Neutral Citation Number: [2012] EWHC 2254 (Admin)

Case No: (I) CO/4236/2011 (II) CO/4468/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2012

Before:

PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
MR JUSTICE SILBER

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I. BETWEEN	**R (Rawlinson & Hunter Trustees and others)**	**Claimant**
	- and -	
	(1)Central Criminal Court	**Defendant**
	(2)Director of the Serious Fraud Office	
	-and-	
	Vincent Tchenguiz	**Interested Party**
	AND	
II. BETWEEN		
	R (Robert Tchenguiz and R20 Limited)	**Claimant**
	and	
	(1) Director of the Serious Fraud Office	**Defendant**
	(2) Commissioner of the City of London Police	
	(3) Central Criminal Court	

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Hugo Keith QC and Jonathan Glasson (instructed by **Stephenson Harwood**) for the **Claimant Rawlinson & Hunter**
Lord Goldsmith QC, Ben Emmerson QC and Jonathan Barnard (instructed by **Wilmer Hale**) for the **Interested Party (Vincent Tchenguiz)**
Lord Macdonald of River Glaven QC, Alex Bailin QC and Clare Sibson (instructed by **BCL Burton Copeland**) for the **Claimants Robert Tchenguiz and R20**
James Eadie QC, Mark Ellison QC Allison Clare and Ben Watson for **the Serious Fraud Office**
Fiona Barton QC for **the Commissioner of the City of London Police**

Hearing dates: 22, 23 and 24 May 2012

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Approved Judgment

The President of the Queen's Bench Division:

This is the judgment of the court.

Introduction

1. In these two sets of proceedings two well-known businessmen, Robert Tchenguiz (RT) and Vincent Tchenguiz (VT) and the companies and trusts through which their businesses are carried on, seek to set aside search warrants issued under s.2(4) of the Criminal Justice Act 1987 by His Honour Judge Paul Worsley QC at the Central Criminal Court. They do so on the basis that the warrants were procured by the misrepresentation and non-disclosure of the Serious Fraud Office in the written presentation made to the judge known as the Information and in the oral evidence of the case manager. Challenges are also made to the manner in which the warrants were executed and to the arrest of RT.

2. It is first necessary to set out a chronological account of the factual background that led to the issue of the warrants, the search of the premises and the arrest of RT and VT.

3. The events all arose from the extensive lending by Kaupthing Hf (Kaupthing) to RT and a single loan to VT. Kaupthing was then the largest Icelandic bank. It collapsed on 8/9 October 2008 at the height of the then worldwide financial crisis.

4. In the account of the factual background we refer to Grant Thornton's reports. Grant Thornton and Weil, Gotshal and Manges were appointed on the collapse of Kaupthing by the group responsible for its affairs known as the Resolution Committee to seek to recover funds for the creditors. Their reports formed an important basis for the SFO's investigation, as we shall explain. The SFO also had a very substantial amount of other documentation; for example another Administrator provided 203,538 electronic files and third party documentation included 4,096 electronic files from Goldman Sachs and 3,031 such files of Deutsche Bank.

I THE FACTUAL BACKGROUND

(i) RT and the Tchenguiz Discretionary Trust (TDT).

5. Like many very wealthy businessmen, RT operated the businesses in which he had an interest through a complex structure based in an offshore location for fiscal reasons. At its centre from 26 March 2007 was the Tchenguiz Discretionary Trust (TDT) of which RT and his family were the principal beneficiaries.

6. As is not uncommon, a professional trustee company was chosen to act as the trustees of the TDT. The company chosen was Investec Trust (Guernsey) Ltd and its associated company Bayeux Trustees Ltd (to whom we will jointly refer as Investec), part of the large and well-known Investec group of companies, listed on the London and Johannesburg Stock Exchanges. Investec remained the trustees until the summer of 2010 when the role of the trustees was transferred to Rawlinson & Hunter SA (Rawlinson & Hunter), another international company specialising in the provision of private client services to the very wealthy. Rawlinson & Hunter are the claimants in

the first of these judicial review proceedings. We return to the role of Investec at paragraph 107 below.

7. Again, as is common in this sort of arrangement, although the lawyers and other advisors in relation to complex transactions would be retained by the trustees, the trustees would need to know how the investments and transactions by the TDT were to be made in the interests of RT and his family. R20 Limited (R20), the second claimant in the second judicial review proceedings is a UK company owned by the TDT and based in London of which RT was a Director. R20 was the entity through which the trustees were instructed as to how RT and the beneficiaries wanted the investments made and which transactions should be effected. It is important to point out that although the trustees were not bound to do what they were told to do by R20, they would almost always do so. For fiscal and other reasons, such structures are premised on the understanding that trustees make the ultimate decision, that they are not bound to do what they are told to do by the beneficiaries and, of paramount importance for these proceedings, the trustees are responsible for satisfying themselves as to the lawfulness of all transactions they enter into.

8. Thus instructions by the beneficiaries to the trustees are for these reasons usually termed "advice" even though the instructions are almost invariably acted upon. Trustees of independent stature are normally scrupulous to ensure that the lawyers retained on complex transactions formally advise them. A consultancy agreement was made between Investec and R20 in October 2007 which formally set out these arrangements for such "advice".

9. Again, as is common, the TDT used offshore companies, including companies or other entities known as Special Purpose Vehicles (SPV), for individual transactions. Principal amongst the companies from December 2007 onwards was a group of companies controlled by Oscatello Investments Ltd (Oscatello), a British Virgin Islands (BVI) company, owned by the trustees of the TDT.

(ii) VT and the Tchenguiz Family Trust (TFT)

10. In a similar manner, VT and his family were the beneficiaries of the Tchenguiz Family Trust (TFT). This had been established by the family sometime earlier. The trustees were Investec and a transfer was made to Rawlinson & Hunter in the same manner as occurred for the TDT. In a manner similar to R20, the second claimant in the first action, Vincos Ltd, which traded as Consensus Business Group (Consensus), provided "advice" to the TFT. The other claimants in the first judicial review proceedings were companies owned or controlled by TFT.

(iii) Kaupthing Bank and its relations with RT

11. Kaupthing, at the time the largest bank in Iceland, was one of the Icelandic banks that made significant loans for the purposes of the acquisition of assets outside Iceland to companies and individuals who had little connection with Iceland. It had subsidiaries in Luxembourg and London, including Kaupthing Singer and Friedlander.

12. It appears that the first business transacted between Kaupthing Bank and the interests of RT was in 2004 when RT's interests purchased, with the financial support of Kaupthing, the Odeon Cinema chain in the UK. There then followed a number of

other transactions, including the purchase with Barclays Capital Ltd and a private equity group, of Somerfield plc, a supermarket chain in the UK and the purchase of other strategic holdings including holdings in J Sainsbury plc, in Mitchells & Butlers plc, in Kaupthing and a 5% stake in Exista Hf (Kaupthing's largest shareholder with 25% of its equity).

13. By the late autumn of 2007, the interests of RT through the TDT, with the substantial financial support of Kaupthing, had built up a significant share and property portfolio. It is apparent from contemporaneous documents that by that stage TDT held significant positions in Sainsbury plc and in Mitchells & Butlers. A significant part of the interests in Sainsbury plc and Mitchells & Butlers plc was held under CFDs (contracts for difference) and other forms of derivative contract; Kaupthing had from at least February 2007 provided some finance for these CFDs. At some stage its subsidiaries became counterparties to the CFDs and other derivatives. We set these matters out in more detail at paragraphs 121 and following.

(iv) The restructuring and the Oscatello loan arrangements made on 19 December 2007

14. On 19 December 2007, the borrowings were restructured. Kaupthing and the interests of TDT entered into arrangements for a loan facility to Oscatello and associated agreements including a profit participation by Kaupthing and the release of RT's personal guarantees; the loan was secured by pledges of shares over the Oscatello companies. The value of the Oscatello companies was the subject of a statement of assets and liabilities dated 30 November 2007 and verified by Investec. The initial loan was £371m under the restructuring. The making and operation of these arrangements were, as set out in the Information, central to the SFO's case of:

> "a deliberate, concerted and dishonest conspiracy between a number of senior Kaupthing executives and two favoured clients of the bank, namely Robert and Vincent Tchenguiz, to defraud and ultimately steal funds on a large scale from the Bank
>
> … There is a thread running through all areas of suspected criminality which demonstrates what appears to be a highly unusual relationship between Kaupthing Bank, its senior executives and the Tchenguiz brothers. Indeed there are reasonable grounds to suspect that this relationship was ... a corrupt one which routinely accepted and developed false or misleading information in order to present a picture of financial health for the bank and extensive lending for key clients."

15. The SFO contended in the Information that the loan facility and the successive increases in the loans were the first of five areas of suspected criminality on the part of RT. The case of the SFO was that the loans made to RT (who had an interest in Kaupthing through Exista Hf) were excessive in scale to the asset base of Kaupthing, were inadequately secured, were not the subject of proper internal credit procedures at Kaupthing and had no real commercial rationale. In addition the transactions were alleged to be the subject of various dishonest arrangements, including the manipulation of asset values. It will be necessary to return to the arrangements that comprised the facility and the associated agreements at paragraph 114 and to the

increases in the lending under the facility at paragraph 127. We should make clear that the case advanced at the hearing by the SFO was different in one respect to that set out in the Information, as it was accepted at the hearing (as must have been obvious at the outset of the investigation) that given the exposure of Kaupthing to Oscatello and TDT in December 2007 and the large positions held in Sainsburys and Mitchells & Butlers, there was at least a possible rationale for the decision by Kaupthing to continue to lend to the TDT companies.

(v) The market in 2008

16. Throughout 2008, the financial markets deteriorated culminating in the collapse of Lehmans on 15 September 2008. However, earlier in the year, there were signs of serious problems in the markets, but no one then anticipated the gravity of the impending financial crisis. For example, in February 2008, Northern Rock was nationalised by HM Government. In March 2008 the collapse of Bear Sterns, a company that had specialised in securitisation, was only averted by its acquisition by JP Morgan for a nominal sum.

(vi) The increase in lending to Oscatello

17. In the course of the early part of 2008, further increases were made in the loans to Oscatello under the loan facility so that the total advanced rose to £600 million by 30 May 2008. These included a further advance of £30 million on 10 January 2008 and a further advance of £33 million on 17 March 2008. It appears further shares were acquired in Sainsburys and Mitchells & Butlers. By the end of March 2008, it appears that Oscatello had a negative equity of £250m as a result of the decline in the share price of its holdings. As we have mentioned, we return to these increases in the loan facility at paragraph 127.

(vii) Money market loans made between January and July 2008

18. Between 10 January 2008 and 16 July 2008, Kaupthing made 36 money market loans to Oscatello totalling £345m. Of these loans, £143 million was repaid, but £156m was outstanding at the time of the collapse of Kaupthing. The Money Market loans are the third of the five areas of suspected criminality relied on by the SFO in the Information. It was and remains the SFO's case that these loans were advanced without security to cover losses on CFD transactions with Kaupthing and other institutions; that there was no commercial rationale for them and the loans could not be justified by ordinary commercial banking practice. It was contended by the SFO that these loans circumvented the ordinary credit controls within Kaupthing. We consider these loans in more detail at paragraph 132 and following.

(viii) Pennyrock Loan Agreement

19. At the end of March 2008, further security was provided to Kaupthing to cover an increase of £80m in the loan facility to Oscatello, taking the facility to £514m. That security included part of a ground rent portfolio owned ultimately by the TFT (of which VT was the beneficiary). At the same time a loan of £100m was made to Pennyrock, a SPV owned by TFT, secured by other parts of a ground rent portfolio owned ultimately by TFT. The ground rent portfolio had been the subject of an actuarial valuation which had been used to value the portfolio in one of the TFT's

company's accounts. The various parts of the portfolio had been used to support senior lending. It is one of the additional areas of suspected criminality relied on. Grant Thornton first provided material on this transaction to the SFO in September 2010.

20. We return to this transaction at paragraphs 180 and following below. It formed the sole basis of the SFO's case set out in the Information for obtaining the search warrants in respect of VT and the TFT interests. As we set out at paragraph 61 below, the then Director of the SFO conceded, on 22 December 2011, that the Information placed before the judge was inaccurate and subsequently, as we set out at paragraph 64 below, identified two of the errors on 16 January 2012 as relating to the actuarial valuation of the ground rent portfolio and the senior lending secured on the ground rent portfolio. The third error was subsequently identified as alleged double pledging of the ground rent portfolio.

(ix) The Pumpster transaction: June 2008

21. Prior to 2007, Kaupthing had, with others, lent funds for the acquisition of the Laurel Pub Group by TDT. That pub group was divided between an operating company, Laurel, and a property owning company, Pumpster. Kaupthing took a minority equity interest in both companies alongside the TDT companies.

22. In 2008, Laurel went into administration. By June 2008, Pumpster was experiencing financial difficulties. It was then notified of proceedings to wind it up. A complex transaction was entered into which we describe at paragraphs 138 and following. That transaction is the fourth of the five areas of suspected criminality relied on by the SFO in the Information. It was alleged that this transaction concealed a bad debt to Kaupthing at a time when Oscatello was insolvent.

(x) The position in the summer of 2008

23. During the summer of 2008, the financial markets, as is well known, deteriorated significantly. This put severe pressure on Kaupthing and on Oscatello. For the purposes of a fair market value of the holdings in Mitchells & Butlers, that holding ceased to be marked to market from the end of July 2008. We return to that issue at paragraph 146 below.

24. On 21 August 2008, Kaupthing wrote a "comfort letter" to Investec stating it was aware of the financial condition of the Oscatello companies and that it was willing to continue to support the companies. We return to this letter at paragraph 148 below.

25. After the collapse of Lehmans on 15 September 2008, the markets declined even more severely. For example the price of the two most significant holdings of TDT, Sainsburys and Mitchells & Butlers, which had been on 30 November 2007 (the date of the statement of the assets and liabilities of Oscatello to which we have referred at paragraph 14) 440p and 557p respectively were, by 3 October 2008, 329p and 210p respectively. By 10 October 2008 the price of Sainsbury was 240p. It was said by Kaupthing's Resolution Committee that by that time over £1.6bn had been advanced to Oscatello and other companies associated with TDT.

(xi) The Thorson transfer

26. On 3 October 2008, £61.84m was transferred from Oscatello's account with Kaupthing to an account of Thorson Investments Limited, a TDT company, with Kaupthing Luxembourg. This was just before the imminent collapse of the bank. This transfer was the second of the five areas of suspected criminality relied on in the Information; indeed the SFO orally advanced at the hearing before the judge a serious allegation of theft against RT in respect of this transaction. The SFO's current position is that the explanation for this transfer was that it was either an internal Kaupthing measure aimed at paying down its liabilities in Luxembourg (to the detriment of its position in Iceland, having been required to do so by the Luxembourg financial regulator) or it was a possibility that the transfer was intended to protect the interests of RT and the TDT. We return to this transaction at paragraph 151 below.

(xii) The collapse of Kaupthing

27. On 8/9 October 2008, Kaupthing collapsed. According to the Information presented by the SFO it had €8bn in debts, 25% of which was owed by companies within the TDT and 12% by Exista Hf, its largest shareholder, to which we have referred at paragraph 11. The Government of Iceland created the position of a Special Prosecutor under the Ministry of the Interior through an Act of the Icelandic Parliament to conduct an investigation into the collapse.

28. In addition, as we have mentioned, the Resolution Committee was appointed on 9 October 2008 to get in the assets of the bank and make recoveries for the creditors; one of its members was a partner in Grant Thornton Iceland. In mid-November 2008, Weil, Gotshal and Manges were instructed by the Resolution Committee to examine the lending between Kaupthing and entities associated with RT. Grant Thornton was appointed as joint UK liquidators and to conduct various investigations by the Resolution Committee.

(xiii) The attempt to put assets beyond the reach of Kaupthing on 13 November 2008: "Project Longboat"

29. After the collapse of Kaupthing, TDT companies entered into a series of transactions on 13 November 2008 through which the security previously pledged to Kaupthing for loans to Oscatello were replaced by "Payment in Kind Notes". Immediately after the transaction had been effected, the lawyers acting for TDT notified the Resolution Committee of Kaupthing that the transactions had taken place. The clear intention and effect of these transactions were to remove the assets, including interests in Somerfield Ltd, used as security for the loans by Kaupthing, to companies outside the Oscatello structure to prevent the liquidators of Kaupthing taking control of those assets and selling them in the then market conditions.

30. On 5 December 2008, the Resolution Committee began proceedings in the British Virgin Islands in respect of these transactions against Investec and the Oscatello companies. The pleadings signed by Mr Steinfeld QC alleged fraud. Grant Thornton prepared a report on this transaction on 14 January 2009. An interim application for the appointment of receivers was made to the courts of the BVI which was vigorously contested on grounds set out in an affidavit sworn by an officer of Investec. The proceedings were subsequently settled for £137m in June 2010; we were told by Lord

Macdonald QC who appeared for RT and R20 that this payment represented the proceeds of the sale of the interests in Somerfield Ltd. All allegations of fraud were withdrawn as part of the settlement.

31. This was the fifth of the five areas of suspected criminality relied on by the SFO in the Information. We consider this transaction in more detail at paragraph 157 below.

(xiv) The actions of the Resolution Committee and their advisers

32. On 24 November 2008, Kaupthing called in the Oscatello loan facility and gave notice of default. Grant Thornton were appointed receivers and in the course of their receivership proceeded to realise the securities held by Kaupthing.

33. On 28 December 2008, Weil Gotshal and Manges and Grant Thornton presented a report to the Resolution Committee on the lending to Oscatello. The conclusion of the report was that the lending was highly irregular; that they had been unable to detect any due diligence on the value of the security; that the loan to asset value of the security was excessive and this would have been obvious to any banking official. The report concluded that there was evidence to suggest that the senior management of Kaupthing had manipulated the financial data to allow excessive lending to take place and the internal credit procedure had been ignored in relation to the Money Market loans and the further advances under the Oscatello facility. A copy of this report was provided in due course to the SFO.

34. On 13 May 2009, in other proceedings in Iceland, Kaupthing obtained judgment against Oscatello for £643.92m.

(xv) The commencement of the SFO investigations

35. During the course of the investigation by the Icelandic Special Prosecutor and the Icelandic regulator (FME), the assistance of the SFO was sought. Other information was received by the SFO from the Financial Services Authority of the United Kingdom.

36. On 25 November 2009, the SFO met Grant Thornton and Weil Gotshal and Manges. The note records the following discussion at the end of the meeting:

> "A discussion followed on how best Grant Thornton could share information with the SFO. [GT3] thought that it should be possible to replicate the co-operative model as developed for Madoff, on which he had been in the lead for GT. The first issue however was how to get a referral to SFO so as to enable a formal investigation to be initiated. This was a "chicken & egg" situation where SFO needed to have access to S.2 powers to obtain sight of GT's investigation report but the evidence in the report pointing to UK fraud appeared to be the best route to opening an investigation.
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> [GT1] was reluctant to volunteer detailed documentation in case this should prejudice the civil claims. He suggested that a first step might be for WG to update the presentation material

> provided to the Icelandic FME & Special Prosecutor. SFO could then request this material (on an intelligence basis) direct from the Special Prosecutor. It was agreed to proceed on this basis."

37. On 15 December 2009, in the light of information received from the FSA and Grant Thornton, the then Director of the SFO authorised a formal investigation. Notices under s.2 of the Criminal Justice Act 1987 (the CJA 1987) were served on Grant Thornton in respect of reports prepared by them. That section of the CJA 1987 gives the SFO extensive investigatory powers; it is set out in part at paragraph 80 below.

38. On 24 March 2010, Grant Thornton made a presentation to the SFO of its findings. It is clear from a Weil, Gotshal and Manges memorandum dated 23 December 2008 written in answer to the request of the Resolution Committee referred to in paragraph 28, that the Oscatello loans had been the subject of detailed consideration since mid-November 2008. Essentially Grant Thornton alleged that Oscatello appeared to have been technically insolvent from late 2007. This had been masked by successive reconstructions with a purported VT securitisation of ground rents which Grant Thornton thought bogus - a reference to the Pennyrock loan to which we have referred at paragraph 19 above. There had also been false marking of the Mitchells & Butlers share price in relation to RT's position (a reference to what we have briefly described at paragraph 23). There were documents which appeared explicitly to show R20 instructing Kaupthing to continue to give unqualified support, notwithstanding the insolvent position of Oscatello. They considered this confirmed the emerging picture that the interests of RT and VT were protected at a senior level in the bank and that normal banking practices of due diligence enquiries being made and restricting additional lending to an insolvent client (in the absence of additional security) were not followed. These allegations were developed in subsequent meetings as we shall explain.

39. On 27 February 2010, the SFO interviewed an employee of Kaupthing Luxembourg who stated that the risks associated with the bank's exposure to RT were not properly addressed at a senior level with the bank despite the fact that he and others had raised this point. He also spoke of certain strange transactions undertaken by RT shortly before the collapse of the bank.

40. The SFO continued to work closely with the authorities in Iceland. Amongst the documents supplied to it were a report of the Icelandic Regulator to the Icelandic Special Prosecutor dated 28 April 2010 which concluded that the lending by Kaupthing was not in accordance with normal and healthy business practices; the lending in this manner was so extensive that it might give rise to a case of criminal culpability on the part of the officers of the bank who were responsible.

(xvi) The claim by TFT against Kaupthing

41. On 1 July 2010, Rawlinson & Hunter, on behalf of TFT, issued proceedings against Kaupthing in the Commercial Court in London, claiming a declaration that the security agreements over shareholdings provided by the TFT for the liabilities of Oscatello under the increase in the Oscatello loan facility (to which we have referred at paragraph 13 above) and the Pennyrock loan agreement (to which we have referred in paragraph 19 above) were void. A similar claim was brought by Rawlinson &

Hunter for TDT on 5 July 2010. The purpose of these claims was to have the receiverships that Kaupthing had appointed over these companies declared unlawful and to recover very substantial damages, including damages in respect of the realisation of some of the securities in the very depressed markets in late 2008 after the collapse of Kaupthing. The claim set out allegations that Grant Thornton had, as receivers, acted wrongfully in appointing new directors to the companies whose shares had been pledged and in the advice they gave to the Resolution Committee in relation to the appointment of receivers and the effect it would have on the business of the companies.

42. Kaupthing applied on 23 August 2010 to stay the claims. The application was heard between the 9 and 11 February 2011. In a judgment given on 16 March 2011 Burton J dismissed both applications, his judgment being reported as [2011] EWHC 566 (Comm). Kaupthing therefore was required to serve a defence in the proceedings which continued in the Commercial Court.

(xvii) The supply of further information by Grant Thornton to the SFO: the allegations of dishonesty against VT in respect of Pennyrock loan agreement

43. On 9 September 2010, Grant Thornton informed the SFO by telephone of the issue of proceedings by TFT to which we have referred. They stated that they believed they had uncovered material that led them to conclude that "VT may have lied to auditors (a Companies Act offence) or otherwise was a party to producing fraudulent accounts." They said that this related to the ground rent portfolio and the actuarial valuation in relation to the Pennyrock loan to which we have referred at paragraph 19 and which we explain in more detail at paragraphs 180 and following. The SFO team queried with Grant Thornton why the other banks had accepted the actuarial valuation. The SFO was told that the banks had relied on the acceptance of the methodology by the auditors who appeared to have relied on incorrect information from VT. The actuarial valuations were based on future income of a much shorter period. Grant Thornton thought that VT may have committed Companies Act fraud offences. The evidence of the SFO was that this conversation may have been the origin of the SFO's allegations in respect of the Pennyrock Loan Agreement.

44. On 20 September 2010, investigators from the SFO met with Grant Thornton. They were permitted to view three of Grant Thornton's draft reports for the Resolution Committee, including that on Pennyrock. The SFO was not permitted by Grant Thornton to take copies of these reports, as Grant Thornton stated they were privileged. In the meeting the SFO were told that overdraft facilities had been extended to Oscatello despite its financial difficulties and the security provided had been overstated. An explanation was given to the SFO about the difference between a conventional valuation and the actuarial valuation carried out.

45. On 27 September 2010 Grant Thornton in response to a s.2 notice provided the SFO with a number of further documents, including the Pennyrock Loan Agreement. The evidence of the SFO was that the Pennyrock Loan Agreement was not read and its significance was not appreciated before the application for the search warrants.

46. There was a further meeting between the SFO and Grant Thornton on 22 November 2010. Members of the SFO team were permitted to read (but not copy) Grant Thornton's reports on events prior to the execution of the Oscatello loan facility and

the lending under that facility, including the matters to which we have referred - the making of the Oscatello facility, the increases in it, Pumpster, Money Market loans, Pennyrock and Project Longboat.

(xviii) The SFO's decision to apply for a search warrant

47. On 12 January 2011 a position paper was prepared on the SFO's investigative findings. That was supplemented by a further note on 21 January 2011. On 10 February 2011 the investigators from the SFO made a further visit to Grant Thornton where they reviewed a further draft report Grant Thornton had prepared in relation to RT and R20.

48. On 10 February 2011, a decision was made by the case manager responsible for the investigation, subject to satisfaction by the then Director of the SFO and the City of London Police, to apply for search warrants and to arrest RT, VT and others and to undertake searches on 9 March 2011. The SFO involved the City of London Police as their involvement was required to effect the arrests as Parliament had not conferred a statutory power of arrest on the SFO. The Information was then prepared.

(ixx) The hearing before Judge Worsley

49. On 4 March 2011 the Information was delivered to the Central Criminal Court. It was considered by Judge Worsley over the weekend.

50. A hearing took place on Monday, 7 March 2011. At that hearing an in-house advocate employed by the SFO appeared for the SFO and called the case manager to give evidence. It is clear from the evidence given by the case manager that he did not put the case against RT, VT and the companies in the analytical way required on such an application. For example:

> "A. Incredible, yes. Yes, apologies, my Lord. There are material documents that have been passed over from the Tchenguiz side which were wholly untrue, given their position. The way that the money was passed out of the bank was highly suspicious. It diverted the normal procedures within the bank. Just for example, instead of going through the proper procedure, the Credit Committee, these agreements of hundreds of millions of pounds were basically done across a meal in a nightclub with no paperwork at all; and they used money market loans, in one case 36 money market loans to get nearly 400 million out to Tchenguiz.
>
> As the year progressed from 2007 towards the collapse, the misrepresentations, we would say, was a conspiracy to defraud. In terms of a conspiracy to steal, there's a wholesale – days before the collapse of the bank, when the FSA were counting KSF in London, The Icelandic Central Bank were taking over the bank in Iceland, Tchenguiz basically came in, in a final last act, and took 61 million out of the bank that basically took him 39 million over his overdraft facility, which at that time was 600 million. They did not have any money in Luxembourg,

> where his private account was. They contacted Iceland and just said, "Yes, no problem at all."
>
> A lot of this money has gone, we believe, to Luxembourg, where basically, following the collapse of the bank – there was a Kaupthing Bank Iceland and Kaupthing Bank KSF basically sort of phoenixed in a way to a new bank, and it is as that premises there that a lot of the secrets of this investigation are held."
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> Note:
>
> 1. The last sentence in the first paragraph refers to the 36 money market loans which we have mentioned at paragraph 18 and to which we refer again at paragraphs 132 and following.
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> 2. The transaction referred to in the second paragraph is a reference to the Thorson transfer which we have mentioned at paragraph 26 above and to which we refer again at paragraphs 151 and following below.

After short submissions from the in-house advocate the judge authorised the issue of the warrants. Nothing was asked or said as to whether the judge had been told matters that weighed against issuing the warrants.

51. The judge gave no reasons for his decision. This is a matter of complaint which we consider as the second issue at paragraphs 202 and following.

52. On 8 March 2011, the SFO and police teams were briefed.

(xx) The execution of the warrants

53. Early on 9 March 2011 the search warrants were executed at the residences of VT and RT and at the business premises of R20 and Consensus. RT and VT were arrested at their homes by the City of London Police. They were interviewed under caution and released on conditional bail. RT raised in these proceedings the issues of whether complaint can be made against the City of London Police for his arrest and bail. We consider the arrest as the third issue at paragraph 209 and following and bail as the fourth issue at paragraphs 248 and following.

54. The search continued on 10 March 2010. It was self evident, given what the SFO had been provided with by Grant Thornton that there would be a significant amount of privileged material in relation to the litigation. A complaint is made about the manner in which the warrants were executed as regards privileged material. We return to this as the fifth issue at paragraphs 254 and following.

55. On 14 March 2011, Rawlinson & Hunter's solicitors, Stephenson Harwood, wrote to the then Director of the Serious Fraud Office in relation to the search that had been carried out. On 22 March 2011 a short letter was sent by the Serious Fraud Office returning seven boxes of material seized in error from the offices of Consensus.

(xxi) The commencement of judicial review proceedings

56. On 9 May 2011, Rawlinson & Hunter began the first of the judicial review proceedings and on 17 May 2011 RT and R20 began the second.

57. On 30 June 2011, summary grounds and an acknowledgement of service were served in both claims.

58. On 11 July 2011, the SFO returned documents that were privileged.

59. On 26 July 2011, Mitting J refused permission in both sets of proceedings. An application was made on 1 August 2011 for renewal. Following that, on 18 August 2011, VT became an interested party to the first judicial review proceedings.

60. On 3 November 2011, the renewed permission hearing was vacated by consent; there were discussions between the parties which did not result in the resolution of the matters raised in the judicial review proceedings.

(xxii) 22 December 2011: The admission of the inaccuracy in the information provided to the judge

61. The evidence of the SFO before us was that by 15 December 2011 it was clear that the judicial review proceedings would not be compromised. As a result of the reconsideration of the Information in the light of an internal review and external advice, the then Director of the SFO concluded that the search warrants in respect of VT and Consensus could not be defended because of errors in the Information. However, the then Director concluded that the investigation into VT should continue; for that purpose, he wished to retain the documents that had been seized under the warrants which could not be sustained. He decided to do so by serving a further notice under s.2 of the CJA 1987, referred to as a "here and now" notice. Although we consider the legal arguments on the "here and now" notice at paragraphs 86 and following, it is important to set out what happened as it materially altered the stance hitherto taken by the SFO.

62. On 22 December 2011, the SFO wrote to Stephenson Harwood, solicitors to Rawlinson & Hunter, in relation to the judicial proceedings brought by them and VT:

> "….. the Director has instructed me to review this investigation in general, and the information which was relied on in the application for warrants in particular, with a view to ascertaining whether the information was accurate in the respects complained of in your grounds. I had had no previous involvement in the investigation before this stage. He has concluded that the information was not accurate in those respects and accordingly has instructed that the items seized should be returned forthwith."

The letter made clear that the criminal investigation into VT and others was continuing. The letter then went on to state that it enclosed two schedules itemising material which was seized from Consensus and VT and the physical items were being returned that day to Stephenson Harwood and Kingsley Napley, solicitors to VT.

However, the letter enclosed notices under s.2(3) of the CJA 1987, the "here and now" notices to VT requiring him to provide the SFO with the documents described therein. The letter then explained why the documents were important and then continued under the heading 'Reason for issuing Notices':

> "These Notices require the production by [VT] of documents, some of which were seized from his home and your client's address on March 9th and 10th 2011. Given that the Director has decided not to contest the judicial review in his case and to accept that those warrants should not have been granted on the basis of the information relied upon, the documents seized from his premises fall to be returned. In the period between September and the return of these documents they have not been examined by the case team. The Director takes this position on the basis that the application for the warrants contained errors of fact, but that the information was submitted to the court in good faith.
>
> However, this is a major criminal investigation and it is not thought that errors in the obtaining of the search warrants should result in serious prejudice to it. I have now been permanently assigned to lead the case and the director remains personally closely involved. Fresh consideration has been given to what documents are necessary for the case team to obtain and consider. The first Notice (the 'here and now' Notice) is therefore being served on [VT] at the time of the return of some of the search material so that those items which fall within this updated list of material required may lawfully be obtained by the SFO for the purposes of this investigation. The list of what was seized during the searches of his premises will be retained and used to assess compliance with this Notice. The second Notice (the 14 day Notice) is being served on him to obtain those items within this updated list of material required which do not form part of the search material being returned."

The letter then explained why the process under s.59 of the Criminal Justice and Police Act 2001 had not been followed. Issue 6 in these judicial review proceedings relates to the legality of the action of the then Director of issuing the "here and now" notices and retaining the material instead of utilising the statutory machinery provided for under s.59. We consider this at paragraphs 268 and following.

63. In early January 2012, Wilmer Hale for VT and Stephenson Harwood for Rawlinson & Hunter sought to obtain more detailed explanations of the inaccuracies in the Information submitted to the judge and asked why the criminal investigation was continuing.

64. On 16 January 2012, the then Director of the SFO wrote to Judge Worsley explaining the errors and apologising to him. The factual errors in relation to the Pennyrock loan (to which we referred at paragraph 19) were explained as follows:

> "The particular issue concerns the allegation made in the information about a loan made to [VT] (the 'Pennyrock loan' at paragraphs 114-119 of the Information). This allegation was supported by two factual contentions. The first was that the documentation submitted to Kaupthing before obtaining the loan did not disclose the existence of senior lending. In fact, the documentation seen by Kaupthing's lending committee referred to other creditors.
>
> The second factual contention was that the value of the securities offered within the portfolio was widely overstated. In fact, information was provided about the basis of valuation. Reputable agents had been prepared to adopt a projection of rental income over 150 years and other lenders had been prepared to accept this basis.
>
> Those two factual contentions, therefore, cannot be substantiated. I am very sorry to say that the SFO had the material which undermines those allegations when we were drafting the information."

65. Subsequently the court was informed that an *ex parte* hearing had been arranged before Judge Worsley in chambers for an oral explanation to be given in relation to the warrants. In the light of the fact that these proceedings were pending, we made clear that no such hearing should take place until after the conclusion of these proceedings. In the light of this judgment and the fact that these proceedings will continue in the Queen's Bench Division, no useful purpose can be served by any further hearing before Judge Worsley.

(xxiii) The events preceding the hearing

66. On 22 February 2012 there was a renewed permission hearing before the court. The issues were clarified and a date for the hearing set for May 2012. A timetable was set for the production of statements. The SFO was to produce its statements by 28 March 2012.

67. On 28 March 2012, the SFO made written application to extend the time for service of its statement of evidence until 5 April 2012 on the basis that the draft statement needed to be carefully reviewed by a number of persons, including the then Director who was overseas. On 31 March 2012 the court granted the extension requested.

68. Two days later, on 2 April 2012, an application was made by the SFO to break the fixture and to adjourn the hearing until July 2012 on the basis that the SFO needed 4-6 weeks more to file its evidence. In support of the application, the case review manager at the SFO stated that, in the light of all the comments received on the draft statement produced by the SFO and referred to in the application for an extension of a few days made on 28 March 2012, it would be impossible for its evidence to be completed earlier.

69. At a hearing on 4 April 2012, the court declined to adjourn the hearing, but extended the time for service of evidence by the SFO until 30 April 2012 – in effect giving the SFO almost all the time it required.

(xxiv) The concession by the SFO on the day before the hearing.

70. On 21 May 2012, the day before the start of the hearing of the judicial review, a note was filed on behalf of the new Director of the SFO who had only taken office three weeks earlier. First, as Mr Eadie QC on his behalf informed us, the new Director would undertake to review VT's status in the investigation by 18 June 2012. Secondly, advice having been taken from Mr Ellison QC, very experienced counsel, the materials retained by the then Director under the "here and now" notice issued on 22 December 2011 (see paragraph 62 above) ought to have been returned to those acting for VT to review on their premises. Those acting for VT ought then to have been allowed to respond to a s.2 notice in the ordinary way; the "here and now" notice had not been a valid notice. Arrangements would therefore be made to return the documents to those acting for VT.

(xxv) Discontinuance of the investigation against VT

71. On 18 June 2012, subsequent to the hearing, the new Director of the SFO informed VT that the investigation against him would be discontinued.

II THE ISSUES

72. We turn to consider the issues which we do under the following seven headings:

    i) Non disclosure and misrepresentation in the Information and evidence given to the judge on the application for search warrants.

    ii) The failure of the judge to give reasons.

    iii) The lawfulness of the arrest of RT.

    iv) Bail.

    v) The conduct of the search in relation to privileged documents.

    vi) The "here and now" notice.

    vii) Consequential relief.

ISSUE 1: NON-DISCLOSURE AND MISREPRESENTATION IN THE INFORMATION AND EVIDENCE GIVEN TO THE JUDGE ON THE APPLICATION FOR SEARCH WARRANTS

(1) The case advanced by RT and VT and the matters for our decision

73. We have set out in our chronological account the background to the allegations and the presentation of the application to the judge. The basic case advanced by

Rawlinson and Hunter, RT and VT was that the Information contained such extensive inaccuracies and such extensive non-disclosure that the search warrants could not be sustained.

74. The SFO, as we have set out at paragraphs 62 and 64, had conceded that there were serious inaccuracies in the Information in respect of the Pennyrock loan. As that transaction was the only basis on which the warrants had been obtained against VT, the SFO had accepted in December 2011 that they could no longer sustain the warrants against VT and Consensus. The case advanced by Lord Goldsmith QC on behalf of VT was that the SFO's concession had been inevitable, as the SFO had misunderstood the transaction to a far greater extent than it had conceded and had wholly misrepresented it to the judge. It was submitted that the court should, in the circumstances, examine the evidence in relation to Pennyrock and conclude that there was no basis on which the continued investigation of VT, Consensus and the other TFT companies could be justified. His submission was strengthened by some additional material that was put before the court in a statement served on behalf of the TFT companies.

75. Although the SFO accepted that there were corresponding inaccuracies in that part of the increase in the Oscatello loan facility associated with the Pennyrock loan, it maintained that the warrant could be sustained against RT as other matters of suspected criminality had been relied on and the warrants would have been granted on the basis of those other parts of the Information, despite the errors in relation to Pennyrock.

76. Lord Macdonald on behalf of RT and the TDT companies contended that the SFO had failed to make a proper presentation to the judge in the Information, there were grave misrepresentations and non-disclosure and the warrants should be quashed on that basis. He contended that it was not appropriate in these proceedings to review the evidence against RT to consider whether the investigation of RT and the TDT companies should continue. We were provided with a copy of a letter written by Mr Burton of BCL Burton Copeland on 14 November 2011 to the then Director of the SFO which set out RT and R20's case as to why the allegations were misconceived; one or two additional contemporaneous documents were put before the court by his legal team, but this aspect was not developed in the light of Lord Macdonald's contention that it was not appropriate to consider the merits of the investigation in these proceedings.

77. Our task is therefore first to determine whether there were errors and non-disclosures in the presentation to the judge in the Information and oral evidence. Our second task is to determine the effect of errors and non-disclosure on the grant of the warrants. Our third is to consider whether we should reach a view on the continued investigation of VT. There was some debate about our second and third tasks. We return at paragraphs 171 and following to the effect of any findings of non-disclosure and misrepresentation. We return at paragraph 178 and 200 to the question as to whether it is appropriate for us to consider the merits of continuing the investigation.

(2) The duties applicable to the grant of the search warrants

(i) The constitutional principle

78. It has been a principle of the common law now embodied in statute that the courts control the invasion of privacy that is involved when the state seeks to search the premises of any individual or company. The duty of the judge on an application for the authority to search premises was eloquently expressed by Lord Hoffman in *A-G of Jamaica v Williams* [1998] AC 351 at 358. It is a matter of high constitutional importance that the citizen is protected by independent judicial scrutiny from the excesses of allowing an officer of the Executive to decide for himself whether to enter property and search.

79. The obtaining of a search warrant is never therefore a formality. All the material necessary to the grant of a warrant must be provided to the judge: see *R (Redknapp) v Commissioner of the City of London Police* [2009] 1 WLR 209.

(ii) The powers of the Director of the SFO

80. Under the CJA 1987, the Director of the SFO was given special powers to investigate serious fraud. Under s.1 the Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud. Under s.2, the Director is given power to request the production of documents and power to apply to the court for a warrant.

> (1)The powers of the Director under this section shall be exercisable, but only for the purposes of an investigation under section 1 above, **…** in any case in which it appears to him that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.
>
> (3) The Director may by notice in writing require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified, any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified description which appear to him so to relate; and—
>
> (a)if any such documents are produced, the Director may—
>
> (i)take copies or extracts from them;
>
> (ii)require the person producing them to provide an explanation of any of them;
>
> (b)if any such documents are not produced, the Director may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.
>
> (4)Where, on information on oath laid by a member of the Serious Fraud Office, a justice of the peace is satisfied, in relation to any documents, that there are reasonable grounds for believing—

> (a)that—
>
> (i)a person has failed to comply with an obligation under this section to produce them;
>
> (ii)it is not practicable to serve a notice under subsection (3) above in relation to them; or
>
> (iii)the service of such a notice in relation to them might seriously prejudice the investigation; and
>
> (b)that they are on premises specified in the information,
>
> he may issue such a warrant as is mentioned in subsection (5) below.

Applications for warrants under s.2(4) are invariably made to the Crown Court.

(iii) The SFO's duty of disclosure

81. It is common ground that the Director must put before the judge not only all the necessary material so that the judge can satisfy himself that the statutory conditions for the grant of the warrant are fulfilled, but there must be full and complete disclosure to the judge, including disclosure of anything that might militate against the grant: see Bingham LJ in *R v Lewes Crown Court ex p Hill* (1991) 93 Cr App R 60 at 69 and Kennedy LJ in *R(Energy Financing Team) v Bow Street Magistrates Court* [2006] 1WLR 1316 at 1325. The last obligation was elegantly phrased by Hughes LJ in *Re Stanford* [2010] 1 WLR 941 at paragraph 191 in stating that the advocate must

> "put on his defence hat and ask himself, what, if he was representing the defendant or a party with a relevant interest, he would be saying to the judge."

82. All of this was made very clear in the SFO manual. The judge must be given information to make an informed, balanced and fair decision. There was "a particular duty to disclose to the court all known material facts which may be relevant to the Judge's decision, including matters which indicate that the issue of a warrant might be inappropriate".

(iv) The position of the judge

83. It is not sufficient that the judge considers that the Information and evidence presented is reasonable. The judge must personally be satisfied that there is before the judge sufficient material on which it is proper to grant the warrants. This has been repeatedly stated by the courts: see for example Parker LJ in *R v Guildhall Magistrates ex p Primlaks Holdings (Panama) inc* [1990] 1 QB 261 at 270. In *R(Bright) v Central Criminal Court* [2001] 1 WLR 662 Judge LJ (as he then was) said at page 677:

> "In my judgment, it is clear that the judge personally must be satisfied that the statutory requirements have been established. He is not simply asking himself whether the decision of the constable making the application was reasonable, nor whether it would be susceptible to judicial review on *Wednesbury* grounds (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This follows from the express wording of the statute, "If … a circuit judge is satisfied that one … of the sets of access conditions is fulfilled". The purpose of this provision is to interpose between the opinion of the police officer seeking the order and the consequences to the individual or organisation to whom the order is addressed the safeguard of a judgment and decision of a circuit judge. This conclusion is consistent with the approach suggested in *R v Inland Revenue Comrs, Ex p Rossminster Ltd* [1980] AC 952, as well as a series of decisions in the Divisional Court of which *R v Lewes Crown Court, Ex p Hill* (1990) 93 Cr App R 60 represents a valuable example"

84. The judge therefore had to be personally satisfied that there were grounds for reasonable suspicion. What is sufficient for reasonable suspicion is set out in the speech of Lord Steyn in *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286 at 293 and in *Al Fayed v Commissioner of the Police of the Metropolis* [2004] EWCA Civ 1579 at paragraph 50.

85. The importance of the fact that the judge is personally satisfied that the statutory criteria are met is illustrated by what happened in this case. The hearing took 20 minutes. The actions of the SFO attracted a great deal of self engendered publicity. There were then some hostile comments. In an interview given to the *Estates Gazette* and published on 16 April 2011 the criticisms of RT and VT of the SFO's action as "disproportionate" "aggressive" and "a publicity stunt" were put to the then Director. The response of the then Director was to deny this:

> "it was a perfectly proper course of action for the SFO to take. A judge had to approve the searches and would do so only if absolutely satisfied that it is the right thing to do."

The express reliance on the judge's authorisation as an independent verification of the grounds for issuing the warrants emphasises the importance of the very heavy burden that is placed on the judge. Far from being anything that could be characterised as a "rubber-stamping process", it requires detailed, anxious and intense scrutiny by a judge as the cases make clear.

86. The important question is how in practice that detailed, anxious and intense scrutiny can be carried out by the judge in a case involving the financial markets. The task is very different to the usual cases where search warrants are sought and the task of the judge is relatively straightforward.

87. In the present case, the judge was presented with the Information and the evidence of the case manager. None of the underlying documentation was put before him. In an application for a search order in civil proceedings, the important underlying

documentation would be exhibited to the statement of evidence before the judge and the judge would have an opportunity of considering them. That is not the practice where a warrant is sought in a criminal investigation under s.2(4) of the CJA 1987.

88. Thus, given there is no practice to provide the underlying documentation, it was accepted that there is a very heavy duty placed on the SFO to ensure that what is put before the judge is clear and comprehensive so that the judge can rely on it and form his judgment on the basis of a presentation in which he has complete trust and confidence as to its accuracy and completeness. Cases in the financial markets investigated by the SFO are likely to require the judge to be familiar with the commercial and market background. That background must be set out in the written presentation to the judge. The transactions must then be explained in a coherent and analytical manner. The allegations of reasonable suspicion must then be set out. What is alleged must be verified by persons expert in the market or accounting practices whose independent advice has been expressly sought. A record of that verification should be retained by the SFO. Not only must the case for reasonable suspicion be put, but the matters that might undermine that case must be enumerated. The skill and experience required to prepare a presentation of that kind cannot be underestimated.

89. The judge's duty then is, on the basis of that presentation, to be satisfied personally that what is presented meets the statutory test of reasonable suspicion. It requires careful consideration and rigorous and critical analysis by the judge. As we set out at paragraphs 202 and following in relation to the second issue before us, a judge must give reasons. These will be a short summary of the detailed analytical process undertaken by the judge in his scrutiny of the material presented.

90. We were helpfully provided with notes by the parties with suggestions as to what might be the best procedure for such applications in cases of serious fraud. For example, consideration needs to be given as to whether the practice of simply putting an Information without the underlying documents before the judge is the best practice for cases investigated by the SFO. Such issues should be addressed by a body such as the Criminal Procedure Rule Committee or an *ad hoc* body established for that purpose. These are difficult issues which require that level of review. It would be helpful if such a review might also raise with the Senior Presiding Judge the best way in which such cases should be listed before judges, taking into account the observations of Hooper LJ in *Windsor v CPS* [2011] EWCA 143, [2011] 1 WLR 1519.

(3) The overall adequacy of the presentation made in the Information and oral evidence to Judge Worsley

91. Before considering the specific matters and transactions set out in the Information and oral evidence, it is necessary to consider the overall adequacy of the presentation.

(i) The need for a clear summary of the case

92. The task faced in making a fair presentation to the judge in the present case was formidable, as the background we have already set out makes clear. We regret that we have concluded that the Information and oral evidence provided to the judge failed properly (1) to present the matter in a manner which fairly set out the background, (2)

to set out the chronology, (3) to make clear in an analytical and fair manner what the allegations were and (4) to set out the matters which weighed against the issue of the warrants.

93. The background to the allegations was relatively straightforward, though some of the transactions were complex. The judge needed the market background, a chronological account of the facts, an analytical exposition of the individual transactions and what would be said in explanation by RT and VT. The judge, for the reasons we explain in detail, did not get such a presentation.

(ii) The role of Grant Thornton and the lack of independent verification

94. It is now clear that the basis of much of what was said to be suspected criminality was based on information provided by Grant Thornton and to a lesser extent Weil, Gotshal and Manges. The Information disclosed that Grant Thornton had been appointed by the Resolution Committee to analyse the lending by Kaupthing and the entities connected with VT and RT. The Information disclosed the involvement of Grant Thornton in the allegations made against RT and in respect of Oscatello and the litigation against Oscatello to which we have referred at paragraph 30. In the oral evidence to the judge, the case manager also told the judge that Grant Thornton were freezing assets in the Oscatello structure; this was an error. There can be no doubt that the judge would have appreciated that much of the material relied on was supplied by Grant Thornton.

95. However the Information said nothing about the role of Grant Thornton in the allegations relating to the Pennyrock loan or the litigation brought in respect of it. It was submitted by Lord Goldsmith that in the circumstances, the judge should have been told of that fact and of the fact there was litigation between Kaupthing and the companies controlled by the TFT in which Grant Thornton were acting for Kaupthing. It was contended that Grant Thornton had a direct interest in the civil proceedings because of the allegations made against them in respect of their actions as receivers; we have referred to one of the claims at paragraph 41 above. Therefore the judge should have been put on notice so that he was alert to any possibility that the SFO was being used to promote the interests of one party to civil litigation.

96. We consider that submission to be well founded. This is a case where it appears that the SFO relied very heavily on the work and conclusions of Grant Thornton. In the absence of independent verification by the SFO's own independent experts of those conclusions, it was essential that the judge be told of the extent of the interest of Grant Thornton in relation to each transaction. Grant Thornton may have been right, but the judge needed to know of their interest and the lack of independent verification of their conclusions. We return to this issue in relation to VT and the TFT companies at paragraphs 191 and following.

(iii) The need for independent verification

97. As we have observed at paragraph 88 the burden placed on the SFO in making a presentation to the judge is a very heavy one. As the judge needs complete confidence and trust in the completeness and accuracy of the Information presented, he needs to know the investigation has been carried out independently at a highly professional level by those of the highest ability with an understanding of the markets

in which the transactions in issue have taken place. It is complete confidence in the investigation and independent expert advice that can be the only basis for a judge to approve the issue of warrants on the basis of a presentation to him which is not supported by underlying documentation.

98. In the present case, as we have mentioned at paragraph 19 and consider in more detail at paragraph 187 one of the allegations in respect of the Pennyrock loan was misrepresentation of the valuation of the ground rent portfolio that was pledged. The allegation, as far as we have been able to determine, was made on the basis of the opinion of Grant Thornton; the SFO took no independent advice. If the judge had been told of their interest and that there was no independent opinion, he would no doubt have closely questioned those parts of the Information, as he could not have had the requisite confidence in what was alleged without detailed enquiry of those presenting the application to him.

99. It was submitted by Mr Eadie that the SFO were entitled to rely, without independent expert verification, on the advice of experts such as Grant Thornton who were instructed by parties to litigation connected to matters which the SFO were investigating. We have already made clear that the SFO had to disclose to the judge that there had been no independent verification. Although it is essential that information is provided to the SFO by accountants and others investigating transactions, reliance on such experts instructed by others without independent verification when applying for search warrants is not, for the reasons we have given, a practice that is in the public interest in the investigation and prosecution of suspected crime in the financial markets.

(4) The reasons why a s.2 (3) notice might seriously prejudice the investigation

100. As is clear from the provisions of s2 (4) of the CJA 1987, the judge must be satisfied that a notice under s.2(3) would not be practicable or such a notice might seriously prejudice the investigation.

101. The case made in the Information was that the case manager (who signed the Information) had reason to believe that RT, VT and the companies would not co-operate voluntarily; that, in response to a s.2 notice, they would not hand over documents which would incriminate them; that they might destroy or conceal the documents. The Information also stated that, although VT and RT were of good character, the allegations were of "substantial, complex, concerted and longstanding dishonest and deceitful conduct" by them; the dishonesty was identified as the presentation of deceitful information to obtain credit facilities and the collusive relationship with Kaupthing. There was no allegation against RT or VT that they had tampered with or destroyed documents, though such an allegation was made in the Information against others.

102. It was, in these circumstances, rightly submitted on behalf of Rawlinson and Hunter, RT and VT that as the case for a s.2(4) warrant in essence therefore depended on demonstrating that there was reasonable suspicion of dishonesty on the part of RT, VT and the entities, it was essential that the greatest care was taken in ensuring the accuracy of the allegations of dishonesty.

103. Another consideration was raised on the basis that a large part of the matters relied on were the subject of civil litigation. It was to be anticipated that the lawyers acting for the TDT and TFT interests would have gathered together the extant documents for the purposes of disclosure in the civil proceedings. As we have set out, the fact of litigation involving RT and TDT was made clear in the Information, though, as we have pointed out at paragraph 95, not in respect of the Pennyrock loan which formed the basis of the case against TFT and VT. It was submitted on behalf of RT and VT that the judge should have expressly been asked to consider whether this was a factor that militated against granting the warrants. This submission is relevant in relation to Project Longboat and the Pennyrock loan; we consider that issue in these transactions at paragraphs 161 and 192 respectively.

104. Against that general background, we turn to examine the specific allegations made against RT and the TDT entities and then to the single allegation made against VT and the TFT entities.

(5) The allegations relating to RT and the TDT

105. As we have set out, five specific transactions were relied on as showing suspected criminality. Listed in chronological order, they were:

i) The Oscatello loan facility and the increases in lending under it

ii) Money Market loans

iii) Pumpster

iv) Thorson

v) Project Longboat and the PIK notes

106. Before turning to consider the case advanced by RT in respect of the inaccuracies in respect of each of these, it is convenient first to consider the case made by RT in respect of the inaccuracies in the Information about Investec.

(i) The role of Investec

107. As we have set out at paragraph 6, the trustees of the TDT at the material time were Investec, part of the well known Investec group.

108. The Information referred to Investec as a trustee of the TDT and explained its role as follows:

> "Each trust is managed by Trustees and Joint Trustees appointed to operate the business of the trusts. Nominee company directors are appointed by the trustees to manage the day to day activities of the multiple holding companies and Special Purpose Vehicles (SPV) set up to perform specific activities within the structure. The brothers retain, respectively, the UK R20 and [Consensus] to advise and provide instructions to the nominee directors."

A little later, the Information stated:

> "The Trustee companies set up to operate the TDT were: Investec Trust (Guernsey) Ltd, Bayeaux Trustees Ltd. Both above Trustee Companies acting as trustees for both TFT and TDT."

The statement that Investec was set up to operate the TDT was repeated elsewhere in the Information.

109. The Information did not explain the role of Investec in any of the transactions or that it was part of a well-known financial group. As we shall set out, in some of the transactions, Investec, although instructed by RT through R20 to enter into the transactions, took advice and then had to decide for itself, under the arrangements which we have described, whether to enter into the transactions.

110. We accept that obviously the fact that a trustee company is interposed in a transaction does not mean that there can be no criminality; as Mr Eadie put it: "It is not a crime cut out". We also accept there was powerful material that showed that the actual deal making between Kaupthing and TDT was done by RT, as would be usual in this type of arrangement. However, in a case where suspected criminality is alleged in a transaction and a trustee is formally the party who enters into the transaction and signs the documents, often after taking his own advice, it is plainly material that the role the trustee performs is explained, particularly when the trustee is a well-known trustee company.

111. Although, therefore, the fact that a trustee is involved does not mean there is no criminality, it is material to know that the transactions were entered into by the trustees. That is particularly so when that trustee is an entity that is independent of the beneficiary and which has its own reputation to safeguard in the financial markets.

112. It would have been very simple to have explained the arrangements made between RT, TDT and the offshore companies, the role of Investec and how transactions were carried out, if those drafting the Information had sought to do so. It is a matter of great regret that the Information adopted the tone it exhibited and did not clearly and properly explain the arrangements. The presentation in the Information and in the oral evidence indicated a regrettable lack of understanding by the case manager of the nature of the arrangements and the role a reputable trustee plays. It was, in particular, a serious omission in relation to the making of the Oscatello loan facility and associated arrangements, the Pumpster transaction, the Pennyrock loan and Project Longboat.

113. We therefore turn to the transactions, which it is easiest to set out in chronological sequence (apart from Pennyrock), though that was not done in the Information.

(ii) The making of the Oscatello loan facility and associated agreements

114. As we have mentioned at paragraph 11, RT and the TDT invested heavily in the acquisition of companies and of interests in blocks of shares in publicly-quoted companies for which one of the major lenders was Kaupthing. Central to the case against RT of collusive and dishonest borrowing from Kaupthing were the

arrangements to which we have referred at paragraph 14 for the restructuring of the TDT borrowings, the loan facility to Oscatello made in December 2007 and the agreements associated with it. It was submitted to us that there was sufficient in the Information and evidence to show that there was a reasonable suspicion of this. That on its own justified the grant of the warrants.

115. The arrangements made in December 2007 included the Oscatello Framework Agreement, the Facility Agreement and the First Oscatello Mortgage. These arrangements were referred to after the insolvency of Kaupthing by those acting for Kaupthing and the SFO as the Oscatello Loan Facility, reflecting their view it was in essence simply a loan facility. The TDT interests referred to the agreements as the "Osctaello Joint Venture", reflecting their contention that it was a joint venture with Kaupthing to manage and provide long term financing capacity to fund the interests held by TDT in publicly quoted companies which it was anticipated would provide a long term return for TDT and Kaupthing.

116. Under these arrangements, as best as we understand them from the limited documentation and other material before us, a BVI company called Eliza Ltd (Eliza) was formed. It received an injection of equity from TDT and a profit participation loan from Isis, a company owned by Kaupthing. Another company also participated, but that participation was merged into that of Isis. Another BVI company, Oscatello (to which we have referred at paragraph 9) was funded by Eliza through equity and intra-group debt. Oscatello then entered into the Loan Facility with Kaupthing for £371m.

117. Oscatello then acquired through the purchase of shares in other TDT companies significant assets and repaid some of the outstanding borrowing. The loan under the facility was secured by pledges and other security interests over the shares of the companies within the Oscatello structure that owned the assets. The facility agreement provided that the loan to asset ratio should be 87%. Personal guarantees given by RT under the prior borrowings were discharged.

118. The Information identified specific aspects of conduct in the making of these arrangements as the basis for suspected substantial and potentially dishonest misrepresentations. In the argument before us, what was set out in the Information remained the basis for the case that there was a reasonable suspicion of collusive and dishonest lending between RT and the TDT companies and Kaupthing. The specific matters relied on were:

i) A warranty was given by TDT as to the statement of assets and liabilities of the Oscatello companies as at 30 November 2007. This showed that Oscatello had a net equity of £264.46m. However it was contended that if the inter-company liabilities at that time or as at 17 December 2007 were brought into account, the Oscatello Group was in fact insolvent. TDT therefore was in breach of the warranty.

ii) Shortly after the making of the arrangements, there was said to be evidence that Oscatello was insolvent. The Information referred to an e-mail on 30 December 2007 from Gudmundur Thor Gunmarsson, Head of Corporate Credit at Kaupthing, to R20 where he stated that "the structure as a whole is under water and we need to sell aggressively".

iii) Grant Thornton had calculated the loan to value ratio of Oscatello was 350% at 19 December 2007. However, the Information did not explain this calculation or whether any dishonesty was alleged; it merely stated that it was in excess of the 87% in the agreement. The note by the SFO of the meeting on 25 November 2010 at which this information was imparted to them does not contain any detail.

iv) The release of the personal guarantees of RT.

v) The failure by Kaupthing to honour the request made to it by the Icelandic Financial Regulator to keep an overview over the lending to Oscatello and the value of the securities.

119. These matters are all significant, despite first the lack of any detail from which it was possible to discern the basis of these allegations and second the lack of independent verification by the SFO.

120. However, the serious defect in the Information was that it did not explain the reality of the position of Kaupthing and the TDT at the time of the making of the Oscatello loan facility and associated agreements. In our view, it should have done so, so that the judge could understand the context of the serious allegations both in relation to the making of the facility and as to the increases in the loans under the facility in 2008 (which were said to have no commercial rationale from Kaupthing's perspective) and the other transactions where specific allegations of suspected criminality were made, as we shall set out in more detail.

121. The background was that the bulk of the very large positions held in Mitchells & Butlers (about 20% of the equity) and Sainsbury (about 10% of the equity) was held through CFDs and other forms of derivative contract (as we have explained at paragraph 13). It appears that prior to the agreements of 19 December 2007, the holdings in Sainsbury were through CFDs where the counterparties were a Kaupthing subsidiary, Dawnay Day or Morgan Stanley; it also appears that the bulk of the holdings in Mitchells & Butlers was in CFDs with counterparties including Kaupthing's UK and Luxembourg subsidiaries. An internal memorandum of Kaupthing written by Mr Gunnarsson on 12 December 2007 produced by the SFO stated that the equity levels of the TDT investments was only 14.67% at 30 November 2007; a forced sale of the interests in Sainsburys and Mitchells & Butlers would result in a drastic drop in the share prices. On 30 November 2007 (the date of the statement of assets and liabilities of the Oscatello companies), the share price of Sainsbury was 440p and that of Mitchells & Butlers 577p. At paragraph 130, we set out how by March 2008 the prices had dramatically fallen and the position of Kaupthing and Oscatello had deteriorated.

122. It was obvious that a forced liquidation of Oscatello at the time of the 19 December 2007 arrangements could, because of the nature of the security held by Kaupthing, in all probability have seriously damaged Kaupthing. It is not uncommon that a bank exposed to a company with a balance sheet of the type exhibited by Oscatello might have therefore a commercial rationale for lending more money in those circumstances, even if the company was insolvent; the bank would hope that the market would improve and that the loss that would result from a decision to terminate the lending and consequent insolvency would be averted.

123. In our judgment, the failure to set out these facts and to explain these matters in the Information and oral evidence, was a grave and material omission which resulted in the judge not being given a fair presentation of the key issue in the case – was this a case where Kaupthing made a wrong commercial decision in December 2007 by continuing to lend to the TDT companies in the hope that their exposure would be reduced by an improvement in the market or was this dishonest and collusive lending?

124. The failure to explain that issue in these relatively simple terms is entirely consistent with the overall presentation to the judge which did not set the issues out in an analytical manner. It is with deep regret that we have reached this conclusion on what was done. Properly understood and explained, the materials which we have had an opportunity of examining during a three-day hearing before us and thereafter, might have provided grounds for reasonable suspicion on the basis of the matters to which we have referred at paragraph 118 and the matter to which we refer in paragraph 126. It would then have been for the judge to be personally satisfied that it did. However that was not the way in which the matter was put before the judge. He was given an account that was not only wholly inadequate, but unfair.

125. There was an omission to set out the role of Investec. This omission taken with the omission to refer to Investec's role in other transactions was material. As we have mentioned at paragraph 112, the role of Investec in this transaction was important. The Information did not point out that the statement of assets and liabilities to which we referred at paragraph 118 i) was supplied to Kaupthing under cover of a letter signed by Investec which stated that the statement correctly stated the assets and liabilities of the companies. In a case of alleged dishonesty by RT, the judge should have been told that.

126. The further and important matter relating to the Framework Agreement and Loan Facility which was not highlighted in the Information was Kaupthing's use of its subsidiaries as counterparties for Oscatello's CFDs and other derivatives though which TDT's interests in Sainsbury and Mitchells and Butler were held, despite the fact that Kaupthing was providing the financing for Oscatello. It must have been obvious that margin calls by the subsidiaries would require further finance if the market declined and that provision of this finance by Kaupthing through the Money Market loans, to which we refer at paragraph 132 and following, further increased its existing significant exposure.

(iii) The increases in the Oscatello loan facility in the first part of 2008

127. As we have set out at paragraph 17, there were further increases in the lending to Oscatello under the facility in 2008.

128. The Information made a number of allegations of suspected criminality in respect of these increases in the Oscatello loan:

i) The value of collateral for significant assets was deliberately overstated or manipulated.

ii) There was no obvious commercial rationale for the subsequent increase in the loans made to Oscatello and the concentration of the exposure of Kaupthing to the TDT.

iii) The loan to value ratio had been ignored or arbitrarily changed.

iv) Documentation showing approval by the Kaupthing Credit Committee for other specific additional loans was created retrospectively and in breach of the loan to value safeguards.

v) Kaupthing had lent RT funds to meet margin calls from subsidiaries of Kaupthing. "In other words, the parent company of the group loaned funds to him to meet margin calls from its subsidiaries, a concept without any apparent commercial rationale".

vi) A paragraph of the Information stated:

> "Alternative collateral for loans under the Agreement consisted solely of shares of intermediary holding companies within the Oscatello structure, with subsidiary companies further down the structure holding assets of value. The loan to value ratio for such collateral was initially set at not less than 87% of the outstanding loan. The loan to value ratio applies to the amount an institution is willing to advance as opposed to the value of the underlying asset or collateral. So in this case it was 87% of the value of the underlying collateral."

Mr Eadie told us that this paragraph was meant to reflect a report by Grant Thornton to the SFO on 25 November 2010 that other lenders had their loans secured on actual assets, whereas Kaupthing's security was on the shares of companies whose assets had all been pledged to the other lenders. The other lenders were identified as Morgan Stanley and Dawnay Day who it appears were the counterparties to the CFDs and other derivatives; the conclusion of Grant Thornton was that Kaupthing was in effect funding margin calls by way of overdrafts.

129. As we have stated at paragraph 119, an explanation for the increases in the loan facility in 2008 was the exposure of Kaupthing to Oscatello, if the market was to decline. The position of Kaupthing was made precarious by the fact that the bulk of the holdings were held under CFDs and other derivative contracts under which margin calls had to be met in the market conditions of 2008. The position was then significantly worsened by Kaupthing refinancing the CFD and derivative contracts as we have explained at paragraph 126. We were told that by October 2008, most of the counterparties to the CFDs and other derivative contracts had become subsidiaries of Kaupthing.

130. It was, in our view, essential that this was set out in the Information as it provided a possible explanation of the commercial rationale from the perspective of Kaupthing for the increase in the loans by Kaupthing which the judge needed to consider in assessing whether there were proper grounds for suspecting that RT might have committed the criminal matters alleged. For example, the credit application evidencing the increase in the loan facility to Oscatello by £80m in March 2008 (which we consider at paragraph 181 below under the heading of the Pennyrock loan) stated that the increase was needed to meet margin calls with Dawnay Day, Morgan Stanley and Kaupthing subsidiaries. The document noted that the share price of

Sainsbury was 318p and that of Mitchells & Butlers was 336p at 17 March 2008, a significant fall from the values at 30 November 2007 to which we have referred at paragraph 121. The document noted that the share price did not reflect the long term value. It concluded:

> "Even though the exposure on TDT is considerably underwater, it is estimated that the interest of Kaupthing is best served by keeping Oscatello alive."

131. This explanation in Kaupthing's documentation might have been disingenuous, but it did provide a possible explanation for the lending, given the decline in the market price and the exposure of Kaupthing. The omission was, in our view, a significant omission in the context of the increases in the loan facility as it was a possible explanation for the continued lending and for the provision of loans to meet margin calls made by Kaupthing's subsidiaries. Its omission contributed to making the presentation of the case to the judge unfair.

(iv) The M*oney Market loans made between January and July 2008*

132. The third of the five aspects of suspected criminality alleged were the 36 Money Market loans made between 10 January 2008 and 16 July 2008 which we mentioned at paragraph 18. The Information stated that much of the further lending was delivered in the

> "form of Money Market loans in order to deliberately circumvent normal credit control and sanction process at Kaupthing."

There were said to be 36 money market loans credited to the Oscatello account amounting to over £343m. They were made in the form of short term cash deposits and it was said that such loans would only be used for short term borrowings between banks and other institutions. They were said to have no commercial rationale from the perspective of Kaupthing.

133. The basis of this allegation appears to have been a discussion with Grant Thornton on 26 November 2010 when the SFO were told that the loans were made at a time Oscatello was insolvent and no security was required. Grant Thornton had advised that the loans were not advanced on a commercial basis.

134. Although some of these loans were repaid, there was outstanding at the date of Kaupthing's collapse £156m, including interest.

135. We have already set out our view at paragraph 130 above that the fact that there was a possible commercial rationale from Kaupthing's perspective should have been drawn to the attention of the judge. It was another material omission. We would add that the way in which the case manager explained the matter in a single sentence to the judge, as we have set out in paragraph 50, was not the analytical way in which these transactions should have been explained to the judge.

136. The use of Kaupthing's subsidiaries as counter parties for the CFDs and other derivatives is a matter of continuing investigation; in conjunction with the issues in

relation to the Oscatello facility, as we have observed at paragraph 124, the circumstances of the making of those loans might have provided grounds for reasonable suspicion.

(v) The Pumpster transaction in June 2008: the Laurel Pub Group.

137. The detail relating to the Pumpster transaction is indeed complex. It is the fourth of the areas of suspected criminality relied on by the SFO. As best we understand it from the materials before us, the background was as follows.

138. As we have mentioned at paragraphs 21 and 22, TDT acquired the Laurel Pub Group with finance provided by a number of lenders including Kaupthing. The Laurel Pub Group was divided after acquisition between an operating company, Laurel, and a property owning company, Pumpster. Kaupthing took a minority equity interest in the group through Isis, the entity to which we referred at paragraph 116 in connection with the Oscatello Loan Facility. As part of the creation of the Oscatello Framework agreement and loan made in December 2007, the shares in the TDT companies owning the majority interest in Laurel and Pumpster were charged as part of the security.

139. In the early part of 2008, Laurel was put into pre-packaged administration. By June 2008, Pumpster was in financial difficulties; the lenders, including Kaupthing, were notified that winding up proceedings were to be commenced. A very complex set of arrangements were then made, the effect of which was to leave Kaupthing as the lender to Pumpster but to provide £45m from Isis (the company owned by Kaupthing) to Eliza (the TDT company created with equity from the TDT and a profit participating loan from Isis). Oscatello was then lent those funds which it used to purchase a sub-participation in the loan. An amendment was made to the December 2007 arrangements for profit participation and for the provision of additional security for the Oscatello loan; the equity interests in Pumpster owned by Kaupthing through Isis were purchased by Oscatello.

140. The Information alleged that the transactions resulted in Kaupthing exchanging "£46m of impaired debt with a profit participation loan due from Eliza Ltd thus avoiding bad debt provisioning." It was said that Kaupthing, R20 and RT knew that Pumpster was insolvent and £46m was a bad debt. It was said that the debt was sub-participated to Oscatello to remove it from Kaupthing's books as a bad debt and show it as a good debt from Eliza; it was a circular transaction where no cash was moved. In summary:

> "the evidence suggests therefore collusion to create a false position as to Kaupthing's accounts".

141. It appears that some of the negotiations for this transaction were conducted through two leading international law firms, Kirkland & Ellis and Linklaters and that Linklaters had drafted the documentation. The documentation was executed by Investec. Lord Macdonald submitted that was known to the SFO and it should have been disclosed to the judge, as it was relevant to the judge's assessment of suspected criminality.

142. It is clear from the e-mails sent by Linklaters that advice was given about the transaction in the context of insolvency, regulatory issues and the commercial rationale of the transaction. Kirkland & Ellis' e-mails also show that such issues were known to arise. The response of the SFO to Lord Macdonald's submission was to say that drawing the attention of the judge to these matters "would have strengthened the allegation."

143. In accordance with the duty of the SFO to set out for the judge their case and to draw to his attention factors that weighed against that case, it was important to explain their case on the transaction and to explain what might be said against it. This was, without doubt, a transaction with complex details. It was not easy to summarise. It was, however, important to the SFO in their case of a collusive relationship between RT and Kaupthing. Given the difficulties in summarising its complexity, it was important for the judge to know that pre-eminent firms had been asked to advise and had raised significant insolvency and regulatory issues in relation to the transaction. The judge would then have needed to know the SFO's case in relation to the reaction of RT, Kaupthing and Investec to the concerns raised by the lawyers. It may be the case that the concerns raised were ignored or they may have been addressed by RT and Kaupthing. We do not know. Nor do we know the position of Investec.

144. We cannot therefore uphold the contention of the SFO that the issues raised by Linklaters and Kirkland & Ellis strengthened their case. They may have done; they may not have. We therefore conclude that the judge should have been told, as it was material to the decision as to whether the transaction gave rise to reasonable suspicion of criminality. Whether it would or not we have no way of knowing on the evidence before us. The answer will in fact probably never be known, as the transaction is no longer under active investigation by the SFO.

(vi) The position of the Oscatello loan in the summer of 2008

145. During the summer of 2008, as is well known, there was a further deterioration in the financial markets.

146. The Information stated that at the end of July 2008, Kaupthing's employees were instructed to value the shares in Mitchells & Butlers at a fixed value that was higher than the market price which was steadily declining. We have briefly referred to this at paragraph 23; it reflected an allegation that had been made to the SFO by Grant Thornton to the effect that the price of Mitchells & Butler shares had been fixed from 25 July 2008 at 489p in Kaupthing's books resulting in an overstatement of value of £214m by 31 August 2008 (see paragraph 38 above).

147. The Information also stated that on 5 August 2008, an internal Kaupthing report stated that the main assets securing the Oscatello loan had fallen in value by 35% and the loan ceiling had been exceeded. The Information alleged that despite this, lending to Oscatello increased. At the time of Kaupthing's collapse, the lending to Oscatello was in excess of £639m.

148. The Information also alleged that Mr Clifford of Investec sent an e-mail to his colleagues on 15 July 2008 in which:

> "he outlined his concerns about the insolvency of the Oscatello structure. This concern was raised with R20. In response a "Comfort letter" dated 14 August 2008 drafted at R20 and forwarded to Kaupthing by a senior employee of R20, Aaron Brown in an e-mail attachment. Aaron Brown requested that the draft be placed onto Kaupthing headed paper and signed. This request was carried out by the above mentioned Gudmunder Thor Gunnarsson who signed and returned the letter as requested on Kaupthing headed paper and with the date amended to 21 August 2008. This seems at odds with the e-mail referred to above [which we have mentioned at paragraph 118.ii) above] in which Gunarsson states that Oscatello was "under water". This letter makes reference to the fact that the Bank were "fully aware of the position of the borrowers", meaning Oscatello. The nominee Directors duly acknowledged receipt of the letter within the minutes of a meeting called by the nominee directors."

The Information referred to this as highly unusual practice and that it raised serious questions about the operating independence of Kaupthing when it came to overseeing the interests of RT. It appeared that Kaupthing was acting more in accordance with RT's direction than it should have been and in contravention of the normal commercial interests of Kaupthing.

149. In our view that part of the Information materially misstated the position. First, as already set out, it did not explain the possible rationale for Kaupthing's lending. Second, as regards the allegations which we have set out in paragraph 148, it is evident from the documentation in the possession of the SFO that Investec wanted to be satisfied as to Kaupthing's continued support of Oscatello, as without it, it was insolvent. The letter of comfort to them from Kaupthing (to which we have referred at paragraph 24 above) was therefore needed by them if Investec was not at risk of various criminal offences in relation to insolvency. A note of a meeting between RT, Mr Clifford of Investec and others on 3 September 2008 made clear that Investec needed this as trustees concerned about their solvency obligations and the interests of creditors. It was essential that explanation was set out for the judge as a possible answer to what was alleged.

150. As regards the allegation set out at paragraph 146 that the shares in Mitchells & Butlers were not being marked to market in the books of Kaupthing from July 2008 onwards, it was contended on behalf of RT and the TDT companies that the attention of the judge should have been drawn to a possible explanation for that. The possible explanation was that in the then market conditions, the market price did not properly reflect the fair value of the significant holding in Mitchells & Butlers; moving away from a mark to market valuation might therefore be justified by the application of generally accepted accounting standards. There was some material before us as to whether a fixed valuation was an appropriate measure of valuation in Kaupthing's accounts for the holding in Mitchells & Butlers financed through CFDs and other derivatives to which subsidiaries of Kaupthing were counterparties. However we do not consider that was sufficient to enable us to determine whether that was in reality a possible explanation which should have been put before the judge.

(vii) Thorson; the transfer of £61.84m on 3 October 2008

151. As we have mentioned at paragraph 26, there was a transfer of £61.84m from the Oscatello account with Kaupthing to an account of Thorson Investments Ltd with Kaupthing Luxembourg. This increased the overdraft by £39m. Thorson was a TDT company whose shares were charged to Kaupthing.

152. This was the second of the five aspects of criminality alleged against RT in the Information. It was dramatically highlighted in the evidence of the case manager before the judge, as we have set out in the second paragraph of the quotation at paragraph 50 above.

153. The text of the Information stated that this transaction was on 9 October 2008 (after the collapse of Kaupthing), though the chronology in the Information gave it its correct date of 3 October 2008 before the collapse. The case manager told the judge that it was before the collapse of Kaupthing.

154. What is more important is the way in which the matter was put by the case manager to the judge. It is evident from the review carried out for these proceedings that at the time the case manager gave his evidence to the judge, the SFO had no more than a suspicion of criminal conduct and that that related to a concern that assets under the control of friends of Kaupthing were being transferred to Kaupthing Luxembourg to protect them when Kaupthing itself collapsed. It had no evidence that RT had instructed the transfer. A few days before the hearing before the judge, the SFO was provided with internal e-mails which suggested that this was an internal transaction, though the e-mails did not remove all doubt.

155. In our judgment, there was no justification whatsoever for the evidence of the case manager to the judge on this transaction. It raised a transaction which possibly justified some further investigation into an allegation of serious criminality by RT which was wholly unfounded. It was a grave misrepresentation by the case manager for which we have had no proper explanation.

156. Subsequent enquiry has not produced any evidence that this transfer was initiated by RT or R20 or produced a gain for them. It is possible that Kaupthing intended to protect the assets of the TDT or was reacting to pressure from the Luxembourg regulator to pay down its liabilities in Luxembourg. It is again probable that what happened will never be known as the SFO has not pursued its investigation of this transaction.

(viii) The attempt to protect Oscatello's assets in November 2008: Project Longboat and the PIK Notes

157. We have set out at paragraphs 29-31 an outline of what was described as the Project Longboat transaction. It occurred after the collapse of Kaupthing. It was the fifth of the five allegations relied on by the SFO as showing suspected criminality by RT. The Information alleged in summary that RT had removed valuable collateral away from Kaupthing (and its creditors) and replaced it with worthless Payment in Kind notes (PIK Notes). The notes were certificates issued by the companies that purchased the assets and constituted unsecured obligations by the companies to pay the note holders by 13 November 2038 the face value of the notes plus floating

interest based on LIBOR plus 1%. The notes were direct and unsecured obligations of the issuing companies.

158. Lord Macdonald submitted that the Information contained a materially inaccurate presentation in relation to this transaction, as it did not set out matters that should have been drawn to the attention of the judge which emerged from what was set out in the papers in the BVI action which the SFO had or must have had.

159. We have referred at paragraph 30 to the BVI action brought by Kaupthing against Investec as the first defendant and the Oscatello companies as other defendants. Mr Robert Clifford, an English solicitor and an executive director of Investec, swore an affidavit on 12 February 2009 in support of the opposition to the interim application for the appointment of receivers made in those proceedings. His affidavit made it clear that the transaction on 13 November 2008 was intended to protect the interests of the TDT in assets, principally interests derived from the investments in Welcome Break and Somerfield, from the consequences of the insolvency of Kaupthing and by being made the subject of a "fire sale" by Grant Thornton. He stated that after the transaction, the assets were ring fenced so that they could not be used by the beneficiaries of TDT and Kaupthing would not be prejudiced. He added:

> "The collapse of Kaupthing involved public and regulatory authorities in a number of jurisdictions. There was huge publicity. The notion that the Trustees could or would have made off with the assets so as to "defraud" Kaupthing is ridiculous"

His affidavit went on to explain the reasons for his view which included an earlier fire-sale by Kaupthing without notice to TDT, the transparent nature of the transactions effected on 13 November 2008, the immediate notification to Kaupthing, the way the transactions were structured so that they could be unwound and the offering of an undertaking by Investec that the assets would not be dealt with.

160. The affidavit sets out a detailed account of the reasons why the transactions were effected to prevent a "fire sale" by Grant Thornton for Kaupthing in the then state of the market. It set out the engagement by Investec of Ashursts, another pre-eminent firm of London solicitors to advise, the subsequent retention (when Ashursts could no longer act because of a conflict of interest) of Quinn Emanuel, a very large and well known US-based litigator with offices in London, who notified Kaupthing by letter of the transaction on 13 November 2008 immediately after it was effected. It explains in detail how the transaction was effected. In addition to this affidavit, there was a defence which set out further details of the transaction which was signed by Sue Prevezer QC, an advocate highly experienced in this area of law.

161. It is clear that the SFO had the defence in the BVI action and the Quinn Emanuel letter of 13 November 2008. We infer that they had the statement of Mr Clifford. Although it would not be appropriate for us to express any view on the transaction, in our judgment, the Information should have disclosed to the Judge matters that had been raised by those on the TDT side of the litigation that were submitted in answer to the allegations of suspected criminality. There was in our judgment the following non-disclosure:

i) The Information was silent on the role of Investec. The SFO contended that RT remained in ultimate control. Although the degree of control that was respectively exercised by Investec and RT is a matter that may ultimately have to be decided, the judge should have been told what was said by those involved for RT and TDT. He should therefore have been told what Investec said its role was in the transaction and the reasons given by Mr Clifford for what it was seeking to do.

ii) The Information said nothing about the immediate notification to Kaupthing of the transaction. It was said by the SFO that Kaupthing considered the transactions were illegitimate. However in judging whether there were reasonable grounds for suspecting the transaction to be criminal, it would be material to take into account that Kaupthing were immediately notified.

iii) The Information was silent on the undertaking offered by Investec and on Investec's contention that the assets were ring fenced. It should have set it out, as it was again highly material to a judge's determination as to whether there were reasonable grounds for suspecting the transaction to be criminal.

iv) The Information stated that Leading Counsel for Kaupthing had concluded that the transactions were fraudulent. If that was thought to be relevant (which it was not), the Information should have stated that Leading Counsel for the defendants in the BVI claim, Ms Prevezer QC, had characterised in the defence the allegation of fraud as "scandalous and/or vexatious and/or ought never to have been made."

v) The reference in the Information to a meeting in Scott's Restaurant between RT and Mr Sigurdsson, chairman of Kaupthing, in 2008, in relation to the sale of the interest in Somerfield was no doubt intended to show a close relationship between RT and Kaupthing. If that meeting was to have been relied on, a more detailed account of what RT and TDT said as to the reasons for the meeting was necessary to give a fair and balanced picture.

vi) The Information stated that proceedings had been brought in the BVI against RT; that was wrong. The litigation had been brought against Investec and the Oscatello companies.

It was submitted that the Information should, when stating the action had been settled, also have drawn attention to the fact that the allegation of fraud had been withdrawn. However, the SFO did not know the terms on which the action had been settled. Furthermore although it was submitted that the judge should have been asked to consider whether the fact that litigation was extant militated against the grant of the warrant as the lawyers would have safeguarded the documents (as set out in the submission we have recorded at paragraph 103), this factor was an obvious matter to any judge and did not need to be spelt out.

162. Thus we are satisfied that the way in which this transaction was put before the judge was materially misleading by reason of the serious non-disclosure. The SFO made clear at the hearing that this transaction is no longer the subject of "active investigation".

(ix) No benefit to RT

163. It was contended by Lord Macdonald that the Information should have made clear that there was no evidence of any diversion of any funds away from Kaupthing or Oscatello for the personal benefit of RT. The case manager should not have told the judge "nearly a billion pounds passed out of Kaupthing Bank and into the hands of the Tchenguiz brothers."

164. We do not think that this contention adds anything to what we have already set out. We have set out our views of the case manager's evidence before the judge; the statement we have quoted at paragraph 163 was another example of the failure to present the case to the judge in an analytical manner. It is clear what the judge should have been told from what we have already set out. The fact that there was no evidence of personal benefit to RT made no difference whatsoever. It must be recalled that very serious fraud is often committed in the financial markets without there being direct personal benefit.

(x) The discussions between Mr Burton of Burton Copeland and the SFO

165. RT knew he was under investigation. It was the evidence of Mr Burton of BCL Burton Copeland that he and Mr Sallybanks of that firm had had a meeting on 11 November 2009 with the then Director of the SFO. At the time Mr Burton was not formally instructed by RT. Mr Burton had referred to the press reports of the investigation and that RT had been mentioned as someone who might be caught up in the investigation. Mr Burton stated that he had been approached to advise the former chairman and former chief executive of Kaupthing and was anxious to identify any difficulty in jointly representing them and RT. The then Director had mentioned the possibility that those at Kaupthing might say RT had been told something and this might be denied. Mr Burton then made clear that RT would be happy to cooperate. The then Director had said that the SFO would be interested in hearing what individuals, including RT, had to say and if they were interested in making an approach to the SFO. Mr Burton responded that some indication of the matters being investigated would be needed and that RT would probably be happy to talk to the SFO. There was then discussion of the provision of documents; Mr Burton said that the SFO would be pushing at an open door.

166. In July 2010, Mr Burton spoke to the case manager at the SFO. The case manager told him that matters had moved on from what was stated in the SFO press release and the SFO were concentrating on the period 1 June to 8 October 2008. Mr Burton referred to his potential instructions on behalf of RT. The case manager confirmed that RT was a suspect.

167. It was contended by Lord Macdonald that the judge should have been told that Mr Burton, a very well known solicitor of great experience in these matters, had offered the cooperation of RT. The Information referred to an approach by a representative of RT on the basis that assistance was forthcoming; however the Information explained that was in relation to an earlier period and of dealings between Kaupthing and Exista Hf:

> "I have considered whether this approach amounted to genuine, open and frank assistance by [RT]. In the context of the

> material I have viewed suggesting substantial dishonest conduct by or at the direction of [RT], I do not believe that to be the case. My belief as an experienced criminal investigator, and as the Case Manager, is that this was a tactic employed to seek to direct this investigating body. It does not diminish my belief that the suspect will not comply with service of a S.2 notice requirements or that I have reasonable grounds to believe that material under the warrants sought and of relevance to this case investigation will be located at the target premises."

That was apparently a reference to a completely different approach to that of Mr Burton.

168. Mr Eadie on behalf of the SFO contended that there was no need to disclose the approach from Mr Burton, as he was not formally instructed and the approach was no more than an indication.

169. In our judgment, no criticism can attach to the SFO for not drawing this matter to the attention of the judge. The indications given by Mr Burton were all informal; if RT had wanted to help, a formal offer could and should have been made. If that had been done, then that would have had to be disclosed.

(xi) Conclusion in relation to RT and R20

170. We regret to conclude that the Information did not properly present the transactions where criminality was suspected in the context of the financial markets in which they were undertaken. The background was straightforward, but it was never explained. The case that was made on the specific transactions was not in the respects we have identified accurately set out; it failed in the respects we have identified fairly to draw to the attention of the judge the points that weighed against the granting of the warrants.

171. We therefore turn to the question we identified at paragraph 77 where there was debate between the parties as to the test to be applied in determining the effect of errors, misrepresentations and non-disclosure on the validity of the grant of the warrants.

172. In civil cases, the courts have made very clear that a failure to comply with the duty of disclosure on an *ex parte* or without notice application will often result in the setting aside of the order: see for example *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, *Fitzgerald v Williams* [1996] QB 657. Although it was accepted there is a difference between a civil and a criminal case, it was submitted by RT, VT and the TFT and TDT companies that the test to be applied when considering whether to quash a warrant issued under s.2(4) of the CJA 1987 was whether the errors and non-disclosure <u>might</u> have made a difference to the grant of the warrant. Mr Eadie on behalf of the SFO submitted that the test was whether they <u>would in fact</u> have made a difference. We were referred to a number of decisions including, *Jennings v CPS* [2006] 1 WLR 182 at 52-8, *R (Mercury Tax Group) v HMRC* [2008] EWHC 2721 at paragraph 48, *R (Wood) v North Avon Magistrates Court* [2009] EWHC 3614 at paragraphs 34 and 37, *R (Faisaltex) v Crown Court at Preston* [2009] EWHC 1687 at

paragraph 81, *Burgin and Purcell v Commissioner of Police for the Metropolis* [2011] EWHC 1835 at 66-71, *Re Stanford (supra).*

173. On the facts of this case, the difference is immaterial as we shall explain. It is therefore not necessary for us to reach a concluded view, but in a criminal case the authorities and consideration of public interest point, in our view, to the test being whether the errors and omissions would in fact have made a difference to the decision of the judge to grant the warrants.

174. There was then a further matter raised by Mr Eadie. He submitted that before setting aside the warrants we should ask ourselves the question whether the judge would have granted the warrants if what had been made known to this court on the judicial review had been put before the judge. It was submitted we should consider what the Information should have contained including not only the corrections, but also such other material as appeared to us it should have contained on the basis of the evidence before us. If that other material could have been provided to the judge, we should not set aside the warrants, as on a judicial review the court was entitled to refuse to quash the warrants on the basis that the warrants would have been granted if the correct material now made available to this court in the evidence before us and explained to us had been provided and explained to the judge.

175. The failure to set out the background, lack of clarity in the presentation in the Information and in the oral evidence, the errors made and the failure to put the matters that weighed against the granting of the warrant have been set out by us in detail. At the hearing before the judge, the oral evidence given at the hearing was both unfair and inaccurate. The tone of that evidence was unjustified. We have no doubt that, if what was in the Information had been presented in such a way that the background was properly explained, the errors were corrected and the matters that weighed against the grant of the warrant had been drawn to the judge's attention, it would have made a real difference and he would not have granted the warrants. This is very far from the case where the failures only might have made a difference; they plainly did, as the warrants would not have been granted.

176. However, it is apparent from what we have set out after a detailed examination of the materials over three days in court and a study thereafter of the evidence presented to us that a case of reasonable suspicion might have been advanced and presented by the SFO to the judge, at least in relation to the making of the Oscatello loan facility and associated arrangements (see paragraph 124 above) and the Money Market loans (see paragraph 136). This would have been a task that did not require corrections or additions by way of disclosure, but it would have required starting again and putting the presentation in a coherent, fair and analytical manner. Whether there was or is such a case of reasonable suspicion, if a case had been made in that way, would then have been for the judge to determine.

177. Although we consider such a case might have been made, we cannot accept the submission that it would be just to refuse to quash the decision of the judge. What we would be doing would be permitting the SFO in effect to justify what it had done by adopting a proper and analytical approach in this court and doing what it had manifestly failed to do when it went to Judge Worsley.

178. In any event, as Lord Macdonald correctly submitted, as we have set out at paragraph 76, the merits of the investigation and continuing the investigation are not an issue in these proceedings. It is very important that proceedings of this kind are confined to the issues that strictly arise and are not utilised as a means of indirectly seeking the court's view on an investigation. The question whether matters should be investigated is under our constitution the responsibility of the investigating and prosecuting authorities; the role of the courts is strictly limited. There would be highly undesirable consequences if it were otherwise.

179. That is however not to say that the public interest should not be protected. As the court observed in *R (Cook) v SOCA* [2011] 1 WLR 144 at paragraph 16, there is the public interest to consider criminal justice. That public interest can be protected. If the SFO considers that the documents should not be returned, it can utilise the statutory procedure available under s.59 of the Criminal Justice and Police Act 2001 which we consider at paragraphs 276 and following.

(6) The transaction relating to VT and the TFT: Pennyrock

180. We turn to the position of VT and Consensus where it is conceded that the warrants should be quashed.

(i) The factual background

181. As we have set out at paragraph 19 above, a part of a ground rent portfolio ultimately owned by TFT was used as security to cover an increase in the Oscatello loan facility thus benefiting TDT and a part used as security for a loan of £100m to Pennyrock, a SPV owned by TFT. The basis of the SFO's allegations in respect of this transaction was the information provided by Grant Thornton from September 2010 as we have mentioned at paragraphs 43 and following. It is now necessary to describe the transaction.

182. The ground rent portfolio was held for the TFT through the Peverel companies. TFT had acquired Peverel Group Limited in May 2007 for £514.5m, with a loan of over £480m being provided by Bank of America. It provided residential property management, investment management and related services within the UK. It was split into two companies – a company often referred to as "Peverel Opco" and Peverel Property Ownership Ltd (Peverel Propco). The valuation of the interests held by Peverel Opco, the operating company, were based on a traditional valuation methodology. Peverel Propco held freeholds entitling it to ground rents. The valuation of these was carried out utilising actuarial methodology based on discounted cash flows from ground rents received under the leases from high quality commercial tenants. The actuarial valuation was carried out by Oliver Wyman, a global management consulting firm with an actuarial consulting practice. It projected the ground rent valuation over an income of 150 years.

183. In March 2009, a further increase of £80 million was needed for the Oscatello Loan Facility, taking the facility up to a lending capacity of £514 million. This was done by additional collateral provided by security over part of a ground rent portfolio ultimately owned by TFT.

184. In connection with this arrangement, Kaupthing agreed to lend £100 million to Pennyrock (the SPV owned by TFT) on 31 March 2008. This loan was secured by a different part of the ground rent portfolio ultimately owned by TFT. Part of the security was provided by a ground rent portfolio owned by Peverel Propco. There was lending by other banks to TFT interests using parts of the portfolio as valued by Oliver Wyman. In the Pennyrock loan agreement, there was the usual clause setting out that senior lending.

185. The Information presented to the judge set out, under the heading "the Pennyrock Loan" that there were reasonable grounds for believing that RT and VT had obtained facilities through substantial and material misrepresentations that might amount to fraud offences. It was said that £100m had been advanced to VT. To the extent that this statement was meant to convey a personal loan to VT it would have been wrong.

(ii) The erroneous allegations of suspected criminality

186. The Information set out three misrepresentations said to have been made by VT and RT as evidence of suspected criminality. The SFO now accepts that its allegations were wrong.

187. The first misrepresentation which it was said had been made by VT and RT was that the valuation of the securities was overstated on the basis that it had been valued by Oliver Wyman which the Information described as "an Actuarial Consultant of 55 Baker Street, London W1U 8EW who had previously undertaken consultative positions in relation to the TFT companies". It was said that Oliver Wyman had carried out an actuarial valuation on 28 March 2008 and assessed the value of the restructured Peverel Group to be £947.6m. The Information stated:

> "It is believed that the value of the securities offered within the portfolio was widely overstated. Actuarial values have been included within the Financial Statements of the underlying ground rent owning companies that Kaupthing relied on for the continued lending arrangements. Whilst actuarial values are a valid way of valuing the portfolio, the basis for this particular valuation was a projection of rental income for 150 years as opposed to the accepted accounting practise of 50 years. Consequently it is believed that the Financial Statements were materially overstated."

188. The then Director of the SFO accepted in his letter to the Judge of 16 January 2012 (set out at paragraph 64 above) that reputable agents and other lenders had accepted this basis of valuation. In fact, as should have been obvious to the SFO, the accounts of Peverel Propco had been audited by BDO Stoy Hayward, the well known auditors and the method of valuation was set out in a note to the accounts; the 150 year period was expressly mentioned. Furthermore, it was a condition subsequent of the Pennyrock loan agreement at clause 4.4.1 and paragraph 2 of schedule 2 that a financial and tax due diligence report would be provided by Baker Tilly, chartered accountants. A member of the SFO team noted in November 2010 that there was a due diligence report from Baker Tilly dated 21 May 2008. Moreover, the tone of the Information in describing Oliver Wyman as "an actuarial consultant of 55 Baker

Street" who had previously undertaken consultative work for TFT companies was unfair and uncalled for.

189. Secondly, it was said in the Information the portfolio had been pledged not only for an increase of £80m in the Oscatello loan facility, but also for the Pennyrock loan of £100m. It appears that this was an allegation of double pledging. In fact the portfolio of ground rents was split into different asset pools as follows:

i) The securities pledged for the Oscatello facility were (1) the shares of companies that owned the GEN1 portfolio (in respect of which the senior lender was Deutsche Bank), (2) shares of companies owning the GEN2 portfolio (in respect of which the senior lender was Bayerische Landesbank) and (3) shares of companies in the GEN5 portfolio (in respect of which the senior lenders were HBOS and AIB UK).

ii) The securities pledged for the Pennryrock loan were (1) the shares of different companies in the GEN 5 portfolio (in respect of which the senior lender was HBOS), (2) the shares of companies owning the Peverel Propco ground rent portfolio (in respect of which the senior lender was BOA, RBS and Prudential) and the shares of companies owning Peverel Opco (in respect of which the senior lender was BOA).

It is evident from an internal SFO note that the SFO had appreciated this division of the ground rent portfolio.

190. The third allegation in the Information against VT and RT was the failure to disclose the senior lending. As we have set out, this senior lending was disclosed in the Pennyrock loan agreement in one of the standard clauses. The SFO had not read the loan agreement, although they had been provided with it on 27 September 2010.

(iv) The litigation involving the TFT companies

191. In addition to these errors, which it had been conceded were sufficient on their own to justify quashing the warrants against VT, there was, apart from the failure properly to describe the role of Investec, one other significant matter which, as we have set out at paragraphs 95-96, should have been disclosed to the judge – the involvement of Grant Thornton in the litigation brought by Rawlinson and Hunter on behalf of the TFT companies against Kaupthing.

192. The existence of this litigation was said to be material for another reason which we have touched on at paragraph 103, namely that the lawyers would safeguard the documents. Although the judge should have been told of the litigation, that consideration would have been obvious and did not need to be spelt out.

(v) The allegations against VT as maintained on 30 April 2012

193. In the evidence provided by the SFO on 30 April 2012, it was stated that the SFO's suspicions relating to the Pennyrock transaction meant that it remained a live part of the investigation. It was said that was because of the almost total lack of due diligence by Kaupthing and the appropriateness of the valuation methodology employed by the TFT interests. Prior to the hearing, a detailed statement was served

on behalf of the TFT companies setting out much more information about the transaction. This led the new Director to the decision communicated to us to reconsider whether there remained a case of suspected criminality against VT and the TFT companies that required the continuation of the investigation.

194. Nonetheless, Lord Goldsmith questioned the basis of the allegations made in the evidence served by the SFO on 30 April 2012. We have pointed out that it was known to the SFO that there was a due diligence report from Baker Tilly and the valuation by Oliver Wyman had been used in accounts audited by BDO Stoy Hayward. It was therefore difficult to see how this transaction could have given rise to suspicions of criminality on the part of VT that justified the grant of the warrant, quite apart from the errors to which we have referred.

195. However, as we have set out at paragraphs 43-44 above, these allegations rest upon what the SFO were told by Grant Thornton on and after 9 September 2010. We only have the notes of the meeting and not the copy of the report of Grant Thornton. They declined in answer to a request from VT to make available the evidence on which such serious allegations were advanced to the SFO. We therefore do not know the basis of Grant Thornton's opinion on the valuation carried out by Oliver Wyman or their opinion on the acceptance of that valuation in the audited accounts. Certainly the allegation (which we have set out at paragraph 43) made by Grant Thornton to the SFO that VT may have misled the auditors as to the period on which the actuarial valuation was made was unfounded, the entire basis of valuation is recorded in note 7 to the accounts. Nor do we know the basis of the contention of Grant Thornton and the Resolution Committee that Kaupthing had not conducted due diligence.

196. Lord Goldsmith severely criticised this conduct of Grant Thornton, having put them on notice on 15 March 2012 and invited them to become a party to the proceedings and to state whether the allegations were maintained. Grant Thornton acknowledged the receipt of this notice in a letter written by their solicitors on 9 May 2012. They stated that they would not become a party, they had not been served with the proceedings and were not in a position to provide information because of the confidentiality provisions of Icelandic law, the Code of Ethics of the Institute of Chartered Accountants and legal professional privilege. They contended that no criticism should be made of their conduct, as the SFO had accepted that the misstatements to the judge were its fault. Lord Goldsmith made clear that the fact that the allegations were still being maintained was continuing to have an adverse effect on the interests of TFT and VT and preventing TFT from repaying the Pennyrock loan.

197. We do not consider that it is for us to comment on the conduct of Grant Thornton, save to say that it is unfortunate that the court does not know the basis for the criticism of the actuarial valuation and the audited accounts. It is perhaps difficult to understand how provisions of Icelandic law or the Code of Ethics of the Institute of Chartered Accountants or legal professional privilege could have permitted Grant Thornton to assist the SFO, after service of a s.2 notice, in making allegations of criminal conduct against RT and VT in relation to the valuation and the accounts, but not to be in a position to assist this court by providing the basis for those two specific allegations when VT and RT challenged by way of judicial review the case made against VT and RT by the SFO who had relied on Grant Thornton's views on those

two specific allegations. From the observations we have made in paragraph 195, the provision of information would have been of assistance to the court.

198. The difficulty faced by the court underlines the importance to which we have referred at paragraphs 97-99 of the SFO obtaining verification of the allegations made through its own independent expert. If that had been done, the SFO would either not have made the allegations or would have been able to put forward an explanation of the allegations based on expert opinion which it could use.

199. As the basis of the allegations made by the SFO in respect of the actuarial valuation and audited accounts were matters put forward by Grant Thornton, it would not be fair for that fact and Grant Thornton's stance in these proceedings to be overlooked in any criticism of the then Director of the SFO for the action taken against VT and Consensus.

200. In the light of the paucity of information before us, the decision of the new Director of the SFO to discontinue the investigation against VT and the other TFT companies and the other considerations to which we refer at paragraphs 282-284, it is not appropriate for us, despite the submissions made, to comment further on the valuation methodology, its inclusion in the audited accounts, the alleged lack of due diligence by Kaupthing or the merits of continuing the investigation during 2012.

(iii) Conclusion on VT

201. As we have already stated the SFO accepted that the warrants should be quashed. There can be no doubt that this concession was right. It was apposite that in the light of the publicity given to the issue of the warrants that those acting on behalf of VT and Consensus were able publicly to set out the nature and extent of the errors made by the SFO.

ISSUE 2: THE JUDGE'S FAILURE TO GIVE REASONS

202. We have briefly mentioned at paragraph 89, the duty of the judge to give by way of reasons a short summary of the detailed analytical process the judge will have undertaken in reviewing the presentation of the SFO.

203. At the end of the evidence of the case manager, the judge said,

> "You obviously have an encyclopaedic knowledge of this case, understandably and I am entirely satisfied that you should have the warrants you require. I need to check that what I am authorising is that which you properly need"

204. A little later the judge added:

> "In preparation of being impressed with [the case manager]'s evidence, I have signed the warrants."

205. After submissions from the in-house lawyer, the judge was asked if he would give the reasons for granting the warrant:

> "Normally I simply grant them if I am satisfied you have made out a case for the necessity of warrants being granted and I find that there is. It seems to me that this is the only way in which you are likely to pursue the lines of enquiry that you wish to pursue."

206. His attention was not drawn to the authorities which make clear that a judge should in an application of this kind always give reasons. This was made clear by Watkins LJ in *R v Southampton Crown Court (*1992, unreported) and by Laws J in *R v Central Criminal court ex p Propend* [1996] Cr App R 26 at page 29:

> "[The judge] gave no reasons for her decision. With respect to her she should have done so. That is not only because generally judges should always give reasons for what they do, but here in particular because she was exercising a draconian jurisdiction."

207. It is regrettable that the giving of reasons is not seen as a matter of course and that this court has repeatedly had to give reminders: see the observations of Moses LJ in *Wood v North Avon Magistrates Court* [2009] EWHC 3614. We appreciate, as Kennedy LJ observed in *R v Lewes Crown Court ex p Weller* (transcript, 12 May 1999), that judges in the Crown Court are often very hard pressed. However, it is essential that judges give reasons and that the lists of the court are adjusted so that the judge has time to do so. This is no doubt a matter that should be considered by the review which we suggested at paragraph 90 .

208. It was submitted by Rawlinson and Hunter that the judge's failure to give reasons was indicative of a failure by him to scrutinise the application and to enquire why the warrants were needed. We do not accept that this can amount to an independent ground of criticism. The presentation to the judge was so deficient for the reasons we have given that no purpose would be gained by examining how the judge should have dealt with the application in his reasons and whether, if he had done so, that would have shown he had not given appropriate scrutiny to the applications.

ISSUE 3: THE LAWFULNESS OF THE ARREST OF RT

(i) Introduction

209. As we have mentioned at paragraph 53 above, on 9 March 2011 at 6.55 am, search warrants, which had been obtained by the SFO, were executed by officers from the City of London Police with representatives of SFO in attendance at the home and business addresses of RT. Substantial amounts of property, including hard copy documents and electronic media, were seized.

210. RT was arrested and he was then held in police custody for almost 10 hours during which time he was interviewed. He was then released on bail to return on 30 September 2011. RT seeks to challenge by way of judicial review the decisions to arrest and to bail him by a police officer for whom the Commissioner of the City of London Police is responsible.

211. The grounds of the claims in respect of the arrest are that:-

i) Where an arresting officer is misled into believing there are other reasonable grounds for arrest by another state agent responsible for law enforcement and that state agent is on notice that the information he is providing to the arresting officer is incorrect or incomplete, then the law must grant a narrow exception to the *O'Hara* principle in order to give RT a remedy; and/or that

ii) The arrest of RT was not "necessary" as stipulated in the criteria set out in section 24(5) of the Police and Criminal Evidence Act 1984; and/or

iii) The decision to bail RT was parasitic upon an unlawful arrest and was therefore unlawful in any event; and/or was not necessarily proportionate or lawful.

212. Although there had been some dispute as to whether judicial review is the appropriate forum under which to challenge the arrest and bail decisions, Ms Fiona Barton QC for the Commissioner correctly, in our view, accepted that judicial review is the appropriate way to challenge such decisions. Indeed Latham LJ explained in *R (Redknapp) v Commissioner of City of London Police* that:-

> "23…As far as the decision to arrest is concerned, I accept that, as this court has said on a number of previous occasions, such a decision is amenable to judicial review in appropriate circumstances. It is the exercise of a discretion which can be challenged on *Wednesbury* grounds (see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) or other grounds…."

213. Lord Macdonald accepted that (1) RT was not in a position to contradict what facts the arresting officers said he was told by the SFO; (2) there was no significant factual dispute between the parties and the claim against the City of London police could be resolved on the basis of the documentary evidence; and that (3) the facts given to the arresting officer by the SFO (had they been true) would have provided reasonable grounds to suspect RT of serious fraud.

(ii) The O'Hara rule - a new exception?

214. The appropriate and relevant provision in respect of arrest without warrant is s.24 of the Police and Criminal Evidence Act 1984 as amended which provides that: -

> "…
>
> (2) - If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without warrant anyone whom he has reasonable grounds to suspect of being guilty of it.
>
> …
>
> (4) – But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable

> grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.
>
> …
>
> (5)(c) (iii) to prevent the person in question causing loss of or damage to property
>
> …
>
> (5)(e) to allow the prompt and efficient investigation of the offence or of the conduct of the person in question
>
> …
>
> (5)(f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question."

215. Similar wording was considered by the House of Lords in *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286 in which the Appellate Committee concluded that for a claim for wrongful arrest to be defeated, it was not necessary to show that any of the facts upon which the officer based his suspicions were true. Lord Hope of Craighead said at page 298 in a speech with which other members of the Appellate Committee agreed that:-

> "The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information, which has been given to him anonymously, or it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true."

216. The approach in that case was followed in cases such as *Hough v Chief Constable of Staffordshire* [2001] EWCA Civ 39 in which an erroneous entry on the Police National Computer was relied upon as being the basis of an arrest and which was held to be lawful, notwithstanding that the entry was inaccurate.

217. The position therefore is that if apparently reliable information is given to a police officer, who then relies on it without more to make an arrest, then that can give rise to reasonable grounds on his part so as to defeat a claim for wrongful arrest, notwithstanding that the apparently reliable information is incorrect. Indeed in *O'Hara*, like in the present case, the source of the information was directly involved

in the provision of complex information. The briefing in the present case was more detailed than that in *O'Hara,* where it was described at page 303 by Lord Hope as "scanty".

218. Lord Macdonald for RT submitted that there should be a very narrow exception granted to the *O'Hara* principle so that the "*reasonable grounds to suspect*" of a constable should not include facts about which another member of the investigation team, upon which he relies, has positively and materially misled him in circumstances where the other team member knew or ought to have known that the information he provided was misleading. In other words, a police officer can be successfully sued for wrongful arrest in cases if he obtains information from another member of the investigating team who knew or who ought to have known that the information, which he was providing, was misleading.

219. The basis of the exception is advanced on the basis that, unlike the cases of *O'Hara* and *Hough,* the Court in the present case is dealing with a situation in which the decision to arrest was preceded by very serious errors made by the principal investigators, the SFO, and upon which the arresting officer relied.

220. In the case of RT it is said that the arresting officer was misled because he was informed by a SFO employee that (1) after the collapse of Kaupthing, RT removed valuable collateral from the joint venture structure and replaced it with worthless PIK notes – a transaction we have described at paragraphs 157 and following, (2) prior to the collapse of Kaupthing, RT had been involved in concealing from the bank a bad debt owed by Pumpster – a transaction which we have tried to outline at paragraphs 137 and following and (3) prior to the collapse of Kaupthing, RT had been involved in a fraudulent valuation of the Peverel Group – this relates to the transaction known as the Pennyrock loan transaction which we have set out at paragraphs 181 and following. The case for RT is that each of these facts was untrue and that the SFO was on notice that each was untrue.

221. To justify this exception, Lord Macdonald relied first on the relationship of the police with the SFO in a complex investigation of this sort because, as he explained, they worked closely and hand in hand and therefore became part of a joint investigating team.

222. This submission fails, in our view, to take account of two facts. First, Parliament has vested the SFO with power and statutory responsibility and authority to investigate offences of fraud. It cannot be the duty of the police in cases such as the present one to duplicate this work as the police are entitled to rely on the result of investigations by the SFO. They do not need to exercise an independent mind so as to scrutinise that information.

223. Second, this role of the SFO is explained in a Memorandum of Understanding between the SFO and the City of London Police relating to the provision of information by the SFO to members of that police authority which states that:--

> "The SFO will ensure that any information passed to the [City of London Police] will be fully accurate and complete, in particular in relation to requests for activities such as the making of arrests, executing search warrants."

224. This separation of the roles of the SFO and the police explains why we are unable to accept the case for RT that because the police and the SFO worked closely and hand in hand and therefore became part of a joint investigating team, there ought to be an exception to the *O'Hara* principle.

225. Lord Macdonald next contended that his narrow exception is needed in order to secure the safeguard afforded by article 5(1)(c), 5(5) and 13 of the ECHR. His submission is that without such an exception the law would fail to secure that which the European Court of Human Rights described in *Fox, Campbell and Hartley v United Kingdom* [1991] EHRR 157 at paragraphs 32 and 34 as "the essence of the safeguard afforded by article 5(1)(c)." This case was considered in *O'Hara*; Lord Hope explained at page 302 that he saw no conflict in principle between the approach in the *Fox* case and the cases which he followed in order to reach his decision in *O'Hara.*

226. In order to justify his claim for an exception to the *O'Hara* doctrine Lord Macdonald submitted that, in the absence of the exception for which he contended, RT had no alternative private law remedy other than against the Commissioner, because the existing remedies in tort would not assist RT. His reasoning was that the torts of malicious abuse of process and misfeasance in public office require proof of malice, but that is absent in the case of wrongful arrest by police officers. Furthermore, he also pointed out that it would also be a defence to any claim of false imprisonment brought against the arresting officer that the arrest and detention of RT was valid.

227. These submissions failed to recognise the rights of somebody wrongly arrested as against the person who was responsible for the arrest by giving some direction to the police officer, or procuring, or directly requesting, or directly encouraging the arrest by the police officer. Indeed Lord Macdonald's submission failed to take account of the decision in *Davidson v Chief Constable of North Wales Police and another* [1994] 2 All ER 597 in which the Court was specifically considering the situation in which a person or body could be held liable for the acts of the arresting officer.

228. In that case, the police officers had lawfully arrested the claimant on the basis of wrong information provided to them by the store detective. A claim was then brought by the plaintiff against the police officers (which was dismissed by consent) and against the employers of the store detective. The Court of Appeal dismissed an appeal from the decision of the trial judge who withdrew the case from the jury on the basis that there was no evidence that the store detective's actions went beyond the giving of information to the police officers for them to take such action as they thought fit.

229. Sir Thomas Bingham MR explained at page 604H:-

> "Accordingly, as it would seem to me, the question which arose for the decision of the learned judge in this case was whether there was information properly to be considered by the jury as to whether what [the store detective] did went beyond laying information before police officers for them to take such action as they thought fit and amounted to some direction, or

> procuring, or direct request, or direct encouragement that they should act by way of arresting these defendants. He decided that there was no evidence which went beyond the giving of information. Certainly there was no express request. Certainly there was no encouragement. Certainly there was no discussion of any kind as to what action the police officers should take."

230. Staughton LJ stated at page 605J:-

> "What is clear in the passage I have read is that merely giving information is not enough."

231. The position was therefore that, if the facts supported that contention, RT could contend that his arrest was procured or directly requested by the SFO and so it should be liable for false imprisonment, which is a tort of strict liability and which does not require proof of malice. That would meet the justice of the case in the light of the respective responsibilities of the police and the SFO.

232. It is important to note that Mr Eadie accepted on behalf of the SFO that the City of London Police were acting as a conduit for the SFO or as their agents. To the extent there were issues in relation to the lawfulness of the arrest, Mr Eadie accepted that was the responsibility of the SFO.

233. In addition, if a claimant could prove that a third party procured an arrest maliciously and without reasonable and probable cause, an action for malicious arrest could also be brought (*Roy v Prior* [1971] AC 470 and *Hough* (supra) at paragraph 18). We do not decide that RT could bring and succeed in such a claim, but our conclusion is that, contrary to Lord Macdonald's submissions, there are remedies available to protect and to secure the rights afforded by article 5(1)(c), 5(5) and 13 of the ECHR.

234. We are therefore unable to accept that there is any basis for contending that there should be an exception to the *O'Hara* rule of the kind contended by Lord Macdonald.

(ii) The arrest of RT was not necessary

235. Lord Macdonald contended that DC Aldous, who arrested RT acted irrationally when he justified that decision by stating that :-

> "I reached the opinion that the arrest was necessary and proportionate to the offences being investigated ... it was essential to the investigation that all persons of interest were to be interviewed simultaneously without the opportunity to discuss matters with each other."

236. The reason why it was contended that this was irrational was that the investigation was not a secret one, but on the contrary it was one which RT and others had known about for months and so they would have had ample opportunity to collude. In addition it was submitted by Lord Macdonald that the need for there to be separate questioning was undermined by the fact that at the conclusion of his interview, the City of London

Police imposed no bail conditions upon RT, which would have prevented him thereafter from contacting other suspects or witnesses. The case for RT was therefore that it was difficult to believe that the police would have failed to have done this, if they really believed that there was a risk of RT colluding with other individuals in order to defeat justice.

237. Another contention made on behalf of RT was that he should have been offered a voluntary interview and to support that submission, reliance was placed by Lord Macdonald on the statements of Hughes LJ in *Scott Hayes v The Chief Constable of Merseyside Police* [2011] EWCA 911 at paragraph 34 when Hughes LJ explained that:-

> "The officer in that case had adopted a pre-determined decision to arrest and had not thought about any alternative. The court held that he had not, objectively viewed, had reasonable grounds for his belief that arrest was necessary."

238. The significance of that statement to the present application was, in Lord Macdonald's submission, there was no reason to suppose that RT would, if invited to do so, have declined to attend the police station forthwith for an interview under caution. Lord Macdonald also said that Detective Inspector Fyfe suggested in his evidence that he formed the view that it was necessary to arrest RT because otherwise he "may steal or destroy evidence" but both he and the arresting officer were aware at the time of the arrest that search warrants were to be executed securing all the documents and that there was no evidence at all that he had previously destroyed documents even though he had known that he was a suspect for months.

239. Thus, it was submitted that this conclusion was irrational as was the contention of the City of London Police that there was a flight risk involved if RT was not arrested, as that was based on a statement in "*Metro*", the free London weekday morning paper, that he had put his house on the market but that statement had not been checked by the police.

240. The response of Ms Barton QC on behalf of the Commissioner was that the *O'Hara* principle applied to the necessity element of the arrest with the consequence that it was necessary to decide the issue of necessity on the basis of what the police were told by the SFO. The evidence of Detective Inspector Fyfe and Detective Constable Aldus explained why the necessity condition had been satisfied by the police although obviously if they had been misinformed by the SFO, then they would be liable. In any event the facts and matters relied on as supporting the necessity criteria have to be judged at the time of the arrest and not on the basis of what happened later.

241. We accept the submission made by Ms Barton that the fact that RT and other suspects had previously had an opportunity to collude did not mean that they should have been given a further opportunity to do so, particularly when a degree of collusion might have already occurred. Similarly we accept the fact that RT might have been given the opportunity to attend interview voluntarily was a factor to take into account, it certainly was not determinative. It is noteworthy that in *Redknapp* it was not suggested that voluntary attendance at the police station meant that the necessity element of the power of arrest could not be satisfied (see *Redknapp* at page 2098).

242. It is also noteworthy that Detective Inspector Fyfe did consider the risk of RT walking out when he considered the necessity factors in his memorandum. He concluded that even though this had been offered, he accepted the opinion of the case manager at the SFO that "this approach was deemed insincere in the light of the apparent failure to supply documentation when requested by the SFO". Hughes LJ in *Hayes v Chief Constable of Merseyside* (supra) considered the issue of voluntary attendance and stated:-

> "42. Whilst of course it may be that it is quite unnecessary to arrest a suspect who will voluntarily attend an interview, as it was with the schoolteacher in *Richardson*, it is not the case that a voluntary attendance is always as effective a form of investigation as interview after arrest. Section 29 of the Act reminds officers of their duty, if inviting voluntary attendance, to tell the suspect that he may leave at any time he chooses. It would not be honest for an officer to invite a person to attend a voluntary interview if he intended to arrest him the moment he elected to leave. Nor would it be effective. It would mean that the suspect could interrupt the questioning the moment it reached a topic he found difficult. Even if it were possible simply then to arrest him, the interview could not continue until all the important formalities of reception into custody, checks on health, notification of friends or relatives and so on had been complied with. If the complaint made by Mr Mooney was true and the suspect was a drug dealer manipulating his customer, this was a case where that might happen. Moreover, the officer did need to inspect any mobile telephone which the suspect might have, and without warning him of the intention; the suggestion that he ought to have been asked politely to bring his telephone with him would, assuming a truthful complaint, have accomplished nothing other than the deletion of all relevant information or the leaving of the phone behind. Thirdly, the officer did need to be able to frustrate any attempt, if it were made, to send an unsupervised message on arrest, which might, assuming the complaint to be true, easily involve getting someone else to visit the complainant to deter him. I also agree that it was very likely, if the investigation proceeded, that the suspect would have to be released on bail conditions designed to prevent contact with the complainant; whether this can properly go to necessity on ground 24(5)(e) or would have to call for separate invocation of ground 24(5)(d) ("to protect a….vulnerable person from the [suspect]") is a question on which we have not heard argument and which we do not need not resolve."

243. In our view, the consideration which had been given to the risk of RT walking out and the necessity conditions were properly considered by Detective Inspector Fyfe. This constituted a valid answer to Lord Macdonald's complaint on this issue. Indeed, we are satisfied that he was entitled to act in the way in which he did.

244. Thus this case is far removed from the case of *Richardson v Chief Constable of West Midlands Police* [2011] EWHC 773 QB (to which Hughes LJ referred in the passage quoted in *Hayes* above) in which the arresting officer had not considered whether the claimant's arrest was necessary with the consequence that Slade J found that the necessity test had not been complied with on the specific facts of that case.

245. We are satisfied that Detective Inspector Fyfe considered the necessity test properly. Indeed it is far from clear that RT did make an unequivocal offer to attend the interview voluntarily and for the reasons which we have explained we do not consider even if an offer had been made this would have obviated the necessity to arrest.

246. As to the contention that there was a risk of destruction of documents, the police had been told by the SFO that RT had been involved in the removal of assets. In the light of that information, it was not unreasonable for the police to have concluded that RT might steal or destroy evidence. We consider that the police officers were entitled to rely on what they had been told by the SFO and reach their decision.

247. We have therefore come to the clear conclusion that the necessity test was amply made out and so we reject the challenges to the arrest.

ISSUE 4: BAIL

248. The case for RT was that first the decision to release him on bail was not necessary, proportionate or justified and the facts upon which the risks of absconding were based were inaccurate. In consequence it is said that the bail decision was flawed.

249. The provisions with regard to making decisions relating to the granting of bail are contained in section 37(2) and 34(5) of the Police and Criminal Evidence Act 1984 which insofar as material provide that:-

> "37 (2) If the custody officer determines that he does not have such evidence before him, the person arrested shall be released either on bail or without bail, unless the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him."
>
> "34 (5) A person whose release is ordered under subsection (2) above shall be released without bail unless it appears to the custody officer—
>
> (a)that there is a need for further investigation of any matter in connection with which he was detained at any time during that period of his detention; or
>
> …
>
> and, if it so appears, he shall be released on bail."

250. In essence, a person in RT's position will be released without bail unless it appears to the custody officer that there is a need for further investigation (section 34(5) (a)). RT was bailed on three conditions: (1) a condition of residence, (2) a condition to notify a change of residence and (3) a condition to notify of travel plans.

251. In considering the contention that the decision to release RT on bail was not necessary, proportionate or justified, we bear in mind that the issue has to be determined, as was the power of arrest, on the basis of the facts known to the custody officer at the time. We have already explained what those facts were and it must be stressed that the decision made was in the context of the understanding of the police that there was a complex international investigation concerning an international businessman involving significant funds and a number of individuals.

252. Our clear conclusion is that the decision made by the custody officer was one that he was entitled to reach. We cannot therefore accept Lord Macdonald's submissions as reliance could be placed by the police officers on the information and direction given by the SFO, who had carried out detailed investigations and on whom the officers were entitled to rely.

ISSUE 5: THE CONDUCT OF THE SEARCH

253. Mr Hugo Keith QC on behalf of Rawlinson & Hunter, Consensus and the TFT companies challenged the way in which the SFO conducted the search as regards their treatment of privileged documents. He contended that the warrants should be quashed because the policy of the SFO as regards searching for privileged material was unlawful and because the manner of the searches exceeded their lawful purpose.

(i) The factual background

254. The premises of Consensus were in a building in Park Lane, London. Consensus employed a number of lawyers for the purposes of giving legal advice and conducting litigation; it also retained a number of external law firms which also provided advice and conducted litigation. As we have set out, companies controlled by TFT were engaged in heavy litigation with Kaupthing. It was common ground that the SFO knew, given their knowledge of the litigation, that the offices of Consensus would contain a large amount of privileged material. The warrant expressly excluded privileged material.

255. When the SFO arrived at the premises of Consensus to begin their search, the senior officer was made aware of the substantial amount of privileged material at the premises. Nonetheless the evidence filed on behalf of Consensus was that a large number of documents to which legal professional privilege attached were read.

256. Large quantities of privileged material were seized as was a large quantity of documentation not covered by the warrants; 139 bags of documents out of the 320 bags seized (approximately 40% of what was seized) were returned two weeks later with the explanation that they had been seized in error.

257. Two basic complaints were made: (1) The necessary safeguards to protect legal professional privilege were not in place when the search was conducted at the premises of the TFT companies with the result that a large quantity of privileged

material was read by those doing the searching; and (2) the lawyers in attendance to resolve disputed issues of privilege were not independent.

(ii) The safeguards necessary to protect legal professional privilege when conducting a search

258. The importance attached to legal professional privilege and the need to ensure that it is safeguarded during a search is too well known to require citation of the numerous authorities.

259. It was common ground that, as the documents at the premises would include a substantial quantity of privileged documents, careful planning was required. The evidence filed on behalf of the SFO set out what they submitted was careful planning with a Detective Inspector in charge of the search at the premises of the TFT companies and the provision of an experienced lawyer to assist him directly.

260. The way in which a search should be carried out in the ordinary type of documentary case is set out in *R v Chesterfield Justices ex p Bramley* [2000] QB 576 at 586-89. That was a case where the police were searching for documents relating to fraud. The policy of the SFO at the time, was set out in its handbook and appears to have been based on the decision in *ex p Bramley*. The policy permitted a police officer to inspect any document in order to form a view if legal professional privilege attached; he would be entitled to form a view using his own knowledge.

> "A police officer may not seize any items if s/he has reasonable grounds to believe that they may be subject to LPP. "Reasonable grounds" are more than a mere possibility. The simple fact that a solicitor or an occupier claims privilege does not by itself amount to reasonable grounds to believe that items may be subject to LPP. The officer will be entitled to inspect the document(s) if s/he considers it necessary, in order to form a view. He will be expected to use his own knowledge of the investigation and all other relevant circumstances."

If the officer had reasonable grounds for believing that any items might be subject to privilege he must not seize them.

261. The policy had been changed in a further edition of the SFO manual.

> "It is important that, when the SFO requires the production of material or seizes material pursuant to its statutory powers, all material which is potentially privileged is treated with great care. The approach described here is designed:
>
> 1. to minimise the risk that privileged material is seen or seized by an SFO investigator or a lawyer involved in the investigation;

> 2. to ensure that any privileged material which is seized is properly isolated and promptly returned to the owner without being seen by an SFO investigator or a lawyer involved in the investigation;
>
> 3. to ensure that any dispute relating to privilege is resolved in advance of the material being seen by an SFO investigator or a lawyer involved in the investigation;
>
> 4. to ensure that where an investigator or a lawyer involved in an investigation inadvertently sees privileged material, measures are in place to ensure that the investigation and any subsequent prosecution is not adversely affected as a result.
>
> Care must always be taken to ensure that privileged material is not viewed by the SFO members involved in the investigation. Privileged material must never be circulated or copied within the investigation team.
>
> **Minimising risk**
>
> All SFO investigators and lawyers should have an understanding of the concept and scope of LPP and the reasons why the privilege is recognised as a fundamental element of the rule of law.
>
> All SFO investigators and lawyers should be aware of this policy."

The new policy set out a much clearer approach which is needed when premises contain a large quantity of privileged material.

262. The evidence served on behalf of the SFO sought to explain the way in which the search conducted was a lawful search. This was disputed by the TFT companies and VT on the basis that the search followed what was said to be the unlawful policy contained in the earlier version of the manual. We do not consider that it assists in the resolution of the disputed issues in relation to the lawful nature of the search first to determine whether the manual embodying SFO policy was correct or incorrect. What matters is whether the way in which the search was conducted was lawful; that is decided by making findings of fact as to what actually happened during the search and on the basis of those findings, determining whether the search was or was not lawfully conducted.

263. We therefore accept the submission of the SFO that the general issue in relation to the conduct of the searches is best dealt with in the further conduct of these proceedings when transferred to the ordinary list of the Queen's Bench Division. That is because the issues are factual and can only be determined by the giving of evidence by witnesses. However we can determine the lawfulness of the policy in relation to "independent lawyers", as that is a short point of law and practice.

(ii) The presence of independent lawyers

264. It is clear from *R v HM Customs and Excise ex parte Poley* [1999] All ER (D) 1048 and *R v Middlesex Guildhall Crown Court ex p Tamosius* [2000] 1 WLR 453 that the proper procedure is that an independent lawyer should be present to assess claims made for legal professional privilege, without prejudice to the right of the person being searched to go to the court.

265. In *R (Faisaltex)* to which we have referred at paragraph 171, an issue which the court considered was whether barristers who came from the same chambers as others retained in the case were independent. Unsurprisingly, the court held they were. It is long established that barristers in the same chambers are so independent of one another that they can appear on the opposite side of a case.

266. However five of the six lawyers sent to the premises of Consensus were not independent. The five were employees of the SFO; only one was independent as that lawyer was a barrister in independent practice. It is clear that in civil search orders, the independent lawyer has to come from a different firm: see CPR 25A.7.6. We do not see how the position in a criminal case can be different. The lawyer must be and be seen to be independent of the SFO; an employee of the SFO is not independent.

267. In our view, the policy of the SFO in using its own lawyers was misconceived, though it was, no doubt, adopted because of the lack of resources available to the SFO. How serious the consequences were in the circumstances of this case can only be determined by the evidence that will be heard on the conduct of the search.

ISSUE 6: THE "HERE AND NOW" NOTICE

268. We have outlined at paragraphs 61-62 how the then Director of the SFO by means of the "here and now" notice retained some of the TFT and VT documents seized under the search warrant which the then Director had conceded had been unlawfully obtained.

269. The right to do so was challenged by Lord Goldsmith and Mr Keith on the basis that (1) there was no statutory basis for the "here and now" notice in respect of the material that had been seized in March 2011 and (2) the statutory power under s.59 of the Criminal Justice and Police Act 2001 could not in any event be exercised, as there was no sufficient case against VT and Consensus to continue the investigation. It is first necessary to set the facts out in a little more detail.

(i) The facts

270. On 21 December 2011, the SFO made clear they wanted to meet Rawlinson and Hunter's solicitors, Stephenson Harwood and Kingsley Napley, solicitors then acting for VT. The meeting was arranged for 9 am on 22 December 2011. At the meeting the SFO explained that all the material that had been seized in the searches was in six boxes in a van near Stephenson Harwood's office awaiting instructions from the SFO. Two boxes of the material would be delivered and three boxes would be retained under a notice issued under s.2 known as the "here and now" notice; the documents were listed in a schedule.

271. Two s.2 notices were addressed to VT and served on Kingsley Napley as solicitors for VT - one a "here and now" notice and one requiring delivery of documents in 14 days. The four boxes that the SFO contended contained material deliverable under the "here and now" notice were taken back by the courier for storage at a secure facility away from the SFO. The SFO stated that the boxes would be stored on terms that no access would be granted without the agreement of all parties. The digital material seized was similarly stored. Time for compliance with the 14 day notice was subsequently extended. The justification for the SFO's action in issuing and serving the "here and now" notice was said to be the risk of loss, damage or destruction whilst the documents were out of the control the SFO.

(ii) The position taken by the parties

272. The position of the then Director of the SFO was that he was entitled to retain the documents through such a notice. This was disputed by VT for the reasons we set out below. It was contended that the then Director's actions were an abuse of the power Parliament had entrusted to him.

273. On the day before the hearing, as we have set out at paragraph 70, the new Director conceded that the documents should not have been retained under the "here and now" notice.

(iii) The lawfulness of the actions of the then Director of the SFO

274. Although it was conceded that the documents should have been returned, it is right we should set out our reasons for agreeing that the use of a "here and now" notice was unlawful, in the light of the detailed submissions made by Lord Goldsmith.

275. As Lord Goldsmith correctly submitted on behalf of VT, Rawlinson and Hunter and the TFT companies, the use of the "here and now" notice by the then Director circumvented the statutory procedure control of the courts over wrongly seized material which Parliament had expressly enacted to protect the public in such circumstances. That procedure reflected not only the long standing position of the common law that the privacy and possessions of an individual were not to be invaded except for the most compelling reasons, but also the fundamental importance of judicial control over the grant of warrants: see *Entick v Carrington* (1765) 19 State Trials 1029 and *Ghani v Jones* [1970] 1 QB 693 at 706.

276. The machinery which gave the courts control over the disposition of material wrongly seized is set out in s.59 of the Criminal Justice and Police Act 2001. It is clear that the section applies to what happened in this case.

> "(1)This section applies where anything has been seized in exercise, or purported exercise, of a relevant power of seizure."

The schedule to the Act included the power under s.2 of the CJA 1987.

277. Second, the procedure to be followed is clear:

> "(5) The appropriate judicial authority— …

> (b) on an application made by the person for the time being having possession of anything in consequence of its seizure under a relevant power of seizure, or …
>
> may give such directions as the authority thinks fit as to the examination, retention, separation or return of the whole or any part of the seized property.
>
> (6) On any application under this section, the appropriate judicial authority may authorise the retention of any property which—
>
> (a)has been seized in exercise, or purported exercise, of a relevant power of seizure, and
>
> (b)would otherwise fall to be returned,
>
> if that authority is satisfied that the retention of the property is justified on grounds falling within subsection (7).
>
> (7)Those grounds are that (if the property were returned) it would immediately become appropriate—
>
> (a)to issue, on the application of the person who is in possession of the property at the time of the application under this section, a warrant in pursuance of which, or of the exercise of which, it would be lawful to seize the property; or
>
> (b)to make an order under—
>
> (i)…..
>
> under which the property would fall to be delivered up or produced to the person mentioned in paragraph (a).

278. By not using the statutory machinery we have set out, the SFO avoided:

i) The necessity for compliance with the provisions of s.59 which this court had made clear required strict compliance: see *El Curd v Winchester Crown Court* [2011] EWHC 1853 at paragraphs 64-5.

ii) Rigorous examination of the circumstances leading up to the illegality of the original seizure; see *El Curd* and *Windsor v Bristol Crown Court and HMRC* [2011] EWHC 1899 (Admin) at paragraph 31.

iii) Proving that a fresh warrant could have been sought, as required by s.59(7). This would have meant satisfying a judge that there was a case of reasonable suspicion against VT.

iv) Returning all privileged material which had not been returned.

279. It is clear that the then Director considered the use of s.59. His reasons for not using it were explained in the letter of 22 December 2011 to Stephenson Harwood to which we have referred at paragraph 62 above and more fully in an internal memorandum which stated:

> "Although this would have the advantage of bringing judicial scrutiny to the decision to retain the material it is thought preferable to take a completely fresh view of what is required at this stage of the investigation. A number of strands of the investigation which were live in March 2011 are no longer being pursued. Some of the material seized during the searches is no longer relevant to the investigation and therefore can be returned without any impact. Equally, there is now material which may not have been caught under the terms of the warrant and this should properly be sought by Notice. A further warrant would not be appropriate because it can no longer be suggested that any of the access grounds under s.2(4)(a) CJA 1987 are made out. There would also be the appearance, under the circumstances of the SFO, having conducted an unlawful search, of a heavy-handed attempt to have a "second bite at the cherry" if another search warrant were sought.
>
> Finally, recognising the background of a JA being sought by VT, the Director has decided that it is appropriate to offer an undertaking to VT that the material provided will not be examined by the case team for 14 days after it has been provided. This is to allow him the opportunity of seeking JR of the decision to issue this Notice."

280. There can be no doubt that the then Director acted unlawfully in issuing the "here and now" notice. As the three boxes held by the SFO contained material seized under a s.2(4) notice which the then Director had conceded in December 2011 had been wrongly obtained, the statutory machinery under s.59 was the only lawful way in which the then Director could have retained the material. If he did not want to apply to court, he had to return the papers. He could then have served a s.2 notice, provided the condition for its issue could at that time have been satisfied, and he then would have had to have given VT time to comply with it.

281. It is important to make clear that it is not an agent of the Executive but the court, in the light of long standing constitutional principle, which has been given the power by Parliament under s.59. The then Director should therefore have returned the material or he should have applied to the court. As he did not do so, his action in issuing a "here and now" notice was unlawful. In the light of the memorandum of December 2011, it is not easy to understand why the then Director acted as he did.

(iv) Were there grounds for suspecting complex fraud on the part of VT and the TFT companies in relation to the Pennyrock transaction?

282. As we have set out, it was the contention advanced on behalf of VT and Rawlinson and Hunter that by 21 December 2011 and at the time of the hearing there were no grounds for suspecting complex fraud by VT or the TFT companies in relation to the

Pennyrock loan. We have set out our views on the evidence before us in relation to the errors in the Information.

283. It is neither necessary nor desirable to arrive at a concluded view, as we have already stated at paragraph 200. It is unnecessary for two additional reasons. First we have determined that the issue of the "here and now" notice was in any event unlawful and the documents are to be returned. Second it is not necessary for us to decide whether the s.2(3) notice issued on 22 December 2011 which required the production of documents in 14 days was valid as the investigation against VT has been discontinued.

284. It is undesirable as the new Director had discontinued the investigation and the point is moot. In any event, as we have explained at paragraphs 195-197, we do not know why Grant Thornton put forward the contentions in relation to the valuation by Oliver Wyman nor do we know the reasons why it is said there was a lack of due diligence by Kaupthing. In the absence of that, we do not have the material on which we could have formed any meaningful view. Even if we had, as we have pointed out at paragraph 178, the court should not, unless it is specifically required to do so (as it would be if s.59 was a live issue), express views on whether matters should be the subject of investigation.

ISSUE 7: CONSEQUENTIAL RELIEF

285. There are consequential claims.

(i) Declaration

286. The claimants sought a declaration that the warrants and searches and seizures consequent upon them were unlawful; they relied on decisions to the effect that this was relief that could be granted. Their entitlement to a declaration was accepted by the SFO.

287. It will be necessary for that declaration to be drafted by the parties with care so that no misunderstandings arise in any other proceedings.

(ii) Further conduct of the action

288. It was common ground that this court should transfer the action to the ordinary list of the Queen's Bench Division under CPR Part 54.20 for any civil claims for damages to be pleaded and determined by a judge of the Division.

289. The action will be assigned to a judge who will manage the case, calling upon the assistance of a Master, if necessary, but under the direction of the judge. It may be of assistance if we make agreed directions on the handing down of this judgment for a timetable for pleadings.

(iii) Costs

290. The SFO accepted that it should pay the reasonable costs of Rawlinson and Hunter and VT sought an order for indemnity costs.

291. We shall determine these issues when the parties have had the opportunity of considering this judgment.

POST SCRIPT

292. The case review manager at the SFO for the judicial review sets out in her evidence to us two lessons that she considered should be learnt:

    i) The need for the Information to be supported by a schedule so that it was clear what underlying material justified the statement made.

    ii) The need to see that the Information was checked and assured by those with sufficient expertise and experience

293. In our view, there is a more important lesson to be learnt which in fairness to the then Director of the SFO we must make clear. The investigation and prosecution of serious fraud in the financial markets requires proper resources, both human and financial. It is quite clear that the SFO did not have such resources in the present case:

    i) A fundamental error was a failure to set out the commercial background to the events. The identification of suspected criminality and the drafting of an Information for presentation to a judge requires a team with a proper understanding of the financial markets in which the transactions have been effected.

    ii) The drafting of a document such as the Information in a case relating to the financial markets is a formidable task that requires a draftsman with an understanding of the markets, the agreements in issue and accounting issues. The facts and issues must be set out in a clear and analytical manner; this requires very considerable skill. Its presentation to the judge then requires a lawyer with great skill and experience.

    iii) Although many investigators are reliant in the first instance on the provision of information by those who have an interest in the transactions such as administrators or lawyers or accountants involved in disputes, it is essential that those charged with investigation and prosecution can scrutinise the information provided with the same level of skill. The SFO should have scrutinised what it was told by Grant Thornton through the use of expertise of at least equivalent experience. The SFO should not have been compelled to rely on Grant Thornton who owed duties to their own clients which rightly took precedence over the interests of the public.

    iv) The execution of a warrant requires the presence of independent lawyers where there is the prospect of privileged documentation. This expense has to be resourced.

    v) The prosecution of such offences necessitates equality of arms being provided to those investigating and prosecuting. Equality of arms is used most commonly to apply to the unequal position of defendants to an investigation or a prosecution. However, the public interest in upholding the integrity of the

financial markets is destroyed if those who investigate and prosecute do not have access to the same level of legal and accountancy skills and human and financial resources as those who are the subject of investigation and prosecution.

vi) The matters in issue occurred in the period between late 2007 to October 2008. Although there are some complex details as regards some of the individual transactions, the case is not a complex one. The investigation should have been concluded a very long time before now, but again this required adequate resources, both human and financial.

All of these considerations must be taken into account in any consideration of the present case and criticism of those involved, as it is clear to us that the SFO was not properly resourced for this investigation.

294. In the present case, the result has been our decision to set aside search warrants against two well known businessmen after a long investigation of transactions in the financial markets. In other cases, the result could have been the failure properly to investigate and prosecute successfully conduct where there could be no doubt as to its criminality and serious effect on public confidence in financial institutions and the financial markets. It is clear that incalculable damage will be done to the financial markets of London, if proper resources, both human and financial, are not made available for such investigations and prosecutions in the financial markets of London.