amounts which were actually paid to those companies, when assessing the value of benefits obtained as a result of Mr Al Rajaan profiteering from his position. However, this was not an issue that was squarely addressed in the expert Kuwaiti law evidence.

1979. Against that background, I consider it appropriate to address the unpaid amounts on the basis of PIFSS' transactional disadvantage case, rather than the "benefits as harm" case. The essential question, is: whether – if Mr Al Rajaan had not acted corruptly and in his self-interest in seeking and procuring the payment of Secret Commissions, and had he acted in accordance with his obligations under the Civil Service Law – PIFSS would have received the benefit of the monies payable to the QWM companies, whether by way of reduced fees, waiver of fees or a rebate in fees payable to PIFSS. The monies payable include both the monies that were actually paid, and the balance of USD 47.1 million which was owed but unpaid. In short, the question is therefore whether – if Mr Al Rajaan had not been acting corruptly – he could and would have secured for PIFSS benefits equivalent to those which were to be enjoyed by himself and Mr Amouzegar and Mr Khosrovani. This is a similar issue to that which I have considered in the context of the EFG Scheme and double actionability: see Section J10 above.

1980. I consider that the answer to this question is a straightforward "yes". In an honest world, Mr Al Rajaan, who knew of the substantial commissions which fund managers such as LDV/Aerium were willing to pay to introducers, would have sought to secure the benefit of those monies for PIFSS. There was and would have been no need to pay the alleged introducers anything, because (see Section K6 above) Mr Amouzegar and Mr Khosrovani had not performed any genuine introductory services.

1981. Furthermore, I have no doubt that Ely Michel Ruimy would have been more than willing to allow rebates or discounts equivalent to the monies payable to the QWM companies, and would not have sought to play hardball in any

negotiation with Mr Al Rajaan. I regard as unrealistic Mr Grocott-Barrett's suggestion that, in effect, Mr Al Rajaan would not have been able to achieve much in a negotiation, because he had already shown his hand by indicating an interest in the Aerium funds at the start, or because the success of AP1 meant that he was particularly attracted to later funds.

1982. A very significant point, in considering what would have happened in a hypothetical negotiation, is that Ely Michel Ruimy was so keen on obtaining PIFSS investment monies that he was willing to pay very large bribes for that purpose. A number of counsel in the case (in particular Mr Smouha for Man and Mr Matovu for Mr Massad) made the point, in the context of the inherent probabilities, that those who pay bribes are taking a considerable risk with their reputation and indeed potentially their liberty. If a person such as Ely Michel Ruimy was prepared to take that risk, and to participate with Mr Al Rajaan and others in very significant corruption, then that says a great deal about what he would be prepared to do in order to obtain investment monies from PIFSS. In my view, it makes no real sense to posit that, in a hypothetical negotiation where Mr Al Rajaan had required discounts or rebates, Ely Michel Ruimy would not have been willing to play ball or accede to what Mr Al Rajaan was demanding.

1983. I do not therefore accept that Ely Michel Ruimy would have drawn the line at giving PIFSS rebates or discounts, equivalent to the monies payable to the QWM companies, because of the potential impact of other investors requesting similar favourable treatment. In relation to the Aerium funds with which I am concerned, PIFSS was the most significant investor. It was the first and largest investor in AP1, and it was the only investor in many of the later funds. Even if Ely Michel Ruimy had to contemplate giving similar treatment to other investors, the benefits of obtaining PIFSS' investment monies were so great that this would not have been a material obstacle. In any event, as the expert investment evidence indicated, there would be an easy way of dealing with the position of other smaller investors in such a situation, if it were necessary to do so. The rebates to PIFSS could be explained on the basis of the size of their investment, and they could be offered to any other investor who was willing to make an investment of equivalent size.

1984. Mr Grocott-Barrett argued that, in the context of considering this counterfactual, an adverse inference should be drawn against PIFSS for its failure to call Adel Al Bader. He referred to the fact that Mr Al Bader did pay attention to the fees that were being charged on the Aerium funds, and did from time to time seek to negotiate some fees downwards. I did not consider that these were points of any weight. Mr Al Bader does appear to have acted conscientiously and with professionalism. However, he was not the senior person at PIFSS, and it was ultimately Mr Al Rajaan who was the key decision-maker and (as Ely Michel Ruimy said in his letter to BNP Paribas) the key person with whom Ely Michel Ruimy was dealing. The question that I am considering is what would have happened if Mr Al Rajaan had not been corrupt, but had acted honestly and in accordance with his duties. The answer to that question is not assisted by considering the position of Mr Al Bader. Nor do I think that Mr Al Bader would have been in any position to give relevant evidence as to what would have happened in the counterfactual world that I am considering, as to what Mr Al

Rajaan would have done in a counterfactual world. I cannot see that it would be appropriate to draw an adverse inference from PIFSS' failure to call him to give evidence.

1985. Accordingly, I consider that PIFSS has established its case of transactional disadvantage. I conclude that in an honest world, PIFSS would have received the benefit of the monies payable to the QWM companies. That includes the USD 47.1 million which was unpaid. It also includes the monies that were in fact paid, and which are recoverable under PIFSS' "benefits as harm" case. Transactional disadvantage therefore provides an alternative basis of claim to those (paid) monies. Accordingly, by one route or another, PIFSS' claim of USD 100,327,124 succeeds in principle, albeit subject to issues as to the impact of the Mirabaud and EFG settlements and the applicable currency of the claim.

1986. It follows from the above conclusions that a number of the detailed quantum points advanced by Mr Grocott-Barrett do not arise or make no difference to the result. As already indicated, it is not necessary to reach any conclusion as to the extent to which monies paid to QWM reached Mr Al Rajaan. Nor is it necessary to decide whether the Quadra payment discussed in the context of the VP Scheme was derived in whole or in part from monies paid by Aerium fund managers. Nor does it make any difference if a particular payment was paid or unpaid to QWM. If it was unpaid, it will reduce the sum payable on the basis of "benefits as harm" but will increase the net amount that can be claimed as transactional loss.

Other quantum points

1987. As explained above, there is a dispute as to whether USD 79,930 was paid by Aerium to FGG in relation to the Aerium IV fund, where the practice was for FGG to pay fees in the first instance, and then seek to recoup 50% from Aerium. The issue here is whether it is more likely than not that this amount was paid by Aerium. I do not think that this dispute really matters, since if it was unpaid it would be recoverable as part of the transactional loss claim. However, although the documentary evidence is sparse and inconclusive, I think it more likely than not the money was paid. There was no dispute that it had been invoiced. There is nothing to suggest that Aerium was thereafter chased for payment, as would naturally be expected if an amount was unpaid. Even though, as Mr Grocott-Barrett submitted, FGG collapsed in 2008 following the Madoff scandal, I am not persuaded that there would have been such a significant delay in payment by Aerium that the collapse of FGG would have occurred before payment. The correspondence giving rise to the relevant payment was dated May 2008, and it was not until the end of the year that FGG collapsed. In any event, the liquidator of FGG could have been expected to seek to recover the payment, if it had not been made.

1988. At the end of his submissions, Mr Grocott-Barrett advanced two further arguments, in connection with the FNP amounts.

1989. First, he submitted that the quantum of liability for the FNP amounts should be reduced so as to take account of fee reductions which were negotiated by Mr Al Bader in July 2015 in connection with Bainbridge I, Aerium Opportunity I, and

Meigerhorn I. Franck Ruimy agreed to reduce Aerium's management fees by 50% in return for PIFSS agreeing to extend the life of those funds. Mr Grocott-Barrett submitted that this should reduce the quantum of the claim for the FNP amounts for those funds after 2015, which amounted in total to USD 10,863,138. I understood the argument to be that the management fee element of that total FNP claim, amounting to USD 6,595,132, should be deducted from the amounts otherwise recoverable, in order to avoid double-counting.

1990. I was not persuaded by this argument. When Mr Al Bader negotiated a reduction in fees going forward in 2015, in return for an extension of the life of the funds, he knew nothing about the amounts payable to the QWM companies. It was a fresh agreement made in consideration of the life of the funds being extended. I do not see that this fee reduction had any connection at all with the amounts which were owed to the QWM companies. Those amounts were still recorded in Aerium's books as being payable at that point in time, and indeed it was only at around that time that Anna-Maria Rauf stopped chasing for payment. I do not see why the reduction in management fees agreed in 2015, in ignorance of the secret commission arrangements involving the QWM companies, should reduce (in the manner proposed by Mr Grocott-Barrett) PIFSS' transactional loss which essentially looks at the agreement which would have been reached many years earlier if Mr Al Rajaan had not been corrupt.

1991. Secondly, he submitted that care needed to be taken more generally so as to avoid double-counting, in circumstances where bribes had been paid by reference to some of the fees earned by Aerium, but where payment of the bribes had then stopped. I agree with that point as a matter of principle. However, I do not consider that my approach to quantification involves double-counting.

K10: AFL issues

1992. Separate issues, as to both liability and quantum, arise in relation to the claim against AFL, which concerns the Mirabaud payments rather than the QWM payments. The key issues can in my view be summarised as follows. (1) To what extent, if at all, were AFL monies used to fund the Mirabaud payments? (2) To the extent that monies were used to fund the Mirabaud payments, was Ely Michel Ruimy responsible for the fact that this was done? (3) If so, does any liability on the part of AFL arise in consequence of the conduct of Ely Michel Ruimy?

1993. *To what extent, if at all, were AFL monies used to fund the Mirabaud payments?* The answer to this question is apparent from a spreadsheet prepared by Ms Emmanuelle Barczak. This tabulates amounts received by three companies which were beneficially owned by Ely Michel Ruimy: Spiranese Capital Ltd ("Spiranese"), Winston Advisory Group Ltd ("Winston") and Hiram Holdings Ltd ("Hiram"). The table includes information as to: the date; the transferor of funds; the amount received and the currency; the reason for the payment; and then the amount paid to Ely Michel Ruimy's Mirabaud bank account. It shows, in the case of Spiranese and Winston, that sums were paid by AFL as retrocession fees, and that a substantial part of those sums was then paid into Ely Michel Ruimy's Mirabaud bank account. That account was not used for any

purpose other than making the Mirabaud payments to or for the benefit of Mr Al Rajaan.

1994. The amounts paid into the Mirabaud account, referable to various retrocession fees identified as "IXIS", "SG Turquoise" and "Tensyr", were as follows. In relation to Spiranese, there are 4 payments and these total (including one USD payment converted to €) € 1,070,547. In relation to Winston, there are 4 payments, and these total € 2,188,048. However, the spreadsheet appears to show that the final payment was returned by Mirabaud, so that the net total was € 1,997,341. If that is right, then €3,067,888 is the total amount shown on the spreadsheet as having been originally paid by AFL to Winston and Spiranese, and then paid on into Ely Michel Ruimy's Mirabaud account.

1995. The spreadsheet also shows that there were other sources of transfers into Spiranese, whilst the source of payment to Hiram is not identified. In her closing submissions, Ms Dilnot accepted that the source of payment into the Mirabaud account was monies emanating from a mixture of PIFSS' investments, and not simply the RMF, Tensyr and Turquoise investments where commissions were paid to AFL.

1996. It is possible that there were further sums emanating from AFL and paid into the Mirabaud account. PIFSS' closing referred to a spreadsheet prepared by Mr Lam Chok. However, I do not find it easy to identify those payments from that spreadsheet. Ms McKechnie referred to a figure of € 5.8 million as being the high point of PIFSS' case. That figure was based upon Appendix 7.3 to the RAPOC, which identified the total payments by Winston and Spiranese into Ely Michel Ruimy's Mirabaud account. However, that schedule does not identify the payments which emanated from AFL.

1997. Before reaching a conclusion that the amount emanating from AFL and paid into the Mirabaud account is limited to € 3,067,888, I would wish to have the benefit of further submissions at the consequentials hearing – if PIFSS contends that there is evidence to support a higher figure. However, I do consider that Ms Barczak's spreadsheet sufficiently establishes that at least € 3,067,888 paid by AFL was used to fund the Mirabaud payments.

1998. *Was Ely Michel Ruimy responsible for using AFL monies to fund the Mirabaud payments?* I have no doubt that, on the facts, Ely Michel Ruimy was the person who directed these payments. In her submissions, Ms McKechnie said that there was insufficient evidence to show this. However, I indicated that I would want to hear further submissions on that issue, because my impression of the evidence was that Ely Michel Ruimy was the significant person taking decisions in relation to AFL, and that I needed to be persuaded that he could be distanced from AFL. Mr Grocott-Barrett then, in his submissions, accepted that Ely Michel Ruimy caused the relevant contracts to be made at both ends, namely at the AFL end and the Winston and Spiranese end. I have no doubt that he was also responsible for the transfers from AFL into Spiranese and Winston, and then from those companies to his Mirabaud account. Thus, there was documentary evidence of Ely Michel Ruimy giving instructions for transfers into the Spiranese account on 20 May 2008 and into the Winston account on 27 October 2009. These transfers, which were both reflected on Mr Lam Chok's

spreadsheet, were from AFL. Ely Michel Ruimy was giving instructions for the second payment as well as the first, even though he had formally ceased to be a director of AFL in February 2009.

1999. Furthermore, Ely Michel Ruimy's defence accepted that he was responsible "in a general sense" for payments into the Mirabaud account from sources including Spiranese, and that he was the person who was directing that sufficient funds should be transferred in order to enable (on his case, which I have rejected) repayments of the Mirabaud loan to be made.

2000. It is clear therefore that it was Ely Michel Ruimy who was directing the payments made by AFL to Winston and Spiranese, and then the onward payment to his Mirabaud account.

2001. *Does any liability on the part of AFL arise in consequence of Ely Michel Ruimy's conduct?* Ms Dilnot submitted that there was no difficulty in establishing vicarious liability, on the part of AFL, for the corrupt payments which were made via the Mirabaud account to Mr Al Rajaan. She said that Ely Michel Ruimy was either an actual director of AFL, in the period up until February 2009, or that he de facto controlled it. Specifically in relation to the payments made, he was the person giving instructions in the payment chain, with payments being routed from AFL to his Mirabaud account.

2002. I agree with that submission, in so far as it seeks to impose liability in respect of the monies routed from AFL to the Mirabaud account. As discussed in Section B14 above, vicarious liability under Kuwaiti law will capture a wide variety of "subordinates". It can include people in a senior position, such as directors or the chairman of a company. There is no reason why it would not encompass Ely Michel Ruimy.

2003. Ely Michel Ruimy's instructions for payments to be made by AFL to Spiranese and Winston clearly related to the conduct of the affairs of AFL. He was a director of AFL up until February 2009, and thereafter de facto controlled it. He certainly controlled the relevant payments, since he was the person to whom others looked for instructions. His purpose in making the payments from AFL to Winston and Spiranese was to pay bribes to Mr Al Rajaan. He was thereby acting tortiously, for reasons already explained: in particular, because he was assisting Mr Al Rajaan to breach his duties under Articles 11 and 12 KPPL. I do not think that there is any reason why AFL should not be responsible for Ely Michel Ruimy's torts, in so far as they related to the payments made by AFL.

2004. I do not consider that this analysis is affected by Mr Grocott-Barrett's argument that the payments made by AFL to Winston and Spiranese were made pursuant to legitimate retrocession agreements which AFL was obliged to make. One reason for that conclusion is that, as discussed in the context of the Mirabaud payments, I do not consider that AFL made genuine introductions of the RMF, Turquoise and Tensyr funds. It follows that any arrangement between AFL and Ely Michel Ruimy's companies, to retrocede AFL's commissions on that business, should be disregarded. In any event, when AFL made the payments to Spiranese and Winston, it did so knowing (via Ely Michel Ruimy) that it was funding corrupt payments to Mr Al Rajaan.

2005. However, I do not accept Ms Dilnot's more expansive case, addressed briefly in her closing, that AFL can be held liable for the entirety of the Mirabaud payments, including payments which did not originate with AFL. She argued that Ely Michel Ruimy, via AFL, was orchestrating all of the payments, and that therefore both he and the company were collectively responsible for the amounts which went to Mr Al Rajaan via Ely Michel Ruimy's Mirabaud account. I agree that Ely Michel Ruimy was orchestrating all of the payments, and that he is personally liable as a tortfeasor. However, I am not persuaded that it can be said that he was doing so in all cases "via AFL". He was making some payments via AFL, and those payments result in AFL's vicarious liability. But in so far as there were other payments, which were not connected with AFL, the liability is that of Ely Michel Ruimy.

2006. As indicated above, I will if necessary hear further argument as to whether the quantification of AFL's liability extends beyond the € 3,067,888 to which I have referred.

K11: **Conclusions as to the liability of Mr Al Rajaan (and therefore D1), Ely Michel Ruimy and AFL under Kuwaiti law**

2007. In the light of the above conclusions, Mr Al Rajaan and Mr Ruimy are liable under Articles 227/228 KCC, in essence because they: (i) agreed that Mr Al Rajaan would be paid the Mirabaud payments, which were secret commissions paid for the benefit of Mr Al Rajaan in relation to investments that he caused or influenced PIFSS to make and (ii) agreed with Mr Amouzegar/Mr Khosrovani (and Ms Rauf and Franck Ruimy) that the QWM payments would be paid as secret commissions for the benefit of Mr Al Rajaan in relation to investments that he caused or influenced PIFSS to make. This caused PIFSS harm in the value of the commissions which were agreed, and which were in due course paid or unpaid, entitling PIFSS to orders for compensation.

2008. The legal basis of Mr Al Rajaan's liability under Kuwaiti law is materially the same as set out in previous sections, in particular those dealing with the Mirabaud Scheme and the Pictet Scheme.

2009. The legal basis of the liability of Ely Michel Ruimy is explained in Section K8 above. The legal basis of AFL's liability, which concerns the Mirabaud payments only, is explained in Section K10 above.

K12: Conclusions as to the quantum of compensation

2010. Prior to taking into account the impact of the Mirabaud and EFG settlements, the quantum of PIFSS' successful claim for compensation, subject to possible conversion to other currencies, is therefore as follows:

i) D1/Mr Al Rajaan: USD 110,261,728;

ii) Ely Michel Ruimy: USD 110,261,728;

iii) AFL: at least € 3,067,888, but subject to possible increase as set out in Section K10 above.

SECTION L: THE PENSÉE SCHEME

L1: The events and issues in outline

2011. This claim concerns substantial sums of money which were paid into the account of a Bahamian Foundation called the Pensée Foundation ("Pensée") between 2013 and 2015. (In this section of the judgment, I shall capitalise the word "Foundation" and "Founder" throughout). The sums paid were the equivalent of USD 31,533,111, but they were then successfully invested and increased substantially in value. This resulted in growth to an amount in excess of USD 41 million in 2021. I have been informed that the value of assets held by Pensée as at 23 September 2026 was around USD 54 million.

2012. PIFSS' claims in respect of the Pensée Scheme are made against D1, Mr Nasrallah and Pensée. The principal claim against Pensée is for all of the monies in the account held in Pensée's name, including the increased value following their successful investment. In the alternative, PIFSS advances a claim against both Pensée and Mr Nasrallah for USD 31,533,111, being the amount paid into that account in and after 2013, and without regard to the increased value of the funds. The "unique" claim against D1 is for USD 51,281,849. This claim against D1 involves "grossing up" the USD 31,533,111 to a figure which represents the original amounts paid by fund managers to Zetland companies owned by or associated with Mr Amouzegar and Mr Khosrovani, prior to distribution of Mr Al Rajaan's share. A deduction from the grossed-up amount is then required, in order to avoid duplication with the amounts claimed under the Aerium Scheme.

2013. Pensée was created in 2013 with the assistance of Deltec Bank & Trust Ltd ("Deltec"). This followed discussions in 2013 involving Mr Al Rajaan, Mr Nasrallah and Mr Jean Chalopin, who was at the time a major shareholder in Deltec and was promoting its business as described below.

2014. The principal individuals behind the payments into the account were Mr Al Rajaan and Mr Amouzegar, who owned or co-owned the various companies, administered by Zetland, which made the payments. As between PIFSS and Pensée, there is no dispute (and in any event I find) that the monies paid into the account were derived from secret commissions on PIFSS investments, which were channelled to Mr Al Rajaan as bribes. They were therefore the proceeds of corruption. The successful investment of the monies so received was the result of investment decisions taken by Mr Al Rajaan.

2015. It is remarkable that substantial sums of money have remained in Pensée's account at Deltec, and also that their existence has been discovered. Mr Al Rajaan, with the assistance of Mr Chalopin (as described below) tried to move the monies out at the start of 2019, but the proposed movement was stopped by Deltec's compliance department. Mr Al Rajaan, in his asset disclosure in 2019 responsive to the WFO in the present litigation, deliberately did not disclose the existence of the assets in Pensée's account at Deltec, despite the order clearly requiring disclosure of assets which were within his control. That WFO dated 16 October 2019 injuncted Mr Al Rajaan from disposing of, dealing with, or diminishing the value of any of his assets up to USD 847.7 million. Under paragraph 3, the injunction applied to all of Mr Al Rajaan's assets:

> "whether or not they are in his own name and whether they are solely or jointly owned and whether the Respondent is interested in them legally, beneficially or otherwise. For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the assets in accordance with his direct or indirect instructions. For the avoidance of doubt, the above definition of the Respondent's assets shall extend to the assets of non-trading companies which he controls or which are controlled in accordance with his direct or indirect instructions."

2016. Paragraph 7 of the WFO required an affidavit disclosing all Mr Al Rajaan's assets as defined in the above paragraph. There is a significant dispute between PIFSS and Pensée as to whether or not the Pensée assets in the Deltec account were beneficially owned by Mr Al Rajaan. There was, however, no dispute – and indeed there can be no doubt, in the light of the evidence as a whole – that those assets fell squarely within the scope of paragraph 3 of the WFO and therefore should have been disclosed by Mr Al Rajaan. I have no doubt that Mr Al Rajaan deliberately sought to conceal these assets when he made his asset disclosure. Contrary to his case, he had not forgotten about those assets: he had been dealing with their investment for many years, and had had regular meetings with Mr Chalopin about them. He also had a meeting to discuss the assets and their investment with Mr Turnquest of Deltec, and this occurred not long before Mr Al Rajaan's asset disclosure.

2017. The existence of the Pensée monies only came to light as a result of the asset disclosure by Mr Nasrallah in 2020, pursuant to undertakings which he gave (and which were the equivalent of a WFO). Mr Nasrallah claims credit for having been frank in disclosing these assets which were not then known to PIFSS, and it was submitted that I should therefore regard Mr Nasrallah as an honest man. I consider, however, that credit for this disclosure is not appropriate, or is minor at best. There is no evidence that Mr Nasrallah knew that he was revealing information that was unknown to PIFSS. He did not know what Mr Al Rajaan had disclosed in his own asset disclosure, since that asset disclosure was confidential and was not available to all the Defendants. Mr Nasrallah did not therefore know that Mr Al Rajaan had made no disclosure of the Pensée assets. Also, by 2020 (and indeed before), Mr Nasrallah was keen to distance himself from Mr Al Rajaan. He also knew that he would never be able to claim the monies himself: his own attempt to move them in 2017 had been rebuffed by Mr Chalopin. Accordingly, I do not consider that, in disclosing the Pensée monies, Mr Nasrallah was acting altruistically in the interests of PIFSS. Rather, he was seeking to distance himself from Mr Al Rajaan and improve his own position in circumstances where non-disclosure could potentially reflect badly on him, and would not advantage him in any material way.

2018. No claim is made in these proceedings against Deltec. The substantial opposition to PIFSS' entitlement to claim, in respect of the Pensée monies, has been made by Pensée, for whom Mr Edey KC appeared. He was not concerned to address issues as to the liability of D1 and Mr Nasrallah. The submissions of D1 and Mr Nasrallah do not address their potential liability in relation to the Pensée scheme in any detail. Rather they rely upon their general arguments, such as that the "secret" commissions were not secret, because they were authorised, and that they were not acting dishonestly or intending to cause any harm to PIFSS. I have already rejected those arguments, and – given the facts below – D1 and Mr Nasrallah have no defence under Kuwaiti law to PIFSS' claims in respect of the Pensée Scheme.

2019. The oral arguments at trial, in relation to the Pensée assets and more generally the Pensée Scheme, therefore focused on the position of Pensée. That too is the focus of this section. PIFSS advanced in summary four bases of claim against Pensée.

2020. First, PIFSS contended that there was a right to trace and recover the proceeds of the secret commissions, as a matter of Kuwaiti law, pursuant to the KPPL and in particular Articles 23 and 28 thereof. Since Pensée does not now dispute that the monies paid to Pensée, and the assets which now represent those monies, were the fruits of unlawfully obtained secret commissions, this argument raised issues of Kuwaiti law, rather than factual issues. PIFSS contended that it had, pursuant to the KPPL, an "in rem" priority right to the Pensée monies, including the monies which represented the fruits of the successful investment of the funds initially placed in the account at Deltec. PIFSS also contended that, in so far as it had no claim directly against the monies, the transfer by Mr Al Rajaan to Pensée would be nullified as a matter of Kuwaiti law. The effect of this nullification would be that the monies are no longer regarded as Pensée's, but rather as Mr Al Rajaan's, and that they would therefore be amenable to enforcement of any judgment against him. This court could therefore make appropriate orders to give effect to these rights.

2021. Pensée submitted that, for various reasons, PIFSS could not recover those monies by this route. Pensée accepted that there would be no difficulty in recovering the monies if English (or Bahamian) law were applicable, but it was submitted that Kuwaiti law was different. Pensée submitted that this was not a remedy that a civil judge applying Kuwaiti law could order. Furthermore, even if an order were potentially available, the effect of nullification (as provided for in Article 28 KPPL) would not provide PIFSS with any claim which was proprietary in nature, or which would extend to the increased value of the secret commissions originally paid into the account.

2022. Secondly, PIFSS contended that the monies paid into the Pensée account at Deltec were held by Pensée on bare trust for Mr Al Rajaan. This argument derived, at least in large part, from a written document agreed by Mr Nasrallah and Mr Al Rajaan concerning Pensée, and their respective rights arising thereunder. The document was witnessed by Mr Chalopin. That written document originated in discussions in Paris in June 2013 involving Mr Al Rajaan, Mr Nasrallah and Mr Chalopin. The typed written document was

referred to by the parties, and I shall refer to it, as the "Pensée Agreement". Mr Chalopin also sometimes called it the "nominee agreement".

2023. It was common ground that the issues relating to this second basis of claim were governed by Bahamian law, which could (in the absence of any evidence to the contrary) be presumed to be the same as English law. The parties' arguments raised issues as to the proper interpretation of the Pensée Agreement, construed in the light of the factual matrix to that agreement. PIFSS also argued that the Pensée Agreement was not to be interpreted in isolation, and that the parties' full agreement, as to the trust, included the matters agreed in Paris. Pensée disputed that argument.

2024. There was no dispute that, if this argument succeeded, PIFSS would be entitled to declaratory relief, as to Mr Al Rajaan's ownership of the Pensée monies, and that this would extend to the entirety of the funds including any increase in the amount thereof beyond what had originally been paid in.

2025. Pensée contended, in summary, that there was no bare trust in favour of Mr Al Rajaan; that the monies belonged, and belonged only, to Pensée. They also submitted that even if there was a bare trust, the effect of Mr Al Rajaan's death was that any interest in the monies had not passed to his estate (D1), but rather was held for his two daughters. This latter contention also raised factual issues as to the background to the Pensée Agreement.

2026. If the claim was successful on either of the first two bases as described above (Kuwaiti law or bare trust), then it would not be necessary to consider the third and fourth issues described below.

2027. Third, PIFSS contended that Pensée was liable for the torts, under Kuwaiti law, of Mr Chalopin. This aspect of the case focused on Mr Chalopin's alleged role in 2013 in money laundering. PIFSS contended that Mr Chalopin assisted in the concealment of assets which he knew were secret commissions unlawfully obtained by Mr Al Rajaan.

2028. It was common ground that this tortious claim was governed by Kuwaiti law. The usual position under Kuwaiti law is that a legal entity cannot commit a criminal offence. However, the Kuwaiti money laundering offence is an exception to this general principle, and it can be committed by a legal person such as Pensée. Accordingly, the basis of the claim was not that Pensée was vicariously liable for Mr Chalopin's tortious conduct. Rather, it was that Mr Chalopin's relevant acts and intention were to be attributed to Pensée, which itself acted tortiously (causing loss to PIFSS) by money laundering and thereby acted unlawfully and tortiously. By the end of the trial, there was no dispute that Mr Chalopin's acts and intention would be attributed to Pensée.

2029. The principal issue arising, in relation to this third basis of claim, was the factual question of whether, at the time that monies were being received by Pensée from Mr Al Rajaan in mid-2013 and for a period thereafter, Mr Chalopin intentionally assisted in money laundering, knowing that the monies were the proceeds of criminal conduct on the part of Mr Al Rajaan, namely the unlawful receipt of

secret commissions. The evidence of Mr Chalopin, and his cross-examination, was largely directed at this central issue.

2030. It is common ground that if this claim were to succeed, it would not extend to the increased value of the Pensée assets, beyond the amounts of the original secret commissions received by Pensée.

2031. Fourth, PIFSS contends that the torts of both Mr Al Rajaan and Mr Nasrallah are to be attributed to Pensée. There was an issue as to the applicable law concerning attribution: Pensée contends that it is Kuwaiti law, whereas PIFSS contends that it is Bahamian law (and therefore English law, in the absence of any specific evidence as to Bahamian law). There were also issues as to whether, under either of these laws, the torts of Mr Al Rajaan or Mr Nasrallah would be attributed to Pensée. In view of my conclusions on the earlier issues, it has not been necessary for me to determine this fourth issue.

2032. Pensée's opposition to PIFSS' claim was full-throated, and maintained at enormous expense. Although Pensée called only one factual witness (Mr Chalopin), as well as one shared expert witness on Kuwaiti law, their legal costs were estimated at £ 19 million. Mr Chalopin in evidence described this expenditure as "insane". Mr Chalopin also said that he did not know who was giving instructions for the claim to be defended in this way, and that he did not know whether it was Mr Al Rajaan's daughters.

2033. In my view, it is an obvious inference from the fact that this claim is being defended so vigorously by Pensée, against a background of Mr Al Rajaan having been the individual who controlled Pensée and its assets prior to his death, that it is being defended in the interests of, and no doubt on the instructions of, Mr Al Rajaan's heirs. A letter sent by PCB, on behalf of D1, towards the end of the trial (on 9 March 2026) made it clear that the heirs were not giving instructions either to Mr Chalopin or to Pensée's solicitors. I accept that that is so. But the letter pointedly did not say that the heirs were not giving instructions to Deltec's fiduciary services department which was, as Mr Edey explained to me, responsible for instructing Pensée's solicitors.

2034. The matters described in the previous paragraph are not directly relevant to the issues resulting from the 4 ways in which PIFSS puts its case. They do, however, highlight a consequence of the arguments which Pensée is advancing. Pensée does not dispute that the monies in the Pensée account are in fact the proceeds of crime: i.e. unlawful secret commissions paid to Mr Al Rajaan. Pensée does not formally concede that that is so, but (sensibly) it advances no argument to the contrary. The evidence at the trial plainly indicates that the monies are indeed the proceeds of crime. Those illegally acquired monies have been caught in Pensée's account at Deltec as a result of a combination of Deltec declining to move them in early 2019, despite Mr Chalopin's best efforts, and then the WFO and Mr Nasrallah's disclosure of the Pensée assets. However, the effect of Pensée's submissions is that the court should now assist in the completion of the process of laundering those commissions through to Mr Al Rajaan's heirs, by declining to accept any of PIFSS' arguments, and then (presumably) lifting the injunction in so far as it relates to the Pensée monies.

2035. As explained above, Pensée accepts that an English court applying English law would do no such thing. An English court would have no difficulty at all in granting relief to PIFSS in relation to monies which are the proceeds of bribes. However, Pensée contends that the position is entirely different under Kuwaiti law, which (on its approach) would permit and indeed require the court to allow the monies to be passed to Mr Al Rajaan's heirs. This result is strange and disturbing, and produces a result which is counter-intuitive. It therefore calls for close scrutiny of Pensée's arguments in order to see whether they could possibly be correct.

2036. Oral evidence at trial in relation to the Pensée issues was given by Mr Nasrallah and Mr Chalopin. Mr Nasrallah was cross-examined on these issues by Mr Edey for Pensée, and Ms Jordan for PIFSS. Other sections of this judgment (in particular Sections H and J) contain my assessment of Mr Nasrallah as a witness. I have concluded that, generally speaking, he is not an honest man or a reliable witness. Mr Edey also cautioned against reliance on answers given by Mr Nasrallah in response to PIFSS' cross-examination for a different reason: that some of the responses relied upon were by way of agreement to leading questions, in circumstances where PIFSS was itself seeking to rely on Mr Nasrallah's evidence. I agree that, for that additional reason, some of Mr Nasrallah's answers in evidence should be treated with caution.

2037. With that background, I turn to the relevant facts. I start with my assessment of Mr Chalopin as a witness.

L2: Mr Chalopin

2038. Mr Chalopin was an unlikely person to have very senior positions in a bank. He had had a successful career in animation and screenwriting, and his company enjoyed great success with the well-known "Inspector Gadget" series. He became a shareholder in Deltec International Group, the parent company of Deltec in the early 1990s. By 2009, he (or entities with which he was concerned) was the largest shareholder in the parent company, and he remains the largest shareholder to this day. He had no banking experience, and he said that he received no training in governance or compliance when he joined the board of the parent company. From 2010, he became involved in trying to bring in clients for Deltec.

2039. At the time of the relevant events in 2012 – 2013, he was a director of Deltec International Group, and a non-executive director of Deltec. His active involvement in the business of Deltec increased in late 2012, following the death of its CEO Tim Fraser-Smith. One of his roles was to seek a new CEO for Deltec. Another role was to become the de facto relationship manager for Mr Al Rajaan. In his evidence, Mr Chalopin accepted that relationship manager was a fair description of what he was doing, albeit that he did not formally have that job title and was not, in late 2012 or early 2013, being remunerated by Deltec (save that certain travelling expenses were being reimbursed).

2040. Mr Chalopin became chairman of the parent company in 2014, and was chairman of Deltec between 2016 and 2024. He was also the CEO of Deltec between 2016 and 2019. He found someone to replace him in 2019, but later

resumed that post in December 2024 and held it at the time when he gave evidence in the trial.

2041. He said in cross-examination that he was not a banker by training. He did not pretend in his 60s to learn banking work or fiduciary work, he lacked knowledge in the financial sector and was completely out of his league. On this basis, it is impossible to see how he was suitable for the role of CEO of a bank, bearing in mind (for example) his written evidence that management of the bank, including the CEO and Chairman of Deltec, had oversight over its compliance department, to ensure that they did their job properly.

2042. My impression was that Mr Chalopin may have understood rather more than his self-portrayal as a complete amateur in the banking world; or as PIFSS put it, a person who "moved cluelessly through the world of offshore asset structures". The documents show that he came up or was involved with ideas, at various times after 2013, for moving Mr Al Rajaan's assets around, using offshore vehicles.

2043. Mr Chalopin was cross-examined for just short of two days in relation to his involvement in the creation and operation of Pensée, and his dealings with Mr Nasrallah and Mr Al Rajaan. In that context, PIFSS' case was that he always knew that Pensée was set up with the intention of concealing Mr Al Rajaan's interest in its assets from the wider world; and that Mr Chalopin always knew that the account was going to receive secret commissions on behalf of Mr Al Rajaan. This was denied by Mr Chalopin. But he did accept, on two occasions in his cross-examination, that he had known that the Pensée account was held for Mr Al Rajaan and for Mr Al Rajaan alone. Thus, there was the following exchange towards the end of his cross-examination:

> "Q. You always knew that the money in the Pensée account was held for Mr Al Rajaan and Mr Al Rajaan alone.
>
> A. It's what the nominee agreement shows and the nominee agreement received my signature, so, yes, I'm aware of that, but time have passed and I had forgotten about that thing. It's why I was asking to retrieve. I did not remember the content."

2044. Mr Chalopin's evidence in cross-examination left me in no doubt that, in his dealings with Mr Al Rajaan, his attitude was to try to do what the client wanted, without any regard to its propriety. His focus was on attempting to grow the business of Deltec Bank, which was small in 2012 and 2013. He was looking to bring in clients, and he was not a person who would ask difficult or awkward questions. If there was a problem with what a client wanted to do, then the first and only line of defence was Deltec's compliance department, which Mr Chalopin described as a "circuit-breaker". However, Mr Chalopin had no real qualms about misleading colleagues in Deltec in order to achieve the client's aims.

2045. These matters were illustrated by episodes explored in the evidence. Section L5 below refers to these episodes in their chronological sequence, but I will describe them here in the context of my assessment of Mr Chalopin.

2046. One of the most striking episodes concerned a development in August/September 2019. On 1 August 2019, Ms Ava Smith (in Deltec's Data Management Department) asked the fiduciary services department for CRS/tax forms for Pensée. The request was passed on through a number of individuals at Deltec, who identified that the account was linked to Mr Al Rajaan, as well as Mr Nasrallah. Mr Robert Turnquest, an investment officer, copied Mr Chalopin into the relevant e-mail string in the late afternoon of 1 August 2019. He said that it was also his understanding that the account was linked to Mr Al Rajaan, and he did not have a contact for Antoine Nasrallah. He added: "I have copied Jean as he may be able to clarify the relationship". Mr Chalopin responded by email:

> "FAR is only the investment advisory. The Foundation belongs to Antoine (Tony) Nasrallah. Send me the documents and I will contact him (he is a Lebanon resident and so is his son)."

2047. The statement that Mr Al Rajaan was "only the investment advisory" was untrue, and Mr Chalopin knew that it was. As can be seen from the answer quoted above (and as discussed in more detail below) his understanding was that Pensée and its assets belonged beneficially to Mr Al Rajaan. Mr Chalopin did not have a clear understanding of how Bahamian Foundations worked, and in particular did not understand that legally (as Pensée emphasised in submissions), and unlike a company, a Bahamian Foundation is not in fact owned by someone. Mr Chalopin's straightforward view was that Mr Al Rajaan was the beneficial owner of Pensée. That this was his view can be seen in the response which was given to questions asked by Mr Nasrallah's solicitors, Quinn Emanuel Urquhart & Sullivan LLP ("QE") in 2020.

2048. Mr Chalopin's understanding as to Mr Al Rajaan's beneficial ownership of Pensée, and thus that he was not "only the investment advisory" is also illustrated by Mr Chalopin's refusal, when Mr Nasrallah came to his office in 2017, to act upon Mr Nasrallah's request as to the transfer of funds. Following the formation of Pensée, Mr Chalopin dealt exclusively, or almost exclusively, with Mr Al Rajaan. It was therefore to Mr Al Rajaan that Mr Chalopin turned for instructions in response to Mr Nasrallah's request.

2049. However, the episode in August 2019 does not end with Mr Chalopin's response to Ms Clarke. The CRS and tax forms were then sent to Mr Chalopin. A CRS (Common Reporting Standard) form is required, principally, as a method of combating tax evasion. It requires the identification of beneficial owners or those who exercise control over entities such as trusts and companies. Mr Chalopin's untrue statement that Mr Al Rajaan was only the investment advisory, and that Mr Nasrallah was the owner, had consequences in terms of the documentation that needed to be signed. If, as Mr Chalopin knew or believed, Mr Al Rajaan was the owner or exercised control, then it would not

be satisfactory or sufficient for the relevant documents to be signed only by Mr Nasrallah, nor for those documents to contain no reference to Mr Al Rajaan.

2050. On 3 September 2019, an internal Deltec e-mail identified that the absence of CRS/tax forms was a regulatory breach, and that therefore "the client's account will be blocked by Compliance within 15 days should the requisite documents not be provided". The "client's account" was Pensée's account at Deltec. By 18 September 2019, the compliance department was requested by the data management department to proceed with blocking Pensée's account.

2051. This turn of events came to the attention of Mr Chalopin, and on 19 September 2019 an email was sent to Ms Ava Smith from Gia Singh, who was assisting Mr Chalopin in relation to Pensée and other matters. Ms Singh said:

> "Jean would like to have the complete physical file of Pensée (Antoine Nasrallah) sent to me or if you prefer I can arrange to collect."

2052. By 24 September 2019, Ms Smith was asking whether the file could be returned. Ms Singh responded that the files were being "secured in a file in Jean's Office", and that she would reach out to him to see if they could be returned. Another chaser was sent by Ms Smith on 18 October 2019. (I note that this was 2 days after I had granted the WFO in the English proceedings). The documents show that the files had been returned by 29 October 2019, when Ms Singh asked Ms Smith to confirm receipt.

2053. In the meantime, on 24 October 2019, a CRS and a tax form were purportedly signed by Mr Nasrallah. In his evidence, Mr Nasrallah was adamant that he had not signed the forms, and that the signatures on the forms were not his. He pointed out that his name was in fact mis-spelt: "Nassallah" rather than "Nasrallah". I accept that evidence, and have no doubt that these documents were clumsy forgeries. They were made whilst the files were in Mr Chalopin's possession, and hence when he would be able to see what Mr Nasrallah's signature and handwriting looked like for the purpose of copying. I also have no doubt that, despite Mr Chalopin's denials in evidence, the forgeries were either made by him or at his direction, with a view to providing forms which would then purport to meet regulatory requirements and thereby potentially lead to the unblocking of Pensée's account.

2054. On 7 November 2019, Ms Clarke e-mailed the executed CRS and tax forms to Deltec's data management (and others) stating:

> "Please see the attached as executed by the client in the presence of Jean Chalopin and returned to our office."

2055. Although Mr Chalopin maintained in evidence that he was a man of integrity, there are many aspects of this sequence of events which show otherwise.

2056. First, Mr Chalopin's initial e-mail on 1 August 2019 to his colleagues was misleading. As discussed, Mr Al Rajaan was not "only the investment advisory" and Mr Chalopin knew this. It was also misleading, because Mr Chalopin had

no intention of contacting Mr Nasrallah, and did not in fact do so. All of Mr Chalopin's dealings in relation to Pensée, since its creation and initial funding in the summer 2013, had been with Mr Al Rajaan. All of Pensée's investment activities had been at the behest of Mr Al Rajaan, and all the information as to the performance of investments had been given by Mr Chalopin to Mr Al Rajaan, for example when they had meetings in London. No performance information had been given to Mr Nasrallah, who therefore did not know what investments Pensée had made. In fact, the only contact which Mr Chalopin had with Mr Nasrallah, after the initial creation and funding of Pensée in 2013, was the brief visit by Mr Nasrallah to the Bahamas in 2017, when Mr Chalopin refused to let him close Pensée's account, and have the monies in its account remitted to him. Mr Chalopin took telephone instructions from Mr Al Rajaan, who made it clear that this was not to happen.

2057. Secondly, Mr Nasrallah's signature on the CRS and tax forms, which were in due course returned by Mr Chalopin to Ms Clarke, was forged either by or at the direction of Mr Chalopin.

2058. Thirdly, and leaving aside the issue of forgery, Mr Chalopin must have known that the information contained in the CRS form was incomplete and misleading. Part VI of the CRS form contains a declaration as to various matters, including that: "I confirm that the details of each beneficial owner and Controlling Person have been correctly completed". Part V required a list of "EACH Controlling Person of the Entity, confirming ALL jurisdictions of tax residence and ALL Tax Identification Numbers for EACH Controlling Person". The only details inserted in that section were those of Mr Nasrallah. There was no reference to Mr Al Rajaan, notwithstanding that it would have been obvious to Mr Chalopin that Mr Al Rajaan was a controlling person. It is impossible to see how this form could properly have been completed without any reference to Mr Al Rajaan at all. I do not accept Pensée's submission that I cannot reach this conclusion without the benefit of expert evidence as to CRS forms.

2059. Fourth, I have no doubt that Ms Clarke's statement to her colleagues, on 7 November 2019 – that "the attached as executed by the client in the presence of Jean Chalopin" – was based on information that Mr Chalopin had given to Ms Clarke, whether directly or indirectly. In fact, Mr Chalopin had not met Mr Nasrallah since 2017, and there were no documents in 2019 which were executed by Mr Nasrallah in the presence of Mr Chalopin. In informing Ms Clarke that the documents were executed in his presence, Mr Chalopin was acting dishonestly. As described below, this was not the only occasion on which Mr Chalopin had pretended to colleagues that he had met Mr Nasrallah, in order to give the impression that Mr Nasrallah had a continuing involvement and interest in Pensée and its operation. I do not accept Mr Chalopin's suggestion that Ms Clarke's e-mail was the result of a misunderstanding on her part.

2060. Mr Edey put forward a variety of arguments as to why I should not pay any regard to this episode, or draw any relevant conclusions adverse to Mr Chalopin.

2061. He submitted that PIFSS had not pleaded the forgery of the CRS forms, or their intention to rely thereon. I do not accept that this needed to be pleaded. The argument essentially repeats, in a different context, Pensée's argument that

failed at an earlier stage of this trial; see [2025] EWHC 1357 (Comm). I referred there to the decision of the Court of Appeal in *Fen and others v D'Cruz* [2007] EWCA Civ 319, and how dishonesty may become relevant evidentially rather than as an element of a cause of action: see in particular paragraphs [67] – [68]. I accepted PIFSS' argument that:

> "there is indeed a distinction between an allegation of dishonesty which is part of a claimant's cause of action (which must be expressly pleaded), and an allegation of dishonesty which arises evidentially (which need not be pleaded). Similarly, as May LJ says, one party can always say that another party's evidence on a particular issue, and indeed generally, is untrue. These are not points which need to be pleaded or particularised in advance, and this is the case even if a party is alleging that the witness is being untruthful (and not simply mistaken) in the evidence given."

2062. Here, the forgery of Mr Nasrallah's signature is relevant evidentially: it is relevant to Mr Chalopin's credibility, his willingness to act with impropriety in relation to the affairs of Mr Al Rajaan, and to put forward documents which do not represent the true position. These matters are relevant to the assessment of the evidence in relation to the matters which are squarely pleaded as to his assisting in money laundering, for the benefit of Mr Al Rajaan, at the time that Pensée was created in 2013.

2063. I also reject the argument that there is any unfairness in this point being taken. PIFSS had never accepted that the CRS forms were genuine. At the hearing on 16 May 2025, when Pensée (largely unsuccessfully) sought to limit the cross-examination of Mr Chalopin, Ms Jordan for PIFSS made it clear that PIFSS had pleaded all the documents created at the inception of the Pensée scheme where falsity was alleged. However, she made it clear that there might be cross-examination on documents created subsequently, which PIFSS would or might say were produced fraudulently: see paragraphs [82] – [83] of the above judgment. Mr Mather on behalf of Pensée did not object to this course, correctly in my view.

2064. The question of the authenticity of Mr Nasrallah's signature of CRS documents then came into focus some 2 weeks before Mr Chalopin was cross-examined on 25 July 2025. Mr Nasrallah was cross-examined on 11 July 2025, and he made it clear that he had not signed the relevant documents. Pensée and Mr Chalopin therefore had a reasonable amount of time to consider this point in advance of cross-examination of Mr Chalopin.

2065. Mr Edey submitted that there had been no opportunity for Pensée to obtain handwriting evidence, to support an argument that Mr Nasrallah had indeed signed the documents. I reject that too. The length of this trial means that there has been a considerable amount of time when parties could, if so advised, seek to adduce further evidence on issues which emerged evidentially during the trial. Here, Mr Nasrallah's evidence was given 2 weeks before Mr Chalopin's, and an expert could have been consulted during that time. Furthermore,

although his evidence finished on 11 July 2025, the trial itself continued for a further 8 months. There was ample time in the following months for Pensée to obtain handwriting evidence, or evidence from other factual witnesses who could speak to Mr Nasrallah having signed the document, and to make an application to adduce that evidence on the basis that the point had not been anticipated in advance of trial. I would most likely have been sympathetic to such an application, and it may not even have been opposed. However, no application to adduce further evidence was made.

2066. Mr Edey's central submission, however, on this and other areas where Mr Chalopin's integrity was challenged, was that it provided no substantial evidence on the key question of whether Mr Chalopin had known, in 2013, that the monies received by Pensée were the proceeds of secret commissions paid unlawfully to Mr Al Rajaan. He said that the events happened in 2019, some 6 years after the formation of Pensée and the receipt of monies. They cast no light backwards as to what the position was at an earlier stage.

2067. I was not persuaded by this argument. The episode that I have described casts very considerable doubt on Mr Chalopin's honesty, including in his dealings with his colleagues. These matters are relevant to my assessment of whether Mr Chalopin is a reliable and credible witness, bearing in mind as well my rejection of his evidence on this episode.

2068. However, the evidence as to this episode is relevant not only to the weight to be attached to Mr Chalopin's evidence. It shows him as a man willing to assist in the production of documentation which falsely records the true position, and to do so for the purpose of assisting Mr Al Rajaan to obtain monies which he would otherwise be prevented from obtaining access. This is of clear potential relevance when considering what Mr Chalopin's attitude and knowledge was in 2013, when (as described below) documents were produced, in the context of the formation of Pensée, which falsely recorded the true position. I accept that it is not conclusive; for example, because Mr Chalopin may have had more knowledge in 2019 than he had in 2013. However, I regard it as powerful, and I will return to its significance in relation to my assessment of the evidence as a whole: see Section L8 below.

2069. There are other episodes which illustrate Mr Chalopin's lack of integrity and willingness to do whatever it was that his client wanted, irrespective of its propriety. By the summer of 2015, Mr Chalopin – and indeed the Board of Deltec – were aware of the criminal investigations into Mr Al Rajaan. A report to the Board by Deltec's compliance department in June 2015, headed "Fyne Properties", referred to the accounts of Mr Al Rajaan having been frozen in the UK and Switzerland, and that the Kuwaiti authorities were seeking the assistance of Interpol in having Mr Al Rajaan arrested and brought back to Kuwait to be prosecuted. The report also stated that based on the allegations being made, Deltec immediately took action to block the Fyne account to prevent it being accessed by the client.

2070. Nevertheless, Mr Chalopin sought to assist Mr Al Rajaan in early 2016 in transferring the ownership of Fyne from Mr Al Rajaan to Mr Al Rajaan's daughter. Mr Chalopin met Mr Al Rajaan on 11 January 2016, and on 31

January 2016 he asked some of his Deltec colleagues for letters transferring Fyne (and another company, Lulienne) to his daughter Fajer Al Rajaan ("Fajer"). This seems (to put it mildly) a surprising thing to do in circumstances where there are known asset freezes, admittedly in other jurisdictions, and when the Board of Deltec had been informed by compliance that access by the client to the Fyne account had been blocked.

2071. There was then a further meeting between Mr Al Rajaan and Mr Chalopin on 4 February 2016. In an email to his colleagues on that day, Mr Chalopin referred to his meeting, and indicated that something had gone wrong with the paperwork: the document providing for the transfer from Mr Al Rajaan to Fajer was missing. The email went on to say:

> "Also he would like to have a similar document for each company with date left in blank doing the reversed transaction, that he would like to have signed by him and his daughter and that we would keep in our safe. I have copied Kenris so that she could authorize the crafting of these documents.
>
> Once this is done, can you send the 3 documents (Fyne, then Lulienne and Fyne for the reversal) by courier to [Mr Al Rajaan's address in Knightsbridge]
>
> PLEASE PUT MY DAUGHTER'S NAME AND ADDRESS IN NEW YORK AS THE SENDER'S ADDRESS – TANIS FONG, 133 GREENE STREET, NYC, 10012 USA." (Capitals in original)

2072. In cross-examination, Mr Chalopin accepted (as was clearly the case) that what was being proposed was a transfer of shares to Mr Al Rajaan's daughter, but then a secret reverse transfer that Mr Al Rajaan could put into effect at any time, thus making sure that he retained the real ownership in these companies. It was put to him that Mr Al Rajaan was wanting to pretend that he was transferring ownership, but not really transferring ownership. Mr Chalopin agreed that that was what appeared to be the effect of the note. He was then asked whether he thought that it was honest to assist Mr Al Rajaan to do that. Mr Chalopin said that this was a difficult question, and he now feels that (in the light of everything now known) he should have been more cautious.

2073. I did not myself think that this was a difficult question. I cannot see any honest justification for the pretence of a transfer to Fajer, with the document providing for the re-transfer – which showed the true nature of the transaction as a whole – then being secreted in Deltec's safe. Mr Chalopin must have appreciated this at the time, and I do not accept his evidence – and this was a theme of his evidence throughout – that it is only with the benefit of hindsight that he could see that something was amiss.

2074. Again, these events are potentially relevant to Mr Chalopin's attitude and knowledge in 2013. Indeed, this proposal – with which Mr Chalopin was happy to go along (although in the event it did not materialise) – substantially mirrors

what happened with the documents relating to the creation of Pensée. There too, the true nature of the transaction as a whole, including Mr Al Rajaan's interest in Pensée, was concealed, at least as far as Deltec's electronic files were concerned, by a key document being placed in Deltec's safe, together with a specific instruction that it should not be scanned.

2075. Mr Chalopin was also cross-examined about the capitalised sentence in the above e-mail. It was put to him that this involved a lie: a pretence that the documents were coming from his daughter in New York when they were in fact coming from Deltec in the Bahamas. Mr Chalopin did not accept that this was a lie, and felt that this was "too strong". I disagree. Mr Chalopin was prepared to create a document which falsely recorded the sender of the relevant documents, thereby hiding the fact that it had been drafted and sent by Deltec.

2076. These events in February 2016, and Mr Chalopin's willingness to participate in concealment and a lie, are even more concerning in view of the fact that Mr Chalopin had only recently become the CEO of Deltec.

2077. His attitude at that time, and indeed earlier, was encapsulated by his response to the question as to whether this (i.e. the pretence that documents were being sent by his daughter) was a lie:

> "I feel the word "lie" is too strong for that, but … the client …. wanted something to be sent, not using Deltec name. What do you do?"

My answer to that question is that Mr Chalopin should have acted honestly, and told the client that his request was improper and could not be complied with.

2078. However, that was never Mr Chalopin's attitude. At another point in his evidence, Mr Chalopin was asked about requests which he had made in January 2019 for various steps to be taken to dissolve Pensée, form a new company in the name of Mr Al Rajaan's son Fawaz, transfer the assets of Pensée to the new company, and to ensure that Fyne was transferred to Fajer. It was put to him that he was trying to help Mr Al Rajaan to hide his assets. In my view, that was exactly what Mr Chalopin was trying to do. Mr Chalopin had two answers to the point. He said that he knew about the accusations against Mr Al Rajaan, but did not know the detail, for example about secret commissions. And he said that he trusted the compliance system, which meant that something would not be done if it should not be done. He went on to explain:

> "I was trying to, apparently, accommodate the need, knowing that if it could not be done, it will not be done. Somehow it's trying to be commercial and accommodate the request of the client. My role was not to be conflictual with him, and keep in mind that I was seeing him and discussing with him very rarely at that time. So it was, "Okay, you want that", I transmit to account services. "Let's see what can be done". It's a little bit easy for me to say that, honestly speaking, but it's the state of mind I had at that time."

2079. In considering Mr Chalopin's attitude, I do bear in mind that, at least as a starting point, a banker is expected or required to follow his client's instructions. However, a reason that banking is highly regulated, with compliance such an important feature, is that a banker cannot do so uncritically or without regard to propriety, not least in order to avoid money-laundering.

2080. These various episodes, and Mr Chalopin's attitude, are material to Pensée's argument that Mr Chalopin had no motive knowingly to assist Mr Al Rajaan in concealing monies which were the proceeds of secret commissions. I reject that point. Mr Chalopin's attitude throughout demonstrates an obvious motive: he perceived his job as being there to help the client do what he wanted, and thereby develop the business of the bank in which he had a substantial shareholding.

2081. Overall, my assessment of Mr Chalopin is that he was not a person of integrity generally, and specifically in relation to his work for and engagement with Mr Al Rajaan. I treat his evidence with considerable caution, in particular as to his knowledge of what Mr Al Rajaan was seeking to do, and as to whether Mr Chalopin knew that he was helping to launder secret commissions.

L3: Bahamian Foundations

2082. Before addressing the facts in detail, I will briefly explain the legal nature of a Bahamian Foundation, since it is much relied upon by Pensée in connection with their arguments, particularly the bare trust issue. There was no real dispute as to the legal position, and the following substantially reproduces Pensée's written closing submissions in that regard.

2083. Private Foundations are creatures of statute originating in civil law jurisdictions and subsequently enacted in various common law jurisdictions, including the Bahamas by way of the Foundations Act, enacted in 2004. They are regarded as attractive for a range of legitimate and lawful purposes, including: (i) offshore wealth/tax planning, particularly by clients from civil law or Islamic law jurisdictions; and (ii) succession planning, including with a view to guarding against forced heirship rules which are typical in Islamic and civil law jurisdictions. They can, however, be used for illegitimate purposes as well, as Mr Edey recognised in his closing submissions.

2084. A Foundation is a separate legal entity created by incorporation or registration at the instigation of one or more Founders and is governed by a council or other governing body. It must have a Foundation agent or secretary, and that person will be an officer of the Foundation. In the present case, Deltec was the Foundation agent.

2085. The primary constitutional document of a Foundation is its charter, for which section 6 of the Foundations Act makes detailed provision as to mandatory and discretionary contents. The Foundations Act also provides an annexed Model Foundation charter, whose contents operate as default provisions in the absence of contrary provisions.

2086. The Model Foundation charter provides that the Foundation's main purposes or objects shall be to manage "its" assets and do all such ancillary things as are

reasonably necessary thereto, including making payments or distributions to or for the benefit of beneficiaries.

2087. The separate legal personality of a Foundation means that its assets are separate from the property of the Founder, in the same way as the assets of a company are separate from those of its shareholders. In contrast with the position with trust assets, a feature of a Foundation is that it is conventionally both the legal and beneficial owner of the assets transferred to it. Nevertheless, as Pensée accepted, it is legally possible for a Foundation to receive and hold assets on bare trust for another party in the same manner as any other legal person. A key issue is whether this happened here: see Section L6 below.

2088. The position of a Foundation's beneficiaries differs markedly from that of beneficiaries under trusts. The Model Charter provides that the Founder may remove or add beneficiaries from time to time by written notice. The beneficiary of a Foundation – who is not the beneficial owner of the Foundation's assets, unlike a trust beneficiary in relation to trust property – has limited remedies against the Foundation council or the Foundation itself, generally lacking even contractual rights as against the Foundation of which he or she may be unaware. The Founder can himself be a beneficiary, although in the present case, Mr Al Rajaan was not a named beneficiary.

2089. A Founder of a private Foundation has the ability to retain considerably greater influence, or even practical control, over the entity than would a settlor over a trust, at least under the orthodox English law tradition. Founders' rights or powers may include the right to: revoke the Foundation; amend its constitution; designate, add or remove beneficiaries; and give directions to the governing council, including as regards distributions. If a Foundation is revoked by the Founder, absent contrary provisions, the Foundation's assets shall be refunded to the Founder or such other person nominated by the Founder in the notice of revocation.

2090. The Foundations Act also expressly envisages the use of a nominee Founder: a "Founder" is defined (at s 2(1)) as the person who subscribes his name to the charter establishing a Foundation "acting either for himself or on behalf of another" and who endows that Foundation with its initial assets. Thus, where a nominee Founder is used, all references to the "Founder" in the Foundations Act, the Model Charter and the Foundation's charter are to be read as references to the nominee Founder. (I note in passing that, contrary to the requirement of the Act, Mr Nasrallah did not in fact endow Pensée with any assets, including the minimum initial assets of USD 10,000 provided for in Clause 4 of Pensée's charter). It is, for example, the nominee Founder whose name must therefore appear in the Charter: s.6(1)(b). An obvious, and possibly only, reason for using a nominee Founder is as an additional layer of privacy for the ultimate Founder. Equally obviously, a desire for such additional privacy is not in itself a hallmark of wrongdoing – otherwise, nominee Founders would not be an express feature of the legislative scheme.

2091. It follows from the above provisions of the Foundations Act that, as a matter of Bahamian law, the retention by the Founder of very extensive powers of practical control with respect to the assets transferred to a Foundation is

consistent with the Foundation having full ownership of those assets by reason of the transfer. By the same token, an intention on the part of the Founder to retain such powers of practical control with respect to assets is consistent with the Founder's intention to divest himself of the ownership of those assets and transfer the ownership of those assets to the Foundation. The existence of a vehicle created by statute and, by dint of statutory provision, having those features, distinguishes such transfers from, for example, a transfer (or purported transfer) into trust, where the settlor's intention to retain powers of control tantamount to ownership may be inconsistent with the existence of an intention to part with the beneficial ownership of the property transferred.

2092. Pensée's Foundation Charter was signed by Mr Nasrallah, and bore the date 18 June 2013, although it appears that this was inserted subsequently. It identified the Founder as Mr Nasrallah. In so far as particular provisions of the Charter are relevant to the parties' arguments, they are discussed in context below.

2093. I now turn to the facts relating to the creation and operation of Pensée in more detail, before returning to the arguments on the 4 issues raised by PIFSS.

L4: 2012 – 2013: the creation of Pensée

2012: Fyne Properties Ltd

2094. Mr Al Rajaan's relationship with Deltec began in May 2012 as a reaction by him to the Swiss criminal investigation and the need to move money from Pictet. He had a long-standing relationship with Mr Hugues Lamotte, who was a shareholder (along with Mr Chalopin) in the parent company of Deltec. Mr Lamotte had been partner (with Mr Patrick Stevenson) in Atlas Capital Ltd. PIFSS had been the largest client of Atlas, with sums exceeding USD 500 million in funds under management. Substantial commissions, amounting to around USD 50 million, had been paid by Atlas, or Sigma (a company with which Atlas was associated). These form part of the claim against Mr Al Rajaan and Mr Nasrallah in these proceedings: see Section J above. However, there is presently no claim against Atlas, or Mr Lamotte, and I cannot make any findings as to whether that company or Mr Lamotte was knowingly party to bribery. What is clear on the evidence, including the evidence of Mr Nasrallah, is that Mr Al Rajaan knew Mr Lamotte very well, and would have trusted him. When the difficulties arose in Switzerland for Mr Al Rajaan in 2012, he therefore turned to a Bahamas bank with which Mr Lamotte was associated.

2095. Mr Al Rajaan was introduced by Mr Lamotte to Mr Tim Fraser-Smith, then the CEO of the Bank. There was clearly a desire on the part of Mr Al Rajaan, and indeed Mr Lamotte, for an account to be opened very quickly. Mr Lamotte's email to Mr Fraser-Smith, dated (Thursday) 10 May 2012, asked whether the bank would be able to receive funds in the following week. A handwritten letter from Mr Lamotte, also dated 10 May 2012, said that ideally Mr Al Rajaan would start transferring cash on the following Monday. The anticipated receipts were USD 40 million in cash and a similar amount in funds. On 11 May 2012, Mr Fraser-Smith told Mr Lamotte that the account was open. Mr Lamotte replied stating that he would tell the new client "that everything is now set at DBT to welcome his transfer of assets".

2096. Mr Chalopin does not appear to have had a significant involvement at that time, save that it was envisaged that a company which he had previously owned – Fyne – would in effect be transferred by Deltec to Mr Al Rajaan for the purposes of receiving the assets to be transferred.

2097. In fact, no payment into the new account, in the name of Fyne, was made until the end of May/beginning of June 2012, when a transfer from Pictet of EUR 34 million was made. At around the time of the transfer, Deltec's compliance department, headed by Ms Lianne Johnson, carried out checks on Mr Al Rajaan, who would be the new beneficial owner of Fyne. These checks revealed nothing untoward.

2098. In September 2012, Mr Fraser-Smith met Mr Al Rajaan in London. In his evidence, Mr Chalopin accepted that he would likely have received a debrief on what had happened at the meeting. By early January 2013, Mr Chalopin knew enough about Mr Al Rajaan to tell his colleagues that Mr Al Rajaan could be a very significant client, and that "[t]otal discretion and privacy is an essential factor for him". In the meantime, Mr Fraser-Smith had died, and Mr Chalopin was becoming more active in relation to the business of Deltec.

2099. Prior to the Paris meeting described below, Mr Chalopin had met Mr Al Rajaan twice: once at his home in Cologny, and the second time in April 2013 at his apartment in Knightsbridge. That second meeting took place against the background of concerns expressed by Ms Johnson, following the World-Check report referred to below. In addition to being head of compliance at Deltec, Ms Johnson was also Deltec's nominated Money Laundering Reporting Officer.

2100. On 16 January 2013, she sent a memo to her colleague, Terry Girling (an executive director of Deltec, and at that time the CFO and acting CEO) saying that they needed to discuss the Fyne account urgently. She said that: "This account was opened in May 2012 which is significant as World-Check is now reporting (November 2012) that as at May 2012 (a few days after the opening of the account) that he is being investigated." The World-Check report said that the investigations were into corruption charges. Ms Johnson had therefore identified the coincidence in timing between the start of the investigation and the opening of the Fyne account.

2101. On 20 February 2013, Ms Johnson sent a further memo to Mr Girling, repeating the text of her January memo. She reported that Mr Chalopin had spoken with Mr Al Rajaan during the previous week. The latter had said that he was the "victim of the brokerage company and that there was no issue on the corruption charges, but he would discuss the findings in detail when they meet in person". It was therefore envisaged that there would be a more detailed discussion between Mr Chalopin and Mr Al Rajaan when they met. Ms Johnson advised that the account would be reported to the board, and that its risk rating would be adjusted from medium to high in order to "allow us to monitor the account more closely".

2102. On 21 March 2013, Ms Johnson forwarded to Mr Chalopin several newspaper articles. These articles covered various issues connected to PIFSS and Mr Al Rajaan, as well as wider political developments in that context. They referred

to: reports that Mr Al Rajaan's Swiss bank accounts had been frozen; the suspension of Mr Al Rajaan; and to significant losses in options trading. Relevant passages in the reports were highlighted.

2103. Mr Chalopin and Mr Al Rajaan did then meet, and there was discussion of these matters. There is no dispute that by this time, and indeed from an early stage, Mr Chalopin knew that Mr Al Rajaan was the Director General of PIFSS. Mr Chalopin's evidence was that he was told by Mr Al Rajaan that the issue was a political issue. An internal Deltec memo, updating Ms Johnson's earlier memos, recorded her understanding of what Mr Chalopin was told by Mr Al Rajaan, at their in-person meeting in April 2013: Mr Al Rajaan had retained his job at the pension fund and the Swiss banks had unfrozen his accounts. The memo went on to record that Mr Al Rajaan had now been removed from World-Check and was no longer listed as a concern. It does not appear that Mr Chalopin asked any detailed questions of Mr Al Rajaan in relation to the timing of the payments to the Fyne account.

2104. I agree with PIFSS that Mr Chalopin's evidence as to the meeting was surprising in that: he did not ask Mr Al Rajaan to explain the timing of the EUR 34 million transfer of funds from Switzerland to Fyne at Deltec; he said that he did not realise that Mr Al Rajaan had wanted to move his assets with urgency in May 2012; he said that the timing of the opening of the Fyne account was not the core point to which compliance wanted an answer; and he did not recall being concerned that Deltec might have been used as the recipient of funds to avoid them being frozen. In my view, the explanation of some of this evidence lies in the fact that Mr Chalopin was not a man who would ask difficult questions of a client whose business he was interested in cultivating, or would probe answers received. He was happy to do whatever the client wanted, and would readily accept anything that he was told in order to maintain and develop the business relationship.

2105. In summary, the position at this stage was that Ms Johnson in compliance was asking appropriate questions and appeared to be carrying out her work conscientiously. As a result of her work, Mr Chalopin was aware of allegations of corruption concerning Mr Al Rajaan, and also reports as to the freezing of his bank accounts in Switzerland. However, he received assurances from Mr Al Rajaan that there was no basis for concern. Had matters rested there, it would be difficult for PIFSS to contend that Mr Chalopin knew that Mr Al Rajaan was seeking Deltec's assistance in concealing corrupt payments.

2106. However, matters did not rest there. It is clear that there was discussion between Mr Al Rajaan and Mr Chalopin, at the meeting and perhaps in the call which preceded it, about the setting up of a vehicle in the form of a "Foundation" by Deltec in the Bahamas, and about the involvement of Mr Nasrallah in that connection. This is clear from the fact that Mr Chalopin brought various documents to the next meeting with Mr Al Rajaan in Paris in June, and Mr Nasrallah was there, available to sign them.

2107. Quite who initiated the discussion about the Foundation is uncertain and is not important. Mr Al Rajaan had already established more than one Foundation, and so it is possible that he raised the issue. It is also possible that he had previously

discussed the idea with Mr Lamotte, as Mr Nasrallah suggested in his second witness statement. Mr Chalopin had some knowledge of Foundations which he described as becoming "fashionable" in the Bahamas at that time: he said that Deltec's fiduciary services department were proposing Foundations as an alternative to trusts. So it is also possible that it was Mr Chalopin who raised the issue. Mr Chalopin's evidence, which in this respect I accept, is that he did not fully understand at that time the legal nature of a Bahamian Foundation, including how it differed from a trust arrangement. He also did not understand a legal point which has been emphasised by Pensée: that the assets of a Bahamian Foundation are entirely owned by the Foundation itself.

2108. A number of matters, arising from the discussion about setting up a Foundation, are relevant in the context of the issues concerning what Mr Chalopin knew about why Mr Al Rajaan wanted this, and whether it was connected with the receipt of secret commissions. First, why was it that Mr Al Rajaan needed a Foundation at all, in order to receive monies? He already had Fyne, which had received substantial sums and which no doubt could receive more. Secondly, what was discussed about the purpose of the proposed Foundation? In his witness statement, Mr Chalopin said that Mr Al Rajaan wanted to do something for Mr Nasrallah's son, Nadim. Thirdly, why was it necessary to involve Mr Nasrallah at all, and to have him attend the meeting in Paris in order to sign documents?

2109. I come back to these issues in more detail, in various contexts, below. However, the short answer to these questions is that Mr Al Rajaan needed a new entity which, unlike Fyne, could not readily be seen to be connected to him. Questions were being asked about Fyne at Deltec, and Mr Chalopin was being asked to discuss them with Mr Al Rajaan. The documentation relating to Fyne at Deltec clearly showed its connection to Mr Al Rajaan. Fyne was therefore an unattractive vehicle for Mr Al Rajaan's purposes. As to the reason for needing a Foundation: I discuss in more detail below Mr Chalopin's evidence that it was for the benefit of Nadim Nasrallah. In my view, this suggestion fell apart in Mr Chalopin's cross-examination, and is unsustainable. As to the need to involve Mr Nasrallah: this was to avoid any apparent connection between the Foundation and Mr Al Rajaan.

2110. It was put to Mr Chalopin in cross-examination that this was the "whole purpose of the Pensée meeting that has been set up after your late April meeting with Mr Al Rajaan. He's asking you: "How can I hold my money with Deltec even more secretly than via Fyne"". Mr Chalopin's response was: "I don't find that to be more secret. Maybe it's my perception of things. I don't think it's protected him in any fashion any better". I consider this answer to be unconvincing, and it did not represent Mr Chalopin's view at the time. The evidence (discussed in more detail below) shows that the reason for the new Foundation had nothing to do with a desire to benefit Nadim Nasrallah; but rather was a way of providing a new vehicle, created with false documentation and surrounded in secrecy, which would receive and hold Mr Al Rajaan's assets. I have no doubt that Mr Chalopin appreciated this at the time, and that it is not something that he has only appreciated with the benefit of hindsight.

The George V meeting

2111. Following that meeting in Knightsbridge, a further meeting took place in Paris, at the George V Hotel on 7 June 2013. Evidence as to the meeting was given by Mr Nasrallah. Mr Chalopin could not in fact recall that he had met Mr Nasrallah on that occasion. His memory was that Mr Nasrallah had signed documents, relating to the establishment of what became Pensée, in the Bahamas. In that regard, however, Mr Chalopin's memory was inaccurate, as indeed Mr Chalopin was inclined to accept.

2112. Mr Chalopin's evidence in his witness statement was that he was "confident" that he did not bring any documents to create Pensée to the meeting. I reject that evidence. It is clear (as Mr Edey was inclined to accept in his oral opening submissions) that Mr Nasrallah did sign documents relating to the creation of Pensée at that meeting, albeit that the name "Pensée" was only finally decided subsequently.

2113. The initial series of documents relating to the proposed Foundation were thus signed in the George V Hotel Paris at the meeting attended by Mr Chalopin, Mr Nasrallah and Mr Al Rajaan. Mr Nasrallah's written evidence was that Mr Amouzegar also attended, but Mr Chalopin said that he did not believe that he had ever met Mr Amouzegar. I do not think that anything turns on the question of whether Mr Amouzegar did or did not attend. I think that Mr Chalopin may well be right in his belief that he never met him. There are no documents which suggest that Mr Amouzegar had any material involvement in the creation of the Foundation or with Mr Chalopin at any stage. Mr Nasrallah's evidence, as to Mr Amouzegar's involvement, can be viewed as part of a theme in his evidence whereby he sought to elevate Mr Amouzegar's role in the payment of secret commissions to Mr Al Rajaan, and their concealment, and to minimise his own.

2114. The documents signed at the Paris meeting were all signed by Mr Nasrallah. No documents concerning the Foundation were signed at that stage by Mr Al Rajaan. This is not surprising, since the substance of the arrangement between Mr Al Rajaan and Mr Nasrallah was that although the Foundation was Mr Al Rajaan's, Mr Nasrallah was going to be the front. No documents concerning the Foundation were in fact ever signed by Mr Al Rajaan, except for one: the "Pensée Agreement". This was signed in June 2013, but subsequent to the Paris meeting.

2115. Prior to the Paris meeting, Mr Chalopin had never met Mr Nasrallah. In fact, the evidence indicates that he only ever met him, at least in a business context, on one subsequent occasion: in 2017, when Mr Nasrallah unsuccessfully sought to close the Pensée account at Deltec. Mr Chalopin's diary refers to one other meeting headed "Nasrallah", in December 2013, but there was no evidence which indicated that this meeting had actually taken place. His witness statement also refers to a Paris meeting, which had no real purpose, save for Mr Nasrallah to show his Paris apartment to Mr Chalopin.

2116. Mr Nasrallah's evidence, in his witness statement, was that the purpose of the Paris meeting was to arrange an alternative method of paying the Pictet commissions. He said that he "suggested the name "Pensée"" for the nominee account, but the details of the legal arrangements were put in place by Mr Chalopin and Deltec. Mr Nasrallah said that he drafted a handwritten agreement

which, as he recalled, set out that the monies held by Pensée in Pensée's account were held for and on behalf of Mr Al Rajaan as the ultimate beneficiary of those funds, and, in the event of Mr Al Rajaan's death, his daughters would be substituted as beneficial owners of Pensée. Mr Al Rajaan told him this was important to him and that was why it was recorded at that time in the handwritten agreement. He said, referring to the text of the Pensée Agreement later drafted, that it was agreed with Mr Al Rajaan and Mr Chalopin, that Mr Al Rajaan was always the ultimate beneficiary of Pensée and the beneficial owner of the assets in the Pensée account, where he (Mr Nasrallah) only acted as a nominee for Mr Al Rajaan. He said that all the people at the Paris meeting, including Mr Al Rajaan himself, appeared to know that Mr Al Rajaan was the ultimate beneficial owner of Pensée and the assets within it.

2117. I do not accept every aspect of Mr Nasrallah's account, as summarised above. I do not accept that it was agreed that the money to be received by Pensée was to be derived, either exclusively or in substantial part, from Pictet commissions. This was part of a theme in Mr Nasrallah's evidence in which he sought to distance himself from the receipt of any monies whose source was not Pictet. In fact, the monies paid into Pensée had their source in fund managers other than Pictet, and were routed through the various Zetland companies. I am also unable to make a positive finding as to whether there was a handwritten agreement which recorded the parties' arrangements. Mr Nasrallah's evidence, ultimately, was that this was in Arabic – a language which Mr Chalopin would not have understood, and which could not have served as a useful basis for the Pensée Agreement which was in due course drawn up and signed.

2118. I also consider that Mr Nasrallah's evidence as to the intention for the daughters to be the beneficiaries of Pensée or its assets, in the event of Mr Al Rajaan's death, is based on a misreading of the Pensée Agreement, and that Mr Al Rajaan did not say that he wanted to benefit them to the exclusion of his other children. Indeed, when Mr Al Rajaan sought to liquidate Pensée in early 2019, with the assistance of Mr Chalopin, the intended recipient of the assets was Mr Al Rajaan's son or a vehicle which he owned.

2119. However, I do consider that all the participants agreed and well understood that, as Mr Nasrallah said, Mr Al Rajaan was to be the ultimate beneficial owner of Pensée and the assets within it; and that Mr Nasrallah's role was purely as a nominee. None of the participants in the meeting had any clear understanding as to the legal basis and effect of creating a Bahamian Foundation, and none of them understood the legal distinctions which existed between Foundations and trusts. Their understanding would have extended no further than that Foundations were a good way of concealing the real ownership of assets, and that this new Foundation could be created without showing its connection to Mr Al Rajaan. The participants also understood that there was no intention to benefit Nadim Nasrallah; and also that the reason for the involvement of Mr Nasrallah as nominee, and his son as the identified beneficiary, was to conceal the interest of Mr Al Rajaan in Pensée and its assets.

2120. The background to the agreement reached in Paris, and the written Pensée Agreement, and the aim and genesis of the transaction, had the following features.

2121. First, there was a need for a new structure to be created in order to receive the proceeds of secret commissions which, as both Mr Al Rajaan and Mr Nasrallah certainly knew, were being unlawfully paid to Mr Al Rajaan. Pensée did not ultimately dispute that, as far as those individuals were concerned, this was indeed one important aim of the arrangements.

2122. Secondly, there was a need for Mr Al Rajaan's ownership of the monies being paid into Pensée, and his connection with the Foundation, to be concealed. The method adopted was that Mr Nasrallah would be the apparent but not the real owner of the monies used to fund Pensée, and would be the only person identified as its Founder, with his son the only person identified as beneficiary. Fyne could no longer be used for the purpose of receiving Mr Al Rajaan's monies, since it was connected in Deltec's records to Mr Al Rajaan, and questions were being asked about it.

2123. Thirdly, there needed to be some written record of the fact that the real position was not as reflected in the documents signed in Paris. It was Mr Al Rajaan who wanted this to be recorded in writing, in a private and confidential agreement. The fact that the document was prepared at Mr Al Rajaan's behest is evidenced by the covering letter which Mr Chalopin sent out on around 17 June 2013, described below.

2124. All of these aims were known to Mr Al Rajaan and Mr Nasrallah, as will be apparent from my discussion of the evidence below. There is a significant dispute as to whether Mr Chalopin knew of the first aim, and I address that in detail in Section L8 below. However, I have no doubt that the second and third aims were known to him.

2125. Mr Chalopin's understanding from the very start was, in my view, that the proposed Foundation was Mr Al Rajaan's Foundation. In September 2020, Deltec was asked various questions by QE, and I was told by Mr Edey that this was at the behest of PIFSS. Deltec's response was dated 9 October 2020, and it was based upon enquiries made of Mr Chalopin, as well as the documents. One question was: "Who Deltec understands the legal and beneficial ownership of Pensée to be". Deltec's response was that: "It is Deltec's understanding that the legal owner of Pensée is Mr Antoine Nasrallah and the beneficial owner is Mr Fahad Al Rajaan". At the end of his cross-examination, in the passage already quoted, it was put to Mr Chalopin that he had always known that the money in the Pensée account was held for Mr Al Rajaan and Mr Al Rajaan alone. Mr Chalopin did not dispute this, saying that this was "what the nominee agreement shows, and the nominee agreement received my signature, so yes".

2126. Similarly, when asked about the Pensée Agreement, it was put to him that he understood that "after the transfer of funds into the Foundation, the true ownership remained with Mr Al Rajaan". His response was that he learned later that the Foundation is the owner, and that the person financing it is a donor. But here "the documents speak about "UO" which is "ultimate owner", so your interpretation seems to be correct on that definition". I consider that this must have reflected Mr Chalopin's understanding of the Pensée Agreement at the time that he sent it to Mr Nasrallah. I note in passing that Mr Chalopin's

understanding reflects my own interpretation of the Pensée Agreement: see Section L6 below.

2127. It was also put to Mr Chalopin at the end of his cross-examination that he had always known that Pensée was being set up with the intention of concealing Mr Al Rajaan's interests from the outside world. Mr Chalopin's answer was:

> "… I have answered that question many, many times. It was a structure put in place at his request. I don't recall why exactly it was done that way, but it was done, and yes, it's --- and by the way, it's known in the open, so I don't know how to answer your suggestion."

2128. That answer recognised, as did Mr Chalopin elsewhere in his evidence, that Mr Al Rajaan's intention in setting up Pensée was indeed to conceal his interests from the outside world. Although Mr Chalopin there (and elsewhere) suggested that he did not recall knowing that at the time, I have no doubt that this was clear to him at the time. Indeed, I do not consider that there is any other sensible conclusion, based on the documents which Mr Chalopin took to the meeting, and which were then signed, and those which were prepared and sent to Mr Nasrallah for signature subsequently. I now discuss those documents.

The documents signed at the Paris meeting

2129. The most significant documents signed at the Paris meeting were the "Foundation Questionnaire and Agreement", and the "Letter of Wishes". The former is, as its heading indicates, both a questionnaire and a contract, and it was later signed by Deltec in July 2013.

2130. The "Foundation Questionnaire and Agreement" ("the Questionnaire") contains the handwriting of Mr Nasrallah, but it also contains additional handwriting added subsequently by one or more individuals at Deltec. There was no evidence that Mr Nasrallah authorised any individuals at Deltec to make alterations to the document which he had signed. He was not asked to sign a copy which included the handwritten alterations. I received no explanation as to how a document, signed in one form by Mr Nasrallah at the meeting, could then be supplemented by additional handwritten insertions to which he had not agreed. This seemed to me to be indicative, to say the least, of extremely poor practice within Deltec, although I accept that there is nothing to indicate that Mr Chalopin was directly involved in this. The document bears the date 18 June 2013 against Mr Nasrallah's signature, but this date is not in his handwriting and was added by someone at Deltec at a later stage. The Paris meeting itself was earlier, on 7 June 2013 according to Mr Chalopin's diary entry. Against this background, I approach the dates which the documents bear with a degree of caution.

2131. Another notable feature of this Questionnaire is that it was not completed or signed by Mr Al Rajaan, even though he was the actual "Founder" of the Foundation. The document does not refer to him at all. The document is signed by Mr Nasrallah above the word "Founder". The form contemplates that details may be provided by more than one Founder, and also that it may be signed by

more than one Founder. However, the spaces on the form for details of the second Founder, including information as to his source of wealth and estimated wealth, were left blank. No signature appears in the space where a second Founder can sign. Instead the letters "N/A" (i.e. not applicable) have been inserted, and it would appear that these were inserted by someone at Deltec together with the date 18 June 2013.

2132. The standard form not only contemplates that there may be more than one Founder, but also provides that: "Each Founder must provide a certified, current passport, in addition to an original proof of address …". A decision must have been taken, by the participants at the Paris meeting, not to include Mr Al Rajaan as the Founder, or as a Founder. The intention was therefore to conceal his involvement on the signed formal documentation. Mr Chalopin was party to this decision.

2133. The Questionnaire also contains space for the details of 5 beneficiaries to be inserted. The only beneficiary identified was Nadim Nasrallah, whose details have been inserted in Mr Nasrallah's handwriting. Nadim's address and phone number are the same as those of Mr Nasrallah, and indeed the latter inserted his own date of birth apparently by mistake.

2134. Mr Nasrallah's signature appears immediately below some confirmations. In addition to agreeing thereby to the Bank's terms and conditions and fee schedule, the "Certification" included the following:

> "**BY SIGNING BELOW**, the Client hereby agrees to and makes the following assurances to the Bank:
>
> (i) All information provided herein is true and correct
>
> (ii) The client will immediately notify the Bank of any change in any information provided herein
>
> (iii) …
>
> (iv) The client confirms that all funds credited to the account are and will be beneficially owned by the client."

2135. The Questionnaire does not specifically define "the beneficial owners", or indeed refer to "beneficial owners" elsewhere. It does, however, refer to Mr Nasrallah as both the Founder and the Client, and is signed by Mr Nasrallah as "Founder". The form also requires the Founder to provide personal information, including as to his source of wealth and estimated wealth. The confirmation as to the beneficial ownership of funds credited to the account is clearly linked to the requirement for the Founder to provide that information, and also other information as to his identity. One obvious reason for requiring the confirmation, and the other information, is for KYC (Know Your Client) and AML (anti-money laundering) purposes. In the course of his evidence, Mr Chalopin agreed that, unless a document otherwise specifies, it is important that monies coming into an account should be beneficially owned by the client,

because otherwise they could be used for money laundering or they could derive from fraud or something like that.

2136. On reading the Questionnaire as a whole, Mr Nasrallah is the most natural and indeed only real candidate for "the beneficial owners" referred to in the confirmation. He is the only person identified as the Founder, the client and the person who provides the relevant anti-money laundering information. That reading is supported by the confirmation on the "Client Profile – Foundation Form" discussed below. There is certainly nothing in the Questionnaire to indicate that Mr Al Rajaan was the beneficial owner.

2137. It also appears that the drafter of the standard form Questionnaire may not have appreciated the legal point that, strictly speaking, Bahamian Foundations are not owned in the same way as companies are owned, and that the law provides that the assets of a Foundation are legally and beneficially owned by the Foundation itself. The drafter appears to have been under the impression (as was Mr Chalopin) that a Bahamian Foundation and its assets can be beneficially owned by someone else.

2138. Since it was clear to those at the meeting, including Mr Chalopin, that all the monies which were to be paid to the Foundation would come from Mr Al Rajaan, and that the intention was that the money would remain his, the statement made by Mr Nasrallah as to beneficial ownership was false. It was, in my view, part of the concealment which was at the heart of the proposed arrangement for this Foundation. It was Mr Chalopin who brought this document to the meeting, and it was Mr Chalopin who obtained the signature of Mr Nasrallah on the document at that meeting, and did not obtain the signature of Mr Al Rajaan even though he was known to be the 'real' Founder and the intended source of monies. Against this background, I have no doubt that Mr Chalopin was fully aware that he was participating in an exercise of concealment, as far as concerns the formal documents creating the Foundation. In my view, he must have appreciated that the confirmation provided by Mr Nasrallah was false.

2139. Part II of the Questionnaire was headed "PERSONAL INFORMATION (ON THE FOUNDER)." The Questionnaire required, in the case of Founders that are a corporate structure, a client profile to be completed "by the donor of the assets, who must be an individual". Although Mr Nasrallah was not a corporate structure, he nevertheless later completed a "Client Profile – Foundation Form", which I discuss below. There was no dispute that, as appears from the date and place on the form, it was signed by Mr Nasrallah in Beirut on 22 June 2013; i.e. after the Paris meeting.

2140. This section of the Questionnaire also required "Each Founder" to provide a certified, current passport in addition to an original proof of address. Mr Nasrallah's name and address were given, and the boxes requiring his source of wealth and estimated wealth were completed by him, albeit with vague and incomplete information. His source of wealth was described as "Professional activity", and he had written: "Businessman". The "Details on Source of Wealth" was simply stated to be "Work". At a later stage, someone at Deltec added the words – "Former Trader". That description was inaccurate, and

appears more apt to describe Nadim Nasrallah. (It is not clear how this description came to be given, and there is also the question of why it was proper to alter the form signed by Mr Nasrallah). The "Estimated Wealth" was stated to be in excess of USD 15 million, but no estimation of wealth was provided in response to the detail requested in the standard form Questionnaire.

2141. At the Paris meeting, Mr Nasrallah also signed a Letter of Wishes. This letter provided his wishes "in relation to the assets and administration of the referenced Foundation". It identified the goal of the Foundation as being "mainly to provide for the educational and personal needs of the following beneficiaries, namely". The only person identified was "Nadim Nasrallah". The Letter of Wishes went on to say that the assets should be held "100% for the benefit of Nadim Nasrallah per stirpes". This "per stirpes" designation indicated that Mr Nadim Nasrallah's children would potentially be beneficiaries. Mr Al Rajaan was identified at the end of this document, as being the person for whose benefit the Foundation's assets would be held in the event "all of the beneficiaries die before receiving their portion of the Foundation's assets". Leaving aside the Pensée Agreement itself, this was the only document – of very many that Mr Nasrallah signed in relation to the creation of Pensée – which has Mr Al Rajaan's name. However, his entitlement is only a residual entitlement in the event of the death of all the beneficiaries.

2142. In my view, this designation of Mr Nadim Nasrallah (per stirpes) as the sole beneficiary of the Foundation was nothing more than a front, as the three individuals at the Paris meeting all knew. Mr Al Rajaan and Mr Nasrallah were indeed friends (as Mr Chalopin said in his evidence), but it was obvious to all concerned that Mr Al Rajaan had no intention of creating a Foundation for the benefit of Mr Nasrallah's 45-year old son, who would have had no educational needs at that stage in his life. The Foundation was obviously for the benefit of Mr Al Rajaan, and that was reflected in the way that it was operated throughout, with Mr Al Rajaan taking all the investment decisions, and Mr Chalopin (and other Deltec personnel) having virtually nothing to do with Mr Nasrallah senior (except when the occasional document needed to be signed), and nothing to do with Nadim Nasrallah at all.

2143. Mr Chalopin said in cross-examination that the intention was that the Foundation was to benefit "their children", and he explained that this was Mr Nasrallah's son and Mr Al Rajaan's two daughters. However, if the intention was to benefit Mr Al Rajaan's daughters as well as Nadim Nasrallah, there was no explanation as to why the daughters were not named in the Letter of Wishes, or the Questionnaire, or indeed in the appointment of beneficiary document that Mr Chalopin later requested Mr Nasrallah to sign. Furthermore, Pensée's case (based on Mr Chalopin's witness statement) was opened on the basis that Mr Al Rajaan's intention was to benefit Mr Nasrallah's son because of his friendship with Mr Nasrallah, that Mr Al Rajaan wanted to do something for Mr Nasrallah's son, and that Mr Chalopin did not find this surprising. It was only in cross-examination that Mr Chalopin referred to Mr Al Rajaan wanting to do something for his own daughters. I discuss this point further in Section L8 below.

2144. Pensée's defence included the following as to Mr Chalopin's understanding:

> "To the best of Mr Chalopin's knowledge and belief, his broad understanding was that Mr Al Rajaan's and Mr Nasrallah's purpose in relation to the creation of the Foundation was to pass wealth on to the next generation, specifically Mr Nasrallah's son, and that in the circumstances of the close relationship between them (that is, between Mr Al Rajaan and Mr Nasrallah) as associates and friends, it was envisaged that both of them would contribute funds to benefit Nadim Nasrallah, but Mr Al Rajaan would be contributing substantial funds and wished to retain some influence with respect to the funds contributed. "

2145. I do not accept that this was Mr Chalopin's understanding at the time. There is no reference in this paragraph to the desire to benefit Mr Al Rajaan's daughters. The suggestion in the pleading that both Mr Al Rajaan and Mr Nasrallah would contribute funds to benefit Nadim is directly contradicted by the terms of the Pensée Agreement. This states that all the funds are coming from Mr Al Rajaan. Furthermore, the suggestion, that Mr Al Rajaan wanted to retain "some influence" with respect to the funds contributed, was contradicted by Mr Chalopin's oral evidence. This was, in substance, that all of the investment decisions were to be taken by Mr Al Rajaan, because he did not trust Mr Nasrallah in that regard**.** This is in itself an oddity. If the purpose of the Foundation was to benefit Mr Nasrallah's son, then it is surprising that Mr Nasrallah himself was to be excluded from all investment decisions in relation to the assets of the Foundation. Similarly, it is odd, if the purpose was to benefit Mr Nasrallah's son, that there is no evidence – in the years that followed – of any reporting to Mr Nasrallah, let alone his son as the sole interested beneficiary, as to the progress of the investments made by the Foundation.

2146. Mr Nasrallah's evidence, repeated many times, was that his son was never intended to benefit from the Foundation. The assets in the Foundation were to be contributed exclusively by Mr Al Rajaan, and those assets were to belong to him, and in the event of his death, his two daughters. Save in relation to the role of the two daughters, I consider that this evidence is a broadly accurate account of the arrangements made in Paris, and that this was how it was understood by all participants.

2147. I asked Mr Chalopin why it was necessary to have a Foundation at all, in circumstances where Mr Al Rajaan already had Fyne as a vehicle to hold his assets and to make investments. Mr Chalopin was unable to answer. I agree with PIFSS that the answer lies in concealment, because Mr Al Rajaan was identified in Deltec's records as the beneficial owner of Fyne.

2148. It is also significant that the Founder, identified in the Questionnaire, was an individual, Mr Nasrallah. It would have been possible to have used a corporate vehicle as a nominee Founder. However, if that were done, then it would be necessary (as per the Questionnaire) to have complete information concerning the individual who was the donor of the assets. Mr Al Rajaan did not want that. What was needed was an individual who would appear to be the actual Founder

of the Foundation, and hence the need for a new structure and the involvement of Mr Nasrallah as the front.

Documents created and signed shortly after the Paris meeting

(i) The Pensée Agreement

2149. Subsequent to the meeting, Mr Chalopin sent Mr Nasrallah a letter enclosing a number of documents for signature. The letter was drafted or sent on around 17 June 2013 and signed by Mr Chalopin. It stated:

> "As discussed in Paris, please find herewith the letter requested by Mr. F. AR, for his and your perusal, and if acceptable, execution.
>
> – The name of the Foundation has been accepted (Pensée Foundation)
>
> – I have included a few more documents, for you to execute as the Founder, namely:
>
> o Bank account opening documents (just sign where indicated, and we will, as the Foundation Agent, fill up the documents.)
>
> o Appointment of Beneficiary (the Letter of Wishes you gave us and signed already is confidential, so we need this separate appointment of Beneficiary in case of a need for document disclosure.)
>
> o Appointment of Protector (same as above)
>
> Please return these documents after execution to Deltec Bank & Trust, by FedEx or other courier (FedEx is the most efficient in the Bahamas), using the attached envelope. If you have any question, please feel free to contact me on my Bahamian mobile +1 242 4241723 or at the office directly +1 242 3024100. In my absence you can also speak with Kenris Albury, Head of Clients Services, who is well aware of the present transaction."

2150. The Questionnaire signed in Paris had identified three possible names (including Pensée) for the Foundation, and Mr Chalopin indicated that Pensée was to be its name.

2151. The "letter requested by Mr F. AR" was the Pensée Agreement. The fact that it was requested by Mr Al Rajaan indicates that it was his concern to ensure that, notwithstanding that the formal documentation might show that the Foundation and its assets were Mr Nasrallah's to control, the true position was that they were his. The sensitivity surrounding this document is illustrated by the fact that Mr Chalopin referred to it simply as a "letter", rather than an agreement or

nominee agreement. A notable feature of the documentation between April and July 2013, when Pensée was created and monies started to flow into it, is that the Pensée Agreement is not specifically referred to in any email or correspondence, apart from this reference to a "letter".

2152. There is therefore an absence of evidence as to how the Pensée Agreement came to be drafted, or by whom, or whether any legal advice was taken in that regard. It is tolerably clear that Mr Chalopin, who had attended the Paris meeting, must have said something to someone about an agreement. Mr Norbury accepted that it was unlikely that Mr Chalopin drafted the Pensée Agreement himself, and therefore he must have obtained a draft or precedent from someone. But how this came about is not documented. It is possible that he had some notes of what had been discussed, and it is also possible that there was some written document (I doubt that it was in Arabic) in which Mr Al Rajaan set out what he wanted, or even that was signed by Mr Al Rajaan and Mr Nasrallah. Whatever existed has not survived. Deltec's response to QE, on 9 October 2020, stated that it was possible that the Pensée Agreement was drafted by the head of fiduciary services (Ms Kenris Albury), and that there was no evidence that an external third party was involved. However, Ms Albury has not been called to give evidence, and so her involvement (if any) is unclear.

2153. This absence of any documentation containing a reference to the Pensée Agreement, including any earlier draft thereof, is itself odd. Other documents from that period have survived, including Mr Chalopin's covering letter. If Mr Chalopin was consulting people in Deltec about the drafting and terms of the agreement, then one might have expected some emails relating thereto to exist. It is possible that the absence is explained by the sensitivity which, from Mr Chalopin's perspective, surrounded that agreement. At a later stage in the story, when sensitive documents were produced by him, he told his colleague to print and then erase the electronic record. It is possible that this is what happened here, but I cannot positively find that it was.

2154. Mr Chalopin's letter indicated that he was looking to Mr Nasrallah to obtain Mr Al Rajaan's signature on the document. The Pensée Agreement was in due course signed by both Mr Nasrallah and Mr Al Rajaan. It is not clear when Mr Al Rajaan signed it. Mr Chalopin also signed it as a witness. This was false, in that he had not witnessed the signatures of either of the other two. It indicates the casual approach which Mr Chalopin took to the creation of documents, but is not the most significant point against him in that regard.

2155. It is also unclear on the evidence when the Pensée Agreement was sent back to Deltec. PIFSS submitted that it was likely to have been returned separately from the other documents, since it needed to be signed by Mr Al Rajaan as well. Pensée submitted that it was sent back together with the other documents received from Mr Nasrallah. The evidence is not clear, but there is support for PIFSS' submission in circumstances where (as described below) Ms Johnson raised various questions about the documents sent back by Mr Nasrallah, but did not refer to the Pensée Agreement.

2156. What is clear is that on 18 July 2013, an envelope marked confidential, and containing 2 copies of the Pensée Agreement, was put in Deltec's vault, after a

specific instruction had been given that it was not to be scanned. It was therefore not available for anyone to view on Pensée's records. By contrast, there was evidence that all of the other documents concerning the formation of Pensée - in particular the Questionnaire, the Client Profile, the Letter of Wishes, and the Appointment of Beneficiary – formed part of the electronic records of Pensée.

2157. The Pensée Agreement is an important document, and I therefore set it out in full:

> "PRIVATE & CONFIDENTIAL AGREEMENT
>
> Between:
>
> Antoine Nasrallah ("Founder"), a Lebanese national, born on March 8th, 1940 in Beirut (Lebanon) presently the holder of a Lebanese passport n° RL 1043810 issued on June, 6, 2007 and expiring on May 10, 2017,
>
> And:
>
> Fahad Al Rajaan, ultimate beneficiary, ("UO"), a Kuwait national, born on December 23rd, 1948 in Kuwait (Kuwait), presently the holder of a Kuwait passport n° 3333382, issued on March, 7th, 2013 and expiring March 6th, 2023.
>
> Whereas it is noted that:
>
> A. On June 18, 2013, the Founder has, at the UO's request, commissioned Deltec Bank & Trust Limited ("DBT"), a private bank and trust company located in The Bahamas and regulated by Bahamian authorities and laws, to create a Bahamian Foundation currently named: "The Pensee Foundation" ("Foundation")
>
> B. Furthermore, the Founder has instructed DBT to open an account with its bank for the custody, administration and management of the assets of the Foundation. The Foundation intends to hold and manage assets of a substantial value and therefore,
>
> Both Parties acknowledge and irrevocably agree to the following:
>
> 1. The Founder is acting in a nominee capacity, for and on the behalf of the UO.
>
> 2. The assets used to fund the Foundation are 100% owned by the UO, regardless of their sources.
>
> 3. The Founder hereby waives his rights to any credits to the Foundation by way of cash deposits, interest or

> income derived from the investment of the Foundation's assets, acquisitions, or capital contributions of any kind.
>
> 4. The Founder waives his automatic right under Bahamian law to revoke the Foundation and agrees not to revoke the Foundation unless expressly directed to do so by the UO.
>
> 5. The UO reserves the right to relieve the Founder of some or all undertakings with respect to his role as Founder, without cause or the need to justify UO's decision. This includes but is not limited to the power to remove/change any of the beneficiaries recorded presently and in the future, the Protector, Foundation Council (if any), the Foundation Agent, the Foundation's Banker and/or bank account, in addition to certain powers to manage, invest, liquidate, distribute or remove assets.
>
> 6. In the event of UO's incapacitation or death, UO's power under this letter shall be vested in the following person:
>
> Name: Fajar Al Rajaan and/ or Farah Al Rajaan
>
> Contact information: [blank]
>
> 7. The foregoing agreements are private and strictly confidential between the UO, the Founder, and both parties hereto agree to the non-disclosure of any of the contents herein.
>
> 8. This agreement has been made with effect from the 20th day of June 2013 in two counterparts, one of which will be kept by each of the Founder, and the UO."

2158. There was no evidence to suggest that the Pensée Agreement was in the form of, or based upon, a Deltec standard form agreement. Mr Chalopin's evidence was that he had not seen anything similar, although he also said that he had been told by Ms Albury that it had been done a number of times.

(ii) The account opening documents

2159. Mr Chalopin's letter to Mr Nasrallah referred to the "Bank account opening documents". These comprised a number of documents, but it is not necessary to describe all of them in detail. One document listed authorised signatories. Mr Nasrallah was the sole authorised signatory for the proposed account of Pensée, which was subsequently given account number 300294. Another document indicated that instructions could be given by fax or telephone.

2160. Mr Al Rajaan was not a signatory, and there is nothing in the account opening documents which authorised Deltec to act on the instructions of anyone other than Mr Nasrallah. In fact, as matters developed, all of the instructions to disburse money for investment purposes came from Mr Al Rajaan, albeit there was no documentation which entitled Deltec to do this. This was a point which was picked up by Deltec at a later stage, as described below.

2161. Mr Edey submitted that clause 5 of the Pensée Agreement entitled Mr Al Rajaan to give instructions in relation to investments and other matters. I disagree. Clause 5 gave Mr Al Rajaan the right to relieve Mr Nasrallah of the powers that he would otherwise have, and identified the full range of powers that could be taken away from Mr Nasrallah. But it did not immediately confer on Mr Al Rajaan the powers that were otherwise vested in Mr Nasrallah as Mr Al Rajaan's nominee. The constitutional arrangements for the operation of the Foundation were contained in the Foundation Charter, signed by Mr Nasrallah and dated 18 June 2013. This named Mr Nasrallah (and only Mr Nasrallah) as the Founder, and it gave him extensive powers. One power (Clause 18 (1)) was as follows:

> "In addition to the powers reserved to the Founder in this Charter, the Founder may by written notice to the Foundation Council assume the power to give advice or directions (whether personally or through a delegate) to the Foundation Council with regard to investments".

There was, however, no Foundation Council that was ever appointed, still less any written notice by Mr Nasrallah delegating his powers to Mr Al Rajaan. The need for a written instrument, and written notice to the secretary of a Foundation, is provided for in sections 9 (2) and 9 (4) of the Foundations Act.

2162. The authorised signatory form, described above, was referred to in the "Account Opening Form and Agreement" ("the Account Opening Form") which Mr Nasrallah also signed. This records that the type of account was an "Execution" account. The form explained that this meant that: "Deltec will execute transactions in accordance with instructions received from the client or an authorized agent designated by the client". However, as explained above, Deltec never acted on the basis of instructions from Mr Nasrallah. Indeed, in 2017, on the occasion when Mr Chalopin met Mr Nasrallah in the Bahamas, Mr Chalopin refused to act on his instructions. Moreover, there is no evidence that Mr Al Rajaan was ever designated by Mr Nasrallah as his authorised agent.

2163. The Account Opening Form bears Mr Nasrallah's signature and the date, in his handwriting, 22 June 2013. Immediately above the signature are provisions whereby "the Client" gives various assurances to Deltec. These included assurances that all information provided was true and correct and that:

> "The client confirms that all funds credited to the account are and will be beneficially owned by the client."

2164. I am inclined to accept Mr Edey's point that the confirmation in that document was provided by Mr Nasrallah on behalf of Pensée (defined at the start of the document as "the client"), rather than by Mr Nasrallah personally. Accordingly, Mr Nasrallah was not here confirming that he personally was the beneficial

owner of the funds sent to Pensée's account. However, the statement was false because the funds credited to the account were not those of Pensée (which was in the course of formation), but were those of Mr Al Rajaan. I do not accept Mr Edey's argument that the confirmation is to be read as a statement of beneficial ownership only once they are received in the account. The confirmation is required, as Mr Chalopin explained in the evidence to which I have already referred, because of concerns as to possible money laundering, or other matters such as abuse of a victim or fraud. Hence, Deltec wants to receive confirmation that the funds that are being sent to it are beneficially owned by the client that is making the remittance. The bank also wants a confirmation that the funds, once in the account, will be beneficially owned by the client; so that it can safely deal with those funds on the instruction of the authorised signatory, here Mr Nasrallah.

2165. In any event, even if the confirmation is to be read in the limited way for which Pensée contends, the confirmation was still false; because the effect of the agreement reached in Paris, and later reflected in the Pensée Agreement, was that Pensée's assets were to remain beneficially owned by Mr Al Rajaan. This was understood by Mr Al Rajaan, Mr Nasrallah and Mr Chalopin, as further discussed in Section L6 below.

Appointment of Beneficiary

2166. Another important document referenced in Mr Chalopin's letter was the Appointment of Beneficiary. This document, which was signed by Mr Nasrallah, identified Mr Nadim Nasrallah as the only beneficiary. There was no reference to any connection to Mr Al Rajaan, including no reference to his daughters as intended beneficiaries.

2167. Mr Chalopin's covering letter had requested this document, saying that: "we need this separate appointment of Beneficiary in case of a need for document disclosure". Mr Chalopin was therefore contemplating that the Appointment of Beneficiary form may need to be disclosed to third parties. Mr Edey submitted that he was wrong to think this, and that there could never be disclosure. I did not consider that there was any clear evidence to that effect, and it is not difficult to imagine that there might be circumstances in which (for example) a banking regulator might ask to see relevant documents concerning Pensée. Indeed, section 63 of the Foundations Act 2004 contemplates that a beneficiary's name can be disclosed in response to a court order or if required by law.

2168. But even if Mr Edey's submission were correct, the important point is that Mr Chalopin believed that the document might need to be disclosed, and he knew that the document did not fully record the position as he said that he understood it: i.e. that the real intended beneficiary was Mr Al Rajaan. It also contained no reference to Mr Al Rajaan's daughters.

2169. Pensée argued that it was not essential for all intended beneficiaries to be identified in a document such as the Appointment of Beneficiary form, and that it would be permissible for the Foundation to pay monies to people who were not identified beneficiaries. Mr Edey drew attention to Clause 6 (1) of the Charter of the Foundation. This provided:

> "The Foundation's main purposes or objects shall be to manage its assets, to invest in and hold the shares of various companies and/or other legal entities, to conduct all such activities and to exercise all such powers as are reasonably necessary in this connection or ancillary or incidental thereto or otherwise authorised by section 4 of the Act, including but not limited to the making of donations in cash or in specie to Beneficiaries or any other person or entity nominated by the Founder".

2170. However, the Charter also contained a very lengthy clause 7, and this dealt specifically with the position of "Beneficiaries". It provided as follows:

> "7. (1) The Founder shall appoint by written notice to the Foundation Agent a Beneficiary or Beneficiaries of the Foundation and by written notice may remove or add Beneficiaries including a remainder Beneficiary. In the event that the Founder are unable to act, the Foundation Council, with the consent of the Protector or Committee of Protectors (if any), may remove or add Beneficiaries, including a remainder Beneficiary. The interests of each Beneficiary need not be equal and the Founder [or the Foundation Council, as may be applicable], by written notice to the Foundation Agent establish such share or shares for the Beneficiaries, including such other rights, privileges, limitations and restrictions, in such manner as the Founder or Foundation Council, with the consent of the Protector or Committee of Protectors (if any), shall determine convenient.
>
> (2) Subject to any amendment by the Founder, which amendment shall require the consent of the Protector or Committee of Protectors (if any), distributions of the Foundation's assets to the Beneficiary or Beneficiaries are to be made in the discretion of the Foundation Council whether during the life of the Foundation or upon its liquidation, winding up or other termination.
>
> (3) Distributions to Beneficiaries shall be made by the Foundation Council.
>
> (4) Should all Beneficiaries die or cease to exist prior to the distribution of the Foundation's remaining assets, then such assets shall be distributed in the discretion of the Foundation Council.
>
> (5) With the prior consent and approval of the Founder and the Protector or Committee of Protectors (if any), the Foundation Council may adopt rules and regulations permitting a Beneficiary to transfer all or part of such Beneficiary's beneficial interests in the Foundation."

2171. The effect of Clause 7 is that it is the Foundation Council that decides upon distributions to beneficiaries, and the beneficiaries are those which have been notified to the Foundation Agent. The Foundation Agent in the present case was Deltec, and no Foundation Council was in fact ever created. It is true that it is easy for the Founder to add or remove beneficiaries. Given the formalities envisaged by Clause 7, I do not accept that Clause 6 should be read as contemplating that third parties, not named as beneficiaries, can be treated as though they were beneficiaries, with the result that large payments could be made to them. A condition of the exercise of the power in Clause 6 is that the exercise of powers must be "reasonably necessary in this connection or ancillary or incidental thereto." It would therefore not be straightforward for a substantial distribution to be made to a third party who had not been identified as a beneficiary. At all events, there is nothing in Mr Chalopin's evidence that indicates that he thought that it was unnecessary to identify beneficiaries specifically.

Appointment of Protector

2172. An "Appointment of Protector" form was also signed by Mr Nasrallah. But this was blank, and did not therefore identify any "Protector", so there was no reference to Mr Al Rajaan.

Client Profile – Foundation Form

2173. Another document completed at this stage was Deltec's "Client Profile – Foundation Form". This was signed by Mr Nasrallah in Beirut on 22 June 2013. The signature bears the same date as the Account Opening Form, and it appears to have been sent as part of Mr Chalopin's package of documentation, albeit not specifically referred to in the covering letter.

2174. Certain details on the document were completed by Mr Nasrallah. Others were added or completed by someone at Deltec at a stage after Mr Nasrallah had sent the document back. Again, Mr Nasrallah was not asked to authorise those changes. The Deltec employee had added Mr Nasrallah's occupation as "Retired (Previously a Trader)". In fact, Mr Nasrallah had been a banker, and had not been a trader. This was the same erroneous information that was inserted into the Questionnaire.

2175. The concluding part of the document contains several confirmations, including the following under the heading: "STATEMENT OF WEALTH/OWNERSHIP (to be completed by the beneficial Owner only)":

> "I confirm that all funds credited to the account are owned by me as ultimate beneficial owner.
>
> I further confirm that I acquired my wealth as a result of the following."

Some boxes were then ticked. The ticked boxes were "Inheritance", "Employment" and "Investments".

2176. This statement as to ultimate beneficial ownership was again false, to the knowledge of both the signatory (Mr Nasrallah) and, in my view, Mr Chalopin – who had sent this standard form document to Mr Nasrallah. The "STATEMENT OF WEALTH/OWNERSHIP" should not have been completed by Mr Nasrallah at all. The form said that it was to "be completed by the beneficial Owner only". Mr Nasrallah was known not to be the beneficial owner. It was also known both by Mr Nasrallah and Mr Chalopin that the statement: "all funds credited to the account are owned by me as ultimate beneficial owner" was false. Mr Chalopin accepted in his evidence that this was not a correct statement, since he knew that substantial funds (as he said, the majority of the funds – although the Pensée Agreement refers to the entirety of the funds) were to be contributed by Mr Al Rajaan. He said, however, that perhaps he was negligent; he was not involved in the technicality of the documentation, and did not have the expertise. He trusted the system, and was simply the messenger who was passing on requests for signed documents made by others at Deltec.

2177. In my view, however, Mr Chalopin knew rather more than these answers indicated. He knew that the formal documentation was intended to reflect the pretence that Mr Nasrallah was the real Founder, contributing the assets, for the purported benefit of his son. The reality, however, was that these were Mr Al Rajaan's assets, being contributed by Mr Al Rajaan for his own benefit.

2178. The standard form required "details regarding the item checked above"; i.e. details of the "Inheritance", "Employment" and "Investments". It appears from the colour of the ink on the document that these boxes may not have been ticked by Mr Nasrallah, but rather by the person at Deltec who completed the form. The Deltec employee had written: "Family wealth, General Manager & CEO of Kuwait Pension Fund – Own Investment Portfolios". This was not on the document when signed by Mr Nasrallah. These details, although vaguely expressed, related to Mr Al Rajaan. It appears that they were inserted, without any apparent thought, following Ms Albury's "same details as Fyne" message described below.

2179. The inclusion of those details made the form as a whole a nonsense, and also misleading to anyone at Deltec who had not been involved in its creation. The form was signed by Mr Nasrallah confirming his ultimate beneficial ownership of the funds to be credited to Pensée, and it contained his confirmation as to the source of the wealth. The details of his source of wealth included that he was "General Manager & CEO of Kuwait Pension Fund". However, Mr Nasrallah had never been the General Manager of a Kuwait Pension Fund. A reader of the document, who had not been involved in its preparation, would not have appreciated this. There was no form signed by Mr Al Rajaan, and Mr Al Rajaan was not named at all on the Client Profile form.

Receipt of the package and steps taken by compliance

2180. On around 18 June 2013, Ms Johnson carried out some work on the documents previously available: i.e. those signed in Paris. World Check reports were also run on Antoine and Nadim Nasrallah. No checks were carried out at that time on Mr Al Rajaan. She passed on various comments to Mr Chalopin by email on

18 June 2013, making a number of points – such as the inadequacy of the description of the Founder's source of wealth as "Work". Her e-mail indicates that she did not at that stage know of Mr Al Rajaan's connection to Pensée. She referred to the fact that the Founder and the Beneficiary on the Questionnaire (though she mistakenly referred to it as the Letter of Application for a Foundation) had the same birth date of 8 March 1940, and she asked whether this was a coincidence or a typo. She was therefore thinking of Antoine Nasrallah as the Founder, and Nadim as the Beneficiary, but did not know that they were father and son. She was not thinking of Mr Al Rajaan at all. Since the documents do indicate that Ms Johnson was conscientious, it is apparent that she had not seen the Pensée Agreement at that stage.

2181. As at 18 June 2013, the documents sent by Mr Chalopin to Mr Nasrallah subsequent to the Paris meeting had not yet been received back. A package of documents signed by Mr Nasrallah, was received at Deltec on 28 June 2013, in an envelope addressed to Mr Chalopin. Ms Angela Haven (a Human Resources Manager) told Mr Chalopin on 28 June 2013 that a package addressed to him from Antoine Nasrallah had been received, enclosing "some opening documents". There was no reference there to the Pensée Agreement, although it is possible that Ms Haven did not look closely at what had been received. She advised that she had passed the documents to Kenris Albury. Deltec had at that stage a combined fiduciary and client services team, and it was managed by Ms Albury. Another member of the team at that stage was Angela Stubbs. Mr Chalopin in his witness statement described it as a "very small team".

2182. Following receipt of Ms Haven's email, Mr Chalopin e-mailed saying: "Kenris, let's speak when you have a minute as I want to make sure everything is in order". There is no evidence as to what conversation took place, nor as to whether the package contained the Pensée Agreement. Ms Albury emailed her colleague Ms Stubbs, asking her to work closely with Lianne Johnson "on Pensée Foundation (documents on your desk) we need to complete them as best as we can".

2183. On 1 July 2013, Ms Johnson emailed Ms Stubbs and Ms Albury, following her review of the "account opening documents". She asked various pertinent questions, and identified various materials that were required. Ms Stubbs promptly provided answers to some, but not all, of the questions.

2184. It is clear from Ms Johnson's email dated 1 July 2013 that she had received the various account opening documents, including the blank Appointment of Protector form. However, there is no evidence that she was given the Pensée Agreement itself. There is nothing in her email of 1 July 2013 – or indeed in any subsequent e-mail that she sent – which refers to it, or which indicates that she had reviewed or commented on it. She did not therefore identify any inconsistencies between the Pensée Agreement (which referred to Mr Al Rajaan's ownership of the funds to be transferred to Pensée) and the documents signed by Mr Nasrallah, which indicated the contrary. Indeed, the documents that she reviewed and on which she commented, both in her 18 June 2013 and 1 July 2013 e-mails, did not refer to Mr Al Rajaan. Nor did she carry out any World Check report on Mr Al Rajaan at that stage. There is nothing in her emails

which suggests that, at that point, she understood the existence or significance of Mr Al Rajaan's involvement in the arrangements.

2185. Ms Stubbs then passed Ms Johnson's comments and request for information to Mr Chalopin, asking whether he could provide any of the information which Ms Johnson had identified as being required. Amongst Ms Johnson's requests, which had not at that stage been answered by Ms Stubbs, were requests for information as to "Beneficial Owners Occupation", and "Beneficial Owners Name of Employer". Mr Chalopin did not respond in writing, and the evidence is unclear as to what, if anything, he told Ms Stubbs. However later that day (1 July 2013), Ms Albury told Ms Stubbs, copying Ms Johnson:

> "Angie, this ac[count] will have the same details as Fyne."

2186. In his evidence, Mr Chalopin said that he did not provide this information to Ms Albury, who was simply giving a quick response to Ms Stubbs. However, it seems likely that this information did come from Mr Chalopin. There is nothing in the documentary record which indicates that Ms Albury would have known to provide this information other than through information given to her by Mr Chalopin. There is no documentary evidence that Ms Albury had herself seen the Pensée Agreement at that time (or indeed at any time), and the formal documentation indicated that it was Mr Nasrallah who was the Founder of Pensée. He was the person who had signed all the documents.

2187. There is no evidence as to what either Ms Stubbs, or Ms Johnson, made of this information, since neither has been called to give evidence. There is nothing to suggest that Ms Stubbs asked any questions about it. I do not know anything material about Ms Stubbs, including her age or experience. It may be that it was Ms Stubbs who then added the handwritten information to the various forms, for example adding to the Client Profile the (incorrect) information that Mr Nasrallah was "Previously a Trader", and the details of the "Statement of Wealth/ Ownership" above Mr Nasrallah's signature as: "Family wealth. General Manager & CEO of Kuwait Pension Fund – Own Investment Portfolios". This was lifted from Deltec's Corporate Account Profile Form concerning Fyne.

2188. However, it can fairly be said on Mr Chalopin's behalf that, assuming he did provide the "same details as Fyne" information to Ms Albury, he was not seeking to hide from her Mr Al Rajaan's connection to Pensée. It does also appear, from later emails, that Ms Albury, Ms Stubbs and Ms Johnson, all appreciated that there was a connection; i.e. that Pensée was not exclusively a Nasrallah Foundation.

2189. The thrust of Mr Chalopin's evidence is that he was open with Ms Albury in client services, and also with Ms Johnson in compliance. He did not therefore seek to hide the involvement of Mr Al Rajaan from them. He also says that they did not see anything wrong with the arrangements, and that therefore there was no reason why he should have done so. I shall return to this point in due course (see Section L8 below), since it forms a central part of Pensée's case as to why Mr Chalopin did not act with knowledge that there was anything untoward about

the arrangements, and in particular did not know that Mr Al Rajaan was seeking to conceal unlawfully obtained secret commissions. I agree that he did not seek to hide Mr Al Rajaan's connection to Pensée from those individuals.

Payments into the Pensée account

2190. On 3 July 2013, Pensée was formally registered as a Foundation in accordance with the Foundations Act 2004, pursuant to documents filed by Deltec.

2191. On 4 July 2013, Mr Chalopin asked Ms Stubbs to give him details of the bank account and the transfer instructions for various currencies, "so I can contact the client". It is unclear which "client" he had in mind; i.e. whether it was Mr Nasrallah or Mr Al Rajaan.

2192. Ms Stubbs responded on 8 July, asking if Mr Chalopin could confirm a few items "on the nominee Founder rather than going back to the client". Accordingly, by this time, Ms Stubbs and Ms Albury appreciated that there was indeed a "nominee Founder", and that this was Mr Nasrallah. Ms Stubbs prepared a letter, for possible signature by Mr Chalopin, which confirmed Mr Nasrallah's home address. She also said that she needed to confirm the bank from which "the client" will be remitting the funds. Her email uses the words "nominee Founder" (twice), and "the client". It is not clear whether she thought that the "client" that would be remitting the funds was different from the nominee Founder, Mr Nasrallah.

2193. On 9 July 2013, Ms Stubbs e-mailed a letter to Mr Nasrallah. This letter, addressed to Mr Nasrallah, had been signed by Mr Chalopin, and it contained details of Deltec's account number for Pensée, and (in an attachment) wire instruction details for remittances in various currencies. It was pointed out to Mr Chalopin in cross-examination that there was no equivalent letter sent to Mr Al Rajaan himself, although he was to be the source of all (or on Mr Chalopin's evidence, the majority of) the funds paid to Pensée. Mr Chalopin explained that Mr Nasrallah was the point of contact, and that this letter was not part of a paper trail to conceal Mr Al Rajaan being the source of funds to be transferred. I think that this was a fair point. If there is a nominee Founder, it would be natural to expect a bank to deal with that nominee, since he has been nominated by the actual Founder and the nominee will no doubt be dealing with the Founder behind the scenes. Accordingly, on its own, I do not think that it is of much significance that, at this early stage in the life of Pensée, remittance instructions were sent to Mr Nasrallah. Of greater significance, in my view, is that thereafter there is scarcely any contact between Deltec and Mr Nasrallah in relation to anything to do with Pensée.

2194. The documents between 1 July 2013, when the "same details as Fyne" email was sent, and 16 July 2013, do not evidence any work or involvement of Ms Johnson in compliance. There are, as I have said, no documents which show that Ms Johnson was shown the Pensée Agreement. By 16 July 2013, however, compliance was aware of the connection of Mr Al Rajaan to Pensée. On that day, a World Check report on Mr Al Rajaan was received, and he was identified as a PEP, i.e. a Politically Exposed Person. Shortly afterwards, Ms Johnson used this information in completing an "Account Approval Form" for Pensée dated

18 July 2013, designating the client high risk. It is therefore apparent that Ms Johnson did appreciate the connection between Pensée and Mr Al Rajaan. Indeed, in 2014, she obtained further World Check reports in relation to PIFSS and Mr Al Rajaan, as well as the various Zetland entities which were paying money into the Pensée account.

2195. By 17 July, funds had started to be remitted into the Pensée account. This prompted Ms Albury to ask questions of Mr Chalopin:

> "We are beginning to receive funds for Pensée, so far approximately EUR 3.2 million. when we discussed this relationship I was under the impression that the assets that we are currently holding in another account would be used to fund the Foundation. To ensure that our records are aligned, we will need to know the source of this additional funding that is coming in. We will need this especially since I understand the relationship is designated high risk by Compliance."

2196. Mr Chalopin's response was as follows:

> "It was always designed to receive new funds, without interfering with the actual account. The client is closing his relationship with two other banks for personal reasons that he explained to me and that are perfectly legitimate. This is funds that he had been holding for quite some time. The total to expect is in the neighborhood of $25-30m. If you remember the first conversation with Tim and the client, it is consistent with what he initially wanted to do.
>
> This client is not high risk. There was an article about him and his boss a year and a half ago, which has been proven unfounded later on. There is no negative record on either of the clients. Also, it is to be noted that we have via Atlas a long relationship and I am glad we are getting his business back.
>
> I hope it answers your questions."

2197. The exchange shows that Ms Albury had had some previous discussion with Mr Chalopin, and this had led her to believe that the monies from Fyne would be funding the Pensée account. Mr Chalopin's reply asserts, in effect, that she had misunderstood the position. The exchange illustrates one of the difficulties in Pensée's factual case that Mr Chalopin was fully open with his colleagues, informing them of the position and relying on their approach, in circumstances where there is scant documentary evidence of what Mr Chalopin was telling them, and no oral evidence from any of those colleagues. Thus, there is no reliable evidence that Ms Albury had misunderstood what she was originally told by Mr Chalopin, and so it is possible that Mr Chalopin was now giving a different explanation.

2198. In any event, Mr Chalopin's response is odd. It does not identify the two other banks with whom Mr Al Rajaan was closing his relationship for personal reasons. It is puzzling as to why, if the relationship with the other banks was being closed, the expected USD 25-30 million was not transferred in one or two lump sums. Instead, Mr Chalopin was told that € 3.2 million had been transferred. At his request, he was kept informed about subsequent transfers. Again, there were a number of them, rather than any lump sum transfer.

2199. I consider that Mr Chalopin knew more about these transfers, and their source, than he told Ms Albury. His oral evidence was that he was expecting the money to come from Pictet, where accounts were being closed. In fact, it came from Standard Chartered Bank, Hong Kong, and Australia and New Zealand Bank (ANZ) Singapore. Mr Chalopin – who asked to be kept informed about the fund transfers into Pensée – said in evidence that this was not what he had expected, but there is nothing to suggest that he advised his colleagues of this.

2200. Mr Chalopin's email was passed to Ms Johnson in compliance, with Ms Albury asking: "Is this enough for you". Ms Johnson said, in an email on 17 July 2013, that whilst Mr Chalopin's email helped, it was necessary to know the source of funds to be transferred: "i.e. the Bank and/or custodian holding the assets to be transferred to Deltec. Is it on the payment receipts, if so would Mr Chalopin confirm that those are the two banks from which we will be expecting funds". Ms Johnson also explained why the client (i.e. Mr Al Rajaan) was considered high risk, the designation that Mr Chalopin had been keen to water down.

2201. The documents do not show Ms Johnson's questions being passed to Mr Chalopin, or how they were answered. But since Ms Johnson had raised the issue as one requiring confirmation, it is likely that Mr Chalopin did provide that confirmation. He was the de facto relationship manager for Mr Al Rajaan, and he would be the natural person to provide answers to the questions raised. A KYC form, which appears to have been prepared at around this time, has a box headed: "Source of Funds", against which was marked "No", to indicate that the information was not on file. A handwritten comment then says: "Jean Chalopin to provide", and there is a further marginal note saying: "Provided".

2202. It is therefore likely that Mr Chalopin confirmed that Standard Chartered and ANZ were the banks from which monies were expected. That conclusion is reinforced by the fact that the account opening form, originally signed by Mr Nasrallah on 22 June 2013, was completed and signed on 18 July 2013 by Ms Albury and a colleague. This form refers to Standard Chartered, Hong Kong and ANZ Singapore as being the source of funds to be transferred to Deltec.

2203. I do not accept Mr Chalopin's evidence that he was expecting monies to come from Pictet. He did not advise his colleagues that Pictet would be the source of funds. Mr Chalopin was also interested in the banks from which the money was being received: on 29 July 2013, he asked Ms Albury, who had advised him about various payments, whether you could "tell from which banks it came originally each time".

2204. At this point in time, formal approval for Pensée's bank account had not been given by Deltec. On 18 July 2013, however, Mr Girling and Ms Albury signed

the account opening form, previously signed by Mr Nasrallah. On the same day, a formal approval document relating to the opening of the account was signed by a number of Deltec senior staff, including Ms Johnson.

2205. Also on the same day, the Pensée Agreement was put into Deltec's vault. The signatory of the "Safe Custody Receipt Form" was Ms Johnson. There was a "special instruction": "Do not Scan". I have no doubt that Mr Chalopin was the person behind the decision to put this document into the vault, and who gave the instruction that it should not be scanned. He was certainly aware of the document having been placed in the vault: at a later stage, in around 2019, he asked for it to be located. I do not consider that I have received any good explanation as to why it was appropriate for this document, which formed an important part of the arrangements concerning Pensée, to be placed in the vault, with no copy of the document being available with Deltec's records for anyone at Deltec to consult – or indeed to produce to regulators should questions begin to be asked about Pensée, or Mr Nasrallah, or Mr Al Rajaan. The explanation is, in my view, that Mr Al Rajaan and Mr Chalopin did not want a document which recorded the true nature of the arrangements between Mr Nasrallah and Mr Al Rajaan to be readily available.

2206. However, I recognise that Ms Johnson – who appears to have been doing a conscientious job in compliance – went along with what Mr Chalopin wanted: she was the person who signed Deltec's document deposit form. It is not clear, however, whether she saw the document itself. As I have said, there is nothing in the documents where she comments on, or analyses, or asks questions about the document. When it was finally recovered, it was in an envelope, with "Confidential" marked in 4 places thereon, and a post-it note with the text: "Vault. Lianne. 18 July 13. Pinsee (do not scan)". It is certainly possible that this was how the document was given to her by Mr Chalopin, and that all she knew was that (as recorded on the Safe Custody Receipt Form which she signed) there was a "Private and Confidential Agreement between Founder and Ultimate Beneficiary". Since Ms Johnson did not give evidence, I do not know what evidence she would have given as to whether or not she saw the Pensée Agreement. I can say, however, that there is no reliable evidence that she ever did: she never refers to it in any email, and when Deltec made a Suspicious Transaction Report ("STR") in relation to Fyne in 2015 it does not appear to have occurred to her to give an STR in relation to Pensée.

L5: Events subsequent to the creation of Pensée and the opening of Pensée's account

2207. I have described the documents created, and the relevant events, up to and at the time of the account opening in some detail. It is not necessary to describe subsequent events in such detail. Instead, I shall focus on a number of episodes, which are particularly relevant to Mr Chalopin's knowledge and conduct at the time. I have already covered some of these in Section L2 above, when addressing Mr Chalopin as a witness.

2208. PIFSS submitted that, in the period after Pensée had been set up, there were many instances of Mr Chalopin carrying out or continuing to facilitate the concealment of Mr Al Rajaan's ownership and control of the Pensée account,

whether by: laying down a false paper trail; outright dishonesty in reporting the identity of the beneficial owner and/or source of funds to third parties; or by failing to disclose Mr Al Rajaan's connections to Pensée to the board of Deltec or to the authorities (such as the Financial Intelligence Unit of the Bahamas) when such disclosure was clearly called for. I consider that PIFSS has made out its case in that regard.

Late July – December 2013

2209. On 25 July 2013, Ms Johnson – who had been sent a transaction report concerning transfers over USD 5,000 – asked Ms Albury whether she had any further information on the source of funds for "Pensée Information per below; i.e. I note that the funds receipts below all mention funds received from consulting fees from different companies". The report identified a large number of payments from various companies. These came from the various Zetland companies associated with Mr Amouzegar and Mr Khosrovani, including Wentworth and Moccak (see the Aerium Scheme in Section K above). All of the payments were recorded as being "consulting fees". There is no evidence as to any response being given to this e-mail. However, I think that it is highly likely that Mr Chalopin was informed about the nature of the payments since (on 19 July 2013) he had requested Ms Albury to let him know "each time Pensée receives donations". The fact that Pensée was receiving consulting fees – rather than receiving funds transferred from another bank – did not provoke any reaction on the part of Mr Chalopin.

2210. In early August 2013, Mr Chalopin and Ms Albury exchanged emails on the subject of the fees to be charged for Pensée's account. Ms Albury was looking to get USD 100,000 or more. Mr Chalopin responded to this suggestion on 9 August, saying that he was fine with the proposal: "I will inform the client at the next occasion". I have no doubt that the "client" that Mr Chalopin had in mind was Mr Al Rajaan. Mr Nasrallah's evidence, which I accept, was that Mr Chalopin never discussed fees with him.

2211. Nevertheless, Mr Chalopin sought to maintain the pretence, to Ms Albury, that he was dealing with Mr Nasrallah, as one would expect where a nominee had been appointed. On 19 August 2013, he was asked by Ms Albury whether the client had agreed to the fees. His response was that he had not "reached him yet. He called back when I was in the plane and left word on my vm. I tried him back but it is past midnight in Beirut. Will probably confirmed in the morning".

2212. I do not accept that Mr Chalopin made any effort to contact Mr Nasrallah. His email the next day was also false: "I spoke to Antoine … He asked that we keep the funds received in the currency we received, whichever it was". The question of whether funds would be held in any particular currency was one where Mr Chalopin would have contacted Mr Al Rajaan. He would not have taken instructions from Mr Nasrallah, who would not have been interested in the currency in which funds were to be maintained.

2213. In due course, the figures of USD 19,000 and USD 75,000 were inserted into the Questionnaire (i.e. the Foundation Agreement and Questionnaire). This document had been signed (undated) by Mr Nasrallah at the Paris meeting, with

someone at Deltec inserting the date 18 June 2013 beneath his signature. The date beneath the signature for Deltec was 18 July 2013. However, agreement on those fees had not been reached at that time, either in June 2013 or July 2013. The true position is that fees were never discussed with Mr Nasrallah, and the Foundation Questionnaire therefore falsely recorded Mr Nasrallah's agreement to those fees, and also falsely recorded agreement on fees having been reached by 18 July 2013.

2214. On 25 October 2013, Mr Chalopin e-mailed Ms Albury saying:

> "I am meeting both the clients from Pensée and then later on Fahad Al R. both on Saturday. Can you send me each of their respective statements."

2215. Mr Chalopin was cross-examined on the basis that what he said was untrue: he was not intending to meet Mr Nasrallah, and he did not in fact meet him at this time. The evidence indicates that this was indeed untrue. Mr Chalopin recalled only two business-related meetings with Mr Nasrallah: a meeting in the Bahamas (as to which he was mistaken) at the time that the Foundation was created, and a later meeting in the Bahamas in 2017. Mr Nasrallah had no recollection of meeting Mr Chalopin except at the Paris meeting and in the 2017 meeting. There was no meeting in October 2013 between Mr Chalopin and Mr Nasrallah. Nor did he ever send him a "statement" as to the performance of the assets, or indeed any statement. Mr Chalopin was seeking to maintain the pretence that Mr Nasrallah, as Mr Al Rajaan's nominee, was a person who had a continuing involvement in the running of Pensée – as would be expected when a person had made someone his nominee pursuant to the Foundations Act and the Foundation Charter.

2216. On 26 October 2013, Mr Chalopin e-mailed Ms Albury and another colleague at Deltec, Mr Damian Forbes who worked on the investment side of the business, and dealt with the investments of both Fyne and Pensée. Mr Chalopin said:

> "Met with our clients today. I am pleased to say that they are very happy with our services, on both side (trading [and] fiduciary).
>
> At the request of the Founder of FONDATION Pensée, our client from Fyne will call you on Monday to instruct you to place a transaction for Pensée. I will thereafter send confirmation of the trade to Pensée. It is likely to be an Option on financials.
>
> Separately, Kenris, you and I should take a minute on Monday to discuss the fees charged. I brought up the subject and have part of the answer, but not all."

2217. Again, Mr Chalopin misrepresented the position to his colleagues. He had not met with "our clients"; i.e. Mr Nasrallah and Mr Al Rajaan. He had only met the latter. It was with Mr Al Rajaan that fees were discussed. Mr Nasrallah

would not have been expressing satisfaction with Deltec's trading and fiduciary services. There had been no request from Mr Nasrallah that Mr Al Rajaan would call on Monday to instruct a trade. It was Mr Al Rajaan who decided that. Thereafter, it was Mr Al Rajaan who instructed all the trades that were carried out for Pensée. Deltec acted on those instructions. Mr Nasrallah had given no instructions for Mr Al Rajaan to carry out these trades, and there was no document which gave Mr Al Rajaan authority to give instructions for trades. This came to be appreciated by Deltec rather later in the story, and gave rise to a problem which Deltec then sought to address.

2218. Mr Forbes replied to the e-mail saying that he would look out for his (i.e. Mr Al Rajaan's) call. Mr Chalopin responded by saying, in an e-mail dated 27 October 2013, that Mr Al Rajaan "might refer to the "trust" though it is technically a Foundation – just [so] that you are not confused". The e-mail indicates that Mr Al Rajaan thought of Pensée as being a trust: i.e. a trust of which he was the beneficiary. The call with Mr Forbes no doubt took place. Even if Mr Nasrallah had given authority for Mr Al Rajaan to make this call (as per Mr Chalopin's email of 26 October 2013), the instruction related only to a single trade, and was not a general instruction covering all the trades that Mr Al Rajaan intended to carry out.

2014 - 2015

2219. Mr Chalopin's involvement with Pensée and Mr Al Rajaan during 2014 – 2015 leaves me in no doubt that Mr Chalopin regarded Pensée and its assets as belonging to Mr Al Rajaan, with Mr Nasrallah playing no relevant role. Hence, on 13 December 2014, Mr Chalopin asked Mr Forbes to "send me Fahad statements – including Pensée". The email exchange then continued with reference to the frequency with which Mr Chalopin met Mr Al Rajaan, and the conversations (which typically revolved around the markets) which Mr Forbes had with Mr Al Rajaan and the outcome of the investments made. Mr Chalopin agreed, in cross-examination, that Mr Nasrallah had nothing to do with the Foundation between 2013 and 2017 "except from some document exchange with the services".

2220. Mr Chalopin had at least two meetings with Mr Al Rajaan at around the turn of 2014/2015. In February 2015, he asked the reception at the Ham Yard Hotel in London to print various documents, including performance documents, so that Mr Chalopin could give or show them to Mr Al Rajaan. Mr Chalopin used to stay at that hotel.

2221. Also in late 2014/early 2015, Mr Al Rajaan was seeking, with Mr Chalopin's assistance, to create a new Foundation called White Cavendish. Mr Chalopin was also putting forward ideas in relation to the transfer of funds of Mr Al Rajaan from Pictet Bahamas to accounts of his daughters. Mr Chalopin prepared a document, which he called "anon.doc", setting out his ideas in relation to these matters. He asked a colleague at Deltec to print the document, and a power of attorney, and take it to Mr Al Rajaan's apartment in Knightsbridge. He also asked his colleague to erase the documents – obviously, in my view, in order to keep the proposal secret. The idea involved White Cavendish appearing to be connected to Mr Al Rajaan's daughters, but with them giving Mr Al Rajaan a

power of attorney to deal with all matters relating to its account at Deltec. It appears that the proposal for the transfer of funds from Pictet Bahamas came to nothing, apparently because of difficulties that arose with banks in the Far East which Mr Chalopin was hoping to involve in the arrangements.

2222. Later in 2015, Mr Al Rajaan instructed Mr Chalopin to transfer Fyne's assets, then around USD 40 million, to that new Foundation. On 26 May 2015, Mr Chalopin asked his colleagues to donate all of Fyne's assets to the White Cavendish Foundation, and to close Fyne Ltd.

2223. A memo dated 29 May 2015 from Deltec's compliance department to its board, copied to "Legal", identified the difficulties with what was proposed. It reported, in relation to Mr Al Rajaan, that World Check had listed Mr Al Rajaan as a PEP and that he was:

> "Wanted for questioning over allegations of financial misconduct at the Kuwait Social Security Department, where he was formerly Director-General. Orders issued by Kuwait's Public Prosecution to freeze his property and assets. Reportedly challenging allegations of wrongdoing and seeks to lift the asset freeze."

2224. The memo also reported that Google searches revealed the following:

> "It is purported that the UK has frozen the Donors bank accounts upon Kuwait's request based on the ongoing public prosecution investigations. British Authorities allegedly have refused to freeze his wife and children's bank accounts. It has also been alleged that the public prosecution and the Fatwa and Legislation department has taken special measures to track down all of the Donor's bank accounts and real estate in addition to having the Interpol arrest and bring him back to Kuwait to be prosecuted."

2225. The memo, together with the World-Check report, was circulated by Ms Johnson, stating that they needed to discuss how Deltec would deal with the allegations with some urgency. A decision was taken to take advice from outside counsel, and meanwhile Deltec would suspend the transfer to the new account.

2226. In June 2015, as reported in a further memo to the Deltec board, the Fyne account had been blocked, on the basis of the allegations being made against Mr Al Rajaan. The memo, dated 22 June 2015, added further information as to proceedings which had been started against Mr Al Rajaan, including that a "penal complaint was filed with the Public Prosecution."

2227. Mr Chalopin met Mr Al Rajaan at around this time, following a request by compliance to do so in the light of the information then being received about Mr Al Rajaan. Mr Chalopin prepared a note to the file, recording that Mr Al Rajaan was fully aware of the accusations "which he said to be totally unfounded, and only the result of a political battle between families in power in

Kuwait". Mr Al Rajaan said that there was no justification for the freezing of his bank accounts in the UK and Switzerland, and that he had hired an attorney in London to unfreeze his accounts and clear his name in the UK and Switzerland. The note to the file contained no reference to Mr Al Rajaan's connection to Pensée, referring only to the account of Fyne and Mr Chalopin's view that Mr Al Rajaan had "conducted himself impeccably" since that account had been opened.

2228. In July 2015, an STR was made by Deltec to the Financial Intelligence Unit (i.e. the Bahamian authorities). The report was in relation to Fyne. There was no STR in relation to Pensée. The report stated:

> "We write to inform you of the reason that we are filing this Suspicious Transaction Report ("STR"). We have had difficulty arriving at this conclusion, as there were no transactions involved, only allegations being made in the media; however we have determined to take a conservative approach in this matter and submit the attached STR. It has been alleged by the Kuwaiti Government that certain transactions undertaken by The Public Institution for Social Security of Kuwait, at a time when our client was head, were fraudulent. It is of note, that currently, these are merely allegations. World-Check advises that the Client is reportedly once again challenging these allegations of wrong doing and seeking to lift the asset freeze.
>
> The account at Deltec has operated solely as an Investment Account and has had no transactions into or out of the account since inception other than investments within the account. We would request that you reply to us as soon as possible on this matter, as we do not want to cause the client any additional hardship."

2229. There was no logical reason for drawing any distinction between Fyne and Pensée, bearing in mind the reasons (as set out above) for the notification of Fyne. There was no evidence as to why it was decided to submit an STR in relation to Fyne, but not Pensée. The likely explanation is that the board of Deltec (apart from Mr Chalopin) was not aware that Mr Al Rajaan was connected to Pensée, as well as Fyne. In cross-examination, Mr Chalopin accepted that there should also have been an STR in relation to Pensée: "Yes, the answer is yes, probably with the knowledge of the nominee agreement, we should probably have done both".

2230. When asked, in the context of his note to file, whether the board would have been interested to know about Mr Al Rajaan's link to Pensée, Mr Chalopin said that he believed that the client was known to the board and compliance also knew that. He then suggested that "at some point we didn't remember the existence of that nominee agreement". Mr Chalopin was clearly struggling to find an explanation as to why he had not referred to Mr Al Rajaan's link to Pensée, other than that it was to be concealed. Mr Chalopin had not forgotten

about the Pensée Agreement in 2015. He had throughout been dealing with Mr Al Rajaan as relationship manager, and he certainly knew about the Pensée Agreement: in 2019, he asked for it to be retrieved from the vault. I agree with PIFSS that Mr Chalopin was, here, not being transparent with Deltec's board, and that this was for the purpose of ensuring Mr Al Rajaan's continued ability to enjoy the benefits of the Pensée account.

2231. I do not accept that Mr Chalopin can shuffle off his own failing to Ms Johnson. It is true that she was still at Deltec at the time. But I do not have any evidence from her as to why she did not advise the board about Pensée, or ensure that an STR was made for Pensée as well as Fyne. It is plausible that she did not make the connection. Her involvement with Pensée had been relatively brief and had occurred some years earlier, and she was not regularly in touch with Mr Al Rajaan and had never met him.

2232. In December 2015, Ms Rolle (in compliance) informed Mr Chalopin as follows:

> "Nov. 2015 — Public prosecution has issued an international arrest warrant against former general director of the Public Institution for Social Security FAR after a prison sentence was handed in absentia against him on charges of manipulation of the institution's funds. The prosecution said in his statement that it had concluded investigations into the case involving FAR and an employee for inflicting grave harm on the funds of the institution."

2233. On 16 December 2015, a memo was sent by compliance to Mr Chalopin, relating to a request to open a new account called Lulienne which was to be beneficially owned by the same UBO as Fyne (i.e. Mr Al Rajaan). The memo referred to Mr Al Rajaan being wanted for questioning over allegations of financial misconduct; to the asset freeze; to an international arrest warrant; and a prison sentence in absentia on charges of manipulation of PIFSS's funds. The compliance department concluded with a recommendation that "a decision be made in relation to the future of this relationship".

2016 - 2018

2234. Despite these developments, in January 2016 Mr Chalopin sought to assist Mr Al Rajaan in a purported transfer of the shares in Fyne to his daughter Fajer. This was the transaction (see Section L2 above) where Mr Chalopin proposed, based on Mr Al Rajaan's wishes, that a document containing a reverse transfer should be kept in Deltec's safe; and where Mr Chalopin's daughter's name and address was to appear (falsely) as the sender's address.

2235. During 2016, Mr Chalopin continued to meet with Mr Al Rajaan and to provide him with data relating to the performance of Pensée's investments. By this time, Mr Robert Turnquest of Deltec was speaking and liaising with Mr Al Rajaan on the investment side.

2236. In January 2017, Mr Nasrallah met Mr Chalopin for the second time, this time in the Bahamas. He wanted to close the Pensée account. Mr Chalopin refused to let him do so. During the meeting, Mr Chalopin called Mr Al Rajaan. He was taking instructions as to whether he should accede to Mr Nasrallah's request. Mr Chalopin was not willing to take instructions from the nominee, because he regarded the Foundation and its assets as belonging to Mr Al Rajaan.

2237. On 6 September 2017, Mr Turnquest prepared documents for Mr Chalopin on "accounts related to Mr Al Rajaan: Fyne, Pensée, Lulienne and Al Wazzan". He sent a similar e-mail to Mr Chalopin a year later, referring to "Mr Al Rajaan's portfolios: Fyne, Pensée, Lulienne and Al Wazzan". In August 2018, Deltec again filed an STR report. This related to Fyne and Lulienne. But there was again no reference to Pensée. Mr Chalopin suggested in evidence that he did not remember the Pensée Agreement at that stage. I reject that evidence: he knew about it throughout, and in any event was dealing regularly with Mr Al Rajaan in relation to Pensée. There is no good reason why Mr Chalopin did not advise the board, or other colleagues, as to the need for an STR in relation to Pensée. He cannot blame Ms Johnson this time, because she had left.

2238. On 5 November 2018, Mr Turnquest reported on a meeting with Mr Al Rajaan at his Knightsbridge apartment on 22 October 2018. Mr Turnquest reported to his colleagues in the investment team, and to Mr Chalopin, that Mr Al Rajaan had explained that the objective of his accounts at Deltec, namely Fyne and Pensée, was to "preserve his wealth and maintain his lifestyle". Accordingly, Mr Al Rajaan was there saying that both accounts were for his benefit. As Mr Norbury pointed out to Mr Chalopin in cross-examination, there was no reference to Pensée being for the benefit of Nadim Nasrallah, in whole or even in part.

2239. In his meeting with Mr Turnquest, Mr Al Rajaan also explained how he used those accounts and how he intended to use them. This included statements that: "he treats the accounts like a bond"; he "wants the combined value of Fyne, Pensée and Lulienne [another company formed by Mr Al Rajaan] to remain at approximately $ 75 million"; and that if he had to withdraw capital from the accounts, he intended to replace it.

2240. Shortly after this email was sent, on 27 November 2018, Ms Crystal Bethell told Mr Chalopin about various outstanding matters in relation to Pensée. Ms Bethell had taken over, in March 2018, from Ms Albury. (Ms Johnson had also left by this time – she left in June 2016). Ms Bethell had not been involved in the set-up of Pensée in 2013. The outstanding matters included the receipt of certain KYC documents concerning Mr Nasrallah and his son, and the CRS form to be completed by Mr Nasrallah. (I have already described what later happened with the CRS form: see Section L2 above). Ms Bethell also picked up on the anomaly arising from Robert Turnquest's recent note concerning the dealings with Mr Al Rajaan:

> "It appears (per a recent meeting note prepared by Robert Turnquest) that we communicate with/ accept instructions from FA regarding the investments held by the Foundation. DBT account for the Foundation is set

> up as execution only. We do not hold any info/ docs on file that grants this power to FA. Files therefore need to be documented in this regard. At present, our client of record is the Founder (Antoine N) and the beneficiary (Nadim N).
>
> A reminder – per Letter of Wishes signed by the Founder, FA is only a contingent beneficiary (i.e. he is only to benefit if all beneficiaries die before receiving their portion of the Foundation's assets)."

Accordingly, Ms Bethell was indicating that, as far as Deltec's records were concerned, Pensée was connected to Mr Nasrallah, not Mr Al Rajaan, and there was nothing which entitled Mr Al Rajaan to treat Pensée as his own – which was what he was doing, as per Mr Turnquest's note.

2241. Later that evening, Ms Bethell identified a simple solution. She said that the Founder (Mr Nasrallah) should appoint himself and Mr Al Rajaan as members of the Foundation Council. There was no Foundation Council appointed to date. She said that a "side letter can be executed by both parties stating that any one of the Foundation Council members (Antoine N or FA), acting singly, is authorized to give direction or advice over the investment of the Foundation assets".

2242. Mr Chalopin's response was that he had "missed him in London", but had then spoken extensively. He was referring there to Mr Al Rajaan; not Mr Nasrallah. It is obvious that Ms Bethell's simple solution had not found favour with Mr Al Rajaan. The reason, as suggested to Mr Chalopin in cross-examination, was that Mr Al Rajaan did not want to be identified, in formal Pensée documents, as being connected with Pensée. Mr Chalopin did not explain this to Ms Bethell in writing, but instead said that he "will come to you to explain his comments".

2019

2243. Mr Chalopin then discussed the issue with Ms Bethell, and her email dated 4 January 2019 indicates that she was told that there was a "document … held in-house, reflecting that FA is the economic contributor for Pensée". She advised that they had not been able to locate that document. She also noted that the sources for the initial funding were fund transfers representing consulting fees. She concluded by saying that "[w]e hoped to be able to trace the initial funding to an account here in the name of FA". In other words, she was disappointed to see that the source of funding was consulting fees, rather than an in-house transfer of monies from Mr Al Rajaan. Notably, Mr Chalopin did not show any surprise when learning that the source of funding was consulting fees.

2244. This then led Mr Chalopin to send a number of Whatsapp messages to Ms Shonel Clarke in client and fiduciary services. Mr Chalopin wanted the document in the vault to be found, for Mr Al Rajaan then to be "put" as the Founder, and for Pensée to be dissolved with its monies being transferred to a new company in the name of his son, Fawaz Al Rajaan. However, at that point in time, the document in the vault could not be found: an incomplete e-mailed

file note records that there was "[n]o documentary evidence found in vault or on files which reflects FAR as economic contributor". In my view, the fact the Pensée monies were to be transferred to Mr Al Rajaan's son negates the proposition that the monies were always intended to benefit only Mr Al Rajaan's daughters, in the event of his death. If the assets were being reserved for them, then it is difficult to see why Mr Al Rajaan was going to transfer them to his son.

2245. Mr Chalopin's proposals could not be implemented. He was told that the transaction could not proceed from a regulatory perspective "because these files were raised during CBOB's [Central Bank of Bahamas] last inspection; and the recent STR's [Suspicious Transaction Reports] that were re-filed". I note that as at this time, there is no STR which had been filed in relation to Pensée.

2246. In the meantime, Mr Al Rajaan had taken steps with a view to putting into effect what Mr Chalopin had proposed to his colleagues. He sent an email to Mr Chalopin (a rare example in these proceedings of an e-mail apparently sent by Mr Al Rajaan) enclosing a scan of "My son passport".

2247. At around this time, Ms Bethell appears to have become concerned that there had been no annual general meetings ("AGMs") for Pensée. Some draft documents had been prepared in October 2018, and these were then finalised and signed in early 2019. They purported to record AGMs in each year between 2014 and 2018 inclusive. In fact, no AGMs had taken place. Whilst these documents indicate that Deltec employees appear to have few qualms about producing falsely dated documents, and to that extent reflect very poorly on Deltec, it does not appear that Mr Chalopin was involved in this episode. It does not, therefore, affect my view of his evidence.

2248. In May 2019, Mr Chalopin was in London, staying at the Ham Yard Hotel. He asked the concierge to print various documents, including a portfolio report for Pensée. It is apparent that he was meeting Mr Al Rajaan to give these documents to him, or at least discuss them with him.

2249. The date is significant, because it was only a few months before Mr Al Rajaan gave asset disclosure in response to the WFO which PIFSS obtained in the present proceedings. As already discussed, Mr Al Rajaan deliberately and dishonestly omitted any reference to Pensée. Mr Al Rajaan knew all about Pensée, and exactly how much money it had. He treated its assets as his assets. He had discussed it with Mr Turnquest in October 2018, had started to take steps to transfer its assets away in January 2019, and had frequent meetings over the years (and received or been shown numerous documents concerning the performance of its assets) with Mr Chalopin.

2250. On 9 December 2019, after the WFO had been granted and an application to discharge it had failed, Mr Turnquest reported on a conversation with Mr Al Rajaan that morning. He reported that Mr Al Rajaan had requested a copy of Deltec's statements for, amongst others, Pensée. I reject the argument, on behalf of D1, that Mr Al Rajaan might have forgotten about Pensée at the time when he gave his asset disclosure. His first Affidavit in that regard was filed on 13 November 2019, and he served a second Affidavit dated 14 January 2020. The

failure to give asset disclosure was one logical consequence of the plan from the start: that it was a vehicle for concealing his ownership and control of assets.

2251. In July 2019, the Bahamian Financial Intelligence Unit sent a Production Order to Deltec stating as follows:

> "Pursuant to its authority under **Section 4(2)(d)** of the **Financial Intelligence Unit Act (FIUA), Chapter 367 of the Statute Laws of The Bahamas**, the Financial Intelligence Unit (FIU**) requests the production of information in your possession, excluding information subject to legal professional privilege**, in respect of the person(s) and/or entity(ies) listed below, which may be relevant to fulfil [sic] its functions as outlined in **Section 4 of the FIUA.**
>
> | | |
> |---|---|
> | **FIU Reference:** | **STR No. 3807** |
> | **Name of Subject/Entity:** | **Fahad Mazyad Al Rajaan** |
> | **Date of Birth:** | **23rd December 1948** |
> | **Nationality:** | **Kuwaiti** |
>
> **Name of Entities: Fyne Properties Limited**
>
> **Lulienne Limited**
>
> **Information requested:**
>
> Balances for all accounts held by the subject.
>
> Please be reminded that pursuant to **Section 14 of the Proceeds of Crime Act, 2018** and **Section 30 of the Financial Transaction Reporting Act (FTRA), 2018** it is an offence to "tip off" anyone in relation to this Production Order." (Bold text in the original)

2252. Deltec's response was as follows:

> "Please note the below account balances for all accounts related to the subject. The portfolio valuations are attached.
>
> | | |
> |---|---|
> | **Lulienne Limited** | 7,074,321 |
> | **Fyne Properties Limited** | 38,836,598 |
> | **Fahad Mazyad Al Rajaan** | No Accounts in Personal Name |

> We confirm that the two accounts listed above are the only accounts related to the subject."

2253. There was, therefore, again no reference to Pensée. If the nature of the Pensée arrangements, including the Pensée Agreement itself, had been properly documented in Deltec's files – rather than a critical document not being scanned and being placed in a vault – then accurate information should and would have been given to the FIU. As it is, the information given was not complete.

2254. Mr Chalopin accepted in evidence that, as a member of the board, he would have known of the FIU's production order. He said that he had no recollection of seeing, or assisting in relation to, the response. However, it does seem to me that, as a board member, and as the person who was responsible for and knew most about the relationship with Mr Al Rajaan, he should have taken steps to ensure that the production order was fully and properly answered. He did not take those steps, and I consider – bearing in mind other events at around this time – that this was the result of Mr Chalopin wanting to assist Mr Al Rajaan by concealing information from the authorities.

2255. In August 2019, as described above, there was a need to obtain signed CRS/tax forms. Both Ms Shonel Clarke, and Mr Turnquest, said that they thought that the Pensée account was linked to Mr Al Rajaan. But Mr Chalopin, in his email of 1 August 2019, denied that this was the case. He told them:

> "FAR is only the investment advisory. The Foundation belongs to Antoine (Tony) Nasrallah. Send me the documents and I will contact him (he is a Lebanon resident and so is his son)."

2256. This document, and the subsequent story, have already been described in Section L2 above. In summary, Mr Chalopin knew that FAR was not "only the investment advisory". He had no intention of contacting Mr Nasrallah, and did not do so. Mr Nasrallah's signature on the relevant documents was forged by him, or at his direction. Mr Al Rajaan's beneficial interest in/ownership of Pensée was not revealed.

2257. In March 2020, QE on behalf of Mr Nasrallah began to ask questions (apparently at the request of PIFSS) in relation to Pensée. A number of follow-up letters were sent. A further check of the vault was carried out at the start of June 2020, but no documents relating to Pensée, Mr Nasrallah, or Phoenix International Consultant SARL were initially found. However, following a double-check of the vault, the Pensée Agreement was located in June. This was promptly sent to QE.

2258. Against this factual background, I turn to the 4 ways in which PIFSS advances its case. I start with the bare trust case, albeit that PIFSS advanced its Kuwaiti law case (based on Articles 23 and 28 KPPL) as its primary case.

L6: The claim for a declaration as to a trust

The parties' arguments

2259. PIFSS seeks a declaration that the assets in Pensée's account are held on trust for Mr Al Rajaan (and now D1, his estate). PIFSS argues that the arrangement, agreement or understanding reached at the Paris meeting was that incoming payments to Pensée were

to be held by Pensée on bare trust for Mr Al Rajaan, and this was the basis upon which the funds were in due course transferred to Pensée and received by it. Mr Al Rajaan's intention in setting up Pensée and in opening the account, using Mr Nasrallah, was for Pensée to be used as a means of concealing his ownership of the funds. He communicated this to Mr Nasrallah and, on PIFSS' case, to Mr Chalopin as well. The trust came into effect upon the first transfer of funds into Pensée.

2260. For the purposes of establishing this claim, Mr Norbury submitted that the court was not confined to looking at the Pensée Agreement. That agreement was only one part of the arrangements which demonstrate a clear intention that the assets be held on trust. He submitted that, on one interpretation of the Pensée Agreement, there was a declaration of trust. But the argument worked more satisfactorily if one looked at the surrounding circumstances, from which one could see much more clearly what Mr Al Rajaan's intention really was. It was therefore permissible to look outside the four walls of the Pensée Agreement in order to determine that intention.

2261. Furthermore, the mutual intention of the parties, objectively ascertained, had to be gathered partly from documents but also from oral exchanges and conduct. Objectively ascertained, the parties did not rely solely on the Pensée Agreement. There was no reason to think that Mr Al Rajaan intended the Pensée Agreement to be the sole record of the basis on which his money was being held.

2262. Mr Norbury submitted that if the arrangements were partly oral and partly in writing, it was appropriate to look at subsequent conduct as well; something that would not be possible if it were a question of only construing the Pensée Agreement itself. Irrespective of subsequent conduct, however, it was sufficient to consider the circumstances prior to the Pensée Agreement in order to establish that the gist of what Mr Al Rajaan said in London and Paris was essentially as follows: "however you structure this, I want it to stay mine and be untraceable".

2263. Mr Norbury also submitted that, in the Pensée Agreement, "ultimate beneficiary", defined as UO or ultimate owner, meant the ultimate owner of the assets that came into Pensée. Paragraphs 1 and 2 revealed an intention that, both before and after the receipt of the assets by Pensée, these were and are Mr Al Rajaan's. The document therefore effects or evidences the declaration of trust relied upon.

2264. On behalf of Pensée, Mr Edey submitted that it was not permissible to determine whether there was a trust by reference to anything other than the written Pensée Agreement document. The parties had reduced their agreement to writing, and any trust had to be found in the written document, or not at all. There was a strong presumption, in a contractual context, that where parties have reduced their intentions to writing, they intend that to be the exclusive record of the bargain. The same applied at least as forcefully to alleged declarations of trust.

2265. Mr Edey accepted that the Pensée Agreement had to be construed in the light of the factual matrix. Commercial commonsense could also be taken into account. But subjective intention and subsequent events were inadmissible. There was nothing in the factual matrix which assisted PIFSS' arguments.

2266. As far as concerns the Pensée Agreement itself, Mr Edey said that the reference to Mr Al Rajaan being the "ultimate beneficiary" or "ultimate owner" did not mean that there

was a bare trust. There were other explanations for the language used there. In so far as the argument was based on Clause 2, the case did not work on the language used, and the argument was inconsistent with the rest of the Pensée Agreement, ignored the factual matrix including the Foundations Act and Pensée's charter, defied common sense and the aims of the transaction, and positively frustrated those key aims. In developing these points, Mr Edey's key themes were as follows.

2267. The Pensée Agreement was drafted by someone at Deltec in fiduciary services, and they would have been familiar with how Bahamian Foundations worked, including the provisions of the Foundations Act and Pensée's charter. A Foundation, in contrast to a trust, is a distinct legal entity, which owns its own assets both legally and beneficially. Although it would be theoretically possible for a Foundation to hold assets pursuant to an express bare trust in favour of someone, it would be most unlikely that this would be intended. It would not be necessary, given the extensive practical control over a Foundation and its assets that a Founder enjoys.

2268. The Foundations Act itself was an important part of the factual matrix, and relatedly it is orthodox for Foundations to own their assets legally and beneficially. That is also the position under the charter of the Foundation, which repeatedly refers to its (i.e. the Foundation's) assets. The parties would not have wanted to disturb that orthodox position here. Even assuming that Mr Al Rajaan's aim was to secrete his assets, that would not assist PIFSS' argument. It would provide a reason why he wished to put them into a separate legal entity, so as to be immune from arguments that the assets were his. It therefore made far more sense, from Mr Al Rajaan's perspective, for Pensée to hold the assets on an orthodox basis. It made no sense for there to be a bare trust arrangement.

2269. That was also reinforced when taking into account the evidence of Mr Nasrallah and Mr Chalopin as to how Mr Al Rajaan wanted to benefit his daughters in the event of his death. If there were a bare trust, then (as PIFSS indeed contended) the assets would form part of Mr Al Rajaan's estate, and the daughters would in practical terms gain little or nothing from their power to replace Mr Nasrallah under clause 6.

2270. As to the terms of the Pensée Agreement itself, Clause 2 was simply referring to the position prior to the transfer of funds. There was a logic in recording that prior ownership, which might be important if the Foundation were ever revoked. Other clauses of the Pensée Agreement, in particular clauses 3-5, contained wide waivers of the powers that Mr Nasrallah might otherwise enjoy, and in practical terms gave Mr Al Rajaan the power to control the Foundation and the destination of its assets. There was therefore no need for Mr Al Rajaan, additionally, to be the beneficial owner of the assets of the Foundation. He did not need to remain the beneficial owner of the assets after transfer in order to be able to exercise almost complete practical control over them, notwithstanding their being owned legally and beneficially by the Foundation in the orthodox way. There is nothing in the Pensée Agreement which is anything like clear enough to indicate an intention to displace the orthodox position.

2271. In so far as the evidence of witnesses suggested that they may have understood that Mr Al Rajaan was the owner of the Foundation or its assets, this evidence was of no assistance. The subjective understanding of the individuals was inadmissible in order to construe the Pensée Agreement. In any event, it is unsurprising that individuals may have mistakenly equated the rights which Mr Al Rajaan had under the combination of the Foundations Act and the Pensée Agreement as being tantamount to ownership, even

though in law that was not the actual position. The fact that Mr Al Rajaan may have mistakenly referred to Pensée as a trust does not indicate that he did not in fact want the normal incidences of a Foundation.

Discussion

2272. A number of matters were common ground. The Pensée Agreement is governed by Bahamian law, and this can be taken to be the same as English law. It follows that Bahamian law would also apply to the question of whether the parties' agreement was contained partly orally and partly in writing. The Pensée Agreement is to be construed with regard to the factual matrix, which included the aim and genesis of the agreement. It was also common ground that, in assessing whether there was an intention (objectively expressed) to create a trust, it was the intention of Mr Al Rajaan that mattered.

2273. The initial question is whether, in assessing whether the Pensée assets were to be held on trust for Mr Al Rajaan, the agreement between Mr Al Rajaan and Mr Nasrallah is to be found exclusively in the Pensée Agreement itself.

2274. When there is a written document, it is possible for the evidence objectively to show that the parties did not intend their agreement to be solely governed by that document, so that the agreement is contained partly in writing and partly orally. This gives rise to a question of fact: see Lord Hoffmann in *Carmichael v National Power plc* [1999] 1 WLR 2042, 2049 A-D and 2050H – 2051C.

2275. The decision in *Carmichael* was referred to by Arnold LJ, giving the judgment of the Court of Appeal, in *Gill v Thind* [2023] EWCA Civ 1276. That case concerned an issue as to whether there was an oral declaration of trust. At paragraph [48], Arnold LJ set out the basic principles relating to the creation of a trust:

> "It is well established that an express trust will only arise where the "three certainties" essential for the creation of a trust are satisfied. First, there must be certainty of intention to create a trust. Secondly, there must be certainty as to the subject-matter of the trust. Thirdly, there must be certainty as to the beneficiaries of the trust."

Arnold LJ then referred, at [49] – [51], to the leading authority, *Paul v Constance* [1977] 1 WLR 527, and quoted from the judgment of Scarman LJ in that case.

> "No particular form of expression is necessary for the creation of a trust, if on the whole it can be gathered that a trust was intended.
>
> …
>
> … there must be a clear declaration of trust and that means there must be clear evidence from what is said or done of an intention to create a trust – or, as [counsel] put it, 'an intention to dispose of a property or a fund so that somebody else to the exclusion of the disponent acquires the beneficial interest in it'."

2276. Arnold LJ then went on to address in more detail what must be proved, and the difference between the approach to a written declaration of trust and an oral declaration:

> "54. As counsel for Mr and Mrs Thind submitted, this argument conflates two different questions: what must be proved, and the standard of proof required to prove it.
>
> 55. What must be proved is an intention to create a trust. If A asserts that a declaration of trust has been made by B in a document, the claim might be analysed in two stages. First, A would have to prove, on the balance of probabilities, that B had signed the document. Secondly, A would have to persuade the court that the document, properly interpreted, constituted a declaration of trust. In principle, a similar two-stage analysis applies if A asserts an oral declaration of trust by B. First, A has to prove, on the balance of probabilities, what B said. Secondly, A has to persuade the court that this demonstrated an intention to declare a trust.
>
> 56 The principal difference between these scenarios is that, in the case of a documentary declaration, the first stage of the analysis involves a question of fact whereas the second stage is a question of law, and evidence as to B's subjective intentions and subsequent conduct is not admissible at that stage; whereas, in the case of an oral declaration, the questions of what was said and what was intended by it are both questions of fact, and evidence as to B's subjective intentions and subsequent conduct are admissible: compare the position concerning oral agreements (and agreements made partly in writing, partly orally and partly by conduct) as explained by Lord Hoffmann in *Carmichael v National Power plc* [1999] 1 WLR 2042, 2049 A — D and 2050 H —2051 C.
>
> 57 A secondary difference is that, in the case of an oral declaration, it may well not be possible for the court to make a finding as to the exact words used by B, and so the court may only be able to make a finding as to their gist. In those circumstances, there would be nothing wrong in the court running the two questions together and asking whether, on the balance of probabilities, B said words that were such as to demonstrate an intention to declare a trust."

2277. These principles are applicable in the present case. I see no reason in principle why, as Mr Norbury submitted, the existence of intention to create a trust should not be found partly in a document, and partly in oral exchanges and conduct, provided that the objective evidence justifies the conclusion that the document was not intended by the parties to be an exclusive record of the relevant intention.

2278. So the initial question is whether the parties, and in particular Mr Al Rajaan, intended the Pensée Agreement to be the sole record of the basis on which his monies,

representing the proceeds of the secret commissions, were to be held: i.e. to the exclusion of what was agreed in Paris.

2279. I agree with Mr Norbury that, objectively, this was not the intention of Mr Al Rajaan or indeed Mr Nasrallah. The Pensée Agreement was not an agreement arrived at, drafted or read over at the Paris meeting by any of the participants. The idea of a new vehicle for Mr Al Rajaan's benefit had been discussed at the Knightsbridge meeting in London, but Mr Chalopin did not bring a draft of the Pensée Agreement with him when he came to the Paris meeting, where the new vehicle was again discussed and some documents signed. It may be that Mr Al Rajaan and Mr Nasrallah recorded their understanding in a short document at the Paris meeting itself, but it would not have looked anything like the Pensée Agreement. Rather, the Pensée Agreement was the result of Mr Chalopin taking steps to produce a document in the Bahamas. It was then sent to Mr Nasrallah, and he and Mr Al Rajaan then signed it without making any changes.

2280. Importantly, it appears that the objective intention of the 3 men was that the document created by Mr Chalopin would be completely confidential, and that it was not intended to see the light of day. There was agreement in the document as to "non-disclosure of any of the contents herein". Neither Mr Nasrallah nor Mr Al Rajaan retained a copy of the document after it had been sent back to Mr Chalopin. Mr Nasrallah remembered it in 2020, but the document was only found as a result of a request from QE.

2281. Against that background, there was objectively no intention by Mr Al Rajaan or Mr Nasrallah to conduct their dealings on the basis of the document, as distinct from what had been agreed at the Paris meeting.

2282. On a formal level, the document contains no 'entire agreement' clause, but I agree with Mr Edey that this is not a particularly significant point. More important, in my view, is that the reason that Mr Al Rajaan wanted a document was that he needed something in writing which would negate the position as shown on the formal documentation which Mr Nasrallah had signed at the Paris meeting, and which would reaffirm what had been discussed and agreed in Paris. Moreover, the whole background to the Pensée Agreement, and the signature of the formal but false documents was the criminal enterprise on which Mr Al Rajaan and Mr Nasrallah were engaged in relation to Mr Al Rajaan's secret commissions, and the need to conceal what was happening.

2283. All of this is clearly a very long way from the normal situation, in cases cited by Mr Edey, where a court is construing an agreement which the parties have reduced to writing, and where there is a strong presumption that the contract is intended to contain all the terms of the bargain: see e.g. *Chudley v Clydesdale Bank* [2020] QB 284 at [52].

2284. As to what was discussed and agreed in Paris, it is clear on the evidence that all 3 men came away from the meeting, and acted throughout, understanding and believing that Pensée's assets belonged to Mr Al Rajaan. Mr Chalopin's email to Mr Forbes dated 27 October 2013, advised that Mr Al Rajaan "might refer to the trust". This must be because Mr Al Rajaan had, in his dealings with Mr Chalopin, frequently referred to the arrangement as a trust, and there can be little doubt that this was how it was referred to at the Paris meeting. Accordingly, Mr Al Rajaan understood that the assets of the Foundation were his, and I have no doubt that this was conveyed at the Paris meeting.

2285. That too was the understanding of Mr Chalopin, based on his discussions in Knightsbridge and Paris, as already discussed. In its letter to QE in 2020, based on information provided by Mr Chalopin, Deltec said that it understood that the legal owner of Pensée was Mr Nasrallah, "and the beneficial owner is Mr Fahad Al Rajaan".

2286. Mr Nasrallah also considered that the monies were Mr Al Rajaan's. It was put to him in cross-examination that "whatever the official documents that you were signing said, it was his money and it would continue to be so". Mr Nasrallah's answer was: "Exactly". He went on to say that it was Mr Al Rajaan who was running the account: "But as it was his money, he was doing even orders to Mr Chalopin to —— to buy, to sell, to do whatever he wants to do."

2287. The understanding of the 3 men, as described above, arose because of the discussion at the Paris meeting. There must have been such discussion, and an agreement reached, because Mr Nasrallah was signing documents which indicated that he was the only Founder, and his son was the only beneficiary, and that "all funds credited to the account are and will be beneficially owned by the beneficial owners" (a reference to Mr Nasrallah). All 3 men knew that these documents did not represent the true position. The gist of the discussion was, as Mr Norbury submitted, Mr Al Rajaan making it clear that the monies were still his (and I consider that the word trust was likely used in that context) and Mr Chalopin being asked to get something drafted which made it clear that this was Mr Al Rajaan's money, even though Mr Nasrallah's name was on the documents.

2288. Against this background I consider that this is a case where, as Mr Norbury submitted, the intention and agreement of the parties is contained both in the oral exchanges and the later written document. The argument that the court can look only at the Pensée Agreement, and at nothing else, seems very artificial given the context in which Mr Al Rajaan and Mr Nasrallah were operating. They were furthering the criminal enterprise of ensuring that Mr Al Rajaan continued to receive secret commissions, and for that purpose Mr Nasrallah was signing documents at the Paris meeting which did not represent the true position. This was done so as to avoid Mr Al Rajaan being overtly connected to the new vehicle, and which falsely portrayed Mr Nasrallah and his son as being the only people connected to the Foundation, save for Mr Al Rajaan as residual beneficiary. They wanted to ensure that there was some record of the fact that the money nevertheless still belonged to Mr Al Rajaan, whatever the documents might say. There needed to be a document of some kind which recorded that, and that this document would be private and confidential so that, if all went well, it would never see the light of day. Against that background, it would be a strange result if the court could not, in resolving the bare trust argument, look at anything other than the Pensée Agreement itself.

2289. If (as I consider to be the case) it is permissible to look at the oral agreement reached in Paris, alongside the terms of the Pensée Agreement, the bare trust argument must in my view succeed. This is because the expression "ultimate beneficiary" and UO or "ultimate owner" fits perfectly with what was discussed and agreed at the Paris meeting; i.e. that the monies being paid to the Foundation were and would remain Mr Al Rajaan's. All of the remaining provisions of the agreement should be read in that light, and none of them are inconsistent with that analysis.

2290. However, even if that approach were wrong, I reach the same result even if I am simply construing the Pensée Agreement against the admissible factual matrix. I now turn to the terms of that document, and what I regard as the most significant aspects of the factual matrix, albeit that these aspects have largely been covered above.

2291. As far as concerns the language of the document, the most significant point is that Mr Al Rajaan is referred to as the "ultimate beneficiary", which in turn was defined as "UO", which was shorthand for "ultimate owner". The expression "UO" was then used in a number of clauses in the short agreement: clauses 1, 2, 4, 5, 6, 7 and 8.

2292. The reference to Mr Al Rajaan as "ultimate beneficiary", or ultimate owner, is in my view a reference to his status or position as the ultimate beneficiary or ultimate owner of something. That something is, most naturally, the assets of the Foundation, and not simply the assets prior to funding the Foundation.

2293. Moreover, it is a description of Mr Al Rajaan's status or position which would have been very important to the parties given the factual matrix. This was an agreement between two men of Middle Eastern origin, neither of whom were legally trained or took legal advice. Although they had experience of Foundations, there is nothing that suggests that they knew anything about Bahamian Foundations and how they worked. (For his part, Mr Chalopin had very little understanding himself). However, the one thing that they would both have understood very clearly was the idea of an "ultimate beneficiary" or "ultimate owner": that the assets, although held in the name of some other person, belonged beneficially to Mr Al Rajaan.

2294. That analysis is reinforced when one considers the genesis and aim of the Pensée Agreement. It is not generally permissible to have regard to pre-contractual negotiations when construing the terms of a contract. However, it is permissible to refer to such negotiations in order to elucidate the general object of the contract: see *Lewison: The Interpretation of Contracts* page 125 (text prior to paragraph 3.43):

> "Evidence of pre-contractual negotiations is not generally admissible to interpret the concluded written agreement. But evidence of pre-contractual negotiations is admissible to establish that a fact was known to both parties; to decide (in a consumer contract) whether a term has been individually negotiated; to determine which party put forward a particular term; and to elucidate the general object of the contract. Evidence that parties negotiated on the basis of an agreed meaning is only admissible in support of a claim of estoppel or rectification."

2295. The question of elucidating the general object of the contract is then further discussed by Lewison at paragraphs [3.56] – [3.57], where the author refers to authority supporting the view that material is admissible to show the genesis and aim of the whole transaction. Mr Edey, in oral submissions, correctly accepted that pre-contractual communications as to the aim and purpose of a transaction are admissible as factual matrix.

2296. The genesis and aim of the Pensée Agreement are (to say the least) unusual, in that, broadly speaking, it was an aspect of a joint criminal enterprise between Mr Al Rajaan

and Mr Nasrallah to secrete secret commissions unlawfully obtained by Mr Al Rajaan. However, in itself that would not have necessitated the Pensée Agreement, not least because Mr Al Rajaan was not identified as a Founder or source of funds or listed as a beneficiary.

2297. The immediate background to the Pensée Agreement, known to the 3 men who were present in Paris, is that formal documentation was being signed by Mr Nasrallah in Paris which portrayed him (and only him) as the Founder, portrayed Nadim (and only him) as the beneficiary, and even contained the confirmation (in the Client Profile – Foundation Form) as to Mr Nasrallah being the beneficial owner. These statements in the documents were known by Mr Al Rajaan and Mr Nasrallah to be false. (As discussed in Section L8 below, I conclude that Mr Chalopin also knew this. But this is not critical to the issue which I am currently considering). The aim and genesis of the Pensée Agreement was to provide a documentary record which recorded the fact, whatever the formal documents said, that Pensée was not Mr Nasrallah's, but was Mr Al Rajaan's. A related aspect of the background is that Mr Al Rajaan's involvement as the actual Founder, and the provider of funds to Pensée, and as the real beneficiary, was to be concealed: hence the absence of any reference to these matters in the formal documents, and indeed the absence of any reference to Mr Al Rajaan save as residuary beneficiary in the event that Nadim Nasrallah and all his issue died.

2298. It was against that background that the expression "ultimate beneficiary" and "UO" or "ultimate owner" was used, and I consider that they indicate beneficial ownership, and the trust for which PIFSS contends.

2299. I now turn to the various narrower meanings of those words which have been proposed by Mr Edey.

2300. It was submitted by Mr Edey in opening that ultimate beneficiary or ultimate owner was not an entirely clear reference, but that it was best read "as a reference to Mr Al Rajaan's status as ultimate beneficial owner of Pensée in a compliance or AML sense"; or possibly as a reference to his being the person presently entitled to the funds which were to be endowed by him on Pensée; or possibly even to his status under the letter of wishes as the person who would become beneficiary in a Foundation sense if the named beneficiary, Nadim, died.

2301. I do not accept that the reference to Mr Al Rajaan as ultimate beneficiary, or ultimate owner, should be read down in any of the ways proposed by Mr Edey. The natural meaning of the language used goes wider than any of his suggestions.

2302. I reject the argument that the words are best read as a reference to Mr Al Rajaan's status as ultimate beneficial owner in a compliance or AML sense. In my view, this is too narrow. This was an agreement between Mr Nasrallah and Mr Al Rajaan (albeit also witnessed by Mr Chalopin), and there is no reason why these two men would have thought it necessary to reach agreement on compliance or AML matters. Indeed, given the criminal nature of the enterprise on which they were engaged, compliance and AML would have been the last thing on their minds.

2303. I also consider that the language, in identifying Mr Al Rajaan's status as ultimate beneficiary, is broader than simply a reference to Mr Al Rajaan being the person presently entitled to the funds which were to be endowed by him on Pensée. Given that

the agreement was intended to regulate the parties' dealings and rights in the future, the description of Mr Al Rajaan as the "ultimate beneficiary" or "ultimate owner" is looking to what his status is both at the time of the agreement and into the future: i.e. as the ultimate beneficiary or owner of the assets of the Foundation.

2304. I do accept that the words of Clause 2 are, in isolation, most naturally read as referring to the position prior to remission of the monies to Pensée. However, I do not think that this casts any significant light on, or limits, the meaning and effect of the language which refers to Mr Al Rajaan as the ultimate beneficiary or ultimate owner, and which in my view indicate that this is to be his status throughout. Once that is recognised, then there is no difficulty in reading Clause 2 as applicable to the ownership position after remission of the monies, and that reading is supported by the admissible factual matrix already discussed.

2305. I also do not accept that "ultimate beneficiary" or "ultimate owner" can possibly be read as a reference to Mr Al Rajaan's status under the letter of wishes as the person who would become beneficiary in a Foundation sense if the named beneficiary, Nadim, died. Indeed, the 'per stirpes' meant that Nadim's issue would also have to die before Mr Al Rajaan could become the beneficiary. Again, however, this is a very narrow meaning of the relevant words, and it would be surprising if Mr Al Rajaan and Mr Nasrallah would have thought it important to record Mr Al Rajaan's status as ultimate beneficiary in the event that Nadim and all his issue died. That was already recorded in the Letter of Wishes, and there was no reason to do it again. Furthermore, the clauses of the Pensée Agreement, as a whole, have the effect (as Mr Edey submitted) of conferring wide powers on Mr Al Rajaan, and wide waivers by Mr Nasrallah. The parties were not simply looking at what the position might be if Nadim and all his issue died.

2306. In their written closing, Pensée also submitted that the relevant words are a reference to the extensive residual powers of control that Mr Al Rajaan had in relation to the Foundation's assets as ultimate Founder. Those powers meant that he might colloquially be regarded as the ultimate owner of the Foundation and would, for AML purposes, be its beneficial owner, even though a Foundation has no owner in a proprietary sense. I think that this argument largely repeats the argument (which I have rejected) that the words were used in a compliance/AML sense. In so far as it goes wider, I do not accept that the expressions "ultimate beneficiary" or "ultimate owner" are naturally to be read simply as a reference to powers of control. They are dealing with ownership.

2307. I do not consider that Mr Edey's arguments, as to the nature of Foundations under Bahamian law, or as to the orthodox position that such Foundations own their own assets, are powerful factors in the factual matrix against PIFSS' argument. Nor are the related points to the effect that if the intention was to conceal Mr Al Rajaan's assets, he would not have wanted them to be held on trust on his behalf. This was an agreement signed by two individuals who had no real understanding of Bahamian Foundations and how they operated. Moreover, it was signed in the factual context which I have described, namely the need to have some record which in effect contradicted the false statements in the formal documentation. The paramount need was therefore to ensure that there was a record that the Foundation and its assets were Mr Al Rajaan's, not Mr Nasrallah's. The factual matrix to the Pensée Agreement does not suggest that there was any sophisticated thinking or discussion beyond that, as part of its aim and genesis: for example as to the inheritance implications of the arrangement whereby Mr Al

Rajaan was the beneficial owner, or the advantage of having a Foundation so as to provide protection from claims that might be made by PIFSS or others. Indeed, it should not be forgotten that this was always intended to be a private and confidential agreement, which would be disclosed to no-one. It would never have seen the light of day but for Mr Nasrallah's asset disclosure in the present proceedings.

2308. Mr Edey also argued that, if PIFSS' case on bare trust were accepted, Pensée's assets would now vest in Mr Al Rajaan's daughters, rather than his estate. Reliance was placed in that regard on the evidence of Mr Nasrallah – which in many other respects Pensée sought to discredit – supported (albeit belatedly and only in his oral evidence) by Mr Chalopin. I do not consider that there is any reliable evidence that the trust was exclusively for the benefit of Mr Al Rajaan's daughters in the event of his death. There is nothing in the written Pensée Agreement which can be relied upon as supporting this contention. The daughters are not referred to as the ultimate beneficiary or ultimate owner in the event of Mr Al Rajaan's death. They are only referred to in clause 6, as being the people in whom Mr Al Rajaan's powers under the agreement vest in the event of his death. Mr Nasrallah's evidence in relation to the daughters, and Mr Chalopin's evidence to the extent that he supported it, was based on a misreading of clause 6. As discussed above, the fact it was not intended exclusively to benefit the daughters is evidenced by Mr Al Rajaan's efforts to transfer the Pensée assets in 2019 to his son.

2309. Accordingly, PIFSS' bare trust argument, and the claim for a declaration in that respect succeeds.

L7: The claim based on Articles 23 and 28 KPPL

Articles 23 – 28 KPPL

2310. PIFSS advanced a case based on Articles 23 and 28 KPPL. (In closing this was advanced as the first of 4 ways in which PIFSS advanced its case). Article 23 appears in Section 3 of the KPPL headed "Offenses and Penalties". Article 28 appears in Section 4, headed "Precautionary Measures". The relevant provisions (using the PIFSS translation) are as follows:

> "Article 23
>
> First instance judgments imposing fines or ordering repayment or compensation for any of the crimes in violation of this Law shall be immediately enforceable.
>
> The Court considering an opposition or appeal may order the suspension of enforcement of the judgment. The assets of the entities mentioned in Article 2, as well as administrative expenses and international asset search expenses as referred to in the following article, shall have a preferential right over all movable and immovable assets of the convicted person, taking precedence over other preferential rights except for all types of alimony rights.

The previous two paragraphs shall apply to judgments issued in implementation of articles 44, 45, 47, and 48 of the aforementioned Law No. 31 of 1970.

Section 4: Precautionary Measures

Article 24

The Public Prosecutor, if he has collected sufficient evidence that an individual has committed any of the crimes provides for in articles 9, 10, 11, 12, or 14 of this Law, may order that the individual be prohibited from traveling or disposing of or managing his property and may begin such precautionary measures as he deems appropriate with regard. This applies to all or some of the assets in the possession of the accused or in the possession of others, without prejudice to the duty of the aggrieved entities referred to in Article 2 of this Law to take all judicial, precautionary, legal, and administrative measures within the country and abroad to prevent smuggling of funds. The Public Prosecutor may also order that such measures be taken against the property of the individual's spouse, minor or adult children, or others if that property is connected to the crime.

The Public Prosecutor shall appoint a representative to administer property that an individual is prohibited from administering as the result of his nomination to the position of Head of the State Audit Bureau, and a statement of the representative's obligations and the rules for his discharge of his duties shall be issued by resolution of the Head of the Bureau.

The procedures provided for in the previous paragraphs shall apply to persons and incidents subject to articles 44, 45, 47, and 48 of the aforementioned Law No.3 1 of 1970.

Article 25

Investigative authorities, in order to preserve the funds referred to in the preceding article, may take whatever measures they deem necessary to trace them abroad, and whatever they deem appropriate to preserve those funds in any condition they may be, including through diplomatic methods and by utilizing foreign public or private investigative and intelligence entities.

Article 26

Any interested party may object before the competent court against a decision preventing disposition and management of funds after the passage of three months from the date of issuance of this decision. The court shall promptly rule on the objection, either by dismissing it, admitting it and cancelling the order, or mending it and determining the necessary guarantees if

> warranted. The objection may not be refiled except until six months after the ruling on the prior objection. The Public Prosecutor may withdraw or amend the order as required by the investigation.
>
> Article 27
>
> If the accused is convicted, the decision preventing disposition and management or any other precautionary measures are not lifted with respect to his property/funds except after completing the execution of the financial penalties provided for against the perpetrator, in addition to the administrative expenses and international asset search expenses.
>
> The Public Prosecutor may forcibly take possession over such property from the entities with which it is attached and dispose of it by sale, including sale by administrative procedures.
>
> Article 28
>
> Any disposals carried out by the convicted person with respect to the funds related to the crimes stipulated in this Law, or by those to whom such funds have been transferred, shall be considered null and void if such dispositions were made for the purpose of smuggling these funds or preventing the right of the aggrieved entity to recover what may be adjudicated in its favor. The nullification stipulated in the previous paragraph shall not apply to transactions concluded with persons acting in good faith. A person is not considered to be acting in good faith if he knew, or could have known, of the existence of a crime or the purpose behind the transaction. The provisions of the previous two paragraphs shall apply to disposals of property related to crimes provided for in articles 44, 45, 47, and 48 of the aforementioned Law No. 31 of 1970."

2311. It was common ground that these Articles were to be read in the light of the KPPL as a whole. The Explanatory Memorandum to the KPPL, which is admissible in interpreting it, sets out its objectives as follows. (Again, I have used the PIFSS certified translation, because any differences compared to the Man + translation are not material):

> "Article 17 of the Constitution states that "Public property is inviolable, and its protection is the duty of every citizen". Articles 44 to 52 of Section II of Law No. 31 of 1970 Amending Certain Provisions of the Penal Code, Law No. 16 of 1960, under the title of "Embezzlement and of Public Funds and Breach of Trust" criminalizes offenses committed against public funds. Recently, various forms of tampering with public funds have been revealed, particularly involving investments located domestically and abroad. In many of these cases, those who seize public funds exploit their influence and official authority either to smuggle these funds abroad, where they enjoy banking

secrecy shielding them from disclosure and putting them beyond recovery or the reach of justice, or to transfer them to third parties through fictitious transactions to remove them from suspicion and evade legal consequences. Out of a desire to protect public property and penalize all individuals that violate it, this bill was prepared to focus on the following objectives:

I: To achieve the highest degree of protection possible over public funds, as expressed by the provisions of the bill. It is necessary to address gaps in existing legislation, which lacks provisions to pursue many newly emerged criminal activities against public funds.

II: To adopt a preventive approach rather than a reactive one, so that the country will not witness incidents similar to the recent blatant attacks on public funds, and to establish a new system placing State control, reinforced by legitimacy, over public funds through serious governmental and popular oversight.

III: To extend the scope of protection to include investments abroad, whose role has grown to become a main contributor to the national economy.

IV: To impose strict penalties and firmly punish any hand that tampers with public funds. At the same time, the bill allows the court, if it finds the circumstances or the harm caused by the crime to be minor, to reduce the penalty to imprisonment not exceeding three years and a fine not exceeding three thousand dinars, or one of these two penalties.

V: To track unlawfully obtained funds, whether domestically or abroad, in any state, and to preserve them to guarantee fines, restitution of misappropriated funds, and all other related guarantees, including nullifying transactions transferring ownership undertaken by the offender to conceal or smuggle funds, such as sales of real estate or shares or gifts and donations, whether the transfers are for consideration or gratuitous. The bill ensures that the victim governmental entities can recover their rights and prevent the offender or any accomplice from smuggling funds under any pretext, even if disguised as contracts or transactions, while protecting the rights of bona fide third parties who acted with the offender without suspicion of collusion or bad faith. This principle achieves justice and aligns with the Constitution, particularly Article 18, which provides that “private property is inviolable,” a principle established by the Constitutional Court in its ruling of 11/7/1981 and considered fundamental to society.

VI: To grant property subject to judgment, which must be recovered from the convicted person in public fund crimes, priority over other preferential rights, except for alimony rights

> under Shariah of all types. These foundations aim to protect public funds from tampering by wrongdoers and greed of opportunists, and to fill gaps in existing legislation, enabling the detection of crimes early before escalation and increased risk.
>
> The bill contains five sections, the first of which concerns general provisions, the second of which concerns means of oversight over public funds, the third of which concerns crimes and punishments, the fourth of which concerns precautionary measures, and the fifth of which concerns final provisions. In order to achieve the intended objectives, the first two sections contain provisions on the oversight and protection of public property at an early stage, so that such property will remain under the control of governmental and popular entities responsible for oversight, at a time that prevents the escalation of the risk of tampering with those funds, instead of waiting until a crime occurs, and to avoid discovering the crime late, after the perpetrator has arranged matters and smuggled the embezzled or misappropriated funds, which would result in the State losing the opportunity to recover those funds in a timely manner. Section III contains provisions that give form to the desire behind the bill to strengthen the punishments and address all forms of violations against public property. To complement the system proposed in the bill, section IV naturally contains general provisions on precautionary measures to protect and trace public property, regardless of whose possession it may be in, to challenge that possession, and to nullify dispositions if they are intended to smuggle the property away."

2312. The Explanatory Memorandum deals as follows specifically with Articles 23 and 24:

> "Article 23 provides another expression of the interest in recovering funds involved in the crime. Sentences of a fine, restitution of funds, or compensation are immediately enforceable against the defendant's funds from the date of their issuance, even if the defendant appeals them, unless the court hearing the appeal rules to suspend the execution of the lower sentence. Existing legislation contains provisions that grant the Public Prosecutor's Office the authority to prevent individuals from disposing of funds or stay their hand in administering it. In line with that, article 24 fills gaps in legislation that have been discovered in the course of their practical application, out of a desire to stem any violation against public funds by providing sufficient procedures to recover the property and prevent it from being smuggled away or removed from the country in any way."

2313. Article 28 is explained as follows:

> "Article 28 nullifies any dispositions carried out by the convicted person or by anyone to whom such funds have been transferred, if such dispositions are related to the crimes stipulated in this

> Law and were made with the intent of smuggling these funds or preventing the aggrieved entity from recovering what may be adjudicated in its favor. This article aims to protect public funds and to enable the injured government entity to enforce its rights, preventing the convicted person or any individual involved with him from smuggling funds under any cover, even if disguised through contracts, transactions, or attempts to give them a legitimate appearance. To prevent such conduct, this article provides for the nullification of such dispositions, so that the injured entity can protect its rights. The article also provides a general rule to be applied in all cases of deliberate smuggling of public funds, regardless of when the crime was committed or when the disposition was performed. It does not specify a particular date for dispositions that are nullified, nor is nullification tied to a given period of time before or after the violation. Instead, it leaves the matter as a general principle and is only subject to general rules, thus providing greater protection for public property. If the basic goal of the article is to protect public property, then the rights of good-faith persons who engage in transactions with a defendant or enter into a contract with him, without any bad faith, any suspicion of wrongdoing or any involvement in the wrongdoing, should also be protected. This principle is in service of justice and is in keeping with the Constitution, in particular article 18 thereof which provides that "Private property is to be well protected." It is a firmly established principle applied by the Constitutional Court in its judgment on 11/7/1981, where it found that private property is a fundamental building block of society. Similarly, the general rule in the Civil Code, article 189, requires that a good-faith person's rights be protected in the event of the nullification of a contract if this person received proper consideration.
>
> Therefore, the new article follows this principle in providing that nullification does not have effect on disposals performed for consideration to good-faith third parties. The application of this article means that a disposal performed without consideration, even to a good-faith third party as a gift or donation, is nullified and the injured entity entirely retains its right to recover the property from the recipient of the gift or donation."

The parties' arguments

2314. In summary, PIFSS' reliance on Article 28 seeks to nullify the effect of Mr Al Rajaan's transfers of his secret commissions into Pensée, so that those assets are amenable to the enforcement of its claims against Mr Al Rajaan relating to the unlawful arrangements which generated those transfers. PIFSS' reliance on Article 23 seeks to establish a priority right to those monies, once they have been subject to the nullification.

2315. In view of my conclusion in relation to the bare trust argument, PIFSS no longer needs Article 28 in order to establish that the Pensée assets are Mr Al Rajaan's, and therefore amenable to the enforcement of a judgment against him. Nevertheless, I will deal fully

with the arguments addressed in Article 28 (as well as Article 23), because it provides a second potential route to recovery of the assets paid to, or currently held by, Pensée.

2316. PIFSS contends that nullification and its right arise by reason of Mr Al Rajaan's tortious conduct in breaching the KPPL Articles 11 and 12, resulting in the payments made into Pensée. PIFSS contends that its entitlement, pursuant to Articles 23 and 28, is not limited to the USD 31.5 million that was paid into Pensée, but is substantially greater. That is not because of the increase in the assets paid to Pensée by reason of successful investment. Rather, it is because the USD 31.5 million represents only around 60% or thereabouts of the monies that were obtained as a result of the unlawful arrangements, contrary to Articles 11 and 12, which resulted in the payments to Pensée. On that basis, the monies paid to Pensée should in effect be 'grossed up', so as to take into account the monies, derived from that unlawful conduct, that would have been retained by the Zetland companies which made the payments to Pensée.

2317. It was not possible for PIFSS to analyse all the payments which were made to Pensée, in order to see the exact percentage slice which the monies received by Mr Al Rajaan bore to the original amounts paid to the Zetland companies. However, PIFSS was able to analyse, to a degree, the payments made to Wentworth and Moccak. This analysis showed that Mr Al Rajaan received in the order of 60% of the commissions paid to these two companies. That figure of 60% is a little lower than, but nevertheless broadly consistent with, Mr Al Rajaan's share of amounts that were paid to Mr Nasrallah and Mr Mombelli in respect of various transactions. I consider it a reasonable figure on which to work.

2318. This grossing up, on the basis of Mr Al Rajaan receiving 60% of the sums originally paid by fund managers, results in PIFSS' claim against Mr Al Rajaan being for USD 52,555,186.[5] This is very close to the value of the assets which, as I was told by Pensée, was held by Pensée as at 23 September 2026: around USD 54 million. Indeed, even if one assumed that Mr Al Rajaan received a higher amount, namely 70% of the monies paid to the Zetland companies, the grossed up figure would still be high: USD 45 million.

2319. PIFSS does not contend that Kuwaiti law gives PIFSS what would, in English law, be a straightforward proprietary remedy to recover the monies paid to Mr Al Rajaan and then directed to Pensée and successfully invested. Mr Ritchie made this clear in oral reply closing. He accepted that the starting point would be for PIFSS to establish its entitlement, as against Mr Al Rajaan, to compensation/repayment (via Article 247 KCC and/or Article 16 KPPL). Once that had been established, then remedies under Articles 23 and 28 would be available to the extent of PIFSS' right to compensation/repayment.

2320. In his closing submissions, Mr Norbury made it clear that the remedies available under these Articles were not dependent on any wrongdoing by Pensée or Mr Chalopin. Nullification under Article 28 was because of PIFSS' KPPL claim against Mr Al Rajaan. Relevant to nullification was the fact that (as was not disputed), Pensée was not a bona fide purchaser for value in respect of the payments received: it was simply the recipient, as donee, of large sums of money at the direction of Mr Al Rajaan.

[5] This is the grossed up figure, but the "unique" claim against Mr Al Rajaan is slightly lower, at USD 51,281,849. This is because there is an overlap of USD 1,273,337 with the QWM payments under the Aerium Scheme.

Furthermore, Article 28 provides that "a person is not considered to be acting in good faith if he knew, or could have known, the existence of a crime or the purpose behind the transaction". My findings in Section L6 above and L8 below, concerning Mr Chalopin, would be sufficient to prevent successful reliance on the "good faith" provisions of Article 28.

2321. Mr Edey summarised, correctly in my view, the necessary steps in PIFSS' case as follows:

i) PIFSS must establish its case against Mr Al Rajaan for breach of Articles 11 or 12 KPPL.

ii) PIFSS must show that Mr Al Rajaan's dispositions to Pensée were within the scope of Article 28: i.e. that the dispositions were "made for the purpose of smuggling these funds or preventing the right of the aggrieved entity to recover what may be adjudicated in its favor". If so, then PIFSS needs to establish the existence of a right to nullification under Article 28.

iii) PIFSS must show that the effect of the nullity claim is to revest in Mr Al Rajaan all of the assets bought with the money transferred to Pensée.

iv) PIFSS must show that, on that basis, PIFSS has a right under Article 23 KPPL to an order that Pensée hands the assets or their value to PIFSS.

v) The revesting of the property is not precluded by s.3(4) of the Foundations Act.

2322. Mr Edey indicated that there were certain aspects of these steps that he did not challenge: specifically, Step (1), the factual premise of Step (2), namely the purpose of the smuggling of funds, and Step (5). I agree that each of these matters has been established by PIFSS, and it is not necessary to discuss these points in detail here. I have explained elsewhere why, as a matter of Kuwaiti law, PIFSS is entitled to claim as against Mr Al Rajaan (and others) the full amount of the amounts of the monies unlawfully obtained, so that PIFSS' claim is not limited to the amounts actually received by Mr Al Rajaan.

2323. Mr Edey's arguments therefore focused on the final part of Step (2), and steps (3) and (4). In that regard, he made 5 principal submissions.

2324. First, he submitted that there is no basis under Kuwaiti law on which a civil claimant, bringing a civil claim under the Kuwaiti Civil Code before a civil court, could claim under Articles 23 and 28 KPPL. This was not an argument which was based on Dr Youssef's general point (which I have rejected) that the requirement for unlawful conduct, for the purposes of a tort claim, cannot be based upon a crime unless there is a criminal conviction. This was a more specific point based upon the KPPL itself, and the way in which PIFSS had advanced its tort claim. The primary basis for the tort claim was Article 246 KCC, with Article 16 and 22 KPPL being relied upon under the "umbrella" of that Article 246 KCC claim. There was, he submitted, no equivalent to Article 246 which could provide the umbrella for a claim under Articles 23 and 28 KPPL.

2325. Secondly, even if a civil judge could potentially have resort directly to the provisions of the KPPL, the wording of Articles 28 and 23 KPPL do not work in a civil context before a civil court. The terms of those articles only make sense in the context of criminal proceedings before the criminal court.

2326. Thirdly, even if Article 28 was available, nullification under Article 28 did not give the transferor any proprietary interest in the sum transferred. Nullification did not therefore have the effect of revesting property in Mr Al Rajaan. That was not possible in circumstances where Kuwaiti law did not recognise trusts, and the relevant property was (as here) in the name of Pensée. The effect of nullification was not an issue that had been explored with Dr Abbas in evidence, and his evidence did not provide support for the proposition that there was any revesting of property. When asked what the effect of nullification would then be, Mr Edey submitted that it would give a right to claim the money that Pensée had originally received, but no more. There would be no revesting of the full amount of Pensée's assets. Accordingly, any fruits of the successful investment would remain with Pensée and would not revest in Mr Al Rajaan as the original transferor. Mr Edey referred in that connection to evidence given by the experts in relation to the remedy of "repayment" under Article 22, and how this could not exceed the amount of the benefit received.

2327. Fourth, nullification does not entitle the victim to recover from the transferee more than the amount the transferee received. Any nullification would apply only to the amount received by Pensée. The points made in favour of this argument overlapped with those made in relation to his third point. The separate point made by Mr Edey here was that there is no requirement for an innocent recipient to disgorge any benefits it had made on the money it received.

2328. Fifth, the claim based on these Articles is non-justiciable. I do not address that, but reject the non-justiciability arguments in Section S.

2329. Standing back from the detail, the effect of Mr Edey's submissions is that Articles 23 and 28 of the KPPL are wholly ineffective, in the context of a civil claim by an entity which is the victim of tortious conduct, to achieve the stated objectives of and explanations for those articles as set out in the Explanatory Memorandum. Those objectives included, as set out in objective V, the tracking of unlawfully obtained funds, and seeking to ensure that "victim governmental entities can recover their rights … while protecting the rights of bona fide third parties". The objectives of the provisions of Section III, in which Article 23 appears, are (as explained on the second page of the Explanatory Memorandum) to "give form to the desire behind the bill to strengthen the punishments and address all forms of violations against public property". The objectives of Section IV, in which Article 28 appears, are as follows:

> "To complement the system proposed in the bill, section IV naturally contains general provisions on precautionary measures to protect and trace public property, regardless of whose possession it may be in, to challenge that possession, and to nullify dispositions if they are intended to smuggle the property away."

2330. Furthermore, given the terms of the relevant Articles, and their objectives, it is clear that Kuwaiti law does provide for effective remedies designed to ensure that a

wrongdoer – such as Mr Al Rajaan in the present case – is not in a position to benefit from his wrongs at the expense of the victim.

2331. These considerations call into question Mr Edey's overarching submission that: whereas English law would have no difficulty in enabling PIFSS to recover the monies received by Pensée since they were the fruits of secret commissions unlawfully obtained, Kuwaiti law reaches a fundamentally different result. In my view, whilst the route taken by the two systems of law is different, the end destination of Kuwaiti law, as reflected in Articles 23 and 28, is similar to the English law destination.

2332. I start by summarising what in my view was the most pertinent evidence in relation to the relevant Articles, and their context.

The evidence of Dr Abbas

2333. In his first report (paragraphs 580 – 595), Dr Abbas addressed a series of questions which included: "Can the claimant enforce proprietary rights in respect of the unlawful retention of public property (to the extent that is established)?", and "Is there a right to follow and trace property into the hands of third parties?" He explained the position as follows.

2334. According to general rules, tortious and unjust enrichment claims, on which a claim for "repayment" under Kuwaiti law is based, are personal remedies. They merely create personal obligations on the perpetrator and others to pay compensation. Both tortious liability and unjust enrichment are two kinds of personal obligations according to the KCC. This means that debts arising from tortious liability are enforced like any other personal obligations. Thus, the victim will not have a right *in rem* over the profit. It will have no priority over the monies of perpetrators, but will share with other creditors in execution on the monies of perpetrators and others. Further, it has no right to trace.

2335. There was no dispute as to the general approach summarised above. Earlier in his report, and in cross-examination, Dr Abbas also explained that Kuwaiti law does not have the same concept of trusts – with a split of legal and beneficial ownership – that is recognised in English law. Kuwaiti law does not therefore recognise trusts over property.

2336. Dr Abbas explained in his first report, however, that the KPPL provided an exception to the rule that debts arising from tortious liability were personal obligations. The KPPL thus allowed the victim entity to have (i) priority over all other creditors of the persons liable to repayment with respect to the execution of the repayment award on all monies of those persons; and (ii) a right to trace the profits or benefits. He said that Articles 23 and 28 provided the victim entity with a right *in rem*.

2337. As far as concerns Article 23, Dr Abbas referred to objective VI, and said that when the state entity seeks to enforce the repayment award, and in case other creditors of the liable persons are enforcing their rights, the right of repayment shall have priority over all other creditors, both creditors with other priority rights and other creditors, except for legal alimony claims. Dr Abbas was there recognising, as PIFSS' closing submissions also recognised, that Article 23 was dependent on PIFSS succeeding in establishing its claim for repayment against the wrongdoer: there would then be a priority right in relation to all his assets.

2338. Dr Abbas then went on to say that, in support of this priority, the law provided the state entity with a right to trace the profits or benefits obtained as a result of the crimes under Articles 9 – 12 of the KPPL. This right was based on Article 28. This article provides the victim entity with the right to trace the obtained benefit, which allowed the victim to execute on the obtained benefit in the hands of the party to which the donation or transfer was made.

2339. In that connection, he made reference to objective V in the Explanatory Memorandum: "To track unlawfully obtained funds … and to preserve them to guarantee fines, restitution of misappropriated funds … including nullifying transactions transferring ownership undertaken by the offender to conceal or smuggle funds". Article 28 provided the victim with a nullity claim concerning acts disposing of the obtained benefit or profit. He cited *Al-Sanhoury* in support of the general proposition that a nullity claim was an *in rem* or "in kind" remedy. I note that *Al-Sanhoury* was not there dealing specifically with the KPPL, but the passage cited does support Dr Abbas's view that a nullification right is regarded as an "in kind" remedy.

2340. Dr Abbas's conclusion was that in consequence, the entity affected by one of the KPPL crimes has the right to trace the relevant funds and a right of priority over other priority rights, save for legal alimony.

2341. Dr Abbas's evidence in his first report, as summarised above, was maintained in cross-examination. In my view, that evidence as to the effect of Articles 23 and 28 was consistent with the wording of the provisions in the light of the KPPL as a whole, and the Explanatory Memorandum.

2342. That said, I agree with Mr Edey (and indeed it was common ground) that the "right to trace" should not be understood in the same way as English law would understand that concept; i.e. as a right to recover the bribes or their proceeds as a proprietary claim. As Dr Abbas explained in response to Mr Edey's questions, Article 28 gives "the right to go and trace and request the nullification of these transactions that are prejudicing its right to collect its entitlement". In other words, Article 28 did not create a right of recovery which was separate to and independent of the claim which a victim of tortious conduct would otherwise have: i.e. the victim's claim for a repayment remedy or compensation. Dr Abbas agreed in cross examination that Article 28 did not therefore expand the amount the state could recover pursuant to Article 16 and 22 KPPL.

2343. In his reply closing, Mr Ritchie submitted that it was better not to look at the claim, pursuant to Articles 23 and 28, as a proprietary claim. Rather, it was a secured claim for an *in personam* claim against Mr Al Rajaan. Thus, PIFSS accepted that it would need to make good its claim against Mr Al Rajaan, including the quantum thereof, in order to be in a position to establish a claim to and enjoy priority in relation to the full amount of the monies in Pensée's account at Deltec, including its increased investment value. If PIFSS' claim against Mr Al Rajaan, arising from the KPPL breaches which resulted in the payments into Pensée, was lower than the amount of Pensée's monies (including their increased investment value), then to that extent there would be no secured claim.

2344. Against this background, I do not consider that there is any substance to Mr Edey's point that there is no Article 246 "umbrella" which permits the grant of the remedies available under Articles 23 and 28. That "umbrella", on PIFSS' case, covers claims for

repayment under Article 16 (or Article 22). The remedies under Articles 23 and 28 are ancillary to those claims. The claim by the victim entity must therefore succeed in order for Articles 23 and 28 to come into play. Professor Mallat fairly accepted in cross-examination (see below) that the rights referenced in Article 24 include the ultimate substantive right of the victim entities to recover repayment under the KPPL or compensation or both.

Dr Youssef and Professor Mallat

2345. I now turn to the evidence of Dr Youssef and Professor Mallat. As a result of cross-examination, it seemed to me that there was very little, if anything, between all the experts as to objectives of Articles 23 and 28, and how they operated. The only significant issue was whether or not those articles could operate in the absence of a criminal conviction. Before addressing that point specifically, I will summarise the evidence of Dr Youssef and Professor Mallat in cross-examination, because it is relevant by way of background to that principal issue.

2346. Dr Youssef's evidence in relation to questions on Articles 23 and 28 was markedly less confrontational and strident than his evidence on other issues. He accepted that it was appropriate to look at the entire KPPL when considering any particular article, and that it should be "read together in light of its explanatory note and purpose as well".

2347. He agreed that the KPPL was intended to provide a set of measures that enabled the injured party – one of the entities in Article 2 – to recover the funds and the assets that have been unlawfully taken. He accepted that that was a right that arose on breach of the provisions of the KPPL. He was asked about Article 24, which refers to the powers of the Public Prosecutor to begin precautionary measures against an individual who has committed any of the crimes within Articles 9- 12, but which also refers to the "duties of the aggrieved entities referred to in Article 2 of this Law to take all judicial, precautionary, legal and administrative measures within the country and abroad to prevent smuggling of funds". Dr Youssef agreed (eventually) that this was referring to the substantive rights that arose on breach of the provisions of the KPPL, and that it was appropriate to test the existence of those rights against the measures that the entity could take. He agreed that the language of Article 24 was very broad, and that it envisaged "any kind of measures".

2348. In relation to Article 28, he agreed that transactions are deemed void when they were entered into for the purposes of smuggling the proceeds of the relevant crimes, unless there was a bona fide purchaser for value. It was put to him that the effect of voiding, if an action was nullified, is "that it vests the property back in the transferor", and that it was an in rem right. I did not understand him to disagree in his response, which was: "In the regular effect of nullity, if the transaction is void, it's reversed". He agreed that one of the purposes of that was to enable the funds to be protected for the purposes of repayment to the victim entity. He described a court decision, as to nullity, as the "trigger", but acknowledged that the right of the victim may precede that decision of the judge.

2349. It was put to Dr Youssef that the references in the KPPL to a "convicted person" did not stop the law applying in circumstances where there was no conviction. He agreed that if a judge was making a determination under Article 22, judgment could be

rendered against the heirs or against someone who has assisted and been accessory to the perpetrator.

2350. Professor Mallat, in cross-examination on the same issues, largely agreed with all the points that were put to him. He agreed that it was appropriate to interpret the KPPL as a whole, and that it was important to understand what the various provisions were trying to do in terms of protection for private entities and state entities. He agreed that the proper interpretation of the KPPL as a whole was that it conferred rights on Article 2 entities; that this was because they were the entities that were going to be injured by the breaches of the KPPL; and that the rights conferred by the KPPL arise on breach. He agreed that the reference to the duties of the entities, in Article 24, did not create a right, but rather reflected an underlying right of the victim entities that had arisen under the KPPL: in particular, the ultimate substantive right of the victim entities to recover repayment under the KPPL or compensation or both. It was correct that that right arose on the date of breach of the law, and that in support of that, Article 28 deemed void any transactions entered into by the person against whom a judgment was obtained. The voidness of those transactions would be ab initio, even though it would require a court to declare or determine their voidness.

2351. It was put to him that nullity (under Article 28) vests in rem rights in the transferor – so it reverses the transaction and the property returns to the transferor. He agreed, and referred only to a "tangential criticism" of Dr Abbas and Dr Youssef resulting from civil laws which draw a distinction between movables and immovables rather than the "in rem" and "in personam" distinction under English law.

2352. When asked about the practicalities of what the law achieved, he agreed that it expressly envisages that steps can be taken to prevent the smuggling or concealment of the benefits of breaches, and to recover the assets. Indeed he said: "not only that – and some of it is tracing". He went on to say that the objective of the law clearly upholds the right of the state to recover its assets against people who have dissipated it in a manner which is unlawful. He agreed, with one caveat, that it was open to a victim entity to seek (if a relevant forum had these powers) interim measures in line with or equivalent to tracing relief, to seek disclosure orders, and to seek orders about where the money had gone. His caveat was that the law was somewhat inconsistent in that it sometimes referred to the public prosecutor, and sometimes to the aggrieved or injured entity. There was a "tension between the two that's not all too clear".

2353. After being referred to the objectives as set out in the Explanatory Memorandum, he agreed that the purpose of the measures, taken as a whole, is to enable the victim entities to vindicate their rights. In that regard, he referred to a point in his report which, in my view, did not substantially affect the substance of his agreement to that proposition. Indeed, he later agreed that the purpose of the statute was "inter alia" to ensure and to take the measures necessary to protect the rights of the victim entities. He also agreed that there was a preferential right, a priority right given to victim entities, and that "lien" was one way of describing it. He did not dispute that there are priority rights that are created from the moment at which the breaches of the statute occur in favour of the victim entities.

Can an aggrieved entity access the rights under Arts 23 and 28 in a civil claim?

2354. The central point advanced by Dr Youssef was that the remedies under Articles 23 and 28 could not be obtained in the absence of a criminal conviction. Pensée placed considerable reliance on the reference in Article 23 to "the convicted person", and the similar expression in Article 28. Reliance was also placed upon other aspects of the wording of those articles.

2355. However, I consider that this interpretation fails properly to recognise the purpose of the KPPL, the Explanatory Memorandum and in particular its objectives as set out therein, and the KPPL as a whole. When those matters are considered, I consider that Dr Abbas's view – that no conviction is necessary – correctly reflects Kuwaiti law, and that that would be the decision that the Kuwaiti Court of Cassation would reach if it had to address the issue.

2356. The issue is currently not the subject of any Kuwaiti decided case. No doubt this is because, as Dr Abbas said, the usual case for the grant of these remedies will be a criminal case in which the aggrieved victim entity will join as an adhesive claimant. However, it is clear from Article 22 that a conviction is not essential to the grant of these remedies. That is because if the alleged offender dies, the criminal case effectively dies with him, but nevertheless the victim entity can request repayment and compensation. This is explained as follows in the Explanatory Memorandum:

> "Article 22 is another expression of the firm desire to recover funds involved in crimes. A criminal complaint may end with the death of the perpetrator, for example, but nevertheless it is possible to pursue the property in possession of the individual's heirs and legatees as well as anyone who obtained a substantial benefit from the crime, as they are liable for those funds to the extent of the benefit they received from the crime."

2357. Dr Youssef accepted at the end of his cross-examination that it was not essential that somebody has in fact been convicted in order for an Article 22 judgment to be obtained. I consider that there is no reason why, in circumstances where Article 22 applies, the judge should not go on to grant, to the aggrieved victim entity, the remedies that are available under Articles 23 and 28. No logical reason has been advanced as to why there should be a significant difference between the ability of an aggrieved party to obtain those remedies when an offender is alive and convicted, and the situation where the offender has died and an Article 22 case has proceeded. I accept Dr Abbas's evidence that, in the latter situation, Article 28 is indeed available. I did not understand Dr Youssef or Professor Mallat to suggest otherwise, or to draw any distinction between Articles 28 and 23 in that regard. Indeed, in oral closing, Mr Edey did not seek positively to advance an argument that the Article 23 and 28 remedies were unavailable in an Article 22 context.

2358. In these circumstances, I do not consider that the reference to "convicted person" in Articles 23 and 28 can bear the weight which Pensée's argument seeks to place on it. The remedies are available even if there is no conviction.

2359. However, Pensée submitted that the position is inapplicable in the present case, because I am not engaged on an Article 22 exercise, and there never was an Article 22 exercise. It was therefore suggested that the position is very different in circumstances where there never have been criminal proceedings.

2360. I see no reason why that should be the case, and every reason why it should not. As is clear from the evidence quoted above, the KPPL provides remedies to enable aggrieved victim entities to obtain redress for wrongs. Those remedies arise in relation to rights that exist prior to the court making a decision on whether, for example, there should be nullification of a transaction. Those rights come into existence at the time when the KPPL is breached. Moreover, the right to repayment and compensation, for which Articles 23 and 28 provide ancillary remedies, are regarded (as a matter of Kuwaiti law) as civil rights. The rationale for the existence of those remedies, to enable the victim's civil rights to be effective, is the same in a situation where (i) the offender is convicted, and the judge determines a party's adhesive claim; (ii) the criminal proceedings terminate, for example, because of the death of the offender, but the judge nevertheless goes on to determine the victim's rights and remedies pursuant to the express power in Article 22; and (iii) there have been no criminal proceedings in the first place – for example because the offender may have died before they could be commenced – but the aggrieved victim has valid civil rights to assert.

2361. Pensée's argument, if accepted, would lead to a strange and anomalous result which I do not think that the Kuwaiti Court of Cassation would contemplate as a matter of Kuwaiti law. It would mean that the heirs of an alleged offender were in a fundamentally more advantageous position in the event that no criminal proceedings were ever brought, than they would be in circumstances where they were brought but had terminated. In the latter case, the criminal conduct of the offender could be proved with a view to establishing his tortious liability, and the remedies under Articles 23 and 28 would be available without difficulty. In the former case, however, the criminal conduct of the offender could also be proved in a civil case with a view to establishing his tortious liability, but for some reason the remedies under Articles 23 and 28 would not be available. Given the purpose and objectives of the KPPL, as explained in the Explanatory Memorandum, there could be no justification for this result.

2362. Furthermore, all experts agreed that the result of Article 28 was nullification ab initio, albeit that a court would need to decide that that was the position if it was contested. The right of an aggrieved party to obtain relief that a transaction is nullified ab initio is described by Al-Sanhoury as an "in kind" (or as Dr Abbas described it, "in rem") right. There is no reason why the existence of that right, and the ability of the aggrieved party to obtain the court's declaration as to its existence, should be different in any of the three situations described above.

2363. Similarly, Article 24 confirms that the aggrieved entity has rights which arise from the moment of breach, and requires that entity to take all judicial, legal and administrative measures both in Kuwait and abroad to protect those rights. Dr Youssef said that the obtaining of such measures would not require full proof of the existence of those rights, but only some lesser standard such as reasonable suspicion of an infringement of the rights. That may well be the case, although it might depend upon the approach taken by the court in the forum where the application for interim measures was made. The important point for present purposes, however, is that it would be very odd if an entity was required to take all these measures at an interim stage, but was unable ultimately to vindicate its right to the remedies under Article 23 or 28 before a civil court.

2364. Accordingly, I do not accept that the remedies under Articles 23 and 28 require a prior conviction. Nor do I accept that these remedies do not work in a civil context: they are perfectly capable of working in that context, and there is good reason why they should

do so in circumstances where they are ancillary to a successful civil claim. Nor do I accept that they are unavailable in civil proceedings in a civil court. The argument to that effect ultimately depends on the more general proposition that rights based on the KPPL are not enforceable in civil courts, an argument which I have rejected in the context of Articles 16 and 22.

2365. Mr Edey's remaining arguments focused on the question of whether the effect of nullification is to revest property in the transferor, and whether that revesting would extend beyond the monies originally received by Pensée (i.e. to the proceeds of successful investment).

2366. As to the question of revesting, Professor Mallat agreed that the effect of nullification was that the transaction was reversed and the property returned to the transferor. Dr Youssef did not disagree when this point was put to him, saying that the regular effect of nullity is that the transaction was void and reversed. There was also no dispute on the evidence that voidness was "ab initio". In my view, it is obvious from the wording of Article 28, seen in the light of its purpose and the Explanatory Memorandum, that the effect of nullification is indeed to reverse the transaction, and to return assets to the transferor who sought to smuggle them away to someone else.

2367. None of the experts seem to have thought that this was problematic because Kuwaiti law does not recognise trusts, with a split of legal and beneficial ownership. This is not surprising. It is in my view obvious that the Kuwaiti court would have power, pursuant to Article 28, to make whatever orders are necessary to achieve the nullification for which the law provides. If the assets are in the hands of a third party, which is what Article 28 contemplates, appropriate orders could be made for the return of the assets to the wrongdoer who sought to smuggle them away. I also see no reason why an English court, fashioning a remedy to give effect to the nullification and priority rights in Articles 28 and 23, should not simply order the payment of the monies directly to the party (here PIFSS) with the priority right over the assets in the hands of the wrongdoer.

2368. As to the question of whether the transferee can retain the fruits of the assets transferred to him, the position is in my view as follows. Nullification and voidness ab initio must mean that the transferee – unless it can bring itself within the exception in Article 28 for bona fide transfers – cannot retain the fruits of the assets received. Otherwise, there would be no full nullification or voidness ab initio. As Mr Ritchie put it: "You can't cut the cake up and say "Ab initio, but because in fact there were investment returns we're going to hang on to the rest of it"". I also consider that the contrary result would be inconsistent with the objectives and purpose of the KPPL, which includes tracking assets and preventing them being smuggled away. On Pensée's argument, there is an incentive to smuggle assets away and successfully invest them, because the investment returns would be beyond the reach of the victim in civil proceedings to enforce his rights. This makes little or no sense, in the light of the objectives and purpose of the KPPL.

Conclusion

2369. Accordingly, the transfers made by Mr Al Rajaan into Pensée are nullified and are void ab initio. In the light of Article 23 KPPL, PIFSS has a priority right to those assets in the hands of Mr Al Rajaan and now his estate, to the extent that PIFSS' claim against Mr Al Rajaan is established: see paragraphs 2343-2344 above. The appropriate order

to give effect to the nullification, and the priority right, is an order that Pensée should transfer all remaining Pensée assets to PIFSS, to the extent that PIFSS' claim against Mr Al Rajaan is established. I leave for further argument, at the consequentials hearing, issues as to the extent and exact terms of the appropriate order, including whether the priority right extends to PIFSS' claims (if established) for interest or costs. I also leave for further argument, and determination at the consequentials hearing or thereafter, whether any other orders are appropriate in respect of monies or other assets of Pensée which may no longer be available.

L8: The alleged money laundering by Mr Chalopin

The critical issue

2370. PIFSS contends, and seeks a finding of fact, that Mr Chalopin knew in 2013 that the funds coming into Pensée were the proceeds of corruption. Such a finding would enable PIFSS to contend, in summary, that Pensée was tortiously liable under Kuwaiti law by reason of its contravention of Kuwaiti money laundering legislation: specifically, Article 2 of Money Laundering Law No. 106 of 2013.

2371. In closing submissions, Mr Norbury indicated that he was not pursuing a case that Mr Chalopin was expressly told this in so many words, either by Mr Al Rajaan or Mr Nasrallah, at either the Knightsbridge meeting in April 2013, or at the Paris meeting in June 2013. However, he submitted that it was obvious from all the circumstances. PIFSS particularly relied on Mr Chalopin's knowledge of Mr Al Rajaan's position as the Director General of PIFSS, and his knowledge of Mr Al Rajaan's intention dishonestly to conceal the source and his ownership and control of the funds coming into Pensée. Mr Norbury submitted that when one put together concealment of Mr Al Rajaan's role in the creation of Pensée, and the position that Mr Al Rajaan held, it was obvious that a Kuwaiti public official, facing allegations of corruption, who is hiding his assets in the way that they were hidden, was hiding the proceeds of corruption.

2372. In arguing for this conclusion, PIFSS relied upon various features of the chronology set out above, and in particular: false documents which were created in the context of the formation of Pensée, and Mr Chalopin's knowledge of their falsity; the secrecy surrounding the Pensée Agreement, which was not scanned but was placed in an envelope in its vault; Mr Chalopin's willingness to mislead his colleagues, including his colleagues in compliance; and Mr Chalopin lending assistance to Mr Al Rajaan, in various ways during the period 2015 – 2019, including producing false documents himself, with a view to enabling Mr Al Rajaan to move or utilise assets – this being at a time when Mr Chalopin was aware of serious steps being taken by authorities internationally against Mr Al Rajaan.

2373. On behalf of Pensée, Mr Edey submitted that the evidence did not justify the finding that PIFSS sought, and needed, to establish its case. Reliance was placed on various features of the chronology, including in particular the following. Mr Chalopin had given honest evidence, to the best of his recollection during the trial. He had no motive to participate in money-laundering: he had enjoyed a successful career in animation, and had no financial or other reason to assist in money laundering. (As to this: I have addressed motive in Section L2 above). Mr Chalopin was not an experienced banker or a details man, and he was reasonably entitled to rely on Deltec colleagues in fiduciary services and compliance to point out if there was anything wrong with the agreements

relating to the formation of Pensée, and the documentation pertaining thereto. The relevant individuals in fiduciary services (Ms Albury and Ms Stubbs), and in compliance (Ms Johnson), were fully informed about the contractual arrangements concerning Pensée, including the Pensée Agreement and Mr Al Rajaan's connection with Pensée, and they saw nothing wrong. If none of them worked out that there was money laundering of the proceeds of corruption, there was no reason why Mr Chalopin could or did work it out for himself.

2374. Pensée also submitted that it was important to look at the relevant events in the context of the nature of Bahamian Foundations, where privacy (or as PIFSS would term it, secrecy) is permissible and indeed one of the attractions of a Foundation. The structure of the law around Foundations makes it very difficult for outsiders to find out who founded or donated money to a Foundation, or who were the beneficiaries who may potentially benefit from a Foundation. The use of nominee Founders adds another layer of privacy or secrecy for the ultimate Founder. That was the obvious and perhaps sole purpose of using a nominee Founder. A desire for privacy or secrecy comes with the territory of offshore banking generally and Foundations and Bahamian law relating thereto. Secrecy or privacy is not in itself a pointer to anything untoward, still less that a Foundation is being used to launder the proceeds of crime. Many very wealthy people desire the highest levels of privacy around their wealth simply because that is how they think, and there is nothing suspicious about that. There are many reasons why a wealthy individual might wish to avail himself of the high levels of privacy that come with Foundations and nominee Founders, ranging from the entirely innocent to the criminal. Someone might want to hide their connection to money which their political enemies might wrongly come after, or hide the fact that an inheritance was to be left to someone not entitled to receive that inheritance under Islamic forced heirship rules. Mr Edey acknowledged that some people will seek to exploit the secrecy inherent in Foundations for less innocent reasons, but the most extreme and presumptively least likely reason for desiring secrecy is that the Foundation is being used to launder the proceeds of crime.

2375. Pensée also submitted that Mr Chalopin's later (i.e. post 2015) willingness to assist Mr Al Rajaan, in ways that might in retrospect seem unwise or open to criticism, provides no basis for concluding that he knew in 2013 that the monies paid to Pensée were the proceeds of corruption. Mr Chalopin spoke to Mr Al Rajaan about these allegations on the telephone in early 2013, and then met him at his apartment in Knightsbridge in April. Mr Al Rajaan, who was a charming and persuasive man, emphatically denied the allegations, saying that they were politically motivated. Mr Chalopin believed him – and Mr Edey drew a parallel with Ms Al Dakheel who similarly believed Mr Al Rajaan's denials. As for the later period, Mr Chalopin had by then come to know Mr Al Rajaan rather better than in 2013, and he continued to believe that he was being pursued unfairly by the various authorities as a result of politically motivated allegations. Wrongly, he believed in Mr Al Rajaan's innocence and persuasive denials. None of the later events cast any light backwards as to Mr Chalopin's knowledge in 2013.

2376. The critical issue is therefore: did Mr Chalopin realise, in 2013, that the monies which were to be paid into Pensée, and which were then paid (starting in 2013) were the proceeds of corruption? If so, then – applying the principles in Section B above – it would inevitably follow that Pensée, via Mr Chalopin, acted tortiously as a matter of

Kuwaiti law, by assisting to create Pensée in order to receive these proceeds, and then assisting in their actual receipt; such receipt being unlawful because it would be contrary to the Kuwaiti anti-money laundering legislation.

Discussion

2377. I accept, as a starting point, Pensée's argument that privacy or secrecy is inherent in the use of Bahamian Foundations. In that regard, it is indeed permissible for an individual to use a nominee, and this adds an additional layer of protection against outsiders finding out about who founded a Foundation, or who donated money, or who are the beneficiaries of a Foundation. I agree that a desire for secrecy or privacy, or the use of a nominee, does not in itself lead to the conclusion that a Foundation is being used to launder the proceeds of crime. That does not mean that a desire for secrecy, and the use of a nominee, is irrelevant when considering whether that conclusion is appropriate, but there must be other significant features which enable a court to draw that conclusion. Do those features exist in the present case? I think that they do, for the reasons that follow. These reasons largely draw together (and therefore to some extent repeat) matters that I have already addressed in detail above.

The origin of Pensée

2378. First, it is important to pay close regard to the circumstances in which Pensée was conceived. Mr Al Rajaan had become a client of Deltec in May 2012, and had then utilised Fyne for the purpose of receiving substantial sums of money. There is nothing to indicate that, in the next 11 months, Mr Al Rajaan had any interest in creating a Foundation, or had any dissatisfaction with Fyne. So why did he become interested in April 2013, when he met Mr Chalopin in Knightsbridge? The obvious reason, as would have been apparent to Mr Chalopin, was that Deltec's compliance department (in the shape of Ms Johnson) was asking pertinent and awkward questions about the opening of the Fyne account, and the transfers made to it, in the light of the allegations which had surfaced about Mr Al Rajaan being corrupt, and a Swiss freezing order having been imposed. There is no dispute that Mr Chalopin was aware in 2013 that Mr Al Rajaan was the Director General of PIFSS, and that he knew about the allegations as a result of the information and press cuttings passed to him by compliance.

2379. He was then tasked with speaking to Mr Al Rajaan about the allegations, and for that purpose had the telephone call, followed by the meeting in Knightsbridge in April 2013 at which it was intended (according to Ms Johnson's note of 20 February 2013) that they would "discuss the findings in detail". Mr Chalopin's evidence as to that meeting (see Section L4 above) indicates that no questions were asked about the timing issues, as to the opening of the Fyne account and the transfers to it, that had concerned Ms Johnson. On his evidence: he did not ask Mr Al Rajaan to explain the timing of the € 34 million transfer of funds from Switzerland to Fyne at Deltec; this was not a core point to which compliance wanted an answer; he did not realise that Mr Al Rajaan had wanted to move his assets with urgency in May 2012; and he did not recall being concerned that Deltec might have been used as the recipient of funds to avoid them being frozen.

2380. I have no doubt that Mr Chalopin did understand that compliance was concerned about these matters. He did know that it was a core point that needed to be discussed. But he did not ask any questions of Mr Al Rajaan in order to find out answers to these points.

He did, however, communicate to Mr Al Rajaan that compliance was asking awkward questions about Fyne, and both men knew that Fyne was shown in Deltec's records as belonging to Mr Al Rajaan.

2381. The concerns of Ms Johnson in compliance were the origin of the decision to create a Foundation. There was discussion at the Knightsbridge meeting about a new vehicle which could be created for Mr Al Rajaan, and where it would be possible (as Mr Chalopin saw it) for Mr Al Rajaan not to be connected to that vehicle in the same way that Fyne was. That is the reason why Mr Chalopin brought Foundation documents to the Paris meeting, and it is why Mr Nasrallah was there ready to sign them. Mr Chalopin appreciated that Mr Al Rajaan was looking for the additional secrecy that a Bahamian Foundation could provide, with Mr Nasrallah as the nominee. There was no other reason for creating Pensée, since Mr Al Rajaan could have continued to use Fyne, which had operated perfectly satisfactorily for the best part of a year.

The reasons for Pensée's creation/Nadim Nasrallah as beneficiary

2382. Secondly, it is also important to pay close regard to the reasons advanced by Mr Chalopin, in his evidence, as to why Mr Al Rajaan wanted this new Foundation. There have in my view been shifting explanations by Mr Chalopin and Pensée, and no acknowledgment that it was connected with the questions that compliance was asking about Fyne. Mr Edey identified a number of possible reasons why, in the context of the present case, Mr Al Rajaan might have wanted a Foundation, such as to shield his assets from political enemies, or to get round Islamic forced heirship rules. I do not consider that there is evidence that any of these possible explanations was communicated to Mr Chalopin.

2383. On the contrary, Pensée's pleaded case, as to Mr Chalopin's understanding of the background to and reason for the creation of Pensée, was that it was created in order to benefit Nadim Nasrallah. Similarly, in his witness statement, Mr Chalopin said that he understood that Mr Al Rajaan was doing something for Mr Nasrallah's son that would be in Mr Nasrallah's name, but that he wanted to manage the assets himself rather than leaving that to Mr Nasrallah. He said that he was not sure whether all of the assets were supposed to come from Mr Al Rajaan, and he thought that Mr Nasrallah was also going to contribute, as the Foundation was being set up for Mr Nasrallah's son and he had been told by Hugues Lamotte that Mr Nasrallah was also very wealthy.

2384. This explanation was, in my view, not consistent with key documents, did not survive cross-examination, and is inherently improbable. It is an unreliable account of what happened, and seeks to deflect attention from the real reasons why Pensée was established.

2385. As to the documents: the Pensée Agreement expressly provides that it was Mr Al Rajaan who would be funding Pensée. There is no suggestion that Mr Nasrallah would be contributing at all. By contrast, and as described in section L4 above, the key documentation produced in connection with the formation of Pensée – the Questionnaire and the Client Profile – indicates that <u>all</u> of the money was to come from Mr Nasrallah; something that Mr Chalopin knew was not going to happen.

2386. As to cross-examination, Mr Chalopin's evidence moved from Pensée being set up for Mr Nasrallah's son, to a case that Mr Al Rajaan's daughters were also intended to

benefit. At times in his evidence, Mr Chalopin referred more generally to Mr Al Rajaan's children.

2387. The true position, as in my view Mr Chalopin appreciated, was that Pensée was being set up to benefit Mr Al Rajaan himself. I have already quoted his response to the question that he "always knew that the money in the Pensée account was held for Mr Al Rajaan alone". In addition, he was asked in cross-examination about Mr Nasrallah's attempt to close the account in 2017, and the fact that he had checked the position with Mr Al Rajaan. His initial response was that Mr Al Rajaan was the person doing the investment. It was then put to him that it had nothing to do with the investment, and that it was because it was Mr Al Rajaan's money. His initial response was that "it was Mr Al Rajaan's money that came into the account, for sure". I followed up this answer:

> "MR JUSTICE JACOBS. Well I think – was it just that the money that had come into the account was Mr Al Rajaan's or didn't you regard the money that was there in the account as being Mr Al Rajaan's?
>
> A. Personally, yes."

2388. These questions were answered in the context of Mr Chalopin's understanding of the money that had been received in the account. There is, however, no reason to think that Mr Chalopin's understanding – that the monies were Mr Al Rajaan's, so that he would be the person benefiting from those monies – was any different in the short period between the creation of the Pensée documentation (June 2013) and the time when the monies started to flow (July 2013).

2389. Similarly, I have already quoted Mr Chalopin's answer in relation to the "ultimate beneficiary" and "UO" language of the Pensée Agreement. Pensée's submissions focused heavily on the inadmissibility of evidence as to subjective understanding, and pre-contractual discussions, when interpreting that agreement. However, Mr Chalopin's understanding of that agreement, and the discussions which took place at the Paris meeting, are important in answering the question: who was the Foundation intended to benefit? Based on the discussions in Paris, and the terms of the Pensée Agreement as Mr Chalopin understood them, the answer to that question was: Mr Al Rajaan, not Nadim Nasrallah.

2390. As to the inherent probabilities: the creation of Pensée can be traced back to no later than the April 2013 meeting in Knightsbridge. Mr Nasrallah was not at that meeting, and it is most improbable that the discussion at that meeting would have been about setting up a Foundation to benefit Mr Nasrallah's son. The discussion would have been about setting up a Foundation to benefit Mr Al Rajaan, so that he could continue to enjoy the use of monies which could no longer be sent to Fyne.

2391. I have no doubt that Mr Chalopin knew that the Foundation was never about benefiting Mr Nasrallah's son, and he also knew that Mr Nasrallah's role was no more than a front for Mr Al Rajaan. This is evidenced by the fact that Mr Nasrallah was largely ignored by Mr Chalopin once Pensée had been established and the monies started to flow in and out. No investment reports were ever sent to Mr Nasrallah, so that he could have some idea about what the Foundation – ostensibly to benefit his son – had invested in, or how successful it had been. No thought was ever given by Mr Chalopin to Nadim Nasrallah.

On the one occasion after 2013 when Mr Chalopin actually met Mr Nasrallah, in early 2017, Mr Chalopin would not allow him to close the Pensée account, or to transfer the assets to his account in the Lebanon (which is what, according to Mr Chalopin's witness statement, he thought that Mr Nasrallah was requesting).

2392. Accordingly, I consider that Mr Chalopin has given unreliable and false evidence as to the reason for establishing Pensée. Mr Chalopin always knew that Pensée was founded for the benefit of Mr Al Rajaan.

2393. The fact that there was no intention to benefit Nadim Nasrallah, and that Mr Chalopin knew this, is also supported by the evidence at trial of his father, Mr Antoine Nasrallah. I approach anything that Antoine Nasrallah has said with very considerable caution, and recognise that on various issues he was concerned to distance his son from the matters with which this litigation is concerned. However, on the question of whether there was an intention to benefit Nadim, I accept Mr Nasrallah's evidence. It is inherently improbable that Mr Al Rajaan ever intended to bestow a large fortune on Nadim Nasrallah, as Mr Chalopin would have realised. And in any event, for reasons already given, Mr Chalopin knew that it was Mr Al Rajaan who would be remitting the funds, and knew that he was doing so for his own benefit.

2394. There is also no documentary, or other reliable, evidence that Mr Chalopin ever specifically told his colleagues in fiduciary services or compliance that there was no intention to benefit Nadim, and that the funds were intended for the benefit of Mr Al Rajaan himself. Nor do the contemporaneous documents suggest that fiduciary services or compliance appreciated this. One of the questions asked by Ms Johnson on 1 July 2013, following her review of the account opening documents, was: "Is the beneficiary vested? If so then we would require a Client Profile Foundation form and its attachments of certified passports and utility bills for him". Ms Johnson was there clearly asking a question about Nadim Nasrallah, whose name appeared on the documents. Ms Stubbs' response was that the beneficiary (i.e. Nadim) was not vested.

2395. Furthermore, Deltec's internal records, according to a print-out in November 2018, reflected the Letter of Wishes, and said that Pensée "was established on 18 June 2013 by the Founder … to provide for the educational and personal needs of Nadim Nasrallah as the sole beneficiary during his lifetime". It is not clear when this internal record was created. It is possible that it was only created in around November 2018, by which time Ms Albury, Ms Stubbs and Ms Johnson had all left, and that it was based on the documents which were available on Deltec's electronic Pensée file. However, there were no documents on the file which showed that the position was otherwise: i.e. that the monies were for Mr Al Rajaan to use and enjoy. Indeed, as already described, in 2019 Mr Chalopin gave false information to his colleagues, that Mr Al Rajaan's role was only as an advisor.

2396. There was one document which, at least in my view (see Section L6 above), did indicate that the assets of the Foundation were for the benefit of Mr Al Rajaan. That was the Pensée Agreement, with its reference to Mr Al Rajaan as ultimate beneficiary or "UO". However, there is no reliable evidence that that document was seen or reviewed by Ms Johnson in compliance, or indeed by Ms Stubbs or Ms Albury in fiduciary services. And even if they did see it and review it, it is understandable that they would not have appreciated the significance of those expressions; i.e. as showing that the assets were for Mr Al Rajaan's benefit. After all, Pensée has strenuously argued in these

proceedings that they do not have this significance. However, their significance would have been apparent to Mr Chalopin, who had attended the Paris meeting and knew very well what they signified. There is no evidence that any of this was explained to Ms Johnson, Ms Albury or Ms Stubbs.

The false statements in the 2013 documentation

2397. Thirdly, I turn again to the documentation on which Mr Chalopin obtained Mr Nasrallah's signature in 2013. The documentation was false in key respects.

2398. Against a background where Mr Chalopin knew that Pensée was for the benefit of Mr Al Rajaan, not Nadim, Mr Chalopin must have understood that at least three of the documents created in June 2013 were false: the Letter of Wishes, signed by Mr Nasrallah at the Paris meeting; the Questionnaire, also signed at that meeting, which also identified Nadim as the only beneficiary; and the Appointment of Beneficiary document sent by Mr Chalopin for Mr Nasrallah's signature after the meeting, and which Mr Chalopin recognised might have to be disclosed. Indeed, even on Mr Chalopin's case in cross-examination, the documentation was false because it omitted any reference to Mr Al Rajaan's daughters (or children more generally) as intended beneficiaries.

2399. It is no answer to these points that Mr Chalopin was not a 'details' man. He brought only a few documents to the Paris meeting, and they included the Questionnaire and the Letter of Wishes. He would have read them before asking for them to be completed, or at least at the time that they were being completed in his presence. And he clearly focused on the Letter of Wishes and the Appointment of Beneficiary documents, because he specifically references them in his covering letter sent out on around 17 June 2013.

2400. The Letter of Wishes, the Questionnaire, and the Appointment of Beneficiary documents were not the only documents which contain false statements. I have already discussed in detail how the Questionnaire and the Client Profile each falsely indicated that Mr Antoine Nasrallah was to be the source of the funds to be paid to Pensée. The Questionnaire also failed to identify Mr Al Rajaan as the Founder, even though there was space on the standard form for that information to be provided. Mr Chalopin sought to distance himself from these documents, on the basis that he was not a details man and that it was for others at Deltec to identify any problems.

2401. I do not accept this explanation. Mr Chalopin was the person who took the Questionnaire to Paris. It was incumbent on him to have the form completed honestly and properly. There would have been no difficulty in getting Mr Al Rajaan to sign it, along with Mr Nasrallah, since they were both at the meeting, and the Questionnaire form contained space for the details and signature of more than one Founder. The reason that it was not filled in properly was because Mr Al Rajaan's role as Founder, and the person who would be funding Pensée, was not to be shown on any of the formal documentation relating to the formation of Pensée. It was also Mr Chalopin who sent both the Client Profile and the Account Opening Form to Mr Nasrallah after he returned to the Bahamas. Again, both of those documents deliberately omitted any reference to Mr Al Rajaan, or his role as Founder and funder. Mr Chalopin would have understood that.

2402. I have already acknowledged the validity of Mr Edey's point that privacy or secrecy is, as he put it, part of the territory in relation to Bahamian Foundations. However, this does not mean that a casual attitude can be taken to documentation containing confirmations that are relevant to money laundering, still less that false information can be provided. Mr Chalopin is an intelligent man, and the confirmations provided in each of those documents are obviously important in the context of preventing money laundering and fraud, as Mr Chalopin recognised in his evidence. I do not accept that Mr Chalopin failed to recognise that the confirmations that he was asking Mr Nasrallah to give were false, given his knowledge that Mr Al Rajaan was to be the source of funds.

2403. In summary, the transaction recorded in the formal documentation, which was to be placed on Deltec's file, did not properly reflect what was actually agreed and was happening: i.e. that the monies were coming from Mr Al Rajaan and would be for his benefit. Furthermore, the formal documents deliberately did not refer to Mr Al Rajaan at all, save for the one reference to him being a beneficiary if Nadim Nasrallah and his issue died.

Pensée's arguments

2404. However, Pensée contends that no conclusion, adverse to Mr Chalopin and what he knew, can or should be drawn, for a variety of reasons.

2405. Pensée submits that the various documents concerning the creation of Pensée need to be seen in the light of the Pensée Agreement, from which it is clear that the funds for Pensée were to be provided by Mr Al Rajaan. I agree that this is clear from the Pensée Agreement, but this point has very little force in the light of the secrecy which was put in place in relation to that agreement. It was deliberately not scanned so as to be available for anyone at Deltec, who needed information about the arrangements, to read, and was placed in an envelope in Deltec's vault. I have not received any satisfactory explanation from any Pensée witness as to why this was done, or why it was considered appropriate or permissible. The obvious explanation is that the real agreement between the parties, which was inconsistent with the formal documents signed by Mr Nasrallah, was to be concealed to the maximum extent possible.

2406. Pensée submits that the Pensée Agreement was known to others in Deltec; that by July 2013, Mr Al Rajaan's connection to Pensée was known by fiduciary services and compliance, including that he was the source of the funds being paid in; and that they saw nothing wrong with the arrangements, and neither did nor should Mr Chalopin. Mr Edey recognised that I might conclude that fiduciary services and compliance had not done a very good job, in particular given arguable inconsistencies between the formation documents and the fact that Mr Al Rajaan was to be the real Founder and the source of funds. He submitted that this could and should not be held against Mr Chalopin, who was not a details man.

2407. As discussed in Section L4 above, I accept that by July 2013, Ms Albury, Ms Stubbs and Ms Johnson knew that Mr Al Rajaan was the source of the monies being paid into Pensée, and also that Mr Nasrallah was a nominee Founder. This can be seen from, for example, Ms Albury's "same details as Fyne" message on 1 July; the e-mails circulating in mid-July in relation to the monies that were then coming in; and the fact that Ms Johnson obtained World Check reports on Mr Al Rajaan on 16 July 2013. However, as discussed, there is nothing to indicate that they were ever told that Mr Al Rajaan himself

was the intended beneficiary of the Pensée assets, and that this is what had been discussed and agreed in Paris. Nor is there evidence that they were told that Nadim was not the intended beneficiary.

2408. Furthermore, there is no documentary or otherwise reliable evidence that, prior to 1 July, any of them knew anything about Mr Al Rajaan's connection to Pensée. The documents initially provided to Ms Johnson, and on which she commented in her 18 June 2013 e-mail, contained no reference to Mr Al Rajaan. Hence, the World-Check reports that she obtained on 18 June 2013 related to Mr Nasrallah, not Mr Al Rajaan. Mr Chalopin was keen to emphasise in evidence that he kept compliance fully informed. However, it appears that Ms Johnson knew nothing, as at 18 June 2013, about the involvement of Mr Al Rajaan.

2409. There is also no documentary or reliable evidence which shows that, following the April meeting and prior to the Paris meeting, Mr Chalopin consulted with anyone in fiduciary services or with Ms Johnson as to what was then being considered, or how the documentation should be filled in. Accordingly, there is no basis for concluding that Mr Chalopin was in some way relying on their advice as to how the documents should be completed. Nor is there any evidence that, on his return from Paris, he sought advice from these three individuals about Pensée.

2410. As to the Pensée Agreement itself, there is no reliable evidence as to who drafted the Pensée Agreement before it was sent out by Mr Chalopin on around 17 June 2013. Mr Norbury accepted that it would not have been drafted by Mr Chalopin himself. But the drafter remains unidentified, and it is possible (for example) that Mr Chalopin obtained an existing precedent and then made some amendments himself.

2411. I have already commented on the absence of any contemporaneous materials which refer to the Pensée Agreement. In written and oral closing argument, Mr Edey drew my attention to various documents created in June and July 2013, as showing that others at Deltec (apart from Mr Chalopin) knew of the Pensée Agreement. I have looked at all of those documents, but none of them contain any specific or clear reference to the Pensée Agreement. The only oblique reference is in Mr Chalopin's covering letter to the documents sent out on around 17 June 2013, and this refers only to a "letter" that Mr Al Rajaan had requested. The Pensée Agreement was very clearly not in the form of a letter, and in any event there is no evidence that anyone else at Deltec saw or considered Mr Chalopin's covering letter. It is also clear, for reasons already discussed, that Mr Chalopin was treating this "letter" and the Pensée Agreement as being of the utmost confidentiality.

2412. Accordingly, when looking at the period up to the Paris meeting and the documents sent to Mr Nasrallah following that meeting, I do not consider that the involvement of fiduciary services or compliance is of any assistance to Mr Chalopin in justifying his role in obtaining Mr Nasrallah's signature at the Paris meeting of documents which did not represent the true position: i.e. as to Mr Al Rajaan's role as Founder; as to Mr Al Rajaan being the only person who would provide the funds for the Foundation; and as to the Foundation being for the benefit of Mr Al Rajaan and not Nadim Nasrallah.

2413. As to the period after the Paris meeting: I accept that, by July 2013, the 3 women at Deltec did know of Mr Al Rajaan's involvement, and that he was the source of the funds being paid to Pensée, and that Mr Nasrallah was a nominee. They should probably have

picked up the fact that the formal documentation was incorrect in material respects: in particular Mr Nasrallah's confirmations as to the ownership of the funds being paid to Pensée, and the absence of reference to Mr Al Rajaan in the Questionnaire. I also accept that, after 1 July when Ms Johnson asked various questions, Mr Chalopin did not seek to conceal Mr Al Rajaan's involvement from his colleagues. It is difficult to see how, if he wanted the arrangements to go ahead, he could do so. There is no reliable evidence, however, that he had volunteered information as to Mr Al Rajaan's involvement at the outset, when returning with documents from the Paris meeting. Nor, for reasons already given, is there reliable evidence that he advised anyone Mr Al Rajaan was the intended beneficiary of the funds. Indeed, again as already discussed, Pensée's pleaded case and Mr Chalopin's first witness statement all maintain what I consider to be a false case that the Foundation was intended to benefit Nadim.

2414. Furthermore, apart from my findings as to their knowledge summarised in the previous paragraph, I do not have any idea about what any of these individuals were told, or what they understood, or why (if they did) they considered it permissible for key documentation to be signed by Mr Nasrallah which was inconsistent with the Pensée Agreement (if they saw it). There is no evidence as to what, if anything, they told Mr Chalopin about the arrangements. They have provided no explanation as to why it was appropriate for the Pensée Agreement to be placed in the vault, unscanned. Nor is there any evidence that Ms Johnson, who signed the instruction for the document to be placed in the vault, read the document before doing so. It is certainly possible that she received a clear instruction from Mr Chalopin simply to place the envelope in the vault, accompanied by some explanation which satisfied her. In the absence of any such evidence, I cannot draw any conclusions as to what any of these individuals was thinking, or was told by or communicated to Mr Chalopin.

2415. Mr Edey submitted that, in the light of PIFSS' pleading, there was no reason to call any of these individuals, in particular Ms Johnson, to give evidence. I disagree. The 10RAPOC expressly pleads all of the documents to which I have referred: the Letter of Wishes, the Appointment of Beneficiary, the Questionnaire (all pleaded in relation to whether Nadim Nasrallah was the sole beneficiary) as well as the Client Profile and Account Opening Form: see in particular paragraphs 281B (c) (f) and (g); 281 H1 (a); and 281 H1 (iii) which refers back to the documents pleaded in 281B. These matters are all pleaded in connection with a case as to the true nature of the arrangements concerning Pensée. Furthermore, Mr Chalopin's witness statement refers extensively to the role of compliance, and a significant part of his case is that fiduciary services and compliance were fully informed at all times. Against this background, there was in my view ample reason to call witnesses from fiduciary services or Ms Johnson to corroborate any case that they fully understood the arrangements, and to describe their dealings with Mr Chalopin in relation thereto.

2416. Without this evidence, I consider that there is an absence of evidence as to Mr Chalopin's dealings with his colleagues or any reliance that he may have placed on what they were saying or doing. The documentation in the period April – June 2013 is very limited. On the available documentation, the Pensée Agreement itself comes out of nowhere, without any record of what Mr Chalopin told anyone about it, what discussions took place, whether there were any earlier drafts, and indeed who drafted it. It is unclear when the Pensée Agreement was returned to Deltec, and there is an absence of any documentation recording any discussion of its terms.

2417. Pulling these threads together, there is significant evidence that, to Mr Chalopin's knowledge, there was much more to the Pensée arrangements than simply the desire of a wealthy man for privacy or secrecy. In particular, as discussed above: Mr Chalopin knew that the Foundation was formed as a direct result of the awkward questions asked by compliance about Fyne, and that Mr Al Rajaan needed a vehicle which could not be connected to him in the same way that Fyne was; he knew that Pensée was not going to benefit Nadim Nasrallah, but was for the benefit of Mr Al Rajaan, despite what the documents said; he was involved in obtaining Mr Nasrallah's signature on documents which contained statements as to the source of funds which were false to his knowledge, and which deliberately omitted reference to Mr Al Rajaan as Founder; he knew that such was the need for secrecy in relation to the arrangements, including that a key document should not be available on Deltec's files; and he knew that all of these matters took place in the context of allegations of corruption against Mr Al Rajaan.

2418. All of these matters point very strongly to the conclusion that Mr Chalopin did indeed know that Pensée was not being founded for a legitimate reason, but was for the purpose of enabling Mr Al Rajaan to receive the proceeds of the corruption of which he had been accused.

Conduct in later years supporting the conclusion

2419. These conclusions are further supported by Mr Chalopin's conduct, particularly in later years, as discussed in Section L2 above. I also consider that his conduct after the formation of Pensée does shine a light backwards on what he knew when Pensée was formed in 2013.

2420. That conduct starts with the information which Mr Chalopin gave about the source of the funds coming to Pensée. Ms Albury's email of 17 July 2013 indicates that she had been given the impression by Mr Chalopin that the source of funds would be monies held in the Fyne account. However, when the monies started to be received, Mr Chalopin gave a different explanation: that Mr Al Rajaan was closing his relationship with two other banks. This explanation does not, in my view withstand scrutiny for reasons already discussed. In particular, it would not explain why monies were coming in not by way of lump sums, but rather from a variety of different companies in small tranches. On 25 July 2013, Ms Johnson asked Ms Albury for additional information on the source of funds, noting that the receipts all mention funds received from consulting fees from different companies. There is no documentary evidence as to what response Mr Chalopin gave to explain this, but I have no doubt that he would have been asked to provide an explanation. The source and description of the receipts contradicted his earlier response that a relationship with two other banks was being closed down, as did the fact that payments into Pensée continued until 2015. Although Mr Chalopin did not accept that he had been told at the time that the funds received were consulting fees, I have little doubt that he knew. He appears to have expressed no surprise when told in 2019 by Ms Bethell, that the source of funds was consulting fees.

2421. The question then arises: if Mr Chalopin was told that these were consulting fees, why did he think that such fees were being paid to the Director General of PIFSS? And why did he not query these payments, in circumstances where he had previously told Ms Albury that the client was closing his relationships with two other banks, and the funds were "funds that he had been holding for quite some time". The answer is, in my view, that Mr Chalopin knew that these "consulting fees" were the fruits of the corruption of

which Mr Al Rajaan had been accused. There is nothing which indicates that Mr Chalopin ever queried with Mr Al Rajaan why funds which he had allegedly been holding for quite some time were now coming in as "consulting fees".

2422. Mr Chalopin's relevant conduct thereafter includes: his role in seeking to move Mr Al Rajaan's assets, both Fyne and Pensée, notwithstanding the actions of authorities around the world; his failure to advise the Deltec board of the connection of Pensée to Mr Al Rajaan, so as to enable an STR to be given in relation to Pensée, or for the Production Order from the FIU to be properly complied with; and the forgery of documents so as to try to prevent the Pensée account from being frozen. I do not consider that any of these matters can be explained by Mr Chalopin's alleged naivety and continuing faith in Mr Al Rajaan. In my view, they are explained by Mr Chalopin wanting to assist Mr Al Rajaan in concealing his connection to Pensée, and preserving the Pensée assets so that Mr Al Rajaan could continue to enjoy them.

2423. Finally, there is the point made by Mr Edey that Pensée was operated in the way in which nominee arrangements, as contemplated by the Foundations Act and Pensée's Foundation Charter, would usually act. However, both the Act and the Charter contemplate that the nominee will be the person giving instructions in relation to the affairs of the Foundation, albeit that there is a person who stands behind the nominee and who acts through him. A party in the position of a bank, such as Deltec, can therefore properly deal with the person who is the nominee. Here, as explained, Deltec did not deal with Mr Nasrallah as nominee. It was Mr Al Rajaan who gave all relevant instructions in relation to the Foundation. Indeed, one puzzling feature of the arrangements is that the only signatory to Pensée's account at Deltec, and the only person who could properly give instructions relating to the disbursement of monies from that account was Mr Nasrallah. Yet Deltec paid out millions of dollars, in acquiring investments, without ever asking Mr Nasrallah for instructions.

Conclusion

2424. Accordingly, and notwithstanding the various points made on Pensée's behalf, I do not accept Mr Chalopin's evidence that he did not appreciate that corruption lay behind the formation of Pensée and the monies that started to be received in 2013.

2425. Subject to causation and harm, Mr Chalopin and therefore Pensée acted tortiously in laundering the proceeds of Mr Al Rajaan's crimes.

L9: Causation and Harm

2426. Pensée advanced, very briefly, an argument that its laundering of the proceeds of Mr Al Rajaan's crimes has, on the facts, caused no harm to PIFSS, or at least not the same harm caused by Mr Al Rajaan's wrongdoing. I reject that point. As discussed in Section B6 above, the act of concealing the proceeds of crime is regarded, under Kuwaiti law, as causing the same harm as the crime itself, since the act of concealment precludes the victim from recovering them. Dr Abbas referred to an Egyptian case (quoted in Section B6) which addressed that point in the context of a thief and a handler, both of whom contributed to the victim's deprivation of property. He said that the reasoning of the Egyptian court "would, in my opinion, apply in the context of the crime of money laundering since the essence of the crime of money laundering is the concealment of

the proceeds of the crime in a manner that deprives the victim of its money, which is the same rationale that the court has relied upon."

2427. Dr Abbas's analysis makes complete sense, and I have no doubt that the Kuwaiti Court of Cassation would accept it as a correct statement of Kuwaiti law. Indeed, any other result would be extremely surprising and, I have no doubt, unacceptable to the Kuwaiti Court of Cassation. It would mean, in practical terms, that launderers who conceal the proceeds of crime would escape tortious liability under Kuwaiti law by arguing that all of the harm was caused by the original criminal conduct, and that their conduct in knowingly laundering the proceeds of crime should be seen as entirely separate and divorced from that conduct on the basis that it did not cause additional harm.

2428. I also cannot see that there is anything in the particular facts of the present case which would lead to the conclusion that Pensée's laundering of the proceeds of Mr Al Rajaan's crimes was somehow separate and divorced from the harm caused to PIFSS by Mr Al Rajaan. There was nothing special about Pensée's laundering of the proceeds of crime in the present case, and which would distinguish it from other cases of money laundering.

2429. Furthermore, if Pensée's argument were correct, it would produce another very strange result. Here, the proceeds of Mr Al Rajaan's crimes have been identified in Pensée's account, and to that extent the laundering process has not been wholly successful and is not complete: the proceeds have not yet been passed to Mr Al Rajaan's heirs. However, if Pensée's argument were to succeed, it would mean that a launderer would be permitted to complete the laundering process without incurring any tortious liability.

2430. The above conclusions are reinforced by my conclusions in Sections L6 (trust) and L7 (Kuwaiti law) above. The conclusion in L6 means that these are assets of Mr Al Rajaan against which PIFSS can enforce its judgment. The conclusion in L7 has the same practical effect, and in addition gives PIFSS a priority right to the assets in Pensée's account. The analogy with the case of a thief and handler seems even stronger in a case where PIFSS has these rights.

2431. Accordingly, I accept Dr Abbas's analysis. I note that Pensée's argument was not advanced by EFG, the other Defendant in this case which was alleged to have laundered the proceeds of Mr Al Rajaan's crimes.

L10: Attribution

2432. Since the tort claim against Pensée succeeds on the basis of attribution of Mr Chalopin's tortious conduct to Pensée, it is not necessary to consider the parties' arguments as to whether the conduct of Mr Al Rajaan and Mr Nasrallah should also be attributed to Pensée.

L11: Conclusions as to the liability of Mr Al Rajaan (and therefore D1), Mr Nasrallah and Pensée under Kuwaiti law

2433. For the reasons given in Section L6 above, PIFSS is entitled to a declaration that the assets in Pensée's account are held on trust for Mr Al Rajaan, and now D1.

2434. For the reasons given in Section L7 above, the transfers made by Mr Al Rajaan into Pensée are nullified and are void ab initio. In the light of Article 23 KPPL, PIFSS has a priority right to those assets in the hands of Mr Al Rajaan and now his estate. PIFSS is entitled to appropriate declaratory relief or other orders to reflect these matters.

2435. *Mr Al Rajaan:* On the basis of the facts found in this Section L, Mr Al Rajaan (and now D1) is liable under Articles 227 – 229 for his civil fault arising from breaches of Kuwaiti criminal law and breaches of the CSL. The basis of that liability is materially the same as set out in earlier sections: breaches of Articles 11 and 12 KPPL, Articles 35 and 39 of Law 1970, and the CSL. His liability arising out of money laundering is addressed separately below.

2436. *Mr Nasrallah:* On the basis of the facts found in this Section L, Mr Nasrallah is liable under Articles 227 – 229 for the assistance which he provided to Mr Al Rajaan in relation to the above breaches of Articles 11 and 12 KPPL, and Articles 35 and 39 of Law 1970. The basis of that liability is materially the same as set out in earlier sections: acts of assistance contrary to Articles 47 and 48 KPC. His liability arising out of money laundering is addressed separately below.

2437. *Mr Al Rajaan, Mr Nasrallah and Pensée – money laundering*. The payment flows into Pensée's account described in this section were transfers of property orchestrated by Mr Al Rajaan, Mr Nasrallah and Pensée between accounts under the control derived from criminal acts, which concealed and disguised the true nature of the sums received with the intent of laundering the money and making it appear to be funds obtained from a legitimate source – while knowing the source to be criminal conduct.

2438. Mr Al Rajaan and Mr Nasrallah have committed breaches of Article 2 of the Money Laundering Law No 35 of 2002. Mr Al Rajaan, Mr Nasrallah and Pensée have committed breaches of Article 2 of Money Laundering Law No 106 of 2013. The liability of Pensée arises because the conduct knowledge and intention of Mr Chalopin are to be attributed to it (irrespective of whether the conduct knowledge and intention of Mr Al Rajaan or Mr Nasrallah are to be attributed to it).

2439. As a result of those breaches, Mr Al Rajaan, Mr Nasrallah and Pensée each committed a fault for the purposes of Article 227, and each is tortiously liable to PIFSS pursuant to Articles 227-229.

L12: Conclusions as to quantum of compensation

2440. Prior to taking into account the impact of the Mirabaud and EFG settlements, the quantum of PIFSS' successful claim for compensation, expressed in US Dollars and subject to possible conversion to other currencies, is therefore as follows:

i) D1/Mr Al Rajaan: USD 51,281,849;

ii) Mr Nasrallah: USD 31,533,111;

iii) Pensée: USD 31,533,111.

SECTION M: THE MAN SCHEME

M1: Introduction

The payments in issue and the Defendants concerned

2441. PIFSS' case concerning the (so-called) Man Scheme involves claims against a number of Defendants: D1, Mr Mohamed El Ghazzi, various Man companies and Mr Antoine Massad, an individual who worked for Man for around 19 years and for most of that time was the senior individual in Man's Middle East office. In discussing the principal issues which arise on liability, I shall generally refer to "Man" rather than any specific Man company, save where it is necessary to distinguish between them. The role and distinction between various Man companies is of primary relevance to issues of vicarious liability. There, the principal dispute is whether – assuming liability is established against any of the 3 Man individuals that are alleged to have been complicit in Mr Al Rajaan's bribery – vicarious liability only attaches to Man Investments AG ("MIAG"), D18, or whether it can extend to some other companies in the group. The "unique" claim against all parties is USD 155,170,214, although quantum will be affected by one or both of the Mirabaud and EFG settlements.

2442. Man does not dispute – and in my view it is very clearly established on the evidence – that bribes were paid by Mr Mohamed El Ghazzi to Mr Al Rajaan over a lengthy period of time. The first payment which is clearly documented in the evidence was made in early 1998 to Ozak, the company formally owned by Mr Nasrallah but in fact owned or held for the benefit of Mr Al Rajaan. Although Mr Nasrallah is sued in respect of the laundering of that money, he is not alleged to have had any involvement more generally in the "Man Scheme". Thereafter, payments were made over many years, to or for the benefit of Mr Al Rajaan, from an account of Mr El Ghazzi at Banque Mirabaud. There are some gaps in the documentary evidence as to the payments made, specifically: the period before the Ozak payment, the period after that payment until the opening of Mr El Ghazzi's Banque Mirabaud account, and the payments following the closure of Swiss accounts in 2012 after Swiss investigations into Mr Al Rajaan started. These gaps are relevant to quantum issues, but do not significantly affect the principal liability issue.

2443. The source of the monies paid by Mr El Ghazzi to Mr Al Rajaan over these many years was commission payments which Mr El Ghazzi received from Man, in respect of investments made by PIFSS in various Man products. Mr El Ghazzi received these payments pursuant to an Intermediary Agreement with MIAG ("the Intermediary Agreement") initially concluded in 1993. There were some amendments to that agreement over the years, and these had the effect of increasing the amounts payable. The Intermediary Agreement concluded in 1993 was then restated (i.e. its terms were reconfirmed) in 2008, at the time that there was a change in the person running the Middle East office: Mr Massad left, and Mr Patrick Merville took over. The commission payments made in respect of PIFSS' investments over the lifetime of the Intermediary Agreement (1993 – 2013) were very substantial: around USD 155 million. Since the first PIFSS investment was made in late 1996, this meant an average payment to Mr El Ghazzi of nearly USD 10 million a year. A substantial part of the commissions paid to Mr El Ghazzi was then paid over to Mr Al Rajaan.

2444. The defences of Mr Al Rajaan/D1 to PIFSS' claims in this regard are the same as the general defences to the other claims: principally, arguments based on alleged knowledge, justiciability and limitation. I deal with these various points elsewhere, and conclude that there is no substance to any of them.

2445. Mr El Ghazzi did participate in these proceedings for a fair amount of time, and a defence (signed by leading and junior counsel) was served on his behalf. He also responded to a request by PIFSS for further information, and this is of relevance in the context of an important issue debated by the parties, viz: who (if anyone) at PIFSS, apart from Mr Al Rajaan, knew that Mr El Ghazzi was acting as Man's intermediary in the context of the investments which were made by PIFSS over the years. As described below, these investments were all made in the context of correspondence and signed documentation passing directly between PIFSS and Man, with none of the documents emanating from or even making any passing reference to Mr El Ghazzi.

2446. Mr El Ghazzi's participation in the proceedings ceased not long before he was due to provide disclosure, and he has thereafter played no part in the proceedings or trial. His defence to the claim is, in essence, that the monies were not being paid by him to Mr Al Rajaan as bribes, but rather in order that Mr Al Rajaan could invest them on Mr El Ghazzi's behalf. This defence is absurd, and it was Man's submission that the arrangements between Mr El Ghazzi and Mr Al Rajaan were obviously corrupt and dishonest. I agree that this is clear on the evidence as a whole. Man submitted that Mr El Ghazzi was a fundamentally dishonest man, such that no reliance could be placed on anything that he had said in his defence or in his response to the RFI. I agree with most of that submission, but will return in due course to the relevance of the response to the RFI.

The central issue as between PIFSS and Man

2447. Since the participation of Mr Al Rajaan and Mr El Ghazzi in corrupt arrangements is clearly established, the focus of this section is upon the position of Man (including Mr Massad) and the issues as to their potential liability. The central issue is, in summary, whether this scheme by which commission payments were routed by Mr El Ghazzi to Mr Al Rajaan was a "Man Scheme", as PIFSS sought to characterise it, or whether it was in fact simply a "MEG scheme" (using Mr El Ghazzi's initials), as Man characterised it. The issue is therefore whether there is evidence, sufficient to meet the necessary standard of "cogency", that there was knowledge and therefore participation by a relevant Man employee in the corrupt scheme that existed between Mr El Ghazzi and Mr Al Rajaan. For that purpose, I am concerned under Kuwaiti law with actual knowledge, and not any lower standard (if it is a lower standard) of blind-eye knowledge. Mr Collins' submissions on Kuwaiti law also acknowledged (correctly in my view) that if actual knowledge was shown, this would resolve any issues as to intent for the purposes of establishing participation in a crime under Kuwaiti law; so that any debate about whether "probable intent" was sufficient would be academic.

2448. The case of actual knowledge and participation is alleged by PIFSS against three individuals: Mr Massad, Mr Merville and Mr Moeller (often referred to in argument as the "3Ms").

2449. Mr Massad is the 20th Defendant. He was employed by Man from January 1989 to the end of September 2008, and then was retained on a consultancy agreement until

approximately January 2009. He was the Regional Manager for the Middle East Region from 1996 onwards. He gave evidence for 3 days during the trial, and Man (and Mr Massad himself) submit that I can rely on his evidence on the material issues. Unsurprisingly, this is disputed by PIFSS, who submit that Mr Massad's evidence was unreliable and false in material respects.

2450. Mr Patrick Merville was employed by Man from October 2005 until April 2013, and retained as a consultant from April 2013 to July 2013. He was Deputy Regional Manager for the Middle East from 2005. In October 2008, he took over from Mr Massad as Regional Manager for the Middle East, and he also became at that time CEO of Man's operating company Man Investments Middle East Limited ("MIMEL"). He took over Mr Massad's role and responsibility for PIFSS and the relationship with Mr El Ghazzi.

2451. Mr Merville provided a written witness statement for these proceedings, and Man relies upon that statement as providing accurate and reliable evidence. Man contends that Mr Merville's account in his witness statement accords with the account which he gave in 2012 during the course of the Senior Management Review ("SMR") process described below, and is therefore reliable. Mr Merville was unwilling to be cross-examined at trial – either in person or by video-link. He no longer works for Man, and no criticism can be made of Man (or of course Mr Massad) in respect of their inability to call Mr Merville at trial. PIFSS contends that Mr Merville's account in his witness statement is knowingly false in material respects, as were key statements which he made during the SMR process. The falsity of those statements is, they say, the obvious reason why Mr Merville was not prepared to allow his account to come under the scrutiny of cross-examination at trial.

2452. Mr Christoph Moeller was employed by Man from October 1981. He had various senior positions in his career. He was manager of Man's Regional Office Network from 1995, and was Head of Sales from 2000/2001 to 2013. He was the direct supervisor for Mr Massad and then Mr Merville while Head of Sales. Thus, they reported to him. Mr Moeller was based in Switzerland, and his responsibilities as Head of Sales encompassed many countries other than Kuwait, which he visited only rarely. He gave evidence over 2¼ days at trial, and Man again submits that his evidence is reliable. PIFSS disputes this, but recognised in their closing submissions that Mr Moeller was in a very different position to Mr Massad and Mr Merville. The latter were on the ground in the Middle East, in particular in Dubai and Kuwait, and could see what Mr El Ghazzi was or was not doing. Mr Moeller was not there on the ground.

2453. The case of knowledge of and participation in corruption was also originally alleged against a large number of other individuals within Man. That case did not allege knowledge and participation during the majority of the period when Mr El Ghazzi was Man's intermediary and PIFSS was making investments: i.e. from 1996 onwards. Rather, it focused on events surrounding the SMR process which was carried out in 2011/2012 in the light of the then recently introduced UK Bribery Act 2010. That process culminated in the continued approval of the relationship between Man and Mr El Ghazzi in mid-2012. There were three individuals, including Mr Moeller, who ultimately made that decision, after considerable work had been carried out or commissioned by Man's compliance department. Following certain management changes, a fresh team of three individuals looked at the issue again, by way of a further SMR in 2013, and the continuation of the relationship was again approved.

2454. PIFSS originally contended that various senior individuals involved in the 2012 and 2013 review processes drew the conclusion and appreciated that the relationship between Man and Mr El Ghazzi was indeed corrupt, but nevertheless allowed it to continue. Most of those individuals gave evidence over a number of days, and were cross-examined at length. At the end of the Man factual evidence phase of the case, I indicated to the parties – essentially to PIFSS – that I was going to require some considerable persuasion if I were to reject the evidence which those witnesses had given, to the effect that they had not drawn the conclusion that Mr El Ghazzi was corrupt. In that context, I indicated that I was dealing with a case that the SMR process had been conducted improperly, in the sense of being dishonest rather than negligent. I invited PIFSS, having now heard their evidence, to consider whether or not they wished to pursue that aspect of the case, emphasising that I recognised that I had not heard final argument on the issues. After reflection, PIFSS decided that it was not going to pursue the SMR case, save in so far as it concerned Mr Moeller.

2455. The SMR process nevertheless featured significantly in the parties' written and closing submissions, and I discuss the relevant aspects of that process below. In particular, PIFSS relied upon statements which were made by Mr Merville in response to questions asked by compliance. They submitted that Mr Merville gave, originally, an accurate description of what he knew that Mr El Ghazzi was doing: a description that showed that he was doing nothing of substance. They say that he then sought to change and embellish that original description, giving false information in response to questions asked by Man's compliance personnel. Man contends that Mr Merville gave consistent answers throughout.

2456. More generally, Man contends that the conclusions of the senior individuals involved in the SMR process, both in 2012 and 2013, should guide my approach to the relevance of various matters relied upon by PIFSS as evidencing knowledge of corruption. Although those individuals were not aware that Mr El Ghazzi was actually corrupt, as the evidence now clearly shows, they were aware of many of the features relied upon by PIFSS as evidencing knowing participation in corruption. Since the SMR was not troubled by any of those features as part of their work, and did not consider them to be evidence of corruption at the time, I should similarly not regard those features as indicative of corruption or participation therein.

A critical issue: what, if anything, did Mr El Ghazzi actually do?

2457. The parties' arguments on the central question of whether any or all of Messrs Massad, Merville and Moeller knew of Mr El Ghazzi's corruption, were lengthy and wide ranging. It was the issue to which most of the written and oral closing submissions of PIFSS, Man and Mr Massad were directed. PIFSS' written submissions on the issue occupied the best part of 100 pages; Man's around 90; Mr Massad around 60. PIFSS' oral closing (including reply) was 2½ days, and the oral closing of Man and Mr Massad devoted around 4½ of their 5 days to the central factual question, or aspects of it.

2458. The most critical issue involved the question of whether Mr El Ghazzi was acting as a "real" or "genuine" intermediary. PIFSS' case is that Mr El Ghazzi was not actually doing any of the work that a genuine intermediary would be doing. He was operating in the shadows, and in practical terms doing nothing except acting as a conduit or launderer for the payment of very large sums to Mr Al Rajaan, and indeed for himself. They say that this was known to the 3Ms, but in particular Mr Massad and Mr Merville.

The question of what a genuine intermediary would be doing should, they submitted, be assessed by considering a number of matters which interlocked. First, they emphasised the importance of looking at the evidence of Mr Massad and Mr Merville as to what Mr El Ghazzi was doing, and determining whether or not that was true. If the evidence was false, then that would lead to the conclusion (as Mr Norbury put it in his oral closing in relation to Mr Merville) not only that Mr Merville gave false evidence as to what Mr El Ghazzi was doing, but also that Mr Merville "must have been aware, living and breathing this relationship, at the time on the ground, that Mr El Ghazzi was a front, was not a genuine intermediary". Secondly, Mr Norbury drew attention to the terms of the Intermediary Agreement, originally agreed in 1993, and then restated in 2008. This provided a reasonable basis for understanding what Mr El Ghazzi would be expected to do, and (in PIFSS' submission) he was not doing it. Thirdly, the court could and should apply commercial commonsense in considering what an intermediary should be doing, and there was in any event ample evidence in the case that, if he was a genuine intermediary, Mr El Ghazzi would have been doing considerably more than, as shown by the evidence, he was actually doing.

2459. Man and Mr Massad contended that Mr El Ghazzi was, and remained at all times, a genuine intermediary, doing the work that Man wanted him to, and appearing to Man to be doing that work. The work that Man wanted him to do evolved over time, and there was nothing unusual in seeing a diminishing volume of work being carried out by Mr El Ghazzi in circumstances where Man had itself developed a strong direct relationship with PIFSS. He remained throughout a valuable intermediary, as reflected in the statements made by Mr Moeller during the SMR process. The court should not approach the issue by any pre-conceptions as to the work that an intermediary should be doing. They submitted (and requested a specific fact finding) that the evidence showed that the role of Man intermediaries varied, and there was no required or standard level of involvement. Aspects of acting as an intermediary might include only the making of the introduction; or pitching the products themselves; or pitching them jointly with Man; or letting Man pitch the products alone; providing advice to the investor; and providing feedback about the investor and its preferences to Man. Intermediaries would not necessarily attend meetings with investors. Against that background, whilst Mr El Ghazzi might appear to have been an intermediary who was (certainly by the end) not particularly energetic, he nevertheless was doing the job that Man wanted him to do and his work was, and was rightly perceived as, valuable.

2460. I consider that an essential question which I need to resolve is whether Mr Massad and Mr Merville have given me a reliable and truthful account of what Mr El Ghazzi was doing as Man's intermediary. Was he indeed carrying out valuable work as an intermediary, or was he really doing nothing in that regard? If their account is indeed reliable and truthful, then the central pillar of PIFSS' case – that Mr El Ghazzi was not a genuine intermediary – would not be sustained.

2461. Conversely, if the account given by Mr Massad and Mr Merville is false and unreliable, then it leads more or less inevitably to the conclusion that they had knowledge of the admitted corrupt relationship between Mr El Ghazzi and Mr Al Rajaan. I did not understand Man to submit that their case, as to lack of knowledge and participation, could survive a rejection of the evidence of Mr Massad and Mr Merville as to what Mr El Ghazzi was doing. If that evidence is unreliable, it is because it is untruthful. It is not because, for example, the passage of time has meant that they can no longer be expected

to remember what he was doing. And if the evidence is untruthful, the obvious reason why it is untruthful is because they had knowledge of the corruption.

2462. The conclusion that they were party to corruption would also follow, from a rejection of their evidence, for related reasons. If the factual position were – contrary to their evidence – that Mr El Ghazzi was not performing his intermediary role, to the knowledge of Mr Massad and Mr Merville, then the question would obviously arise: why were they content for Man to pay him enormous sums of money? Indeed, the question would also be asked, during Mr Massad's period as head of the Middle East office: why were Mr El Ghazzi's commission rates being increased, as they were in 2004 and 2006? Man's Anti-Money Laundering 2004 policy makes what seems to me to be an obvious point. It identified a number of matters that could give rise to suspicion of money laundering, including:

> "An intermediary is involved and there appears to be no real need for him."

2463. In my view, the only cogent reason to explain why an intermediary, who is not doing the work that he is engaged to do, but where nevertheless very substantial investments are coming from his client, is that there is a corrupt relationship. From time to time in their submissions, Man and Mr Massad sought to suggest that an intermediary was entitled to receive continuing payments, even in relation to investments which he had not caused to be made, provided that he had made the initial introduction of the client to Man. By the end of the case, however, Mr Smouha confirmed that he was not advancing a case that Mr El Ghazzi was entitled to do nothing, in his intermediary role, but was nevertheless still entitled to payment because he had brought about the original introduction of Man to Mr Al Rajaan. Man's case was that Mr El Ghazzi was indeed performing his intermediary role in the manner described by Mr Massad and Mr Merville, and I approach the parties' arguments on that basis. I shall, however, address below the question of whether Mr El Ghazzi was entitled to continuing payment, on each investment by PIFSS, by reason of having made the original introduction.

2464. I have referred so far only to Mr Massad and Mr Merville, rather than Mr Moeller. That is because Mr Moeller had no first-hand knowledge of what Mr El Ghazzi was or was not doing on the ground. His knowledge of the position was derived from what he was being told. I will consider his position separately. But it by no means follows that if the account of Mr Massad and Mr Merville, as to what Mr El Ghazzi was doing, is unreliable, that I should reject Mr Moeller's evidence as to what he understood the position to be, based on what he was being told. Conversely, Mr Moeller's evidence is capable of providing support to the evidence of Mr Massad and Mr Merville. Thus, one aspect of Man's case as to why the evidence of Mr Massad and Mr Merville should be accepted is that it is consistent with what they were telling Mr Moeller at the time.

Overview of the evidence bearing on the central issues

2465. The parties' submissions, on the question of Man's alleged participation in corruption, drew on a very substantial volume of documentation as well as witness evidence.

2466. As far as concerns the documentation, the contractual intermediary relationship between Man and Mr El Ghazzi lasted 20 years. After its termination in 2013, there was then a further consultancy agreement between the parties, and this was terminated in

2015. The length of the relationship in itself meant that the parties' disclosure required searches for documents over a very long period, and there was a significant volume of documents to which I was referred at trial.

2467. Not only was the relationship lengthy, but there were a very large number of investments that were made during the period when Mr El Ghazzi was intermediary. Between 1993 and 2013, there were 38 investments, of which 35 involved the payment of commissions to Mr El Ghazzi, giving rise to the claim. The investments individually involved, on a number of occasions, investments of USD 100 million. Again, the number of investments had an impact on the volume of disclosure, which also extended to investments which were contemplated but not in fact made.

2468. The disclosure also included, at least to some extent, documents concerning a business called RMF, which Man had acquired in 2002. The reason why 3 PIFSS/Man investments did not form part of the 38, in respect of which the claim was made, was that they were sales of RMF products. Mr El Ghazzi was not involved in those sales. A different individual – Mr Stefan Woernle – was responsible for the RMF products, and PIFSS contends that he too was an intermediary. PIFSS did not allege that he shared commissions with Mr Al Rajaan, and there is therefore no claim in respect of these investments. However, PIFSS contends that the work that Mr Woernle was doing is relevant, because of its contrast with the lack of work carried out by Mr El Ghazzi.

2469. One might have thought that, in the context of an intermediary who worked for Man for 20 years, and who earned USD 155 million by way of commissions over that period, in respect of 35 investments involving hundreds of millions of dollars, the answer to the question – "what did Mr El Ghazzi actually do, when performing his intermediary work" – would not be particularly difficult. An instinctive reaction is that this ought to be readily apparent from the documentation in the case. The approach of courts to disputed issues of fact, as addressed in Section A above, is to look at the objective evidence – contemporaneous documentation being a particularly important example of such objective evidence – and to test the account of witnesses against that objective evidence.

2470. Anticipating my conclusions in due course, the documentary evidence – taken as a whole – does not evidence any intermediary work, as described in the witness statements of Mr Massad and Mr Merville, being carried out by Mr El Ghazzi. Nor does it evidence intermediary work, or interactions by Mr El Ghazzi, which I would expect to see being undertaken, based on the witness evidence that I have heard, the contractual terms under which Mr El Ghazzi was operating, and applying commercial common-sense.

2471. Despite the volume of documentation to which I have been referred, I note that in the period up until the commencement of the SMR process in late 2012, there is only one document – a one-line e-mail written by Mr Merville in September 2011 – which contains any description of work that Mr El Ghazzi was allegedly doing in relation to his dealings with PIFSS. I address that e-mail below. But the more significant document addressing the question of what Mr El Ghazzi was doing, and the first document which does that apart from the one-line e-mail, is a note of a discussion with Mr Merville in early 2012 made by Mr Adam Waghorn who worked in Man's compliance department in London. The subject-matter of the discussion was 3 Man intermediaries, including Mr El Ghazzi. Mr Waghorn had given advance notice of what he wanted to discuss,

and Mr Merville's responses were summarised in a note of the call that Mr Waghorn prepared. The parties' submissions addressed the note in detail, and I address the arguments below when dealing with the SMR process.

2472. However, the reaction of Mr Stephen Ross, then Group General Counsel, hit the nail on the head when (having seen Mr Waghorn's note) he summarised the gist of what Mr Merville was saying:

> "The main focus however is on the role of the intermediary on the Kuwait business and there appears to be none/negligible."

2473. It seems to me that this is, in essence, PIFSS' case as to what the position was not only in 2012, at which point Mr Merville had been running the Middle East office for 3 ½ years, but also prior to that time during Mr Massad's tenure.

2474. However, Man submits, for various reasons, that I cannot draw the conclusion from the documents that Mr El Ghazzi's work was none/negligible. Man submits that I need to be particularly careful about the documents that exist in the present case. I am looking at events which happened up to 30 years ago, and it is clear that not every document that once existed has survived. Furthermore, in a case such as the present, involving business conducted many years ago by individuals from the Middle East, much if not all of the important dealings were likely to have been carried out on the phone or at meetings, and these were not documented. They also submit that there are indeed some documents which evidence valuable intermediary work being carried out by Mr El Ghazzi, consistent with the evidence of Mr Massad and Mr Merville.

2475. I have hitherto briefly introduced the documentary evidence bearing on the central issue which I have identified. As far as concerns witness evidence, the evidential picture is as follows. I have had no evidence or disclosure of documents from Mr El Ghazzi, and Mr Merville has not been willing to attend for cross-examination.

2476. As far as concerns witnesses, there was only one witness called by PIFSS who had dealings with Man over the years: Ms Al Dakheel. On any view, she was an important witness. She worked in the relevant department at PIFSS, the Direct Investment Department, during the entire period when PIFSS was investing in the Man products in issue in these proceedings (1996- 2013). Her role became increasingly important and visible to Man as time went on. She was cross-examined by Mr Smouha and Mr Collins, on behalf of Man, for 2¼ days. She came to know Mr Massad well, and he frequently met her when he was at PIFSS' offices. Mr Merville described her as his main contact. Her evidence is relevant to the question of what Mr El Ghazzi was or was not doing. She said that she never met him, and had never heard of him: i.e. no-one ever mentioned him to her. That evidence was ultimately not disputed.

2477. However, Man contends that other witnesses, who allegedly knew Mr El Ghazzi, should have been called, and that, far from Mr El Ghazzi operating in the shadows (as submitted by PIFSS), he was in fact well-known to a number of individuals who worked at PIFSS at the material time, and he was known to be Man's intermediary. They contend in that regard that an inference, adverse to PIFSS, should be drawn from PIFSS' failure to call relevant witnesses.

2478. On the Man side, the principal witness from the Middle East office was Mr Massad. The only other individual who had worked there, and who gave live evidence, was Mr John Kelly. Mr Kelly was based at Man's office in Bahrain from the mid-1980's, and it was during his time as general manager of Man's office in the Middle East that he employed Mr Massad in 1989. However, Mr Kelly then left the Middle East for Switzerland in around 1990 or 1991, where he was then responsible for the sales and marketing of investment products globally from 1991 to around 2001/2002. He then moved to the United States. He therefore left the Middle East well before the Intermediary Agreement was signed with Mr El Ghazzi in 1993 (albeit that Mr Kelly was Man's authorised signatory on that agreement) and well before the first investment made by PIFSS in 1996. He did not have any regular or significant dealings with Mr El Ghazzi, and recalled only meeting him once, at a courtesy meeting in 1996 at PIFSS' offices. I discuss that meeting below.

2479. As the Middle East office grew, a number of other individuals apart from Mr Massad feature in the documents, but none of them were called to give live evidence. They include Mr Merville (who did give a statement); Mr Matthew Williamson, who was responsible for compliance in the Middle East office, and who had an involvement in important aspects of the SMR process; and Mr Patrice Conchon, who had some dealings with Mr El Ghazzi, including providing him with net asset value statements as to PIFSS investments.

2480. Mr Moeller was, as described above, the person to whom Mr Merville and Mr Massad reported. However, he visited Kuwait only rarely, making 2 or possibly 3 visits there over 18 years. He also had no significant dealings with either Mr El Ghazzi or Mr Al Rajaan. He met Mr El Ghazzi on two occasions and Mr Al Rajaan on one occasion.

2481. The only other Man witness who had relevant dealings with Mr El Ghazzi was Mr Paul Dackombe. He became Head of Sales for Middle East in April 2013, taking over responsibility for the relationship between Man and Mr El Ghazzi/ PIFSS from Mr Merville. After assuming that responsibility, he went to the Middle East and met Mr El Ghazzi and (separately) Mr Al Rajaan and Ms Al Dakheel. He quickly came to the conclusion that there was no reason to keep Mr El Ghazzi as an intermediary. It is no longer alleged that this was because he knew him to be corrupt. In 2013, Mr El Ghazzi's Intermediary Agreement was terminated, but he was retained as a consultant. That consultancy was short-lived, being terminated in 2015.

2482. The other witnesses called by Man – principally individuals involved in the 2012 and 2013 SMR processes – had no or no significant contact with Mr El Ghazzi, and did not provide any material evidence as to what he was or was not doing.

2483. Having introduced the issues and the main relevant witnesses, I now set out a factual narrative so that the central debate which I have identified – what was Mr El Ghazzi doing or not doing – can be seen in its chronological context. I do not consider it necessary to set out, at the outset, my views as to each of the witnesses called by Man. Instead, in so far as I consider that their evidence is important in the context of the critical issues which I need to decide, my views will be apparent from my discussion below.

M2: Factual narrative

Mr Massad, Man, and Mr El Ghazzi

2484. Mr Massad joined Man at their Bahrain office, headed by Mr John Kelly, in 1989. Mr Massad was then in his early 20s. Mr Kelly left for a more senior position in around 1990 or 1991, and Mr Massad was disappointed when he was not offered the role of regional manager after Mr Kelly's successor had left after a year or so. However, he was appointed Deputy Regional Manager at around the same time, in around 1993, and he then became Regional Manager of the Middle East, based in the Bahrain office, in 1996. Man opened an office in Dubai in 1998, and Mr Massad moved there in 1999. Thereafter, it was the Dubai office, in particular Mr Massad and then Mr Merville, which was responsible for Man's relationship with PIFSS and Mr El Ghazzi.

2485. Man's business model in the early 1990s, and indeed until around 2013, involved the use of intermediaries. Man marketed its products to investors through a global network of hundreds and later thousands of intermediaries, both institutional and individuals.

2486. When he joined Man, Mr Massad was told to go out and build a network of intermediaries. In relation to Kuwait, his evidence (which was not challenged) was that he went through the Yellow Pages (for Kuwait), and found a company called Kuwait International Investment Company ("KIIC"). He arranged to meet a Mr Fouad Al Chehab, the Deputy General Manager of KIIC, at their offices in Kuwait. KIIC was not interested in investing in hedge funds, and Mr Chehab personally was not interested in becoming an intermediary. However, Mr Chehab said that he could introduce Mr Massad to a colleague who could help with his contacts and relationships. That was Mr El Ghazzi who worked for KIIC in the building.

2487. Mr Massad's impression was that Mr El Ghazzi would make a good intermediary. He understood from their discussions that he was a highly experienced currencies and commodities trader, and he was running a brokerage and trading desk for KIIC, reporting to Mr Chehab. Mr El Ghazzi also led Mr Massad to understand that he was very well connected socially, and had a number of high net-worth individuals as his clients.

2488. Mr Massad then sought, as he needed to do, the approval of Mr Kelly to sign Mr El Ghazzi as an intermediary. Mr Massad's recollection was that, before doing so, Mr Kelly met Mr El Ghazzi at KIIC's offices. Mr Kelly had no recollection of doing so, and said that he did not know that Mr El Ghazzi worked for KIIC. I think it likely that Mr Kelly did not meet Mr El Ghazzi at KIIC's offices, as Mr Kelly's evidence indicates. But whether Mr Kelly did so or not is immaterial. Mr El Ghazzi was signed up, as an intermediary, on Man's standard form intermediary agreement on 15 March 1993. PIFSS accepted that, at the time that it was signed, this was a genuine intermediary agreement: i.e. it was not, at the outset, intended as a front for the corrupt relationship which later existed as between Mr El Ghazzi and Mr Al Rajaan.

2489. Mr Massad also recalls, but Mr Kelly did not, a dinner organised at around this time by Sheikh Mubarak Fahad Al Salem Al Sabah, a senior member of the Kuwaiti Royal Family, at his palace. Mr Massad believed that Mr El Ghazzi had asked Sheikh Mubarak to organise the dinner, that Mr Al Rajaan was one of the guests, and that as a result of introductions at the dinner, John Kelly met with Mr Al Rajaan and Mr El Ghazzi at PIFSS' offices the following day. Mr Massad described this as the first contact between

Man and PIFSS, but that he did not attend the meeting at PIFSS' offices on the following day because of his junior status and prior commitments.

2490. I was not persuaded that this evidence (on which Mr Massad was not directly challenged) was accurate. Mr Kelly would likely have remembered a dinner at a Kuwaiti palace. Mr Kelly was clear that the only time that he met Mr Al Rajaan and went to PIFSS' offices was in 1996, and I think that that evidence is likely to be accurate. However, again it is immaterial whether or not Mr Massad's recollection, that Mr Kelly attended the dinner at the palace, is correct. PIFSS did not dispute that it was Mr El Ghazzi who was responsible for introducing Man to Mr Al Rajaan and thereby PIFSS. It was also common ground that Mr El Ghazzi had known Mr Al Rajaan for some time, since 1982, and had been running a brokerage account for him. It is also clear that Mr El Ghazzi did know Sheikh Mubarak, whether or not the latter hosted a dinner at his palace. That is because Sheikh Mubarak did invest in a Man product, via Mr El Ghazzi, albeit that the investment proved loss-making.

Mr Kelly's meeting with Mr Al Rajaan at PIFSS

2491. Mr Kelly described in his witness statement, and in cross-examination, a "courtesy" meeting which he attended at PIFSS' offices in around 1996. This was prior to PIFSS' first investment in a Man product. The evidence indicated that this meeting barely justified being so described, and it does not appear to have been courteously conducted, at least on Mr Al Rajaan's part. Mr Kelly remembered it well, because he had interrupted a trip to the Far East which was important for personal reasons, and it was a complete waste of his time. He said that he was grumpy, he could not wait to get out of there.

2492. There was no discussion with Mr Al Rajaan about possible investments. During the meeting, Mr Al Rajaan took several phone calls, and there were four or five individuals who came in and out of the room during the meeting. Mr Kelly said that when he went in there and Mr Al Rajaan got on the telephone, it seemed quite discourteous. "I sat there, people coming and going, and I first wondered if there was some crisis or emergency that he was dealing with, but then people were coming and going, El Ghazzi was there, they're all chatting together, in Arabic, so I couldn't follow it, and that was the meeting". Mr Kelly thought that they were senior individuals, since they showed no deference to Mr Al Rajaan. They just walked in without invitation, or requesting to speak. As far as he recalled, this was the only meeting or interaction that he had with either Mr El Ghazzi or Mr Al Rajaan.

2493. Man attaches considerable significance to this meeting, in support of its case that Mr El Ghazzi was well known to senior individuals at PIFSS. They rely on Mr Kelly's evidence that the intermediary was very comfortable with all the individuals from PIFSS who were there. Mr Kelly said that whenever someone from the client came into the room, the intermediary would greet them, which gave him the impression that he was a regular visitor to PIFSS' offices. He drew the conclusion that it was inconceivable that those attending the meeting did not know that the intermediary was an intermediary for Man.

2494. I do not consider that this meeting is of any significance, let alone that it establishes that any particular individual at PIFSS, other than Mr Al Rajaan, knew that Mr El Ghazzi was an intermediary for Man. Mr Kelly could not identify the names of any of

the individuals who came into the room. No business cards were exchanged, and it is not clear what was said when Mr Kelly was introduced to some (but apparently not all) of the people who came into the room and started speaking to Mr Al Rajaan in Arabic. Mr Kelly said that he was introduced to only some of the people who came in, but he said that they had no interest in him and were not part of the meeting.

2495. I accept that some of the unidentified individuals may have been told that they were being introduced to Mr Kelly, but it is not clear whether the introduction went any further than identifying him by name, or whether it included any reference to Man. Nor is there any evidence that Mr Kelly or Mr Massad told any of these people that Mr El Ghazzi was Man's intermediary, or that Mr El Ghazzi said that himself. Indeed, Mr Massad in evidence said that Man never introduced people as intermediaries. Speaking of Mr El Ghazzi, he said: "He was never introduced as an intermediary. We never introduced someone as an intermediary".

2496. In my view, Mr Kelly's evidence does no more than indicate that Mr El Ghazzi, as a human being (not as a Man intermediary), was known to some unidentified people who worked at PIFSS. However, that is not surprising and leads nowhere. As Man submitted, relying on evidence from Mr Al Othman, Kuwait is a small place, where people know each other. Since Mr El Ghazzi at KIIC ran brokerage or trading accounts for various people, and since (as Man emphasised in its evidence) Mr El Ghazzi was well connected, it may well be that some of the individuals were clients of KIIC or were simply known to Mr El Ghazzi socially. In cross-examination, Mr Kelly agreed that he did not know whether the individuals knew Mr El Ghazzi personally or whether he managed investments on their behalf, and he just assumed that they were senior managers perhaps on the investment committee.

2497. Mr Kelly's evidence as to what transpired at the meeting was clearly honest, as Mr Norbury said during the cross-examination. However, in the light of his description of the meeting, Mr Kelly's statement that it was "inconceivable that those attending the meeting did not know that the intermediary was an intermediary for Man" is, unpersuasive and without any real foundation. As with some other aspects of Mr Kelly's evidence, it reflected a desire on his part to help, from time to time, the case that Man was advancing, and causes me to view some of his evidence with caution.

2498. In my view, three matters do emerge from that meeting which have potential relevance. First, it is fair to say (as Man submitted) that Mr Kelly did attend a meeting with Mr Al Rajaan at PIFSS' offices, with Mr El Ghazzi there. To that extent, at that point in time, Mr El Ghazzi was not being kept "in the shadows". Secondly, however, this is the only meeting where there is any corroboration (here from Mr Kelly) of Mr Massad's evidence as to Mr El Ghazzi attending any meeting at PIFSS. None of the documents in the case, including documents referring to meetings between Mr Massad and Mr Al Rajaan, evidence Mr El Ghazzi's attendance at any subsequent meetings. Nor is there corroboration from any other witness. Thirdly, it is apparent that Mr Al Rajaan was not, at this stage, particularly interested in making an investment in Man's products: investment was not even discussed.

PIFSS' initial investment:

2499. It took well over 3 years, from the conclusion of the Intermediary Agreement, before PIFSS made its first investment in a Man product. Mr Massad explained that during

much of that time, Man's products were not particularly saleable. However, in 1996 Man brought out the first of a series of products which proved to be very attractive to investors, and which resulted in very significant increases over time in the amount of Man's assets under management ("AUM"). That product was the IP 220 product.

2500. In November 1996, Mr Al Muraikhi, the manager of the Direct Investment Department, sent a subscription form by fax to Mr Massad at Man's Bahrain office. The form was signed by Mr Al Rajaan, and it was for an investment of USD 15 million. For the purposes of the trial, each investment was identified with the prefix "MF", and I shall use this herein. This investment was therefore MF 1.

2501. Mr Al Rajaan's signature on the subscription form acknowledged that he had read the prospectus in full. A prospectus was prepared in respect of each proposed investment, and I was referred to a number of them during the trial. Mr Massad's evidence (see section M3 below) was that prospectuses were initially forwarded to Mr El Ghazzi, who would be the route of transmission to PIFSS. However, as the relationship developed, Mr Massad would send copies of the prospectus direct to 5 individuals at PIFSS: Mr Al Rajaan, Sheikh Abdullah, Mr Al-Muraikhi, Mr Amjad Sheikh and Ms Al Dakheel. There is documentary evidence, certainly from the later years when Mr Merville was there, that these 5 individuals were indeed sent, directly by Man, copies of the prospectuses. The question of whether Mr El Ghazzi was receiving copies of the prospectuses is an issue of some significance, to which I will return in due course.

2502. PIFSS' disclosure contains a significant volume of documentation, from PIFSS' investment files, relating to the subscription and redemption process in relation to the 35 investments in issue. The application forms and related financial documents and other relevant correspondence concerning each investment were gathered together by PIFSS in a very helpful schedule (Appendix 6 to their closing) running to 18 pages. This also includes documents from Man's disclosure relating to the subscription and redemption process. Thus, for example, the signed subscription form for the first investment was produced both by Man and PIFSS as part of their disclosure.

2503. Appendix 6 shows that none of the documentation sent to PIFSS is sent by Mr El Ghazzi. It all comes from Man, and is never copied to Mr El Ghazzi. Similarly, none of the documentation sent by PIFSS to Man is sent or copied to Mr El Ghazzi. Nor does any of this correspondence, and associated documentation, passing between Man and PIFSS contain any reference to Mr El Ghazzi. Accordingly, the documentation as a whole evidences a relationship which was, throughout, directly between Man and PIFSS.

2504. Moving forward in time to the conclusion of this investment: on 12 January 1999, a faxed letter was sent from PIFSS, signed by Mr Al Rajaan, notifying the intention to redeem the MF 1 investment. The investment had done well, having increased in value from USD 15 million to USD 22.665 million in a period of just over 2 years. However, since the investment had not been held for a sufficiently long period, a redemption penalty was applied. This was set out in a Transaction Note dated 18 February 1999 prepared by Man in its Swiss office in Pfaeffikon, and which showed that the net amount payable to PIFSS was USD 21,985,050. The Transaction Note was addressed to PIFSS by name, but with an address in Bahrain care of (c/o) Mr Massad. On 22 February 1999, Mr Massad wrote to Mr Al Rajaan saying that it was a pleasure meeting

him today, and that the proceeds of USD 21,985,050 would be credited to PIFSS on that day.

2505. I have described this process in order to identify a number of matters which have some bearing on the parties' arguments.

2506. First, the redemption process shows the involvement of the Swiss office of Man, the relevant company being ED&F Man Corporate Services GmbH. A large number of Man functions, relevant to the business of Man's Middle East office and the work of Mr Massad in sales and dealings with investors, were run from Switzerland. This included, as here, the payment of redemption proceeds. It is also where Mr Kelly, and then Mr Moeller, were based as head of sales. Mr Kelly signed Mr El Ghazzi's Intermediary Agreement when he was based in Switzerland, and the contracting party is "ED & F Man Management AG" which later became MIAG. The Swiss office also included a compliance function, with which Mr Massad dealt from time to time.

2507. Mr Martin Schweikhart, who worked for MIAG between 2002 and 2017 in various functions, and who gave evidence at the trial, summarised the position by saying that Man's business in Switzerland was the most significant part of its network, the place where many important decisions were made. All the decisions relating to how products would be structured and marketed would be made in Pfaeffikon, Switzerland. The sales organisation, management and design teams, as well as intermediary services teams, were located there too.

2508. For present purposes, it is not necessary to distinguish between different Man corporate entities in Switzerland which were responsible for any particular function, and I shall therefore simply refer generally to Man's "Swiss office" unless it is necessary to be more precise. However, it is a relevant point, relied upon by Man in various contexts, that Mr Massad in the Middle East was not operating autonomously. He was operating in the context of a superstructure (and Man emphasised that this included a compliance superstructure) in which many other individuals, principally in Switzerland, had oversight of the Middle East office and Mr Massad and later Mr Merville.

2509. Secondly, the Transaction Note for the redemption, and other documents relating to it, were not sent directly by the Swiss office to PIFSS. An instruction given by Mr Massad to the Swiss office at an early stage of the relationship with PIFSS was that nothing should be sent directly, but any correspondence should be sent to him: hence the c/o address to which I have referred. On PIFSS' case, Mr Massad's careful control of the correspondence with PIFSS is relevant, and assists in explaining why there is never any reference to Mr El Ghazzi.

2510. I note, however, that the subscription forms signed by Mr Al Rajaan, for example for MF1 and MF2, do not suggest that correspondence should not be sent directly to PIFSS. Thus, each of those subscription forms has a question: "Where would you like all correspondence (including Contract Notes) sent?" There are then two options: "same as listed in Part Two" or "c/o another name and address, please list below". A cross was placed in the "same as listed in Part Two" box. Part Two listed a PO Box address for PIFSS in Kuwait.

2511. Thirdly, the MF 1 product (IP 220), in common with other similar Man products, provided for a redemption fee on a sliding scale depending upon the length of time that

the investment was held. A significant reason for this was that Man would pay its intermediaries a large amount of money by way of up-front commission when the product was sold. This commission was called "front end load", or FEL. The FEL in Mr El Ghazzi's 1993 Intermediary Agreement was 4%. From Man's perspective, the investor needed to hold the product for a sufficiently long period of time, around 4 years, to allow Man to earn back, by way of fees, the up-front FEL paid to intermediaries at the start. Hence, there was a penalty which the investor had to pay for an early redemption.

2512. Although Mr El Ghazzi was not referred to in the correspondence between Man and PIFSS, his role as intermediary was necessarily known to Man's Swiss office. His first commission payment, amounting to USD 600,000 – being 4% of the USD 15 million investment – was made in the fourth quarter of 1996. It was paid to his account at ABN Amro bank in Beirut. There has been no disclosure of documents from that bank, and there are no documents which show, one way or other, whether any part of that money was paid to Mr Al Rajaan.

The nature of the IP 220 product

2513. The IP 220 product is a "structured product". It is therefore a more complex type of product than a simple investment in a bond or shares, albeit that such products do generally include both a bond component as well as a derivative component. It is the derivative component which, in Man's products, produced the potential for substantial increases in value. The bond component, which was accompanied in most of Man's products by a guarantee, provided the security.

2514. The underlying asset or basket of assets, on which the derivative component of a structured product is based, may vary. The nature of Man's structured products, including the variation in the underlying asset relevant to the derivative component, was explained with simplicity and clarity by Mr Schweikhart in his written and oral evidence. He had worked for RMF before its takeover by Man, and the following summary is based principally on his evidence.

2515. Both RMF and Man were running what are colloquially known as "hedge funds". RMF's business was predominantly a "fund of funds" business, which meant that rather than investing directly in bonds, shares and so forth, its funds invested in other funds to create a fund portfolio. Investors could invest directly in a "fund of funds", or could invest in a structured product in which the fund of funds is the underlying asset. By contrast Man's business had a different product offering of direct investment vehicles, rather than a fund of funds. This business included the products of a business called AHL, which was essentially a commodity trading business.

2516. The structured products that Man designed and launched were generally similar in terms of their format, including the naming conventions. This meant that there were several products with the same name as they had similar investment strategies and terms. They were launched and targeted globally.

2517. The principal way in which Man used structured products was to repackage its hedge fund products with the protection of a capital guarantee to appeal to investors, who might otherwise not be attracted to investments in hedge funds which could be seen as too risky in the 1990s and early 2000s. The combination of a guarantee, and a leveraged

hedge fund component, was attractive in that it removed the risk and maximised the return. The capital guarantee was provided by a bank and essentially protected the value of the initial investment. It gave an investor the reassurance that, for example, it could invest USD 100,000 and, whatever happened, its investment would be protected and it would receive back at least the initial amount of its contribution at the end of the investment term (unless redeemed early, in which case the guarantee would not operate).

2518. The money provided by an investor would be used in part for the purposes of purchasing a capital guarantee, and in part for leveraged investment. The greater part of the money would be used for the purchase of the collateralised capital guarantee from a third-party bank. This would usually cost around 60% of the investment, although this would depend upon interest rates at the time. This was a guarantee that 100% of the initial investment would be returned by the end of the investment term (unless redeemed early, in which case the guarantee would not operate), which was usually up to 12 years. The third-party bank would not be paying a coupon on the money it received, but the economics of the transaction assumed that an investment of 60, with zero coupon, would equate to 100 after 12 years.

2519. This left 40% available for investment purposes. Structured products were able, potentially, to achieve a high level of return because the underlying investments were leveraged. Although the leverage was not the same for every product, a common structure would be that for every USD 100 invested, there would be USD 160 of investment exposure. As Mr Schweikhart explained, of the remaining 40% (after allocating 60% to the capital guarantee), a portion would be invested into AHL in combination with money that Man borrowed from a bank. This meant that even though (for example) only USD 20 per USD 100 of investment went into AHL, margin trading meant that the USD 20 represented a USD 100 dollar investment. The remaining USD 20 would also be leveraged to USD 60 to invest in other parts of the investment strategy, for example in products of a business known as Glenwood, which Man acquired in 2000. Accordingly, after leverage around USD 160 would be invested for each USD 100 investment. This was how Man IP 220 products got their name, since it was the equivalent of spending 60% of the investment for the capital guarantee, and obtaining 160% investment exposure (60 + 160 = 220).

2520. The majority of the 35 investments, which are the subject of the present claim, were capital guaranteed products of the kind which, broadly speaking, were similar to that described above. Of the products sold during Mr Massad's tenure, there was only one non capital-guaranteed product. In later years, however, the products bought included income generating products.

The 2nd investment: April 1997

2521. On 11 April 1997, PIFSS invested USD 20 million in Man-IP 220 (Series 2) Ltd (MF 2). Again, the application form was signed by Mr Al Rajaan, and relevant covering faxes were sent by Mr Al Muraikhi. A subsequent letter, in November 2000, requesting redemption and reinvestment in another fund (MF 7) was also signed by Mr Al Rajaan, as was the application form. By this time, correspondence was being sent to Mr Massad at Man's Dubai office. This investment had again proved very successful, with the reinvested amount being USD 36,652,860.

2522. During the course of 1997, a number of further payments were made to Mr El Ghazzi at his account at ABN Amro Beirut, including USD 800,932 which included the 4% FEL on the USD 20 million investment. Payments of "trail commission", to which Mr El Ghazzi was entitled under his Intermediary Agreement, were also made. Trail commissions were commissions payable on existing investments, payable during the period when the investments continued to be held. Again, there is no evidence as to whether any of that money was paid on to Mr Al Rajaan.

The 3rd investment and the Ozak payment

2523. In March 1998, PIFSS invested USD 25,000,000 in Man IP 220 FUSION Limited (MF3). Mr Al Rajaan signed the subscription form, and also the covering fax dated 11 March 1998 confirming the investment. The correspondence indicates that there had been prior discussions between Mr Massad and Mr Al Rajaan: Mr Massad's letter dated 9 March 1998 refers to recent discussions, and proposed a reduction in the otherwise applicable redemption fee scale.

2524. Also, at this time, a fax was sent by Ms Monteiro, who was an administrative assistant in the Bahrain office, to colleagues in the Swiss office. She told them that Mr Massad had asked her to inform them "that any correspondence to be sent to [PIFSS] should first be checked by him".

2525. On 26 March 1998 Mr El Ghazzi signed a letter, addressed to Mr Massad at the Bahrain office, requesting the payment of 4% commission on two investments. One of them was the USD 25 million investment in MF 3. The other was an investment made by another Kuwaiti financial institution, known as KFAED, which had invested USD 15 million in the same product. The letter requested transfer of Mr El Ghazzi's 4% FEL Commission on both investments to: Northern Trust International Bank. New York, Favour of: Bank Edouard Constant Ltd. Geneva, Account ## 100768-20230, Favour of Ozak Services Inc Account # 699080, Attention: Mr. Gilles Guerin, Swift Code: BECWCHGG.

2526. As described in Section J, Ozak Services Inc was a company nominally owned by Mr Nasrallah, but operated for the benefit of Mr Al Rajaan.

2527. The evidence indicates that Mr El Ghazzi's letter, requesting payment, was typed in the Bahrain office itself. Other letters from around this time conclude with the somewhat unusual punctuation "Kind regards. Yours sincerely," Furthermore, the general formatting of the letter matches a similar letter, sent at that time, by Mr Massad to PIFSS.

Subsequent payments

2528. The payment request was then passed to the Swiss office, where no objections were taken to or points raised about the payment. It was then made. This was the only payment which was made by Man to Ozak. With one exception, the subsequent payments made in 1998 and up to the 4th quarter of 2001, were made to ABN Amro, Beirut. The exception was a payment in the 3rd quarter of 2001 to an account which Mr El Ghazzi had opened at Mirabaud & Cie Geneva. Payments were thereafter made exclusively to that Mirabaud account for around the next 3 years. In the course of 2004, however, the payments made to Mr El Ghazzi were split, with FEL and ordinary trail

commissions being paid to his Mirabaud account, and enhanced trail commissions being paid to an account at Byblos Bank, Beirut.

2529. It is the disclosure of documents from Mirabaud, in consequence of the MLA request from Kuwait to Switzerland, which revealed the transmission of monies from Mr El Ghazzi to Mr Al Rajaan's vehicles, and this in turn has led to the present proceedings. Leaving aside the Ozak payment, the first known payment to an Al Rajaan vehicle, referable to Man investments, was a transfer of USD 163,990 in February 2000. This was the first of 77 known transfers, totalling USD 80,565,411.

The 4th investment

2530. PIFSS' 4th investment (MF4) was USD 30 million in MAN-IP 360 (SERIES 2) Ltd. The investment began with a letter of introduction to the product from Mr Massad to Mr Al Rajaan, beginning: "I enclose details of our new guaranteed fund …" Details of the fund are then provided. The letter concludes: "I look forward to meeting with you next week in Kuwait, in the meantime should you have any queries please do not hesitate to contact me on +973 217777". PIFSS relies on this letter, and similar letters introducing other funds, as showing that it was Mr Massad, not Mr El Ghazzi, who was introducing and pitching the funds to Mr Al Rajaan. The concluding sentence indicated that Mr Massad would be the person meeting Mr Al Rajaan in the following week, with no suggestion that Mr El Ghazzi would be there. The telephone contact number was for Mr Massad, not Mr El Ghazzi.

2531. The covering letter, and the subscription form dated 29 November 1998, were signed by Mr Al Rajaan. Immediately below his signature (save for one line of text) were the words:

> "Intermediary name…….. Intermediary Code
>
> (if applicable)"

Mr El Ghazzi's name was not filled in.

2532. Man disclosed copies of the subscription forms for earlier investments that contained similar words, but the PIFSS disclosed form for MF 4 is the first one which clearly shows Mr Al Rajaan's signature almost adjacent to the blank space which could have been filled in with the name of Mr El Ghazzi. PIFSS made the point, as part of its argument that Mr El Ghazzi was operating in the shadows, that neither Mr Massad, who had sent the form, nor Mr Al Rajaan, who signed it, identified Mr El Ghazzi as the intermediary. This led to some evidence and argument as to whether it would be expected that the name of the intermediary would be filled in prior to being sent to Mr Al Rajaan, or by Mr Al Rajaan, or rather at a subsequent point in time when the investment was being processed in Switzerland. I considered that there were reasonable points to be made on each side in relation to this area of argument. If this point had stood alone, I would not have regarded it as a particularly powerful point in PIFSS' favour.

2533. On the following day, 30 November 1998, Mr Massad wrote to Mr Al Rajaan in relation to the applicable redemption fees. The letter started with a reference to "our recent discussions".

The first redemption: February 1999

2534. The first redemption was in February 1999, when PIFSS redeemed MF1 as already described.

Further investments 1999 - 2001

2535. Over the next 3 years, PIFSS continued to make further investments, with the documentary picture concerning the conclusion of the transactions being broadly similar to that already described. I do not consider it necessary to describe in detail the transactional documents, or the correspondence which led to them. The investments concluded prior to the end of 2001 were as follows.

Reference number	Date	Fund Name	Amount (USD)
MF 5	April 1999	MAN-IP PRISMA Ltd	20,036,660
MF 6	July 1999	MAN-IP PRISMA (SERIES 2) Ltd	10 million
MF 7	December 2000	MAN-Glenwood Nexus Guaranteed Ltd	36,652,860
MF 8	March 2001	Man-Glenwood Select Ltd	18,368,003
MF 9	June 2001	Man-IP 220 Plus (Series 3) Ltd	20,014,000
MF 10	October 2001	Man-IP 220 Plus (Series 4) Ltd	36,473,031
MF 11	December 2001	Man Multi-Strategy (Series 3) Ltd	50,011,110

Developments in relation to Mr El Ghazzi

2536. By this time (2001), there had been various developments in relation to Mr El Ghazzi.

2537. First, in October 1998, there was an agreed revision to the terms of his remuneration in a letter signed by Mr El Ghazzi, Mr Massad and two signatories from the Swiss office including Mr Moeller. This revision increased Mr El Ghazzi's trail commission if certain investment thresholds were met.

2538. Secondly, on 8 November 2001, a document (headed "Fax") was signed by Mr El Ghazzi instructing Man to pay all commissions to his Banque Mirabaud account in Geneva. The document is a rarity, because it appears to be the only example of a fax being sent by Mr El Ghazzi. Even that is somewhat unclear, because the document contains no letterhead, other than "Fax", no fax number for Mr El Ghazzi, and any fax transmission details from Mr El Ghazzi (if they existed) are no longer visible.

2539. Thirdly, Mr El Ghazzi said in his Statement of Defence that it was in 2001 that he "formally retired" and settled in Lebanon, albeit returning to Kuwait several times a year. There was no documentary corroboration that this was the date of his retirement. In his witness statement (paragraph 205) Mr Massad indicated that this occurred in about 1998-99. In his oral evidence, Mr Massad supported Mr El Ghazzi's statement that he had left Kuwait for Lebanon in 2001.

2540. There is nothing in the documentary picture, concerning the making and redemption of PIFSS' investments in Man products, which showed any change consequential on Mr El Ghazzi's departure. In short, Mr El Ghazzi had no documentary footprint prior to his departure for Lebanon, and none afterwards. The documentary picture is that matters were dealt with by Mr Massad and PIFSS, principally Mr Al Rajaan. Thus, by way of example, the letter of introduction for MF 7 on 24 October 2000 (before Mr El Ghazzi's alleged retirement in 2001) was from Mr Massad to Mr Al Rajaan, enclosing a copy of the prospectus. The concluding paragraph invited Mr Al Rajaan to call him (Mr Massad), giving two telephone numbers. The letter of introduction for MF10 in August 2001 (possibly after Mr El Ghazzi's alleged retirement in 2001) was from Mr Massad to Mr Al Rajaan: "I am writing to introduce you to Man-IP 220 Plus (Series 4) Limited", and invites Mr Al Rajaan to raise any queries with the Bahrain office.

2001 – Ms Al Dakheel is promoted to supervisor of the Direct Investment Department

2541. There are 5 individuals with whom Mr Massad said that he had dealings in relation to PIFSS' investments. One of those individuals was Ms Al Dakheel, who was promoted in 2001 to the position of supervisor of the Direct Investment Department. It may be that this promotion is the reason why, in relation to MF 9, one sees the first letter sent by Mr Massad to Ms Al Dakheel on 26 April 2001. This was in identical terms to a letter, introducing the fund, sent on the same day to Mr Al Rajaan.

2542. It is common ground that, at least from that point onwards, Ms Al Dakheel met regularly with Mr Massad and Mr Merville. It was also common ground that Ms Al Dakheel was never introduced to Mr El Ghazzi. Her evidence, which was not challenged and which in any event I accept, was that she had neither met him nor heard of him. PIFSS places reliance on these matters in support of their argument that Mr El Ghazzi was not a genuine intermediary.

2543. Ms Al Dakheel is specifically referred to in one of the rare entries made by Mr Massad in connection with his meetings with PIFSS. Man had a software programme, called "ManEdge" for much of the period with which I am concerned, and this enabled Man's salespeople to record their relevant interactions with clients or relevant to their clients. In fact, the salespeople were required to record these interactions, but the evidence from a number of witnesses, including Mr Massad, was that many people failed to do so. Man's disclosure included information from ManEdge, to which information on its predecessor system had been migrated. There are relatively few entries concerning PIFSS. One entry, not long after Ms Al Dakheel's promotion, is of relevance, as explained below. There is no reference at all, in the disclosed ManEdge materials, to any meetings or discussions with Mr El Ghazzi. (Man has pointed out that there is a reference in a 2013 e-mail from Ms Grew to a conversation in September 2012 between Mr Conchon and Mr El Ghazzi, and Ms Grew's email suggests that this conversation was recorded on ManEdge. I do not think that this single reference, which came after the 2012 SMR, is of significance or that it detracts from the general point as to the absence of entries referring to meetings or discussions with Mr El Ghazzi).

RMF

2544. Man acquired RMF in May 2002. The documents show that a "turf war" started to develop shortly thereafter, because PIFSS had – prior to Man's acquisition – been targeted as a potential investor in RMF products. The individual who handled the

relationship with PIFSS was a Mr Stefan Woernle, whose business was called or referred to as "Swiss Edge". He was not a Man employee, but rather worked under an intermediary agreement with RMF which – because it predated the acquisition by Man – was not on Man's standard terms. PIFSS contends that it is instructive to look at the work carried out by Mr Woernle, as evidenced by documents in particular in 2002 – and to contrast the documentary footprint showing Mr Woernle's work as an intermediary with the lack of any equivalent footprint of Mr El Ghazzi. I will return to this area of the case below.

2002 – October 2008

2545. Many further investments were made by PIFSS during these years, in the period prior to Mr Massad's resignation and departure in September 2008. The further investments brought the total number of transactions during Mr Massad's tenure to 26 (excluding RMF products), and there were 2 further investments made during the period of his consultancy agreement and for which he was the moving force. All of these 28 investments, apart from MF 22, were in products with a capital guarantee.

2546. It is again unnecessary to describe the detail of the transaction and redemption documentation, which was again broadly in line with the documents for prior transactions already described. I will therefore simply list those investments:

Reference Number	Date	Fund Name	Amount (USD)
MF 12	March 2002	Man AP Strategic Series 1 Ltd	30 million
MF 13	October 2002	Man IP 220 Series 4 Ltd	40,005,330
MF 14	December 2002	Man Multi-Strategy Series 4 Ltd	30,004,330
MF 17	March 2003	Man Multi-Strategy Series 5 Ltd	30 million
MF 18	June 2003	Man AP Unison Series 1 Ltd	50,010,410
MF 19	March 2004	Man RMF Multi-Style Limited	30 million
MF 20	June 2004	Man Global Strategies Diversified Series 2 Ltd	30,001,750
MF 21	April 2005	Man AP Enhanced Series 2 Ltd	30,003,670
MF 22	June 2005	MGS Diversified Opportunities Ltd	30,028,000
MF 23	October 2005	Man IP 220 Limited	48,269,105

MF 24	December 2005	Man BlueCrest Ltd	40,025,000
MF 26	December 2006	Athena Guaranteed Futures Limited Series 3	49,999,916
MF 27	June 2007	Man AP Spectrum Ltd	67,286,410
MF 28	December 2007	Man IP 220 Series 5 Ltd	50,000,000
MF 29	June 2008	Man Vision Ltd	100 million
MF 30	November 2008	Man IP 220 Series 6 Ltd	100,451,000
MF 31	November 2008	Man IP 220 Index Notes Series 4	89,229,036

2547. During this period of time, Mr El Ghazzi's remuneration was increased on two occasions.

2548. On 26 February 2004, Mr Massad wrote to Mr El Ghazzi indicating that MIAG would pay an override commission of 0.5% if Mr El Ghazzi procured at least USD 30 million into Man RMF Multi-Style Ltd. MIAG later confirmed that entitlement.

2549. In June 2006, Mr El Ghazzi's Intermediary Agreement was amended so as to provide for additional trail commissions up to 0.5%, and override commission of 1.5% (with a threshold of USD 30 million).

Events at the time of Mr Massad's departure

2550. Mr Massad's departure from Man, in September 2008, was not altogether amicable. Mr Moeller's evidence was that it was his (Mr Moeller's) decision that Mr Massad would leave. He decided this because Mr Massad had become less interested in the business and less motivated in his role. Mr Moeller's job was to grow the business and that required people who were motivated. The decision that Mr Massad should depart appears to have been made in around April 2008, and Mr Massad ceased to be employed at the end of September 2008 but remained a consultant for around 4 months thereafter. At around the time of his departure, Mr Massad sent a hostile e-mail to Mr Moeller on 21 October 2008 in the context of monies payable on termination, saying that he had been targeted and harassed by Mr Moeller.

2551. September 2008 was also the time of the turmoil in markets, and world economies, often referred to as the Global Financial Crisis (and at trial as the "GFC"). PIFSS' investments with Man were, naturally enough, affected by the crisis. The total value of PIFSS' investments dropped by around USD 52 million in July, USD 29 million in August and USD 42 million in September. This had the effect of pushing some investments into, or close to, "permanent cash". In essence, what this meant is that the losses absorbed the potential investment element of the monies originally invested: i.e. the monies over and above the 60% which was allocated to the bond/ capital guarantee

element of the investment. This meant that although there would be sufficient money to ensure that no loss was suffered, there was no prospect of the investment increasing in value. As Man said in their written closing, this was the prompt for discussions that led to what was referred to as the "rebalancing" of PIFSS' investments with Man. Investments in products in or close to permanent cash would need to be switched into new products to regain the potential upside of investment exposure.

2552. The documents indicate that there were meetings at around this time between Man (Mr Massad and Mr Merville) and PIFSS. I discuss the sequence of events in greater detail later in this judgment. Man's case was that these would obviously have been difficult meetings at a time when PIFSS' investments with Man were losing money. It is common ground that Mr El Ghazzi did not attend any of the meetings that Man held with PIFSS at this difficult time, and this is relied upon by PIFSS as showing that Mr El Ghazzi was not a real intermediary; essentially because a key aspect of the work of an intermediary is to assist when times are tough. Man contended that there was evidence that discussions were taking place between Mr El Ghazzi and Mr Massad and Mr Merville at this time, and that these discussions would have related to the rebalancing exercise. Mr Smouha submitted, in closing, that it was understandable that Mr El Ghazzi did not attend the meetings which Man had with PIFSS. It was for Man to decide whether or not they wanted an intermediary such as Mr El Ghazzi present at such meetings, and there was a good reason why Mr Merville – whose experience was with direct institutional relationships – would not want Mr El Ghazzi to be present. This is an important area of dispute, and I shall return to it in due course.

2553. The upshot of the parties' dealings between August and October 2008 was that three investments were redeemed, and two new investments were made (MF 30 and MF 31). These are discussed in more detail below: see Section M9.

Investments between 2009 and April 2012

2554. PIFSS made 7 substantial investments during the period of Mr Merville's tenure as CEO. They were as follows:

Reference Number	Date	Fund Name	Amount (USD)
MF 32	March 2009	Man AHL Diversified Strategies LTD EUR Bonds	88,871,961
MF 33	June 2009	Man AHL Diversified Strategies USD Index Notes Series 2	70,000,000
MF 34	March 2010	Man Directional Series 2 – USD Income Bonds	50,000,000
MF 35	November 2010	Man Synergy – USD Income Bonds	75,000,000

MF 36	March 2011	Man IP 220 GLG – USD Income Bonds	100,000,000
MF 37	December 2011	Man International Opportunities Ltd – USD Income Bonds	50,000,000
MF 38	April 2012	Athena Guaranteed Series 2 – Guaranteed Bonds	100,000,000

2555. The documentary picture (as shown by PIFSS' Appendix 6) relating to the conclusion of the transactions is broadly the same as for MF 1 – MF 31. The documents sent to PIFSS were sent by Man directly, and were signed by Mr Merville (save for MF 36 where the signature page of the letter appears to be missing). The letters of introduction from Mr Merville were addressed to Mr Al Rajaan. There is no correspondence from Mr El Ghazzi or reference to him. The letters and documents evidencing PIFSS' agreement to invest were generally signed by Mr Al Rajaan, albeit that there is one letter and application form (MF 32) signed by Sheikh Abdullah. I do not attach any significance to this. Ms Al Dakheel's evidence was that Sheikh Abdullah would sometimes sign such documents in Mr Al Rajaan's absence.

2556. A feature of these transactions is that some of them (MF 34, 35, 36 and 37) were structured products in the form of income bonds, and did not have a capital guarantee element.

2557. Another important aspect of the documentation, relevant to these investments, is that Man's Middle East office retained a record of documents that were couriered out. As part of the SMR process (described below), Man sought to investigate whether there was evidence of materials being sent to Mr El Ghazzi in relation to the last, and at that time most recent, of PIFSS' investments: MF 38 in Athena Guaranteed Series 2 Ltd. The investigation revealed that no documents had been couriered to Mr El Ghazzi in relation to that investment. Instead, Man's courier log showed that 5 copies were sent directly to PIFSS. The documents were sent prior to the transactions being concluded, and were obviously the prospectuses for the funds, which Mr Massad said that he used to send to 5 recipients at PIFSS. Mr Williamson, in an email of 29 April 2012 to Mr Waghorn, confirmed that the documents sent in relation to MF 38 were "full prospectus packs".

2558. The same courier log showed, similarly, that 5 copies of documents, relating to various funds, had been sent to PIFSS in relation to 6 earlier actual or potential investments. These included MF 34, MF 35, MF 36 and MF 37. However, there was no evidence of any documents being sent to Mr El Ghazzi on any of those transactions. Although the courier log did not cover the 2009 transactions, MF 32 and 33, there can be little doubt that no prospectuses on those funds were sent to Mr El Ghazzi. I will return to the significance of these points in due course.

The UK Bribery Act and Man's compliance reaction

2559. The (UK) Bribery Act 2010 was passed in April 2010, and came into effect on 1 July 2011. As with other major financial institutions doing business in the UK, this resulted in steps being taken by Man to reconsider and if necessary adjust their processes so as to ensure that they were compliant. There is no doubt, on the evidence, that Man's senior management – both in England and in Switzerland – took their responsibilities in this regard seriously. It is not necessary to describe all the background steps and processes, but by mid-June 2011 Mr El Ghazzi had been identified as one of a number of high risk intermediaries where due diligence steps were required.

2560. On 16 June 2011, Mr Adam Waghorn (who worked in compliance in London) e-mailed Mr Matthew Williamson (who worked in compliance in Dubai) following on from a mention of bribery during a conference call. He referred to a meeting of Man's Risk Assurance Committee on the previous day, and told Mr Williamson that the agreed actions would impact 4 of his (i.e. the Middle East office's) intermediaries. These included Mr El Ghazzi. He said that a number of actions would be necessary, including the need for a counter-signed letter from the intermediary, and also that "Patrick [Merville] will need to complete a detailed questionnaire to justify the relationship and payment of fees". Mr Waghorn indicated that a draft would be sent as soon as possible. It does not appear that any such document was prepared or signed by Mr Merville. In August 2011, Mr Waghorn said that it would be better to have a "free form note" from the relationship manager, rather than asking specific questions. Mr Waghorn identified 8 areas for consideration. It seems that the free form note was never prepared.

2561. On 15 September 2011, Mr El Ghazzi signed an anti-bribery letter, which had been signed by two Man representatives from MIAG on 3 August 2011, by way of an addendum to his Intermediary Agreement. The letter confirmed, amongst other things, that Mr El Ghazzi was complying with all applicable anti-bribery laws, and was not paying bribes to any public official. The letter had been prepared in London, and at one stage the plan in Dubai was for Mr Merville to give it to Mr El Ghazzi in person. It is not clear whether this is how Mr El Ghazzi received the letter for signature.

2562. In the latter part of 2011, Man's compliance department in London – which now had Mr Patrick Kidney as Global Head of Financial Crime Prevention – commissioned a report from a third party, called Alaco, into Mr El Ghazzi. This report, and later reports provided by Alaco, were the subject of a great deal of cross-examination. They formed one part of the "Senior Management Review" or SMR process. I do not consider it necessary to summarise their reports.

2563. In the early part of 2012, Mr Williamson and then Mr Merville became directly involved in the work being carried out into Mr El Ghazzi. Both parties placed reliance on aspects of the SMR process as it developed, and I deal with the chronology in detail in Section M10 below. The process culminated in a report into Mr El Ghazzi, prepared by the compliance team in London, drawing on information from various sources, including Alaco, gathered over the previous months. The final report was circulated in advance to those attending the senior management review meeting which was to be held on 16 July 2012. The 3 members of the SMR team were Mr Peter Clarke (then CEO), Mr Moeller (then Global Head of Sales) and Mr Stephen Ross (then General Counsel). The senior management team formally approved the relationship with Mr El Ghazzi, and the adequacy of the controls and procedures in place, subject to recommendations

that: (a) sales should keep documentary records of the relationship; (b) Mr Merville should "own" the relationship with Mr El Ghazzi and ensure greater contact evidence; (c) third party intelligence updates should be provided on Mr El Ghazzi and PIFSS; and (d) requisite compliance approvals should be obtained for administrative updates to Mr El Ghazzi's account.

2564. During the course of 2013, there were various management changes at Man, including the replacement of Mr Clarke as CEO of Man by Mr Manny Roman. In April 2013, Mr Tim Rainsford became Global Head of Sales excluding the US, reporting to Mr Roman. This position involved him taking over the position previously occupied by Mr Moeller as Head of Sales. In the same month, Mr Paul Dackombe was appointed as Head of Sales for the Middle East, taking over responsibility for the relationship between Man and Mr El Ghazzi/PIFSS from Mr Merville.

2565. As a result of changes in management, Ms Robyn Grew (then Global Head of Compliance and Regulatory, and later in 2022 the CEO) proposed that a new SMR team should be formed to review the position in relation to Mr El Ghazzi. The SMR team was Mr Luke Ellis (Man's president), Mr Dackombe and Mr Rainsford. There is no minute of the meeting which then took place in early May 2013, but the result was that the relationship with Mr El Ghazzi was again approved.

2566. In June 2013, Mr Dackombe embarked upon an exercise of considering which intermediaries should be considered for termination. Man's business model was now changing, and Man was looking for direct relationships with investors. There was a reorganisation of the Middle East office, with Mr Merville being made redundant. The new business model of direct sales meant that the Middle East team could be much smaller, with the numbers being reduced through redundancy from around 18 to a few individuals.

2567. In a spreadsheet listing intermediaries who might or might not be terminated, Mr El Ghazzi was listed as "green". This meant that there was no problem retaining him, but the question was whether there was business to be done. The intermediaries identified as green were to be considered in light of their commercial value. Mr Dackombe wrote to his colleagues on 26 June 2013: "it's really a question of commercial value versus any cost of maintaining the relationship."

2568. Prior to that time, at the beginning of June 2013, Mr Dackombe had visited Kuwait, and had met with Mr El Ghazzi, then with Ms Al Dakheel. He also met, either in that visit or subsequently, Mr Al Rajaan. His meetings with Mr Al Rajaan were always short. The result of the meetings in early June with Mr El Ghazzi and Ms Al Dakheel was that Mr Dackombe formed the view that he could deal with PIFSS directly, and no longer needed Mr El Ghazzi as an intermediary. On 4 September 2013, Mr El Ghazzi's contract as an intermediary was terminated, with a payment of USD 3 million being made in full and final settlement in respect of all claims, including for commission.

2569. At the time that Mr El Ghazzi was told by Mr Dackombe, in July 2013, that the agreement was to be terminated, Mr El Ghazzi pitched the idea of a consultancy agreement. It took some time for this to be agreed, but a consultancy contract dated 14 March 2014 was eventually signed, effective 1 May 2014. Mr El Ghazzi was entitled to an annual fee payment of USD 250,000. Mr El Ghazzi had previously indicated to Mr Dackombe that he might be able to introduce other sovereign wealth funds to Man.

But after a year, nothing had materialised, and Mr Dackombe decided to terminate the consultancy agreement. It was terminated on 1 May 2015.

2570. In the meantime, between September 2013 and June 2014, and without any assistance from Mr El Ghazzi, PIFSS made a number of investments as follows.

Reference Number	Date	Fund Name	Amount
MF 39	September 2013	AHL Evolution Alpha (Restricted) Ltd	200 million
MF 40	September 2013	Man GLG European Long Short Equity Restricted	200 million
MF 41	October 2013	GLG Market Neutral Fund	150 million
MF 42	June 2014	Man GLG Alpha Select Restricted	100 million
MF 43	June 2014	GLG Cross Asset Value Offshore Fund Ltd	100 million
MF 44	June 2014	GLG European Distressed Fund II – Class A Unrestricted	150 million

2571. These investments were by way of a restructuring of PIFSS' portfolio which Mr Dackombe proposed. He thought that structured products, at that time, were not necessarily the best products for large institutional investors, and he suggested products which he thought would achieve PIFSS' objectives in line with its risk appetite. The portfolio which he suggested, and sold to PIFSS, had much lower management fees (around 2%) and had no other underlying fees.

M3: The evidence of Mr Massad as to what Mr El Ghazzi was doing

2572. I have previously identified, as a central issue, the question of what, if anything, Mr El Ghazzi was doing during the period of his Intermediary Agreement. I now summarise the evidence of Mr Massad and Mr Merville on that topic.

Mr Massad

2573. In his witness statement, dealing with the evolution of the relationship with Mr El Ghazzi and PIFSS, Mr Massad described how the introduction to PIFSS had come about: see Section M2 above. He then described how, during the period 1993 – 1996, he had nothing interesting to sell to PIFSS. In 1995/1996, Man funds went through a difficult period, with a number of funds losing their trading capital and Man trying to move away from its role as the investment manager to the MINT funds: funds where the investment manager was MINT Investment Management, which was 50% owned by Man. Mr Massad described how Man lost a lot of money for Sheikh Mubarak in around 1995: 40% of his original investment, which was around USD 3 million, and there was concern that he might bad-mouth Man.

2574. Mr Massad described being taken to PIFSS' offices by Mr El Ghazzi to meet Mr Al Rajaan in about 1994. Thereafter, Mr Massad worked hard, getting to know everyone in PIFSS' offices. He said that he kept trying, but Man did not have the right products for PIFSS at the time.

2575. I note in passing that his statement, as to these early efforts, indicated that they were being made by Mr Massad personally. However, he said later in his statement that when the first investment was made by PIFSS (MF 1), it was the result of "hard work on my part, with very strong direct input and assistance by Mr El Ghazzi". Mr Massad then continued to develop his relationship with "Mr Al Rajaan and his team".

2576. When dealing with the role of Mr El Ghazzi, he described him as being key to building the relationship with PIFSS, since he had opened the door to one of the largest institutional investors in Kuwait. Mr El Ghazzi's role changed as time went on. He said that in the first couple of years, Mr El Ghazzi would come to the meetings with Mr Al Rajaan, and he was active in pitching the funds. He would not attend the meetings with the more junior members of the investment team, but would initially attend any meetings which were attended by Mr Al Rajaan/ Mr Massad or Sheikh Abdullah/ Mr Massad.

2577. Mr Massad said that meetings at PIFSS tended to work in the same way. He would send Mr El Ghazzi the materials (i.e. the prospectus, etc) by courier in advance. These would not be sent directly from Switzerland, but rather via the Middle East office. If Mr El Ghazzi was happy with the proposal, he would provide the materials to the "investment team at PIFSS". Later, as Mr Massad built trust with PIFSS, he would send the materials directly. He said that he always provided copies to each of Mr Al Rajaan, Sheikh Abdullah, Amjad Sheikh, Sulaiman Al Muraikhi and Ms Al Dakheel, as well as sending copies to Mr El Ghazzi. He eventually dropped Mr Al Muraikhi from the distribution list at Ms Al Dakheel's request.

2578. Mr Massad would then travel to Kuwait and meet Mr El Ghazzi to discuss the investment opportunity. After that, usually the next day, they would meet at PIFSS' office, and Mr El Ghazzi "would help me to pitch the product to PIFSS". In the first few years, when Mr El Ghazzi attended meetings at PIFSS, he would speak to Mr Al Rajaan and take him through the materials, and he would explain how the funds would fit into PIFSS' existing portfolio and why they were a good investment. In the meetings, Mr El Ghazzi seemed to have a good understanding of what other investments PIFSS had, and how the Man investments might fit into their portfolio. He thought, but could not now recall, that it may have been Mr El Ghazzi's idea to put the Man funds, with their guaranteed returns, into PIFSS' bond portfolio bucket.

2579. Mr Massad said that Mr El Ghazzi was generally very knowledgeable and experienced. He had managed a brokerage team trading commodities, currencies and indices. Whilst he did not know as much about structured products as Mr Massad, his knowledge of financial markets was way beyond that of Mr Massad. In the meetings with Mr Al Rajaan, they would talk all about the Man funds, but there was always also a side discussion between Mr Al Rajaan and Mr El Ghazzi about markets.

2580. Mr Massad described Mr El Ghazzi as being a good advocate for Man's funds. When Mr Massad had first explained to Mr El Ghazzi how the guaranteed bonds worked, he understood and loved it. It was also very obvious that Mr Al Rajaan was well briefed

by Mr El Ghazzi before the meetings. Mr Al Rajaan always asked good questions and, in most cases, he already had the prospectus on his desk.

2581. After the meetings with Mr Al Rajaan, if Mr El Ghazzi had not attended the meeting, sometimes he would ask Mr Massad to report on the meeting, and at other times Mr El Ghazzi would call and advise him of the next steps. He would also often call with an advance warning if PIFSS was about to redeem from a fund. It was clear that Mr El Ghazzi would have follow up conversations with at least Mr Al Rajaan after Mr Massad had visited PIFSS. But he did not know if he also spoke to Sheikh Abdullah or others at PIFSS.

2582. On other occasions, Mr El Ghazzi would say that PIFSS was not interested in investing, but he advised Mr Massad that he should meet the team anyway for feedback. Mr Massad would therefore fly to Kuwait and meet with Mr Al Rajaan and/or Ms Al Dakheel to have a more general discussion of their investment priorities, and why they were not willing to invest in the products Man had presented. Mr Massad would speak to Mr El Ghazzi before and after each of his meetings with PIFSS to help to set the tone and discuss feedback after the meetings.

2583. As time went on, Mr El Ghazzi encouraged Mr Massad to build relationships with other individuals at PIFSS. Mr El Ghazzi gave him names and contact details for various people at PIFSS, telling him that they would be expecting Mr Massad to be in touch. Mr Massad started meeting others at PIFSS, including building personal relationships with Amjad Sheikh and Ms Al Dakheel, who became Mr Massad's primary contacts for the PIFSS relationship. Following meetings with Mr Al Rajaan, Mr Massad would therefore meet with Mr Al Rajaan's junior team members, in particular Amjad Sheikh and Ms Al Dakheel, once she joined the team. Mr Massad would sometimes meet Ms Al Dakheel again during the middle of the launch period, to see if there was any resistance to investing. Towards the end of the offer period, Mr El Ghazzi would tell Mr Massad whether PIFSS was investing or not.

2584. In describing the evolution of Mr El Ghazzi's role, he said that as the institutional relationship between Man and PIFSS strengthened towards the late 1990s, he would meet PIFSS without Mr El Ghazzi. But he would always either meet or speak with him separately before and after the meeting. From 1996 onwards, Mr Massad visited Kuwait approximately every quarter: i.e. each time a new product was released. As he got to know Mr El Ghazzi better, they would meet in a less formal setting; for example for dinner at Mr El Ghazzi's apartment – Mr El Ghazzi being a very good cook.

2585. By about 1998 – 1999, Mr El Ghazzi had stopped attending meetings with Mr Al Rajaan in relation to Man's business almost entirely. (I note in passing that, by the end of 1998, PIFSS had made only 3 investments: MF1 – MF3). For a period of time, Mr El Ghazzi asked to come to the meetings. However, whilst Mr Massad did not say "no", he was keen to develop the relationship with PIFSS and preferred to meet Mr Al Rajaan himself. Eventually Mr El Ghazzi stopped asking to come. This stepping back by Mr El Ghazzi felt like a perfectly natural development in the light of the strengthening bilateral relationship between Man and PIFSS. He said that it may also have been connected to his move from Kuwait back to Lebanon, which "occurred at about the same time", although he kept his apartment in Kuwait for when he would visit.

2586. Mr Massad said that nevertheless Mr El Ghazzi always remained very involved. Mr Massad would meet him at least 3-4 times a year, and they spoke very regularly on the phone. He would send him the materials for any investment proposals before going to PIFSS and discussing the investments with them. Mr El Ghazzi would then call him to say that he had discussed the latest investment proposals with Mr Al Rajaan, and if they were interested, that Mr Massad should meet with Mr Al Rajaan and his team to discuss further. Mr Massad would then contact PIFSS directly to arrange the meetings. Drawing an analogy with a non-executive chairman, Mr El Ghazzi went from being an 'executive intermediary' to a 'non-executive intermediary'. That was not uncommon with intermediaries, once the relationship had been established. However, even when acting as a non-executive intermediary, Mr Massad still relied heavily on Mr El Ghazzi's ability to step in when things went sour. He was always there as a resource that was on standby, and was available to and did react when needed.

2587. For example, when investments were not performing well, Mr El Ghazzi managed to smooth things over with PIFSS and persuade them not to withdraw. When fund performance was lower than expected, Mr Massad would be called to meet with Mr Al Rajaan and he would shout at him, obviously very upset and concerned by the poor performance. He described being given a hard time, and a dressing down by Mr Al Rajaan in the latter's office. Mr Massad described how a discussion would then take place with Mr El Ghazzi on whether a redemption fee waiver ought to be suggested to PIFSS, should they agree to switch from the poor performing product into a new guaranteed fund. Any portfolio restructurings discussed and subsequently jointly agreed with Mr El Ghazzi were always helpful to PIFSS as an investor. He had an ability to smooth things over.

2588. In a passage in his witness statement on which he was cross-examined in some detail, Mr Massad said that by the time the institutional relationship with PIFSS was strong, Man could probably have got rid of Mr El Ghazzi. However, it was not part of Man's culture to do this. There was also, he said, a perception at Man that to cut ties with such a significant intermediary as Mr El Ghazzi would have been like Man shooting itself in the head reputationally.

2589. He also said that the question of Mr El Ghazzi making undisclosed payments was discussed informally on a handful of occasions. None of these discussions made a significant impression on him. He referred in that connection to conversations with Mr Kelly and Mr Moeller. (Neither of those individuals had any recollection of such conversations). On a couple of occasions, Mr Massad asked Mr El Ghazzi whether he was sharing commissions with someone at PIFSS, and he denied it. Mr Massad strongly denied that he had turned a blind eye to the possibility that Mr El Ghazzi was sharing his commissions with Mr Al Rajaan. That was outrageous and not true. He said that "we actually did wonder, as with other intermediaries, whether he might be doing so; and I did ask him about this." Mr El Ghazzi denied it in a straightforward way, and "we never had any reason to doubt this or any evidence to suggest otherwise".

2590. In cross-examination, Mr Massad's evidence indicated that Mr El Ghazzi was still attending meetings at PIFSS, together with Mr Massad, in the period after he moved back to Lebanon, including as late as 2004. He was asked about an exchange in August 2004 with a London colleague, Mr Alexander Lowe, concerning a possible redemption. Mr Massad rated redemption as a 50/50 possibility, after a meeting with PIFSS which "went fine". Mr Massad agreed that this was the type of problem-solving situation that,

on his evidence, Mr El Ghazzi was involved in. The reason that there was no trace of him in the documents was because the contact with him was by phone or at meetings. He said that in 2004, Mr El Ghazzi still had a presence in Kuwait, and that he would fly in for some of the meetings and attend at PIFSS together with Mr Massad "especially those when it was in relation to poor performance".

2591. In response to my questions, Mr Massad's evidence was, again, that Mr El Ghazzi was attending meetings at PIFSS, together with Mr Massad, in the period up to 2004. He said that after Mr El Ghazzi went to Beirut, in around 2001, he would still meet Mr El Ghazzi around 6 times a year; 3 times in Beirut and 3 times in Kuwait. He said – with reference to his evidence that Man could probably have got rid of Mr El Ghazzi – that the institutional relationship between Man and PIFSS became stronger by 2002, 2003 and 2004. I asked whether, by the time that the relationship became strong, there were any things that Mr El Ghazzi was doing that Man could not do itself. He said that yes, Mr El Ghazzi was doing several things. He was assisting in the preparation for Mr Massad's meetings with PIFSS. Mr El Ghazzi would present the funds first to PIFSS and then, when he was there in Kuwait, they would go together to present the funds. But, more importantly, he was crucial and fundamental when there were periods of bad performance which were experienced from time to time. And then he would help Mr Massad on how to restructure the portfolios and not lose the assets under management. I asked why Mr Massad could not have done that himself, since he was very skilled and had a good relationship with PIFSS. Mr Massad said that whilst he might have tried, Mr El Ghazzi was "very convincing with them".

Mr Merville's evidence

2592. Mr Merville joined Man in 2005, being hired to bring in new business from institutional investors and to be Man's Deputy Regional Manager in the Middle East. His goal was to make inroads with new institutional investors. He took over from Mr Massad in October 2008, but whilst Mr Massad remained as a consultant (until January 2009), Mr Merville said that he had "limited engagement with PIFSS or Mr El Ghazzi during this period".

2593. Mr Merville described a direct channel of communication with PIFSS through Ms Al Dakheel. Mr El Ghazzi was the other channel. He said that he would speak to Mr El Ghazzi to inform him of a new product launch, before PIFSS subscribed to a product, and upcoming visit requests if he needed Mr El Ghazzi to assist in co-ordinating meetings with PIFSS, particularly at the start of his tenure. He spoke to Mr Al Rajaan very infrequently, from recollection once or twice a year. Ms Al Dakheel dealt with the day-to-day investment matters. With Ms Al Dakheel, he would have technical conversations about product launches, financial market conditions and fund performance of PIFSS' current investments. The conversations with Mr Al Rajaan were much shorter in nature, and were general conversations about the performance of the markets.

2594. He said that he understood that the correspondence to PIFSS was not sent centrally to PIFSS, but rather via the Middle East office. This arrangement predated his role as relationship manager, and he did not know why the arrangement was in place.

2595. He described Mr Al Rajaan as the most senior person in the investment decision making process. He understood that Ms Al Dakheel, who had good knowledge of the products,

would review the documents and then she would either recommend the investment to the Investment Committee or not. However, he did not know which individuals sat on the committee, and "did not ever speak with the Investment Committee". He had very little understanding of how the investment decision process worked at PIFSS. Ms Al Dakheel was his principal contact at PIFSS.

2596. In relation to the October 2008 rebalancing, he referred to the meeting which he and Mr Massad had had with Ms Al Dakheel. He recalled that at the time, Mr Massad had been negotiating a rebalancing of PIFSS' investments, "but I do not recall having much involvement in those negotiations". Having refreshed his memory from the documents, his recollection was that the negotiations had already been concluded by Mr Massad by the time of the meeting. He believed that part of the purpose of this meeting was also to introduce him as PIFSS' new relationship manager.

2597. When the relationship was handed over, Mr Massad told him that he (Mr Massad) would directly contact PIFSS upon a global product launch, and that Mr El Ghazzi's role had primarily become assisting the navigation of the relationship with PIFSS if there were any issues with respect to the investments. Once Mr Merville had taken over the relationship with Mr El Ghazzi, Mr Merville was the main contact in relation to product matters such as product launches. Patrice Conchon was responsible for the administrative side of the relationship, alongside the team in Switzerland. When Mr Conchon left, Mr Williamson took over his role.

2598. Mr Merville's impression when he took over the relationship was that Mr El Ghazzi was familiar with the PIFSS investments, understood the products and was asked to discuss investments with them. Mr El Ghazzi was the intermediary on an important account for Man. After Mr Merville took over, Mr El Ghazzi continued to act as an intermediary for PIFSS and he was their contact if any clarification about the investments was needed. Mr El Ghazzi generally provided insights into how to handle the relationship with PIFSS and how to market the products to PIFSS. Although he did not recall if Mr El Ghazzi spoke to him about the specific individuals he was in touch with at PIFSS, he did tell him that he was in regular contact with the investment team at PIFSS. Whilst Mr Merville understood the investment team (with whom Mr El Ghazzi was in contact) to be those in senior management at PIFSS, he said that: "I am not sure of the names of the individuals but I do recall that it did not include Ms Al Dakheel". He was under the impression that Mr El Ghazzi knew the team at PIFSS well. Whilst he did not recall ever speaking to anyone at PIFSS about Mr El Ghazzi, or attending a joint meeting with PIFSS and Mr El Ghazzi, he was under the impression that people at PIFSS, including Mr Al Rajaan, were aware of Mr El Ghazzi because he was the intermediary. He recalled that Mr El Ghazzi mentioned to him a few times that he would speak to PIFSS about the latest launches.

2599. Mr Merville's understanding was that Mr El Ghazzi had good, deep relationships in Kuwait, that he was someone who PIFSS trusted and so when a product was not performing as expected, Mr El Ghazzi would speak to PIFSS. He always considered Mr El Ghazzi to be a genuine intermediary, who was assisting Man in maintaining and developing its relationship with PIFSS.

2600. Although he did not have a lot of interactions with Mr El Ghazzi, Mr Merville – or someone in the Middle East office – would generally try to update Mr El Ghazzi both before and/or after the meetings he had with PIFSS in relation to performance related

issues. PIFSS was Mr El Ghazzi's client, and it was the proper thing to do to tell him when he (Mr Merville) was meeting PIFSS. Mr Merville, or either Mr Conchon or Mr Williamson, would also update Mr El Ghazzi as to whether PIFSS seemed happy or not with its current investments or the new product launch. Whilst Mr Merville was the main point of contact in relation to product related matters for PIFSS, Mr El Ghazzi would usually call Mr Conchon to get an update on the performance of PIFSS' portfolio, as he had been dealing with him for some time. Mr Conchon dealt with all the administrative functions relating to Mr El Ghazzi's relationship, including assisting with the processing of commission payments, paperwork and application forms.

2601. Mr Merville said that if a product was not performing, Mr El Ghazzi might ask him if there was a product which PIFSS could switch into. He would also ask about the financial health of the products that PIFSS was invested in, adverse price share movements, acquisitions by Man, and also speak about any product/ investment objective shifts that PIFSS had relayed to him. Since Mr El Ghazzi was not based in Dubai, his main method of communication with him was by phone rather than in person.

2602. When dealing with his conversation with Mr Waghorn in the context of the SMR process, he denied that he thought that Mr El Ghazzi played no role in return for the sums he was paid, and that the relationship with PIFSS was entirely direct. Mr Merville had always thought that Mr El Ghazzi was a genuine intermediary who assisted Man in maintaining and growing its relationship with PIFSS. His description of the relationship as "entirely direct", was because "I had direct contact with PIFSS, as opposed to some of the other investors where the salesperson only dealt with the intermediary who in turn dealt with the underlying client (investor). It was not that Mr El Ghazzi did not play a role in the relationship. Even though Man had a direct line of communication with PIFSS, I understood that Mr El Ghazzi knew the team at PIFSS well and was … able to provide insights into the relationship, for example in cases of negative performance of Man funds." The way in which Mr El Ghazzi was involved in the relationship with PIFSS changed over time, but he always thought that he was providing assistance to Man.

2603. Mr Merville denied the allegations made against him, saying that he had always conducted himself in a professional and ethical way. He did not suspect that Mr El Ghazzi's commissions were bribes being paid for the benefit of Mr Al Rajaan.

M4: The parties' arguments

2604. The arguments advanced on each side – by Mr Norbury for PIFSS, Mr Smouha for Man, and Mr Matovu for Mr Massad – were, as previously indicated, extensive. In writing this judgment, I have re-read every word of the written submissions, and the transcript of the oral submissions as well. I do not consider it necessary to lengthen this judgment by summarising the arguments at great length, not least because what ultimately matters is my assessment of the most significant features of the evidence which point one way or the other. The major points on each side will be apparent from my discussion below, and what follows is a summary of the main themes that were developed.

2605. On behalf of PIFSS, Mr Norbury's principal argument was that Mr El Ghazzi was only a "pretend" intermediary, a placeman for Mr Al Rajaan and the payment of bribes. He did nothing of substance in the PIFSS/Man relationship, and was not the active and

effective intermediary portrayed in the witness evidence of Mr Massad and Mr Merville, and the case advanced by Man. The documentary record shows that Mr El Ghazzi had no role as an intermediary between Man and PIFSS, and that this was well known at all times by Mr Massad and Mr Merville and, it is to be inferred, Mr Moeller.

2606. Reliance was placed on various factors, including the absence of documentation showing any genuine intermediary work being carried out by Mr El Ghazzi; the fact that Ms Al Dakheel, Man's principal contact, was never introduced to Mr El Ghazzi, and was never told about him by anyone (including Mr Massad and Mr Merville); the contrast between the work evidenced by the documentation concerning Mr Woernle of RMF, and the lack of any documentation evidencing the work of Mr El Ghazzi; and the statements made by Mr Merville in the course of the SMR process, with PIFSS drawing a contrast between his description at the start of the process, with later embellishment and untrue statements. That Mr El Ghazzi was only a pretend intermediary, not a genuine one, was apparent to the people on the ground in the Middle East, Mr Massad and Mr Merville. PIFSS invited me to reject the evidence of Mr Massad and Mr Merville as to the work allegedly carried out by Mr El Ghazzi.

2607. PIFSS also submitted that whilst Mr Moeller was not there on the ground, he knew enough about various unusual circumstances of the arrangement to have worked out for himself – even if he had not been told directly – that Mr El Ghazzi was paying bribes to Mr Al Rajaan.

2608. On behalf of Man and Mr Massad, reliance was placed on various matters. Both Mr Massad and Mr Merville were people of good character, without any blemish on their professional reputations. Positive evidence as to the perceived integrity of Mr Massad, and the high regard in which he was held, was given by a number of Man's witnesses, including Mr Kelly and Lord Fink. The consequences of complicity in a bribery scheme – including potential criminal proceedings and imprisonment, as well as loss of reputation – meant that it was highly improbable that either individual would have become involved in corruption. Mr Matovu for Mr Massad submitted that there was no motive for him to do so; or at least an insufficiently strong motive to warrant risking the adverse consequences of involvement.

2609. There was a genuine intermediary agreement at the outset of the relationship between Man and Mr El Ghazzi, as PIFSS acknowledged. Mr El Ghazzi obtained investments from Sheikh Mubarak, and also another Kuwaiti sovereign wealth fund called KFAED (Kuwait Fund for Arab Economic Development). It was also not disputed that Mr El Ghazzi had indeed introduced PIFSS and Mr Al Rajaan.

2610. Although the conspiracy is alleged to have lasted for many years, there were no documents in which any of the alleged conspirators let slip that bribes were being paid. It was contrary to all the probabilities that there would be no such document if there was such a conspiracy.

2611. The first evidence of any money being passed to Mr Al Rajaan was in early 1998, indicating that there was no corrupt arrangement until some time after the first investments had been made. It was therefore likely that bribery only became a feature of the relationship between Mr Al Rajaan and Mr El Ghazzi some time after the dealings with Man started, and this indicated that Mr Massad cannot have known about it at the start. It was more likely something worked out by Mr Al Rajaan and Mr El Ghazzi after

the investments with Man had started. Those dealings had started in a small way, with a relatively small investment in MF1. They had then progressed in an incremental way, explicable by the success of the initial investments in the IP 220 product.

2612. A point on which considerable emphasis was placed was that it was most improbable that Mr Al Rajaan and Mr El Ghazzi – who knew each other well and had a longstanding relationship prior to the conclusion of the Intermediary Agreement in 1993 – would want to involve the young and naïve Mr Massad, then only in his 20s, in a corrupt arrangement. The arrangement could function perfectly well without him, because there was a genuine intermediary agreement in place and that was all that Mr Al Rajaan and Mr El Ghazzi needed for the purposes of obtaining substantial monies from Man.

2613. Man and Mr Massad also relied upon the strong compliance culture within Man, with considerable oversight into the relationship between Man and Mr El Ghazzi, including approvals being given to Mr El Ghazzi's contractual terms over the years. It was improbable that any corrupt arrangement, to which individuals at Man were party, could exist or flourish in that context. Mr Massad answered questions from compliance, when he was asked: for example informing Mr Wallace as to the reasons why confidentiality was important in the context of the PIFSS relationship. There was no secrecy, within Man, as to the existence of the intermediary relationship involving Mr El Ghazzi.

2614. Reliance was placed on various other facts which were said to be contraindicators of corruption. These included the following (in broadly chronological order).

2615. Mr Massad went with Mr Kelly and Mr El Ghazzi to PIFSS' offices in 1996: there was no attempt to hide Mr El Ghazzi's involvement. It took 3 years before any investments were forthcoming from PIFSS.

2616. Mr Massad sought approval for the Ozak payment in 1998. If he had been involved in Mr El Ghazzi's bribery of Mr Al Rajaan, he would never have permitted a payment to be made directly from Man to Mr Al Rajaan.

2617. There were times that Mr Al Rajaan did not invest in Man's products, and occasions when Mr Al Rajaan sought a waiver of redemption fees as part of a restructuring. If there was a conspiracy, then one would think that Mr Massad would only introduce products where he had been tipped off that Mr Al Rajaan would invest. Mr Massad used to send copies of the prospectuses to various individuals at PIFSS, and he spent time talking to Ms Al Dakheel and others. There would have been no point doing so if all that he had to do was to obtain Mr Al Rajaan's approval for an investment. PIFSS was perceived by Mr Massad (and Mr Merville) as having a robust decision-making process, with various individuals involved lower down, making recommendations, and ultimately a decision being taken by an investment committee.

2618. Mr Collins also drew attention to two cases where redemption fees were waived by Man. On the first occasion, in 2006, this resulted in a reduction in the FEL payable to Mr El Ghazzi. On the second occasion, following the rebalancing, there were exchanges in Switzerland in 2009 as to the impact of switches on the FEL calculation. If there had been a recommendation to redeem a different product, which had been held for longer, then there would have been no or a smaller reduction in the FEL payable. These were said to be positive contra-indicators of corruption.

2619. Mr Moeller terminated Mr Massad's employment, and he would not have done so if Mr Moeller was in on the bribery scheme.

2620. Mr Merville took a very light touch to the El Ghazzi – PIFSS relationship: an approach inconsistent with being engaged in a tripartite conspiracy. Mr Merville showed a lack of diligence in servicing the relationship, whereas an active participant in a conspiracy would have wanted to maintain a tight grip in order to ensure that it remained secret. Mr Merville also delegated certain work to Mr Conchon. Mr Merville was not precious about handing over the relationship with PIFSS and Mr El Ghazzi to Mr Dackombe, and made no objection to Mr El Ghazzi's termination.

2621. When Mr Al Rajaan sought to shut down his Swiss accounts in 2012, he did not seek to involve Mr Massad in that process.

2622. Generally speaking, there was poor note-taking by Mr Massad and Mr Merville of their dealings with PIFSS and Mr El Ghazzi. In that regard, the evidence was that there was generally bad note-keeping by people in sales. The documentation in relation to Mr El Ghazzi was no different. If there had been corruption, greater effort would have been made to keep notes. The absence of records was therefore a contra-indicator of corruption or at best neutral.

2623. In addition, Man contended that Mr El Ghazzi was well-known to key individuals within PIFSS, albeit not to Ms Al Dakheel. An adverse inference should be drawn against PIFSS for failing to call these individuals: specifically, Sheikh Abdullah, Mr Al-Muraikhi, and Amjad Sheikh.

M5: Discussion - overview

2624. Having reviewed the evidence and argument, there is in my view cogent evidence that both Mr Massad and Mr Merville were aware that bribes were being paid to Mr Al Rajaan by Mr El Ghazzi, and participated in the process whereby he was paid. I do not consider that there is sufficiently cogent evidence that Mr Moeller was aware of this.

2625. My essential reason for reaching these conclusions is that Mr Massad and Mr Merville knew that Mr El Ghazzi was not acting, in relation to PIFSS' investments, as a genuine intermediary, but rather as a placeman for Mr Al Rajaan, with the Intermediary Agreement being used as a front for that purpose. That was because he was not doing the work described in the witness evidence of Mr Massad and Mr Merville, but in reality was doing nothing by way of promotion of Man's products, or assisting in the servicing of the relationship between Man and PIFSS. I address that issue from a number of angles: the documentary picture (Section M6); Ms Al Dakheel's lack of knowledge of Mr El Ghazzi (Section M7); the contrast between the work and documentary footprint of Mr Woernle (the intermediary for RMF) and Mr El Ghazzi (Section M8); Mr El Ghazzi's non- attendance at meetings with PIFSS in connection with the 2008 handover and the rebalancing of PIFSS' portfolio (Section M9); the SMR process (Section M10); and my assessment of the evidence of Mr Merville and Mr Massad (Sections M11 and M12).

2626. Once that conclusion has been reached, there are other factors which fit the overall picture of knowledge of and participation in corruption: (Section M 13).

2627. I have considered the arguments, to the contrary, advanced by Man and Mr Massad: (Section M 14). However, I do not consider that there are any powerful contra-indicators which point away from the conclusion that they knew about and participated in corruption. Nor do I consider that any adverse inferences should be drawn against PIFSS.

2628. The underlying and more detailed reasons which have led to these conclusions are as follows.

M6: The documentary picture

Overview

2629. Despite Man's submissions to the contrary, I attach significance to the absence of any material documentary record, evidencing the work allegedly carried out by Mr El Ghazzi as described in the witness evidence. I do think that, in the context of an intermediary who worked for Man for 20 years, and who earned USD 155 million by way of commissions over that period, in respect of 35 investments involving hundreds of millions of dollars, there ought to be a reasonable documentary footprint which evidences his involvement. There is in my view a remarkable absence of documents evidencing the alleged work. This absence of contemporaneous objective support for the evidence of Mr Massad and Mr Merville, which Man invites me to accept, is a significant reason for rejecting that evidence.

2630. The overall picture was summarised in questions which Mr Norbury put towards the end of Mr Massad's cross-examination, when Mr Massad was asked about the documentary record. He agreed that: there was no documentary evidence of Mr El Ghazzi contacting PIFSS in relation to the selling of funds or the operation of funds; there was no reference in the correspondence with PIFSS from Man to the existence of an intermediary on Man's products, and certainly no reference to Mr El Ghazzi; there was no documentary evidence, direct or indirect by way of reference in an e-mail, to Mr El Ghazzi ever attending PIFSS' offices with Mr Massad – nor attending separately from Mr Massad; no evidence of Mr El Ghazzi passing any materials to PIFSS; and no evidence of Mr Massad passing any materials to Mr El Ghazzi.

Prospectuses

2631. In relation to the latter point, Mr Massad maintained that there had been faxes, and that at every fund launch he had sent a full pack of materials to Mr El Ghazzi. However, there was no documentary evidence to support that, although I accept Mr Smouha's point that Mr Massad's relationship with PIFSS was very long ago (1996 – 2008), and it is not surprising that documents such as courier records may not have been maintained in the first place, or (as with any faxes) may not have been retained or survived the passage of time.

2632. However, in relative terms, Mr Merville's tenure was more recent, and there is positive evidence which indicates that the key documents for a fund launch, namely prospectuses, were not being sent to Mr El Ghazzi, but were only sent in 5 copies to PIFSS. This is shown by the courier records obtained during the course of the SMR process, where (see Section M2 above) it was apparent that documents were sent only to PIFSS in relation to 7 fund launches which resulted in 5 investments: MF 34, 35, 36,

37 and 38. These investments were very substantial: a total of USD 375 million invested in around 2 years, between March 2010 and April 2012. It included an investment (MF 38), in April 2012, which was made during the period when Mr Merville was involved in the SMR process itself.

2633. It is in my view reasonable to infer that if this is the position in relation to these 7 fund launches, the position would have been the same – i.e. no prospectuses were sent to Mr El Ghazzi – in relation to the first two investments (MF 32 and MF 33) made during Mr Merville's tenure and not involving Mr Massad. MF 32 and MF 33 were the first investments made after the 2008 rebalancing exercise in which Mr Massad was involved.

2634. Furthermore, I consider that it is also reasonable to infer that the position had been no different during Mr Massad's tenure, or at least for a number of years prior to Mr Merville taking over in late September 2008. Mr Merville's evidence was that he did nothing to "shake up" the relationship with PIFSS, from which it can be concluded that things proceeded under Mr Merville in much the same way as they had under Mr Massad. There is certainly no positive documentary evidence that any prospectuses were sent to Mr El Ghazzi at all. Man pointed to one document, a courier log showing that documents were sent to Mr El Ghazzi on 5 January 2005, on the same day that documents were also sent to PIFSS. The log also shows that flight tickets were sent to Mr El Ghazzi on 6 January 2005. Man submitted that it was likely that the same documents were sent to Mr El Ghazzi as were sent to PIFSS, and that it was unlikely that they related to hospitality because of the specific entry relating to Mr El Ghazzi's flight tickets, and because other entries referred (in relation to other intermediaries) to "present" and "personal documents".

2635. It is unclear as to what documents were sent on 5 January to both PIFSS and Mr El Ghazzi. However, it is improbable that they were prospectuses for a new fund launch. The marketing materials for the next fund launch, which resulted in MF 21, were not sent to PIFSS until 26 January 2005. Also, as shown on later courier logs, the practice was for 5 copies of a prospectus to be sent to PIFSS, but the 5 January 2005 entry only seems to relate to one package.

2636. Similarly, there is a DHL invoice recording that Mr Conchon sent some unidentified documents to Mr El Ghazzi in March 2010. Again, it is improbable that this was a prospectus, since the marketing materials for the relevant product, MF 35, were not sent until significantly later: in September 2010. The documents sent by Mr Conchon most likely related to Mr El Ghazzi's hotel stay in Dubai, which was being arranged in March 2010.

2637. If, as I conclude, prospectuses were not being sent to Mr El Ghazzi during Mr Merville's tenure, this calls into question Mr Merville's evidence as to the assistance that Mr El Ghazzi was allegedly providing both to Man and PIFSS in relation to the various funds in which investments were being proposed. Put simply, if Mr El Ghazzi did not have the prospectus, then he would not have had the most basic information necessary for him to do the work described in Mr Merville's witness evidence. He could not have understood the funds on which he was supposedly giving advice and assistance to Man and PIFSS. (I also note in passing that the Intermediary Agreement, which I will discuss later, clearly envisaged that materials such as a prospectus would be sent to the intermediary).

2638. The importance of materials such as the prospectus, for the purpose of enabling a genuine intermediary to do his job, is obvious. But in any event, confirmation can be found in the exchanges culminating in Mr Williamson's email dated 10 May 2012, sent to Mr Merville and Mr Conchon in the course of the SMR process. This was sent at a time when it became apparent that there was no evidence of contact with Mr El Ghazzi in relation to the then latest fund, MF 38, the Athena Guaranteed Series 2 fund: a substantial investment of USD 100 million.

2639. The background was that, on 8 May 2012, Mr Waghorn asked Mr Williamson whether he had followed up, with Patrick Merville, whether he had sent anything direct to Mr El Ghazzi. Mr Williamson's response was that: "Patrick did not have a note of any specific calls or emails about the latest fund". He added that he now had an action here "to get more substantial regular reporting to MEG in place, including recording this appropriately – in Edge". When Ms Grew saw that email, she asked the question: "Nothing sent to MEG". Mr Waghorn's response was: "Apparently not".

2640. Ms Grew was asked about this exchange in evidence. I asked whether, if Mr El Ghazzi was advising Man on how to position the products, he would need to see the materials relating to the product to see what its advantages were, and whether it was the sort of thing that the client might want. She said that she would have liked to have seen that, and would like to have seen a meeting where he (Mr El Ghazzi) could be taken through a number of different options. The bottom line was that she would expect to see something. Whilst resisting Mr Norbury's suggestion that she must have been extremely concerned that nothing had been sent, she acknowledged that she "would have liked to have seen something sent".

2641. Mr Williamson's e-mail, setting out the "more substantial regular reporting", began as follows:

> "We need to implement a regular and robust schedule of reports to MEG which will ensure he is adequately equipped and informed to support PIFSS. I understand this happens in at present [sic.] in a less formalised manner but given the significance of the relationship, it is important to formalise a bit and keep good records."

He made suggestions as to how this could be achieved, saying in relation to new funds: "A record of when we send a prospectus and marketing material". He added at the end, in relation to Mr Merville:

> "@Patrick – Need to start including notes in EDGE about conversations & recommendations for new fund investments, and switches."

2642. I consider that if, as was the case certainly under Mr Merville's tenure, and in my view under Mr Massad's tenure as well, Mr El Ghazzi was not sent the prospectus and associated marketing material, then he was not "adequately equipped and informed" to support either PIFSS or indeed Man. If he was not so equipped and informed, this casts considerable doubt on the evidence of the witnesses as to the valuable work that he was allegedly doing.

2643. During the course of Man's closing submissions, I asked how Mr El Ghazzi could have been giving behind-the-scenes advice in relation to an investment, when he had not even seen the prospectus. In his closing submissions, Mr Smouha placed reliance on Mr Williamson's email of 10 May 2012, contending that it provided some evidence that prospectuses were sent to Mr El Ghazzi, albeit without there being a formal process. He said that it was happening in an "ad hoc" way, and that "we just don't have the material, 13 years later, to know exactly what happened".

2644. However, I do not consider that there is any evidence that prospectuses were somehow transmitted to Mr El Ghazzi in an ad hoc way. The obvious way to send a prospectus to him would be to courier it. But the courier records show that that did not happen.

2645. It would have been possible for Mr Merville to have delivered prospectuses or other documents to Mr El Ghazzi in person. However, his witness statement contains no evidence that this is what he was doing. Mr Merville's evidence was that as Mr El Ghazzi was not based in Dubai, his main method of communication with him was by telephone rather than in person. Mr Merville does refer in his statement to the dinner with Mr El Ghazzi in August 2008 as part of the handover process. But there is nothing in his statement, or in the documents, which indicates that he ever met Mr El Ghazzi again.

2646. If, therefore, Mr Williamson is saying in his 10 May 2012 e-mail that prospectuses had previously been provided on an ad hoc or informal basis, it is not apparent how this was done. Mr Williamson did not provide any witness evidence. In the light of the above matters, I do not consider that any weight can be attached to that statement.

2647. I have focused hitherto on the position during Mr Merville's tenure, where the question of whether prospectuses had been sent arose during the SMR process. The position during Mr Massad's tenure is, as I have said, that there is no documentary corroboration for Mr Massad's evidence that he would pass prospectuses to Mr El Ghazzi at one of their regular meetings. Nor is there any documentary corroboration for his evidence that, in the early stages of the relationship, he would send a prospectus to Mr El Ghazzi, who would pass it on to PIFSS.

Correspondence with PIFSS

2648. An important feature of the documentary picture is that, during the 20-year period of Mr El Ghazzi's Intermediary Agreement, and during the 16 or thereabouts years that PIFSS made many investments in Man's products (1996-2012), there is no written communication from Mr El Ghazzi to PIFSS, or vice versa. All of the relevant correspondence, which was collected together in Appendix 6 to PIFSS' closing submissions, was directly between Man and PIFSS. Furthermore, none of that correspondence contains any reference at all to Mr El Ghazzi. In my view, this is a surprising state of affairs, if it were true that Mr El Ghazzi was an active intermediary.

2649. Man submitted that I should not be surprised by this, and I should not approach the evidence with any expectation that there would be such correspondence. The essence of the argument was that intermediaries work in different ways, and Mr El Ghazzi was a person whose function was to open doors for Man to deal with PIFSS, using contacts at the highest level. This would not, or would not necessarily, involve written communications.

2650. They relied, for example, on the evidence of Mr Luke Ellis, who became President of Man in February 2013 and CEO between 2016 and 2023. He agreed that an intermediary should be actively marketing future investment proposals, and that this could involve getting examples of brochures, taking them or sending them along to the client, or describing them to the client. He said that that could be what an intermediary did, but it could also be having conversations over lunch or dinner, where the intermediary understands what is in the client's interests. In the context of the SMR process, in which Mr Ellis participated as one of the three SMR members in 2013, he said that he wasn't surprised that there were not "a whole lot of documents". He said that he was not worried that there were no documents at all, and that he would "not especially" expect to see documents which evidenced the work that he was actually doing. He said that document retention processes were not particularly strong, and so he was not surprised in 2013 that there were not lots of documents. He said that the proof of the pudding was in the eating: a lot of investments were coming in, and this demonstrated the work that was being done.

2651. Mr Ellis did not have the benefit of seeing or considering the run of documents, over a lengthy period, that I have seen in this trial, including correspondence from the start to the end of the investment relationship, which was between Man and PIFSS directly, and with no reference in any correspondence to Mr El Ghazzi. The correspondence does not reflect or evidence a joint effort at promotion between Man and Mr El Ghazzi, but rather the efforts of Man alone. I accept the evidence, from a number of Man witnesses, that a relationship may evolve, with the intermediary becoming less involved and Man becoming more involved and developing a direct relationship with the client. However, the documents in this case do not reflect a relationship that was evolving in that way, but rather one where the intermediary was playing no role in the promotion of the products at any stage.

2652. Moreover, I cannot accept that there is any force in Mr Ellis' "proof of the pudding" point, upon which Man and Mr Massad relied in their closing submissions. I can see that where there is a longstanding intermediary, and investments are coming in, a person – who has no knowledge or suspicion of corruption – might easily conclude that the investments are down to the promotional work and skill of the intermediary. However, I am here dealing with a case where there was, as is now admitted, a corrupt relationship between the intermediary and Mr Al Rajaan. The fact that investments are coming in throws no light on the question of whether those investments were the consequence of corruption on the one hand, or the alleged promotional work and skill of the intermediary.

2653. In my view, Mr Moeller provided realistic evidence which supported the point, which I think is obvious, that one would expect to see some correspondence from the intermediary to the investor in relation to the promotion of the products.

> "MR JUSTICE JACOBS: Now, I haven't, so far in the trial, seen any documentary evidence of Mr El Ghazzi contacting PIFSS in writing in relation to the selling of Man's funds during that time. Is that unusual in your experience?
>
> A. Yes, I think so. I would have assumed that, when he intro- -- he could introduce or any intermediary could introduce a product to an investor, either by way of a meeting/a telephone call, more

> often than not by way of an email or letter, giving details of the relevant product.
>
> MR JUSTICE JACOBS: So you would expect some written communication between the intermediary and the client -- is that right? -- normally?
>
> A. Normally, yes.
>
> MR JUSTICE JACOBS: And what about the operation of funds? So an investment has been made and the investment may be going well, it may be going badly. Would you expect to see some documentary evidence of the intermediary in touch with the client about the operation of the funds in which the client has invested?
>
> A. Yes, but particularly when the fund wasn't doing well because that's when the client probably would start to ask more questions. But, again, he could have done that by way of telephone or by way of an email."

2654. Mr Moeller's evidence, that one would expect to see written communication between the intermediary and the investor, is confirmed by the terms of the standard form Man Intermediary Agreement with Mr El Ghazzi, discussed below.

2655. I also consider it surprising (if Mr El Ghazzi was indeed an active intermediary) that the fairly voluminous correspondence between Man and PIFSS, over the 17-year period of their investing relationship, contains no reference to Mr El Ghazzi. The subscription documents are never sent by him, and they are not sent back to him. He is not cc'd on any of the correspondence, so as to keep up to date with what was happening. He is not referred to, even by way of a throwaway remark or a passing reference, in any of these materials.

2656. Mr Massad's evidence was that "we never referred to intermediaries, especially with institutions – when we were writing to the institutions". He said that this was because they wanted to establish a direct relationship with the institution. I did not think that this explanation made any sense. Mr El Ghazzi was, on Mr Massad's evidence, an active intermediary engaged in the process of pitching products to PIFSS, visiting their offices, and meeting Mr Al Rajaan and others. I cannot see how a passing reference to him in correspondence, or copying correspondence to him, would somehow obstruct or inhibit the development of the direct relationship with PIFSS that Mr Massad was keen to establish. The more probable reason why the correspondence was only between Man and PIFSS, and why there was not even a passing reference to Mr El Ghazzi in the correspondence, is that he was not playing any substantive and genuine role in the promotion of products, or servicing the relationship with PIFSS.

The Intermediary Agreement

2657. Man's standard form terms were attached to the Intermediary Agreement agreed in 1993, and then restated in 2008. Man referred, from time to time, to an amended standard form agreement which came into existence in 1996. But these were not the

standard form terms on which Mr El Ghazzi was engaged, and in any event for present purposes they were not materially different to the terms on which he was engaged.

2658. The material terms of the Intermediary Agreement were as follows:

> "**WHEREAS** E. D. & F. Man Management AG ("MAN") and its associate companies act as a broker of certain open-ended investment companies and thus are interested in an effective distribution and promotion of shares in those companies, and
>
> **WHEREAS** the Intermediary intends to promote the sale of and procure purchasers for such shares,
>
> **NOW THEREFORE IT IS AGREED**
>
> that MAN shall pay the Intermediary an incentive commission on each sale to the public of shares ("the Shares") of the open-ended investment companies listed in the Schedule hereto ("the Funds") effected by the Intermediary. The list of funds may be updated by MAN from time to time and sales will attract the incentive commission applicable as per the Schedule In force at the time of the sale
>
> …
>
> **2. DUTIES OF INTERMEDIARY**
>
> (1) Subject to Clause 1 above and sub-clause (2) hereof the Intermediary represents that it shall use its best endeavours to
>
> (a) promote the sale of, procure purchasers for, and service purchasers' requirements for information with regard to the Shares;
>
> (b) promote investment interest in the Funds;
>
> (c) promptly to provide MAN with such information relating to or in connection with investors in the Funds introduced by the Intermediary as MAN may reasonably require from time to time
>
> (2) The Intermediary hereby agrees to use its reasonable endeavours to co-ordinate its approach to and the manner in which it conducts its business with the Funds as well as with MAN, particularly also with respect to
>
> (a) investors in the Funds introduced by or to the Intermediary, and
>
> (b) intermediaries receiving incentive commissions from MAN other than the Intermediary

3. PERFORMANCE OF DUTIES

The Intermediary shall

…

(2) observe the terms and conditions from time to time relating to the promotion of the Funds and to the issue and sale of the Shares whether contained in any prospectus explanatory memorandum or other sales document issued at the time of first offer of Shares to the public or from time to time

…

5. PROVISION OF INFORMATION BY MAN

(1) MAN shall from time to time provide the Intermediary with such information or advice relating to or in connection with the Funds as may be reasonably requested by the Intermediary in connection with its duties and functions hereunder PROVIDED THAT MAN shall not be obliged to provide or supply the Intermediary with information which is not generally available to other intermediaries receiving incentive commissions from MAN in connection with the promotion of the Funds

(2) Without prejudice to the generality of the foregoing MAN shall provide the Intermediary at its own expense with the following

(a) a reasonable number of copies of the Annual or other periodic reports of the Funds or any prospectus explanatory memorandum or other document issued in respect of the Shares by MAN and detail of valuations from time to time made available to MAN by the Funds,

(b) general details of all advertising proposed to be carried out by the Funds in relation thereto,

(c) monthly lists

(i) of all shareholders in the Funds in respect of whom incentive commissions is payable to the Intermediary pursuant to Claus 11 hereof,

(ii) of the issue price of Shares allotted unsold to such shareholders, and

(iii) the amount of commission paid or payable to the Intermediary in respect hereof,

(d) monthly detail of the Net Asset Value of the Shares Clause 11, subpara (1)

…

14. ENTIRE AGREEMENT

This Agreement and the Schedule hereto embody the entire understanding between the parties with respect to the subject matter hereof and no modification or amendment or provision of this Agreement shall be effective unless the same shall be reduced to writing and signed by the parties hereto."

2659. The standard form contract sets out what the intermediary is required to do, at least in the absence of written waiver. I accept that it is always possible that practice may, in the case of a particular intermediary, depart from the terms of the written contract. Contracts are sometimes operated in a way that does not accord with their strict terms. However, the contractual agreement does provide an important starting point as to what the intermediary is expected, indeed contractually required, to do.

2660. The essential obligations of the intermediary are identified in Clause 2. The obligations in Clause 2 (1) (a) and (b) are to use best endeavours to do essentially two things: (i) to promote the products and find purchasers, and promote investment interest and (ii) to service purchasers' requirements for information with regard to the "Shares".

2661. The first obligation requires active promotion by the intermediary. I accept that active promotion could be approached by different intermediaries in different ways. Promotional strategies are likely to vary as between different intermediaries, and the contract envisages that there may be some co-ordination between the intermediary and Man: see Clause 2 (2) (a). However, in a continuing relationship between an intermediary and a client over many years, I would expect to see (as indeed Mr Moeller would expect to see) some correspondence between the intermediary and the client, or at the very least some documentary evidence of the active promotion that the intermediary is required to carry out.

2662. The second obligation, as to provision of information to potential or actual investors, is also obviously important. It is again an obligation of the intermediary, and it relates not only to the provision of information for the purposes of selling, but also to the provision of information to the investor after investment. The contract envisages that the information flow will be via the intermediary. Hence, clause 5 obliges Man to provide various written materials to the intermediary, including prospectuses (which are also referred to in other clauses such as clause 3 (2)) and net asset value statements. The contract therefore envisages that there will be a flow of written information from the intermediary to the investor, and this is a further reason why one would expect to see written communications between the intermediary and his investor client.

2663. It is to be noted that the Intermediary Agreement is not a consultancy agreement which simply requires consultation between Man and a consultant behind the scenes. It envisages that the intermediary will have a direct involvement with the investor client in the selling process.

2664. At various stages during the course of the trial – although ultimately not pressed in their written and oral closings – Man and Mr Massad submitted that an intermediary's role might simply be limited to the making of an initial introduction, and that the

intermediary thereafter had an entitlement to commission on all investments made by that client, irrespective of whether the intermediary could claim to have caused those sales. Similarly, some witnesses (for example Mr Kelly) gave evidence to the effect that an intermediary may simply be an introducer, and Man sought a fact finding that the role of Man intermediaries might include only the making of the introduction.

2665. I do not consider that this line of argument is consistent with the terms of the Intermediary Agreement. The agreement (in the words following "NOW THEREFORE IT IS AGREED") is for payment of commission on each sale effected by the intermediary. Clause 2 contains the key obligations of the intermediary. Clause 11 refers back to those obligations. Mr Moeller was therefore right to agree that it was critical that the sale was actually effected by the intermediary. Mr Moeller also correctly agreed, when asked about the terms of the Intermediary Agreement, that promotion of products and provision of information was absolutely key to the intermediary relationship, and also emphasised that there's an equally important service that the intermediary should provide: to service the investment, service the client and endeavour to keep the funds invested.

2666. Furthermore, Mr Smouha ultimately made it clear in his closing submissions that Man was not contending that Mr El Ghazzi was an intermediary whose role stopped at the making of the initial introduction. That was not the evidence of Mr Massad and Mr Merville. It was also not the way in which those involved in the SMR process viewed the matter. They were looking for evidence that Mr El Ghazzi was performing valuable work. Man's case, and the witness evidence that I am asked to accept, is that Mr El Ghazzi did actively perform his contractual obligations over the years, albeit that there was a diminution over time in the nature of the work actually carried out, as Man's direct relationship grew stronger. Thus, it was said that he was still an active intermediary in 2012, when the SMR process was being carried out. It is that factual case that needs to be considered, rather than a case that all he needed to do was to make the initial introduction.

2667. Against this background, I agree with PIFSS that for anyone at Man to think that Mr El Ghazzi was a genuine intermediary, rather than a conduit for corrupt payments, they would have to have thought that Mr El Ghazzi had an ongoing commercial role in the Man/PIFSS relationship.

Meetings with PIFSS

2668. Apart from the meeting in 1996, when Mr Kelly corroborates Mr Massad's evidence as to a meeting with Mr Al Rajaan with Mr El Ghazzi in attendance, there is no documentary corroboration of Mr Massad's evidence that Mr El Ghazzi attended meetings, together with Mr Massad, at PIFSS' offices with Mr Al Rajaan or anyone else at PIFSS.

2669. In their closing submissions, PIFSS summarised (in Annex 4) the documentary evidence to the extent that it referred to meetings which took place between Man and PIFSS. These included a few meetings in London, which Mr Al Rajaan did not attend, and which appear to have been largely in the nature of building or cementing the relationship between Man and PIFSS. However, most of the meetings referred to in the relevant part of the list of meetings were between Mr Massad and Mr Al Rajaan, and sometimes others at PIFSS. The relevant part of the list, in my view, is the period up to

the end of 2004. This is because Mr Massad's oral evidence was that Mr El Ghazzi was still attending meetings at PIFSS after he moved to Beirut, including up to the end of 2004. Mr Massad did not give evidence as to attendance thereafter, and Mr Merville did not suggest in his written evidence that he attended any meetings at PIFSS with Mr El Ghazzi. Indeed, judging from his witness statement, Mr Merville appears to have met Mr El Ghazzi only on one occasion, in August 2008 shortly before Mr Massad's departure.

2670. Mr Massad's evidence as to when Mr El Ghazzi stopped attending meetings was, in my view, not consistent. I appreciate that one of the difficulties for all the witnesses in this case, which covers a long time-span of events which occurred many years ago, is that it is difficult to be precise about timings. However, even making allowance for that difficulty, I thought that Mr Massad's oral evidence bore signs of being embellished for the purpose of portraying Mr El Ghazzi as being actively involved in meetings for a more substantial period than was suggested in his written evidence.

2671. In Mr Massad's written evidence, Mr Massad described how Mr El Ghazzi would, "in the first couple of years", come to meetings with Mr Al Rajaan, and be active in pitching funds. This would mean that Mr El Ghazzi's active participation in meetings was between 1996 and 1998. He then referred to Mr El Ghazzi attending meetings "in the first few years". He then said that by about 1998-1999, Mr El Ghazzi had stopped attending meetings with Mr Al Rajaan "almost entirely". He also said that Mr El Ghazzi originally asked to attend meetings, but then stopped doing so and stepped back. This stepping back occurred at about the same time as Mr El Ghazzi returned to live in Beirut. Mr Massad did not say that Mr El Ghazzi continued to attend meetings with PIFSS after he had left for Beirut. And although Mr Massad referred to Mr El Ghazzi being helpful when investments were not performing well, it is by no means clear from his statement that he was saying that Mr El Ghazzi attended meetings at PIFSS for the purposes of smoothing things over.

2672. In his oral evidence, however, Mr Massad was clear that Mr El Ghazzi continued to attend meetings after he had left Kuwait for Beirut, and that he was particularly convincing during meetings which were held when the PIFSS portfolio was experiencing difficulties. He described attendance at meetings during the period up to 2004.

2673. It did not seem to me that this evidence hung together. Mr Massad's witness statement indicated that, by the time Mr El Ghazzi had returned to Lebanon, Mr El Ghazzi was no longer attending meetings, and indeed that Mr Massad didn't want him there. However, his oral evidence has Mr El Ghazzi performing a valuable role, at times of difficulty in later years, in meeting with PIFSS, presumably at Mr Massad's request. The position with the PIFSS portfolio was, as Mr Collins explained in his oral opening, that performance was generally good up until the end of 2002. Man products were, he said, doing incredibly well in the period 2001/2002. It was only into 2003 and 2004 that Man products were doing less well, compared to markets that were beginning to recover from the dot.com bubble. It seemed to me that Mr Massad needed to change, in his oral evidence as compared to his written evidence, the period of Mr El Ghazzi's active involvement in meetings, in order to cover the time when things were not going so well.

2674. Leaving aside any inconsistencies in Mr Massad's evidence, another significant point here is that there is no documentary evidence of Mr El Ghazzi actually attending PIFSS'

offices at all, let alone in the period 2001 – 2004. There are a fair number of documentary references, in PIFSS' Annex 4, to meetings with Mr Al Rajaan or PIFSS in that period. They include some rare "Event Notes" written by Mr Massad, as well as references to various meetings in the correspondence. There is no reference to Mr El Ghazzi at all.

2675. It is clear that, at times during that period, in particular in 2004, there are references to poor performance. Thus, in an email sent on behalf of Mr Massad on 15 August 2004, he referred to PIFSS being the largest investor in the region, and being very concerned about performance. Mr Massad was going to meet with PIFSS in the following week. Another email at around the same time indicates that the meeting was to be in Kuwait. However, there is no reference to Mr El Ghazzi being involved, either at the meeting or in the background. In his oral submissions, Mr Smouha showed me a number of documents which, as he submitted, evidenced Mr El Ghazzi's work as an intermediary. However, there were no such documents in the 2003 - 2004 period when PIFSS' investment in Man's products was not doing so well.

2676. PIFSS' written closing submissions identified other occasions where the documents evidence concerns about performance: in mid-2002, January 2003 and September 2003. There was evidence, from Mr Moeller, that when there are problems with performance, that is a critical time for an intermediary to be engaged in sorting matters out with the client, and Mr Massad's evidence was to the effect that this was when Mr El Ghazzi really added value. However, there is no documentary evidence which suggests that this was happening.

2677. I deal separately below with the question of Ms Al Dakheel never being introduced to Mr El Ghazzi, and never being told about him. The important point is that if Mr El Ghazzi had been attending meetings at PIFSS' offices in 2001 – 2004, then it would have been entirely natural for him to be introduced to Ms Al Dakheel, if he was a genuine intermediary. The fact that he was not introduced is, in my view, very strong evidence that he was not there during that time, and also that he was not a genuine intermediary.

2678. Overall, the documentary evidence indicates that Mr El Ghazzi did not attend meetings with Mr Massad at PIFSS' offices in relation to the investments which PIFSS started to make in late 1996. This was because, consistent with the documents showing direct communications between Man and PIFSS throughout, the relationship between Mr Massad and PIFSS was direct. Mr Massad was perfectly capable of explaining the products to Mr Al Rajaan, and he did not need any assistance in that regard from Mr El Ghazzi.

Documentary picture – the documents relied upon positively by Man

2679. In his oral submissions, Mr Smouha took me carefully through a number of documents which, he argued, positively showed that Mr El Ghazzi was performing his functions as an intermediary, "doing intermediary things", as Mr Smouha sometimes described it. He sensibly omitted from this selection documents which were related to the payment of monies to Mr El Ghazzi, or purely administrative matters. The number of remaining documents was small, bearing in mind the length of the relationship. In some years there were no relevant documents at all. Mr Smouha frankly acknowledged that it was

not productive for me to ask which was his best document, because there were not many of them.

2680. The documents, taken as a whole, did show that there was some limited contact between Man and Mr El Ghazzi over the years. But I agree with PIFSS that there is nothing, not even a throwaway remark in an email, over the 20-year period of the relationship, which records Mr El Ghazzi playing any role in any sales of any products at all, whether by assisting or advising Man, or explaining the products to PIFSS and persuading them to buy. The documentary record did not show Mr El Ghazzi performing any substantive sales or marketing role, or passing relevant information to PIFSS.

2681. In inviting me to infer substantive activity on the part of Mr El Ghazzi, Mr Smouha sometimes cleverly sought to reconstruct what he submitted was a likely story which was the backdrop to or explanation of the document, to highlight Mr El Ghazzi's involvement. I did not find this persuasive.

2682. One example was a calendar note for Mr Merville to call Mr El Ghazzi on 15 September 2008, where it was submitted that Mr Merville was speaking to Mr El Ghazzi about poor performance in advance of a difficult meeting with Mr Al Rajaan later that month. I deal later with the events relating to the 2008 handover, and the portfolio reconstruction at around that time. In short, however, there is nothing that enables me to conclude that this was the nature of the discussion. And bearing in mind Mr Merville's written evidence as to his relative lack of involvement in the portfolio reconstruction at that time, I cannot infer that Man's reconstruction of this call is likely to be accurate.

2683. Another example was an e-mail in December 2002 from Mr Massad to Mr Moeller at a time when RMF, which had by this time recently come under Man's ownership, had sold a product to PIFSS. Mr Moeller had told Mr Massad about this investment, and Mr Massad replied:

> "I know and so does Mohamed by the way who is in Kuwait at the moment.
>
> Please inform Andreas [Ritzi] that twice I had to go through some of the fees, mainly why during the meeting RMF did not mention the various layers of fees as well as why it was not mentioned that the management fee would be charged on the 200%. Anyway, it's done now.
>
> By the way, PIFFS will be in Sugar Quay on 15 January (I'll be with them) and I think it would be good if Andreas could join for part of the day. What do you think?"

2684. With reference to the final paragraph, Mr Smouha submitted that it was a reasonable inference that the attendance of PIFSS in London had been discussed with Mr El Ghazzi. There is in my view nothing in the e-mail which indicates that Mr Massad had discussed PIFSS' attendance with Mr El Ghazzi. Even if he had done so, this is scarcely the performance by Mr El Ghazzi of substantive intermediary work as contemplated by the Intermediary Agreement and described in Man's witness evidence.

2685. The first line of this e-mail -- that Mr El Ghazzi knew about the business placed by RMF – hints at unhappiness on the part of Mr El Ghazzi that this RMF business was happening at all. That is also apparent from a later e-mail in 2009 to which Mr Smouha referred in support of his argument as to the work carried out by Mr El Ghazzi. In the relevant email string, Mr Merville comments on an issue arising from an RMF product, and wanting to "avoid MEG's wrath when he finds out that another intermediary sold products to his client". As Mr Norbury submitted, this tends to indicate that Mr El Ghazzi would potentially be angry that he was not receiving a payment for such products, even though he had had no part in their sale to PIFSS. If anything, therefore, it supports PIFSS' case that Mr El Ghazzi expected to be paid for doing nothing.

2686. Mr Smouha also relied upon a sales activity monitoring spreadsheet dated 12 January 2005, which records that Mr Massad spoke with Mr El Ghazzi and attended meetings with him in relation to a product, Man AP Enhanced Limited, over the previous 2-3 months. Relevant background to this document is that concerns were raised by a Mr Richard Gray in the Swiss office, in the context of mis-selling, as to the absence of recorded contact between Man and various intermediaries. In December 2004, Mr Massad was given a spreadsheet which identified the position of Mr El Ghazzi. There had been no recorded contact on the Salestrak system since 1997. PIFSS did not contend that this was likely to be an accurate picture, accepting that there would have been some contact between Man and Mr El Ghazzi. That contact is evidenced by, for example, the 2002 e-mail when Mr Massad referred to Mr El Ghazzi as being in Kuwait, and knowing about the RMF investment.

2687. Mr Massad then amended the record of no contact, so as to say that there had been contact in the previous 6 months. The sales activity monitoring sheet dated 12 January 2005 was completed around a month later, and it recorded a total of 47 meetings and 94 phone presentations involving 44 clients or intermediaries. In relation to Mr El Ghazzi, the spreadsheet records 4 meetings on this product and 14 telephone presentations. In relation to PIFSS, there were 2 meetings and 10 phone presentations. Mr Massad's evidence was that this was an average picture of interactions with an intermediary.

2688. At the time that he was giving that evidence, Mr Massad was proceeding on the basis (this being the premise of the relevant questions in re-examination) that the sales activity record concerned a product in which PIFSS had invested. In fact, PIFSS had not invested in that product, only investing later on in Series 2 of that product line (MF 21). This casts some doubt on the accuracy of Mr Massad's evidence as to what the position was in relation to this product. Mr Massad was therefore never asked to explain why there was such a high level of contact on a product which had not actually been sold.

2689. More importantly, however, I agree with Mr Norbury's submission that it is implausible that, in 2005, Mr Massad was meeting Mr El Ghazzi on around 4 occasions in relation to each product. During the course of 2005, PIFSS invested in 4 products (MF 21, MF 22, MF 23, MF 24), and this would equate – if Mr Massad's evidence as to the average picture were correct – to 16 meetings with Mr El Ghazzi. However, Mr Massad's evidence did not suggest that, after Mr El Ghazzi left Kuwait and became a 'non-executive' intermediary, he was meeting Mr El Ghazzi as frequently as that. He suggested in evidence that, in the period 2001 – 2004, he might meet 3 times in Beirut and 3 times in Kuwait.

2690. I consider it very plausible that the high level of contact referred to in this sales activity report is a response by Mr Massad to the issue raised in December 2004 by Mr Gray, as to the need to demonstrate contact with intermediaries. There is no other documentary evidence supporting the high level of contact between Mr Massad and Mr El Ghazzi on this product, in which PIFSS did not invest, or indeed on any product whether at around this time or otherwise. I also take into account the evidence that there was some falsification by Mr Massad of Man's internal records (discussed below), whereby he falsely identified Mr El Ghazzi as an intermediary for 3 individual investors. Accordingly, I am not persuaded that these entries accurately reflect the level of interaction between Mr El Ghazzi and Mr Massad, or that it demonstrates that the interaction related to the marketing and promotion of Man's products.

2691. I also note that there are no other completed sales activity reports which have survived. Mr Norbury submitted that that was because they did not exist. Mr Smouha submitted that it was likely that they had been completed, but had not survived. In view of the general lack of good record-keeping by Mr Massad, I think that Mr Norbury's submission is more likely to be correct. I also think that it is improbable that there was any similar sales activity record during the period of Mr Merville's tenure, not least because it is more difficult for Man to contend that such documents from this later period had not survived. Had such records been completed, they would have been obvious documents for Mr Merville, or Mr Williamson, to provide to compliance in the context of the SMR process, when compliance was seeking documentary support for the dealings with Mr El Ghazzi. Furthermore, since Mr Merville was not meeting Mr El Ghazzi during the period when MF 32 – MF 38 were being sold, and since Mr El Ghazzi had not been sent the prospectus for those funds, entries on any sales activity record (if they existed) would likely be blank.

2692. Mr Smouha also referred to some other documents. They did not in my view materially add to the picture or support the case that Mr El Ghazzi was carrying out genuine intermediary work. At a relatively late stage in the story, when Mr Merville took over from Mr Massad, there was evidence of a handful of Net Asset Value statements being sent to Mr El Ghazzi. They were not sent with any degree of regularity, and certainly did not comply with the intermediary agreement: Clause 5 (2) (d) provided for monthly submission of net asset value statements. It was also ultimately common ground that such documents would enable Mr El Ghazzi to calculate, or check the calculation of, his commissions. Accordingly, the fact that Mr El Ghazzi received these documents, or that he may have been interested in receiving them, does not evidence that he was performing the intermediary work described in the evidence of Mr Massad and Mr Merville.

The argument that the documentary picture is incomplete

2693. Man submitted that the documents in the present case should not be taken as showing the whole picture. Mr Smouha drew upon the now well-known (if not classic) work of Professor Daniel Kahneman, a psychologist and winner of the Nobel Prize for economics. In *Thinking Fast & Slow*, Professor Kahneman identifies many problems with coming to swift conclusions on issues, including because of what he terms "WYSIATI": What You See Is All There Is. Mr Smouha submitted that I should avoid falling into that error here. The case involves events many years ago. A full documentary picture is not available. The problem affects Mr Massad's period particularly, since that came to an end in 2008. Man's servers have changed, and

documents have obviously been lost. This is demonstrated, for example, by the fact that an important document such as the 2005 sales activity report has only survived because it was attached to an email that happened to be sent out, but did not survive in native format. He also says that much business and discussion would have taken place orally, in meetings or phone calls.

2694. I agree that the documents that now exist are not the full universe of documents that ever existed. I also agree that there would have been conversations over the years which are not documented, as evidenced for example by the fact that there are no minutes of meetings between Mr Massad and PIFSS. However, this does not mean that I should not apply the well-established approach of considering disputed oral evidence against the contemporaneous documents, as well as other undisputed or objective evidence in the case.

2695. As far as the documents are concerned, there is, overall, a reasonably substantial volume of material which enables the issue to be looked at from different angles. There is substantial correspondence between Man and PIFSS over the years. There are a large number of internal Man emails over the years, including a fair number of communications concerning changes to Mr El Ghazzi's remuneration terms, the speed of payment to him, the bank accounts to which monies were to be paid, and accounting matters of that kind, as well as the lavish hospitality from Man which Mr El Ghazzi enjoyed. There is a more complete documentary picture in the later years, where there are courier logs and even some limited e-mail correspondence with Mr El Ghazzi. During the later periods of time, as PIFSS submitted, there would have been an increased focus on record-keeping for regulatory purposes. There is also the SMR process, discussed below, where questions were asked as to what Mr El Ghazzi was doing, and there is a substantial documentary record which developed. Questions were also asked during that process as to what documents existed at that time, and work was done to see what there was. Also, long before the present litigation, there was in 2015 a 'deep dive' carried out, at Mr Kidney's request, into the historic e-mail record, following an earlier e-mail search requested by Ms Grew in July 2013.

2696. The documentary record summarised above is against a backdrop of evidence from Mr Massad that Mr El Ghazzi was stepping back from meetings, and becoming a 'non-executive' intermediary. Overall, I am not persuaded that, if a larger documentary record existed, it would present a different picture to the one that is available to me, and against which I am testing the evidence of the witnesses. In any event, there are other significant points, apart from the documentary record, which lead me to the conclusions that I have reached.

2697. The conclusion that I reach on the documentary record is, as submitted by PIFSS, that Mr El Ghazzi did not perform the role of a professional intermediary, and that this was apparent to Mr Massad and Mr Merville at the time. That accords with the initial account of Mr Merville in the SMR process discussed below: namely that the relationship between Man and PIFSS was entirely direct, and that he did not know what Mr El Ghazzi was doing in relation to PIFSS.

M7: Ms Al Dakheel's lack of knowledge of Mr El Ghazzi's role as intermediary

2698. Ms Al Dakheel's evidence was, in summary: that she never met Mr El Ghazzi at any time; that she never knew that Man had Mr El Ghazzi as an intermediary; and Mr El

Ghazzi was never mentioned to her by anyone else. I accept that evidence, which was ultimately not challenged by Man and Mr Massad.

2699. In my view, that evidence is significant on the question of whether Mr El Ghazzi was performing a genuine intermediary role, including (on Mr Massad's evidence) visiting PIFSS' offices with some regularity at least up until 2004. If that was the position, then it would have been entirely natural for Mr El Ghazzi to be introduced and to meet her on at least one, if not all, of the visits. It would also be entirely natural for Ms Al Dakheel to know of his role as Man's intermediary.

2700. The evidence showed that Ms Al Dakheel played an increasingly significant role, as far as Man was concerned, during the period from the early 2000s onwards. At that time, Mr Al-Muraikhi had the role as manager of the Direct Investment Department, with Ms Al Dakheel succeeding him in that role in 2013. However, Mr Massad's written evidence was that he did not deal much with Mr Al-Muraikhi after the initial investments, did not know him well, and was not sure what he did in relation to the investments with Man. He said that in practice he dealt with Ms Al Dakheel most of the time, and she was much more hands-on. Indeed, Mr Massad appears to have thought that she had taken over Mr Al-Muraikhi's role in around 2000.

2701. Mr Massad said, correctly, that she had joined PIFSS as a junior in 1996; that she was a hard-working employee, so much so that she took over the roles of Mr Amjad Sheikh and Mr Al-Muraikhi. He said that she reported to Sheikh Abdullah. She was smart and he said that she quickly became Mr Al Rajaan's and Sheikh Abdullah's right-hand person for fund investments. He saw her as similar to himself: hungry to learn and grow, eager to do her job properly and ambitious. During his last 5 years, he met and spoke with Ms Al Dakheel more frequently than with Mr Al Rajaan. He said that Ms Al Dakheel was the one who made most, if not all, of the recommendations when it came to PIFSS' investments with Man. He said that he never agreed investments with Mr Al Rajaan. Whilst he may have indicated that PIFSS may invest, the investment was always agreed with Ms Al Dakheel.

2702. In his oral evidence, he said that Ms Al Dakheel became an increasingly important person who—as he saw it – had the ear of Mr Al Rajaan, and he would listen to her. Mr Norbury put to Mr Massad that, on his evidence, Ms Al Dakheel was the most important person at PIFSS, other than Mr Al Rajaan. It seemed to me that that was a fair summary of the evidence in his witness statement. Mr Massad said that Sheikh Abdullah was "equally important", as was Amjad Sheikh and (somewhat surprisingly, in view of his written evidence) Mr Al-Muraikhi.

2703. Mr Merville's evidence was that Ms Al Dakheel was his main point of contact at PIFSS, and that did not really change over time. He spoke to Mr Al Rajaan infrequently, once or twice a year. But Ms Al Dakheel dealt with the day-to-day investment matters. He would have technical conversations about the product launches, financial market conditions and the fund performance of PIFSS' current investments with Ms Al Dakheel. The conversations with Mr Al Rajaan were shorter in nature and were general conversations about the performance of the markets. He said that he did not seek to negotiate or discuss the terms of any investment. That level of detail would have been with Ms Al Dakheel.

2704. This evidence was, to some extent, seeking to "talk up" the role of Ms Al Dakheel, as part of Man's case that they perceived PIFSS to have a robust decision-making process, and that Mr Al Rajaan was not seen as the sole or key decision-maker. I was not persuaded by that evidence. Mr Merville correctly identified Mr Al Rajaan as the most senior person in the decision-making process, and both Mr Massad and later Mr Merville appreciated that he was the key person whose approval was necessary if there was to be an investment in Man's products. When Mr Kelly paid his visit to PIFSS in 1996, he was taken to Mr Al Rajaan's offices. Over the years, the application forms, and associated correspondence relating to the investment decision, were almost invariably signed by Mr Al Rajaan. Ms Al Dakheel's evidence was that it was Mr Al Rajaan who decided, and I have no doubt that that was indeed the case.

2705. However, for present purposes, that area of debate does not matter. The important point is that by the early 2000s, Ms Al Dakheel was perceived by Man as very important, and had the ear of Mr Al Rajaan. There are very few entries made by Mr Massad in Man's sales records of meetings, albeit that Mr Massad and Mr Merville were supposed to make such entries in ManEdge and its predecessor. Those which do exist are in my view revealing.

2706. Mr Massad's entry for 15 March 2001 reads:

> "A meeting was held in January and in February with Fahad Al Rajaan. Also several meetings and discussions were held since January with Amjad Sheikh, Chief Investment Accountant. PIFFS is now much happier with the portfolio due to the recent good performance. MIP invited Amjad and Mrs Lama Al Dakheel to the Altinvest Conference early February.
>
> They are considering investing USD 10 Million or more in MSG, decision will be taken around 20 March."

2707. The fact that there were two meetings with Mr Al Rajaan, in a short space of time, indicates that he was the senior person that Mr Massad needed to persuade. There is no reference to any meeting with Sheikh Abdullah. There is no reference to Mr El Ghazzi attending any of the meetings, either with Mr Al Rajaan or Mr Amjad Sheikh – even though there appears at this stage to have been some concerns about performance, albeit that PIFSS was now much happier. The reference to Ms Al Dakheel indicates that, by this time, she must have been seen as potentially important to Man. The investment in "MSG" was indeed made shortly afterwards: an investment of EUR 20 million in MF 8.

2708. There are then 2 entries by Mr Massad in May 2002. The entries relate to a meeting with Mr Al Rajaan on 21 May 2002, and a later meeting that day with Mr Amjad Sheikh.

> "Met with Fahad Al Rajaan on Tuesday 21st May. Discussed performance as they are a bit concerned. Ok for the moment. Also discussed APS2 and whether they would invest. He said probably not as they invested USD 30M in APS1. Overall ok and re-confirmed their commitment to continue investing with MIP and increase portfolio size."

2709. Accordingly, this was a meeting between Mr Massad and Mr Al Rajaan. There is no reference to meeting Sheikh Abdullah, and no reference to Mr El Ghazzi. There were some concerns expressed about performance. However, Mr Massad did not then think it necessary to enlist Mr El Ghazzi's assistance for a follow up meeting, to assuage any concerns about performance.

2710. That Mr Al Rajaan was, to Mr Massad's knowledge, the key person taking investment decisions is evidenced by the fact that it was Mr Al Rajaan who reconfirmed PIFSS' commitment to continue investing. There is no reference to him saying, and indeed he would not have said, that this commitment was subject to obtaining the agreement of his colleagues on the investment committee.

2711. Mr Massad's entry for the meeting with Amjad Sheikh reads as follows:

> "After meeting with Fahal Al Rajaan, met with Amjad Shaikh. Discussed again performance at length. APS2 same reply as Fahad, however Amjad mentioned that there is a slim possibility of PIFSS investing a small amount (US$10M) in APS2. He also informed me that MIP is now amongst the biggest managers in their portfolio and the top performer in terms of realised profits. He also suggested I strengthen my relationship with Lama Al Dakheel (Supervisor - Investment Dept) as now Fahad always consults with her on Fund Investments."

2712. Mr Massad therefore had a further discussion about performance, and appears to have tried to enlist Mr Sheikh's support for an investment in APS 2. There is no reference to Mr El Ghazzi, even though there were concerns about performance. Mr Sheikh suggests that Mr Massad strengthen his relationship with Ms Al Dakheel, with no suggestion that it would be a good idea for Mr El Ghazzi to do so as well.

2713. Although some Man witnesses expressed the view that they could understand why Mr El Ghazzi was never introduced to Ms Al Dakheel, on the basis that his contacts were at a more senior level, I was unpersuaded by that evidence. On Mr Massad's evidence, he would always come to see Ms Al Dakheel (assuming that she was there), after seeing Mr Al Rajaan. He viewed her as an important person who had the ear of Mr Al Rajaan. He had been told to strengthen his relationship with her, for that very reason. If the factual position was, as Mr Massad maintained in evidence, that Mr El Ghazzi was still attending meetings at PIFSS' offices in the period 2001 – 2004, and if he was a genuine intermediary, then I can think of no good reason why Mr Massad would not have brought him downstairs (Mr Al Rajaan and senior management were on a higher floor compared to Ms Al Dakheel) to meet and get to know Ms Al Dakheel. It is an obvious thing to do, and for a genuine intermediary to want to do.

2714. Indeed, it is apparent from the correspondence at around this time (2002) that it was something that the intermediary for RMF, Mr Woernle, was doing. He was having meetings with Mr Al Rajaan, but the correspondence shows that he was also having meetings with Ms Al Dakheel.

2715. Mr Moeller gave evidence, which I accept, as to what an intermediary would be expected to do. I asked him whether he would expect an intermediary normally to be liaising with analysts who would be reporting to Mr Al Rajaan. His answer was:

> "I think so, yes. I think so because the questions that came back through the intermediary, as I recall, sometimes were quite detailed, from which you could conclude that they must have come from the investment --from the analysts rather than a high-level investment committee."

2716. A little later, when asked about a document referring to a meeting which Mr Woernle was going to have with Ms Al Dakheel, he agreed that this was an intermediary doing what he would expect an intermediary to do, namely to talk to Ms Al Dakheel. When asked whether he would have expected Mr El Ghazzi to be doing the same, he said: "Yes, most likely so, yes".

2717. The expectation that an intermediary would be speaking to an analyst in the building, who had the ear of Mr Al Rajaan is, in my view, consistent with the terms of the standard form intermediary agreement, which required the exercise of best endeavours to promote Man's products. That would naturally involve, in my view, an intermediary taking the lift downstairs to meet Ms Al Dakheel.

2718. Mr Moeller's initial answer, quoted above, referred to questions which he understood were coming back "through the intermediary". I had previously understood similar answers to indicate that he understood that Mr El Ghazzi was in fact dealing with the analysts. I asked him:

> "Q … you said, I think on a number of occasions, that you were told that Mr El Ghazzi was talking to the analysts who worked for PIFSS. Have I got that right?
>
> A. That is correct.
>
> Q. Can I ask you, who told you that?
>
> A Well it would have been Tony and/or Patrick."

2719. In fact, as Mr Smouha said in closing, the evidence which Mr Moeller had previously given may not have been so explicit in stating that he was told that Mr El Ghazzi was talking to the analysts, rather than deducing that that was happening on the basis of what he was being told by Mr Massad and Mr Merville. I do not think that this makes any real difference to the substance of the point: i.e. that, on the basis of what he was hearing, he understood that Mr El Ghazzi was indeed dealing with analysts, and that detailed questions were coming back through him as intermediary.

2720. The factual position, however, is that Mr El Ghazzi was never introduced to Ms Al Dakheel, and any questions from analysts were not the result of anything that Mr El Ghazzi was doing.

2721. Mr Massad was cross-examined as to why Ms Al Dakheel had never met Mr El Ghazzi, and why (as Mr Massad accepted) he had never mentioned Mr El Ghazzi to Ms Al Dakheel. He said that Mr El Ghazzi did not come up in any conversation, not with Ms Al Dakheel or with anyone else. I asked why, if she had become increasingly important and had the ear of Mr Al Rajaan, it was not a good idea to take Mr El Ghazzi down to introduce him to her. His answer was far from convincing:

> "When I went down to the -- I can't remember, you know, the floors, he continued -- he may have been sitting with Sheikh Abdullah, he may have been sitting with Lama, I just carried on."

There is no reason why Mr Massad could not have waited for Mr El Ghazzi to finish any conversations on the higher floors before taking him down to meet Ms Al Dakheel. It also seems improbable that, if Mr El Ghazzi was indeed visiting PIFSS on a fair number of occasions between 2000 and 2004, there would have been no opportunity, because of ongoing conversations on the higher floor, to introduce him to Ms Al Dakheel, particularly bearing in mind that Mr Massad was himself going to meet her, as he usually did after talking to Mr Al Rajaan.

2722. These matters lead me to conclude that, contrary to Mr Massad's evidence, Mr El Ghazzi was not continuing to visit PIFSS' offices during the period, beginning in 2002 at the latest, when Ms Al Dakheel became important.

2723. However, in my judgment, this point goes somewhat further, in the light of the evidence that I have heard. Mr Massad and indeed Mr Merville had many meetings with Ms Al Dakheel. On their evidence, she was their primary point of contact, and they were dealing with her for around 10 years. During all that time, Mr El Ghazzi was never referred to at all. In my view, the only rational explanation for that is that they both knew that Mr El Ghazzi was not to be referred to: Ms Al Dakheel was not to be told about him. That in turn was because, as both Mr Massad and Mr Merville knew, Mr Al Rajaan did not want him referred to at PIFSS. Far from an intermediary who was visiting PIFSS regularly in order to promote Man's products, Mr El Ghazzi was a person who, as Mr Al Rajaan wanted, was operating in the shadows, invisible from anyone at PIFSS who might start asking questions about him.

2724. In that regard, there is other evidence of sensitivity about Ms Al Dakheel knowing about Mr El Ghazzi. In his witness statement, Mr Merville describes the work carried out by Mr El Ghazzi and says:

> "As far as I was concerned when I took over, Mr El Ghazzi continued to act as an intermediary for PIFSS and he was their contact if any clarification about the investments was needed. Mr El Ghazzi generally provided insights into how to handle the relationship with PIFSS and how to market the products to PIFSS. Although I do not recall if Mr El Ghazzi spoke to me about the specific individuals he was in touch with at PIFSS, he did tell me that he was in regular contact with the investment team at PIFSS. Whilst I understood the investment team to be those in senior management at PIFSS, I am not sure of the names of the individuals but I do recall that it did not include Ms Al Dakheel. I was under the impression that Mr El Ghazzi knew the team at PIFSS well. Whilst I do not recall ever speaking to anyone at PIFSS about Mr El Ghazzi, or attending a joint meeting with PIFSS and Mr El Ghazzi, I was under the impression that people at PIFSS, including Mr Al Rajaan, were aware of Mr El Ghazzi because he was the intermediary on the account." (Emphasis supplied)

2725. The statement that Mr El Ghazzi was PIFSS' contact, if any clarification about the investments was needed, makes no sense in circumstances where (i) the person primarily dealing with those investments – as explained in Mr Merville's evidence – was Ms Al Dakheel, and (ii) Ms Al Dakheel did not know about Mr El Ghazzi. Given that, as Mr Merville explained in the SMR process, the relationship between PIFSS and Man was "entirely direct", it is obvious that clarification requests would come from Ms Al Dakheel to Mr Merville.

2726. Also noteworthy, in the context of the present issue, is Mr Merville's positive evidence that he knew that Mr El Ghazzi was in touch with the "investment team", but that he knew specifically that Mr El Ghazzi was not in touch with Ms Al Dakheel. Given that during the SMR process (see below), Mr Merville initially could not say what Mr El Ghazzi was doing with PIFSS, and thereafter provided scant detail, how was it that he positively knew that Mr El Ghazzi was not dealing with Ms Al Dakheel – the person who was Mr Merville's primary contact? And how was it that, during the 5 years that Mr Merville was dealing with Ms Al Dakheel, he never happened to mention Mr El Ghazzi's name? Mr Norbury made a powerful point, in his closing argument, about Mr Merville not saying anything about Mr El Ghazzi even at the introductory meeting or meetings with Ms Al Dakheel in September 2008 (when there was a scheduled meeting) or October 2008. If Mr El Ghazzi was the intermediary in the relationship, and performing valuable work in that regard, then it would be only natural for his name to come up in the context of conversations about how things were going to move forward under the new relationship manager, Mr Merville.

2727. The rational answer to these questions, in my view, is (as Mr Norbury submitted) Mr Merville was "in on it" from the start, and knew that no mention of Mr El Ghazzi was to be made to Ms Al Dakheel.

2728. The sensitivity of Ms Al Dakheel not knowing about Mr El Ghazzi is, in my view, apparent from Mr Dackombe's account of his first conversation with him. Mr El Ghazzi said to Mr Dackombe, in what Mr Dackombe thought was an off-the-cuff remark, that it was "not necessary to mention him to Ms Al Dakheel because she was not aware of him; his long-standing relationship was with Mr Al Rajaan at PIFSS, not Ms Al Dakheel." Mr Dackombe did not read anything into that comment, because he understood that Mr El Ghazzi was dealing with the top levels of PIFSS. Mr Dackombe was not concerned if a more junior member such as Ms Al Dakheel was not aware of him. I accept that this was the view of Mr Dackombe at the time: Mr Dackombe was a straightforward witness who answered questions fairly. However, on the basis of the evidence in the trial, I read more into Mr El Ghazzi's comment than Mr Dackombe did at the time. I have evidence that Ms Al Dakheel was rather more than simply a "junior employee". She had had the ear of Mr Al Rajaan for at least 10 years, and Mr Massad had been told, back in 2002, that he should strengthen his relationship with her for that reason. In my view, the reason why Mr El Ghazzi told Mr Dackombe not to mention him to Ms Al Dakheel was that the involvement of Mr El Ghazzi, as an intermediary receiving many millions of dollars for placing Man products, was not known at PIFSS, save for Mr Al Rajaan.

2729. That Mr El Ghazzi was operating in the shadows, not as an intermediary visible to PIFSS, is in my view the rational explanation for the otherwise puzzling features of the documents to a large extent already described; that no correspondence or application forms are ever sent by Mr El Ghazzi to PIFSS; that Mr El Ghazzi is not referred to in

any of the correspondence with PIFSS; that, apart from the 1996 meeting with Mr Kelly (prior to any investment), there is no documentary evidence of Mr El Ghazzi ever attending, or being invited to attend, any meeting with PIFSS; that Mr El Ghazzi is not invited to attend the "relationship" building meetings in London; and that Mr Massad kept tight control on correspondence sent from Switzerland, requiring that nothing should be sent directly to PIFSS, but should all be sent to him, thereby avoiding any accidental mention of Mr El Ghazzi.

2730. Accordingly, these matters support my conclusion that Mr El Ghazzi was, to the knowledge of Mr Massad and Mr Merville, not a genuine intermediary.

M8: Mr Woernle

2731. Contrary to Man's submissions, I consider that it is relevant and instructive – in assessing whether Mr El Ghazzi was a genuine rather than pretend intermediary – to compare and contrast the visibility to PIFSS and promotional and other work of Mr Woernle (RMF's intermediary), and the invisibility and lack of evidence of promotional and other work carried out by Mr El Ghazzi. They were operating or allegedly operating as intermediaries at the same time and in relation to the same client.

2732. The disclosure of RMF documents concerning Mr Woernle has not been complete: he was not a custodian for the purposes of disclosure, and his name was not a key search term in the disclosure of Mr Andreas Ritzi, who was a custodian. The documents indicate that Mr Ritzi was employed by RMF. He had an RMF e-mail account, and he described his position as "Member of the Management Committee, Product Structuring, RMF Capital Markets". He worked together with Mr Woernle in presenting products to PIFSS.

2733. The documents provide a helpful snapshot of the work that Mr Woernle was carrying out, and it is in line with the work that one would naturally expect an intermediary to be carrying out. As PIFSS submitted, and I accept, Mr Woernle was performing typical intermediary tasks.

2734. The background to the e-mail correspondence referred to below was the acquisition of RMF by Man in May 2002. Mr Woernle's intermediary agreement, which was at one stage sent to Mr Massad, predated the acquisition of RMF, and therefore was not on Man's standard terms. It was in fact far shorter and less detailed than the Man standard terms. It was headed "Distribution Agreement", and was between RMF Investment Products (Bahamas) Ltd and Euro Capital Advisers Ltd of Bermuda. The rights and obligations of the Distributor were set out briefly: "The Distributor is entitled to offer and distribute units of all the investment vehicles listed in Annex 1 for commercial purposes to the clients listed in Annex 2 only". The only client identified in Annex 2 was PIFSS.

2735. Mr Moeller said that Mr Woernle was an intermediary or consultant for RMF, but was not employed by them. When initially asked about Mr Woernle, Mr Massad agreed that Mr Woernle was an intermediary, and said that from memory RMF did not have a sales force. Later on, Mr Massad sought to retreat from acknowledging that Mr Woernle was an intermediary, referring to an e-mail (to which he was not a party) in which Mr Ritzi had referred to Mr Woernle as a relationship manager. In my view, there can be no doubt that he was indeed an intermediary.

2736. The documents show Mr Ritzi writing a letter to Ms Al Dakheel, on 15 November 2002, in relation to a proposed investment in an RMF product. The letter followed an earlier meeting with Ms Al Dakheel. There was express reference to Mr Woernle:

> "Stephan Woernle suggests that we organise a conference call next week and if necessary a live meeting the following week to review in detail the product and the various changes. He will call you on Sunday."

There is no comparable, or indeed any, reference to Mr El Ghazzi in the correspondence with PIFSS.

2737. The letter was also sent by email to Mr Massad. The email included references to Ms Al Dakheel: that the proposal had been sent to Lama; that "we will naturally be at Lama's disposal for a detailed explanation via telephone conference and/or personal visit; and that Stephan Woernle will call Lama on Sunday to inform her of the arrival of the proposal and to offer our support". It was this email that was shown to Mr Moeller when (see above) he said that it showed what he would expect an intermediary to be doing, namely talking to Lama; and that he would most likely have expected Mr El Ghazzi to be doing the same.

2738. By January 2003, the documents show that a "turf war" was underway between Mr Massad and Mr Ritzi, with Mr Massad indicating how he wanted matters to proceed. In his email dated 29 January 2003, Mr Massad told Mr Ritzi, for information, that he had "met Fahad Al Rajaan on Monday. We discussed the forthcoming Man fund, Man Multi Strategy Gtd Series 5, and he confirmed PIFSS' participation". There was no reference to Mr El Ghazzi being involved, and the decision-maker was clearly Mr Al Rajaan.

2739. In fact, a later e-mail from Mr Ritzi (not sent to Mr Massad) indicated that Mr Ritzi thought that the relationship between Mr Massad and PIFSS was direct. He wrote on 30 April 2003:

> "PIFSS regards the investments they make through Stephan as separate from the business they do with Man Investments directly."

There is nothing in the documents which indicates that, notwithstanding the turf war, either Mr Woernle or Mr Ritzi were informed about Mr El Ghazzi.

2740. On 14 March 2003, Mr Woernle emailed Mr Ritzi, Mr Moeller and Mr Massad with the subject line: "3 XL – Good news". He said that he had just got an e-mail from PIFSS confirming that the subscription form for an investment should be signed and sent on the following Monday. Mr Woernle's email therefore evidences an intermediary who is involved in obtaining the subscription. Although the e-mail received by Mr Woernle from PIFSS is not available, Mr Woernle's email also shows that PIFSS could communicate directly with an intermediary when he was indeed involved in the subscription process.

2741. On 14 April 2003, Mr Woernle emailed Amjad Sheikh at PIFSS. The subject line of the email was: "RMF Multi Manager – a couple of questions re reporting". The email then asked questions as to what the reporting format should be for the investment which had

been made. Mr Matovu, in his written closings, said that this simply showed Mr Woernle being involved in more mundane work than Mr El Ghazzi, and that nothing should be read into this because different intermediaries can work in different ways. In my view, however, the e-mail shows the visibility of Mr Woernle to PIFSS, and his involvement in work that one would expect that an intermediary would be doing. Even if it might be described as "mundane" work, the Man intermediary agreement does (see above) contemplate that the reporting information flow to the investor will be via the intermediary.

2742. On the same day, 14 April 2003, Mr Woernle emailed Mr Massad. He had been hoping to report to Mr Massad in person, but his trip to Dubai had been cancelled. He dealt with various matters in his e-mail. This included the reporting which he was agreeing with Amjad Sheikh. In relation to new products, he referred to a discussion with Mr Al Rajaan who confirmed his interest in a particular product. He said that he would only talk to others in the institution "as and when the boss asks me". The email evidences the work that Mr Woernle was carrying out, as intermediary. It also shows that an intermediary could deal with Mr Al Rajaan, at the very top of the organisation, but also (as evidenced by the earlier letter to which I have referred) deal with Ms Al Dakheel.

2743. On 30 April 2003, Mr Ritzi sent a lengthy email to Mr Huyton of Man. He described Mr Woernle as PIFSS "Relationship Manager", and how he had a longstanding relationship with PIFSS of putting together custom-made structures. He also described how he (Mr Ritzi) and Mr Woernle had worked together to give PIFSS proposals. This led Mr Smouha to adopt Mr Massad's retreat from accepting that Mr Woernle was an intermediary, and to submit Mr Woernle should not really be regarded as an intermediary, but rather was in a position equivalent to Mr Massad. I disagree. Mr Woernle was an intermediary: he was not employed by RMF but worked together with Mr Ritzi of RMF to present appropriate products to PIFSS. I see no reason why this should not be regarded as the work of an intermediary. The difference between Mr Woernle and Mr El Ghazzi is not that they were not both intermediaries, but rather that there is substantial evidence of Mr Woernle carrying out the work of an intermediary, but that evidence is absent in the case of Mr El Ghazzi.

M9: The 2008 handover and rebalancing of PIFSS' portfolio

2744. The events at the time of the handover in 2008, and the rebalancing of PIFSS' portfolio, featured in the parties' arguments. PIFSS relied upon the fact that there were important meetings between Man and PIFSS at this time, against the background of the global financial crisis, and that Mr El Ghazzi did not attend them. Man relied on some references to Mr El Ghazzi in the Man internal correspondence, which they submitted were indicative of his involvement in the rebalancing proposals that were made and agreed by PIFSS. They also rely upon the "business as usual" nature of Man's internal communications at this time, with no reference to corruption or bribery in the documents. The more significant communications, in the context of these arguments, were as follows.

2745. On 19 August 2008, there were internal exchanges between Mr Moeller and Mr Massad (copied to Mr Merville) in relation to Mr Massad's impending departure. Mr Moeller said that one of the key things in the handover was to introduce Mr Merville to PIFSS and Mr El Ghazzi. Mr Merville advised that they were meeting Mr El Ghazzi that night. Mr Massad told Mr Moeller that he had been working closely with Mr Merville in

relation to PIFSS. Mr Massad said that he had already met Mr El Ghazzi and had told him that he was leaving, and that he was going to meet with Mr Al Rajaan and tell him face to face about his departure. Within the exchanges, Mr Moeller referred to how PIFSS' portfolio had suffered "more from the industry downturn in July and may well be restructured completely in the coming months".

2746. On 28 August 2008, Mr Massad wrote to Mr Al Rajaan to introduce the latest hedge fund investment product, namely the Man IP 220 Series 6. On 3 September 2008, Mr Al Rajaan wrote to Mr Massad, confirming the investment of USD 100 million in that product, and enclosing a signed application form. On 4 September 2008, Mr Massad emailed Mr Moeller (in Switzerland) and Mr Peter Clarke in London enclosing the signed application form. Mr Massad indicated that he would continue until the last day of his employment to fulfil his duties. The documents indicate that PIFSS paid for this investment on 8 October 2008. This was investment MF30.

2747. On 31 August 2008, Mr Massad e-mailed Mr Merville, copying Mr Moeller and others, confirming that he had met with PIFSS and that the announcement of his departure could now be released. Mr Massad's letter of resignation as Director and CEO of Man Investments Middle East Ltd ("MIMEL") was dated 9 September 2008, and was effective on 30 September 2008.

2748. As already described, August and September 2008 was a time when markets, and the value of PIFSS investments in Man products, started to fall. The collapse of Lehman Brothers was on 15 September 2008.

2749. Shortly before the Lehman collapse, Mr Conchon in the Dubai office sent Mr El Ghazzi an email, dated 10 September 2008, attaching the latest net asset value (NAV) sheet reflecting July prices. This e-mail is the first surviving e-mail, in Man's disclosure, between Man and Mr El Ghazzi. Man had had an e-mail address for Mr El Ghazzi since 2005, but there are no other surviving emails. A later e-mail from Mr Conchon to Mr Merville, sent in January 2009, indicates that the September email (with July values) was the most recent such statement which had been sent to Mr El Ghazzi.

2750. On 11 September 2008, Mr Williamson e-mailed a colleague in Man's Swiss office, referring to the very long and successful relationship between Mr Massad and Mr El Ghazzi "but more important is the trust that existed between the two of them". Mr Williamson reported that Mr Massad (and Mr Merville) had requested "that in order to offer some level of assurance to MEG in terms of the ongoing relationship, fees etc, that we put everything down in writing and send it from MIAG." This led to the letter from MIAG to Mr El Ghazzi, which set out and restated the contractual terms which then existed.

2751. On 15 September 2008, Mr Merville's calendar invite said: "Call Mohamed". His witness statement does not, however, address what may have been said on the call. I think it is unlikely (and there is in any event no evidence) that this call involved the "rebalancing" exercise. PIFSS had already agreed to invest USD 100 million in early September, as discussed above. The agreement on redemption of three investments, and a further investment (MF 31) – discussed below – was discussed and reached in October. Furthermore, Mr Merville's evidence in relation to the relevant meeting in October was that he did not have much involvement in the negotiations for the rebalancing.

2752. Calendar invites were sent to Mr Merville and Mr Massad to meet with Mr Al Rajaan and Ms Al Dakheel on 23 September 2008. Consistent with Ms Al Dakheel's evidence, the invites indicate that the first meeting (beginning at 07.00 or 11.00 local time) would be with Mr Al Rajaan, and that the meeting with Ms Al Dakheel would be later: beginning at 07.30 (11.30 local time). Mr Massad confirmed in evidence that Mr El Ghazzi was not invited to that meeting. It was put to him in cross examination that this was pretty extraordinary: it was a big moment in the relationship. Mr Massad said that he and Mr Merville had already met Mr El Ghazzi at the dinner, and had agreed that the relationship would continue, and that Mr Merville and Mr Massad would visit PIFSS for the handover of the relationship.

2753. Mr Smouha said that with a loss of USD 81 million in the value of PIFSS' investments with Man, in July and August, it would be very surprising if Mr Massad and Mr Merville were not given a bit of a grilling on performance at the meeting. There is no direct evidence that this grilling took place, and Ms Al Dakheel was not cross-examined on the basis that there was any such grilling in her presence. However, it is certainly the case that markets were in turmoil and that Mr Massad and Mr Merville might have expected difficult questions to be asked. Mr Smouha said that there would inevitably have been a difficult discussion about performance and starting to think about rebalancing.

2754. On 29 September 2008, on the day before his departure, Mr Massad sent a farewell message to a large number of colleagues in Switzerland and elsewhere. Mr Moeller sent a message to Mr Massad, thanking him for his hard work in building a great franchise for Man in the Middle East. Mr Massad replied, saying that he was "meeting El Ghazzi & trying to work out something interesting for [PIFSS]". His email also referred to the need to work out a "final settlement": i.e. of monies owed to Mr Massad.

2755. A meeting then took place on Monday 20 October 2008 between Mr Merville and Mr Massad and Ms Al Dakheel. On the day before the meeting, Mr Merville told Sheikh Abdullah that he and Mr Massad were visiting on the following day, and asked whether he would be available to meet at around 11.30.

2756. It seems likely – from the fact that the rebalancing proposal was accepted so promptly – that Mr Massad and Mr Merville met Mr Al Rajaan on 20 October 2008. In that regard, Mr Massad told Mr Moeller, in an e-mail sent on 21 October 2008, that he had received confirmation that morning that PIFSS would invest EUR 70 million in the IP 220 note, and that this would bring PIFSS' total AUM to USD 700 million. Mr Al Rajaan wrote on 22 October 2008, confirming the investment.

2757. The main focus of Mr Massad's email of 21 October 2008, reporting on the new investment, was his bonus, and his contention that he was not being paid what he deserved. It was here that he said that Mr Moeller was targeting and harassing him. He also said:

> "When we had a problem recently relating to Mohamed & PIFFS, the company came to me and trusted me to help, that was the right thing. You and I discussed some financial reward for me and I trusted you, I was wrong."

2758. PIFSS contended that this was a reference to the corruption of which Mr Massad and Mr Moeller were aware. However, the sentence is cryptic, and I can draw no conclusion as to whether there was in fact a particular "problem", what the problem was, or what the solution was.

2759. On the following day, 22 October 2008, Mr Merville wrote, thanking Ms Al Dakheel for taking the time to meet. The letter proposed a rebalancing of the portfolio, with the redemption of three funds, and an investment in a further fund. The letter referred to the making of an application for EUR 100 million in Man IP 220 Series 6 notes, and it said that in consideration of this investment there would be no exit fees in relation to the three funds being redeemed. This was an error. PIFSS had already, as at 22 October, invested USD 100 million in those notes: MF 30 as described above.

2760. On the same day, 22 October, Mr Al Rajaan wrote back. He confirmed the redemption of the three funds without an exit fee. Those funds were MF 20, 22 and 27. He also confirmed the investment of EUR 70 million in the Man IP 220 Series 6 notes. This repeated Mr Merville's error. In fact, the investment of EUR 70 million was in Man IP 220 Index Notes Series 4 (MF 31). Ms Al Dakheel sent Mr Conchon the application form for that investment, signed by Mr Al Rajaan, on 26 October 2008.

2761. Although exit fees were waived on the three redeemed investments, PIFSS took a large loss on those investments, as Mr Massad confirmed in evidence. The total loss on the 3 investments was around USD 20.57 million. As far as concerns the investments in MF 30 and MF 31, both Mr El Ghazzi and Mr Massad received significant payments in consequence of the MF 30 and MF 31 investments. Mr El Ghazzi's FEL commission was around USD 9 million, and he received over USD 7 million in trail commissions over the lifetime of the investments. The investments also contributed, in whole or substantial part, to the bonus of just under USD 900,000 that Mr Massad was paid in December 2008.

2762. Mr Norbury cross-examined Mr Massad on the basis that MF 30 and MF 31, the final investments made by PIFSS during Mr Massad's time at Man (including his time as a consultant) were "a final hurrah", with substantial monies being paid to Mr El Ghazzi – and also to Mr Al Rajaan – to keep them sweet. Mr Massad denied this.

2763. In my view, the most significant aspects of this sequence of events are as follows.

2764. First, there is nothing in the documents which suggests that Mr El Ghazzi played any real role, in terms of genuine intermediary work either vis a vis Man or PIFSS, in relation to the redemptions or the placing of the new investments. MF 30 was proposed by Mr Massad. The redemptions, and the new investment in MF31, came about as a result of the visit by Mr Massad and Mr Merville to PIFSS in October 2008.

2765. Whilst there is reference in the documents to Mr El Ghazzi – for example to the dinner with Mr El Ghazzi (in August), and to a scheduled call with Mr Merville on 15 September – there is nothing in the documents that shows that these discussions concerned genuine intermediary work as described in the witness statements of Mr Massad and Mr Merville: in particular, strategies as to what products Man might try to pitch to Mr Al Rajaan, or how to rebalance the portfolio, or how Mr El Ghazzi might himself pitch products to Mr Al Rajaan in advance of Man meeting him. The meeting and discussions evidenced by the documents could have simply been about how more

money could be obtained for the benefit of Mr Al Rajaan and Mr El Ghazzi. There is no way of concluding, from the brief references in the documents, that it was the former (genuine) intermediary work, rather than the latter corrupt work.

2766. Secondly, it is significant that Mr El Ghazzi was not invited to attend either the meeting scheduled for September, or the visit to PIFSS in October. Mr Smouha, in his closing submissions, acknowledged that these meetings would likely have been difficult for Man, as a result of the global financial crisis. Markets, and the value of PIFSS' investments, had fallen significantly. It is apparent, from the fact that Man found it necessary to offer redemptions without an exit fee – thereby waiving substantial fees that would otherwise be payable – that something needed to be offered to PIFSS. There was evidence from Mr Moeller that a crucial time, for an intermediary to be involved, is when things are not going well. Mr Massad also agreed, in cross-examination, that the rebalancing was just the type of difficult issue that you would expect Mr El Ghazzi to have been involved in.

2767. In my view, the meetings held between Man and PIFSS at around this time are meetings which one would expect a genuine intermediary to be attending. There was a handover of a long-standing relationship to a person, Mr Merville, that had not previously been known to PIFSS. It was occurring at a difficult time. There is evidence that it was known to Man that Mr El Ghazzi was nervous about the fact that Mr Massad was leaving. It seems to me to be precisely the time when a genuine intermediary, acting to protect his own interest in the continuation of a relationship, at a time of difficulty, would want to attend important meetings with the client. Equally, it is also the time at which one would naturally expect Mr Merville – if he understood that Mr El Ghazzi was a genuine intermediary performing valuable intermediary work – to want the intermediary to attend, in order to ensure that the important relationship with PIFSS would continue.

2768. I do not accept Man's argument that I can make no findings, to the effect of what would normally be expected, in the absence of expert evidence, or because of Man's evidence that intermediaries can work in different ways. When determining whether or not to accept the evidence of witnesses – here to the effect that Mr El Ghazzi was understood to be performing valuable intermediary work as a genuine intermediary – a judge is entitled to look at the inherent probabilities. That includes, in my view, consideration of normal human behaviour in the commercial context that is under consideration. Here, I have no doubt that normal human behaviour, in the particular context, would result in Mr El Ghazzi attending important meetings with the client at the time of the handover.

2769. In any event, Mr Smouha in his closing submissions recognised the need to provide a rational explanation as to why Mr El Ghazzi did not attend the meetings with PIFSS at this time. The explanation was, in summary, that it was for Man to decide how, if at all, they wanted an intermediary to interact with the client. Here, Mr Merville's experience had been of direct relationships with clients. In the light of that experience, one would not expect Mr Merville to want to fly Mr El Ghazzi in for the meeting. Mr Smouha accepted that it would have been easy for Mr El Ghazzi to fly in for the meeting, but that did not mean that Mr Merville would have wanted him to be there.

2770. I did not consider this explanation was persuasive. The evidence does not suggest that Mr Merville himself made a decision, for the reasons given or otherwise, that Mr El Ghazzi should not attend. Rather, his evidence was (having refreshed his memory from the documents) that he did not recall having much involvement in the rebalancing

negotiations; that the negotiations had already been concluded by Mr Massad by the time that Mr Merville sent the 22 October 2008 letter; and that he sent the letter to PIFSS because Mr Massad was no longer an employee of Man.

2771. Furthermore, even if Mr Merville's experience had only been of direct relationships with clients, that does not provide a reason why he should not want a long-standing intermediary – who was in place for the relationship with this particular client – to attend important meetings. If that intermediary was, or was perceived as being, valuable to the relationship, then it would be surprising if Mr Merville would decide that he need not attend, at a time when the value of PIFSS' investments was dropping, and a new person (i.e. Mr Merville) was coming in.

2772. The rationalisation is not persuasive for other reasons. I accept, as Mr Merville said in his witness statement, that when he was hired, his goal was to make inroads with new institutional investors. However, PIFSS was an existing institutional investor, and indeed the most important investor in Kuwait. In addition, there was on any view already a strong direct relationship between Man (through Mr Massad) and PIFSS. There is no reason to think that Mr El Ghazzi's attendance at important meetings would somehow have imperilled that strong direct relationship. In fact, Mr Merville's evidence was that when he took over the management of the relationship with PIFSS, his contact with PIFSS was infrequent as the relationship was well-established, and he never really looked to shake the relationship up.

2773. Accordingly, this sequence of events, and in particular Mr El Ghazzi's lack of involvement in meetings with PIFSS at this time, supports my conclusion that both Mr Massad and Mr Merville knew that Mr El Ghazzi was not performing genuine intermediary work, as described in their evidence, or otherwise, and that Mr El Ghazzi's involvement was for the purpose of facilitating corrupt payments to Mr Al Rajaan.

M10: The SMR process

Overview

2774. I now turn to a different strand of evidence to which I have already referred in various contexts, namely: the SMR process and the information provided by Mr Merville during that process. Strictly speaking, the SMR (i.e. the Senior Management Review) came at the end of the process, when the senior management team met to consider the position of Mr El Ghazzi. The process up to that point, or at least earlier on, was an exercise of "enhanced due diligence". However, nothing turns on that distinction, and I shall refer to the SMR process, or more generally the process, as encompassing the enhanced due diligence exercise. The SMR process is important because it is the first time that the documents contain any significant discussion as to what Mr El Ghazzi was, or was not, doing. It is also important because some effort was made to obtain documents to evidence Mr El Ghazzi's substantive work.

2775. In summary, PIFSS contends that when Mr Merville was first asked about what Mr El Ghazzi was doing, he gave an account which was true and which PIFSS characterises as being nothing that Mr Merville knew about. PIFSS contends that his account in his witness statement is not consistent with what he said at the start. It also contends that, as the SMR process developed, so did Mr Merville's account of what Mr El Ghazzi was

doing and that the later account was not true. PIFSS also contends that the attempts to find documents to evidence Mr El Ghazzi's alleged work proved fruitless, and that this further supports the case that PIFSS advances.

2776. Man contends that PIFSS' case does not fairly characterise or analyse Mr Merville's statements during the SMR process. Mr Merville did not lie during that process, and there were no inconsistencies in what he was saying. His statements need to be read in the light of the fact that the SMR process was iterative, where initial comments might well be the subject of further questions and then further information being provided.

2777. A number of individuals were involved in the SMR process in 2012, when the bulk of the work and discussion was carried out. Upon the management changes in 2013, other senior management individuals became involved when Mr El Ghazzi's position was reviewed again.

2778. The process leading to the July 2012 meeting of three senior managers (Mr Clarke, Mr Moeller and Mr Ross) was lengthy, and can be traced back to at least June 2011: see Section M2 above. It involved work carried out by individuals within Man's compliance function in London: in ascending order of seniority, Mr Adam Waghorn, Mr Patrick Kidney and Ms Robyn Grew.

2779. Mr Waghorn did much of the day-to-day work. He had worked in compliance for Man since 2004, and in August 2011 he became Head of Compliance (Distribution and Marketing), until he left Man in 2017. He reported directly to Ms Grew. He did not give evidence at trial.

2780. Mr Kidney, who did give evidence at trial, was employed by Man as Head of Financial Crime Prevention, joining in September 2011 and taking over from Mr Philip Wallace. He therefore joined when the process of looking into Mr El Ghazzi was already underway. He was also appointed the Money Laundering Reporting Officer ("MLRO").

2781. Ms Robyn Grew was a former barrister, and was Chief Compliance Officer at GLG, an investment house that was acquired by Man in 2010. She became Global Head of Compliance and Regulatory from October 2010, Global Head of Legal and Compliance from March 2015 and (after other very senior positions) became CEO of Man in September 2023. She also gave evidence at trial.

2782. Those in London were assisted by Mr Matthew Williamson who worked in the Middle East office. From April 2008 to April 2015, he was the Chief Operating Officer (and MLRO from May 2007 onwards), with responsibility for operations, marketing and compliance in the Middle East. He did not give evidence at trial.

2783. Mr Stephen Ross, Group General Counsel, and Global Head of Product Structuring, was also involved in the process, both in seeing aspects of the work of compliance as matters progressed, and also as a member of the 3-man senior management review team who ultimately considered the work produced by the compliance department, in the form of a detailed report and a summary by Ms Grew.

2784. This is, in my view, a very important part of the case, and I consider that it properly received detailed consideration during the evidence and argument at the trial. I therefore address the relevant sequence of events in some detail.

The September 2011 e-mails

2785. Prior to Mr Waghorn's 2 March 2012 e-mail discussed below, there is one document (relied upon by Man) where a description, albeit very brief, can be found of the work that Mr El Ghazzi was doing. On 15 September 2011, Mr Waghorn in London e-mailed Mr Williamson in Dubai in relation to a forthcoming visit by the UK Financial Services Authority. It was anticipated that questions might be asked about an investment by PIFSS of USD 100 million in a Man IP 220 GLG income bond product: i.e. MF 36 in which PIFSS invested in March 2011. Mr Waghorn therefore asked Mr Williamson to work with Mr Merville to provide "as much detail regarding this investment, rationale for investing in this product, history of their investments in structured products etc".

2786. Mr Merville gave a short summary. Mr Waghorn's response was that the summary helped with why the investment opportunity made sense for PIFSS, and then asked: "Do you have a short summary on the role of the intermediary in this case". Mr Merville responded, approximately an hour later, as follows:

> "The intermediary is someone they trust, that has investment experience and helps them analyse various funds and recommend what fits best in their portfolio."

2787. This brief explanation indicated that Mr El Ghazzi took an active role in dealing with PIFSS, in analysing funds and making recommendations. The role there described is one which is unsurprising: a role that one would naturally expect an intermediary to be performing.

2788. I cannot, however, accept that this is the role which Mr Merville actually understood the intermediary to be performing. There is no contemporaneous documentary evidence of Mr El Ghazzi actually undertaking this role, as previously discussed. Also, as previously discussed, the prospectus for this product had not actually been sent to Mr El Ghazzi. He was therefore not in a position to analyse this fund or provide advice as to whether it fitted into PIFSS' portfolio. Furthermore, Mr Merville provided a statement, but declined to attend for cross-examination (a matter to which I return below). Finally in the present context, it is apparent from Mr Merville's account, as recorded in Mr Waghorn's 2 March email (discussed further below) that Mr Merville did not actually know what Mr El Ghazzi was doing in relation to PIFSS.

2789. At this point in time (September 2011), Mr Merville may have had some involvement in obtaining the anti-bribery letter signed by Mr El Ghazzi: see section M2 above. But he had not been otherwise involved in the enhanced due diligence work relating to Mr El Ghazzi, which was being carried out by Man's compliance personnel in London. It is not necessary to describe in detail the work undertaken in late 2011, but it included the obtaining of a November 2011 confidential "Project Artis" report into Mr El Ghazzi from a company called Alaco Ltd.

January 2012

2790. Mr Merville's involvement really began at the start of 2012. On 9 January 2012, Ms Grew told Stephen Ross that compliance was setting up a call with Mr Merville to "discuss next steps as soon as possible this week". The background to that proposed call, as summarised in an email from Mr Kidney to Ms Grew on 9 January, was a review

carried out by Mr Kidney and Mr Waghorn. This described various public allegations of mismanagement, ineptitude and corruption relating to PIFSS, and concluded:

> "Adam and I reviewed the report with Alaco who advised that it is credible for El Ghazzi to be acting as an intermediary. He appears to have credible partners as well. He has worked in the financial services industry so he has the right experience and credentials to act as an intermediary. There are indications that he may have the right level of access to the Investment Committee of the PIfSS, but the lack of transparency at the PIFSS on how they make investment decisions and how they are run, makes it very difficult to determine the extent of his relationship with the PIfSS. But, but by way of context, the PIfSS is one of the largest run FIs in the region and it would not be unusual for them to receive criticism. Ultimately there are no allegations or otherwise to indicate concerns from a due diligence perspective.
>
> However, it is vital to speak to the RM and better understand the relationship and transparency between El Ghazzi and the PIfSS — TBA."

2791. Later on the morning of 9 January 2012, Mr Waghorn emailed Mr Williamson, copied to Mr Kidney, asking whether there could be a call later that week with "Patrick and the three of us" to discuss next steps in relation to Mr El Ghazzi and two other intermediaries. The intention was therefore to have 4 participants: Messrs Waghorn, Williamson, Kidney and Merville. Mr Williamson asked for more background on what needed to be done next. Mr Waghorn's response was that "we specifically need to get more background on relationships and specific points mentioned below. We need to discuss ways to document the answers to some of these queries".

2792. In relation to Mr El Ghazzi, Mr Waghorn's e-mail identified the specific points as follows:

> "Mohamed Ali Moutih El Ghazzi (El Ghazzi) -. ELG0002289 (signed Man intermediary agreement in March 1993)
>
> More particularly, we would like to discuss the relationship between Mr El Ghazzi and Kuwait's Public Institution For Social Security (PIfSS). Our research did not identify any information linking El Ghazzi to the PIfSS, and combined with the lack of transparency at the PIfSS on how they make investment decisions and how they are run, it therefore makes it very difficult to determine the extent: of his relationship with the PIfSS. We would also like to discuss how he has access to the Investment Committee of the PIfSS. Since this relationship goes back to 1993 we understand that there is a long-standing relationship with Mr Ghazzi and the PIfSS and it is important for us to document the nature of the relationship between Mr El Ghazzi and the PIfSS."

2793. The e-mail also identified specific points in relation to two other intermediaries, whose names and clients are redacted. Those intermediaries were also discussed with Mr Merville as described below, but it is unnecessary to describe the specific points that were raised in relation to them.

2794. In a follow-up e-mail on (Monday) 9 January 2012, Mr Waghorn said that "MEG is on the senior radar because of the recent launch". He asked to get something in the diary as soon as possible, preferably Tuesday or Wednesday. There was, therefore, some degree of urgency about the call. A calendar invite shows that a call was then scheduled for Thursday 12 January 2012, involving the above 4 participants. Mr Waghorn also advised Ms Grew that he was trying to get something in the diary. The email chain with Ms Grew, and an attachment sent as part of that sequence, identified various investments made by PIFSS in the course of 2011: a redemption of USD 73 million in March, a new money investment of USD 100 million in April (MF 36), and a further USD 50 million in December (MF 37).

2795. In fact, the call on 12 January 2012 did not go ahead. The reason, as explained by Mr Kidney to Ms Grew and Mr Ross in an email sent that day, was that a catch-up call had taken place between Mr Merville and Mr Moeller. Mr Merville had explained to Mr Moeller that "we have the scheduled call today to talk through the intermediary relationships". Mr Moeller had asked Mr Merville to postpone the call until after Mr Moeller had seen Mr Kidney in the following week, when Mr Kidney was due to be in Switzerland.

2796. PIFSS submitted that Mr Moeller's intervention, by way of postponing the call, was sinister and reflected a desire and intention to shape what Mr Merville should be saying about Mr El Ghazzi. I reject that submission. I agree that, at the first sight, it is puzzling as to why the planned call could not go ahead before Mr Moeller had spoken to Mr Kidney. However, if Mr Moeller wanted to shape what Mr Merville was going to say on the call, there was an opportunity to do so when Mr Moeller spoke to Mr Merville during their catch-up. More importantly, the critical document on which PIFSS relies in support of its case – Mr Waghorn's 2 March report of the 1 February call with Mr Merville which did in due course take place – is a document that PIFSS says records the true position. It follows that Mr Moeller cannot, or at least is very unlikely, to have sought to influence Mr Merville to give a false account of the position. Ultimately, I see no reason to reject Mr Moeller's evidence that he did not seek to influence Mr Merville in what he was going to say, or actually said, on the 1 February call. The more likely explanation for the postponement is simply that Mr Moeller had not been involved in the work being carried out in London concerning Mr El Ghazzi, and he wanted to understand from Mr Kidney what was happening.

2797. Mr Ross's reaction, when informed on 12 January of the delay to the call, was that it was fine to postpone "but I don't want a delay for any longer. Please be assertive and questioning". Accordingly, from Mr Ross's perspective, the urgency of dealing with the matter remained, and there was a clear instruction to Mr Kidney to address the matter properly.

2798. On (Monday) 23 January 2012, having met Mr Moeller in Switzerland during the previous week, Mr Kidney sought to accelerate the call. He asked for it to take place on either Tuesday or Wednesday of that week (24th or 25th), bearing in mind that he was out of the office on the Thursday and Friday and "much of next week". Mr Williamson

said that Mr Merville was out on business trips at that time, and was only back on the following Tuesday. Mr Merville had asked for the call to be scheduled for Wednesday 1 February.

2799. On the same day, Mr Kidney's assistant circulated a calendar invite for the call, now to take place in the following week, on 1 February 2012, with a duration of 1 hour. The proposed participants were the same: Messrs Kidney, Waghorn, Williamson and Merville. However, Mr Kidney was planning to be out of the office during that week, and the evidence indicates that he did not actually participate in the call that took place on that day. In his oral evidence, he had no recollection of the call summarised in Mr Waghorn's 2 March email. The e-mail itself indicates that the participants were Mr Waghorn, Mr Merville and Mr Williamson, with no reference to Mr Kidney. Mr Kidney could only remember what he described as a short call to tee up what they needed, and he said that it was quite possible that there were two calls and that Mr Waghorn had the call without him. He described Mr Waghorn as being the person who "was really driving forward a lot of that. He had a very strong relationship with the salespeople, and so I was relying a lot on that, for him to do that. It's just a bit of a blur there". I conclude that Mr Kidney did not in fact participate in the key call on 1 February 2012.

Mr Waghorn's 2 March 2012 e-mail

2800. There is no dispute that a call did then take place on 1 February 2012. Mr Waghorn produced an email on 2 March 2012, which he sent to Mr Merville, and copied to Messrs Moeller, Williamson and Kidney. It was headed: "Intermediaries – next steps". The call concerned the 3 intermediaries previously identified, including Mr El Ghazzi.

2801. Mr Waghorn's email of 2 March 2012 was originally redacted, so as to exclude the information about the other two intermediaries: not only their names and clients, but everything that was said about them. The cross-examination took place with the email in its redacted form. During the course of Mr Smouha's closing argument, points were advanced which meant, in my view, that the whole email should be disclosed so that the information about Mr El Ghazzi could be seen in context of what was being said about the others. Following a brief contested application, I ordered that the whole email should be disclosed.

2802. Since the e-mail is a very important document, I quote it in full, including the information about the other two intermediaries. The names and clients of the other two intermediaries remained, unobjectionably, redacted.

> "Hi Patrick
>
> I wanted to follow up on our call having now had a chance to discuss next steps within PDLR. I have cc'd Christoph since he has requested to be kept updated regarding any recommendations and next steps.
>
> During the call with yourself and Matt, we covered the history, contractual set-up and role of the following intermediaries;
>
> 1. []

2. []

3. Mohamad El-Ghazzi

You were able to provide insight into the current relationship and recent history with these intermediaries. However, it was noted that with all three, these are relationships which you have inherited.

Our understanding and recommendations for each are as follows;

[]

• We recommend replacing the existing agreement to more accurately reflect [] role as a consultant/expert advisor to Man, for example documenting [] role in advising Man on how to navigate [] structure/organisation or advising us on issues of particular sensitivity.

• The bespoke agreement will reflect the fact that [] is a consultant of Man and does not play an active role in advising [] and [] is not paying for any such service through the investment structures it invests.

• We were advised that [] provides Man with valuable and ongoing input into this key investor relationship. We therefore consider the nature and structure of the commercial arrangements (percentage of our management fee) appropriate and do not recommend changes.

• We note there is no record of contact with this intermediary in ManEdge. Moving forward, we must start documenting our contact with this intermediary for audit purposes.

[]

• It was clear that [] has and continues to have an active role in relationships with Institutional Investors introduced to Man. Currently they are just servicing one investor but their involvement has and does involve input into structuring/pitching investment proposals and servicing queries. [] was recently involved in recent discussions with newly formed [] and the introductory and advisory role provided was clearly evident. ManEdge also shows an audit trail of regular contact and involvement.

• We consider that the level of the compensation arrangements moving forward will be in part driven by the investment vehicles and structures which are appropriate for new investors but we consider placement and servicing fees to be

acceptable given both the introductory and ongoing servicing role undertaken.

• We therefore consider the standard intermediary agreement largely fit for purpose.

• However, we note that the [] entity itself is more of a humanitarian entity, whilst the intermediary is also the principal of a financial services company called []. We think it is appropriate to enter into the relationship with the financial services entity instead and at the same time, use the opportunity to ensure that the Institutional nature of her investor base is acknowledged and reflected in the description of her duties and obligations in the intermediary agreement.

Mohamed El-Ghazzi (El-Ghazzi)

• The relationship with El-Ghazzi was established in 1993 and given that this relationship has been inherited you were not able to provide full details regarding the previous role of the intermediary in pitching new business to the end investors and providing on-going support.

• The role El-Ghazzi provided during the early stage of the investor relationship may have developed over time but the legacy commercial relationship entered into with EI-Ghazzi has never been re-visited and it is difficult for us to ascertain if the commission reflects the role as at today.

• El-Ghazzi is currently only linked to one investor (Public Institute For Social Security ("PiFSS")) who is still active in placing new deals with Man. It was difficult for us to ascertain what role the intermediary has in pitching new business, for example, how he interacts with PiFSS to recommend investment proposals and what role he provides in servicing the investor on an on-going basis.

• You advised that our relationship with PiFSS is entirely direct i.e. El-Ghazzi does not participate during new product pitches or assist us with servicing the investor such as attending meetings and/or conference calls.

• You were unable to provide an explanation regarding the relationship between El-Ghazzi and PiFSS and how the two would interact.

• The attached paper includes the summary of our independent due diligence on El-Ghazzi.

• It also includes a number of questions, the purpose of these are to assist you in addressing the gaps in our knowledge

> following the meeting and not answered by the independent report (questions 1-11, pages 4- 5). Reference is also made in question 2 to previous investors introduced by El-Ghazzi who have since redeemed.
>
> Please feel free to correct any misunderstandings or include anything which I have missed.
>
> We would be grateful for your thoughts on recommendations for [] and []. Regarding El-Ghazzi, we appreciate that some of this information may be obtained internally but may also need to be sourced from El Ghazzi and/or PiFSS and we would like to initially leave this to Sales to manage. We feel at this stage that we do need the answers to the questions to allow us to establish how we can continue this relationship and ensure that it is properly documented.
>
> Please let us know if you would like to discuss and if/how we can be of assistance.
>
> Many thanks
>
> Adam"

2803. The e-mail recorded, in my judgment, Mr Waghorn's understanding of the significant points that Mr Merville had made on the call. I accept Mr Smouha's submission that it may not have recorded everything that Mr Merville said. Mr Smouha was thus able to point to a reference, in the draft report on Mr El Ghazzi which was prepared shortly before 2 March, which indicates that Mr Merville also said that Mr El Ghazzi had not worked for PIFSS. However, I consider that Mr Waghorn's email did cover those matters which were of most importance to the enquiries that he was pursuing.

2804. Mr Smouha also submitted that the e-mail may to some extent blend in Mr Waghorn's own views or thoughts. I do not think that the e-mail contains substantial evidence that this is the case. But even if it does, I do not consider that any 'blending' (i.e. of Mr Merville's statements with Mr Waghorn's views) affects the reliance that can be placed on Mr Waghorn's email as an accurate summary of the essence of what Mr Merville was saying. Indeed, Mr Smouha made it clear that he was not submitting that Mr Waghorn's email was unreliable as a summary of what Mr Merville had said.

2805. Furthermore, in assessing the reliability of the summary in the e-mail, I bear in mind the very limited evidence called by Man in relation to the call with Mr Merville on 1 February 2012. Neither Mr Waghorn nor Mr Williamson provided witness statements, and they were therefore not called at the trial. Mr Kidney was called, but he had no recollection of the call, and (see above) he did not actually participate in it. Mr Merville was not called, as a result of his refusal to give evidence at trial. Significantly, the e-mail concluded by asking Mr Merville to feel free to correct any misunderstandings or include anything which Mr Waghorn had missed. There was no e-mailed response by Mr Merville which indicated that Mr Waghorn had misunderstood things or missed any points.

2806. Man advanced various arguments whose substance was to seek to downplay the significance of what may have been said by Mr Merville on the call, as recorded by Mr Waghorn. Man drew attention to the fact that Mr Waghorn's email was only sent a month after the call had taken place. They said that Mr Merville had been away on a business trip prior to the call, and that therefore he may not have been properly focused on the issues under discussion, referring in that context to evidence from some Man witnesses that salespeople do not necessarily focus properly on compliance issues. They said that there was no evidence that Mr Merville had seen, or been told in advance about, the issues which Mr Waghorn wished to discuss, as summarised in Mr Waghorn's email to Mr Williamson dated 9 January 2012.

2807. I do not consider that there is force in any of these points. The SMR documents as a whole show that Mr Waghorn was diligent and detailed, and I do not consider that the delay in producing the e-mail was attributable to inefficiency, or that the delay indicates that the summary is unreliable. The documents, further discussed below, indicate that the delay was attributable to the fact that Mr Waghorn and Mr Kidney wanted to send a list of questions to Mr Merville, and this was in fact done under cover of the 2 March 2012 e-mail. That list of questions had been drafted shortly after the call, and had been sent to Mr Ross for approval on 9 February. There was then some considerable delay in Mr Ross giving that approval, since in turn he had to seek approval at an even higher level within Man, from Peter Clarke (Man's CEO at the time). Mr Ross's approval was only communicated to Mr Kidney on 27 February, and the 2 March email was sent a few days later. In that e-mail, Mr Waghorn referred to the fact that he wanted or needed to discuss matters with PDLR (Product Development Legal and Risk), and this likely referred to the need to obtain Mr Ross's approval.

2808. As to Mr Merville's state of preparation for the call, I consider it overwhelmingly likely that he knew by 12 January 2012 what was to be discussed. The subject-matter of the call had been conveyed to Mr Williamson by Mr Waghorn on 9 January 2012. Although the evidence does not show the e-mail being passed on to Mr Merville, it is likely that Mr Williamson would have informed Mr Merville about what Mr Waghorn wanted to know about. Indeed, if not informed on Mr Williamson's own initiative, Mr Merville would likely have asked to know what the proposed call was all about: there is nothing to suggest that Mr Merville was routinely being asked to speak to 3 people in compliance. The fact that Mr Merville mentioned the call to Mr Moeller in their catch-up, and that this then led to the postponement of the call from 12 January, indicates that the call was a matter of importance. That the call was postponed for a number of weeks, and was then reinstated with 8 days' notice, indicates that Mr Merville would have had plenty of time to think about the topics to be discussed.

2809. Furthermore, even if (which I do not accept) Mr Merville had in some way been unprepared for the call, that does not diminish the significance of what he said on the call. Mr Merville was the relationship manager for PIFSS, and a large number of investments – including relatively recent investments of substantial value in the course of 2011 and an investment underway in 2012 – had been made under his watch. He would and should naturally have been able to give, if asked, an account of what, if anything, Mr El Ghazzi was doing in that regard, and to do so without needing to carry out detailed research or to be given a great deal of time to think about it. An account given by a person in internal documents or conversations when they are off-guard is often very much more valuable, as evidence, when compared (for example) to heavily-

lawyered witness statements prepared for litigation, or to other statements made when a person knows that earlier statements made by him are problematic. For the significance of "off-guard" statements in contemporaneous internal documents, see the judgment of Males LJ in *Simetra Global Asset v Ikon Finance* [2019] EWCA Civ 1413.

2810. With that background, I turn to the substance of what was conveyed by Mr Merville as recorded by Mr Waghorn. The arguments of the parties, particularly by Mr Smouha, involved much parsing and analysis of the precise words chosen by Mr Waghorn. I do not myself think that there is any real difficulty in seeing what Mr Merville was saying. Mr Ross captured its essence (in the underlined words below) when reacting to Mr Waghorn's email by sending it and his comments to Mr Clarke, Man's CEO at the time:

> "Please see below when you have a moment, especially El-Ghazzi. It does seem to me inequitable in these tight times that one can pick up very substantial compensation for an entirely inherited intermediary and not be able to answer even the most basic questions. This is north of $600 mio structured product I think. You know the commission rates. <u>The main focus however is on the role of the intermediary on the Kuwait business and there appears to be none/negligible</u>. Unclear what this implies and working on it.
>
> We await a response from Patrick to further questions, we are taking it steady.
>
> Will keep you informed." (my emphasis)

2811. In summary, on a fair reading of the e-mail as a whole, Mr Merville was saying that he did not know what role Mr El Ghazzi was playing in relation to dealing with PIFSS, and did not identify any role that Mr El Ghazzi was playing vis a vis Man in that process. This is apparent from various statements in the email as discussed below. I start by looking at what was said about Mr El Ghazzi, and then consider that in the light of what was said about other intermediaries.

2812. [2nd bullet]: It was "difficult for us to ascertain if the commission reflects the role as at today". There was some argument as to whether the "us" referred to Man's compliance department (as Ms Grew tentatively suggested in her evidence), or more generally to "Man" including Mr Merville. I consider that it more naturally refers to the latter, and this is borne out by the next bullet. I do not, however, think that the debate, as to who is "us", matters. It was because Mr Merville had not been able to provide a description of any role actually played by Mr El Ghazzi, that it was difficult for Man, or the compliance department, to know whether the commission "reflects the role as at today". However, the fact that Mr Merville had been unable to describe the role is significant. As Mr Moeller said in evidence, given that he was the relationship manager, "he was the best person to assess the value of the intermediary".

2813. [3rd bullet]: "It was difficult for us to ascertain what role the intermediary has in pitching new business, for example, how he interacts with PIFSS to recommend investment proposals and what role he provides in servicing the investor on an on-going basis". This essentially repeats the previous point: that Mr Merville did not know what, if anything at all, Mr El Ghazzi was doing in relation to PIFSS. In that bullet, the "us"

refers to Man, and in particular Mr Merville. I do not accept Man's argument that this bullet should be read as indicating that Mr Merville did know what Mr El Ghazzi was doing in relation to PIFSS in general terms, but was unable to give any detail. That is in my view contrary to the e-mail as a whole, including the 5th bullet: "You were unable to provide an explanation regarding the relationship between El Ghazzi and PIFSS and how the two would interact". There is also no statement here, or in the e-mail as a whole, to the effect that Mr El Ghazzi was regularly visiting Kuwait, having regular meetings with PIFSS, meeting with its investment committee, or analysing the products or making recommendations to PIFSS: all of these being matters which Mr Merville was later to convey in the course of the SMR process. In short, Mr Merville simply did not know if Mr El Ghazzi was doing anything in relation to PIFSS. The statement recorded here is, in my view, very different to the account which Mr Merville gave in his witness statement in these proceedings. I think that there is no persuasive answer to PIFSS' argument that if Mr El Ghazzi was known by Mr Merville to be doing the things described in his witness statement, then he would have been able to describe those matters to Mr Waghorn at the time.

2814. Furthermore, if (as Mr Merville was later to indicate) Mr Merville was having discussions with Mr El Ghazzi in relation to proposed or past investments, then such discussions would naturally be expected to provide Mr Merville with information as to what Mr El Ghazzi was doing in relation to PIFSS. Thus, the fact that Mr Merville could not provide any information, as to how Mr El Ghazzi was interacting with PIFSS, indicates that Mr Merville was not having the discussions with Mr El Ghazzi that he describes in his witness statement.

2815. [4th bullet]: "You advised that our relationship with PIFSS is entirely direct i.e. El-Ghazzi does not participate during new product pitches or assist us with servicing the investor such as attending meetings and/or conference calls". PIFSS placed considerable reliance on the statement that the relationship was "entirely direct". I consider that this, combined with the later statement that "El Ghazzi does not assist Man with servicing the investor such as attending meetings and/or conference calls", is indeed significant. It shows that the only relevant interactions that were taking place, as far as Mr Merville was aware, were direct interactions between Man and PIFSS.

2816. In closing submissions, reflecting some evidence given by Ms Grew, Mr Smouha said that the relationships between Man, PIFSS and Mr El Ghazzi should be viewed as a "triangle": a direct relationship between Man and PIFSS; a relationship between El Ghazzi and Man; and a relationship between El Ghazzi and PIFSS. The difficulty with the argument, on the facts, is that – on the basis of the information given by Mr Merville – two sides of this triangle are missing. The side with the direct relationship was there, as Mr Merville explained. But that was the only side that was there, as indicated by the phrase "entirely direct". The El Ghazzi – Man side of the alleged triangle was missing: Mr El Ghazzi did not participate in new product pitches or assist Man in servicing the investor. And Mr Merville knew nothing about the Mr El Ghazzi – PIFSS side of the alleged triangle, as discussed above and as reconfirmed in the 5th bullet.

2817. Mr Smouha also submitted, in substance, that the reference in the 4th bullet to "servicing the investor" should be confined to the matters referred to at the end: i.e. attending meetings and/or conference calls. However, I do not consider that this is a fair reading of what Mr Waghorn records. Mr Waghorn understood Mr Merville to be saying that Mr El Ghazzi provided no assistance in servicing, and the absence of

participation in meetings or conference calls was an illustration ("such as") of this lack of assistance. There is nothing here to suggest that Mr El Ghazzi was providing valuable behind the scenes assistance which would help shape the approach that Man took in its direct dealings with PIFSS, although that was later something that Mr Merville sought to suggest was happening.

2818. It was suggested by Man in argument that if Mr Merville had knowingly been participating in a corrupt scheme, he would not likely have given what might be seen as a potentially damaging account as to the lack of involvement of Mr El Ghazzi. However, Mr Merville may not have appreciated the implications, in terms of the enhanced due diligence work being carried out in London, of what he was saying. This was a time when the Bribery Act 2010, and the work of compliance in relation thereto, was still relatively new. Mr Waghorn's email to Mr Williamson on 9 January 2012, advising as to what he was interested in, did not specifically refer to possible bribery, but rather referred more generally to understanding the background on relationships. It is possible that Mr Merville did not appreciate that the enquiries were in the context of a Bribery Act review, but may have thought that the discussion was concerned with, for example, looking at whether Mr El Ghazzi's contractual terms should be changed. Furthermore, the discussion was also taking place between people who, in professional terms, were friends: Mr Merville worked with Mr Williamson in Dubai, and Mr Kidney described the strong relationship between Mr Waghorn and the salespeople. Mr Merville is likely to have been relaxed, and not on his guard, as he spoke.

2819. The information given by Mr Merville on that call, as to the relationship being "entirely direct", and his inability to say what if anything Mr El Ghazzi was doing, and his statements as to the lack of assistance provided by Mr El Ghazzi, seems to me to accord with the picture that emerges from the documentary evidence considered above: (i) the positive documentary evidence that, from the time when PIFSS started to invest in late 1996, there were only direct dealings between PIFSS and Man; and (ii) the lack of any evidence that Mr El Ghazzi was actually doing anything of substance, either in relation to PIFSS or Man, save as a placeman for the payment of monies.

2820. What Mr Merville said about Mr El Ghazzi should also be seen in the light of what he was able to say about the other intermediaries. The parties submitted brief written submissions, following the disclosure of the 2 March 2012 email in unredacted form, on that issue. I consider that the submissions made by PIFSS on this issue were persuasive. I agree that the level of detail that Mr Merville was able to provide about the other two intermediaries, and the positive work that they were performing, indicates that he was prepared for the call. I also agree with PIFSS that there is a significant contrast between what Mr Merville was able to say about the other two intermediaries, and what he was able to say about Mr El Ghazzi.

2821. Thus, in relation to the first intermediary, Mr Merville was able to identify the intermediary's behind-the-scenes advice to Man, but also that the intermediary did not play an active role in advising the relevant client. The behind-the-scenes advice was described as "valuable and ongoing input into this key investor relationship". There is nothing in the description of Mr El Ghazzi's work that is in any way equivalent or comparable, although Mr Merville's later statements including his witness statement, lay emphasis on the valuable and ongoing input of Mr El Ghazzi behind the scenes.

2822. Similarly, in relation to the second intermediary, Mr Merville was able to identify his active role both with Man and with investors, thus enabling the conclusion to be reached that the standard intermediary agreement was largely fit for purpose. The work in relation to investors involved both structuring and pitching, and also "servicing queries". There is again nothing equivalent or comparable in the description of Mr El Ghazzi's work. Indeed, as noted above, Mr Merville said that Mr El Ghazzi did not "assist us with servicing the investor". There is nothing to suggest that Mr El Ghazzi was assisting Man in servicing queries. In contrast, Mr Merville's witness statement states that he was PIFSS' "contact if any clarification about the investments was needed". It is in my view clear that it was Man that was servicing queries from PIFSS, and Mr El Ghazzi was doing nothing in that regard.

2823. I also consider, consistent with PIFSS' submission, that there is nothing in the e-mail, read as a whole, that supports the proposition that Mr Merville knew in general terms the work that Mr El Ghazzi was doing with PIFSS, but could not provide the details.

Mr Waghorn's list of questions

2824. At the end of his 2 March 2012 e-mail, Mr Waghorn referred to the need for "answers to the questions to allow us to establish how we can continue this relationship and ensure that it is properly documented". Although this referred to "how" the relationship could be continued, it would have been apparent to Mr Merville that the information which he had previously provided gave rise to a question as to whether the relationship could be continued. The e-mail attached a relatively early draft of the report on Mr El Ghazzi, which was ultimately, after additions and refinement over the following months, provided to the SMR 3-man committee. There was a list of questions which Mr Merville was requested to answer. These were as follows:

> "General
>
> 1. Provide an overview of the intermediary's working history and experience prior to his relationship with Man, to contextualise his role and experience.
>
> 2. Describe how (and when) the intermediary established relationships with the below named entities/individuals namely:
>
> i. The Public Institution for Social Security
>
> []
>
> 3. Provide clarification on the intermediary's relationship and role in the following entities
>
> (i) MG Capital Consultancy, a Kuwaiti limited liability company established on 21st March 2000 and registered in Kuwait and of which he is a shareholder. Clarify the role of his co- shareholders, namely: Fuad Al Shehab and Bassem Al Otaibi; and

(ii) Mohamed El Ghazzi Investment Company, a Lebanese Societe a Responsabilite Limitee company established on 18th September 2001 in Beirut, along with the named shareholders: Zouheir Aref Merhi and Mohamed Anis Yehia Siblin (according to records published in the Beirut Register of Commerce, this entity appears to have ceased trading in 2008— please confirm)

Note: Determine to what extent the intermediary is acting in his personal capacity, or as a shareholder with for example MG Capital, and the role of the other shareholders to the extent that is relevant.

4. Provide a list of Man employees the intermediary either currently or historically liaises with and/or who he has met with.

The following questions are all in relation to the PiFSS.

5. Provide any relevant information regarding key individuals that he has relationships with at PIfSS which assists the Intermediary in establishing and maintaining this relationship

6. Describe what the intermediary's role has been in introducing past investment proposals (include how (and how often) the intermediary has communicated/met with PIfSS. It would be useful to evidence prior deals, presentations, etc to evidence the expertise he has brought to the PIfSS relationship/investments.

7. Describe how the intermediary interacts with and/or obtains information from PIfSS regarding investment objectives and how these have been communicated to Man to assist in structuring investment propositions. Please reference examples and provide any documentation to the extent relevant.

8. Describe what the intermediary's role has been in providing ongoing services to the PIfSS in respect of past investments introduced. Recommend establishing how the intermediary interacts, if at all (directly or indirectly) with PIfSS's Investment Committee.

9. Describe what the role of the Intermediary would be if introducing a new investment proposal to PIfSS (reference if this will involve any of the individuals or entities referenced in 3 (i) and 3 (ii) above.

10. Describe what role the Intermediary will be providing moving forward in terms of an ongoing service to PIfSS.

11. In addition to any of the services provided above, does the intermediary provide any direct services to Man that does not

> involve PIfSS (e.g. a consultancy service). Expand if this goes beyond the PIfSS relationship."

2825. The questions were highly pertinent and designed to elicit relevant further information. They were also asked in a neutral fashion. In contrast to Mr Waghorn's approach in some later emails, they were not 'leading' questions aimed at eliciting a particular answer. As Ms Grew accepted in evidence, compliance should ask questions in a neutral way, not least in order to avoid the risk of confirmation bias. The questions had been worked on by Mr Waghorn and Mr Kidney following the call with Mr Merville and had been run through Mr Ross. Mr Ross in turn passed what he described as the "probing" questions to Mr Clarke and asked to discuss over the phone "before I start knocking over the bone china". There was clearly great sensitivity about the questions that were to be asked, no doubt in view of the importance to Man of retaining PIFSS as a client – particularly at a time when, as the documents show, Man's results were deteriorating. Mr Ross and Mr Clarke were interested in who, within Man, received commissions on the PIFSS account, and Mr Kidney confirmed that this was Mr Merville.

2826. There was some delay in obtaining approval for the questions to be sent, and on 27 February 2012 Mr Kidney chased Mr Ross for "any news on this matter". Mr Ross responded on the same day saying that Peter Clarke is "very happy for you to proceed very carefully and step by step. Legitimate and proportionate enquiries no issues at all, just want to avoid spooking or undermining a legitimate piece of business".

2827. The SMR documents do indicate that both Mr Kidney and Mr Waghorn were, to a degree, affected by confirmation bias. For example, Mr Kidney's email to Mr Ross on 9 February, setting out the questions, expressed the view that the substantial investments made by PIFSS since 2000 "speaks to the senior level connections that MEG has and the key role he appears to play, but this is what we are hoping to confirm and document". The same can possibly also be said of Mr Ross's "spooking" email, with its suggestion that the relevant business was legitimate, and the need to proceed very carefully. Mr Ross did however make it clear that legitimate and proportional enquiries could be made, and the 'probing' questions were indeed asked, and sent to Mr Merville for response, under cover of the 2 March e-mail. Mr Ross was not attempting to shut down appropriate enquiries.

2828. The fact that Mr Waghorn asked these questions does not cast doubt on the accuracy of Mr Merville's account as summarised in the 2 March e-mail. Nor does it mean that he considered that Mr Merville had failed to give proper attention to the issues on the call. Mr Waghorn thought, however, that wider enquiries might enable his questions to be answered. Hence his point towards the end of the e-mail:

> "Regarding El-Ghazzi, we appreciate that some of this information may be obtained internally but may also need to be sourced from El Ghazzi and/or PIFSS and we would like to initially leave this to Sales to manage."

2829. PIFSS contended, as part of its initial case alleging dishonesty on the part of a large number of people who participated in the SMR process, that they must have taken a deliberate decision not to follow up Mr Waghorn's suggestion of contacting PIFSS, because they knew that any questions directed to PIFSS would be unhelpful or adverse as to the role of Mr El Ghazzi. That point, as far as concerns those against whom the

case of dishonesty has been dropped, is no longer relevant. However, in my view it remains a significant point against Mr Merville, who – as "Sales" – was the person, or at least one of the people, tasked with this follow up. There is no evidence, and indeed no suggestion, that Mr Merville made any attempt to contact PIFSS in order to fill in (as reflected in what he had said on 1 February) his absence of knowledge as to what Mr El Ghazzi was doing in relation to PIFSS. For example, he made no effort to ask PIFSS for information in order to answer questions as to the "key individuals that he has relationships with at PIFSS", or "how (and how often) the intermediary has communicated/ met with PIFSS", or to obtain materials to "evidence prior deals, presentations etc to evidence the expertise he has brought to the PIFSS relationship." Mr Moeller, in cross-examination, was asked whether, looking at it now, contacting PIFSS seems to be the obvious thing to do. Mr Moeller fairly agreed: "Yes, it would have been the natural thing to do".

2830. I consider that the fact that Mr Merville took no steps to contact PIFSS to obtain the information is because he knew full well that he would not receive any information that was favourable in answering the questions which compliance had posed. Mr Merville had an easy line into PIFSS: he could ask Ms Al Dakheel, who was his primary contact, and if necessary, could ask to speak to Mr Al Rajaan. He did not do so because, in my view, he knew that the relationship with Mr El Ghazzi was corrupt, with Mr El Ghazzi having no visibility to PIFSS (save for Mr Al Rajaan) because he was not doing any work. There is also no evidence, and indeed no suggestion in the documents, that he sought any assistance from Mr El Ghazzi in responding to the questions, in order to assist in filling in the gaps in his own knowledge, or in obtaining documentary support to evidence Mr El Ghazzi's alleged work with PIFSS. Again, in my view, that was for the same reasons that Mr Merville took no steps to contact PIFSS.

2831. When Mr Merville did respond to the questions, he did not deal with each of them in turn. Many of them did not receive any real answer, and he did not produce any documentation to evidence what he was saying. It is certainly arguable that, in those circumstances, compliance should then have taken steps to ensure that PIFSS was contacted, and that its failure to do so was a shortcoming in the process then underway. However, I am not dealing with a case where the complaint is that compliance acted negligently in failing to take such steps, and I am no longer dealing with a case where it is alleged that the failure to take such steps is said to evidence dishonesty on the part of a large number of people in compliance. The principal issue, given that the case of dishonesty is now only advanced against Mr Moeller and Mr Merville in the context of the SMR process, is whether the failure of 'Sales' to contact either PIFSS or Mr El Ghazzi is evidence of participation in corruption. In the case of Mr Merville, I consider that it is. An 'innocent' Mr Merville would have been interested in providing full information in response to compliance, and in taking up Mr Waghorn's sensible and natural suggestion that there should be contact with PIFSS and/or Mr El Ghazzi in order to find out the answers. The fact that Mr Merville did not do so (and there is no suggestion in his witness statement that he did so) is in my view significant for the reasons already given.

2832. The evidence as to a degree of confirmation bias which can be seen during the process is, however, not irrelevant. The same is true of evidence as to any shortcomings in the process, such as compliance's failure to follow up on the sensible suggestion that PIFSS should be contacted. Any such shortcomings may reflect that confirmation bias. The

reason why these points are not irrelevant is that Man sought to place significant reliance on the views and reaction of those who were engaged in the process, to the effect that there was no evidence of corruption.

2833. I do not think that this argument has any force. Although the SMR process was considering questions related to potential bribery involving Mr El Ghazzi, the individuals involved were not engaged in the same exercise that I am required to carry out. I am required to reach an independent judgment as to Man's alleged complicity in corruption on the basis of a very significant amount of evidence adduced before me. Most of that evidence, including the evidence as to actual payments from Mr El Ghazzi to Mr Al Rajaan, was not before those concerned in the SMR process. Mr El Ghazzi's corruption was not known to those in compliance, or (save for the case advanced against Mr Moeller) by any of the members of senior management to whom the issue of Mr El Ghazzi was referred in 2012 and again in 2013. The factual background is therefore significantly different to the materials available in 2012 and 2013.

2834. Furthermore, those concerned in the SMR process were not, as Mr Kidney emphasised in his evidence, engaged in an investigation into whether there was corruption on the part of Mr El Ghazzi or Man. It was not a process which was aimed at reaching findings of fact. Indeed, the conclusions of the meeting of the senior management in 2013 were not even documented. Rather, the process started as an enhanced due diligence review, which was to some extent (as Mr Norbury submitted) process driven. Man's compliance department wanted to be able to show, if necessary, that the issue of possible bribery had been considered and addressed in an appropriate manner. This is very different to the exercise on which I am engaged. Additionally, if (as I consider to be the case) confirmation bias was present, then this is a further reason why I should not be influenced, to any significant degree, by the conclusions reached by those engaged in 2012 and 2013. It is also clear, as evidenced by Mr Ross's "spooking" e-mail, that there were commercial considerations which would potentially impact the approach of those concerned, whereas this is not something which affects a judicial decision on the evidence.

2835. I also do not accept Man's argument that the court should pay particular regard to the conclusions of the SMR when assessing the significance of a particular fact that was known by the SMR and is also now relied upon by PIFSS as evidence of corruption and complicity therein. The essence of the argument is that if the SMR did not attach importance to it, the court should come to a similar conclusion or at least hesitate before coming to a different conclusion. An allied argument is that, when assessing the relevance of such facts, the court should put out of its mind the evidence that now exists as to the actual corruption as between Mr El Ghazzi and Mr Al Rajaan.

2836. I do not think that this is the correct approach. The court must assess all the evidence in the case. It may be that a particular fact – that might be regarded in the abstract and isolation as neutral and therefore not positively indicative of complicity in corruption – would be viewed differently if evidence of actual corruption came to light. An analogous argument, that a judge should exclude from consideration any fact which is consistent with negligence rather than fraud, was rejected by Lord Hope in *Three Rivers District Council v Bank of England* [2001] UKHL 16, paragraphs [55]-[56]. Such allegations may, when the evidence is considered as a whole, support a case that there was fraud.

Reactions to the 2 March email and the list of questions

2837. Mr Moeller said, fairly, that he did not recall Mr Waghorn's e-mail and therefore could not say what his reaction to it would have been. However, he thought that his reaction would have been the same as it is now, having looked at the email; namely, that it contradicted what he had been led to understand, over the years, by Mr Massad and Mr Merville.

2838. It took Mr Merville some time to respond to the questions. Mr Waghorn sent a chaser on 13 March 2012, asking for Mr Merville's initial thoughts in relation to the questions asked about Mr El Ghazzi, also indicating that he wanted to manage expectations in terms of next steps and timings with Mr Ross and Ms Grew.

2839. On 25 March 2012, Mr Williamson e-mailed Mr Merville with some information based on the research that he had been doing. Mr Smouha argued that it was a point in Mr Merville's favour, in that he had not sought to shut down the enquiries being made and was content for Mr Williamson to do research. I did not consider this to be significant. London compliance was clearly looking for further information, and Mr Merville would not have been in a position to shut down the enquiries. He may have allowed Mr Williamson to do some historical research, but in my view, he steered well clear of asking questions of PIFSS or Mr El Ghazzi.

2840. One of the matters which Mr Williamson's research did reveal is of relevance to Mr Massad's integrity and credibility. Mr Williamson had identified that there were three accounts that were linked, in the records of Man's Middle East office, to Mr El Ghazzi. These three accounts were amongst those of a number of "orphan" investors, who had no financial adviser, but who (for regulatory reasons) were perceived by compliance as needing one because they could not count as professional investors. Man had written to such investors proposing the names of possible intermediaries. Mr Williamson had discovered that in:

> "The case of the 3 below, at the request of the then MIME CEO, Antoine Massad, they were linked to MEG in early 2007. We do not believe that MEG actually had any relationship with any of these investors at any stage."

Accordingly, Mr Massad had created a false record of these 3 investors being advised by Mr El Ghazzi. The point is significant not only in relation to Mr Massad's credibility – the evidence being that he was prepared to create a false record – but also as to the intermediary to whom he decided to link the investors. I return to this point below, when considering Mr Massad's evidence more generally.

2841. Mr Merville sent his response to the questions on 26 March 2012. In response to Questions 5-10 concerning PIFSS, Mr Merville gave a generalised response, as follows:

> "The information below covers questions 5-10.
>
> Mr. El Ghazzi interacts regularly with the MIME RO. He travels frequently to Kuwait and regularly maintains his relationships there. Prior to traveling there, he generally calls to get an update on the performance of the portfolio, and queries whether we

> would recommend switching out of a fund in favour of another. He also queries relevant information such as the financial health of Man, Man's trading updates, as well as the reasons behind an adverse share price movement when it happens. Previously, upon finding out that they have fully utilised their alternative allocation, he has recommended that in our pitches, we emphasize the fixed income component underpinning the guarantee in the structures, and therefore that this could fit into their bond allocation. Recently, he has recommended that we focus more on income structures as they have started to value coupon payments to meet their obligations."

2842. In that response, many of the questions went unanswered, or were answered only at a very high level of generality. For example, Mr Merville did not: identify which key individuals at PIFSS Mr El Ghazzi had a relationship with; provide anything which evidenced prior deals, or presentations to evidence the expertise he had brought to the PIFSS relationship/ investments; describe how Mr El Ghazzi obtained information from PIFSS regarding investment objectives, and how these had been communicated to Man; describe Mr El Ghazzi's role in providing ongoing services to PIFSS in respect of past investments; provide information as to how Mr El Ghazzi interacted, if at all, with the PIFSS investment committee; describe what role Mr El Ghazzi would be providing moving forward.

2843. Mr Merville's response also sought to attribute to Mr El Ghazzi's efforts something which, on Man's evidence at trial, was likely attributable to discussions between Mr Massad and Ms Al Dakheel. Thus, Mr Merville referred to Mr El Ghazzi as being the person who suggested emphasising the fixed income component underpinning the guarantees in Man's products, and that therefore this could fit into their bond allocation. Mr Massad's evidence, however, was that it was Ms Al Dakheel who told him that PIFSS was able to put Man capital guarantee products into their bond portfolio, because of the nature of the risk, which was helpful to PIFSS.

2844. Mr Merville's response led to Ms Grew telling Mr Kidney that they should speak to Mr Merville. A call then took place on 27 March 2012, and Mr Waghorn prepared a summary of that call which was sent to Ms Grew and Mr Kidney on that day. It is apparent that Mr Waghorn was seeking to beef up the information that Mr Merville had provided, with a view to showing that Mr El Ghazzi had a genuine intermediary role. His summary of the call was as follows:

> "**Summary of call with Patrick Merville**
>
> 1. We can make it clearer in the profile that it is PM's understanding that MEG regularly visits Kuwait to meet with PiFSS. PM mentions in his write up that MEG will obtain information from us in advance of these visits. In addition to requesting Man's advice as to whether PiFSS should switch funds. This is evidence of his intermediating role.
>
> 2. He provided some examples in his write up regarding how MEG adds value to Man's relationship with PiFSS e.g. advising

> Man during our pitches to '*emphasize the fixed income component underpinning the guarantee in the structures*'
>
> 3. We discussed whether MEG is mentioned during pitches, regular meetings with PiFSS etc. PM advised he is not but that this was not surprising as we mostly deal with Analysts and MEG's involvement will be at a much more senior level i.e. the Investment Committee. When PM meets with the Investment Committee it is not to discuss product specifics but more to build the general relationship.
>
> 4. I queried whether it was transparent to PiFSS that MEG receives fees in relation to this business. PM advised that PiFSS understood the fees, it has been a part of the product structure since they started investing and he made reference to fees being anyway disclosed in the Prospectus.
>
> 5. At this stage, this is as much information as he has to provide. However, PM will endeavour to obtain further information through his informal meetings with MEG to continue to add to the profile."

2845. Four features of that response are of significance. First, as recorded in the third paragraph, Mr Merville sought to explain away the fact that, as he knew, Mr El Ghazzi was never mentioned when he was speaking to Ms Al Dakheel. She was the key person, referred to as the "Analysts", with whom Mr Merville was dealing. He said that Mr El Ghazzi's involvement was at a more senior level, i.e. "the Investment Committee". However, in my view he had no basis for thinking, or saying, that Mr El Ghazzi ever had an involvement with the investment committee. He also referred in his response to his own meetings with "the Investment Committee", again seeking to explain why Mr El Ghazzi was not mentioned during pitches or regular meetings. As Mr Waghorn records Mr Merville telling him:

> "When PM meets with the Investment Committee it is not to discuss product specifics but more to build the general relationship."

2846. In my view, however, that statement if made – and I have no reason to doubt that it was indeed made – was untrue. There is no evidence of Mr Merville ever meeting with any investment committee. In fact, his evidence in his witness statement is as follows:

> "As far as I was aware, the most senior person in the investment decision making process at PIFSS was Mr Al Rajaan. Ms Al Dakheel (who was subordinate to Mr Al Rajaan) was in charge of the alternative investments. My understanding of PIFSS' process, although I cannot recall whether I learnt this information from Mr Massad, PIFSS or Mr El Ghazzi, was that before it made an investment, Ms Al Dakheel, who had good knowledge of the products, would review the documents and then she would either recommend the investment to the Investment Committee or not. Whilst I understood that she

> presented her recommendations to the Investment Committee for approval, I did not know which individuals sat on the committee and I did not ever speak with the Investment Committee. I had very little understanding of how the investment making decision process worked at PIFSS other than as I explained above." (my emphasis)

2847. Mr Merville was therefore, in my view, giving information to Mr Waghorn which Mr Merville knew to be untrue. Mr Smouha sought to explain Mr Merville's statement as being a reference to individuals who were on the investment committee, on the basis that it would be unlikely that Mr Merville would be meeting the investment committee itself. However, that is not what Mr Merville was telling Mr Waghorn. And in any event, since Mr Merville did not know who was on the investment committee, he cannot have been referring to such individuals. And if he was, that too was untrue since he did not know who they were and therefore could not be describing his meetings with them.

2848. Secondly, although Mr Merville said that he mostly dealt with analysts, his evidence acknowledges that he did also deal with Mr Al-Rajaan, albeit that he says that his interactions were brief. However, as the above passage shows, Mr Merville knew that Mr Al Rajaan was the most senior person in the decision-making process, and I have no doubt that every proposed investment was discussed by Mr Merville with him. Ms Al Dakheel's evidence was that that was how the process operated at PIFSS: fund managers would speak to Ms Al Dakheel after they had met with Mr Al Rajaan. She said in her 2nd statement, and I accept, that when representatives of Man visited PIFSS, they met with Mr Al Rajaan first and he would decide which investments he was interested in. They then came down to see her afterwards to explain the technical aspects of the fund. She did not recall any Man representatives ever telling her that they were going to see Mr Al Rajaan after meeting her.

2849. Since Mr Merville was meeting with Mr Al Rajaan, it is likely (contrary to what Mr Merville was saying to Mr Waghorn) that Mr El Ghazzi's name would have cropped up in their discussions.

2850. Thirdly, Mr Merville was specifically asked whether it was transparent to PIFSS that Mr El Ghazzi was receiving fees. It was put to Mr Moeller that Mr Merville was avoiding answering the question as to whether PIFSS really understood Mr El Ghazzi's fees. Mr Moeller agreed that Mr Merville was avoiding giving a direct answer to the question. That too is significant. The reason that he did not directly answer the question is that he knew that the only person who knew about Mr El Ghazzi's fees was Mr Al Rajaan, and he also knew that his main contact, Ms Al Dakheel, knew nothing about Mr El Ghazzi or the fees paid to him.

2851. Finally, Mr Merville indicated that he would endeavour to obtain further information through his informal meetings with Mr El Ghazzi. There is nothing to suggest that Mr Merville ever did so, or that he passed any such information back to Mr Waghorn.

2852. Thus, Mr Merville did not provide any further information beyond his written response on 26 March to Mr Waghorn's list of questions, and the further information provided in the call on 27 March with Mr Waghorn.

2853. Mr Smouha submitted that there was no inconsistency between the information provided to Mr Waghorn on the 1 February call, and his later responses on 26 and 27 March. Those responses involved the expected iterative process where a person provides further detail in response to specific questions. I have read and re-read the 26 and 27 March responses, against the 2 March note, and I cannot accept that they are consistent. The later responses do not provide further detail of information already provided on 2 March. The 2 March note records, in substance, that Mr Merville did not know what Mr El Ghazzi was doing with PIFSS, that the relationship with PIFSS was entirely direct as between PIFSS and Man, and that Mr El Ghazzi was not assisting Man with servicing PIFSS. The later responses paint a different picture, with Mr El Ghazzi regularly interacting with Man, giving recommendations as to how to approach PIFSS, travelling frequently to Kuwait to maintain his relationship with PIFSS, meeting the PIFSS Investment Committee and so forth. In my view, the fact that Mr Merville gave inconsistent accounts as to Mr El Ghazzi's work, is a point which significantly undermines his evidence as to the positive work that the latter was allegedly doing. I consider that his first account as recorded in the 2 March 2012 e-mail – before he realised the difficulties which that account created and the need to row back from what he had said – reflects the real position. It is also consistent with the absence of documents evidencing any significant work being carried out by Mr El Ghazzi.

2854. Following the call with Mr Merville, Mr Kidney asked Ms Grew whether Mr Waghorn could email Mr Moeller to see if he could add further information, or whether she wanted to email him herself. She was happy for Mr Waghorn to do so. On 28 March, Mr Waghorn sent a composite email to Mr Merville and Mr Moeller. The e-mail set out Mr Waghorn's summary of the call, and then asked various points of Mr Moeller. Mr Waghorn's confirmation bias can clearly be seen in this e-mail:

> "**Christoph** – We are really keen to try and help you build up the best profile we can on this, In order to ensure that we have as complete picture as possible, please do let us know if there is anything you wish to add to the profile before we finalise from your own knowledge and interaction with MEG and PiFSS. Some points I think it would be good to highlight;
>
> 1. Let's try to expand on your understanding of his local reputation and importance to evidence why he would be a trusted advisor to the Investment Committee
>
> 2. If you have any more info regarding the seniority of individuals he deals with in PiFSS, let's make a point of highlighting this in the profile.
>
> 3. If we can explain that it is not uncommon for an entity such as PiFSS in this region to require the involvement of a local trusted advisor, let's not be afraid to emphasise this. Let's also explain that this is important not just on introduction but on an ongoing basis.
>
> 4. If MEG was no longer involved in the relationship, let's make a point of stating that this would lead to PiFSS

> Investment Committee riot: receiving the approval, sign-off, comfort etc that they rely on from MEG.
>
> 5. Patrick previously mentioned the importance of the mind--set of PiFSS and the credibility that MEG brings behind the scenes to the relationship that Man has with PiFSS. It would be very useful to expand on this especially as you and other senior executives have met with PiFSS and MEG on a regular basis.
>
> 6. If you have ever discussed fees with PiFSS, if you have ever discussed the role of MEG with PiFSS etc (anything which helps with transparency) please feel free to make this important in the profile.
>
> Picking up on a point that: Patrick said was very important: in our initial call, all of the above is designed to put into context his role from the perspective of the mind-set and objectives of PiFSS as this type of entity operating in this region. It is therefore important that we explicitly state in the profile that you believe the role described is commensurate to the level of fees we are paying him. In this context you are best placed to make this judgement call."

2855. Mr Moeller's response indicated that his dealings with Mr El Ghazzi over the years had been very limited. The full text of his response was:

> "Following please find my answers prefaced by the observation that my personal contact with him over the years has been very limited as the relationship has been handled directly out of Dubai
>
> 1) From the few contacts I had and the info from our previous head of ME it seemed clear that based on his previous work and time spent in Kuwait MEG enjoyed a good reputation and was/is well connected in the financial community of Kuwait. This is a small market in terms of the number of players, if you are successful there it follows that you are respected and well regarded by the market participants.
>
> 2) 1 believe he has multiple contacts at senior level, the investment board, at PIFFS, again stemming from his previous career in the local market.
>
> 3) It is certainly not unusual for institutions in the region to use local, trusted advisors. Relationships in the region are strongly based on personal trust and confidence, in that sense they are not comparable to the institutional process in the US or Europe. By way of an example senior execs from Man recently met the new head of [] in London. The meeting that was arranged through a close contact of the [] head who we use as a consultant.

> 4) This is the flipside of the coin, if a long relationship is broken, this sends a very negative signal, a breach of trust, and implies that something is wrong with us. The impact would be adverse not just with regards to PIFFS but potentially other instil in Kuwait given the close knit nature of the market. To illustrate the point we had a bad experience in Qatar where one institutional investor was quite unhappy with our performance and FOFs, this spilled over onto other potential investors in this market and meant we were effectively shut out of the market, for a long time
>
> 5) Here I can only confirm what Patrick said, Meg, over the years has clearly been well informed about the investment strategy of the investor giving us valuable guidance on the approach. Conversely he was keen to be up to date about our investment performance and corporate info (health of the firm, big transactions etc).
>
> In sum MEG has and continues to play an important role in the relationship with PIFFS. The fees we pay him under the intermediary agreement are the standard fees applicable to the relevant product and a straight percentage of the fees we earn. The override agreement is designed to encourage to keep assets under management and is comparable with similar set ups we may have elsewhere."

2856. It was clear from Mr Moeller's cross-examination that the information that he was providing, as to what Mr El Ghazzi was doing, was based on what he had been told over the previous 15 years by Mr Massad and Mr Merville, rather than any first-hand knowledge.

2857. On 3 April 2012, Mr Waghorn told Mr Williamson that Mr Ross, after seeing the information provided by Mr Moeller and Mr Merville, had asked for some evidence that Man pitched information to different analysts at PIFSS: i.e. that they were not restricted to talking to one key decision-maker. In addition, Mr Ross had asked whether there was any evidence of the information flow between Man and Mr El Ghazzi. In response to these questions, Mr Waghorn said that he had been unable to "find anything useful on ManEdge so grateful for your thoughts". He suggested picking "one launch to provide him with evidence of the information we sent to MEG and details of who we talked to at PIFSS". Mr Waghorn also expressed the view that they were almost finalised, and would appreciate any help that Mr Williamson could give to wrap things up.

2858. Mr Waghorn then advised his colleagues on 5 April 2012 that Mr Williamson and Mr Merville were "going to dig out some evidence (e.g. email exchanges, [courier] notes etc) before next week to support the profile". However, Mr Williamson had acknowledged that "notes from Patrick M[erville] (and formerly Tony Massad) are lacking on ManEdge for MEG and non-existent for PIFSS."

2859. This episode in the SMR review process is significant because it was a contemporaneous search for documents evidencing the way in which the relationship

worked, and the description of what Mr El Ghazzi was doing. It was contemporaneous in the sense that there had been significant investments by PIFSS in the preceding months: MF 37 investment of USD 50 million was in December 2011, and the MF 38 investment of USD 100 million was in the process of being concluded. It was not a search carried out many years later in the context of responding to litigation disclosure obligations. It could reasonably be expected, therefore, to identify documents that evidenced the relationship in the recent past, if they existed.

2860. It can fairly be said that the search proved fruitless. Mr Williamson advised, on 5 April 2012, that there was not much by way of email correspondence, and that PIFSS still communicated largely by fax and phone. He attached a series of faxed audit requests from Mr Al Muraikhi at PIFSS, and an e-mailed response from Mr Conchon to Ms Al Dakheel. He said that Patrice Conchon and Patrick Merville often communicate with Ms Al Dakheel by phone and fax, and that Mr Conchon sent monthly statements by fax each month to PIFSS. All of this, therefore, evidenced only a direct relationship between Man and PIFSS.

2861. Mr Williamson did add, however, that he could "evidence when product information is sent through our local courier logs and the product application log maintained by the Client Service team". He attached a spreadsheet. It is this document, already described, that showed that prospectuses for 7 actual or proposed investments, had been sent to PIFSS between February 2010 and February 2012, with no evidence of anything sent to Mr El Ghazzi.

2862. Mr Williamson's email was forwarded by Mr Waghorn to Ms Grew and Mr Kidney on 16 April 2012. Mr Waghorn told Ms Grew and Mr Kidney that that was "all we have in terms of evidencing the contact we discuss in the profile". He thought that they needed to proceed with the SMR "with what we have" and have a recommendation for full records in relation to Mr El Ghazzi in the future.

2863. On 26 April 2012, Mr Waghorn e-mailed Mr Williamson. He told him that Ms Grew asked if they were able to evidence the information that was sent to Mr El Ghazzi and PIFSS in relation to the latest Athena Guaranteed launch. "Any chance we will have anything". The request was sent through to Mr Merville, advising him that Mr Waghorn was "looking to evidence the paper trail with MEG, PIFSS". He said that he had a record of the prospectus information being sent to PIFSS on 19 February (i.e. 19 February 2012) for Athena, and asked Mr Merville whether he remembered "sending anything to MEG directly". Mr Merville said that he personally did not, but that Mr Williamson should check with Mr Conchon.

2864. On 4 May 2012, Ms Grew asked Mr Waghorn to "circle on the latest PIFSS investment". Mr Waghorn advised that they did not get anything from Mr Williamson other than a fax of the prospectus. On 8 May, Mr Williamson advised that Mr Merville did not have a note of any specific calls or emails about the latest fund. When the email was passed on to Ms Grew, she asked: "Nothing sent to MEG?" Mr Waghorn's response was: "Apparently not".

2865. Mr Waghorn then continued his work relating to the preparation of a report for senior management to consider. It is not necessary to discuss that further work, and the later development of the report, since it throws no further light on issues as to the work that Mr El Ghazzi was or was not doing. The nature of the work, and the approach of the

members of the senior management review team who considered the report ultimately produced, was explored in detail in evidence. However, following PIFSS' decision to drop the case of participation in corruption by those involved in that review, I do not consider that the approach of the members, or the outcome of the review, is of any assistance in resolving the key issues in dispute.

2866. It suffices to say that Mr Waghorn's finalised report was prepared for the purposes of a meeting of the senior management (Mr Ross, Mr Clarke and Mr Moeller) that took place on 17 July 2012. Mr Waghorn also prepared a written "walk through/ key points" for Ms Grew, who was to attend the meeting. Ms Grew then prepared a summary of the meeting (which was not an in-person meeting, but rather a call), based on Mr Waghorn's "key points".

2867. The note identified that the reason for the review was that, in light of the UK Bribery Act and FSA Principles for Business, Senior Management had to make an assessment that Man has in place "adequate due diligence and controls for a relationship of this profile". This is not the issue with which I am concerned in these proceedings. Whilst the SMR participants did reach the conclusion that Man had adequate due diligence and controls for the relationship, that is not a conclusion which assists me in resolving the key factual question that arises in the context of evidence which now shows clearly that Mr Al Rajaan was being bribed by Mr El Ghazzi: that key question concerns the alleged knowledge and participation of Messrs Massad, Merville and Moeller in that bribery. Apart from, in substance, signing off on the continuation of the relationship, there were a number of recommendations approved by the SMR team. These included that "Sales to keep detailed records as documentary evidence of MEG's involvement in new business and on-going servicing", and that Patrick Merville was "to "own" the relationship with MEG and ensure greater contact evidence". Subject to those matters, the conclusion was that "Senior Management formally approved the relationship and the adequacy of controls and procedures in place".

2868. Subsequent events, including the further SMR process in 2013, have been described in Section M2 above. I do not consider that these subsequent events are significant on the question of whether Mr El Ghazzi was a genuine intermediary, doing the work described by Mr Massad and Mr Merville in their evidence. I therefore mention only the following.

2869. Mr Merville was made redundant in April 2013, but remained as a consultant for a few months. He gave Mr Dackombe, who was taking over from him, a short briefing in which he said that Mr El Ghazzi was intrinsic to the PIFSS relationship. However, Mr Dackombe came rapidly to the view, after meeting Ms Al Dakheel and Mr El Ghazzi in early June 2013, that he could deal with PIFSS directly and no longer needed Mr El Ghazzi as an intermediary. In February 2015, Mr Kidney arranged for an extensive e-mail search to be carried out, following further information coming into the public domain about Mr Al Rajaan, and a memorandum from Alaco dealing with developments in Switzerland and Kuwait. The search was for all e-mails, at any time, between Mr El Ghazzi and 5 individuals who worked in the Dubai office, including Mr Massad, Mr Merville, Mr Conchon and Mr Williamson. The search produced few documents, none of which evidenced substantial work being carried out by Mr El Ghazzi.

2870. My conclusions from the SMR process are as follows:

a. Mr Merville's first account to Mr Waghorn was accurate in indicating that Mr El Ghazzi was not providing any genuine intermediary services to Man in the context of the relationship with PIFSS, which was entirely direct as between Man and PIFSS.

b. Mr Merville knew nothing about any genuine intermediary services being provided to PIFSS, in the context of investments being placed.

c. Mr Merville thereafter sought to embellish his account in his statements to compliance, including making knowingly false statements as to Mr El Ghazzi's interaction with the investment committee, and his own interaction with that committee.

d. In light of the above, Mr Merville's account of Mr El Ghazzi's work, as set out in his witness statement, is also false and untrue, to his knowledge.

e. Searches for documentation, during the process, did not unearth any materials that evidenced the alleged work carried out by Mr El Ghazzi. On the contrary, the spreadsheet evidencing the fact that no prospectuses were sent to Mr El Ghazzi for a period of 2 years, during which 5 substantial investments were made, shows that Mr El Ghazzi was not in a position to do the work described in Mr Merville's evidence.

M11: Assessment of Mr Merville

2872. Man was unable to call Mr Merville to give evidence at the trial, for reasons which were beyond their control: Mr Merville refused to attend. Nevertheless, Man invites me to accept the evidence of Mr Merville on the critical issues. It will be apparent from the previous sections, in particular Section M10 where the SMR process is discussed, that I am unwilling to do so. I do not consider that Mr Merville's evidence, as to the work carried out by Mr El Ghazzi, is consistent with the documentary evidence, or with the account which he gave to Mr Waghorn and Mr Williamson on 1 February 2012. His failure to give clear answers to the questions posed by Mr Waghorn in the attachment to the 2 March 2012 email, his false information as to the work of Mr El Ghazzi and his own work in relation to meeting PIFSS' investment committee, and his failure to seek further information from PIFSS or Mr El Ghazzi in order to respond to Mr Waghorn's questions, add to the picture of a person who was not revealing what he knew to be the true position. His evidence (paragraph 55 of his witness statement) – that Mr El Ghazzi was PIFSS' contact if any clarification of their investments was needed – is clearly false.

2873. In February 2012, Mr Merville knew nothing about Mr El Ghazzi's interactions with PIFSS, and his responses to Mr Waghorn thereafter were at a high level of generality. But the one thing that he did know is that Mr El Ghazzi was not dealing with Ms Al Dakheel. Mr Merville knew that Ms Al Dakheel knew nothing about Mr El Ghazzi, and Mr Merville himself never mentioned Mr El Ghazzi's name to her, despite her being his primary contact at PIFSS and despite interacting with her over many years. These matters – when taken together with the other features of the evidence to which I have referred – can only realistically be explained by the fact that Mr El Ghazzi was not acting as a real intermediary, and that Mr Merville knew that he had to keep quiet about his involvement when dealing with Ms Al Dakheel. Mr Merville's statement, in

paragraph 69(o), that he would have expected Mr El Ghazzi to discuss a proposed switch "with someone at PIFSS, for example, Ms Al Dakheel or Mr Al Rajaan" is also false: not least because he knew that Mr El Ghazzi was not dealing with Ms Al Dakheel.

2874. It is obvious that if Mr Merville had attended for cross-examination, he would have had many difficult questions to answer. His reasons for non-attendance were explained in a letter dated 26 February 2025 from his solicitors (Cooke, Young and Keidan). The letter describes Mr Merville's reluctance to assist Man, because it would "jeopardise his ability to effectively conduct business in the Middle East region and be potentially damaging to his reputation and business interests in the region where he lives and works". He had, however, eventually agreed to provide a comprehensive witness statement, but did so "notwithstanding that he considers that both his role and the relevant evidence he can provide is very limited". This was because his involvement coincided with the Global Financial Crisis, after which the investment products in which PIFSS invested did not perform well, and his interaction with PIFSS became very limited.

2875. The letter says that Mr Merville had explained that he did not wish to assist Man any further given his concerns. His statement was comprehensive, and was more than sufficient to explain his limited involvement in the relevant events. The process of providing the statement was "much more involved and took more time than he anticipated" or considered reasonably necessary. Mr Merville would, however, be happy to provide answers to any further questions in written form. The letter continues:

> "To be clear, Mr Merville is seriously concerned as to the risk to both his professional reputation and business interests if he is considered by individuals in the region to be further involved in the Proceedings against a Sovereign entity. He does not wish to give evidence in a Court room which is open to the public and which is likely to have considerable international journalist interest, including from Kuwait."

2876. It was then explained that Mr Merville had been based in the Middle East region for 20 years, and that as a result of the allegations in the case he had "felt what he perceives to be reputational damage as a result of having worked for Man at that stage". This had resulted in him finding it difficult to pursue his career in fund raising in the region, due to the damage that has already occurred to his reputation. He considered that there was a great risk to his current professional role, and possible further positions on the boards of international companies "which he considers will be highly unlikely to be possible should his name appear in the press further to giving oral evidence during the Proceedings".

2877. I do not consider that any of these reasons, for Mr Merville's unwillingness to attend for cross-examination, stands up to scrutiny. I consider that the reason that Mr Merville has not attended is that the account which he has given in his statement would not stand up to scrutiny in cross-examination at trial.

2878. As to the reasons which Mr Merville has given, I do not see how answering questions, in order to demonstrate the truth of the account given by Mr Merville in his statement, would potentially damage his reputation. Mr Merville's statement does not criticise anyone at PIFSS, or seek to implicate them in any wrongdoing. By giving a statement

to Man, Mr Merville has already involved himself in the proceedings brought by PIFSS. The statement is aimed at establishing Mr Merville's bona fides in the work that he carried out for Man. Attendance for cross-examination, in order to demonstrate that bona fides, would not damage Mr Merville's reputation, at least if his account were to be accepted. Indeed, if that account were accepted, then it would enhance his reputation, and dispel the reputational damage that he says that he has felt as a result of being associated with Man. By not attending, Mr Merville runs the more significant risk that the court will conclude that his account is not true, including because an adverse inference could be drawn against him by reason of his non-attendance.

2879. In addressing Mr Merville's reasons for non-attendance, I acknowledge a point made by Mr Smouha: that individuals do not always think logically, and that they have concerns which on analysis may be irrational. However, I remain unpersuaded that Mr Merville's failure to attend is the result of anything other than his knowledge that the evidence in his witness statement would be exposed as false, as in my view it is.

2880. In summary, I reject the evidence of Mr Merville for the reasons given. That conclusion is reinforced by the fact that Mr Merville has not attended for cross-examination, and because I consider that the reason for that failure is because (as I have concluded when considering the merits of his evidence) he knows that his evidence does not stand up to scrutiny. I conclude that he knowingly participated in the corrupt scheme involving Mr Al Rajaan and Mr El Ghazzi.

2881. Whilst there is no evidence that Mr Merville participated in corruption prior to the handover in 2008, my above conclusion necessarily impacts on my conclusions as to the position during Mr Massad's time. Mr Merville took over a corrupt scheme that was already functioning, and doing so very well and effectively. Mr Merville did not initiate the scheme. Mr Merville's evidence was that he did not do anything to shake up the relationship that existed. A conclusion that Mr Merville knew about it and participated in it, but Mr Massad for some reason did not, would make no sense. My rejection of Mr Merville's evidence is, in practical terms, fatal to Man's case that there was no complicity in corruption on the part of Mr Massad in the earlier period. However, I recognise that a degree of caution is required here, not least because Mr Massad is a defendant to the action personally, and because a reason (albeit not the only reason) for rejecting Mr Merville's evidence is his non-attendance for cross-examination: see *4 VVV and others v Spence and others* [2024] EWHC 2434 (Comm) at [11], (Foxton J). I therefore turn to my assessment of Mr Massad as a witness, putting on one side my conclusions as to Mr Merville.

M12: Assessment of Mr Massad

2882. Mr Massad is clearly a highly intelligent man, and he has enjoyed a successful business career. A number of witnesses, including Mr Kelly and Lord Fink, spoke very highly of him, including as to their perception of his integrity. He has, to date, had no blemishes in the course of a long business career: he is a person of good character. I note in passing that Mr Merville too is a person of good character, although there was in his case not the same degree of positive good character evidence from Man's witnesses.

2883. Mr Massad was well-prepared to give evidence, as indeed were all of Man's witnesses. This is no criticism. Given the seriousness of the allegations made, it is natural and appropriate for witnesses to work hard prior to the difficult experience of being cross-

examined. He was articulate, and had a ready answer to the questions that he was asked. Superficially at least, his performance as a witness was polished and relatively assured, with a degree of charm. It is no surprise that he was very successful as a salesman. However, ultimately I did not buy the story, as to Mr El Ghazzi's involvement, that he was putting forward.

2884. I do not accept that his integrity was as complete as Man's evidence sought to suggest. The work carried out in the SMR process included consideration of the three "orphan" investors who were linked, at the request of Mr Massad, to Mr El Ghazzi. However, it was concluded that Mr El Ghazzi "did not actually have any relationship with any of these investors at any stage". This came to light as a result of Mr Williamson's work, in March 2012, in looking into Mr El Ghazzi's other clients, following Mr Waghorn's questions. On 25 March 2012, Mr Williamson wrote:

> "The following 3 accounts were at one stage linked to MEG. The history here is that they were all "Orphan" investors in 2006 (with about 200+ others in the general Middle East region). At that time, the steer from Man Compliance was that someone should be advising them and therefore they should (as long as they could meet the required criteria) be classified as MIME Clients. As part of the exercise, MIME wrote to all Orphan investors asking them to sign our Client Agreement if they could meet the required criteria to qualify as a Professional Client under the DFSA rules, which at the time required them to confirm they held at least US$1m in net assets. Many investors could not meet the criteria or did not respond. In which case, we wrote to all of them with the names of 2 or 3 signed Man intermediaries in their home country who they may wish to contact for advice and this was considered case closed. In the case of the 3 below, at the request of the then MIME CEO; Antoine Massad, they were linked to MEG in early 2007. We do not believe that MEG actually had any relationship with any of these investors at any stage."

2885. Mr Massad was cross-examined on this issue, and it was put to him that he had not acted honestly in linking these investors to Mr El Ghazzi. Mr Massad's response, when the point was first raised, involved avoiding giving direct answers to the question. In my view, Mr Massad understood what he was being asked about. At the time when he was first asked, the names of the investors had been blanked out. Mr Massad said that he could name one of them: Ms Al Dakheel had invested. However, Ms Al Dakheel had not been cross-examined on the basis that she knew Mr El Ghazzi because she had invested with him. He also referred to Mr Al Chehab, who was Mr El Ghazzi's boss at KIIC, and Sheikh Mubarak. This led to an order that the names should be unredacted. As was accepted in the closing submissions on behalf of Mr Massad, Mr El Ghazzi was not the intermediary for any of the investors whose names were thereby revealed. None of them worked for PIFSS, although it is possible that one of them was related to Amjad Sheikh who did work for PIFSS.

2886. Mr Matovu submitted that there was no foundation for the suggestion that, in relation to these investors, Mr Massad was dishonest. In a document responding to various points taken by PIFSS as to the credibility of the evidence of Mr Massad, Man

submitted that the Dubai Financial Services Authority ("DFSA") rule did not require the linked investors to be intermediated by the nominated intermediary – hence why compliance decided that the requirement was met by offering investors 2/3 names of intermediaries they could speak to. They submitted that there was no basis to say that any records were falsified, or rules broken: everything was done in accordance with advice from Compliance.

2887. I do not accept these submissions. Mr Williamson's email, summarising the position, indicates that all investors, who did not meet the criteria required by the DFSA rules, or did not respond, were written to with the names of 2-3 intermediaries "who they may wish to contact for advice". There is nothing to suggest that Mr El Ghazzi was one of the 2-3 identified. Investors therefore had a choice as to whether or not to have a relationship with those intermediaries. Nothing in Mr Williamson's email indicates that Man's compliance department told Mr Massad, expressly or impliedly, to identify any investors as intermediated by Mr El Ghazzi, when in fact the investors had not agreed to have a relationship with him. I cannot see that Man's compliance department would ever consider this appropriate, and Mr Williamson's report does not suggest that it did.

2888. These matters are relevant to an assessment of Mr Massad's credibility. To my mind, they do evidence a falsification of Man's internal records: identifying 3 investors as being intermediated by Mr El Ghazzi, when they had no such relationship. This casts doubt on Mr Massad's argument that he was (as Mr Matovu described him in closing) a "martinet" on compliance issues, and also upon the suggestion that he was a man of complete integrity.

2889. I also agree with Mr Norbury's submission that it is significant that the intermediary that Mr Massad chose, for these purposes, was Mr El Ghazzi. The Middle East office had many intermediaries, but the one that Mr Massad chose was Mr El Ghazzi. In my view, this is not a coincidence. He was a "pretend" intermediary for these 3 investors, and this supports a case that this too was the position in relation to PIFSS. It is not known whether Mr Massad spoke to Mr El Ghazzi to obtain his agreement to being identified as the intermediary for these 3 investors. If he did, and Mr El Ghazzi agreed, it shows the latter's willingness to go along with being an intermediary in name only. If he did not, then the obvious reason for not doing so was because Mr Massad knew that Mr El Ghazzi would not object if he found out that he had been identified as the intermediary for three investors, when he was no such thing.

2890. This is not the only matter which causes me to consider that Mr Massad is, on the key issues, not a reliable witness and that he has ascribed to Mr El Ghazzi an active intermediary role which he was not playing. His evidence in that regard is, in my view, inconsistent with the documentary picture, for reasons already given. His evidence – that Mr El Ghazzi continued to attend meetings at PIFSS' offices up until 2004 – involves a departure from his witness statement evidence that Mr El Ghazzi stopped attending meetings almost entirely by 1998/1999, and that Mr Massad did not want him to attend. If Mr El Ghazzi was attending meetings in the period up to 2004, then (as I conclude above) it would have been natural for Mr Massad to introduce him to Ms Al Dakheel. Mr Massad's reason as to why this never happened was, in my view, a lame excuse and unpersuasive. So too was his reason for never having referred to Mr El Ghazzi in the extensive correspondence with PIFSS.

2891. Another area where Mr Massad's evidence got into some trouble, in cross-examination, was in relation to his evidence in paragraph 211 of his witness statement, where he said that by "the time that the institutional relationship with PIFSS was strong, Man could probably have got rid of Mr El Ghazzi". He then explained, in his statement, that it was not part of Man's culture to do this. When asked about this in cross-examination, it was put to him that there really was no need for Mr El Ghazzi at all. Mr Massad did not seem to disagree with this – which in my view would simply reflect his statement that they could have got rid of Mr El Ghazzi. Mr Massad's response was:

> "I need to explain this, if I may. This was my personal view, this was not the company policy, and I was reminded that it's not company policy to terminate intermediary agreements once they've done all the work, the hard work, and assisted Man in establishing a strong relationship with the investor."

2892. He then said that there was a written policy to that effect. In fact, no such written policy has been disclosed by Man. More significantly, however, Mr Massad was then referred to the MIAG "Money Laundering Deterrence Procedures" for the Middle East office in Dubai. This identified a number of matters that could give rise to suspicion of money laundering. These included:

> "An intermediary is involved and there appears to be no real need for him."

I note in passing that Mr Kidney described such a case as being a red flag for corruption, albeit that it would be necessary to consider all the information available before reaching a conclusion that this was suspicious.

2893. After being shown the written policy, Mr Massad sought to distance himself from his earlier answer, where he had not disagreed with the proposition that there was no need for Mr El Ghazzi. He said that he had not said that there was no need to have him, that his view that they could have got rid of him was a view born of arrogance, and that he wanted to demonstrate that he was a salesman doing his job. This attempt to distance himself from his earlier answer was unconvincing. In my view, Mr Massad knew that, in terms of bona fide intermediary work, there was no need for Mr El Ghazzi and Man could have got rid of him. His importance was that he was the person assisting to channel money secretly to Mr Al Rajaan.

2894. Another area where Mr Massad's evidence was unsatisfactory concerned the circumstances in which Mr El Ghazzi's letter, requesting payment to Ozak, came to be written. The letter was in the same format as a letter sent to Mr Al Rajaan at around the same time. It concluded in the same way as other communications sent by or on behalf of Mr Massad at that time: "Kind regards. Yours sincerely,". Mr Massad, when confronted with the evidence that he must have participated in the drafting of the letter, suggested that Mr El Ghazzi may have used a Man template which had been sent to him. This is most improbable. It is most unlikely that any such template would have been sent as an attachment to an e-mail, since there is nothing to suggest that Mr El Ghazzi was using e-mail at this time. Whilst the template could have been given on, for example, a floppy disk, which were still widely used at that time, it is fanciful to suppose that this would have happened. I bear in mind this letter was written many years ago, and Mr Massad could not ordinarily be expected to have a recollection of

how particular letters were written. However, it seemed to me that Mr Massad, in his evidence, sought unrealistically to distance himself from documents which pointed to his involvement.

2895. Overall, therefore, I did not consider Mr Massad to be a reliable witness on the key issues. His evidence does not therefore cause me to re-evaluate my assessment of Mr Merville's evidence, and the latter's knowing participation in the corrupt scheme. I consider that Mr Massad was also a knowing participant. I shall address the position of Mr Moeller separately below, but turn to two other topics before doing so.

M13: Other aspects of the picture which confirm participation in corruption

2896. The conclusions which I have reached are in my view reinforced by other aspects of the overall picture, discussed below, which would have been apparent to Mr Massad and Mr Merville. Each of these aspects, if viewed in the abstract and in the absence of the matters described above, would not – whether viewed individually or collectively – in themselves have provided sufficiently cogent evidence of their participation in corruption. However, when viewed in the light of the overall evidence, they reinforce my conclusion as to the participation by both men in corruption. These were described by PIFSS as unusual features of the Man/PIFSS/El Ghazzi relationship.

2897. I agree with PIFSS that Mr El Ghazzi was very much an outlier, as an intermediary, in terms of both his success and his client base. He was one of Man's most successful intermediaries, both in the Middle East and globally. Man's internal documents show him as the largest intermediary in the Middle East by November 2004, and he was in the top 3 globally by December 2006. By February 2012, he was the second largest intermediary globally, with AUM (assets under management) of almost USD 871 million.

2898. Mr El Ghazzi achieved his extraordinary success with no apparent office infrastructure. He operated from a personal gmail.com account when, eventually, he opened an e-mail account (in 2005). His success was almost exclusively based on PIFSS' investments. KFAED had been a client in the early years, but from around 2004 had established an institutional relationship with Man and was no longer investing via Mr El Ghazzi.

2899. Other intermediaries in the Middle East had significantly less AUM, and significantly more clients. There was no example of an intermediary with a similar profile to Mr El Ghazzi, with a single client giving rise to such a large AUM. Most of the other intermediaries, who were at or approaching, the same level as Mr El Ghazzi, were financial institutions or independent financial advisers with hundreds or thousands of clients.

2900. The increases in Mr El Ghazzi's remuneration are also notable. He received increased remuneration in both 2004 and 2006, long after – even applying Mr Massad's approach – he had become a non-executive intermediary. A number of Man witnesses accepted that his rates of remuneration, as they developed, were exceptional, or in Mr Dackombe's words "quite staggering".

2901. Efforts were also made, both by Mr Massad and Mr Merville, to ensure that Mr El Ghazzi was paid ahead of other intermediaries. Although not paid earlier than his contractual entitlement, only Mr El Ghazzi and two financial institutions were

identified for early payment. Mr El Ghazzi was not, however, running a substantial business which required prompt cash flow. There was evidence from Mr Massad that he provided support for a large number of relatives. This, however, would not result in a pressing need for prompt payment of many millions of dollars. PIFSS submitted, and I agree, that the reason for early payment was to ensure timely retrocession of payments to Mr Al Rajaan.

2902. There was much evidence and argument devoted to the topic of whether PIFSS' investment profile made PIFSS an outlier. PIFSS' original case was that the capital guaranteed structured products were unsuitable investments for a financial institution such as PIFSS, but rather were retail products aimed at smaller investors including high net worth individuals. That case was ultimately not pursued, since the evidence indicated that such products did appeal to some financial institutions. However, the scale of PIFSS' investments in these products, which were expensive in terms of fees and generated the highest margins for Man, was unusual. In February 2003, Mr Massad described PIFSS as "one of the largest investors and by far the largest investor in MIP Guaranteed Funds". PIFSS usually held a substantial percentage share of each fund. For 24 of the 35 claim products (i.e. those which generated commissions for Mr El Ghazzi and Mr Al Rajaan) PIFSS held more than 30% of the fund, and for 31 products it held more than 20% of the fund. On the expert evidence, such large holdings are unusual, because they give rise to a concentration risk which would potentially threaten the viability of the fund if PIFSS' investment were redeemed.

2903. The pattern of PIFSS' investments was, on the evidence, also unusual. Institutional investors might start with hedge fund investments in structured products, but would then generally move to more direct investments. PIFSS did not do so, but continued as a heavy investor in structured products even after the 2008 Global Financial Crisis. Although, as Mr Ellis explained, late 2010 and 2011 were the nadir of the structured products market, PIFSS continued to invest in such products at that time. Internal messages of some Man staff recognised the surprising nature of what was happening. One referred to PIFSS as the "big ticket saviour", and another as the "middle eastern sized rabbit".

2904. It is also clear that Mr Massad sought to exercise tight control over communications with PIFSS and Mr El Ghazzi. As previously discussed, he sought to prohibit any direct communication between anyone in Switzerland and PIFSS, requiring that all communications be sent to him. The Man internal instruction for Mr El Ghazzi was: no phone calls or faxes to Mr El Ghazzi, with all mail to be forwarded to Mr Massad. Although Man could point to examples of some other intermediaries who were dealt with in this way, this clearly was not routine for intermediaries.

M14: Man's arguments, including contra-indicators

2905. Man and Mr Massad relied upon various matters as pointing, decisively in their submission, away from participation in corruption. These included various points as to the inherent probabilities, but also what they alleged to be contra-indicators of participation in corruption. There was overlap between these lines of argument.

Motive

2906. On behalf of Mr Massad, Mr Matovu emphasised the importance of identifying a motive for participation in corruption. He pointed out, correctly, that there was no evidence of Mr Massad himself receiving any monies from Mr Al Rajaan or Mr El Ghazzi. However, that does not mean that Mr Massad did not have a motive to participate. There were in my view strong, or at least ample, potential motivations for participation.

2907. Mr Massad's principal form of remuneration was in the form of commissions or bonuses, rather than simply salary. By way of example, Mr Massad's salary in 2004 was USD 225,000, whilst his sales commission was USD 1.081 million and his performance related bonus was around USD 380,000. He could typically expect to receive up to 0.39% of the value of each of PIFSS' investments as a cash bonus upon the sale of a structured product. PIFSS calculated that, during the course of his employment and consultancy, he received at least USD 4.5 million in respect of PIFSS' investments. I did not understand any of these figures to be disputed.

2908. In addition to these direct financial benefits, Mr Massad was motivated to achieve results for the Middle East office as a whole, thereby proving his worth to Man and enhancing his reputation and status. An individual in his position may also be attracted, and I consider that Mr Massad was attracted, towards powerful and influential figures. Mr Al Rajaan was such a figure, in his heyday during Mr Massad's tenure. If a connection can be established with such figures, this could well assist someone in Mr Massad's position, not only in terms of producing results for the Man Middle East office which he ran, enabling his career to progress in different ways, but also serving as a basis for future business opportunities. Thus, after Mr Massad left Man, and was looking to join UBP, he turned to Mr Al Rajaan for a reference. He maintained contact with Mr Al Rajaan for a number of years after Mr Massad had left Man, and the contact included discussion of possible business opportunities.

2909. Mr Matovu said that these motivations were insufficient, because all individuals in a similar position to Mr Massad would potentially be similarly motivated. I do not accept that argument. All of these matters remain important potential motives for a person in Mr Massad's position to participate in corruption, but of course it does not follow that Mr Massad yielded to these potential motives.

2910. As far as Mr Merville was concerned, he too would have been potentially motivated by similar considerations. PIFSS calculated that he received around USD 3 million, in commissions and bonuses, referable to PIFSS' investments.

Dangers of yielding to temptation

2911. It was submitted that it was inherently improbable that either Mr Massad, or Mr Merville, would, even if motivated to do so, have yielded to temptation, bearing in mind the enormous risks of doing so, including possible imprisonment and loss of reputation. I agree that this is a point to be taken into account, alongside the evidence as to the good character of both individuals.

2912. Equally, I must take into account the fact that, as was in my view clear on the evidence, Mr Massad was an ambitious young man in the early 1990s. He had only been at Man for around 2 years when Mr Kelly left, and he was disappointed not to be offered Mr

Kelly's position. He was someone who wanted to be successful, and wanted his success recognised.

2913. I do not think that there is anything, in the evidence that I have heard, that indicates that either Mr Massad or Mr Merville were not the type of people to yield to temptation. In my view, when looking at the evidence as a whole, that is what they did. It is true that there were risks attached to involvement in corruption. However, as with any criminal activity, a participant may assess the rewards as sufficiently great, and the risk of detection as sufficiently low, to warrant participation, particularly if tight control was maintained (as it was by Mr Massad) on the information flow to PIFSS.

2914. That was in my view the calculus by Mr Massad here, and his assessment was correct. It was very many years after the start of Mr Al Rajaan's corruption, in relation to the Man investments, that the scheme was detected. It was fortuitous that it was, because the original Kuwaiti request to Switzerland for Mutual Legal Assistance was not directed towards Banque Mirabaud, where Mr El Ghazzi held the account that was used for most of the payments.

2915. When Mr Merville took over, he no doubt also considered that the risk of detection was low, in circumstances where the corruption had been running smoothly and undetected for many years. The fact that all was running smoothly also explains why Mr Merville appears to have taken a "light touch" to the relationship with Mr El Ghazzi, and why his approach seems to have been more relaxed than that of Mr Massad. I also have the strong impression that he was not as smart, careful and switched-on as Mr Massad.

Improbability of involving Mr Massad

2916. Much emphasis was placed on an argument that it was inherently improbable that Mr Al Rajaan and Mr El Ghazzi would have wanted to involve anyone else in their scheme. Man and Mr Massad relied upon the fact that there was, as PIFSS accepted, a genuine intermediary agreement between Man and Mr El Ghazzi. They submitted that this provided the perfect cover for the flow of what would appear to be legitimate commissions to Mr El Ghazzi. Given the existence of the cover, there was no need to involve Mr Massad. Furthermore, Mr Massad was not a friend of either Mr Al Rajaan or Mr El Ghazzi, certainly at the start, and did not move in the circles in which they moved, which included Kuwaiti royalty. They would not have risked involving the young and inexperienced Mr Massad in their scheme.

2917. This argument involves consideration of the modus operandi of Mr Al Rajaan, who was the principal beneficiary of the scheme, and drawing conclusions as to how he would want the scheme to run. This trial has meant that I have had considerable evidence, relating to different schemes, as to how Mr Al Rajaan wanted things to run. It is certainly the case that Mr Al Rajaan liked and wanted secrecy, but it does not follow that his approach would have been to keep things secret from Mr Massad. On the contrary, Mr Al Rajaan liked intermediaries who were, as far as possible, invisible to others at PIFSS, or whose visibility was very limited. He also liked insiders. The insiders included, in relation to the various schemes, as discussed elsewhere in this judgment, the Ruimy brothers (Aerium), Mr Guerin of EFG, Mr Chalopin (Pensée), Mr Pierre Mirabaud (Mirabaud) and Mr Bertherat and Mr Amouzegar (Pictet).

2918. Thus, the Aerium scheme involved Mr Amouzegar and Mr Khosrovani. Neither of their names appeared in the relevant correspondence with PIFSS. There is no evidence that either of them ever visited PIFSS' offices in connection with the various funds for which they received commissions, which were then substantially channelled to Mr Al Rajaan. In that scheme, as I conclude elsewhere, Mr Al Rajaan dealt with insiders, Mr Ely Michel Ruimy and Mr Franck Ruimy. Similarly, although Mr Nasrallah was not wholly invisible, in that his name appears on a handful of documents, he was invisible in relation to most of PIFSS' investments. Similarly, Mr Mombelli – who did have a business operating as an intermediary – was not visible in relation to very many investments. He only visited PIFSS' offices once, at an early stage of his dealings with Mr Al Rajaan. Mr Al Qattan, involved in the Mirabaud Scheme, was another intermediary who was not visible to PIFSS.

2919. Of those in the above list who were intermediaries, and leaving aside Mr Al Qattan as to whom there is no evidence: none of them lived in Kuwait. So to that extent, Mr El Ghazzi was in a different position. However, he went to Beirut by no later than 2001, and Mr Massad's written evidence suggests that it was some time earlier than that. He was, therefore, for most of the years in which the scheme was operating, not resident in Kuwait. The evidence that he regularly visited Kuwait thereafter is the pleaded position of Mr El Ghazzi (whom Man accepts is an unreliable witness and dishonest man), and Mr Massad (whose evidence on material issues I have not accepted). It is not independently corroborated.

2920. The reason that Mr Al Rajaan liked to involve others does not really matter. The important point is that he did so. The reason that he did so is, in my view, that he thought that this would make things run more smoothly, with fewer questions being asked internally by the organisations with which he was dealing, with an insider available to deal with any questions that did arise. Thus, if Mr Massad had not known about the scheme, he would quickly have asked himself (and perhaps others in Man): "why are we still dealing with Mr El Ghazzi, when he appears to be doing nothing, and I am doing all the work"? That might in turn have led to awkward questions internally, and then questions being directed to PIFSS.

2921. Mr Massad's youth and alleged naïveté are not, in my view, significant factors or contra-indicators of participation in corruption. A clever young man who is determined to get ahead may take risks that a more experienced person would not. Mr Massad described himself as arrogant, in the context of being able to get rid of Mr El Ghazzi when the relationship between Man and PIFSS was strong. Arrogance would also potentially contribute to a man taking risks which others might not. No doubt Mr Al Rajaan would have wanted to be satisfied that Mr Massad could be trusted. He would have been able to form that view as a result of meeting him over the 3 years before any investments were made, and no doubt also as a result of Mr El Ghazzi's views.

2922. I was not therefore persuaded about this "improbability" argument. Furthermore, there was evidence in the case – in various contexts – that Mr Al Rajaan was not always discreet with investment managers and others when it came to the need to pay him, if they wanted investment. As discussed in Section N, Mr Mombelli's evidence was that he was told at the start, by Mr Al Rajaan, that he would need to be paid. Mr Al Rajaan grew angry when he was told that others were looking for payment in relation to the introduction to Mr Mombelli. Mr Mombelli himself indicated that various fund managers knew full well about the need to pay Mr Al Rajaan. Mr Al-Othman's evidence

was that he learnt that various fund managers were not permitted, by their compliance departments, to deal with PIFSS, because of the understood need to pay bribes.

Improbability of Mr Merville being brought in

2923. It was submitted that it was inherently improbable that Mr Massad would involve, or take the risk of involving, Mr Merville in corruption, and that this leads to the conclusion that neither of them were so involved. I disagree. The evidence indicates that Mr Merville did indeed become involved: see in particular Sections M10 and M11 above. It is not contrary to the inherent probabilities that this would have happened.

2924. I accept that Mr Massad would be less personally motivated, after leaving Man, for the scheme to continue, since he would no longer financially benefit from it. However, both Mr Al Rajaan and Mr El Ghazzi would have been looking to Mr Massad to ensure that it continued, and this naturally would mean involving his successor. Mr Massad would remain motivated to assist, because he would also be looking to the future and the possibility that the relationship with Mr Al Rajaan would be useful to him in his future career.

2925. Another motivation for Mr Massad arose from the relationship and trust which had developed over the years between the three men. As far as Mr El Ghazzi is concerned: at the time of the handover, Mr Conchon referred (in an e-mail to Man's Swiss office) to the trust which had developed between Mr Massad and Mr El Ghazzi. Mr Massad described, in his witness statement, having dinner on a number of occasions at Mr El Ghazzi's apartment, where Mr El Ghazzi would cook. Subsequent to his departure from Man, the documents indicate that Mr Massad maintained contact with Mr El Ghazzi. The latter turned to Mr Massad for advice on the terms of the consultancy agreement that Mr Dackombe was proposing in 2013. As far as Mr Al Rajaan is concerned: Mr Massad put him forward to UBP as a person from whom a reference could be obtained. The documents also show Mr Massad maintaining contact with Mr Al Rajaan in the years following his departure from Man. That contact included meeting on a number of occasions in 2015, by which time the net had closed on Mr Al Rajaan in consequence of the production of documents pursuant to the MLA request, and Wafra had been tasked with asking questions of fund managers.

2926. Accordingly, my finding that Mr Merville was brought into the circle of corruption is not contrary to the inherent probabilities.

Documentary evidence

2927. Mr Smouha placed considerable reliance on the fact that the conspiracy was alleged to have lasted for very many years, but no conspirator let slip the fact that it was ongoing by making any reference to it in the large volume of documents disclosed by Man in these proceedings. In my view, however, the point is not persuasive, particularly when viewed in the context of all the evidence in the case.

2928. On the basis of my findings, there were two conspirators on the Man side: Mr Massad and then Mr Merville. (For reasons explained below, I do not consider that there is cogent evidence that Mr Moeller was party). The nature of the corrupt conspiracy is such that one would not have expected Mr Massad or Mr Merville to be overtly discussing it in e-mails. Mr Massad is a clever man, and he would have appreciated the

need to avoid any direct reference to what was happening. As discussed above, he kept a tight rein on the document flow to PIFSS. Mr Merville was only brought into the circle at the time when he took over and Mr Massad was leaving. There is no significant e-mail correspondence between Mr Massad and Mr Merville. Both men were supposed to record entries in ManEdge (or its predecessor) as to their contacts with PIFSS and indeed Mr El Ghazzi. They generally did not do so, save for the very small number of entries made by Mr Massad to which I have referred. Against this background, the absence of any express documentary reference to the corruption is not surprising.

2929. Furthermore, as previously discussed, there is no documentary footprint of Mr El Ghazzi actually performing any genuine work as an intermediary. That is because, in my view, one important aspect of the corruption was that Mr El Ghazzi was not to be visible to others in PIFSS, which was the way in which Mr Al Rajaan would have wanted it. Care was taken to avoid reference to Mr El Ghazzi, and so it is for this further reason unsurprising that neither Mr Massad nor Mr Merville let slip, in the documents, that there was ongoing corruption. In my view, both Mr Massad and Mr Merville did leave an important documentary trail, but it was not a trail which contained express reference to the ongoing corruption. Rather, it was a trail whose significance is the absence of any evidence as to genuine intermediary work being performed by Mr El Ghazzi.

2930. No doubt neither Mr Massad or Mr Merville, nor indeed Mr Al Rajaan or Mr El Ghazzi, would ever have thought that this documentary trail would come under scrutiny in the way that it has during the present trial. Had they done so, a greater effort might have been made to portray Mr El Ghazzi as actually doing something. But this was not the way in which this corruption worked, and it was not the way in which Mr Massad or Mr Merville were thinking about things.

Alleged knowledge/lack of knowledge of others at PIFSS

2931. Man relied upon the evidence of Mr Massad, and to some extent Mr Kelly, to demonstrate that Mr El Ghazzi's role as an intermediary for Man was known to others at PIFSS. Man's case was that this was known to Sheikh Abdullah, Mr Al-Muraikhi and Amjad Sheikh. Man invited me to draw an adverse inference against PIFSS for their failure to call these witnesses to establish their alleged lack of knowledge, and therefore to infer that they did know about his role. PIFSS submitted that there was no reliable evidence that any of them did know about Mr El Ghazzi's role, and that it was not appropriate to draw any adverse inference from the fact that they had not been called.

2932. In considering the question of adverse inferences, I apply the approach set out by Lord Leggatt in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, at [41].

2933. My starting point is, again, to approach this issue – as to whether anyone at PIFSS apart from Mr Al Rajaan knew about Mr El Ghazzi's role – by considering the objective evidence and the inherent probabilities.

2934. The documentary evidence of the correspondence and dealings between Man and PIFSS, which I have already addressed in detail, contains no reference to Mr El Ghazzi. That correspondence includes documents sent by Mr Al-Muraikhi to Mr Massad, for example when subscriptions were being made, but none of that correspondence was

cc'd to Mr El Ghazzi, as might be expected if Mr El Ghazzi was known to Mr Al-Muraikhi as Man's active intermediary.

2935. The objective evidence also includes the fact that Ms Al Dakheel was positively unaware of Mr El Ghazzi. Since she was an increasingly important person at PIFSS as time went on, including in relation to the Man investments, it is improbable that others would have known, but she would not. That point applies with particular force to Mr Al-Muraikhi, whom Ms Al Dakheel succeeded as manager of the Direct Investment Department at PIFSS. It is difficult to see why Ms Al Dakheel would not know about Mr El Ghazzi, but her predecessor – whom Mr Massad clearly regarded as less important – would know. It would also be reasonably expected that if others knew, they would mention it to Ms Al Dakheel, if only in passing.

2936. A significant aspect of the objective evidence is, in my view, Mr El Ghazzi's response to a request by PIFSS for further information of his defence. Mr El Ghazzi had pleaded, without particularisation, that his role was known to others at PIFSS. He was asked: who else knew? His response was:

> "Mr El Ghazzi's role was known to at least Mr Al Rajaan. Mr El Ghazzi is unable to identify other individuals at the Claimant who may have been informed of his role by Mr Al Rajaan, the Man Group and/or others, or who otherwise became aware of it."

2937. Accordingly, Mr El Ghazzi was unable to name any other individuals who knew about his role. This was, in my view, because no-one else did know. It is true that Mr El Ghazzi is a dishonest man, and the essence of his defence is untrue and indeed absurd: i.e. that he was passing money to Mr Al Rajaan to make investments on Mr El Ghazzi's behalf. However, it does not follow that Mr El Ghazzi was not telling the truth when he said that he was unable to identify others. Since it was part of his pleaded case that others did know, he had every reason to identify anyone that fell into that category.

2938. Mr Smouha advanced an inventive possible explanation for Mr El Ghazzi's answer: in summary, that Mr El Ghazzi did know who else knew about his role, but was keeping quiet about it at that stage, perhaps intending to use the threat of exposing others as leverage in possible future settlement discussions. I regard this as unrealistic. Since it was part of Mr El Ghazzi's defence (signed by leading and junior counsel) that others knew, it was in his interests to identify those individuals. It is counter-intuitive to imagine that he would have said that he did not know their names, with a plan later to reveal their names – not least because a change of case in that regard would not be credible.

2939. Furthermore, there is other evidence which indicates that the only person that Mr El Ghazzi knew was Mr Al Rajaan. Thus, when Mr Dackombe met Mr El Ghazzi in 2013, the only person that Mr El Ghazzi identified as his contact was Mr Al Rajaan. Mr Merville was unable to name any other individuals who were known to Mr El Ghazzi, whilst being clear that Mr El Ghazzi did not know Ms Al Dakheel.

2940. There is therefore, in my view, a substantial weight of objective evidence which indicates that Mr El Ghazzi's role as intermediary was not known to others at PIFSS. It is also inherently improbable that his role was known, given my other findings above: in particular, that Mr El Ghazzi was not attending meetings, and that he existed only in

the shadows. Against this background, I do not consider that it would be appropriate to draw an adverse inference, from PIFSS' failure to call witnesses to give evidence that his role as Man's intermediary was unknown to them.

2941. There are other reasons why the drawing of an adverse inference would be inappropriate. PIFSS served a request for further information, relating to allegations in Man's defence concerning the work allegedly carried out by Mr El Ghazzi. Although the response says that Mr El Ghazzi's work included arranging for meetings between Mr Massad and Amjad Sheikh and Mr Al-Muraikhi, neither of them were positively identified as individuals who knew about Mr El Ghazzi's role. In response to the question about who knew, Sheikh Abdullah was the only individual who was (to use Mr Smouha's expression) name-checked.

2942. However, the documentary record does not show any significant involvement of Sheikh Abdullah in making decisions on whether or not to purchase Man's products. The key decision-maker was Mr Al Rajaan, and I accept Ms Al Dakheel's evidence to that effect. Mr Merville's statement does not even refer to Sheikh Abdullah, and there is no positive evidence that Mr Merville ever met him. Sheikh Abdullah was belatedly invited to meet Mr Merville at the time of the visit of Mr Merville and Mr Massad to PIFSS in October 2008, at the time of the handover. This invitation was only sent on the day before the visit, and there is no evidence from Mr Merville that he met Sheikh Abdullah on that, or any other, occasion. There is also nothing in the documents which indicates that Sheikh Abdullah knew about Mr El Ghazzi's role.

2943. In any event, it would not be appropriate to draw an adverse inference from the failure to call Sheikh Abdullah. There was evidence from Mr Bhaskaran (the solicitor at Stewarts with overall conduct of PIFSS' case), as well as evidence from Mr Nasrallah, as to Sheikh Abdullah's ill-health. It is not necessary for me to reveal details, but they provide a good reason why he had not been called.

2944. Contrary to Mr Smouha's argument, I do not think that any adverse inference is appropriate in consequence of the fact that PIFSS did not obtain a statement from Sheikh Abdullah, in relation to Man's case of knowledge of Mr El Ghazzi's role, prior to Sheikh Abdullah's ill-health intervening. Adverse inferences arise when a party has failed to call a witness, not because a statement was not obtained when it now seems desirable, with the benefit of knowing Sheikh Abdullah's indisposition.

2945. As far as concerns Mr Al-Muraikhi and Mr Amjad Sheikh: both individuals left PIFSS many years ago, and I do not consider that it would be appropriate to draw an adverse inference from the fact that they have not been called as witnesses.

2946. As to the positive evidence called by Man as to the knowledge of others at PIFSS: I have already addressed Mr Kelly's evidence (see section M2 above), and I do not consider that this proves that any particular individual knew of Mr El Ghazzi's role. The case of knowledge therefore rests on the evidence of Mr Massad, uncorroborated by other documents or other independent evidence. Since I do not consider Mr Massad to be a reliable witness, I do not accept that evidence. I consider that the weight of evidence as a whole, including Mr El Ghazzi's statements to which I have referred, shows that others at PIFSS did not know about that role.

The 3-year delay in PIFSS making the first investment and related matters

2947. It was submitted that there were features which existed at the start of the relationship which were contra-indicators of Mr Massad's participation in corruption. Reliance was placed upon: the fact that PIFSS accepted that the Intermediary Agreement was, when it was concluded in 1993, a genuine agreement; the gap of three years before any investments were made by PIFSS in Man products; and the fact that the first evidence of sharing of commissions was around 18 months later, when payment was made to Ozak, thereby indicating that it was only some way into the Man investment story that Mr Al Rajaan and Mr El Ghazzi decided that payments would be made to Mr Al Rajaan.

2948. I did not consider that any of these points were powerful. It is far more significant, in my view, to look at the relationship as a whole, and the features which I have identified as providing cogent evidence of the participation of Mr Massad and Mr Merville in corruption.

2949. It is accepted by PIFSS that there was a genuine Intermediary Agreement at the start. However, that does not mean that it was not used, some 3 years later, to the knowledge of Mr Massad, as a convenient vehicle for corrupt payments to Mr Al Rajaan.

2950. Nor does the 3-year gap point, or point strongly, in the direction for which Man contends. That gap is explicable by the fact that Mr Massad did not have an attractive product to sell. There was evidence in the case, for example from Mr Mombelli, that Mr Al Rajaan wanted PIFSS' investments to do well, and that he was not solely motivated by the desire to receive corrupt payments. A particular reason why Mr Al Rajaan would want investments to do well, leaving aside that it was his job to try to achieve that, was to avoid any criticism which would arise if substantial losses were suffered. When the IP-220 product was made available in 1996, it was something which suited all of Mr Al Rajaan's purposes. It was the product of a reputable institution; the capital guarantee meant that it could never be loss-making, and it involved very high fees taken by Man, thereby facilitating large payments to Mr El Ghazzi and thence to Mr Al Rajaan. The 3-year gap does not mean that, as and when investments started to be made, Mr Massad did not understand perfectly well that monies were going to go to Mr Al Rajaan.

2951. It is true that the first payment to Mr Al Rajaan, of which there is clear evidence, is the Ozak payment in April 1998. Since neither Mr Al Rajaan nor Mr El Ghazzi have given evidence, and since Mr Massad has denied any knowledge of corruption, it has not been possible to explore why it was that there is no evidence of payment to Mr Al Rajaan prior to April 1998.

2952. However, this fact says very little, if anything, about when and how the corruption started, not least because there are so many uncertainties. It is very common, in conspiracy cases, that the evidence about how the conspiracy started is unclear. In the present case, it is not clear whether the Ozak payment was in fact the first payment to Mr Al Rajaan. Mr El Ghazzi withdrew from the present proceedings prior to disclosure, and there has therefore never been disclosure of documents from the Lebanese account to which the payments to Mr El Ghazzi were initially made. It is possible that there were other payments to Mr Al Rajaan prior to the Ozak payment. It is also unclear as to why Mr El Ghazzi was paying to Mr Al Rajaan his commission on business placed with KFAED. PIFSS has inferred, from the size of the Ozak payment, that this represented Mr Al Rajaan's share of commissions payable to Mr El Ghazzi for MF1 – MF3. However, this too involves making assumptions; e.g. as to the size of Mr Al

Rajaan's agreed share at that time, and that no payments had previously been made. I do not consider that the timing of this payment is a pointer against Mr Massad's participation in corruption. Given the uncertainties, it is in my view at best (from Man's perspective) a neutral factor. More significant, in my view, is that Mr Massad was involved in the preparation of the letter, signed by Mr El Ghazzi, requesting payment to Ozak. I have addressed this point above.

2953. More generally, I consider it unlikely that Mr Al Rajaan would have embarked on the process of investing in Man products without having made it clear to Mr El Ghazzi that he would want to receive a substantial share of the commissions payable by Man. Man submitted, correctly, that Mr El Ghazzi is a dishonest man. It is improbable that Mr El Ghazzi, who had known Mr Al Rajaan for many years by 1996, started the PIFSS investment relationship with Man honestly, but only later became involved in corruption. That, certainly, was not the case which he advanced in his defence.

2954. It was also submitted that Mr Massad's knowledge of the Ozak payment is a contra-indicator of participation in corruption. This was because if Mr Massad had known that the money was going to Mr Al Rajaan, he would not have been so foolish as to assist in payment being made to Ozak, an Al Rajaan vehicle. I do not consider that this is a contra-indicator of participation. Mr El Ghazzi was a participant in corruption, and yet he was clearly involved in arranging for the Ozak payment. It clearly did not occur to him, at that stage, that this was problematic, in terms of potentially indicating corruption. If he did not spot that it might be problematic, then it is likely that Mr Massad also did not spot the possible difficulty. Furthermore, Ozak was a company which could not readily be associated with Mr Al Rajaan. It was a company which appeared to be owned by Mr Nasrallah, as discussed in Section J.

The compliance system and culture

2955. Reliance was placed by Man and Mr Massad on the compliance system and culture within Man. I do not consider that this is a significant point. There was evidence that in the 1990s, the compliance systems at Man were far less developed than they later became. I do not consider that the existence of these systems would, at any stage, have operated as a significant deterrent either to Mr Massad or Mr Merville. It is not as though their work in the Middle East was under constant scrutiny or surveillance from compliance in Switzerland or London.

2956. It clearly cannot be said that the corruption on the part of Mr El Ghazzi would have been identified by compliance if it had existed. It did exist, and compliance did not identify it, even after the best part of a year's work on enhanced due diligence and the SMR in relation to Mr El Ghazzi in 2011/2012. It is therefore unrealistic to suggest that compliance would have identified the participation of Mr Massad and Mr Merville in that corruption, if it was taking place. To do so would in my view have required close scrutiny and understanding, as has been required during the course of the present trial, of what Mr El Ghazzi was – or was not – doing on the ground. It was not the role of compliance to investigate matters of that kind. Although the SMR process did involve looking at this issue, it was not in the nature of an investigation as Mr Kidney was at pains to emphasise.

Investments not made/reducing redemption fees

2957. Reliance was placed on the fact that Mr Al Rajaan did not cause PIFSS to invest in certain Man products proposed to him. There are many reasons why this may have happened. There may have been other investments which attracted Mr Al Rajaan at the time. He may not have been happy with performance at a particular point in time. He may have decided that PIFSS had enough money invested in Man's products. The evidence indicated that Mr Al Rajaan did not invest simply on the basis of maximising his own secret commissions. Thus, for example, investments were made in RMF products, and there is no evidence that secret commissions were paid in relation to those investments. The evidence, such as that given by Mr Mombelli, indicated that Mr Al Rajaan did pay some regard to what he perceived to be the interests of PIFSS and its investment needs.

2958. I do not accept that it is a strong contra-indicator of complicity in corruption that, as Mr Massad and Mr Merville could see, Mr Al Rajaan did not always cause PIFSS to invest in Man products proposed to him, and thus did not always seek to maximise the payments that he received. This only signified, and would be perceived as signifying, that he was not attracted to a certain product at a particular point in time, and that he was not purely motivated by self-interest.

2959. For similar reasons, I do not accept that it is significant that, on some occasions Mr Al Rajaan required Man to waive or reduce redemption fees. The effect of doing so, in practical terms was to reduce Mr El Ghazzi's FEL on investments into which PIFSS was switching, and thereby the monies being paid to Mr Al Rajaan. In his oral closing submissions, Mr Collins drew attention to two occasions, in 2006 and 2009, where this happened. The e-mail string concerning the 2006 occasion includes an email where Mr Massad indicates that it was something that he had agreed – no doubt with Mr Al Rajaan. The 2009 occasion relates to the 2008 rebalancing exercise, to which Mr Al Rajaan had agreed. I do not regard this as a contra-indicator, still less a strong contra-indicator, of complicity in corruption. The evidence indicates that Mr Al Rajaan was from time to time concerned about PIFSS not paying redemption fees. He could no doubt see that it was not in PIFSS' interests to do so, and decided to act so as to benefit PIFSS. It is also possible that he did not want scrutiny of transactions where significant redemption fees were payable alongside further investments being made. The fact that Mr Al Rajaan may not always have acted purely in his own self-interest clearly does not mean that he was not corrupt in relation to much of what he did. Nor is it a strong pointer against the complicity of others in his corruption.

Other points

2960. Reliance was placed upon the fact that Mr Massad had no involvement in the closure of Mr Al Rajaan's Swiss bank accounts in 2012. However, there is no reason why he would have been involved in that process.

2961. It was said that Mr Merville did not obstruct the removal of Mr El Ghazzi as intermediary by Mr Dackombe. He was not, however, in a position to obstruct it. He had been made redundant by Man and ceased to be employed in April 2013, working as a consultant until July 2013. The termination of Mr El Ghazzi was decided upon by Mr Dackombe after his meetings at the start of June 2013, but it was not until July 2013 that Mr Dackombe told Mr El Ghazzi that he was to be terminated.

2962. Ultimately, I did not consider that any of the matters relied upon by Man were powerful, and none of them (individually or collectively) were sufficiently powerful to dissuade me from the conclusions which I have reached as to the cogency of the evidence of participation in corruption by Mr Massad and Mr Merville.

M15: Mr Moeller

2963. I have hitherto concentrated on the position of Mr Massad and Mr Merville, who I am satisfied were participants in the corruption scheme. I now turn to the position of Mr Moeller. I can address his position more briefly, because I do not consider that there is sufficient cogent evidence of his participation in corruption.

2964. Mr Moeller could not see what was happening on the ground in Kuwait, but was dependent for his knowledge on what he was told by Mr Massad and Mr Merville. Mr Moeller had a wide range of worldwide responsibilities, with a particular focus on Man's clients in Japan, Germany and Switzerland; Kuwait was not top of his agenda. He went to Kuwait only rarely, and could recall meeting Mr El Ghazzi only twice, and Mr Al Rajaan once.

2965. Mr Moeller, for good personal reasons, gave evidence by video-link. He came across as a thoughtful and careful witness who was seeking to assist the court to the best of his recollection. He gave a number of answers, to which I have referred, which were contrary to Man's interests and were in my view more realistic than some of the evidence from other Man witnesses for example: that he would expect to see correspondence from the intermediary to the client; that he would expect Mr El Ghazzi to have been speaking to Ms Al Dakheel; that he believed that Mr El Ghazzi was doing so; and that the intermediary must actually bring about the investment in question, in order to be entitled to his commission. Overall, I considered that he was a reasonably straightforward witness, who dealt with each question on its merits and without automatically defaulting to answers supportive of Man's case.

2966. I think that it is improbable that either Mr Massad or Mr Merville would have sought to involve Mr Moeller in the corruption. It is difficult to see why they would have wanted or needed to do so, since there would potentially be severe repercussions for both individuals if Mr Moeller had been unwilling to play ball. I was also not persuaded that Mr Moeller had a significant motive for becoming involved. He was not seeking to cultivate a relationship with Mr Al Rajaan, and any impact of PIFSS' investments on his overall income would be marginal.

2967. I also think that there is, here, a significant contra-indicator of participation. Mr Moeller was the person who decided that Mr Massad should leave Man. Mr Massad's reaction to Mr Moeller's proposed termination payment was to complain at its insufficiency, and allege that he was being harassed and victimised by Mr Moeller. This would be a strange way for Mr Moeller to have treated a co-conspirator.

2968. An important part of my reasoning as to why Mr Massad and Mr Merville were aware of the corruption was that Mr El Ghazzi was not doing, and could be seen by them not to be doing, any genuine intermediary work. However, I do not consider that this was visible to Mr Moeller. I accept his evidence that he understood, based on what he was told by Mr Massad and Mr Merville, that Mr El Ghazzi was indeed doing valuable intermediary work. Indeed, in another frank answer, Mr Moeller said that Mr Merville's

first statements in the SMR process (i.e. what he told Mr Waghorn on 1 February 2012) contradicted what he had previously been told and therefore understood. I have decided, however, that Mr Merville's initial statement to Mr Waghorn did reflect the reality.

2969. Recognising the difficulty arising from the absence of cogent evidence and the inherent improbability that Mr Moeller was told of the corruption by Mr Massad or Mr Merville, the principal way in which Mr Norbury put the case was that Mr Moeller worked it out for himself. I do not accept that he did. The case that he did so was based on various factors from which Mr Moeller would have drawn the inference that there was corruption, including factors considered in Section M13 above: for example, Mr El Ghazzi's being an outlier in terms of Man's intermediaries; and PIFSS being an outlier in terms of the investments that it was making. However, whilst those points reinforce the conclusion that there was participation by Mr Massad and Mr Merville in corruption, when viewed in the context of other facts known to Mr Massad and Mr Merville, I do not consider that they form a sound basis for concluding that Mr Moeller (who did not know what was actually happening on the ground) worked out for himself that there was corruption behind PIFSS' investments in Man's products.

2970. Nor do I consider that Mr Moeller worked it out for himself through his participation in the SMR process. He did not subject what was being said by Mr Merville to any degree of analysis, and certainly not the degree of forensic analysis to which it has been subject during this trial. In my view, when Mr Moeller gave his written account to Mr Waghorn's 28 March 2012 e-mail, he gave a fair account of how he understood Mr El Ghazzi's role, whilst making it clear that this was not to any great extent based on first-hand knowledge.

2971. Each side advanced arguments as to the impact of the potential conclusions as to Mr Moeller's knowledge of corruption.

2972. Man and Mr Massad submitted that it was not permissible for the court to conclude that Mr Massad and Mr Merville were party to corruption, but Mr Moeller was not. They said that PIFSS had advanced its case on the basis that the "3Ms" were in it together. Therefore, a decision that Mr Moeller was not a party, but that the other two men were, would involve the court in putting forward a new theory which had not been properly ventilated at trial. Man also contended that Mr Moeller's contemporaneous understanding, as to what Mr El Ghazzi was doing, supported the evidence of Mr Massad and Mr Merville as to what he actually was doing.

2973. PIFSS submitted that if the court determined that Mr Massad and Mr Merville knew about the corruption, then it was inherently improbable that Mr Moeller did not, particularly bearing in mind the various factors from which an inference of knowledge of corruption could be drawn.

2974. I do not accept any of these points. Mr Moeller was in a very different position to Mr Massad and Mr Merville. He was involved from a distance, with many other responsibilities, whereas the other two men were in the Middle East on the ground, dealing with the most important client of the Middle East office. There is no logical reason why a decision as to participation should not differ as between the men in the Middle East and the man in Switzerland. That is certainly possible in circumstances where, as I have held, Mr Moeller's understanding of what was happening on the ground differed from what was actually happening.

2975. Furthermore, when dealing with a conspiracy case, where a claimant contends that there were a number of conspirators, the court must look at the case against each alleged conspirator separately. There is no reason why, when considering the evidence, the court is bound to conclude that all of the conspirators were involved, or none of them were. That does not, in my view, involve the court putting forward a new theory. It is the result of the court's evaluation of the evidence at trial, including here the evidence given by Mr Moeller to the effect that he did not know and participate. I see no reason why, if the court accepts that evidence, that should somehow automatically mean that it must also accept the evidence of other individuals, who have advanced a similar case which the court rejects.

2976. There are certainly cases where a case has succeeded against some, but failed against others, even though the claimant's case was that all were involved. An example is *First Subsea Ltd v Balltec Ltd* [2014] EWHC 866 (Ch). Of course, it can sometimes be a good point, on the evidence, that the conspiracy could only work if a particular individual was involved: see *Hotel Portfolio II Limited v Ruhan and Stevens* [2022] EWHC 383 (Comm) at [202]-[203] (Foxton J). However, I see no reason why the corruption in Kuwait on the part of Mr Massad and Mr Merville could not have successfully worked without the knowing participation of Mr Moeller. In my view, it did.

M16: The extent of Mr Massad's liability

2977. Mr Massad, and Man, submitted that Mr Massad could have no liability in connection with secret commissions which were paid on investments made following his departure from Man in September 2008 and which he had had no role in selling to PIFSS.

2978. It is true that Mr Massad had no role (whether on behalf of Man or otherwise) in persuading PIFSS to make the investments made subsequent to the rebalancing exercise in 2008. However, applying Kuwaiti law, the question is whether Mr Massad can be regarded as having provided assistance in relation to the profiteering and bribery which took place after his departure. On the facts of this case, I consider that he did. The corrupt scheme which Mr Merville took over was the scheme that Mr Massad had assisted to create and operate over many years. Mr Massad wanted that scheme to continue, for the benefit of Mr Al Rajaan and Mr El Ghazzi. When handing over to his successor, Mr Merville was told about the scheme and how it should operate, with a view to its continuation. Mr Massad thereby lent his assistance to the continuation of the scheme and I consider that his liability – based on Articles 47 and 48 KPC – did not cease at the moment that he left Man. In my view, his liability extends to the secret commissions paid during Mr Merville's tenure.

M17: Man's pleading point

2979. Mr Collins argued that PIFSS had not sufficiently pleaded a case to the effect that Mr Merville's tortious fault arose from his breaches of the relevant Kuwaiti criminal laws. The potential relevance of this point, if sound, would be that PIFSS could not take advantage of the extension of the limitation period for Mr Merville's criminal acts provided for in Article 253 (2) KCC. (That article is discussed in detail in Section R below). It would not prevent PIFSS from advancing a civil claim based on Mr Merville's participation in corruption. However, the claim would be subject to the purely civil limitation periods: 3 years from the date of knowledge, or a 15-year

longstop. Man sought to argue that the requirement to begin proceedings within 3 years of the date of knowledge had not been satisfied.

2980. In view of my conclusion in M16 above, the issue is academic. That is because Mr Massad's liability for assistance, and therefore the vicarious liability of MIAG, covers the period after Mr Massad had left and the investments made during Mr Merville's tenure.

2981. In any event, however, I do not accept that PIFSS' pleading was inadequate as alleged, essentially for the reasons given by Mr Norbury on Day 107, pages 101-113 of the transcript. In summary, paragraph 160 of the RAPOC, when read together with paragraph 157, pleads the point sufficiently.

2982. Furthermore, I did not consider there was sufficient knowledge on the part of anyone at PIFSS to trigger the running of time for the purposes of the 3-year date of knowledge limitation period. Ms Onslow's argument in that respect involved adding together the alleged state of mind of different individuals within PIFSS, none of whom individually could be proved to have had the relevant knowledge. There was nothing in the Kuwaiti law evidence which suggested that this was permissible.

M18: Which Man companies, other than MIAG (D18) are liable under Kuwaiti law?

2983. Man accepts that MIAG (D18) is vicariously liable for the torts of Mr Massad and Mr Merville. That is because there was the necessary degree of subordination to give rise to vicarious liability under Kuwaiti law: see Section B14 above.

2984. PIFSS contends that three other Man companies, Man Group Ltd (D15), Man Strategic Holdings Ltd (D16) and Man Investments Ltd ("MIL") (D17) are also vicariously liable. No claim is pursued against Man Investments Middle East Ltd ("MIMEL") (D19), because it was dissolved some time ago.

2985. The claims against D15 and D16 can be readily dismissed. As PIFSS acknowledged in its written closing, D15 had no operational functions and MSHL was simply a holding company with no management or operational role. There was therefore no relationship of subordination between those companies and Mr Massad and Mr Merville. In any event, PIFSS' pleaded case in paragraph 157 of the 10 RAPOC linked Mr Massad and Mr Merville to MIL, but not to other companies. (The position was otherwise in relation to Mr Moeller, who was also linked with D15). Accordingly, it is only necessary to consider the question of whether MIL is vicariously liable for the torts of either Mr Massad or Mr Merville.

2986. Man submitted that MIL could not be vicariously liable because it was not involved in the acts which are the subject of PIFSS' claims. It was MIAG, as the sales arm of Man, which had the relationship with Mr El Ghazzi, paid him, and sold the products to PIFSS. MIL's role was to manage the assets on behalf of the funds. Regardless of whether Mr Massad or Mr Merville could have acted on behalf of MIL, they were not so acting when selling products to PIFSS.

2987. As Man acknowledges, Mr Massad and Mr Merville were clearly subordinates of MIAG for the purposes of applying the vicarious liability principles. They were part of

the sales arm of Man, which was the responsibility of MIAG. However, I do not accept that MIL was uninvolved in the acts which are the subject of PIFSS' claim.

2988. When Man's Middle East office was set up, it was a representative office of MIL. Letters from Mr Massad, proposing investments in Man products, were sent on the letterhead of MIL. (The company was then called ED&F Man Investment Products Ltd, but I shall refer to it as MIL).

2989. At the foot of the letters, after the Dubai office was opened, was text which identified the representative office of MIL as being at the Dubai address of the Middle East office. When the Dubai office was opened, the board of MIL passed a resolution establishing the Dubai office as its representative office, and appointing Mr Massad as the General Manager. Man's disclosed documents include a power of attorney from MIL to Mr Massad. They also include a 2004 application form from Mr Massad to the Dubai Financial Services Authority for "Authorised Individual Status". This referred to Mr Massad as having spent more than 16 years with Man Investments in the Middle East region.

2990. During the earlier period of the Bahrain office, the letterhead was MIL, but the footer referred to ED&F Man International Ltd. This too was an earlier name of MIL, as evidenced by Mr Massad's application to the Dubai Financial Services Authority referred to above. There is no power of attorney relating to that earlier period, but there is a 2002 power of attorney between MIL and Mr Massad relating to the establishment of a representative office in Bahrain. That power of attorney authorises Mr Massad, amongst other things, to "do all such things as the Attorney shall deem fit in connection with the establishment and proper operation of the said representative office." Although equivalent documentation for the earlier period is not available, there can be little doubt that Mr Massad's authority from MIL would have been the same.

2991. In the light of this evidence, I consider that – at least for the period up until 2005 – there was a sufficient relationship of subordination between MIL and Mr Massad so as to give rise to vicarious liability on the part of MIL. As explained in Section B14 above, Dr Abbas's evidence was that what mattered was the ability of the principal to exercise authority over the subordinate, rather than whether or not the principal actually did so. Here, MIL had the ability to exercise that authority, in circumstances where Mr Massad was running its representative office. It may be that MIL did not in practice do so, because the sales function was in practice overseen and operated by MIAG in Switzerland. However, MIL had the ability to exercise authority over Mr Massad.

2992. In my view the position changed in 2005. At that stage, the Middle East office ceased to be a MIL representative office. It was then the office of a separate company, MIMEL. I do not consider that there was a relevant subordination relationship between Mr Massad and MIL thereafter, and there was never such a relationship between MIL and Mr Merville.

2993. Accordingly, MIL is liable for the torts of Mr Massad in the period prior to the change in 2005, but not thereafter.

M19: Conclusions as to the liability of Mr Al Rajaan (and therefore D1), Mr El Ghazzi, MIAG (D18), MIL (D17), and Mr Massad

2994. The legal basis of Mr Al Rajaan's liability under Kuwaiti law is materially the same as set out in previous sections, in particular those dealing with the Mirabaud Scheme and the Pictet Scheme.

2995. The legal basis of the liability under Kuwaiti law of Mr El Ghazzi, Mr Massad and Mr Merville (who is not individually a defendant) is the same as that of others who paid bribes to Mr Al Rajaan and assisted him in his receipt of secret commissions, such as Mr Nasrallah and Ely Michel Ruimy. That tortious liability arises pursuant to Articles 227 – 229 KCC for breaches of Kuwaiti criminal law. Mr El Ghazzi, Mr Massad and Mr Merville each committed offences under Articles 47 and 48 of the KPC, in assisting Mr Al Rajaan's breaches of Articles 11 and 12 KPPL, and Article 35 of the KPC. The legal basis of the liability under Kuwaiti law of MIAG is that it is vicariously liable for the torts of Mr Massad and Mr Merville. The legal basis of the liability under Kuwaiti law of MIL is that it is vicariously liable for the torts of Mr Massad in the period prior to the establishment of MIMEL in 2005. The assistance of Mr El Ghazzi, Mr Massad and Mr Merville was in summary as follows.

2996. Mr El Ghazzi assisted Mr Al Rajaan's breaches of Articles 11 and 12 KPPL and breaches of Article 35 KPC by: (i) allowing the Intermediary Agreement to be used as a front for the payment of secret commissions, which he did on each occasion that PIFSS made an investment in Man products, thereby agreeing to pay bribes; (ii) securing variations to the Intermediary Agreement to secure higher commissions; (iii) receiving commission payments from Man in respect of PIFSS' investments in Man Group products and then transferring commissions to Mr Al Rajaan; and (iv) keeping his existence and the payments he made and received secret from PIFSS.

2997. Mr Massad and Mr Merville assisted by: (i) marketing products to PIFSS and accepting PIFSS' investments in those products, knowing that secret commissions on those investments would be paid to Mr Al Rajaan; (ii) causing or permitting payments to be made to Mr El Ghazzi as commissions, knowing that such payments would be shared with Mr Al Rajaan; (iii) taking steps to maintain the secrecy in the Man/PIFSS/El Ghazzi relationship, so that the existence and purported role of Mr El Ghazzi would not be revealed to anyone at PIFSS other than Mr Al Rajaan.

M20: Conclusions as to the quantum of compensation

2998. As discussed in Section B11 above, and applied and further discussed in Section K9 above and Section N5 below, the quantum of the compensatory or repayment remedy extends to the entire amount profiteered, and is not limited to the monies received by Mr Al Rajaan.

2999. Prior to taking into account the impact of the Mirabaud and EFG settlements, the quantum of PIFSS' successful claim for compensation, subject to possible conversion to other currencies, is:

i) D1/Mr Al Rajaan: USD 155,170,214.

ii) Mr El Ghazzi: USD 155,170,214.

iii) MIAG: USD 155,170,214.

iv) Mr Massad: USD 155,170,214.

v) MIL: an amount to be calculated, based on the tortious conduct of Mr Massad in the period prior to the establishment of MIMEL in 2005.

SECTION N: THE MOMBELLI SCHEME

N1: Introduction

3000. The Mombelli Scheme involves claims against 4 Defendants, the 26th – 29th Defendants, as well as against D1. This section considers the position under Kuwaiti law, which I have decided is the applicable law of the torts alleged against these Defendants.

3001. Mr Francesco Mombelli is the 26th Defendant. His career has been in financial services. He described himself in his witness statement as a retired financial consultant, who during his career had provided services to investment funds and investors. He was Swiss and lived and worked in Switzerland until 2014. His dealings with Mr Al Rajaan began in 1995. At that time, Mr Mombelli was working for a wealth management and investment advisory firm called Gesfinance S.A. in Geneva.

3002. In December 1999, Mr Mombelli left Gesfinance and set up his own business, ICS Investment Consulting Services SA ("ICS"). He was the director and sole shareholder in ICS, which is the 27th Defendant in these proceedings. Thereafter, Mr Mombelli set up and operated through a number of other companies. He is the sole shareholder and beneficial owner of both the 28th Defendant, Sintesi Ltd. ("Sintesi") and the 29th Defendant Methis Management Ltd ("Methis"). It was common ground that Mr Mombelli's acts and knowledge were to be attributed to all those companies, and that this was the case under both Kuwaiti law and Swiss law. Where appropriate, I shall refer to Mr Mombelli and the 3 Defendant companies as "the Mombelli Defendants".

3003. PIFSS contends that between 1995 and 2016, Mr Mombelli personally and through companies he owned or controlled, or where he was employed, conspired with Mr Al Rajaan to benefit from PIFSS' investments. It alleges that Mr Mombelli or the companies with which he was associated – initially Gesfinance, and later Mr Mombelli's own companies – received a percentage of fund manager management and performance fees on PIFSS' investments, and that a very substantial proportion of those fees was then paid to Mr Al Rajaan as secret commissions.

3004. There was much common ground between PIFSS and the Mombelli Defendants as to what happened, as a matter of fact. Mr Mombelli was treated by fund managers as the introducer between PIFSS and 18 different fund managers in relation to USD 3.8 billion of PIFSS' investments in 49 different funds during the period 1995 – 2016. Each of those investments led to the payment of commissions to Mr Mombelli, or a company with which he was associated. Mr Al Rajaan was then paid a very substantial proportion of the commissions paid by the fund managers.

3005. There was also much common ground as to the sums involved. The Mombelli Defendants admit that commissions to the value of USD 125,659,151 were received from the fund managers. PIFSS' pleaded figure is USD 686,615 higher, but the figures are so substantial that PIFSS is prepared pragmatically to accept the Mombelli Defendants' figure. Of that sum, the Mombelli Defendants admit that USD 61,640,497 was actually paid to Mr Al Rajaan, including entities controlled by him, between February 1996 and September 2016. Again, PIFSS' figure is a little higher, but it is willing to accept the Defendants' figure. Of that sum, Mr Mombelli admits that USD 6.5 million was delivered by him to Mr Al Rajaan in cash, once the 2012 Swiss investigation into Mr Al Rajaan created problems in making bank transfers.

3006. The claim against Mr Al Rajaan and Mr Mombelli is for the above figure of USD 125,659,151. There are no overlaps between the claims under the Mombelli Scheme and other schemes; essentially because other defendants were not involved in assisting in laundering the monies. There are, however, claims against the three defendant companies, in respect of the commission flows in which they were involved. These claims in total do not add up to the USD 125,659,151 figure. That is partly because that figure includes claims made when Mr Mombelli was at Gesfinance, which is not party to the present proceedings. It is also because PIFSS acknowledges a limitation issue, under Kuwaiti law, in respect of the claims against the companies. PIFSS therefore advances a claim in respect of sums received after the date in 2004 which is 15 years prior to the date when proceedings were commenced. This means that the claims, converted to US Dollars, are USD 20,943,027 against ICS; USD 54,449,060 against Sintesi; and USD 26,697,156 against Methis.

3007. The monies actually paid to Mr Al Rajaan (USD 61,640,497) were lower than the amounts which Mr Mombelli had agreed to pay him, according to the percentage split agreed between them. The reason is that actual payment became problematic in 2012 and in the years afterwards, and therefore Mr Mombelli ended up retaining a significant amount of the money that would normally have gone to Mr Al Rajaan. An outstanding amount of around USD 26.6 million was therefore left unpaid. This figure is derived from a "Global Review Spreadsheet" ("GRS"). This was a meticulous record, prepared and maintained by Mr Mombelli, of the sums to which Mr Al Rajaan was entitled. It was regularly updated by Mr Mombelli, and was shown to Mr Al Rajaan at their frequent meetings. It was, however, never sent in documented form to Mr Al Rajaan, whether by post or email or otherwise. Nor was it ever sent or mentioned to PIFSS. Indeed, although it was shown to Mr Al Rajaan at meetings, it appears never to have been printed out – or if it was printed out, the print-out was not retained.

N2: Summary of the parties' cases

3008. PIFSS contends that Mr Mombelli knew that the arrangements were corrupt. They also contend that he acted dishonestly in concealing them – although Mr Norbury emphasised in his submissions that "dishonesty" was not in fact an ingredient of the criminal offences committed by Mr Al Rajaan and Mr Mombelli in concert, or of the Kuwaiti tort liability which existed in consequence of that criminal conduct.

3009. PIFSS contends that Mr Mombelli knew the following matters:

i) Mr Al Rajaan was the Director General of PIFSS and that he exercised control or influence over PIFSS' investment decisions.

ii) The promise to and payment of secret commissions to Mr Al Rajaan were in return for Mr Al Rajaan exercising that control and influence in a way that benefitted Mr Al Rajaan and Mr Mombelli and/or the companies that employed him or that he owned.

iii) There was a conflict of interest between Mr Al Rajaan's duties to PIFSS and his interest in the commission sharing agreements he had with Mr Mombelli.

iv) It was in Mr Mombelli's and those companies' commercial interests to secure PIFSS's investments in the various Mombelli Scheme funds through Mr Al Rajaan.

v) PIFSS was unaware of and had not authorised the receipt by Mr Al Rajaan of the secret commissions.

vi) The commission sharing arrangement he had with Mr Al Rajaan was unlawful.

vii) Steps were taken by Mr Mombelli to ensure secrecy so as to conceal from PIFSS the nature of Mr Mombelli's involvement and to conceal from PIFSS and others the commission sharing arrangement.

viii) The acts, knowledge and intention of Mr Mombelli are attributed to ICS, Sintesi and Methis.

ix) PIFSS significantly overpaid fees to the fund managers of the Mombelli Scheme funds, which it would not have done had Mr Al Rajaan not acted corruptly, causing it harm and loss.

3010. There was no real dispute as to i) to iv) above, and in any event those facts are clearly established. Nor did it seem to me that there was any dispute as to vii) above: Mr Mombelli did not allege that he made any disclosure of the payments to anyone at PIFSS, and the evidence clearly shows that he lied at various times about the payments that he was in fact making. As indicated, there was no dispute on attribution: i.e. viii) above. As to ix) above, Mr Mombelli accepted in evidence that rebates of fees would be made to investors who were not agreeable to the retention by his companies of the commissions paid by fund managers. This was something that he offered investor clients, with his remuneration then coming by way of an agreed fee.

3011. The real dispute was as to v) and vi) above. Mr Mombelli's case, in essence, was that he at all times believed that Mr Al Rajaan was authorised to receive the monies that he was receiving. Ultimately, Mr Brown KC made it clear that he was not alleging that there was authorisation in fact. However, for the purposes of criminal and therefore tortious liability, it was Mr Mombelli's understanding and belief that mattered, and he invited me to accept Mr Mombelli's evidence that he believed that there had been authorisation. Mr Mombelli also disputed PIFSS' case that he knew that Mr Al Rajaan was acting unlawfully. He believed that there was a common market practice that such commissions could be paid.

3012. Mr Mombelli's mindset was summarised, in his written closing submissions as follows. He did not intend to induce Mr Al Rajaan to misuse his position. He intended to recommend profitable investments for PIFSS and did so. He understood that final investment decisions had to be approved by an investment committee applying objective criteria. Mr Al Rajaan never suggested to him that PIFSS' investment decisions were conditional on his receipt of retrocessions. He believed that the payments were lawful, and reasonably believed that PIFSS knew of and approved of Mr Al Rajaan's receipt of retrocessions. Mr Mombelli never intended to cheat PIFSS. He always considered that he was acting in PIFSS' best interest. The best evidence of this was that significant profits were generated by PIFSS from investments introduced by the Mombelli Defendants.

3013. I now turn to the facts. It will become apparent that I accept PIFSS' case as to i) – ix) above, including v) and vi). In the factual narrative below, I include findings as to Mr Mombelli's state of mind.

N3: Factual narrative

Background and initial meetings

3014. Prior to setting up his own consultancy business in 1999, operating through the above (and other) companies, Mr Mombelli was employed as a financial consultant for Gesfinance in Geneva between 1992 and 1999. Whilst he was there, he carried out business on behalf of other Gesfinance companies, including Interfin Management SA ("Interfin").

3015. Mr Mombelli's background was as follows. He completed a four-year law degree at the University of Geneva between 1980 and 1984. He then worked for a number of well-known financial institutions before joining Gesfinance, which had started as a wealth management firm but later developed fund advisory services to asset management companies and some family offices, specialising in alternative or non-regulated investment vehicles. It was while he was at Gesfinance that Mr Mombelli was introduced to Mr Al Rajaan. Mr Mombelli described, in his evidence, how this introduction came about. His account of his initial meetings with Mr Al Rajaan was not challenged by PIFSS, and indeed was relied upon as evidence of his complicity in corruption.

3016. Gesfinance had been set up by Mr Yves Byrde and Mr Louis Olivier. In 1995, Mr Byrde told Mr Mombelli that a contact of his at the Kuwait Investment Office ("KIO"), Dr Yousef Al Awadi, knew somebody called Dr Al Shati who could introduce Gesfinance to Mr Al Rajaan. Mr Mombelli understood that Mr Al Rajaan was the Director General of PIFSS, and was looking for investment opportunities. Mr Mombelli did not know Dr Al Awadi or Dr Al Shati, but later discovered that Dr Al Awadi had become the President of the KIO. As far as he was aware, neither of these individuals had any connection to PIFSS. Prior to meeting Mr Al Rajaan, Mr Byrde told Mr Mombelli that Gesfinance had agreed to share a percentage of any commission it received from funds introduced, and in which PIFSS then invested, with Dr Al Awadi and Dr Al Shati.

3017. Mr Mombelli then met Mr Al Rajaan for about an hour in around April or May 1995 at KIO's office in London. Nobody else was present at the meeting. Mr Mombelli's evidence as to the meeting, and indeed his subsequent dealings with Mr Al Rajaan, provide a useful case-study as to Mr Al Rajaan's modus operandi. In short, Mr Al Rajaan made it clear that if PIFSS was going to invest, he would need to be paid.

3018. Mr Mombelli's evidence as to the meeting was that Mr Al Rajaan was initially formal and cold. His impression was that Mr Al Rajaan did not want to be at the meeting, but had been told to attend by Dr Al Shati or at least someone who was able to tell Mr Al Rajaan what to do. Mr Mombelli described his presentation of an investment strategy to Mr Al Rajaan, whose interest then seemed to grow. It was immediately clear to Mr Mombelli that Mr Al Rajaan was financially sophisticated and understood the technical aspects of the investment products that he was presenting.

3019. During the meeting, Mr Al Rajaan asked him how Gesfinance was remunerated. Mr Mombelli explained that, as an introducer for investment funds, Gesfinance was paid directly out of the fund manager's own fees.

3020. The question of payments to Mr Al Rajaan was discussed at that very first meeting. Mr Mombelli described Mr Al Rajan asking him whether Gesfinance would share the commission it received from fund managers, if PIFSS were to invest. Mr Mombelli's evidence was that it was probably Mr Al Rajaan who brought up the topic. He said that he would never have proposed it himself: "If somebody doesn't ask, I don't tell. I'm not stupid to share my business". I accept that evidence. I reject the case advanced on behalf of D1/D2, and developed in cross-examination of Mr Mombelli by Mr Adamson: namely, that Mr Al Rajaan asked for nothing, but was in due course the passive recipient of Mr Mombelli's generosity in offering to share his commissions.

3021. Mr Mombelli understood Mr Al Rajaan's request as being that a payment should be made to himself, rather than to PIFSS. However, Mr Mombelli could not give a positive response at that time, and he told Mr Al Rajaan that Mr Byrde had already agreed that Gesfinance would share its commissions with Dr Al Awadi and Dr Al Shati, and that there was no scope to share with anyone else. Mr Al Rajaan became extremely angry at this. He said that Dr Al Awadi and Dr Al Shati were wrong to expect commission, since these two persons had nothing to do with PIFSS. He said that they wanted to take advantage of his work, and this was not acceptable. In his oral evidence, Mr Mombelli referred to Mr Al Rajaan being "very very angry, very pissed off". The flavour of Mr Al Rajaan's reaction was to say that Gesfinance should "eliminate" any relationship or payment to those individuals. As Mr Mombelli put it:

> "Eliminate that wholly corrupt – which is the right term – or call it what you have – or cost of doing business whatever before – but this was the usual way in my perception they were making business over there – "We eliminate them and I continue to work with you."

3022. Mr Mombelli, in that answer, recognised that what Mr Al Rajaan was proposing was corrupt. Indeed, this would have been obvious to anyone of modest intelligence, let alone someone who was highly intelligent such as Mr Mombelli.

3023. In his oral evidence, however, Mr Mombelli described this as being "really, a step up of what I was thinking to be in a normal corrupt business". This was because, in Mr Mombelli's perception, Mr Al Rajaan was knowledgeable, and he was keen on the success of the institution that he was running: he really wanted to build up a good pension fund in the interests of Kuwait. Accordingly, as Mr Mombelli said that he perceived it, Mr Al Rajaan was not an individual who was seeking purely and simply to line his own pockets via the investments made by the institution that he was running. He was also concerned – in Mr Mombelli's view primarily concerned – with making sound investments for the institution, albeit alongside lining his own pockets. As discussed below, I do not consider that this alters the fact that the proposed arrangement was, very obviously, corrupt.

3024. Following that initial meeting, Mr Mombelli reported back to Mr Byrde, who was not surprised that Mr Al Rajaan expected to receive a share of Gesfinance's commission. Mr Byrde planned to "eliminate" Dr Al Awadi and Dr Al Shati by telling them that Mr

Al Rajaan was not interested in the investments that Mr Mombelli had presented, "rather than the real reason". Mr Byrde and Mr Mombelli agreed that the latter would update Mr Al Rajaan on how the markets and their funds selection were performing. He did this every two weeks or so, including at in-person meetings which were usually in Geneva. After about three or four months, Mr Byrde told Mr Mombelli that Dr Al Awadi and Dr Al Shati had stopped making enquiries. Mr Mombelli informed Mr Al Rajaan of this at one of their regular meetings. Soon afterwards, Mr Al Rajaan told Mr Mombelli that he was ready to invest.

Investments during the Gesfinance period

3025. The first investment was made in August 1995, and the first commission payment to Gesfinance was later that year. The investment was USD 6 million, which went into a number of funds which were all treated by PIFSS at that time as part of the Interfin Global Fund. Regular further investments were made thereafter, so that the total invested by PIFSS in the Interfin Global Fund was USD 145 million.

3026. It is plain from what was said at the meeting, and the way in which matters were then handled by Mr Byrde in conjunction with Mr Mombelli, and the fact that no investment was made until the path was cleared for Mr Al Rajaan to be paid, that PIFSS' investment decision was conditional on Mr Al Rajaan's receipt of commissions. I reject the contrary case advanced, in different ways, by both Mr Mombelli and D1/D2.

3027. The agreement at the time of this first investment in 1995 was a 50/50 split in commissions, to which Mr Byrde had agreed. About three to four months after PIFSS' first investment, Mr Mombelli told Mr Al Rajaan that Gesfinance had received its commission from the fund manager, and asked where to send the payment. Mr Al Rajaan gave Mr Mombelli a piece of paper with details of a numbered bank account.

3028. Further investments were made by PIFSS in the Interfin Global Fund in 1995 and 1996, and indeed through to 1999. Mr Mombelli said that, in around 1997 or 1998, Mr Mombelli noticed that Mr Al Rajaan was no longer showing much interest in his recommendations, even though Mr Mombelli considered them optimal for an institutional investor in terms of cost and expected performance. Although he did not know what arrangements Mr Al Rajaan had with others, Mr Mombelli's feeling was that he was getting more attractive offers elsewhere. Mr Mombelli said that he wanted Gesfinance to offer Mr Al Rajaan funds best suited to institutional investors, but those funds usually had lower fees, meaning less commission for Gesfinance and therefore a lower amount shared with Mr Al Rajaan. Mr Mombelli then explained:

> "For these reasons, I proposed to Mr Al Rajaan to increase his share from 50% to 70% of the commission Gesfinance received from the managers of funds in which the PIFSS invested. He was very pleased. I told him I had to discuss this with Mr Byrde."

3029. Mr Byrde did agree, and the first fund to which the 70:30 split was applied was a fund operated by a Japanese fund manager in the Sparx group. This was the first of three investments made towards the end of 1997: investments in the Sparx Long-Short Fund, the CRM US Value Fund, and in Needham Capital Intel. The timing of these investments, in late 1997, indicates that the discussions referred to by Mr Mombelli would have occurred in 1997, rather than 1998.

3030. Thereafter, over the years, a significant number of investments were made in funds managed by the Sparx group and Mr Mombelli applied the 70:30 split to all of PIFSS' investments through Gesfinance, and later through ICS. There was one exception. For the Martin Currie Absolute Return Japan Fund, where PIFSS' investment was made in 2007 after Mr Mombelli had left Gesfinance, the commission received by Mr Mombelli's company was very low. He therefore took the initiative to increase Mr Al Rajaan's share to 80:20, because Mr Mombelli said that he was convinced that this was the right product for PIFSS. Along with Sparx, the Martin Currie group was the fund manager with whom the majority of PIFSS' investments were made over the years.

3031. Another investment made during the Gesfinance period was USD 55 million in an Endeavor fund. Mr Mombelli was the director and shareholder of an investment manager called Endeavor Asset Management Limited (Bahamas) ("Endeavor Asset Management"), which acted, or purported to act, as a fund manager. In 1999, Mr Mombelli proposed the Endeavor Ltd fund, managed by Endeavor Asset Management, to Mr Al Rajaan. PIFSS went on to invest in this fund in August 1999, a few months before Mr Mombelli left Gesfinance. Endeavor Asset Management received management fees from Endeavor Ltd. Endeavor Ltd also received introducer fees from the investment managers of the funds which Endeavor invested in. There were therefore two layers of fees which were shared with Mr Al Rajaan: the fees paid by the underlying fund managers to Endeavor Ltd, and the fees paid by Endeavor Ltd to Endeavor Asset Management.

3032. In cross-examination, Mr Mombelli accepted that it would have been better if Mr Mombelli's recommendation had been for PIFSS to invest directly in the underlying funds, rather than incurring a second level of fees because of investing in Mr Mombelli's Endeavor Asset Management fund. Indeed, PIFSS did have some direct investments in the underlying funds. It was put to Mr Mombelli in cross-examination that he was just "ripping PIFSS off". Mr Mombelli agreed that this was the case in relation to his management commission: "I made a big mistake on the commission that I was charging at the level of Endeavor, what the supplementary expenses for PIFSS". He agreed that it was wholly unnecessary for PIFSS to pay that.

3033. He also agreed, after looking at the GRS, that it appeared that Mr Al Rajaan was receiving commissions on the fees paid at both levels. Accordingly, an unnecessary expense was incurred to the disadvantage of PIFSS, and to the benefit of Mr Mombelli and Mr Al Rajaan. This episode shows that Mr Mombelli, together with Mr Al Rajaan, were not acting purely and simply in PIFSS' interests in making their investment recommendations and decisions. Both of them were looking to line their own pockets.

1999 – 2013: overview

3034. When Mr Mombelli departed Gesfinance in late 1999, he sent a letter to Mr Al Rajaan, by fax, announcing his departure and the formation of ICS. This was relied upon by Mr Brown as a contra-indicator of dishonesty, since Mr Mombelli was not hiding his presence. I will return to that point, and some other alleged contra-indicators of dishonesty, in due course.

3035. After Mr Mombelli left Gesfinance, the business with Mr Al Rajaan followed essentially the same course as previously. Between 1999 and 2013, Mr Al Rajaan caused PIFSS to invest in a large number of investments on which commissions were

paid to Mr Mombelli's companies. The income of those companies was derived from the investment managers of the various funds in which PIFSS invested, and was paid out of their own fees. These were then shared with Mr Al Rajaan. Mr Mombelli would instruct his companies' bankers to make the transfer to an account identified by Mr Al Rajaan.

3036. During this time, Mr Mombelli conducted his business through a number of companies, including ICS, Madrina Corporate Inc ("Madrina") (BVI), Atena Management Ltd ("Atena") (BVI), Green Sea Ltd ("Green Sea") (Bahamas), Delfin Capital Management Ltd ("Delfin") (BVI), Blue Nile Trading SA ("Blue Nile") (Bahamas), FEM International Ltd ("FEM") (Bahamas), Creative Advisors Ltd ("Creative Advisors") (BVI), and Morel Management Ltd ("Morel") (BVI). None of these companies had any mandate from PIFSS. Apart from ICS, Madrina (which merged with Sintesi) and Methis (which merged with Atena), they are not defendants to the present proceedings, but they do feature in the later events and the documents.

3037. Sparx was the single most important fund manager, representing 40% of the investments made by PIFSS overall. Some USD 47 million was paid in commissions by Sparx for introducing PIFSS, of which USD 33 million was passed to Mr Al Rajaan. These figures include the 3 Sparx investments made prior to Mr Mombelli's departure from Gesfinance.

3038. The second most important fund manager was Martin Currie, representing around 20% of the investments. The first investment was made in 2002.

3039. The documentary picture concerning Mr Mombelli's involvement does, to some extent, contrast with the documentary position of other intermediaries who have featured in the trial. Unlike the position with other intermediaries such as Mr Al Qattan, Mr El Ghazzi, Mr Khosrovani and (at least to a very large extent) Mr Nasrallah, there is documentary evidence that Mr Mombelli was doing some work that would be expected of intermediaries. Thus, there were 200 letters or other documents disclosed by PIFSS which emanated from Mr Mombelli. The vast majority of this material (139 documents), however, emanated from the period prior to Mr Mombelli's departure from Gesfinance in December 1999 and related to investments made during that period. Many of the 61 post-December 1999 documents, sent after Mr Mombelli's departure, concern those funds as well, since Mr Mombelli continued to deal with them.

3040. During the course of his submissions, Mr Brown showed me a fair number of documents, principally those sent prior to December 1999, in support of his case that Mr Mombelli was doing intermediary work, including liaising with fund managers, suggesting funds and providing documents. I agree that this shows that such work was being carried out at that time.

3041. Subsequent to 1999, there are far fewer documents on PIFSS's files. There are only 61 documents, of which 22 relate to the Gesfinance funds. Another 13 are performance reports which contain a disclaimer which can be used to identify ICS as having produced the report, but usually without actually naming ICS. Overall, there are in my view surprisingly few post-December 1999 documents, given the volume of investments and the amount being paid by way of commissions.

3042. There are a greater number of documents in the Mombelli Defendants' disclosure which evidence communication with PIFSS. There were 492 documents in total, of which 322 relate to the position after 1999. Out of the 322, some 311 were addressed to Mr Al Rajaan. As indicated by the relative absence of post-1999 documents on PIFSS' files, it is likely that they were given to Mr Al Rajaan at one of the regular meetings in Geneva that took place between him and Mr Mombelli, and were never placed on PIFSS' files. These documents contain some performance reporting, and so it can fairly be said that Mr Mombelli was doing some intermediary work.

3043. Mr Mombelli made the point, which is correct but of no real significance, that there was no contractual relationship between PIFSS and Gesfinance or the other companies that received commissions from fund managers. The remuneration of those companies was pursuant to agreements made with the various fund managers. PIFSS did not therefore directly pay fees to these companies, and there was no advisory agreement between Mr Mombelli (or the companies) and PIFSS. I agree that there was an element of Mr Mombelli giving "advice" to Mr Al Rajaan in relation to investments, albeit that he had no role as an "adviser" to PIFSS. As with any intermediary who is engaged by a fund which is seeking to raise money, Mr Mombelli was encouraging the investor to invest, and no doubt identifying the benefits of the particular products, and in that sense giving "advice".

Statements to banks and other third parties: 1999 - 2014

3044. On various occasions, both prior and subsequent to his departure from Gesfinance, Mr Mombelli needed to provide an explanation to the banks for the transfers being made to Mr Al Rajaan. His written responses contained either straightforward lies, or deliberately omitted material information, with a view to misleading the banks to whom the information was being provided. Mr Mombelli was cross-examined on 7 of these documents at trial.

3045. For example, on 11 May 1999, when he was still at Gesfinance, Mr Mombelli gave the following explanation to Cater Allen Bank in the Isle of Man as to the reason for a payment to a numbered account at Banque Mirabaud:

> "According to our today telephone conversation, please find below the transfer instructions I sent to your bank on May 7, 1999. As I told you, your colleague Mr. John Copper did not complete the transfer because it was directed to a Swiss numbered account. Being submitted to the Swiss Banking law and regulations I cannot give you the name of the account holder but I can certify that the beneficiary of this transfer is very well known by the bank owner to which attention I would like to send the money. As you can see from the Delfin account statements the money is coming from funds managers that I am representing. (Lionhart Aurora Fund, Kingate, Kingsville I think has an account with your bank). The payments that I am making represent rebates to the professionals, mostly asset management companies that are following my investment recommendations. My business is clear and honest but I do not want to interfere with your internal rules. If you cannot transfer the below amount

> just let me know and I will ask my client to set up an offshore company to receive the payment."

3046. Mr Mombelli, in cross-examination, did not seek to maintain that the information provided to the banks, such as the information quoted above, was honest or truthful. The above payment was not being made to "the professionals, mostly asset management companies that are following my investment recommendations". It was being made to the numbered account of an individual who was the Director-General of the Kuwaiti social security institution that was making the investments that generated the commissions. Mr Mombelli recognised in his evidence that he could not give a truthful explanation to the bank. As he said: "Considering the bank compliance request, it [i.e. a truthful explanation] would not have been acceptable". He went on to say:

> "…it would not have been acceptable because generally showing that there is a potential conflict of interest, a conflict of interest, that no bank will accept unless they have all the certification necessary to be sure that the officer can be paid, and for me it was implying an effort that I just wanted to avoid."

3047. This was one of several occasions in his evidence where Mr Mombelli acknowledged his awareness that the payments to Mr Al Rajaan created a conflict of interest. He also acknowledged that in his interview with the Swiss prosecutor in August 2018.

3048. In relation to the answer quoted above, Mr Mombelli said that the "certification necessary" meant a written consent from the investor. When asked whether he knew that he couldn't get that, he replied:

> "That, for me, was not a certitude, but I didn't dare to ask".

3049. Mr Mombelli denied that the reason that he did not dare ask was because he did not want others at PIFSS to know about the commissions he was paying Mr Al Rajaan. I do not accept that denial. Mr Mombelli explained, at the conclusion of his evidence, that he had serious doubt as to whether he could get written authorisation and "I was worried to ask Mr Al Rajaan, that he would have stopped working with me".

3050. Another example was a letter sent to Sentinel Bank in August 2002, explaining the use of the Green Sea account at that bank. Mr Mombelli said in that letter:

> "Green Sea Ltd was incorporated when I was still working for Interfin Ltd. and Interfin Management SA, a fund advisory business selling offshore investment funds worldwide. The Fund managers were paying Interfin Ltd. (the fund distributor), for the capital introduced to their funds. A portion of these commissions was usually repaid to the investors in the different funds (most of times the investors were also intermediaries).
>
> When I left Interfin to set up my own company, ICS Investment Consulting Services S.A. I continued to use the account for the same purpose, continue to pay this investor for the investment he is maintaining with Interfin Ltd."

3051. Mr Mombelli accepted in evidence that the second paragraph contained a lie. PIFSS was the investor, but monies were not being paid to PIFSS but to Mr Al Rajaan.

3052. What is the reason for these lies? Mr Mombelli wanted the business to continue. The letter to Cater Allen was written around 6 months before he left to start his own business, and it is probable that he would have had that start-up in mind at the time. Other documents, such as the Sentinel Bank letter, were written after he had left Gesfinance. He knew, prior to his departure from Gesfinance, that PIFSS' business would be potentially very profitable to him, and it was indeed very profitable after he had set up on his own. He knew that he could not ask for a written document from PIFSS, stating that Mr Al Rajaan was authorised to receive the commissions that he was being paid. If such a document was to have any value, it would have involved telling others at PIFSS about the arrangements with Mr Al Rajaan. As Mr Mombelli knew, asking for such a letter would never have produced an answer saying that Mr Al Rajaan was authorised. Doing so would have revealed the existence of arrangements which were being kept secret, and which Mr Al Rajaan did not want revealed.

3053. The various letters to banks, containing misleading or incomplete information, are one aspect of the secrecy over the payments which Mr Mombelli maintained. There were many others. It is a notable feature of the evidence that, in the entire period of over 20 years when Mr Mombelli and Mr Al Rajaan were dealing with each other, there is not a single document from Mr Mombelli, sent to PIFSS – or indeed to any third party – which reveals the existence, still less the amounts, of commission being retroceded to Mr Al Rajaan. The GRS spreadsheet was itself never forwarded in writing. It did not refer to Mr Al Rajaan's name. In certain spreadsheets relating to Delfin investments, a pseudonym, "Frank", was used. This illustrates a point which is of general application to the overall case, and the arguments of various parties as to the absence of documentation referring to bribes. People who are engaged in corruption, such as Mr Al Rajaan and Mr Mombelli here, take care not to document what they are doing, for obvious reasons. Mr Mombelli's GRS is something of a rare exception. But, as discussed, it was never printed out (or at least no printed version was ever retained), it did not refer to Mr Al Rajaan specifically, it was never referred to in correspondence, and it was never sent to Mr Al Rajaan whether by email or otherwise.

3054. Mr Mombelli had numerous opportunities, over the years, to tell third parties about the arrangements involving Mr Al Rajaan, and honest answers to questions asked would have required such disclosure. But his approach was to lie to the banks, such as Cater Allen, to whom he was providing important information for compliance purposes. He also accepted in evidence that he had never himself told anyone at PIFSS about the payments that he was making to Mr Al Rajaan.

3055. The evidence also indicated that Cater Allen and the banks were not the only third parties to whom Mr Mombelli did not tell the truth. I discuss below the information provided to a firm of accountants/administrators, Berney Associes, as well as information provided by Mr Mombelli in response to Wafra's investigation, on behalf of PIFSS, in 2015.

3056. It is also obvious, as Mr Mombelli would also have realised, that Mr Al Rajaan himself would, if asked, never have agreed to provide a document, signed by himself, which stated that he was being authorised to receive the vast sums of money that he was receiving. Mr Al Rajaan's modus operandi was to use numbered accounts and nominees

to receive monies on his behalf, and to keep his arrangements secret. There is no document, certainly in the period up to 2016 when Mr Mombelli was dealing with Mr Al Rajaan, where Mr Al Rajaan freely admits the receipt of payments by way of retrocessions of commissions paid on funds invested in by PIFSS. This is so across the board in relation to the investments with which this trial is concerned, and not simply those introduced by Mr Mombelli. Indeed, far from freely admitting the receipt of commission payments, in 2015/2016, in the context of the English criminal restraint order proceedings, Mr Al Rajaan gave false evidence that all of his income and wealth was legitimately acquired: see Section F above.

3057. If, therefore, there had been any suggestion by Mr Mombelli to Mr Al Rajaan that the latter should provide a document showing his authority to receive the payments, that would have been the end of Mr Mombelli's business with Mr Al Rajaan. Mr Mombelli would have appreciated this. The position would have been the same if Mr Mombelli had told Mr Al Rajaan that he was proposing to write to PIFSS, asking for a letter which showed that Mr Al Rajaan was authorised to receive the retrocessions.

3058. Mr Mombelli's desire to continue the profitable business with Mr Al Rajaan, and to keep it secret, is also the explanation for Mr Mombelli's willingness to sign false documentation which positively confirmed that no payments were being made. There were some 11 agreements between Mr Mombelli's companies and Sparx entities which contained a clause which was materially the same as the following:

> "4.3 MADRINA confirms that no portion of any introduction fee is paid by MADRINA (directly to or indirectly for the benefit of) any individual employee or officer of any of the Clients that is a fiduciary, corporate or governmental investor in the Fund unless such payment has been duly authorized in writing by such fiduciary, corporate or governmental investor."

3059. This was one of three clauses under the prominent heading: "Money Laundering; Corrupt Practices". Mr Mombelli accepted that he signed a number of documents containing this clause. They were signed from 2004 onwards. Mr Mombelli was cross-examined by reference to an agreement between Madrina and Sparx Overseas Ltd dated 29 March 2006. The final page of the contractual document was a "Beneficial Owner Certification" signed by Mr Mombelli. In that certification, Mr Mombelli confirms that: all representations and warranties in the agreement are true and complete; Mr Mombelli would inform Sparx immediately if that ceased to be the case; Mr Mombelli would ensure that Madrina complied fully with the agreement, and would not take any action that would cause Madrina to be in breach thereof.

3060. Mr Mombelli knew that he could not properly provide any of the confirmations provided in the Beneficial Ownership Certification, and that his company Madrina could not properly agree to clause 4.3 of this agreement and equivalent clauses in other agreements. Mr Mombelli knew that monies were to be paid to Mr Al Rajaan directly from the introduction fee to be paid by Sparx under the agreement, and he knew that Mr Al Rajaan was an employee or officer of a company, PIFSS, which was a fiduciary, corporate or governmental investor. He knew that there had been no written authorisation from PIFSS which permitted the receipt of such monies, and (as discussed above) that he could not ask either PIFSS or indeed Mr Al Rajaan for such confirmation. He had no intention of seeking such confirmation. He was asked by the Swiss

prosecutor: "How did Madrina comply with this requirement". His response to the prosecutor, and in his evidence, was that this was not a matter which he had taken forward: "Je n'ai pas donne suite, je n'ai rien dit".

3061. I consider that the signature of this, and similar, confirmations by Mr Mombelli was dishonest, as Mr Mombelli appreciated at the time. Quite simply, an honest person in Mr Mombelli's position could not properly put his name to documents which contained these confirmations, knowing of the arrangements which existed between himself and Mr Al Rajaan. Mr Mombelli suggested in evidence that Sparx were not misled, because they knew or turned a blind eye to the payment of these payments to Mr Al Rajaan. There was no documentary evidence which supported this assertion, and no evidence was called on behalf of Mr Mombelli to support it. I do not consider that, on the present evidence, I can accept the uncorroborated word of Mr Mombelli that Sparx knew. In any event, I do not consider that knowledge on the part of any individual at Sparx, as to the falsity of the statements being made, excuses Mr Mombelli from his part in knowingly signing false documents, or in failing to ensure that Madrina complied with its clear obligation in clause 4.3. Mr Mombelli's evidence as to Sparx's knowledge would, if true, simply show the complicity of another party in corruption.

3062. The heading to this contractual clause is also instructive. Mr Mombelli is a very intelligent person, and it would have been obvious to him that unauthorised payments made to a person in Mr Al Rajaan's position, in connection with investments made by PIFSS, were corrupt. Indeed, it is difficult to think of a more classic instance of bribery and corruption. The heading "Corrupt Practices" made that crystal clear.

3063. In his oral evidence, Mr Mombelli to some extent recognised the unlawful nature of the payments that were being made. Thus, in the context of questions about the letter to Cater Allen, it was put to Mr Mombelli that he was making unlawful payments that he didn't want Cater Allen bank to know about. He said:

> "They have been considered unlawful in Switzerland, in the UK, or I don't know which region, but one I was operating in Kuwait with the Kuwait practice and doing business for me, I was not …. really feeling to do something unlawful."

3064. Similarly, a theme of his evidence was that he preferred to describe his payments as being a "cost of doing business" rather than corruption, recognising that such payments in some countries are "unconscionable in law". At the end of his evidence, he gave me the following answers:

> "Q. I think your evidence is that Kuwait is a place which is very corrupt: is that right?
>
> A. On our view, we call corrupt, but as I said, over there, I was saying also "cost of making business".
>
> Q. Well, is there a difference between ---
>
> A. No

> Q. Is there a difference between bribes and corruption and the cost of doing business? If there is a difference, can you explain it to me.
>
> A. It was – it's always perceived by different culture, by different customs. It's the perception of that. Here it's unconscionable in law, but we have an example of today. [Mr Mombelli then gave examples, including by reference to decisions made by President Trump, of what he considered to be examples of corruption]
>
> …
>
> I never saw this cost of making business create poverty over there. I never saw Kuwaiti poor. For that reason, I think this amount of money in itself, it's an engine for corruption, it's an engine – it's a fire for corruption
>
> …
>
> I think corruption, unfortunately, is everywhere."

3065. I have no doubt that Mr Mombelli recognised at the time that the payments which he was making to Mr Al Rajaan were corrupt, indeed corrupt on a massive scale. I do not accept that he believed at the time that such payments were somehow permissible or lawful in Kuwait, in contrast to the position taken in Switzerland, the UK and other jurisdictions which would consider them to be "unconscionable in law". This is Mr Mombelli's attempted rationalisation for why he is not to be criticised for conduct which any ordinary person (and certainly an intelligent man in Mr Mombelli's position) would regard as unconscionable, impermissible, unlawful and indefensible. I do not consider that Mr Mombelli thought otherwise at the time. His focus was on developing business, initially at Gesfinance, and subsequently on his own behalf. He was looking to make money, and corruption was a way of making very substantial sums.

3066. Nor do I accept that there is any difference between a corrupt payment which is a bribe, and a "cost of doing business". As Mr Norbury put it, Mr Mombelli may have thought that everyone else was making such payments, and it was a cost of doing business. But it was not a cost of doing legitimate business.

3067. In his answers quoted above, Mr Mombelli appeared to accept that a bribe and a "cost of doing business" were the same, and in any event he was unable to articulate any sensible difference between them. In my view, a "cost of doing business", in the present context, is no more than a euphemism for a bribe. A bribe, or similar corrupt payment, does not lose its character as such by being described as a "cost of doing business". Mr Mombelli's evidence of what needed to be done in around 1997, when he thought that Mr Al Rajaan was losing interest in making investments with him, was that the payments to Mr Al Rajaan needed to be increased from 50 – 70%, and thereafter (in the case of the Martin Currie funds) 80%. Accordingly, Mr Mombelli was saying to Mr Al Rajaan: if PIFSS increases its investments with us, or invests in products which we would like you to invest in, you, Mr Al Rajaan, will be paid higher sums. This was bribery pure and simple.

3068. One of Mr Mombelli's justifications as to why the payments to Mr Al Rajaan should not be regarded as bribery and corruption was to emphasise that he always believed that Mr Al Rajaan was knowledgeable in financial matters, and was doing his best to make sound investments for PIFSS. For his part, Mr Mombelli asserted that he would only propose sound investments and he pointed to the evidence that, over the years, many (albeit not all) of the investments made money, sometimes substantial profits. He sought to distinguish the position of the individuals (Dr Al Awadi and Dr Al Shati) who had introduced Gesfinance/Mr Mombelli to Mr Al Rajaan, and were looking to be rewarded in respect of investments which (as they hoped) would thereafter be made by PIFSS. Mr Mombelli had no difficulty in regarding those individuals as corrupt, presumably on the basis that they had used their own positions (Dr Al Awadi, as President of the KIO) to influence and possibly pressurise Mr Al Rajaan to meet Gesfinance in the hope of the personal and continuing gain from investments made by PIFSS. Mr Mombelli considered that this was corruption, because neither of them were working for PIFSS or seeking to promote the interests of PIFSS.

3069. Mr Mombelli then contrasted Mr Al Rajaan's position, on the basis that Mr Al Rajaan was throughout looking for PIFSS to do well. However, Mr Mombelli accepted in cross-examination that this was not Mr Al Rajaan's only motivation. He agreed that he knew at the start that Mr Al Rajaan would only cause PIFSS to invest if he thought it was a good investment and if Mr Mombelli paid him some of his commissions. He also accepted that Mr Al Rajaan's stance created a conflict of interest, but asserted that Mr Al Rajaan's desire to do the best for PIFSS meant that he stayed just on the "edge" of the line between permissible and impermissible conduct. I do not accept any of this. It is not necessary for me to say whether or not the conduct of Dr Al Shati and Dr Al Awadi was corrupt: they were not working for PIFSS, and it might be said that they were simply seeking payment for an introduction made. However, Mr Al Rajaan, and his conduct throughout, were unquestionably corrupt, and I see no basis for saying that Dr Al Shati and Dr Al Awadi were corrupt, but Mr Al Rajaan was not.

3070. I also do not accept that it is any answer for Mr Mombelli to assert that the payments to Mr Al Rajaan can be excused, or that there was no dishonesty on his part, because they were simply a consequence of how business needed to be done in Kuwait. Mr Mombelli was not compelled into doing business with Mr Al Rajaan, or indeed with any other corrupt Kuwaiti individuals that may have existed. That was Mr Mombelli's own decision. He was free to develop his business in countries where, as he saw it, people in senior positions were not corrupt, and where business could be carried out in an ethical and lawful manner. He was living and working in Switzerland which, as he recognised, was in that category. He was also free to ask for evidence as to Mr Al Rajaan's alleged authorisation to receive the payments which Mr Mombelli was making, but he deliberately chose not to do so because he knew that would put an end to the relationship. He came to the view that it was easier and more profitable to do business with a corrupt individual, and indeed had no hesitation about doing so: the payment of commissions to Mr Al Rajaan personally was discussed at the very first meeting in 1995, and proceeded thereafter.

3071. Another third party to whom Mr Mombelli lied was a firm of auditors called Berney Associes ("Berney"). Mr Mombelli explained that Berney had acted as auditors/ accountants, and they were also involved in setting up a number of Mr Mombelli's companies and acting as their administrators and performing back-office functions.

They prepared notes of their discussions with Mr Mombelli, recording his answers to questions about the payments being made.

3072. A note dated 3 February 2006 records Mr Mombelli advising Berney:

> "He [i.e. Mr Mombelli] works on ICS with Martin Currie and on other international investments funds, particularly in the Middle East.
>
> He will receive introducer fees from these funds. That said, he explains that he will have to pay back part of his income to a business provider who helped him open these relationships in the Middle East. It should be —50% share."

3073. This was untrue. Mr Al Rajaan (to whom Mr Mombelli was referring in the second quoted paragraph) was not a "business provider who helped [Mr Mombelli] open these relationships in the Middle East". Mr Al Rajaan was the director-general of the institution investing in the funds, but Mr Mombelli at no stage revealed that. Also, the reference to 50% – which I have no doubt came from Mr Mombelli – sought to hide the fact that Mr Al Rajaan was being paid substantially more than 50%. This was, no doubt, because a payment of 50% might look like a 'normal' split of commissions between Mr Mombelli and a business introducer, but payments of 70% or 80% would raise obvious question marks as to the nature of such high payments.

3074. A note dated 23 November 2007 records Berney asking questions, and Mr Mombelli's responses, about payments to Dryden, one of Mr Al Rajaan's vehicles. Mr Mombelli knew that Dryden was in substance Mr Al Rajaan. The note records:

> "3. He [i.e. Mr Mombelli] confirms again that this is a payment to his introducer of clients who work with Martin Currie funds, with which ICS also works, and that pays part of the introducer fees to Atena. The bank statements clearly state the source [of funds]. There is no overcharging.
>
> 4. We ask FM [Mr Mombelli] if he knows the beneficiary of the account to which he instructs us to pay. FM explains that he does not know the identity of the beneficiary but that he is instructed by Fahad Al Rajaan, a business provider specializing in high finance, a rich businessman, owner of a bank in Bahrein and investments' companies."

3075. This information was incorrect and misleading. The payments were not made to "his introducer of clients", and Mr Mombelli accepted in evidence that this was incorrect. They were being made to Mr Al Rajaan, and Mr Mombelli knew that he was the beneficiary of the account to whom the payments were being made. The description of Mr Al Rajaan as a "business provider specialising in high finance [etc]" was misleading in that he was not (or at least not principally) a business provider specialising in high finance: he was the Director-General of the institutional investor in the funds which generated the commissions. Mr Mombelli accepted in his evidence that "I leave out a key point, yes". I do not accept that, as he said, it was not his intention to hide anything. He may (as he said) have been just adopting the easiest solution, to continue his

business. But the way in which he did this was to give a misleading, and in my view, dishonest account of the payments in his explanation to Berney.

3076. A note dated 18 August 2008 records Berney seeking an explanation in relation to 5 substantial payments, totalling € 1.8 million, which Berney were being asked to make. They were concerned to receive confirmation that "the said transaction are fully compliant with the anti-money laundering rules applicable in Switzerland as well as with the business rules". In his evidence, Mr Mombelli accepted that he could not give that confirmation: he had no formal confirmation that Mr Al Rajaan was entitled to receive that money. Mr Mombelli accepted that his explanations to Berney then gave (partially, in Mr Mombelli's words) an inaccurate and misleading description of Mr Al Rajaan, and omitted a key fact. In an earlier part of the note, the author at Berney records being told that the payments were going to a person who had introduced the business to him (Mr Mombelli), namely as an adviser to institutional clients in the Middle East. Later in the note, there is the following:

> "Mr. Mombelli then gave us the name of the financial adviser who has introduced him to the client that receives the payments. That is Mr Fahad Rajan. The said individual would be directly or indirectly the beneficiary and the beneficial owner of the PBT account, being himself a customer of PICTET bank that takes care of his business interests. Mr. Mombelli confirms to us that he would also be the beneficiary of Dryden Worldwide SA."

3077. In that call, Mr Mombelli gave a misleading description of Mr Al Rajaan's position. Mr Al Rajaan was not a financial adviser who had introduced the business. There was no reference by Mr Mombelli to his role as the Director-General of the investor. Mr Mombelli accepted that he intentionally withheld Mr Al Rajaan's identity as the director of PIFSS. Mr Mombelli also referred to the payments being "at least 50%"; thereby seeking to conceal the fact that the payments were always 70%, and higher in the case of the Martin Currie fund.

2015: Responses to Wafra and PIFSS

3078. Another area where Mr Mombelli lied was in connection with the investigations that both Wafra and PIFSS itself were making in 2015.

3079. In June/July 2015, Wafra asked questions of Sparx concerning the Sparx Japan Real Asset Properties Fund I. This was a fund where commissions were paid to Mr Mombelli by Sparx on PIFSS' investment, even though real estate is not his area, and it is difficult to see how Mr Mombelli could be said to have introduced PIFSS to that particular fund. The GRS recorded that Mr Al Rajaan was entitled to receive his share of the commissions, although it is not clear that monies were actually paid over in view of the difficulties which Mr Al Rajaan was encountering after 2012.

3080. Wafra's questions were discussed by Sparx with Mr Mombelli, who (at his request) was sent a copy by email of some written questions which Wafra had asked, and Sparx's proposed response. When asking for the questions to be sent, Mr Mombelli said:

> "In any case I can confirm that I did not share any fees I received on this fund."

3081. In response to the first question, Sparx proposed providing (and did provide) to Wafra a copy of the introducer agreement relating to this fund. The second question, and the proposed response were as follows:

> "[Question] Please also confirm how long they have been paid, whether PIFSS is aware of the payment, whether to your knowledge the third-party agent shares their fees with another party, and if so with whom;
>
> [Answer] We have been paying fees since the agreement was executed in 2012. We are unsure of PIFSS' awareness of the payment. Clause 4.3 of the agreement expressly prohibits the sharing of fees with another party unless authorized in writing by PIFSS."

3082. There was then a phone call between Sparx and Mr Mombelli, and it is apparent that Mr Mombelli was content for Sparx to give the above proposed response. Mr Mombelli was thereby misleading Wafra and was in my view again acting dishonestly. He accepted that sums on this fund were payable to Mr Al Rajaan, and he knew, as he accepted in evidence, that Sparx wanted to know whether sums were payable to Mr Al Rajaan. It would have been obvious to him that that is what Wafra, on behalf of PIFSS, wanted to know: he described PIFSS as being "quite aggressive on their request". Sparx's answer to the question, which referred to Clause 4.3 of the introducer agreement (discussed above) would have conveyed to any reasonable reader, in the position of Wafra or PIFSS, that there was an express prohibition on the sharing of fees, and therefore that there was no sharing arrangement in place in relation to the fees on this fund. Mr Mombelli knew that that was not true. Mr Mombelli did not suggest that Sparx should respond to the question by stating that, as he now asserts: commissions were being shared with Mr Al Rajaan; this was usual and accepted practice in Kuwait; and that this was known to and had been authorised by PIFSS.

3083. It is also interesting to note the statement to Wafra that Sparx was "unsure of PIFSS' awareness of the payment". Sparx were there saying, with Mr Mombelli's approval, that they were unsure as to whether or not PIFSS was aware that payments were being made to Mr Mombelli. If Mr Mombelli had believed (as he asserted in evidence) that PIFSS was aware of and had authorised the sharing of his commissions with Mr Al Rajaan, then it makes no sense for him to have approved Sparx telling Wafra that it was unsure whether PIFSS was aware of the payments to Mr Mombelli.

3084. Mr Mombelli sought to assert in evidence that Sparx was being dishonest here, because individuals there knew full well that commissions were being shared with Mr Al Rajaan. I can make no findings, one way or the other, as to Sparx's knowledge or dishonesty. Any such dishonesty would not, however, provide an answer to Mr Mombelli's own dishonesty in associating himself with the answers which Sparx gave to Wafra.

3085. Mr Mombelli was also cross-examined in relation to a written confirmation that he gave, in October 2015, to Polunin Capital Partners Ltd ("Polunin"). The letter from Polunin, which Mr Mombelli countersigned, referred to two funds in which PIFSS had invested, and upon which commissions were paid to one of Mr Mombelli's companies, and then paid on (in substantial part) to Mr Al Rajaan. The background to the written

confirmation was that PIFSS had written to Polunin in October 2015, asking for certain confirmations to be provided. Mr Mombelli had, in turn, been asked to provide an appropriate written confirmation, and he accepted in evidence that he had seen PIFSS' request for such confirmation. Mr Mombelli then provided the following confirmation on behalf of his company, Creative Advisors Ltd:

> "We and our officers, directors, employees, placement and similar agents and controlled persons ('Covered Associates') have acted and will continue to act in full compliance with all applicable laws and regulations governing ethical behaviour in dealings with PIFSS and understand that such provisions apply to persons doing or seeking to do business with PIFSS. In addition, we and our Covered Associates have not knowingly made, and will not knowingly make, whether directly or indirectly any contribution or payment to any official, employee, staff, fiduciary or similar associate of PIFSS in violation of applicable laws. We shall continue to maintain and operate processes and procedures compliant with, and shall promptly notify Polunin Capital Partners Limited of any applicable violation with respect to, such laws."

3086. Mr Mombelli accepted that this confirmation was not true. He would have known that at the time. I have no doubt that, again, Mr Mombelli was acting dishonestly in giving a confirmation that he knew to be untrue. Again, it is no answer for Mr Mombelli to pray in aid Polunin's alleged complicity in his own dishonesty.

Investigations into Mr Al Rajaan and the period after his resignation

3087. In April or May 2012, Mr Al Rajaan told Mr Mombelli to stop making transfers to the numbered accounts that he had previously identified for the payment of his share of commissions, and Mr Mombelli did so. He also told Mr Mombelli that he had been suspended temporarily from his role at PIFSS, that this was a political decision due to a change of power in Kuwait. Mr Mombelli's evidence was that Mr Al Rajaan did not seem too concerned and told Mr Mombelli that the suspension of bank transfers would be temporary.

3088. Later in 2012, Mr Al Rajaan asked Mr Mombelli to make cash payments in respect of his share. Mr Mombelli described how the sums payable to Mr Al Rajaan were far greater than the amount that he would be able to give him in cash. However, he started to deliver instalments of cash in person to his villa in Cologny. Mr Mombelli continued thereafter to receive commissions from the investment managers, including Sparx and Martin Currie, but Mr Al Rajaan told him to hold on to his share of those fees. Following Mr Al Rajaan's reinstatement at PIFSS, Mr Mombelli continued to report to Mr Al Rajaan on the funds in which PIFSS had previously invested, but he did not make or purport to make any new introductions.

3089. Following Mr Al Rajaan leaving PIFSS in 2014, Mr Mombelli stayed in touch. Mr Al Rajaan asked him to continue giving him cash in part payment of what he had agreed to share with him. Mr Mombelli moved to Portugal in 2014, but continued to make payments to Mr Al Rajaan by delivering money in person to his villa in Cologny. After Mr Al Rajaan moved to London, which Mr Mombelli understood to be in 2015, he

continued to provide Mr Al Rajaan with cash, including in London. In October 2016, Mr Mombelli read an article in Le Temps headed "Kuwaiti Storm over Mirabaud and Pictet", and he became aware of criminal proceedings in Kuwait. He said that he then began to understand how serious the situation was for Mr Al Rajaan.

3090. In 2018, Mr Mombelli was interviewed by the Swiss Public Prosecutor. Mr Mombelli gave a fairly frank account of his dealings with Mr Al Rajaan over the years, albeit that he lied about the continuation of cash payments to Mr Al Rajaan.

N4: Liability issues

The parties' arguments

3091. I have already identified, in Section N2 above, the main aspects of the parties' arguments. In summary PIFSS's case is that Mr Mombelli was aware: (i) that Mr Al Rajaan was a public official and that he intended to make a personal profit in return for exploiting that position; (ii) that Mr Al Rajaan doing so would potentially infringe PIFSS's rights; and (iii) that there was potential harm to PIFSS in Mr Al Rajaan doing this; and Mr Mombelli intended to and did assist Mr Al Rajaan in this regard, knowing the risk of harm to PIFSS.

3092. The essence of Mr Mombelli's defence is that he honestly believed that it was lawful to share commissions with an investor's fiduciary and that he thought PIFSS knew about Mr Al Rajaan's receipt of these commissions.

Discussion

3093. Mr Mombelli, in cross-examination, gave thoughtful answers, and responded in most cases directly to the questions which were asked. He was in many respects a rather charming witness. It is also fair to say that in his evidence at trial, and indeed in his 2018 interview with the Swiss prosecutor, he admitted most if not all of the key aspects of PIFSS' case against him and his companies.

3094. What remained was an argument that he believed that he was not acting unlawfully, that he was not dishonest, and that he believed that Mr Al Rajaan was authorised to receive the payments which he received. It will be apparent from Section N3 above that I reject that case on the facts. The evidence of Mr Mombelli as to these matters was, despite his charm, not credible.

3095. Since I reject the main aspects of Mr Mombelli's case on the facts, I do not consider it necessary to have an extended discussion about the application of Kuwaiti law to the facts as I have found them. I do, however, accept Mr Norbury's argument that, as a matter of Kuwaiti law, it is not actually necessary to prove "dishonesty" as an ingredient either of the criminal laws which were contravened, or the resulting tort liability. I have, however, referred to "dishonesty" in this Section N, because it is a word which fairly describes Mr Mombelli's conduct and state of mind.

3096. As explained in Section B above, PIFSS essentially needs to prove the intention on the part of Mr Mombelli to do the relevant acts which constitute the criminal offences which are relied upon, and also (for example in relation to Article 11 KPPL) to prove an intention to harm PIFSS. Thus, an accessory must intend to assist or incite the

perpetrator and know the material element of the crime and its criminal result. Intention, in the context of Kuwaiti criminal law, includes probable intent, as discussed in Section B.

3097. I consider that PIFSS has proved all of the relevant elements to establish tortious liability as against Mr Mombelli. He clearly intended to pay monies to Mr Al Rajaan in return for PIFSS investing in funds on which the various companies would receive commissions. It was clear that Mr Al Rajaan was profiteering from his position at PIFSS. He assisted in concealing the fact that monies were being paid to Mr Al Rajaan.

3098. In relation to intending harm, which is an ingredient of the offence under Article 11 of the KPPL: Mr Mombelli did intend such harm, even if his primary motive was to line his own pockets and those of Mr Al Rajaan. Mr Mombelli knew that the arrangements for the receipt of secret commissions by Mr Al Rajaan created a very serious conflict of interest between his personal interest and PIFSS's interest and his duties to PIFSS. This corrupted the decision-making process of PIFSS, obviously to the disadvantage of PIFSS.

3099. Mr Mombelli also knew that it was possible for rebates of fees to be given to investors, as indeed he said when lying to banks as to what was happening. Indeed, after he set up on his own, a 2001 presentation on behalf of ICS made it clear that clients could ask for and receive a rebate of fees or a discount, and he accepted in evidence that he would normally give one. He was prepared to work on the basis of an alternative structure, whereby the entirety of fees received from fund managers would be returned to the investor, and he would charge a fee. This was explained in the 2001 presentation as follows:

> "In case an investor is adverse to ICS being compensated by the managers, any manager compensation may be directed to the client and a negotiated management and/or incentive fee will be charged as a compensation for the ICS reporting and monitoring on the fund's activity."

3100. Mr Mombelli could see that PIFSS was being harmed, because although it was a large institution with considerable potential leverage in relation to fees, none of the payments made by fund managers were being applied for the benefit of PIFSS. Instead, Mr Al Rajaan and Mr Mombelli were keeping everything for themselves. Mr Mombelli accepted that, by 2008 when PIFSS was his only client, he would have been willing to work for a fixed fee of USD 500,000 per year, albeit that PIFSS suggested that he would in fact have done so for much less. On any view, however, Mr Mombelli could see that PIFSS was being disadvantaged.

3101. There is also nothing in the Kuwaiti law evidence which suggests that the Mombelli Defendants can rely upon a defence which consists of an assertion that Mr Mombelli believed that he was acting lawfully under Kuwaiti law. In any event, that was not his belief. Whilst I accept that a genuine belief that Mr Al Rajaan was authorised to receive the monies might ground a defence under Kuwaiti law, Mr Mombelli had no such belief.

3102. Mr Brown relied upon various "contra indicators" which, in his submission, showed that Mr Mombelli's mindset was not dishonest, and that he did believe that Mr Al Rajaan was authorised. He referred in particular to: his frank interview with the Swiss

prosecutor in 2018; the fact that he did visit PIFSS' offices "in plain sight"; that he had dealings with various members of staff at PIFSS, and that there were 200 documents in PIFSS' disclosure which emanated from him – he was therefore not operating completely in the shadows; that he wrote to PIFSS when he left Gesfinance and set up on his own.

3103. I do not consider that any of these points is of significance, particularly bearing in mind the other evidence to which I have referred in Section N3 above. When interviewed by the Swiss prosecutor, he did admit making payments to Mr Al Rajaan and did explain the background to those payments, and did disclose the existence of the GRS. However, by that time the Swiss prosecutor had a good number of relevant banking documents, so it would have been difficult for Mr Mombelli credibly to deny participating in payments to Mr Al Rajaan. Furthermore, Mr Mombelli did lie to the Swiss prosecutor in relation to cash payments.

3104. It is also true that Mr Mombelli did visit PIFSS' offices. However, he only did so once, in 1997, and so this point does not lead anywhere. It is true that some documents were sent by him to PIFSS, as discussed above. I accept therefore that, unlike some of the other intermediaries in this case, he was not completely in the shadows. However, there is very limited correspondence in the period after 1999, as already discussed. And in any event, the correspondence does not refer to payments being made to Mr Al Rajaan. None of the matters referred to by Mr Brown, individually or collectively, outweighs the secrecy which surrounded the arrangements with Mr Al Rajaan, as described above.

3105. Mr Brown also submitted that Mr Mombelli did make genuine introductions to the various fund managers, and that the commissions which they paid were in line with market rates. There was a substantial issue as to whether Mr Mombelli was responsible for all of the introductions. I do not consider that any aspect of liability under Kuwaiti law – or indeed the quantum of recovery – is affected by the question of whether the introductions were genuine. I will proceed on the basis that at least some of them were. But even assuming that Mr Mombelli was responsible for all the introductions, that does not say anything about the corruption which went alongside those introductions, and which gives rise to tortious liability under Kuwaiti law.

3106. Another aspect of the submissions on behalf of Mr Mombelli was that the final investment decision was made by PIFSS' investment committee. Again, I do not consider that this is of any relevance or provides a defence. Mr Mombelli had no dealings with anyone on the IIC or HIC, and did not know who was on them. In relation to the decision to invest, he dealt only with Mr Al Rajaan. It was, throughout, obvious to Mr Mombelli that Mr Al Rajaan was the key decision-maker at PIFSS. That was why Mr Mombelli and his companies were paying him. When the investment in 1995 was not followed up with further investments, it was Mr Mombelli's initiative to approach Mr Al Rajaan to increase the commission rate to 70%, and this produced the desired result in terms of further investments at the end of 1997.

3107. There was also a revealing piece of evidence by Mr Mombelli as to how Mr Al Rajaan presented himself to fund managers. This is relevant not only to Mr Mombelli's understanding, but also in my view as to the understanding of others who were dealing with Mr Al Rajaan. Mr Mombelli said that Mr Al Rajaan "was acting like he was the owner of the institution, like it was his own institution. He was the decision-maker, he was the general director 100% and he showed that, in every meeting when he met the

manager, 'I decide everything'". This indicates that there was no substantive decision-making role being played by an investment committee.

3108. Mr Mombelli's evidence continued as follows in response to my questions:

> "MR JUSTICE JACOBS: Do you remember you said that a moment ago? What did you mean by "he showed that in every meeting when he met the manager, 'I decide everything'"? Were you at meetings with Mr Al Rajaan and the manager and you could see that being said? Why did you say that?
>
> A: In our occasion with SPARX, yes. I met also — I introduced him to Polunin also. I met him in the villa. He explained what he was doing and he was presenting the institution like it was his creation, his job. As I said, he was very proud of the institution and — very proud – … of his creation.
>
> MR JUSTICE JACOBS: He was also saying, "I'm the one who decides everything"; is that right? You heard him say that?
>
> A: He didn't say that, but he was showing that he was the man to deal with."

3109. Reliance was also placed, by Mr Brown, on an argument that the investments involved in the Mombelli scheme had generally proved profitable. That appears to be the case for many of the investments. However, I do not consider that this makes any difference to the success of the tortious claim that exists under Kuwaiti law. Whilst some investments may have proved profitable, it does not follow that PIFSS has not suffered harm by reason of the torts of the Mombelli Defendants.

3110. Accordingly, I do not consider that there is any defence to liability in relation to any of the Mombelli Defendants. I also consider that there is no defence to the claim against Mr Al Rajaan. I deal separately below with the issues of non-justiciability, contributory fault, and limitation.

N5: Quantum issues

3111. A number of issues were raised by the Mombelli Defendants concerning the quantification of the claim against them.

3112. It was submitted that the claim should exclude the monies paid on the investments made during the Gesfinance period. The claim there is made against Mr Mombelli rather than his companies, but it was submitted that Mr Mombelli neither received nor benefited from these commissions, and was not the payor of monies to Mr Al Rajaan where monies were paid by Gesfinance.

3113. I consider that PIFSS has a valid claim. Mr Mombelli was assisting Mr Al Rajaan during that period and in relation to those investments. He is liable under Kuwaiti law as a result of his assistance. There is nothing in the Kuwaiti law evidence which suggests that he can defend the claim by pointing to the fact that he was doing so as an employee

of Gesfinance, or that he did not personally benefit from the funds which flowed. He acted tortiously, and is therefore liable.

3114. There was a dispute as to whether the extent of the Mombelli Defendants' liability should be limited to the sums actually received by Mr Al Rajaan: a total of USD 61,640,497. Mr Norbury submitted that, on any view, the claim should include the additional sums which were payable to Mr Al Rajaan under his deal with Mr Mombelli, albeit that they were never paid because of the difficulties which Mr Al Rajaan encountered after 2012, and because of Mr Mombelli's decision to stop paying – no doubt because after a certain point in time, there was no point in Mr Mombelli paying him. Those additional sums were calculated by PIFSS to be around USD 26,600,000, based on the GRS. I did not understand that, subject to issues of liability (and the arguments based on justiciability, contributory fault and limitation), there was a dispute as to the recoverability of these sums as a matter of Kuwaiti law. In any event, I do not consider that there is a persuasive argument against their recoverability.

3115. Mr Brown's main point on quantum concerned PIFSS' claim for the Mombelli slice of the commissions received from fund managers. This slice, mainly comprising the 30% or 20% share payable in relation to the investments after the initial investment, amounted to in the region of USD 37.8 million. Mr Brown submitted that it would be inappropriate in effect to deprive Mr Mombelli of his career earnings. These commissions were earned under contract in accordance with standard market practice for introducing the fund managers to PIFSS. Mr Mombelli had carried out valuable work for PIFSS, and the investments had generally proved profitable. He drew attention in this context to the evidence which indicated that Mr Mombelli had made introductions of fund managers to PIFSS.

3116. I do not consider that Mr Brown's argument can succeed, given my conclusions as to Kuwaiti law. In Section B above, I have addressed in detail the compensatory remedy for which PIFSS has argued. I have concluded that a repayment remedy is available jointly and severally against the public official as principal tortfeasor under Article 227 KCC and, pursuant to Article 228 KCC, against the doers and accomplices who have assisted him. In awarding a civil repayment remedy for breach of the KPPL provisions, as compensation for harm, the legislator is recognising and reflecting that the prescribed breaches result in harm to the victim entity in at least the value of the profits/benefits caused by the breach. I have also specifically addressed the issue of whether the compensatory remedy is limited to the amounts received by the public official, and have concluded that it is not. In summary, Articles 11 and 12 of the KPPL both criminalise profiteering which benefits others, as well as benefiting the corrupt public official. Accordingly, the quantum of the compensatory or repayment remedy will extend to the entire amount which has been profiteered.

3117. It is therefore unnecessary (subject to a point arising in the double actionability period) to consider the case advanced by PIFSS as to its quantum of recovery based on transactional loss; i.e. the loss calculated by reference to what the position would have been if Mr Al Rajaan had acted honestly. It suffices to say that this approach would also have produced a claim very close to the USD 125,659,151. This is because, in an honest world, Mr Al Rajaan and Mr Mombelli would have procured the payment of the commissions, payable by the fund managers, to PIFSS rather than to themselves, with Mr Mombelli being content with remuneration on a fixed fee basis, such fee being

rather lower than the USD 500,000 per annum which Mr Mombelli acknowledged as acceptable in the course of cross-examination.

3118. A number of other smaller points on quantum were raised.

3119. D1/D2 argued that some portions of the commissions received by Mr Al Rajaan were payments in respect of his personal investments. PIFSS has calculated that the relevant figures would be USD 216,105, of which Mr Al Rajaan's share would be USD 151,273. However, I accept PIFSS' submission that this figure (relatively small in the scheme of things) should not reduce the claim. That is because these were unauthorised benefits received through the unlawful exploitation of Mr Al Rajaan's official position. It was no answer in the *Dubai Wire* case that investments were made using the personal funds of some of the defendants in that case. I have rejected similar arguments about personal investments in the context of the Mirabaud and the EFG Schemes.

N6: Other issues

3120. PIFSS' first Gesfinance investments were made in the double actionability period. Accordingly, I must consider English law in relation to that investment. Leaving aside the general arguments as to why Mr Mombelli was not liable (i.e. because he believed that the payments were authorised etc), I did not understand that any additional specific points of English law were raised in relation to liability in relation to these investments. Mr Al Rajaan is liable under principles of English law for breach of fiduciary duty and bribery. Mr Mombelli is liable for bribery, dishonest assistance in Mr Al Rajaan's breach of fiduciary duty, and knowing receipt of trust property.

3121. As far as concerns quantum under English law: as a briber, Mr Mombelli would be liable under English law for the amount of the bribe paid. I can see that there is an argument that, under English law, the Gesfinance share of the commissions on these investments are not part of the bribe, and therefore would only be recoverable if PIFSS could show that it had suffered transactional loss in the amount of that share. Given that Mr Mombelli would have been willing to deal with PIFSS on the basis of a fixed fee, I can see that there should be a small reduction, which I estimate at USD 300,000, to reflect the fee that would have been payable.

3122. The Mombelli Defendants argued a specific limitation point based on the expiry of the 3-year period, from the date of knowledge, under Kuwaiti law. It was not disputed by PIFSS that, because of the way that its case has been pleaded, the Kuwaiti civil limitation periods were applicable to the claims against the Mombelli companies. PIFSS therefore did not pursue claims against the companies in respect of the period prior to 2004. I address that issue in the context of the limitation arguments in Section R below, where I conclude that there is no limitation defence.

N7: Conclusions as to the liability of Mr Al Rajaan (and therefore D1), and the Mombelli Defendants under Kuwaiti law

3123. The legal basis of Mr Al Rajaan's liability under Kuwaiti law is materially the same as set out in previous sections, in particular those dealing with the Mirabaud Scheme and the Pictet Scheme.

3124. The legal basis of the liability under Kuwaiti law of Mr Mombelli is the same as that of others who paid bribes to Mr Al Rajaan and assisted him in his receipt of secret commissions, such as Mr Nasrallah and Ely Michel Ruimy. That tortious liability arises pursuant to Articles 227 – 229 KCC for breaches of Kuwaiti criminal law. Mr Mombelli committed offences under Articles 47 and 48 of the KPC, in assisting Mr Al Rajaan's breaches of Articles 11 and 12 KPPL, and Article 35 of the KPC. In summary, Mr Mombelli assisted by agreeing with Mr Al Rajaan to share commissions, thereby agreeing to pay bribes, and then receiving and sharing the commissions received on PIFSS' investments, and adopting practices to keep the arrangements and payments concealed. He had the relevant knowledge and intent, as discussed in this Section N.

3125. The liability of Mr Mombelli's companies, D27 – D29, arises because Mr Mombelli's conduct is attributed to them. This was not disputed, and it is unnecessary to analyse or explain the principles of attribution.

N8: Conclusions as to the quantum of compensation

3126. Prior to taking into account any possible impact of the Mirabaud and EFG settlements, the quantum of PIFSS' successful claim for compensation, subject to possible conversion to other currencies, is therefore as follows:

D1/Mr Al Rajaan: USD 125,359,151;

Mr Mombelli: USD 125,359,151;

ICS (D27): USD 20,943,027;

Sintesi (D28): USD 54,449,060;

Methis (D29): USD 26,697,156.

3127. The above figures take into account the USD 300,000 reduction in PIFSS' claim for the double actionability period, and my conclusions on the limitation issue in Section R below.

SECTION O: THE UBP SCHEME

3128. As a result of the settlement between PIFSS and UBP, reached early in the trial, PIFSS makes no claim for compensation in respect of the UBP Scheme.

3129. The claim in respect of the UBP Scheme was also made against D1 and Mr Nasrallah. D1 sensibly agreed that the costs of that claim should be costs in the case. However, Mr Nasrallah has declined so to agree. PIFSS contends that findings in relation to the UBP Scheme may be potentially relevant to costs. Mr Nasrallah does not dispute that such findings are only potentially relevant to costs.

3130. I do not consider it necessary to make detailed findings in relation to this scheme, because I cannot see that such findings have any real prospect of being relevant on the question of costs. Given my adverse conclusions in relation to Mr Nasrallah in connection with the Pictet Scheme, the EFG Scheme and the Pensée Scheme, it is unrealistic to think that there would be no adverse costs order against him, on the basis that PIFSS as the successful party is entitled to an award of costs. I can see no basis for an apportionment of the costs of the UBP Scheme. The only reason that the claim did not need to be addressed in any great detail at the trial was that PIFSS reached its settlement with UBP. In any event, I see no reason for reaching materially different factual conclusions as to Mr Nasrallah, in relation to the UBP Scheme, to those which I have reached in the context of the Pictet and EFG Schemes.

3131. If I am ultimately persuaded by either party that it is necessary to make detailed findings in relation to the UBP Scheme, I will do so hereafter.

SECTION P: FUND FLOWS

3132. When addressing the individual schemes, I have endeavoured to deal with such arguments as were raised in relation to fund flows. When circulating the judgment in draft to the parties, I said (in this Section P) : "If any of the parties identify points which have not been addressed, then I may supplement this section of the judgment. Alternatively, I may address any such issues at, or following, the "consequentials" hearing." In the event, none of the parties identified any points which had not been addressed.

SECTION Q: CONTRIBUTORY FAULT

3133. The main proponent of the argument on contributory fault was EFG. Kuwaiti law in that regard was addressed by Ms Bingham, and she also addressed the factual position in her written and oral submissions. The submission focused on PIFSS' governance failures, as described in Section E above. It also relied upon PIFSS' alleged failure to take appropriate action in response to the allegations of corruption made against Mr Al Rajaan by Parliamentarians and others in the 2000s. Those lines of argument were adopted by other Defendants.

3134. The argument can be swiftly dismissed. The Defendants seek to invoke contributory fault in circumstances where their faults and torts were intentional, and where any fault on the part of PIFSS was unintentional. As discussed in Section B16 above, there would be no reduction for contributory fault in such circumstances. The Defendants' intentional wrongdoing overshadows any fault on the part of PIFSS.

3135. Even if this were not the clear position under Kuwaiti law, and even if it were permissible to consider making an allocation as between PIFSS and the various Defendants, I would not consider any reduction in PIFSS' compensatory claims to be appropriate. I am dealing with wrongdoing on an enormous scale, over a lengthy period of time. Each of the Defendants, in different ways, took advantage of weak governance structures at PIFSS, and Mr Al Rajaan was responsible for creating and then maintaining those weak structures. It would be entirely unjust to make any reduction in those circumstances.

SECTION R: LIMITATION UNDER KUWAITI LAW

R1: Limitation and Article 253 of the KCC

The central issue

3136. Article 253 of the KCC provides as follows, although there was a dispute between the parties as to the appropriate translation of Article 253 (2):

> "1- Tort liability claims prescribe by the lapse of three years from the date of the injured party's knowledge of the harm and the responsible party for it, or by the lapse of fifteen years from the day on which the tort occurred, whichever period lapses first.
>
> 2- If the tort liability claim is based on a crime, then it shall not prescribe as long as the criminal lawsuit remains [pending] [available], even if the periods stipulated in the first paragraph have lapsed."

3137. There was no dispute as to the appropriate translation of Article 253 (1), or indeed its effect. This sets out the basic limitation period for tort under Kuwaiti law. This is three years from the date of knowledge of the facts which would enable a tort claim to be brought against the defendant, but with a long-stop of fifteen years from the date of occurrence of the tort.

3138. The central issue here concerns Article 253 (2) of the KCC, and the effect of situations where tort liability is based on a crime. The alternative translations of Article 253 (2) reflected the views of Dr Youssef ("pending") and Dr Abbas ("available") respectively. In summary, Dr Abbas's view was that the civil limitation period would be extended provided that criminal proceedings were potentially available: e.g. because criminal proceedings were not prescribed because the applicable limitation period had not yet run its course. Dr Youssef's view was that the extension of the civil limitation period would only arise in the event that criminal proceedings were actually commenced. On this basis, as EFG submitted, the ordinary three- or fifteen-year civil limitation period applies because there is not, and never has been, any parallel criminal suit or prosecution rendering it inexpedient for PIFSS to proceed with its civil action within either of those time periods.

3139. There was no dispute that the actual commencement of criminal proceedings in respect of the relevant crime would have the effect of extending the civil limitation period pursuant to Article 253 (2). There was also no dispute that, in circumstances where there had been actual commencement of criminal proceedings, the commencement date for the three-year "date of knowledge" period would commence when those proceedings were concluded, whether by dismissal, acquittal, conviction or otherwise. Where there were actual criminal proceedings, it would inevitably be the case that the three-year "date of knowledge" Article 253 (1) trigger would be applicable, rather than the fifteen-year longstop; because the victim of the crime, who would be the potential civil claimant, would necessarily know about the crime and the alleged criminal/tortfeasor. Thus, in the Kuwaiti cases which have considered the impact of criminal proceedings on the limitation period, it is always the three-year "date of knowledge" trigger which is under consideration.

3140. In very many cases where criminal proceedings are actually commenced, a civil claimant would likely wish to make a civil adhesive claim in those proceedings, and no limitation issue would be likely to arise. Indeed, PIFSS contends that no limitation issue could arise in such circumstances, because (on PIFSS' case) the civil claim would certainly be timely if the criminal proceedings were themselves timely. PIFSS submits that this is the reason why, as was common ground, there are no Kuwaiti cases where an adhesive civil claimant's claim was held to be prescribed by limitation.

3141. It is also clear that, in the cases where the Kuwaiti court is concerned with the civil limitation period where there have been actual criminal proceedings, the court looks at the date of termination of the actual criminal proceedings as the trigger for the effective start of the civil limitation period: i.e. the three-year period which would be the relevant period in circumstances where a claimant had knowledge of the relevant facts giving rise to the claim. There was also no dispute that, in cases where there had been actual criminal proceedings, the courts would not engage in an exercise described as "totting up". Accordingly, there is no suggestion in the cases that the courts need to include, in the calculation of the three-year period, any time that may have elapsed between the date of commission of the crime and the time when the criminal proceedings actually commenced. There is a straightforward calculation of the three-year period starting on the day of termination of the criminal proceedings. PIFSS contended that the absence of any need for "totting up" supported its position as to how Article 253 (2) worked; namely that the running of time was suspended from the moment of the commission of the crime, irrespective of whether or when the criminal proceedings actually commenced.

3142. The key dispute between the parties concerns the situation where no criminal proceedings are actually brought. EFG through Ms Bingham KC led the cross-examination of Dr Abbas and closing argument on this issue, and their position was adopted by other Defendants. For convenience, I will simply refer to EFG's submissions.

3143. Although EFG in its written closing distanced itself from Dr Youssef (see Section B above), their argument on this issue was that the underlying Kuwaiti case-law and commentaries supported the conclusion (which had been advanced by Dr Youssef) that suspension of the running of the civil limitation period would only happen if criminal proceedings were actually commenced. Such proceedings therefore had to be "pending" in Dr Youssef's translation. Dr Youssef's evidence, and EFG's argument, was that it was not sufficient if only the potential for such proceedings existed: the suspension was not affected by the fact that criminal proceedings may theoretically have been "available". If, therefore, no criminal proceedings were ever commenced, or were commenced after the applicable three-year date of knowledge or fifteen-year long stop date, then the claim would be time-barred.

3144. Dr Abbas's evidence, and PIFSS' case, was (in summary) that as long as criminal proceedings to establish criminal liability could be brought, the civil limitation period (whether three years from the date of knowledge, or the fifteen-year longstop) would be suspended from the time when the criminal liability arises. In practice, this means that time would only begin to run, for civil limitation purposes, when it was no longer possible to establish criminal liability. Dr Abbas put the matters as follows in paragraphs 741- 742 of his first report:

> "[741] Furthermore, the second paragraph of Article 253 of the KCC lays down an exception from the general rule that applies to tort claims that arise out of a crime. In this case, Article 253 of the KCC links both the criminal and civil claims together: the civil claim shall remain available to the injured party so long as the criminal claim has not prescribed. The civil claim shall not thus prescribe irrespective of whether the 3-year or 15-year periods have lapsed under Article 253(1) of the KCC (whichever would be applicable), so long as the criminal claim has not prescribed.
>
> [742]. This was confirmed by the Kuwaiti Court of Cassation. In this respect, the Court highlighted that if a tort is based on the commission of acts constituting a crime, then the civil claim shall not prescribe until after the extinguishment of the criminal claim. If this is the case, the prescription period of the civil claim shall be paused so long as the right to file, initiate, and proceed with the criminal claim exists."

3145. PIFSS submitted that Dr Abbas's evidence was supported by the applicable principles articulated in the relevant Kuwaiti Court of Cassation case-law, as well as a number of Egyptian cases and other materials.

3146. One example of how, in Dr Abbas's approach, this principle operates is the case where criminal proceedings have in fact been brought, and have come to an end by way of a conviction or an acquittal. In such a case, the civil limitation period would be suspended until the day after the termination of those proceedings.

3147. Another example, according to Dr Abbas, is the situation where the criminal limitation period expires. Unlike the general position in England where historic offences are routinely prosecuted, Kuwaiti law provides for limitation periods for many crimes. That limitation period varies for different crimes. For example, in the case of bribery under the KPC, the limitation period is ten years. Dr Abbas's evidence is that once the limitation period for criminal proceedings expires, then proceedings to establish criminal liability are necessarily no longer possible, and therefore the civil limitation period is suspended until the day after the expiry of the criminal limitation period. This means that there is a much longer period for a civil claim to be brought. Thus, in the case of a claim for bribery based on the crime committed under the KPC, the period would potentially be ten years plus the fifteen years provided for under Article 253 (1), if the bribery was successfully concealed (and therefore the relevant facts giving rise to the claim were not known) for a very considerable time.

3148. This potential extension is particularly relevant to the claims brought by reference to contravention of the KPPL (or its predecessor statutes), and the Money Laundering laws, since there is no limitation period for those crimes. This means, on Dr Abbas's approach, that in a case where criminal proceedings for contravention of those laws have not been brought, time is not running against a civil claimant in relation to its potential civil claim.

3149. EFG submitted that, in the context of criminal statutes which provided for no limitation period, PIFSS' case gave rise to the remarkable position that there would be an

indefinite suspension of the running of time for a civil tort claim. A party could in theory wait forever, safe in the knowledge that it could always bring a claim provided only that criminal proceedings remained theoretically available. They submitted that this was inconsistent with the purpose of statutes of limitation, which was to create an identifiable end-point for the possibility of bringing a claim.

3150. EFG summarised its main arguments as follows.

i) There was no Kuwaiti precedent for the engagement of Article 253 (2) where there had been no opening of formal investigation, and its effect was to overshoot the fifteen-year longstop imposed by Article 253 (1).

ii) There was no Kuwaiti precedent for the engagement of Article 253 (2) where the predicate offence was "evergreen": i.e. with no applicable criminal limitation period.

iii) The rationale of Article 253 (2) was the priority of a criminal judgment, in circumstances where there were parallel criminal and civil claims. This rationale had no application where no criminal proceedings had been brought.

iv) Article 253 (2) was an example of an "impediment" to the commencement of civil proceedings. It was one example of impediments identified in Article 446 of the KCC. The reason why actual criminal proceedings were an impediment was that separate civil proceedings would be stayed pending the outcome of the criminal proceedings, and it would therefore be pointless to commence them. However, where criminal proceedings had not been commenced, this rationale did not apply, and there was no real impediment to the commencement of civil proceedings at all.

v) The "*jurisprudence constante*" which is contained in the Kuwaiti case-law (see the relevant excerpt below) consistently refers to the language of "choice". That makes sense in the context of criminal proceedings actually brought, but is inapplicable in cases where no such proceedings have been brought and where a claimant has not been required to make a choice.

vi) The translations of Article 253 (2) provided by various independent translators all support the "pending" approach of Dr Youssef.

R2: Discussion

3151. I do not approach this issue with a pre-conceived preference for the views of Dr Abbas, notwithstanding my view that he was a far more impressive witness than Dr Youssef: see Section B2 above. I agree with EFG's submission that I should look carefully at the underlying materials in order to decide between the competing views of the experts. I therefore put on one side the fact that Dr Youssef's evidence as to the effect of Article 253 (2) has shifted around. For a long time, he advanced unsustainable arguments, later abandoned, that (i) a criminal conviction was necessary if Article 253 (2) was to apply, and (ii) the 253 (2) extension was only applicable where a claimant had made an adhesive claim in criminal proceedings. I agree with PIFSS' submission that no expert, who had properly considered the relevant case-law, could reasonably reach either of those conclusions. I also agree that it reflects very poorly on Dr Youssef that he

maintained those unsustainable views for a long time, including in the Joint Expert Memorandum, and that he only corrected his evidence on these points very shortly before the expert evidence was to begin. At best, these aspects of his evidence reflect an expert witness who had not read the relevant materials for himself, but was relying on drafts prepared by members of his team, and at worst an expert who was prepared to advance views supportive of his client's position irrespective of the case-law and his duty to the court when giving expert evidence.

3152. However, it does not necessarily follow that I should reject Dr Youssef's views on the central issue which remained: whether suspension is only applicable when criminal proceedings have actually been commenced. In that regard, I bear in mind that there are undoubtedly passages in some of the Kuwaiti case-law which, in the context of the Article 253 (2) suspension, refer to the existence of criminal proceedings, or use similar expressions, and which could be read as supportive of Dr Youssef's views.

3153. Nevertheless, I consider that, on a careful reading of the underlying case-law and underlying materials, Dr Abbas's views do indeed properly reflect Kuwaiti law, and that those views are to be preferred to those of Dr Youssef on this issue.

3154. I do not consider it appropriate to start by seeking to resolve the issue of how to translate Article 253 (2). Where, as here, there is very substantial Kuwaiti case-law which identifies how Article 253 (2) is to be interpreted, and the relevant principles to be applied in that context, the appropriate starting point is to consider that interpretation and application. That may in itself resolve, or at least assist in resolving, the dispute as to how Article 253 (2) is to be translated. But in any event, I consider that I should apply the Kuwaiti Court of Cassation approach to interpretation and application irrespective of how Article 253 (2) is translated, and more particularly irrespective of how an English judge might interpret the language of that English translation as if it were a UK statute.

3155. In that regard, I note that the Kuwaiti case law does not proceed on the basis of a close textual analysis of the words of Article 253 (2), such as might appeal to English lawyers engaged on an analysis of an English statute. Rather, the Kuwaiti case-law contains a formulation of the relevant principles which appears very regularly, and which can fairly be regarded as "*jurisprudence constante*": see Section B3 above.

3156. The case cited by Dr Abbas in his first report, in the context of paragraphs 741 and 742 quoted above, is illustrative. My quotations from case-law below are, where PIFSS's translations are in dispute, from the certified translations provided by the Man + Defendants.

3157. In Kuwaiti Court of Cassation, Challenge No. 83 JY 99, dated 25 October 1999, there was an appeal against a lower appeal court decision which rejected a claim on limitation grounds. It was a defamation case, where the appellant (claimant) had been accused by the respondent of attempting to kidnap him. The accusation was made on 7 November 1993, and the public prosecutor then arrested the appellant. He was released on bail on 15 November 1993. Subsequently, the Kuwaiti public prosecutor decided to dismiss the criminal complaint administratively "due to a lack of criminal intent". That happened on 13 December 1993. The appellant filed the civil proceedings on 1 December 1996. This was within three years of the dismissal of the criminal complaint by the public prosecutor, but more than three years after the appellant had been released on bail. The

lower appeal court had taken the latter date (i.e. 15 November 1993) as the relevant start date for calculating the three-year limitation period. The Court of Cassation held that this was the wrong date, and accepted the appellant's argument that the relevant date was the date of dismissal of the criminal complaint. The court expressed the relevant principles as follows:

> "And whereas this argument is well-founded, since Article 253 of the Civil Code provides that: (1) A claim for liability arising from an unlawful act shall lapse after three years from the date on which the injured party became aware of the damage and the identity of the person responsible for it, or fifteen years from the date the unlawful act occurred—whichever period expires first. (2) However, if the liability claim arising from an unlawful act is the result of a criminal offense, the claim does not lapse as long as the criminal proceedings remain pending, even if the time limits set forth in the first paragraph have elapsed. Furthermore, Article 446 of the same law states: (1) The limitation period for hearing a claim does not begin to run where an impediment exists that prevents the creditor from asserting their right, even if such impediment is of a moral nature…… This means that if the unlawful act constitutes a criminal offense that gives rise to both a penal action and a civil claim for damages, the civil action does not become time-barred unless the penal action itself lapses. Accordingly, if the two actions are separated—due to the injured party choosing to pursue compensation through the civil route without joining the criminal proceedings—the limitation period for the civil claim is suspended for as long as the right to initiate, pursue, or continue the criminal action remains available. If the criminal action concludes—whether by the rendering of a final judgment convicting the perpetrator, or by any other means such as expiration by statute of limitations or dismissal—the limitation period for the civil compensation claim resumes from that date. This is because the continued availability of the right to initiate, pursue, or proceed with the criminal action is deemed, under the meaning of Article 446 of the Civil Code, a legal impediment preventing the injured party—the creditor—from asserting their right to compensation."

3158. I agree with Dr Abbas and PIFSS that the significant features of this statement of principle are as follows.

3159. First, the court refers to the civil claim being suspended for "as long as the right to initiate, pursue, or continue the criminal action remains available". Later on, it referred to "continued availability of the right to initiate, pursue or proceed with the criminal action". (In PIFSS' translation of the earlier passage, the translated words are similar: "so long as the right to file, move or continue the penal action remains outstanding". The translation of the later passage is also similar: "the continued existence of the right to file, move or continue a penal action …"). Accordingly, it is the availability of the "right to initiate, pursue or proceed" which is important. The reference to the "right to initiate" indicates that the criminal action has not in fact been commenced, but that there

is a right to do so. That right will exist, and indeed continue to exist, where there has been a crime and the criminal limitation period has not expired. Accordingly, in a case such as bribery, where there is a criminal limitation period of 10 years, there will be a right to initiate the criminal action in Year 9 Day 364. It follows from the statement of principle that the civil limitation period cannot have expired at some earlier time, prior to the time when a criminal action prescribes. The court is clearly contemplating a situation where no criminal action has been initiated, but nevertheless the right to do so remains.

3160. The Kuwaiti law expert evidence addressed the question of when criminal proceedings are "initiated". In the end, there was no dispute that the initiation of criminal proceedings is the moment when the public prosecutor puts the accusation to the accused. Dr Abbas's evidence as to the relevant steps in criminal proceedings was that a criminal claim, as a procedural act, is composed of three distinguishable steps: (i) initiation; (ii) filing, and (iii) proceeding with the criminal claim, which I address in turn below. The first step, initiation of the criminal claim (*tahreek*), refers to the opening phase of the criminal claim by the public prosecution, through directing an indictment to the perpetrator and starting investigations by the public prosecution. The second step, the filing of the criminal claim (*raf*), refers to the filing of the claim before the competent criminal court. The third step, proceeding with the criminal claim (*al seir feeha*), refers to the proceedings that follow the filing of the criminal claim before the criminal court, ending with a decision on the criminal claim with a final decision. This includes both the trial and the appeal phases.

3161. This summary was not in dispute or challenged in the cross-examination of Dr Abbas. It is supported by the discussion of 'initiation' at 217-218 of the treatise of Dr. Ahmed Fathy Sorour*: Sorour*, *Al Wasit in Criminal Procedures Law,* Book 1, Edition 10:

> "**Chapter Two: The Criminal Lawsuit:**
>
> **[…] 105- Its Stages:**
>
> The criminal dispute goes through all or some of the following stages:
>
> Initially, there may be a preliminary stage that precedes the initiation of the dispute. This is the stage of gathering preliminary information about the crime and the accused. Despite its importance, this stage is not necessary for the initiation of the criminal dispute and is not considered a part of it. [...]
>
> **1-The Accusation Stage:** This is the first stage of the criminal dispute, and it is primarily undertaken by the Public Prosecution. During this stage, the criminal lawsuit is conducted and exercised. This stage is essential for the initiation of the criminal dispute and continues throughout the criminal proceedings until a final judgment is issued. At the moment of initiating the criminal dispute, it is referred to as the initiation of the criminal lawsuit, while in other stages, it is referred to as the conduct or exercise of the criminal lawsuit. Therefore, the initiation of the

> criminal lawsuit is less comprehensive, which entails the term the accusation stage.
>
> **2- Preliminary Investigation Stage […]**
>
> **3-The Trial Stage:** This takes place before the judiciary at all levels. The Egyptian law has adopted the principle of two levels of litigation in misdemeanors. However, in felonies, they are only considered in Egypt before a single level of litigation, which is the Criminal Court, and it should be adopted at two levels.
>
> **106- Secondary Terms […]**
>
> The initiation of criminal proceedings is the opening act of a criminal case, and it establishes the criminal dispute. As for the filing of the criminal case, it is done by presenting it to the trial court. Filing the case may be one of the procedures of the dispute, such as summoning the accused to appear before the criminal court in misdemeanors and violations. At this stage, the case is initiated by filing it before the court based on the investigation report in misdemeanors. The conduct or exercise of the criminal case is carried out through subsequent procedures following its initiation, such as filing the case before the court, submitting requests to it, and appealing judgments."

3162. Dr Abbas's evidence was that the Court of Cassation's reference to the "right to … initiate" referred to the right to start criminal proceedings, as described above. This evidence was logical and compelling. When the Court of Cassation is referring to the right to initiate the criminal action, it must clearly have had in mind this well-recognised formal step of the public prosecutor putting the charge to the accused. It necessarily follows that the existence of a "right to initiate" presupposes that criminal proceedings have not yet commenced. Hence, the *jurisprudence constante* is inconsistent with Dr Youssef's argument that there is suspension of the running of time only if criminal proceedings have actually been commenced.

3163. In the course of argument, Ms Bingham drew attention to the sequence in which the Court of Cassation sometimes expresses the principle in other cases, where one sometimes sees the word "initiate" after "file". She submitted that this was not the logical sequence if "initiate" meant the very first stage in the process. Thus, she submitted, the court must have had in mind some initiation step which occurred subsequent to the process of filing of the case with the criminal court, and she floated the possibility that it referred to the initiation of the trial.

3164. I do not regard this as persuasive. Although the *jurisprudence constante* case-law does sometimes place "initiate" after "file", this is not invariably the case. In the (above) wrongful accusation of kidnap case, the phrase in the Defendants' translation was: "the right to initiate, pursue or proceed". In the Defendants' translation of Court of Cassation Appeal 752/2012 dated 13 May 2014, the court refers both to "the right to file, initiate or proceed" and to "the ongoing right to initiate or pursue". In any event, this is in my view a linguistic point of no substance. The concept of initiation of criminal proceedings, as described by *Sorour* and Dr Abbas, is well-known. There is no reason

to think that the court – in the jurisprudence constante – is referring to some different (and unspecified or at least elusive) stage by "initiate".

3165. I therefore do not accept EFG's submission that the relevant phrase is simply a composite way of (as Ms Bingham put it) "describing the fact that a set of criminal proceedings remains active".

3166. Secondly, the court identifies the critical moment when the civil limitation period begins to run, or in the court's word "resumes". This is when "the criminal action concludes" for whatever reason. The means by which that might come about include "expiration by statute of limitations". This would naturally include the circumstance where no criminal proceedings were in fact commenced, and the limitation period then expired. Accordingly, the court in this passage is again contemplating the possibility that no criminal proceedings had actually been commenced. When this point was put to Dr Youssef in cross-examination, he had (in my view) no clear or persuasive answer to this point. In closing argument, Ms Bingham drew attention to Article 8 of the KPC, which (as she submitted) identified circumstances where an existing criminal action may be prescribed. There was in fact no expert evidence on this point, and it was not one which occurred to Dr Youssef when he was asked questions about it. Even assuming that there is a possibility that an existing criminal case may expire by prescription, I do not consider that the Court of Cassation – when referring to expiration by the statute of limitations – was only considering that situation, to the exclusion of the normal case where a case is never started and then is barred by prescription. Indeed, I consider that this is clear from a later case (Appeal 548/2013 – the Bangladeshi crash victim case) referred to below.

3167. EFG placed considerable reliance on the reference, in this statement of principle, to the "choice" which is available to a claimant: i.e. choosing to pursue the civil route without joining the criminal proceedings. They argue that this presupposes the existence of criminal proceedings. I do not consider, however, that this affects the principle articulated by the court. The court is in my view illustrating what happens if there are criminal proceedings and a claimant decides not to join them as a civil claimant. It is not saying that the existence of criminal proceedings, and therefore the existence of a choice, is necessary in order for the principle to apply.

3168. EFG relied upon the absence of Kuwaiti precedent where there had been no opening of a formal investigation, and where the effect was to overshoot the fifteen-year longstop. It is true that there is no Kuwaiti precedent where the effect of Article 253 (2) is to overshoot the fifteen-year longstop. However, there are two cases discussed below (the Bangladeshi crash victim case and the defamed judge case) where there had been no relevant initiation of criminal proceedings (i.e. by an accusation against the accused), but the court nevertheless applied the principle for which PIFSS and Dr Abbas contend; that there is a suspension of the civil limitation period whilst the right to initiate criminal proceedings remained available. Whilst neither case referred to the fifteen-year longstop, there is no reason why the effect of Article 253 (2) should only be a qualification on the three-year knowledge trigger, but not on the fifteen-year longstop. Article 253 (2) is clearly a qualification of 253 (1), which refers to both triggers, and there is nothing in the case-law which suggests any distinction between the triggers, as far as Article 253 (2) is concerned.

3169. EFG also relied upon expressions, which can certainly be found in the case-law, as to suspension throughout the duration of the criminal trial, or for the duration of the criminal proceedings. However, these expressions should not be divorced from their context, which generally speaking were cases where there had been criminal proceedings. The important question is to see how Kuwaiti courts approach the issue when there are, and have been, no such proceedings. The Bangladeshi crash victim case and the defamed judge case, discussed below, provide the answer.

Bangladeshi crash victim case

3170. In Kuwaiti Court of Cassation Appeal 548 of 2013 dated 22 October 2014, the court was concerned with a limitation argument in the context of a claim for a road traffic accident on 26 September 2007. The appellants were the heirs of a Bangladeshi man who had been killed in that accident caused by an unidentified party. They brought a civil claim for lawful blood money against the Kuwaiti state, which had the obligation to pay this blood money. The lower appeal court held that the claim was barred by the three-year time period for civil claims, and there was a cassation appeal. The relevant argument on appeal by the heirs was that the claim was one for liability arising from an unlawful act that constituted a crime, and thus it did not lapse so long as the criminal action remained available. The Court of Cassation accepted that argument, and allowed the appeal.

3171. In allowing the appeal, the court referred to a three-year period for personal injury cases under Articles 256(2) and 261 of the Civil Code. Although Ms Bingham relied upon this as a point of distinction in the context of the debate about Article 253 (2), I do not consider that this affects the point of principle on which the case was decided. There was a three-year limitation period for civil claims, and it is not significant as to whether this arose under Article 253 (1) or Articles 256 (2) and 261. Furthermore, the Court expressly referred to Article 253 when setting out the *jurisprudence constante* in materially identical terms to the kidnap defamation case, concluding as follows:

> "If the criminal action is extinguished by the issuance of a final judgment convicting the perpetrator, or by any other cause of extinction, the prescription period for the compensation claim recommences from that date. The rationale is that the continued existence of the right to initiate, file, or proceed with the criminal action constitutes, within the meaning of Article 446 of the Civil Code as cited above, a legal impediment rendering it impossible for the injured party to assert his right to compensation."

3172. Ms Bingham submitted that "right to initiate, file or proceed" was a mistranslation of the sequence, and that (as with other cases) "initiate" should have followed the word "file". I will assume that this is correct, but for reasons already given it makes no difference to the substance.

3173. The Court of Cassation continued as follows:

> "Furthermore, the purport of Articles 6 and 8 of the Penal Code is that the criminal action in misdemeanours lapses upon the lapse of five years from the date the offence was committed. The running of the prescription period of the criminal action is

> interrupted by acts of accusation, investigation, or trial, or by inquiries conducted in the presence of the accused or officially notified to him. If the prescription period lapses without such acts being completed, the consequence is the extinguishment of the criminal action by lapse of time. From that point onward, the impediment that had previously suspended the running of the prescription period for the injured party's civil claim against the liable party ceases to exist.
>
> In the present case, it is established from the case papers that the appellants' predecessor passed away on 26/9/2007, and that Criminal Case No. 177 of 2007 – Abdullah Al-Mubarak Traffic Misdemeanour – was filed in connection with the incident. On 30/6/2008, the case was temporarily closed due to the unknown identity of the perpetrator who caused the death. This closure order is deemed an administrative act issued by the Public Prosecution in its capacity as the authority overseeing all investigative procedures, and as such, it is not binding upon it and may be revoked at any time prior to the extinction of the criminal action.
>
> Given that the identity of the perpetrator remains unknown, the right to initiate, file, or proceed with the criminal action continues to exist. Furthermore, the five-year period prescribed for the extinguishment of misdemeanours under Articles 6 and 8 of the Penal Code has not lapsed. Accordingly, the impediment preventing the running of the prescription period in the appellants' civil claim remains in effect, and their right to file the claim is not extinguished until the date on which the criminal action became time-barred, namely, 30/6/2013. The civil prescription period thus begins on that date and runs for three years, ending on 30/6/2016."

3174. The judgment is relevant, and supportive of PIFSS' case and Dr Abbas's evidence, because it confirms the application of the principle, as to the suspension of time in the cases of tort claims based on a crime, in situations where there are no relevant criminal proceedings. Thus, the first paragraph quoted above shows that the Court of Cassation was considering the case where a criminal case lapses, by reason of prescription, prior to its commencement. In that situation, the court considered that the usual principle applied; namely that the period of suspension would cease at the time when criminal proceedings were prescribed, and the civil period would then begin to run. The court is therefore clearly contemplating a case where no criminal proceedings are underway, but nevertheless there is suspension. This is also apparent from the second paragraph, with its reference to the "extinction of the criminal action". The reasoning in the third paragraph is, also, that the full criminal limitation period is available until extinction, and it is only at that point that the civil period begins to run. All of this reasoning was in the context of a case where there can have been no formal commencement of criminal proceedings, because the identity of the perpetrator was unknown. He could not therefore have been accused of the crime.

3175. Ms Bingham fairly recognised that the case was against her (and Dr Youssef's) argument. She sought to explain it as the court being swayed by the very unfortunate position that the Bangladeshi heirs found themselves. She also described it as an outlier.

3176. I disagree. In my view, it is the straightforward application of the principle that one finds in the *jurisprudence constante*. It is not an outlier: I do not consider that any of the cases relied upon by EFG reach a different result or take a different approach to the issue under consideration in the Bangladeshi crash victim case. Furthermore, the reasoning is consistent with the analysis and result in the defamed judge case discussed below. Indeed, although a very large number of cases were referred to in EFG's written closing, there were no cases in which a Kuwaiti court had in fact held that a civil claim based on a crime prescribes prior to the time when criminal liability prescribes or is otherwise terminated (e.g. because the claim is dismissed, or there is a conviction etc). Nor is there any case in which a civil claimant has been unable, through prescription, to bring an adhesive claim in criminal proceedings. There is good reason for this, as one can see from the discussion in *Al-Sanhoury* discussed below.

3177. Before leaving this case, there are three other points to note.

3178. First, the reported judgment in this case, as with many of the Kuwaiti cases, contains something equivalent to a "headnote" which seeks to identify the relevant principle which the case establishes. The statement of the relevant principles is consistent with Dr Abbas's analysis:

> "In misdemeanour cases, the criminal action lapses upon the lapse of five years from the date the offence was committed. Means [of interruption]. The interruption of the prescription period of the criminal action occurs by means of acts of accusation, investigation, trial, or inquiries conducted in the presence of the accused or officially notified to him. The lapse of the prescription period without this. Should the period of prescription lapse without any of the foregoing taking place, the necessary consequence is the extinguishment of the criminal action by prescription. Implication. The implication of this is that upon such extinguishment, the impediment which had caused the suspension of the prescription period of the injured party's civil claim against the liable party ceases to exist. Example: A case in which the civil claim for the payment of lawful blood money, based on the rules of personal injury compensation, is not extinguished by the three- year prescription period."

3179. Secondly, the court dealt with the "temporary closure" of the case file, holding that it did not affect the ability to initiate criminal proceedings. As the headnote explains, correctly in my view:

> "The temporary dismissal of the case due to the unknown identity of the perpetrator is deemed an administrative act by the Public Prosecution, in its capacity as the authority supervising all investigations. It may revoke such act at any time prior to the extinguishment of the criminal action. Unknown perpetrator. Effect. The unknown identity of the perpetrator entails the

> continued existence of the right to file, initiate, or proceed with the criminal action. This entails that the five-year period prescribed for the extinguishment of the misdemeanour, under Articles 6 and 8 of the Penal Code, has not lapsed. Implication. The implication is the continued existence of the impediment preventing the commencement of prescription in the civil claim; it is established the two appellants had instituted their claim for the lawful blood money prior to the expiry of the limitation period of the criminal action, which marks the commencement of the three-year period necessary for the extinguishment of the civil claim pursuant to Article 256(2) of the Civil Code. The implication is that their claims are not time-barred. The challenged judgment's conclusion to the contrary constitutes a misapplication of the law warranting its quashing by way of cassation."

3180. The effect of a temporary closure, for example where the perpetrator cannot be identified, is to be contrasted with the Court of Cassation's approach in cases where there is a 'permanent' closure or 'permanent preservation order'. In such cases, the approach of the Court of Cassation is to treat the latter as a termination of the criminal proceedings which will mean (at least after any unsuccessful appeal) that the civil limitation period is no longer suspended. This is illustrated by Court of Cassation Appeal 752/2012 dated 13 May 2014. The public prosecutor had closed an investigation "definitively" in 2004, and there was an unsuccessful challenge to that decision. The challenge was determined by the criminal court on 27 August 2005. The Court of Cassation said that this was the last date "with which the validity of the limitation period for the compensation lawsuit begins, taking into account that on this date it was proven with certainty that [the claimant] knew the damage and the person who caused it, and that he could have filed the lawsuit immediately". Since the civil claim was only filed on 1 March 2009, more than three years after 27 August 2005, the claim was prescribed by limitation.

3181. The cases therefore show that a temporary preservation order does not mark the moment when the three-year period begins to run: see the Bangladeshi crash victim case. By contrast, a permanent closure or preservation order (or an unsuccessful challenge to such an order) will mark the moment when the three-year period will begin to run: see appeal 752/2012. A permanent closure identifies a point in time when, for the purposes of the commencement of civil proceedings, the Kuwaiti court will consider criminal proceedings to have been terminated.

3182. There was some discussion of temporary and permanent closures (or preservation orders) in EFG's written and oral closing argument. EFG's argument was, in substance, that even where there had been a permanent closure or preservation order, it was nevertheless possible – if further evidence emerged late in the day – for the criminal case to be resumed, and there might still at that point be "plenty of life left in the criminal limitation period". However, the Kuwaiti court did not consider it relevant that such life remained: a permanent closure order would start the three-year civil limitation period running. This indicated, on EFG's submission, that it is the commencement and pendency of criminal proceedings which matters, rather than the potential availability of such proceedings.

3183. I did not consider that the position in relation to temporary and permanent closure orders advanced EFG's argument in any material respect. The position in relation to a temporary closure order is addressed in the Bangladeshi crash victim case, which shows that such an order has no material impact on the limitation period, which is assessed by reference to the availability of criminal proceedings. The position in relation to a permanent closure is addressed in appeal 752/2012, which shows that the Kuwaiti courts regard such an order, or an unsuccessful legal challenge against such order, as the termination of the criminal case. It therefore marks the start of the running of time for civil limitation purposes. That approach is not surprising. The Kuwaiti courts take the simple view that, with a permanent closure order which is subject to an unsuccessful challenge, the proceedings are at an end, and therefore a civil claimant must start within three years.

3184. Thirdly, there is (as Mr Ritchie pointed out) one unexplained feature of the Bangladeshi crash victim case. The court appears to have considered that the criminal limitation period ran for five years from the date of temporary closure, rather than from the date of the accident. The reasons for this approach are not apparent from the judgment, but it makes no difference to the analysis or indeed the result in that case.

Defamed judge case

3185. Kuwaiti Court of Cassation Appeal No 49 of 2023 dated 9 July 2023 concerned, so far as material, an appeal by a judge who alleged that he had been defamed by a Kuwaiti (political) minister. The judge was a member of a special committee for the trial of ministers, and the committee was examining the conduct of the respondent minister. In 2017, the minister submitted a request to dismiss all the committee members, on the grounds that the committee's procedures indicated personal antagonism against him. The judge contended that this dismissal request defamed both him and the committee members. The judge was successful in the lower court, but appealed the amount of damages awarded. The minister also appealed, contending that the claim was time-barred.

3186. The time-bar argument was based on the expiry of a three-year limitation period. The minister contended that the relevant start date was 3 May 2017, when his request for disqualification of the committee had been ruled on by an appellate court. On the basis of this argument, the limitation period expired on 2 May 2020, and the judge had only filed his lawsuit after that date. Alongside this argument, the minister also contended that there had been no "defamation under Kuwaiti Penal Law", since he was exercising a legal right of complaint against the investigative committee.

3187. The Court of Cassation rejected these arguments. Citing Article 253 of the Civil Code, the court said that "if the tort liability claim arises from a criminal offense, it shall not lapse as long as the criminal case remains actionable, even if the time limits specified in the first paragraph have expired". There was, as I understand it, no dispute as to the accuracy of this translation, which supports the evidence of Dr Abbas both as a matter of substance and on the translation issue: 'actionable' and 'available' are the same as a matter of substance, and (as described below) the court went on to refer to suspension "for as long as the right to file the criminal case remains available".

3188. The court went on to express the relevant principle in familiar *jurisprudence constante* terms:

> "This means that if the wrongful act constitutes a crime that gives rise to both a criminal case and a civil compensation claim, the civil claim does not lapse until the criminal case itself expires. If both proceedings are separated, and if the injured party opts for civil rather than criminal proceedings, the limitation period is suspended as long as the right to file, initiate, or proceed with the criminal case remains existent. Once the criminal case is conclusively terminated – whether by a final conviction or another cause such as lapse of time – the limitation period for the civil claim resumes from that date. This interpretation aligns with Article 446 of the Civil Code, which considers the continued viability of the criminal case a legal impediment preventing the injured party (creditor) from asserting his right to compensation."

3189. The court then referred to the lower court's dismissal of the minister's argument that he had not defamed the judge, declining to interfere with that court's assessment of the merits of that argument. The Court of Cassation said:

> "… since [the lower court] found that the expressions used by the [minister] in his disqualification request …. constitute the crimes of defamation and libel under Articles 109 and 110 of the Penal Code, which are among the misdemeanors that do not prescribe except upon the lapse of five years as of the date of their commission. Accordingly, the Appellee's right to file a compensation claim arising out of the harm he sustained from such acts remains available and is suspended for as long as the right to file the criminal case remains available. What is established is that the five-year period had not lapsed from the date on which the request for dismissal was submitted until the date on which the current compensation case was filed, and these are valid reasons and are reasonably substantiated by the documents and are sufficient to lead to rendering the judgment and refute any contrary contention."

3190. The court went on to elaborate as to why the minister's argument, that he was entitled to say what he said, failed:

> "This is because the legislature did not sanction the use of language that demeans or defames individuals in a manner that impairs their honor and reputation; and prohibited this under Article 210 of the Penal Code. Thus, if an expression contains statements which constitute, by their very nature, insults which impairs honor or reputation, then this constitutes a fault which necessitates compensation whenever the elements of tortious liability are satisfied, and this cannot be considered as a form of sanctioned critique, and accordingly the claim is unfounded."

3191. The case provides clear support for the views expressed by Dr Abbas that it is the availability of criminal proceedings, in respect of the relevant crime upon which the tort claim is based, that suspends the running of time for civil limitation purposes. There

is nothing in the judgment which suggests that any criminal proceedings had ever in fact been commenced, and this certainly forms no part of the reasoning of the Court of Cassation. The court referred to the full five-year period in which the right to file the criminal case was available, and that this had not elapsed at the time when the civil lawsuit was filed. The claim was for that reason well in time. As previously discussed, the case is also clear authority against the argument that a criminal conviction is required when a tortious claim is based on a crime. There was no conviction in this case, and the case was clearly based on the provisions of criminal law, as the Court of Cassation recognised in its judgment: see further Section B5 above.

3192. Dr Youssef was cross-examined on the case, and in my view had no good answer to the point that it was inconsistent with his argument that time is only suspended when there are criminal proceedings underway. He looked in vain for any reference to criminal proceedings in the judgment, or indeed for any reference to a criminal complaint having been made to the public prosecutor.

3193. EFG, in its oral closing, sought to distinguish the case on the basis that defamation was somehow exceptional: the suggestion being that in defamation cases, it was not necessary for criminal proceedings to have been commenced in order for suspension to operate. I do not consider that the case provides any support for that line of argument. The reasoning of the Court of Cassation is quite general: it refers to Article 253 (and 446), and restates the *jurisprudence constante*, without there being any suggestion that the relevant principles – or their application in that case – are confined to defamation cases.

Rationale

3194. Accordingly, both the Bangladeshi victim case and the defamed judge case, as well as the *jurisprudence constante*, are inconsistent with the argument advanced by Dr Youssef and EFG. By contrast, there are no Kuwaiti cases where a claim has failed on limitation grounds in circumstances where criminal liability remained available. I do not consider that this is surprising or that it is, as EFG submitted, inconsistent with the rationale for limitation periods or for the suspension of time where a tort is based on a crime.

3195. Dr Abbas accepted in cross-examination that a rationale for the suspension of time for a tort based on a crime is the fact that a civil claim will be stayed to allow a criminal case, once commenced, to run its course, with the essential findings of the criminal court becoming *res judicata*. Kuwaiti law clearly considers this to be an impediment to the commencement of civil proceedings. However, I do not consider that this rationale necessarily favours EFG's argument. The actual commencement of criminal proceedings can readily be seen as an impediment: it would provide a good reason why a civil claimant would not want to spend time and money in starting separate civil proceedings, when such proceedings would be automatically stayed and when in any event the claimant could file an adhesive claim. However, the same or at least a very similar impediment can be seen to exist in circumstances where criminal proceedings have not been commenced, but nevertheless might be commenced because of an extant right to initiate them. Again, a civil claimant would not want to spend time and money on such proceedings when they are at risk of being stayed because of the initiation of criminal proceedings.

3196. Furthermore, I accept Dr Abbas's evidence that the potential for a stay of separately commenced civil proceedings is not the only rationale for the approach taken in Article 253 (2). Dr Abbas drew attention to the work of Al-Sanhoury in explaining the rationale for allowing a civil claimant the benefit of the full criminal law limitation period. Al-Sanhoury is the leading scholar in relation to the Egyptian Code, on which the KCC is based. In *Al-Sanhoury, Al Wassit In The Explanation Of The Civil Law*, Part I, paragraph 625, the authors refer to Article 172 of the Egyptian Civil Code, which is the equivalent of Article 253 of the KCC. Its wording is not precisely the same, but both experts referred to Al-Sanhoury's work in the context of the limitation arguments, without any suggestion that Egyptian law was materially different to Kuwaiti law.

3197. The authors there identify the need to distinguish a liability claim based on a civil fault that is not considered a crime, and the case where it arises from a criminal offence. In the latter case, they say as follows:

> "In the second case, if the liability claim arises from a crime, such as a felony murder, the claim is primarily barred by the statute of limitations by the shorter of the two aforementioned periods. If we assume that the shorter period is three years, five years, or any other period less than ten years, this results in an anomalous situation where the civil claim could be barred before the criminal action. The criminal action does not expire until ten years have passed (Article 15 of the New Criminal Procedure Law). This anomaly, where the civil claim falls while the criminal action is still pending, and a criminal penalty is imposed on the offender without being able to compel them to pay compensation—which is less severe than the criminal penalty—is what the law sought to avoid. It stipulates that in such cases, the civil claim does not expire but remains in force with the criminal action and does not fall until it does, allowing the injured party to claim civil compensation at the time the offender is punished. The reverse is acceptable: the criminal action expires before the civil claim. For example, if the heirs only become aware of their benefactor's murder after ten years from the commission of the felony, the criminal action would have expired due to the statute of limitations, yet the civil claim remains because neither three years from the time of knowledge of the crime and the offender nor fifteen years from the time of the crime have elapsed. Similarly, if the crime giving rise to the liability claim is a minor offense where the criminal action expires after six months from its occurrence (Article 15 of the New Criminal Procedure Law), the civil claim remains after the criminal action has expired, as the former does not expire in less than three years."

3198. This passage provides further support for Dr Abbas's evidence as to the effect of Article 253, and I do not accept that there is any significance to the differences in wording between the Egyptian and Kuwaiti codes. Neither expert considered, when writing their reports, that there were significant material differences. Furthermore, I was referred to a number of Egyptian cases which include the same *jurisprudence constante* that one

sees in the Kuwaiti cases. This is unsurprising in circumstances where, as the experts explained, the KCC is based on the Egyptian code, and many of the Kuwaiti judges are Egyptian or trained there: see Section B3 above.

3199. Also, and significantly for present purposes, *Al-Sanhoury* identifies (in the passage quoted above) the anomaly that would arise if civil claims were barred before a criminal action was barred. This chimes with a similar point made by the Swiss Federal Court in explaining the equivalent provision in Swiss law, another civil law system: the

> "purpose of this rule is to harmonize the limitation period of civil law with that of criminal law; it would be shocking if the perpetrator could still be punished, but compensation for the damage inflicted could no longer be demanded."

3200. Accordingly, if EFG's argument were to be accepted, an anomalous position could arise whereby criminal proceedings – if started comparatively late in the day – could establish criminal liability, but the victim of the crime would be unable (through prescription) to obtain compensation. This would be particularly anomalous in the context of civil law systems which permit civil adhesive claims to be advanced alongside criminal proceedings. There is therefore good reason for the approach of Kuwaiti law for which Dr Abbas contends.

3201. I do not consider that there is any good reason why the law should be any different in the context of the somewhat unusual case of crimes which do not prescribe. EFG, in its submissions, drew attention to what in their submission were the extraordinary consequences that might arise, if Dr Abbas's argument were accepted: that a civil claimant could in theory wait 40 or 50 years, after knowing of the potential claim, before deciding to bring the civil claim. In my view, although theoretically possible, this is unlikely to be the position in the real world. It would be a rare claimant who, with full knowledge of the fact that it was a victim of a crime and had suffered loss as a result, would nevertheless wait many years before commencing proceedings.

3202. It is far more realistic to think that, in circumstances where a criminal case was being prosecuted, a victim would either join the criminal case as an adhesive claimant, or would wait to see how the criminal case was resolved and then begin proceedings reasonably soon thereafter in the event that the crime was established. Both courses are clearly permissible under Kuwaiti law, and the latter course is expressly catered for by allowing three years for the civil claim after the termination of the criminal case.

3203. If, by contrast, there were no criminal proceedings, but the claimant had sufficient knowledge about the crime to begin proceedings, one could expect a claimant who had suffered significant loss to start reasonably quickly once the relevant facts were known. Indeed, that is what happened in the present case. Once PIFSS had sufficient knowledge about the relevant crimes, following the grant of access to the Swiss materials in 2017, proceedings were commenced in England reasonably promptly and (leaving aside various arguments by Aerium and Pensée in relation to amendments) within three years of access to those materials. Indeed, EFG itself does not submit that any of PIFSS' claims against them are barred by reason of any failure to claim within three years of the date of knowledge.

3204. It is only in a case such as the present, where there has been effective concealment of the crimes, that a real possibility of a very long delay in commencing proceedings is likely to arise. However, it is difficult to see why Kuwaiti law, or indeed any law, would favour giving substantial limitation protection from civil litigation to those who have effectively concealed their crimes. Some limitation protection for some crimes is clearly available under Kuwaiti law: i.e. where, as is usually the case, there is a finite limitation period in respect of the crime. Thus, in the case of bribery, the finite period for a criminal case is ten years. But Article 253 (2) then provides (as I find Kuwaiti law to be) a further fifteen-year longstop, after the ten-year period, for the commencement of civil proceedings. This means, in practical terms, that the concealment in the case of bribery must last for a very long time (25 years) before civil liability is prescribed through the longstop provisions.

3205. In the case of some crimes, however, the Kuwaiti legislature has considered that there should be no limitation period for criminal liability. It is not difficult to understand why, in the case of the KPPL or the Money Laundering laws, this approach was taken. Both statutes are concerned with crimes where efforts at concealment are highly likely, indeed almost inevitable, as demonstrated by the facts of the present case. I see no reason why those involved in such concealment can have any complaint if it transpires that civil proceedings against them, pursuant to Kuwaiti law, are not commenced for some considerable time after their undiscovered tortious behaviour takes place.

3206. Accordingly, I do not consider that there is any substance in EFG's argument that Dr Abbas's evidence as to Kuwaiti law lacks an appropriate rationale, or produces results which are anomalous, or inconsistent with the purpose of limitation periods.

Totting up

3207. Although further support for Dr Abbas's views is not required, it is nevertheless to be found in the approach taken by Kuwaiti law as to the computation of the period of suspension, in circumstances where the tort was based on a crime. There was no dispute as to how the civil limitation period works, in circumstances where there are indeed criminal proceedings and they terminate. In those circumstances, it was common ground that the computation of the civil limitation period does not require any "totting up" of any period prior to the commencement of the criminal proceedings. In other words, the full three-year period is available from the time when the criminal proceedings terminate.

3208. I consider that this is consistent with, and easily and simply explained by, the fact that it is the availability of the criminal process in respect of the crime (or to put it another way, the availability of the right to initiate criminal proceedings) which has the suspensory effect. It is because time does not run or does not get past '0', for civil limitation purposes, when the alleged crime is committed, that the clock starts (or is set at '0') when the criminal proceedings terminate. The courts have not therefore sought to enquire as to whether any time passed between the time when the crime was committed, and the time when the criminal proceedings started. This is to be contrasted with the approach taken as to other impediments to the commencement of civil proceedings, where there is "totting up" of the periods prior and subsequent to the period of suspension. For example, "totting up" did take place in a case where the Iraqi invasion of Kuwait had forced the claimant to leave Kuwait. Although this was a relevant impediment, the period prior to his forced departure was added to the period

after the impediment ceased: Kuwaiti Court of Cassation Labour Circuit Appeal 91 JY1996.

3209. Dr Youssef struggled to explain how the absence of totting up was consistent with his evidence as to the necessity for there to be extant criminal proceedings. He suggested that this was because, in Kuwait, criminal proceedings were usually commenced promptly after the crime was committed. Whilst that may often be the case, it is unrealistic to think that it is invariably the case, not least because (as the above passage from *Sorour* indicates) there may well be a period of investigation prior to criminal proceedings being initiated. Indeed, it is not difficult to see that, in some cases, there may be a significant period of police investigation prior to the public prosecutor initiating proceedings, and EFG accepted that this period would not form part of the criminal proceedings. If the argument of EFG were correct, then one might expect to see in the case-law examples of the court taking this period into account, as part of a totting up approach. However, this is not suggested by the case-law.

3210. EFG, which largely distanced itself from Dr Youssef's evidence in its closing submissions, put forward another explanation for the absence of totting up. They suggested that if criminal proceedings were actually commenced, one can see why it would be appropriate to "backdate" the proceedings, for civil limitation purposes, to the time when the crime was committed. Ms Bingham submitted that where criminal proceedings have in fact materialised it could be seen "with the benefit of hindsight" that, had the victim launched a civil suit, he would have been confronted with an impediment in the form of the parallel criminal proceedings. The claimant could therefore fairly be deemed to have faced that impediment all along. It seemed to me that this was a complicated and unpersuasive analysis. If, as EFG's submissions emphasised, there was a need for an actual impediment in the form of extant criminal proceedings, it would not be satisfied by a period (prior to initiation) when there were no such proceedings. I consider that the simplest and far more persuasive explanation for the absence of totting up is that given by Dr Abbas: time is suspended whilst the criminal limitation period is running, even if proceedings have not yet been initiated.

3211. It also follows, from the absence of totting up, and more generally from the Kuwaiti case-law, that there is no significance in the fact that the Kuwaiti court refers to the civil limitation "resuming", rather than "commencing", once the criminal limitation period has expired, or after criminal proceedings have been terminated. This is in my view a linguistic point which, in the light of the case-law, is of no substance. In any event, where there has been a period of suspension, with the clock therefore not moving beyond '0', it is linguistically permissible to refer to the running of time resuming.

Egyptian case-law

3212. PIFSS also sought to rely upon a number of Egyptian cases which were identified by Dr Abbas at a very late stage, at a time when Dr Youssef was giving evidence. Although I permitted Dr Youssef to talk to his instructing solicitors about those cases, EFG submitted that it would be unfair for reliance to be placed on them. Given that I have formed a clear view on the basis of the Kuwaiti law materials, and the evidence of Dr Abbas, I do not consider it necessary to discuss or take into account the Egyptian cases, save only to note (as Ms Bingham acknowledged in her oral closing) that they contain the same *jurisprudence constante* that appears in the Kuwaiti cases.

Translation

3213. In the light of my above conclusions as to Kuwaiti law, I resolve the translation issue in favour of Dr Abbas. His translation accords with those conclusions.

Conclusion

3214. I therefore conclude that, as a matter of Kuwaiti law, a claim in tort based on a crime has a limitation period of three years from the date of knowledge, or fifteen years longstop (see Article 253 (1)); and that, in a case where no criminal proceedings have in fact been commenced, and therefore have not terminated, this limitation period runs from the time when criminal proceedings are prescribed.

3215. Applied to the present case, this means that tortious claims based on bribery under the KPC are only prescribed after 25 years: i.e. the ten-year criminal limitation period, and the fifteen-year long stop, subject to the effect of a claimant acquiring knowledge during that period so as to trigger the three-year knowledge-based trigger.

3216. In relation to the tortious claims based on the KPPL and the money laundering law, the claims do not prescribe, because criminal liability under those statutes is not prescribed by limitation; and therefore there is no relevant trigger for the commencement of either the three-year or fifteen-year period identified in Article 253 (1).

3217. In the light of these conclusions, no defendant has a sustainable limitation defence under Kuwaiti law; since the torts relied upon by PIFSS can be established by reference to the KPPL and/or money laundering law, where the criminal limitation period has not prescribed. The arguments of the Aerium Defendants and Pensée, based on amendments to the pleadings and relation back, therefore do not arise.

3218. If the position were that the tort could only be established by reference to bribery under the KPC, then some claims against some Defendants might be time-barred by virtue of the 15-year longstop. However, PIFSS' claims in tort are not, and do not need to be, based exclusively on bribery as the relevant criminal wrongdoing. It is therefore unnecessary to consider what the Kuwaiti limitation period would be in a situation where bribery was the only relevant criminal wrongdoing.

3219. Nor is it necessary to address other arguments which were only potentially relevant in the event that PIFSS' above case on Article 253 (2) failed.

3220. Even if that case had failed, however, Mr Al Rajaan (D1) would have had no limitation defence. That is because, as Dr Abbas explained (without any challenge in cross-examination), the effect of Article 446 KCC, in combination with Article 253 (1), is that all civil limitation periods were suspended for as long as he remained Director General, and thus, for so long as the principal/agent relationship between him and PIFSS subsisted. Accordingly, no civil limitation period commenced prior to 14 January 2014, when Mr Al Rajaan left PIFSS. The 15-year longstop period had therefore not expired at the time when proceedings were brought against Mr Al Rajaan. Nor is there any basis for an argument, save possibly in relation to the Mirabaud Scheme, that the 3-year knowledge-based period expired prior to the commencement of the present proceedings.

R3: The Mombelli corporate defendants

3221. As indicated in Section N above, a separate limitation point arises in connection with PIFSS' claim against the Mombelli corporate defendants, D27 – D29. If PIFSS had pleaded a case based on the vicarious liability of those corporate defendants for Mr Mombelli's torts, then Article 253 (2) could be relied upon by PIFSS to extend the limitation period. However, PIFSS pleaded a case based on the attribution of Mr Mombelli's conduct to D27 – D29. That case succeeds on the facts, for reasons given in Section N. However, since corporations generally cannot commit crimes under Kuwaiti law, Article 253 (2) cannot be relied upon to extend the period.

3222. The Mombelli Defendants submit that the 3-year civil limitation period, which starts on PIFSS' date of knowledge, defeats PIFSS' claims against the corporate defendants in their entirety. That is based on the proposition that PIFSS acquired relevant knowledge, of the harm and responsible party, by no later than October 2015. That was more than 3 years before March 2019, when proceedings against the Mombelli Defendants were started. Reliance was placed on a number of documents, dated between March and October 2015, which were alleged to prove PIFSS' knowledge.

3223. I reject that argument. Kuwaiti law requires actual knowledge of the harm and the person responsible. That is why the cases discussed above, relevant to the 3-year period, have usually involved a situation where criminal proceedings have been started and concluded. In such circumstances, it would be very difficult for a party to contend that it did not have relevant knowledge, since the very commencement of those proceedings – with the opportunity for a claimant to make an adhesive claim – would indicate that there was knowledge of the harm and the person responsible.

3224. However, it is clear from Article 253 (1) that nothing short of actual knowledge would suffice. In particular, the 3-year period does not run from the time when knowledge of the harm, and the person responsible, was reasonably discoverable. There is nothing in the documentation relied upon by the Mombelli Defendants which demonstrates actual knowledge on the part of anyone at PIFSS as to the harm caused by the Mombelli corporate defendants, and their identity. The case amounts to no more than an assertion that PIFSS could have pieced together various bits of information, coming in at different times and from different sources, and worked out that there was a potential claim. Even if proved, that is not sufficient.

3225. The high point of the Mombelli Defendants' case is the final document in the sequence. This is a letter dated 17 October 2015 from PIFSS to the Swiss Federal Prosecutor. The letter does not refer anywhere to Mr Mombelli. It does refer to Madrina and Delfin (two of Mr Mombelli's companies) in the following context:

> "87. In addition there are yet further suspicious bank transfers from Madrina Corporate Inc., Delfin Capital Management Ltd, Brown Brothers Harriman New York, Citco Banking Corporation NV, Citco Bank and Trust Co Bahamas Ltd, Sentinel Bank & Trust Nassau, etc.
>
> 88. The PIFSS respectfully requests that the investigation also look into all of these substantial transfers credited to the accounts of its disloyal former Director General. As is, the schemes put in

> place for these payments are not completely identified, because some sequences cannot be traced because they are opaque.
>
> 89. We have every reason to fear that these payments of more than USD 100 million also constitute corruptive payments and embezzlement."

However, this document shows no more than a suspicion of corruption which needed to be investigated. That is not the same as actual knowledge.

3226. Mr Norbury made some other powerful points. Thus, the sequence of documents relied upon by the Mombelli Defendants included various statements by Sparx in the context of Wafra's enquiries. Those responses draw attention to their contractual clauses which prohibit the sharing of fees with third parties unless authorised by PIFSS. Sparx were thereby indicating that they had no knowledge of such payments being made. There is nothing that indicates that PIFSS knew that the position was otherwise. Mr Norbury also submitted that even if it were to be concluded that PIFSS had relevant knowledge, that could not in any event extend beyond Sparx, and would not extend even to all of PIFSS' investments with Sparx. There was considerable force in that submission, but it is not necessary to discuss it in detail because the limitation defence fails for a more fundamental reason.

SECTION S: JUSTICIABILITY

S1: The shape of the arguments on justiciability

3227. Rule 20 of *Dicey Morris & Collins on The Conflict of Laws* 16th edition is:

> "English courts have no jurisdiction to entertain an action:
>
> (1) for the enforcement, either directly or indirectly of a penal, revenue, or other public law of a foreign State; or
>
> (2) founded upon an act of state."

Rule 20 was Rule 3 in earlier editions, and the case-law therefore refers to Rule 3.

3228. All of the active Defendants, including D1/D2, rely upon this rule in order to contend that PIFSS' claims as a whole, or certain aspects of PIFSS' claims, are non-justiciable. All Defendants rely on the "other public law" aspect of the rule. All of these Defendants, apart from EFG, also rely upon the "penal" aspect of the Rule. The "revenue" aspect does not arise, and nor does "act of state".

3229. The most extensive written submission on the issue of justiciability, and the broadest case advanced in that respect, was set out in the opening submissions of D1/D2. Their submission identified three separate lines of argument, each of which was adopted or developed by various other Defendants. The three lines of argument were in summary as follows.

3230. First, all of PIFSS' claims which are predicated on Mr Al Rajaan's commission of Kuwaiti or Swiss criminal offences involved the indirect enforcement of foreign penal laws.

3231. This case, based on the "penal" aspect of the Rule, was developed in particular in the oral submissions of Mr Brown on behalf of the Mombelli Defendants. The essence of the argument is that a claim is non-justiciable where it requires proof of criminal wrongdoing as a matter of foreign law in order to access compensatory remedies that are sought. Similarly, Man (focusing only on the Kuwaiti legislation) submitted that the KPC and KPPL were penal statutes, and that therefore claims based on those statutes were non-justiciable.

3232. Secondly, all of PIFSS' claims for relief under Articles 16 and 22 of the KPPL involved the direct enforcement of Kuwaiti penal and public law.

3233. Thirdly, all of PIFSS' claims against D1 and D2 sought to enforce the governmental interests of a foreign state, or involved the assertion of sovereign authority.

3234. The second and third lines of argument focused generally upon the KPPL. Man submitted that the KPPL was an "other public law", because the central interest it sought to protect was governmental. The non-justiciability of claims which sought to draw upon the KPPL was developed in the submissions of EFG, who in other respects took a more limited approach to that advanced by other Defendants.

3235. Thus, EFG accepted that PIFSS' bribery and money laundering claims were ordinary private law claims of the kind that any victim of a crime could bring, based upon generally applicable laws against bribery and money laundering. However, that was to be contrasted with the KPPL claim which was, in EFG's submission, a special public law claim. It could only be brought because PIFSS is a public institution, alleging wrongdoing by a public official, in the exercise of his public duties, in connection with public property. PIFSS was relying on the KPPL because it was subject to a special, unlimited, limitation period and because it gave rise to special remedies not generally available under the KCC. In other words, PIFSS was seeking to enforce a very particular regime for the recovery of public funds, which is only available to public bodies, and which confers advantages well beyond those available to ordinary litigants. PIFSS' claims under the KPPL were squarely caught by Dicey Rule 20.

3236. In his oral submissions on behalf of EFG, Mr Stratton described the KPPL as setting up Kuwait's integrated public integrity regime. He submitted that public integrity was a core state function. The KPPL was a special law protecting public bodies in the interests of public integrity. It gave special advantages that were not available to ordinary private litigants. Those advantages included an unlimited limitation period, and restitution against co-defendants who had never had the public property. The claim was a special claim in an attempt to enforce a foreign public law.

3237. PIFSS contended that it was essential to focus on the claim that was actually brought, and whether enforcement of that claim was impermissible. The claims brought were ordinary civil claims, and the court was being asked to enforce rights, arising from the Defendants' tortious conduct, under Article 227 of the KCC (the Kuwaiti law claim) or Article 41 of the Swiss Code of Obligations. PIFSS was not seeking to enforce a penalty. English law would characterise the claims brought as vindications of private rights rather than an assertion of sovereign authority. Rule 20 had no application. PIFSS also advanced a number of further arguments in the event that the court considered that Rule 20 had any application, in particular that there was a public policy exception which would be applicable and thereby mean that the claims were justiciable.

S2: The case law

3238. I was referred to a large number of authorities, of which the most significant in my view were: *Huntington v Attrill* [1893] AC 150 (PC); *Mbasogo and anr v Logo Ltd and others* [2006] EWCA Civ 1370 (CA); *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWCA Civ 1374 (CA); *United States Securities and Exchange Commission v Manterfield* [2009] EWCA Civ 27 (CA); *Skatteforvaltningen v Solo Capital Partners LLP and others ("Skat")* [2021] EWHC 974 (Comm) (Andrew Baker J); [2022] EWCA Civ 234 (CA); [2023] UKSC 40 (Supreme Court). I was also referred to the extensive discussion in the current edition of *Dicey, Morris & Collins*, paragraphs 8-002 – 8-021. Strong reliance was also placed by D1/D2 and the Mombelli Defendants on the decision of Field J in *Republic of Djibouti and others v Boreh and others* [2013] EWHC 2393 (Comm). PIFSS in response referred to the more recent decision of Dame Clare Moulder DBE in *Official Receiver of the Bangkok of Commerce Public Company Ltd v Saxena and others* [2023] EWHC 521 (Comm).

General approach

3239. In *Skat* at first instance, Andrew Baker J set out (at [17]) a helpful and concise summary of the relevant principles. They were not in dispute in that case, and none of the parties here disputed any aspect of those principles. Andrew Baker J's decision, as to the application of those principles on the facts of *Skat*, was overturned by the Court of Appeal. The Court of Appeal's decision was then upheld by the Supreme Court. However, that does not affect the usefulness or correctness of Andrew Baker J's summary:

> "(i) Dicey Rule [20] is not a rule of jurisdiction, despite the language in which it is articulated in *Dicey*. It is a substantive rule of English law leading to the dismissal of claims falling within it, on the ground that the court will not entertain them because they involve an attempt to have the court enforce extra-territorially the exercise of sovereign authority.
>
> (ii) The rule demands an analysis of the substance of the claim rather than the form: the court must look past the cause(s) of action pleaded, or even (though not relevant here) the identity of the claimant, to the substance of the right sought to be vindicated, or the nature of the acts or actions upon which the claim is founded.
>
> (iii) Dicey Rule [20] is a rule of English law applicable whether or not English law will govern the merits more generally by reference to English law conflict of laws rules; and it is for the court to decide for itself whether, given its substance, a claim falls within Dicey Rule [20]. That is not a question for Danish law, for example, even if in this case Danish law is the governing law of a particular claim.
>
> (iv) Whether Dicey Rule [20] applies in this case involves a question of characterisation, for any given claim, whether it is a claim to enforce, directly or indirectly, Danish revenue law, so as to fall within (as it has often been called) the rule in *Government of India* (after *Government of India v Taylor* [1955] AC 491) and/or whether in some other way it amounts in substance to an attempt to exercise sovereign power extra-territorially.
>
> (v) There is a distinction to be drawn between "*an exercise of sovereign power and an action brought by a sovereign state which might equally be brought by an individual to recover losses for damage to property*" (*Mbasogo v Logo Ltd* [2007] QB 846, para 67). The latter of these has been referred to, after inter alia Lord Keith in Government of India, as a "patrimonial" claim; "when a state owns property in the same way as a private citizen there is no impediment to recovery" (*Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2009] QB 22, para 136).

> (vi) There is a distinction between mere recognition of foreign penal, revenue or other public laws, or sovereign acts, including recognising the effects or consequences of the past exercise of sovereign power in the sovereign territory, for example the vesting of title to property by an act of expropriation completed in the territory of the expropriating sovereign, on the one hand, and enforcement on the other hand. Dicey Rule 20 is not designed to preclude or prohibit the former."

3240. Similarly, the Court of Appeal (where the leading judgment was given by Flaux C) emphasised the importance of considering the substance of the claim. The Chancellor said at [127]:

> "It is also clear from a number of authorities that, in determining whether a claim is inadmissible by virtue of Dicey rule 3, the court must examine the substance of the claim to see whether it is really a claim to recover foreign revenue."

3241. That statement was made in the context of an argument as to whether the 'revenue' aspect of Dicey Rule 20 was in play, but it is equally applicable where it is said (as here) that the 'penal' aspect is in play. This can be seen in one of the cases to which Mr Brown referred, *USA v Abacha and others* [2014] EWCA Civ 1291, where Gloster LJ looked at the "reality" of the claim in order to see whether it should be characterised as penal or compensatory, deciding that the justification of the present proceedings was clearly penal and their basis was not compensatory: see paragraphs [75]-[76].

3242. Furthermore, there is authority that the rationale for both the revenue and penal aspects of the rule is the same. In *Mbasogo* at [41], Sir Anthony Clarke MR (giving the judgment of the Court of Appeal) said:

> "[41] The importance of the speech of Lord Keith in *Government of India v Taylor* [1955] AC 491 and the judgment of Lord Denning MR in the *Ortiz* case [1984] AC 1 is that they both sought to explain the rationale for the well established rule that the courts will not enforce the penal and revenue laws of another country. In short, it is that the courts will not enforce or otherwise lend their aid to the assertion of sovereign authority by one state in the territory of another. The assertion of such authority may take different forms. Claims to enforce penal or revenue laws are good examples of acts done by a sovereign by virtue of his sovereign authority ('jure imperii'). In each case, it is necessary to see whether the relevant act is of a sovereign character. Penal and revenue laws are assumed to be of a sovereign character."

3243. This rationale, based upon *Government of India v Taylor* [1955] AC 491 was adopted by the Supreme Court in *Skat* at [22]: i.e. that

> "a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one state within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or

> convention apart) contrary to all concepts of independent sovereignties."

The Supreme Court also said (at [36]) that "there can be no justification for extending this exclusionary rule beyond what is required by its rationale".

3244. In *Skat* at [21], the Supreme Court summarised (by reference to *Dicey*) what is meant by direct and indirect enforcement. Direct enforcement occurs where a foreign state or its nominee seeks to obtain money or property, or other relief, in reliance on the foreign rule in question. Indirect enforcement occurs where the foreign state (or its nominee) in form seeks a remedy, not based on the foreign rule in question, but which in substance is designed to give it extra-territorial effect; or where a private party raises a defence based on the foreign law in order to vindicate or assert the right of the foreign state. The court continued:

> "However, the rule does not prevent recognition of a foreign law of the type in question and where direct or indirect enforcement does not arise a foreign law of this type will be recognised if it is relevant to the issue and provided it is not contrary to public policy."

3245. It is clear from the authorities (as Mr Brown correctly accepted in the course of argument) that the identity of the claimant does not assist in deciding whether the particular claim comes within Rule 20, let alone determine the issue one way or the other: see for example Andrew Baker J in *Skat* at paragraphs 17 (ii) and 75 (iii). Similarly, in *Mbasogo* at [55], the Court of Appeal said: "[o]bviously the mere fact that the claimants are the President and the Republic of Equatorial Guinea is not sufficient to make these claims non-justiciable".

3246. Thus, once it is recognised that it is necessary to look at the substance of the claim, the fact that the party making the claim has a particular characteristic (or indeed is a state) does not matter. Thus, contrary to one of the points pleaded by D1/D2 and Mr Nasrallah (albeit not pursued in oral argument), the fact that PIFSS is the claimant is not a point of any relevance or significance.

The "penal" aspect of the rule

3247. *Dicey* paragraph [8-008] contains a summary of the position in relation to "Penal laws". None of the parties disputed this summary, which is entirely in accordance with the authorities, and which I therefore quote in full (omitting footnotes):

> "Penal laws. 'The common law considers crimes as altogether local, and cognisable and punishable exclusively in the country where they are committed… Chief Justice Marshall, in delivering the opinion of the Supreme Court, said: "The courts of no country execute the penal laws of another".' In *Huntington v Attrill* the Privy Council defined penal to include not only crimes in the strict sense, but 'all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State government, or someone representing the public' and (adopting the test laid down by the United States Supreme Court)

> 'all suits in favour of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.' Hence, for this purpose a penal law is a law which punishes or prevents an offence. To come within this principle the law does not have to be part of the criminal code of the foreign country. Thus a law intended to protect the historical heritage of New Zealand by forfeiting historical articles illegally exported was held to be penal; proceedings in the United States to forfeit assets involved in money laundering were penal even if the assets might be returned to Nigeria from where they had been looted; so also in the Republic of Ireland it was held that the process of sequestration of assets of the National Union of Mineworks after its civil contempt of court in England was penal in nature. The penalty must normally be exigible by the State, and therefore an action of punitive damages by a private person will not be regarded as penal. But the mere fact that a law contains penalties does not render penal all the other provisions of the law. In *Islamic Republic of Iran v Barakat Galleries Ltd* Iran was not debarred by the penal law rule from recovering ancient artefacts allegedly exported from Iran and belonging to the Iranian State. The Iranian law contained penalties for (inter alia) illegal export, but Iran was relying on provisions which vested title in the State, and these were not penal provisions.
>
> Since 'the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it,' the English court will not enforce a foreign criminal (or otherwise penal) judgment."

3248. A leading case in this regard is the decision of the Privy Council in *Huntington*, which is referred to by *Dicey* as support for the proposition that the "penalty must normally be exigible by the State". The case involved an action to enforce in Ontario a judgment of the New York courts. The judgment related to a debt which a limited company had incurred on a loan made by the claimant. Although the debt was incurred by the company, a New York statute imposed personal liability on the company's directors if false statements had been made in reports or public documents issued by a company. The Ontario courts had decided that the substance of the action was to enforce a penalty, and that enforcement should therefore be refused applying the principle enshrined (now) in Dicey Rule 20. The Privy Council disagreed and reversed the appealed decision.

3249. Lord Watson, giving the judgment of the Privy Council, identified (at 155) the critical issue as follows:

> "The Court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State."

3250. He went on to explain the foundation of the rule (at 156):

> "The rule has its foundation in the well-recognised principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the Courts of any other country."

3251. He then referred to difficulties with the use of the phrase "penal actions", identifying an important "distinction between civil rights and criminal wrongs which is the very essence of the international rule". He went on to describe (also at 156) a distinction between penalties (i) exigible by the State in the interest of the community and (ii) by private persons in their own interest:

> "But the expressions "penal" and "penalty," when employed without any qualification, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether exigible by the State in the interest of the community, or by private persons in their own interest."

In that context, he quoted (at 157) from a US Supreme Court judgment (of Mr Justice Gray):

> "The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, *but to all suits in favour of the State* for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties." (emphasis in original)

3252. These considerations then led to the following conclusion as to the proper test for deciding whether an action is penal within the meaning of the rule:

> "Their Lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. All the provisions of Municipal Statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign

> tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community."

3253. The question of whether a law was penal was also addressed in some detail in the *Government of the Islamic Republic of Iran* case. At [105], the court, referring to *Huntington*, described the rule as being that "no proceeding, even in the shape of a civil suit, which had as its object the enforcement by the state, whether directly or indirectly, of punishment imposed for such breaches, ought to be admitted in the courts of any other country". At [106], the court said that the characterisation of the foreign law depends on English law, and does not depend on the label given to the law by the foreign system of law, nor on whether the claim is in form a private law claim. Accordingly:

> "The English court has to determine the substance of the right sought to be enforced, and whether its enforcement would, directly or indirectly, involve the execution of the penal law of another state."

3254. At [108] – [109], the court said that the particular provision relied on should be categorised, rather than the law as a whole. The fact that "a provision is found within a law which contains criminal sanctions, such as penalties or forfeiture, does not mean that the provision itself is penal in nature".

3255. Similarly, in *US SEC v Manterfield* at [11], Waller LJ (giving the main judgment of the Court of Appeal) said:

> "Whether the foreign law constitutes a penal law which the English courts will not enforce is a matter of English law, and thus whether the foreign law regards the law in question as a penal law or a public law is irrelevant."

"Other public law"

3256. In *Skat*, the Supreme Court also considered what it described (at [53]) as the "broader principle" reflected in *Dicey* Rule 20, namely that an action for the enforcement, either directly or indirectly, of a public law of a foreign state is inadmissible. The Supreme Court referred to this as the "sovereign authority" rule. In rejecting the argument that the claim of the claimant, Skat, infringed this aspect of the rule, the Supreme Court approved the approach and distinction drawn in the judgment of the Court of Appeal in *Mbasogo*:

> "The critical question is whether in bringing a claim, a claimant is doing an act which is of a sovereign character or which is done by virtue of sovereign authority; and whether the claim involves

> the exercise or assertion of a sovereign right. If so, then the court will not determine or enforce the claim. On the other hand, if in bringing the claim the claimant is not doing an act which is of a sovereign character or by virtue of sovereign authority and the claim does not involve the exercise or assertion of a sovereign right and the claim does not seek to vindicate a sovereign act or acts, then the court will both determine and enforce it. As we see it, that was the broad distinction of principle which the court was seeking to draw in the *Emperor of Austria case* 3 De GF & J 217. In deciding how to characterise a claim, the court must of course examine its substance, and not be misled by appearances: see for example, *Huntington v Attrill* [1893] AC 150."

3257. In concluding that Skat's claims were justiciable, the Supreme Court said (at [58]) that the prior exercises of sovereign power by Denmark in creating its law relating to the taxation of dividends, and operating the tax system, merely provided the context for the present claims. Focusing on the substance of the claims advanced, the court said that they did

> "not involve any act of a sovereign character, any exercise or enforcement of a sovereign right, or any vindication of sovereign power. On the contrary, the respondent is simply bringing restitutionary claims to recover monies of which it has been defrauded, a course open to any private citizen who had been similarly defrauded."

3258. Useful guidance as to the acts which involve the exercise of sovereign authority is provided in *Dicey* paragraph [8-021]:

> "The result of the authorities in the Court of Appeal is that the English court will not enforce a claim based on foreign public law if the claim involves the exercise or assertion of a sovereign right, unless it is contrary to public policy for the claim to be shut out. In the *Iran* case the Court of Appeal also considered what types of public law would be likely to fall within the prohibition. It approved the test suggested by Lord Denning M.R. in *Att-Gen of New Zealand v Ortiz* that the question depended on whether the claim involved acts done by a sovereign *jure imperii*, by virtue of sovereign authority. The Court of Appeal concluded that exchange control legislation, and (perhaps) export restrictions would so fall. In practice probably the most important rules falling within the category are those which authorise governmental interference with private property, whether in the form of requisition, nationalisation or confiscation."

Public policy exception

3259. As indicated in the above quotation from *Dicey*, there is Court of Appeal authority which supports the existence of a public policy exception to the sovereign authority rule: see *Islamic Republic of Iran* paras [151] – [163]. Although these paragraphs were

obiter, there is no basis for me to say that the principle there articulated is wrong. Indeed, the existence of a public policy exception was also acknowledged, again obiter, by the Court of Appeal in *Skat* at [146]. I accept, however, that the exception is not, at least on current authority, applicable to the 'penal' aspect of *Dicey* Rule 20.

S3: Discussion

Characterisation of the claim

3260. The case-law, particularly in the context of the "other public law" element of *Dicey* Rule 20, identifies the importance of characterising the nature of the claim from the perspective of English law, and doing so by reference to the substance of the claim advanced. I did not consider that the Defendants' submissions, in their various forms, attempted to do this. Rather, their focus was on matters such as the identity of PIFSS as a claimant, the ingredients under Kuwaiti law and Swiss law of the cause of action advanced, the overall nature of the KPPL, and differences between claims that could be brought by ordinary citizens and claims that could be made by PIFSS and other entities using or with the benefit of the KPPL.

3261. The particular focus on the KPPL being an ingredient of the cause of action advanced under Kuwaiti law, and the arguments arising therefrom, was identified and criticised – correctly in my view – by Mr Ritchie in his reply submissions. In doing so, he drew attention to the oddity inherent in EFG's argument, which acknowledged the justiciability of claims based upon the Kuwaiti Penal Code and the money laundering law, but contended that claims where an ingredient was the KPPL were non-justiciable. As Mr Ritchie put it: "how can it be said that, under an exercise which requires characterisation without reference to the foreign law, that the claim is justiciable under English law and all or part of potential governing law A but not under all or part of potential governing law B". As he said, the only answer is "because the defendant wrongly analyses the position by starting inside-out on the foreign law causes of action, and focuses on the specific labels and provisions of those foreign laws".

3262. Viewed from the perspective of English law, PIFSS' claims would be characterised as straightforward civil claims, not involving an assertion of a sovereign right or anything close to it. If English law governed, the facts relied upon by PIFSS would give rise to ordinary civil claims in bribery, conspiracy, and dishonest assistance. In summary, PIFSS alleges (and has proven) that it is the victim of bribery arising from its Director General preferring his own personal interests over the duty owed to PIFSS. PIFSS correctly submitted that English law would characterise such claims as vindication of private rights rather than an assertion of sovereign authority.

3263. That remains the characterisation of the substance of the claim even were it to be the case that either Kuwaiti law or Swiss law would, as a matter of domestic law, characterise the claims differently. However, there is nothing to suggest that either Swiss law or Kuwaiti law would characterise the claims differently. The claims, whether under Article 227 of the KCC, or Article 41 of the SCO (as to which see Section W below), are claims made for civil remedies arising from the tortious conduct of the various Defendants. That is also specifically the case in relation to Articles 16 and 22 of the KPPL, on which many of the Defendants' arguments focused. As discussed in detail in Section B above, when Kuwaiti courts enforce Articles 16 and 22, they are enforcing compensatory civil remedies.

3264. Accordingly, consideration of the substance of the claim and its characterisation from an English law perspective leads to the conclusion that PIFSS' claims are justiciable, or at least that the non-justiciability argument is highly problematic and unlikely to be sound. Closer consideration of the Defendants' arguments also leads to the conclusion that the claims are justiciable.

The penal aspect of Rule 20

3265. As far as concerns the 'penal' aspect of Rule 20, I agree with PIFSS that the short answer to this objection is that PIFSS is not seeking to enforce any penalty or (to use the expression in *Huntington*) punishment. The nature of the remedy sought by PIFSS is not penal in nature. PIFSS is simply seeking to recover a civil compensatory remedy, by pursuing tort claims under Article 227 KCC or Article 41 SCO. This is not a case where it can be said that, in reality, the nature of the claim is penal.

3266. Furthermore, the Defendants did not challenge the correctness of the statement in *Dicey*, based on *Huntington*, that the penalty must normally be exigible by the State. Here, there is no claim for a penalty exigible by the state of Kuwait. No claims are made by the State of Kuwait itself, and a hallmark of a 'penal' claim – namely that it is exigible by the state – is therefore lacking. The claims in these proceedings are being advanced by PIFSS, not the State of Kuwait. PIFSS has an independent legal personality, pursuant to Article 3 of Law 61 of 1976 which established PIFSS. It operates its own budget, its own investment activities and is subject to its own governance framework. It operates with functional and legal independence to administer the social security and pension system of Kuwait and performs that role with autonomy, pursuant to Article 133 of the Kuwaiti Constitution. PIFSS has the power to bring and defend proceedings in its own name.

3267. Here, it is bringing proceedings to recover compensation for wrongdoing. The claim in these proceedings is not, and cannot realistically be described as, an assertion of sovereign authority by the State of Kuwait. The rationale of both the revenue and penal law aspects of *Dicey* Rule 20 is that there should not be an assertion of sovereign authority by one state within the territory of another. That is not what is happening here.

3268. The Defendants' argument on this issue relied heavily on the fact that PIFSS was invoking Kuwaiti and Swiss penal laws to supply an ingredient of the cause of action in tort. The claim under Kuwaiti law is illustrative. PIFSS looks to various laws – the KPPL, the KPC provisions relating to bribery, and the Money Laundering laws – in order to establish that the Defendants were at fault for the purposes of Article 227. This is because, under Article 227, fault can be established by demonstrating the contravention of a criminal statute. However, this does not mean that a court which is asked to decide that a defendant committed a tort, on the basis that it was at fault because it contravened a criminal statute, is enforcing directly or indirectly a penal law. PIFSS is not seeking to give any criminal law extra-territorial effect. Rather, it is simply identifying why, applying the civil law of Kuwait, the Defendants were at fault for the purposes of a tort claim. Again, such a claim does not involve the assertion of sovereign authority by one state within the territory of another, which is the rationale of the 'penal' aspect of Rule 20. The Supreme Court stated that the exclusionary rule should not be extended beyond what is required by its rationale. The Defendants' argument requires, in my view, an impermissible extension.

3269. In the recent Commercial Court case, *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm), Cockerill J was considering the requirements of Article 41 SCO (which is also relied upon here). The article provided that

> "Any person who unlawfully causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation."

Cockerill J then referred to two provisions of the Swiss Criminal Code (including Article 158 – also relied upon here) to supply "the requisite unlawfulness". She obviously (and rightly in my view) saw no difficulty in using those criminal law provisions for that purpose.

3270. It is true that there was no non-justiciability argument that was advanced in *Marino*. But that was not because the point was missed, but rather because it is incorrect and, if advanced, would have been rejected without difficulty. *FM Capital Partners* was a case which involved a civil claim brought by a private party in relation to the receipt of secret commissions. In the context of such a claim, it would be impossible seriously to argue that it involved the assertion of sovereign authority in some way, or that it involved a claim for a penalty exigible by the state. It was a straightforward claim in tort by a private party, with one element of its Swiss law tort claim being based upon conduct being unlawful because it was contrary to Swiss criminal law. The present claim, as a matter of substance, is no different. The only difference, in my view, is that it is a claim advanced by an entity connected with the Kuwaiti state. But as already discussed, that makes no difference to the nature and substance of the claim, and cannot affect the issue of justiciability.

3271. I also agree with PIFSS that the Defendants' argument also fails because at most it involves recognition of the relevant foreign law, rather than its direct or indirect enforcement: see paragraph [21] of *Skat* in the Supreme Court. As Mr Burdin submitted, it is essential to focus on the provision that the court is actually being asked to enforce. Here it is Article 227 (Kuwaiti law) or Article 41 (Swiss law). So although the court is being asked to recognise foreign criminal law for the purposes of supplying elements of a tort claim, that does not involve asking the court to enforce criminal penalties or anything of that kind.

3272. Indeed, if the Defendants' submissions on this aspect of the case were to be accepted, it would have surprising and far-reaching consequences as far as the ability of claimants (whether private parties or state entities) to bring ordinary tort claims in England where the applicable law is a civil law system.

3273. It is apparent from the evidence as to both of the civil law systems in issue in the present case (Kuwait and Switzerland) that a feature of those systems is that the wrongfulness element of conduct, by an alleged tortfeasor, can be assessed by the standards of behaviour laid down by the criminal law. The Defendants' justiciability argument, if successful, would mean that tortious claims based on civil law systems would need to be advanced and adjudicated in England in a fundamentally different way, in terms of establishing fault or unlawfulness, from the way in which civil law countries would approach that issue. In effect, it would 'gut' a civil law tort claim of a potentially important aspect of the way in which a claim could be proved. I see nothing in the authorities which suggests that this can be correct, and nothing in the rationale of the

'penal' aspect of *Dicey* Rule 20 which should lead to that conclusion. As PIFSS submitted, it would emasculate principles of comity – and indeed the Rome II regulation, which requires the English court in certain circumstances to apply other laws – if the court were to refuse to recognise foreign criminal laws where foreign tort law looks to their content. Indeed, the Defendants' argument, if accepted, would be particularly serious in the context of Swiss law, where a successful claim for financial losses will often depend upon whether the defendant has contravened a law which is a "protective norm"; i.e. which protects financial rights.

3274. On this aspect of the case, D1/D2 and Mr Mombelli relied heavily on the decision of Field J in *Republic of Djibouti v Boreh*. That was a reverse summary judgment application, where the judge delivered judgment on the day immediately following the conclusion of the argument. The defendant was alleged to have improperly profited from his position as president of the Djibouti Ports Free Zone Authority. The Claimants in that case included the state of Djibouti itself. The main point argued concerned the sustainability of claims based on various articles of the French Civil Code. Having reviewed the expert evidence, the judge considered that those claims had a real prospect of success. A further point, however, concerned a claim pleaded on the basis of Article 6 of the Djibouti code of criminal procedure. This provided:

> "Civil action for compensation of the damage caused by a crime, a misdemeanour or an offence belongs to all who have personally suffered from the damage directly caused by the infraction.
>
> The renunciation of civil action cannot put a stop to or suspend the exercising of public action, subject to the cases set out in paragraphs 3 and 4 of article 2."

3275. Article 8 provided that a civil action could be brought at the same time as a criminal action and before the same court of law. Article 9 provided that a civil action could also be brought before a civil court separately from a criminal action.

3276. The judgment refers (paragraph [51]) to expert evidence on this aspect of the case, but it does not set out what the evidence was. In paragraph [52], the judge said that it was beyond argument that the effect of Articles 6 and 8 was that a civil claim could be brought in a criminal court as an adjunct to a criminal prosecution, that such a claim would be parasitic on the prosecution, and that if a conviction resulted the judge would go on to consider a claim for compensation. In paragraph [53], the judge said:

> "Article 9 is entirely separate. This provides, possibly out of an abundance of caution, that there may be a claim for compensation made in a civil court that is based on the same facts and matters that would constitute a crime. But that claim is to be determined under ordinary civil law provisions. In my judgment, the only interpretation that can be placed on the claimants' pleading in this part of its case is that it advances a claim that, by virtue of the alleged crimes having been committed, there is a right to compensation."

3277. Field J then set out [54] the principle that an English court has no jurisdiction to entertain an action for the enforcement, whether directly or indirectly, of a penal law of a foreign state, and he referred to *Dicey* and set out an extract from *Huntington*. He went on [55] to refer to the fact that the state of Djibouti was the first claimant, that the claim proceeded on the basis that crimes had been committed, and that it followed that there was a claim for compensation or disgorgement of benefits. He concluded that in his judgment this "clearly falls foul of the rule in *Huntington v Attrill*". In the concluding (unnumbered) paragraph, he stated that a proposed amendment would not provide an answer to the summary judgment claim, because it was "not proposed to remove those paragraphs of the pleading that plead the substantive crimes and plead that those crimes were committed and plead that, by virtue of Article 6, there is an entitlement to compensation".

3278. I do not consider that this case is a strong or persuasive authority against the conclusions which I have reached. Its reasoning is sparse. It does not consider the case-law on 'penal' provisions subsequent to *Huntington*. Field J also did not have the benefit of the decisions of the Court of Appeal and Supreme Court in *Skat*. The case is not referred to in any leading textbook, and has not been considered in subsequent authority. The evidence relating to Articles 6 – 9 is not summarised. Field J appears to have treated the effect of Article 6 as providing in some way for a different remedy to that which would be available if a claim had been made in an adhesive civil claim under Article 8, or in a separate civil claim under Article 9. It is possible that his view that this was a different remedy was based on the expert evidence in that case. It does not appear that he would have regarded either an Article 8 or 9 claim as non-justiciable. He viewed the different Article 6 remedy as penal, and hence was not prepared to allow the proposed amendment if it still referred back to Article 6. There is, however, no discussion in the judgment of the substance of the right that was to be enforced pursuant to Article 6, or its characterisation from the perspective of English law. It may possibly be the case that Field J's decision was appropriate on the facts of that case, and the evidence before him. But I do not consider that it provides any guidance as to how I should approach the present issue in the light of the detailed evidence in the present case, and the much fuller arguments on justiciability that I have received.

3279. By contrast I consider the more recent Commercial Court decision of Dame Clare Moulder, in *Official Receiver of the Bangkok of Commerce Public Company Ltd v Saxena and others*, to be far more instructive and to provide better guidance. The judge was there dealing with an application to enforce the judgment of a Thai criminal court. The court had imposed a sentence of imprisonment and a fine upon the defendant, who was also ordered to make a payment to a Bangkok bank (referred to as "BBC" in the judgment). The issue was whether this "repayment order" was penal.

3280. The judge decided that it was not. She discussed various authorities, including but not limited to *Huntington*. She considered in some detail *Raulin v Fisher* [1911] 2 KB 93, where Hamilton J had drawn a distinction between a judgment "for the satisfaction of a private wrong or for the punishment of an infraction of public law". At [92] – [94], the judge considered the substance of the right sought to be enforced, and she held (at [92]) that it was "a private law claim for pecuniary loss and not the exercise or assertion of sovereign authority involving the execution of the penal law of another State". She went on to say:

> "[93] The OR is exercising the right on behalf of the victim to bring private law proceedings to recover damages for loss suffered as a result of a civil wrong. The OR brings the claim as receiver and manager of the BBC's property.
>
> [94] The claim arises from the fact the BBC was the victim of the tort committed by the defendants. It is not a suit in favour of the State whose law has been infringed. It is an order in favour of the BBC as the injured party. As stated above the fact that the State may ultimately and indirectly receive part of the proceeds of any recoveries does not alter the substance of the right nor does it amount to the exercise of a sovereign right."

3281. Similarly, the position in the present case is that the substance of the claim is for satisfaction of a private wrong, not for punishment of an infraction of public law. It is a claim by the victim of the relevant tort, and is not a suit in favour of a state whose law has been infringed. It is not for (to use the language of *Huntington*) a "pecuniary mulct": i.e. a financial penalty or fine imposed for contravention of a criminal statute.

3282. It also seems to me that Dame Clare Moulder's analysis reflects one of the principles identified by the Court of Appeal in *United States of America v Inkley* [1999] 1 QB 255, 265E:

> "the fact that the right, statutory or otherwise, is penal in nature will not deprive a person, who asserts a personal claim depending thereon, from having recourse to the courts of this country; on the other hand, by whatever description it may be known if the purpose of the action is the enforcement of a sanction, power or right at the instance of the state in its sovereign capacity, it will not be entertained."

3283. Here, even if PIFSS' right were to be regarded as 'penal in nature', which is not how I would characterise it, this would not deprive PIFSS of its right to assert a personal claim dependent thereon.

Other public law

3284. All laws can, in a general sense, be said to have resulted from the exercise of sovereign right. Thus, in *Skat* in the Supreme Court, the court referred [58] to the fact that there were prior exercises of power by Denmark in creating its law relating to the taxation of dividends and in operating its tax system. However, it is clear from the authorities that the fact that a law has been passed, and that it is somehow relevant to the claims brought, does not bring the case within the "sovereign authority" aspect of *Dicey* Rule 20.

3285. *Dicey* paragraph [8-021] identifies, following the *Islamic Republic of Iran* case, that the essential question is whether "the claim involved acts done by a sovereign *jure imperii*, by virtue of sovereign authority". *Dicey* then identifies exchange control legislation and perhaps export restrictions as falling within this category, and also that the more important rules falling within this category are "those which authorise governmental

interference with private property, whether in the form of requisition, nationalisation or confiscation".

3286. I consider that there is nothing in the present claim which involves acts done *jure imperii*, and that there is nothing in the present case which can be equated to the types of actions described by *Dicey*.

3287. The Defendants' argument here was focused very much on the KPPL, and the fact that it was designed to protect public funds. However, I do not consider that this is significant. States and governments nowadays carry out numerous functions, and this involves appointing or employing very large numbers of people to administer those functions. It is unsurprising that laws may be passed in order to identify the standards of behaviour expected of those who are in those positions, particularly if they have responsibility for making decisions on behalf of the state which can affect its finances or assets. I do not consider that a claim against a corrupt public official, for compensation resulting from his corruption including the disgorgement of monies wrongly received, can be said to involve acts done by a sovereign *jure imperii.* Put in the language of the Supreme Court in *Skat*, the substance of the claim does not involve any act of a sovereign character, any exercise or enforcement of a sovereign right, or any vindication of sovereign power. It does not in substance amount to an attempt to exercise sovereign power extraterritorially.

3288. On the contrary, I do not think that there is any material difference between the justiciable claim for fraud in *Skat*, and the claim in the present case which is also in substance a claim for the fraudulent conduct of Mr Al Rajaan (and those who assisted him) by reason of the hidden receipt of secret commissions. A private non-state party whose senior officer had taken secret commissions could bring claims against that person, and any argument based on the "sovereign authority" (or any other) aspect of *Dicey* Rule 20 would fail. I cannot see why the position should be any different if a similar claim is brought by a state party in precisely the same circumstances. The substance of the claim is the same. Again in the language of the Supreme Court in *Skat*, this is a course open to any private citizen who had been similarly defrauded.

3289. The Defendants' argument in this regard did not in my view address the substance of the claim that is being brought. Rather, the Defendants focus on the way in which the claim is formulated by reference to the KPPL, and they assert that a private citizen would not be able to formulate a claim in the same way as an entity covered by Article 2 of the KPPL. I accept that there are some "private citizens" who would not be in a position to formulate the claim for compensation, based on tortious conduct arising from breaches of the profiteering provisions of the KPPL, in the same way as PIFSS has formulated its case here. Even so, there are some "private citizens" who could do so, since Article 2 of the KPPL extends not only to state entities but also to entities in which the Kuwaiti state has an interest of 25% or more. Accordingly, an ordinary bank, in which the state had a substantial shareholding, could formulate a claim in the same way. Furthermore, a person or entity which had no state shareholding could potentially bring a tortious claim against a public official, or those who had assisted him, relying on breaches of the KPPL as providing the requisite element of "fault". For example, a tortious claim might arise if the profiteering by the public official, in conjunction with conduct of an employee of the entity, had resulted in the loss of valuable present and future contracts which the entity had with the state.

3290. I do not accept the proposition that it is necessary, to escape the exclusionary rule in *Dicey* Rule 20, for all private citizens to be able to bring a claim in the same way as a claim can be brought by the state entity. This argument, advanced in various ways by the Defendants, posits that a particular claim, and the manner in which such claim can be formulated, must be universally available to all types of claimant. There is nothing in the authorities that supports this proposition. It is correct that in *Skat*, and earlier cases such as *Islamic Republic of Iran*, the courts looked to the writings and analysis of Dr FA Mann in relation to the exclusionary rule. For example, in *Skat* paragraph [56], the court quoted the following:

> "Where the foreign state pursues a right that by its nature could equally well belong to an individual, no question of a prerogative claim arises and the state's access to the courts is unrestricted. Thus a state whose property is in the defendant's possession can recover it by an action in detinue. A state which has a contractual claim against the defendant is at liberty to recover the money due to it. If a state's ship has been damaged in a collision, an action for damages undoubtedly lies. On the other hand, a foreign state cannot enforce in England such rights as are founded upon its peculiar powers of prerogative. Claims for the payment of penalties, for the recovery of customs duties or the satisfaction of tax liabilities are, of course, the most firmly established examples of this principle."

3291. Neither Dr Mann nor the Supreme Court was here saying that all claims are non-justiciable if they cannot be formulated by all private citizens in the same way that a state can formulate a claim. Dr Mann is simply identifying examples of cases where no prerogative claim arises, focusing on whether the right "by its nature" could equally well belong to an individual. He distinguishes between those cases, and rights "founded upon its peculiar powers of prerogative".

3292. The fact that private citizens do not need to be able to formulate the case in exactly the same way as the state, or a state entity, is illustrated by *Skat* itself. The claim there involved payments of tax refunds. No private citizen could ever formulate a claim based on such refunds, since only the state collects taxes and makes tax refunds. However, the nature of the claim was a claim for fraud, and this could be formulated by any private citizen. Thus, as Professor Adrian Briggs said (prior to the decision in the Supreme Court in *Skat*) in *Private International Law in English Courts* 2nd edition, paragraph 111:

> "It is not decisive that the claim is of a kind which only a state may bring; it is not decisive that the state purports to found its claim on a cause of action framed as one in private law. What matters is that the interest to be vindicated by it is, as a matter of fact, one which is uniquely governmental. It may be slightly messy, but the general shape of the law is clear."

3293. Applied to the present context, claims against individuals who have taken bribes can be made both by the state and by private individuals or entities. Ultimately what matters on the authorities is the substance and nature of the claim advanced, and not the

particular way in which it is formulated. Claims against individuals who have taken bribes are, viewed as a matter of substance, in no sense uniquely governmental.

3294. The fact that a justiciable claim can be one which only a state can bring can be seen in the decision of the Court of Appeal in *Manterfield*. The claim was there made by the US Securities and Exchange Commission. It sought a freezing order in support of proceedings in the US in respect of an alleged fraudulent investment scheme. The relief sought by the SEC included the recovery of misappropriated money, which could then be returned to investors in a process known as disgorgement. A freezing order was granted at first instance, and this was upheld by the Court of Appeal, rejecting arguments based on *Dicey* Rule 20. The court quoted (at [20]) and applied the judgment of the Court of Appeal in New South Wales in *Robb Evans of Robb Evans & Associates v European Bank Ltd* [2004] 61 NSWLR 75:

> "The recoupment of funds with a view to their return to persons deprived of those funds is a normal consequence of the application of the civil law. In my opinion, as a matter of substance, that is what is occurring in the present proceedings. There is nothing in this case of the character of a governmental interest in the sense in which that concept is applied in the Australian authorities, i e, as the exercise of a power peculiar to government. In my opinion the particular proceedings before the court should not be characterised in that manner. The exclusionary rule does not apply and this court should not decline jurisdiction."

3295. Thus, the substance of the claim was what mattered, and it made no difference that the claim was brought by a government entity: see paragraphs [23] – [24].

3296. I therefore accept PIFSS' submission that it does not follow – from the fact that a right that could equally be exercised by any private individual will *never* be excluded by Rule 20 – that any right allocated by statute to a public body will *always* be excluded by Rule 20. I agree that Rule 20 requires analysis of the substance of the action from the perspective of English law, not the preferred status of a given claimant as conferred within the prism of the foreign legal system. Thus, where the action is in substance a normal civil claim, the fact that under the KPPL there are particular rules which apply does not change the nature of the action.

3297. For these reasons, the argument based on "other public law" (i.e. "sovereign authority") fails.

Public policy

3298. PIFSS submitted that if Rule 20 applies, the court should apply the public policy exception which was recognised (albeit obiter) by the Court of Appeal in *Islamic Republic of Iran* and more recently in *Skat*. The Supreme Court in *Skat* said at [62] that it did not need to decide whether the claim fell within such a public policy exception, and the decision of the Supreme Court is therefore neutral on the question of whether the public policy exception exists.

3299. Since the existence of such an exception has been recognised in two Court of Appeal cases, and is recognised in *Dicey* which is the leading textbook in this area, I proceed on the basis that such an exception does indeed exist. If necessary, I would also hold that the present claim falls within that exception. This is a case of major international fraud. Bribery has been described as a special form of fraud: see *Petrotrade Inc v Smith* [2000] 1 Lloyd's Rep 486 (David Steel J), para [19]. In *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 at [42], Lord Neuberger quoted from Lord Templeman in an earlier Privy Council case: "Bribery is an evil practice which threatens the foundations of any civilised society". He went on to say that:

> "concern about bribery and corruption generally has never been greater than it is now: see for instance, internationally, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1999 and the United Nations Convention against Corruption 2003, and, nationally, the Bribery Acts 2010 and 2012. Accordingly, one would expect the law to be particularly stringent in relation to a claim against an agent who has received a bribe or secret commission."

3300. Further, as PIFSS submitted, the decision in *Islamic Republic of Iran* also referred to international instruments as being relevant to public policy. The UK, Switzerland and Kuwait are all signatories to the UN Convention Against Corruption (2003). The convention demonstrates the international policy of combatting corruption. Signatories must therefore: criminalise the bribery of foreign public officials (Article 16), and adopt measures to establish the liability of participants in bribery offences (Article 26). Article 35 requires states to ensure that victims of bribery have the right to initiate legal proceedings for compensation:

> "Compensation for damage Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation."

3301. Against this background, I agree that it would be contrary to public policy if the "sovereign authority" aspect of Rule 20 required the English court to exclude the enforcement of laws that implement and support the objectives of the 2003 UN Convention, or indeed the earlier OECD Convention to which Lord Neuberger referred.

Other arguments

3302. A number of other arguments were advanced by PIFSS, in particular: that, if necessary, the court could sever any parts of the relief claimed that would infringe Rule 20; and that where jurisdiction is conferred under the Brussels Regulation or Lugano Convention, applying Rule 20 would impair its operation and is precluded. PIFSS also argued that characterising PIFSS' claim as an excluded penal or other public claim would be inconsonant with Rome II. In view of my conclusion that Rule 20 does not apply for the reasons given above, it is not necessary to address these additional arguments.

3303. Much of the Defendants' argument as to justiciability, at least as far as concerns the KPPL, was driven by the fact that there is no criminal limitation period for offences under that law: Article 21[bis]. This has, by virtue of Article 253 (2) (as discussed in Section R above), an impact on the civil limitation period. I did not understand the Defendants to submit, however, that the claims were non-justiciable because of the applicable limitation period, or because of Article 21[bis] or Article 253 (2). Any such argument would, in view of the authorities discussed above, be unsustainable. Civil limitation periods are simply part of the civil law of Kuwait and Switzerland. The absence of a limitation defence does not mean that the court is imposing a penalty, and it does not have any bearing on whether the claim involves the exercise of sovereign authority.

Conclusion

3304. All of PIFSS' claims are justiciable. In summary, this is because – viewed as a matter of substance and through English eyes – the claim is not an attempt to enforce a penalty or a right that is of a uniquely sovereign character.

SECTION T: RECOVERIES

T1: Factual background

3305. For some considerable time in this litigation, the Defendants collectively have been very interested in the question of whether, and to what extent, PIFSS or the State of Kuwait have already succeeded, or may in the future succeed, in recovering assets from Mr Al Rajaan or his estate, or his wife D2, or his other heirs. This generated requests for disclosure and various interlocutory orders aimed at providing information on that issue.

3306. PIFSS' position has always been, and remains, that it has not yet succeeded in recovering any assets from D1, his estate, D2 or his other heirs. PIFSS has provided extensive disclosure in these proceedings, and it has been required to search for and produce documents relevant to the question of such recoveries. There is nothing in PIFSS' disclosure which provides any evidence that it has recovered assets. I do not accept that there is any basis for a conclusion that PIFSS has failed to provide proper disclosure and is somehow seeking to conceal the fact that recoveries have been made. Indeed, none of the Defendants in their closing submissions submitted that I should reach such a conclusion, although some of the Defendants advanced arguments along the lines that the factual picture was not complete.

3307. The principal focus of the Defendants' arguments, concerning actual or potential recoveries, is the orders made by the Kuwaiti court in the criminal proceedings against Mr Al Rajaan and D2 which culminated in their convictions (in absentia) in June 2019.

3308. As set out in the outline chronology in Section C above: on 27 June 2019, Mr Al Rajaan and Ms Al Wazzan were convicted in Kuwaiti criminal proceedings by judgment of the Plenary Court of the Criminal Circuit (10) of Kuwait. The case related to the Mirabaud Scheme, and did not address any of the other schemes with which I am concerned. Both Mr Al Rajaan and Ms Al Wazzan were sentenced to imprisonment for life with labour. They were also ordered to return the amount of USD 82,200,000, which was the amount which (the court concluded) Mr Al Rajaan had obtained for himself, his wife, and his company Galmir Advisory. I have not concluded in these proceedings that Galmir, as opposed to Silvery Bay, was Mr Al Rajaan's company: see Section G above, dealing with the Mirabaud Scheme. However, I also note that PIFSS' claim in respect of the Mirabaud Scheme nevertheless exceeds USD 82.2 million.

3309. Mr Al Rajaan was also ordered to pay a fine of twice USD 82.2 million: USD 164,400,000. Ms Al Wazzan was ordered to pay a slightly smaller fine: USD 147,600,000. The court also ordered that:

> "The property, companies, stocks and movable property used in the commission of the crime of money laundering in the fashion detailed in the reasoning of the judgment on the supplementary penalty imposed on the two Defendants shall be confiscated."

3310. Earlier in the judgment, the court listed various assets, in particular vehicles, shareholdings and properties. However, the order made at the end of the judgment, quoted above, was not confined to the listed assets, and was in general terms. What has happened, as will be apparent from the figures below, is that a large number of different

assets have been seized and confiscated, and these include assets which are both listed and unlisted in the Kuwaiti criminal judgment.

3311. PIFSS was not a party to those criminal proceedings. It did not bring an adhesive claim as a civil claimant. However, since it was the victim of the wrongdoing of Mr Al Rajaan and D2, as found by the court, the order for the payment of compensation of USD 82,200,000 is an order which requires that compensation to be paid to PIFSS. However, there is no suggestion that Mr Al Rajaan or Ms Al Wazzan has complied with that order, nor indeed with the orders that fines should be paid. In fact, as a result of Mr Al Rajaan's death, it appears that his fine will no longer have to be paid.

3312. Despite Mr Al Rajaan and Ms Al Wazzan taking no steps to comply with the orders of the Kuwaiti court, those orders have been far from ineffective, because substantial assets have been subject to confiscation. This successful confiscation has given rise to a variety of arguments on the Defendants' side. They contend that, by one route or another, the recovery of these confiscated assets should reduce the amount of their liability. They also contend that, again by one route or another, the court should not grant a monetary judgment until there is further and better information as to the position in relation to the confiscated assets.

3313. The factual position concerning confiscation has been explained in various memoranda and letters written by individuals within the Kuwaiti Office of Attorney-General ("KAG"). These memoranda and letters have been written in response to questions asked in the context of the present proceedings, and also in response to questions asked by the (UK) Crown Prosecution Service ("CPS") in connection with the ongoing UK criminal proceedings which started with the criminal restraint order described in Section F above. An issue in those criminal proceedings is, in summary, whether the state of Kuwait can enforce the Kuwaiti criminal judgment, and thereby recover assets restrained by the criminal restraint order. Various memoranda were exhibited to the witness statement of Ms Heather Chalk of the CPS, the most recent memorandum being dated 23 May 2024.

3314. PIFSS has itself not produced disclosure, from its own documents, as to the position in relation to the confiscation process. That is unsurprising. The confiscation process is an aspect of the criminal proceedings taken by the Kuwaiti public prosecutor, and one would not expect PIFSS' records to contain information about the process or its results – save to the extent, if any, that it has been informed about these matters by the public prosecutor.

3315. The evidence emerging from the KAG memoranda and letters, as to what confiscation has taken place, was summarised in a helpful table prepared by PIFSS which Mr Ritchie explained during the course of his oral closing submissions. None of the Defendants made any submission that this summary of the materials, or Mr Ritchie's submissions in that regard, were incorrect. Indeed, Ms Rogers based her oral submissions on the tabulated figure of (in round terms) USD 261 million which represents recoveries from confiscated assets already transferred to the treasury of the state of Kuwait. I will proceed on the basis that the information provided by the KAG, and summarised in PIFSS' table is accurate.

3316. The position as at March 2025 was that many, but perhaps not all, of the assets specifically identified in the criminal court's judgment had been gathered in and

realised by the Kuwaiti state following sales of vehicles, property and other measures. The total, converted to USD, was the USD 261 million figure to which I have referred. These are assets which have already been allocated by the state, in that they or their proceeds have been sent to the Kuwaiti treasury. In addition, assets to the value of a further USD 200 million have been gathered in, but have not yet been allocated in the sense of being sent to the treasury or elsewhere.

3317. In addition to those figures, the KAG has provided information as to assets which have been restrained outside Kuwait, in Switzerland and the UK. This includes bank accounts, which held £23.5 million, which were restrained by criminal restraint order in the English proceedings. It also includes two properties in London (Eaton Square and Knightsbridge), valued at around USD 16 million, which were frozen as a result of the WFO in these proceedings. The total figure for these restrained assets in Switzerland and the UK is USD 145 million. A further USD 10 million of assets owned by Khaled Fahad Al Rajaan (D42) has also been restrained.

3318. The most recent information provided by the KAG, available at the trial, was a letter sent in December 2025. This confirmed that there had been no developments since March 2025.

3319. The way in which recoveries by the state of Kuwait are to be allocated is not straightforward. It was an issue addressed in a memorandum, dated May 2024, by the KAG in response to questions which were asked by the CPS. It is not necessary, however, to describe the detail. The May 2024 memorandum indicates an intention on the part of the state to allocate some recoveries, from certain bank accounts, to the USD 82.2 million compensatory order made by the Kuwaiti criminal court. However, consistent with PIFSS' evidence that it has not yet received any recovery, this and the other memoranda do not suggest that any payments towards this compensation have yet been made.

3320. More generally, it is apparent from the memoranda provided to the CPS that it is the state, not PIFSS, which decides upon allocation. The memoranda also indicate that there are ongoing investigations into Ms Al Wazzan, and that any "excess amounts in Kuwait" – which I understand to mean any monies which remain after satisfying the judgments of the criminal court – are to be "transferred to the new case as the Attorney General has issued an order to restrain all properties owned by Muna Al Wazzan and her children (Khaled Alrajaan, Fawaz Alrajaan, Fajer Alrajaan and Farah Alrajaan) in the new investigation." It therefore seems possible that there may be further criminal proceedings against Ms Al Wazzan, and that these may relate to various schemes (leaving aside the Mirabaud scheme) with which I am concerned in these proceedings.

3321. Leaving aside the Kuwaiti confiscation recoveries, it was not suggested that there had been any relevant recoveries in other jurisdictions. The submissions of some of the Defendants referred to the situation in Switzerland. However, as Ms Rogers KC for EFG correctly acknowledged in her oral submissions, PIFSS has not yet made any recoveries from that jurisdiction. The Swiss criminal proceedings against Mr Al Rajaan have now come to an end, and there is an issue, currently being argued about, as to what is to happen to the Swiss assets which have been frozen in that jurisdiction. There are substantial assets there, including monies in various Banque Mirabaud accounts frozen in 2012. This includes some USD 75 million in the account of Domini, around USD 7 million in Intermac, and USD 6.5 million in SCI Cum Laude. The Swiss Office of

Attorney General ("OAG") is considering remitting these to PIFSS or the state of Kuwait, and it has received submissions on that issue from PIFSS. It appears that D1/D2 oppose that course, but their submissions to the OAG have not been disclosed and are not available. At all events, the issue has not yet been resolved, and so the factual position is that PIFSS has yet to recover anything from D1/D2's Swiss assets.

T2: Procedural matters

3322. Issues relating to potential recoveries by the state of Kuwait or PIFSS were the subject of various interlocutory orders. Paragraph 6 of the PTR Order provided for the bifurcation of certain issues. The bifurcation meant that certain issues would not form part of the present trial, but would be resolved (if resolution was required) at a second trial. One of the bifurcated issues identified in paragraph 6 was the issue of recoveries, where the issue was only bifurcated to some extent:

> "6.2 The quantification and tracing of any recoveries made by or on behalf of PIFSS or the Kuwaiti State or any Kuwaiti State Entity, subject to the following:
>
> 6.2.1 To the extent practicable, and subject to any further direction which the Court may give, the Court will determine at the Phase 1 trial the legal principles applicable to the issue of recoveries (whether under English law or foreign law), including (for the avoidance of doubt) as to the extent to which (if at all): (a) PIFSS is in principle required to give credit in respect of any such recoveries; and (b) any further quantification and/or tracing process should in principle be conducted.
>
> 6.2.2 The Court will determine at the Phase 1 trial the factual, legal and case management consequences of the Court's decision in respect of paragraph 6.2.1 above, including consideration of the extent to which any quantification and/or tracing process would in fact be feasible on the disclosed evidence and/or evidence that would foreseeably come available before the Phase 2 trial.
>
> 6.2.3 The Court will consider at the Phase 1 trial, including in the light of the disclosure provided at that time and any legal findings made pursuant to paragraph 6.2.1 above, the extent to which factual questions about recoveries are capable of being determined as part of the Phase 1 trial. Where such factual questions cannot be determined (for example, as a result of insufficient information and / or disclosure), they will fall to be determined (where applicable and if the Court considers that such determination is feasible) at the Phase 2 trial."

3323. Expert evidence from both Kuwaiti and Swiss law experts had, by the time of the PTR Order, been served by the parties. This was extensive, and raised many issues. However, it appeared from the oral opening submissions of the Defendants on Kuwaiti

law that they had lost their enthusiasm for the plethora of points raised by their experts, with an indication being given that this topic would be addressed only briefly. Thus, when Dr Abbas came to give evidence for PIFSS, there was no cross-examination on any of the written evidence that he had given, save for a very small number of questions (lasting around 5 minutes) asked by Ms Bingham KC as to one aspect of the Kuwaiti money-laundering laws pursuant to which assets had been confiscated. The cross-examination of PIFSS' Swiss law experts was somewhat longer, but was nevertheless relatively short, leaving much of PIFSS' Swiss law evidence unchallenged.

3324. Since Dr Abbas had not been challenged on his evidence as to Kuwaiti law concerning recoveries, it was not necessary for Dr Youssef or Professor Mallat to be cross-examined on areas where there had been no challenge to what Dr Abbas had said. Mr Ritchie indicated in his cross-examination that he was taking that approach, and there was (rightly) no objection raised by the Defendants.

3325. I therefore proceed on the basis that I can and should accept Dr Abbas's unchallenged evidence on this area of the case. I reject the argument of D1/D2 to the effect that I should regard all of the issues as open for debate, on the basis that they had not participated in the cross-examination. Having failed to appear during that part of the trial, and having failed to cross-examine Dr Abbas, D1/D2 are in no different position to the other Defendants as far as concerns the lack of challenge to Dr Abbas's evidence. In any event, having considered Dr Abbas's written evidence about recoveries, I found it persuasive and saw no reason why it should not be accepted.

T3: The parties' arguments

3326. In summarising the parties' arguments, I shall focus on the arguments relating to the Kuwaiti confiscation recoveries. That is because the position in Switzerland and Swiss law does not require consideration. I have already held that Swiss law is not the applicable law of the torts alleged. There is therefore no reason why the effect of the Kuwaiti criminal judgment, and any recoveries made pursuant to that judgment, should be viewed from the perspective of Swiss law.

3327. Indeed, even if Swiss law were applicable, I consider that the effect of the Kuwaiti criminal judgment, and whether it produced a recovery in the hands of PIFSS, would be a matter of Kuwaiti law. Ms Rogers in her oral submissions accepted Kuwaiti law must realistically apply to issues as to what rights PIFSS has in Kuwait to claim some of the sums that have been confiscated by the state, under a Kuwaiti criminal judgment.

3328. Furthermore, there have been no recoveries from Switzerland, and I do not consider that there is any basis for any reduction in PIFSS' claim by reference to recoveries which have not been made, and where D1/D2 are apparently seeking to persuade the OAG that the frozen Swiss assets should not go to Kuwait or PIFSS.

3329. As far as concerns the Kuwaiti confiscation recoveries, the main points advanced by the parties were as follows.

3330. PIFSS identified, on the basis of Dr Abbas's evidence, the principles applicable to the issue of recoveries. These are summarised below. Applying these principles, PIFSS submitted that there was no basis for making any deduction from, what would otherwise be, the Defendants' liability. PIFSS' central points were that it had made no actual

recovery in Kuwait in consequence of the criminal judgment and orders. There was no reason why such recoveries as had been made by the Kuwaiti state, pursuant to the confiscation orders made by the Kuwaiti criminal court, should reduce PIFSS' claim. PIFSS was a separate legal entity, distinct from the Kuwaiti state. Recoveries by the state were not recoveries by PIFSS. Furthermore, fines and assets which had been confiscated represented punishment for criminal wrongdoing, and could not be treated as compensation to PIFSS.

3331. PIFSS acknowledged the possibility that, in due course, it might receive monies from the confiscated assets. PIFSS accepted that if there were to be an actual recovery in respect of the USD 82.2 million compensatory/restitutionary element of the criminal judgment, PIFSS would need to give credit for it. But that had not yet happened, and there was no principle whereby PIFSS was required to mitigate its loss – in advance of obtaining judgment in these proceedings – by seeking recoveries from the state, whether in respect of the USD 82.2 million or more generally. PIFSS' alleged failure to seek such recoveries could not reduce the Defendants' liability.

3332. *D1/D2:* D1/D2 submitted that PIFSS' claims (or, alternatively, at least PIFSS' claims in respect of the Mirabaud scheme) are barred in their entirety under each and any of: (i) the common law rule against former recovery; (ii) s.34 of the Civil Jurisdiction and Judgments Act 1982 ("CJJA"); (iii) the High Court's inherent jurisdiction to prevent abuse of its process and/or (iv) as an abuse of rights under Kuwaiti law. Alternatively, PIFSS' claims fall to be reduced by any sums recovered by the Kuwaiti authorities under Kuwaiti law.

3333. In support of this line of argument, D1/D2 relied on various matters, including: the assistance which PIFSS had given to proceedings which the public prosecutor had brought, including through offering documents; the fact that PIFSS decided not to join the Kuwaiti proceedings as a civil party, when it could have done; its legal right to enforce the restitutionary award made by the Kuwaiti criminal court; the practical connections between PIFSS and Kuwait; and the possibility or likelihood that PIFSS will receive substantial monies in the future.

3334. D1/D2 also submitted that the court is unable presently to make determinations about the quantum, make-up, or allocations of recoveries made pursuant to the criminal judgment, or the extent to which they will be transferred or made available to PIFSS. Alternatively, any determination would be premature and prejudicial to D1/D2, given the pending possible additional recoveries and expected allocation to PIFSS of recoveries made by the Kuwaiti authorities.

3335. *EFG:* In their written submissions, EFG took what they described as a pragmatic approach. PIFSS should not lose out on an award of damages if the prospect of recovering assets from D1/D2 is speculative. Equally, there should be no question of PIFSS or the Kuwaiti state recovering twice over. They suggested a number of pragmatic solutions: deferring a final decision on recoveries to a second trial, by which time further information will have emerged; giving PIFSS a window to make requests and applications in Kuwait in order to recover sums from the confiscated assets; or making no reduction at this stage, but order ongoing disclosure on recoveries issues and give the Defendants liberty to apply. However, EFG's preference was for the approach taken by Robin Knowles J in *Republic of Mozambique v Credit Suisse International SA*

[2024] EWHC 1957 at [600], whereby he gave credit in full for recoveries, but gave Mozambique liberty to apply as to the amount of credit.

3336. In relation to what recoveries had been made in Kuwait, EFG submitted that the position was unclear. PIFSS had called no witness on the issue. The KAG's memoranda indicated that substantial sums had been hypothecated to a combination of restitution of the USD 82.2 million in Mirabaud Scheme commissions and to fines.

3337. EFG's main focus, in its written and then oral submissions, was on the USD 261 million which had been recovered. Reliance was placed on Article 6 of the Kuwaiti Money Laundering Law 2002. This provides:

> "Without prejudice to any more severe penalty set out in another law, anyone who commits one of the crimes set out in Article 2 of this Law shall be punishable with imprisonment for a period of no more than seven years and a fine of no less than half and no more than the full value of the funds subject of the crime, with the confiscation of the funds, property, proceeds, and instrumentalities utilized in the commission of the crime, without prejudice to the rights of bona fide third parties.
>
> The lapse of a criminal case for any reason shall not prevent a ruling to confiscate the funds obtained from money laundering transactions, and in all cases in which a ruling to confiscate is issued in accordance with the provisions of this Article, the confiscated funds shall be disposed of in accordance with the rules and procedures issued under a resolution from the Minister of Finance."

3338. EFG submitted that PIFSS is a bona fide third party, and that its pleadings assert proprietary rights. Article 6 makes it clear that proprietary rights are not defeated by confiscation. The assets held by the state must, EFG submitted, include the secret commissions relevant to the present case, or their proceeds. The public prosecutor therefore holds the confiscated assets subject to PIFSS' proprietary rights. EFG submitted that: "All PIFSS has to do is ask for them back", and it referred in that context to Dr Abbas's evidence in cross-examination. It was reasonable for a claimant complaining that it has been deprived of assets to take steps to claim them from a third party who holds them subject to the claimant's supervening right. An obvious way of avoiding or reducing the damage caused by the misappropriation of assets was to get them back.

3339. There were therefore two ways forward. Either the court should reduce PIFSS' damages to take account of its failure to mitigate, or it should afford PIFSS a window to take steps to obtain those recoveries to which it has a proprietary claim. There was no discernible basis on which the state of Kuwait could resist PIFSS' bona fide proprietary claim.

3340. If the first course were taken, then a question would remain as to how to allocate recovered assets as between the different schemes in these proceedings. EFG favoured a rough and ready pro rata division to do practical justice between the Defendants. This approach would involve taking the claim in respect of the EFG Scheme (USD 403

million) and comparing it to the total claim in these proceedings (USD 1.036 billion). The resulting percentage, 38.9%, should be applied to the total recoveries.

3341. *Man:* In a brief written submission (not supplemented by any oral submissions), Man submitted that it was not feasible, practical or fair for the court to carry out the quantification exercise referred to in the PTR order. They submitted that there was insufficient information available for relevant factual findings to be made. The issues should therefore be deferred to a second trial.

3342. The Mombelli Defendants submitted that no distinction should be drawn between the Kuwaiti state and PIFSS. Thus, they said that "anything recovered by PIFSS and/or the Kuwaiti State should be deducted from any sum awarded to PIFSS to avoid effective double recovery". They also submitted that any sums awarded as restitution in criminal proceedings should be accounted for when determining any compensation awarded to PIFSS. They adopted EFG's argument that where any recovery is not attributable to any specific Defendant or group of Defendants, the reduction to any award should be pro-rated against each scheme.

3343. In addition to these points, a separate issue was raised by D1/D2, EFG and Mr Nasrallah as to the treatment of certain monies which were part of PIFSS' settlement with UBP. I deal with this separately in Section T7 below.

T4: Relevant principles of Kuwaiti law

3344. In his oral closing submissions, reflecting PIFSS' written closing, Mr Ritchie identified Kuwaiti law principles which were applicable to the recoveries issue that I am considering. The following principles are in my view established by Dr Abbas's unchallenged evidence.

3345. (1) Double recovery is not permitted. This was common ground between the parties.

3346. (2) Double recovery only arises if the award in the first judgment is compensation for the same harm for which compensation is claimed in the second case. Accordingly, if the award in the first judgment – here the judgment of the Kuwaiti criminal court – is not compensation, such as criminal punishment, or it is compensation for a different harm, then the principle of double recovery will not apply.

3347. (3) Double recovery only applies where there is an actual recovery, not simply a court judgment. An aspect of this principle is that if the injured entity has not collected on a judgment, it still has the freedom to make claims for compensation against other joint debtors. This freedom to elect is the core of the joint liability rule.

3348. (4) A creditor can have recourse against any debtor, even if the creditor has a right in rem to the property of one of the debtors.

3349. (5) Pursuant to Article 3 of the Social Security Law, PIFSS is a public institution that enjoys a separate legal personality and a separate budget from the state of Kuwait. This independence is provided for by the Kuwaiti Constitution itself. This mandates the independence of public institutions that operate under the auspices of the state.

3350. (6) The Kuwaiti state's financial oversight over PIFSS aims to protect public funds. This has nothing to do with the independence of PIFSS' budget or the separation of its patrimony from the state.

3351. (7) Civil and criminal remedies differ in their rationales and objectives. The imposition of criminal liability aims at protecting the interests of society as a whole. This takes place through punishing certain acts through criminal penalties. The purpose of these criminal punishments is twofold: to punish the offender and deter him from repeating the act, and to serve as a general deterrent.

3352. (8) A fine is a criminal sanction and should not be mistaken for compensation or any other form of monetary claim which can be brought against a defendant. Fines are punitive. The KPPL mandatory fine, of twice the misappropriated amount, aims to deter perpetrators.

3353. (9) Civil courts cannot decide to allocate criminal fines for the payment of compensation. A Kuwaiti criminal court can, under Article 228 of the Kuwaiti Criminal Procedures and Trial Law No 17 of 1960 ("KCPL"), exercise a discretion to allocate all or part of a fine to the payment of compensation for victims. However, if the court does not exercise this discretion at the time when it orders the punishment of the offender, then no fines can be allocated for that purpose. In the present case, there was no such allocation.

3354. (10) Confiscation is the transfer of ownership of money, assets or objects to the state without compensation. It is a supplementary criminal sanction issued with respect to specific assets or objects. Unless otherwise specified by the relevant law, confiscation is not compensatory in nature. Rather, it is considered as a punishment or precautionary measure that aims at avoiding the reuse of the money, assets or objects to commit the crime again. In the context of the Kuwaiti money laundering laws and the KPPL, confiscation serves only a punitive and precautionary function, and is not compensatory.

3355. (11) Under Article 237 of the KCPL, if a judgment is issued for confiscation, the confiscated property becomes the property of the state. Article 237 also provides that the court, the Chief of Police and Public Security, or the Public Prosecutor may order the destruction of the confiscated items, their sale by auction or direct sale, or their delivery to a government entity for utilization within the limits of the law. This article does not provide for any compensatory nature of confiscation. If confiscated property were, pursuant to Article 237, allocated by the state to PIFSS, this would be a normal allocation by the state of its funds. It would not be considered as compensation for faults. It could not therefore be deducted from any compensation claim.

3356. (12) Since fines and confiscation are criminal punishments that do not aim at compensating victims, they cannot be used for the purpose of providing compensation – except in the case, discussed above, where the criminal court orders the fine or part thereof to be used in that way pursuant to Article 228 KCPL. Requiring the state to use the proceeds of fines and confiscation to compensate PIFSS would amount to requiring the state to waive and drop the criminal punishments, because in such a case PIFSS would be compensated and no punishment would have been applied. The state is not allowed to do so, since it is against public policy. The state cannot be obliged to forego

its right to punish perpetrators by allocating the fines and confiscation punishment to payment of compensation.

T5: The Kuwaiti recoveries – discussion

General

3357. Applying Kuwaiti law, and considering the Kuwaiti criminal judgment and the recoveries thereunder in the light of Kuwaiti law, I do not consider that there is any principled basis for making any reductions in the amounts which should be awarded to PIFSS in respect of the tort liability of the various Defendants. Nor is there any reason to defer the award of the compensatory remedy to a second trial.

3358. I do not accept that there is insufficient factual information for the court to reach a judgment on the relevant issues, or to make factual findings which are relevant to the application of the applicable Kuwaiti law principles. The information provided by the KAG – both to the CPS in the context of the English criminal restraint proceedings, and to PIFSS in response to questions raised for the purposes of obtaining information for these proceedings – gives a sufficiently clear picture as to what has happened. I have described this in Section T1 above. In any event, in the light of the above principles and the discussion below, the only question that really matters is: has PIFSS made a recovery in respect of the USD 82.2 million compensatory award? The answer to that question, on the evidence, is "no".

3359. It is true that some uncertainties remain, for example: whether the Kuwaiti state will succeed in obtaining the funds which are subject to the English criminal restraint order; whether the OAG will release the Swiss frozen assets to PIFSS or the Kuwaiti state; whether the Kuwaiti state will, at some point in the future, apply some of the confiscated assets (or their proceeds) to the USD 82.2 million compensation ordered by the Kuwaiti criminal court; and whether the state will decide, pursuant to its general powers of allocation, to give further monies to PIFSS.

3360. However, I do not consider that any of these uncertainties provides a principled basis, applying Kuwaiti law, for adopting the approach for which the Defendants argue. The Defendants' approach is designed primarily to prevent PIFSS from obtaining a monetary judgment now, despite having established the liability and quantum of the Defendants in these proceedings, and thereby delay enforcement until some uncertain date in the future. Alternatively, it is aimed at very substantially reducing the financial liabilities of the Defendants, by reason of confiscations made in criminal proceedings which have not benefited PIFSS and which are the consequence (including the penal consequence) of the serious criminal wrongdoing which has been found by the Kuwaiti court. Further information about those uncertainties will not, however, meet the difficulties confronting the Defendants' case on recoveries. Nor will any further information enable the Defendants to advance a defence to the claim, save only that PIFSS' receipt of USD 82.2 million would provide D1 with a defence to the enforcement of the judgment in PIFSS' favour in relation to the Mirabaud Scheme.

3361. The essential reasons for this conclusion are as follows.

PIFSS is not the state of Kuwait

3362. First, there is no basis for equating the recoveries made by the Kuwaiti state, in consequence of criminal proceedings, with recoveries made by PIFSS. PIFSS is not the Kuwaiti state, but was established long ago as a separate legal entity. I addressed this feature of PIFSS in the context of rejecting arguments, at an earlier stage of these proceedings, that PIFSS was effectively to be equated with the Kuwaiti state for the purposes of providing disclosure in these proceedings: see [2024] EWHC 480 (Comm), paras [40] – [51] and (for example) [141]. Although the description of PIFSS and various Kuwaiti governmental bodies was based on the witness statement of Mr Haworth of Stewarts (PIFSS' solicitors), I consider in the light of the evidence as a whole that the description remains sound. A particular focus of the arguments in that case was the documents generated in relation to the Kuwaiti criminal proceedings, which have given rise to the recoveries here. I do not consider that the Defendants' argument, to equate PIFSS with the Kuwaiti state, is any better in the context of the recoveries than it was in the context of disclosure.

3363. Furthermore, Dr Abbas's unchallenged evidence was that, for reasons which he gave, PIFSS was to be treated as a separate person from the state for the purposes of recoveries.

3364. It follows that the fact that the Kuwaiti state has made recoveries does not mean that PIFSS has made recoveries.

3365. Furthermore, Kuwaiti law has the effect of vesting property, confiscated pursuant to criminal proceedings and orders, in the Kuwaiti state. Thus, the relevant confiscated property is now owned by the state of Kuwait. It is not owned by PIFSS, and therefore there is no basis for saying that PIFSS has received any compensation by virtue of the confiscation of property. That would also be the position if, in due course, further property is successfully confiscated.

PIFSS has not received recoveries

3366. Secondly, PIFSS has yet to receive any recoveries consequential on the confiscations. Accordingly, there is no factual basis for applying the principle – which does apply as a matter of Kuwaiti law – that there should be no double recovery.

3367. Furthermore, even if PIFSS were to receive monies which were derived from the confiscated assets, it would not follow that such monies would be regarded as compensation for the purposes of the double recovery rule. The relevant principles of Kuwaiti law in this regard are explained above. The important point is that the fines imposed on Mr Al Rajaan and D2, and the order for confiscation, are criminal sanctions. They do not have a compensatory character.

3368. Subject to the point made in the following paragraph: if the state of Kuwait decides to allocate monies to PIFSS, by giving it some of the proceeds of the confiscation, that would not mean that PIFSS would be receiving compensation for the purposes of the double recovery rule. As Dr Abbas has explained, it would not be permissible, as a matter of Kuwaiti public policy, effectively to diminish or nullify the confiscation punishment ordered by the criminal court by treating that confiscation as compensation paid to PIFSS. The fact that confiscation is not compensatory is another important reason why it is unnecessary to resolve uncertainties as to what further assets might be

seized and confiscated in the future. For similar reasons, it is unnecessary to resolve uncertainties as to what sums might be allocated in the future.

3369. The position is otherwise in relation to the USD 82.2 million restitutionary element of the judgment of the Kuwaiti criminal court. That does have a compensatory character. There is therefore the potential for some future payments in that regard, if actually paid by the Kuwaiti state from confiscated assets, and received by PIFSS, to be regarded as compensation for the wrongdoing relating to the Mirabaud Scheme. If so, this would potentially benefit D1/D2. But it is a point which is of no assistance to the other Defendants, since the Kuwaiti criminal judgment was concerned only with the Mirabaud Scheme. There is no restitutionary award in relation to any of the other schemes with which I am concerned.

3370. PIFSS has made it clear that if it does make recoveries in respect of the USD 82.2 million compensatory award in the future, it will give credit for any such recoveries. If there were such a recovery, it would reduce the amount for which PIFSS could enforce its judgment.

3371. As a general matter, where a judgment is obtained against a number of defendants, any post-judgment recovery from one defendant would likely impact on the amount for which the judgment could be enforced against another defendant. However, the possibility that, by reason of a post-judgment recovery, a judgment cannot be enforced for its full amount does not mean that there should be any reduction in the judgment sum when it is awarded. The possibility of future recoveries is therefore not a basis for making a reduction, now, in the compensatory award to which PIFSS is entitled, after having proved its case on liability and quantum. Indeed, that is a point which would apply even if, contrary to the above views, there was a potential for payments out of the confiscated assets to engage the rule against double recovery.

3372. As far as concerns Kuwaiti law, it is clear that where there are two defendants who are jointly and severally liable to compensate a claimant, one defendant cannot reduce the quantum of its liability by saying that the claimant will be able to recover the full amount from the other defendant. Dr Abbas's evidence is that, under Kuwaiti law, a claimant is entitled to an award for full compensation against all defendants who are jointly and severally liable. A defendant cannot therefore reduce its liability by saying that another defendant is liable and is in a position to meet the judgment. It follows that a defendant cannot reduce its liability to the claimant by arguing that there is another party, not yet a defendant to the proceedings, who could potentially be liable. Allocation of post-judgment sums paid between defendants, or potential defendants, is a matter for contribution proceedings, not a reduction of the judgment sum.

3373. In the present case, the possible future recovery, to which the present arguments are addressed, is not from a jointly and severally liable defendant. Rather, the potential recovery is from a third party, the state of Kuwait. I do not think that this makes any difference. A potential recovery from an "innocent" third party source is not a reason to reduce a claimant's compensatory award, any more than a potential recovery from an existing defendant, or a potential defendant to future proceedings. The Defendants' closing submissions identified no principle of Kuwaiti law which would produce this result. Indeed, it is not difficult to think of contexts where it would be essential, and certainly sensible, to obtain a full award of compensation from the wrongdoer in order

to assist with the potential recovery from a third-party source: for example, a third party who has agreed to provide an indemnity to a defendant.

3374. I can see that there might be circumstances in which an English court might exercise a discretion to stay execution of part of a compensatory award to take into account a potential recovery from a third party source: for example, if it were clear that the claimant was about to receive a payment which would be credited against the defendant's liability. However, I am not here dealing with an argument that there should be a stay in such circumstances, but an argument which seeks to reduce the claimant's compensatory award, or to defer it until some point in the future. I do not accept that the possibility of a future recovery, including a future recovery in respect of the USD 82.2 million restitutionary award, provides a justification for either of those approaches.

Mitigation

3375. Thirdly, I consider that there is no substance in the Defendants' mitigation argument. The basis of the argument was that the confiscation which had taken place did not prejudice the rights of bona fide third parties. That much is clear from Article 6 of the 2002 law, quoted above. However, it does not follow that the liability of the Defendants should be reduced because of the possibility that PIFSS, as a bona fide third party, might have some possible proprietary right to some of the assets confiscated by the Kuwaiti state.

3376. Ms Rogers accepted that, as a matter of Kuwaiti law, a claimant could decide which defendants it was going to proceed against in order to establish a claim. Thus, a claimant is not required first to pursue a defendant against whom there exists an *in rem* right: i.e. a proprietary right. This point is made by Dr Abbas in his supplemental report, and is supported by *Al-Sanhoury: El Waseet in Explaining the Civil Code,* Dar Ehiaa El Torath El Araby, Vol.3, p.300:

> "182. The creditor may receive payment of the entire debt from any joint debtor: This is set out at the beginning of the first paragraph of Article 285 Civil, as we saw, where it states: "The creditor may claim the debt from the joint debtors collectively or individually." The creditor may choose any joint debtor – the most solvent one or the one most likely to pay or the ones he wishes, as all of them are jointly liable for the debt – and claim the debt from him in its entirety, not just his share of it. 1 As we set out above, this relates to the unity of the subject matter in joint liability, and this is also the most significant effect of negative joint liability (between debtors), as this type of joint liability was originally provided in the interest of the creditor. It is in fact even a stronger commitment than a guarantee even if the guarantor is jointly liable, as we stated earlier.
>
> The creditor retains his right to claim the full debt from any debtor he chooses, even if he has an in- kind guarantee such as a mortgage or lien, and he may, despite the existence of this security, claim the debt from the debtor he chooses before claiming the property mortgaged or encumbered by a lien, even if the property is owned by someone other than the debtor. This

> is because the law does not require the creditor to first claim the property encumbered by the in-kind guarantee. The creditor may find that the personal claim in which he demands the entire debt from a joint debtor is less burdensome and less costly or involves simpler procedures than the real claim that it files for the real security."

3377. Given this principle, it is illogical for the Defendants to argue that PIFSS is for some reason required, in order to obtain an award of compensation for the Defendants' wrongdoing, first to seek to assert rights against the state of Kuwait in relation to assets of D1/D2 which have been confiscated. If the assets had remained in the hands of D1/D2, none of the Defendants would have been able to argue that PIFSS was required to assert proprietary rights against D1/D2 first. I do not consider that the position is any different in circumstances where the property, in respect of which EFG contends that PIFSS has proprietary rights, is in the hands of the state of Kuwait.

3378. In my view, that is really the end of the mitigation point. However, there are other reasons for rejecting it.

3379. I do not consider that the Defendants' proposition – that there should be such a reduction in the damages award because of PIFSS' failure to assert alleged proprietary rights – is supported by any of the Kuwaiti law evidence. The beginnings of EFG's point emerged in the handful of questions which Ms Bingham asked Dr Abbas in cross-examination, in which he accepted that Article 6 preserved bona fide proprietary rights, and that a party with a proprietary right was in a position to ask the state authorities for the asset which it allegedly owned. But as Dr Abbas also said in response to the questions, the party asserting the proprietary right would have to prove it. That line of cross-examination did no more than establish the possibility that a party potentially had the ability to assert a proprietary claim. It does not follow that a party is somehow required to assert that claim, and that its failure to do so assists a defendant in reducing the quantum of the compensation which it should otherwise pay.

3380. It would in my view be very strange, and indeed unjust, if the court were to conclude that PIFSS' failure to assert possible proprietary rights was a failure by PIFSS to mitigate its loss, leading to PIFSS' compensatory award being significantly reduced, or to the need for delay in granting judgment whilst PIFSS asserts those rights. In the present case, none of the Defendants have set out to prove that PIFSS has clear proprietary rights in the assets which have been confiscated. On the contrary, I have been dealing, in a very lengthy trial, with a case in which all of the Defendants have denied that they have any liability at all to PIFSS. Their case is that PIFSS has no entitlement to anything, and they have all required PIFSS to prove its case. After immense effort and expense, PIFSS has now succeeded in establishing the wrongdoing of the Defendants, and (subject to the present argument about recoveries) the quantum of the compensation that should be awarded. I cannot see how PIFSS can be criticised for failing, prior to establishing its case in these proceedings, to go to the Kuwaiti state and assert proprietary rights in the confiscated assets, or why this alleged failure should lead to a reduction in the compensation which the Defendants are required to pay. It seems to me that, in circumstances where wrongdoing is strongly contested, the starting point was for PIFSS to establish its personal claims against the various Defendants, and the quantum of the loss for which PIFSS was entitled to be compensated. Having done so, there would likely be a firmer foundation for an assertion of proprietary rights in

confiscated assets than would be the case where PIFSS' disputed claims of wrongdoing had yet to be established.

3381. I also reject EFG's argument that all that PIFSS had to do was to go along to the Kuwaiti state and assert proprietary rights, or that there is no discernible basis on which the Kuwaiti state could have resisted that assertion. It is true that PIFSS' pleaded case asserts the existence of proprietary rights. However, that does not establish that PIFSS does indeed have proprietary rights in all, or indeed any, of the assets which have been confiscated. As I have said, the Defendants have not set out to prove that PIFSS has proprietary rights in any of the confiscated assets as a matter of Kuwaiti law, and it is far from clear on the Kuwaiti law evidence, or the facts, that such rights exist.

3382. In that context, it is worth considering the claims made in relation to the Pensée Scheme. That is the one area of this trial where the existence of a proprietary right, under Kuwaiti law, has been considered. Pensée has strenuously resisted the conclusion that PIFSS has a proprietary claim under Kuwaiti law, with a variety of arguments being advanced. The discussion in Section L7 above illustrates that the assertion of proprietary rights under Kuwaiti law is not straightforward.

3383. Furthermore, the Pensée Scheme would appear to be a case where proprietary rights might be thought to be easier to establish. That is because the assets of Pensée can readily be traced to secret commissions paid to Mr Al Rajaan – a proposition that is now accepted by Pensée but which was at one time also disputed by them. There is clearly scope for more substantial dispute as to whether the variety of vehicles, shares and properties which have been confiscated can be traced to secret commissions, and if so to which schemes. The tracing of those assets, to the particular schemes with which I am concerned, would be a complex and indeed impossible exercise, not least because of the failure of D1/D2 and others, for example Mr Nasrallah, to provide full disclosure. It is possible that some of the assets are derived from wealth legitimately acquired, for example through inheritance, or that they relate to other as yet unknown schemes.

3384. The opposition by Pensée to PIFSS' assertion of proprietary rights illustrates the good sense of the principle that a claimant is not required, under Kuwaiti law, to pursue a particular defendant, even when there is a possibility of asserting *in rem* rights. It also shows the potential difficulty of establishing those rights in any particular case. The effect of the Defendants' mitigation argument is not only that PIFSS is required to assert those rights, but also that it is to be assumed in the Defendants' favour – by way of a reduction in the damages sought – that the assertion of those rights would have been successful. I see no basis for either step of this argument.

3385. There is then the further difficulty of reaching a conclusion, without any tracing exercise being carried out or even being possible, as to which assets are referable to which scheme. EFG's submission, adopted by the Mombelli Defendants, that a broad brush pro rata approach should be taken, simply serves to illustrate that the tracing exercise has not been carried out and indeed cannot be carried out, thereby further emphasising the difficulties in PIFSS establishing its alleged proprietary claim.

3386. I therefore reject the argument that there has been a failure to mitigate, or that it has any effect on the quantification of the Defendants' liability.

3387. For the above reasons, I reject the Defendants' arguments on recoveries, although I deal below with certain specific points taken by D1/D2 which were separate from those taken by the other Defendants. In reaching the above conclusions, I derive no assistance from the approach taken by Robin Knowles J to recoveries in the *Mozambique* case. He was dealing with a case where there was evidence of recoveries by the claimant, the state of Mozambique. This is a different factual scenario to the present case, where there have been no recoveries by PIFSS, the claimant in the present proceedings. Moreover, he was not dealing with a case under Kuwaiti law, or considering the impact of a Kuwaiti law criminal judgment.

T6: Separate arguments of D1/D2: the rule against former recovery, the CJJA, and abuse of process

3388. D1/D2 advanced various separate arguments in relation to the impact of the Kuwaiti criminal judgment. These arguments were developed in their opening written submissions. Although they were couched in general terms as applicable to the entire case, I do not see how they can arise save in relation to the Mirabaud Scheme. That was the only scheme which was the subject of the Kuwaiti criminal proceedings.

3389. First, D1/D2 argued that PIFSS' claim was barred by the common law rule against former recovery. Reliance was placed on the decision of Potter J in *Black v Yates* [1992] Q.B. 526, where the requirements for the application of that rule are set out. One of those requirements is that the judgment of the foreign court must be satisfied. That has not happened in the present case, and that is a sufficient reason for rejecting this case.

3390. Secondly, D1/D2 rely upon the CJJA s 34. This provides:

> "No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland."

3391. This section would only be applicable if there were "proceedings between the same parties, or their privies". However, PIFSS was not a party to the Kuwaiti criminal proceedings. As D1/D2's submissions correctly acknowledged, PIFSS did not join those proceedings as a civil claimant. The parties were therefore the state of Kuwait (in the shape of the public prosecutor), Mr Al Rajaan and D2.

3392. D1/D2 also say that PIFSS was a "privy" to those proceedings. The identification of a "privy" was addressed by the Court of Appeal in *Resolution Chemicals Ltd. v H. Lundbeck A/S* [2013] EWCA Civ 924. Floyd LJ said at [32]:

> "a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality,

> the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation."

This passage was referred to more recently by Bryan J in *Mad Atelier International BV v Manes* [2020] EWHC 1014 (Comm) para [63], where he summarised the principles including that privity of interest is a "somewhat narrow doctrine".

3393. PIFSS could in colloquial terms be said to be interested in the criminal proceedings, not least because a restitutionary award could be made – and was indeed made – under the KPPL. By no stretch of the imagination, however, could it be said that PIFSS was in reality the party to the original proceedings. The party to those proceedings was the state of Kuwait, in the shape of the public prosecutor. The previous proceedings were criminal, and it was the public prosecutor who was responsible for the initiation and continuation of those proceedings. PIFSS could neither initiate, prosecute, nor discontinue those proceedings. Against that background, I see no reason in justice why PIFSS should be bound by the outcome of the criminal proceedings, so as to preclude the commencement of the present proceedings in respect of the Mirabaud Scheme.

3394. There is also a particular, and unusual, factor which reinforces that conclusion as to the just outcome, and which is also relevant to the abuse of process argument advanced by D1/D2. That factor is that D1/D2 denies that the Kuwaiti criminal judgment is enforceable. Thus, D1/D2 seek, on the one hand, to rely on the Kuwaiti judgment for the purposes of s 34. But at the same time they also deny the validity and enforceability of that judgment. This is apparent from their opening submissions in these proceedings, where they do not accept the enforceability of the Kuwaiti criminal judgment. It is also, as I understand the position, their stance in the ongoing English criminal proceedings. I was told that the issue of enforceability will at some stage be decided by a Crown Court judge, in the context of an application by the CPS to remit to Kuwait the monies which are the subject of the criminal restraint order. It will, no doubt, be their position in other jurisdictions, if attempts are made to enforce the Kuwaiti court's restitution order elsewhere.

3395. I do not consider that I need to embark upon a resolution of the question of whether or not the Kuwaiti criminal judgment is in fact enforceable. D1/D2's arguments in that regard have not been developed before me, and it is an issue that may require a decision in the English criminal proceedings to which I have referred. It suffices to say that D1/D2's inconsistent position, and likely resistance based on attempts to enforce the Kuwaiti criminal judgment, reinforces my conclusion as to the just outcome.

3396. Finally, D1/D2 submit that it is an abuse of process for PIFSS to claim in the present proceedings. That argument was advanced, in D1/D2's opening submissions, on the basis of English law. I consider that an issue as to whether the present proceedings are an abuse is indeed a matter for English law.

3397. I reject any argument that it is abusive for PIFSS to bring the present proceedings, proceedings in relation to the Mirabaud Scheme, or indeed in relation to any other matters. D1/D2 do not accept the validity or enforceability of the Kuwaiti criminal judgment. Neither the common law rule against former recovery, nor s 34 CJJA, prevents the present claim from being brought. Against that background, it is entirely

legitimate for PIFSS to seek a judgment from this court. It is not difficult to see that such a judgment, in the context of proceedings which D1/D2 have defended for many years, may be less susceptible to challenge than the *in absentia* Kuwaiti criminal judgment. In saying this, I express no view on the question of enforceability of the Kuwaiti judgment. The important point, in the context of abuse of process, is that PIFSS is acting sensibly and appropriately in seeking what may prove to be a cast-iron judgment of the English court.

3398. I therefore reject these separate arguments of D1/D2.

T7: The UBP Settlement

3399. D1/D2 and Mr Nasrallah (as well as EFG) refer to paragraph 301 of the 10RAPOC. This pleads, in the context of the UBP Scheme, that a total of at least USD 14.9 million was paid into Mr Al Rajaan's accounts, and that all or the vast majority of those sums represented secret commissions. Paragraph 301.a says:

> "US$12.9 million (being 86.6%) were payments made from the accounts of Phoenix, Ozak and Golgen at EFG and which it is reasonably to be inferred, on the basis of the matters pleaded in respect of the UBP Scheme and in section H, are Secret Commissions or the traceable proceeds thereof under the UBP Scheme or Further Nasrallah Scheme."

3400. The confidential settlement between PIFSS and UBP includes an allocation of the settlement sum paid by UBP. Certain specific claims are identified, with figures allocated. There is then a residual allocation of part of the settlement to "all remaining claims of whatever nature". This includes, for the avoidance of doubt, "(b) …. any claims arising out of paragraph 301.a of the Particulars of Claim; and (c) any claim (if any) by PIFSS for interest …"

3401. The issue is whether the claims against D1 and Mr Nasrallah should be reduced by USD 12.9 million because of the settlement with UBP. The argument in favour of reduction is that PIFSS' laundering case against UBP in paragraph 301.a relates to the same assets that EFG and Mr Nasrallah are also said to have laundered. Accordingly, there is to that extent an overlap between the claim against UBP and the claims against D1 and Mr Nasrallah in connection with the EFG Scheme. It is argued that the UBP settlement monies allocated to the residual category therefore reflect a recovery by PIFSS of the USD 12.9 million which forms part of the claim made, in the context of the EFG Scheme, against D1 and Mr Nasrallah. The point, if valid, would also serve to reduce the claim against Mr Guerin in relation to the EFG Scheme.

3402. Mr Ritchie had two answers to this point: a construction argument, and an argument about appropriation. I do not need to resolve the construction argument, because his appropriation argument is decisive. Mr Ritchie relied on the decision of Eder J in *Otkritie Investment Management Ltd v Uromov* [2014] EWHC 755, para 6 (iii). Thus where, as here in relation to the residual claims, a settlement sum has been received from a particular defendant in respect of a number of claims, a party can make a bona fide decision to allocate the sum received to claims which do not overlap with claims against another defendant. Here, PIFSS' decision was to make a bona fide allocation to its claims against UBP for interest, which were expressly referred to and settled in the

relevant clause of the settlement agreement. It is fair to say that neither EFG nor D1/D2 answered this point in their responsive submissions. I therefore reject the argument that credit of USD 12.9 million needs to be given.

SECTION U: REMEDIES

3403. The principal remedy sought by PIFSS is compensation. The liability of the Defendants under each scheme is set out in Sections G – N above. The quantum of compensation is set out at the conclusion of each section. This quantum is, however, subject to alteration for reasons already given: in particular, to account for the Mirabaud and EFG settlements and currency conversion issues.

3404. PIFSS is also entitled to declaratory relief in relation to Mr Al Rajaan's assets. This issue is addressed in Section F above in relation to assets which Mr Al Rajaan admitted owning. In relation to the limited number of assets where there was a pleaded dispute as to Mr Al Rajaan's interest, my conclusions are set out in Section G5 above.

3405. As far as concerns Mr Al Rajaan's heirs, there has been a decision of the Court of Appeal on joinder: [2025] EWCA Civ 1505. This judgment (and my earlier judgment at [2024] EWHC 3321 (Comm)) were decided on the basis that the heirs should be bound by the judgment, in order to enable PIFSS to be in a position to enforce any judgment. This was referred to by the Court of Appeal as the "Enforcement Basis". PIFSS' position, explained in January 2026, was that it would not request the court to grant judgment on the "Substantive Basis", as described in the Court of Appeal's judgment. I will grant appropriate relief to reflect the Enforcement Basis.

SECTION V: INTEREST

3406. The parties were agreed that they would address the relevant principles concerning interest under Kuwaiti and Swiss law, and would not address principles of private international law or the application of principle concerning interest. In the light of this judgment, it is not necessary to address Swiss law.

3407. As far as concerns Kuwaiti law, it was common ground that Kuwaiti law does not generally provide for interest. In the Joint Expert Memorandum, the Kuwaiti law experts were agreed that:

> "The KCC prohibits interest (both simple and compound) in the realm of civil matters, and thus interests in this realm are contrary to Kuwaiti public policy. This is explicitly enunciated in Article 305 KCC, which unequivocally nullifies any contractual terms that stipulate the accrual of interest in exchange for the provision of a loan or the deferment of an obligation's fulfilment. The prohibition extends to obligations arising in a tortious context. Article 306 KCC provides only for *compensation* in the event of *unusual harm* and where the original *obligation is a sum of money*."

3408. PIFSS' case is that it can claim interest pursuant to the Court's discretion under s 35A of the Senior Courts Act. However, that raises an issue of private international law, and also the exercise of discretion, which the parties have agreed to defer.

3409. The Aerium Defendants submitted, in their written closing, that I should now dismiss that claim for interest. I decline to do so. They were party to the agreement (proposed in the letter from A&O Shearman dated 2 October 2025), for the deferral of issues of interest, save for identification of the relevant principles of Kuwaiti (and Swiss) law. Most of the other Defendants, correctly in my view, acknowledged that the court should not go beyond the identification of the relevant principles of Kuwaiti law.

SECTION W: SWISS LAW

W1: The expert evidence

3410. This section contains my findings as to Swiss law. These are only relevant if, contrary to my conclusion in Section D, Swiss law is the applicable law of the Defendants' torts. The only parties who addressed Swiss law in any detail in their closing submissions were Ms Rogers for EFG and Mr Brown for the Mombelli Defendants. As a result of the EFG settlement, it is no longer necessary to discuss some Swiss law issues relevant to EFG's position, but which had no application to the position of the Mombelli Defendants or indeed any other Defendant. Those issues arose from EFG's argument that there was a 1-year time bar for PIFSS' claim based on vicarious liability for Mr Guerin's torts, and a case that PIFSS advanced (essentially to meet that point) based on provisions of the Swiss Penal Code. This section therefore omits any discussion of those issues, or other issues relevant only to the position of EFG.

3411. I heard evidence from a number of highly qualified and distinguished Swiss legal experts. The Claimant's Swiss law experts were Professor Christiana Fountoulakis and Professor Mark Pieth. The Defendants' experts were Professor Pascal Pichonnaz, Professor Wolfgang Wohlers and Dr Thomas Weibel. Their distinction and achievements were reflected in lengthy CVs, and the following is only a brief summary of who they are.

3412. Professor Fountoulakis is Professor at the Law School of the University of St. Gallen, Switzerland, where she holds the Chair in Private Law with a focus on the Law of Obligations. She served as President of the Institute of Business Law of the University of Fribourg from 2023 to 2025, and she has held a number of visiting professorships in the United States and elsewhere in Europe. Her evidence concerned Swiss civil law.

3413. Professor Mark Pieth has, since 1993, been the Professor of Criminal Law and Criminology at the University of Basel, Switzerland. He has published extensively, and his work was often quoted in the Swiss judgments to which I was referred at trial. From 1990 to the end of 2013, Professor Pieth chaired the OECD Working Group on Bribery in International Business Transactions. His evidence concerned Swiss criminal law.

3414. Professor Pascal Pichonnaz is Professor of Law at the University of Fribourg, where he holds the chair for Private Law and Roman Law. As with the other experts, he has published extensively. He has also served as President of the European Law Institute for 4 years until 2025. His evidence concerned Swiss civil law.

3415. Professor Wolfgang Wohlers has, since 2015, been Professor of Criminal Law at the University of Basel, Switzerland. He is also the Dean of the Faculty of Law at that university. He has previously held chairs in criminal law at other universities. His evidence concerned Swiss criminal law.

3416. Dr Thomas Weibel is a practising lawyer with the Swiss law firm Vischer. He advises and represents clients in complex commercial disputes in court and arbitration. His practice areas also include white collar crime. He gave evidence in the *Marino* case discussed above in the context of applicable law. His evidence spanned both civil and criminal law.

3417. Pursuant to an interlocutory order, the Defendants divided into 2 groups. Professor Pichonnaz and Professor Wohlers were called by EFG from the "Man+" group, which had diminished to a group of 1 because UBP had settled, and Man and Mr Massad no longer relied on Swiss law. Dr Weibel had been instructed by the "participating non-Man+ Defendants". By the time that he gave evidence, that group had also diminished because the Aerium Defendants no longer relied on Swiss law, and D1/D2 were no longer participating in the trial. The Mombelli Defendants were therefore the only defendants from that group who were participating in the trial at the time that Dr Weibel was called.

3418. PIFSS' Swiss law case was presented by junior counsel Mr Leslie, and I would wish to commend the skill and clarity with which he presented the case. He cross-examined the Defendants' experts, with most of the cross-examination directed towards Professor Pichonnaz and Professor Wohlers. Dr Weibel had largely agreed with their views, and so it was not necessary to go over the same ground with him. The presentation of the Swiss law case for the Defendants was carried out, again with skill and clarity, by Ms Rogers for EFG and Mr Brown for the Mombelli Defendants.

3419. Although the written reports were very lengthy, the important issues in dispute narrowed considerably by the time that the witnesses gave evidence. They narrowed even further during that evidence, with Professor Wohlers disputing relatively little of the evidence given by Professor Pieth. Both of those witnesses were clearly seeking to assist the court in the way in which they gave their evidence, and there was ultimately very little between them.

3420. The disagreements between Professor Fountoulakis and Professor Pichonnaz remained more extensive. They were both articulate witnesses. I thought that Professor Fountoulakis was rather more fair-minded than Professor Pichonnaz, who on occasions had to be asked questions a number of times before he agreed to a relatively straightforward proposition. He came across as much more opinionated than Professor Fountoulakis. His views were also, on occasion, somewhat extreme: for example, on the question (discussed below) as to how to approach the issue of whether a provision of Swiss criminal law is a protective norm. He also, at times in his evidence, appeared to take an extreme and unsupportable view in the context of mitigation, where he seemed at times to be asserting that a joint and several tortfeasor could rely by way of mitigation on a victim's failure to take proceedings against another joint and several tortfeasor. If true, this would lead to a strange result, whereby each tortfeasor would have a complete mitigation defence on the basis that the other one should have been sued. Professor Pichonnaz eventually did not maintain this position, and it formed no part of EFG's submissions in closing.

3421. All of that said, this is not a case where my approach is to incline towards the views of Professor Fountoulakis in preference to Professor Pichonnaz on any particular issue simply on the basis of my overall impression that Professor Fountoulakis was far less opinionated than Professor Pichonnaz. Instead, I consider their views on each issue in the light of the underlying case-law and materials on which they relied, as well as the logic of their positions.

3422. Dr Weibel gave his evidence under cross-examination well, and with a view to assisting the court. Ultimately, however, he had largely agreed with the evidence of Professor

Pichonnaz, and I did not think that there was any important issue on which his evidence materially added to the debate.

3423. This section does not seek to address all the issues of Swiss law which were debated between the experts. There are a number of reasons for this. First, I have decided that Swiss law is not the applicable law of the torts relied upon. Secondly, the key points on which EFG and the Mombelli Defendants ultimately relied were far less extensive than those which had been debated. Thirdly, a decision on one or several of the key points of Swiss law means that it is unnecessary – when dealing with the question of what the position under Swiss law would have been if it had been the applicable law – to determine other points. Fourth, for reasons explained in Section T above, it is not necessary to explore Swiss law in relation to "recoveries", in circumstances where (i) there have been no recoveries in Switzerland and (ii) the position arising from the Kuwaiti judgment against Mr Al Rajaan and D2 in the Kuwaiti criminal proceedings is a matter for Kuwaiti law in any event.

W2: The court system and sources of Swiss law

3424. There was no dispute as to the structure of the Swiss legal system or the material sources of law. The following summary is based upon the evidence of PIFSS' experts, which in this respect was not materially challenged.

3425. Switzerland has a codified civil legal system. There is a dual system of cantonal and federal courts.

3426. In each canton, there is a first instance civil and criminal court. The first instance court is the District Court, and the second instance appellate court is the Cantonal Court. Decisions of the Cantonal Court may be appealed to the Federal Supreme Court, the highest court of Switzerland.

3427. At the federal level are administrative and criminal courts. The Federal Criminal Court has jurisdiction over certain offences that are subject to federal jurisdiction, and are prosecuted by the Office of the Attorney-General. These offences include cross-border money laundering and foreign bribery. The court is made up of a first instance Criminal Chamber and two second instance chambers: the Lower Appeals Chamber, which hears appeals against procedural decisions, and the Higher Appeals Chamber. Decisions of the Higher Appeals Chamber may be appealed to the Federal Supreme Court.

3428. Since criminal cases are dealt with by judges (rather than juries as in England), decisions on criminal cases are contained in detailed written judgments, and I was referred to a large number of these during the course of the evidence. The judgments are, by and large, anonymised so as to remove the names of the parties and other individuals involved. The cases are therefore identified by a reference number rather than, to English eyes, the names of the defendants. In the case of decisions of the Swiss Federal Court the case references are usually "DFSC" (i.e. Decision of the Federal Supreme Court), but other acronyms are used in particular "BGE" (Bundesgerichtsentscheide) and "ATF" (Arrets du Tribunal Federal) or "DTF".

3429. Civil and criminal law interact, to some extent, in both substantive and procedural law. As a matter of substance, conduct which amounts to a criminal offence can, in certain circumstances, give rise to civil law tortious liability, as further discussed below. As a

matter of procedure, Swiss law offers the opportunity for the victim of a criminal offence to participate in the criminal proceedings as a civil law claimant, and have their tort law claim derived from the criminal offence assessed before the criminal court. The criminal judge must then render a judgment on the civil law claim, unless evidence is missing for assessing the civil law claim, in which case the claim in tort is referred to the civil courts. I was referred to a number of cases which addressed arguments as to whether a civil claimant should be permitted to join criminal proceedings.

3430. Written law is the primary source of law. Swiss laws include Acts, and I was referred to case-law concerning the Unfair Competition Act SR 241. It also includes Codes, the most significant of which (for the purposes of the present proceedings) are: the Swiss Civil Code ("CC"), the Swiss Code of Obligations ("SCO") (which is the 5th part of the CC), and the Swiss Penal Code ("SPC"). The principles of Swiss civil law are codified in the SCO and the CC. In broad terms, the SCO establishes and defines substantive civil rights and obligations, whilst the CC regulates matters such as the attribution of liability and succession. The SPC is concerned with criminal law, and is the legislation which creates criminal offences and specifies punishments.

3431. There exist official language versions of Swiss laws in French, German and Italian. The established methods of interpretation are: grammatical interpretation that looks at the wording of the law; systematic interpretation that looks at where the respective provisions stand in the Act or Code; historical interpretation that takes into account how the law originated; and teleological interpretation that considers the purpose of the law.

3432. Swiss law does not have a formal system of judicial precedent. Lower courts are not formally bound by the decisions of the Federal Supreme Court. However, judgments of the Federal Supreme Court are a source of interpretative guidance as to the meaning of statutes and are treated as persuasive authorities. In practice, lower courts will typically follow the decisions of the Federal Supreme Court. There is thus a "limited duty to follow" the Federal Supreme Court's decisions. Because the Federal Supreme Court has jurisdiction to fill gaps in existing law, that court both develops the law and interprets it. I will refer to the Federal Supreme Court hereafter as the "FSC".

3433. In legal practice, the jurisprudence of the FSC is very relevant for lawyers, because any lower instance decision that contradicts the case law of the FSC is likely to be appealed to the next higher court, and eventually to the FSC. For reasons of legal certainty, the FSC does not change its practice lightly, but only if there are serious objective reasons for doing so and if the new solution corresponds to a better understanding of the *ratio legis*, a change in external circumstances or a changed view of the law.

3434. Academic writing and commentaries (known as "doctrine") have no binding effects. However, Swiss courts rely on such material both to interpret the law and to develop it where particular legal issues have either not been considered or not been satisfactorily resolved by the legislature or the courts.

3435. Comparative law plays an important role in Swiss law. Swiss courts often refer to foreign judgments and doctrine, especially where Swiss law offers no settled answer to a particular issue. The FSC has held that comparative law must be taken into account when interpreting Swiss law. The FSC makes particular reference to German doctrine in the law of tort, since German law has had an influence on the SCO and given the generally strong influence of German law on Swiss law in general.

W3: Key provisions of the Swiss Code of Obligations, Civil Code and Swiss Penal Code

3436. This section contains, without commentary, the sections of the SCO, CC and SPC which featured most prominently in the evidence and argument, and which are referred to later in this part of the judgment.

SCO

> "Article 41
>
> (1): Any person who unlawfully causes damage to another, whether wilfully or negligently, is obliged to provide compensation.
>
> Article 42
>
> (1): A person claiming damages must prove that damage occurred.
>
> (2): Where the exact value of the damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the person suffering damage.
>
> Article 43
>
> (1): The court determines the form and extent of the compensation provided for damage incurred, with due regard to the circumstances and the degree of culpability.
>
> Article 44
>
> (1): Where the person suffering damage consented to the harmful act or circumstances attributable to him helped give rise to or compound the damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely.
>
> (2): The court may also reduce the compensation award in cases in which the damage was caused neither wilfully nor by gross negligence and where payment of such compensation would leave the liable party in financial hardship.
>
> Article 50
>
> (1): Where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the person suffering damage.
>
> (2): The court determines at its discretion whether and to what extent they have right of recourse against each other.

(3): Abettors are liable in damages only to the extent that they received a share in the gains or caused damage due to their involvement.

Article 55

(1): An employer is liable for the damage caused by his employees or ancillary staff in the performance of their work unless he proves that he took all due care to avoid a damage of this type or that the damage would have occurred even if all due care had been taken.

Article 60 (before 1 January 2020)[6]

(1): A claim for damages or satisfaction becomes time-barred one year from the date on which the injured party became aware of the loss or damage and of the identity of the person liable for it but in any event ten years after the date on which the loss or damage was caused.

(2): However, if the action for damages is derived from an offence for which criminal law envisages a longer limitation period, that longer period also applies to the civil law claim.

(3): Where the tort has given rise to a claim against the injured party, he may refuse to satisfy the claim even if his own claim in tort is time- barred.

Article 136

(1): Where the prescriptive period for one person who is jointly and severally liable for a debt or jointly liable for indivisible performance is interrupted, it is likewise interrupted for all other co-obligors, provided the interruption is due to an act by the creditor.

Article 143

(1): Debtors become jointly and severally liable for a debt by stating that each of them wishes to be individually liable for performance of the entire obligation.

(2): Without such a statement of intent, debtors are joint and severally liable only in the cases specified by law.

Article 144

[6] An amendment to the SCO changed the limitation period with effect from 1 January 2020. However, the text of Article 60 here set out is applicable to the claims made in these proceedings.

(1): A creditor may at his discretion request partial performance of the obligation from each joint and several debtor or else full performance from any one of them.

(2): All the debtors remain under the obligation until the entire claim has been redeemed.

Article 147

(1): Where one joint and several debtor satisfies the creditor by payment or set-off, the others are discharged to that extent.

(2): Where one joint and several debtor is released from liability without satisfaction of the creditor, such release does not benefit the others save to the extent justified by the circumstances or the nature of the obligation.

Article 148

(1): Unless the legal relationship between the joint and several debtors indicates otherwise, each of them assumes an equal share of the payment made to the creditor.

(2): A joint and several debtor who pays more than his fair share has recourse against the others for the excess.

(3): Amounts that cannot be recovered from one joint and several debtor must be borne in equal shares by the others.

Article 321a

(1): The employee must carry out the work assigned to him with due care and loyally safeguard the employer's legitimate interests.

Article 321b

(1): The employee is accountable to his employer for everything, and in particular sums of money, he receives from third parties in the performance of his contractual activities and must hand it over to the employer immediately.

Article 400

(1): The mandatee is obliged at the mandator's request, which may be made at any time, to give an account of his activities under the mandate and to return anything received for whatever reason as a result of such activities.

(2): He must pay interest on any sums which he is late in forwarding to the mandator.

Article 722

The company shall be liable for any loss or damage caused by unauthorised acts carried out in the exercise of its business activities by a person authorised to manage or represent the company."

CC

"Article 2

(1): Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.

(2): The manifest abuse of a right is not protected by law.

Article 55

(1): The governing bodies express the will of the legal entity.

(2): They bind the legal entity by concluding transactions and by their other actions.

(3): The governing officers are also personally liable for their wrongful acts."

SPC

"Article 12

(1): Unless the law expressly provides otherwise, a person is only liable to prosecution for a felony or misdemeanour if he commits it wilfully.

(2): A person commits a felony or misdemeanour wilfully if he carries out the act in the knowledge of what he is doing and in accordance with his will. A person acts wilfully as soon as he regards the realisation of the act as being possible and accepts this.

Article 21

Any person who is not and cannot be aware that, by carrying out an act, he is acting unlawfully, does not commit an offence. If the error was avoidable, the court shall reduce the sentence.

Article 25

Any person who wilfully assists another to commit a felony or a misdemeanour shall be liable to a reduced penalty.

Article 26

If criminal liability is established or increased by a special obligation on the part of the offender, a participant shall be liable to a reduced penalty.

Article 70

(1): The court shall order the forfeiture of assets that have been acquired through the commission of an offence or that are intended to be used in the commission of an offence or as payment therefor, unless the assets are passed on to the person harmed for the purpose of restoring the prior lawful position.

(2): Forfeiture is not permitted if a third party has acquired the assets in ignorance of the grounds for forfeiture, provided he has paid a consideration of equal value therefor or forfeiture would cause him to endure disproportionate hardship.

(3): The right to order forfeiture is limited to seven years; if, however, the prosecution of the offence is subject to a longer limitation period, this period also applies to the right to order forfeiture.

(4): Official notice must be given of forfeiture. The rights of persons harmed or third parties expire five years after the date on which official notice is given.

(5): If the amount of the assets to be forfeited cannot be ascertained, or may be ascertained only by incurring a disproportionate level of trouble and expense, the court may make an estimate.

Article 71

(1): If the assets subject to forfeiture are no longer available, the court may uphold a claim for compensation by the State in respect of a sum of equivalent value, which claim may be enforced against a third party only if he is not excluded by Article 70 paragraph 2.

(2): The court may dismiss an equivalent claim in its entirety or in part if the claim is likely to be unrecoverable or if the claim would seriously hinder the rehabilitation of the person concerned.

Article 73

(1): If as a result of a felony or misdemeanour a person has suffered harm and is not entitled to benefits under an insurance policy, and if it is anticipated that the offender will not pay damages or satisfaction, the court shall award the person harmed, at his request, a sum of money up to the amount of damages or

satisfaction set by a court or agreed in a settlement with the person harmed and obtained from:

a. the monetary penalty or fine paid by the offender;

b. objects and assets that have been forfeited, or the proceeds of their sale after deduction of expenses;

c. compensatory claims;

d. the amount of the good behaviour bond.

Article 97

(1): The right to prosecute is subject to a time limit of:

a. 30 years if the offence carries a custodial sentence of life;

b. 15 years if the offence carries a custodial sentence of more than three years;

c. 10 years if the offence carries a custodial sentence of three years;

d. seven years if the offence carries a different penalty.

Article 98

The limitation period begins:

a. on the day on which the offender committed the offence;

b. on the day on which the final act was carried out if the offence consists of a series of acts carried out at different times;

c. on the day on which the criminal conduct ceases if the criminal conduct continues over a period of time.

Article 158

(1): Any person who by law, an official order, a legal transaction or authorisation granted to him, has been entrusted with the management of the property of another or the supervision of such management, and in the course of and in breach of his duties causes or permits that other person to sustain financial loss shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

Any person who acts in the same manner in his capacity as the manager of a business but without specific instructions shall be liable to the same penalty.

If the offender acts with a view to securing an unlawful financial gain for himself or another, a custodial sentence not exceeding five years or to monetary penalty shall be imposed.

(2): Any person who, with a view to securing an unlawful gain for himself or another, abuses the authority granted to him by statute, an official order or a legal transaction to act on behalf of another and as a result causes that other person to sustain financial loss shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

(3): Criminal mismanagement to the detriment of a relative or family member is prosecuted only on complaint.

Article 305*bis*

(1): Any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony or aggravated tax misdemeanour shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

(2): In serious cases, the penalty is a custodial sentence not exceeding five years or a monetary penalty.

A serious case is constituted, in particular, where the offender:

a. acts as a member of a criminal or terrorist organisation;

b. acts as a member of a group that has been formed for the purpose of the continued conduct of money laundering activities; or

c. achieves a large turnover or substantial profit through commercial money laundering.

Article 322*ter*

Any person who offers, promises or gives a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces an undue advantage, or offers, promises or gives such an advantage to a third party in order to cause the public official to carry out or to fail to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion, shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

Article 322*septies*

Any person who offers, promises or gives a member of a judicial or other authority, a public official, an officially-appointed

> expert, translator or interpreter, an arbitrator, or a member of the armed forces who is acting for a foreign state or international organisation an undue advantage, or gives such an advantage to a third party, in order that the person carries out or fails to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion,
>
> any person who as a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces of a foreign state or of an international organisation demands, secures the promise of, or accepts an undue advantage for himself or for a third party in order that he carries out or fails to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.
>
> Article 322*octies*
>
> (1): Any person who offers, promises or gives an employee, partner, agent or any other auxiliary of a third party in the private sector an undue advantage for that person or a third party in order that the person carries out or fails to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.
>
> (2): In minor cases, the offence is only prosecuted on complaint.
>
> Article 322*novies*
>
> (1): Any person who as an employee, partner, agent or any other auxiliary of a third party in the private sector demands, secures the promise of, or accepts an undue advantage for himself or for a third party in order that the person carries out or fails to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.
>
> (2): In minor cases, the offence is only prosecuted on complaint."

W4: The basics of a tort claim in Swiss law

3437. There was no dispute that the general rule of liability in tort in Swiss law is contained in Article 41 (1) of the SCO. There are therefore four elements: unlawfulness, loss, causation and fault. The burden of proving these elements is on the claimant.

3438. It was common ground (as between PIFSS and EFG/the Mombelli Defendants) that questions as to the standard of proof were a matter for English law. It is therefore for

the court to determine whether, on the balance of probabilities, PIFSS has established the elements of the torts alleged. The Swiss law experts did address, to some extent, the way in which the Swiss courts would approach the evidence, and in particular the impact of Article 42 on the question of whether the standard of proof had been satisfied. However, in view of the acceptance by EFG/the Mombelli Defendants that the standard of proof was a matter for the *lex fori*, English law, this was not a matter that was explored in cross-examination.

Unlawfulness

3439. The most important legal issue between the parties, in the context of Article 41, concerns the question of unlawfulness. An act is unlawful for the purposes of Article 41 if it violates either: (i) an "absolute right" of the claimant, i.e. a right that the claimant has against the world; or (ii) a "protective norm", i.e. a legal norm (including a criminal norm) which protects the claimant from suffering loss of the kind incurred, including pure economic loss. It was not alleged that the unlawful conduct alleged in the present case (in summary, the payment and receipt of bribes, and money laundering) violated "absolute" rights. Absolute rights are those which have an exclusionary and defensive effect against any person, and include personal legal interests such as life, physical and mental integrity, and property rights.

3440. Rather, the allegation is that PIFSS' financial interests were harmed. Financial interests other than rights such as property or other rights *in rem* are not among the absolutely protected legal interests. Financial loss suffered by a person as a result of another person's conduct, and which does not affect an absolutely protected legal interest, is not unlawful as such. It is only eligible for non-contractual (i.e. tortious) compensation if it is caused by a breach of a specific rule of conduct that protects against such pecuniary loss. In other words, the conduct must violate what is known as a "protective norm" or a "financial interests protection norm". This was explained in the decision of the Swiss Federal Supreme Court DFSC 133 III 323 as follows:

> "If, as in the present case, the loss is purely economic, it can only be compensated on the basis of the unlawfulness derived from the behaviour if the harmful act violates a norm that has the purpose of protecting the injured party in the rights impaired by the incriminated act. Such norms can arise from the entire Swiss legal system, be it from private, administrative or criminal law, and it does not matter whether they are written or unwritten, federal or cantonal."

In the above quotation, and elsewhere in this Section, I have usually omitted internal citations to other cases.

3441. As indicated in the above quotation, protective norms relevant to liability in tort can be found in criminal law. It was common ground between the experts that the Swiss courts had held that Article 158 SPC (one of the provisions relied upon by PIFSS in relation to their tort claim) was intended to protect financial interests. Contravention of Article 158 SPC could therefore supply the necessary element of unlawfulness in order to ground a tortious claim under Article 41 SCO.

3442. The area of dispute was as to whether bribery offences, under Article 322*septies* SPC and similar provisions, were intended to protect financial interests. PIFSS' experts contended that they were so intended, and that contravention could therefore serve to ground a tortious claim. The Defendants' experts contended otherwise. I return to this issue in more detail below.

3443. It is, however, important to note that – as PIFSS' experts correctly said, and indeed was common ground – the protection of financial interests does not have to be the sole or even the primary purpose of the relevant criminal law in order to be considered as a protective norm. It is sufficient if it was one of the purposes. The point is illustrated by a number of decisions to which I was referred.

3444. For example, in the decision of the FSC of 28 September 2010 (4A_213/2010), the court was considering a breach of Article 11 of the Federal Act on Stock Exchanges and Securities Trading (or "SESTA"). The FSC referred to Article 11 having a "twofold" purpose: it belonged to public law, but also had a private law purpose, namely to protect creditors and investors.

3445. Another example is a violation of the law criminalising the wilful obstruction of public services, in particular postal, railway and telephone services: Article 239 SPC. A purpose of this law, indeed the primary purpose, is the public interest in the maintenance of such services. However, it has been held that a civil claimant can found a claim in tort on a contravention of Article 239, because it also protected financial interests. As Professor Fountoulakis said, the key question is whether a legal provision only and exclusively protects public interests, such as public safety or the functioning of the financial market, or whether the interests of the individual are also protected.

3446. A final example, close to home in the context of the present case, is the offence of money laundering contrary to Article 305*bis* SPC. In BGE 146 IV 211, the FSC held that:

> "the offence of money laundering within the meaning of Art. 305*bis* Item 1 primarily protects the administration of justice in the enforcement of the state's right to confiscation and the public interest in the smooth functioning of the criminal justice system. However, according to case law, in cases in which the assets subject to confiscation originate from offences against property, the offence serves not only the state's interest in confiscation but also the protection of the individual victim of the predicate offences. The loss is then limited to the assets whose confiscation has been thwarted by the money laundering. Confiscation in favour of the state is only permissible if the assets are not handed over to the aggrieved party in order to restore the lawful situation (Art. 70 para StGB). In the case of property and financial offences, confiscation is therefore carried out in the interests of the victim. In these cases, money laundering in the sense of thwarting confiscation is therefore also directed against the interests of the person who was harmed by the predicate offence."

3447. The evidence of Professor Fountoulakis, which I accept, was that tort law does not lay down any particular criteria as to when a rule of conduct is or is not a protective norm that constitutes unlawfulness and would trigger liability in tort. The question of whether a legal provision can be a protective norm is thus left to case law and legal writing. It is the responsibility of the civil law judge to determine whether a provision that prescribes or prohibits certain conduct, and which has been violated, also has the function of preventing the financial loss of a party in any case where such loss has occurred. For some provisions, the question of whether they are protective norms, in terms of liability in tort, has long been clarified by case law. Where there is a lack of case law or academic treatises, the question of whether the provision constitutes a protective norm has to be answered on a case-by-case basis. The critical question is whether a legal provision only and exclusively protects public interests, or whether the interests of the individual are also protected.

Causation

3448. Swiss law requires natural causation and adequate causation. The former is essentially a factual question, and the latter is somewhat akin to English law concepts of remoteness of damage. It is not necessary to expand on these concepts, because they were not central to the issues in dispute. I address below the question of causation when there are a number of tortfeasors.

Fault

3449. Fault requires that the wrongdoer acts with culpable intent or negligence. No detailed explanation is required of these concepts. There was no dispute that if the relevant conduct relied upon by PIFSS was unlawful, because it contravened criminal law, then that would be sufficient fault for the purposes of tortious liability.

Loss

3450. Swiss civil law applies what the experts described as a "difference" hypothesis. In essence, this involves considering the extent to which a person is worse off as a result of the tortious conduct, in comparison to the position that they would have been in if the tort had not been committed. This could include both out of pocket losses suffered by the victim, and also gains of which the victim has been deprived as a result of the tortious conduct.

3451. There were issues as to how this applies in the context of tortious civil claims based, in particular, on disloyal management and bribery. The broad ambit of the debate was as follows, to which I return in more detail below.

3452. PIFSS contends that the measure of loss is at least the sum of the bribes paid to Mr Al Rajaan. This is because there are two approaches to the calculation of loss in the context of secret retrocessions, and each leads to the same conclusion. Thus, loss flows from (i) the failure to disclose the bribes/retrocessions, leading to the inability of the principal to require them to be paid over; and/or (ii) a failure to negotiate in the best interests of the principal so as to achieve a reduction in the value of the transaction in the sum of at least the agent's secret payment.

3453. EFG and the Mombelli Defendants dispute the applicability or availability of the first route, or at least contend that this is not necessarily and automatically available in the case of bribes or secret retrocessions. They therefore contend, in substance, that the only available route is the second route, which requires PIFSS to prove the extent of any improvement in their position had the torts not been committed.

Joint and several liability

3454. Article 50 (1) regulates the joint and several liability of tortfeasors. This Article extends to the instigator, perpetrator or accomplice, and results in joint and several liability. Article 50 (1) is aimed, as Professor Fountoulakis explained, at the situation in which several parties have caused the loss together through their conscious cooperation. The assistance provided by an accomplice can be physical (through material support and services) or psychological (for example by encouraging the perpetrator's determination to commit the offence).

3455. The effects of joint and several liability are explained later in the SCO, in particular in Articles 143, 144 and 147. Each jointly and severally liable person is potentially liable for the full amount of the loss, and each remains liable until the full amount of the loss has been paid.

3456. The principal dispute between the experts, reflecting a well-recognised academic debate in Switzerland, was whether or not Article 50 (1) required a participant to be individually and independently liable for committing a wrong under Article 41, or whether it was sufficient to have assisted another person to have committed the wrong in question. PIFSS' case was that it was only necessary for one tortfeasor to have satisfied the requirements of Article 41. However, this dispute was not explored in cross-examination, essentially because it did not really arise on the way that PIFSS advanced its case. PIFSS' case, under Swiss law, against all relevant defendants was that they had committed criminal offences themselves, because Article 25 of the SPC (further discussed below) criminalises the conduct of anyone "who wilfully assists another to commit a felony or a misdemeanour". If, by way of example, a defendant had wilfully assisted Mr Al Rajaan to commit an offence under Art 158 SPC (the offence of disloyal management), then that defendant would have acted in contravention of the criminal law. That contravention, assuming that the relevant criminal law was a protective norm, would – provided that the requisite *mens rea* for the offence were established – ground civil liability, irrespective of how Article 50 (1) was to be interpreted.

3457. There was no dispute that there needed to be a causal link between the joint fault and the loss. There was, however, some disagreement as to what this meant. Again, this was not a matter explored to any great extent in evidence.

3458. Professor Fountoulakis' view, as set out in the joint memorandum, was that if several persons are responsible for the harmful event, either because they colluded in this respect or because they could have known that they were contributing to the realisation of the harmful event, then the loss caused was attributed to each of them. An individual's contribution was thus not to be viewed in isolation. It did not matter that such contribution in and of itself would not have caused the harm. It is (only) relevant that the person concerned contributed to the harmful event (that is, the event causing the harm). This quite naturally includes committing the harmful event itself as a (co-

)perpetrator; but it also includes merely instigating the commission of the event or assisting in its commission. In the case of loss caused jointly in this way, the (natural and adequate) causal link must exist between the joint action and the loss, but not between the behaviour of each participant in the offence, considered in isolation, and the loss.

3459. By contrast, Professor Pichonnaz said that there needed to be an adequate causal link not "just" between the "joint action" and the loss, but between each participant and the loss, and for each one for the totality of the loss. However, the nature (or intensity) of such causal link may differ between participants, depending on their type of participation. There are therefore different intensities of causal link, but no joint causation.

3460. It was not clear to me whether this difference of view was of any practical significance on the facts of the present case, and neither EFG nor the Mombelli Defendants made anything of the point in their closings. In any event, I prefer the view of Professor Fountoulakis. Her view was supported, as it seemed to me, by Dr Weibel, who said in the joint report that what was required for causation was "culpable interaction between the persons involved in the causation of the loss". It is also supported by the leading commentaries. For example, *Werro/Perritaz: Commentaire Romand, Code des Obligations I*, 3rd edition say:

> "In applying CO 50, case law holds that there must be an adequate causal link between the joint fault and the damage (see Intro. CO 50-51 N 50). Where this is the case, all participants in the tortious activity are liable, including those whose conduct did not directly cause the damage (instigator, accomplice, co-perpetrator). It is therefore not necessary for the liable parties to have jointly committed the harmful act. It is sufficient that their cooperation contributed to causing the damage."

3461. There is, however, a qualification to the rule that a person who assists is jointly and severally liable for the whole loss. Article 50 (3) SCO deals with the liability of a person who is an accessory after the fact. This may apply to some money launderers, who only come onto the scene at a later stage after a predicate offence has been committed.

3462. Some money launderers may be accomplices to the original offence, for example by agreeing in advance to help launder the proceeds of a relevant criminal offence, or setting up bank accounts for that purpose. In such cases, joint and several liability will arise, in the ordinary way, under Article 50 (1) SCO.

3463. Other money launderers may come on the scene only afterwards, and Article 50 (3) will then govern their liability. Article 50 (3) looks either to the abettor's share in the gains, or to the damage due to their involvement. Thus, in BGE 146 IV 211 (quoted above), the FSC held an "after the fact" money launderer liable, under Article 50 (3), for the amount of the loss to the victim which his assistance had perpetuated: "the money launderer is jointly liable for the predicate offence loss to the extent of the assets whose confiscation was thwarted by the money laundering".

W5: Defences to civil liability

3464. A number of potential complete or partial defences to tortious claims were the subject of evidence and argument. These included: consent to the tortious act; contributory fault; failure to mitigate; limitation; and abuse of rights. In the Defendants' closings, the most significant points addressed were contributory fault and limitation. Mitigation and abuse of rights were relied upon by the Mombelli Defendants in the context of issues concerning recoveries. To the extent necessary, I address these points when dealing with the arguments advanced by the Mombelli Defendants.

W6: Swiss Criminal Law

Background

3465. As discussed above, Swiss criminal law is important in the civil context because contraventions can supply the necessary element of unlawfulness and fault for the purposes of a civil tort claim.

3466. Swiss criminal law applies where: (i) any of the elements constituting the crime were carried out on the territory of Switzerland; or (ii) the offender intends to realise the effects of his actions in Switzerland. No point was taken that any of the relevant conduct relied upon by PIFSS, in support of their case that criminal offences were committed, would not have been subject to Swiss criminal jurisdiction.

3467. Swiss criminal law distinguishes between (i) felonies, which carry a custodial sentence of more than 3 years, and (ii) misdemeanours, which carry a custodial sentence not exceeding 3 years. The distinction is critical to PIFSS' claims concerning Article 305bis SPC, since that provision only criminalises the laundering of the proceeds of a felony. It is also relevant to periods of criminal limitation (and thereby to civil limitation periods, for reasons explained below). Longer limitation periods apply to criminal felonies.

3468. A civil claimant may be able to bring an "adhesive" civil claim; i.e. a claim whereby a party is admitted as a civil claimant in criminal proceedings. As reflected in Article 60 SCO, where the claim is based on criminal conduct, the criminal limitation period will apply to the civil claim. The FSC has explained that the "purpose of this rule is to harmonize the limitation period of civil law with that of criminal law; it would be shocking if the perpetrator could still be punished, but compensation for the damage inflicted could no longer be demanded."

3469. Where a civil claimant seeks to rely on criminal conduct as the basis of fault for the purposes of its claim in tort, and also thereby seeks to extend the applicable limitation period, the claimant will need to establish what in English law would be termed the "*actus reus*" (i.e. that the defendant did the relevant act) and "*mens rea*" (i.e. the relevant state of mind of the defendant). The general position under Swiss criminal law is that *mens rea*, or the "moral" element of the crime, is established where the claimant proves that the defendant has acted wilfully: see Article 12 SPC. This means that proof is required either of: (a) knowledge and intent, in respect of all objective elements of the offence; or (b) wilful blindness, as provided for in Article 12 (2) ("A person acts wilfully as soon as he regards the realisation of the act as being possible and accepts this"). The latter state of mind is referred to as "*dolus eventualis*".

3470. Article 21 provides for a defence where a person is not and cannot be aware that, by carrying out an act, he is acting unlawfully. As explained by Professor Pieth, the general position is that ignorance of the law is no defence. In practice the threshold for avoiding criminal liability via Article 21 is high. In principle, citizens in general, but in particular bankers and fiduciaries, are supposed to know the law – at least in their professional area – or if they are uncertain to seek professional advice. Cases of unavoidable error are therefore very rare. They typically relate to highly technical issues outside the professional experience of a person.

The criminal provisions relied upon by PIFSS and the central issues

3471. PIFSS relies on 3 criminal provisions, within the SPC, to ground its civil tort claims: Article 158 (disloyal management), Article 322*septies* (bribery of a foreign official), and Article 305*bis* (money laundering).

3472. Article 158 creates the offence of disloyal management. There was ultimately no dispute (at least as between PIFSS and EFG/the Mombelli Defendants) that Mr Al Rajaan was in a relevant management position for the purposes of that section: i.e. a person "entrusted with the management of the property of another or the supervision of such management". The Swiss case-law has generally considered the offence by reference to the duties which are owed by directors or others involved in the management of Swiss companies. However, the offence can apply to those, such as Mr Al Rajaan, who owe duties to a foreign entity. In those circumstances, it is necessary and appropriate to focus on Mr Al Rajaan's duties owed to PIFSS under Kuwaiti law. Ultimately, however, there was no real dispute which required a precise analysis of those duties. Neither EFG nor the Mombelli Defendants disputed that Mr Al Rajaan's receipt of undisclosed secret commissions, and his failure to disclose and hand them over to his employer, would amount to a breach of his duties under Kuwaiti law.

3473. The principal issue which arose, in relation to Article 158, related to the question of whether PIFSS could show that loss was the result of Mr Al Rajaan's breach of his duties. Article 158 requires that loss is proved, in order for the offence to be committed. In broad summary, issues arose as to the nature of the loss that had to be proved in the criminal context, and also as to whether – if loss was proved for the purposes of the criminal offence – this would also establish loss for the purposes of a tort claim.

3474. Article 322*septies* is the offence of bribery of a foreign public official. The main issue that arose in that context was the question of whether Article 322*septies* was a protective norm which could ground a tort claim based on a criminal contravention of that Article.

3475. Article 305*bis* is the offence of money laundering. The most significant issue which arose in this context was not directly concerned with questions as to whether the Article 305*bis* offence had been committed at all. There was very substantial evidence that EFG's employee, Mr Guerin, had indeed committed money laundering offences over the years, and I have so held in Section J above. And although there were a number of disputes on the expert evidence as to various aspects of Swiss law relating to money laundering, these were not points which were the focus of the case advanced by Ms Rogers for EFG in opening and cross-examination. Thus, it was no part of EFG's case that Mr Guerin had not committed Swiss law torts. The focus of EFG's case was on the question of whether EFG could be held liable for the tortious conduct of Mr Guerin. I

need no longer resolve that issue, and the various aspects of the parties' arguments, in the light of the EFG settlement.

Accessory criminal liability

3476. As described above, any person who wilfully assists another to commit a felony or a misdemeanour commits a criminal offence: Article 25 SPC. There was no dispute as to the relevant principles. As explained by Professor Pieth, these are in summary as follows.

3477. For the purposes of complicity under Article 25, the assister does not need to make a substantial contribution to the main offence. A physical or psychological furthering of the offence is sufficient.

3478. The *mens rea* of the accomplice has two components. The accessory must (i) know the essential elements of the perpetrator's harmful criminal act, although without necessarily knowing all the details, and (ii) agree to assist the offender in a criminal act. Since the assistance must be wilful, Article 12 applies – so that *dolus eventualis* is sufficient. Accordingly, it is sufficient for a person to act knowing of the risk of harm and of the commission of a criminal act, but proceeding regardless.

3479. In the *Hotels* case described in more detail below, the FSC gave a concise summary of the relevant legal principles:

> "The accomplice is a secondary participant who provides assistance to commit a crime or an offence (art. 25 CP). Complicity assumes that the participant provides the main perpetrator with a causal contribution to the perpetration of the offence, so that events would not take place in the same way without such assistance. It is not necessary for this to be a condition sine qua non of the perpetration of the offence. It is sufficient for it to increase the chances of success of the main act. Subjectively, the accomplice must be aware or realize that he is contributing to a specific criminal act and that he wants or agrees to do so. In this respect, it is sufficient for him to be familiar with the main aspects of the criminal activity of the perpetrator, who must therefore have taken the decision to act in that way. *Dolus eventualis* is sufficient."

3480. Article 26 SPC is relevant to the issue of complicity in the context of the Article 158 disloyal management offence. Article 158 is a "special" offence for the purposes of Article 26. The effect of Article 26 is that a defendant who participates in a special offence as an accomplice or instigator is held liable, even if that defendant did not himself owe the duty of care owed by the main offender. Thus, in relation to the Article 158, where Mr Al Rajaan owed particular obligations to PIFSS, a person is still criminally liable even if they themselves owed no special obligation to PIFSS.

3481. In relation to the various criminal offences which are alleged in the present case, criminal liability can arise either on the basis that a particular offence was committed by a defendant, or because that defendant assisted another to commit the offence. Thus:

i) The Article 158 offence can only be committed by Mr Al Rajaan, because he is the only person who can be the disloyal manager. However, other defendants can assist him to commit that offence.

ii) The Article 322*septies* offence can be committed in two ways: active bribery or passive bribery. A defendant who actually bribed Mr Al Rajaan can therefore be guilty of either limb: (a) as a principal offender who actively bribes, or (b) as someone who assisted Mr Al Rajaan to receive bribes and thereby commit the offence of passive bribery.

iii) A money launderer can also commit the offence either personally or by way of assisting another.

3482. If offences have been committed by a perpetrator or an assistant, they will potentially result in joint and several liability under Swiss civil law, as discussed above.

3483. In the following sections, I discuss the principal legal issues raised in relation to each of the criminal offences relied upon by PIFSS as giving rise to tortious liability.

W7: Article 158 SPC (disloyal management)

Background and common ground

3484. It is common ground that Article 158 SPC is a protective norm, and can therefore found a civil tortious claim.

3485. The *actus reus* of an Article 158(1) SPC offence comprises four elements: (i) a person who performs a managerial role for a principal; (ii) a duty of care for the principal's property; (iii) a breach of that duty; and (iv) financial loss.

3486. On the facts of the present case, the existence of the first three elements is beyond serious argument – and indeed EFG did not raise any points as to those elements. Mr Al Rajaan was a person who performed a relevant managerial role. As such, he owed duties to PIFSS under Kuwaiti law. Article 158 applies in that context, at least where the non-Swiss legal system imposes specific or general duties in respect of management of a principal's assets comparable to those imposed under Swiss law. There was no relevant dispute as to the existence of duties.

3487. The Mombelli Defendants at one stage alleged that, on the facts, there was no breach of those duties by Mr Al Rajaan, on the basis that his receipt of commissions was at all times known and approved by PIFSS. That argument was not ultimately pursued in closing, and in any event it has no foundation in the facts. It was beyond serious dispute that if that argument were rejected, Mr Al Rajaan was in breach of his duties owed to PIFSS, and that this would ground liability under Article 158.

3488. The principal legal issue concerned the question of "loss". The debate involved an issue as to how Swiss criminal law approaches the question of loss in the context of a criminal case. On that question, Professor Wohlers fairly accepted that there were numerous, relatively recent, decisions of the Swiss Federal Court which established how loss was to be approached in the context of Swiss criminal law. A separate issue was as to how, if at all, that criminal law approach to loss carried across to a civil law tortious claim.

Before addressing those points, I will briefly refer to two other aspects of Art 158 which were not substantially in dispute.

3489. Article 158 provides in certain respects for an offence to be a felony; i.e. to be punishable by more than 3 years' imprisonment. Thus, if the offender acts with a view to securing an unlawful financial gain for themselves or another, they commit a felony under Article 158(1). So too does a person granted a specific power of representation who abuses that authority, under Article 158(2).

3490. Both intent and wilful blindness (*dolus eventualis*) suffice to establish the requisite *mens rea*. However, Professor Pieth pointed out that wilful blindness is not lightly to be inferred in cases of disloyal management, so as to counterbalance what he described as the "open wording" of breach of duty in Article 158.

The issue as to loss

3491. There was no dispute that, in the criminal context of Article 158, as well as in Swiss civil law in general, loss is assessed by reference to the "difference-hypothesis". Thus, as Professor Fountoulakis explained:

> "According to the difference-hypothesis-test, the assets as they appear after the harmful event are compared with the assets as they would appear without the harmful event. The loss corresponds to the difference between the assets with the harmful event and the assets without it."

3492. For the purposes of loss in Article 158, the criminal law looks to the civil law. Professor Wohlers agreed in cross-examination that where loss is established for the purposes of Article 158, that was civilly recognised loss.

3493. PIFSS' principal case as to loss in the context of Article 158, and Professor Fountoulakis' evidence, was straightforward. She said that the loss suffered by the principal due to the retention of secret retrocessions is the amount of those retrocessions which were not handed over to the principal. Without the damaging event – i.e. the failure to hand over the secretly received retrocessions – the principal's assets would have increased by the amount of the retrocessions. On this approach, it was irrelevant whether or not the contracts based on the retrocession payments were concluded at market prices, or whether the contractual performance was satisfactory so that the principal benefited from the contract resulting from bribery. The connecting factor for the principal's claim for damages is the breach of the duty to surrender the commissions to the principal.

3494. However, she also explained that a claimant could also establish loss in the amount of the secret commissions by proving to the satisfaction of the court that if the agent had acted in accordance with his duties, the contract price should have been reduced by the value of the retrocessions. This had been done in a number of cases.

3495. In my view, Professor Fountoulakis' views and straightforward analysis are supported by a substantial body of recent or fairly recent case-law of the Federal Supreme Court.

3496. *BGE 144 IV 294*: In a 2018 case, BGE 144 IV 294, the director (X) of a wealth management company (Y) was charged with an Article 158 offence. The wealth management company managed the assets of various clients, whose monies were deposited with a bank. The depositary bank charged fees on the clients' assets and partly retroceded them to Y. X had not told his clients about these retrocessions, and had not accounted to his clients for them. I note in passing that a case of this kind, involving an external manager, is rather lower down the scale of misconduct when compared to the present case of international bribery involving hundreds of millions of dollars paid to the most senior executive in PIFSS. Indeed, many of the retrocession cases in the Swiss courts involve relatively small retrocession payments made to people who have similarities with small independent financial advisers (IFAs), where no allegation of bribery was made.

3497. X argued that he was not deserving of punishment on account of not informing his clients of the retrocessions and payments received. The FSC disagreed and upheld his conviction. The FSC pointed out that it had not, to date, examined the scope of Article 158(1) in the context of retrocessions received by a wealth manager from the depositary bank. It referred to various authors who had taken the view that a wealth manager, who does not inform his client of the benefits which they are receiving from the depositary bank, "is committing an act of disloyal management because the client, for lack of the necessary information, is unable to claim from the manager the restitution to which they are entitled, and they therefore suffer a loss due to non-increase in his assets". That view was endorsed by the FSC, which said at paragraph [3.3]:

> "The agent's accountability to the principal must enable the principal to verify that the activity of his cocontractor is consistent with due and faithful execution of the mandate: the information must enable him to claim what the agent must return to him and, if appropriate, to claim damages from him. Accountability thus plays a preventive role in protecting the interests of the principal. Accountability and restitution obligations are therefore not at the same level in the statutory mandate arrangement; the effect of the latter obligation depends, on the contrary, on the due and proper performance of the former."

3498. The significant feature of this case is the simplicity of approach. It was not necessary to carry out an exercise of ascertaining the extent to which X's conduct had influenced the way in which he had decided to give the client's assets to the bank, or whether the terms on which the bank accepted the deposits were favourable or were better or worse than terms offered by other banks, or whether the clients could have received the retrocession themselves if there had been a negotiation by them or on their behalf. The court simply looked at the failure to account, which led to the client not having the retrocessions handed over to him, as relevant loss for the purposes of the difference-hypothesis necessary to establish the existence of a relevant loss.

3499. This 2018 case has, as Professor Wohlers accepted in evidence, generally been assumed to be authoritative in subsequent case-law. He also agreed that it has been cited in ten subsequent FSC decisions, and therefore represents the FSC's consistent and authoritative approach.

3500. *The "Hotels" case – FSC decision dated 10 October 2024* (DFSC 6B_913/2023, 6B_917/2023). This criminal appeal had originally concerned a number of defendants. The points of significance for present purposes arose in relation to the appeal of D, referred to as Appellant 1 in the judgment. In essence, D had been responsible for the management of various hotels owned by his principals, and he had received payments – described by the FSC as bribes or kickbacks – in return for placing various contracts with third parties. He was convicted of various Article 158 offences, and appealed against his convictions on a number of counts, relying in particular on arguments that loss had not been established. His arguments and appeals were (so far as relevant) dismissed. The reasoning of the FSC on the issue of loss is relevant, and in my view supports the analysis of Professor Fountoulakis.

3501. At paragraph [3.1.3], the FSC explained the concept of loss in the context of an Article 158 offence. The analysis shows that loss is determined by reference to the difference analysis, albeit that in a criminal case the loss does not in fact need to be quantified. The FSC referred specifically to Article 41 SCO, which sets out the basic principles of civil tort liability. The judgment shows, as indeed the experts agreed, that there is no difference in considering loss for the purposes of Article 158, and loss for the purposes of a tort claim. The court said (again omitting internal references):

> "[3.1.3] The offence is only completed if a "loss" has been caused, a concept which must be understood in the same way as for other financial offences, particularly fraud. That is the case when one finds oneself in the presence of a true loss, that is, a reduction in assets, an increase in liabilities, a lack of reduction in liabilities or a lack of increase in assets, or the endangering thereof such that it results in reducing the value thereof from an economic point of view. Only the loss caused to the pecuniary interests over which the manager has a managerial and supervisory duty may be taken into consideration. … A loss, which does not need to be quantified, exists when the injured party has a right protected by civil law, particularly within the meaning of art.41 [S]CO, to compensation for the loss suffered."

3502. Having set out this general principle, the court considered each of the relevant payments received by D. One payment (in case 1.1.1.3) involved commissions received by D, from a building company, in the sum of at least € 164,000. The lower court had accepted that there had been no overcharging, but this did not affect the question of whether there had been a loss to D's principal. The FSC identified two routes to loss; i.e. reasons why there had been a loss. The court said, first, that D had not managed affairs in his client's best interests, "as he could have obtained a reduction in the price of the works equivalent to the amount which the contractor was prepared to pay by way of commission". It went on to say (paragraph [3.2.1]):

> "Secondly, he had violated his qualified obligation of accountability, thereby preventing his client from being able to claim the amounts received from him. Consequently, for the Cantonal Court, even in the absence of overcharging, the aspect constituting the loss was established, whether considered under the aegis of the older case law (ATF 129 IV 124 …) or that of the more recent case law (ATF 144 IV 294 consideration 3.3)

> Appellant 1 had knowingly and wilfully armed the interests he was responsible for supervising in the capacity of manager, within the meaning of article 158 CP, for his own benefit, obtaining sums received to the detriment of his client. The offence of aggravated disloyal management (art. 158(1)(3) CP) was perpetrated."

3503. Accordingly, the court in that paragraph referred back to paragraph [3.3] in the 2018 decision already described and quoted above. This was part of the "more recent case law", which took a different approach to the older case law which had focused on transactional disadvantage.

3504. D also argued, in support of his case that there was no loss, that the Cantonal Court's reasoning would lead to all commissions being criminalized systematically. He also said that case ATF 144 IV 294 was of no significance, because the banking environment was very different to the construction environment. He said that the Cantonal Court had failed to estimate the loss. These arguments were rejected, with the court again identifying the two routes to loss in a case of this kind:

> "In this particular case, it is noted that, from the outset, the principle of the payment of commission was, at the very least, an implicit condition of the award of the works. Appellant 1 in charge of negotiations could have and should have obtained a reduction in the price of the works corresponding to the amount of commission, that is, an amount of at least EUR 164,000. Moreover, he did not inform his client of the commission received, depriving her of any possibility of claiming those amounts from him. Consequently, appellant 1 violated his management duties by failing to faithfully execute his mandate in accordance with his client's pecuniary interests and by violating his obligation to provide information and be accountable to his client, thus depriving her of the possibility of claiming the return of the amounts received from him (cf. art. 398 and 400 CO). The fact that such practices might be common in the building world and that the sums at stake were huge is totally irrelevant from the point of view of establishment of the aspects constituting the offence. Moreover, appellant 1 does not claim in any way that his contract provided for his being able to benefit from such commission. With regard to the loss, one can understand that it resulted partly from the failure to negotiate a reduction in the price of the works, so that the client had paid a higher amount (which implies a reduction in assets), and partly from the lack of information which deprived the client of a return of the amount of commission (which corresponds to a lack of increase in the assets). These losses are combined *in casu*, so that the Cantonal Court rightly maintained a loss in the sum of EUR 164,000." (My emphasis)

3505. The FSC referred to the losses being "combined", but I agree with Dr Weibel who said that the two paths were being presented as alternatives, and that either could be sufficient to establish the loss.

3506. D advanced a similar argument in relation to his conviction in case 1.1.17 where he had received commissions from a different company, E.1 Sarl, for works undertaken at various hotels. The precise amount of the commissions was not established, the Cantonal Court having said that the financial harm was undetermined and undeterminable on the basis of the case file. The court had said that it did not matter that there had been no overcharging. D appealed on the basis that no loss had been established.

3507. Again, the FSC disagreed. It said:

> "The Cantonal Court's line of reasoning is certainly brief and refers to the reasoning provided in case 1.1.1.3. One can understand, however, that the loss maintained corresponds to the amount of commission received by appellant 1 from E1. Sarl, even if the exact amount thereof could not be determined. In fact, it is established that appellant 1, at the very least, implicitly subjected the award of the works to the payment of bribes unbeknown to the respondent owner companies, in violation of his obligation to provide information, to be accountable, of fidelity and to protect the pecuniary interests of those companies deriving from his position as manager. Therefore, the companies were de facto deprived of the possibility of claiming the return of the amounts received by appellant 1. These amounts correspond to the loss in the form of a lack of increase in the assets. According to case law, the loss did not need to be estimated. As the offence had already been perpetrated by such conduct, it is ultimately immaterial to determine, if the Cantonal Court could do so in this case, that a lower price could have been negotiated, all the more so as the question of knowing whether such a reduction in price was sufficiently apparent from the accusation remains open." (My emphasis)

3508. Accordingly, even in the absence of detailed reasoning by the Cantonal Court, or evidence as to the exact amount of the loss, the FSC had no difficulty in applying the straightforward analysis. The FSC was able to uphold the conviction on the basis that there was an obvious loss, even though the court did not know exactly what retrocessions or bribes had been paid. The court clearly did not require an extensive or complicated counterfactual analysis looking at such matters as whether the principal could have obtained a price reduction if there had been no bribes paid, or what that reduction would have been.

3509. The essence of the point raised by the Defendants' experts is that it is wrong to treat this line of cases as laying down an inflexible rule as to how loss is calculated in cases of retrocessions and bribes, and that it was always necessary to carry out an analysis applying the difference hypothesis. In my view, it may be the case that there is no inflexible rule. It is possible that there might be unusual facts whereby the straightforward approach of the FSC – i.e. in essence, that where there is a failure to account, there is loss because the principal has not received the money that should have been accounted for if there had been disclosure – would for some reason be inapplicable. Dr Weibel fairly accepted in his evidence that, in very many cases, a principal will indeed be able to recover the amount of the bribe, notwithstanding a

successful investment, on the basis that – absent the wrongful conduct (the failure to account) – the principal would have had both the successful investment and an increase in its assets in the sum of the bribe. Accordingly, even if there is no inflexible rule, it does not follow that a complicated counterfactual exercise is necessary in order to establish loss, either in the criminal or civil context, when there is a breach of Article 158 consisting of a failure to account for retrocessions or bribes received.

3510. Subsequent to the evidence, there are two recent decisions which potentially bear on the points discussed above. In DFSC 6B_610/2025, a judgment dated 27 November 2025, the FSC dealt with a further appeal in the *Hotels* case. This was an appeal against conviction under Art 158 by the briber or assistant (i.e. someone in the position of the Mombelli Defendants), rather than (as in the other appeals) the bribee. The appellant had paid CHF 312,425.95 to the bribee. The FSC referred to the decisions where the bribee had been convicted, stating that:

> "His conviction for aggravated criminal management is based on the fact that he had conditioned the award of the works, at least implicitly, on the payment of bribes without the knowledge of the owner companies, in breach of his duty to provide information, to disclose, and for loyalty and safeguarding of the financial interests of those companies arising out of his management position. Even in the absence of overbilling (relative to fictitious services or inflated invoices), the companies in question were de facto deprived of the possibility of claiming the handover of the amounts received (CHF 312,425.95), which corresponded to damage in the form of non-increase of assets. This damage also took the form of reduction of assets, since the complainants had not been able to obtain a reduction in the price of the works equivalent to the amount the contractor was prepared to pay as commissions."

3511. This statement was therefore fully in line with the earlier case-law. The FSC said that it was not necessary "to go back over the appellant's criticisms relating to the fulfilment of the constituent elements of the offence of aggravated criminal mismanagement by [the bribee]." It held that the loss suffered had been definitively established at the amount of the bribe, CHF 312,425.95. The court then considered the position of the appellant (briber) and dismissed his appeal.

3512. However, in a decision given a week later, 6B_973/2023 (and related cases), the FSC reached a different result on an appeal by the Swiss OAG (Office of Attorney-General) against the acquittal (in a highly-publicised case) of the Secretary-General of FIFA (football's governing body), Jerome Valcke. Valcke was alleged to have received various benefits, including financial payments, from media companies in connection with the award of rights to broadcast the 2026 and 2030 World Cups. The lower court held, and the FSC agreed, that in soliciting and obtaining these benefits, Valcke had breached several internal provisions of FIFA which formed an integral part of his employment contract and prohibited the receipt of any advantage. The FSC, which included three judges who had decided the *Hotels* case a week earlier, referred to the 2018 wealth manager retrocession case, but held that it concerned a manager who had misappropriated "benefits which are destined from the start to his employer".

3513. The court then considered the findings of the lower court, which held that the particular benefits received by Valcke – which included the use of a villa and also cash payments – were not "destined from the start to his employer". The FSC held that it was bound by that fact finding. The court emphasised that it was not concerned with a case involving retrocessions. It referred to evidence that it had not been established that those who paid the bribes were disposed to pay FIFA itself the amounts corresponding to the advantages received by Valcke:

> "Such advantages, paid by third parties as bribes, therefore, by definition, could not form part of the assets of [FIFA] over which [Valcke] had a duty of management. Yet the damage caused to the pecuniary interests over which the manager has a duty of management or supervision can be taken into consideration. Consequently, the Appeals Chamber was right to consider that the breach by Appellant 2 of his obligation to disclose and hand over these advantages to [FIFA] alone did not constitute damage by non-increase of assets within the meaning of Article 158 …"

3514. The FSC then went on to consider whether there had been damage to the pecuniary interests of FIFA. Although the prosecutor argued that the acceptance of bribes corresponded to a reduction of the price of the media contracts ultimately concluded, there was no finding of the lower court which supported that proposition, and therefore the argument failed.

3515. On behalf of the Mombelli Defendants, Mr Brown placed particular reliance on this decision, as demonstrating the need in all cases to show that a loss was suffered. He submitted that it shows that it cannot be assumed that, as a matter of Swiss law, the harm is in the amount of the advantage paid. On the facts of the present case, he submitted that it could not be said that the commissions paid were destined from the outset to PIFSS. They were the Mombelli Defendants' commissions.

3516. I confess to being somewhat puzzled by the result of the FIFA case in relation to loss caused by the failure to account, because it does seem difficult satisfactorily to reconcile with the *Hotels* case a week earlier, and indeed the earlier *Hotels* cases. The October 2024 *Hotels* decision was referred to in the FSC's judgment, and there is no suggestion that the court was departing from the principles or approach in that case. In *Hotels*, the court had no difficulty in holding that there was a failure to account for the bribes which the senior manager had obtained, and it does not appear that a question arose as to whether those bribes were destined to his employer from the start. It seems that a decisive feature in the FIFA case is that there was nothing to suggest that those who paid the bribes to Valcke would ever have been willing to pay those monies to FIFA. It is also significant that the court considered that cases involving retrocessions are different to the FIFA facts. I shall return to these points when considering the arguments of the Mombelli Defendants.

W8: Article 322*septies* SPC (Bribery of a Foreign Official)

Introduction

3517. Article 322*septies* has its origins in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The OECD explained the background to the Convention as follows:

> "The OECD Working Group on Bribery in International Business Transactions (WGB) leads global efforts to fight bribery of foreign public officials in international trade and investment. The fight against foreign bribery is a core shared value that unites all Parties to the Convention. The Parties' commitment to this fight is grounded in the recognition that no government or market economy can function effectively if it suffers from high levels of bribery. Serious harm results when public officials take bribes, for example, when awarding contracts to foreign businesses in such areas as road construction, water infrastructure, medicines or electricity. In addition to the human suffering caused by inferior products and services, bribery undermines the functioning of markets and economic development. Under the Convention, Parties therefore agree to establish the bribery of foreign public officials as a criminal offence under their laws and to investigate, prosecute and sanction this offence."

3518. Article 322*septies* has two paragraphs, which it is convenient to refer to as (1) and (2). Paragraph (1) criminalises the offer, promise or giving of a bribe: i.e. active bribery, penalising the briber. Paragraph (2) criminalises a demand, securing the promise of, or acceptance of a bribe: i.e. passive bribery, penalising the bribee. Each offence is always a felony.

3519. Article 322*septies* (1) (active bribery of a foreign public official) entered into force on 1 May 2000. Article 322*septies* (2) SPC (passive bribery) entered into force on 1 July 2006. The active and passive variants are relevant to activity on or after those dates. However, this may not be a point of great significance in that Article 158 was in force prior to that time, and the receipt of bribes (and the acts of those who assisted in that regard) would be criminalised by that section (and Art 25 in relation to assisters).

3520. The *actus reus* of active bribery comprises four elements: (i) a foreign public official; (ii) is offered or promised or given an undue advantage; (iii) in order that the person carries out or fails to carry out an act in connection with his official activities; which (iv) is contrary to his duties or dependent on his discretion. The *actus reus* of passive bribery is essentially the same, save that (ii) concerns the conduct of the bribee who demands, secures the promise of, or accepts an undue advantage.

3521. The following aspects of the offence were not controversial:

a. "Foreign public official" includes senior employees of state-owned institutions and entities, where these serve the public interest. The Swiss Federal Supreme Court has held that a portfolio manager of a state insurance institution would fall within the relevant definition. Mr Al Rajaan was, applying this test, such an official.

b. Offer of advantage ("*quid*"): the advantage must be undue, in the sense that it is something to which the recipient was not entitled.

c. "In order that" ("*pro*"): there must be a link between the "*quid*" and the "*quo*".

d. Connected to, and contrary to, official duties or discretion ("*quo*"): it is sufficient if the offered advantage was made so as to influence the foreign official's decisions and actions in any aspect of his official duties, including the exercise of any discretion. It is not necessary that the act or omission is a breach of duty.

3522. The same act may constitute active bribery on the part of the briber, and passive bribery on the part of the bribee.

3523. It is necessary to show *mens rea*. However, *dolus eventualis* is sufficient. As Professor Pieth explained: it is therefore sufficient that the perpetrator regards the realisation of the offence as possible and accepts the possibility. The payor of the bribe would therefore need to be aware that the remuneration was undue, and that it could give rise to an act or omission in breach of duty or in application of discretion.

Protective norm?

3524. The principal issue in relation to Article 322*septies* is whether it is a protective norm. Under Swiss law, pecuniary damage is only unlawful, for the purposes of tort law, if it is the result of a violation of a norm of conduct that serves to protect against such pecuniary damage; i.e. a protective norm. Accordingly, for a civil claim for pure economic loss, there must be a breach of a protective norm.

3525. It was common ground between the experts, and indeed clearly established by the case-law, that a norm of conduct, here a criminal statute or provision, can serve two interests: for example, a public interest primarily, and pecuniary interests secondarily. As Professor Fountoulakis explained: a protective norm is a behavioural norm that has, as its aim, to protect the financial interests of the aggrieved party. That norm may have as a first aim the protection of public policy or the correct function of the state, but then as a subsidiary aim the protection of the financial interests of an individual or an entity or state.

3526. It was common ground between the experts that the primary purpose of Article 322*septies* was the protection of public interests. These public interests are summarised in the *Commentaire Romand, Code Pénal II* by Professor Bertrand Perrin as follows:

> "The legal asset protected by the Criminal Code 322*septies* is the objectivity and impartiality of the decision-making process and foreign state activities (including those of international organisations) or, to use a more elliptic wording, the objectivity and impartiality of foreign authorities. The provision aims to protect foreign interests, its purpose being to overcome the deficits that may exist in some countries in terms of criminal procedure. The criminally protected asset is also the human rights."

3527. This, and similar commentaries or statements which were put to Professor Pieth in cross-examination, do not address the crucial question as to whether Article 322*septies* exclusively protected these public interests (as the defendants' experts contended), or

whether it could also be considered to protect the financial interests of foreign states referred to in that Article (as PIFSS' experts contended).

3528. It was also common ground that there were no decisions of the FSC, one way or the other, as to whether Article 322*septies* also served to protect financial interests. Professor Pichonnaz' evidence was that, in the absence of a decision by the FSC, it was difficult to know how the FSC would decide the issue. He illustrated this by reference to the FSC's decision in DFSC 129 IV 322 that Article 305*bis* (money laundering) was a protective norm in circumstances where the predicate offence involved violation of a provision which was itself a protective norm. He said that this decision had come as something of a surprise, and indeed Professor Pieth's evidence was that it was contrary to the prior thinking of many commentators.

3529. Professor Pichonnaz also agreed in cross-examination that policy considerations would affect the decision as to whether a particular provision is a protective norm. This accords with the *Berner Kommentar* (Dr Roland Brehm), which describes protective norms as arising "where this appears to be appropriate from a legal policy perspective". Similarly in the *Commentaire Romand, Code des Obligations I*, Werro and Perritaz identify a lengthy list of protective norms, and then state that: "It should be noted that the question of whether a protective norm exists or not is often difficult, not to say risky, to interpret, since it will often depend on the result which the judge considers to be fair".

3530. Ultimately, in accordance with the principles relating to how an English court approaches issues of foreign law, I need to decide how, based on the evidence of Swiss law adduced before me, the FSC is likely to resolve the issue as to whether Article 322*septies* is a protective norm. I do not therefore accept Professor Pichonnaz' evidence that, in the absence of an existing decision by the FSC on the point, it would be speculative to decide that a provision is a protective norm, or that one must proceed on the basis that it is not a protective norm. These were, in my opinion, extreme views which did not bear analysis. The cases to which I was referred, where a provision was held to be a protective norm, do not start from any assumption that a particular provision is not a protective norm. Rather, the court analyses the provision in question, and comes to a view on the point, no doubt influenced by policy considerations.

3531. Nor do I accept Professor Pichonnaz' evidence that the wording of the relevant statute is a critical factor in the analysis, so that the absence of any express reference to the protection of financial interests is an indicator that the provision is not a protective norm. Again, this was an extreme view, and was unsupported by case-law. For example, in BGE 102 II 85, the court considered Article 239 SPC, which criminalised wilful or negligent disturbance of public utilities, in the context of a civil claim brought after an interruption in electricity supply. There was nothing in the statutory provision which explicitly protected private financial interests. However, the court concluded that the relevant provision could be relied upon in a civil action: there was an "unlawful act to injure a private interest implicitly protected by a criminal law enacted in the public interest". The statute was held to "protect the interests of subscribers against harm caused to them by acts falling within the scope of this provision".

3532. Similarly, in the money laundering case, 129 IV 322, the court referred to an earlier decision of a lower court that Article 305*bis* "indirectly protects assets in addition to the interest in a regulated administration of criminal justice". The FSC referred to the fact

that money-laundering offence was classified, in the SPC, as an offence against the administration of justice. The court agreed with the lower court decision that the offence primarily protected the administration of criminal justice in the enforcement of the state's right to confiscation. However, it went on to conclude that the administration of justice was not the only legal interest protected, and held that it also "(co-)protects individual legal interests under certain circumstances". Those circumstances were those cases in which the assets subject to confiscation originate from criminal offences against individual interests. That was "because the act of thwarting also directly affects the financial interests of the person harmed by the predicate offence". In reaching this conclusion, the FSC did not focus on the wording of Article 305*bis*.

3533. A number of factors persuade me, in accordance with views expressed by PIFSS' experts, that the FSC would decide that Article 322*septies* is a protective norm, breach of which can therefore found the "unlawfulness" element of a tortious claim.

3534. First, I attach significance to cases in which there has been a contested appeal on whether a claimant has been properly admitted as a civil claimant in criminal proceedings. An adhesive claim of this kind is permissible under Article 115 of the Swiss Criminal Procedure Code which provides:

i) A person suffering harm is a person whose rights have been directly violated by the offence.

ii) A person entitled to file a criminal complaint is deemed in every case to be a person suffering harm.

3535. The FSC decision in DFSC 136 IV 188 (6B_908/2009) (2010), referred to at the hearing as the "Rio" case, concerned a corrupt scheme created by some managers of the State of Rio de Janeiro in Brazil. The state had created a special tax unit for large contributors. The corrupt managers made spot checks on large taxpayers, asking for the production of documents at short notice, threatening large fines, but accepting payments in order not to pursue proceedings. The bribery monies were laundered through a bank with offices in Zurich and elsewhere. Criminal proceedings for money laundering were brought against X, who was on the local management committee of the Zurich branch, and he was convicted. Amongst a large number of grounds of appeal, X contended that the lower court had wrongly allowed the Federal Republic of Brazil to sue for damages and bring civil proceedings. So far as relevant, X argued that Brazil could not be regarded as an injured party.

3536. The FSC rejected that argument. It referred to its earlier decision that activities punishable under Article 305*bis* SPC could establish civil liability on the part of the perpetrator towards the person injured by the main offence, the proceeds of which had been laundered. It said at [2.3.2]:

> "In this particular case, the money laundering activities concerned money derived from corruption by officials of the State Tax Office of Rio de Janeiro. According to the facts alleged, the entire amount deposited in the accounts in Switzerland by three of those officials, namely A., B. and C., stems from this corruption, since it is obtained in the form of bribes paid by companies inspected by the above-mentioned

> officials in exchange for closure of the inspection and for discounts on the amounts actually owed to the State by these taxpayers. Thus, through the system put in place by its own employees, the State had clearly suffered loss in that these employees had diverted tax revenues which should in fact have been paid to the State. In addition, corruption of public officials generally distorts the decision-making process within the administration, undermines the public interest and weakens the State."

The court said that in the light of these elements, it may be allowed that, in this particular instance, the State has been injured. The ground for complaint was therefore rejected.

3537. This was not a final decision as to whether or not the Republic of Brazil had actually suffered loss, and it is not known how the civil case was ultimately resolved. PIFSS' experts did not suggest that the decision directly decided the question of whether or not Article 322*septies* was a protective norm. However, their evidence was, in summary, that this is the logical conclusion of what the FSC was saying. Thus, if bribery offences were not protective norms, then it is difficult to see how the court could have decided that Brazil was properly admitted as a claimant. Indeed, Professor Wohlers accepted, in cross-examination, the proposition that: where there was an appeal as to someone's admission as a civil adhesive claimant and the issue in front of the appeal court is whether the offence in fact protects the financial interests of that person, the appeal court would have to consider whether the offence protects such interests.

3538. The judgment also reflects the dual impact of bribery on private and public interests. As Professor Pieth emphasised, the court recognised in this judgment that the bribery and corruption caused financial losses, as well as damage to the administration of justice. The case therefore does lend support, in my view, to the proposition that both public and private interests are protected by Article 322*septies*.

3539. I think that this decision does provide a very clear signpost as to how the FSC would be likely to resolve the protective norm issue raised in the present case.

3540. That conclusion is reinforced by the *World Bank* case (BB.2013.38), which is one of two cases which have followed and applied the *Rio* case. This was not an FSC decision, but rather a decision of the Federal Criminal Court lower appeals chamber. The case involved the payment and acceptance of bribes by A, a person working as a short-term consultant for the World Bank. There was again an appeal against the lower court's decision to allow the World Bank to make a civil claim as a private plaintiff in the criminal case. The accusation against A was that he had violated Article 322*septies*, by selling information of the World Bank on future tenders and supporting a company in preparing and evaluating tenders.

3541. The court said that it was necessary to scrutinise the legal rights protected by Article 322*septies*. It said at [4.4]:

> "The status of the State as an injured person presupposes that it has been directly infringed by the offence on its personal rights. It is not sufficient that public interest is undermined. The

> corruption of public employees perverts the decision-making process in the state concerned, runs counter to public interests and weakens the state (judgement of the Federal Supreme Court 6B_908/2009 of 3 November 2010, consideration 2.3.2 [then *Rio* case quoted above]). It undermines general confidence in the objectivity and impartiality of state action (Despatch of 19 April 1999 on the OECD Bribery Agreement, BBl 1999 5497, p. 5523; see also the Despatch on the UN Corruption Agreement BBl 2007 7349, p. 7350). In any event, according to the Federal Supreme Court's case-law, the foreign state is entitled to bring private action as party injured by acts of corruption in the event of money laundering if financial damage is the result of acts influenced by corruption." (my emphasis)

3542. The court went on to consider whether "the protected legal interest just described was adversely affected by the acts alleged against the Appellant". It concluded that if the alleged acts of bribery had happened, "the Appellant would undoubtedly have breached his official duties and thus also the protected public interests at stake".

3543. I think that the court, which was specifically considering Article 322*septies*, was recognising that Article as a protective norm. Indeed, Professor Pichonnaz correctly accepted in cross examination that, in the sentence underlined above, the court was saying that a civil right of action exists where the victim of corruption suffers loss as a result of the acts influenced by corruption. That conclusion is necessarily founded on the premise that Article 322*septies* is a protective norm.

3544. Secondly, I do not consider that there is any persuasive argument as to why Article 322*septies* should not be read as protecting financial interests, in addition to public interests. The reasoning of the courts in both *Rio* and *World Bank* recognises that a natural consequence of bribery and corruption is damage to those interests. I do not think that there is any policy reason, or indeed any logical reason, why Article 322*septies* should be confined exclusively to the protection of public interests, to the exclusion of private financial interests.

3545. Thirdly, a decision that it was not a protective norm would create some surprising differences in approach between (i) Article 322*septies* and (ii) the protective norm that has been recognised in the context of Article 158, and which in my view should be recognised in the context of Articles 322*octies* and 322*novies*.

3546. As far as Article 158 is concerned, it was common ground that this is a protective norm. It is true that Article 158 expressly refers to the "management of the property of another", and thus could be seen as providing protection as against those property interests (a situation which would ordinarily give rise to a protective norm). However, the wrongful conduct prohibited by that section is disloyalty by the individual who has that responsibility: i.e. when he acts "in the course of and in breach of his duties" and thereby causes loss to his principal. The criminal case-law, discussed above, shows that Article 158 covers the situation where bribes are taken.

3547. I agree with the point that Mr Leslie put to Professor Pichonnaz in cross-examination, namely that the substance of Article 322*septies* is also concerned with the duties of loyalty which are owed by the public official to his principal. Article 322*septies* refers to the

giving (or receipt) of an "undue advantage" in order that "the person carries out or fails to carry out an act in connection with his official duties which is contrary to his duties or dependent on discretion". This is, therefore, prohibiting acts of disloyalty, and is doing so by reference to the official duties which are owed by the public official.

3548. The link between bribery and duties of loyalty is also apparent in the very similarly worded provisions, concerning "private" bribery (i.e. bribery of people who are not public officials) in Article 322^{octies} and ^{novies}. The link is in my view obvious, and it is made in a number of commentaries to which I was referred. Thus, in the *Basler Kommentar, Strafrecht*, Professor Pieth writes:

> "The basic structure of private bribery was adopted from the old law, the basic structure was adopted, according to which an *extraneus* motivates the *intraneus* (the employee, agent, etc.) to harm the interests of the principal (the "third party") and thus violate their duty of loyalty."

There is a similar analysis in the *Commentaire Romand, Code Pénal II*, note 43:

> "Private corruption takes place within the framework of a tripartite relationship. The private agent works for others (third parties) and has legal obligations of fidelity and loyalty, arising from the law or a contract, to protect the legitimate interests of that third party. Under these obligations, the acts they perform in the course of their professional or commercial activities must be in the interests of that third party. By offering, promising or granting their target an undue advantage, the perpetrator attempts to persuade them to perform an act that puts their own interests before those of the third party, which are then put at risk."

3549. It is also noteworthy that in the *Basler Kommentar, Strafrecht*, Professor Pieth quotes the "Botschaft" (equivalent to an explanatory note) relating to Article 322^{octies} (italicised below):

> "While the old law focused on the protection of competition, the definition of legal interests in the new offences was much broader. The "mixed bag" presented by the [Botschaft] covers not only the financial interests of the principal but also collective legal interests such as public health and safety or even the functioning of the economy and confidence in a free and undistorted market: *"In addition to the financial interests of the employer or client, bribery of private individuals can also affect the financial interests of third parties and public legal interests, e.g. harm public health and safety if business activities in this area are tainted by corruption. In general, private bribery damages a functioning economy and destroys the confidence of economic actors in a free and undistorted market*."

3550. I see no material difference between the matters sought to be protected by the bribery offence under Article 322^{octies} (correctly described, in my view, in the above passage),

and the matters sought to be protected by Article 322*septies*. Indeed, the above passage is very much along the lines of the approach in the *Rio* and *World Bank* cases already described.

3551. Fourth, the precursor of the Article 322*octies* private bribery offence was Article 4a of the Unfair Competition Act. I was shown a number of commentaries which expressed the view that this was a protective norm. If so, then it follows that this is also true of the successor offence. And in my view, there is no reason to take a different view when considering Article 322*septies*.

3552. Finally, although it has been said that cases are decided on the basis of what the judge considers fair, I accept that fairness alone is not the legal test for whether a provision is a protective norm. However, I do consider it fair that Article 322*septies* should be so regarded, and I would expect the FSC also to regard this as fair and just and to reach the same conclusion that I have reached.

3553. Subsequent to the close of the Swiss law evidence, Dr Weibel identified two further cases which were relied upon in support of the case that Article 322*septies* was not a protective norm. In 1C_661/2020 (judgment of 15 April 2021), the FSC was concerned with a catalogue of complaints by a serving prisoner who was also a frequent litigant. One of the complaints concerned corruption of a Swiss public official contrary to Article 322*ter*. The court considered the prisoner's standing to bring the claim, which was a request that various officials should be prosecuted. The FSC, upholding the lower court, dismissed the case. In that context, the court said (citing Professor Pieth):

> "Corruption offences protect the public's trust in the objectivity and impartiality of official activities (see MARK PIETH, in: Basler Kommentar, Strafrecht II, 4th ed. 2019, N. 13 ff. of the preliminary remarks on Art. 322 ter StGB). Since neither favouritism nor the possible cases of corruption under consideration in this case protect individual legal interests, the complainant lacks standing in this respect and the complaint is inadmissible."

3554. I do not consider that this is a strong authority against the conclusions which I have reached. The case, which was a public law case, did not involve a civil tort claim for loss based on contravention of Swiss bribery provisions, and did not concern Article 322*septies* at all. It appears that the prisoner was representing himself, and there was no citation of any of the case-law or other commentary to which I have referred. There was no argument about protective norms.

3555. The second case, BGE 129 III 320 (judgment 21 February 2003), involved issues as to contractual rights arising from a contract which had been brought about by corruption, but where there was no evidence that the contractual price was higher as a result, and where the courts in fact decided that there was no binding contract. The principal issue was whether one party was obliged to pay for work performed prior to the opposing party contesting the contract. I derive no assistance from this case. It was not a tort case, and there is no discussion of the protective norm issue which is the focus of the present argument.

W9: Article 305*bis* (money laundering)

3556. As shown by case-law already discussed, Article 305*bis* has been held by the FSC to be a protective norm. However, it was common ground that the underlying felony, giving rise to assets which are liable to confiscation, must itself be a protective norm. As already discussed, an aggravated Article 158 offence is a felony and is a protective norm. The same applies, as I have concluded above, to the Article 322*septies* offence.

3557. The *actus reus* of an Article 305*bis* SPC money laundering offence can be divided into two elements: (i) it must be possible to identify assets that are the proceeds from a predicate offence; and (ii) there must have been an attempt to obscure the origin, or frustrate the tracing or forfeiture of, those assets.

3558. *Proceeds of crime:* As far as the first element is concerned, the predicate wrongdoing must amount to a felony. The proceeds in question need not be the 'same' funds or assets that are the subject of the predicate offence, so long as they are the traceable proceeds of those original funds or assets. As Professor Wohlers explained in his report, assets are suitable objects of the offence if they do not originate directly and immediately from the predicate offence, but they have a natural and adequate causal connection with the predicate offence.

3559. It was also common ground between the experts that a predicate offender can launder the proceeds of their own crime. Hence, the pleaded case against Mr Mombelli was of bribery and money laundering.

3560. There was a dispute on the expert evidence as to whether monies paid by way of 'active' bribery (as opposed to the receipt of monies in the offence of 'passive' bribery) could amount to the proceeds of a felony. Professor Wohlers accepted that where a bribee had committed the passive form of the Article 322*septies* offence (which was criminalised in 2006), the proceeds of the bribe were relevant proceeds of a felony. However, he argued that the proceeds of the bribe, in the context of active bribery, were not the proceeds of a felony. They were, he argued, the instrument by which the offence was committed, and he drew attention to the distinction drawn in Swiss law between the spoils of the offence, and the 'instrumentum sceleris'; i.e. the instrument used to commit the crime. This distinction is not drawn in any of the case-law in Switzerland, and Professor Wohlers accepted that he may have misread an FSC decision on which he had relied for his proposition. There is also no academic support for this view, and academic writing (to which he was referred in cross-examination) does not draw the distinction on which he relied, but proceeded on the basis that active bribery would be a relevant predicate offence. Professor Wohlers also agreed that it would be an irrational result for the proceeds of bribery to be criminalised only in 2006, when the offence of active bribery had been introduced in 2000.

3561. I do not consider it likely that the FSC would uphold Professor Wohlers' view. Indeed, I note that the relevant conduct in the *Rio* case, where X was found guilty of money laundering the proceeds of bribes, took place prior to 2006. A simple analysis, which was put to Professor Wohlers in cross-examination, is that the offence is committed when the active briber offers or promises the bribe. When paid, the money can therefore be regarded as the spoils of the relevant offence.

3562. *Attempt to obscure the origin:* the second element of the offence is concerned with attempts to obscure the origin, or frustrate the tracing or forfeiture of, those assets.

3563. In that regard, money laundering is an "abstract risk" offence, meaning that it is sufficient to constitute the offence that the offender has acted to obscure its origin and sought to frustrate the tracing or forfeiture of the criminal proceeds. Accordingly, the attempt does not need to be successful. The offence can therefore be committed even if the asset is recovered.

3564. In terms of what amounts to relevant obfuscation or frustration, this is a factual question. The case-law shows that payments made to foreign bank accounts as part of the ordinary course of a legitimate business will not be held to be money-laundering, even though there is a foreign element involved. However, acts that create distance to the predicate offence are likely to be sufficient, such as paying monies through the accounts of intermediate corporate entities. Established examples include the making of transfers to foreign domiciled companies or offshore accounts.

3565. Article 305*bis* subparagraph (2) refers to serious cases, which qualify as a felony. That will be so where the offender achieved a large turnover or substantial profit through commercial money laundering. However, the examples of serious cases set out in Article 305*bis* (2) (a) – (c) are not exhaustive. A serious case will also be established if very large sums are laundered and/or there are repeated acts involving large sums. Professor Wohlers agreed in cross-examination that, where two or three individuals work together to launder several million euros across multiple years via the use of opaque and varied transactions and on an international scale, those features are all powerful indications that that would be a case of serious generic laundering.

3566. It is necessary to show *mens rea*. For Article 305*bis* the nature of the requisite intent is consistent with that required for an offence under Article 160 SPC (handling stolen goods) and requires the offender to know or assume that: (i) the monies in question are the proceeds of a crime; and (ii) his actions will lead to obfuscation and/or frustration as set out above. Again, *dolus eventualis* is sufficient: that is, where the offender is aware of factual circumstances pointing to the suspicion that monies are the proceeds of serious crime, together with an acceptance of the risk that that is the source of the monies. The offence cannot therefore be committed through simple negligence.

3567. In terms of territorial reach, there was no dispute that, in the context of Article 305*bis* SPC, Swiss criminal law is engaged (pursuant to Articles 3 and 8 SPC) where an alleged bribery offence is at issue and where the unlawful advantage was paid or should have been paid into a bank account in Switzerland.

W10: Corporate tortious liability for the wrongs of others

3568. It was common ground that, under Swiss law, a company will be liable in tort for the acts of a 'governing organ' (*Exekutivorgan, l'organe exécutif*), whether that is a corporate decision-making organ (e.g. its board of directors) or a natural person with responsibility to act on behalf of the company (such as a member of the board of directors). Thus, where a company's governing organ commits a tort, the company will itself be liable to the claimant victim for that tort.

3569. Such liability flows from the provisions of Article 55(2) CC and Article 722 SCO, which provide for a company's liability for the acts of persons authorised to manage or represent it. The test for whether a natural person amounts to a governing organ is based on both formal and substantive criteria. The person may qualify as a formal organ or a

de facto organ (the academic debate as to the potential classification of a third category, that of material organs, is not relevant for present purposes).

3570. The concept of formal organs extends both to persons who are appointed to act on behalf of the company in an official position (such as that of director) and to persons to whom the board of directors has delegated the exercise of its powers (these people being variously classed as formal organs or material organs by commentators).

3571. There was no dispute, as between PIFSS and the Mombelli Defendants, that Mr Mombelli was an organ in relation to the various Mombelli corporate defendants (D27 – D29).

SECTION X: SWISS LAW CLAIMS AGAINST THE MOMBELLI DEFENDANTS (AND OTHERS)

3572. In this section, I set out my conclusions as to what the position would be if, contrary to my conclusion as to applicable law, Swiss law governed the torts of the Mombelli Defendants. I also briefly address the position of other Defendants.

X1: Claim based on Article 158 SPC

3573. The Article 158 offence is an offence which can only be committed by Mr Al Rajaan. As discussed in Section W above, it has 4 elements: Mr Al Rajaan's managerial capacity, duty of care for assets, breach of duty and loss.

3574. I did not understand the Mombelli Defendants ultimately to dispute Mr Al Rajaan's status as a manager for the purposes of that section. Given his position and responsibilities, there can be no sensible argument that he did not qualify.

3575. Mr Al Rajaan plainly had a duty of care for PIFSS' assets, and it is clear (based on my findings in Section N) that he breached that duty. Professor Wohlers agreed in cross-examination that the essence of a manager's duty of care was a duty of loyalty; that loyalty was at the heart of the disloyal management offence; that this required the manager to act in the best interests of his principal, and required the subordination of the manager's personal financial interests to those of the principal. He also agreed that where a manager received a criminal bribe, that must amount to a breach of the duty of loyalty for the purposes of Article 158; that where the manager was subject to foreign law duties, it would be necessary to look at the duties under the relevant foreign law, and whether the breach would amount to a crime under that law; and that where there was a breach of foreign law duties, and that also amounted to criminal bribery or a retrocession offence under the foreign law, that would be a powerful indication that the manager had breached a duty of loyalty under Article 158.

3576. I do not consider that there is any sensible argument that there was neither a duty nor a breach in the present case. Indeed, in Section U of their closing submissions, which set out their case as to why the Mombelli Defendants were not liable, it was not submitted that the first 3 elements of the Article 158 offence were not satisfied. The focus of their argument was the 4th element, loss. They also submitted that any assistance which they provided to Mr Al Rajaan would not result in criminal liability (and hence could not result in any tort on their part), because Mr Mombelli lacked the requisite *mens rea* for an assistant. I start with that latter issue.

Mens rea

3577. In support of their argument that they are not liable as accessories to Mr Al Rajaan's criminal mismanagement, because Mr Mombelli lacked the requisite criminal intention, the Mombelli Defendants relied upon a number of points:

i) Prior to 2014, or alternatively 2006, it was not a criminal offence to pay retrocessions to a manager, so Mr Mombelli cannot have had any criminal intention when he agreed to pay retrocessions to Mr Al Rajaan. Mr Mombelli did not consider he was doing anything criminal, nor should he have because he was not doing anything criminal.

ii) Mr Mombelli understood the retrocessions to be known and approved of at the very highest levels of PIFSS.

iii) Mr Mombelli did not know that Mr Al Rajaan was not disclosing or would not disclose his retrocessions. He did not know that Mr Al Rajaan would conceal the retrocessions, nor did he have any intention to assist any concealment.

iv) Mr Mombelli understood that PIFSS' investment decisions were taken by an investment committee, and therefore did not know that Mr Al Rajaan had a high degree of autonomy in respect of PIFSS' assets.

v) The Mombelli Defendants did not ever intend to cause a loss to PIFSS. Mr Mombelli was motivated by self-interest to recommend profitable investments to PIFSS, as his commissions were paid in part on performance fees.

3578. In the light of my conclusions on the facts, as set out in Section N above, I reject all of these arguments. As discussed in Section W above, the *mens rea* of the accomplice has two components. The accessory must (i) know the essential elements of the perpetrator's harmful criminal act, although without necessarily knowing all the details, and (ii) agree to assist the offender in a criminal act. Since the assistance must be wilful, Article 12 applies – so that *dolus eventualis* is sufficient. Accordingly, it is sufficient for a person to act knowing of the risk of harm and of the commission of a criminal act, but proceeding regardless.

3579. Here, Mr Mombelli knew all the elements of Mr Al Rajaan's harmful criminal act, and wilfully assisted. In particular, he knew that harm was being caused to PIFSS because Mr Al Rajaan's investment decisions were compromised by corruption, and also because monies which could have been rebated to PIFSS were being pocketed by Mr Al Rajaan – and also by the companies associated with Mr Mombelli. At the very least, Mr Mombelli acted knowing the risk of harm and of the commission of a criminal act, and proceeded regardless, so that there is *dolus eventualis*.

3580. I did not understand Mr Brown, in his oral closing submissions, to pursue a point based upon Mr Mombelli's alleged misunderstanding of Swiss law. He made it clear that he was not relying on "any sort of submission about the state of Swiss law in respect of Mr Mombelli's mindset". Accordingly, his written argument about the position under Swiss law in 2014 or 2006 falls away.

3581. In any event, I would reject that argument. Article 158 has been in effect throughout the period that Mr Mombelli was dealing with Mr Al Rajaan. There was nothing in Mr Mombelli's evidence that suggested that he had any understanding that what he was doing was permissible under Swiss law. On the contrary, he understood that the bribery in which he was engaged was prohibited in Switzerland, as it was in many countries.

3582. The other arguments, as to Mr Mombelli's mindset, have already been addressed. He did not believe that the retrocessions had been approved at the very highest levels. He knew that Mr Al Rajaan was not disclosing his retrocessions. He knew that the receipt was secret, which was why he never told anyone at PIFSS about it, and also why he lied to banks and others about what was happening. He also knew that Mr Al Rajaan was the person who was deciding whether to invest, and Mr Mombelli did not understand the investment committee to be significant in the decision-making process.

Loss

3583. The Mombelli Defendants advanced a number of points essentially directed at the issue of whether PIFSS had suffered a loss in consequence of the torts based on Mr Al Rajaan's contravention of Article 158, and Mr Mombelli's assistance in that contravention. In my view, applying principles of Swiss law, PIFSS has very clearly suffered substantial losses, albeit these are not computed in exactly the same way as under Kuwaiti law. I consider that loss can be approached by taking the two routes identified in the Swiss case law. Each produces a very substantial claim against Mr Mombelli and his companies.

3584. First, there is in my view clearly a loss to PIFSS caused by Mr Al Rajaan's failure to disclose the secret commissions that he was receiving, leading to PIFSS being deprived of its entitlement to require him to account for those commissions. Mr Mombelli assisted Mr Al Rajaan to receive those commissions, knowing that there would be no disclosure to PIFSS. This route would give PIFSS a good claim that it has suffered loss in the sum of the commissions which Mr Al Rajaan actually received, and which should have been disclosed: USD 61,640,497. Professor Wohlers agreed that, in a case of non-disclosure of retrocessions, there was a natural presumption that the loss would be the amount received. The resulting claim is against both Mr Al Rajaan and Mr Mombelli on the basis of joint and several liability, and against Mr Mombelli's companies who incur liability because he was their organ.

3585. I consider that PIFSS would also have a good claim to the additional monies (USD 26.6 million) which were not actually paid to Mr Al Rajaan, but which he had agreed with Mr Mombelli that he would receive. I consider that Mr Al Rajaan's disclosure to PIFSS, which forms the basis of this route to loss, should extend not only to the monies that Mr Al Rajaan actually received, but also to other monies which he had agreed to receive from the briber.

3586. I consider that this approach to loss is in accordance with the approach taken in the 2018 wealth management case, and the *Hotels* cases discussed in Section W above. In my view, those cases set out the principles applicable to the approach to loss in the context of the wrongdoing of Mr Al Rajaan and those who assisted him. I see no plausible argument as to why Mr Al Rajaan should have been under no duty to disclose his retrocessions to PIFSS. Indeed, his obligations to PIFSS are governed by Kuwaiti law, and (as both Mr Ritchie and Mr Leslie argued) the application of Article 158 in the context of a foreign official does require consideration of the duties owed under the applicable law of the relationship between the manager and the person who employs him. Under Kuwaiti law, I do not see that there is any basis for saying that there is no duty of disclosure. Furthermore, as discussed in Section B, the KPPL requires repayment by the public official of benefits received in consequence of profiteering. Thus, a decision that there is loss in the amount of the benefits, and that there should be accounting for that loss, is in accordance with the approach of both Swiss law and Kuwaiti law.

3587. I do not consider that the FIFA case, heavily relied upon by Mr Brown, supports the proposition that there is, in the case of Mr Al Rajaan, no duty to disclose and therefore account. The court in that case distinguished cases involving retrocessions, which is the case with which I am concerned. There is nothing to suggest any disagreement with the *Hotels* line of cases, and these were cited in the judgment. That line of cases is in my

view directly applicable here: the corrupt manager in the *Hotels* case received bribes which he was never going to disclose or hand over to his employer, and both he and the briber were held to have caused loss by the manager's breach of Article 158 and the briber's assistance. Also, the critical point in FIFA appears to have been that the briber would never have been willing to give the benefit of the bribes to FIFA itself. One can understand that at least in the context of allowing Valcke to use a villa and to receive back a deposit that he had paid. In the present case, however, as discussed below, Mr Mombelli would – in an honest world – have given PIFSS rebates in the form of the monies that were given to Mr Al Rajaan. Furthermore, as Mr Leslie submitted in his oral closing, there is in the present case a clear and very direct link between the investment contracts entered into by PIFSS and the bribes paid to Mr Al Rajaan: there was an agreement, prior to conclusion of the investment contracts, to pay bribes so that they would be concluded. That link did not exist, or may not have existed, in the FIFA case. In the present case, as in the 2024 *Hotels* case, "from the outset, the principle of the payment of commission was, at the very least, an implicit condition of the award of the works": i.e. the engagement of the Mombelli Defendants in relation to PIFSS' investment contracts.

3588. I am not persuaded, however, that PIFSS' claim for loss under Swiss law, based on the duty to disclose, would necessarily extend to the slice of commissions which Mr Mombelli (and the companies associated with him) were entitled to retain under their corrupt arrangements with Mr Al Rajaan. The Swiss law cases, to which I was referred, seem to focus on the disclosure obligations of the corrupt manager in respect of the money that he was receiving, rather than disclosure of the profits being made by the briber.

3589. However, there is a potential claim for additional losses, over and above the claim based on a failure to account, if a claimant can show that the bribery (here of Mr Al Rajaan) resulted in transactional disadvantage to PIFSS: in other words, where his failure to act in the principal's best interests results in the manager's failure to secure a better deal for his principal. The Swiss case law shows that this can arise where a manager has diverted assets to himself, which might otherwise have gone to the principal, or where the principal could have paid a lower price if there had been no bribe, or in other circumstances. Dr Weibel said, sensibly, that in a case of bribery, the claim for loss may go well beyond the amounts received as bribes: i.e. far beyond the simple receipt and non-disclosure of retrocessions.

3590. Here, I consider that PIFSS has demonstrated considerable transactional disadvantage as a result of the conduct of Mr Al Rajaan and Mr Mombelli. The resulting loss includes that which is established under the first route (disclosure and accounting) described above. Had Mr Al Rajaan and Mr Mombelli acted honestly, the commissions received by the companies associated with Mr Mombelli would have been rebated, at least in very substantial part, to PIFSS. As discussed in Section N above, Mr Mombelli in the correspondence with bankers, and indeed in his evidence, acknowledged that rebates to investors could be made. That is consistent with the evidence of investment experts which I heard, and is in any event common sense. The Director General of a significant client such as PIFSS would be in a very strong position to require a person in the position of Mr Mombelli to rebate commissions to the investor, in return for significant business being placed via his agency. Indeed, the power which Mr Al Rajaan had is

reflected in the fact that he required Mr Mombelli to give up the lion's share of his earnings if he was to obtain PIFSS' business.

3591. Furthermore, there is evidence, referred to in Section N, that once Mr Mombelli had set up his own business, he was willing to give full rebates of commissions to investors and work for a negotiated fee.

3592. Accordingly, in an honest world, Mr Mombelli would never have received remuneration of around USD 37.5 million (excluding the USD 26.6 million which was not paid over to Mr Al Rajaan). The bulk of that money, and indeed all of the money which was paid or notionally "owed" to Mr Al Rajaan (i.e. including the USD 26.6 million), would have been paid to PIFSS by way of rebates.

3593. There is a question of how much would have been retained by the companies associated with Mr Mombelli in an honest world. Mr Mombelli accepted that a fee of USD 500,000 in 2008 onwards would have been acceptable. I do not myself think that, in an honest world, Mr Mombelli would have been receiving that kind of money in 2008, not least because by that time there were clearly direct relationships between PIFSS and the various fund managers, and there was investment expert evidence which indicated that an intermediary would gradually be eased out of the picture as a direct relationship developed.

3594. Against this background, if I had been considering the claim under Swiss law, I would reduce PIFSS' headline claim of USD 125,659,151 by a maximum of USD 10 million to account for any earnings that the Mombelli companies might have legitimately earned in an honest world. The resulting claim would, in round terms, be USD 116 million.

Profit on the investments made

3595. It was submitted that, as a matter of Swiss law, PIFSS had no claim in respect of loss because, overall, the Mombelli Scheme investments were profitable. The Mombelli Defendants calculated that, overall, PIFSS had made USD 1.087 billion over the years.

3596. I do not consider that this provides an answer to the claim. As discussed, Swiss civil law applies the "difference" hypothesis, requiring consideration of the extent to which a person is worse off as a result of the tortious conduct, in comparison to the position that they would have been in if the tort had not been committed. This can include both out of pocket losses suffered by the victim, and also gains of which the victim has been deprived as a result of the tortious conduct.

3597. Here, the profit made on PIFSS' investment did not diminish PIFSS' loss consequent upon the tortious wrongdoing relating to the secret commissions. As Professor Fountoulakis explained, a benefit received will only be set off against a loss if they are congruent. That is not the case here. In short, PIFSS is entitled to contend that it was worse off as a result of the tortious wrongdoing, notwithstanding the profits on its investments. Had the tortious conduct not occurred, PIFSS would have had both the investment profit, and the vast bulk of the money – at least the USD 116 million set out above – which was obtained for the benefit of Mr Al Rajaan and the companies associated with Mr Mombelli.

X2: Bribery and Money laundering

3598. In view of my conclusions on the torts based on the contravention of Article 158, and the assistance of the Mombelli Defendants in connection therewith, it is not necessary to consider whether the tortious claim could also be based on contravention of Article 322*septies* (bribery of a foreign official), and Article 305*bis* (money laundering). PIFSS does not need those provisions in order to succeed. Suffice it to say that, applying the principles of Swiss law considered in Section W above, and the facts as I have found them in Section N above, those claims would have succeeded – albeit that the quantum of the claim based on bribery would be lower because Article 322*septies* only applied to acts after 1 May 2000.

X3: Contributory Fault

3599. The Mombelli Defendants contended that a reduction in PIFSS' claim should be made because of PIFSS' contributory fault. The basic principles of Swiss law were not in dispute. The court has an open discretion whether to reduce damages and in what percentage. It is seeking to ensure a just, balanced and fair result in each specific case: there are no fixed rules. It will look at the wrong done by the defendant and the conduct of the claimant and make a judgment as to the relative impact of the two, taking into account both the nature of the faults and their causal consequences. There is no hard-edged rule to the effect that a Swiss court can never reduce damages for contributory fault in cases involving intentional wrongdoing.

3600. The Mombelli Defendants argue for a reduction in damages based upon the absence of sound governance systems at PIFSS, and also upon the failure of PIFSS to take steps to protect its position after allegations of corruption on the part of Mr Al Rajaan emerged in the 2000s, gathering steam over time.

3601. Even assuming that PIFSS were to be regarded as being at fault in these respects, it would in my view be entirely inappropriate to reduce the damages for these or any other "contributory fault" reasons. The Mombelli Defendants deliberately participated in a most serious criminal enterprise, with Mr Al Rajaan, over many years. They had plenty of opportunity to tell PIFSS, and others, what was happening, but did not do so because they wished to benefit financially. Their misconduct is the overwhelming cause of the loss suffered by PIFSS, and the damages to which PIFSS is entitled. A reduction in damages would not produce a just, balanced and fair result. The Mombelli Defendants' argument that damages should be reduced because PIFSS was negligent in failing to stop their dishonest criminal conduct, committed over many years, is unattractive, to say the least.

X4: Limitation

3602. PIFSS' claim is a civil claim, but Article 60 (2) SCO has the effect of bringing into play the criminal limitation period which becomes applicable to the civil claim. The applicable criminal limitation periods have increased over the years. In relation to felonies, which is the criminal conduct here, the applicable periods were: prior to 2002, 10 years; from 2002 onwards, 15 years.

3603. The criminal limitation period begins on the day on which the offender committed the offence. That is subject to Article 98 (b) and 98 (c) of the SPC. Article 98 (b) is the

critical provision here. This provides that the limitation period starts "on the day on which the final act was carried out if the offence consists of a series of acts carried out at different times".

3604. I was referred to a number of cases where the Swiss courts had considered the approach to Article 98 (b). The courts refer in that context to the concept of a "natural unity of action". A classic definition is that "there is a natural unity of actions when the punishable acts, i.e. the different acts to which it relates, which are in themselves distinct, proceed from a single decision, that is to say, are part of the same intention, and appear objectively as events forming a whole because of their close relationship in time and space".

3605. This quotation is taken from a recent judgment of the FSC, in a corruption case involving the alleged payment of bribes to the President of Guinea, referred to in argument as the "*Steinmetz*" case: DFSC 6B_655/2023 (judgment of 24 March 2025). The case involved a jurisdictional challenge, but the lower court and the FSC both applied the approach in the limitation cases.

3606. In *Steinmetz*, the acts of corruption had taken place over a 7-year period, but the court held that there was a natural unity of action:

> "The Appellant's criticisms, which refer to the definition of the natural unity of actions, misunderstand the very structure of the offence of bribery of foreign public officials. Thus, the different stages during which the briber formulates his offer or promise (meetings, negotiations, promises, etc.) are part of a natural unity of actions; similarly, the granting of the advantage may be divided into different acts (e.g. in several transfers) which also form a natural unit of shares (DYNES, Territorialité, n° 1188). Moreover, the offer and the promise, and then the granting of the undue advantage, are understood as two successive phases of one and the same process of corruption criminalized by Art. 322septies SCC, and these two aspects in turn form a typical unit of actions (DYNES, Territorialité, n° 1189). A legal unit of actions is used when the conduct defined by the norm presupposes, in fact or typically, the commission of separate acts such as robbery (Art. 140 SCC) or when the norm defines conduct relating to a repeated activity or a process, for example the offence of mismanagement (Art. 165 SCC) or money laundering (Art. 305bis SCC) (**ATF 132 IV 49** at 3.1.1.3)
>
> In the present case, all the facts alleged against the Appellant must be understood as forming a (natural and typical) unit of actions. B.B.___ was from the beginning the desire to obtain exploitation rights on blocks 1 and 2 of V.___. To do this, it has contacted local intermediaries and partners and thus established a network of relationships. She has set up various companies (B.B1.___, N1.___). It promised to pay a large sum to F1.F___, a promise that was fulfilled by the agreement of 20 February 2006; subsequent agreements concluded with F1.F___ or his

> company give concrete expression to the promise to promote F1.F.___ made to the President E1.___ during his lifetime (judgment under appeal, p. 318). All these acts were the result of a single decision, namely that of bribing President E1.___ in order to obtain the coveted mining rights, and form a natural unit of actions. These acts were certainly spread over several years. The spatio-temporal aspects of the natural unity of actions as developed by the case law on prescription must, however, be put into perspective, the emphasis having to be placed on the notion of the whole, given the characteristics of international corruption, which takes place in several territories and often involves the establishment of a network of relations (BERTRAND PERRIN, La répression de la corruption d'agents publics étrangers en droit pénal suisse, Basel 2008, p. 467). In a second phase, after the death of President E1.___, the contracts were concretised by the execution of payments made between 2009 and 2012, corresponding to the grant of the undue advantage (judgment under appeal, p. 319). The offer and the promise, on the one hand, and the granting of the undue advantage, on the other, form two phases of one and the same corrupt process and constitute a (typical) unit of actions. Based on the legal definition, the typical unit of actions does not pose a time requirement; the fact that the last payments took place almost seven years after the first negotiations is therefore not decisive.
>
> In the end, the Cantonal Court was therefore right to hold that the acts of which the Appellant and his co-defendants were accused had to be considered as a whole and that the acts perpetrated by E.___ on Swiss territory alone were sufficient to establish the jurisdiction of the Swiss authorities with respect to the entire complex of facts."

3607. Another recent corruption case, decided by the Federal Criminal Court, Criminal Division, concerned Trafigura: SK.2023.49, judgment of 31 January 2025. The judgment was published before the FSC's decision in *Steinmetz*, and so the court was looking at the lower court's decision in that case – a decision that was upheld by the FSC a few weeks later. An issue arose as to whether the criminal limitation period had expired. The court applied the concept of unity of action, and held that it had not. In so doing, the court made observations as to the nature of a corruption case, holding that limitation ran from the date of the last corrupt payment.

> "1.2.6 The offence of corruption may consist of several acts. From the point of view of criminal prescription, the consecutive phases of corruption, i.e., in the case of passive corruption, between the solicitation or action to obtain a promise and the acceptance, can be considered to constitute a single legal unit of actions. In such a case, it is the last criminal act that marks the start of the limitation period (decision of the Complaints Division of the Federal Criminal Court RR.2013.236-246 of 2

May 2014, consid. 3.5.6; judgment of the Criminal Division of the Federal Criminal Court SK.2019.61 of 1July 2021, consid. 5.2; PERRIN, La répression, p. 465; JOSITSCH, Das Schweizerische Korruptionsstrafrecht, 2004, p. 421 ff.).

The singular wording of Articles 322ter to 322^{novies} of the Swiss Criminal Code ("[...] obtains or accepts an undue advantage [...] for the performance or omission of an act ...") suggests that the legislator had in mind the granting of a single advantage in return for a single act. However, in the case of the granting of several advantages in return for several acts, which is common in practice, if the advantages granted pursue the same purpose, it is reasonable to consider that they form part of a single act.

In addition, in cases of international corruption, payments are often made through an intermediary, which necessarily lengthens the process of making corrupt payments. This is all the more true since the intermediary must necessarily allow a certain amount of time to elapse before transferring the money received, in order to avoid attracting attention by repeating credit transactions from a specific account, that of the corruptor, followed by immediate debits to another specific account, that of the corrupted party.

1.2.7 It may also be considered that the acts constituting the offence of bribery of foreign public officials form a natural unit of action, provided that they can be linked to a common decision and that there is a close connection between them in terms of time and place (judgment of the Criminal Division of the Federal Criminal Court SK.2020.8 of 6 July 2020, consid. III). In the same vein, legal doctrine considers that corruption generally aims to create a lasting economic link, which can give rise to chains of services and considerations; that, in these circumstances, considering them in isolation would risk segmenting the whole series of events and would result in a loss of sight of the overall context (PIETH, in: Baslerkommentar - Strafrecht I, 4 e ed. 2019 n. 53 s.ad art. 322ter CP). Thus, corrupt acts separated by a year or two in time should constitute a whole from a temporal point of view (PERRIN, La répression, p. 467).

In a recent cantonal ruling, it was held that a close temporal link still exists when acts of corruption took place over a period of seven years (ruling of the Court of Justice of the Canton of Geneva AARP/116/2023 of 4 April 2023, consid. 2.1.6). The Federal Court accepted that the conditions for natural unity of action were met in a case of unfair management lasting nine years (Federal Court ruling 6B_310/2014 and 6B_311/2014 of 23 November 2015, consid. 4.5; on the issue of unity of action and the offence of corruption, see also TRECHSEL/PIETH, op. cit., n. 8f and 54 ad art. 322ter CP; CORBOZ, Les infractions de droit suisse, vol. II, 3 e ed., n. 16 ad art. 322^{quater} CP)."

3608. I consider that these cases provide clear guidance that the corruption in the present case does involve a natural unity of action. A corrupt agreement was made at the start, in 1995, with the parties envisaging that investment contracts would be entered into from time to time. Thereafter investments and corrupt payments were made in a seamless way until 2016. Whilst there were some changes, in that Mr Mombelli left Gesfinance, and started up on his own, using different companies, this is not a significant point. As the FSC recognised in *Steinmetz*, corrupt arrangements may well involve different companies being used.

3609. Accordingly, since the 15-year criminal limitation period did not begin until 2016 (or thereabouts), there is no limitation defence.

X5: Other Defendants

3610. If Swiss law governed the torts of Mr Al Rajaan and Mr Nasrallah, they would be in no better position than Mr Mombelli. The same applies to Mr Guerin. However, since none of these parties (or D1) addressed any detailed arguments directed towards their own position under Swiss law, and since Kuwaiti law governs their liability in any event, it is unnecessary to discuss their positions in detail.

SECTION Y: THE SECTION 423 CLAIM

3611. A separate claim (CL-2021-000597) is advanced by PIFSS against D1, D2 and AUB Trustees (Guernsey) Ltd ("AUB") in relation to transfers made by Mr Al Rajaan into a Guernsey trust called the Myrose Trust. The Myrose Trust is a Guernsey trust settled in September 2012, a few months after the beginning of the Swiss investigation into Mr Al Rajaan and the closure of Swiss bank accounts as discussed in earlier sections.

3612. Myrose Trust holds the issued share capital of three companies, Myrose Investments Ltd, Prelude Property Ltd and Rampton Ltd. PIFSS' claim is based on section 423 of the Insolvency Act 1986 in respect of assets gifted to AUB to be held on terms of the Myrose Trust. PIFSS alleges that the transfer of assets was for the purpose of putting assets beyond the reach of PIFSS.

3613. The order made at the 4th Case Management Conference in the main action provided that PIFSS' section 423 claim should be jointly case managed with the main claim. An order dated 23 January 2024 provided for the trial of preliminary issues in the section 423 claim as part of the trial of the main proceedings. These were issues which were identical, or at least substantially identical, with issues in the main action.

3614. AUB, through leading and junior counsel, made only brief written submissions in opening and closing, recognising that the determination of the issues in the main action would in practice decide the preliminary issues in the claim against AUB. AUB therefore did not address any substantive argument in relation to any of the issues. AUB's main concern was that the court should not make findings which might inadvertently affect the separate issues, relevant to the s 423 claim, which were to be determined in due course: for example, as to the purpose of the transfers into the Myrose Trust. I shall avoid doing that.

3615. I identify in italics the preliminary issues, and my answer (which is underlined) and brief reasons in the light of the findings in the main claim.

3616. *Validity of the proceedings: Have the proceedings been validly brought or authorised by PIFSS?* Yes. D1/ D2 raised an issue as to the validity of the commencement of the proceedings, but this had been abandoned by the start of the trial.

3617. *Abuse of Process? Is the claim advanced an abuse of process as a matter of English law on the grounds of political persecution by Mr Al Rajaan by the State of Kuwait?* No. There is no evidence that the claim against Mr Al Rajaan, which is well-founded for the reasons set out in detail above, was motivated by political persecution. On the contrary, PIFSS has a legitimate claim and it cannot rationally be an abuse of process for PIFSS to pursue it.

3618. *Justiciability. Is the s423 Claim justiciable in the English Court or is it an assertion of foreign sovereign authority and/or an attempt to enforce directly or indirectly the penal and/or public law of Kuwait and/or seeks to enforce foreign governmental interests and/or sovereign rights and accordingly non-justiciable?* The claim is justiciable. The claim in the main proceedings is justiciable for the reasons given in Section S. It must follow that the present claim is also justiciable.

3619. *Liability of D1 and Ms Al Wazzan to PIFSS: To what extent (if at all) are D1 and Ms Al Wazzan liable to PIFSS as alleged in the main claim?* This issue is determined in PIFSS' favour by reason of the decision in the main claim.

3620. *Concealment and Asset-Protection: Did Mr Al Rajaan conceal and seek to protect his assets as set out in Section C of the s 423 Claim POC by reference to allegations made in the main claim?* Yes. Sections G to N above contain numerous findings concerning Mr Al Rajaan's concealment of assets, and his conduct as there described was clearly directed to the protection of such assets.

OVERALL CONCLUSION

3621. For the reasons given in Sections A-U above, PIFSS' claim for substantial compensation, or for related relief, succeeds against:

i) D1: the estate of Mr Al Rajaan.

ii) Ms Al Wazzan (in respect of the claim for declaratory relief).

iii) D7: Mr Nasrallah.

iv) D17 and D18: MIL and MIAG.

v) D20: Mr Massad.

vi) D21: Mr El Ghazzi.

vii) D26-29: Mr Mombelli and the other Mombelli Defendants.

viii) D31: Mr Guerin.

ix) D39-40: Mr Ely Michel Ruimy and AFL.

x) D41: Pensée.

3622. No relief is claimed against D42-45 (Mr Al Rajaan's heirs). However, they are bound by the result of and determinations made in the present proceedings, in particular as to the liability of Mr Al Rajaan and now his estate.

APPENDIX

Glossary of Principal Abbreviations

Abbreviation	Definition
10RAPOC	10th Re-Amended Particulars of Claim
ADE	Ayant Droit Economique, the ultimate beneficial owner or UBO
AGM	Annual General Meeting
AML	Anti-Money Laundering
ATF	Arrets du Tribunal Federal (Swiss case reference)
AUM	Assets Under Management
BGE	Bundesgerichtsentscheide (Swiss case reference)
BVI	British Virgin Islands
CC	Swiss Civil Code
CIP	Customer Information Profile
CJJA	Civil Jurisdiction and Judgments Act 1982
CPECs	Convertible Preferred Equity Certificates
CPS	(UK) Crown Prosecution Service
CRS	Common Reporting Standard
CSL	Civil Service Law No 15 of 1979
DDG	Deputy Director General of PIFSS
DFSA	Dubai Financial Services Authority
DFSC	Decision of the [Swiss] Federal Supreme Court
DPP	(UK) Director of Public Prosecutions
Dx	Defendant number x, as per the list on the title page
FEL	Front End Load commission
FNP	"Factures non parvenues" or "invoice not received"
FSC	(Swiss) Federal Supreme Court
GFC	The 2008 Global Financial Crisis
HIC	Higher Investment Committee at PIFSS
IFAs	Independent Financial Advisors
IIC	Internal Investment Committee at PIFSS
JEM	Joint Expert Memorandum
KAG	Kuwaiti Office of Attorney-General
KCC	Kuwaiti Civil Code
KCC	Kuwaiti Court of Cassation (in case citations)
KCPL	Kuwaiti Criminal Procedures and Trial Law No 17 of 1960
KPC	Kuwaiti Penal Code
KPPL	Kuwaiti Public Property Law
KWD	Kuwaiti Dinars
KYC	Know Your Client
MLA	Mutual Legal Assistance
MLRO	Money Laundering Reporting Officer
MoF	Minister of Finance in Kuwait
NAV	Net Asset Value
OAG	Swiss Office of Attorney General
PECs	Preferred Equity Certificates
PEP	Politically Exposed Person
PIFSS	Public Institution for Social Security

PILA	Private International Law (Miscellaneous Provisions) Act 1995
PPM	Private Placement Memorandum
Rome II	Rome II Regulation (Regulation (EC) 864/2007)
SAB	State Audit Board in Kuwait
SCO	Swiss Code of Obligations
Sheikh Abdullah	Sheikh Abdullah Al Jaber Al Sabah, DDG of PIFSS from 2002
SMR	Senior Management Review, carried out by Man in 2012 and 2013
Social Security Law	Social Security Law, No. 61 of 1976 of Kuwait
SPC	Swiss Penal Code
STR	Suspicious Transaction Report
UBO	Ultimate Beneficial Owner
WFO	Worldwide Freezing Order

Glossary of Principal Entities

Abbreviation	Definition
Abraaj	Abraaj Capital Ltd, subsequently Abraaj Investment Management Ltd
Aeriance	The Aeriance group
Aerium	The Aerium group or companies within the group
Aerium IV	Aerium Fairfield Real Estate Fund, later Aerium IV
Aerium Opportunity I	Aerium Opportunities Fund, formerly LDV Opportunity I
Albait	Albait SA
Antheya	Fondation Antheya
AP1	Aerium Properties I
AP2	Aerium Properties II
Atena	Atena Management Ltd (BVI)
Atlas Japan/Idera	Atlas Japan Partners Ltd, subsequently called Idera
ATU	Allgemeines Treuunternehmen
AUB	AUB Trustees (Guernsey) Ltd
Bainbridge Asset Management SARL	Venture manager of Bainbridge I
Bainbridge Capital	Bainbridge Capital SARL
Bainbridge I	Bainbridge Capital Retail Properties Fund
Bainbridge II	Bainbridge II fund
Balboa	Balboa Trust
Banque Mirabaud	Mirabaud & Cie SA
Banque Pictet/Pictet	Banque Pictet & Cie and companies in the Pictet group
BDO	BDO Stoy Hayward LLP
BEC	Banque Edouard Constant SA (previously BSS)
Benton	Benton Consultancy Ltd, a Zetland company
Bernabeu	Bernabeu Invests Ltd
Berney	Berney Associes
Berwyn	Berwyn International Ltd/Berwyn Management Ltd, a Zetland company
Blue Nile	Blue Nile Trading SA (Bahamas)
BNP	Banque Nationale de Paris which merged with Paribas in 2000 to become BNP Paribas
Bordertown	Bordertown Trader Ltd
Brahma	Brahma Investments Ltd.
Breakers	Breakers Management, a Zetland company
BSS	Banque Scandinave en Suisse
Caradoc	Caradoc Consulting Ltd, a Zetland company
Chulani	Chulani Investments Inc
Citco	Citco Fund Services
Creative Advisors	Creative Advisors Ltd
Dalton	Dalton Financial Group Ltd, a Zetland company
Dalmeny	Dalmeny Real Estate Inc, a Zetland company
Delfin	Delfin Capital Management Ltd (BVI)
Deltec	Deltec Bank and Trust

Domini	Domini Trading SA
Dryden	Dryden Worldwide SA
Dugamo	Dugamo Foundation
Endeavor Asset Management	Endeavor Asset Management Limited (Bahamas)
Evelyn	Evelyn Assets SA
FEM	FEM International Ltd (Bahamas)
FGG	Fairfield Greenwich Group
Fyne	Fyne Properties Ltd
Galmir	Galmir Advisory Services Ltd
Garibaldi	Garibaldi Management Investment Corp, a Zetland company
Gesfinance	Gesfinance S.A.
Glenin	Glenin International Ltd
Glenn Arrow I	Glenn Arrow I fund
Glenn Arrow II	Glenn Arrow II fund
Gold Coaster	Gold Coaster Holdings Ltd, a Zetland company
Golgen	Golgen Property SA
Green Sea	Green Sea Ltd (Bahamas)
Hillows	Hillows Management Real Estate Corp, a Zetland company
Hiram	Hiram Holdings Ltd
Hogara	Hogara Investments Ltd
ICS	ICS Investment Consulting Services SA
Intermac	Intermac Group Inc
Jesting	Jesting Advisory Services SA
KIIC	Kuwait International Investment Company
KIO	Kuwait Investment Office
LDV	Leonard de Vinci group
LDV Management Bainbridge Holding S.C.A.	LDV Management Bainbridge Holding S.C.A.
LDV Management SARL	Owner and manager of Bainbridge Asset Management SARL
Lipuno	Lipuno Foundation
Lulienne	Lulienne Ltd
Madrina	Madrina Corporation Inc
Man	The Man group or companies within the group
Meigerhorn I	Meigerhorn I fund
Meigerhorn II	Meigerhorn II fund
Methis	Methis Management Ltd
MF1 etc.	PIFSS' investments in Man funds
MIAG	Man Investments AG, D18, originally ED & F Man Management AG
Miakunal	Miakunal SA
MIL	Man Investments Ltd
MIMEL	Man Investments Middle East Limited
Moccak	Moccak Management Ltd, a Zetland company
Monaro	Monaro Properties Development Enterprise Inc, a Zetland company
Moolwurf	Moolwurf Investments Ltd

Morel	Morel Management Ltd
New Market	New Market Properties Inc
OECD	Organisation for Economic Co-operation and Development
Orkina	Orkina Foundation
Overton	Overton Group SA
Ozak	Ozak Services Inc
Paribas	Banque Paribas which merged with BNP in 2000 to become BNP Paribas
Pensée	The Pensee Foundation
Phoenix	Phoenix International Consultant SARL
PIB	Phoenix International Brokerage SAL
Pictet Bahamas	Pictet Bank and Trust Ltd, part of the Pictet group
Pictet Europe	Pictet & Cie (Europe) SA, part of the Pictet group
Polunin	Polunin Capital Partners Ltd
QE	Quinn Emanuel Urquhart & Sullivan LLP
Quadra	Quadra Properties SA, a company associated with Mr Amouzegar and/or Mr Khosrovani
QWM	Quadra, Wentworth and Moccak
RMF	Business acquired by Man in 2002
Scopeset	Scopeset Ltd
Sentry	Fairfield Greenwich Group's Sentry fund
Silvery Bay	Silvery Bay Investments Ltd
Sintesi	Sintesi Ltd.
Spiranese	Spiranese Capital Ltd
Suncoast	Suncoast Finance SA
Tawny	Tawny Estate Ltd
Tensyr	Tensyr Ltd
Thaxton	Thaxton Foundation
Treadmore	Treadmore Global Corporation Ltd, a Zetland company
UBP	Union Bancaire Privée
Wafra	Wafra Investment Advisory Group, Inc/later Wafra Inc
Wentworth	Wentworth Development Corp, a Zetland company
Winston	Winston Advisory Group Ltd
Wynacre	Wynacre Ltd
Zetland	Zetland Corporate Services Ltd