Neutral Citation Number: **[2026] EWHC 2767 (Comm)**

Case No: CL-2015-000047

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

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

Date: 29/10/2026

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between:

(1) ALTA TRADING UK LIMITED (formerly known as ARCADIA PETROLEUM LIMITED)
(2) ARCADIA ENERGY (SUISSE) SA
(3) ARCADIA ENERGY PTE. LTD.
(4) FARAHEAD HOLDINGS LIMITED **Claimants**

- and -

(1) PETER MILES BOSWORTH
(2) COLIN HURLEY
~~**(3) STEPHEN CLIVE LANGFORD GIBBONS**~~
~~**(4) MARK RICHARD LANCE**~~
(5) STEVEN KELBRICK
~~**(6) SALEM CHUCRI MOUNZER**~~
(7) ARCADIA PETROLEUM SAL OFFSHORE
(8) ARCADIA PETROLEUM LIMITED, MAURITIUS
(9) ATTOCK OIL INTERNATIONAL LIMITED, MAURITIUS
~~**(10) THE CORNHILL GROUP LIMITED**~~

Defendants

- -
- -

David Quest KC, Clarissa Jones and Chinmayi Sharma (instructed by **Reed Smith LLP**) for the **Claimants**

Richard Eschwege KC and Charles Wall (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **First and Second Defendants**
Tom Sprange KC, Freddie Popplewell and **Edward Mordaunt** (instructed by **King & Spalding International LLP**) for the **Fifth Defendant**

Hearing dates: 21-24 and 28-30 April, 1, 5, 12-13 and 20-22 May 2026
Draft judgment circulated to parties: 16/21 October 2026

Approved Judgment

- -

Mr Justice Henshaw:

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(A) INTRODUCTION

1. This is an Inquiry into Damages following the discharge of a worldwide freezing order ("***the Freezing Order***") which was in place for approximately ten years, leading up to my judgment of 22 January 2025 dismissing the Claimants' claims ([2025] EWHC 91 (Comm)) (*"**the Fraud Trial Judgment**"*). The Claimants alleged that the Defendants had committed a substantial and sustained fraud in connection with 144 crude oil purchase and sale transactions between April 2007 and May 2013 relating to oil originating in West Africa.

2. The cross-undertaking in Schedule B to the Freezing Order provided that *"[i]f the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicants will comply with any order the court may make".* At a hearing on 10 February 2025, I ordered that the Claimants' undertakings in damages be enforced and directed this Inquiry.

3. The First, Second and Fifth Defendants seek compensation in the Inquiry on the footing that, but for the Freezing Order, they could have pursued lucrative business and/or employment opportunities that would otherwise have been available to them.

4. The Claimants dispute, among other things, that any losses were caused by the Freezing Order, as distinct from the fraud claims made against the Defendants in the underlying proceedings. In response, the Defendants allege that the Claimants (acting through, in particular, Mr John Fredriksen, Mr Tor Olav Trøim, Mr Dimitris Hannas and/or Mr Paul Adams) made allegations in the underlying proceedings, as well as in obtaining and maintaining the Freezing Order, which they knew to be false; and that in those circumstances the Claimants are not entitled to advance a causation defence of that nature.

5. By a judgment dated 21 October 2025 I concluded that there was a realistic prospect that the dishonesty allegations, if made good, would be relevant to the Claimants' causation argument, as well as for other reasons. For shorthand, this has been termed the "*dishonesty issue*".

6. By a judgment dated 1 April 2026, I allowed in part the First and Second Defendants' application for further disclosure.

7. This case was tried before me over a period of approximately 5 weeks from 21 April 2026 to 22 May 2026, during which I heard evidence from, amongst others, the individual Defendants (Messrs Bosworth, Hurley and Kelbrick), and from Mr Trøim for the Claimants, as well as expert witnesses on oil trading practices, oil trading recruitment, Swiss property, and forensic accountancy.

8. For the reasons given in this judgment, I have reached the conclusions that:

   i) but for the Freezing Order, Mr Bosworth and Mr Hurley would have sought to establish an oil trading business, and would not have sought employment;

   ii) the lost returns from that business are to be assessed in the manner set out in section (O) below;

   iii) but for the Freezing Order, Mr Kelbrick would have continued to operate Attock Dubai, and would not have sought employment;

   iv) the lost returns from Attock Dubai are to be assessed in the manner set out in section (R) below;

   v) Mr Bosworth, Mr Hurley and Mr Kelbrick are entitled to further compensation in respect of lost investment opportunities (sections (S) and (T) below), sale/liquidation of assets (section (U) below) and, in Mr Bosworth's case, certain other costs (section (V) below);

   vi) general damages should be awarded to Mr Bosworth, Mr Hurley and Mr Kelbrick as indicated in section (W) below; and

   vii) the application to set aside the jurisdiction application costs orders should be dismissed.

(B) OVERVIEW OF PARTIES AND CLAIMS

9. An overview of the companies and individuals involved in this case is set out in detail in the Fraud Trial Judgment. The relevant parts are repeated here as an aid to the factual narrative that begins at section (E) below.

10. The First Claimant, Alta Trading UK Limited (formerly known as Arcadia Petroleum Limited), was established in 1988. For consistency, I shall continue to refer to it as "***Arcadia London***", as in the Fraud Trial Judgment. The Second Claimant, Arcadia Energy (Suisse) SA ("***Arcadia Switzerland***"), was established on 1 February 2007. The Third Claimant is Arcadia Energy Petroleum Limited ("***Arcadia Singapore***") and the Fourth Claimant is Farahead Holdings Limited (***"Farahead"***). Farahead is a Cypriot holding company owned by a discretionary trust settled by Mr Fredriksen, a Norwegian/Cypriot shipping magnate, for the benefit of members of his family.

11. Farahead's function was to act as the group parent company for Arcadia London, Arcadia Switzerland and Arcadia Singapore. Arcadia Switzerland and Arcadia Singapore have always been, and continue to be, 100% owned by Farahead. Until 16 March 2006, Arcadia London was 100% owned by the Japanese conglomerate, Mitsui. On 16 March 2006, Farahead completed its acquisition of Arcadia London from Mitsui. Mr Fredriksen and his then deputy Mr Trøim were the ultimate decision-makers at Farahead.

12. The First Defendant, Mr Bosworth, joined Arcadia London as a crude oil trader in about October 1992 and became Head of Trading in or around 1999. He later became the Chief Executive of the Arcadia Group companies, which he remained until around March 2013.

13. The Second Defendant, Mr Hurley, joined Arcadia London as a financial controller in about June 1992, and was the Finance Director/Chief Financial Officer of the Arcadia Group companies from 16 March 2006 until September 2013.

14. The Fifth Defendant, Mr Kelbrick, was employed as an oil trader at Arcadia London between 1998 and 2004. Thereafter, he worked for a Chinese State oil company, PetroChina, and then set up various companies through which he says he undertook oil consultancy services on his own account: South Energy Consulting SARL ("***South Energy***"), Blacksea Petroleum Offshore SAL ("***Blacksea***"), Multiford Enterprises Limited ("***Multiford***"), and Proview Enterprises Inc ("***Proview***"). He is a specialist in originating and trading West African crude oil and has spent long periods of time living and working in West Africa, in particular in Nigeria.

(C) WITNESSES OF FACT

15. The Claimants called Mr Trøim as a witness. He represented Farahead during the relevant period, although he has not been involved with any of Mr Fredriksen's businesses since he and Mr Fredriksen parted ways in 2014. As was the case in the original trial of the Claimants' claims ("***the Fraud Trial***"), Mr Trøim said he had no vested interest in the outcome of the Inquiry. As indicated in the Fraud Trial Judgment (§ 23), I found his witness evidence for the Fraud Trial unsatisfactory in certain respects. However, my impression was that he gave his evidence at the Inquiry Trial in a candid manner, including at times when he expressed regret that his original witness

statement had not properly reflected the evidence he was now giving about the level of activity he understood Arcadia Lebanon to be carrying on.

16. Mr Fredriksen provided a witness statement but did not in the end give oral evidence on behalf of the Claimants. Shortly before the Inquiry Trial commenced, on 16 April 2026, the Claimants provided a letter referring to Mr Fredriksen's health concerns and providing an opinion from a cardiologist. Given the inference which the Defendants invite the court to draw from Mr Fredriksen's non-attendance at trial, I find it unavoidable to set out the text of the letter:-

> **"CARDIOLOGICAL MEDICAL OPINION**
>
> **REGARDING FITNESS TO ATTEND COURT**
>
> This opinion is provided from the perspective of specialist cardiology in relation to Mr John Fredriksen (DOB: 11 May 1944) and his current cardiovascular status. The medical concern is whether the attendance and his live cross-examination can be tolerated safely. It is my opinion that it cannot.
>
> Mr Fredriksen has significant and progressive cardiovascular disease. He has an ageing mechanical aortic valve now considered due for replacement, progressing heart failure, multi-vascular arteriosclerotic disease, prior intravascular stent treatment, medically treated hypertension, and a materially reduced cardiovascular working capacity. In a patient with this degree of structural heart disease and vascular compromise, sustained psychological stress is not merely uncomfortable; it has direct haemodynamic consequences, including increased blood pressure, increased physical workload, heightened risk of cardiac decompensation, worsening heart failure symptoms, and clinically relevant exhaustion.
>
> Attendance at court over one or more full days with the cumulative strain of oral evidence would, in cardiological terms, represent an undue and medically unjustifiable stress burden.
>
> Accordingly, Mr Fredriksen should be regarded as medically unfit to attend court in person or to undergo live oral examination.
>
> Yours faithfully,
>
> Dr. Alessia Quattrone
>
> Specialist in Cardiology, MD"

The Claimants' solicitors' letter nonetheless stated that *"Mr Fredriksen is determined to attend at Court to give evidence"*. However, on 23 April 2026, shortly before Mr Fredriksen was due to give evidence on 27 April, the Claimants provided a further letter

saying that, "*[t]he Claimants have now been informed by Mr Fredriksen that, on the basis of further medical guidance, he is unable to appear at trial."*

17. Mr Bosworth and Mr Hurley ask the Court to infer that Mr Fredriksen was not prevented from attending court by health concerns; rather, he no longer wished to give evidence after hearing Mr Bosworth and Mr Hurley's opening submissions and realising the strength of the dishonesty case against him. They also note that Mr Fredriksen did not disclose a copy of the further medical guidance referred to. In the light of the medical evidence that was provided, I do not consider it appropriate to draw the inference suggested. It is evident that Mr Fredriksen changed his mind, having initially decided to give evidence despite the cardiologist's report. Although the further medical evidence was not produced, there is no reason to assume that it did not exist. It may, for example, have been oral and/or informal advice, perhaps reiterating the already strong advice given in the letter quoted above. Even without further medical advice, the advice already given there may, on reflection, have persuaded Mr Fredriksen that it would not be medically safe to give evidence.

18. No hearsay notice was served in relation to Mr Fredriksen's witness statement. The Claimants submit that under CPR 33.2(1)(b), there is no requirement for a hearsay notice when a party serves a witness statement and notifies the other parties that the witness will not be called to give oral evidence, and why. However, CPR 33.2(2) indicates that such notification must be given when the witness statement is served. Nonetheless, it is clear that a failure to give such notice does not of itself render the witness statement inadmissible, but can be taken into account as a matter affecting its weight, or in deciding as a matter of discretion not to admit the evidence (White Book note 33.2.3, referring to section 2 of the Civil Evidence Act 1995). In the present case, the circumstances leading to Mr Fredriksen not being called to give evidence arose, or at least seem to have been appreciated, well after his witness statement was served. I conclude that the witness statement should be admitted in evidence and given such weight as may be appropriate in the light of the evidence as a whole.

19. The First and Second Defendants, Mr Bosworth and Mr Hurley, gave evidence themselves and also called Mr Main as a witness.

20. Mr Bosworth produced two witness statements for the Inquiry Trial (his eleventh and twelfth witness statements), following the ten that he produced for the Fraud Trial. He was cross examined over two days. As I set out later, I found some of his evidence about Sahara to have been a little confused, and his evidence about hypothetic investment in bitcoin and gold to be inconsistent in some respects. Nonetheless, my impression was that he gave evidence candidly and was doing his best to recollect the relevant events.

21. Mr Hurley provided one witness statement for the Inquiry Trial (his seventh witness statement), following the six that he produced for the Fraud Trial. He was cross-examined for half a day. He was a good witness.

22. Mr Main produced one witness statement for the Inquiry Trial (his second witness statement), following the one that he produced for the Fraud Trial. He is a CEO of a group of companies called ARCEM involved in asset-based mining and oil/gas opportunities. In the mid-2000s he worked on a joint venture with Mr Fredriksen and Arcadia to develop mining activities in Africa. His companies included Concerto, to

which Arcadia Lebanon made payments on behalf of Arcadia. My impression was that he gave his evidence candidly, and I do not accept the Claimants' suggestion that he was merely trying to assist his longstanding friend, Mr Bosworth, or was motivated by a grievance against the Claimants (who in 2021 had written to Mr Main advancing a claim for dishonest assistance).

23. The Fifth Defendant, Mr Kelbrick, gave evidence himself and also called as witnesses Mr Paul Himsworth and Mr Habeeb Fasinro.

24. Mr Kelbrick produced two witness statements for the Inquiry Trial (his fourth and fifth witness statements), further to the three that he produced for the Fraud Trial. He was cross-examined for just over one day. He was a good witness.

25. Mr Himsworth produced three witness statements for the Inquiry Trial. Mr Himsworth joined Vitol in 2010 and became Managing Director of Vitol Dubai Limited (***"Vitol Dubai"***) in 2016. He retired from Vitol in 2018. Mr Himsworth has known Mr Kelbrick in a personal and professional capacity for over 17 years. He gave evidence in a straightforward manner, for example where at one point he accepted that it would not be unfair to say that Mr Muller would have been a more obvious recruit for Vitol than Mr Kelbrick. He accepted that he was a friend of Mr Kelbrick's (adding though that in a business context Mr Kelbrick was "one of the smartest people I've ever dealt with").

26. Mr Habeeb Fasinro produced one witness statement for the Inquiry Trial. He is a former lawyer and member of the Nigerian House of Representatives, and a businessman in the oil and gas sectors in Nigeria. The Claimants maintain that Mr Fasinro's evidence should be disregarded entirely, as it is comprised of his opinion on the matters as a close friend of Mr Kelbrick. I do not accept that criticism. My impression was that his evidence was given honestly, and it was in my view inherently plausible.

27. Mr Kelbrick also adduced the first witness statement of Mr Mounzer (dated 8 March 2017) (Mounzer 1) in evidence in this Inquiry by service of a hearsay notice pursuant to s.2 Civil Evidence Act 1995 and CPR r.33.2. That witness statement was originally served in 2017 in support of an application to discharge the Freezing Order and strike out the proceedings. Mr Mounzer was responsible for the financial, management, and administrative affairs of Attock.

28. In June 2025, Mr Kelbrick sought Mr Mounzer's assistance for the trial of this Inquiry. Mr Mounzer's solicitors replied, saying that Mr Mounzer had settled with the Claimants and that the terms of the settlement agreement with the Claimants prohibited him from assisting Mr Kelbrick or giving evidence on his behalf. They stated:

> "Mr Mounzer settled the claim in 2018 to exclude himself from the litigation. Therefore, he is quite understandably unwilling to incur any further time, cost or strain in relation to it, which is now a matter between Mr Kelbrick and the Claimants. In any event, Mr Mounzer is not currently aware of any documents that fall within the definition of "Further Documents".
>
> The express wording of the settlement agreement says: "Mr Mounzer shall not assist or cooperate in any way with: (a) the

> Other Defendants in connection with the Litigation, or (b) any person in connection with a Claim or Proceedings brought against the Claimant Parties or their Related Parties, unless and to the extent that he is legally compelled to do so or, in the case of Attock Mauritius only, to the extent required in accordance with his duty as a director of Attock Mauritius. Notwithstanding the above, Mr Mounzer shall not give oral or written testimony on behalf of the Other Defendants unless and to the extent that he is legally compelled to do so."

29. The Claimants submit that Mr Mounzer's witness statement is hearsay and it was given in 2017, i.e. not contemporaneously. Mr Kelbrick submits that the reason Mr Mounzer's evidence could not be tested in court by cross-examination is because of the Claimants' improper settlement agreement with him which precluded him from assisting Mr Kelbrick (Clause 11.4). In addition, the Claimants' settlement agreement positively obliges Mr Mounzer to provide reasonable assistance to the Claimants (see clause 3.3) but, despite the benefit of that provision, the Claimants did not call Mr Mounzer themselves. It follows, Mr Kelbrick submits, that there is a strong basis for drawing an adverse inference against the Claimants.

30. The propriety or otherwise of the Claimants' settlement agreement with Mr Mounzer, insofar as it purported to preclude Mr Mounzer from assisting Mr Kelbrick, was not really argued before me. I therefore express no concluded view on it, though I have significant doubts about its propriety (c.f. the conclusions of the Hong Kong Court of Appeal in *Crane World Asia Pte Ltd v Hontrade Engineering Ltd* [2016] HKCA 737 at [29]-[31] that a term of a settlement offer made by D to a defendant Y purporting to impose a condition that Y agree not to prepare any witness statement for a third party (P) who was suing D in another case constituted "*unambiguous impropriety*" resulting in loss of legal professional privilege). What is clear, first of all, is that no adverse inference can be drawn against Mr Kelbrick for not calling Mr Mounzer to give evidence. Though in principle he could have been compelled to give evidence if he is in the jurisdiction, for a party to secure a person's attendance at a complex commercial trial by a witness summons without having had the opportunity to speak to them first would be a rare and risky approach, and not one that could reasonably be expected. Any suggestion that parts of Mr Mounzer's evidence relied on by Mr Kelbrick have limited weight by reason of his non-attendance therefore have very limited force. Secondly, given the positive obligations imposed on Mr Mounzer in favour of the Claimants, there might be issues on which it is appropriate to draw an adverse inference against the Claimants, in the context of which there can hardly be any doubt that the Claimants could have called Mr Mounzer had they wished to do so. However, any such issues will need to be considered on a case by case basis in the usual way.

(D) EXPERT EVIDENCE

31. The Claimants and Mr Bosworth/Mr Hurley called evidence on the oil trading business from John MacNamara and Nigel Scott respectively.

32. Mr MacNamara has worked in commodity trade finance since 1982 (apart from a break for military service). He worked at Boustead Commodities from 1982 to 1984 and Safic Alcan from 1988 to 1990, where he worked in Nigeria on a regular basis. From 1990 to 1996, he worked at Hypobank, before moving to Banco Santander from 1996

to 2000. There, he set up and ran structured trade and commodity finance, and introduced the bank to several oil traders, including Glencore, Vitol, Trafigura, and Shell, amongst others. In 1999, he joined Deutsche Bank, where he set up and ran the global commodity trade finance business for 20 years as managing director and global head of structured commodity trade finance and then Vice Chairman of trade finance commodities. He left in 2019 to set up his own consulting company, Carshalton Commodities Limited, a consultancy advising banks, insurers, traders, funds and lawyers in commodity trade finance. Mr MacNamara acknowledged that his work did not involve looking for equity investors. He also said that he has not himself traded oil or run an oil trading book.

33. In general, I found Mr MacNamara's evidence clear and cogent, though there were some aspects which I found less satisfactory. First, in the context of industry perceptions of fraud allegations, he expressed the view (as set out in the Joint Memorandum) that:-

> "the fact that D1/D2, as both UK nationals, fought against English court jurisdiction for 10 years for an accusation of fraud, looks more incriminating than the accusation of fraud itself, in the context that a) traditionally Swiss jurisdiction had the market reputation of being more tolerant of bribery/ other aggressive commercial practices than many other jurisdictions (at least until recently), while b) English jurisdiction is traditionally seen as being 'fair' (and therefore not a jurisdiction an innocent counterparty would actively avoid) …"

In cross-examination, however, Mr MacNamara said that was *"just a perception"*, that he did not know why Mr Bosworth and Mr Hurley had challenged the English court's jurisdiction, and that he was not familiar with the challenge. His comment was also misplaced in that the Fraud Trial was not in fact about bribery. Bearing in mind that commercial parties commonly challenge jurisdiction for a variety of reasons, I found Mr MacNamara's evidence on this point surprising and insufficiently evidence-based. Secondly, as noted later, I found his evidence about the likely effect of a freezing order somewhat blinkered. Thirdly, his evidence based on TXF data about the availability of bank financing was incomplete (see § 663 below). On the other hand, I felt he was candid in accepting, for example, that a mere allegation of fraud would be unlikely on its own to cause a bank to stop providing trade finance to an oil trading client. Considering his evidence as a whole, I felt able largely to place reliance on the detailed and informed views he was able to express, particularly in relation to the oil trading business.

34. Mr Scott has extensive experience in commodity trading and banking. He worked at a commodities trading house (Cargill) from 1991 to 2000. Then he was globally responsible for commodity trading and commodity finance at Rabobank from 2000 to 2005, and globally responsible for commodity finance at J.P. Morgan from 2005 to 2007. From 2007 to 2010 he ran private equity and hedge funds, before working in senior commodity finance and banking roles, including Rabobank and Sumitomo Mitsui Banking Corporation, until 2024. Mr Scott said in evidence that he was not holding himself out as an expert company valuer, but that he had extensive experience as a private side banker and worked closely with M&A and corporate advisory colleagues. As a witness he had a tendency sometimes to give unnecessarily long

answers, not always directed to the question asked, and occasionally to be argumentative. However, I have no doubt that he was expressing his views candidly and professionally.

35. The parties called expert evidence in the field of forensic accountancy. The Claimants called David Dearman and the Defendants called David Stern.

36. Mr Dearman has over 25 years of experience of working as a forensic and investigative accountant and expert witness. He is a Senior Managing Director of Ankura Consulting Limited, a global company specialising in providing expert witness, crisis management and dispute resolution services. Mr Dearman leads the Disputes and Economics practice in the UK. He is also a Fellow of the Institute of Chartered Accountants in England and Wales. The Defendants submit that Mr Dearman's evidence was unsatisfactory because he was not familiar with the facts of the case, had not read the Fraud Trial Judgment, had cherry-picked data and had at times assumed the role of arbiter of fact. I reject all of those criticisms. In my view, Mr Dearman gave his written and oral evidence in a fair, transparent and professional manner. Where he had, for example, provided illustrative comparisons excluding data that he considered was or might be exceptional, he explained why he was doing so. He had read the evidential materials provided to him, and could not reasonably have been expected to rove over other large tracts of material such as all the transcripts of the evidence given in the Fraud Trial, or necessarily even the whole of the Fraud Trial Judgment. The suggestion that he had assumed the role of arbiter of fact was misplaced. That criticism seems to have arisen from a misdirected line of cross-examination apparently to the effect that an expert should assume as correct any factual evidence not contradicted by other factual evidence in the case. He responded, entirely fairly, that it all depended what the evidence was, and whether, for example, it had documentary or analytic support (see e.g., Day 8/102/2 – 103/16). In my view, Mr Dearman fully and correctly appreciated the nature of his role as an expert and acted accordingly.

37. Mr Stern has over 25 years of experience in litigation and arbitration claims, financial investigations and business valuations. He is a partner in StoneTurn, a global professional services firm that provides expertise in forensics and investigations, risk and compliance, data and technology, economic and dispute advisory, and strategic business consulting. He is also a Fellow of the Institute of Chartered Accountants in England and Wales. He was a good witness.

38. The Claimants and Mr Bosworth/Mr Hurley called expert evidence on oil trading recruitment. The Claimants called Craig Smallbone and Mr Bosworth/Mr Hurley called Mark Heaven.

39. Mr Smallbone has extensive experience in hiring and remuneration. From 2007 to 2024, he worked at Trafigura as Global Head of Resourcing. He recruited over 300 traders, around 60% of which were oil traders. He acknowledged that he has never worked at Mercuria or Vitol (the places most relevant to the Defendants' loss of employment claims). However, he maintained that he had extensive knowledge of what competitors did, although he did not speak directly with his peers in the recruitment departments. Mr Smallbone was a very unsatisfactory witness. He repeatedly failed to answer the question put, was prone to giving over-long answers and was sometimes argumentative. These features of his oral evidence were so marked that I felt it

necessary to intervene to remind Mr Smallbone to answer the questions, and ultimately to remind him of his duties as an independent expert.

40. Mr Heaven has worked in recruitment since 1996, with a focus on senior commercial and operational roles in oil trading and shipping companies. In 2004, he joined Oil Recruitment Limited. He was a Director by the time he left in 2014. In 2015, he founded Mark Heaven Consulting Limited, where he is Managing Director. He acknowledged that he has never placed any senior executives at Mercuria but maintained that he had good relationships with their chief of staff and COO, and once placed someone in the London gas team in the 2010s. He also acknowledged that he has never placed any senior executives at Vitol, but he placed a Cargo Assurance Manager in 2024-2025, and a Head of Business Development with one of Vitol's JV companies in 2021. He said that his role was to help inform the hiring decision, but the company was the ultimate decision-maker. Mr Heaven was a good witness.

41. The parties also called expert evidence on Swiss property valuations. The Claimants called Gilles Vago and the Defendants called Yves Cachemaille.

42. Mr Vago has worked in real estate appraisal since 2011. He provides independent real estate appraisal services relating to the valuation of residential, commercial and land properties. From 2011 to 2019, he worked at Vago Experts Immobiliers SA. In 2019, he founded the company G.VAGO Analyses Immobilières Sàrl. Mr Vago gave his evidence professionally, though (as appears later), I have not accepted his theoretical approach as addressing the relevant question for the purposes of the relevant issue in the present case.

43. Mr Cachemaille has worked in the Swiss real estate sector for nearly 25 years. He led property departments at Groupe de Rham and Banque Cantonale Vaudoise, before joining Consulting SA as a partner and director, specialising in property valuation and market analysis. He headed the Valuation & Consulting department for French-speaking Switzerland from 2019 to 2025. In 2025, he co-founded Novéo Immobilier SA, where he is a director. He was a good witness.

(E) PRE-2015 ACTIVITIES OF ARCADIA

(1) Arcadia's business model and profitability

44. The Arcadia Group traded crude oil primarily from Africa, the Middle East and North America. Its structure was unusual: the Group was private investor-owned, and its bank financing lines were secured by a parent company guarantee backed by a portfolio of pledged liquid assets worth up to US$300 million. 70% of the net profits were paid out as dividends to the owners (Farahead) annually.

45. There is some disagreement between Mr Bosworth/Mr Hurley and the Claimants as to the profitability of Arcadia. Mr Bosworth/Mr Hurley say that Arcadia became one of the largest oil traders in the world and was comparable to other major oil trading houses such as Vitol, Glencore, and Trafigura. In 2010, Arcadia traded approximately 1 million barrels of oil per day. A Reuters Report from October 2011 notes that Arcadia brought 800,000 barrels a day to market, *"a volume similar to OPEC country Qatar"*, and that its trade in paper derivatives was *"about 10 million barrels a day"*. It listed

Arcadia as the sixth largest of the trading houses that predominantly traded energy, and thirteenth largest of all commodities trading houses worldwide.

46. Mr Scott, the oil trading expert for Defendants, says that these numbers are *"approximately equivalent to my estimate of [the volume of oil traded by] Mercuria, and roughly 54% of Trafigura's daily barrels for that year"* (Scott 1, [102]). Arcadia also had a very high return on equity on average across the years from 2006 to 2013: 33.1%, comparing favourably with Trafigura (23.8%) and Mercuria (23.1%) (Scott 2, [176]).

47. The Claimants submit that Arcadia is not comparable to the major oil trading houses. By 2013, the number of barrels of oil traded by Arcadia per day had reduced from 1 million to 600,000 (a decline of 40% in only 3 years), a significant factor being reduced supply from the US due to changed market conditions. There was also a substantial fall in supply from the Middle East and North Africa, at least partly due to political problems in Sudan and Yemen (which had been key suppliers to Arcadia 1's very profitable Singapore crude book). Further, Mr MacNamara did not agree that return on equity is a good metric to compare Arcadia with larger competitors, even though in his expert report he described return on equity as *"the best way to measure relative performance of commodity traders"* (MacNamara 1, [122]) (my emphasis). Mr MacNamara explained in cross-examination:

> "I didn't say that the return on equity of Arcadia was bad. I never said this. The great thing about return on equity is it's not specific to the size of the company. I can be a one-man trader and get very good return on equity. It doesn't make me a peer of Trafigura."

48. Mr MacNamara compared revenues, net worth, revolving credit facility ("***RCF***") size, traded volumes of oil, and number of employees. He said: *"I must point out that the 2010 Revenues of Arcadia in that year are given as USD 26.6 billion in the 2010 Information Memorandum, while the revenues for the same year for Mercuria were USD 51 billion, according the company website graph below. I do not see how this makes the two companies "approximately equivalent"* (footnotes removed). In terms of profitability, the Claimants point out that between 2009-2013, Arcadia saw a decline in its annual net trading profit, falling from $363.7 million in 2009 to a loss of -$2.6 million in 2013. The previous year, 2012, was also a relatively poor performing year, generating a net profit of only $5.5 million. As Rabobank noted in February 2013, *"Arcadia's recent profitability is below peers, physical turnover has reduced significantly"*.

49. Mr Bosworth/Mr Hurley point out that Arcadia's annual profits varied significantly each year. The net trading profit went up from US$ 39.2 million in 2006 to US$ 217.7 million in 2007, fell to US$ 17.0 million in 2008, but then rebounded to US$ 363.7 million in 2009. It also had good years in 2010 (US$ 230 million profits) and 2011 (US$ 211 million profits), before suffering poor years in 2012 and 2013. Mr Scott says, *"there were years, which is customary in my experience with commodity traders, of higher profits and there were years with lower profits, which is usual when I look at commodity traders."*

50. One of the recurring themes in this case has been the volatility of the oil markets and particularly the volatility of the West African oil market. It is therefore difficult to come to a conclusion on the profitability of Arcadia by reference to a few good or bad years, or by reference to one metric. I agree with Mr Bosworth/Mr Hurley that, in terms of profitability, Arcadia under their leadership was a very successful business, which across the eight financial years 2006 to 2013 generated a cumulative net trading profit of USD 699.80 million, with annual average net trading profit of USD 87.5 million. Those figures are relevant context to the present Inquiry, because market perceptions of Arcadia's profitability, amongst other things, will be relevant to determining the likelihood that Mr Bosworth and Mr Hurley would have secured investment for their new business venture from 2014 onwards.

51. At the same time, it is also true to say, in agreement with Mr MacNamara, that looking at things more broadly, Arcadia was probably not a "Tier 1" trading house. It is notable that Mr Bosworth/Mr Hurley's business plan, to which I turn later, described their goal as being to create a "*mid size*" company, and did not include Arcadia in the list of the largest traders. In the "*Industry Analysis*" section, the plan said:

> "The trading community is dividing into the large traders with massive infrastructure bases (Vitol, Glencore and Trafigura), mid level trading companies (Gunvor and Mercuria) and smaller niche trading companies.
>
> The large trading companies are established, with their main competitive advantages being, high cash reserves, resulting in low transaction costs and a reduced reliance on the banking community; massive worldwide infrastructure bases to augment their trading activities. The mid level trading companies need to expand or will increasingly have rely on speculation in order to survive (a very risky strategy). The small niche companies have to work on longer term partnership projects; with the main focus on sourcing crude oil and developing outlets for refined products. Overheads, both variable and fixed will have to be aggressively managed by all sectors of the business."

By the metrics set out there, particularly infrastructure and cash reserves, Arcadia was not in the top tier with Vitol, Glencore and Trafigura. I also note that Mr Adams' business review in July 2013 (§ 69 below) referred to Arcadia as a "*small/medium sized trading company, with a well established brand and global coverage*".

(2) Constraints on Arcadia's business model

52. There is also some disagreement between Mr Bosworth/Mr Hurley and the Claimants as to whether there were significant constraints on Arcadia's business model.

53. One of Mr Bosworth's and Mr Hurley's frustrations with Farahead's management of Arcadia was that Farahead took cash (in the form of dividends and fees) out of the business instead of re-investing it (Bosworth 11, [10]). Mr Bosworth says in his eleventh witness statement:

> "Increasingly towards the end of my time at Arcadia, I felt he [Mr Fredriksen] didn't have the appetite to grow the business to its full potential. There were several issues. The biggest one was that every year, he stripped out the cash from the business in the form of dividends, instead of reinvesting it in the company as was necessary to grow it significantly […] [H]e was aware that he only got 65% of the upside from Arcadia; the other 35% went to the management and traders. So if there was a profitable asset to be bought, he wouldn't have wanted Arcadia to buy it. He would have wanted to buy it himself. That way, he kept 100% of the upside and did not have to share with Arcadia."

54. Similarly, Mr Hurley says in his seventh witness statement:

> "We needed more cash to grow the company, and there was not a lot of cash in there. John pledged a security portfolio of up to US$300m. On the back of that, we had a revolving credit facility, which I think was more than the value, or pretty close to the value, of the entire security package, and we had around US$3billion or US$4billion worth of bank facilities to support the company in its trading activity. But there was extreme pressure from John and Tor to continually return cash to them. Every year, John and Tor stripped the dividend out to the extent that they left the company with bare bones. There was not a coherent investment strategy there to grow that company. It was just, year-on-year, "what can we make this year?". There was no ambition to grow it, and that was not consistent with what Pete and I expected and wanted to happen."

55. It was put to Mr Trøim that this model constrained Arcadia's growth:

> "No, that's not correct, because kind of Farahead also gave the kind of guarantees of the more than $300 million to back the trading activity and on that trading activity, we got the credit lines. So the credit line was there all the way into Pete and Colin decided to invest in the oil companies in Nigeria, which was eating all the RCFs. So that's not correct. It didn't restrict the business in any way.
>
> …
>
> I think it's also very wrong of you to say that we take off all the dividend. We took off all the dividend after the employees took off their 30% share. That was the cost -- that was the deal. It was 30/70. That was the day it was dealt with. So I think the employees took out as much as we from that point of view."

56. Mr Trøim said, *"You have to choose your model"* and *"It was the model which… everybody agreed to."*

57. The Claimants note that Arcadia's growth was also constrained by the fact that its traders were taking out very large bonuses. Further, Arcadia's substantial financing was in large part facilitated by the knowledge that the Group had an owner with deep pockets. Mr MacNamara says in his expert report:

> "241. The Arcadia1 arrangement whereby the TNW was built in the first instance on a parent company guarantee backed by a portfolio of pledged liquid assets was very unusual. From a creditor perspective it looks fraught with structural risks (both legal and operational) as to how that would work if ever needed. I accept that it did work as described, but, in my opinion, a large part of its plausibility as a solution was that a) the UBO was known to have very deep pockets and b) it was never really stress-tested for real: it worked in the rising oil market…"

58. Ultimately both experts agreed that one of the constraints on Arcadia was that profits were not retained sufficiently in order to build net worth and facilitate growth.

(3) Mr Bosworth/Mr Hurley proposed buy-out of Arcadia

59. In early 2013, apparently in the context of their frustration at Farahead's constraints on the Arcadia business model, Mr Bosworth and Mr Hurley considered offering to buy the Arcadia Group from Mr Fredriksen, with a focus on the physical trading business (Bosworth 11 [8]-[14]; Hurley 7 [29] [36]).

60. Mr Bosworth explains in his eleventh witness statement:

> "12. […] Multiple times during my time at Arcadia, he and Tor threatened us with closing down Arcadia. There was at least one meeting in the period from 2007-2013 in which they asked us to work out a "close down scenario". Similarly, Tor told Colin and I that one of the reasons John hired Tom Francisco (who later helped Paul Adams lead an "investigation" into Colin and me at John and Tor's behest, which led to the fraud claim against us) was to find out what it would cost to close Arcadia down.
>
> 13. In about 2013, Colin and I started talking seriously with each other about buying the business off John. It seemed a natural next step. I was confident that if we were able to reinvest our profits and run Arcadia ourselves, we could take it even further."

61. Mr Hurley asked Rabobank, one of Arcadia's financing banks, whether they were interested in financing the purchase (Bosworth 11 [14]; Hurley 7 [35]). A Rabobank Presentation titled "*Project Hoddle, Management Buy Out"* dated 28 February 2013 noted in summary that: *"Rabobank is the 2nd largest lender to Arcadia"*; *"Current UBO is not committed to grow the equity of Arcadia"*; and *"Rabobank TCF Management supports management of Arcadia and has confidence in viability of the new venture".* The presentation also included the following points.

i) Under "*Analysis of Situation*", the presentation said: *"Current UBO is not committed to grow the equity of Arcadia"*; *"Current UBO is cash-flow driven*

(and less mark to market)"; *"CEO/CFO have initiated discussion for a limited buy-out (Australia, Singapore, Dubai and 'Africa'), excluding Swiss, UK and US, on a zero cost basis"*; *"Arcadia has a large banking pool with total facilities of ~US$ 5 bln, including a ~USD300mln committed RCF"*; *"Arcadia's recent profitability is below peers, physical turnover has reduced significantly."*

ii) Under "*Rabobank position*": "*Rabobank is the 2nd largest lender to Arcadia"; "Current discussion is on an financial advisory basis and not as an existing lender"; "TCF Management supportive of new venture"*.

iii) Under "*Equity Contribution*": "*Despite relative straightforward transactions USD 150 mln is minimum equity to obtain USD 2 bln in (used) facilities (~8%)"*; *"Equity can be in the form of paid up capital, subordinated debt, pledged shares, etc"*.

iv) Under "*Role Rabobank*": *"Rabobank TCF Management supports management of Arcadia and has confidence in the viability of the new venture"*; *"Indicative commitment is however limited to USD 300 mln…"*.

62. In the event, these plans were interrupted by Mr Bosworth's decision to leave Arcadia in March 2013 (Bosworth 11 [14]). Nevertheless, Mr Bosworth/Mr Hurley "*wanted to look to start something, and to find potential backers"* (Hurley 7, [39]). This was the genesis of Mr Bosworth/Mr Hurley's plan to set up a new oil trading business after they left Arcadia. The oil trading business will be discussed below.

(4) Mr Bosworth's resignation from Arcadia in March 2013

63. Mr Bosworth resigned from Arcadia in March 2013 for personal reasons.

64. Farahead asked Mr Bosworth to assist in obtaining repayment of the funds that Atlantic, Capital and Equinox owed Arcadia. I refer to these in more detail below. Mr Bosworth's evidence is that *"this was very substantial work, which needed my input and time specifically, and this frequently had me flying to Nigeria and across Europe through all of 2013 and virtually all of 2014."* (Bosworth 11 [17]).

(5) Arcadia restructuring in 2013

65. Following Mr Bosworth's departure, Farahead appointed Mr Adams and Mr Francisco to chair an Arcadia management committee. Mr Adams started work on a restructuring plan for Arcadia and acted as the CEO.

66. Mr Trøim considered that the transactions that Arcadia entered into from 2011-2013 with the Nigerian oil companies Atlantic and Capital ultimately triggered the restructuring. In the Fraud Trial Judgment at §§ 618-668, I found that Mr Fredriksen, Mr Trøim and/or Farahead had not understood all of the risks of the transactions, but that they involved no misconduct or fraud on the part of the Defendants. In the Inquiry Trial, Mr Trøim said that *"both those transactions did nothing else than making losses for us"*, and cutting costs was *"one of the reasons"* for the restructuring, but *"[t]he main reason was that we were running out of the RCF because of exposure limits created by investments in Nigerian oil companies."*

67. On 2 April 2013, Mr Adams sent an email to Mr Trøim saying:

> "Banking is the most serious issue. Today we were advised by Sac Gen [sic] that they are suspending our credit lines until they have the opportunity to discuss the restructuring with Colin. Obviously this is an urgent priority. We know that our trading competitors are fueling the rumors about Arcadia losses, J'F's commitment, etc. so we need Colin to forcefully refute this directly with the banks."

68. It was put to Mr Trøim that the banks were concerned about Mr Fredriksen's commitment to Arcadia in 2013. He responded, *"Well, I think they've said both things: they wouldn't be concerned if there weren't losses. So if there are losses, then you're worried about shareholder commitment."*

69. On 9 July 2013, Mr Adams emailed Mr Trøim with a *"pre-read for our meeting tomorrow"*. The attached "*business review*" included this:

> "The capital structure of the Arcadia group should be highlighted at this time as it clearly has strategic consequences. The group is private investor-owned, with no employee ownership. Staff are compensated with bonuses computed from prior year profits, with no direct incentive for long term value creation or mechanism to encourage retention in the company. Net profits are substantially dividended to the owners annually, with minimal earning being retained in the company. This model is very different from that of our major trading competitors-Vitol, Trafigura, Mercuria, etc., and more akin to that of a hedge fund. Consequences include:
>
> - Less incentive to pursue long term investments
> - A critical retention tool for key staff is foregone, and
> - The Farahead balance sheet is not allowed to grow, with negative consequences on counter-parties and financing banks
>
> Summarizing Arcadia's position today, we are a small/medium sized trading company, with a well established brand and global coverage."

70. To similar effect, on 13 September 2013, Mr Hutton of Holman Fenwick Willan LLP emailed Mr Lance in respect of Arcadia's proposed restructuring. Mr Hutton noted that:

> "the various substantial commercial reasons for undertaking this reorganisation, not least being the inability to attract new investors to the existing structure, the inability to attract bank finance to the existing operations and, finally, the increasing

> inability to retain and motivate existing employees and to attract new employees to the group."

(6) Farahead's investigation into the Capital and Atlantic transactions

71. As part of the restructuring, Mr Francisco was charged with analysing the Arcadia portfolio. A series of investigations were conducted into the Atlantic and Capital transactions and the Arcadia Lebanon dividend.

72. During the Inquiry Trial, Mr Trøim was shown a series of emails from May 2013 in which he had asked Mr Bosworth about the Capital transactions. On 27 May 2013, Mr Trøim wrote to Mr Adams, Mr Fredriksen's pilot, Kjell Nordbaek, and Mr Francisco: *"He [Mr Bosworth] just continues to avoid answering what we're asking about. We don't have a choice, we have to pick someone. "Bloodhounds" during the week…….I'll talk to Paul...".*

73. It was put to Mr Trøim that his intention in this period was to use aggressive measures to recover money from Mr Bosworth and Mr Hurley. Mr Trøim said:

> "A. "Bloodhounds" is not somebody who's going to go after and get the money. The bloodhounds is effectively the way to find the blood, to find the body and what's going on. What's going on? That's what we were after. We didn't get the truth out of these people and then we needed to get -- to get some investigators to find out what was really going inside the company. That's what this is about. This is not about money. This is about finding out what's going on in the company.
>
> …
>
> A bloodhound is not -- the bloodhound find the blood and in the end you find the body, and when you find the body, you can start to deal with the problem. We didn't know what the body was. We didn't know what was kind of hidden here because management rejected to give us the true story, and that's why we had to investigate it and that's where -- call it bloodhounds. Kind of, in effect, I probably write the wrong words, but this is not about taking Bosworth or Hurley. This is about finding out what's going on. That's what you use a blood tracking dog for." (Day 9/27/6)

That was something of a departure from his evidence at the Fraud Trial, where he said in cross-examination that the 'bloodhounds' were people *"who could collect money to get it back to us"*, or "*meant to be some aggressive people who can get the money*"; and that Messrs Francisco and Adams were *"part of that team"*; though, to be fair to Mr Trøim, that discrepancy was not specifically put to him in the Inquiry Trial.

74. The details of the Atlantic deal are summarised at §620 of the Fraud Trial Judgment. Arcadia Switzerland and Atlantic entered into a Crude Oil Sales Agreement dated 30 September 2011 and a Prepayment Agreement. The advance payments were by way of loans and the collateral consisted of security rights over delivery of the crude oil.

Pursuant to Addenda to the Prepayment Agreement, the amount advanced was increased from US$50 million to US$100 million in June 2012, and to US$150 million in September 2012. The Atlantic deal had a maturity date of 18 February 2014.

75. In the Inquiry Trial, Mr Trøim maintained the evidence he had given at the Fraud Trial, namely that he and Mr Fredriksen did not feel they had been properly informed about the position in relation to Atlantic. He accepted that the Arcadia Switzerland audited accounts for 2012 showed the initial US$50 million prepayment financing, and that the Arcadia Singapore accounts dated July 2013 referred to the full US$150 million. However, he said that Mr Bosworth and Mr Hurley had committed the further funds without authorisation:

> "… there are two problems here. The $50 million we lent these guys was not enough to produce any oil. What do you do then when you can't deliver the oil? You need more money, and that's the problem and that's what happened in this case. And we didn't authorise to go in with more money because we were concerned about this thing, and then Pete and Colin decided to fork out more money to these two oil companies, and that's why we ended up in a problem in that meeting with the banks and that's why Pete left in 2013 when we discovered these things." (Day 9/34)

76. Mr Trøim accepted that pre-financing structures of the kind that was envisioned in the Atlantic deal are a common part of oil trading activities, but only *"if they're secured well and with good companies"* and not *"companies which have only a promise in the future to do something."* Mr Trøim described the Nigerian oil transactions of 2011-2013 as *"a big disaster for us"*: *"significant losses were accrued in both the transactions and effectively, they could have taken down the whole Arcadia if the shareholders wouldn't have backed it."* It is not necessary for me to reach a conclusion about these matters, but the Claimants' strength of feeling about them forms part of the background leading up to the obtaining of the Freezing Order.

(7) Farahead investigations into payments and dividends

77. On 27 June 2013, Mr Francisco sent an email to Irene Theocharous of Seatankers Management Co Ltd: *"Tor Olav [Trøim] and John [Fredriksen] have asked me to understand the historical equity invested and dividends paid by/to the owners of Arcadia/Parnon over the years since these entities were purchased… Is this something that you might have on hand or would be able to compile from Farahead Holding's perspective?"* In the Inquiry Trial, Mr Trøim said this instruction was given because, *"when we go into problems, as we clearly were at that time because of the—because the massive investment they'd done in Nigerian company, we wanted to see what the net result of this investment activity would have been."*

78. Ms Theocharous replied the following day, on 28 June 2013, attaching a schedule which includes the dividends received from Arcadia Beirut. She wrote, *"Attached find summary that was arranged previously and given to Tor Olav."* This was the same schedule of "*Arcadia Group Investments*" that Mr Hannas had sent to Mr Nordbaek for Mr Fredriksen's attention in March 2012, and which Mr Nordbaek forwarded to Mr Trøim. The document stated: "*Dividends received paid from Arcadia Beirut – not*

included". "*Arcadia Beirut*" was the term used by Farahead individuals when referring to Arcadia Lebanon.

79. In July 2013, Ms Theocharous sent an updated summary to Mr Francisco. One version of it contains an entry referring to "*Arcadia Beirut 15,000,000*" and a manuscript addition from Ms Theocharous "*DH to check – to exclude – may have been rec'd & then paid. He did not find anything*" (Fraud Trial Judgment §§ 690-694). Mr Hannas appears to have provided the 15,000,000 figure to Ms Theocharous (Fraud Trial Judgment § 694). Mr Fredriksen in cross-examination at the Fraud Trial at one stage said he recalled that Mr Hannas had been looking for the US$15 million Arcadia Lebanon dividend, but then said he did not particularly remember that (Fraud Trial Judgment § 697).

80. On 5 August 2013, Mr Hannas emailed Mr Francisco a summary of Farahead's investment in Arcadia and the sums Farahead had received, in preparation for a meeting in London on 19 August 2013. The attached summary was the version of the schedule that Ms Theocharous had previously provided, not including the 'Arcadia Beirut' entry (Fraud Trial Judgment § 697).

81. It was put to Mr Trøim that he knew as early as 2012 that Arcadia Beirut was a Farahead company, and he knew that Arcadia Lebanon was beneficially owned and controlled by Farahead. Mr Trøim said:

> "Q. You knew in 2012 that Arcadia Beirut was a Farahead company, didn't you?
>
> A. I knew exactly what I've said in the kind of -- all my witness statements; that Arcadia Lebanon was set up by Pete Bosworth and Colin Hurley, effectively owned by Colin Hurley and Pete Bosworth, that Farahead had a 70% economical interest in the results from Arcadia Lebanon.
>
> Q. I'll ask the question again. You knew in 2012 that Arcadia Lebanon was a Farahead company, didn't you?
>
> A. That we had 70% economical interest, but that the company was effectively owned by those two other individuals." (Day 9/23)
>
> …
>
> "Q. You asked Mr Francisco and Mr Hannas to investigate the Arcadia Lebanon dividend in 2013 because you knew that Arcadia Lebanon was a Farahead company, didn't you?
>
> A. I think I've already answered it. I said the company was owned by Pete Bosworth and Colin Hurley from the beginning, but we had a 70% economic interest, which was our understanding, with these people. And the company was obviously called Arcadia Lebanon as well, so it kind of clearly

> belonged into the group, but we weren't the actual owners." (Day 9/24)
>
> …
>
> "Q. You knew that Arcadia Lebanon at all times was Mr Fredriksen's standalone company; correct?
>
> A. I don't think we go any further on this. I think I have said what I said. I said kind of there is a very big legal difference between who owns a company and who has an economical interest if there is -- it's that deviated from the shareholder register.
>
> Q. You always knew that Mr -- that Arcadia Lebanon was Mr Fredriksen's company because Arcadia Lebanon had to pay dividends to Farahead; correct?
>
> A. Yes, but it's not Mr Fredriksen company because you have to pay dividend to him. Kind of the economical compensation -- we pay economical compensation. 30% of the profit in Arcadia went to the employees, but it's not the employees' company for that reason." (Day 9/78)

(8) The Hannas note

82. The Hannas Note is discussed in the Fraud Trial Judgment at §§ 698-701. It is an undated note that exists in four photocopied versions, each with the same handwritten text but different highlighting. The first entry says, *"Arcadia Lebanon = JF's stand alone company"*. The version of the Note that contains the least highlighting has one highlighted entry and records: *"TOT [Mr Trøim] - $15m AL dividend will be used to reduce PB loan from Fulham"*.

83. Mr Bosworth and Mr Hurley say that the likelihood is that this note was created in 2013 as part of the Arcadia Lebanon dividend investigation, and that Mr Hannas's principals (including Mr Fredriksen and Mr Trøim) and Mr Adams were aware of the Hannas Note or its contents before the Adams Affidavit was sworn on 11 February 2015 and became the basis on which the Claimants obtained the Freezing Order.

84. The Claimants do not admit the allegation that the Hannas Note was created at this time (Cs' Amended Inquiry Defence § 30B(4)). At the Fraud Trial, the Claimants had advanced a positive case that Mr Hannas created the Hannas Note in October 2015 in order to respond to questions from the Claimants' then solicitors, Freshfields.

85. The Hannas Note was disclosed in October 2023 and thereafter became an important piece of evidence in the Fraud Trial. Five days after the disclosure of the Hannas Note, the Claimants told the Defendants that Mr Hannas's notebooks had been destroyed in 2017 and 2022. The destruction of the notebooks is discussed in the Fraud Trial Judgment at §§ 53-59. I found Mr Hannas's explanations *"wholly implausible, particularly from a person for whom record-keeping was a significant part of his role"*,

but felt unable to draw a firm conclusion on the evidence as to whether Mr Hannas had destroyed the notebooks on the instructions of Mr Fredriksen.

86. Following the disclosure of the Hannas Note, the Claimants threatened to seek an injunction to prevent Quinn Emanuel from continuing to act on Mr Bosworth and Mr Hurley's behalf. No such application was in the event pursued.

(9) August 2013 meetings

87. As a result of the departures, investigations, and restructuring taking place in Arcadia, its banks required reassurance. Mr Francisco scheduled a series of meetings with the banks from 20-22 August 2013.

88. On 7 August 2013, Mr Francisco sent Mr Hurley a cover letter that would be sent to the auditors in advance of the scheduled meetings, copying Mr Adams and Mr Trøim. He said that the letter *"now includes changes from the shareholders"*. It referred to *"a meeting with representatives of our main banks here in London the week of 20-22 of August […] Both Tor Olav and JF intend to be in these meetings to help reinforce shareholder support for the business and formally introduce Paul [Adams] as CEO."*

89. The cover letter was edited by the shareholders and signed by Mr Hurley. It said: *"The Atlantic and Capital contracts were executed without the shareholders understanding the risks inherent in these deals."*

90. In the Inquiry Trial, Mr Trøim was shown a draft of the cover letter, which had been sent to him by Mr Francisco on 5 August 2013, with Mr Adams in copy. The draft text said, *"The Atlantic and Capital contracts were executed without adequate communication with Arcadia shareholders."* Mr Adams commented on this draft: *"I think you need to consider softening this for fear that as written it amounts to an admission of fraud which would breach the RCF covenants and trigger personal litigation from Pete/Colin and/or the banks."*

91. It was put to Mr Trøim that that section of the draft letter was rewritten because it was untrue to say that the Arcadia Group did not adequately communicate the 2013 deals. Mr Trøim maintained that the Nigerian oil transactions were *"misrepresented to us by the management in the company"*. In relation to the changes in the cover letter, he said:

> "A. I think this is a technicality versus the bank. This is an internal thing and versus the way you face the kind of outside world, because if you can -- if it was fraud, they could effectively call the RCF and effectively declare us in default on those things and we didn't want to put ourselves in that position." (Day 9/41)

92. On 19 August 2013, Mr Fredriksen, Mr Trøim, Mr Francisco and Mr Hannas held a meeting to discuss the *"cash (dividends & guarantee fees) from Arcadia"*. Mr Trøim accepted that the Arcadia Lebanon dividend *"might well have been"* a topic of discussion at the meeting and he gave evidence that *"I wanted to – probably to know if anything had been paid out from there."*

93. The following day Mr Francisco and Mr Trøim met with the banks. Mr Fredriksen did not attend. Mr Trøim described the 20 August 2013 meeting as follows in his oral evidence at the Inquiry Trial:

> "We were totally depending on absolutely transparency and credibility with all the banks in the world. Here we had a situation where suddenly we discovered two bloodhounds or whatever you call it. We found out that exposure was far outside what we had thought it was and what we had authorised. When that was discovered, we had to prepare and stand up for the banks and said, "Okay, we know this is wrong. Pete -- we have taken the consequence now. Pete Bosworth has left the company, was mainly involved in the deal. We've taken that action, and we will clear this thing and we'll stand by the company and make sure you don't have any losses." That was the whole story around this meeting on 20 August." (Day 9/43:11)

94. The Claimants suggest that the meeting was about reassuring the banks about the Nigerian oil transactions, whereas Mr Bosworth and Mr Hurley say the banks' real concern was that Mr Fredriksen would withdraw support from Arcadia, and they note that the 19-page presentation used in the meeting contained only one reference to Atlantic, and (as Mr Trøim accepted) the banks had known about the transaction's existence since 2012. I find it unnecessary to resolve that controversy for present purposes, though I would observe that the answer may be that both concerns existed and were linked. Mr Adams's summary of the meeting, sent on 21 August 2013, indicated that:

> "The purpose of the meeting was to introduce me as Pete's replacement, present our audited accounts for last year, and update progress on recovery of our outstanding loans and receivables in West Africa. Tor Olav used the occasion to reiterate the owners commitment to Arcadia, and we introduced the likelihood that we won't be renewing the RCF in October and will instead use JF's funds to finance the cash needs of the company. …."

In Mr Trøim's words, in cross-examination at the Inquiry Trial:

> "A. … this has also to do with bankers' core capital. If the – if the lender is not obliged to pay the money yourself, you have to set aside a different amount of core capital than you have if you had to lean on the guarantees. So this has to do with banking and the core capital the bank needs involved in the facility. Arcadia was clearly not in position to be able to pay back the RCF at that time … because the money was spent on -- that was spent, actually, in the two Nigerian oil companies." (Day 9/52)

This part of Mr Trøim's cross-examination is also of interest for his explanation of his motives in giving evidence for a second time:

> "Q. At this important meeting, Mr Fredriksen did not want to explain himself to the banks or answer questions from the banks; correct?
>
> A. But that was not the work under a normal situation. I think he sent me normally in those kind of situations. I was the one that was dealing with the banks normally in -- when it comes to things like that. He's not the financial guy.
>
> Q. He left it to you to answer the questions, didn't he?
>
> A. No, I think the guy who was dealing with the situation was really Colin, which was the chief financial officer of the company. I think he was the one who had the orient about the RCF. Then we would say if there was any concern about the RCF, we were their shareholders and say that whatever happens, we are there to (inaudible - background noise) the company.
>
> Q. And now 13 years later, you alone, Mr Trøim -- you're the only individual answering questions for Mr Fredriksen again; correct?
>
> A. I am here because I have nothing to hide. I have nothing -- I have been in the court case. I have no economical interest in this thing. I'm not kind of spending time on it or spending costs on it and I have no upside, no downside, but I think the truth should be the truth and that's why I'm here." (Day 9/54)

(10) Mr Hurley's dismissal from Arcadia in September 2013

95. In parallel to the meetings of August 2013, Mr Adams and Mr Francisco were considering dismissing Mr Hurley.

96. On 7 August 2013, Mr Adams emailed Mr Francisco:

> "Can we really stage manage Colin's exit over next two weeks? Perhaps we should bite the bullet, tell him he is being terminated, and pass that message to the banks immediately in a letter that includes the invitation to meet on Tuesday 20th. The risk with that is the banks take precipitous steps immediately, but we would then need to call on JF's influence as promised to get them to hold off on that."

97. On 1 September 2013, Mr Adams emailed Mr Trøim with proposals to remove Mr Hurley. Mr Adams suggested not doing anything until the extension of the RCF in mid-October 2013: *"On the issue of succession, we say and do nothing until the RCF is extended or not on October 10th […] i believe he still add positive value as we negotiate the RCF extension."*

98. On 3 September 2013, Mr Adams sent an email to Arcadia:

> "Our primary focus at present is to agree the level at which we renew our RCF (revolving credit facility) in October […] Separately, with Tom Francisco now established in London, and a heightened Finance workload, we have decided to split the current Group CFO position. With immediate effect Tom will be formally seconded into Arcadia in a part time capacity to oversee accounting and reporting, this position reporting to me. He also retain his responsibilities as Shareholder representative. Colin remains CFO, with his focus on finance, relationship with banking partners, renewal of the RCF, and recovery of remaining loans and receivables in West Africa".

99. On 26 September 2013, Farahead dismissed Mr Hurley. This is discussed in more detail in the Fraud Trial Judgment at §§ 706-712.

(11) RCF extension October 2013

100. On 2 October 2013, Mr Francisco emailed Mr Trøim about the Atlantic transaction, copying Mr Adams:*"[w]e need to move fast on this and the novation agreement between Arcadia and the SPV in relation to Atlantic need to be signed tomorrow morning as part of the RCF paperwork. This agreement will obviously have the amount to be paid in it so we need to make a decision on the amount today. I will give you a call later today to discuss."*

101. Also on 2 October 2013, Mr Francisco emailed Mr Trøim saying that the security package for the Arcadia RCF could be reduced*: "we can take out the $99m after the Atlantic transaction and RCF is completed, some time after 10 October".* In response, Mr Trøim emailed Mr Hannas, Mr Francisco and Mr Nordbaek: "*What is the routine for checking this ? When was it last checked ? We need much tighter control on this in the future…."*; and the following day: *"We should reduce the depot [sic] immediately after the new RCF is in place by October 10th."*

102. On 10 October 2013, Ms Pauline Daly emailed Mr Adams, Mr Lance, Mr Trøim, Mr Francisco and Mr Hannas to confirm that the Arcadia RCF had been extended at a level of US$ 150 million for 180 days. Nonetheless, Société Générale, DBS, First Gulf Bank, OCBC Bank, Natixis and Axis Bank declined to extend their participation, citing the *"departure of CFO"* and *"changes at management level"*.

(12) Mr Trøim and Mr Fredriksen fall out

103. In mid-October 2013, Mr Trøim and Mr Fredriksen fell out and Mr Trøim left Farahead *"in circumstances that were not entirely amicable"* (as Mr Trøim describes it in his fifth witness statement). Mr Trøim also said in the Inquiry Trial, *"when you work for John, you work for a guy which is extremely demanding. When you work for him for 19 years, in the end, you have that little drop of water, it makes the glass go over."*

104. It was put to Mr Trøim that he was responsible for the Farahead security package. Mr Trøim had said in the Fraud Trial that *"I was responsible for the downside to protect that USD 300 million which we put in core capital and key capital never got lost."* He clarified in the Inquiry Trial:

> "14:13 A. No, it was not my responsibility, but I came up with idea that we could use that as a collateral, including some shares in order for Colin and Pete to arrange credit lines against that facility.
>
> Q. It was your responsibility to oversee that share package.
>
> A. No, I -- it was Colin's, who was chief financing officer, who was dealing with the RCF and the banks. I was in some other meetings with the banks, but I think it's very hard to kind of complain that somebody who spends four to five hours in a month on this file are responsible for running a business.
>
> …
>
> 15:14 A. What I said -- I say the same as I say now. Colin was responsible for arranging the RCF. Against the RCF was the collateral package. I oversaw that and made sure that we weren't in any breach on the covenants or anything like that when it comes to security package.
>
> …
>
> 17: 9 […] I'm responsible from all sides to make -- to versus John that effectively the 300 was kept there. It wasn't my day-to-day responsibility to deal with this. This was effectively Colin Hurley. It was the chief financial officer dealing with the banks. So my responsibility was just to set(?) that he did his job and did that in a proper way."

105. It was also put to Mr Trøim that, as a result of his overall responsibility for the security package, Mr Fredriksen blamed him for the Arcadia situation, and that in order to shift the blame he decided to scapegoat Mr Bosworth and Mr Hurley. Mr Trøim denied this, saying:

> "A. No, not more than in any other situation. John is a little bit like if things goes well, he does it himself. If things doesn't go well, then there's other people to blame. But I think kind of John and I had that relationship for 19 years. I don't think there was particular -- particular things there. He didn't blame me for lending money to Atlantic or Capital.
>
> …
>
> Q. And part of the divorce deal with Mr Fredriksen was you would help him in this Arcadia litigation; correct?
>
> A. That's absolutely not correct at all. I had no obligation to this case whatsoever from the day I left. …"

(13) Further investigations in 2014-2015

106. In March 2014, Farahead engaged Freshfields *"to discreetly conduct a more detailed forensic examination of the electronic documents stored on the Arcadia Group's central server, with the aim of: (a) determining whether or not these preliminary findings were substantiated by such an analysis; and (b) if so, to establish the scope and magnitude of any irregular activities".*

107. In early April 2014, Farahead instructed EY to carry out a *"fact-finding investigation"* into Arcadia's West African trading. This work resulted in EY's first report ("***EYI***").

108. In June 2014, Farahead instructed Diligence *"to assist in establishing who owned and controlled the various entities identified."*

109. On 9 February 2015, EY provided a report to Farahead *"in respect of our fact-finding investigation into the possible diversion of profits outside of a subsidiary group of Farahead."* The EY Report said at [2.21] that EY were *"assisted by Farahead and its legal advisors in establishing any other commercial or operational reason that may explain our findings."* EY concluded at [3.2] that *"companies in the Arcadia Group entered into a number of trades with no apparent commercial or operational purpose."* In addition, the EY Report said: *"we are instructed that Arcadia Lebanon has never been a part of the Arcadia Group."* In response to questions in cross-examination, Mr Trøim said he did not know who instructed Ernst & Young that Arcadia Lebanon was not part of the Arcadia Group and was not a Farahead company.

(F) PRE-2015 ACTIVITIES OF ATTOCK DUBAI

(1) Establishment of Attock Dubai in 2012

110. In 2009, Attock Mauritius was acquired by Mr Kelbrick and Mr Mounzer. Attock Mauritius was a successful oil trading business that had a substantial and well-established presence in West Africa, as I recorded in the Fraud Trial Judgment at §567. Attock Mauritius is sometimes referred to in the witness statements as AOIL (Attock Oil International Limited, Mauritius).

111. Around mid-2012, Mr Kelbrick and Mr Mounzer set up a new company in Dubai to carry on Attock Mauritius' business while benefitting from the tax advantages in the UAE (Fraud Trial Judgment § 679). Attock Dubai was incorporated in January 2013 and Attock Mauritius' business was transferred to Attock Dubai (Fraud Trial Judgment § 679). Mr Kelbrick ran the operational and trading part of the business on the ground in West Africa, while Mr Mounzer ran the financing and administrative part of the business.

112. In April 2013, Arcadia ceased trading with Attock Dubai. Attock Dubai quickly found new buyers for its cargoes of oil and was selling to BP by June 2013 and Exxon by September 2013. One year later, in April 2014, Vitol also expressed interest in buying Attock Dubai's cargoes of oil, although this opportunity was not taken up. Mr Kelbrick explained in his fourth witness statement:

> "I have been shown by King & Spalding an email from Paul Casey of Vitol in April 2014, in which Vitol wanted to buy

> Attock's oil for a premium of OSP + US$0.70/bbl. I do not remember this episode particularly clearly, but I suspect I did not take up Vitol on that offer because I did not want to jeopardise the relationship with BP that I had struck."

113. Generally Attock Dubai continued to trade in the same way that Attock Mauritius had done, buying and selling oil cargoes on its own account (Fraud Trial Judgment § 680).

(2) Attock Dubai term contracts from 2013-2015

114. Attock Dubai purchased its oil pursuant to three term contracts.

i) Attock Dubai had a contract with GEPetrol between 2013 and 2014.

ii) Azenith, one of Attock Dubai's contract holders, had a term contract with NNPC from 2013 to 2015.

iii) Crudex, another of Attock Dubai's contract holders, had a term contract with NNPC from 2013 to 2015.

115. Crudex and Azenith were two of Attock Mauritius' "contract holders". Each of Crudex and Azenith was party to a lifting agreement with Attock Mauritius which provided that Attock Mauritius would have free unencumbered title to the crude oil. When Attock Mauritius transferred its business to Attock Dubai, Crudex and Azenith entered into lifting agreements with Attock Dubai on equivalent terms. Attock Mauritius and Attock Dubai had credit lines with four principal banks (Crédit Agricole, Crédit Suisse, ING, and Société Générale) which enabled them to finance the liftings.

116. Mr Mounzer explained in his first witness statement:

> "12.2. AOIL [Attock Mauritius] also entered into supply contracts for crude oil directly, following successful tenders, with national oil producers in West Africa, or indirectly through other companies owned by Mr Kelbrick (and not, for the avoidance of doubt, by me, either legally or beneficially, and either directly or indirectly), namely Crudex Oil International Limited ("Crudex"), Azenith Energy Resources Limited ("Azenith"), and Arcadia Petroleum Limited (Mauritius) ("Arcadia Mauritius") (which Mr Kelbrick had bought from Mr Jean Pierre Decker in September 2009, who had himself bought it in 2004 with the knowledge of Mitsui Corporation, the former owner of Arcadia London), which companies had a supply contract directly with a national oil producer and with whom AOIL entered into a lifting arrangement to off take, finance and trade the crude oil. These were proprietary trades, in respect of which AOIL assumed all commercial financial and operational risks and either made a profit or loss on its own account. I have referred to these transactions in my Defence as "Category 2" trades.

> 12.3. Attack Dubai entered into supply contracts for crude oil directly with national oil producers in West Africa, or indirectly through Crudex and Azenith as described above (Arcadia Mauritius had been put into liquidation in 2011).
>
> …
>
> 15. The West African oil industry is a difficult market, and it is challenging to ensure continuous access to oil barrels from a national oil producer. For this reason, it is common practice to tender for supply contracts using multiple vehicles, to increase the chances that one of those tenders is successful."

117. Mr Kelbrick gave oral evidence at the Inquiry Trial to similar effect about the contract holder arrangements between Attock Dubai, Crudex, Azenith, and NNPC. He indicated that he believed Crudex was owned by him and Azenith by Mr Akpata. However, Attock Dubai had lifting agreements with both companies that gave it control of the oil.

118. In the light of all this evidence, I am satisfied that it is appropriate to regard Crudex's and Azenith's term contracts as in substance having been for the economic benefit of Attock Dubai.

(3) Nominations for oil liftings

119. Normally, a producer company such as NNPC would nominate the companies who would be entitled to lift oil (i.e. actually receive a cargo of oil), pursuant to their term contracts, around two months in advance, as Mr Kelbrick confirmed in his oral evidence. For example, a nomination made in March 2015 was for a lifting and sale in May 2015.

120. This system is relevant because, as discussed later, there were three nominations and deliveries to Attock Dubai after 12 February 2015, i.e. after the imposition of the Freezing Order. Those nominations happened in late February 2015 (for delivery in April 2015), March 2015 (for delivery in May 2015) and May 2015 (for delivery in June 2015, though delayed to July 2015).

(4) Regularity of Attock trades before the Freezing Order

121. Mr Kelbrick's written evidence was that *"prior to April 2015, Attock Dubai had maintained a steady rhythm of nominations, typically lifting on average around one cargo per month."* (Kelbrick 4, [63]).

122. Between September 2009 and April 2013, Attock Mauritius conducted 77 proprietary crude oil cargo transactions in a period of 43 months, with gross profits of $138,746,578 on sales, selling primarily to Arcadia.

123. Between June 2013 and January 2015, Attock Dubai bought 20 crude cargoes from NNPC and GEPetrol, and sold them to third parties, BP and Exxon. i.e., it lifted 20 cargoes in a period of roughly 19 months. On those 20 crude cargoes, it earned $27,372,814 in gross profits.

124. To summarise the trading history of Attock Mauritius:

i) Number of trades: 77 trades from September 2009 to June 2013.

ii) Supplier: 15 trades from GEPetrol; 62 from NNPC.

iii) Trades per year: 6 trades were conducted in 2009; 33 in 2010; 21 in 2011; 13 in 2012; and 4 in 2013.

iv) Volume: each trade was for a similar volume of oil of around 1,000,000 barrels.

125. To summarise the trading history of Attock Dubai:

i) Number of trades: 20 trades from June 2013 to January 2015.

ii) Supplier: 4 trades from GEPetrol; 16 from NNPC.

iii) Trades per year: 9 trades were conducted in 2013; 10 in 2014; 1 in 2015.

iv) Volume: each trade was for a similar volume of oil of around 1,000,000.

126. Aggregating Attock Mauritius and Attock Dubai's trades (both having lifted cargoes in 2013), and adding the three trades carried out after the Freezing Order, the number of trades year by year was:-

i) 6 cargoes in 2009

ii) 33 cargoes in 2010

iii) 21 cargoes in 2011

iv) 13 cargoes in 2012

v) 13 cargoes in 2013

vi) 10 cargoes in 2014

vii) 4 cargoes in 2015

127. Mr Stern's "Kelbrick Loss Model" detailed the Attock Dubai trades as follows, with the shaded cells below relating to the post-Freezing Order trades (four rows, because the second post-Freezing order trade was split into two cargoes):

B/L Date	Volume	NOC/Contract Holder	Attock Company / on-sale purchaser	Calculated Gross Profits
10/06/2013	949,944	NNPC/AZENITH	AOIDMCC/BP	$398,976
05/07/2013	949,482	NNPC/CRUDEX	AOIDMCC/BP	$4,160,630
03/08/2013	949,851	NNPC/CRUDEX	AOIDMCC/BP	$446,430
06/09/2013	1,001,307	GEPETROL/APSAL101	AOIDMCC/EXXON	$3,785,942
04/09/2013	1,000,162	GEPETROL	AOIDMCC/EXXON	$5,522,895
08/10/2013	950,478	NNPC/CRUDEX	AOIDMCC/BP	$446,725

22/11/2013	899,729	NNPC/AZENITH	AOIDMCC/BP	$359,892
08/12/2013	949,579	NNPC/CRUDEX	AOIDMCC/BP	$398,823
28/12/2013	1,036,661	GEPETROL	AOIDMCC/EXXON	$207,332
09/01/2014	949,985	NNPC/CRUDEX	AOIDMCC/BP	$398,994
10/02/2014	996,404	NNPC/CRUDEX	AOIDMCC/BP	$2,349,521
21/03/2014	899,927	NNPC/AZENITH	AOIDMCC/BP	$359,971
04/04/2014	949,610	NNPC/CRUDEX	AOIDMCC/BP	$1,639,976
26/06/2014	974,920	NNPC/CRUDEX	AOIDMCC/BP	$516,708
10/07/2014	899,827	NNPC/AZENITH	AOIDMCC/BP	$494,905
24/08/2014	950,010	NNPC/AZENITH	AOIDMCC/BP	$522,506
03/09/2014	999,825	GEPETROL	AOIDMCC/BP	$3,725,348
28/09/2014	907,360	NNPC/CRUDEX	AOIDMCC/BP	$499,048
05/12/2014	996,555	NNPC/CRUDEX	AOIDMCC/BP	$548,105
14/01/2015	1,000,151	NNPC/CRUDEX	AOIDMCC/BP	$590,089
14/04/2015	649,600	NNPC/AZENITH	AOIDMCC/BP	
02/05/2015	249,421	NNPC/AZENITH	AOIDMCC/BP	
27/05/2015	995,851	NNPC/AZENITH	AOIDMCC/BP	
18/07/2015	907,208	NNPC/CRUDEX	AOIDMCC/BP	

(5) NNPC trades 2013-2015 before the Freezing Order

128. Attock Dubai's trades with NNPC (via its contract holders) were spread out from June 2013 to January 2015 as follows: 6 trades were conducted in 2013; 9 in 2014; and none in 2015.

129. It was put to Mr Kelbrick that this was not monthly trading, and so his term contracts with Crudex and Azenith did not guarantee Attock Dubai monthly nominations from NNPC. Mr Kelbrick accepted this:

> "Q. Right, but one point I just wanted to clarify with you is obviously on the screen, on paper, this is an annual contract for a certain number of barrels per day, but as I understand your evidence, that didn't guarantee you that you would get a nomination every month.
>
> A. And nor did it -- nor did it -- I mean, there's a timeframe specified here of June to May '14 to '15. That didn't mean anything either.

…

> Q. […] [W]e can see that there are some months which are missing here, aren't there? So, for example, May 2014 is missing and October and November 2014 are missing, and then we have got -- looks like February and March 2015 are missing. Does that reflect the fact that whatever efforts were made by NNPC, sometimes you didn't get a nomination?
>
> A. It reflects -- it could reflect a number of things.
>
> Q. Yes.
>
> A. Yes? It could reflect production issues. It could reflect any number of things.
>
> Q. Yes. So in that sense, there was a degree of irregularity in the availability of crude from NNPC because it would depend on production. It would depend on other things.
>
> A. I wouldn't say so. We were lifting roughly a million barrels a month; right? Whether it's -- whether it's Nigeria or whether it's EG, we were lifting around a million barrels a month for a long period of time. And Attock, as we'd said in the previous trial, had a long and unblemished record of lifting crude oil out of Nigeria. So I wouldn't call it -- sorry, what was your word you used?
>
> Q. Well, I said "irregular".

130. Mr Kelbrick could not recall why there were no NNPC liftings in the missing months of 2014 and 2015:

> "[…] [D]o you know, for example, why -- do you recollect now why there were no deliveries in month 10 and month 11 in 2014?
>
> A. No. I just said it's a long time ago.
>
> Q. I understand. In 2015, it looks like there were no deliveries in month 2 and month 3 and, again, you can't recall why that was.
>
> A. No."

(6) GEPetrol 2013-2014 before the Freezing Order

131. Turning to GEPetrol, Attock Dubai had direct supply arrangements with GEPetrol in the years 2013 and 2014 which were not subject to annual tenders (unlike NNPC). GEPetrol's trades with Attock Dubai were spread out in the period before the Freezing Order as follows: 3 trades were conducted in 2013 and 1 trade was conducted in 2014.

132. It was put to Mr Kelbrick that the last nomination that he received from GEPetrol was in June 2014 (presumably meaning in fact to refer to September 2014), many months

before the Freezing Order, and so it looked like business with GEPetrol had simply *"dried up"*:

> "A. No, I wouldn't say it necessarily dried up. I was still lobbying hard and we had to get to get our foot in the door vis-à-vis the Zafiro, because I sensed an opportunity. And I think it's also worth -- that's why I asked earlier on about the P&L column. So if you could find me a P&L column, because what you'll find there, what you'll find there is that Zafiro and Ceiba, etc, tended to be high-value cargoes to us. So if we as essentially a two-man band -- well, here we, are, evidence: Zafiro blend, $3.785 million per cargo; Ceiba, 5.522. Right? As what is essentially two people with a 50/50 shareholding in Attock, to be earning these amounts of money, yeah, we didn't necessarily need them every month but we lobbied every month, yeah. And the Zafiro I think was a real opportunity. The fact that he gave it to us rather than Arcadia showed his trust in us. So we were building that relationship with Antonio from day 1. Why it didn't come through in Q4, that's why I asked you about the BL date for the other one, right? Because why it didn't come through in Q3, if it slipped into September or whatever, he could easily use that against me and say: come on, Steve, you've had your one for Q3 or Q4 or whatever, right? And we were only supposed to get one a quarter as it was, yeah? I think you'll find if you find our contracts somewhere in your documents there was only supposed to be one per quarter as it is. The Zafiro was a new departure, and that's why I asked for the P&L on that, because when you then go and look at our business in Equatorial Guinea it was substantial in P&L terms. And it goes back to the issue of volumes that you were raising from day 1. To us, this was substantial business and it was ongoing business.
>
> Q. Right. You say one a quarter; I mean, you only got one in the whole of 2014, didn't you?
>
> A. As I say, the record -- we got one in 2014, okay. Which one was that, please?
>
> …
>
> A. 3.725 million. That's quite a lot to a company like ours.
>
> Q. I'm simply making a point about frequency, Mr Kelbrick: that you only got one GEPetrol nomination in the whole of 2014.
>
> A. And I'm simply making a point that it doesn't necessarily have to be super-frequent for it to be of high value to us and our company. That's all."

133. The Claimants submit that nominations from GEPetrol were rare; and certainly regular nominations had ceased prior to the Injunction. The last nomination occurred in

September 2014, months before the Injunction in 2015. The submission made on behalf of Mr Kelbrick is that *"While it is fair to acknowledge that the cargoes from GEPetrol were less regular than those from NNPC, it is also crucial to recognise that GEPetrol cargoes were particularly profitable. For example, on the GEPetrol cargo on 3 September 2014, Attock made gross profits of $3.7m."*

(7) Summary on Attock Dubai activities before the Freezing Order

134. The Claimants' submission is that *"[h]istorically, lifting nominations were always sporadic, even to term contract holders such as Azenith and Crudex…".* By contrast, Mr Kelbrick submits that Attock's liftings were regular and largely consistent: *"prior to April 2015, Attock Dubai had maintained a steady rhythm of nominations, typically lifting on average around one cargo per month."*

135. I focus on the actual trading rather than the terms of the lifting agreements, the regularity specified in which Mr Kelbrick said *"didn't mean anything"*, in the sense that the NNPC liftings were not strictly monthly, nor were the GEPetrol liftings strictly quarterly.

136. I consider a fair assessment to be that Attock Dubai's trades with NNPC were regular. A handful of months were missed over the years, but that is not enough to undermine the consistency of the liftings. The GEPetrol liftings were not regular. There were three liftings in 2013, followed by a gap of nine months, and then one lifting in September 2014. However, they were generally particularly profitable, and their irregularity – which may have been connected with that fact – did not in itself suggest that they were unlikely to have continued had no Freezing Order been made. I therefore do not accept the Claimants' submission that Attock Dubai's trading history was patchy and therefore future business was not to be expected.

(G) FREEZING ORDER OBTAINED AND MAINTAINED

(1) The Freezing Order

137. On 12 February 2015, the Claimants obtained a without notice freezing and proprietary injunction from Teare J against Mr Bosworth, Mr Hurley, Mr Kelbrick and Attock Mauritius.

138. The Adams Affidavit, dated 11 February 2015, was the basis on which the Claimants obtained the Freezing Order. The Adams Affidavit, including the draft Particulars of Claim exhibited thereto, alleged that Mr Bosworth, Mr Hurley and Mr Kelbrick had diverted profits from the Arcadia Group by the use of 'fraudulent entities' (in particular, Arcadia Lebanon) and had concealed Arcadia Lebanon's activities from Farahead. The Adams Affidavit and the draft Particulars of Claim included:

i) an allegation that Mr Bosworth/Mr Hurley and Mr Kelbrick beneficially owned and controlled Arcadia Lebanon (Adams Affidavit §§ 11, 31, 40 and 67-70; draft Particulars of Claim §§ 15.5, 31.1, 31.3 and 40.4);

ii) an allegation that Mr Bosworth told Mr Fredriksen and Mr Trøim that he and Mr Hurley had established Arcadia Lebanon as a *"separately owned company"*

for one particularly lucrative contract (Adams Affidavit § 97; draft Particulars of Claim § 53);

iii) an allegation that Mr Bosworth and Mr Hurley represented to Farahead, by the latter part of 2008, that the contract for which Arcadia Lebanon had been established had come to an end and the company had become dormant (Adams Affidavit § 99; draft Particulars of Claim §§ 54.3 and 55);

iv) an allegation that Mr Bosworth/Mr Hurley represented to Mr Fredriksen and Mr Trøim in 2009 that the Arcadia Group's regular West African business had ceased (Adams Affidavit §§ 111-112, 115 and 148; draft Particulars of Claim §§ 61-63);

v) an allegation that Farahead was not aware at the time that GEPVTN had received payments from Arcadia Lebanon; and that this had come to light only from Arcadia Lebanon transfer instructions *"that have now been identified"* (Adams Affidavit § 210); and

vi) allegations that Mr Kelbrick "*closely collaborated with Mr Bosworth and Mr Hurley in the allegedly fraudulent activities originating in West Africa*" (Adams Affidavit § 56) and *"[t]he documents that have recently come to light appear to confirm that Mr Kelbrick was closely involved with Mr Bosworth and Mr Hurley in operating the alleged fraud"* (Adams Affidavit § 56).

139. In the Fraud Trial Judgment, I rejected each of those allegations, concluding that:

i) allegation (i) above (beneficial ownership) was not made out: Arcadia Lebanon was not beneficially or 'economically' owned by Mr Bosworth and Mr Hurley; they were the legal shareholders, but held it to Farahead's order and operated Arcadia Lebanon in substance as an Arcadia Group company (Fraud Trial Judgment § 929);

ii) allegation (ii) above (Arcadia Lebanon established for one particular contract representation) was unfounded: in fact, it was agreed that Arcadia Lebanon would be used as a contract holder in order to mitigate compliance risks of West African oil trading; that the Sao Tome and Zafiro Contracts should be migrated to it; and that later similar contracts should be treated in the same way (Fraud Trial Judgment §§ 308-310);

iii) allegation (iii) above (dormant by late 2008 representation) was "entirely unsupported by the evidence", "should have been withdrawn", "had no coherent basis whatsoever" and "should never have been pursued" (Fraud Trial Judgment §§ 475 and 925);

iv) allegation (iv) above (regular West African trading ceased by 2009 representation) was "entirely unsustainable" and "wholly unsatisfactory and inconsistent with the documentary evidence" (Fraud Trial Judgment §§ 528 and 534);

v) allegation (v) above (GEPVTN) was untrue and the evidence of Mr Hannas in support of it was untrue (Fraud Trial Judgment §§ 60-61); and

vi) allegation (vi) above (Mr Kelbrick collaboration in fraud) also failed: I was fully satisfied that Mr Kelbrick acted honestly in relation to the transactions he was involved in (Fraud Trial Judgment §§ 1007-1014),

I reserved for future consideration any further factual findings as to *"[t]he respects in which his [Mr Adams'] affidavit has turned out to be incorrect"* (Fraud Trial Judgment § 41).

140. On 13 February 2015, the Claimants issued the claim form.

141. On 5 March 2015, Mr Bosworth/Mr Hurley were formally served with the Freezing Order. I assume that the Freezing Order was also served on Mr Kelbrick on or around that date.

142. On 1 July 2015, the Freezing Order was continued by the Court by order of Flaux J.

143. Following an application dated 11 August 2015, the Claimants were granted permission by Males J on 15 December 2015 to seek to enforce the Freezing Order in Switzerland and Lebanon.

144. The Claimants notified the following banks and financial institutions of the Freezing Order against Mr Bosworth/Mr Hurley:

i) Pictet Bank and Trust;

ii) Pictet Asset Management Ltd;

iii) DBS;

iv) UBS;

v) Bankmed;

vi) Coutts;

vii) Natwest;

viii) Bank Audi;

ix) EFG;

x) Julius Baer;

xi) SG Private Banking; and

xii) St James's Place.

145. In addition to Mr Bosworth/Mr Hurley's banks which the Claimants notified directly, the Claimants notified Mr Kelbrick's and Attock Mauritius's banks that they had obtained the Freezing Order. The relevant banks were (in addition to those set out above): Audi Saradar Private Bank; Crédit Agricole; ING; Credit Suisse; Mashreqbank; Emirates National Bank of Dubai; BCV; Société Générale; Near East Commercial Bank; and Old Mutual.

(2) Mr Bosworth and Mr Hurley's attempt to set aside the Freezing Order

146. On 10 December 2015, Mr Bosworth and Mr Hurley issued an application to set aside the Freezing Order for material non-disclosure (***the "Set-Aside Application***"). The Claimants resisted the application, relying on the evidence to which I refer in section (G)(3) below.

147. On 16 September 2016, Mr Bosworth/Mr Hurley withdrew the Set-Aside Application. Mr Bosworth explains in his eleventh witness statement:

> "131. I was unable to have the Freezing Order set aside. Colin and I tried to do so in December 2015, by an application to the Court. I thought if we got the Freezing Order off our backs, we could have our own company, use our own assets, and make a living. However and in response to our application, John, Tor and Dimitrios gave false and dishonest evidence in support of the Freezing Order. I was unable to disprove that evidence without disclosure or cross-examination of John, Tor, and Dimitrios. I would also have struggled to bear a costs award against me, had the application gone to a hearing and failed. Colin and I therefore withdrew our application. After that, it seemed pretty clear to me that the Claimants would resist any further application to discharge or vary the Freezing Order. And because of the Freezing Order, my financial situation only became more precarious over time. So I could not afford the risk of bringing (and losing) a further application. That was the situation as it stood until the Claimants gave disclosure. Then, once the Claimants had given disclosure, my whole focus was on fighting to prove my innocence at trial (which would and did have the effect of lifting the Freezing Order)."

148. Likewise Mr Hurley says in his seventh witness statement:

> "17. During the early part of the period that the Mareva was in place, we did make an application to try to set it aside. We were not in a position to pursue the application once the Claimants filed their evidence, which was false and which I believe was also dishonest. After that, it was very difficult for us. We had to consider whether we had enough new information to get the Mareva removed when we knew the Claimants were willing to protect it dishonestly. We also had to think about the cost. The Freezing Order meant that we were under extreme financial pressure, and meant that we were clinging on to what little we had left. We could not afford to apply again to set aside the Freezing Order if there was a risk that we would be ordered to pay the Claimants' costs. We would have collapsed if we had been ordered to pay their costs. That was a real concern, and made it very difficult for us to try again to get the Mareva set aside."

149. It was suggested at various points in the Claimants' written and oral submissions that the Defendants could have made requests to the Court for variations of the Freezing Order. Whether or not that would have been feasible would naturally depend on the nature of the injunction and the nature of the proposed variation. The Claimants cited *Organic Grape Spirit v Nueva IQT SL* [2020] EWCA Civ 999, [2020] 2 CLC 176 as an example that "*where someone is looking to make a bona fide investment in a new venture, the court can be expected to give permission.*" However, *Organic Grape* was a case in which it was "*common ground that under Spanish law the claim is not proprietary in nature*" [7]. *Organic Grape* is also relevant to the ordinary course of business exception. Newey LJ stated:

> "29. … OGSL [the relevant company] could be described as having 'commenced Business' and it has spent substantial sums on acquiring equipment for its venture. As yet, however, it has not progressed as far as either sales or manufacture and it is some way off even having everything that it would need to start production. Perhaps it could be said that it is possible to discern a pattern of past expenditure but, given that 'ordinary and proper course of business' has a 'narrower rather than a wide meaning', …. The better view, I think, is that a defendant in OGSL's position, which has not established a pattern of trading, cannot simply rely on the 'ordinary and proper business' exception to a freezing order but must specifically ask the court to authorise pursuit of its fledgling business. That conclusion seems to me to make sense. The protection afforded by a freezing order could be significantly eroded if the defendant could claim that transactions fell within the 'ordinary and proper business' exception when there was no benchmark against which the activities could be assessed.

150. This topic was the subject of the following exchanges with counsel for the Claimants during closing submissions:

> "MR QUEST: … So what did the order actually prevent? So I accept, of course, that the -- what was its coercive or restraining effect? I accept, of course, that it would prevent the defendants from contributing their own assets as capital to the company and I accept that if they wanted to do that, then they would need a variation or relaxation of the order in order to achieve that. But we do say that it could and should have been done and there was a reasonable chance of the court granting it. And Mr Bosworth's evidence -- I'll just give you the reference; you needn't turn it up, at Day 3, page 43 -- is that if it got to a position where he had to put his own money into the company in order to establish it, then he would have asked the court for a variation. And then the ultimate question would be -- and, of course, it was said, well, the claimants wouldn't have agreed to that, but the ultimate question is what the court would have allowed.
>
> MR JUSTICE HENSHAW: Why do you say the court would have allowed it?

> MR QUEST: Well, I can't say it would have allowed it. I can say it might have allowed it, and that would depend, of course, on how much capital was being sought to invest.
>
> MR JUSTICE HENSHAW: Supposing it was 25 million.
>
> MR QUEST: If it was 25 million, then almost certainly not, but that's because 25 million was probably not a realistic thing for Mr Bosworth to do. But what I am saying is if it's not an absolute -- and obviously this then looks to see -- one gets to the alternative case later as to how much credibly would have been put in, but if, for example, there's a situation where there's a co-investment with a strategic investor, it is at least feasible that the court would have allowed an investment, as it did in the Organic Grape case, to start a reasonable new business. And I do accept that the position would be also affected by the fact that it's a proprietary injunction."

151. In my view there is no realistic chance that the court would have varied the Freezing Order, especially (though not only) given its proprietary nature and the fraud allegations on which it was based, to allow Mr Bosworth and Mr Hurley to spend the amount of money required – probably of the order of US$25 million – to start a new oil trading business, whose prospects would inevitably be to a degree speculative and over which the Claimants/the court could realistically not expect to have any effective control (c.f. the reference by Males J at first instance in *Fiona Trust* to the court's refusal to allow money claimed by the claimants there to be spent by the defendants on "*risky ventures*" [43]). Further, it was reasonable in my view for them to discontinue the application they made, given the evidence served on behalf of the Claimants and the financial implications of pursuing the application. Equally, there is no chance that the Claimants would have consented to such a variation. Similar considerations apply to any suggestion that Mr Kelbrick should have sought a variation of the Freezing Order in order to allow him to continue to run Attock Dubai's business.

(3) Claimants' evidence in response to the Set-aside Application

152. In their response to the Set-aside Application, the Claimants relied on the First Witness Statement of Mr Fredriksen (**"*Fredriksen 1*"**), the First Witness Statement of Mr Trøim (**"*Trøim 1*"**), the First Witness Statement of Mr Hannas (**"*Hannas 1*"**), and the Eighth Witness Statement of Mr Croall (**"*Croall 8*"**), each dated 15 July 2016. At this stage, I refer only to some of the cross-examination of Mr Trøim at the Inquiry Trial.

153. Fredriksen 1 had included this evidence relating to what he and Mr Trøim were told about Arcadia Lebanon:

> "9. In his statement Mr Bosworth states that he never told me or Mr Trøim that Arcadia Lebanon had ceased trading and was dormant (Greeno 2, paragraph 42; Bosworth 3, paragraph 8), [EPGWS_02/16] [PMBWS_03/3] that we were "well aware of the continued existence and purpose of Arcadia Lebanon beyond 2008" (Bosworth 3, paragraph 74) [PMBWS_03/21] and that Farahead was "fully aware that Arcadia Lebanon was

> trading in West African crude oils long after late 2008 and until late 2011" (Greeno 2, paragraph 33). [EPGWS_02/14] This is also untrue.
>
> 10. I repeat that Mr Bosworth told us that Arcadia Lebanon had been established for a particular opportunity involving a very limited number of specific trades over a very short time span of activity, as explained above. Based on this explanation, it was my understanding that Arcadia Lebanon would not be and was not involved in any ongoing activity after those trades were completed. I understood from what I was told by Mr Bosworth that the company was no longer active and was to be closed down. Given the passage of time, it is difficult now to remember precisely on what occasions which discussions took place. I am, however, clear that this is what I was lead to believe by Mr Bosworth (in particular) and Mr Hurley. I am also clear that neither Mr Bosworth nor Mr Hurley ever told me that Arcadia Lebanon had been involved in any further trading activity in West Africa or elsewhere (beyond the specific trades for which I was told it had been established) and I did not know about its ongoing involvement in West African oil trading until it was discovered during the investigations leading to these proceedings."

154. Trøim 1 had included the following evidence:

> "9. Mr Bosworth also alleges that he never told me or Mr Fredriksen that Arcadia Lebanon had ceased trading and was dormant (Greeno 2, paragraph 42; [EPGWS_02/16] Bosworth 3, paragraph 8), [PMBWS_03/3] that we were "well aware of the continued existence and purpose of Arcadia Lebanon beyond 2008" (Bosworth 3, paragraph 74) [PMBWS_03/21] and that Farahead was "fully aware that Arcadia Lebanon was trading in West African crude oils long after late 2008 and until late 2011" (Greeno 2, paragraph 33). [EPGWS_02/14] This is also not true.
>
> 10. As I have explained above, it was my clear understanding based on what was told to me by Mr Bosworth that Arcadia Lebanon had been used by Mr Bosworth and Mr Hurley for only a very limited number of specific trades over a very short time span of activity. It was also my clear understanding that Arcadia Lebanon was not to be involved in any further trades and that it was dormant and was in the process of being closed down. I was not told by Mr Bosworth or Mr Hurley, and I was not aware, that Arcadia Lebanon had been involved in any further trading activity in West Africa or elsewhere, other than this limited number of specific trades, until it was discovered during the course of the investigations leading to these proceedings."

155. In the Inquiry Trial, it was put to Mr Trøim that the above statements cannot have been true because he and Mr Fredriksen received daily reports that West African trading was

regular and ongoing (as discussed in the Fraud Trial Judgment at §§ 529-530). Mr Trøim acknowledged that he received the daily reports but said that they showed that the West African P&L was *"totally immaterial"* and *"we didn't consider that as a big risk for the company because the activity had been reduced. We considered it almost as a dormant company"*. His evidence at the Inquiry Trial included these passages:

i) on the ownership of Arcadia Lebanon:

> "… from the moment Pete and Colin established this company, which they are -- established in their own name, it was all the idea that 70% of that profit should go back to Farahead. That's never been disputed. That's been in all my documents." (Day 9/90)
>
> "Q. You deliberately made no mention of the Arcadia Lebanon dividend payment to Farahead in your witness statements; correct?
>
> A.… else than what I remember from those time. I think there has to be a certain understanding of the fact that it's not that easy to remember things which were 10 or 15 or 20 years ago. But I have only given the evidence, as I said, and the evidence is 70% of the economical interest of Arcadia Lebanon was owned by -- was effectively not owned, but belonged to Farahead and hoped to get the money out. That's a very -- technicality and that's it.
>
> Q. You knew that if you referred in your witness statement to the Arcadia Lebanon dividend to Farahead, it would be obvious that Farahead owned and controlled Arcadia Lebanon, didn't you?
>
> A. I feel we're going around in a circle. I said it ten times. You can't own a company where you're not the shareholders. We were never the shareholder of that company.
>
> Q. You knew that if you referred in your witness statement to the Arcadia Lebanon dividend to Farahead, it would be obvious that Mr Bosworth and Mr Hurley did not beneficially own and control Arcadia Lebanon.
>
> A. I think it's actually -- in many ways, it's wrong to call it a dividend because it's not a dividend because if you're not a shareholder, you're not entitled to a dividend. It's a compensation for 70% of the economical interest. Like Arcadia -- as I said, in Arcadia, they had -- 30% of economic results goes to (inaudible). They get that money not because they're shareholders; because they're entitled to it. It's the same thing here. It's nothing different.
>
> Q. Can we go, please, to paragraph 97 of the Adams affidavit at (J1/1/41).

A. But a dividend is something you receive as shareholder. You don't receive a dividend if you're not a shareholder. I've never seen a company where -- where you receive a dividend without being shareholders." (Day 9/91-93)

"Q. You knew that Arcadia Lebanon was not separately owned, was it?

A. It was separately owned in the shareholder register. I think when it comes to 70%, how many times do I need to repeat the same facts that I repeated 100 times today almost or at least ten times that the shares were owned by Bosworth and Hurley? We had a 70% economical upside in whatever results which came out from there. Hurley and Bosworth had 30% of it. They were the shareholders. That's fact. I don't think we have to discuss it further. That's never been disputed by anybody.

Q. Farahead beneficially owned and controlled Arcadia Lebanon, didn't it?

A. No." (Day 9/95-96)

ii) on the alleged representation about Arcadia Lebanon being established for one lucrative contract:

"Q. Over the course of nine years, in each successive witness statement and in your oral evidence, you give different accounts about what Mr Bosworth said to you. That's right, isn't it?

A. No.

Q. You give different accounts because Mr Bosworth never said to you that he and Mr Hurley had established Arcadia Lebanon as a separately owned company for a particularly lucrative contract. That's right, isn't it?

A. No, that's wrong. That's kind of -- effectively, the reason when I got the kind of call about this thing, that was the way it was described to me.

…

Q. When you say "described to me", what do you mean?

A. I started to ask, "Why are we setting up this company?" And then they said, "We had a particularly lucrative contract" and then that was -- and it could be a compliance issue as well as the benefit of not having the rest of the employees in part of that bonus pool. I said, "That's fine as long as the economic incentive for Arcadia is kind of -- or the Farahead Group is the same, the 70%", and then they keep 30% for themselves.

…

Q. Mr Trøim, I'm going to ask you once more to listen to the question. When you gave information to Mr Adams in 2014, you knew that Mr Bosworth and Mr Hurley had not set up Arcadia Lebanon for their own benefit, but had set up Arcadia Lebanon for Farahead to profit from West African trading, didn't you?

A. No, I think it's wrong because it was the profit both for Mr Hurley and Bosworth and also for Farahead. And it was kind of partly linked to the kind of employee people and that we got more out of it that way and partly linked to the compliance issue, which probably was, in retrospect, a bigger issue because there was less compliance issues in Beirut than there was anywhere else." (Day 9/101-103)

"Q. You knew that there was not one particularly lucrative contract, didn't you?

A. I think that's the way it came across the first time they approached me and that the company already was set up. They didn't -- it certainly was not Mr Fredriksen and my idea to set up a company in Beirut. They had the idea and they were the one who established it and they informed us afterwards. I think there was some discussion about when we were informed and things like that, but certainly this didn't come on our initiative. I think when it was set up, we were only focused about one thing and that's we had the 70% economic compensation of it. We don't bother if they owned the shares or who own the shares. The important thing; that there was an understanding that 70% of the economical benefit belonged to Farahead." (Day 9/99)

iii) on the alleged representation in late 2008 about Arcadia Lebanon having ceased trading and become dormant:

"Q. In your trial statement, you made no reference to the allegation that Mr Bosworth had told Farahead in late 2008 that Arcadia Lebanon had ceased trading and was now dormant, did you?

A. That might be correct. I think there is one thing which kind of -- I want to kind of -- the different -- your Honour, that's -- there is a difference between is a difference between a dormant activity in the trading industry and a liquidated company. A dormant activity is what I would consider a company with no specific (inaudible), but it's not liquidated. There is still funds in there, there's still audit and there is some minimum activity. That's also the same situation for the West African thing, which we're going to be -- we also have had this discussion about; what's a dormant company? A dormant company for me is a

company which had very kind of small little position changes where you might do trades through them, but they're not kind of effectively dissolved or liquidated. I think that's -- in retrospect, I wish my kind of explanation was more clear about this, but -- because if a company is liquidated, then the company doesn't exist, and it's clearly that both West African trading, which was part of the book every day, which was reported, and also Arcadia Lebanon, which was called Arcadia Middle East or whatever it was called, both existed prior -- after that date, and I think that's the thing."

The only shock I really got was when Tom Francisco started to look into Arcadia Lebanon and he found out that there was massive amounts of trade which had taken place there which -- we weren't aware of the size of activity. But it hadn't influenced the P&L, so you never saw it in the way we reported, but on the revenue side, there was massive amounts of trading going on.

…

Q. You knew that Arcadia Lebanon was still in business in late 2008, didn't you?

A. Yes, but I considered it dormant business. I think that's -- that's kind of -- maybe it's kind of weak way of -- the way I have described it, but we have several dormant companies which are not kind of the business, but then there is no kind of major activity in them." (Day 9/106-108)

"Q. The allegation that Mr Bosworth had told you and Mr Fredriksen that Arcadia Lebanon had ceased trading and was dormant, that allegation was not true.

A. I think it was dormant, was what he effectively told us, but kind of ceased trading -- I can see that kind of in retrospect, it was kind of wrong way to describe it, because we knew that the company was still existing and it was there. The size of the -- the reason why it was set up so specifically; trade was executed and that was not the reason any longer, and I think the rest of what was coming inside there we didn't have any kind of good feeling for. But I can clearly see that this could have been presented by me in a different way when it was presented in the affidavit.

Q. You knew that the allegation that Mr Bosworth had told you and Mr Fredriksen, that Arcadia Lebanon had ceased trading and was dormant, was untrue. You knew that allegation was untrue, didn't you?

A. No, I didn't know it was untrue, because he said effectively that contract was over and that was the reason why it was set up. So from that point of view, we didn't know that he was kind of

carrying through a lot of trades with a very well connected party, which didn't influence the P&L in any kind of material positive way." (Day 9/109-110)

iv) on the alleged representation in 2009 about the Arcadia Group having ceased its regular trading activities in West Africa:

"Q. Could we go, please, to the particulars of claim at paragraph 60, (C1/1.1/48), and at paragraph 61, there is an allegation Mr Bosworth told Farahead that the Arcadia Group had ceased its regular trading activities in West Africa; yes?

A. Yes. … But I think it comes with that that the regular trading activities in West Africa when we took over the company was to kind of trade millions of barrels of oil of the West Africa every day, so kind of it was a pretty material business. So that business had been quitted because they hadn't really made any money out of it." (Day 12/112)

"I think there's one extremely important thing there; the "regular trading activity in West Africa". It didn't trade -- it didn't stop the trading activity in West Africa, but it's that the regular trading activity, which was pretty massive when we started that company." (Day 9/115)

"I think -- what I can say about this is what I have said all the time, and that's we got a report every day, which -- West Africa was on the P&L. It was a very, very, very small kind of fluctuation in the P&L and we didn't consider that as a big risk for the company because the activity had been reduced. We considered it almost as a dormant company. Dormant company is a company where you kind of (inaudible) with couple of hundred thousand dollars here and there, but there's not kind of tens of millions, which was the historic story of that thing before. So I think that's -- and if that's not clear from my witness statement, I take the blame for that, but that doesn't mean that I in any way have tried kind of to misrepresent what happened there. We were told a very clear story from Pete Bosworth on both those two matters that there was no kind of major activity in any of them and we considered them dormant, but we still had a kind of P&L which was coming in both from the kind of things." (Day 9/115-116)

"Q. So, Mr Trøim, you understood that Arcadia Lebanon was carrying on the West African oil trading activities of the Arcadia Group, didn't you?

A. No. The first time I ever got to know about that was when Tom Francisco effectively presented a big story afterwards, kind

of whatever happened, particularly with one client which was the counterpart to most of these transactions.

Q. You did understand Arcadia Lebanon was carrying on the West African oil trading activities of Arcadia, didn't you?

A. I don't want to confirm this kind of -- I said it -- we were informed that that was a dormant company and, of course, when it comes to the kind of results from that company, it was extremely small, so there wasn't any reason to believe that there was a lot of activity going on inside it." (Day 9/117)

Q. The allegation that Mr Bosworth told you, that Arcadia had ceased its regular trading activities in West Africa, was untrue, wasn't it?

A. No. I confirm that I said the regular trading activity which was in the company when we took over was a massive amount of activity in Nigeria. That was not the case at that time.

Q. You knew that that allegation was untrue, didn't you?

A. No, not in any way. I still stand for the same thing I said at that time.

Q. You received a profit and loss report every day –

A. Yes.

Q. -- that showed regular ongoing West African trading, didn't you?

A. Yes, but you can also look at that report and you see that it was totally immaterial compared to the group, the scale of the group."

"Q. Could we go, please, to Day 6 of your evidence in 2024.

A. It's pretty obvious that when you get a sheet every day which says that the West African trading -- and then that book is kind of more or less (inaudible) anything that there is still activity in the company, but it was minimum and it wasn't any focus for us because there was -- it never kind of hit the P&L when it made a number. That's what we were focused about.

…

Q. And your evidence was (Day6/174:20):

"... it's too stupid because we got a report every day ..." Do you remember that evidence?

A. Yes.

Q. The allegation that Mr Bosworth had told you that West African trading had -- regular West African trading had ceased was too stupid, your words; yes?

A. Yes, but listen to what I'm saying. It's the size and the regular West African business.

…But the interesting thing with that size, it was a massive amount of trading, but it didn't influence the P&L because somebody else made the money.

Q. If we go to page 171 (Day6/171:1), I took you to the daily report and can you see you agreed that there was a daily change in West Africa?

A. Mm-hmm.

Q. You agree with that; yes?

A. Yes.

Q. And it was ongoing on a daily basis; yes?

A. Uh-huh, but it was extremely small numbers compared to what we're talking about here in oil trading business.

…

Q. So you did look at the daily profit and loss reports in 2016, didn't you?

A. When I write that, it's pretty clear for me, and I hope it's clear for the people who read my affidavit, that I still was of the clear impression that there was activity in West African trading going on, but that it was a very limited and almost a dormant company. That's the way I've tried to describe and if I used the wrong word, kind of partly blame my English, but kind of that's -- that's the -- for me, a trading company is understanding the risk. If you think we have very, very limited exposure, it's not a reason to spend a lot of time on it."

…

Q. The reports showed that there was regular ongoing trading in West African crude; yes?

A. That I also gave evidence for in court.

> Q. You saw the regular ongoing West African trading from the reports in 2016, didn't you?
>
> A. I confirmed that to the court.
>
> …
>
> Q. So you knew at all times that Arcadia's West African oil trading was regular and ongoing.
>
> A. Yes -- it was not regular and I think for – we considered as a dormant business and I said if you look at the P&L, when you look at the swings we had, when the company made kind of altogether billion of dollars or whatever it is altogether, this was a very insignificant thing and we consider it as a dormant company. That's the way I consider dormant companies. I have several dormant companies in my firm. They still go on activities, It's not liquidated. It's a difference." (Day 9/120-130)

(4) Mr Lance's disclosure

156. In parallel to dealing with the Set-Aside Application, the Claimants were in settlement negotiations with Mr Lance. He was the Arcadia Group's corporate secretary from about March 2006 to March 2016, and was a director of Arcadia London between 16 March 2006 and 13 March 2015. The Claimants alleged that he was a conspirator, but settled with him in April 2016 on terms which required him to co-operate with and assist the Claimants in the litigation.

157. On 12 April 2016, Mr Lance provided a list of documents in his possession to Mr Adams. The list included a "*Correspondence File*" in respect of Arcadia Lebanon, but Mr Adams does not appear to have responded to Mr Lance or to have collected the files at the time. The list also referred to a *"Farahead meeting 15 October 2008"* and *"[p]apers relating to 15 October meeting"*.

158. On 10 August 2016, Mr Lance had lunch with Mr Adams. The following day, on 11 August 2016, Mr Lance sent four documents to Mr Adams *"[a]s discussed"*. The first document was the minutes of the Farahead/Arcadia quarterly meeting on 15 October 2008, which referred to *"[c]ash distribution to Farahead"* of *"USD 15 million (other sources)"*. Mr Lance specifically drew Mr Adams' attention to his handwritten notes of the same meeting, which showed that the US$ 15 million *"come from Lebanon"*. A version of the 15 October 2008 minutes, which the Claimants disclosed on 25 April 2024, shows a manuscript addition to the document that Mr Lance sent to Mr Adams that records: *"ML says 15m refers to paymt fro[m] Lebanon"*.

159. On 14 May 2026, the Claimants revealed in a letter sent from Reed Smith LLP on their behalf that Mr Adams had forwarded his email of 11 August 2016 and the four attachments to Freshfields on 15 August 2016.

(H) BOSWORTH/HURLEY OIL TRADING BUSINESS: "ARCADIA 2"

(1) Genesis of oil trading business idea

160. Around the time that Mr Bosworth left Arcadia in March 2013, Mr Bosworth and Mr Hurley started thinking about starting their own oil trading business, a proposed venture referred to in the Inquiry Trial as "***Arcadia 2***". As Mr Hurley describes in his seventh witness statement:

> "20. The idea that Pete and I had after leaving Arcadia was that we would set up a company. It was not going to be identical to Arcadia, but it was going to be a lookalike in terms of being able to trade products and crude oil, and other associated services. Pete and I would be involved as principals, but we were looking for an investor to kickstart it, so that we would not be starting from scratch. So it was almost identical to what we had handed on a plate to Farahead when they purchased Arcadia."

161. Mr Bosworth says that shortly after he left Arcadia in 2013, he was called by senior contacts in the industry who knew of his reputation and tried to involve him in their oil trading ventures (for example Jacques Hachuel of H Oil and Mike Adenuga, a prominent Nigerian businessman). At the time, Mr Bosworth did not have time to explore these opportunities because he was still sorting out historical issues with Arcadia related to the Atlantic, Capital, and Equinox transactions (Bosworth 11, [17]-[18]).

162. On 21 October 2013, Mr Tarek El-Gowhari of Crédit Agricole (Suisse), Global Commodity Finance emailed Mr Hurley to ask whether Mr Bosworth/Mr Hurley were *""shopping" for a strategic investor who could replicate, more or less, what you have been doing for the past 20 years"*. As Mr Bosworth said in his oral evidence, *"It was an unsolicited approach to us via a contact of Mr Hurley's."* (Day 2/4:5-6)

163. The potential investor proposed by Mr El-Gowhari was a client of Crédit Agricole called Tri-Ocean. As a result of this introduction, Mr Bosworth and Mr Hurley met with Mr Tamer Akkad of Tri-Ocean around the first week of November 2013.

164. On 9 November 2013, Mr Hurley told Mr Akkad in an email that most of Mr Bosworth/Mr Hurley's time and attention in the near future would be occupied with assisting Farahead, but that he would nonetheless put together a written business plan in the near future:

> "As mentioned during the meeting we do have one or two items that we will assist Arcadia with as they exit certain physical businesses […] We shall however use this time to produce the written business plan which we shall be pleased to present to you for consideration in the new year. We do believe that this will prove to be of interest to Tri-Ocean and look forward to discussing further in the near future."

165. Mr Bosworth says in his eleventh witness statement:

> "21. Towards the end of 2014, Colin and I therefore began talking about what we wanted to do next in business. I had my list of things which I wanted to do, and he had his list of things that he wanted to do. They converged in many areas, both inside oil trading, and outside.
>
> 22. As to oil trading, and in the absence of the option to buy Arcadia or parts of it, we agreed that we would look to set up our own oil trading business… with a similar profile and operations to Arcadia."

I accept that evidence.

166. It was put to Mr Hurley that his intention after leaving Arcadia was to retire, and he was taken to a WhatsApp message dated 10 October 2013 where he said to his old school friend Pat Turner, *"Have resigned from company I worked for and probably retiring."* Mr Hurley described this as a *"throwaway line to someone that I have a beer with. Nothing to do with our industry at all"* and *"99:24 A. This is nobody that even knows what our business is about. It's a very light-hearted remark after leaving employment from Arcadia not of my own accord, I might add. So I also didn't tell him I was fired."* I accept that evidence: Mr Hurley's subsequent involvement in the business plan indicates that, at least by early 2014, he did not really intend to retire.

(2) The 2014 business plan

167. In 2014, Mr Bosworth and Mr Hurley put together the 2014 business plan, dated 5 March 2014. This version was intended for Tri-Ocean, although it would later be amended in 2015 to target a more general investor pool. Variations of this idea were then presented to Mitsui, Mocoh, the Sahara Group, Sberbank, Lekoil, Bonroy and ETG Commodities between 2015-2021, as is elaborated in the chronological summary below.

168. The 2014 business plan in summary said:

i) Under "1.0 Executive Summary":

> "[t]he purpose of this business plan is to secure additional financial support to establish and develop a hydrocarbons trading entity between the proposers, (Peter Bosworth and Colin Hurley) to be instated as the executive management of the company and an investing partner."

ii) Under "1.1 Trading Activity":

> "[t]he primary revenue source for the business will come from the direct trading of crude oil and refined oil products. The company will in addition seek energy related assets offering a return on a stand-alone basis or as assets to supplement and add value to the company's core trading activity."

iii) Under "1.2 Financing":

> "At this time a strategic partner is sought in order to extend and develop banking and trade relationships and enable accelerated business development. The partner will be expected to provide a financing package of US$ 150,000,000 by way of equity and subordinated loans or in part by guarantee acceptable to financing bank group. The financing package is primarily required to secure bank finance facilities and provide working capital."

iv) Under "1.3 Mission Statement": *"The management intend to develop the trading entity into a mid-size trading company specialising in the trading of crude oil and refined oil products and management and operation of energy related assets."* (my emphasis)

v) Under "1.5 Turnover Forecast (3 years)", the plan projected turnover of USD 2.5 billion in Year 1, USD 5 billion in Year 2, and USD 7 billion in Year 3. The plan noted: *"(Turnover estimates are based upon underlying physical crude price of us$110m). The turnover refers solely to trading activity; no contribution from assets is included."*

vi) Under "1.6 Expansion Plan": *"[t]he management will introduce an expansion plan after the successful completion of the financing for the company. A number of expansion prospects have been identified that can be pursued once the trading operations commence."*

vii) Under "2.1 Corporate Structure": *"A Cyprus registered holding company initially with a Dubai, DMCC registered trading entity. The proposers have identified a small capital target DMCC company that would be available for strategic investment. The company has an existing office, core staff and initial supply contracts that would enable an immediate start up."*

viii) Under "2.2 Funding Requirements":

> "Financial support in the form of equity, subordinated loans or acceptable guarantees of US$ 150,000,000 is anticipated. It is expected that the funds can be injected in a combination of cash, financial assets (e.g. equity portfolio) or guarantees. A minimum of $100,000,000 will be held solely for the purpose of guaranteeing financing banks to provide trade finance facilities to the company. It is expected that the funds or guarantees will be capable of leverage on a basis of 10:1 to enable facilities of US $1 billion to be made available to the company. The prime purpose of the facilities is for letter of credit issuance for the purchase of physical cargoes on a secured and self liquidating transactional basis. An element of the facilities will be required to support initial margin calls for exchange traded activity for hedge instruments and strategic paper trading activity related to physical markets."

ix) Under "2.3 Equity Interest": *"It is envisaged that the company would be owned by Tri-Ocean (or nominee) and the Management of the company in a ratio to be determined."*

x) Under "2.4 Exit Strategy": *"Upon successful development the management identify three potential exit strategies that could yield a significant return for the equity holders: a) Sale of the company in its entirety to a third party b) Market listing c) Capital raising with dilution of existing equity interest."*

xi) Under "3.0 Trading Activity":

> "As stated in the Executive Summary the primary revenue source for the business will come from the direct trading of crude oil and refined oil products. The company intends to actively trade physical contracts, futures, swaps and options related to crude oil and oil products […] As stated in the Executive Summary the primary revenue source for the business will come from the direct trading of crude oil and refined oil products. The company intends to actively trade physical contracts, futures, swaps and options related to crude oil and oil products.
>
> …
>
> If the proposal of a strategic investment in the existing company is taken up this ensures that the new company will be able to benefit from the company's trading record and importantly provide historic accounts key for registration purposes with a large number of trading counterparties.
>
> The management of the company have brokerage and banking relationships that will enable exchange trading accounts to be established promptly.
>
> The strategic investment approach will enable the new company to maintain and develop existing longstanding relationships with an extensive group of market participants ranging from small independent trading entities to oil majors and state-owned oil companies. The acquisition further enables the company to commence with existing crude oil contracts for the purchase of 60-120 mbpd and products volume of 30-120 mt/mth.
>
> The company will seek to increase supply volumes by development of relationships in targeted locations for crude oil and refined oil products. This will initially focus on West Africa, East Africa, Middle East and Asia. The company will benefit from marketing experience to develop the sales distribution to cover all regions of major demand. It is envisaged that an enhanced profile and consequent opportunities can be achievable by jointly developing relationships with the right partner.

…"

xii) Under "6.2 Industry Analysis":

> "The trading community is dividing into the large traders with massive infrastructure bases (Vitol, Glencore and Trafigura), mid level trading companies (Gunvor and Mercuria) and smaller niche trading companies.
>
> The large trading companies are established, with their main competitive advantages being, high cash reserves, resulting in low transaction costs and a reduced reliance on the banking community; massive worldwide infrastructure bases to augment their trading activities. The mid level trading companies need to expand or will increasingly have rely on speculation in order to survive (a very risky strategy). The small niche companies have to work on longer term partnership projects; with the main focus on sourcing crude oil and developing outlets for refined products. Overheads, both variable and fixed will have to be aggressively managed by all sectors of the business.
>
> Perhaps the most challenging area all of the trading community faces is compliance, both in paper markets and the so called Foreign Corrupt Practices Act for physical trading. Increasingly there will be nowhere to run or hide, trading companies will have to face the law and adapt their strategies to comply."

xiii) Under "6.4 Competitive Analysis", the plan set out the advantages that the business would enjoy: *"[t]he proposed structure for the company benefits from a) a low overhead base, b) highly motivated management (Shareholders), c) flat management structure resulting in short decision time d) Long term business relationships"*.

xiv) Under "7.0 Personnel": *"The management of the company have long-term comprehensive experience in a trading environment including negotiation at all levels including with Heads of State"*, and biographies of Mr Bosworth and Mr Hurley were included.

xv) Section 9 of the plan was an "Operating Statement" in the form of the table. Its contents were the same as in the 2015 business plan as quoted in § 182 below.

(3) Tri-Ocean 2014

169. On 6 March 2014, Mr Bosworth/Mr Hurley sent the 2014 business plan to Tri-Ocean, an Egyptian energy company.

170. Mr Bosworth/Mr Hurley's Tri-Ocean contact in this period was Mr Akkad. On 24 March 2014, Mr Akkad wrote to Mr Bosworth and Mr Hurley:

> "Thank you again for sharing the below proposals. Following most recent internal discussions it has been confirmed that Tri-

> Ocean Energy's parent company (Egypt Kuwait Holding) has opted to shift its focus away from the Middle East and Africa and towards evaluating opportunities in the U.S and Canada. I understand that they have a perception of risks associated with their concentration of investments in the region which has prompted them to try and diversify to more 'stable' regions.
>
> With regards to our future current trading activities; I expect to receive clarification within the coming few weeks on various items that will determine our initiatives moving forward. As you can see quite a few things are up in the air. However, it would a pleasure to meet in Dubai to explore possibilities for future collaboration. I'm hoping to confirm dates this week and I'll get in touch to arrange accordingly." (my emphasis)

171. It was put to Mr Bosworth in cross-examination that Tri-Ocean clearly interpreted the business plan as being focused on West Africa and the Middle East, and pivoted away from it for commercial reasons:

> "Q. … it looks, doesn't it, that Tri-Ocean themselves had seen this as a plan that was focused on the Middle East and Africa […] And it seems, doesn't it, that they -- at least their reasons were they regarded Middle East and Africa as less stable than other regions that they might invest in?
>
> A. Well, firstly, if I can put it in context, we were -- they were looking for us to be a trading arm. As far as I'm aware, they weren't an active trader. They may have had some trading means, but their main focus was on assets in Africa and the Middle East and so it's those assets rather than trading that they seem to want to diversify away from to more stable regions. They were in Sudan as an equity producer. I forget where else. Syria. So yes, they were operating their assets, not trading business, in those areas." (Day 2/13)

172. The Claimants suggest that the response of Tri-Ocean demonstrates that, with or without the Freezing Order, there are commercial reasons why an investor may have been unwilling to take up this opportunity. For Tri-Ocean, the issue was that they were already invested in Africa and the Middle East, and wanted to diversify to more 'stable' regions. Mr Bosworth/Mr Hurley accept that Tri-Ocean *"did not want to pursue the opportunity because they no longer wanted to focus on the Middle East or Africa."* Mr Bosworth says, *"even if Tri-Ocean had been ready to move forward with us, I was engaged with the historic transactions until late 2014, and would not have been able to take advantage of this."* It was only in 2014, once Mr Bosworth had finished his work for Farahead, that he and Mr Hurley amended the 2014 business plan for a more general audience and began to seriously pursue setting up their own business.

(4) 2015 amendments to the business plan

173. On 10 May 2015, Mr Hurley emailed Mr Bosworth saying, *"If you want to take a look through this - I have amended from original let me know if you have any comments.*

Section 6 will need some amendments from your side." He attached the 2015 business plan, dated 11 March 2015. In the event, Mr Bosworth did not amend Section 6 of the 2015 business plan, headed "Economic Outlook", so it retained references to 2014 that were out of date.

174. It was suggested to Mr Hurley in cross-examination that he backdated this business plan. Mr Hurley responded, *"It could well have been produced in March and now I'm just sending it to Mr Bosworth in May. I'm not saying it's backdated."* Mr Hurley could not recall what prompted the amendments, although he did say, *"It's post the freezing order being imposed upon us, so that may have caused some amendments."* Mr Bosworth also said in cross-examination:

> "20:21 Q. Was there a particular reason why, in May 2015, you and Mr Hurley had gone back to amend the plan?
>
> A. I don't recall the specific reasons or who it was prepared for, but it will obviously be in the light of receiving the law case and being under a Mareva."

I do not consider the precise dating of the 2015 business plan to be significant.

175. The changes made in the 2015 business plan compared to the 2014 version were fairly minor, and include the following.

i) The references to Tri-Ocean in the 2014 business plan were removed and replaced with more general references to *"an investing partner"*. The "Equity Interest" was now *"[t]o be agreed between the investor and senior management."*

ii) Under "Trading Activity", the word "increase" was changed to "establish":

> "The company will seek to **establish** supply volumes by development of relationships in targeted locations for crude oil and refined oil products. This will initially focus on West Africa, East Africa, Middle East and Asia. The company will benefit from marketing experience to develop the sales distribution to cover all regions of major demand. It is envisaged that an enhanced profile and consequent opportunities can be achievable by jointly developing relationships with the right partner."

and the two paragraphs about strategic investment were removed.

iii) Under "Corporate Structure", the 2015 plan envisaged *"[a] holding company in a suitable jurisdiction to be established with trading offices envisaged in Switzerland, Dubai and London."* This was a change from the version of the plan developed for Tri-Ocean, which envisaged a holding company in Cyprus and acquiring an existing trading entity, likely Attock Dubai.

iv) Most of the detail was removed from a section in the 2014 business plan about Asset Investment.

176. The financial projections and funding requirements are the same in both the 2014 and 2015 business plans. None of the key numbers were changed. Both documents record Mr Bosworth and Mr Hurley's intention to secure strategic investment of US$150 million, with the same turnover forecasts.

(5) Financial projections in the 2015 business plan

177. The financial projections of the 2015 business plan are based on the following assumptions about the value of oil in 2014:

i) number of barrels of oil per cargo: 1 million barrels per cargo. Both of the oil trading experts agreed that a typical single cargo of West African crude oil would be around 950,000 bbl (with cargoes typically smaller for oil products);

ii) value of barrel: US$ 110 per barrel; and

iii) value of cargo: US$110 million per cargo.

178. The 2015 business plan forecasts turnover as:

i) USD 2.5 billion in Year 1;

ii) USD 5 billion in Year 2; and

iii) USD 7 billion in Year 3.

179. The turnover estimates for Years 1-3 of the business translate into the following forecast number of barrels traded:

i) 23 million barrels in Year 1;

ii) 45 million barrels in Year 2; and

iii) 64 million barrels in Year 3.

180. Accordingly, the 2015 business plan envisaged that the business could trade:

i) 23 cargoes a year in the first year, or approximately 2 cargoes per month;

ii) 45 cargoes a year in the second year, or approximately 4 cargoes per month; and

iii) 64 cargoes a year in the third year, or approximately 5 cargoes per month.

181. The business plan also included costs of sales figures at page 16. These figures included finance costs and interest.

182. On the basis of the projected number of barrels traded, the expected cost of sales, and the fixed overheads, the business plan forecast net profits of:

i) USD 6,950,000 in Year 1;

ii) USD 15,795,000 in Year 2; and

iii) USD 44,825,000 in Year 3.

1.5 Turnover Forecast (3 years)

	$m
Year 1	2,500
Year 2	5,000
Year 3	7,000

(Turnover estimates are based upon underlying physical crude price of us$110m).

9.0 Operating Statement

	Year 1 US $'000	Year 2 US $'000	Year 3 US $'000
Sales	2,500,000	5,000,000	7,000,000
Cost of Sales	2,490,000	4,980,000	6,950,000
Trading Result	10,000	20,000	50,000
Overhead	3,050	4,205	5,175
Net Result	6,950	15,795	44,825

The Cost of Sales figures stated above for Years 1 to 3 were 99.6%, 99.6% and 99.3% respectively of the Sales figures.

183. Mr Bosworth/Mr Hurley argue that these were achievable volumes for a trader of Mr Bosworth's experience. As set out in Mr Scott's report, the projected turnover in terms of barrels *"equated in the first year of Arcadia 2 to 8-10% of Arcadia's historical turnover and around 25-30% of Arcadia's turnover by the third year - so reasonable starting volume and growth in volume for experienced seniors within the market starting a new venture."* (Scott 1, [415]).

184. Mr Hurley says in his seventh witness statement:

> "56. We included a turnover forecast in the business plan for Tri-Ocean. It is necessary to include those in a business plan. But there was an understanding that the forecasts were dependent on market conditions, and that they were therefore only estimates. But what I can say is that the estimates in this business plan are not unrealistic. The forecast is for $2,500m turnover in the first year, based on an underlying crude cargo price of $110m. That equates to one or two cargoes a month, depending on the price, which would be achievable by having one term contract alongside additional spot trades. That is not a lot. At Arcadia, we

> at times had multiple term contracts in West Africa alone. So the estimates in this business plan would be a start, and the idea would be to go from there. Hurley 7, [56].
>
> 57. As to how the forecasted turnover of $2,500m in year one relates to the bank facilities, you tend to need coverage on average for 45 days' worth of bank facilities to meet your turnover. So if you look at that, it means you would need only $360m or $375m of credit to do the $2,500m of annual turnover. So the year one forecast does not rely on the full $1bn facilities that are proposed in the plan. In fact, the financing figures are way in excess of what would be required to get the turnover in year one, and are probably enough to cover year two as well."

185. Mr Bosworth also says that they planned to start Arcadia 2 with around 5-10 employees, keeping costs down as much as possible, and making the most of booms in the market:

> "52. The Business Plan forecast that Arcadia 2 would have a turnover of US$ 2.5 billion in year 1 (paragraph 18.5 of Bosworth 9 [D2.1/3/7]). I did not need many traders to trade that large a volume of crude. In the early 2000s, prior to John taking over at Arcadia, there were periods when I used to personally trade a million barrels a day of Nigerian / West African crude (about a cargo a day). Another reason why this volume estimate in the Business Plan was a conservative estimate is that the rate of trading would depend heavily on whether there was a boom cycle for oil trading. Typically you get a boom when oil prices are volatile, as traders can profit from that volatility. And the oil trading business was in a boom cycle from 2015, when we began seriously pursuing Arcadia 2, until this year, 2025."

186. The Claimants argue that the numbers pertaining to the value of barrels and cargoes in 2014 cannot be projected forward, as the oil price collapse in 2014-15 would have had implications for the business plan. Oil had fallen from US$110 per barrel to US$55 per barrel, and so the 2015 business plan should have been amended. They point out that if the price per barrel were adjusted to US$55 in the 2015 business plan, Mr Bosworth/Mr Hurley would have had to had to sell 130 million barrels of oil in year 3 in order to make their projected turnover of US$7 billion. This is double the total that Arcadia was trading on its Africa and Middle East books, which remained at between 65-85 million barrels from 2011-2013.

187. Mr Bosworth agreed that the oil price had roughly halved, but did not agree that the business plan no longer made sense. Counsel put this question to Mr Bosworth by reference to the turnover figures in the 2015 business plan:

> "Q. Yes. So if we go back to (X3/661/4), if you wanted to generate $3 billion of turnover, as I say, you would need to be trading, whatever it was, about 140 million barrels, which was more or less double what Arcadia 1 was doing on those books, wasn't it? (Day 2/23)

It seems likely that counsel in fact meant to US$ 7 billion of turnover, the figure stated in the plan for Year 3, since at US$ 55 a barrel 140 million barrels would generate US$ 7.7 billion of turnover. Mr Bosworth answered:

> A. Look, from a practical point of view in our industry, turnover is not a terribly important number. As you rightly pointed out, it's subject to just the price of oil. It's a random thing. So if a cargo of oil is 50 or $100 million, that's what changes your turnover, but turnover is -- doesn't create necessarily profit. We're not in the business of taking this, this and this and creating or making plastic things. What we're in the business of doing is trading. So turnover to us is not a -- from a commercial perspective is not a particularly important number. It is possible that that number -- it is based on 110. It should have changed to 100 or to 50/55, whatever you say the number is, and that would alter the turnover forecast by half. It's a draft document and I'm afraid you will have to ask Mr Hurley on that.
>
> Q. Well, I will ask Mr Hurley on that, but just to pick up your point that turnover doesn't matter, I mean, can that be right? If you look at page 15 (X3/661/15) of the plan where Mr Hurley has generated the net result, presumably for the benefit of the investor reading it, and, I mean, just for example, the profit doubles or more than doubles between year 1 and year 2 and that's because the sales have doubled. I mean, the more sales, the more profit.
>
> A. It's not how our business works. You would have to ask Mr Hurley exactly that formula that he has put together here.
>
> Q. Well, it's how this plan works, isn't it?
>
> A. But the plan is a document to get your foot in the door to talk to somebody. Until you speak to somebody, you don't know what they want to achieve and what – versus or including what we want to achieve. It is, if I can put it, a starter for ten.
>
> Q. Well, presumably what they want to achieve, Mr Bosworth, is to make money. This plan is presenting -- on the numbers there, this plan is presenting a forecast of profits –
>
> A. They're potential –
>
> Q. -- and those profits are entirely driven, aren't they, by the sales figures?
>
> A. From a commercial perspective, not necessarily. I don't know the basis of those numbers from Mr Hurley. However, I believe within the plan, the original plan was -- bases significant positions on physical oil and either immediately after that or once we have the comfort of the relevant investor

> shareholder/joint venture partner. That we would get involved in the paper markets. Now, I can't talk to how that affects your turnover. You would have to ask Mr Hurley. But you could have the same amount of physical through the time, but an increased volume in the paper aspect of it. But pure speculation.
>
> Q. Well, obviously –
>
> A. From a practical perspective.
>
> Q. What I'm suggesting to you, Mr Bosworth, is that these sales figures in this plan are entirely unrealistic at a time when oil is $55 a barrel because in order to achieve these figures, you would need to be selling 150 million or more barrels of oil.
>
> A. Well, if we -- if we calculate it on the first one -- this is off the top of my head, so please take it in that sense -- if we were trading 60-odd million barrels, two to three cargoes of physical crude per month, if you then add to that a paper book, and that can have significant volumes associated with it, it wouldn't be difficult to go from -- keep the same physical, but get to a higher sales and -- a higher sales figure.
>
> Q. All right. So are you saying that this plan is dependent on the new business making its money from something other than physical crude trading?
>
> A. I believe this -- again, you would have to ask Mr Hurley what he based those numbers on." (my emphasis)

188. Mr Hurley's evidence about turnover, quoted in § 184 above, is based on a crude price of US$ 110 a barrel, and he was not in fact cross-examined in any detail about turnover, though he reiterated that the sales figure was based on an estimated price of US$ 110 a barrel. He was asked about the cost of sales figures, and said he did not know to what extent these reflected what the original Arcadia business had achieved by way of margin, and that:

> "A. … bearing in mind this is a discussion document, it is estimated and based upon the experience of the individuals where the input comes from. So what we're getting there is an equivalent number of barrels of oil at the top sales level and from that, you would expect to make a certain margin based upon those barrels of oil equivalent, be it in crude oil or be it in products or any or product that you were looking at, and from there, from your margin, you can determine what you would estimate your profit to be. These are very simplistic estimates, but realistic based upon the experience, as I say, of the individual giving the information, and from there, you can deduce your cost of sales.

> Q. I understand all that. I'm just trying to understand on a slightly more arithmetical level. Did you, for example -- I appreciate you say it's a matter of judgment. Did you, for example, say, well, the cost of sales is typically, let's say, 99% of the -- of the actual sales? Is that the kind of process –
>
> A. I don't think that was the way the process worked. I think the process worked on: if we've got this amount of volume in terms of either barrels in crude or capable of being converted into metric tonnes for products, this gives me a volume and on the basis -- on that volume, historical experience tells me that I would expect to make X. And you get a profit number from that and you deduce the cost of sales as an average from that across all different products. So that would be too complex to do in a hypothetical world, but you can make estimates based on historical experience.
>
> Q. All right, and it was you who made those estimates.
>
> A. This would have been in discussion with Mr Bosworth. If we have the financial capability to achieve X number of barrels, what would we expect to make in terms of the trading result based upon that?
>
> Q. All right. So in one way or another, you and Mr Bosworth, having discussed it, came up with these numbers for cost of sales.
>
> A. For estimates for the trading result for the period going forward based upon the volume."

189. I return later to the question of turnover, in the light of the expert evidence.

(6) Geographical expansion of the business

190. There was some disagreement between Mr Bosworth/Mr Hurley and the Claimants as to the geographical scope of the 2015 business plan, with the Claimants suggesting that the business plan was clearly focused on West Africa and the Middle East and that that is how it would have been understood by investors.

191. There are some references to West Africa and Middle Eastern trading in the business plan:

i) Mr Bosworth is described as a *"one of the industry's leading experts in the West African crude oil and refined oil products business."*

ii) Under "Trading Activity", the business plan said: *"The company will seek to increase supply volumes by development of relationships in targeted locations for crude oil and refined oil products. <u>This will initially focus on West Africa, East Africa, Middle East and Asia.</u> The company will benefit from marketing experience to develop the sales distribution to cover all regions of major demand. It is envisaged that an enhanced profile and consequent opportunities*

> *can be achievable by jointly developing relationships with the right partner."* (my emphasis)

192. Under "Expansion Plan", the business plan said, *"[t]he management will introduce an expansion plan after the successful completion of the financing for the company. A number of expansion prospects have been identified that can be pursued once the trading operations commence."*

193. It was suggested to Mr Bosworth in cross-examination that the "Industry Analysis" related to West Africa, as it noted the compliance challenges with oil trading: *"Perhaps the most challenging area all of the trading community faces is compliance, both in paper markets and the so called Foreign Corrupt Practices Act for physical trading. Increasingly there will be nowhere to run or hide, trading companies will have to face the law and adapt their strategies to comply."* Mr Bosworth responded that that analysis was *"Not specific to West Africa, but across the board."*

194. Mr Bosworth said that the other references to West Africa and the Middle East reflected the starting point, as this was where Mr Bosworth/Mr Hurley had the most experience and a *"competitive advantage"*:

> "8:15 … And it's fair to say, isn't it, that a potential investor reading this plan and in particular reading your biography and the list of principal trading partners would understand it to be a plan that was focused mainly on Africa and the Middle East?
>
> A. This -- to put it into some context if I can, this type of document is a -- it's not a formal business plan. It is some -- a document which gets you in the door because whoever you're talking to, whether it be Tri-Ocean or somebody else, they will have views as to why they think you might be able to fit into their organisation. It is through those discussions that you find out what we can do, and we would have elaborated, and I think we do, into other areas of business which we would have gone into. But the easy part -- well, nothing is easy in the oil business, but the easier part is to start in West Africa because of my expertise and then move out from there. It wasn't planned to create a small West African trading company. We are trying to replicate Arcadia 2.
>
> Q. Thank you for the context, but my question was a potential investor reading this plan would understand it to be a plan that was mainly focused on Africa and the Middle East, wouldn't they?
>
> A. Well, in discussions, they -- they may look at that. It's an interpretation they could have. However, through discussions, they would quickly realise that that was part of the plan at the beginning to set up there, because that's where we had a competitive advantage immediately." (Day 2/8)

195. Similarly, Mr Hurley said in his seventh witness statement:

> "46. … Obviously we had got some target areas of physical business we were going to be looking at, and that's West Africa, Middle East, and indeed the Far East, and our expectation was that we would be able to pick up some of Arcadia's previous business in those areas. But it was going to have to be without John and Tor's support, rather than following an agreed acquisition or transfer of contracts from Arcadia. It would be a new company.
>
> 47. However, the plan for the new business was that it would be very similar to the business Arcadia had engaged in, and in particular it would be an expansion of that. It was going to be predominantly the same counterparties that we had dealt with while we were at Arcadia, because those were the people who knew us. It would be broadly the same set of introducers, service provides, and oil companies. And we were going to be drawing on the relationships we had built with the banking groups used by Arcadia as well (which I describe in more detail below).
>
> …
>
> 58. We said to Tri-Ocean in that business plan that we would introduce an expansion plan, and that we had prospects identified. Those would be targeted geographical regions, targeted businesses, that predominantly Pete would be identifying. But we would not put all of those things down in the business plan, because they are our knowledge, and we don't want to put those down until someone has committed."

196. Overall, the business plan made clear that the intention was to focus initially on West Africa, East Africa, the Middle East and Asia, though Arcadia 2 was not intended to be limited to those regions. At the same time, Mr Bosworth and Mr Hurley realistically acknowledged that the starting point would be Africa and the Middle East because that is where they felt they had a competitive advantage immediately; and, in Mr Hurley's words, *"[i]t was going to be predominantly the same counterparties that we had dealt with while we were at Arcadia, because those were the people who knew us. It would be broadly the same set of introducers, service provides, and oil companies"*.

(7) Investment by Mr Bosworth and Mr Hurley in Arcadia 2

197. The business plan envisaged that the equity in Arcadia 2 remained to be agreed between the investor and Mr Bosworth/Mr Hurley. Mr Bosworth said in his eleventh witness statement:

> "32. I planned to put the majority of my money into Arcadia 2 (over 50% of whatever cash I had), because it was the venture I would have had the largest control over, and the biggest upside. The remainder of what Colin and I needed would have come from investment and/or bank finance"

though without mentioning a specific figure. In his ninth witness statement, Mr Bosworth had stated that an important difference between Arcadia 2 and the Arcadia Group *"was intended to be that Mr Hurley and I would be founding shareholders, and therefore in a stronger economic and corporate position than we were at Arcadia Group"*. Mr Hurley said in his witness statement that the equity ratio would be a matter for discussion with the investor and would depend on what they could offer. During cross-examination, Mr Bosworth said *"... we were, in an ideal world, looking for 150 million, Colin and I put in 25 and therefore, the strategic investor would have had a potential majority in the company"*.

198. Mr Scott's basic models for Arcadia 2 assumed that Mr Bosworth/Mr Hurley would contribute US$25 million in equity, representing 16.6% of total equity of US$150 million. Mr Scott considered that they would have been able to raise that amount, based on their asset position in 2015, and said:

> "209. Mr Bosworth, as group CEO, and Mr Hurley, as group CFO, held senior executive management (and, in the case of Mr Bosworth, executive trading) roles at Arcadia (and related entities). I have reviewed the assets that each of Mr Bosworth and Mr Hurley shared with the court in 2015. The declared assets, subtracting mortgages from property and including liquid assets such as cash, and assuming a 1:1 rate of the Swiss Franc to the US Dollar, which I believe is conservative, had a value of around US$35m and $10.5m, respectively.
>
> 210. My view is that allocation, directly, or through leveraging their other assets, of US$25 million as the founders' equity for the new venture, Arcadia 2, is reasonable, on the basis that this is only a percentage of assets that could be used as security for a loan(s), and/or the assets could be sold and the cash used, and that potential personal income (salary and bonuses) and shares in a new enterprise could have been used as additional collateral for a loan or loans." (footnotes omitted)

199. Mr Scott considered US$ 25 million to be an appropriate level of equity investment by Mr Bosworth and Mr Hurley:

> "409. My view is that given Mr Bosworth and Mr Hurley's assets as set out in their asset lists (Mr Bosworth circa $35m and Mr Hurley circa $10.5m excluding pensions and receivables), this level of investment would be affordable for Mr Bosworth and Mr Hurley. This level of investment would place Mr Bosworth and Mr Hurley in a stronger position to negotiate the terms of their remuneration and would be looked on favourably by financial investors as providing the founders with "skin in the game". Mr Bosworth and Mr Hurley have also stated their intention to invest their own funds in Arcadia 2. That noted, Mr Bosworth and Mr Hurley could have begun Arcadia 2 with much less by way of personal equity (and indeed much less overall equity). The key threshold for general, optimal 'bankability' (global banks, excluding local and regional banks and NBFI's

> like trade finance funds which in my experience had lower thresholds) would have been a combined $20m in equity between Mr Bosworth and Mr Hurley and their investors (see paragraph 9 of this Report).
>
> 410. As previously stated, although I am not a private banker, and assuming no diminution of the value of their assets, I consider it is reasonable to expect Mr Bosworth and Mr Hurley to have raised £25m and $5m respectively, given their asset base. This equity could have been generated by some combination of cash, realised capital from the sale of property and/or personal loans secured against property and/or shares in the company. I have observed a combination of these methods being used by founders to raise equity over the decade."
>
> (footnotes omitted)

200. The Claimants query whether Mr Bosworth and Mr Hurley would have been able to raise $25 million cash from their assets. Mr Bosworth's asset disclosure indicated that he had about $35 million in total assets as at 2015, but the vast majority of those assets were in the form of real property, with only about US$ 2 million in liquid assets. On that basis, *"the majority of my money ... (over 50% of whatever cash I had)"* (the expression used in § 32 of Mr Bosworth's witness statement) would not have amounted to anything approaching US$25 million. In any event, in order to raise, say, US$ 20 million would have required substantial borrowing on Mr Bosworth's part against his assets.

201. In my view, it is realistic to consider that Mr Bosworth and Mr Hurley would have been able, between them, to raise US$ 25 million of equity, though that would have required some borrowing. They had sufficient assets to provide security, a good track record in business, and strong relationships with a number of banks. They also had a strong incentive to raise and contribute the money, in order to achieve a substantial economic stake in the new enterprise in the way they intended. I therefore read Mr Bosworth's reference to more than 50% of his cash to refer to his assets as a whole: it is, and would have been, obvious that an investment limited even to 100% of the cash assets he held in 2015 would have been very unlikely to secure any significant equity stake in the new venture.

(8) Securing a strategic investor

202. The 2015 business plan sought a financing package of US $150,000,000 from an "investing partner". This was the same financing package that had been pitched to Tri-Ocean in the 2014 business plan. The equity interest in the 2015 business plan was *"[t]o be agreed between the investor and senior management."* Mr Scott's basic models assumed that the investor would contribute US$ 125 million and Mr Bosworth/Mr Hurley, US$ 25 million.

203. Mr Hurley says in his seventh witness statement:

> "52. We said to Tri-Ocean in the business plan that we expected a financing package of US$150m, and that we required $100m

> of the $150m for the purpose of guaranteeing financing banks to provide trade finance facilities. Those figures were likely at the high end of what we needed. It is normal practice to put a top end target number down. But we could also have started with something less in my view.
>
> 53. On the basis of the $100m for guaranteeing financing banks to provide trade finance, we expected that that amount could be leveraged to enable the new company to obtain facilities of $1bn. This could have been raised from banks I had established relationships with. In terms of leverage, that proposal is more conservative and vanilla than the arrangement we had operated with at Arcadia, where I recall we had facilities of up to $4bn as well as a Revolving Credit Facility of $300m, based on security of $300m in the form of guarantees. The proposed leverage in the plan we put to Tri-Ocean is considerably less than we had in effect at Arcadia. I thought it was achievable at that point of time.
>
> 54. We wanted to put reasonable realistic proposals in the business plan, which we knew could be achieved given our experience at Arcadia and the relationships we had built with the banks (see below). But we also would have needed to find out about the preferences and existing banking relationships that Tri-Ocean (or any potential investor) had. It might be that an investor is willing to put in cash in the form of equity, and that would have been our preference to try to build the company. But it might be that an investor puts in cash in the form of debt instead. That would depend on the investor, and on our negotiations with them. Then the facilities obtained by the new business would have also depended on both the profile of the investor and the appetite of the banks. It might be that they had a significant banking relationship with a bank that we were not currently dealing with which included a large existing facility. In that case, the new business might have been able to draw on that facility up to a certain amount with parent company approval. Or at least the business might have been able to use that existing relationship to obtain facilities. You do not know, so you do not want to put anything in your business plan other than vanilla type requirements. But, once we had had those conversations with an investor, we would then have developed a more detailed plan for financing, drawing on the investor's profile and existing banking relationships and on our existing banking relationships."

204. The Claimants suggest that Arcadia 2 was an unappealing investment proposition and would not have secured investment. First, Arcadia 2 was a new business. While there was demonstrable interest from Rabobank in February 2013 when Mr Bosworth/Mr Hurley proposed to buy-out Arcadia ("*Project Hoddle*", mentioned earlier), that project entailed purchasing a pre-existing business, and assumed that $150m of equity would have been available to secure the finance. Similarly, the purchase of Arcadia in 2006 by Mitsui had been a purchase of a going concern with 42 existing staff and existing

customers and contracts. By contrast, Arcadia 2 would have been a start-up. Secondly, the Claimants submit that the general investment environment would have made an investment unlikely, due to the oil price collapse in 2015, the lack of bank appetite to finance oil trading, the decline of crude oil production in Africa, and regime change in Nigeria. I consider those matters later in the context of the expert evidence.

205. Thirdly, the Claimants submit that Mr Bosworth and Mr Hurley's track record was tainted by the significant challenges that Arcadia had experienced under their management. Against that, Mr Hurley said in his seventh witness statement:

> "43. […] I do not think there was any untoward reputation issues arising from Atlantic or Capital (as I understand the Claimants to allege). Nobody had any serious problem with them, and in particular (as I address below) we retained very good relationships with the banks that we had worked with during our time at Arcadia.
>
> …
>
> 49. […] if the Capital and Atlantic issues had been serious in the eyes of the bank, Credit Agricole would not have approached me straight after I left asking to be involved in my next trading project."

206. Mr Hurley's evidence is that, to the contrary, his and Mr Bosworth's track record would have made them a desirable investment proposition: *"We made the owner of Arcadia (Fredriksen) $644 million over a period of six (or in really in effect five) years before we left."* Mr Hurley also outlined his relations with banks:

> "65. Some of the most important banking relationships we had at Arcadia were with Rabobank, BNP Paribas, Crédit Agricole, ING Bank, Société Générale and Standard Chartered. We would have used our existing relationships with those banks in particular when setting up the new oil trading business. But (having refreshed my memory by reference to the facility documents we had in place while at Arcadia) we also arranged finance for Arcadia through (for example) ABC International, ABN Amro, Bank of Tokyo-Mitsubishi, Credit Suisse, First Gulf, Fortis, Mizuho, Natixis, and United Overseas. So we would also have been able to call on relationships with some of those banks too when arranging financing for the new oil trading business.
>
> 66. In the normal way, I sent a goodbye email to my contacts at most of those banks on 13 October 2013 following my departure from Arcadia (INQD1D20017441). My recollection is that the responses were positive, with people responding to wish me well and to raise the possibility of working together in the future. For example, having refreshed my memory, I see the list of people included Tarek El-Gowhari at Credit Agricole, who then contacted us soon afterwards about the Tri-Ocean opportunity

> that I mention above, and that (for example) Patrick Arnaud of ING Bank responded and specifically said that he was interested to see what 'Arcadia V2' would look like (PBCH0024524)
>
> …
>
> 68. My firm expectation after I left Arcadia was that, when setting up our new oil trading business, Pete and I would draw on the positive relationships with banks we had already developed, like those I mention above. Before the Freezing Order was imposed, I had only received positive indications from my contacts about the likelihood of banks wanting to work with me and Pete on our new business, and I was not aware of any banks having any concerns about us that might have affected their willingness to work with us.
>
> 69. In terms of how we actually would have gone out to the banks to finance the new oil trading business, that would have depended in part on the specific context. So for the proposal with Tri-Ocean that I mention above, Credit Agricole would have been my first port of call, because the introduction had come through them. And they were a huge lender to Arcadia. And then these things do tend to build on each other. If you sign Credit Agricole, it's easier to sign SocGen, and if you've got Credit Agricole and SocGen, it's easier to get Rabobank, and if you get Rabobank, Credit Agricole, SocGen, it's easier to get certain others. So it sort of snowballs. Because a lot of the banks have similar requirements. I also believe that with the track record that we had, we would have got a core number relatively quickly. We did not need to get a billion straight away. But if you are able to get two or three hundred million, you are up and running."

207. Similarly, Mr Bosworth says in his eleventh witness statement:

> "23. … I had run Arcadia and had taken it from more or less a blank sheet of paper when we started out to a company that had made over USD 200 million in net profits most years (under John), trading physical and paper all around the world [INQD1D20001649]. I understood Arcadia was exiting its physical trading books and I planned to take over some of those opportunities and relationships as Arcadia abandoned them."
>
> "26. I was known in the industry as the CEO who had overseen this expansion and delivered these results. While I was at Arcadia, we would send Arcadia's banks our profits on a regular basis. We would also send audited accounts of individual companies within the Arcadia Group to Arcadia's banks. Those banks would talk. Oil traders would also compare each other's bonuses, to see if someone doing their job at a different firm was getting paid better or worse. Since bonuses were associated with profits, that also meant sharing news about our profits. The oil

> trading industry is tight knit, with a small number of key trading houses. It is common for traders to move between houses, and even more common for them to socialise. In this business, news about results spreads fast.
>
> 27. There were only a handful of people in the industry who've had both the physical and paper trading experience that I've had, at the level I've had, and with the success I've had. I understand the business, have known both good times and bad times for the business, and have seen how the business has developed and grown over time. I've made money when the oil price was high, and made money when the oil price was low. I was well placed to tackle whatever changes might happen to the business. Very few people in the industry had my experience, or my reputation.
>
> 28. Colin was known as the CFO who had delivered the finance that had underpinned this success. Colin was famous in the banking world for making John's financing of Arcadia work. I'm not a finance expert, but I understand it was almost unheard of to finance a company like Arcadia by putting up shares as collateral instead of cash. But that's what John did, and it was Colin who achieved it. Beyond that Colin had a very good reputation with the banks. He kept them well informed. He ran the systems at Arcadia professionally, both internally and externally. The people that worked for him were also very professional."

208. Having regard to the evidence as a whole, I consider that Mr Bosworth and Mr Hurley's track record would, on balance, have made a positive impression on potential strategic investors as well as banks. They had indeed made a great success of Arcadia 1, notwithstanding some tailing off of profits in the final period, and I see no reason to believe that investors would have seen the Atlantic and Capital transactions as materially undermining Mr Bosworth's and Mr Hurley's capabilities to run an oil trading business successfully.

(9) Starting the business without a strategic investor

209. Mr Bosworth and Mr Hurley's pleaded claim is that, but for the Freezing Order, they would have secured funding for the business "*as set out in the Business Plan*", which was based on finding a strategic partner to invest US$150 million (Amended Particulars of Loss and Damage in the Inquiry § 51). Similarly, § 49 alleges that the Freezing Order "*caused and/or was an effective cause of stymying the aforesaid discussions with potential business partners and/or investors such as to prevent the establishment of an Oil Trading Business*" (my emphasis). There is no allegation to the effect that Mr Bosworth and Mr Hurley could have started and run Arcadia 2 without a strategic investor.

210. During the course of the Inquiry, there was nonetheless some discussion of whether Mr Bosworth and Mr Hurley could have started Arcadia 2 with their own funds, even if they had not been able to find a strategic investor. Mr Bosworth said in his eleventh witness statement:

> "30. We were totally flexible about how to go about raising the investment and how to structure the investor's ownership alongside ours. We planned to consider whatever terms any serious player offered. We could also have started the business, albeit probably on an initially smaller scale, with just our own resources plus bank finance.
>
> …
>
> 50. …Even a small amount of financing would have allowed us to demonstrate that Arcadia 2 was profitable. We would have used this initial success to attract more investors, and to rapidly scale up the business.
>
> …
>
> 51. We were very flexible as to how to fund the company, and as to how much of our own money we'd put in. As I've explained at paragraph 54 of Bosworth 9 [D2.1/3/22], Arcadia 2 could have been launched with as little as US$ 5 million of equity capital. In oil trading, you can leverage a lot, because the cargoes provide so much security for your borrowing. When you get credit to buy a cargo, a great deal of your collateral is what you are buying with that credit. It's the cargoes themselves. As a result, I would have expected to turn equity capital into tradeable cargoes on a basis of 1 to 10. So for every US$ 5 million of equity capital invested in Arcadia 2, we could have been trading US$ 50 million in cargoes just by getting letters of credit, cargo-by-cargo, from trade finance banks using the cargoes in question as security for that debt. And that is before taking into account any debt facilities Arcadia 2 could have accessed through its investors."

211. As quoted earlier, Mr Scott in his report said:

> "… Mr Bosworth and Mr Hurley could have begun Arcadia 2 with much less by way of personal equity (and indeed much less overall equity). The key threshold for general, optimal 'bankability' (global banks, excluding local and regional banks and NBFI's like trade finance funds which in my experience had lower thresholds) would have been a combined $20m in equity between Mr Bosworth and Mr Hurley and their investors (see paragraph 9 of this Report)."

212. Mr Scott submitted an amended Model 1 on 26 April 2026 (two days before he was due to give evidence in cross-examination). He explained in the covering letter that this model corrected some errors in the original model, but also allowed for the user to change some of the inputs, in particular in relation to equity.

213. In cross-examination, Mr Bosworth suggested that, in fact, the real objective would have been for him and Mr Hurley to have a majority stake in their own company, but

this was prevented by the Freezing Order. This emerges in particular from the following passages from Day 2/114 to 120:

> "A. … that business plan is not the key to what Colin and I wanted to do. We wanted to have our own company. That business plan is, if I can put it, more of a -- more joint ventures with other entities. That wasn't our original plan. None of those were.
>
> Q. I'm not sure I understand now. We looked at a plan – […] -- which talked about a strategic investment of $150 million.
>
> A. That's -- that was with regard to -- but that's not -- that's with a company that's already in existence and working with them that approached us. That's a response to their request. For us, certainly in my mind, we -- I wanted to have a new entity that was in effect going to be controlled by us with a strategic investor rather than become part of a different group. That was the real plan. That is the real plan. That's what we will hopefully do.
>
> Q. Right. We're going to need to explore this a little bit, Mr Bosworth. I mean, you are -- you are aware, I think, that in this claim, you have brought a claim for the value of this business.
>
> A. Yes.
>
> Q. And I think you have probably seen Mr Scott's report.
>
> A. I have.
>
> Q. And in that report, he refers extensively to the business plan and he's constructing a model to show what would have happened if the business plan had been implemented; yes?
>
> A. I'm trying to -- not clarify, but give a nuance to that. That business plan would have been in effect the base concept. All of those principles in there are what we were looking to do. The reality of what we wanted to do was to have our own company and an investor with it, not -- we didn't go to Tri-Ocean. They came to us. So in that circumstances, we go back to them with something that fits potentially with them, but that wasn't what we wanted to do.
>
> Q. Is -- what you're telling us now what you really wanted to do, is that written down in any plan somewhere?
>
> A. No. We never got there because prior to December 2025 -- 2025, I do apologise; no, 2014, we were still -- I was still working with Arcadia to solve the issues that they had and it was only after that that we would have started to put together the

> actual approach to real -- not real investors. The others are potential investors, but that -- as I say, that's being part of an existing group. That wasn't or isn't our ultimate goal.
>
> …
>
> Q. Right. I'm just exploring this with you, Mr Bosworth, because, as I say, I think you read Mr Scott's report.
>
> …
>
> Q. And he's modelled an arrangement, hasn't he, where the external investor has the majority of the equity?
>
> A. Yes, I think he did, actually, yes, because we – if we're looking on -- the basis we were, in an ideal world, looking for 150 million, Colin and I put in 25 and therefore, the strategic investor would have had a potential majority in the company.
>
> Q. But, in fact, as I understand your evidence, you're saying that the arrangement he's modelled is not the arrangement you're telling us you would have pursued.
>
> A. No, we did try to pursue that, exactly that –
>
> Q. All right, sorry –
>
> A. -- but in an ideal world, which was not possible because of the Mareva, we would have had started the entity with a controlling interest or, as people in Mercuria did, start with a lower equity participation and then build it up via reinvestment of bonuses and dividends.
>
> …
>
> Q. You're saying that's a completely different thing from the business plan?
>
> A. No, I'm not, no."

214. That evidence does not seem entirely consistent with some of Mr Bosworth and Mr Hurley's other evidence. Mr Hurley says in his seventh witness statement: *"Pete and I would be involved as principals, but we were looking for an investor to kickstart it."* Mr Bosworth says in his eleventh and latest witness statement: *"Although I believe that Colin and I could have started Arcadia 2 by ourselves on a smaller scale, our intention was to find an investor who could provide capital and credit, that would help us start and grow Arcadia 2. We therefore intended in effect to replicate the Arcadia business and investment structure, but with a third-party investor other than John."* (§ 45)

215. Equally importantly, the notion that Mr Bosworth and Mr Hurley could and would have started Arcadia 2 without a third party investor is not consistent with their pleaded case as summarised above. It would be, as the Claimants submitted, a radically different

case. It would raise new factual issues about whether US$25 million would have been enough to cover working capital and to provide an equity buffer sufficient to raise the finance, as well as, of course, also raising the issue of whether the business would then generate enough cash to service the borrowing necessary to put the US$25 million in in the first place. As an illustration, if one adjusted Mr Scott's model by setting the investors' equity to zero, leaving only founders' equity of US$25 million, the business would be loss-making for the first two years. Further, Mr Scott's amended Model 1 provided on 26 April 2026 reduced the operating expenses from those in his original Model 1, which used the operating expenses as stated in the 2015 Business Plan, on the basis that with less equity, there would be significantly lower operating expenses. But for that modification, the model would show the business as loss-making for the first five or six years, with the equity falling to US$14 million by 2020.

216. In addition, it would be open to question whether, with equity at only US$25 million (or less), any bank would have been willing to extend the necessary trade finance. For example, Mr Scott's evidence was that the Dutch banks were less demanding and that ING had been "*notable for its willingness to consider relationships with clients having equity of approximately 20 million as an initial entry point".* Mr MacNamara's evidence was that commodity trade finance banks tend to require a trader to be able to cover at least one or two of the cargoes they are trading, which would normally set the floor for net equity at about $50 to $100 million. There would also have been issues about how the business would have performed in later years when there was some retrenchment of banks from this sector.

217. All of those matters would have needed to be explored more fully in order for the Claimants to have a fair opportunity to meet an alternative case of this kind. In all the circumstances, I do not consider it to be open to Mr Bosworth and Mr Hurley to advance such a case; and it is very doubtful that it would have assisted them in any event.

(10) Mitsui 2015-2016

218. From 2015-2018, Mr Bosworth and Mr Hurley discussed various opportunities with Mitsui, a Japanese conglomerate and the former owner of the Arcadia Group. Mr Bosworth's and Mr Hurley's main contact in Mitsui in this period was Mr Muto.

219. Both Mr Bosworth and Mr Hurley explain that they had a *"long and close relationship"* with Mitsui. Mr Hurley says in his seventh witness statement:

> "79. Mitsui were an obvious choice as a potential partner, because we had an excellent relationship with them. Before John bought Arcadia in 2006, Pete and I had effectively been running Arcadia in Mitsui's name. It was a very successful time, and they had a high level of confidence in us because of that. And we had then stayed in touch with our contacts at Mitsui after John had bought Arcadia."

220. All of the following opportunities postdate the Freezing Order (dated 12 February 2015). It is accepted by both parties that Mitsui knew about the legal proceedings by this time, although neither Mr Bosworth nor Mr Hurley can remember exactly when they told Mitsui about the Freezing Order. Mr Bosworth says in his eleventh witness statement:

> "137. During the period of the Freezing Order, our discussions with Mitsui ran from around September 2015 to June 2018. I expected Mitsui already knew about case, but I told them about it at an early stage anyway. They were not surprised. Despite the case, they were happy to talk to us. In fact, they were proactive, and themselves suggested business models for working together. Especially at first, the support they offered was substantial and open ended. I had the impression they were keen to collaborate with us.
>
> 138. We met Mitsui many times during that period. We frequently had conference calls. We (and Mitsui) suggested a variety of business models and corporate structures, most of which were some combination of our trading knowledge and Mitsui's finance facilities. Unfortunately, none of those models both worked under the Freezing Order, and worked for Mitsui."

(a) NNPC vehicle (October 2015)

221. The first opportunity discussed with Mitsui, not long after the Freezing Order was imposed, was a scheme where Mr Bosworth and Mr Hurley would identify a vehicle that Mitsui could support in order to secure a crude oil contract with NNPC. On 13 October 2015, Mr Hurley wrote to Mr Muto:

> "Further to our recent discussions we have been working to identify an appropriate vehicle to which Mitsui could lend support in order to secure a crude oil contract with NNPC.
>
> We are advised that the entity must have a minimum of 51% local ownership so this limits the existing suitable companies. Other entities such as Vitol and Mercuria are investing in equity in local companies in order to meet this requirement. From our discussions we understand that this is not an option for Mitsui so have not considered that approach.
>
> We are advised that it could be possible for a new entity that is 100% privately owned (and meeting the 51% local ownership requirement) that would not otherwise meet the registration criteria, to be accepted by NNPC given support from Mitsui rather than equity participation. Can you let me know if this approach could be acceptable to Mitsui and if so the information you would require relating to the new entity in order to request the necessary approval.
>
> From the local side we have been requested for details of Mitsui's energy trading volumes /turnover, any refining capacity either direct or through processing arrangements as well as details of any investments Mitsui currently have in Nigeria. I would be grateful, if this is acceptable, if you could provide me with the relevant details…"

222. The following day, on 14 October 2015, Mr Bosworth wrote to Mr Muto (copying Mr Hurley): *"I believe the way forward would be for the Nigerian company to make the application to NNPC with the application supported by Mitsui under an Alliance agreement rather than a JV. Then a simple sales agreement (fob) between the Nigerian Company and Mitsui."* The Nigerian company was ultimately identified as Artery Resources, who themselves sent Mitsui various documents including a draft "Consortium Agreement" and a copy of the published invitation to tender issued by NNPC.

223. Mitsui declined the opportunity. On 27 October 2015, Mr Muto wrote to Mr Tiriah David-West of Artery Resources: *"Thank you for your idea this time. However, we regret to inform you that we decided to decline the NNPC crude tender closing tomorrow. There is no time for preparation and our intended scheme was not with consortium agreement."*

(b) Trading collaboration scheme (April 2016)

224. On 13 March 2016, Mr Muto wrote to Mr Bosworth (copying Mr Hurley): *"I would appreciate it if you would spare time for the meeting to update the Nigerian and other biz opportunities with you."*

225. It was put to Mr Bosworth that Mitsui were evidently not deterred by the Freezing Order, as they were still seeking out business opportunities:

> "Q. Yes. Now, in your witness statement, you say it was you who told Mitsui about the freezing order, but you can't -- you say you can't precisely remember when. It's likely, isn't it, that by 13 March 2016, Mitsui would have been aware of the freezing order?
>
> A. They were aware of the case and by that time, I would assume they were aware -- I believe we would have told them about the freezing order.
>
> Q. Yes. So they're aware of the freezing order, but, I mean, evidently this is not deterring Mr Muto from inviting you to discuss Nigerian and other business opportunities.
>
> A. In terms of the business opportunities, no, it is not deterring him. However, the structure of those business opportunities weren't as one or he would and perhaps they would have hoped for, namely a joint venture or financial support from them to a company of ours. So there was a change, multiple changes, I believe, in the arrangement or potential arrangement that we would have with Mitsui as a result of the case and the Mareva." (Day 2/35)

226. On 19 April 2016, Mr Muto wrote to Mr Bosworth and Mr Hurley:

> "Thank you for your sparing time for the meeting on April 4. I discussed with Yamada-san for the scheme of trading

> collaboration with you. He is willing to collaborate in the oil trading business with you. Although he considers that our contribution to the scheme would be in finance, project organizing, and the logistics in E. Asia, he doesn't have a specific idea for the scheme at the moment. I'd think that the scheme would be changeable depends on your next trading platform and appreciate it if you would share your rough concept and targets."

227. Mr Bosworth said that it was not unusual for Mr Muto to be *"pushing the envelope"* for business opportunities, even with the Freezing Order in place, because this was typical of someone in the commercial division:

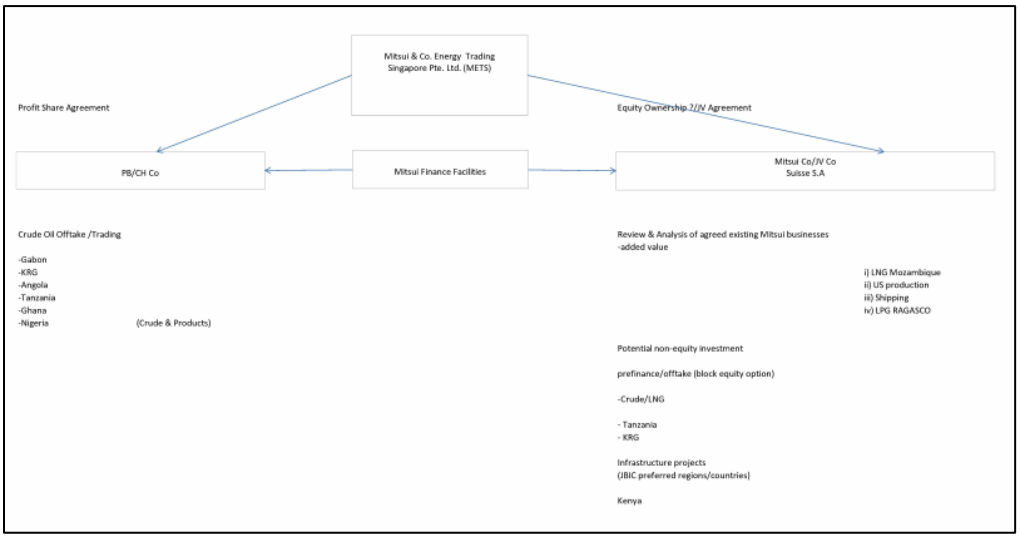
> "Japanese companies tend to be divided by divisions. So there's a commercial division. You don't get to decide who you can or can't deal with. That goes through a rather general word called "corporate". So a commercial person within Mitsui will do whatever he can to bring an opportunity to corporate for them to decide, so it's not unusual for someone like Muto-san to push the envelope of the corporate to say, "Okay, we have this. This is the situation. You make the decision as to whether we go ahead or not." So the fact that he is still pushing for business is perfectly normal within a Mitsui, even with the knowledge of the Mareva and the case." (Day 2/36)

228. It was put to Mr Bosworth that Mr Yamada (who is mentioned in the above email dated 19 April 2016) was from the corporate division and was still willing to collaborate:

> "Q. Mr Yamada, he was -- he was Mr Muto's boss; is that right?
>
> A. No, Yamada-san used to be the coordinator for Arcadia with Mitsui. He sat in our office, so we knew him very well, but no, he had moved from commercial. By this time, he was in corporate.
>
> Q. So he was in corporate?
>
> A. I believe so.
>
> Q. […] So Mr Yamada in corporate was also not deterred by the freezing order from inviting you to pitch whatever ideas you had to Mitsui.
>
> A. No, but you will notice that it says "whichever scheme". He doesn't say, "We will do". He's happy to listen to it, but he's very specific about the next trading platform that we would have.
>
> Q. Well, obviously it depends on what you pitch, but he is inviting you -- he says he doesn't have a specific idea. He's inviting you to suggest to Mitsui what kind of business you might be doing.

A. It would appear so, yes." (Day 2/37)

229. Following this, on 4 May 2016, Mr Hurley sent Mitsui his and Mr Bosworth's specific proposal, including a discussion document and the graphic reproduced below. The proposal involved Mr Bosworth and Mr Hurley setting up their own trading company, to be supported by Mitsui's trade finance lines.



230. On 27 May 2016, Mitsui declined to go ahead with the proposal:

> "I discussed the co-operation scheme with Yamada-san based on your graphic ideas and also checked the risk criteria of our credit division in Tokyo this week.
>
> However, I'm afraid that we are not in position to put our equity in your new company and it seems difficult to prepare our financial facilities for bran-new company without enough capital.
>
> We'd think that we had better consider other way of cooperation in case that you establish a new company by your own equity."

231. Mr Bosworth said in his eleventh witness statement:

> "140. Having shown interest, Muto then took the idea to compliance people inside Mitsui. By that point (though I can't remember precisely when) I had told Mitsui about the Freezing Order.
>
> 141. At that point, Muto told us Mitsui could not put equity into any trading company we set up. At the time, I thought Mitsui's compliance people did not want Mitsui to put equity into a trading company that could not trade, because of the Freezing Order. This was part of a pattern throughout our dealings with Mitsui under the Freezing Order. We or Mitsui's business people would develop an idea. It would go up the chain to compliance people in Mitsui. The idea would be refused. I don't think this

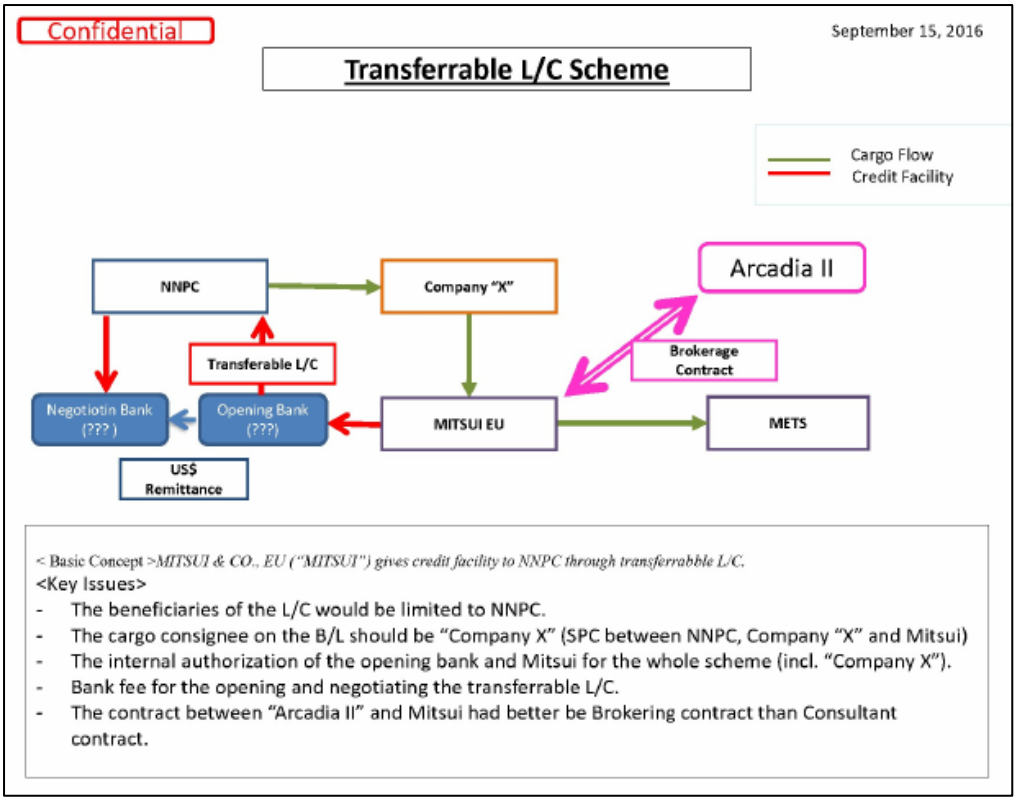
> was because of the proceedings. If it was, I'd expect compliance to have told Muto San and his management "you can't deal with Pete and Colin – full stop", and they would not have spent so much time talking with us. I think it was because the Freezing Order ruled out proposals that could have worked for Mitsui, and forced us to make proposals that did not work for Mitsui. So each proposal got rejected, even though working with us was never off the table."

232. Mr Hurley said in his seventh witness statement: *"Muto did not provide the specific reason that the proposal did not work in the email. I do not recall them doing so at the time either, and my experience was that they would never do so."*

233. It was put to Mr Bosworth that the Freezing Order was not the reason why this particular proposal did not work out; the real reason was that Mitsui did not want to take on the credit risk. He responded that Mitsui were saying they would not want to put money into a company without enough capital. Given his and Mr Hurley's position at the time, they had very little capital. Asked why Mr Muto did not mention the Freezing Order if it was a problem, Mr Bosworth said Mr Muto would not – like most people – discuss a freezing order on this type of exchange, perhaps for fear of being drawn into a legal problem, and there was no particular reason for them to be specific about why they were unwilling to proceed. The Freezing Order would ultimately have been discussed explicitly if and when there was a specific commercial deal on the table. I find that evidence entirely plausible. Mr Bosworth and Mr Hurley were longstanding contacts of Mitsui, and it seems very possible that explicit reference to the Freezing Order and its potential reputational implications for Mitsui would have jarred in the context of the tone of the correspondence between Mr Bosworth and Mitsui.

(c) Brokerage scheme (September 2016)

234. On 15 September 2016, Mitsui suggested a brokerage arrangement between Mitsui and a new company to be owned and run by Mr Bosworth and Mr Hurley, referred to as "Arcadia II". Mr Muto wrote to Mr Bosworth and Mr Hurley: *"Thank you for sparing time for the meeting on Monday. Regarding the Okano crude scheme which we discussed, I revised the scheme diagram as per attachment. Your confirmation to the diagram would be appreciated. According our corporate divisions, the brokerage contract is much easier to conclude than the consultant contract for us."*



235. Mr Bosworth explained in his eleventh witness statement: *"The idea would have been that we'd bring opportunities to Mitsui, and in return, Mitsui gave us a cut of those opportunities, probably a commission or some other fee. I thought this might survive the Freezing Order, because Colin and I wouldn't directly be dealing with cargoes ourselves."* (§ 142)

236. However, on 25 September 2016, Mitsui raised a problem. Mr Muto wrote to Mr Bosworth:

> "I apologize for not getting back to you earlier. I discussed with Yamada-san, our trading teams and corporate divisions.
>
> 1. Okono
>
> I thought the status of "X company" and the price are key issues in the scheme. Yamada san thought you had nominated your own trading company, not "X company".

237. On 26 September 2016, Mr Bosworth sent a WhatsApp message to Mr Hurley*: "They will only work with our trading co which we don't have."* Mr Hurley replied: *"They know that Nigerian contract holder has to be local co. We can obviously say that issuing bank have B/l's therefore control cargo."*

238. Mr Bosworth says in his eleventh witness statement:

> "144. Unfortunately, after further discussion, it became clear that the arrangement would not be acceptable to Mitsui. I recall that this was in about late September 2016. I do not remember Mitsui

> telling us why they didn't want to enter into the agreement. Based on my experience and understanding of Mitsui, gained through working with them for many years, I understood at time that that was for two main reasons. Mitsui had a longstanding and trusted relationship with Colin and me, but they did not have such relationships with local partners, or want to deal with them directly. On top of that, Mitsui wanted Colin and me to have "skin in the game". This made brokerage impossible."

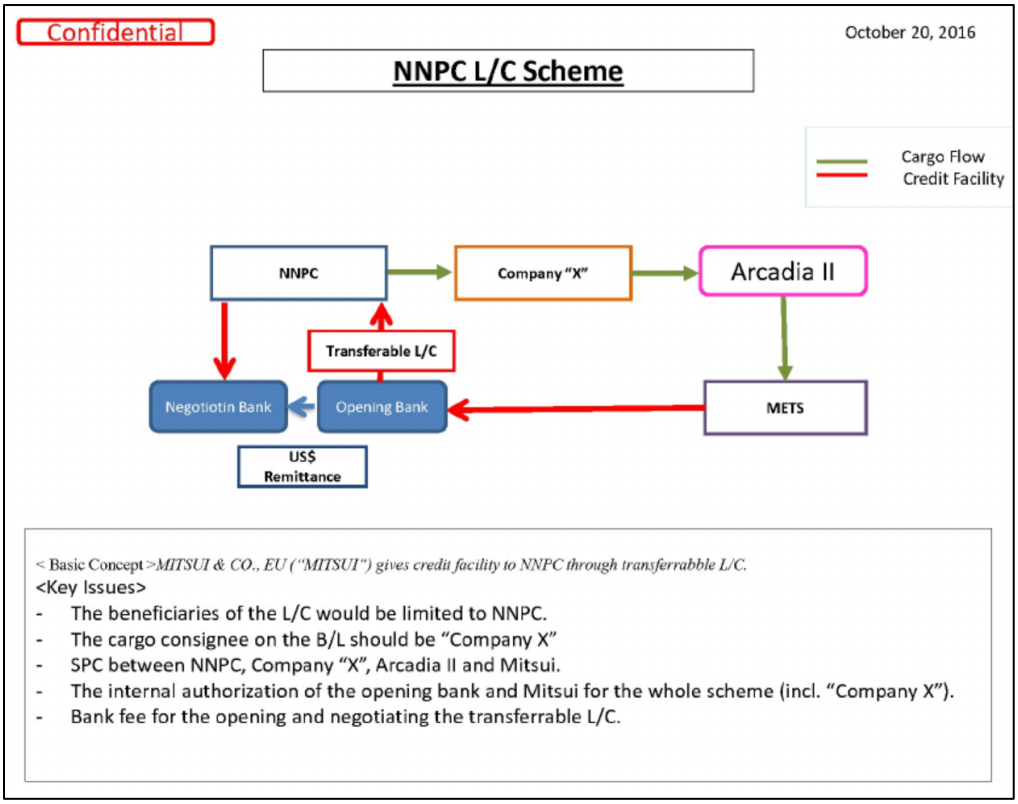
That seems to me a likely explanation.

(d) JV back-to-back scheme (October 2016)

239. The next scheme that Mr Bosworth and Mr Hurley discussed with Mitsui was a "back-to-back" joint venture scheme. Mr Bosworth said in his eleventh witness statement:

> "147. Mitsui continued to try and collaborate with us, despite it becoming clear that a brokerage arrangement was not possible. Shortly after that became clear, Muto San suggested a "back to back" scheme as an alternative.
>
> …
>
> 148. The idea was that we would own a company that purchased crude oil from a local bidding company and then sell it on to Mitsui."

240. On 20 October 2016, Mr Muto wrote to Mr Bosworth and Mr Hurley: *"Thank you for your sparing time for the telephone conference yesterday. Regarding Okano L/C scheme, I made the attached diagram as per telconv. Your confirmation would be appreciated."*



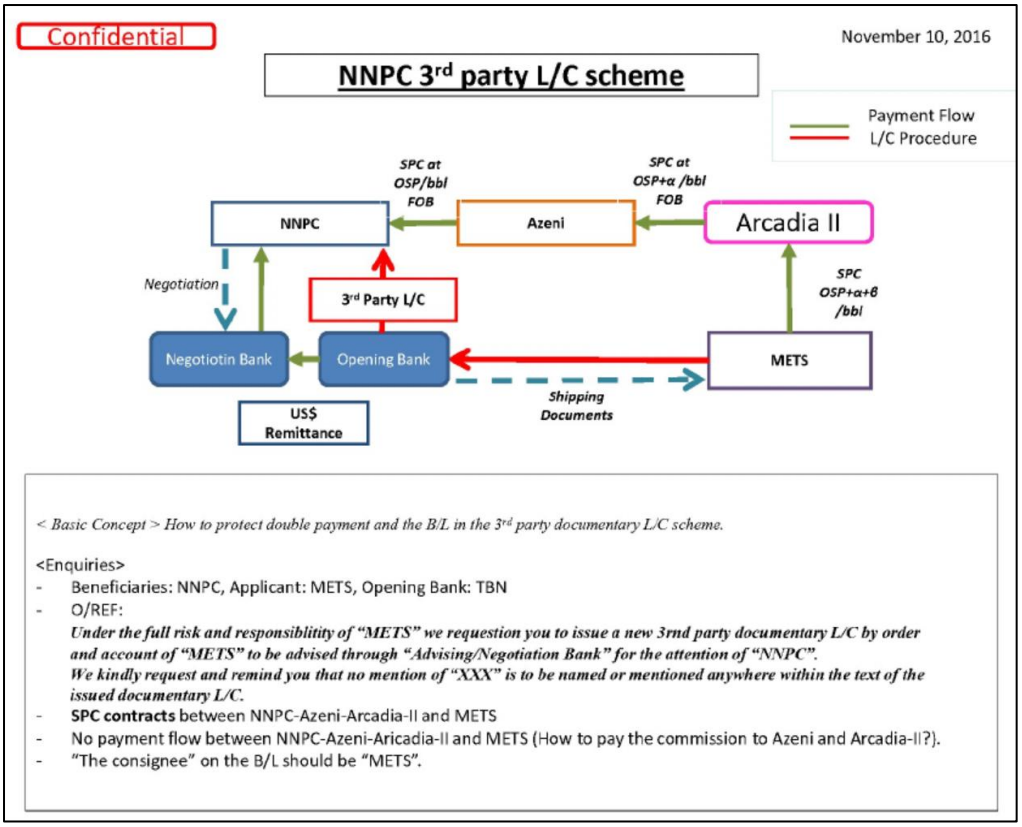
241. It was put to Mr Bosworth that Mitsui seemed to have no problem with dealing with Mr Bosworth and Mr Hurley whether as principal or as brokers. Mr Bosworth suggested that this was another example of the commercial division trying to find a commercially workable scheme prior to presenting it to the corporate section.

242. On 21 October 2016, Mitsui declined the proposal:

> "I talked with Yamada-san about your J/V idea for the NNPC Crude tender for 2017. Yamada-san fears he can't get internal approval for the J/V scheme with the new P+C [Pete + Colin] company at this moment. He added that the back to back scheme which you become the fronting company between "NNPC-Mitsui" and your intended buyer may be workable depends on the intended buyer."

243. It seems that Mitsui and Mr Bosworth and Mr Hurley continued to discuss a further version of this scheme. On 10 November 2016, Mr Muto wrote:

> "Dear colin-san,
>
> I apologize for not getting back to you earlier.
>
> Please refer to the attached diagram for the L/C scheme of NNPC crude tender this month. could you clarify the following enquiries from our corporate divisions? Their intention is just to protect double payment and the B/L in the L/C scheme."



244. Again Mitsui did not pursue the opportunity. On 27 November 2016, Mr Muto wrote to Mr Hurley (copying Mr Bosworth):

> "Dear colin-san,
>
> Thank you for your e-mail and attached documents and your call just now.
>
> 1. NNPC TDR (close 11/27)
>
> Although I noted your change of the scheme and checked your attachment, I'm afraid I don't think we would finish our all internal procedure which is required for the document submission to NNPC by the tender closing."

245. Mr Bosworth says in his eleventh witness statement:

> "151. Mitsui declined to pursue this opportunity. Again, they did not directly say why. However, at the time I thought it was because Mitsui did not want to deal directly with a local Nigerian partner, even in the framework of a joint venture agreement including an entity owned by Colin and me. At the time, I thought it was because Mitsui wanted us to have "skin in the game", and/or because they knew and trusted Colin and me, but didn't know or trust a local partner. I explain at paragraphs 90-91 of Bosworth 7 how Mitsui stopped Arcadia from trading directly with NNPC in around 2003, which caused Arcadia to establish a sleeving structure using Arcadia Mauritius

> [D2.1/1/27-28]. Had it not been for the freezing order, Mitsui would not have had to deal directly with the local partner.
>
> 152. Had Colin and I been able to trade oil through our own company, we would have been able to satisfy Mitsui's preference for a "back to back" scheme. Because of the Freezing Order, we could not."

In re-examination, Mr Bosworth candidly said that he did not remember exactly what Mr Muto had said about the reason why internal approval could be obtained for the JV idea (Day 3/57).

(e) Overall significance of the discussions with Mitsui

246. The Claimants submit that Mr Bosworth's and Mr Hurley's discussions with Mitsui show that the Freezing Order did not prevent them from establishing the Oil Trading Business. Mitsui gave many commercial reasons why the different proposals could not work out, none of which were related to the Freezing Order. These exchanges show, the Claimants suggest, that Mitsui had no concerns at all about the ability of Mr Bosworth and Mr Hurley, while subject to the Freezing Order, to trade through a new company of their own. The Claimants also refer to the evidence in Mr Hurley's witness statement that Mitsui, being very conservative, would not have been having discussions with Mr Bosworth and Mr Hurley at all if they had had reputational concerns about the legal proceedings (Hurley seventh witness statement § 267).

247. The Claimants also submit that at no point in these discussions did Mr Bosworth and Mr Hurley raise the 2015 business plan or pitch a US$150 million investment from Mitsui. That speaks to a lack of intention of the part of Mr Bosworth and Mr Hurley, as well as a lack of commercial viability.

248. I do not accept those submissions. Mr Bosworth said in his eleventh witness statement:

> "154. As to why Mitsui kept on talking with us, despite the Freezing Order, I have a few ideas. First, we had made them a lot of money at Arcadia. So I think they were hopeful we would find a way to do it again. Second, we had a good relationship. The oil industry works on relationships. Sometimes they never pay off. Sometimes they pay off very well. But it makes sense to maintain those relationships, because you don't know which will and which won't. Mitsui may have wanted to keep a discussion open in the hope that the Freezing Order could be resolved. I strongly suspect this was part of their thinking."

I consider that to provide a plausible reason for the continuation of the discussions even against the background of the Freezing Order. As to the commercial element, Mr Bosworth said in cross-examination that he believed Mitsui indicated that they were not in the market for making a significant strategic investment in a new trading entity "*as Mitsui*", hence the discussion of a joint venture or brokerage arrangement instead. Mr Hurley suggested that Mitsui might have been a strategic partner if he and Mr Bosworth had been able to present a company to them, but the Freezing Order prevented that.

249. This was put to both Mr Bosworth and Mr Hurley in cross-examination. Mr Bosworth said:

> "Q. …So, you're suggesting that Mitsui could have been a strategic partner in the way described in the plan?
>
> A. I think that may well have been possible if we had a company that we could present to Mitsui. The problem with that is that we didn't have a company we could present to Mitsui because we were prevented from setting one up because of the freezing order that was in place from February 2015. We could not set up a company.
>
> Q. Right. So, just so I understand, you're saying it would have been a breach of the freezing order for you to set up a company?
>
> A. No, I'm saying it was pretty much impossible to do. If we did it without any approach to the court and to the claimants, as I understand it, that would be a breach. If, however, we were able to achieve that variation, then that would be needed to be notified to a bank, for example, in Switzerland. So if we were considering opening a company in Switzerland, you have to have an initial bank account, and to do that, you need to deposit a minimum I think it's of 100,000 Swiss francs. The problem here is that banks were trying to close accounts for both myself and, I understand, Mr Bosworth, and even those that were open were restricting access severely because of the freezing order that was in place and notified to them.
>
> Q. I just want to try and understand from you, Mr Hurley, what you are saying your understanding was about what the freezing order did and did not prohibit you from doing. Am I right to understand your evidence to say that your evidence is that you could not have set up a new company without an approach to the court without it being a breach?
>
> A. Well, I don't see how I otherwise could have done. You're limited in what you can spend in any particular month. That's part of the court order. To set a company up, I don't understand how that would be possibly achievable given the freezing order in place and the restrictions that were in place in Switzerland in particular. Because of the freezing order being in place, we could not create a company.
>
> …
>
> Q. I'm suggesting to you that you didn't suggest that to them, and the reason you didn't suggest that to them is you didn't think from a commercial perspective it was realistic that Mitsui would invest that amount of money in a new oil trading business?

> A. Well, we did the -- first thing is we would not have cleared the first hurdle at this stage in Mitsui, because the first question would be: what is the company that they're putting the money into? And we did not have a company for them to put the money into. So the first question: what's the company name? Who are the shareholders? Where is it incorporated? Can we have the initial incorporation documents? None of these things we could provide."

250. Viewing the evidence of the discussions with Mitsui as a whole, I consider that, even leaving aside reputational concerns, Mitsui were unwilling to co-operate with Mr Bosworth and Mr Hurley on an oil trading business unless they were able to set up and properly capitalise a trading entity that could transact with Mitsui. The Freezing Order prevented that from happening because it would have involved a substantial disposition of assets, subject to a proprietary worldwide freezing order, to which the Claimants would not have consented and for which the court would have been very unlikely to grant permission.

(11) Mocoh 2017-2020

251. Mocoh is an oil trading company owned by Mr Michael Hacking and his family. Mr Bosworth explained his relationship with Mr Hacking, and how he and Mr Hurley came to approach him, in his eleventh witness statement:

> "155. We could not make Arcadia 2 work with Mitsui, because the Freezing Order made it impossible for us to run our own entity. So we decided we should approach an existing small entity, and see whether we could make Arcadia 2 work through them. This was in about 2017.
>
> 156. The entity we approached was called Mocoh. Mocoh was a small company with decent – but not huge – credit lines. They had been in existence for 30-40 years, mainly trading in Africa, and trading both crude and products. They had a good reputation, a good track record, and good investments in African oil infrastructure (like storage tanks). When Marcus Green had been CEO of Arcadia, Arcadia and Mocoh had operated in South Africa together, and there was a close relationship between the two companies. Mocoh was owned by Michael Hacking. I've known Mike on and off for many decades. I respect what he's done, and I believe he respected what I do. Mike is also one of those gentlemen who has been very good to people who have been in a tough spot, and who will try to assist. That was relevant given our circumstances. Mike was also reasonably old even then, and there were always lots of rumours about him selling or being willing to sell Mocoh. I thought there was a good chance he would benefit from our help with the business. I also thought there was potential for us to take over fully, should the Freezing Order be lifted and if we found the right investor."

252. On 3 September 2017, Mr Hurley sent Mr Hacking an "Abbreviated Business Plan" dated August 2017, the stated purpose of which was *"to outline a proposal to work with [Mocoh] in order to further develop a crude oil trading operation, with Peter Bosworth and Colin Hurley being integrated into [Mocoh]."*

253. Mr Hurley said in his seventh witness statement:

> "90. I have been shown the business plan that we presented to Mocoh in September 2017 (PBCH0024505). It is an adapted version of the business plan we had presented to Tri-Ocean which I describe above. But there are a few important differences which I consider it worthwhile to explain.
>
> 91. The proposal to Mocoh was that Pete and I would be, in effect, a new division under Mocoh. But we could not be employees of the company making decisions, because that would then potentially mean there are volumes under our control, and we could not freely trade ourselves. So the proposal is to kind of push things under the Mocoh umbrella, and have us outside in the form of consultants.
>
> 92. The proposal reflects the conversations we had with Mike Hacking. He recognised the benefits that we could bring, and he was willing to pay us a lot of money to get those. But there was a question of how it could actually work. He had already said that because of the Mareva it was not going to work if we were sitting in for him, or going out to banks, or being the recognisable face of the company. So there were hurdles there to us being able to offer something meaningful. If someone is going to pay you lots of money, they want you to be able to work to the full extent of your ability and we were not able to do that because of the Mareva." (my emphasis)

254. The Claimants note that that business plan did not pitch an idea for Mocoh to help set up a new oil trading business, and suggest that there is no reason to believe that this would have been different in the counterfactual. This was put to Mr Bosworth in cross-examination:

> "57:24 Q. Because Mocoh wasn't really a credible candidate for making a big strategic investment?
>
> A. No, because for us to have an independent trading entity on our own under the Mareva, from a business perspective, it seemed to be -- started to hit insurmountable problems.
>
> Q. Well, we have already seen that you proposed precisely that to Mitsui.
>
> A. Yes, and as -- over time, you start to realise what the real implications are, and with Mitsui, because they were going to be

> doing potentially the financing, that would limit the -- potentially limit the difficulties associated with the Mareva."

I find it entirely realistic that, over time, Mr Bosworth and Mr Hurley would have realised how seriously constrained they were by the Freezing Order, and reined in their aspirations in terms of new business opportunities.

255. Mr Bosworth also indicated that the approach to Mocoh was flexible and the outcome depended on Mocoh's preference. Mr Bosworth says in his eleventh witness statement:

> "157. In late August 2017, we arranged to meet with Mike in Geneva. Mike had a good rapport with Colin, and I recall Colin took the lead in those discussions. I have been shown an email dated 3 September 2017, sent from Colin to Mike with me in copy [PBCH0024504], and its attachment, which is a revised version of the business plan for Arcadia 2 [PBCH0024505].
>
> 158. We were trying to gauge Mike's interest. If his response was positive, and depending on that response, we would have altered our proposal to fit what he wanted.
>
> 159. In the best case, we could have looked to take over Mocoh. Alternatively, we could have managed an existing Mocoh entity (or entities), using Mocoh's existing credit lines. Alternatively, we might have been able to act as consultants for Mocoh, generally or on a specific project.
>
> 160. Whether any of this would have worked under the Freezing Order I did not know. But using our own entity was a non-starter, so we had to explore alternatives.
>
> 161. The discussions we had with Mike in late 2017 did not lead to an agreement to work together, although he didn't rule it out altogether for the future. I don't recall Mike telling me why he wouldn't work with us. But I recall we were the first ones who told him about the Freezing Order. He was happy to talk to us at first. But after we told him about the Freezing Order, he did not want to work with us."

256. It is true that subsequently, on 23 May 2018, there was correspondence between Mr Bosworth/Mr Hurley and Mr Hacking about an agricultural project. Mr Hacking asked *"What happened to the edible oil imports",* and Mr Bosworth replied that the specific opportunity had been taken up by someone else but that *"[w]e are continuing to work on it"*. Mr Hacking replied, *"... sorry that it disappeared as I would like to get into edible veg oil."* This exchange could be regarded as indicating that Mr Hacking remained interested in working with Mr Bosworth and Mr Hurley. However, little is known about the edible oil idea, and Mr Bosworth said in cross-examination that it did not indicate that Mr Hacking was willing to work with Mr Bosworth/Mr Hurley as principals. I do not consider this brief exchange enables any firm conclusion to be drawn about Mr Hacking's approach to the Freezing Order.

257. On 13 July 2018, Mr Bosworth and Mr Hurley proposed a second transaction: the purchase by Mocoh of a cargo of gasoil from Saudi Crown for onward sale to the Republic of Sudan, to be financed with a letter of credit issued by Afreximbank. Mr Bosworth wrote to Mr Hacking:

> "I have been invited to Khartoum with our Saudi partners (Saudi Crown Holdings chaired by HRH Prince Fahad bin Turk bin Faisal bin Turki bin Abdulaziz Al-Saud) to discuss commercial terms of any possible agreement. Following this trip there will be a further meeting with the bank, which will be attended by Colin. I believe it is important, at this stage to discuss and agree commercial terms with you for the use of Mocoh's name for the sales and possibly for the purchase."

258. It then appears from a series of emails between Mr Hurley and Franz Swanepoel (one of the managers in the arrangement) that Mr Hurley was provided with Mocoh letter head paper, and prepared a letter that was sent from Mocoh to Afreximbank on 31 October 2018. Mr Bosworth, who was copied in to the message, accepted in cross-examination that it seemed Mocoh were happy for Mr Hurley to be speaking, on behalf of Mocoh, to the other parties in the transaction about Mocoh's involvement, undeterred by the Freezing Order. That was, however, as Mr Bosworth pointed out, very different from engaging with Mr Bosworth/Mr Hurley as principals and they would not have been party to any agreement reached.

259. Eighteen months later, on 27 May 2020, Mr Hurley sent Mr Hacking a "Discussion Document" titled "Mocoh/PBCH Cooperation" (the acronym "*PBCH*" referring to Mr Bosworth and Mr Hurley). It said:

> "Introduction
>
> Following recent discussions/meetings several projects/transactions in the energy sector have either been identified by PBCH or have been presented to us for our consideration.
>
> Our analysis suggests that certain opportunities would appear to have been highly profitable. At present these transactions are no longer viable or accessible to PBCH and are not therefore given further specific reference.
>
> A hurdle to overcome to progress, in certain cases, was the inability to propose a suitable and readily available vehicle in which to book the transaction. PBCH do have access to a Lebanese vehicle, EPIQ Trading, for this purpose but for various reasons this entity has not proven to be appropriate for the underlying transaction or project proposed.
>
> …
>
> Summary

> PBCH believe that given an appropriate vehicle with which to operate we will be able to identify profitable transactions and operate a successful company on a stand-alone basis.
>
> The essential requirement to avoid any reputational risk issues is fully understood and capable of being managed.
>
> Fee arrangements can be flexible and there will not be any initial ownership participation by PBCH in any identified vehicle."
>
> (my emphasis)

260. Mr Hurley says in his seventh witness statement:

> "93. My recollection is that we continued to discuss various opportunities with Mike Hacking over the following months and years. I have now been shown a document that I prepared for Mike Hacking as a discussion document in May 2020 (INQD1D20003585). We were trying to find a way of working within the rules of the Mareva. We had been talking to Mike, and he had said that we could not come into his company but that he liked some of the things that we had been talking about.
>
> 94. In the document, because Mike was somebody that was obviously interested in working with us, we tried to set out a workable solution to the restrictions of the Mareva. We proposed a solution where we were not going to have any ownership in the company, and where transactions could only happen with the necessary approvals (which would be Mike or someone at Mocoh I suspect). I do not recall the proposal going anywhere, or whether there were further discussions after this. But I think we had sort of beat it to death trying to make it work with Mocoh. Mike was in principle keen to work with us, but in the end it was clear that we were not going to find a way that was acceptable to him and that worked under the Mareva and things petered out."

261. Mr Bosworth was asked about this in cross-examination:

> "Q. What were the reasons that EPIQ were not appropriate?
>
> A. I assume that -- I mean, EPIQ is a small -- a small clean up company. It did have an entity called EPIQ Trading. It didn't have a long history and so it didn't work because it didn't have the wherewithal to be a principal within it -- within such transactions." (Day 2/66)

262. The Claimants say there is nothing to suggest that the project did not go ahead because of the Freezing Order, and that the above answer supports that view, as well as the statement in the Discussion Document quoted above that *"[t]he essential requirement to avoid any reputational risk issues"* was *"fully understood and capable of being managed"*. The Claimants suggest that the Freezing Order did not prevent Mr

Bosworth and Mr Hurley from owning or operating their own company, nor can they have thought that it did. I do not, however, consider that the Discussion Document or Mr Bosworth's evidence support that view. It is clear from the document that Mr Bosworth and Mr Hurley did not consider that they were permitted to have an equity stake in a transacting company, and were seeking other ways of being involved in business. Still less does the document support any suggestion that Mr Bosworth/Mr Hurley would have been, or would have regarded themselves as being, able to set up a company with the amount of capital needed to engage in oil trading: in my view, the Freezing Order did not permit that. Insofar as the document refers to reputational risks being managed, that was Mr Bosworth/Mr Hurley's assertion as part of a 'pitch' for business, and cannot be assumed to reflect Mocoh's view.

(12) Sahara Group 2018-2021

263. Sahara Group is a Nigerian oil trading group conducting international (albeit Nigeria-centric) trading. Mr Bosworth and Mr Hurley's contacts in the Sahara Group in this period were Mr Tope Shonubi and Mr Valery Guillebon.

264. Mr Bosworth's evidence is that he pitched a joint venture to Mr Shonubi in 2018, which was refused as a result of the Freezing Order, so a consultancy or brokerage arrangement was considered instead:

> "165. In 2018, I went to see Tope in his office in Geneva. I pitched to him the idea of a JV between a company operated by Colin and me, and Sahara. As I recall, and due to the Freezing Order, Colin and I would have acted as a consultant or broker. The idea would have been similar to that discussed with Mitsui at paragraphs 142 to 144 above. I thought we could have been a significant benefit to Sahara: they had a strong business in Nigeria, but we could have grown that business internationally.
>
> 166. Tope knew about the case before we met. However when we met I told him about the Freezing Order. He didn't know about it before then.
>
> 167. Later, I think by phone or in person, Tope told me that he had taken my proposal to the rest of the Sahara board. If the case itself had been a problem, he would not have done that. Tope told me that the board considered my proposal, but declined to proceed because the Freezing Order created too much legal risk and uncertainty.
>
> 168. After that, I met with Tope or other Sahara personnel on at least three or four occasions. We talked about different opportunities (such as bunkering and certain projects in North Sudan and Gabon), and offered our services as consultants, but we didn't reach an agreement with Sahara."

The Mitsui discussion referred to in §§ 142-144 of Mr Bosworth's witness statement, cited in quoted § 165 above, was about Mr Bosworth/Mr Hurley acting as consultants

or brokers on the basis that Mitsui would not enter into a JV or co-invest with Mr Bosworth/Mr Hurley.

265. A meeting took place on 18 September 2019, i.e. the year after the timeframe Mr Bosworth refers to in the evidence quoted above. Afterwards, Mr Bosworth sent a *"recap of our meeting"* to Mr Guillebon:

> "Gabon: as I explained our partner is departing for Gabon tomorrow, once he has returned, I suggest we meet again to agree the way forward.
>
> Consultancy: Colin and I are open to working with you on any corporate or trading areas you think might bring a mutual benefit.
>
> LNG bunkering: we are looking for investors in ordering and building LNG bunkering barges. We are in discussions with bunkering companies with a view to getting a term time charter to finance the purchase."

On 19 September 2019, Mr Guillebon replied: *"Thanks for your email It was great meeting you yesterday with Tope. We are def interested in Sudan and Gabon, as said during the meeting. Reg LNG Bunkering, that's def an area we could have an interest too. I will revert to you on that."*

266. In cross-examination, Mr Bosworth accepts that there were no emails or messages relating to Sahara in 2018, and he did not recall whether or not he reported to Mr Hurley on his 2018 pitch to Mr Shonubi. Mr Hurley's witness statement did not refer to any contact with Sahara in 2018. Mr Bosworth also gave this evidence:

> "Q. Just to be clear, what you say in 165 is that what you pitched to Mr Shonubi, and what you say Mr Shonubi later turned down, was that you and Mr Hurley would have acted as a consultant or broker, and it would have been similar to that discussed with Mitsui, which was also a consultancy and brokerage arrangement?
>
> A. The way I read it, I pitched to him the idea of a JV company operated by Colin and I and Sahara." (Day 2/74)
>
> …
>
> "Q. Your recollection of this is not correct, Mr Bosworth. There was no meeting with Mr Shonubi in 2018, and Mr Shonubi never told you that the freezing order created so much risk and uncertainty that they wouldn't do business with you?
>
> A. Yes, I did meet with Tope. I met with him, I believe, more than once. The first meeting I'm pretty sure Valéry Guillebon, his CEO in Geneva, was there. Yes, I did meet with him, yes, we did discuss the case, yes, we did discuss potential business

> opportunities and he did come back to me at a certain point in time and say: we can't work in that way together.
>
> …
>
> Now, if Sahara's board had in 2018 already rejected your proposal for consultancy and brokerage because the freezing injunction created too much risk, it's not likely, is it, that you would have been having this discussion with Mr Guillebon and Mr Shonubi about these opportunities, including consultancy?
>
> A. I don't believe that the board's decision was to do with consultancy, it was to do with the JV entity and us working with them, either as an employee or within the group. I don't recall it being no to a consultancy. That's much easier for them. If there was a problem it would be our problem, because we were purely consultants, not a principal in the business. They would be contracting with the other parties and paying us a fee. That's it." (Day 2/77-78)

267. Later still, on 28 May 2021, Mr Bosworth shared a business plan with Mr Shonubi. This was different to the 2014/2015 business plan. The purpose was *"to outline a proposal to work with an existing entity in order to further develop a crude oil trading operation, with Peter Bosworth and Colin Hurley being integrated in to the existing entity. The objective is to expand and diversify the crude oil trading activity to include identification and operation of appropriate energy related assets."*

268. As Mr Hurley explains in his seventh witness statement:

> "100. The main point of difference from the earlier plans was that the Sahara plan suggested that we would be assisting Sahara's existing trading business on a consultancy business, not setting up and financing a separate entity like in the Tri-Ocean plan. The reason for that change of approach is the Mareva. We realised 6 years into the Mareva that it is not something that was going away quickly. So we realised that for something to progress meaningfully we had to assume that the Mareva would be there for the foreseeable. The plan had been scaled back because of that."

269. Mr Bosworth said in cross-examination:

> "Q. I suggest to you if it were true that the Sahara board had said what you say it said in 2018, you would not be going back to them in 2021 pitching another consultancy proposal?
>
> A. They said no, to my recollection, to us being a principal in the business. Consultancy and brokerage is for the other party we would be working with means we were isolated, the freezing order was just on us, we were not acting as a principal within it

> and therefore it would be our problem, not Sahara's or in Mitsui's case theirs.
>
> Q. And at no point did you ask Sahara whether they would make a strategic investment in any company in your name?
>
> A. No, I didn't." (Day 2/78)

270. It is not possible to be sure whether there was a discussion in 2018 of the kind Mr Bosworth recollected in § 165 of his witness statement. The absence of any available contemporary record suggests that the discussion may in fact have happened in 2019. Mr Bosworth's oral evidence was not consistent with the statement in § 165 that the rejected proposal was one of consultancy, as distinct from a joint venture. I consider it more likely, and consistent with the documents, that Mr Shonubi had not been interested in discussing a joint venture, and so the discussion turned, from the end of the 18 September 2019 meeting onwards, to the possibility of consultancy. To that extent, I believe Mr Bosworth's evidence was confused, but I do not regard any such confusion as undermining his evidence that it was awareness of the Freezing Order that led Mr Shonubi to reject the idea of discussing a joint venture.

(13) Sberbank 2018

271. In 2018, Mr Bosworth and Mr Hurley created a "Business Presentation" for Sberbank, dated January 2018. Sberbank is a Russian bank that was involved in metals trading.

272. The presentation was similar to the 2014/15 business plan, although it did not include financial projections. The purpose of the presentation was:

> "…to outline a proposal to develop an independent trading entity with two initial business streams namely
>
> 1. Crude oil and petroleum products
>
> 2. Vegetable Oils
>
> The entity will be run by Peter Bosworth and Colin Hurley (personal profiles are included at the end of this presentation) and will seek to develop working relationships with existing trading entities and/or investors in order to add value throughout transaction cycles."

273. Mr Hurley says in his seventh witness statement:

> "96. […] The concept for the business was similar to what we had proposed before in other business plans, though we chose to include in this plan an opportunity involving the delivery of palm oil into Nigeria. Ultimately, the opportunity did not progress."

Mr Bosworth says:

> "163. I recall that another potential investor we approached was Sberbank. Colin brought this opportunity, and took the lead with it. I do not recall many details of this opportunity."

274. It is not clear that Mr Bosworth and Mr Hurley intended to be principals in this plan. Mr Hurley said in cross-examination:

> "Q. So this was another proposal, wasn't it, that contemplated the setting up of a new trading entity with you and Mr Bosworth involved in the running of it?
>
> A. To some degree, we would be involved in the running of it, if it was established. They already had a model for a metals trading company, so it could well have been in a similar model that the oil trading business could have worked with them. So it was possible. It didn't work.
>
> …
>
> Q. What was your ask of Sberbank in this plan?
>
> A. That this would be the basis for Sberbank to have a new entity. As I say, they had the model for the metals trading company, which was -- I don't know whether it was a subsidiary or a standalone, but it had Sberbank as the financing entity for the trading company. And I think I met with the head of the metals trading side and he said that it's possible that there could be an oil division that ran alongside the metals division under whatever structure Sberbank would have, but I don't think this is the same format that we were initially looking at. We would not be here as principal now."
>
> (Day 3/89-90, my emphasis)

275. Mr Bosworth and Mr Hurley were not here putting forward a proposal to establish a trading company. However, given their by now clear realisation of the restrictions under which the Freezing Order placed them, that fact provides no reason to doubt that they would have sought to establish a trading company had the Freezing Order not existed.

(14) Lekoil 2020

276. On 23 January 2020, Mr Hurley sent Mr Bosworth a business proposal for Lekoil. Lekoil were local Nigerian oil producers. Mr Bosworth and Mr Hurley's contact in Lekoil in this period was Mr Ebele Ogbue.

277. Mr Bosworth's evidence is that he and Mr Hurley were approached by Mr Ogbue in January 2020 to see if they could assist Lekoil:

> "172. One suggestion I had was to help Lekoil set up its own marketing department. Another, would be to have a formal joint venture, in which we would act as consultants or brokers.

> Finally, I considered the possibility of buying crude oil directly from Lekoil. This was obviously impossible under the Freezing Order. However, had the Freezing Order been lifted (as I hoped throughout the proceedings), this would have been the best way for us to get involved.
>
> 173. I recall that Colin turned these suggestions into a business proposal, and then sent the proposal to Ebele. Later in 2020, I recall we met with Ebele on more than one occasion, including at the Rembrandt hotel opposite the V&A. In those discussions, Ebele was very interested. However the opportunity did not progress further."

278. Mr Hurley said in his seventh witness statement:

> "103. They were looking for us to purchase crude directly from them, or to form a joint venture with them. In particular, they wanted us to lift crude, but we were in no position to do so because of the Mareva. So they moved on, which is what I would have done if I were them. It is simple. We were saying how good we were, but then we could not purchase a simple cargo of crude and sell it. So we were significantly disadvantaged; and it undermined our credibility, and put us way down the pecking order compared to other people who were not under a Mareva and who could offer more than us."

279. The "Lekoil Proposal" was as follows:

> "Our proposal would entail working alongside existing lekoil staff to assist the company in achieving predetermined objectives. In addition to working on the efficient crude oil trading and marketing with lekoil we can additionally assist in establishing/developing essential support services to the trading function. This is intended as an introduction only and we would welcome the opportunity to discuss further and remain at your disposal."

280. Three avenues for collaboration were outlined:

> "1) We support Lekoil in setting up and operating it's own marketing department, whereby Lekoil sell it's own crude oil on the spot or term market.
>
> 2) We have a formal Joint venture to sell/market Lekoil's equity, thus allowing them to gradually be exposed to the complexities of crude oil marketing.
>
> 3) We purchase the crude oil directly from Lekoil and trade it in the market, either on a spot or term basis."

281. Mr Bosworth was asked about this in cross-examination:

> "Q. So you were proposing that you would buy as principal and I suggest if, in your mind, this was obviously impossible under the freezing order, this isn't something you would have been proposing.
>
> A. I remember the wording I used because I put up those three things -- you will see it -- as in the order of probabilities. I repeat that at all times, there was always a chance that we -- this situation would be resolved. And also I think on the other document -- there is another document, I think, where I refer to "Pete and Colin". I think reasonably ambiguous as to whether it was for us to buy, because I just put "Pete and Colin", or for us to bring in a third party to buy the oil from them.
>
> Q. Well, you're -- I suggest what you're suggesting in this document is that you will be purchasing the crude oil directly from Lekoil and trade it in the market, and you would not be suggesting that if you thought that was prohibited by this freezing injunction.
>
> A. We're in a situation where we are trying to get business -- firstly, our financial situation was pretty terminal at the time -- and to try to see if they would go for the latter. Then we would have to try and find a way, if that's possible, or introduce somebody else.
>
> Q. But to be clear, what I'm asking you is about what you thought was permitted or not permitted under the freezing order, and you thought that purchasing the crude oil directly from Lekoil is something that you could properly propose.
>
> A. I did propose it. Whether I thought it would actually happen is a very different story. I didn't think that would be possible for us to have a company that could buy under the freezing order, which is why, on the other document, I'm somewhat more ambiguous about whether it was us or us introducing a third party."

282. Mr Hurley said in cross-examination:

> "92: 3 So you are proposing to them, aren't you, that you will be in a position to trade as principals with them?
>
> A. We're not saying here which entity would be used because I don't know what entity would be used. We haven't presented a company to them, as far as I can tell from this, but it may be that we can propose a company.
>
> Q. Right.

> A. But we don't have one. We don't have one to use, so we would not be able to achieve (3).
>
> Q. But, again, you would not be proposing to Lekoil that you should purchase crude oil directly from them if you thought in some way the freezing order was an insurmountable obstacle to that going ahead.
>
> A. It would not be possible for us with an entity owned by us (1) because we did not have the entity and (2) because we would not be able to finance that entity because of the freezing order in place. What we may be able to do is nominate a company that would be able to do that. It would not be with us as principal.
>
> Q. And Lekoil was not one of the people you asked for any kind of strategic investment.
>
> A. I don't think they were in a position for a strategic investment, no.
>
> Q. Yes. They were a relatively small Nigerian company.
>
> A. I don't know what size the company is, to be honest."

283. In my view, these dealings, conducted at a time when Mr Bosworth's and Mr Hurley's financial situation was (in Mr Bosworth' words) "*pretty terminal*", do not establish either that they could trade as principals under the Freezing Order, nor that they believed they could, unless it were discharged or varied.

(15) Bonroy 2021

284. Bonroy is a Chinese-owned entity. Mr Bosworth was introduced to Bonroy through Mr Thomas Keller, a Swiss businessman with whom Mr Bosworth and Mr Hurley worked. Mr Bosworth explains that, around 2021, Mr Keller knew that Bonroy *"was interested in growing his business into physical oil trading with a West African focus. Thomas spoke with me and asked if Colin and I would be interested in creating a suitable business plan."*

285. On 3 February 2021, Mr Hurley sent the 2015 plan to Mr Bosworth saying, *"This is what we prepared some time ago. I would be inclined to make the submission to Bonroy look a bit more like this."*

286. On 4 February 2021, Mr Hurley circulated a revised business plan to Mr Bosworth, Mr Keller and an ex-employee of Arcadia, Mr Jan Scheepers.

287. The plan, dated 4 February 2021, proposed in summary:

i) The overall purpose of the document was "*to serve as a discussion document for the establishment and development of a hydrocarbons trading entity in Geneva, Switzerland in conjunction with Bonroy Petchem Co Ltd ("Bonroy") and the proposers to be instated as the executive management of the company."* (my emphasis)

ii) Under "1.1 Introduction": *"The purpose is to establish a Swiss commodity trading entity with initial core experienced staff that can commence trading as soon as is practicable."*

iii) Under "1.4 Financing":

> "It is envisaged that the Swiss entity would operate its own trade finance facilities in order to extend and develop banking and trade relationships and enable accelerated business development. The parent company will be expected to provide a financing package by way of equity and subordinated loans or in part by guarantee acceptable to financing bank group. For initial trading activity envisaged within the first year of operation we would expect a cash requirement of circa US $25,000,000. The financing package is primarily required to secure bank finance facilities and provide working capital." (my emphasis)

iv) Under "1.8 Conclusion": *"...Identify office space and commence trading operations April 2021."*

v) Under "2.2 Funding Requirements":

> "Initial financial support in the form of equity, subordinated loans of US$ 25,000,000 is anticipated, supplemented where possible by guarantees where appropriate. The cash requirement will be primarily to provide security to financing banks to providing trade finance facilities to the company. It is expected that the funds or guarantees will, over time, be capable of leverage on a basis of 10:1 to enable facilities of US$ 250,000,000 to be made available to the company. The prime purpose of the facilities is for letter of credit issuance for the purchase of physical cargoes on a secured and self-liquidating transactional basis. An element of the facilities will be required to support initial margin calls for exchange traded activity for hedge instruments and strategic paper trading activity related to physical markets."

vi) Under "2.3 Equity Interest/Bonus Pool": *"To be agreed between [missing word] and senior management."*

288. Mr Hurley said in his seventh witness statement that he and Mr Bosworth had scaled the cash requirement down to US$ 25 million, from the US$150 million contemplated in the 2015 business plan, in order to get something in place, hoping to scale it up subsequently. Mr Bosworth said the amount reflected what he understood Bonroy would be willing to provide. Asked why they were proposing a strategic investment by Bonroy when they had not sought one from Mitsui, Mocoh or Sahara, Mr Bosworth said "[t]*hat's what* [Mr Keller] *led me or led us to believe was the best way to propose to them*".

289. On 8 February 2021, Mr Keller forwarded an email to Mr Bosworth with the following message from Bonroy: *"Thank you for your business plan, unfortunately Bonroy is not*

looking for this at the moment as we are looking to just have a stream of supply. However, appreciate all your efforts and we can revisit in the future if we can see a possibility of building a relationship." Mr Keller expanded on this (it seems having spoken with Bonroy further), stating *"they are not ready to set up a new structure, they just want to cover some shorts in Crude and Lng/Lpg at this stage, and if we show them opportunities the question is what happens next ... unless you have another idea?"*

290. Mr Bosworth said in his seventh witness statement:

> "178. Colin prepared a business plan for Bonroy to help get the discussion going. As I recall, Thomas sent it to Bonroy. The idea looked very promising and my impression (based on what Thomas told me and Bonroy's continuing engagement) was that Vijay and Bonroy were very interested. But then the proposal went into Bonroy's internal bureaucracy and was rejected. I remember calling Thomas to discuss. Thomas said Bonroy had not been willing to divulge why they did not pursue our plan. This was a significant change in direction from the initial enthusiasm and the strong commercial prospects. I remember that I told Bonroy about the Freezing Order and the case, though I can't recall whether I told them directly, or whether I told them through Thomas. At the time I thought it likely that the Freezing Order was one of (if not the) main reasons why they did not pursue our plan."

Mr Bosworth accepted in cross-examination that there was no contemporaneous record indicating that the Freezing Order was the real reason why Bonroy did not wish to pursue the proposal.

291. The Claimants pressed Mr Bosworth and Mr Hurley on the question of why they would have pursued this proposal unless they had considered it possible under the Freezing Order. Mr Bosworth gave this evidence:

> "Q. Right. Again, I suggest you wouldn't have been putting this plan forward if -- and particularly you wouldn't have been putting forward with a suggestion that the company would commence trading operations in April 2021 if, in your mind, you thought this was all prohibited by the freezing injunction.
>
> A. Yes, I did. Do I think it would have been – the freezing injunction may have prohibited some aspects of this proposal? Yes, I do.
>
> Q. So you thought it might have prohibited some aspects, but you put it to Bonroy anyway.
>
> A. Yes. We -- you go through various iterations. As I say, these documents are to get your foot in the door, to discuss, and if there is an interest, as we saw with the other people, that the investment side of it wasn't possible because of the Mareva and

> because of the case, and then you go to the next stage." (Day 2/89)

292. Mr Hurley said in cross-examination:

> "Q. So it looks as though in this plan you were looking for some form of investment. And just my question on this is: was there some reason why that request was made to Bonroy when, for example, you hadn't asked Mocoh or Lekoil? What was it about Bonroy that made you think they -- it was appropriate to ask them for this kind of investment?
>
> A. I think this is from the information that Mr Keller passed down that this is what they were looking to do. It's to establish their company in this instance. I haven't seen what the corporate structure looks like here, but I don't believe we're part of the equity ownership initially in any way. So this was in response to how I understood that Bonroy wanted to set the company up.
>
> …
>
> 95:15 So where appropriate, you were asking people, weren't you, to invest in a separate entity? We saw that in the Bonroy plan.
>
> A. But the Bonroy entity would not have had us as equity participants, as far as I'm aware. It would have been a Bonroy company. We would not have been principals to that. We may have been part of the management in some capacity.
>
> Q. Right. Well, I'm going to suggest to you that's wrong and the effect of the Bonroy plan is that you were looking to be -- have an equity interest in whatever entity was set up.
>
> A. If the freezing order was not in place, we would be looking for -- well, ideally to have an equity interest in whichever business we were working with, and potentially, what we could do with the Bonroy opportunity was agree with them that we may have an equity interest at some point in time in the future when the situation was back to normal and we were not subject to the freezing order.
>
> Q. Well, I mean, if we just look back at the Bonroy plan, (X3/1540/7), 2.3, "Equity Interest/Bonus Pool": "To be agreed between [Bonroy] and senior management." You were intending, weren't you, that you would have an equity interest in this entity?
>
> A. I think I answered that and said that we may not be able to have an equity interest initially, but it may well be that we could

> negotiate that in the future, if this was to work, we may have an equity interest in the future." (Day 3/94-95)

293. I accept that evidence. The Bonroy documents were consistent with any equity interest Mr Bosworth/Mr Hurley might obtain being left for later resolution. Further, it is credible in my view that Mr Bosworth/Mr Hurley would have continued to seek out opportunities, hoping that a structure might be found that would enable them to get back into business subject to any necessary variation of the Freezing Order being sought as and when a transaction was agreed in principle. In any event, Mr Bosworth/Mr Hurley's attitude to this proposal, and Bonroy's reaction to it, shed no real light on the key questions of (a) whether Mr Bosworth/Mr Hurley would and could have created their own oil trading business but for the Freezing Order and (b) whether the Freezing Order prevented that from occurring.

(16) ETG Commodities 2021

294. In May 2021, Mr Bosworth and Mr Hurley discussed a business idea with Ed Stokes, a head hunter who was in contact with the CEO of ETG Commodities, Ronald Jetten. Mr Bosworth and Mr Hurley were put in touch with Mr Stokes through Mr Keller.

295. On 5 May 2021, Mr Stokes wrote to Mr Keller: *"Thanks for the feedback. Ronald will definitely be interested in a business plan of this scale. We need to move swiftly though as the Search is at advanced stage where several business plans are under consideration."*

296. Also on 5 May 2021, Mr Bosworth wrote to Mr Hurley: *"ETG seem to be interested in receiving a business proposal from Thomas and us. I suggest we use the Bonroy biz plan and address it to [ETG]."*

297. On 6 May 2021, Mr Bosworth wrote to Mr Keller:

> "I have discussed with Pete and have attached an amended business plan based on that initially presented to Bonroy. If you could please review. I have deliberately removed the expense budget at this stage as I believe that the one included for Bonroy was exceptionally low. We potentially have an opportunity, if invited to do so, to present one in more detail and with realistic expectation of achieving."

298. On 6 May 2021, Mr Keller wrote to Mr Stokes: *"Given the short notice for the presentation of a business plan, please find attached a proposal that can be elaborated further one if there is an interest from Ronald."*

299. The business plan, dated 2 May 2021, accidentally retained references to "Bonroy" in some places.

300. Mr Hurley says in his seventh witness statement: *"I do not recall why the discussions with Bonroy and ETG failed to progress further."* Similarly, Mr Bosworth says in his eleventh witness statement: *"[u]nfortunately Thomas did not receive a response from Mr Stokes. I do not recall speaking to anyone at ETG myself, and I do not recall their giving a reason why they did not pursue the business plan."*

301. The Claimants suggested to Mr Bosworth in cross-examination that the Freezing Order was not the reason why the ETG plan did not go ahead. However, he was unable to say, and I do not consider it possible to draw any conclusion one way or the other.

(17) Conclusions so far

302. In overview, Mr Bosworth's and Mr Hurley's evidence is that they wished to set up an oil trading business (Arcadia 2), and produced business plans to that end; that between 2015 and 2021, they had discussions with numerous potential counterparties, including Mitsui, Mocoh, the Sahara Group, Sberbank, Lekoil, Bonroy and ETG Commodities; and that none were successful as a result of the Freezing Order. As time went on, they say they adjusted their expectations accordingly as their hopes and finances dwindled under the pressure of the Freezing Order.

303. I find that Mr Bosworth and Mr Hurley did seek to set up Arcadia 2, and would also have sought to do so if the Freezing Order had not existed. I have accepted their evidence to that effect in section (H)(1) above, which is borne out by the existence and contents of the business plans, and Mr Bosworth's and Mr Hurley's efforts described in this section (H) as a whole to implement the plan to the extent possible given the difficulties caused by the Freezing Order. Further, I have concluded in section (H)(7) above that it is realistic to conclude that Mr Bosworth and Mr Hurley would have been able, between them, to raise US$ 25 million of equity to contribute to Arcadia 2.

304. As to the effect of the Freezing Order on his and Mr Bosworth's expectations, Mr Hurley said in his seventh witness statement:

> "21. But after the Mareva was put in place, it became obvious that we could not set up and direct the activities of an oil trading business while complying with the restrictions that the Mareva imposed.
>
> 22. As I will describe, we did try to explore ways of doing the oil trading business anyway…
>
> …
>
> 25. So as I say, the things we tried failed, and over time the expectation level diminished hugely. The more we looked and tried to come up with something, the more it proved to us that it just was not possible to pursue the opportunities while the Mareva was in place. Obviously, people do not generally look you in the eye and say something like "I am not going to deal with you because you have a Mareva in place". That is not something that generally happens in the real world. People deal with these things delicately. But in our experience it seemed like that was always the fatal obstacle to us getting the business off the ground in any shape or form."

305. Mr Bosworth says in his eleventh witness statement:

> "50. During the Freezing Order, we created different versions of the Arcadia 2 business plan. The financing we were seeking in those plans became less ambitious over time, because we were trying to "get our foot in the door" in the face of difficulties created by the Freezing Order. Without the Freezing Order, we would not have needed to scale back the business plans in this way. But the scaled-back versions were viable too, and we could have got Arcadia 2 off the ground with a small amount of financing."

306. Mr Bosworth and Mr Hurley have been candid about the fact that none of their contacts at Mitsui, Mocoh, or any of the other organisations that they contacted, expressly told them that the issue was the Freezing Order. For example, Mr Bosworth gave this evidence in cross-examination:

> "107:20 So what I said is looking at the various people you approached, it's right that when you told them about the freezing order, no one ever raised that as a problem for doing any kind of business with you.
>
> A. At the time -- well, we'll come on to Ian Taylor, but yes, he said it was a problem in terms of my employment there. The others were willing still to continue to discuss with us until a certain point when unfortunately they weren't.
>
> Q. Right, but, again, even when they weren't, they were not raising with you or not saying to you that the reason they weren't was because of the freezing order.
>
> A. They weren't specific about it in that sense. No, they weren't.
>
> Q. Right. Since the freezing order and Mareva was discharged, have you prepared any further business plans?
>
> A. No, I have not.
>
> Q. Not of any kind?
>
> A. In terms of an oil trading business, no, I have not, no, because we don't know the outcome of this and we will have to wait for the outcome to decide what form the new entity will take.
>
> Q. But you've been -- the freezing order was obviously discharged in January of last year.
>
> A. Yes, but if I may, we -- when this started, Colin and were looking for the last move in our career. We are still looking to do that. Right now and since the order has been discharged, I don't have any money to put into a new entity. Only if we do, then we will do." (Day 2/107-108)

307. The Claimants submit that the proposals to Mocoh, Sberbank and Sahara Group were not investment propositions, and there is no basis on which to conclude that, in the counterfactual, any of Mitsui, Bonroy or ETG would have been candidates to provide a $150 million strategic investment in a new oil trading business established by Mr Bosworth and Mr Hurley. Further and in any event, there is no evidence that the Freezing Order made any difference at all to the outcome of the discussions that actually took place, and there is no reason to believe it would have been different in the counterfactual. The Claimants say that the Freezing Order did not prevent Mr Bosworth and Mr Hurley from owning or operating their own company, and they cannot have thought that it did, because they made proposals to set up their own oil trading company to Mitsui in 2016, to Sberbank in 2018 and to Bonroy and ETG in 2021.

308. I do not accept those submissions. The evidence considered in section (H)(10) above indicates that the problem with the Mitsui discussions was Mr Bosworth and Mr Hurley's inability to set up and capitalise an entity with whom Mitsui could transact. They considered the Freezing Order to prevent that, and in my view they were right. With Mocoh, Mr Bosworth/Mr Hurley were not pitching an oil trading business, at least as the initial arrangements, but instead hoping to create a new division of Mocoh, because using their own entity was regarded as a "non-starter". Equally, with Sberbank the idea was not to act as principals but merely to be involved in the running of a new trading entity. With Bonroy, the proposal left open what, if any, equity stake Mr Bosworth/Mr Hurley might obtain, so it was certainly not a proposal to set up Mr Bosworth/Mr Hurley's own oil company. The same applies to ETG. Equally, since that was not the proposal made to any of those companies, the discussions provide no basis on which to conclude that they would not have been potential investors in the very different counterfactual circumstances where there was no Freezing Order and Mr Bosworth/Mr Hurley were seeking strategic investment in an oil trading company that Mr Bosworth/Mr Hurley were themselves going to capitalise to the tune of US$ 25 million. Further, the discussions do not show that Mr Bosworth/Mr Hurley considered themselves free to set up an oil trading company. To the contrary, the rather different ideas put forward to these various third parties illustrate the point that that was what Mr Bosworth and Mr Hurley justifiably considered themselves unable to do in the circumstances in which they found themselves.

309. As to whether Mr Bosworth and Mr Hurley would have succeeded in establishing Arcadia 2 and, if so, how it would have fared, I consider this in section (O) below with the benefit of the oil trading expert evidence.

(I) CESSATION OF ATTOCK DUBAI BUSINESS

310. The first main head of loss claimed by Mr Kelbrick is for losses arising out of the destruction of his oil trading business, Attock Dubai. Mr Kelbrick's pleaded case is that the Freezing Order caused and/or was an effective cause of:

i) Attock Dubai being unable to procure any lifting nominations after around April 2015;

ii) Attock Dubai being unable to finance its business (including through obtaining the necessary credit lines) in 2015; and

iii) Attock Dubai ceasing trading in 2015.

(1) Nominations received from NNPC after the Freezing Order

311. Following the imposition of the Freezing Order on 12 February 2015, Attock Dubai received three oil lifting nominations and cargo deliveries (one of which was split into two parcels). These cargo deliveries in April, May, and July 2015 were financed by Société Générale and Credit Suisse:

i) Nomination in late February 2015 for delivery in April 2015 split across the 'Blue Sky'/'Gulf Coral' vessels: on 6 March 2015, Credit Suisse AG (a Swiss entity), via its Commodity Finance Client Services in Geneva (c/o Ms Florence Bonny), agreed to finance the lifting of this cargo. On 2 April 2015, it was confirmed that the cargo would be split into two liftings on 12-13 April (650,000 barrels) and 29-30 April (250,000 barrels).

ii) Nomination in March 2015 for delivery in May 2015 on the Everbright vessel, financed by Société Générale: on 13 March 2025, Azenith received a lifting nomination for circa 950,000 barrels of Bonga from NNPC. On 24 April 2015, Société Générale (c/o Mr Phillipe Scheibli) confirmed that the bank was *"pleased to finance this new deal"*.

iii) Nomination in April 2015 for delivery in June 2015 on the Glory Crown vessel: on 21 April 2015, Crudex received a nomination from NNPC for lifting a cargo of 950,000 barrels of bonny light crude. On 16 June 2015, Attock wrote to Credit Suisse AG informing them of the lifting and requesting a letter of credit. On 17 June 2015, Credit Suisse AG asked whether a payment undertaking from BP would be issued before the import letter of credit would be issued, and Ms Cristina Azzariti (Attock Dubai's office manager) confirmed that it would. On the same day, Credit Suisse AG wrote, "*On this basis it OK for us to finance this deal."* In the event, the delivery was delayed until July 2015.

312. Mr Kelbrick was asked about the receipt of these nominations but said he could not remember the details. Mr Mounzer in his first witness statement said:

> "30. After the Freezing Order in February 2015, Attock Dubai (via Azenith and Crudex) received only 3 lifting nominations from NNPC for a total of approximately 2.8 million barrels. The lifting nominations were dated 19 February 2015, 19 March 2015 and 21 April 2015, respectively. It is likely that these lifting nominations were granted internally by NNPC just before it became aware of the Freezing Order, but by May 2015 NNPC had become aware of the Freezing Order and, for that reason, did not grant any further lifting nominations for the remainder of 2015."

It was not possible to probe Mr Mounzer's evidence, by reason of the Claimants' settlement agreement with him that I have already mentioned. I return to it later in the context of the evidence and probabilities as a whole regarding the cessation of nominations. At this stage, I note that Mr Mounzer appears to have believed, incorrectly, that the Claimants' solicitors sent copies of the Freezing Order to all West

African suppliers (and others), but there is no indication that that was the basis of his evidence about NNPC having learned of it by a specific time viz May 2015.

313. Attock Dubai received no further nominations after April 2015 and did not succeed in securing a new NNPC tender in October 2015. Mr Kelbrick details his inability to secure any new nominations:

> "65. In addition, news of the Freezing Injunction and the Proceedings became public, and the broader commercial environment changed dramatically. My contacts wanted to know what was going on. I recall trying to explain the situation to Antonio Oburu, GEPetrol's representative, Chief Anenih, Crudex's Nigerian sponsor and Habeeb Fasinro, a former member of Nigeria's House of Representatives, even when I did not fully understand the situation myself. Counterparties grew increasingly cautious, and the market's confidence in our ability to fulfil contracts began to collapse. Essentially, Attock went from a trusted lifter to an untrusted lifter. The word I would use is "contagious". We, and Attock, became contagious. As a result, new business opportunities dried up and existing relationships became strained and unworkable. Our ability to procure oil cargoes and to trade ultimately ceased entirely.
>
> 66. I recall that shortly after I was notified of the Freezing Injunction, I think I spoke to Habeeb Fasinro, and we discussed the implications of the Freezing Injunction. I can't recall who called whom. I also recall that when I spoke to Mr Oburu from GEPetrol, we spoke about the implications of the Freezing Injunction and the Proceedings. I do not recall the specifics of those conversations, but I do recall the gist of them. I remember thinking to myself after the call with Mr Oburu that "that's the end of that", in terms of our business relationship.
>
> 67. Despite the challenges we faced, we made every effort to keep the business running. We proactively reached out to both existing and new contacts to try and explore potential opportunities. But counterparties were put off from doing business with us. Contacts which I had had for years stopped answering my calls. Even Mr Ahmed, who had been a General Manager at NNPC, one of my primary liaisons regarding operations and with whom I was very close, stopped making himself available to me. I had been the guardian of his children while they stayed in Switzerland, but after the service of the Freezing Injunction and the Proceedings, he could no longer assist me. It was impossible for us to continue with the business."

314. Mr Kelbrick could not recall conversations with NNPC about why the nominations stopped:

> "So you did get nominations in - 19 February, 19 March and 21 April. So I suppose it would have been May is the first month that you didn't get a nomination.
>
> A. Okay.
>
> Q. Does that sound right? And there was no -- you didn't have any conversation with anyone at NNPC about –
>
> A. I can't recall.
>
> Q. -- why.
>
> A. I can't recall.
>
> Q. No, no conversation about why. And June 2015, also no nominations. Do you recall any discussion with NNPC about that?
>
> A. No, I can't recall.
>
> Q. No." (Day 3/127:23)

315. The Claimants' then solicitors, Freshfields, did not notify NNPC (or other West African oil suppliers) of the Freezing Order, and Mr Kelbrick accepted that he did not recall any specific conversations about why the NNPC nominations stopped. The Claimants submit that there is no evidence that NNPC were aware of the Freezing Order at this time and no reason to suppose that they were. This was put to Mr Kelbrick in cross-examination:

> "A. I -- I believe it was because of the freezing order, yes.
>
> Q. Right. Did anyone tell you that was a reason?
>
> A. I think I have already said that it was very difficult to get anybody to answer the telephone to me –
>
> Q. Right.
>
> A. -- yes, during that period, yes. It was very difficult to get to see anybody, yes, because of the news, and bad news travels fast.
>
> Q. Right, but just to be clear, no one said to you that the -- you're not getting lifting nominations because of the freezing order.
>
> A. They wouldn't see me.
>
> …
>
> [T]here was normally a list produced and then the politicking began and people started adding to the list, seldom subtracting to the list, and that's what added to competition for volume, which

> is where I prided myself from getting my grade -- grade, volume, time; okay? In this case, yes, we would have then expected to see what were called monthly rollovers, which would have been offered to all of the existing contract holders. So one would have expected to see Azenith, one would have expected to see Crudex, right through to the November/December that year, and we didn't; yes? And as a consequence for me, because I don't believe people had lifted at that point -- somebody can try and prove me wrong, but I do believe that those rollovers and no further cargoes came to Attock through Crudex and Azenith during that rollover period because of the injunction and because of the proceedings." (Day 3/121-124)

(2) Service of the Freezing Order on the banks

316. Mr Kelbrick points out that whilst there were three cargo deliveries following the imposition of the Freezing Order, there was only one cargo delivery following service of the Freezing Order on the banks – the third delivery in June 2015 on the Glory Crown vessel, following a nomination in April 2015.

317. It is necessary to keep in mind the date of service of the Freezing Order on the banks who financed the three cargoes delivered after the Freezing Order was imposed:

i) On 16 February 2015, Credit Suisse London was served with the Injunction, in respect of Attock Mauritius.

ii) On 30 April 2015, Credit Suisse AG (Lausanne branch, copied to the Zurich office) was served with or notified of the Injunction in respect of Mr Kelbrick. The same day, Credit Suisse's Zurich branch was served with the Injunction (copied to the Geneva office) in respect of Attock Mauritius.

iii) Also on 30 April 2015, the Zurich branch of Société Générale (copied to the Geneva branch) was served with the Injunction, in respect of Attock Mauritius.

(a) Service on Credit Suisse

318. There is some disagreement between Mr Kelbrick and the Claimants with regard to the service of the Freezing Order on Credit Suisse. The Order was served on Credit Suisse London on 16 February 2015 and on Credit Suisse AG on 30 April 2015. It was Credit Suisse AG (not Credit Suisse London) who financed the two cargoes delivered in May 2015 and June 2015. Both of these cargoes were handled by Ms Florence Bonny of Credit Suisse AG. Credit Suisse London was a subsidiary and a different legal entity from Credit Suisse AG.

319. The Claimants note that the Credit Suisse London letter was addressed to a London office, but referred to an account with their branch in Geneva. The letter said:

> "We understand that you may hold a bank account on behalf of Attock Mauritius. The account detail of which we are aware is the account number 0251-544182-52 which is held by your branch in Geneva. We do not know if this account remains active

> or what the balance is in this account. Attock Mauritius may also have other accounts of which we are unaware. For the avoidance of doubt, the Order applies to any and all accounts that Attock Mauritius may hold with your bank wherever they are in the world." (my emphasis)

320. The corresponding letter to Société Générale (dated 30 April 2015) was sent to a Zurich office, with a copy to a Geneva office as stated on the face of the letter and quoting the Geneva address. That was not the case with the Credit Suisse London letter, and there is no reason to believe it was copied, by the sender, to a Geneva office. The letter was, moreover, not addressed to any particularly individual or department, and was sent only in hard copy form by courier. It might have been sent to Geneva by some kind of internal transfer, and the oil trading experts were asked about that possibility, having regard to their banking experience. Mr Scott said:

> "A. If the private banker was being asked about and being advised about a Mareva on an individual -- as a private banker, there would be private banking rules around how they would disclose that information. Those teams are separate, very separate, from the corporate banking teams that might be involved in banking the client's company if they're a shareholder, for example, in that company. So it would depend from bank to bank, the culture of the bank and also the systems within that bank of how soon one part of the octopus, if you like, has told another part of the octopus what's going on.
>
> …
>
> It needs to go all the way through different silos, private bank to institutional bank. It then needs to go through all the different right departments and processes there to filter down and then a stop needs to be placed on the facility. So there's lots and lots of processes and what should happen and what does happen are not always the same thing." (Day 6/43-45)

321. Mr MacNamara said that he *"would have thought a legal document would be paid fairly prompt attention"* and pointed out that in 2015 documents could be scanned and sent electronically, but was unable to shed any real light on whether/when the letter sent to the London office would be likely to have been received by the Geneva office.

322. In my view, there is no basis on which to conclude that Credit Suisse AG was notified of the Freezing Order by any particular date prior to 30 April 2015 or thereabouts, when two further letters were sent to Switzerland: one to the Lausanne branch relating to Mr Kelbrick and another to the Zurich branch relating to Attock Mauritius. Even then, the letters did not name Attock Dubai, so the connection with that company may not have been immediately apparent.

(b) Service on Société Générale

323. The Freezing Order was served on Société Générale on 30 April 2015. That diminishes the impact of some of the communications between Société Générale and Attock Dubai

after the granting of the Freezing Order on 12 February 2015. For example, on 16 February 2015, Philippe Scheibli of Société Générale sent an email to Ms Azzariti asking, *"Have you a new deal for us?"* On the same day, Ms Azzariti responded, *"We will indeed get in touch with you as soon as a new deal which can be financed by you becomes available."* I consider later the ongoing contacts after service of the Freezing Order.

(3) Availability of trade finance after service of the Freezing Order

324. Attock Dubai had close relationships with Credit Suisse, Société Générale, Credit Agricole and ING. These credit lines were fundamental to Attock Dubai's operations, as Mr Kelbrick explains in his fourth witness statement:

> "64. Attock Dubai's ability to lift cargoes was entirely dependent on the backing of its banks. The purchase price of a single cargo could be US$100 million and Attock did not have that money available in cash. It therefore relied on its credit lines with its banks. NNPC also regularly required payment of a deposit for the first cargo under a lifting agreement, which could be in excess of US$ 1 million. After the Claimants served our banks with copies of the Freezing Injunction, no further credit lines were extended to Attock Dubai, and our banks ended their relationships with us. It was Mr Mounzer who spoke with our banks directly, I just remember Mr Mounzer telling me (in broad terms) that the banks were pulling the plug. I recall Mr Mounzer telling me that the banks had indicated to him that they had been sent a copy of the Freezing Injunction. Not having access to credit lines put an end to Attock's business. If you do not have the credit lines, you cannot lift the crude oil."

325. Attock Dubai's credit facilities from 2009-2015 are summarised in a table in Mr Mounzer's first witness statement and I reproduce it below (omitting all but one of the footnotes):

Year	Credit Suisse	Société Générale	Credit Agricole	ING
2009	N/A	N/A	$80m	$200m
2010	$90m	N/A	$160m	$200m
2011	$90m	$90m	$250m	$200m
2012	$130m	$130m	$250m	$200m
2013	$130m	$130m	$250m	$120m
2014	$240m	$130m	$250m	Facility not renewed but available on request
2015	$240m	$130m	$250m [FN]	Not renewed
2016	Not renewed	Not renewed	Not renewed	Not renewed

FN: Facility was cancelled by Credit Agricole in mid-2015.

326. The Claimants suggested that, even after the Freezing Order was imposed, Attock Dubai continued to receive trade finance support from banks, and that Société Générale

and Credit Suisse financed the three cargoes delivered in April, May and July 2015. Further, the banks continued to express willingness to finance trades for Attock Dubai. For example, even after the service of the Freezing Order on 30 April 2015, Société Générale continued to seek business from Attock Dubai. As late as 24 June 2015, Mr Scheibli emailed Ms Azzariti: *"As you know, the transaction that we have on our books should be closed by the end of the week. Do you have another transaction for us to finance?"*

327. As to the narrower point, relating to the three cargoes delivered from April to July 2015, in § 322 above I have concluded that there is no basis on which to conclude that Credit Suisse AG was notified of the Freezing Order by any particular date prior to 30 April 2015 or thereabouts. The Freezing Order was served on Société Générale on 30 April 2015. Even then, the letters serving the Freezing Order did not name Attock Dubai.

328. Taking the three cargoes in turn:

i) The first cargo was financed by Credit Suisse AG. The financing was confirmed on 2 April 2015, before service of the Freezing Order.

ii) The second cargo was financed by Société Générale. The financing was confirmed by Mr Scheibli on 24 April 2015. Mr MacNamara stated in oral evidence that a bank would not go back on such a confirmation:

> "Q. Now, we see this is Philippe and he agrees to make the -- issue the LC on 24 April. If you can then go to (X3/645/1), please. I want you to assume that this is Soc Gen receiving notice of the freezing order. So it's 30 April. You see the letter there.
>
> A. Yes, sir.
>
> Q. You see the date. It refers to Attock Mauritius and so on and so forth. Does it -- would it be a surprise to you that the LCs agreed the cargo and the transaction proceeds because -- because the agreement was given six days before the freezing order arrives?
>
> A. Not at all. Once you have issued the LC, it's irrevocable, so the bank can't pull it back.
>
> Q. Okay.
>
> A. You're stuck with it."

iii) The third cargo was financed by Credit Suisse AG. The financing was confirmed by Ms Florence Bonny on 17 June 2015, after service of the Freezing Order.

329. As to that third cargo, it was suggested to Mr MacNamara that the letter of 30 April 2015 may not have been actioned immediately. The letter to the Credit Suisse AG Lausanne branch was not addressed to anyone; it simply said, *"Dear Sirs"*. Mr MacNamara's evidence was as follows:

> "Q. It's not directed to anyone in particular. It relates to Mr Kelbrick, not Attock. Again, would it surprise you if there is a lag between this arriving, let's say, on 30 April and 1 May and then falling into the hands of the colleague in Geneva in credit finance?
>
> A. I would have thought a letter like this from a law firm would end up in the right hands fairly quickly, to be honest. I mean, banks worry about this sort of thing. They do. Then the question is: does the covering letter -- is the covering letter supported by the order? And that's another matter and that's where the legal department come in." (Day7/127)

330. That is one possible reason why the bank did not refuse to finance the transaction on the ground that it was precluded by the Freezing Order. Another is that, as already noted, the letter serving the Freezing Order did not refer to Attock Dubai, so it is possible that the relevant people within the bank did not make the connection, or make it in time.

331. As to the broader point, two matters arise. First, the distinction between sales/transactional personnel at the banks and those involved in credit, risk or policy decisions. For example, as Mr Kelbrick pointed out, Mr Scheibli of Société Générale was on the sales side: *"Scheibli was a relationship manager, director, albeit, of Trade Commodity Finance. I'm not sure if he'd have sat on a credit committee."* (Day 3/153). Secondly, it was Mr Kelbrick and Mr Mounzer's evidence that the trade financing did not end straight away; rather, it petered out gradually. Thus Mr Mounzer in his first witness statement indicated that the banks did not immediately stop all credit lines upon receiving the Freezing Order. Rather, they became uneasy, and this unease was compounded by the subsequent interruptions in Attock Dubai's business flow (caused by a lack of oil lifting nominations). These combined factors led to the withdrawal of the credit lines:

> "33. For many years, I have worked closely with banks to build AOIL's (and subsequently Attock Dubai's) goodwill in order to arrange and increase the credit facilities available to them. Without these credit facilities, it is impossible for a trader to purchase oil. Since 2009, through my efforts and relationships with banks, AOIL and Attock Dubai were granted credit lines of up to US$ 710 million. As I have already mentioned above, the four banks that I had a particularly good relationship with were Credit Suisse, Societe Generale, Credit Agricole and ING, all based in Geneva.
>
> …
>
> 36. My contacts at Credit Agricole, Messrs Alain Caulier and Bruno Charuel, and my contacts at Credit Suisse, Messrs Jerome Bonnard and Guy Barras, mentioned in various discussions with me during 2015 that, as they were aware of the Freezing Order and of underlying allegations of fraud, their management were unenthusiastic, reluctant and altogether unwilling to continue

> providing the credit facilities for Attock Dubai. My contacts explained that the banks' refusal is due to the interruption of Attock Dubai's business flow and that the credit facilities are no longer actively used. Thus, I have been trapped in a vicious circle: on one hand, national oil producers, having been notified of the Freezing Order, are no longer willing to supply crude oil to Attock Dubai, Crudex and Azenith, which has reduced the business flow; on the other hand, the banks, who were already very concerned about the Freezing Order, decided to suspend the credit facilities that had become inactive. Furthermore, I had informal discussions with my usual contacts at Credit Agricole, Credit Suisse and Societe Generale who confirmed the above."
>
> (my emphasis)

That evidence is in my view logical and plausible, and I accept it. It reflects what one would expect to happen in such circumstances.

332. Similarly, Mr Kelbrick gave this evidence:

> "Q. Yes. So, I mean, it looks, doesn't it, that at least between May and July when there was -- when these cargoes were being delivered, you were continuing to get trade finance support both from Soc Gen and from Credit Suisse?
>
> A. Salem did it. I have no idea, yes, but I stand by what I said; that he had told me they were pulling the plug. Whether there's any legacy business in things that we'd been -- we'd been given to trade, whether that was by lobbying by Chief Anenih, the cargoes came through, etc, yes, but then there was a stop to everything as far as I was concerned.
>
> Q. Right, but now we have seen some of these documents, it rather looks, doesn't it, that if Mr Mounzer told you that the banks were pulling the plug, then that doesn't seem to have been right, does it?
>
> A. Well, it seems -- it's not inconsistent. I mean, do people -- when a business relationship ends, does -- is it like a slamming door? No, it tends to peter out, yeah, as people get more and more reason for it not to work. So, I mean, it's not a case in business where one sets one's clock and then says: sorry, that's it, we don't do it anymore. People were still making efforts to get cargoes against what had been done to us. People were still -- by the looks of it, people were still making efforts to try and claw hold of what we could after mid-February's issuance of the freezing order, yeah? And it stands -- the thing then stops. The thing peters out and then stops. But as we've just seen, to suggest that it's to do with a contract round that was awarded in October or November, I don't think that's correct either. I mean, this happened before all of that.

> Q. You didn't speak yourself to any of the banks about the freezing order?
>
> A. Not that I recall.
>
> Q. No.
>
> A. It wasn't how -- again, we've said this: I would go and see a bank maybe once a year or twice a year to tell them how business was in Africa, etc, give them a degree of comfort that we were again a reliable lifter, and that was it. It was Salem's day-to-day job. (Day 3, 151:11-152:22)
>
> …
>
> A. Again, when it comes to these particular transactions, as far as I was concerned I had one person to trust and that was Salem, and he told me they were pulling the plug. How he did this, which part of the legacy business, how things petered out, I mean, they speak for themselves, right? But what we know is that, beyond the nomination for whichever month you've just quoted to me, it was gone. Volume was gone, yeah? There may have been existing relationships that Salem had, but I didn't know about them." (Day 3, 153:23)

333. I accept that evidence. In my view, contrary to the suggestion put to Mr Kelbrick, the banks' dealings with Attock Dubai during this period do not contradict Mr Kelbrick's claim that the Freezing Order was the cause of the company's loss of credit lines. In terms of the mechanism of that loss, I consider that two factors were at play: the banks' managements' reaction to the Freezing Order, and the interruption of Attock Dubai's flow of oil. I return in section (R) below to the likely reasons for those developments.

334. I consider later the letter of recommendation that Société Générale sent as part of Attock Dubai's application for an NNPC tender in October 2015.

(4) NNPC tender application in October 2015

335. On 24 October 2015, Attock Dubai applied for a tender competition run by NNPC. At the bottom of Attock Dubai's application letter was a section entitled "Financing Facilities" saying:

> "ATTOCK has a strong and un-discontinued financial support, throughout the last 20 years, from its bankers: Credit Suisse, ING, Credit Agricole and Societe Generale, with whom it has extensive financing facilities of over than USD 600 million."

One of the attachments to the letter was a presentation on behalf of the Attock Group, the first page of which indicated that it had last been updated on 1 February 2015, saying that Attock had: *"Excellent banking relations with extensive financing facilities with four first class European banks exceeding USD 600 million."*

336. It was suggested to Mr Kelbrick that the letter belied his and Mr Mounzer's evidence that the banks *"pulled the plug"* after the Freezing Order. Mr Kelbrick said the letter was *"a Salem [Mounzer] document and we submitted this to try against all odds with this -- with this freezing order against us at least to try to be in the game"*, and was submitted to show that (among the 200/250 other likely applicants for term contracts) Attock was a reliable lifter, and hence to pass the first stage. His evidence continued:

> "Q. Well, let me ask you this question, Mr Kelbrick. As at, let's say, October 2015 when this application was being made, so just anchor yourself in the date, are you able to say whether it was your belief at that time that you had no bank facilities?
>
> A. I don't -- I don't think we had -- well, my feeling now sitting here is that I don't think we had any banking facilities. Salem had told me that they were all pulling the plug; okay? So if we could get a contract, okay, then we'd have found another way of lifting it somehow, either with the backing of a Vitol or the backing of one of the other companies, and we would have still had a way of making some money." (Day 3, 145: 1)

337. Given the circumstances of Mr Mounzer's absence from the trial, I would be reluctant to make any definitive findings about his motivation in writing to NNPC in the terms of Attock Dubai's 24 October 2015 letter. It may be that he did misrepresent the position to NNPC, in which case the evidence does not show whether that was deliberate or casual (for example, by careless repetition of language from previous similar letter). I do not consider that the letter negates his evidence about the banks having 'pulled the plug', bearing in mind also that that is (a) inherently not unlikely (for the reasons give above, as well as in §§ 677 to 689 below) and (b) consistent with other evidence provided by Mr Mounzer (see the evidence to which I refer below about subsequent lack of responses from Credit Suisse and other bankers).

(5) Société Générale letter October 2015

338. On 19 October 2015, Société Générale Paris sent a reference letter to NNPC in relation to Attock Dubai's application for the NNPC tender. The letter said:

> "At the request of our client Attock Oil International DMCC (the Company) we are pleased to advise you that the Company are reliable and valued customers of Societe Generale Group and are maintaining accounts with our group since 2010.
>
> The Company is currently granted by us an extensive nine digits uncommitted trade finance credit facility.
>
> We consider the Company's management as experienced persons known to us for several years and whom we consider as honest, well-regarded and competent businessmen with a longstanding experience in the business of petroleum supply, refining and trading.
>
> …

> In relation to the Company's application to (above mentioned) tender for the sale and purchase of Nigerian crude oil we are of the opinion that, at the date hereof, the Company would have the ability to establish requested letter of credit and pay the initial deposit of USO 2. 5 mio. Please note that our facilities are of an uncommitted nature i.e. the financing of any specific transaction requires a previous review and approval by various internal desks.
>
> Issued at the Company's request. this letter of reference is given in good faith and is based on the Company's past dealing and/or record with us. It does not entail any liability of the bank or its officers of whatever nature with respect in particular to the Company's financial situation or creditworthiness and shall not be considered as our undertaking to finance captioned transaction."
>
> (my emphasis)

339. In cross-examination, Mr Kelbrick said he had not seen this letter before and was unsure of the context or what Mr Mounzer had said to the bank. Mr Kelbrick had in fact received the letter, as part of a pack of documents provided to him by Mr Mounzer on 20 October 2015, and had forwarded it to Ms Azzariti two days later. However, he thought it likely that it formed part of a large pack which he did not read but which was sent on to NNPC.

340. Mr Mounzer in his witness statement indicates that this was one of the last letters that he secured in what was a slow withdrawal on the part of the banks:

> "31. Following NNPC's public tender in September 2015, Attock Dubai submitted its application (SMS/7-9) [SM5_7_9] and I have been informed that Azenith and Crudex did the same. Unlike previous years, only Societe Generale (out of AOIL's four banks) agreed to provide Attock Dubai with the necessary letter of recommendation. I believe that this weaker support for the application, combined with NNPC's knowledge of the Freezing Order, resulted in Attock Dubai, Crudex and Azenith ending up with no supply contracts and therefore no prospects for 2016. 32.
>
> 32. Following NNPC's public tender in September 2016 Attock Dubai, Crudex and Azenith were unable to apply at all due to the fact that Attock Dubai's banks refused to support the application and provide the critical letters of recommendation, as I explain below.
>
> …
>
> 39. […] I did not receive a response from either Credit Suisse or Credit Agricole. I inquired by telephone after a few days. I was then informed by Mr Jerome Bonnard of Credit Suisse that the bank's management were not agreeable to providing such a letter.

> I had a similar answer from Mr Bruno Charuel of Credit Agricole. Neither man gave an explicit reason, but to me it is obvious that they no longer could support me for the following reasons:
>
> 39.1. the Freezing Order and the underlying fraud allegations suggested that AOIL, Mr Kelbrick and I had a potential liability of over US$300 million;
>
> 39.2. the Freezing Order led to a significant decrease in the activities of Attock Dubai and therefore a meaningless business flow;
>
> 39.3. the wide dissemination of the Freezing Order and surrounding rumours have practically destroyed Attock Dubai's, Mr Kelbrick's and my goodwill in the market;
>
> 39.4. when granting credit facilities, banks expect these facilities to be used regularly and to generate a steady income."

341. Mr Mounzer says that reference letters of this kind were *"usually received within hours following my verbal or written request. That was the result of a long-standing excellent business relationship with the banks, which was built, earned and developed over many years"*. The apparent absence of any similar letters of support at this time from Attock Dubai's other banks is consistent with Mr Mounzer's evidence about declining support; and it would be unsurprising if that, along with likely knowledge of the Freezing Order, was a factor in the cessation of nominations in favour of Attock Dubai. On that basis, the letter of support from Société Générale turned out to be of no help to the company.

342. There was also discussion in cross-examination about the meaning of the word "*uncommitted*" in this letter. Mr Scott explained that banks can retreat from an uncommitted facility at any time:

> "A. … an uncommitted facility is not available without the bank approving on a transactional basis the drawing down of that facility, and in order to do that, it would need to go through know your transaction transactional due diligence, which would have included checks on all of the parties, PEPs, anti-money-laundering all those types of checks, including any block, if you like, if the facility had been in existence, but was on hold.
>
> …
>
> If it's an uncommitted trade bilateral trade finance line, there's no term to it. It just exists. There may be annexes to it that get adjusted in terms of the funding costs from time to time if there's any funding change, but generally, clients are very unhappy about changing the financing costs, as you can imagine, so they tend to actually stay in perpetuity for quite some time at the same level. … You have to actually sort of either place them on hold and advise the client you're placing them on hold or to write to

> the client and terminate the facility. But because they're an uncommitted facility, the bank has the option to do that at any stage and they can turn down any transaction and do turn down transactions." (Day 6, 41:15)

I accept that evidence, which is of course consistent with the express terms of the letter itself, quoted in § 338 above, in particular the passages I have underlined there.

(6) Other suggested reasons for loss of Attock Dubai business

343. The Claimants have put forward some contextual factors which they suggest may explain Attock Dubai's loss of business. As a preliminary matter, Mr Kelbrick submits that these arguments amount to a positive case against him, which was not pleaded and cannot fairly be advanced.

344. Paragraph 34(4)(vi) of the Claimants' Re-Amended Defence (D5) put Mr Kelbrick to proof of what, if any, loss was caused by the Freezing Order, including:

> "that there were no other reasons why Attock Dubai would or might have seen reduced profits or ceased trading even if the Injunction had not been made, including but not limited to the serious fraud claim against both D5 and D6, as well as any significant changes in the relevant markets which might have affected its trading, including regime change in Nigeria in 2015."

345. In relation to Mr Kelbrick, this issue relates, at least in part, to the actual position of Attock Dubai. It is convenient though to mention at this stage that the Claimants make a similar plea in relation to Mr Bosworth and Mr Hurley as regards the oil trading business which they say they would have established in the counterfactual, partly linked to the position of Mr Kelbrick:-

> "Further, in relation to the Group's West African physical trading, the Claimants will rely on the very limited profits which this generated between 2008-2013, particularly by comparison with other aspects of the Group's trading. … Further and in any event, this trading also appears to have been reliant more generally on the reputation and other capabilities of the Claimants' business network, in particular when bidding for contracts, as well as being reliant on assistance from others such as the Fifth Defendant, Mr Kelbrick. Furthermore, D1 and D2 are put to strict proof that their business could have continued to trade successfully in this market for the duration of the relevant period given significant changes during this period, including regime change in Nigeria in 2015." (Claimants' Re-Amended Defence (D1 and D2) § 61(3))

346. Those pleas do not advance positive cases, but indicate certain matters which the Claimants asserted the Defendants need to establish in order to make out their claim. Accordingly, the starting point, at least, is that the Claimants could not then fairly advance evidence in order to make a positive case that Attock Dubai would or might have seen reduced profits or ceased trading by reason of one or more of the identified

circumstances, or that Mr Bosworth/Mr Hurley's proposed oil trading business would be hampered by those circumstances. However, in my view that would not prevent them from arguing, based on the evidence otherwise adduced (in particular, evidence adduced by the Defendants) that they have not proven their case because the evidence showed that those circumstances did exist and the Defendants' formulation of and evidence in support of their claimed losses fail to take account of them.

(a) Change of regime in June 2015

347. The first contextual factor raised by the Claimants is regime change in Nigeria, which had repercussions in the oil industry. In June 2015, President Muhammadu Buhari became the new leader of Nigeria and significant changes were made at NNPC including at board level. Mr Kelbrick addressed this matter in his fourth witness statement, served in November 2025:

> "40. All indications suggested Attock's Dubai business would do well. By 2013, I had been working in Nigeria for over 15 years. In that time, I had developed an extensive network of loyal customers and friends, and had been able to navigate various regulatory and regime changes in the region, throughout which I had maintained success in securing nominations and valuable contracts. I understand that, in these Proceedings, the Claimants have suggested that Attock's profitability would have been affected by the change in President from Goodluck Jonathan to Muhammadu Buhari in March 2015. I disagree that this would have caused Attock a problem. Attock had successfully lifted crude oil from Nigeria under lots of different regimes, and was a trusted customer of NNPC. Throughout that time, there was talk of the "indigenisation" of companies lifting Nigeria's resources, but Attock continued to lift. Attock was perfectly placed to ride changes in power in the country – it was big enough to have proved itself as a reliable customer that NNPC could trust, but small enough not to be made an example of if the powers that be wanted to make changes. In any event, I am confident that the contacts I had in Nigeria, including Chief Anenih and Osagie Akpata, would have been able to assist Attock in securing cargoes, whichever President was incumbent. One of my contacts at NNPC, Farouk Ahmed, moved from the Crude Oil Marketing Division to PPMC in 2015, which would likely have assisted Attock's move into products trading, rather than hampered its crude oil trading."

348. Similarly, Mr Fasinro said in his witness statement:

> "I have no doubt that Steve would have continued to have great connections within NNPC after the political changes in Nigeria in 2015. Steve knew lots of people at NNPC, and the political change in Nigeria in 2015 did not result in a total change of the people working at NNPC." (§ 12)

349. Subsequently, Mr MacNamara referred to this matter in his report served in February 2026, in the context of Mr Bosworth and Mr Hurley's claims. He noted that elections in 2015 in Nigeria led to a complete regime change; and that one of the first acts of the government of President Buhari (which replaced the administration of President Goodluck Jonathan in 2015) was to investigate corruption at NNPC (§§ 40 and 363). He says regime change at presidential level was swiftly followed, already in 2015, by regime change at the top of NNPC, including the group managing director and the heads of all eight of NNPC's divisions (ibid.) Mr MacNamara also states:

> "I accept that Mr Bosworth was well-introduced in his chosen markets, in his day. I would point out that regime change would have largely invalidated those contacts in Nigeria, Angola and Chad over the period 2015 to 2017, but I would anticipate rebuilding them would not be difficult if the originator can adapt to the new rules of the game. This would take time however, probably at least a year or two, plus of course, (a) they would be up against stiff competition and (b) because of the indigenisation rules, they would need a local partner, whose presence would take a very significant bite out of the profitability of the contracts."

Given that, as noted above, the Claimants advanced no positive case on this point against Mr Bosworth/Mr Hurley (or Mr Kelbrick), I doubt that they are entitled to rely on that evidence. In any event, it has been answered.

350. First, Mr Bosworth addressed it as part of his twelfth witness statement, served in March 2026, in evidence that is in part also relevant to Mr Kelbrick and Attock Dubai, and which I set out in full because the detail seems to me important:

> "12. Mr MacNamara expresses doubt, at paragraph 40 of his report, as to whether my contacts survived the 2015 transition to the Buhari regime; and says at paragraph 63 that "regime change would have largely invalidated those contacts". This is not correct. My network in Nigeria was never confined to any single regime. It extended across political generations, through business relationships and personal connections that endured regardless of who was in office, as did those of our relevant service providers.
>
> 13. I knew President Buhari personally. I first met him in approximately 1994 through Chief Akpata. Buhari had been appointed by President Abacha, along with Chief Akpata, to run the Petroleum Trust Fund. They spent time together at Mr Akpata's home in Abuja and I was privileged enough to attend some of those interactions. Although Chief Akpata had passed away before Buhari became president, I was known to President Buhari and would have been given an audience.
>
> 14. Buhari did not appoint a substantive Minister of Petroleum but kept the portfolio under his own control. He appointed a Minister of State for the oil industry, but that was very much a

figurehead position. The President personally approved the award of term contracts by NNPC. Access to him was therefore the relevant point of entry for obtaining a term contract, and I had that access.

15. I did not personally know the first Group Managing Director ("GMD") of NNPC under Buhari (Ibe Kachikwu, who served from 2015 to 2016). However, Kachikwu was close to Mohammed Asibelua, whom I have mentioned above. I also would have been able to leverage my relationship with the Shehu of Borno to gain access to those in Kachikwu's circle. As I explained in my seventh witness statement (see paragraphs 59 to 63), I built a deep relationship with the Shehu during the Abacha era, having operated his contract at that time. The Shehu is the religious and traditional leader of Borno State. His position is more enduring than any political office. Anyone from Borno State who rises to a position of significance would be expected to pay homage to the Shehu.

16. The most recent president, Tinubu, is someone I know through his nephew Wale Tinubu, who runs Oando, one of Nigeria's largest indigenous oil and gas companies. I would also have had access to the relevant aides around Tinubu through Osagie Akpata, who is close personal friends with people in the president's inner circle.

17. With any of these contacts (i.e. with the president, with the GMD, or through sponsors and service providers) access to the relevant decision makers in Nigeria was immediate. Under the Tinubu administration, NNPC offers its crude oil via tenders for spot cargoes. I understand these are conducted on approximately a weekly basis, out of Dubai. There is a process to register with them. As long as you have a company, you are able to bid on the cargoes alongside Vitol, Trafigura and the other major traders. The only thing I would have needed to do was register a company and join the tender process. Under previous administrations, the only time lag would have been in waiting for term contracts to be awarded or tendered. Under Tinubu, you do not need to wait at all. You are back in the bidding process straight away.

18. The political class in Nigeria remains fundamentally the same even as the figureheads change. We used to laugh many years ago that the most important person to know in NNPC was the lift operator — he never changed, and if you wanted to get to the seventh floor, you needed his help. People kept the name of the head of COMD in their books, but they were always in pencil, because it always changed. You are always subject to change in Africa. But the broader networks (i.e. the civil service, the service providers, the traditional rulers, the sponsors) persist through each transition.

> 19. Access to West African oil markets did not solely depend on knowing the president or the minister. As I explained in my seventh witness statement (see paragraphs 24 to 38), sponsors and service providers played a vital role in obtaining and maintaining term contracts with West African governments. The system worked through multiple channels service providers, sponsors, and people on the ground who had their own relationships with the relevant officials.
>
> 20. To give some examples: a woman named Edosa Abebe worked for me for many years handling the product business we did with PPMC. She knew the junior and mid-level people within NNPC, not the political side, but the on-the-ground people who actually operated the contracts. She later worked with a company called Bono Energy and then set up her own company, which, I recall, was awarded at least one crude oil contract in its own right. She was very well connected and she would have done the on-the-ground work for us, as well as running her own company, and assisted in introductions to the relevant people within NNPC."

351. Secondly, Mr Scott replied to Mr MacNamara's evidence on this point, in his supplemental report of 31 March 2026. He noted that the oil trading industry has navigated multiple periods of high volatility and geopolitical risk from 2015-2025, including supply disruptions and price wars, and in his view there was no structural collapse of the oil trading sector of the energy segment for experienced teams that did not engage in fraudulent, irregular or imprudent practices. Arcadia 1 had historically traded successfully amid regional instability, and Arcadia 2's proposed equity alignment and banking relationships would enable similar resilience with respect to credit line capacity. Mr Scott observed that regime changes in key West African producers (Nigeria, Angola, Gabon) had historically led to short-term supply adjustments (positive and negative) rather than leading to permanent exclusion of established traders and having a uniformly negative impact. Post-2015 reforms (e.g., Angola's licensing rounds, Nigeria's Petroleum Industry Act) had aimed to attract investment, and in his view, traders with strong upstream/downstream contacts (as agreed for Mr Bosworth/Mr Hurley in the Joint Experts Memorandum) were best positioned to adapt.

352. Specifically in relation to Mr Bosworth, Mr Scott noted that Mr Bosworth's business relationships had survived regime changes during his tenure in Arcadia 1 and, in his view, would have survived further changes. He referred to the contents of RCF information memoranda dating from 2010, 2011 and 2012 especially to draw those conclusions. These relationships – built on long-term personal trust, consistent delivery, and deep networks with stakeholders (including national oil company officials, influential local figures, intermediaries, service providers, agents and allocation gatekeepers) – had proved durable through multiple political transitions and regime shifts during Arcadia 1's successful years. That resilience positioned Mr Bosworth well to maintain access to crude and products and term arrangements in volatile producing regions, ensuring Arcadia 2 could have operated with the same level of counterparty stability and opportunity capture that drove Arcadia 1's profitability.

353. Similarly, in the Joint Memorandum, Mr Scott pointed out that during Mr Bosworth's tenure in Arcadia 1, West Africa underwent numerous regime changes, including Nigeria's transitions from Obasanjo to Yar'Adua (2007) and then to Jonathan (2010), Gabon's succession from Omar Bongo to Ali Bongo following Omar's death in 2009, and the emergence of South Sudan as an independent oil-producing state in 2011 (followed by civil war in 2013). Despite those changes, Arcadia 1 exhibited profitability, in West Africa and elsewhere. Successful commodity traders are agile and adapt.

354. Thirdly, Mr Kelbrick reiterated in oral evidence that he had been through many regime changes:

> "A. Yes. I'd been through about six new brooms; yes? I'd been through different regimes since -- since Abacha was there and then from Abacha to the interim government of Abdulsalami Abubakar and then from Abubakar on to Baba and then on to -- and then on to Yar'Adua, etc. I'd been through any number of regimes, whether it was starting down there in '98, a military regime, or the birth of the democracy. I'd lived through a number of. So it was -- the phrase I'm looking for was plus ça change. I don't think much of it was going to change." (Day 3/131)

355. It was suggested to Mr Kelbrick that Attock Dubai lacked sufficient connections due to the departure of Mr Farouk Ahmed, who had left NNPC in around February 2014. However, Mr Ahmed returned to NNPC in February 2016. Mr Kelbrick said that if he needed to meet anyone in NNPC, he could rely on Mr Ahmed and also service providers to effect an introduction. His contacts at NNPC in May 2015 included Mr Emmanuel Ibe Kachikwu, also mentioned by Mr Bosworth as quoted above, who was the first Group Managing Director of NNPC under President Buhari, appointed in August 2015.

356. It was put to Mr Kelbrick that, as a result of tumult in the Nigerian oil sector, it became difficult to get in contact with NNPC. He was taken to an email dated 2 July 2015 to Elizabeth Driay concerning NNPC: *"Couldnt get Eli so spoke to BP myself. A new concern is that comd [NNPC Crude Oil Marketing Department] is under lockdown and not allowing anybody in to the dept."* Mr Kelbrick said that could have been for a number of reasons:

> "A. Once again, that's -- there can be any number of reasons that COMD is locked down or NNPC is locked down.
>
> Q. Yes.
>
> A. If you go back through -- when I was -- two years ago, I said there were days when I was fenced, kept out of the whole of NNPC, be it PPMC, COMD, whichever. There were times they may have a security drill. There could be any number of reasons. They may not have had light. It's not -- and also, it's not a place that -- we went through this again last time. It's not a particularly easy place to do business and so there could be - I mean, yours could be one of the reasons."

357. The Claimants also refer to an email from Mr Mounzer to the Attock Dubai shareholders dated 21 September 2015, attaching the 2015 annual financial report:

> "Whilst economical and commercial environment are exceptionally difficult this year we are pleased to send you herewith our semi-annual report as at 30 June 2015 presenting a small profit.
>
> As to the business prospects, we are now in the process of renewing our WAF crude oil supply contracts. We shall keep you posted of any progress in the forthcoming weeks."

I do not regard that communication as shedding any light on the present issue.

358. I accept the evidence of Mr Bosworth, Mr Kelbrick and Mr Scott that (i) there is no historical basis why regime changes in West Africa after 2015 would have had any greater adverse impact on Mr Bosworth's and Mr Kelbrick's contacts (and their ability to originate new contacts) than regime changes in West Africa before 2015, and (ii) both Mr Bosworth and Mr Kelbrick had deep and extensive contacts within the relevant parts of the Nigerian political and industry sectors that meant they were well placed to continue doing business after the latest regime change in 2015.

(b) Alleged change in NNPC tender requirements in 2015

359. The Claimants suggested that another result of the regime change in Nigeria is that the tender requirements for NNPC changed. This argument was not specifically referred to in the Claimants' Inquiry Defences at all.

360. The Claimants cited a Reuters article titled "*Nigeria's NNPC issues 2016 crude oil contracts worth $13.5 billion*" dated 17 December 2015 which said:

> "The Nigerian National Petroleum Corporation (NNPC) has issued its 2016 crude oil term contracts to 21 companies […] The list includes refiners such as Spain's Cepsa, Italy's Saras, India's IO C and ENO C of the United Arab Emirates, as well as trading houses Trafigura, Mercuria and Vitol and international oil companies ENI, Total, Exxon and Shell.
>
> The remainder are Nigerian downstream and NNPC trading companies.
>
> In a statement, NNPC said: "Apart from ensuring transparency, the companies were carefully chosen based on their track records and trading experience to ensure that Nigerian crude cargoes are not left unsold."
>
> The list is pared down from the final 2015 contract list, which comprised 43 companies and did not include any global traders. Many of the mostly local companies included then were criticised by international watchdog groups, such as the Natural

> Resource Governance Institute (NRGI), as "unqualified intermediaries" who added little value.
>
> President Muhammadu Buhari is on a campaign to root out corruption in the NNPC and oil theft across the nation, which he assesses at about 250,000 bpd.
>
> During a televised launch of the contract process in October, when 278 companies submitting bids for crude oil contracts, NNPC officials promised to slash the number of winners and conduct business differently.
>
> "Things have changed in Nigeria," said one oil industry source close to the contract negotiations. "The process of tendering has been more transparent they want to work with more reputable companies."
>
> Oil traders said the inclusion of Exxon and Shell was also unusual. "It is the first time for both," one trader of West African oil said of direct contracts between Exxon, Shell and NNPC. "It seems to tie up with the drive to partner with end-users."

361. The Claimants suggested that the regime change, and the change in NNPC tendering, reflected a move towards indigenisation in the Nigerian oil sector. The results of the tender show that the winners were all either refiners, international trading companies (including Exxon for the first time, to whom Attock Dubai had previously been selling, as well as Trafigura, Mercuria and Vitol), Nigerian downstream companies (such as Sahara) or NNPC itself. By contrast, Attock Dubai was a relatively small company (which at least on its face did not meet the net worth requirement for the tender) and was not Nigerian-owned, nor was Crudex (which was based in Mauritius). This indigenisation had been going on for some time. The Claimants point to an Attock Mauritius balance sheet from May 2013, which said:

> "As expected AOIL crude supply from Nigeria has proven difficult due to increased competition from a number of indigenous trading groups and the refined products for crude oil swap deals operated by PPMC/NNPC which command dedicated volume. A small number of the indigenous groups has performed: the balance either suffering heavy losses and re-strategizing or assigning their operations to established traders.
>
> AOIL/AOIDMCC are now in the process of preparing the Application tor Crude Oil Term Contracts with NNPC. We shall keep you informed as soon as new contracts are awarded."

362. This argument was barely foreshadowed even in the Claimants' expert evidence. Mr MacNamara in a brief section of his report referred to countries like Nigeria starting to insist on greater indigenisation, reflected in new tender arrangements for 2015/16, but noted that the process had got off to an inauspicious start. He refers to indigenous Nigerian oil producer Afren PLC's C-suite having held 'roadshow' presentations for banks in London (which Mr MacNamara attended) in 2014, in order to raise a

syndicated loan backed by oil exports, and stating that under the new rules one would need an indigenous partner, such as them. However, Mr MacNamara says, barely a year later the company collapsed after the CEO and COO turned out to have been syphoning cash off the company, which simply disappeared, and the company collapsed into bankruptcy.

363. An analysis of NNPC's published tender requirements shows that (i) they did not change in any respect relevant to Attock (or Mr Bosworth/Mr Hurley) between September 2010 and September 2015, (ii) Attock did not at any time meet the stated financial requirements regarding turnover and net worth (which from 2010 to 2014 required turnover of US$ 500 million and net worth of US$ 100 million) and (iii) Attock did not meet the "*Who may apply?"* criteria at any time, unless it was regarded as *"an established and globally recognised target volume trader"* (changed, non-materially, in the September 2015 wording, to *"an established globally recognised large volume Crude Oil trader"*). Despite that, Attock was nominated for and lifted multiple NNPC cargos during the years 2010 to 2014. Mr Kelbrick confirmed in re-examination that the requirements had never been an impediment to Attock in the past, and neither NNPC nor anyone else had told him that Attock had failed in the 2015 tender competition due to failing any of these pre-conditions.

364. It is possible that those in charge of the competition took a broad view of the requirements, as regards both size and Nigerian connections. Thus Mr Kelbrick said in oral evidence:

> "Well, we would -- we would have argued at any one time the oil on the water that was under our control could have been worth 110 million, could have been worth 120 million, so as a consequence, we could satisfy some of these things as far as we were concerned. Also, the likes of -- let's take Crudex, for example, had -- I was told had palm oil businesses and all sorts of -- Chief Anenih was a well-known person and he was close to me, so we would use some of his figures in that. That would also count for, as you may wish to put it, the indigenisation of the company. Our company, if you really looked at it, was probably 40% Nigerian, yes. So I think that we met a number of these stipulations, and some of those people who won and were awarded cargoes, I'd quite like to see if they were worth 300 million because the 20 or 21 that won, the seven that were added, it's questionable whether they were worth 300 million after the politicking of the sponsors, etc."

See also the evidence of Mr Fasinro quoted in § 348 above.

365. The key point, however, is that so far as Attock was concerned, there was no material change in the requirements. Based on the evidence before me, therefore, I consider there to be no reason to believe that they became a problem for Attock Dubai in 2015 not having caused any difficulty before. Nor is there any reason to believe that there was any material change that would have impacted on Mr Bosworth and Mr Hurley's planned Arcadia 2 business.

(c) Alleged dispute with Azenith in June 2015

366. In June 2015, Attock may have had a disagreement with Azenith related to the price of one of the cargoes. On 7 June 2015, Mr Kelbrick and Mr Mounzer sent a letter to Azenith:

> "Attock is a commercial counterpart to Azenith and cannot bear the responsibility of a Bank not fulfilling the obligations linked to a commercial contract between its client-AZENITH-and a third party-Attock, and written agreements between these two parties for reason outside of this commercial contract.
>
> Under our commercial contract Attock is hereby restating its disagreement to UBA's attempt to claim an amount which should not be claimed under this commercial contract and enforcing payment under a documentary credit in contradiction with the agreements between the two parties.
>
> Attock is also advising its bank Credit Suisse to enquire on the real motivation of UBA Lagos and their own responsibility in the rejection.
>
> Attock is reserving all its right to further claim under UK law."

367. Mr Kelbrick could not recall any details of this dispute and said that it was likely handled by Mr Mounzer, who used his electronic signature:

> "Q. It's right, as far as we can see from the documents, this dispute was never resolved, was it?
>
> A. Again, I don't know. This document as -- I would probably term it a Mounzer document. We have already been through the fact that he had my signature electronically. I wouldn't stamp a letter like that. So I'm afraid I don't remember it and I think it's highly unlikely that I put that letter together at all.
>
> Q. I'm not suggesting you put it together. It may well be that Mr Mounzer drafted it. I'm just asking about the content of it. It looks, doesn't it, as though you have fallen into a commercial dispute with Azenith and that you are threatening or reserving your rights to make a legal claim against them?
>
> A. Again, I don't recall what happened.
>
> Q. And I'm suggesting to you that from this point, June 2015, you remained in dispute with Azenith and this dispute was never resolved.
>
> A. I don't know. Q. Essentially, what I'm saying is you fell out with Azenith, didn't you, in June of 2015?
>
> A. No.

> Q. You fell out with them over this pricing dispute.
>
> A. I don't believe that I've fallen out with Azenith at all. To my knowledge. Who in Azenith did I fall out with?"

368. Had this point been pleaded, or indeed foreshadowed in any other way, Mr Kelbrick might have been able to investigate it and adduce evidence in response. As it is, the correspondence seems to me entirely inconclusive, and it would not be fair to draw any conclusions from it about relations between Attock Dubai and Azenith or the likely impact of any such disagreement.

(7) Planned geographical expansion of Attock Dubai business

369. Mr Kelbrick said he had intentions for Attock Dubai to expand into North Africa and South Asia as part of his *"long-term strategy for Attock Dubai"*. There is some evidence of attempts to initiate trades with the Indian Oil Corporation ("***IOC***"), the Tunisian national oil company, Entreprise Tunisienne d'Activités Pétrolières ("***ETAP***"), and Mubadala Petroleum in Abu Dhabi in the year leading up to the Freezing Order.

370. Mr Kelbrick said in his witness statement:

> "60. Before the Freezing Injunction, I had already started on these expansion plans. I met with Maurizio La Noce of Mubadala Petroleum in Abu Dhabi to discuss Attock Dubai registering with his company as a trader in petroleum products. I knew that Attock Dubai's pre-existing credit lines with banks such as Credit Suisse would be an asset in its application."

371. In cross-examination, Mr Kelbrick agreed that the meeting with Mr Maurizio La Noce probably took place in May 2014. He did not know whether Attock Dubai actually went on to register as a trader, and the evidence does not indicate that any products were in the event traded by Mubadala before Attock Dubai closed down.

372. On 12 May 2014, Attock Mauritius successfully registered with IOC. Mr Kelbrick could not recall why Attock Mauritius was registered instead of Attock Dubai but said that it was likely because *"Attock Dubai was a new company and so did not yet have the volume of administrative documents required for the registration"*.

373. Mr Kelbrick described IOC as the *"most stringent"* of the national oil companies in India, and so he felt that this successful registration would have led to participation in tenders in India generally. In the event, Attock Dubai did not participate in any IOC tenders.

374. In 2014, Attock Dubai applied to be included on ETAP's list of business counterparties to lift their crude. On 10 February 2015, Attock Dubai received a fax invitation from ETAP to submit offers. The invitation said that offers had to be received between 17-19 February 2015.

375. Mr Kelbrick explained in his fourth witness statement that Attock Dubai could not pursue this opportunity because it could not get letters of credit from banks.

(8) Planned Attock Dubai expansion into paper trading

376. As well as expanding geographically, Mr Kelbrick says that he intended to expand Attock Dubai beyond physical cargoes to trading futures, swaps, and options; and that:

> "62. If Mr Mounzer and I had been able to expand Attock Dubai's business in the way that we had planned, in terms of (i) buying and selling crude oil from and to new regions; (ii) trading products; and (iii) trading paper, I believe that we would have doubled our profits within two to three years. In order to achieve that growth, it is possible that we would have required more manpower, perhaps up to an additional 5 employees."

(9) Eventual closure of Attock Dubai

377. In 2017, Mr Kelbrick and Mr Mounzer made the decision to dissolve Attock Dubai. As Mr Kelbrick explains in his fourth witness statement:

> "68. By 2017, Attock Dubai had been dormant for two years. With no viable path forward and no realistic prospect of resuming trade, the company was no longer a going concern. The Freezing Injunction was still in place and trading was impossible, so after careful consideration and with considerable regret, the decision was taken formally to dissolve the business."

(J) BOSWORTH AND HURLEY ATTEMPTS TO GAIN EMPLOYMENT

(1) Oil trading business vs employment

378. Mr Bosworth and Mr Hurley advance their loss of employment claim in the alternative to their claim in respect of the oil trading business. Their case is that:

> "In the alternative to establishing the Oil Trading Business after their departures from the Arcadia Group in 2013, Mr Bosworth and Mr Hurley considered taking up roles and/or job opportunities as the CEO and CFO of another major oil trading house or other senior executive roles." (Amended Particulars of Loss and Damage in the Inquiry § 55)

As Mr Bosworth said in oral evidence, *"My aim was not to work for someone again. My aim was to have our oil trading company with a strategic investor either from the start or later on."* (Day 2/112).

379. There is nonetheless some overlap in the chronology between Mr Bosworth and Mr Hurley's pursuit of business opportunities and pursuit of employment opportunities, as they explored both in parallel. As Mr Hurley explains in his seventh witness statement:

> "109. I should be clear though that by far and away the preferred route was that we would have our own trading business, and that is where the focus was. So we were conscious that we had to be careful, especially with employment contracts where you tie yourself in and there can be minimum periods and other

> conditions. We thought that our investor for the oil trading business might be a week or a month around the corner, and we did not want to do something that was going to cause us to miss out on an opportunity to set up the trading business. If you sign an employment contract, you might be excluding yourself from pursuing your ultimate objective.
>
> 110. Over time we tried to be flexible to make something work, by seeing if we could be a consultant or a broker or if we could put a company in place owned by someone that we were advising. We really explored all possibilities. If we left any opportunities out there, I am not aware of it.
>
> 111. That meant we were often talking to people if we felt there was any chance of something viable working out, even if we did not know which route it would take. We would speak to them if they were credible, and then try to work out whether they were going to be viable as partners, or investors, or employers. So we were certainly considering and exploring job opportunities, but often as part of wider discussions."

380. Mr Hurley reiterated in cross-examination that *"98:25 A. I think at all times the self-employed opportunities were a priority, but if an opportunity arose that was acceptable and there were potential benefits of that developing business going forward, that would be of interest."* (Day 3/98)

(2) Team moves

381. Mr Bosworth and Mr Hurley approach their loss of employment claims on the basis that it is likely that they would have moved as a team.

382. It is clear from the evidence that Mr Bosworth led most of the conversations with prospective employers, but Mr Hurley says that opportunities would have arisen for him out of these discussions:

> "114. In addition to the ones I mention below, I know that Pete was having other discussions too. That was natural, because the strongest relationships in the industry are between those on the trading side. I knew my counterparts at the other trading houses, and I knew some of the key traders, and I would meet with them occasionally. But meeting with counterparts is much more a day-to-day part of a trader's business, so Pete had the stronger relationships with people at other trading houses, often with the principals, and it made sense for him to have those discussions.
>
> 115. For instance, I recall that he had advanced talks with Mercuria in 2015. I was not involved in those discussions, but he kept me informed at the broadest level about those discussions, and my understanding was that he would keep the discussions as open as he felt was necessary in order to keep the party interested. I was aware that those discussions could translate into

> something for him and him alone. That was his prerogative, and absolutely no problem from my side. But I generally left it open that he could discuss things on my behalf too if need be, and my understanding was that Pete's discussions would often involve me and him being presented as a package, which was how it had been at Arcadia and reflects how closely we tend to work together. So even if I was not directly involved in the conversations Pete was having, if they had not been prevented from progressing due to the Mareva, there was a good chance some of them would have result in a job opportunity for me alongside Pete."

383. There is disagreement between the parties as to whether it should be assumed that Mr Bosworth and Mr Hurley would have moved together. The Claimants suggest that Mr Hurley's loss of employment claim, and particularly his claim for an alleged CFO role at Mercuria and a senior position at Vitol, is speculative at best and hinges entirely on Mr Bosworth securing a role for him. The position of Mr Bosworth and Mr Hurley is that they would have moved as a team.

384. Mr Main said in his second witness statement:

> "16. […] Peter and Colin always worked together and I suppose Colin would have been hired with him. Their track record of 20 years of top level trading would have got them an opportunity. They were known as a team who had delivered annual profits in excess of US$500 million for Arcadia."

385. He reiterated in oral evidence:

> "The experience I have is that Peter and Colin were definitely seen as a team and Colin's ability to leverage the balance sheets of Arcadia Petroleum with the banks was critical to their trading success and Peter always said he couldn't do it without Colin and Colin obviously couldn't do it without Pete. So I saw them, and most of the industry did, as very much a very successful team." (Day 10/10:10-17)

I accept that evidence.

386. The expert evidence sheds some light on the likelihood of team moves happening in the oil industry. Mr Smallbone said in his report:

> "154. […] I do not think such a team move, especially a team consisting of a senior trading manager and someone in a senior finance role would happen in a Tier 1 trading house.
>
> 154.1. In general, team moves are not common within trading houses as they want the strongest performers rather than a team. There are two main reasons for this:

> 154.1.1. Firstly, trading houses want to pick individuals that match each role and this can be increasingly difficult if an individual within the proposed 'team' does not match the vacancy held; and
>
> 154.1.2. Secondly, trading houses would want new hires to adapt to the culture they want to instil (and ways of working within the trading house). In my experience at Trafigura, when we recruited people as part of teams, we had persistent difficulties with the individuals not assimilating to the culture of Trafigura. There was also the added problem with team hires constantly trying to implement or refer to what worked at their previous company rather than adapting to, and integrating into, the new company and culture.
>
> 154.2. In the case of Mr Bosworth and Mr Hurley, the possibility of an established company or major trading house having openings for both a CEO and CFO at the same time would be extremely rare. In addition, these senior roles would usually be filled by long term staff members and succession plans would be in place."

387. In contrast, Mr Heaven wrote in his report:

> "115. […] Oil Trading Houses give priority to the profitability that hiring an individual or team will bring to them. They have the ability and willingness to organise themselves internally to accommodate successful individuals and teams."

388. Mr Smallbone accepted in oral evidence that there are team moves in the oil trading industry, especially if the team consists of outstanding individuals, but reiterated that it would be unlikely that two CEO and CFO roles would open at the same time, and also said that team moves could be problematic:

> "Q. There are team moves in the oil trading industry, aren't there?
>
> A. Yes, there are. I mean, I think to answer the question on them is that often a team move would be maybe two traders or a trading team to be joining. The idea that there would be an opening or roles for a CEO or a regional CEO and a CFO at the same time I think make that -- it's unlikely they'd be looking for the two roles at the same time. I also make the point that when, as a company, you're looking to hire, what you would want ideally is to have the best person for that role. When you hire a team, there can be issues, and I've seen that when we hired a team from Noble for our coal department in Trafigura, is that they come in with this idea of, "Well, this is what we did at the old company. This is what we did at Noble. This is how we did things." So it does make it -- you know, there can be cultural fit

> issues there. And as I said, I think with the two gentlemen in question, to have a higher-ranking trading CEO, regional CEO or head of WAF trading-type role and a CFO role to be vacant at the same time I think would be quite unusual.
>
> Q. It all depends on whether the team consists of outstanding individuals; correct?
>
> A. Yes, I agree."

389. I consider that Mr Bosworth and Mr Hurley clearly intended to move as a team, and would have been likely to do so had either of them moved at all. The evidence indicates that they were regarded as outstanding individuals, and it is common ground that in those circumstances team moves were feasible in the oil trading industry.

(3) Mercuria (second half of 2015)

390. Mr Bosworth's contact within Mercuria at the relevant time was Mr Marco Dunand, the CEO. Mr Bosworth describes him as a *"very old friend of mine."*

391. Mr Bosworth says in his eleventh witness statement:

> "210. In the second half of 2015, I contacted Marco Dunand, CEO of Mercuria, which was one of the top five oil trading companies in the world. I approached him to see whether he had a position at Mercuria for someone with my knowledge and experience. At the time, I could see that Mercuria did not have a specific head of crude oil trading for West Africa and the Middle East. I saw that as a gap in their organisation where I could have added a lot of value.
>
> 211. Marco was very happy to talk, and we met several times in Mercuria's offices. We met several times in a meeting room (the first on the right hand side after you entered the offices, opposite the canteen). I also went to see him at his desk on one or two occasions. That desk was just on the left hand side as you entered Mercuria's trading room. We met at least five times, possibly more.
>
> 212. Marco knew about the case before we met. He knew John by reputation as someone litigious, and it didn't come as a surprise to him. He was happy to talk regardless. In the first one or two meetings Marco was open to me working for Mercuria, in a senior role. At the time I thought that if discussions were successful, I would also get Colin to join the management team in a senior finance role.
>
> 213. However in the second or third meeting, I remember telling Marco I was under a Freezing Order. Once he knew, I didn't need to explain the implications to him. He told me that I

> couldn't be employed by Mercuria, while I was under the Freezing Order.
>
> 214. After that, I met with him a few further times, to explore ways I could work with Mercuria as a consultant or broker. I brought up opportunities in Sudan, Gabon, and a contango that was happening at the time. I distinctly remember Marco telling me he already had 20 VLCCs taking advantage of the contango. As to Sudan and Gabon, Marco sounded interested at first, but the discussions went nowhere. I later learned that Mercuria simply took the idea and did the business without me. As I've mentioned, that showed one of the pitfalls of trying to find a brokerage or consultancy role, while being unable to act on the opportunities you found. To interest people in your consulting, you had to bring them opportunities. But once they had the opportunities, they could just take them for themselves. They had a particularly strong reason to do that in our case, because the Freezing Order prevented us from pursuing those opportunities for them."

392. In cross-examination, Mr Bosworth was candid about the fact that he did not initiate the first meeting with Mr Dunand with the intention of looking for employment; rather, he was looking for a job for his daughter:

> "113:17 Just to be clear, how many times, as you recall, did you meet to discuss employment with Mr Dunand?
>
> A. The genesis of that was once the Mareva and the case hit, I had to tell my oldest daughter that she couldn't do an MBA that she was planning to do and she would have to work to live on her own. I started the conversation with Marco to ask him whether there was an opportunity for her -- she's based Switzerland -- to work with Mercuria. He said he would give her an interview. She passed the interview. So that was my first. The conversations then went from that to: what could we do together? Could you -- can I work for you? What's the –
>
> Q. Sorry to interrupt. We will get on to that.
>
> A. Oh, sorry.
>
> Q. Just at the moment, how many -- you say you met him several times –
>
> A. I don't recall. I don't recall. I met him several occasions talking about both business that we could do together and potentially me working for him."

393. On Day 2 of the Inquiry Trial, the evening after Mr Bosworth's first day of cross-examination, the Defendants disclosed WhatsApp messages showing a conversation between Mr Dunand and Mr Bosworth about the job that was secured for Mr

Bosoworth's Daughter. In a friendly exchange, Mr Dunand wrote: *"I gave her the opportunity for 2 months the rest was up to her. Souad tells me that with such a character she must've a great dad. Clearly she got that wrong. .."*

394. Mr Bosworth was occasionally inconsistent about the extent to which the Freezing Order was discussed during his meetings with Mr Dunand. Sometimes he said that Mr Dunand did not mention the Freezing Order, referring instead to *"your situation"*; and other times it seemed that the Freezing Order was discussed in some detail. He thought it was at either the second or the third meeting when he went through perhaps a bit more detail of the Freezing Order. Mr Dunand was an experienced oil executive so, Mr Bosworth said, he had known what the implications potentially were and it was after that that he said Mr Bosworth could not be employed. Mr Bosworth thought Mr Dunand had spoken to his head of internal compliance, a lady who had previously been head of compliance for Goldman Sachs. Mr Bosworth recalled that it was Mr Dunand who brought up the potential of a Middle East role as they had a gap, but that it was pretty clear early on that Mr Bosworth's "situation" prevented it. Mr Bosworth said he did not know whether Mr Dunand had seen the Freezing Order, but he "*certainly seemed to know that it would be problematic for them hiring me potentially under the freezing order as to whether I could have authorisation to trade with their assets and whether there might be some confusion between their assets and the Mareva"*. Later in his evidence, Mr Bosworth said that he couldn't remember whether Mr Dunand had spoken to compliance in relation to his employment, or in relation to self-employment as a consultant or broker, which was discussed after it had already become clear that employment was impossible due to the Freezing Order. He said the reason why the conversation with compliance was not mentioned in his witness statements was (as I understand it) because that recollection was triggered by seeing the documents.

395. It was put to Mr Bosworth that there was no appropriate vacancy for him to fill at Mercuria. Mr Magid Shenouda had already been appointed as Head of Trading and Deputy CEO in 2014; Mr Kurt Chapman was serving as Global Head of Crude Oil Trading, a role to which he was appointed in 2006 and held until 2019; and Mercuria already had a Managing Director for Africa, namely Mr Laoye Abiola, who had held that role since 2005. Mr Bosworth said that *"what I felt they were missing was that coordination between physical and crude, physical and paper."*

396. It was suggested to Mr Bosworth that he only had a few meetings with Mr Dunand, so it could not be right that he reached the *"advanced stages"* of employment discussions of Mercuria (as he wrote in his witness statement), especially given that the position that Mr Bosworth envisioned was never created as such. Mr Bosworth responded that, knowing Mr Dunand as he did, it would not have been a very long process to employ him, had Mr Dunand wanted to proceed. He believed that Mercuria did take care of the gap internally, though he did not know whether they created the specific position that he had discussed with Mr Dunand.

(4) Vitol (mid 2016)

397. The following year, Mr Bosworth organised a meeting with Mr Ian Taylor, CEO of Vitol. On 23 May 2016, he wrote to Mr Taylor:

> "I hope you are well and don't mind my intrusion. Paul kindly gave me your email address and suggested I reach out to you

> directly. As I am sure you are aware, I have a rather unpleasant legal situation with Arcadia and John. I would really appreciate the opportunity to meet with you, to seek some advice on how to handle things. I am still living in Switzerland but can come across to the UK at your earliest convenience."

398. On 24 May 2016, Mr Taylor responded: *"Peter. Happy to set something up. I am in Switzerland from time to time but for sure London would probably be easier to pin down a time. Pls liase with elena. Look forward to seeing you."*

399. Mr Bosworth said in his eleventh witness statement:

> "219. I recall the meeting with Ian quite well. We met at Vitol's old offices in Victoria, in the afternoon on 26 May 2016, in a conference room close to the entrance.
>
> 220. We discussed the legal case with John. I explained the Freezing Order to Ian, and I asked him if there was anything he could do to help. Ian was an influential man, so I was hopeful. When I told Ian about the case, he was sympathetic. But he told me he didn't have a close relationship with John, so he was unlikely to be able to influence him. As I have said, John had tried to interest Ian in buying Arcadia, and Ian had turned him down. I have been shown an email from Ian to me, dated 10 June 2016, following our meeting []. Ian did see if he could help me indirectly, through someone close to John. Unfortunately, Ian did not find a way to help.
>
> 221. We also discussed the possibility of my being employed by Vitol. I showed Ian the numbers from Arcadia. Ian was an oil trading CEO and he knew what those numbers meant. He understood how successful we had been. He was shocked at that success, particularly when I explained John stripped out his money each year. But even though Ian was impressed, once I told him about the Freezing Order, he ruled out the idea of employment. He was particularly worried that if Vitol employed me, the Freezing Order might affect Vitol."

400. Mr Bosworth said that he was *"not specific"* with Mr Taylor about the potential role he could take on at Vitol, but that it did not matter anyway because Mr Taylor was *"short and sharp"* once Mr Bosworth raised the idea of employment:

> "145:8 Q. Right. And when you say he ruled out the idea of employment, what employment had you asked him for?
>
> A. I -- I wasn't specific. Vitol is a huge organisation. My potential role within Vitol -- I didn't know what spaces they may have. Ian knew of my track record. As I say here, he was pleasantly surprised at our ability to make money and so I asked him whether there might be a role somewhere within the organisation that he could employ me. It wasn't specific.

…

> 147:23 I raised it with him and he said no, as an employee and so it was in that context that it's rather short and sharp with -- I raised it. He did not raise it with me. The meeting was to discuss whether there was a possibility to -- for Ian to help me find an amicable solution to the case and I raised the possibility of working with him at that meeting."

401. On 31 May 2016, Mr Bosworth sent a follow-up email to Mr Taylor:

> "Apologies for not getting back to you sooner, I wanted to say thank you for the opportunity to have a chat about things. I really appreciate it and if you have any ideas, please don't hesitate to let me know.
>
> On a separate note;
>
> 1) if you see any opportunities for me to be of use to Vitol please let me know.
>
> 2) I have been doing some ground work in Kurdistan where Traf and Glencore are prefinancing crude exports; my focus has been on bitumen but the crude oil side is potentially interesting. I think it is difficult for you to be seen to be a participant because of your significant dealings with SOMO but Mitsui may be willing to front/sleeve the business if you were interested."

402. On 10 June 2016, Mr Taylor responded:

> "Peter very good to see you .. I really do hope that you are able to resolve these things with JF and I am quietly feeling out whether there is someone new/fresh but close to him that could help. I will also think what we might be able to do together .. we are quietly involved in Kurdistan .. if you ever need Bitumen let us know as we do now trade it.
>
> Best regards Ian."

(5) Mocoh (2017)

403. Another year later, in parallel to their discussions with Mocoh about business opportunities, Mr Bosworth and Mr Hurley discussed with Mr Hacking at Mocoh the possibility of their being employed. Mr Hurley said in his seventh witness statement:

> "117. I have described above how we discussed setting up the oil trading business with Mike Hacking of Mocoh from 2017 onwards. We also discussed the possibility of me and Pete taking a job at Mocoh. I met Mike a number of times, as did Pete. Having refreshed my memory by looking at a WhatsApp from the time, I recall that Pete reported back following one meeting with Mike that Mike was particularly interested in hiring me. But

> again, the Mareva got in the way []. As I have described above at paragraph 94 above, the Mareva stopped us having any involvement with Mocoh, either from an employment point of view or from the independent business point of view, which as I say was the preferred route, because Mike saw that it stopped us from being able to achieve anything useful for him."

404. On 16 September 2017, Mr Bosworth sent a WhatsApp message to Mr Hurley: *"Hope all good. I had a really good meeting with Michael. He wants to meet you and me las[t] week of September … I would say you are top of his list [smiling emojis] He wants to hire you more than me [smiling emojis]".*

405. Mr Hurley elaborated in cross-examination that no specific job was discussed, and Mr Hacking just *"couldn't get over the hurdles personally"* and was particularly worried about the reputational impact of hiring a senior finance person subject to a freezing order:

> "Q. What is it that you understood Mr Hacking wanted to hire you as?
>
> A. I'm not sure a specific job title was referred to.
>
> Q. Mocoh already had a CFO, didn't it?
>
> A. I'm not sure if they did or if someone was leaving, something was changing. I don't know, but certainly we did discuss me being part of Mocoh in some way, shape or form, but it just -- it just couldn't work for him. He could not get over the hurdles personally. He was happy to talk to me, but ultimately, he just felt that this would not be good reputationally for his company for a senior finance person in their organisation negotiating on any particular transaction with one of his banks when there is a freezing order in place.
>
> Q. But no position was ever discussed.
>
> A. I don't recall that a specific position -- whether it was CFO or anything or whether it was any other particular title, I can't recall." (Day 3/98)

(6) Other potential job opportunities

406. Mr Bosworth mentions in his eleventh witness statement an approach that he made to Glencore in 2015, and his suspicions that he was turned down as a result of the Freezing Order:

> "225. Glencore is another of the top five oil trading companies. In 2015, its head of oil trading was Alex Beard. I knew that Steven Gibbons, who was the Third Defendant in these proceedings, had connections to Alex. In 2015, I therefore asked Steve to speak to Alex, about my getting a job at Glencore. Steve

> later told me that Alex had not responded to his approach. Later, Steve told me that he himself had approached Alex, but had been turned down for a role on account of the Freezing Order. I therefore believed that Alex had turned me down for the same reason.
>
> 227. I have since been shown an email between Alex and Steve. The two discuss recruiting a worldwide head of crude oil trading, and Alex tells Steve that "your situation really makes it untenable" []. As I've mentioned, litigation does not make trading oil untenable. Glencore had retained traders subject to litigation before (paragraphs 104.2 and 104.10 above). For that reason and at the time, I understood the Freezing Order had prevented Alex getting a job at Glencore."

407. Mr Bosworth accepted in cross-examination that he did not contact any major oil trading houses directly for employment after 2016:

> "It's right , isn't it , that after May 2016 when you met with Mr Taylor, you yourself didn't make any further direct approaches in relation to employment to any trading houses?
>
> A. To any of the big trading companies, I did not.
>
> Q. Or to any trading company.
>
> A. Well, we did –– I may have –– well, I did discuss with Tope the possibility of working for them, if you remember, but in terms of me approaching someone specifically to see if there was a job for me, no, I didn't.
>
> …
>
> I asked two people who were friends/people I could really speak to in very senior positions within the industry whether they would consider hiring us. On the basis of what they said, it was frankly a waste of time to start looking for other employment." (Day 3/44)

408. Mr Hurley mentioned one final job opportunity in his seventh witness statement, although he could not remember the name of the company:

> "127. Having refreshed my memory from a WhatsApp conversation on 10 May 2022 (INQD1D20005428), I was involved in further conversations then about becoming the group CFO of a trading company in Dubai. I cannot recall the full name of the company, but I recall being interviewed by them and that things were well advanced. Again, that opportunity did not go anywhere. No one turned around and told me they were not giving me the job because I had a Mareva against my name. But as I said, that does not happen. No one does that. But I would

> strongly suspect that was the reason. Indeed, I recall discussing that with the local contact who had made me aware of this opportunity, who indicated that was the case. I see from the WhatsApp conversation about the Dubai job that the expected salary was at least $500,000. As I have said, that was also my salary when I was at Arcadia and is about the level of salary I expected to earn if we had set up our own oil trading business. My salary expectation for the other job opportunities discussed above would have been similar."

(7) Mr Main's evidence

409. Mr Bosworth and Mr Hurley rely on the evidence of Mr Main in relation to their loss of employment claim. Mr Main has been friends with Mr Bosworth since around 2002. They speak a couple of times per month and Mr Main once lent Mr Bosworth CHF 2.8 million to put down a deposit for his house in Switzerland.

410. Mr Main said in his second witness statement:

> "15. They were known for the profits they had generated. Their reputation was as guys who had gotten Arcadia to where it was making hundreds of millions of dollars in profits, year after year.
>
> 16. Peter and the team could probably have walked into positions at any of the main trading houses with the contacts and experience they had. Peter alone could have brought with him the relationships and experience to trade around a million barrels of Nigerian crude oil a day. There are not many people in the world with that kind of ability and reputation. Peter and Colin always worked together and I suppose Colin would have been hired with him. Their track record of 20 years of top level trading would have got them an opportunity. They were known as a team who had delivered annual profits in excess of US$500 million for Arcadia. They and their team were not only prominent as Nigerian crude traders, they had good contacts in the Middle East, the Mediterranean, all around the world. Their industry reputation was very strong. I don't know anyone who spoke badly about Pete Bosworth or Steve Gibbons or Arcadia. They were unusual in how long they had been at Arcadia – in that business people often move around more than the Arcadia senior management team did."

411. Mr Main adds the following evidence on Mr Bosworth and Mr Hurley's job prospects at Vitol:

> "17. I remember Bob Finch, then a senior executive of Vitol, told me he thought Peter and his team were great. I think that he would have hired Peter and Colin without hesitation were it not for the freezing order and the dispute with John.
>
> …

> 48. […] I also spoke to friends working at Vitol. These individuals called me and asked me what was going on, whether I knew anything that they didn't about the dispute. They had concluded, I recall from these conversations, from the fact that there was a Mareva order against the management team that they were guilty of something, that John must have hard evidence."

412. As Mr Finch retired in June 2015, he would not have been involved in the hiring process following Mr Bosworth's discussion with Mr Taylor in 2016. In any event, a hiring process was never discussed. Mr Main accepted that Mr Finch never expressly told him that he would hire Mr Bosworth and Mr Hurley, but confirmed that Mr Finch spoke very highly about Mr Bosworth whenever they discussed the Arcadia situation.

413. Mr Main acknowledged in oral evidence that he had limited experience of working with Mr Bosworth in a professional capacity and had found him frustrating to work with in the past. He elaborated:

> "A trader mentality is to make decisions at the very last minute. When you're investing in long-term money projects, you've got to have a long-term strategy which you have got to stick to for a long time. So obviously there was a clash in our management styles, but that doesn't mean he wasn't a very successful trader and I have been a reasonably successful mining investor.
>
> Q. Despite the fact that you yourself found him frustrating to work with, you are endorsing him for employment positions.
>
> A. Yes, in his skills." (Day 10/12)

(K) KELBRICK ATTEMPTS TO GAIN EMPLOYMENT

414. Mr Kelbrick claims for the alleged loss of a senior level position at Vitol Dubai or alternatively an equivalent/comparable role at an equivalent/comparable company. I have set out below, and accept, the account he has given of approaches made to Vitol and Mercuria.

(1) Vitol from 1998 onwards

415. Mr Kelbrick's evidence is that he met Mr Paul Greenslade, head of crude trading at Vitol, in 1998, and they connected over their shared experience at Shell. As Mr Himsworth put it, *"Shell guys seem to stick together"*. In 2004, around the time Mr Kelbrick left Arcadia, and as recorded in the Fraud Trial Judgment, Mr Greenslade again encouraged Mr Kelbrick to join Vitol. It became a *"running joke"*:

> "72. I continued to see Mr Greenslade at other industry events and in airport lounges over the years. In the early 2000s, we bumped into each other so often in airport lounges while travelling to similar destinations for work that it became a running joke between us that I should just come and join him at Vitol.

> …
>
> 74. Mr Greenslade and I revisited the possibility of me joining Vitol around 2008, when the company was looking to hire a senior trader for a management role in its Singapore office. Once again, I declined the opportunity, on this occasion because I was not interested in relocating to Singapore at the time. I was working extensively with Mr Decker and Attock and making good money.
>
> 75. Accordingly, I always had it in mind that Vitol could be a potential employment option for me, as long as I maintained strong relationships within the organisation and my reputation in the business."

416. After the imposition of the Freezing Order on 12 February 2015, Mr Kelbrick considered his next career move. He revisited the idea to join Vitol and spoke to his close friend and managing director of Vitol Dubai, Mr Paul Himsworth:

> "78. After the Proceedings had been issued and the Freezing Injunction served, and Attock Dubai was no longer able to trade, I had further conversations with Mr Himsworth about what I would do next in my career. These discussions came at around the same time that Mr Himsworth was considering his own retirement and looking for his successor at Vitol in Dubai. Mr Himsworth said that he would speak with Ian Taylor (then the CEO of Vitol) about me joining, and I believed him. Mr Himsworth is not the kind of person to promise such things and not deliver. My understanding is that there was then a dialogue between Mr Himsworth and Mr Taylor about my joining, and that they discussed it several times in person when Mr Taylor was in Dubai or when Mr Himsworth was in London.
>
> …
>
> 80. We never progressed as far as to have the specific details of the position formally outlined as Mr Himsworth communicated to me that Mr Taylor, and therefore Vitol, was concerned about the Proceedings and the Freezing Injunction and could not engage in any formal discussions about any role until I had got rid of them."

(2) Mr Himsworth's replacement

417. Mr Himsworth and Mr Kelbrick have been friends since 2007 and have known each other in a professional capacity for over 17 years. Mr Himsworth provided evidence on Mr Kelbrick's behalf at the Inquiry Trial in support of his claim for lost employment.

418. Mr Himsworth retired from Vitol in 2018. His evidence was that, absent the Freezing Order, Mr Kelbrick could have been his *"potential successor"* or had a role *"of (at*

least) equivalent seniority to me", although Himsworth also says that Mr Kelbrick's role would have *"differed from mine"*:

> "Mr Kelbrick's role would have differed to mine in that, while I was engaged in a general management role, Mr Kelbrick would have been more "on the ground", in the sense of procuring contracts for oil and liftings of oil, for Vitol. Mr Kelbrick was what I would call an "originator" of oil and oil business, and that is what we would have expected him to do at Vitol. I was not generally involved in sourcing and operating crude oil contracts in the way Mr Kelbrick was."

419. There was disagreement between the Claimants and Mr Kelbrick as to who ended up being Mr Himsworth's replacement. Mr Himsworth said that he was *"replaced at Vitol by Mike Muller in 2018, after 8 years at Vitol".* However, contemporaneous documents suggest that Mr Himsworth was replaced by a Mr Fariq Masood, who also succeeded him as Vitol's nominee director on the board of directors at a part-Vitol owned company, Hascol Petroleum Ltd.

420. Mr Himsworth accepted in oral evidence that Mr Muller did not in the end work in Dubai, and said he ended up stationed in Singapore. A press release (relating to Mr Muller's appointment by a different company) stated that Mr Muller joined Vitol in London in 2018. Hascol's 2019 Annual Report stated that *"Mr Farid Masood is managing director of Vitol Dubai having joined Vitol in 2018".* However, Mr Himsworth maintained that Mr Masood did not take on the same duties as he had had. He recollected that Mr Masood had used the managing director title since before Mr Himsworth retired, and "*he basically then took over from me in Dubai, but he didn't inherit all the duties that I performed*". Mr Himsworth said:

> "In Vitol we weren't particularly hot or, in fact, Mr Taylor would rather we didn't use titles, particularly on things like business cards. Farid came in to be the ears and eyes in Pakistan regarding the Hascol business, so that was actually negotiated with, I think, a friend of his in London who was head of investments. He was due to be based in Pakistan but that never happened." (Day 9/188)

Further:

> "Q. You were replaced as managing director by Mr Masood?
>
> A. He has the title but he didn't get to do the duties that I was responsible for. He's not on the board of directors I believe for the refinery. He's not involved with business development projects around the region." (Day 9/191)

So far as Mr Muller is concerned, Mr Himsworth accepted in cross-examination that it was not correct to say that he replaced Mr Himsworth at Vitol. That was, he said, the original idea 'sold' to Mr Himsworth by Mr Taylor but *"[t]he dynamics moved on"*:

> "Q. It's not right to say, is it, that you were replaced at Vitol by Mr Muller?
>
> A. That was the original idea sold to me by Mr Taylor.
>
> Q. But that's not what happened, is it?
>
> A. No. The dynamics moved on." (Day 9/191)

421. Mr Himsworth accepted in cross-examination that it was *"not unfair"* to say that Mr Muller may have been a more obvious hire than Mr Kelbrick at Vitol:

> "Q. Yes. I mean, Mr Muller might be an example of that kind of calibre of person. I mean, Mr Muller was one of the most successful traders in the world, wasn't he?
>
> A. He certainly ran one of the most successful trading departments in the world. I think Mr Muller had actually much more experience in many ways than Steve Kelbrick and therefore had many more -- had actually lived and worked out in Singapore. And looking back it on it now, I suspect that's why Ian wanted him; to bring him in to take over from the existing general manager of Singapore.
>
> Q. Yes. I mean, one hesitates to make comparisons, but Mr Muller was a rather more obvious recruit to Vitol than Mr Kelbrick because Mr Muller could point to a long history of enormous and high volume success in trading as well as, as you say, presence in Singapore; is that fair?
>
> A. That's not unfair."

422. It was suggested to Mr Kelbrick that his conversations with Mr Himsworth did not descend into any great detail:

> "Q. Did Mr Himsworth tell you what crude oil or what trading Vitol Dubai was doing?
>
> A. I'm not sure how many books were even being run out of Dubai because there was also Vitol Bahrain; yes? So it was -- for me to be shooed in, to have a job -- and I wouldn't have expected to have been in that role until I was 65. I would have expected to have been moved within what was a burgeoning Vitol group.
>
> Q. Just so I understand the nature of the business, how many oil traders were there at Vitol Dubai?
>
> A. No idea.
>
> Q. Do you know how much oil trading they were doing in Vitol Dubai?

A. No idea.

Q. Do you know where -- where they were sourcing the oil at Vitol Dubai?

A. They had tankage and they had facilities in Fujairah; right?

Q. Yes.

A. So they would either blend products -- excuse me. They would either blend products or they would blend crude in Fujairah, and I don't know how much of that business may have been re-BL-ed crude, but -- I don't know. That's speculation. So while -- the trader may well – as I have just said, may well or may not have sat physically in Dubai, but there would have been a trader involved in that business.

Q. But, I mean, it sounds like your discussions with Mr Himsworth didn't really descend to the detail of exactly what Vitol Dubai was doing.

A. I knew that -- I knew the basic geographical area that he was taking care of. I knew some of their investments, but it's not for Paul to say there are investments in Pakistan. It's not for Paul to tell me -- I can go and find out their investments in India; yes? That's something I can do in a trice; yes? But when it comes down to getting into -- as we've seen for the last two days, yes, it's terribly difficult to get into the oil trade; yes? I was already, prior to the injunction -- it's I think fair to mention I was in the oil trade, until the injunction was served, as a principal.

Q. Did Mr Himsworth tell you how much West African trading was being done at Vitol Dubai?

A. I would be surprised, as West African is principally low sulphur, whether any of it was being done, unless it was the discharge end into -- to the customers in India.

Q. Right. So West African oil trading, probably not done.

A. I would say -- I would say almost definitely not." (Day 4/17-18)

(3) Conversations with Mr Taylor, CEO of Vitol

423. Mr Himsworth told Mr Kelbrick that he would raise the employment idea with Mr Taylor, and they started having conversations around 2016. Mr Himsworth said in his first witness statement:

"17. In around 2016, I raised the possibility of potential job opportunities at Vitol with Mr Kelbrick. He confirmed he was interested in taking a role at Vitol Dubai. I then raised this with

> the then Chief Executive Officer ("CEO") of Vitol, Mr Ian Taylor ("Mr Taylor").
>
> …
>
> 19. Between 2016 and 2018, I had multiple conversations with Mr Taylor about Mr Kelbrick joining Vitol Dubai. Mr Taylor was the principal decision maker in relation to hiring Mr Kelbrick. I believe that the conversations about hiring Mr Kelbrick between 2016 and 2018 did not progress into a firm offer of employment because of Vitol's reservations about the Proceedings and the Freezing Injunction (as I discuss further below). I believe Mr Kelbrick and Mr Taylor continued to have several meetings over the years in which they discussed potential job opportunities. Mr Taylor was interested in Mr Kelbrick joining Vitol as, like me, he viewed Mr Kelbrick as a very attractive candidate with an extensive portfolio who could really bring valuable business to Vitol. I recall that there were discussions about Mr Kelbrick joining in around 2018 as my potential successor, although (as I explain below, the roles that Mr Kelbrick and I would have fulfilled would have differed quite a lot.
>
> …
>
> 21. As to the role that he would have had at Vitol Dubai, he would have been of (at least) equivalent seniority to me, and the role would have consisted of sourcing and operating crude oil contracts for Vitol Dubai, as he had done throughout his career, whether for his employer oil traders or for his own account, as well as certain additional investment projects.
>
> 22. I expected then (and still believe) that Mr Kelbrick would also have made a good successor to my role as Managing Director."

424. Similarly, in his second witness statement Mr Himsworth said:

> "16. […] I believe serious conversations about Steve joining came out of discussions around 2016 regarding my plans for retirement, in which Steve indicated that he would be interested in a senior role at Vitol, were it to be available. I suggested to Mr Taylor that Steve join Vitol as my replacement, and it became part of an ongoing dialogue between the two of us. I remember having these conversations with Mr Taylor in both Dubai and London, normally as part of discussions regarding Vitol's wider business. Mr Taylor was keen to pursue Steve, which was ordinarily all that was required for a senior management hire at Vitol, but he thought he could not take Steve on while the proceedings and associated freezing injunction remained in place. My retirement was not a condition of Mr Taylor hiring

> Steve. Steve was such an asset that Vitol would have found a role for him whether I was still at the company or not. I think Steve had his own separate channel of communication with Mr Taylor as well at a later point."

425. Mr Himsworth said in oral evidence that, between 2016 and 2018, he had three or four short conversations with Mr Taylor about recruiting Mr Kelbrick to Vitol, whether as Mr Himsworth's replacement or otherwise. Mr Himsworth announced his retirement in or around 2018. Mr Himsworth gave this evidence about conversations in 2018 with Mr Taylor:

> "Q. Just so I understand the sequence of events, you told Mr Taylor that you were happy to go, if I can put it like that –
>
> A. Yes.
>
> Q. -- and Mr Taylor at that point mentioned that Mr Muller was in the frame.
>
> A. Yes. Well, it basically was, yes, and my job would be a convenient holding spot.
>
> Q. Right. And at what point did you suggest to Mr Taylor that Mr Kelbrick might be a replacement instead?
>
> A. I know I had a meeting with him in the Four Seasons. He was over on a family holiday and it came up.
>
> Q. That's Mr Taylor was on holiday?
>
> A. Mr Taylor was on a family holiday. He called – asked me to come in and just chat to him about what was going on generally. I think at that time, I brought up again Steve Kelbrick as a replacement joining us or just joining us per se, but, again, for the same reasons we have originally discussed, the case and the freezing order, it was a very brief conversation. He wouldn't pursue it."

Mr Himsworth said Mr Taylor did not ask for any information about Mr Kelbrick's or Attock's track record in terms of volumes or sources. The conversation was *"very brief and was curtailed by the outstanding proceedings and freezing order"* (Day 9/214), so there was *"no point … in discussing it in depth"* (Day 9/215).

426. Mr Himsworth said that neither he nor Mr Taylor asked Mr Kelbrick about the Freezing Order; they "*made [their] our own assumptions*" (Day 9/217). Further:

> "Q. It seems odd, doesn't it? I mean, if Mr Taylor was otherwise keen to employ Mr Kelbrick, wouldn't he have wanted to find out whether the freezing order was a problem or not?
>
> …

> A. No. I think there's enough rumour in the market. It's not just the freezing order. Again, you had the proceedings and what the proceedings were about; I guess fraud.
>
> Q. And nobody thought to ask Mr Kelbrick what the terms of the freezing order were.
>
> A. No. We -- our assumption was that he was not allowed to -- had no control over his assets." (Day 9/219)

427. Mr Himsworth said that he was not involved in the hiring of Mr Masood or Mr Muller (his replacements) and acknowledged that those hiring decisions were *"purely down to Ian Taylor"* (Day 9/191) and that he, Mr Himsworth, was *"far too junior"* to be involved in that process (Day 9/192).

(4) Kelbrick meeting with Taylor in September 2018

428. On 5 September 2018, Mr Kelbrick wrote to Mr Taylor's brother, Mr Bruce Taylor, asking if he could organise a meeting with Mr Taylor. The meeting was organised for 18 September 2018. As Mr Kelbrick explains in his fourth witness statement:

> "82. In September 2018, I was able to arrange a meeting with Mr Taylor through his secretary. In the course of preparing this witness statement, I have been shown an email exchange between me and Mr Taylor's secretary. I don't recall this exact email chain, but I do recall in broad terms arranging to speak to Mr Taylor in September 2018, and having looked at the email chain, I think it is likely I met Mr Taylor on 18 September 2018. I wanted to speak to Mr Taylor about the possibility of me joining Vitol. I met with Mr Taylor at Vitol's offices in Victoria, London for approximately 40 minutes. We met in Mr Taylor's office, rather than a meeting room. I remember during the meeting that Mr Taylor had to dab his mouth quite often with his handkerchief, which I assumed was a result of his throat cancer.
>
> 83. But Mr Taylor made clear to me that a role for me at Vitol was available to me only after I got these Proceedings and the Freezing Injunction out of the way. He did not distinguish between the Freezing Injunction and the Proceedings. The message from Mr Taylor was in essence: "We're ready to employ you, but you have to get all of this stuff out of the way, OK?". By "this stuff", he did not distinguish between the Freezing Injunction and the Proceedings. Looking back now in hindsight, I believe that if I could have got rid of the Freezing Injunction, I would have been employed by Vitol, or at least there is a good chance I would have been employed by Vitol."

429. Mr Himsworth said in re-examination that having a meeting with Mr Taylor was *"quite significant, in that he was a busy man. To carve a time out of his diary was pretty tricky. I guess his travelling had slowed down. He was typically travelling a lot of the time"* (Day 9/232). Likewise, Mr Kelbrick said in oral evidence: *"I have a reliable*

recollection of what we [he and Mr Himsworth] were planning to do and I trusted Paul to speak to Ian Taylor about it. He was my envoy to Ian: yes? Ian is a ridiculously busy individual and I wasn't going to waste his time, but if Paul had warmed him up enough that he was prepared to see me, I was going to do that". (Day4/26)

430. Mr Kelbrick did not take any materials to this meeting:

> "Q. And you didn't, in advance of the meeting, provide Mr Taylor with any documentation –
>
> A. No.
>
> Q. -- did you, like a résumé or a business plan or anything of that nature?
>
> A. No, because during that meeting, even at the end of that meeting, he gave me sort of a reassuring smile, put his hand on my shoulder and said, "I think we know what your skillset is, Steven." (Day 4/29)

431. Mr Kelbrick said in oral evidence that Mr Taylor did not directly offer him a job in the meeting. Rather, he said that a job would be available if the freezing order were not in place:

> "Q. Mr Taylor never indicated to you, did he, that there was any serious prospect of giving you any particular position in Vitol Dubai?
>
> A. We had talked about my being in Dubai. We had talked about my being head of Vitol Dubai and then we went on to talk about other things, yes? Did -- I mean, if you're asking me did Ian offer me a job during that meeting? Then categorically no, he did not.
>
> Q. Nor did he indicate that he would have offered you a job had there been no freezing order.
>
> A. Yes, he did. "Get this stuff out of the way", he said to me.
>
> Q. And no specific position was discussed.
>
> A. No specific position, apart from the talk of Vitol Dubai, yes." (Day 4/34-35)

(5) Conversations with other oil trading houses

432. Mr Kelbrick's evidence is that *"the oil trading industry has always been based on relationships*" and he would have alternatively secured a job at a comparable trading house through his strong informal networks, which he nurtures through activities like playing golf. Similarly, Mr Himsworth said in his witness statement:

> "33. If the Freezing Injunction had not been granted or was set aside (but the Proceedings continued) and if we had not offered

> him a role at Vitol Dubai, given Mr Kelbrick's reputation within the industry, I think there is a very good chance that another comparable trading house would have employed Mr Kelbrick in a similarly senior and well compensated role."

433. Mr Kelbrick said that over the course of his career, he had been approached by Arcadia, Vitol (through Mr Greenslade), Essar Group, and Reliance Industries. In his second witness statement, Mr Himsworth listed Trafigura, Glencore, Mercuria, or Arcadia (at the time) as comparable oil trading houses to whom Mr Kelbrick would have been attractive given his expertise in West African trading, and offering similar earning potential.

434. Around 2014, Mr Kelbrick had discussions about possible employment with Mr Chapman, head of crude trading at Mercuria. In 2015, shortly after the imposition of the Freezing Order, Mr Kelbrick arranged to meet Mr Chapman for lunch at the Westin Hotel on Jumeirah Beach Road in Dubai, where he was on holiday at the time, and the opportunity was abruptly dropped:

> "91. I played golf with Mr Chapman on a few occasions in 2014 when I was living in Dubai and before the Proceedings and the Freezing Injunction. Later that year, we discussed potential commercial opportunities for me to assist Mercuria, given my expertise. Mercuria had only recently begun expanding into Dubai, and Mr Chapman informed me that they were looking for assistance to help drive this growth, particularly in India. Mr Chapman suggested that he would explore the possibility of me joining Mercuria with its founders, Marco Dunand and Dan Jaeggi. While I was not necessarily set on the idea, I would have liked to work with Mr Chapman, so I was interested in what opportunities there may have been to do so and would have considered any offers seriously, particularly if it included an opportunity to have a stake in Mercuria's business akin to the Vitol Share Scheme.
>
> 92. Shortly after I was served with the Proceedings and the Freezing Injunction, I think it was the week afterwards, I met Mr Chapman for lunch at the Westin Hotel on Jumeirah Beach Road in Dubai, where he was on holiday at the time. Mr Chapman gave me the impression that he had made some headway with Mr Dunand and Mr Jaeggi regarding me joining Mercuria. Before he could develop this update, however, I felt it important to update him about my new situation. Given how quickly news circulates within the industry, I felt it was important to speak with him directly. It became immediately apparent that any discussions about joining Mercuria would no longer be viable. Having been relatively close with Mr Chapman before these proceedings began, we somewhat lost contact since."

(6) Mr Kelbrick's qualifications

435. The Claimants submit that there was no obvious benefit for Vitol Dubai in hiring Mr Kelbrick, because Vitol Dubai did not do crude oil trading, and the Vitol Group was already lifting crude oil from the NNPC in Nigeria:

> "Q. But if he was sitting in Vitol Dubai as a West African trader, he'd be the only person in Vitol Dubai doing it?
>
> A. Yeah, he would be the person with involvement, yes.
>
> Q. And you mentioned his connections, but at this point Vitol, the Vitol Group, already had a term contract, didn't it, with NNPC for lifting?
>
> A. They did, but if they could find our sources, other ways in to increase their lifts from West Africa or elsewhere, one would use those.
>
> Q. Vitol already had very close connections with the NNPC in particular –
>
> A. It did.
>
> Q. -- because of their joint venture with them?
>
> A. They did."

436. In addition, the Claimants submit that Mr Kelbrick would have been an unsuitable hire because Vitol's crude oil trading was far larger than the comparable trades in Attock Dubai, and Mr Kelbrick's most recent experience of managing an office dated back to his time back in PetroChina in 2005. Mr Himsworth gave this evidence:

> "Q. I mean, compared to the volumes that would have been traded by individual traders out of the Vitol London office, nine cargoes in a year is a relatively modest number, isn't it?
>
> A. It's a modest number.
>
> Q. I mean, a good successful Vitol trader in London will be trading much more than that?
>
> A. They would, but the more the merrier. (Day 9, 197:11)
>
> …
>
> Then if we turn over the page (X3/15/2), it looks like, doesn't it, that that was his most recent experience in office management?
>
> A. Yes. However, he had worked in offices. He'd been managed in offices. The job of actually managing the office in the very specific way, in terms of looking after the running of an office,

> wasn't particularly more than 5, 10% of the job in Dubai. There weren't that many employees in there. The decision-making really was very small. Really, the job there was taking that, looking out for -- managing the traders and then also getting involved with business development across the region." (Day 9, 199:13)

437. In re-examination, Mr Himsworth said that what was most important was not volume or management skills, but rather margins and business skills. As I have already said, in his second witness statement Mr Himsworth listed Trafigura, Glencore, Mercuria, or Arcadia (at the time) as comparable oil trading houses to whom Mr Kelbrick would have been attractive. He continued:

> "Lots of their trading strategies revolved around the fact that West Africa produced the best quality crude oils at prices linked to North Sea Brent Crude, and so anyone who could acquire or control West African barrels of crude oil was in high demand. As a rough estimate, I would say there were approximately 50 top West African crude traders worldwide at the time. Steve was in the top quartile of those traders. His experience in the supply of physical crude in particular, meant that he was very influential in the global trade of West African crude."

438. Similarly, Mr Kelbrick himself suggests that Vitol wanted to hire him because of his connections and his track record in sourcing term contracts. Mr Himsworth said that Mr Kelbrick was *"a big name in the West African trading business"* and "*a clear fit for Vitol*", or any comparable trading house. Mr Kelbrick indicated in cross-examination that he would likely have regarded a Vitol role as a stepping stone to other things:

> "Q. This is a role that you weren't a good fit for and which you probably wouldn't have wanted to do, would you?
>
> A. Well, had I been allowed to do it, yes, had the circumstances been that I could do it, had the freezing order not tainted me, then I would have absolutely done it as a segue into any other, as I said, of the senior roles in the group; yes? I mean, I was known to members of the board at that time. I was known -- certainly known to Ian Taylor through Ian and his brother. I mean, for me, Vitol would -- and there is that sort of lineage, if you like, through the 5S system, so I would have felt comfortable there. Would I have wanted to do it forever? No. I think you're right. I would have used it as a segue into getting into developing business in other places." (Day 4/24-25)

(L) BOSWORTH AND HURLEY: INVESTMENT OPPORTUNITIES

(1) Background

439. Mr Bosworth and Mr Hurley claim for losses for alleged returns from investing the earnings they say they would have made from their claims for their lost businesses or employment.

440. Mr Bosworth said in his eleventh witness statement: *"It is common for people in the oil trading business to pursue business opportunities outside of trading. These are people with tens or hundreds of millions of dollars – they don't just put it under the mattress"* [228]. Similarly, Mr Hurley said: *"What is absolutely certain is that, if I had been earning an income, I would not have just sat on a pile of cash."* [136]

441. As to how much each of them would have invested and where, Mr Bosworth and Mr Hurley gave evidence as follows.

i) Mr Bosworth said in his eleventh witness statement:

> "336. Had Arcadia 2 been successful, I would have invested my dividends from Arcadia 2, and at least 50% of my bonuses from Arcadia 2, in purchasing further shares in Arcadia 2 (paragraphs 74 and 83).
>
> 337. I would then have spent some of my income on the following fixed items.
>
> 337.1. I would have paid the Swiss wealth tax. Historically I've paid about CHF 150,000 a year and I do not expect this would have changed. I would have had various options as regards income tax, including paying a fixed sum to the Swiss tax authorities or working from a lower tax jurisdiction such as Dubai.
>
> 337.2. In addition to taxes, the Swiss government makes you buy health insurance (which cost about CHF 30-40,000 a year), and invest in a state pension (about CHF 50-55,000 a year).
>
> 337.3. After tax, I would have spent about CHF 240,000 on living expenses (mortgages, holidays, [child's name]'s school fees, food, utility bills, and the rest). I am not a person for spending 100 million on a lavish lifestyle. When the Freezing Order hit, I already had Verbier, I had my house in Switzerland, and I had Ibiza. I didn't need any other big expenses. So as my income rose, my lifestyle would not have changed, and my spending would not have increased.
>
> 337.4. Then if I had the money, and if I had not been running Arcadia 2 or employed at an oil trading house, I would have done the Covid contango play (paragraphs 305 to 317 above). That was free money. It would have required USD 5 million in collateral (be it cash or assets) to do it. But it was obvious, and I would have taken money from any of my other investments or businesses to make it happen. If I had been running Arcadia 2, Arcadia 2 would have done the Covid contango play. Similarly, if I had been employed at an oil trading house, I would have done the contango play for my employer.

338. After those fixed items, I planned to split up the remainder of my income as follows:

339. I intended to invest at least 50% of my income in a combination of gold and Bitcoin. From 2015 to July 2020, I planned to predominantly invest in Bitcoin, as I believed it had the greatest upside. From July 2020 onwards, I would have predominantly invested in gold. By then, I would already have built a substantial Bitcoin position, and I would have wanted to diversify. I strongly believed in the value of gold and Bitcoin, and I told people about them again and again during the Freezing Order. I continue to believe they will keep going up.

340. I would have invested 20% into new businesses, though I would have aimed not to invest more than USD 5 million in any one new business.

341. I would have invested 10% speculatively in shares. One of those planned investments was Tesla.

342. I also planned to invest 15% in real estate investments in Switzerland. This was something I was planning around the time the Freezing Order hit. However once the Freezing Order hit, I didn't have the cash to spare. I spoke about it (in person) with Michael Deslarzes (paragraph 274 above), a gentleman called Sebastian Bottari, and an ex oil trader who I used to play tennis with (but whose name escapes me).

343. I planned to keep the remaining 5% in reserve, so I could leap on promising opportunities as they popped up. I planned to keep that 5% in a deposit account with a bank, in highly liquid shares, or in a mixture of the two."

ii) Mr Hurley said in his seventh witness statement:

"132. As to how much money I would have invested in these opportunities, if I had not been prevented from earning an income through the Mareva, I would have split my income into three different parts.

133. The first part was my salary (which as I say I expect would have been around $500,000 when the Mareva order was first imposed and would have increased with inflation). I would have allocated my salary after tax to ongoing living expenses, and generally therefore would not have invested that money.

134. The second part would have been approximately 30% of amounts I received in addition to my salary (for example, through a bonus, through shareholder returns from the oil trading business, or through returns on other investments). I would have put that 30% into what I considered to be safer investments. That

> would have included my investments made through St James's Place, and through Collafin. It would also have included the RH Homes business described below.
>
> 135. The third part would have been the remaining 70% or so of my non-salary income. I would have invested that in slightly more speculative opportunities (for example, the nappy and steel wool businesses, Bitcoin and/or Tesla). I might have done that by taking the money out and pursuing those opportunities with Pete in our personal capacities. But we also might have agreed to leave amounts due to us in the oil trading business, to allow those opportunities to be pursued under the umbrella of the entity itself in the way I have described."
>
> (footnotes omitted)

442. Some of the business and investment opportunities would have involved Mr Bosworth and Mr Hurley together, while others pertain to only one of them. The relevant Defendant(s) is/are listed in each subheading below.

(2) Relevance of Mr Bosworth's and Mr Hurley's existing asset portfolios

443. The Claimants submit that the starting point for the Court to assess how Mr Bosworth and Mr Hurley would have invested in the counterfactual is their existing asset portfolio at the time the Freezing Order was obtained in 2015.

444. Mr Bosworth's affidavit dated 12 March 2015 lists the assets he held at the time in excess of US$10,000. Those investments were predominantly held in real estate, pensions, bank deposits, and cars. Mr Bosworth's only direct equity shareholding was in a Cypriot entity called 'Gene Signal Holding' in a value of EUR 34,572 and forms only around 0.1% of his total shareholding. As Mr Dearman notes, Mr Bosworth's asset portfolio at the time "*reflects a predominantly low risk, low volatility portfolio with low risk assets with capital preservation a priority"*.

445. Mr Hurley's prior asset disclosure shows that his significant investments were held mainly in real estate, cash and bank accounts, investment bonds and holdings in investment funds and some limited holdings in private companies. Under the heading 'Shareholdings' he listed two BVI registered entities; he himself did not hold shares in these companies (rather his wife was the beneficial owner). This is also described by Mr Dearman as a *"predominantly low risk, low volatility portfolio with low risk assets with capital preservation a priority"*.

446. The Claimants submit that these investments are more traditional compared to the significantly higher-risk asset classes being claimed in this Inquiry, including cryptocurrency and early-stage business ventures.

447. Mr Bosworth in cross-examination gave this answer to that line of argument:

> "A. Well, previous to that, I really didn't have much of an investment strategy other than building a property portfolio, which I had done. When you work with Mr Fredriksen, you work

> 24 hours a day, seven days a week. I did not put my time to looking for personal investments other than having built a property portfolio. That time of life and in your early 50s, you can start to look at other investments, and that's what I would have done. (Day 3/20)
>
> …
>
> A. I had built my property portfolio. I didn't need to do any more than that and therefore, you start to look at other investments from that point in time." (Day 3/21)

448. I would accept the point that Mr Bosworth and Mr Hurley's historic risk profiles are not determinative. They had already built up portfolios of properties and other relatively secure investment, and may (in the counterfactual) have ventured into different types of investments than those they had previously held. At the same time, however, had they been either running their own oil trading business, or working in senior positions at a large oil trading house, the pressures on their time would likely have been comparable to those they experienced working for Mr Fredriksen. Further, whilst some element of riskier investment may not have been surprising, it is questionable whether they would have made a very radical change in their existing approach to investment. Those factors must be taken into account in any assessment of the likelihood of Mr Bosworth and Mr Hurley having substantially altered their investment profiles in the way suggested. The nature of their existing portfolios may also, as I consider later, be relevant to questions of remoteness.

(3) Investment opportunities

(a) Bitcoin investments 2014 onwards (Mr Bosworth and Mr Hurley)

449. Mr Bosworth says in his eleventh witness statement:

> "267. I first became interested in Bitcoin in around 2015. I was in Ibiza, and I read a report about Bitcoin, written by a Dutch man whose name I cannot now recall. It prompted me to research further, and it immediately appealed to me."

and explained the rationale for his belief in Bitcoin as an investment.

450. On 24 July 2015, Mr Bosworth received a YouTube video from Daniel Masters titled "*bitcoin under the hood*", which Mr Bosworth forwarded to Mr Hurley on 27 July 2015. On 29 July 2015, Mr Bosworth sent another YouTube video to Mr Hurley with the subject "*The Truth About Bitcoin*". Mr Bosworth continued to correspond with Mr Masters about Bitcoin. For example, on 27 September 2015, Mr Masters sent Mr Bosworth an email with the subject line "Nigerian Central Bank Plans to Regulate Bitcoin" and wrote *"fyi - free to chat most this coming week"*.

451. It was put to Mr Bosworth that this contemporaneous evidence is insufficient to show a concrete intention to invest:

> "Is there any other written record of any research into Bitcoin that you did in 2015?
>
> A. It would have been on the internet, so, no, it would have been on Google searches and ...
>
> Q. So you didn't create any documents yourself.
>
> A. No, I didn't.
>
> Q. You were just Googling it.
>
> A. Yes." (Day 3/16:10)

452. Mr Bosworth was also asked about the Mt Gox scandal of 2014:

> "Q. Do you remember what happened in Mt. Gox in 2014?
>
> A. No, I don't.
>
> Q. You say you did research into Bitcoin in 2015.
>
> A. Mm-hmm.
>
> Q. Your research didn't turn up what had happened at Mt. Gox?
>
> A. I don't recall it as part of my research when I - sorry.
>
> Q. You don't recall from your research into Bitcoin that Mt. Gox was a Bitcoin exchange which essentially handled almost all of the Bitcoin transactions in the world?
>
> A. No, I don't recall that.
>
> Q. You didn't find that when you Googled?
>
> A. I may have done, but I don't recall.
>
> Q. And you don't recall that it was a major scandal in the Bitcoin world because Mt. Gox had to file for bankruptcy following a hacking attempt? You don't remember that from your research?
>
> A. I don't remember the details of it.
>
> Q. And you don't remember that the consequence of that was the Bitcoin price collapsed between 2013 and 2014?
>
> A. I do recall that the -- there was a collapse in the price at that time. Yes, I do.
>
> …

> Q. I mean, no one, Mr Bosworth, who was a serious potential investor in Bitcoin and had done any serious research in it could have been unaware of the Mt. Gox problem and the impact that had on the market.
>
> A. But that was in the past. You're looking about - I'm looking in -- from July 2015, I'm looking to the future." (Day 3/16-18)

453. Mr Bosworth explained his Bitcoin investment thesis in oral evidence:

> "I was looking at the world and at that time the US or most of the countries in the world were starting to run significant borrowing and deficits, and that trajectory was up over time to what it is now, which is in most cases over 100% of their GDP. The ultimate way to handle that, in my opinion, as a government is to effectively devalue your currency because you reduce your debt. And I was convinced by Bitcoin because of the limited amount that is there, that that would not be subject to the relevant devaluation as the US dollar or any other currency would be. So I was, and I still remain to be, utterly convinced that, over time, this is one of the best investments you will make." (Day 2/154-155)

454. Mr Bosworth said in his eleventh witness statement that he would have invested at least 50% of his income in a combination of gold and Bitcoin. That is the approach taken in Mr Stern's model.

455. Mr Hurley says that he would have invested 70% of his non-salary income on more speculative investments, with most likely 10-20% going to Bitcoin:

> "156. My view at the time was that it was hard to ignore Bitcoin as an investment, given the information we got from Danny and other sources. It was clear that it had momentum, and that it was increasingly accepted as the cryptocurrency of choice. So it was something that I would have invested in as part of the 70% (i.e. the part of my income reserved for more speculative investments). The exact amount I would have invested in Bitcoin would have depended on the scale of the 70% in absolute terms. In most eventualities I would likely have invested around 10-20% of the 70% in Bitcoin. But if, for example, the 70% only equated to a relatively low amount – say US$100,000 – it is possible that I would have invested the full 70% in Bitcoin. This is something we would have done as a long-term investment (with the ability to exit and re-enter the investment at will), and we did not have a sense of a need to cash out at any particular price. It was a bit of an unknown, so we would have seen where it was going."

456. Both Mr Bosworth and Mr Hurley say that they would have held onto their Bitcoin investments. Mr Bosworth says in his eleventh witness statement:

> "323. […] Given how strongly I believe in this investment, and the money I would have had from a successful Arcadia 2 or oil trading role, that investment would have been substantial.
>
> 324. At a high level, my plan with Bitcoin was to buy it and hold it. I would still be holding it today. Bitcoin is volatile. If you trade the short term ups and downs, you can lose money. But the long term trend is one way and up. And my bet on Bitcoin (just like my bet on gold) was a long term bet on the future of Western economies."

457. Mr Stern also assumes that Mr Bosworth would have invested in Bitcoin every year and kept holding Bitcoin over the period of 2015-2025.

458. Mr Bosworth and Mr Hurley's original Particulars of Loss and Damage in the Inquiry, signed by Mr Bosworth and Mr Hurley on 14 March 2025, stated:

> "77. The Freezing Order prevented Mr Bosworth and Mr Hurley from investing their own funds into assets or commodities that would have increased in value, and from realising the gains from such increases. The Freezing Order caused and/or was an effective cause of these lost investment opportunities. In particular:
>
> (1) But for the Freezing Order, in or around mid-2015 Mr Bosworth and Mr Hurley would have invested at least US$100,000 each in Bitcoin. In or around July 2015, Mr Bosworth discussed Bitcoin's potential with Daniel Masters, a former oil trader who set up the
>
> "Global Advisors" Bitcoin investment fund. Mr Bosworth and Mr Hurley would have sold their positions in Bitcoin in January 2021. It is averred that they each would have made substantial profits. …"

The Amended Particulars, signed by Mr Bosworth and Mr Hurley on 6 March 2026, revised this plea as follows:

> "77. The Freezing Order prevented Mr Bosworth and Mr Hurley from investing their own funds <u>(including the remuneration that they would have obtained, and/or the expenses that they would not have incurred, but for the Freezing Order)</u> into assets or commodities that would have increased in value, and from realising the gains from such increases. The Freezing Order caused and/or was an effective cause of these lost investment opportunities. In particular:
>
> (1) But for the Freezing Order, in or around mid-2015 Mr Bosworth and Mr Hurley would have invested at least US$100,000 each in Bitcoin. In or around July 2015, Mr Bosworth discussed Bitcoin's potential with Daniel Masters, a

> former oil trader who set up the "Global Advisors" Bitcoin investment fund. ~~Mr Bosworth and Mr Hurley would have sold their positions in Bitcoin in January 2021.~~ It is averred that they each would have made substantial profits. …"

I note that the amount which Mr Bosworth and Mr Hurley said they would have invested remained *"at least US$100,000 each"*.

459. Mr Bosworth gave this explanation for the amendments that were made to the Particulars:

> "A. I don't think they are inconsistent. One is a lump sum or an amount of money that you start to invest based on not necessarily having employment, and the one on the right [the Amended Particulars] is where I have employment or have an income. So on the left [the original Particulars], I would have invested with or without an income. On the right, I would have invested with an income.
>
> …
>
> A. On the left, from what I wrote and what I remember, it was -- I was not thinking about whether I had a job and had an income at that stage." (Day 3, 14:5)

Further, Mr Bosworth said *"the original statement was based on a document or a piece of paper or a WhatsApp to someone saying I would be selling Bitcoin now"*, but *"I was foolish not to write down to a third party that I would have gone back in after 2021"* (Day 3/10-11). He explained that:

> "I had written a note, which I think is in the evidence, that it would be time to sell. I hadn't written a further note to say it would be time to buy back. But as one made money over time, the one on the left I think does not reflect my earning capacity during that period. It was based on what we would -- I would have invested at least 100,000, whereas the one on the right is looking at if we had been employed or had had our own company and therefore had incremental money to be able to trade. So having -- having sold -- I did write that it would be time to sell, but I didn't write down that it would be time to buy again, which I would have done." (Day 3/9)

460. Mr Hurley said in oral evidence that *"I don't know why it's in the original and I don't know why it's deleted from the second"* (Day 3/104); and *"I'll be clear, and that is that as far as Bitcoin is concerned, I'd very much follow Mr Bosworth's lead as far as that's concerned."* (Day 3/103)

461. As to the new suggestion that Mr Bosworth and Mr Hurley would have sold in 2021 but then reinvested in bitcoin, Mr Bosworth said:

> "There's no reason why I couldn't have gone back in. That's just -- what I was trying to say is that one wouldn't -- I'm not the type of trader who buys something, sells it immediately, buys it back and trades. That's highly volatile trading. We are now in a counterfactual world on the right-hand side, I believe, where basis -- the amount of money that has been calculated independently that we could have had at our disposal, we would have been holding it or reinvesting that money back into Bitcoin at a later stage." (Day 3, 7:16)

462. Mr Bosworth was asked why, given his confidence that he would have invested in Bitcoin, he did not include it in his ninth witness statement in December 2023 – which set out (in support of an application for further fortification of the cross-undertaking in damages) the financial damage that Mr Bosworth said the Freezing Order had caused him – mentioning it for the first time in his eleventh witness statement of November 2025:

> Q. So what I'm asking you is why, then, is there no reference to a claim for Bitcoin losses in this ninth statement?
>
> A. Possibly because when we were looking at the specifics of steel wool etc, etc, we weren't modelling out. It was: this is what we think we could have made in that business over time. But we weren't doing a counterfactual -- if that's the right word, and I'm not a lawyer so if I've got the meaning wrong - review of all the things I did. One of the things that we -- it's public domain that I was telling anybody and everybody: buy Bitcoin, buy gold.
>
> Q. Yes, but, Mr Bosworth, you don't need a model from Mr Stern to understand that if you'd invested heavily in Bitcoin in 2015, by 2023 you would have made an enormous profit on it and you were aware of that?
>
> A. But I wasn't aware of how much, because you haven't done an analysis of what my earnings would have been. At that time I didn't have the money to be able to invest; it was all in the case here. So perhaps that's the reason.
>
> Q. Well, that can't be the reason, can it, because the purpose of this document was to estimate your losses that you might be claiming under the cross-undertaking. It's your evidence that you would have invested 50% of your income that you would have got from oil trading or whatever in Bitcoin, and, if you'd done that, that would have made you an enormous profit by 2023.
>
> A. Yes. But I didn't know at that time what -- you can't put the numbers to it is the first point, because we didn't have access to a Mr Stern or anybody else like that because of our financial constraints. I was asked by the lawyers to -- without breaking privilege, sorry -- to be extraordinarily conservative on these things, and I was." (Day 2/158-159)

463. In my view, the December 2023 witness statement and the original Particulars of Loss and Damages are a more reliable guide to Mr Bosworth's likely intentions as regards bitcoin. Other contemporary documents support the view that Mr Bosworth had a genuine interest in bitcoin in 2015. An intention to make a relatively modest investment of US$ 100,000 or so in 2015, which would have been sold in 2021, would be consistent with the original Particulars and (given its modest scale) not inconsistent with the absence of mention of bitcoin in the December 2023 witness statement. Conversely, an intention to invest very large sums of the kind now claimed in bitcoin would have been a major factor that one would have expected to be mentioned in the December 2023 witness statement and the original Particulars. I am not persuaded by the notion that the original Particulars set out only losses that would have occurred even in the absence of Mr Bosworth and Mr Hurley having incomes from an oil trading business or employment. A claim of the magnitude now made in relation to bitcoin would have been something that obviously needed to be mentioned. It would also have been a very radical departure from Mr Bosworth's and Mr Hurley's fairly conservative existing asset portfolios. Further, it would be surprising if Mr Bosworth would have made such a radical investment in circumstances where his investigation of bitcoin had been sufficiently limited for him not to have encountered the Mt Gox episode.

464. I am also sceptical about the suggestion that Mr Bosworth and Mr Hurley would have disinvested from bitcoin in 2021 but then reinvested in 2021. The Amended Particulars do not state that, merely deleting the reference to sale in 2021, thus implying that the investment would simply have been retained throughout. As a result, they contain no suggestion that, following a sale in 2021, Mr Bosworth and Mr Hurley would have reinvested either on at any particular times or in any particular amounts: a matter which would have been of particular significance given the volatility of bitcoin over recent years.

465. Based on the evidence as a whole, I consider it to be more likely than not that Mr Bosworth and Mr Hurley would have invested in bitcoin from July 2015 to January 2021, but that I am not persuaded that they have shown they would have invested any amount over and above US$ 100,000 each. The fairest approach in my view is to assess compensation on the basis that they would each have invested that amount at the end of July 2015 and held it until the end of January 2021.

(b) Coinshares investment 2015 (D1)

466. As part of his interest in Bitcoin, Mr Bosworth spoke to Daniel Masters in 2015, who was considering starting his own cryptocurrency asset management firm. In 2015, Mr Masters established CoinShares (UK) Limited with his business partner Russ Newton, and they started looking for investors.

467. Mr Bosworth said in his eleventh witness statement:

> "319. […] As part of that, in 2015, Danny began looking for investors in CoinShares (UK) Limited […] I understood from Steven Gibbons that that invitation was open – in principle – to him and me. However, at the time, Steven told me that Danny wouldn't let either of us take up that invitation, while the Freezing Order was in effect. Recently, I talked with Russ Newton, who was Danny's business partner at the time. He told

> me that a reason why they wouldn't let Steven and I invest while we were under the Freezing Order, was because they wanted to go public at some stage, or raise money from institutional investors. However, if we had invested, they would have had to notify their investors, that one or more of their "major investors was under a Freezing Order. They didn't want to do that.
>
> …
>
> 321. However, if I had not been under the Freezing Order, I would certainly have invested in CoinShares, as part of my broader bet on Bitcoin. I expect I would have invested a minimum of USD 100,000, although I would likely have invested much more.
>
> 322. When Danny was raising money for CoinShares, I recall he had valued the company at USD 20 million and was looking to raise USD 5 million by offering around 25% of the shares. I have also been shown that CoinShares has recently been valued at USD 1.2 billion [PMB11/63-72]. Therefore if I had invested in CoinShares, I could have increased my investment in CoinShares by a factor of 60."

468. Mr Bosworth accepted that he never received a direct invitation to invest. It was put to him that he would have held only a small stake, of around 0.5%, in the company, so the Freezing Order would not need to have been disclosed to the other investors. He responded:

> "A. It was a fear that they had. I don't think I said that he absolutely said they would have had to, but they wished to avoid both Steve and myself because of the freezing order and any potential problems that may arise from that, including declaring it to third parties or new investors." (Day 3/36)

469. Mr Bosworth did not refer to CoinShares in his ninth witness statement, mentioning it for the first time in his eleventh witness statement. He explained:

> "A. There were a number of things that weren't mentioned. As I say, we were under serious financial and, therefore, time constraints with the legal team and I was asked to be conservative. I didn't have any supporting evidence from Russ or Danny at the time as to what happened to that investment that they had offered to us, so I wasn't aware of how well it had done." (Day 3, 39:4)

The ninth witness statement does indicate that, in the counterfactual, Mr Bosworth would have invested in the steel wool and nappy businesses referred to below, and in an oil project in Mauritania, but does not refer to any other investments.

470. I do not consider that the evidence establishes (on the balance of probabilities) Mr Bosworth would in fact have sought to invest in CoinShares, or in what amount.

(c) Tesla investment 2020 (Mr Bosworth and Mr Hurley)

471. Mr Hurley was particularly interested in Tesla and advised Mr Bosworth that this would be a good investment. He said in his seventh witness statement:

> "159. Green energy was a growing area that we were looking at. But there is then a question as to how you do it. Wind energy projects would require huge investment. Solar energy might have been a bit more manageable. But I saw investment in Tesla as being a bit of a hybrid alternative, being an investment with a green energy angle and with a bit of a AI add-on. In terms of green energy, people think of Tesla as making cars, but I think the key thing is that Tesla is the largest electricity storage player. That infrastructure and storage is going to be vital for anything in the economy that is electricity-driven. And then they are also at the leading edge of AI too. So those elements made it a very attractive investment.
>
> …
>
> 161. I believe I had raised this with Pete by the start of 2020. So that is the latest point at which we would have made that investment. But my recollection is that it is something that we had discussed before then, and the likelihood is we would have made the investment earlier than that if we had been able to do so.
>
> 162. As to the scale of the investment we would have made, I do not think that something in the order of $1 million would have been out of the question for the company that we were considering, and maybe more. So that is the order of magnitude."

472. Mr Bosworth said in his eleventh witness statement:

> "333. Investing in Tesla was Colin's idea. I trusted him on this opportunity, and would have invested alongside him. Had I not been under the Freezing Order, and being as conservative as possible, I expect I would have invested a minimum of USD 500,000 in Tesla. I could well have invested more. Since I was following Colin's advice, I would have bought and exited my positions at the same time as Colin.

473. Mr Stern modelled Mr Bosworth and Mr Hurley making an investment of $500,000 in Tesla in 2020 and holding that investment until 2025. Mr Bosworth was unsure in oral evidence whether that represented a single or joint amount:

> "Q. Right, but your evidence to this court is that you - just looking at your position, you say you would have invested $500,000 in Tesla in 2020; yes?

> A. I'm not sure whether that is jointly between me and Mr Hurley. I suspect it is, but I don't know.
>
> Q. Well, I mean, Mr Stern has done a separate one for Mr Hurley.
> A. So that was for me.
>
> Q. So –
>
> A. Mr Hurley is doing 500. I'm doing 500 as well. I would have copied him."

474. On 9 March 2021, Mr Bosworth sent a WhatsApp message to Mr Hurley saying *"[t]ime to buy more Tesla shares? 30% drop since the recent high".* On 10 March 2021, Mr Bosworth wrote to Mr Hurley: *"Col just to follow up on the Tesla investment. The shares have rallied 20% so I would be selling those out today."* It was suggested to Mr Bosworth that it cannot therefore be correct that he and Mr Hurley would have held onto the investment until 2025. He responded:

> "A. I didn't recall that conversation with Colin. Again, it wouldn't prohibit us from going back in, but that was my view at the time. I don't know what the conversation was with myself and Colin afterwards, but it's possible that he then persuaded me that that wouldn't be a good idea and because he was holding it.
>
> …
>
> I would have sold -- according to this, I would be selling those out today and repurchasing them later, or if Colin had persuaded me otherwise, I would have held them." (Day 3, 32:18)

475. Mr Bosworth was asked about an email from 1 March 2021 that he sent to Mr Hurley about an electric vehicle company called ChargePoint, saying *"We should be buying these shares if not for the mareva."* Then on 16 March 2021, Mr Bosworth added:

> "The stock price of ChargePoint Inc has fallen over the last few days and I would be adding to the existing position. In addition although Gold has simply not performed as an inflation hedge I still believe it will do so and would recommend we buy more and also add a silver position to the portfolio."

Mr Bosworth denied he included Tesla in his claim but omitted ChargePoint because Tesla rose in value whereas ChargePoint fell. He said he had not followed ChargePoint, which was a *"small idea*", and it was omitted by oversight. The fundamental parts of the strategy were bitcoin and gold, whereas shares in companies such as Tesla and ChargePoint were to some degree less important.

476. In my view, the contemporary documents support the claim that Mr Hurley, and (following his lead) Mr Bosworth, would have been more likely than not to have bought US$ 500,000 of Tesla shares some time prior to 9 March 2021, consistent with Mr Hurley's evidence that they would have invested by the start of 2020; but also indicate that they would be more likely than not to have sold them on or about 10 March 2021.

I consider it fair to assess compensation on the basis that they would have bought the shares on 31 January 2020 and sold them on 10 March 2021.

(d) Gold investments 2020 (Mr Bosworth and Mr Hurley)

477. Mr Bosworth and Mr Hurley's (original and Amended) Particulars of Loss alleged that:

> "But for the Freezing Order, in or around July 2020 Mr Bosworth and Mr Hurley would have invested in gold. On 27 July 2020 Mr Bosworth was of the view that the gold price would increase to at least US$3000. Mr Bosworth and Mr Hurley would (together) have invested in excess of CHF 1 million in gold. In line with Mr Bosworth's analysis, the price of gold has risen substantially since July 2020. It is averred that Mr Bosworth and Mr Hurley would have made substantial profits from their investment." (§ 77(2))

478. Mr Bosworth said that he would have started investing in gold around July 2020, and Mr Hurley would have followed him. In terms of the quantity, Mr Bosworth stated in his eleventh witness statement:

> "329. Had I not been under the Freezing Order, I expect I would have invested a minimum of CHF 1,000,000 in gold. Given how strongly I believe in this investment, and the money I would have had from a successful Arcadia 2 or oil trading role, I would likely have invested much more.
>
> 330. I planned to put around 75% of my investment in gold into physical gold and around 25% into gold futures.
>
> …
>
> 332. Just like with Bitcoin, my plan was to buy and hold gold. If I hadn't been under the Freezing Order, I would be holding the gold I bought today. It was a long term bet, based on a long term theory."

479. Mr Main also gave evidence on Mr Bosworth's interest in gold around this time:

> "65. I have been shown (INQD1D20003339) which reflects part of a series of discussions that Peter and I had around January 2020, where we discussed gold trading. Peter wanted to try to do a kind of trading when you buy gold from the mines and then ship it to a refinery in Dubai or elsewhere. Security is very expensive for transporting gold in Africa; it is probably the biggest overhead for some mines. Transporting something worth US$10 million on a truck carries significant risk. So there is a huge incentive, particularly for smaller mines, to sell at the mine site and then you take that risk. There is a margin there, so it's a bit like oil trading. That is what he was thinking.

> 66. It was important for me to ask Peter how much cash he had available because this type of trade in gold is a sophisticated business and to buy a number of tons you would usually need bank financing […] I was trying to help Peter. But it ended up not happening. With the Mareva in place, Peter had zero ability to obtain the level of financing required and then COVID-19 hit."

480. Mr Bosworth said in oral evidence that he was *"sending Whatsapps to anybody who would listen to me"* saying that gold was a good investment. On 26 June 2020, Mr Bosworth sent a WhatsApp to Mr Gibbons saying *"[w]e will enter hyper inflation real estate (not commercial) gold going to do well."* On 23 July 2020, Mr Bosworth sent a further WhatsApp message to a separate contact saying, *"Amigo. Gold goes up. Governments print money to create inflation and reduce debt."* On 27 July 2020, Mr Bosworth sent a document titled "Market View & Comment" to a contact, saying *"[p]lease pass on to Cornwall Cap."* The document set out Mr Bosworth's view that *"Gold goes to USD 3000 and then if the situation continues it goes to a peak of USD 7000."* This was repeated in two emails that Mr Bosworth sent to Jonathan Bearman and Michael Deslarzes on the same day, with the subject line "*Oil market view*". Also on 27 July 2020, Mr Bosworth asked Mr Gibbons *"Where are your charts showing gold goes to?"*

481. On 15 October 2020, Mr Bosworth sent an email to Mr Nicolas Salquin of Banque Cantonale Vaudoise stating that he anticipated *"investing somewhere between CHF 10-50,000"* in gold. It was put to Mr Bosworth in cross-examination that this is significantly less than what is claimed in his eleventh witness statement. Mr Bosworth explained: *"that was in the world as it was in -- my financial world as it was in 2020. I didn't do it because I didn't have the funds, freely available funds, to do it."*

482. It was put to Mr Bosworth that he made no mention of his potential investments in gold in his ninth witness statement dated 2023, despite mentioning other investment opportunities such as the nappy factory opportunity. Mr Bosworth responded that that was because he was *"significantly cash-strapped"* at the time and did not go through the investments he would have made in any detail with his legal team. Further:

> " A. I wasn't approaching this document from a view that I was earning significant amounts of money as a shareholder in a trading company or as an employee." (Day 3, 24:19)
>
> …
>
> A. It was only at the point where we had access to someone to do this analysis that we're able to quantify. I struggled with quantifying what those investments were in a counterfactual world, which is why, when we had somebody to do it for us, we were able to come up with the idea of dividing it into percentages rather than fixed amounts of money."

483. Mr Hurley did not mention gold in his witness statement.

484. In the light of, in particular, the contemporary documents, I think it likely that, but for the Freezing Order, Mr Bosworth would have invested in gold in July 2020 and retained that investment, and that a CHF 1 million investment is a realistic estimate of the amount he would have invested. I have taken into account the point that the Particulars of Loss refer to an investment in that amount by Mr Bosworth and Mr Hurley together. Mr Hurley makes no mention of gold in his evidence, and I see no basis on which to conclude that he would have invested in it. Nonetheless, Mr Bosworth's evidence that he would have invested at least that amount himself remains plausible in my view. On the other hand, I do not consider there to be a reliable basis on which to conclude that Mr Bosworth would have invested a far larger amount, such as 50% of his income from 2020, in gold. That would have been such a major planned investment that it surely would have merited mention in Mr Bosworth's ninth witness statement, as well as resulting in § 77(2) of the Particulars of Loss being cast very differently from its current form. I consider it fair to assess compensation that Mr Bosworth would have invested CHF 1 million in gold on 31 July 2020 and retained it until now.

(4) Business opportunities

(a) RH Homes and Hammill Brickworks 2014 (Mr Hurley)

485. In 2014, Mr Hurley embarked on a business venture with John Rivett, the cousin of his brother-in-law. Mr Rivett had been successful doing dry-lining in properties, and he asked Mr Hurley if he would be interested in setting up a dry-lining business with him.

486. In January 2014, Mr Rivett and Mr Hurley incorporated a company in the UK called RH Homes Ltd as equal shareholders.

487. In June 2014, Mr Rivett and Mr Hurley identified their first project, called Hammill Brickworks, and drafted a proposal for NatWest Bank proposing a profit margin of 19%, with estimated profit before tax of £348,842. Mr Hurley says that this was only a *"starting point"*: *"It was supposed to be the first of many, and we expected to get bigger returns on those later projects."*

488. In the event, the Hammill Brickworks project was delayed, and was not finalised before the Freezing Order was imposed in February 2015. By November 2015, Mr Rivvett and Mr Hurley shut down RH Homes, *"because I was not able to do the business at that time due to the Mareva."*

489. Mr Hurley says the following about this business opportunity:

> "143. Ultimately, some issues arose with the Hammill Brickworks project. That is nothing particularly unusual, it does happen. Delays and problems occur, and you might have to pull out or you might come back to it later. That is normal, and does not mean a project is doomed. That is clear from the Hammill Brickworks project, which I was later told did ultimately get completed after we were forced to pull out because of the Mareva.
>
> …

> 147. My expectation for RH Homes (absent the Mareva) was that it would develop into a considerable business. I did not really see the point of only doing the odd project of the size of Hammill Brickworks. My expectation was that the company would grow and become a big business, through development opportunities and potentially through acquiring other small companies. It is difficult to put a definite figure on that growth. But, if the expected profits from Hammill Brickworks – which as I say we saw as a smaller initial project – were £348,842, then my expectation for RH Homes more generally was that it would in time have generated profits of £1m per year, and potentially more like £2m or £5m a year."

(b) Nappy Manufacturing Plant 2014 (Mr Bosworth and Mr Hurley)

490. In 2014, Mr Bosworth became interested in setting up a Nappy Manufacturing Plant, to take advantage of predictions about Nigeria's booming population. He pursued this idea with Mr Hurley and Mr Scheepers.

491. In late 2014, Mr Bosworth and Mr Hurley toured two German nappy supplier factories; and in February 2015, Mr Bosworth interviewed Mr Bodo Ruhle to assist with setting up and running the factory.

492. The business could not work out, as Mr Bosworth explains in his eleventh witness statement:

> "260. That meeting with Mr Ruhle took place in February 2015. That same month, Colin and I were served with the Freezing Order. As I've said above at paragraphs 242 to 245 above, it was obvious to me that the Freezing Order made the nappy manufacturing business impossible. We took things no further with my land-owning contact, with Mr Ruhle, or with the nappy machine manufacturers."

(c) Steel wool manufacturing 2015 (Mr Bosworth and Mr Hurley)

493. In 2015, Mr Bosworth became interested in steel wool manufacturing, having met someone who was involved with this while on one of his tours of the German nappy factories.

494. Mr Bosworth and Mr Hurley contacted German and Chinese steel wool machine suppliers in January and February 2015.

495. Mr Hurley says in his seventh witness statement:

> "148. Having refreshed my memory based on the emails from the time, I see that further opportunities that Pete and I were looking at around this time (late 2014 and into 2015) were opportunities to set up businesses manufacturing nappies and steel wool in Nigeria.

> 149. As far as I recall, I was not involved in the original discussions about these opportunities so much. But I do recall that we were interested in setting up those businesses in Nigeria because it was a country that we knew well, particularly Pete. It is a country with a huge and increasing population, and a huge market. These businesses were going to focus on manufacturing consumer goods, in markets where we understood there was a lack of competition.
>
> …
>
> 152. In terms of my role, any business has some sort of finance angle, no matter what the underlying commodity is. Until you look at things in more detail, you do not know what the requirements will be. But there might be stock financing requirements, it might be necessary to get finance for machinery. My role would have been to consider those finance points, which are the kind of thing that arise for anyone starting a new business."

(d) Bitcoin mining 2015 onwards (Mr Bosworth and Mr Hurley)

496. Mr Bosworth and Mr Hurley became interested in Bitcoin mining around 2015, shortly after Mr Bosworth became interested in Bitcoin investments in 2014. Mr Bosworth stated in his eleventh witness statement:

> "269. With Bitcoin mining, the process is actually quite simple. You buy Bitcoin mining machines, you then hook them up to a power supply and you can join what is in effect a club of other people who have Bitcoin mining machines. The club mines Bitcoin together, and they calculate your contribution to the club depending on how efficient your machine is, the amount of time it is running during the day, and so on. Then when one of the members of the club mines a single Bitcoin, that gets distributed around the club.
>
> …
>
> 272. … Had I been able to, I would have bought at least 10 machines in 2016.
>
> 273. In 2021, I returned to the idea and produced some financial projections for the bitcoin mining operation Colin and I would have been running, if we hadn't been under the Freezing Order. I have refreshed my memory here by reference to an email I sent to Colin, attaching those projections [INQD1D20004898] and [INQD1D20004899]. It records a scenario involving "10 units" (that means 10 bitcoin mining machines), with monthly profits of US$ 8,074.80 in the "base case", leading to a 2 year profit of US$ 126,295.20. However, those profit projections are based on the price of Bitcoin at that time. In reality… I would have held

> on to the Bitcoin mined, because I believe that the price of Bitcoin is only likely to further increase over time."

497. Mr Hurley said in his seventh witness statement:

> "155. Having refreshed my memory, I also recall that Pete and I discussed the possibility of a Bitcoin mining business. My understanding was that Bitcoin mining is not an overly labour-intensive business. We just needed to have a site with access to cheap power, and the necessary security in place and an individual operating it. We would not have needed to be much more technical than that."

(e) Trafigura 2015 (Mr Bosworth)

498. There is some evidence of a business opportunity with Trafigura that arose around 2015. Mr Bosworth included this in his eleventh witness statement under "*employment opportunities*", but it appears to have been a business opportunity:

> "224. Trafigura was another of the top five oil trading companies. Its CEO was the late Claude Dauphin. Claude was in discussions with Paul Main, a commodities trader who had worked closely with Colin and me while we were at Arcadia. I recall Paul telling me that he had approached Claude in 2015 and asked him whether he would be interested in a joint venture with Colin and me. Claude told Paul (who told me) that it would be impossible for Trafigura to form a joint venture with Colin and me while the legal proceedings and Freezing Order were still live. I didn't speak to Claude directly."

499. Mr Main says in his second witness statement:

> "60. It was in mid-2015, after the Mareva when we talked about Nigeria, and then Peter came up. Claude was trying to do a deal with Nigeria but it was difficult. It was a refinancing transaction, involving swaps, essentially a refinancing deal just to get the liquidity out of Nigerian trading. Nigeria's trading was always a mess. There were very few people that could help. Peter knew his way around all the traps like nobody else.
>
> 61. So, I said to Claude something like (to paraphrase) "Well, I can get Peter here in 20 minutes. He's living in Geneva." And I recall that Claude just said no. I believe that I said, (I'm paraphrasing) "Well, why don't you just use him secretly? His name won't be associated with you at all. He just helps you." And I recall that he said something along the lines of (I'm paraphrasing again) "I can't. My compliance will just kill me."

500. Mr Main said in oral evidence:

> "I can definitely specifically remember what he said in terms of his tone and just that it was an impossible situation. As much as he might have wanted to work with Peter in helping him with this Nigerian transaction, his compliance would not have allowed him to because of the Mareva injunction.
>
> …
>
> If he [Mr Dauphin] can't use him for helping him under this Nigerian problem, which he knew Peter could help him with, then he couldn't use him for anything else."
>
> (Day 10/14 and 22-23)

Mr Main confirmed in oral evidence that this related to a business opportunity rather than an employment opportunity (Day 10/14).

(f) Contango plays / personal oil trading 2020 (Mr Bosworth)

501. Mr Bosworth explained this concept in his eleventh witness statement in this way:

> "306. … "[C]ontango" is a situation where the price of oil one month from now, is less than the price of oil two or more months from now. The opposite is "backwardation".
>
> 307. When the oil market is in contango, if you can buy and store oil for less than the amount that the oil will be worth, you can make money. If you want to reduce your risk, you can buy the oil, then sell futures for that oil at a higher price, which locks in your margin. You can also simply buy oil, store it without hedging, and then sell it later. This can generate greater profits, but comes with greater risk."

502. Mr Bosworth gave evidence that, around 2020, he was asked by Mr Michael Deslarzes about pursuing a contango trade. At the time, there was a particularly lucrative contango as a result of the COVID-19 pandemic:

> "316. At the time of the contango, I got asked by Michael Deslarzes (see paragraph 274 above) about contango plays. Michael was working for a fund and was looking to take advantage of the contango. I recall they were trying to buy WTI oil at negative prices but they couldn't because they didn't have the storage."

503. Mr Bosworth stated that he could not pursue this opportunity:

> "317. If I had the money, or if we had set-up Arcadia 2, I would have done the contango play like a shot. But because of the Freezing Order, I had neither. Even if I had had the money, the contango play would have involved chartering a vessel and purchasing oil, and might well have involved selling futures and obtaining additional financing. The Freezing Order made it

> impossible for us to take the first three of those steps, and would have prevented any bank from taking the fourth. Even if we had sought consents from the Claimants, that would have been a lengthy and uncertain process. The people we were purchasing the oil from, or selling the futures to, would not have tolerated that uncertainty and delay."

(g) Anchor handling tug supply business 2021 (Mr Bosworth)

504. In early 2021, Mr Michael Deslarzes approached Mr Bosworth with the idea for an anchor handling tug supply business. An anchor handling tug supply business owns tugboats and leases them out to be used for oil exploration purposes. Mr Bosworth and Mr Deslarzes intended to invest in tugs, move them to Nigeria, and lease them out.

505. Mr Deslarzes wanted Mr Bosworth to make a personal investment into the company and be a shareholder so that he would have *"skin in the game*". Mr Bosworth said in his eleventh witness statement:

> "281. … The Freezing Order made both of those asks impossible. If I had been a shareholder, I would have needed to get the Claimants' permission to purchase the tugs, and then to dispose of them by leasing them out. Also, because of the Freezing Order, I had no income from employment or from Arcadia 2. I simply didn't have enough to invest. The Freezing Order forced me to abandon the opportunity."

506. Mr Bosworth estimated the profits that he would have made in this way:

> "282. In early 2023, I decided I wanted a record of the losses I'd suffered by being unable to take advantage of this opportunity specifically. This was in the hope I could claim them back, as I am now trying to. I therefore asked Michael to estimate the returns that the tug supply business could have made, based on actual market conditions between May 2021 and May 2023.
>
> 283. I have been again shown the estimate that Michael produced in response to my request [INQD1D20006046]. Based on that estimate, and if Michael and I had purchased the two tugboats we first investigated, we would have generated around USD 20 million in profits in that two year period."

(h) Mauritanian oil project 2021 (Mr Bosworth and Mr Hurley)

507. In October 2021, Mr Bosworth considered starting a company with Mr Keller to deliver product (refined oil) to Mauritania. Mr Hurley became involved as they explored different ways of making the company work.

508. Mr Bosworth stated in his eleventh witness statement:

> "286. I distinctly remember the first call I had with Thomas' contact in Mauritania, whose name was Moussa Diao. I went for

> lunch with Thomas, opposite the club where we both played tennis in Switzerland. We sat outside, Thomas put Moussa on the line, and I explained to Moussa that I couldn't set up a company to take the tender because of the Freezing Order, but that we would try to see if somebody else would support the business, and act as a broker. I remember that his reaction to that was very negative. He said that if and when we did have a company, and we were able to bid for the tender, he would support us with the government. But obviously if we had no entity, we could not bid.
>
> 287. Since we could not bid, we tried to act as a broker, and find another company we could introduce to the opportunity. We were hopeful that if we helped a company win the bid, we would get a payment for our trouble.
>
> 288. I recall that we introduced Robert "Bobby" French to the opportunity. Bobby had worked for Arcadia, and then worked for Trafigura. In 2021, he was working for another oil trading house called Montfort. Bobby is a finance person and Colin spoke to him to ask whether Montfort would be interested in supplying the product, with us acting as broker. We gave Bobby a write up of the tender. But matters did not progress further."

(i) Guinean agricultural products opportunity 2021 (Mr Bosworth and Mr Hurley)

509. Also in 2021, Mr Bosworth considered pursuing an opportunity in Guinean agricultural products with Mr Keller. Mr Keller knew an ex-colonel from the French military who wanted to trade gold for rice.

510. Mr Bosworth resolved to act as a broker between the colonel and companies who could sell him agricultural products. However, this arrangement too did not work out:

> "294. These discussions proceeded quite far, and I received an offer from at least one rice seller. However those offers were conditional on there being financing in place for the colonel to purchase the rice.
>
> 295. We tried to organise financing with the colonel, by setting up a letter of credit. However that was not successful, and the opportunity did not proceed.
>
> 296. I believe the Freezing Order was ultimately responsible for the failure of the opportunity. If Colin and I had had our own company, we would have been able to raise financing for the opportunity ourselves. We would also have been able to afford to fly to Guinea and meet with the colonel and his Guinean partners. Business in West Africa is often very personal, and built on establishing relationships of trust. Face to face meetings can therefore be invaluable. However, due to the Freezing Order

> preventing us from working or running our own business, we lacked the funds for such a trip in 2021."

(j) Evaluation of these claims

511. The evidence summarised above provides reason to believe that Mr Bosworth and Mr Hurley, at various times, had an interest in each of the various business opportunities mentioned above. Whether they would have had the time or inclination to pursue them is another matter, as the counterfactual assumes that they would have been either running an oil trading business or employed in senior positions by a major oil trading house. That must therefore be a matter of considerable uncertainty. In any event, for the reasons given below, I do not consider Mr Bosworth or Mr Hurley to have established that any particular rate of return would have been achieved by such investments.

512. To the extent that Mr Bosworth and Mr Hurley would have invested in any of these projects, they argued that the ARC Equity Index (one of the Private Client Indices produced by ARC Research Limited, a research firm part of S&P Dow Jones Indices) should be used as a proxy for the returns they would have made. It is true that Mr Dearman accepted that the ARC Equity Index could be seen as a reasonable proxy for the high risk portion of Mr Kelbrick's counterfactual portfolio. However, the concept of 'high risk' is relative and, as Mr Dearman noted in the Joint Expert Report (D1/D2), the ARC Equity Index tracks the returns of diversified equity portfolios, with diversification reducing company-specific risk and with survivorship embedded in the index results. The Index (i) is based upon the portfolio performance of contributors comprising well-established private banks and investment managers such as Barclays, Banque Pictet and JP Morgan, (ii) averages annual returns of 6.7% and (iii) does not identify itself as having a West African focus, and a number of its data contributors are UK entities (for example, Bellecapital UK Limited, UBP UK Limited and EFG Asset Management (UK) Limited).

513. By contrast, the ventures in which Mr Bosworth and Mr Hurley say they would have invested were start-up ventures, with no reliable rates of return and (in Mr Dearman's view) a significant chance of failing altogether, and were predominantly focussed on West Africa. I therefore agree with the view of Mr Dearman that, even if Mr Bosworth and Mr Hurley would have invested in those enterprises, the ARC Equity Index was not an appropriate comparator. I return in section (S) below to how, in these circumstances, this part of Mr Bosworth and Mr Hurley's claims should be assessed.

(M) KELBRICK: INVESTMENT OPPORTUNITIES

514. Mr Kelbrick states in his fourth witness statement that he would have invested approximately two thirds of his income, and would have applied the *"80:10:10 rule"*: *"80% is allocated to low-risk, stable investments… 10% is directed toward medium-risk investments… a further 10% is reserved for high-risk investments, reflecting my deliberate approach to balancing potential reward with volatility"* (§ 97). Among other things, he mentioned unspecified *"cryptocurrency investments"* and general *"trading opportunities"* as missed investment opportunities, but those are not pursued as losses. The one specific lost investment for which he does claim concerned Zenus Bank.

515. Mr Kelbrick stated that, absent the Freezing Order, he would have invested US$1-3 million in the bank, set up by his friend, Mr Mushegh Tovmasyan. He explained in his fourth witness statement:

> "100. I first met Mushegh Tovmasyan ("Mush") at a social event several years ago, where we exchanged contact details and stayed loosely in touch. In or around November 2023, Mush approached me with news that he had founded a financial institution, Zenus Bank, in Puerto Rico. He explained that the bank offered a unique proposition: the ability to hold US dollar deposits outside the scope of traditional US banking regulations and without the account holder being required to be a US resident. At that time, Mush was seeking to raise capital by offering Class A Units in Zenus Fund LLC, a Delaware company. Had I been in a position to invest, I would have invested at least US$ 1 million, and potentially as much as US$ 3 million, based on the company's then valuation of US$50 million, which would have entitled me to Class A Shares in Zenus Fund LLC and, in turn, an equivalent number of Class A Shares in Zenus Bank. However, due to the constraints put in place by the Freezing Injunction I felt it necessary to decline. Furthermore, given my inability to have a regular source of income, again by reason of the Freezing Injunction, I was unable to allocate capital of this size.
>
> 101. Since the first round of fundraising, Mush has reconnected with me and renewed his interest in having me invest. I understand from Mush that Zenus Bank's latest fundraising round is based on a significantly increased valuation of US$400 million, reflecting the growth and traction it has achieved since our last conversation. This increase in valuation highlights the regrettably significant lost opportunity it represents for me. Had I invested in November 2023, it seems the value of my investment would have increased eightfold."

516. It was suggested to Mr Kelbrick, and he denied, that it was purely wishful thinking to suggest that he would have made that size of investment in that kind of business. On the other hand, Mr Kelbrick's account of his discussions with Mr Tovmasyan was not specifically challenged. The totality of the cross-examination of Mr Kelbrick about Zenus Bank was as follows:

> "Q. … I suggest to you that this suggestion that you would have made that size of investment in that kind of business is purely wishful thinking based on your knowledge that, with the benefit of hindsight, this is an investment that would have done very well.
>
> A. No, I disagree entirely.
>
> Q. And if you had intended or wanted to invest in Zenus Fund, then you could have come to the claimants or come to the court

> and asked for permission to make an investment, as you did in relation to some of your other investments.
>
> A. At the time, my money was running out fast. We had a lot of legal bills and, again, I'll go back to what I said yesterday. It's very -- unless you've had one of these things served on you, yes, which was referred to as a nuclear weapon, "Please don't breach any of this", etc, it's an extremely confining and nervous state that you find yourself in for ten years. So can I just say the reason that this came to me and the reason I can say with confidence I would have invested there is that I had previously invested in George Davis at Fuse Technologies, which has since changed its name. And it's George and I that met with Mush [Tovmasyan] at Emirates Golf Club, and it is George, who is now the CEO of what is now Lorum, that really explained what the business was of Zenus Bank. … And depending on the amount of funds I would have had at my disposal, I think given that they were raising 50, that would have given me a reasonable shareholding. And even in recent times, Mush has come back to me in a pre−IPO state to say, "Are you in a position to do it now?" And he would need between 5 and 10 million from me now and I don't have that. So, again, it's something that if I had the money available, I would do it now. A similar company which Mr Davis worked for, BVNK, sold about −− well, sold this year to Visa for between 1.6 and 1.7 billion US." (Day 4/35-36)

517. As the Claimants have pointed out in submissions, there are no contemporaneous documents evidencing that Mr Kelbrick was introduced to or would have made this investment, or on what terms. Further, as the Claimants say, the calculation of his returns, (to an 8-fold figure of US$16 million based on a US$ 2 million assumed investment) is not supported by any independent evidence. On the other hand, those points were not put to Mr Kelbrick, so he did not have the opportunity to explain whether or not he would have expected to have or produce contemporaneous records of the discussions or of the bank's current value. The Claimants also did not adduce any evidence to rebut Mr Kelbrick's evidence about the bank's current value.

518. It is also true that Mr Kelbrick did seek permission for other investments. Avani is a Dubai company that specialises in producing products from renewable sources. Mr Kelbrick knew the co-founder, Michael Lennon, through golf. In 2018, Mr Kelbrick secured the Claimants' consent for the US$200,000 investment in Avani; and in 2019, Mr Kelbrick provided Avani with a loan of US$75,000. In 2020, he converted the existing loan balance and invested a further sum, totalling US$300,000. Mr Kelbrick invested a total of US$500,000 in the company and has a 25% share. However, Mr Kelbrick's explanation quoted above, to the effect that by 2023 he was running out of money and lacked the confidence to invest, seems to me plausible, as does his account as a whole. In forming a view on this matter, I also take into account my assessment of Mr Kelbrick as a witness overall. In all the circumstances I accept this evidence, though I think it right to exercise some caution over the likely amount of the investment given that Mr Kelbrick gave only a broad range.

519. To conclude, in the counterfactual where no freezing order existed and Mr Kelbrick had been able to pursue Attock Dubai and/or employment opportunities, I consider it more likely than not that that he would have had sufficient funds to make an investment in Zenus Bank, and would have done so to the extent of US$ 1 million, as part of his 80:10:10 investment strategy.

520. As to the remainder of Mr Kelbrick's lost investments, Mr Stern used the Private Client Indices from ARC Research Limited to calculate what the returns on Mr Kelbrick's investments would have been. ARC has different indices based on different risk appetites. Mr Dearman accepted that the ARC index was a reasonable proxy for calculating Mr Kelbrick's expected returns. Mr Stern assumed that Mr Kelbrick would have invested, in accordance with this evidence, two thirds of his income, basing the income figure on Mr Stern's model of the returns Mr Kelbrick would have received from Attock Dubai or from employment. Applying Mr Kelbrick's 80:10:10 split, Mr Stern then calculated the lost returns using:

i) as to 80%, the ARC Cautious Index;

ii) as to 10%, the ARC Steady Growth Index; and

iii) as to 10%, the ARC Equity Risk Index.

521. I consider that approach to be sound in principle, subject of course to adjusting the assumed returns from Attock Dubai in accordance with my conclusions in section (R) below, and taking account of the US$ 1 million investment in Zenus Bank as part of element (iii) above.

(N) APPLICABLE PRINCIPLES

(1) Basis of assessment

522. A useful starting point for the assessment of damages in an Inquiry is the *dictum* of Lord Diplock in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at [361]:

> "The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. … It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction: see *Smith v. Day* (1882) 21 Ch.D. 421, per Brett L.J., at p. 427."

(2) Causation

(a) The test: general

523. It is for the party seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the injunction. The leading case is *SCF Tankers Ltd (formerly Fiona Trust) v Privalov* [2017] EWCA Civ 1877, [2018] 1 WLR 5623, where the Court of Appeal followed the statement of Mason J in the Australian case of *Air Express Limited v Ansett Transport Industries (Operations) Proprietary Limited* (1979) 146 CLR 249:

> "The object of the undertaking is to protect a party, normally the defendant, in respect of such damage as he may sustain by reason of the grant of the interim relief. It is no part of the purpose of the undertaking to protect the defendant against loss of damage which he would have sustained otherwise, as for example, detriment which flows from the commencement of the litigation itself. That is loss or damage which the defendant must bear himself, as he does when no interim injunction is sought or granted. Consequently, it is for the party seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the injunction." (§ 325)

524. The Court of Appeal in *SCF Tankers Ltd (formerly Fiona Trust)* added the following points based on previous English authorities:

i) As to causation, it is sufficient for the court to be satisfied that the making of the order or injunction was a cause without which the relevant loss would not have been suffered. (§ 41)

ii) The person who seeks to do so must show that the loss would not have been suffered 'but for' the order; that is, on the facts of this case, that the freezing order and the security undertakings were an effective cause of the loss. (§ 42)

iii) (Quoting the words of Saville J in *Financiera Avenida v Shiblaq* (Times, 21 November 1988)), this approach does not mean that a party seeking to enforce an undertaking must deal with every conceivable or theoretical cause of the damage claimed, however unlikely this may be. Once a party has established a prima facie case that the damage was exclusively caused by the relevant order, then in the absence of other material to displace that prima facie case, the court can, and generally would, draw the inference that the damage would not have been sustained but for the order. In other words, the court seeks to approach and deal with this question of causation in a common-sense way. (§ 43)

iv) The fact that the parties seeking compensation (there, the Standard Maritime parties) were given liberty to apply for the release of secured funds to enable them to do this did not affect the nature or effect of the restriction imposed by the order. (§ 44)

v) The judge was entitled to approach and deal with the question of causation in a common-sense way. (§ 45)

vi) Further:

> "46. I do not consider that the onus was on the Standard Maritime parties to show that an application to release funds would fail. It sufficed for them to show that the order prevented them from such investing in newbuildings and the difficulties of any application to the court for the release of funds. In the words of Saville J, once a party has established a prima facie case that the damage was caused by the order then, in the absence of other material to displace that prima facie case, the court can draw the inference that the damage would not have been sustained but for the order. See also Tomlinson LJ's statement in *Energy Venture v Malabu*, albeit in the context of the fortification rather than enforcing the undertaking, that once a prima facie case has been established "*it is open to the respondent to demonstrate that it has not been surmounted, as by demonstrating that there is no causal link between the granting of the injunction or order and the loss in question."* That is not what the Fiona Trust parties have sought to do. In this court, they argued that the burden lay on the Standard Maritime parties to show not only a prima facie case, but that an application would fail. In my judgment, that submission is not consistent with the authorities to which I have referred."

525. The Defendants suggest that the statements referred to in (iii) and (vi) above are consistent with a passage from Gee on Commercial Injunctions, who writes at [11-046]: *"Once the defendant shows that he has suffered loss which was prima facie caused by the order, then the evidential burden of any contention that the relevant loss would have been suffered regardless of the making or continuance of the order will pass to the claimant."* I am inclined to think it more accurate to say that, if a *prima facie* case of causation is made out, then the court may be willing to draw an inference in the absence of contrary evidence; and that that inference may help discharge the burden lying on the defendant.

526. It is clear that the approach outlined above does not displace or alter the standard of proof required to demonstrate the loss which remains the balance of probabilities (or, where applicable, a 'real and substantial' chance): see the decision of the Privy Council *Ennismore Fund Management Ltd v Fenris Consulting Ltd* [2022] UKPC 27 at [65]-[67], including the following passage:

> "67. [*Financiera Avenida*] does not stand for the proposition which the appellant advances. The reference to establishing causation based on a prima facie case refers to situations where the loss is apparent (in that case, the loss of a job), and what is contested is its cause. On the facts of this appeal, if the appellant establishes loss in the form of being prevented from investing, then it is obvious that this stems from the freezing injunction but it is still incumbent on the injuncted party to establish that it would have acted in a particular way on the balance of probabilities, with more than a prima facie case."

(b) The means by which a freezing order may cause loss

527. The Claimants submit that only loss caused by the preventative or coercive effect of a freezing order can be recovered under the cross-undertaking. I reject that submission. It finds no support in the wording of the undertaking in damages, which contains the perfectly general wording "*If the court later finds that this order has caused loss to the Respondent ...*". Nor is there any rule of law to the effect contended for by the Claimants. Any such rule would amount to an illogical and artificial restriction on the availability of compensation for the well-known and commercially potent effects of a freezing order.

528. The Claimants' submission is incompatible with the decisions of the High Court and the Court of Appeal in *Financiera Avenida* SA. In that case, Mr Shiblaq had been a broker with EF Hutton. The claimants had wrongly obtained a freezing injunction against him. He was forced to resign and lost his employment at EF Hutton. He then claimed on the cross-undertaking that the injunction had caused the loss of his employment at EF Hutton. Saville J recorded the evidence as follows at first instance (Times, 21 November 1988):

> "The evidence established to my satisfaction that the responsible officers in EF Hutton were in fact aware that the Defendant had been heavily involved in the copper dealing affairs of the ruler of Abu Dhabi, yet with that knowledge had offered him employment as a broker at the beginning of 1983. The evidence to my mind also established that when the litigation against the Defendant started in June 1983 and the first of the interim Orders was obtained on the 2nd of that month, the attitude taken by EF Hutton was that the Defendant should be given the chance to clear his name by getting the Orders discharged. When the Defendant failed in this endeavour, EF Hutton took the view, in effect, that the Court obviously considered that there was substance in the claims being made against the Defendant, which at that stage included barely veiled allegations of fraud later wholly abandoned. As Mr Damouni (then a regional manager of EF Hutton) put it in evidence -- whether or not the Defendant could get the Orders discharged was regarded as the acid test -- that the Defendant's failure to do so was regarded as a failure to clear his name and that accordingly the Defendant was asked to resign. Mr Damouni said that had the Defendant succeeded in lifting the Orders then he (Mr Damouni) would have fought hard with his employers to retain the Defendant, whose skills he regarded highly. Looking at all Mr Damouni's evidence and the other material before me I was satisfied that in this event the defendant would have retained his engagement with that broking house."

Saville J held that Mr Shiblaq's claim succeeded on the evidence.

529. This decision was subject to an appeal. The appellant submitted on appeal that Mr Shiblaq's loss of employment was "*the result, not of the injunction, but of the antecedent litigation… If so, then damages flowing from the litigation, as distinct from*

flowing from the injunction, would not be recoverable under the undertaking". The Court of Appeal rejected that submission and ground of appeal (Times, 14 January 1991), stating:

> "there was evidence which the judge accepted from a Mr Damouni, the regional manager for the Middle East, that it was the failure to get the injunction discharged on 10th June which was the "acid test", as he put it. I can understand that view. The form of the injunction was such that a reader might well infer that Mr Shiblaq had misappropriated, to use the word which Mr Brister used in his affidavit, three-and-a-half million dollars of client's money. Messrs Linklaters & Paines, having obtained their injunction, served notice of the injunction on E F Hutton as well as on another firm of brokers, Messrs Drexel Burnham Lambert, with whom Mr Shiblaq had had a trading position. In those circumstances the judge was entitled to conclude that it was the injunction rather than the writ which precipitated the resignation."

530. *Financiera Avenida* was cited with approval by the Court of Appeal in *SCF Tankers (Fiona Trust)*, where the court stated that:-

> "In this court [1990] CA Transcript No 973, Lloyd LJ with whom Stocker LJ and Sir George Waller agreed, stated that he saw no fault or flaw in Saville J's judge's approach or in his conclusion on causation." (§ 43)

531. The cases recognise that a freezing order may have severe consequences on a party's commercial standing and, hence, ability to do business or gain employment. As illustrated by *Financiera Avenida*, that is often because the order lends credence to allegations made by the claimant of fraud or other serious wrongdoing by the defendant. For example, a freezing injunction may lead to the loss of a business's credit lines from banks and hence be an effective cause of lost profits (see *Keller v Cowen* [2001] EWCA Civ 1704 at [26]-[29] (Simon Brown LJ)). As Jack J acknowledged in *Al Rawas v Pegasus Energy Ltd* [2008] EWHC 617 (QB), [2009] 1 All ER 346 at [35], "*there is a close analogy between the stopping of a cheque by a bank and the obtaining of a freezing order […] It goes to the heart of the party's ability to use the banking system, which is at the heart of trade. To be on the wrong end of a freezing order is undoubtedly a stigma. […] it suggests that the defendant has failed to pay its debts and has been found likely to try to dissipate its assets"*. In *SCF Tankers (Fiona Trust)*, Males J noted that the freezing order had "*caused great damage to [Mr Nikitin's] relationship with Credit Suisse, his principal ban*k" which had "*destroyed*" the prospect of borrowing in order to fund investments unconstrained by the freezing order ([70]). Similarly, in the earlier case *Columbia Picture Industries Inc & Others v Robinson & Others* [1987] Ch 38, Scott J said at 72-73:

> "It is customary, on account of the Mareva injunction accompanying Anton Piller orders, for a copy of the order to be served on the respondent's bankers. That was done in the present case. The almost certain effect of that being done will be that the bankers will decline to allow any further credit to the respondent.

> The order will throw such a question mark over the business of the respondent as to make any other course commercially imprudent and, therefore, unlikely. In the present case, Barclays Bank, upon service of the order, refused to allow the defendants any further credit."

532. The Claimants cite the statement in *PJSC National Bank Trust v Mints* [2021] EWHC 1089 (Comm) at [27(2)(c)] that:

> "It is only loss which is caused or would have been caused by the preventative or, as the case may be, coercive effect of the injunction that is recoverable under the cross-undertaking: *Harley Street Capital* at [22]. It follows that if the loss would have been suffered in any event because of an injunction properly obtained in the proceedings against other defendants, that will not be recoverable: *Tharros Shipping v Bias* [1994] 1 Lloyd's Rep 577 at p. 583 ("*Tharros Shipping*")."

533. The authority relied on, *Harley Street Capital Limited v Tchigirinski* [2005] EWHC 2471 (Ch), was a decision of Mr Briggs QC (as he then was) sitting as a Deputy Judge. The judge stated:

> "33. In my judgment, the defendants have not disclosed a sufficient risk of loss during the relevant period to justify further fortification of the cross-undertaking beyond the very modest sum ordered by Blackburne J. My reasons are as follows. First, viewing the price fall after 29 April in the context of the fourth defendant's price volatility and trading levels over a wider period, the evidence of a significant and lasting fall, caused either by the proceedings or by the freezing order is, in my judgment, very thin. Secondly, while the very serious allegations being made by the claimant against those said to be in control of the fourth defendant might even, while untested, cause some loss of investor confidence, I am disinclined to treat a misconceived notion by investors that the grant of the freezing order lent the court's credence to those allegations as part of a chain of causation between the freezing order and any loss in share value. It is a factor wholly unrelated to any restraint placed by the freezing order, either on the first, second and third defendants or on anyone else. It therefore lies outside the quasi contractual analysis of causation, set out originally by Brett LJ in *Smith v Day*, and more recently re-affirmed as clear law in *Tharros Shipping*.
>
> 34. Neither I nor counsel were aware of any case in which the purely reputational consequences of being the subject of a freezing order have formed a part of an award of damages under the cross−undertaking, wholly divorced from the consequences of the restraint which the freezing order imposed on the applicant for damages or upon anyone else. In this case, the reputational loss is not even that of the defendants against whom the freezing

> order was made, but of the fourth defendant. That makes the supposed causative link even more tenuous.
>
> 35. Equally, I am not persuaded by the confidential material that it is the freezing order rather than the proceedings themselves and the serious allegations made therein which risks damage to the fourth defendant's relationship with its bankers or the other specified third parties. They are all bound to be sophisticated, or at least very well−advised entities, well capable of understanding that a without notice freezing order says little or nothing about the merits of the underlying allegations. By contrast, the allegations themselves are of a seriousness which, even while untested, might cause any such entities at least to think carefully about their relationship with the fourth defendant."

534. The Claimants also cited the statement in *Tharros Shipping v Bias* [1994] 1 Lloyd's Rep 577, 581-2 (quoting a statement by Mason J in *Air Express,* in turn quoted by Saville J in *Financiera Avenida*):-

> "[t]he object of the undertaking is to protect a party, normally the defendant, in respect of such damage as he may sustain by reason of the grant of the interim relief. It is no part of the undertaking to protect the defendant against loss or damage which he would have sustained otherwise, as for example, detriment which flows from the commencement of the litigation itself. That is loss or damage which the defendant must bear himself, as he does when no interim injunction is sought or granted."

535. Three points arise.

536. First, there is no indication that the decisions of the High Court and the Court of Appeal in *Financiera Avenida* were cited to the judge in *Harley Street*. The decision was accordingly *per incuriam*¸ and there was in fact no lack of authority of the kind mentioned in [34] of the judgment.

537. Secondly, the decision in *Harley Street* was made at a stage where the claimant had obtained a without notice freezing order, but the hearing at which the defendants *"intend to resist the continuation of any freezing relief"* had not yet come on: [6]-[8]. Mr Briggs QC accepted at [29] that *"the continuation of a freezing order after hearing full argument from defendants, would point to there being an arguable case, <u>but this will not occur during the relevant period</u>"* (my emphasis). As Floyd J noted in *Bloomsbury International Ltd v Holyoake* [2010] EWHC 1150 (Ch), after considering the prior authorities on this issue:

> "23. Plainly, the strength of the causative link between the grant of a freezing order and damage to the commercial standing of the defendant will vary from case to case. *Harley Street v Tchigirinski* was a case where Mr Briggs QC felt able to discount it as an element in the defendants' loss at the interim stage, whereas *Al-Rawas* was a case where it was ultimately considered

> to justify an award of damages, once all the evidence was available."

Floyd J went on at [25] to note that on the evidence before him it was:

> "not unrealistic to suppose that the order may have a significant, incrementally damaging effect on Mr Holyoake's standing. The examples given in his evidence may turn out to be cases where the order has had an impact on his ability to benefit from the ownership of his assets and do business with others".

538. Thirdly, the decision in *Harley Street* was premised in substance on a finding of fact that any notion that the without notice grant of a freezing order lent credence to the underlying allegations in that case was misconceived. That is self-evidently not a proposition of law, and may be inapplicable in many cases, particularly once a freezing order has remained in place following the return date. Where the English court has granted a freezing injunction, the court will have been satisfied on the merits that there is a serious issue to be tried or a good arguable case of wrongdoing; and the Court will also have been satisfied that there is a real risk of unjustified asset dissipation. It was not unreasonable or misconceived for industry participants to have an understanding that, adopting the words of Mr Main in the present case, *"the Court wouldn't have granted such a severe order without having seen substantial evidence to justify it."* (Main second witness statement, § 47).

539. For completeness, the fact that, as I consider later, the courts can and do sometimes award general damages for reputational losses caused by a freezing order does not in any way preclude an award of (in effect) special damages where the reputational effect of a freezing order has caused financial loss: as occurred in *Financiera Avenida*.

(c) Effects of the freezing order vs the proceedings themselves

540. It follows from the 'but for' test that (subject only to the 'own wrong' argument considered later) if the relevant losses would have been suffered in any event by reason of the proceedings, then they will not be recoverable. That has been recognised in the case law, most fully in *Air Express*, where Aicken J stated:

> "It is important in all cases, and particularly in the present case, to bear in mind the distinction adverted to in many of the cases …between damages flowing from the injunction and damages flowing from the litigation itself. There may not in every case be any difference between the two but, where there is a difference, it is essential that the damage flowing from the litigation should not be confused with the damage flowing from the interlocutory injunction. This is necessarily required by the form of the undertaking itself." ([40]

Mason J made statements to similar effect. Gibbs J stated:

> "2. The object of requiring a plaintiff who seeks an interlocutory injunction to enter into an undertaking of this kind is to attempt to ensure that a defendant will receive compensation for any loss

which he suffers by reason of the grant of the injunction if it appears in the event that the plaintiff was not entitled to obtain it. … However, it is perfectly clear, and it appears from the words of the undertaking themselves, that the only damages to which a defendant is entitled are those which he has sustained by reason of the grant of the injunction. The generally accepted view is that the damages must be confined to loss which is the natural consequence of the injunction under the circumstances of which the party obtaining the injunction has notice: see Smith v. Day (1882) 21 ChD 421, at p 430 and the cases cited in Kerr on Injunctions, 6th ed. (1927), p. 667, and Halsbury, 4th ed., vol. 24, par. 1077. ….

3. In a number of authorities the court has distinguished between loss which was caused by the injunction and loss which arose from the litigation: ... There is no reason to doubt that it is correct in principle to draw such a distinction if the facts warrant it. If the pendency of the litigation, rather than the making of the order, was the cause of the plaintiff's loss, the terms of the undertaking have no application, since the plaintiff has not sustained loss by reason of the order. Moreover, except in certain cases analogous to malicious prosecution, a defendant is not entitled to recover damages for loss resulting from legal proceedings brought against him - the only liability of the unsuccessful plaintiff is to pay costs. The court should no doubt scrutinize with care an assertion by a plaintiff that loss which has been suffered by a defendant has resulted from the litigation rather than from the making of the interlocutory order, since a plaintiff should not be allowed to evade payment of the price which he has agreed to pay for the grant of the injunction. In the end however the question becomes one of fact: did the making of the order cause the loss? The onus of proof must, in accordance with general principles, lie on the defendant who asserts that he sustained damage by reason of the order.

4. It was submitted on behalf of the appellant that it is enough that the making of the order should have been a cause of the damage, so that if both the making of the order and the continuance of the litigation are concurrent causes the undertaking will be applicable. However, in almost every case in which an injunction is granted the injunction will play some part in causing the party bound by it to act in accordance with its terms. To order a plaintiff to pay damages where it appears that the party bound by the injunction would have acted as he did even if the injunction had not been granted, would be to give the undertaking an effect obviously not intended. The party seeking to enforce the undertaking must show that the making of the order was a cause without which the damage would not have been suffered. It was further submitted that the onus lies on the plaintiff, against whom the undertaking is sought to be enforced,

> to disentangle any damage arising from the litigation from that which was caused by the making of the order. However, the onus of proof does not shift in this way; the defendant, who seeks to enforce the undertaking, must prove that the damage he has sustained was caused by the making of the order."

541. The Claimants accept that if the Freezing Order combined with the proceedings to cause the loss (such that it would not have been suffered at all or to the same extent by the proceedings themselves), then the loss will be recoverable under the cross-undertaking (as noted by Peter Macdonald Eggers QC (sitting as Deputy High Court Judge) in these proceedings at [2021] 4 WLR 72 [42(5)]). That is in accordance with the English authorities, which make clear that the Freezing Order need not be the sole cause of the loss. The Court of Appeal accepted in *SCF Tankers Ltd* at [42] that the Freezing Order was *"an effective cause"* of the parties' loss; and Males J stated at first instance in *Fiona Trust v Privalov* at [48] that *"the freezing order need not be the sole or exclusive cause of the loss in question, but must be an effective cause".*

(d) Constructing the counterfactual

542. The parties made submissions about the correct approach to constructing the counterfactual, though I am in the end not convinced there is any real divergence as to the correct approach, as distinct from its application to the facts.

543. In *Dr Reddy's Laboratories (UK) Ltd v Warner-Lambert Co LLC* [2021] EWHC 2182 (Ch), [2021] Bus LR 1496 at [93], Zacaroli J stated that the counterfactual departs from the actual *"at the last possible moment before the order was made"*. In *Rukhadze v Recovery Partners GP Ltd* [2025] UKSC 10 at [162]-[163], Lord Leggatt observed that where the law uses counterfactual reasoning to determine whether the necessary causal connection has been shown, that exercise entails constructing *"a hypothetical scenario in which the defendant's conduct is changed to the minimum extent necessary to achieve compliance with the duty".* However, it is unclear how either proposition affects a causation analysis of the kind required in the present case. The first would suggest that actual events up to the time at which the Freezing Order was granted should be assumed to be the same in the counterfactual. The second, translated to the present situation (where the Claimants are the compensating party) would presumably indicate that the Claimants' conduct should in the counterfactual be changed only to the extent needed to achieve compliance with their 'duties': specifically, by not obtaining the Freezing Order. Even if applied to the Defendants, it would mean only that their behaviour would be assumed to be different in the counterfactual only to the extent that the Freezing Order would have resulted in a change. None of those propositions appears controversial, bearing in mind the causation test already summarised.

544. It does not follow, however, either (i) that actual events after the date of the freezing order should be ignored or (ii) that those events are necessarily highly indicative of what would have happened in the counterfactual. Depending on the facts, a substantial worldwide freezing order in a fraud case may have such a profound effect on the defendants' situation that, taking *Fiona Trust* as an example, *"the investment policy which he [Mr Nikitin] in fact adopted faced with the freezing order says very little about what he would have done if there had been no such order"* ([71] per Males J). Further, as Mr Bosworth and Mr Hurley point out, it should not be anticipated that a defendant subject to a freezing order will spend their time gathering evidence in relation to

hypothetical plans and projects that they were prevented from undertaking, in anticipation of making a claim under the cross-undertaking (see *Fiona Trust* at [69]).

545. Nonetheless, in assessing the evidence I accept the Claimants' submissions that the following general guidance remains pertinent even in the context of the necessarily hypothetical analysis that needs to be undertaken:

i) Contemporary documents are generally a more reliable guide to the truth than oral witness evidence, including as to the motivation and state of mind of those concerned: *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 [2019], 4 W.L.R. 112 per Males LJ at [48].

ii) In respect of evidence on hypothetical matters given with the benefit of hindsight, Colman J noted in *North Star Shipping Ltd v Sphere Drake Insurance Plc* [2005] EWHC 665 (Comm) at [70] that: *"hypothetical evidence by its very nature lends itself to exaggeration and embellishment in the interests of the party on whose behalf it is given… For this reason, such evidence has to be rigorously tested by reference to logical self-consistency, and to such independent evidence as may be available."*

iii) As noted in *Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas (a firm)* [2012] EWCA Civ 1417 at [122]-[123], a party seeking damages is expected to bring forward *"as good evidence as can reasonably be obtained"* and *"it is not for the court to embark on what could be no more than guesswork to make good the failure of the Claimants' attempt to adduce evidence on which the court could rely in order to prove the amount of their loss."*

(3) Remoteness

546. The general rules for remoteness in contract can be conveniently taken from the following extract from Picken J's decision in *McLaren Indy*, quoting from Lord Hodge's judgment in the Privy Council case *AG for the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18, [2021] AC 23:

> "173. Lord Hodge JSC summarised a number of relevant principles at [31]-[35]:
>
> > "First, in principle the purpose of damages for breach of contract is to put the party whose rights have been breached in the same position, so far as money can do so, as if his or her rights had been observed.
> >
> > But secondly, the party in a breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility, in the sense discussed in paras 27 and 28 above.
> >
> > Thirdly, what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any

> event, which the party, who later commits the breach, then possessed.
>
> Fourthly, the test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach.
>
> Fifthly, the criterion for deciding what the defendant must be taken to have had in his or her contemplation as the result of a breach of their contract is a factual one."

174. As Mr Goulding pointed out, Lord Hodge JSC's second principle in *AG of the Virgin Islands* refers to whether the "type of loss" was reasonably contemplated as a serious possibility. If that test is satisfied, the defendant is liable even if the manner in which the loss occurred, or its extent, was not reasonably contemplated, as happened in *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] 1 QB 791. In that case, the defendant provided a defective pig hopper to the claimant which rendered the nuts stored in it mouldy, and which led to 254 pigs dying from disease. The Court of Appeal held that this loss was not too remote. The majority (Scarman and Orr LJJ) stressed that it is the type and not the extent or precise manner of loss that must be reasonably contemplated. Scarman LJ considered (in agreement with what was stated in the then current edition of McGregor on Damages) that recovery is not to be limited because the degree of physical injury or damage could not have been anticipated. This was so because "*it would be absurd to regulate damages in such cases upon the necessity of supposing the parties had a prophetic foresight as to the exact nature of the injury that does in fact arise"*: see page 813B-C. Scarman LJ added at page 813D-E:

> "It does not matter, in my judgment, if they thought that the chance of physical injury, loss of profit, loss of market, or other loss as the case may be, was slight, or that the odds were against it, provided they contemplated as a serious possibility the type of consequence, not necessarily the specific consequence, that ensued upon breach."

547. The rules for remoteness in contract can be applied generally by analogy, but sensible adjustments are permitted. In *Tharros Shipping Co Ltd v Bias Shipping Ltd*, Waller J said at [582]:

> "In my judgment a party must be able to show that he would not have suffered the damage 'but for' the injunction, but unless he can also show that any necessary links which caused the loss, as well as the type of loss, was something which should fairly and

> reasonably be regarded as having been in the contemplation of the parties or as something which was in the actual contemplation of the parties, he will not be entitled to recover the loss.
>
> Something which will happen in a great majority of cases should fairly and reasonably be regarded as having been in the contemplation of the parties …"

548. Remoteness was discussed in *Hone v Abbey Forwarding Ltd (In Liquidation)* [2014] EWCA Civ 711, [2015] Ch 309. McCombe LJ stated:

> "63. In the result, therefore, and perhaps not surprisingly, I reach the conclusion that the law as to the recoverability of loss suffered by reason of a cross-undertaking is as stated by Lord Diplock in his dictum in *Hoffmann-La Roche*, but with this caveat. Logical and sensible adjustments may well be required, simply because the court is not awarding damages for breach of contract. It is compensating for loss for which the defendant "should be compensated" (to apply the words of the undertaking). Labels such as "common law damages" and "equitable compensation" are not, to my mind, useful. The court is compensating for loss caused by the injunction which was wrongly granted. It will usually do so applying the useful rules as to remoteness derived from the law of contract, but because there is in truth no contract there has to be room for exceptions.
>
> 64. In my judgment, the law also meets the justice of the matter. A defendant wrongly injuncted should be compensated for losses that he should not have suffered, but a claimant should not be saddled with losses that no reasonable person would have foreseen at the time when the order was made, unless the claimant knew or ought to have known of other circumstances that was likely to give rise to the particular type of loss that occurred in the case at hand. A claimant may, however, find himself liable for losses which would not usually be foreseen in particular cases. One such case may be if a loss, not usually foreseeable, arises before a defendant has had any real opportunity to notify the claimant of the likely loss or sensibly to apply to the court for a variation.
>
> 65. In mentioning this possible example, the court must be realistic as to the dilemma facing a defendant when served, out of the blue, with a freezing order. Some claimants are far from reasonable in practice – the present case provides a very clear example (see below). Applications for variation are not that simple. They take time to prepare and are not without cost. At the same time, under the terms of the order, the defendant will be limited as to costs and living expenses and will, no doubt, also be under requirements to identify and verify his assets. In addition, he will be seeking quickly to assess, with his lawyers,

> the claimant's evidence, both with regard to whether to oppose continuation of the order on the return day (or perhaps to apply for variations) and with regard to the ultimate defence of the action. Approaches to claimants to agree variations, or even to provide suitable written indications to banks and other third parties that particular payments are not caught by the order, are often far from straightforward. If, in such circumstances, a defendant is shown to have suffered an unusual loss, then in my judgment the claimant should not be surprised if the court orders him to pay for it.
>
> 66 In the context of the present case, and before turning to factual issues, I would add that I accept Mr Coppel's submission that, for a loss to be recoverable, the remoteness rules only require that the claimant giving the undertaking should have reasonably foreseen loss of the type that was actually suffered by the defendant and not the particular loss within that type: see (again by analogy) Chitty on Contracts, 31st ed (2012), vol I, para 26-113.
>
> 67 I do not consider that the judge misstated the principles applicable, as the appellants contend, when he said [2013] Ch 455, para 27, that the rules rendered: "recoverable either loss suffered by the injunctee that falls within the first or second rule in Hadley v Baxendale and arises from circumstances that were either actually known to the injunctor or deemed to have been known to the injunctor at the time when the injunction is granted…"" Nor do I think the judge was in error when he said, at para 29: "the cardinal point remains this: absent express notice of *special* circumstances arising after the date when the injunction is granted, the conventional approach is that compensation will not be recoverable for events occurring after the grant of the injunction that could not be foreseen at the time when the injunction was granted …"
>
> (my emphasis)

549. Thus, as indicated in *Grant & Mumford Civil Fraud* 1st Ed. at [31-038(7)]:

> "Whereas in contract remoteness issues are determined by the state of the parties' knowledge at the date the contract is entered into, no such strict rule applies on an inquiry. If the claimant becomes aware at some point after the making of the injunction that it is preventing the respondent from undertaking some potentially profitable venture then he will not be able to insulate himself from liability by reference to his state of knowledge at the date of the order." (citing *Abbey Forwarding* at [67])

550. As summarised in *Fiona Trust and Holding Corp v Privalov* at [47]:

> "[T]he defendants are entitled to recover damages for the losses suffered by them as a result of the freezing orders (not as a result of the litigation), assessed by reference to ordinary contractual principles, including principles of causation, mitigation and remoteness, although these principles may need to be applied with some flexibility to take account of the fact that the analogy with breach of contract is not exact: *Hone v Abbey Forwarding Ltd* [2014] EWCA Civ 711 at [38] to [44] and [63]."

551. There is authority for the view that the Claimants bear the burden of establishing that the loss was too remote. In *Armstead v Royal & Sun Alliance Insurance Co Ltd* [2024] UKSC 6, [2025] AC 406 at [23], a negligence case, the Supreme Court stated:

> "62. There is a surprising absence of authority on the question of who has the legal burden of proof in relation to remoteness. But, as a principle which cuts back the right to recover damages for loss that has been factually caused by a tort, remoteness plays an analogous role to the duty to mitigate, contributory negligence and, on what we think is the better view, the concept of an intervening cause. Logically, therefore, the legal burden of proof must likewise lie on the defendant to plead and prove that loss which was in fact caused by the defendant's tort is nevertheless irrecoverable because it is too remote. As discussed above, in relation to the tort of negligence, this requires showing that the loss suffered was not of a type that was reasonably foreseeable.
>
> 63. The underlying justification for this approach rests, as we see it, on considerations of both fairness and efficiency. Once it has been proved that the defendant has committed a wrong which has caused loss to the claimant, it is fair to place the onus on the wrongdoer to show a good reason why the wrongdoer should not be liable to compensate the victim for the full extent of the loss caused. In addition, it would be unduly burdensome to require a claimant who has proved that the defendant committed a tort which has caused the claimant loss to have to anticipate ways in which it might nevertheless be said that the defendant should not be held legally responsible for the loss and rebut them. It is far more efficient, as well as just, to place the burden on the defendant to make such a case."

552. The damage in question must be the natural consequence of the injunction: *Abbey Forwarding* at [38] and [43], applying *Smith v Day* and *Schlesinger v Bedford* (1893) 9 TLR 370, CA. In *Schlesinger*, the Court of Appeal also applied the decision in *Ex p Hall* 23 Ch D 644, where a receiver obtained an injunction restraining a man from selling certain goods, and damage resulted from the receiver restraining him from removing the goods. It was held there that the man against whom the injunction was obtained was not entitled to recover any damage except such as resulted naturally from his being restrained from selling and that the damage was too remote (see as quoted in *Abbey Forwarding* at [41]).

(4) Measure of damages

553. Damages suffered as a result of a freezing order will often be inherently imprecise and so a "*liberal assessment*" can be made, provided that concept is correctly understood.

554. The position was explained by Males J in *SCF Tankers (Fiona Trust)*:

> "50. The principle of "liberal assessment" was applied to an inquiry as to the damages caused by an interim injunction by Norris J in *Les Laboratoires Servier v Apotex Inc* [2008] EWHC 2347 (Ch), [2009] FSR 3. This was endorsed by the Court of Appeal in *AstraZeneca AB v KRKA dd Novo Mesto* [2015] EWCA Civ 484 at [16]. The question arose in the context of a statement by Norris J, also endorsed by the Court of Appeal, that although it is for the party seeking damages to establish its loss, the court should not be over eager in its scrutiny of the evidence or too ready to subject its methodology to minute criticism, in part because the very nature of the exercise renders precision impossible. Kitchin LJ referred at [16] to the need for "*a liberal but fair assessment of loss*".
>
> 51. These were not freezing order cases and part of Norris J's reasoning is inapplicable to such cases. Nevertheless I consider that a liberal assessment of the defendants' damages should be adopted, provided that it is clear what this means. It does not mean that a defendant should be treated generously in the sense of being awarded damages which it has not suffered. It does mean, however, that the court must recognise that the assessment of damages suffered as a result of a freezing order will often be inherently imprecise, for example because the defendant cannot say precisely what it would have done with its funds but for the freezing order; that this problem has been created by the claimant's obtaining of an injunction to which it was not entitled; that in the light of these factors the kind of over eager scrutiny of a defendant's evidence and minute criticism of its methodology to which Norris J referred will not be appropriate; and that it is not an answer for a claimant to say that damages cannot be awarded because the defendant's business venture was to some extent speculative and might have resulted in a loss. Thus the defendant is not absolved from proving its damages, but these factors must be borne in mind in determining whether it has succeeded in doing so."

555. In *Ennismore Fund Management Ltd v Fenris Consulting Ltd* [2022] UKPC 27, the Privy Council said at [69]: *"The references in the cases to liberal assessment do not imply an assessment of loss which is greater than that to which the losing party is fairly entitled."*

556. An analogy may be drawn with the "broad axe" principle in contract damages, though that principle does not permit the court to embark upon guesswork in order to make good a failure to adduce evidence to prove the amount of their loss (see *McLaren Indy*

LLC v Alpa Racing USA LLC [2026] EWHC 110 (Comm) at [150] and *Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas (a firm)* [2012] EWCA Civ 1417 at [122]-[123]). In *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm), Leggatt J said at [165] that whilst there are principles which can help a claimant to overcome evidential difficulties in proving damages:

> "[t]here is a limit, however, to how far they can be taken. They may assist in resolving uncertainties where evidence is not reasonably available but they do not enable the court to conjure facts out of the air and they have little role to play where evidence could reasonably have been obtained, or has in fact been adduced. They may give the claimant a fair wind, but not a free ride."

557. The broad axe principle was summarised recently by Mrs Justice Bacon in the case of *Cabo Concepts Ltd and The Licence World Ltd v MGA Entertainment (UK) Ltd and MGA Entertainment, Inc* [2025] EWHC 1451 (Ch):

> "456. Once causation of a head of loss is established, damages are assessed on the compensatory basis. Cabo is therefore entitled to be placed in the position in which it would have been had the breach not been committed: *Sainsbury's v Visa* [2020] UKSC 24, §194. That requires an assessment of Cabo's performance in the counterfactual world in which its market entry was not impeded by MGA's intervention.
>
> 457. That assessment is necessarily uncertain: it is impossible to predict with precision how an undertaking would have performed on the market in a hypothetical scenario that is very different from what happened in fact. The basic common law approach to the assessment of damages in such a case requires the court to do the best that it can on the available evidence, notwithstanding forensic difficulties that may arise. This is often labelled the "broad axe" principle: see *Mastercard v Merricks* [2020] UKSC 51, [2021] 3 All ER 285, §§49–51 (referring to the well-known dictum of Lord Shaw in *Watson, Laidlaw v Pott* 1914 SC (HL) at 29–30). The basic principle is that the court should avoid "artificial demands for precision" but should instead achieve practical justice on the basis of material which may well be limited: Green LJ in *London & SE Railway v Gutmann* [2022] EWCA Civ 1077, §59. That may well require broad assumptions, estimates, generalisations and "informed guesswork" on the basis of the evidence before the court.
>
> 458. For the same reason, where quantification of the loss turns on a hypothetical exercise, the court does not have to establish a particular quantum of loss on a balance of probabilities. That would demand artificial precision in a context where precise measurement is impossible. Rather, the court must make a reasonable assessment based on the evidence before it, taking all relevant and material factors into account.

…

> 463. It may be appropriate to err on the side of generosity to a claimant in the calculation of loss, where evidence is unavailable as a result of the defendant's conduct. The classic example of this is the case of *Armory v Delamirie* (1722) 1 Str 505, where a jewel of unknown value was removed from its setting by the defendant, which was accordingly required to pay damages on the basis of a presumption of the highest value jewel which the setting would have accommodated. Likewise, the court may draw adverse inferences from a failure to adduce evidence, as the CAT did in the *Royal Mail v DAF Trucks* case in relation to DAF's failure to provide evidence as to how the cartel operated and the benefits it derived from participation: see the judgment of the Court of Appeal in that case at §§143–144, upholding the approach of the Tribunal.
>
> 464. That does not, however, mean that in any case where the defendant's wrongdoing requires damages to be calculated by assessing a counterfactual scenario, even where there is voluminous evidence on both sides, the court is required to resolve all uncertainties in favour of the claimant. That would be wholly inconsistent with the approach set out in the cases above. Rather, the court will assess the totality of the material before it, giving such weight as is appropriate to the evidence on each side, depending on the court's appraisal of the strength of that evidence. Where that analysis requires assumptions or inferences to be made, the court will make those assessments on the basis of a consideration of what is reasonable and realistic. There is no principle that requires that approach to be overridden by a default presumption in favour of the claimant, simply because the exercise being carried out is the assessment of a hypothetical counterfactual scenario which did not occur as a result of the defendant's conduct."

558. Just as there is no default presumption of over-compensation in favour of the claimant, there is no rule requiring the Court to err on the side of under-compensation in favour of the defendant. In the very recent case of *Granville Technology Group Limited (In Liquidation) v LG Display Co Limited* [2026] EWCA Civ 409, the Court of Appeal found at [99]-[103] that it was wrong to err on the side of under-compensation. The correct principle was summarised at [21]-[22]:

> "21. It will be necessary to consider this ground of appeal in due course. However, the correct legal principle is clear and is common ground. When the evidence will only take the court so far, enabling it to narrow the range of uncertainty in the assessment of damages, but not to arrive at a precise figure, the court will assess the damages as best it can with the use of 'sound imagination and a broad axe', aiming to award the right figure without erring in either direction.

> 22. Of course, that principle is easier to state than to apply in circumstances where all the court can say is that the damages suffered are somewhere within a specified range and that the evidence does not allow a more precise assessment. If that is the best that the evidence can do, and one amount within the range is not more inherently probable than another, what amount is the court to award? Inevitably, whatever amount is selected is at least as likely to be wrong as to be right. In such circumstances, unless there is a particular reason to do otherwise, an award of an amount somewhere approximately in the middle of the range could be expected. Although such an award cannot be precisely accurate, it will at least reduce as far as possible the extent to which the claimant is either under- or over-compensated and will ensure that the risks of under- and over-compensation are broadly equal. Such an award is unlikely to be open to challenge in this court, not least because the trial judge will have a feel for the overall justice of the case which this court is unlikely to have." (footnotes omitted)

(5) Loss of a chance

559. A logical starting point is the discussion of losses based on future or hypothetical events in *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602 at [1610]-[1611] per Stuart-Smith LJ:

> "Questions of quantification of the plaintiff's loss, however, may depend upon future uncertain events. For example, whether and to what extent he will suffer osteoarthritis, whether he will continue to earn at the same rate until retirement, whether, but for the accident, he might have been promoted. It is trite law that these questions are not decided on a balance of probability, but rather on the court's assessment, often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which it should be noted depends in part at least on the hypothetical acts of a third party, namely the plaintiff's employer.
>
> …
>
> (3) In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on balance of probability, as Mr. Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?
>
> Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice

> which is directly in point, I have no doubt that Mr. Jackson's submission is wrong and the second alternative is correct."

560. An example is *Les Laboratoires Servier v Apotex* [2008] EWHC 2347 (Ch); [2009] F.S.R. 3, where Norris J had to see what the outcome would have been had Apotex been able, as it ought to have been, to enter a new market for the sale of a particular generic pharmaceutical product. The judge made the following observations among others at § [5]:

> "(d) What Apotex was trying to do (and what the Order restrained it from doing) was to enter a new market for the sale of generic perindopril. It was denied exploitation of this opportunity. The outcome of such exploitation is attended by many contingencies but *Chaplin v Hicks* [1911] 2 KB 786 establishes (per Vaughan Williams LJ at p.791) that whilst *"the presence of all the contingencies on which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision"* damages for the lost opportunity are assessable.
>
> (e) The fact that certainty or precision is not possible does not mean that a principled approach cannot be attempted. The profits that Apotex would have made from its exploitation of the opportunity to sell generic perindopril depend in part upon the hypothetical actions of third parties (other potential market participants) and in part upon Servier's response to them. A principled approach in such circumstances requires Apotex first to establish on the balance of probabilities that the chance of making a profit was real and not fanciful: if that threshold is crossed then the second stage of the inquiry is to evaluate that substantial chance (see *Allied Maples v Simmons & Simmons* [1995] 1WLR 1602). As Lord Diplock explained in *Mallett v McMonagle* [1970] AC 166 at 176E-G
>
> > "… in assessing damages which depend on its view as to what… would have happened in the future if something had not happened in the past, the Court must make an estimate as to what are the chances that a particular thing… would have happened and reflect those chances, whether they are more all less than even, in the amount of damages it awards…"
>
> (f) The conventional method of undertaking this exercise is to assess damages on a particular hypothesis and then to adjust the award by reference to the percentage chance of the hypothesis occurring. In many cases it is sufficient to postulate one hypothesis and make one discount: but there is no reason in principle why one should not say that either Scenario 1 or Scenario 2 would have occurred and to discount them by different percentages. That is the course which Mr Watson QC urged in the present case: and I note that it has some support in *Earl of Malmesbury v Strutt & Parker* [2007] PNLR 570."

It may be noted that the passage quoted in § (e) above makes the point that damages can be assessed even if the percentage chance is less than 50%.

561. Norris J's summary was endorsed by Kitchin LJ in *AstraZeneca AB v KRKA dd Novo Mesto* [2015] EWCA Civ 484 at [13], who added:

> "14. It can be seen that in this case Sales J has found that but for the injunction the defendants would have sought to enter the market with Emozul, and would have done so with, as he put it, full force and effect. Accordingly this is not a case in which he was required to assess the loss of the chance of the defendants taking this course or of taking it in a particular way. However, he was then required to quantify the loss the defendants have suffered. This necessarily required him to undertake an evaluation of the degree of success they would have achieved and the profits they would have made but for the injunction, and in carrying out that exercise to take into account all significant factors but to ignore speculative possibilities. If and in so far as he considered that it was necessary to apply a discount to reflect the various uncertainties inherent in the assessment of this counterfactual scenario then, it seems to me, it was appropriate for him to do so. ..."

562. The same approach was followed by Floyd J in *Tom Hoskins Plc v EMW Law* [2010] EWHC 479 (Ch), who was, on the facts, urged not to apply the *Allied Maples* approach but instead to determine what the relevant third party (the counterparty to a proposed transaction) would have done, since (it was suggested) all the necessary evidence was before the court. Floyd J declined to do so, indicating that it was clear that not all the evidence relevant to the third party's decision had been called. The decision is also of note for the way in which Floyd J approached the existence of multiple contingencies:

> "133. Although there are multiple contingencies (agreement to the terms, attempts to re-negotiate or extend completion and so on) I think it would be wrong to apply percentage upon percentage. For example if I thought there was a 20% chance of ISL agreeing to provide the director's guarantee as a requirement of the contract and an 80% chance of completion occurring at the end of October, a simple multiple of these two percentages (to yield 16%) would not reflect the true chances of the deal being done. That is because the contingencies are not independent. ISL might well have resisted the guarantee so as to prevent exchange of contracts until much later, and then agreed to it when their funding was in place. Or they might have agreed to it at once but with a longer completion date.
>
> 134. I think it right to ask what were the overall chances that TH and ISL would, absent negligence, have negotiated and agreed a contract for the sale for all five pubs, on terms requiring a guarantee, with completion occurring at the end of October 2000?"

By parity of reasoning, and logically, where there are multiple independent contingencies, then it may be appropriate to multiply them, at least as an aid in assessing the overall chances of a particular outcome.

563. Males J in *Fiona Trust* provided a very clear and helpful statement of the approach to be taken in a case like the present one, which I think it helpful to set out reasonably fully as it provides a useful template:

> "55. The true position is that in principle damages can be awarded for loss of profits even if a claimant might have made a loss. The approach which the court will adopt is to ask whether the claimant has proved to a sufficient standard (which may be the balance of probabilities, or sometimes merely that there was a real and substantial chance as in loss of a chance cases) that its trading would have been profitable. If so, the court will make the best assessment of the damages that it can, applying if necessary a discount to reflect whatever uncertainty exists, while recognising that a party seeking to show what might have happened is not required to perform an impossible task with unrealistic precision.
>
> …
>
> 57. [After citing the decisions of Flaux J and the Court of Appeal in *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm) and [2010] EWCA Civ 486, [2011] QB 477] Thus merely to label the prospect of profits as "speculative" takes matters nowhere unless that prospect is so speculative that it must be disregarded. In principle, however, trading which is speculative in the sense that it may turn out to be loss making is capable of giving rise to an award of damages if on the evidence the court is able to find to a sufficient standard that it would in fact have been profitable. Applying this approach, Flaux J found as a fact on the balance of probabilities that the claimant would have made profits. He awarded damages accordingly, adopting what he regarded as a conservative figure pitched at a level which took account of the inherent trading risks and the probability that some individual trades would have been loss-making (see e.g. [188] and [192]). This decision was upheld in the Court of Appeal [2010] EWCA Civ 486, [2011] QB 477. Toulson LJ said:
>
> > "22. There is a central flaw in the appellants' submissions. Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a

> claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss.
>
> 23. The claimant has first to establish an actionable head of loss. This may in some circumstances consist of the loss of a chance, for example, *Chaplin v Hicks* [1911] 2 KB 786 and *Allied Maples Group Limited v Simmons and Simmons* [1995] 1 WLR 1602, but we are not concerned with that situation in the present case, because the judge found that, but for Mr Bomford's fraud, on a balance of probability Tangent would have traded profitably at stage 1, and would have traded more profitably with a larger fund at stage 2. The next task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account. (See *Davis v Taylor* [1974] AC 207, 212 (Lord Reid) and *Gregg v Scott* [2005] 2 AC 176, para 17 (Lord Nicholls) and paras 67-69 (Lord Hoffmann)).
>
> 24. The appellants' submission, for example, that 'the case that a specific amount of profits would have been earned in stage 1 was unproven' is therefore misdirected. It is true that by the nature of things the judge could not find as a fact that the amount of lost profits at stage 1 was more likely than not to have been the specific figure which he awarded, but that is not to the point. The judge had to make a reasonable assessment and different judges might come to different assessments without being unreasonable. An appellate court will therefore be slow to interfere with the judge's assessment. …
>
> 25. … No method of assessment could be perfect, but the method of measurement accepted by the judge as a basis for estimating the lost profits was rational and supported by the opinion of an expert who impressed him. …"

58. I adopt this approach. There is necessarily a degree of uncertainty in determining what Mr Nikitin would have done with his money if it had not been held in the Lawrence Graham account as security for the claimants' claims. Even if it can be said with reasonable confidence what he would have done or sought to do, for example that he would have sought to invest in a programme of newbuildings, there remains considerable uncertainty in assessing the financial outcome which would have resulted. However, these uncertainties are not fatal to the defendants' claims. What the defendants need to prove is that on the balance of probabilities they would have sought to invest in a way that had a real as distinct from fanciful chance of making a profit. If so, it will be necessary to make the best possible

assessment of the profit which the defendants would have made, taking account of the uncertainties inherent in this exercise. In a case such as this where there are a number of such uncertainties, what needs to be assessed is the "overall chance" of the defendants making the profits in question (see *Tom Hoskins Plc v EMW Law* [2010] EWHC 479 (Ch) at [133] to [135]).

…

91. Once it is determined that the defendants would have sought to conclude shipbuilding contracts with Korean yards, there are three main areas of controversy. These are (1) whether they would have been able to conclude such contracts, (2) if so, whether they would have resold the vessels in the spring of 2008, and (3) whether they would have received the price payable under such resale contracts concluded before but to be performed after the financial crash of 2008. All of these issues depend to some extent on the actions of third parties and are therefore subject to at least a degree of uncertainty. My task is to determine whether there was a real and substantial chance that the defendants would have concluded such contracts and resold the vessels at a profit and, if so, to evaluate that chance and that profit as best I can.

…

113. As already indicated, there are a number of contingencies which call into question whether the defendants would have achieved the profits which they claim pursuant to their newbuildings case. Nevertheless I have found that the defendants would on the balance of probabilities have sought to conclude newbuildings contracts in the final quarter of 2005 and that there is at least a real and substantial chance that they would not only have succeeded in doing so but would have achieved the profits which they claim (or something very like those profits) based on resale contracts concluded in or about the spring of 2008 pursuant to which the resale price would have been received on delivery of the vessels.

114. In my judgment the fairest way to reflect the findings which I have made is to apply a suitable discount to the defendants' claim figures. In accordance with the approach of Floyd J in *Tom Hoskins Plc v EMW Law* [2010] EWHC 479 (Ch) at [133] to [135], it is not appropriate in a case of "multiple contingencies" to apply "percentage upon percentage". It would in any event be highly artificial to attempt to do so. Rather it is necessary to evaluate "the overall chances" of the defendants achieving the profit claimed. Inevitably this is a somewhat impressionistic assessment, but I must do the best I can. My conclusion, taking account of all the uncertainties which I have mentioned, is that

> the defendants had a 50% chance overall of achieving this profit and that the damages should be calculated accordingly."

564. Finally, the position was recently summarised again in *McLaren Indy LLC v Alpa Racing USA LLC* [2026] EWHC 110 (Comm), from which it is useful to highlight the following paragraphs:

> "Standard of proof
>
> 141. In civil cases the Court will generally assess allegations by reference to the balance of probabilities. Accordingly, if a claimant shows more than a 50% likelihood that a loss would not have been incurred but for a breach, then (subject to rules of causation and remoteness, discussed below) it will recover that loss in full. However, where the assessment of damages is dependent on whether particular events would have occurred or will occur – that is, where quantification involves a hypothetical exercise – the Court will adopt a more nuanced approach. In certain instances, the claimant need only show that there was or would have been a "real or substantial, rather than speculative " chance of relevant events occurring. The court will, then, award proportionate damages according to the likelihood of the hypothetical event: ...
>
> 142. This is sometimes termed the 'loss of a chance' approach to damages, as explained by Andrew Burrows QC (as he then was) in *Palliser Ltd v Fate Ltd* [2019] EWHC 43 (QB) at [27] :
>
> > "The correct picture of the law on proof in relation to damages is therefore that where the uncertainty is as to past fact, the 'all or nothing balance of probabilities' test applies. Where the uncertainty is as to the future, proportionate damages are appropriate. Where the uncertainty is as to hypothetical events, the correct test to be applied depends on the nature of the uncertainty: if it is uncertainty as to what the claimant would have done, the all or nothing balance of probabilities test applies; if it is as to what a third party would have done, damages are assessed proportionately according to the chances."
>
> 143. As to the actions of a party, the 'all or nothing' test applies, and the claimant recovers either 100% of the claimed loss or 0% thereof. …
>
> …
>
> 145. Accordingly, …:
>
> in relation to the actual scenario (i) where an alleged loss depends on past events, the claimant must prove what actually happened, whether prior to the breach or after the breach but

> prior to trial, on the balance of probabilities, whereas (ii) where a loss depends on future events, the claimant need only show that these have a "real or substantial" chance of occurring, following which damages will be assessed by reference to the likelihood of those events; and
>
> in relation to the counterfactual scenario: (i) a claimant must prove its own and the defendant's counterfactual conduct on the balance of probabilities, whereas (ii) if the loss sought depends on the counterfactual conduct of third parties, the claimant need only prove that there would have been a "real or substantial" likelihood of those third parties acting in a way which would have benefitted them, following which damages will be assessed in proportion to the likelihood."
>
> (paragraph break interpolated)

565. There was some debate between the parties about whether, at the quantification stage, it is appropriate to apply a 'loss a chance' approach properly so called. McGregor on Damages at [11-049] draws a distinction between loss of chance "proper" and loss of chance at the quantification stage, with the former applying only at the causation stage. At the quantification stage, McGregor states, the court does not apply a balance of probabilities approach but instead "*estimates the loss by making the best attempt on the evidence to evaluate the value of the chances lost*", taking into account all manner of risks and possibilities, and applying a pragmatic approach or 'broad axe'. Mr Bosworth and Mr Hurley submitted that:

i) Loss of chance in the 'proper' sense might be relevant at the causation stage, because some of the mechanisms by which the Defendants contend that the Freezing Order affected them involve the actions of third parties. The position will therefore depend on whether the court accepts that the Freezing Order prevented Mr Bosworth/Mr Hurley from setting up Arcadia 2 (a) by reason of the restrictions it imposed on their disposition of assets, or (b) by reason of its effect on potential investors, banks and counterparties.

ii) At the quantification stage, one is not dealing with loss of chance 'proper' but (Mr Bosworth and Mr Hurley accept) making an assessment of damages taking into account the various uncertainties involved.

566. In my view:

i) At the causation stage, any question of whether third parties, such as investors, were deterred by the Freezing Order from taking actions they might otherwise have taken forms part of the analysis of the 'actual', as opposed to the counterfactual, position, and logically falls to be decided on a balance of probabilities basis. The question of whether, in the absence of the freezing order, there is a real and substantial chance that investors and others would in fact have invested in/supported/traded with Arcadia 2 sufficiently for the business to be established and successful relates essentially to the counterfactual, and is, at least in the present case, probably inseparable from the quantification issue.

ii) Whether one terms the assessment required at the quantification stage a 'loss of chance' analysis or not probably makes no difference. Either way, it involves forming an overall assessment, including the use of percentage discounts where appropriate, of the chances of Arcadia 2 being set up as a functioning oil trading business and the profits it is likely to have made.

iii) Similar considerations apply to the Defendants' claims for loss of employment opportunities. The Defendants need to establish that they would have sought employment, and that the Freezing Order resulted in potential employers refraining from employing them when they would or might otherwise have done so. If so, then the court needs to make an overall assessment of (a) whether there is a real and substantial chance that the relevant defendant would in fact have been employed, and if so what chance, and (b) (again as a matter of likelihood) the remuneration he would thereby have earned. Whether one regards (a) as a loss of chance 'proper' causation analysis, or regards both (a) and (b) as part of quantification seems to me unlikely to make any difference to the outcome.

567. I shall therefore (i) consider whether the Defendants would have taken the relevant action on the balance of probabilities; (ii) consider whether there was a real and substantial chance that the defendants would have succeeded in realising that intention; and (iii) if so, evaluate that chance to quantify the loss.

(6) General damages for reputational loss

568. The Court of Appeal in *Abbey Forwarding* confirmed that damages are in principle recoverable for reputational losses resulting from a freezing order. McCombe LJ said:

> "105. HMRC appeal against the judge's award of general damages, contending that the award infringes the principle that damages for distress and anxiety are not usually recoverable in contract. They refer in their skeleton argument to the well traversed contract cases on this subject.
>
> 106. Authority on this aspect of compensation under a cross-undertaking is sparse indeed. However, as already stated, contract rules are to be applied by analogy, where appropriate, and not purely automatically. For my part, I consider the judge's approach (quoted above) accords with principle. He concluded that the Appellants were in principle entitled "to recover a sum by way of general damages to compensate them for the consequences of the order that cannot be claimed as special losses" (paragraph 129). I agree.
>
> 107. Jack J reached a similar conclusion in principle in *Al-Rawas v Pegasus Energy Ltd.* [2008] EWHC 617 (QB). In paragraphs 35 to 39 of his judgment, he said this:
>
> > "[35] I consider that there is a close analogy between the stopping of a cheque by a bank and the obtaining of a freezing order. In each case there is an interference with the party's ability to use its money as it wishes. It goes to the heart of the

> party's ability to use the banking system, which is at the heart of trade. To be on the wrong end of a freezing order is undoubtedly a stigma-see the Booker McConnell case referred to above at [32]: it suggests that the defendant has failed to pay its debts and has been found likely to try to dissipate its assets.
>
> …
>
> [39] I conclude that it is in accordance with principle and the above authorities that general damages may be awarded where a search and seizure order has been wrongly obtained, and likewise with a freezing order. Such damages are to compensate the defendant for the consequences of the order which cannot be claimed as special damage. They are not, however, awarded for nothing. It may be obvious that the particular circumstances of the case justify an award, or it may well not be but rather the contrary. In most cases it will be necessary to have some evidence to support the award."

…

109. In my judgment, it is obvious that a freezing order of the type imposed in this case constitutes a severe invasion upon the liberty of any person to deal with his or her assets as he or she sees fit. An intrusion upon that liberty is bound to have profound effect upon the day to day life of the person affected in a multitude of ways which do not require elucidation by evidence of special damage: see paragraph 39 in the Al-Rewas case (supra).

110. I would refer again to the words of Peter Gibson LJ in the *Cheltenham & Gloucester* case quoted above. As the learned Lord Justice said, this type of order is one of the law's "nuclear weapons". If they are wrongly deployed, just as with a nuclear weapon, damage is inevitable. It would be an affront to justice to hold that damages for the unjustified restrictions imposed, in addition to compensation for distress and anxiety, are irrecoverable under the cross-undertaking. It seems to me that injunctions of this type have the potential to be rather different in their impact from the early cases in which the contract analogy was developed. In the *Cheltenham & Gloucester* case, Peter Gibson LJ alluded to the particular risk of injustice that may arise from the grant of freezing orders,

> "frequently imposing severe restrictions on the respondents' right to spend their money or otherwise dispose of their assets." (see above).

111. The judge proceeded to an admirably careful analysis of the evidence of the Appellants as to specific areas in which their

> well-being, and indeed their health, and that of family members, had been affected by the freezing order." (footnotes omitted)

569. McCombe LJ added that *"I would not adopt an approach of awarding either "modest" damages on the one hand or "generous" damages on the other. I think that the correct approach should be to award realistic compensation for what has occurred"* [124]. He concluded at [111]-[114] that the evidence in that case relating to the effects of the freezing order on the well-being and health of the defendants, as well as their family members, supported a larger award of damages than had been made. Vos LJ and Arden LJ agreed. Vos LJ added:

> "150. In my judgement, general damages can in an appropriate case be awarded on a cross-undertaking in respect of an inappropriately obtained freezing order for any or all of these elements: upset, stress, loss of reputation, general loss of business opportunities, and general business and other disruption including adverse effects of the inappropriate policing of the injunction on the injunctees. Whilst I agree with the judge that damages for upset, stress and loss of reputation are generally modest in this and other fields, I concur with McCombe LJ in thinking that realistic compensation should otherwise be awarded for what has occurred that was in breach of the notional contract I have described.
>
> 151. McCombe LJ has not sought to break down his suggested general damages award of £15,000 for each appellant (or £750 per month) into its constituent parts. I think it would be difficult to do so. It should be clear, however, that his suggested award (with which I agree) is in respect of the upset and stress found by the judge, and the general business and other disruption caused to the appellants by Abbey's breaches of its notional contract. This latter element includes in this case compensation for the adverse effects of the inappropriate policing of the injunction.
>
> 152. I would wish also to make clear that I regard this as a bad case. The liquidator's conduct was, at times, inexcusable, and the adverse effects of the injunction were far-reaching and life-changing for each of the Appellants. These were the consequences of Abbey's conduct in repeatedly breaking its notional contract by which it had undertaken that it would not prevent the Appellants disposing of or dealing with their assets up to a value of nearly £6 million. Those who inappropriately seek, obtain and enforce freezing orders should be aware of the kinds of damage they may cause, and of the fact that the courts will be astute to hold them to account by making such awards for their breaches of their notional contracts."

570. As the Claimants point out, in the few cases where causation is satisfied and an award is made, the award has been modest, ranging from £1,000 to £15,000. The usual range of awards is indicated in *PJSC National Bank Trust v Mints* at § [27]:

> "(i) Thus, whilst a claim for general damages might in theory be available for reputational damage caused by the granting of a freezing order, it is likely to be a rare case as it will frequently be difficult for the defendant to show that the damage has been suffered as a consequence of the restraint and not as a result of other factors, such as the bringing/existence of the underlying litigation.
>
> …
>
> (k) Even where general damages for distress or "stigma" caused by a freezing order are considered to be due, the Court is likely to be very conservative in its assessment of any such damages: see *Bank St Petersburg v Arkhangelsky* [2013] EWHC 3529 (Ch) at [38] (overruled on other grounds):
>
> > "even if "stigma" damages or compensation where a cross undertaking is enforced may in principle be recoverable, the Court is likely to be very conservative in its assessment [of them]…the reluctance of the Court to make any award in respect of purely reputational consequences is illustrated by the dearth or even absence of other examples in which it has done so."
>
> (l) Indeed, to the extent that any such awards for general damages have been made (which have always been made to the party which was actually subject to the freezing order), they have always been very modest: £1,000 in *Al-Rawas v Pegasus Energy Ltd* [2008] 1 All ER 346 at [48]; £10,000 in *Columbia Picture Industries Inc v Robinson* [1987] Ch 38; and £15,000 (calculated on the basis of £750 per month) in *Abbey Forwarding Ltd v Hone (No. 3)* [2015] Ch 309 (CA) at [129]."

571. The above summary was quoted by the Court of Appeal in *Yodel Delivery Network Ltd v Corlett at* [2025] EWCA Civ 1108 in Lord Justice Newey's summary of legal principles on fortification, though the Court of Appeal did not deal with the particular issue of general damages.

(7) Losses on losses

572. I did not understand the Claimants to challenge the recoverability in principle of losses such as the alleged investment losses referred to in sections (K) and (M) above, subject to success on the Defendants' primary claims. Though they may be regarded as 'losses on losses', it appears to me that they can be recovered provided they have been pleaded and proven, subject to the ordinary principles of causation and remoteness (cf. *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34 and Flaux J's decision at first instance in *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm) at [173]-[174]).

(8) Mitigation

573. Picken J provided a helpful recent summary of the general principles of mitigation in *McLaren Indy LLC v Alpa Racing USA LLC* [2026] EWHC 110 (Comm) at [179]:

> "Mitigation
>
> 176. Mitigation is an aspect of legal causation. A claimant must take all reasonable steps to mitigate their loss consequent upon the defendant's wrong and cannot recover damages for any such loss which they failed, through unreasonable action or inaction, to avoid. Put differently and as Lord Toulson JSC put it in *Bunge SA v Nidera* [2015] UKSC 43, [2015] 3 All ER 1082 at [81], a contract breaker will not be held to have caused loss which the claimant could reasonably have avoided.
>
> > "It is well recognised that the so-called duty to mitigate is not a duty in the sense that the innocent party owes an obligation to the guilty party to do so… Rather, it is an aspect of the principle of causation that the contract breaker will not be held to have caused loss which the claimant could reasonably have avoided".
>
> 177. The standard of 'reasonableness' is " not a high one, since the defendant is a wrongdoer" : see *NTN Corporation v Stellantis NV* [2022] EWCA Civ 16 at [27] per Green LJ citing from the then applicable edition of *Chitty on Contracts*, and also *Banco de Portugal v Waterlow* [1932] AC 452 at 506 per Lord Macmillan, as follows:
>
> > "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."
>
> 178. In "judging whether [a Claimant] ha[s] acted reasonably", the Court" should be very indulgent and always bear in mind who was [originally] to blame": *Lodge Holes Colliery Company v Wednesbury Corporation* [1908] AC 323 (HL) at 325, applied in *Borealis AB v Geogas Trading SA* [2010] EWHC 2789

> (Comm) at [137]. The Court will, in particular, recognise that the innocent party is likely to be in a " better position than [the judge] to assess what was appropriate commercially ": *British Racing Drivers Club Ltd v Hextall Erskine & Co* [1996] BCC 727 (HC) at page 743 per Carnwath J (as he then was).
>
> 179. Moreover, there will often be a range of reasonable responses open to the claimant. It is not enough for the defendant to show that there was a reasonable course of action open to the claimant that it did not follow. In order to establish a failure to mitigate, the defendant must show that it was unreasonable for the claimant not to follow it. As stated by Potter LJ in *Wilding v British Telecommunications plc* [2002] EWCA Civ 349, [2002] ICR 1079 at [55]:
>
> > "[I]f there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed."
>
> 180. As Leggatt J put it in *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm), [2016] 1 All ER 675 (Comm) at [38] the standard of reasonableness is "applied with some tenderness towards the claimant having regard to the fact that the claimant's predicament has been caused by the defendant's wrongdoing ". What the defendant must show is "that there was a course of action which it was reasonable to expect the claimant to adopt that would have avoided all or an identifiable part of the claimant's loss ".
>
> 181. It is clear also that a claimant need not take action that will prejudice its commercial reputations or put its good public relations at risk: see McGregor on Damages at [10-098]."

574. McCombe LJ in *Abbey Forwarding* made the following observations on mitigation in the context of applications to vary of a freezing order:

> "64. In my judgment, the law also meets the justice of the matter. A defendant wrongly injuncted should be compensated for losses that he should not have suffered, but a claimant should not be saddled with losses that no reasonable person would have foreseen at the time when the order was made, unless the claimant knew or ought to have known of other circumstances that was likely to give rise to the particular type of loss that occurred in the case at hand. A claimant may, however, find himself liable for losses which would not usually be foreseen in particular cases. One such case may be if a loss, not usually foreseeable, arises before a defendant has had any real opportunity to notify the claimant of the likely loss or sensibly to apply to the court for a variation.

> 65. In mentioning this possible example, the court must be realistic as to the dilemma facing a defendant when served, out of the blue, with a freezing order. Some claimants are far from reasonable in practice – the present case provides a very clear example (see below). Applications for variation are not that simple. They take time to prepare and are not without cost. At the same time, under the terms of the order, the defendant will be limited as to costs and living expenses and will, no doubt, also be under requirements to identify and verify his assets. In addition, he will be seeking quickly to assess, with his lawyers, the claimant's evidence, both with regard to whether to oppose continuation of the order on the return day (or perhaps to apply for variations) and with regard to the ultimate defence of the action. Approaches to claimants to agree variations, or even to provide suitable written indications to banks and other third parties that particular payments are not caught by the order, are often far from straightforward. If, in such circumstances, a defendant is shown to have suffered an unusual loss, then in my judgment the claimant should not be surprised if the court orders him to pay for it."

575. Similarly, in *Fiona Trust,* Males J noted at [68] that there is a duty on defendants to take reasonable steps to mitigate any losses caused by a freezing order, though the burden is on the party who obtained the freezing order to demonstrate a failure to mitigate. He made the following further pertinent observations:

> "[84] It is moreover unrealistic to think that an application to the court for the removal of this prohibition would have been straightforward. There is no need to speculate here. As already noted, the defendants had in fact sought its removal at the hearing on 7 September 2005, but without success. The reaction of HHJ Mackie QC in his judgment of 24 February 2006 further demonstrates the difficulty which the defendants would have faced. The claimants would undoubtedly have resisted vigorously any application to vary the terms of the security to permit the defendants to conclude such contracts. They had expressly reserved the right to do so and, with a proprietary claim over the proceeds of resale of the Hyundai and Daewoo vessels, had strong prospects of being able to see off successfully any such application. The duty to mitigate is only a duty to act reasonably. Any failure by the defendants to make a further application which would have taken time, would have been strongly resisted, and which had only moderate prospects of success, was not unreasonable. There was here no failure to mitigate."

576. On appeal in *SCF Tankers Ltd (Fiona Trust)*, Beatson LJ stated:

> "51. … The question whether a person is required to embark on litigation, whether in the context of causation or in the context of mitigation, is an intensely fact-specific inquiry. The judge

> recognised (at [43]) that other commercial or appellate judges might take a different view of the difficulties the Standard Maritime parties would face to that taken by Judge Mackie and himself but nonetheless reached the conclusion that they faced considerable difficulties and were not required to make the application and to embark on litigation. Provided his decision was not one which falls outside the margin accorded to the judge deciding such questions it is not susceptible of appeal. I consider that, on the evidence before him and the findings of fact that he made, his conclusion was one he was entitled to reach.
>
> …
>
> 55. For similar reasons, I have concluded that the judge did not err in his assessment of mitigation in [84]. I do not consider that he erred in stating that the Standard Maritime parties would face a "practical dilemma" in attempting to present themselves to Korean shipyards while stating that any transaction depended on a successful application to the court, or in making an application to the court without a concrete proposal in hand for the court to assess in order to have a realistic prospect of success in any application. The judge was entitled to take into account the position taken by the Fiona Trust parties in the past."

577. *Grant & Mumford Civil Fraud* 1st Ed. at [31-038(10)] suggests that *"arguments after the event by claimants that the respondent should have avoided the claimed loss by returning to court during the currency of the proceedings to seek a relaxation of the order will be met with scepticism".* Conversely, it has been held that *"[e]quity would be apt to blame an injunctee who stood by, letting the injunctor build up a liability on the cross-undertaking of which he had no knowledge"* (*R v Medicines Control Agency, Ex p Smith & Nephew Pharmaceuticals Ltd (Primecrown Ltd intervening)* [1999] RPC 705, 714 (Jacob J)).

(9) Effect of a freezing order on corporate activity

578. The Claimants submit that the assets of a third party, including a company wholly owned and controlled by the respondent, will not generally be caught by the scope of the Freezing Order: see *Lakatamia Shipping Co Ltd v Su* [2014] EWCA Civ 636 at [42], where Sir Bernard Rix stated that *"in the more ordinary case, even where a freezing order is justified under its standard rationale, that does not extend to freezing the assets of other parties or corporate non-defendants".* This point would be potentially relevant if Mr Bosworth and Mr Hurley had managed to establish Arcadia 2. It might also be relevant to the position of Attock Dubai insofar as the coercive effect of the Freezing Order is relied on.

579. The freezing order in *Lakatamia Shipping v Su,* like that in the present case, used the following wording:

> "[1] Paragraph 2 [i.e. the freezing order] applies to all the Respondent's assets whether or not they are in its, her or his own name, whether they are solely or jointly owned.

> [2] For the purpose of this order the Respondent's assets include any asset which it, she or he has the power, directly or indirectly, to dispose of or deal with as if it were its, her or his own.
>
> [3] The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with its, her or his direct or indirect instructions."
>
> [numbering and paragraph breaks interpolated]

580. The Court of Appeal held that sentence [3] (and hence sentence [2]) covers situations where a trust holds or controls assets in accordance with the defendant's instructions, but does not cover a company's assets merely because of the powers a director or shareholder may be able to exercise over them as such (§§ [30]-[31] and [41]). However, the court also noted that, as Tomlinson LJ put it:

> "For the reasons I have already given however the assets of such a company will ordinarily be indirectly affected by the order because of the effect of disposition on the value of the defendant's assets consisting in his direct or indirect shareholding in the relevant company." [31]

See also, to similar effect, §§ [22] and [26].

581. Thus a defendant will be in breach of the order if he procures a disposition reducing the value of the company's assets (as opposed to an ordinary course of business dealing [23]) as that will reduce the value of his shareholding in it and thus his assets. Moreover, that in practice is likely to give rise to a degree of uncertainty liable to make the running of a business involving regular large transactions difficult or impracticable. As Sir Bernard Rix stated in *Lakatamia*:

> "43 However, as Rimer and Tomlinson LJJ have shown, even under the Order's existing wording, a company owner will not be permitted to deplete the assets of his companies, thereby diminishing the value of his own assets in the form of his shareholdings, unless he can bring such dispositions within an order's exception for the ordinary course of business. It is unlikely however to be within the ordinary course of business for a shareholder to act so as to diminish the value of his shareholdings. In case of doubt, the matter can of course be debated before the court."

582. In *FM Capital Partners Ltd v Marino* [2018] EWHC 2889 (Comm), Peter MacDonald Eggers (sitting as a Deputy High Court Judge) concluded that the subsequent decision of the Supreme Court in *JSC BTA Bank v Ablyazov (No 10)* [2015] UKSC 64 does not alter the conclusion reached in *Lakatamia* that the mere fact that a respondent is a sole shareholder and director of a company does not mean that the respondent has "control" over the company's assets for the purposes of the standard form of freezing order wording. Nonetheless, the potentially serious uncertainty and risk referred to in the preceding paragraph remains.

(10) Relevance of the dishonesty allegations

583. The Defendants submit that their dishonesty allegations are relevant to the legal principles in the following ways. They submit that:

i) the Claimants cannot rely on their own dishonest allegations of fraud in the underlying proceedings to break the chain of causation and defeat or reduce Mr Bosworth and Mr Hurley's claims in the Inquiry (the 'own wrong' point);

ii) if dishonesty is a cause of any relevant loss or damage, it must be treated as the only cause for public policy reasons (the 'sole cause' point); and

iii) if a freezing order is obtained dishonestly, all loss directly caused by the injunction is recoverable regardless of foreseeability (the 'foreseeability' point).

584. I do not find it necessary to resolve any of those points, because:

i) I have concluded that the Defendants have established that the cause of their recoverable losses was the Freezing Order, as distinct from the allegations made in or the existence of the underlying proceedings;

ii) it is unnecessary, on the conclusions I have reached, for the Defendants to rely on the sole cause argument; and

iii) I have not concluded that the Defendants are entitled to any heads of loss that would usually be irrecoverable on grounds of lack of foreseeability (or, expressing the point in contract damages terms, on the ground that they were not in the reasonable contemplation of the parties when the Freezing Order was made).

I therefore record my reaction to the arguments here only very briefly.

585. On the 'own wrong' point, the Defendants rely on *Coudert Brothers v Normans Bay Ltd* [2004] EWCA Civ 215, where Waller LJ stated as follows at [46]: *"Is there a principle which disallows a defendant from relying on a wrong which he has committed in order to reduce the damages that would otherwise flow from a tort or breach of contract? It seems to me that there should be such a principle, and that is what Lord Brown Wilkinson was recognising. It is quite difficult to say why it should be so, other than that it flows from public policy where it is a principle that a person should not be entitled to rely on their own wrong in order to secure a benefit."* It would be inequitable and unjust for the Claimants to rely on their own dishonest accusations of fraud to defeat or reduce Mr Bosworth and Mr Hurley's claims in the Inquiry.

586. In response, the Claimants submit that the 'own wrong' principle is not applicable here. The Defendants' argument is at odds with the fundamental principle that losses are not recoverable under the cross-undertaking if they were caused by the proceedings, and would bypass the requirements of other claims, such as malicious prosecution. In *Berkeley Administration Inc v McClelland* [1995] ILPR 201, Stuart-Smith LJ said at [44]:

> "It is not necessary in this appeal to decide whether, on an inquiry as to damages to ascertain what damage a party has

> sustained as a result of the grant of an injunction, a claim for aggravated or exemplary damages can be brought at all, but I am bound to say that in my opinion Maccorp face formidable difficulties in law in so asserting. It seems to me at the very least that Maccorp have to establish the ingredients of the tort of the abuse of process, which is a separate tort in English law. There must be malice and absence of reasonable and probable cause in bringing the proceedings."

587. I considered the own wrong point at §§ 37 to 66 of my judgment in this case of 21 October 2025 ([2025] EWHC 2724 (Comm)). The Claimants had applied to strike out the Defendants' dishonesty allegation, and I concluded that there was a realistic prospect that the dishonesty allegation, if made good, would be relevant to the Claimants' causation argument as well as for other reasons. Having reflected on the arguments as now put forward, I consider the Defendants to have the better of the argument that the 'own wrong' principle is capable of wide-ranging application, including to circumstances of the kind at issue here. The Claimants' most potent argument is, I think, that based on consistency with the malicious prosecution case law, discussed in §§ 31 and 61-62 of my October 2025 judgment. If the effect of the Defendants' argument were to allow recovery for losses simply on the basis that they were caused by the proceedings, then (even having regard to the additional element of dishonesty) it would be hard to square with that case law and the restrictive approach taken to compensation for the effects of litigation. However, that is not the position here: as indicated in §§ 56-57 of the October 2025 judgment, the Defendants' case arises on the premise that the Freezing Order by itself would have caused their losses, with the effects of the underlying proceedings being relied on by the Claimants in effect as an additional supervening cause. In these circumstances, I would have preferred the argument advanced by the Defendants that the Claimants would be precluded from relying on the effects of allegations dishonestly advanced in the underlying proceedings.

588. On the sole cause point, the Defendants rely on the deceit case *Standard Chartered Bank v Pakistan National Shipping Corp (No.4)* [2001] QB 167, where Ward LJ held at [121] that *"[a]s a matter of law it seems to me the sole cause of the damage is the defendant's deceit and any reason operating on the plaintiff's mind which causes him to act as he did pales into legal irrelevance".* The Defendants submit that the public policy considerations underlying the principle in the context of deceit apply with even greater rigour in the case of a dishonestly obtained freezing order, where the courts *"are properly concerned lest these weapons are used inappropriately and the undertaking in damages provides a salutary potential deterrent against their misuse"* (*Cheltenham & Gloucester BS v Ricketts* [1995] 1 WLR 1545 at 1554G-H, *per* Peter Gibson LJ).

589. I considered the 'sole cause' point in §§ 51 and 68-71 of my October 2025 judgment. I continue to prefer the provisional view expressed in § 71 there, namely that the position in deceit claims reflects a view based on fairness or public policy to the effect that a person deceived by a fraudster should not be denied recovery on the basis that he/she should have been more careful: rather than reflecting some principle of wider application.

590. On the foreseeability point, the Defendants refer to Gee on Commercial Injunctions (7th Ed., 2021) at [11-048], *Al-Rawas v Pegasus Energy Ltd* [2009] 1 All ER 346 and *Doyle v Olby Ltd* [1969] 2 Q.B. 158.

591. Gee on Commercial Injunctions (7th Ed., 2021) says at [11-048]:

> "If a claimant has obtained an injunction fraudulently or maliciously, the court should hold him responsible for all loss directly caused by the injunction regardless of its foreseeability—compare the position in an action for deceit.[325] [*Doyle v Olby Ltd* [1969] 2 Q.B. 158 at 167; *Smith New Court Ltd v Scrimgeour Vickers* [1997] A.C. 254 at 265B–265C.] In such circumstances it is just that the claimant should bear all the loss, and the court can be expected to form the opinion required by the undertaking that the claimant should pay damages in respect of all the loss."

592. In *Al-Rawas,* Mr Justice Jack commented at [31]:

> "It was accepted that following Doyle v Olby (Ironmongers) [1969] 2 QB 158, where an order that been obtained by fraud, as found by Ramsay J here, the rules of remoteness were relaxed and all loss flowing directly from the breach should be recoverable. The authorities which were cited do not provide any clear guidance on this claim."

593. In *Doyle v Olby,* the plaintiff, Herbert Leonard Doyle, won his claim that he had been defrauded in connection with the sale of a shop and dwelling-house, but challenged the amount of damages that he had been awarded by Swanwick J at first instance. On appeal, Lord Denning MR said at p.167:

> "Damages for fraud and conspiracy are assessed differently from damages for breach of contract.
>
> …
>
> "On principle the distinction seems to be this: in contract, the defendant has made a promise and broken it. The object of damages is to put the plaintiff in as good a position, as far as money can do it, as if the promise had been performed. In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say:

> "I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages."
>
> All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case Mr. Doyle has not only lost the money which he paid for the business, which he would never have done if there had been no fraud: he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. He is entitled to damages for all his loss, subject, of course to giving credit for any benefit that he has received. There is nothing to be taken off in mitigation: for there is nothing more that he could have done to reduce his loss. He did all that he could reasonably be expected to do."

Winn LJ said at p.168:

> "It appears to me that in a case where there has been a breach of warranty of authority, and still more clearly where there has been a tortious wrong consisting of a fraudulent inducement, the proper starting-point for any court called upon to consider what damages are recoverable by the defrauded person is to compare his position before the representation was made to him with his position after it, brought about by that representation, always bearing in mind that no element in the consequential position can be regarded as attributable loss and damage if it be too remote a consequence: it will be too remote not necessarily because it was not contemplated by the representor, but in any case where the person deceived has not himself behaved with reasonable prudence, reasonable common sense, or can in any true sense be said to have been the author of his own misfortune. The damage that he seeks to recover must have flowed directly from the fraud perpetrated upon him."

Sachs LJ said at p.171:

> "In cases such as the present the wrong done is tricking a plaintiff into a contract, and the plaintiff is entitled by way of damages to whatever sum he has lost by being thus tricked. The question as to what a purchaser has lost must naturally depend on the subject-matter of the contract. ... The acquiring of a business normally entails the expenses of moving into fresh premises, keeping the business going, and at any rate continuing to keep it going until such time as it can be disposed of; and then one looks also at the expenses of selling. The computation of the loss may in many cases not be easy. Thus, the court must obviously take care not to include sums for consequences which may be due to

> the plaintiff's own unreasonable actions, and also not to include results which are too remote—matters which often involve difficult questions of fact and degree. But such difficulties do not alter the duty of the court, which should approach the matter on a broad basis."

594. I understand the Court of Appeal thus to have held that, in a fraud or conspiracy case, like a tort case, damages are not limited to losses that may reasonably have been in the contemplation of the parties, though they may be too remote if caused by the claimant's own unreasonable actions. However, the case law on freezing orders indicates that compensation under the undertaking is to be approached on a quasi-contractual basis. I am not convinced that dishonesty in relation to the obtaining of the freezing order or the underlying proceedings should, as a matter of principle, result in changing the basis of assessment to one resembling the position in tort. I would therefore have been inclined to reject the Defendants' arguments on this point.

595. The Defendants also rely on dishonesty in relation to the application to set aside the costs orders made on the jurisdiction challenge, which I consider in section (X) below.

(O) BOSWORTH AND HURLEY: LOSS OF OIL TRADING BUSINESS

(1) Real and substantial chance of setting up a profitable Arcadia 2

596. I have concluded in section (H)(17) above that Mr Bosworth and Mr Hurley did seek to set up Arcadia 2, and would also have sought to do so if the Freezing Order had not existed. I have also concluded in section (H)(7) above that it is realistic to consider that Mr Bosworth and Mr Hurley would have been able, between them, to raise US$ 25 million of equity to contribute to Arcadia 2.

597. In this section (O), I consider whether there is a real and substantial chance that Arcadia 2 would have been profitable; and, if so, how that profit (and, in turn, the resulting benefits to Mr Bosworth and Mr Hurley) should be assessed. In addition to some of the factual findings made in section (H) above, the oil trading expert evidence is important in this regard.

598. It is common ground between the experts that financial information in the oil trading industry is sparse. Mr Scott says that the major oil trading houses *"generally operate in near-total secrecy regarding their profitability"*. Both experts were therefore somewhat limited in the comparisons that they could make with competitors. They found it necessary to use proxies of publicly available information including from adjacent segments and sectors e.g. North America and publicly quoted traders.

599. The experts discussed various elements that are necessary to establish and run a successful oil trading business: (i) industry experience and contacts; (ii) strategic investment in 2015; and (iii) trade finance/credit lines. In addition, they considered: (iv) contextual factors, such as whether there was a favourable business environment and the specific risks in West African oil trading; and (v) later risks that emerged from 2015 to 2025 that may have meant that, even if the business had been successfully established, it might not have survived or might not have been as profitable as planned or hoped.

(a) Industry experience and contacts

600. Both experts agreed that Mr Bosworth and Mr Hurley had the type of industry contacts, trading skill and experience necessary to establish and oversee a successful oil trading business.

601. Mr MacNamara highlighted some limitations, such as that *"[Mr Bosworth's] WAF contacts seem already delegated to Mr Kelbrick prior to 2013, and were obsolete after regime change in Nigeria (2015), Angola (2017), and after the steady collapse of production in Equatorial Guinea (see my Figure 6). WAF production volumes also declined generally"* and *"[Mr Hurley's] bank support predates the sea-change in bank attitudes to traders in difficult jurisdictions prompted by the BNP Paribas fine… and credit issues of WAF oil deals 2015..."* I have addressed Mr Bosworth's West African contacts in section (I)(6)(a) above, and the attitude of the banks in section (O)(1)(c) below. The experience of Mr Bosworth and Mr Hurley was nonetheless clearly impressive. Further, Mr Scott pointed out that Mr Hurley's finance contacts and experience were substantial and directly transferable. He had built and maintained around US$5.5bn of facilities across 15 banks (included syndicated RCFs and bilateral trade finance facilities), priced competitively (comparable to tier-1 houses), structured security packages, and coordinated complex syndicated processes, along with some pre-export financing and 40 plus derivative trading counterparties.

602. Mr MacNamara also said, *"I do not see it as realistic to start a trading company with just two people."* However, Mr Bosworth explained in his eleventh witness statement that, *"[w]e planned to start Arcadia 2 with around 5-10 employees."*

603. I consider that Mr Bosworth and Mr Hurley had the necessary skills and contacts to establish an oil trading business of the kind they planned.

(b) Finding a strategic investor

604. In order to set up their oil trading business, Mr Bosworth and Mr Hurley would have needed capital and equity. I proceed on the basis of their Particulars, which state that *"But for the Freezing Order, Mr Bosworth and Mr Hurley would have secured funding for the Oil Trading Business as set out in the Business Plan."*

605. The 2015 Business Plan sought a financing package of $150,000,000 from an *"investing partner"*. The equity interest in the 2015 business plan was *"[t]o be agreed between the investor and senior management."* I consider here whether there is a real and substantial chance that Mr Bosworth and Mr Hurley would have succeeded in securing a strategic investor. I briefly outlined the position of the parties in section (H)(8) above, concluding that Mr Bosworth and Mr Hurley's track record would, on balance, have made a positive impression on potential strategic investors as well as banks. They had indeed made a success of Arcadia 1, notwithstanding some tailing off of profits in the final period, and I see no reason to believe that investors would have seen the Atlantic and Capital transactions as materially undermining Mr Bosworth's and Mr Hurley's capabilities to run an oil trading business successfully. I now consider the experts' views on the feasibility of an investor capital raise in or about 2015.

Mr Scott's views

606. Mr Scott stated that *"investor appetite for energy and commodity trading opportunities remained exceptionally strong"* in 2015. He cited a Prequin report from November 2015 entitled *"Preqin's Special Report: Natural Resources Performance"*, which reported that *"2015 has seen a record $74bn raised by 91 funds so far, up 41% from $52bn raised by 73 funds in 2014"*. The corresponding report from June 2016 stated that 2015 was *"…a record year for natural resources fundraising in 2015…"* and *"[e]nergy remains the most prominent strategy among natural resources fund managers, with 78% of the aggregate capital raised by unlisted natural resources funds since 2006 invested in energy strategies."* The June 2016 report also stated that energy funds were growing: *"Total assets in natural resources funds increased by 8% from December 2014 to September 2015, and now stand at a record $400bn, with dry powder levels also reaching new highs."* I note the breadth of the business categories addressed in those reports.

607. Perhaps more specifically to the oil trading sector in particular, Mr Scott further stated that *"[i]n 2015, the global oil market was recovering from a price drop - Brent crude averaged around $52 per barrel, down over 50% from mid-2014 highs"* and this *"made independent oil trading more attractive, because as market volatility spiked, physical and paper markets offered arbitrage opportunities for skilled traders, so a more compelling business case could be made by an oil trader."*

608. Overall, Mr Scott said, the commodity trading sector *"demonstrated remarkable resilience and profitability in this volatile environment. Independent traders, such as Trafigura, Mercuria, and Gunvor, generated combined net profits exceeding US$3 billion in 2015"*. He noted that Mercuria raised a $1 billion preferred-equity/quasi-equity investment from Chinese state-backed investors in 2015 (negotiations concluded in December 2015 and closed in January 2016) and Trafigura entered an alliance with Mubadala, the Abu Dhabi sovereign wealth fund, for both port and mining assets. Mr Scott also referred in his supplementary report to Castleton Commodities International LLC having acquired Morgan Stanley's global oil merchanting business in May 2015, as an example of "*institutional money, ultra-high-net-worths behind it, making investments into the oil trading space at this particular time*" (Day 5/78).

609. In Appendix 7 to his report, Mr Scott listed possible investment sources for Arcadia 2 and comparators, including (i) Riverstone Holdings launching TrailStone Energy (*"with over $1 billion in commitments, focusing on global commodity trading similar to West African crude merchandising; this dwarfs $125 million and validates PE interest in experienced teams during the crash"*); (ii) Stone Point Capital backing Freepoint Commodities (launched 2011, expanded 2014-2015) with hundreds of millions for energy trading; (iii) firms like Kayne Anderson ($9 billion+ deployed since 1992); (iv) EnCap450 (over $30 billion raised); and (v) ExxonMobil or Chevron, who Mr Scott says could have been potential investors or joint venture partners, in the light of their joint ventures with SABIC and Bunge Ltd in 2021 respectively.

610. Mr Scott indicated that hedge funds too could have invested, citing a report published on 24 May 2014 by private US investment management firm Neuberger Berman. Likewise publicly listed companies could have invested. Further, Mr Scott stated, *"High-net-worth and ultra-high-net-worth individuals, whose investable wealth had grown sharply, continued to allocate aggressively to private equity and real assets, while non-bank trade-finance funds expanded rapidly to fill the gap left by a few retreating bank lenders"*.

611. More broadly, Mr Scott stated that multiple credible sources existed, including: (i) high net worth/ultra high net worth/family offices; (ii) industry peers; (iii) private equity (PE), hedge and/or venture capital funds; (iv) strategic partners (national oil companies, their trading arms, or regional traders); and (v) prior contacts; and that Mr Bosworth and Mr Hurley's track record and 'skin-in-the-game' (investment of their own equity) would have strengthened the investment proposition.

612. Mr Scott cited a Reuters article dated 14 August 2015, entitled "*U.S. shale firms turn to private equity as market funding tails off"* and expressed the view that *"[i]n this overall context, investment in the energy sector was high and rising in 2015. For example, Reuters reported that natural resources-focused PE funds raised approximately $28 billion in the first half of 2015 alone, surpassing the full-year total of $20 billion in 2014, and signalling sustained appetite for energy deals."*

613. On this basis Mr Scott concluded that an investor capital raise would have been successful in 2015. He considered that Mr Bosworth and Mr Hurley could have secured a strategic investment of $125 million to deploy alongside $25 million of their personal capital.

Mr MacNamara's views

614. Mr MacNamara stated that investor appetite was not as strong as Mr Scott suggested, and that Mr Scott's sources (the Reuters report and the Prequin report) presented a more nuanced, if not negative, view. The Reuters article cited by Mr Scott referred to *"a more pessimistic view taking hold that global oversupply could keep oil cheap for years"*, with the consequence that still in the second half of 2015 *"much of that capital has yet to be invested"* and *"I would say, this is a good time to be careful when it comes to investing in energy."* With regard to the Prequin report, Mr MacNamara said:

> "Mr Scott's other source (Prequin) says that 75% of all the funds raised for natural resources are focused on investments in North America. This tallies with my own experience, which is that for US investors, the US is favourite, Canada is tolerable, the better parts of Latin America might do if the yield is high enough, but over-regulated Europe is regarded with scorn, Asia is seen with suspicion and Africa is simply beyond the Pale."

615. Mr MacNamara disagreed with Mr Scott about the impact of the oil price drop:

> "The Brent crude price continued to drop all the way right up to year end 2015. It was very poor timing to launch a new oil trader that year, because as the price kept going down, which compressed margins and caused so many problems for so many counterparties in the market (including bankruptcies and debt restructurings across North America and West Africa), which in turn impacted the banks, who became increasingly unsupportive, all of which taken together eroded equity investor sentiment. It did not improve the following year, because that was when companies finally exhausted their reserves and bankruptcies spiked (see Figure 3 below)." (footnotes omitted)

616. Mr MacNamara said that this price crash created a wave of bankruptcies and restructurings, and *"the fact that oil prices later recovered significantly from the dramatic and sustained collapse of 2014 through to early 2016, should not blind us from the severe negative impact of that period on the oil sector… Furthermore, no-one knew at the time how long the low-price environment would last (paragraph 281 to 332 refers), which inhibited investment appetite."*

617. As to the availability of investors, Mr MacNamara said:-

> "The sources JM has seen (including those of Mr Scott) suggest that, amid a wave of bankruptcies, equity investors sat out 2015, keeping their powder dry, and that by the further wave of bankruptcies in 2020, investor fatigue was well established. As just one example, see the quote in JM1 Footnote 67 from April 2020 "*There is no access to capital markets to refinance. Lenders are skittish about giving money to this industry*," said Kempf, the Fitch director. Moreover, there is investor fatigue given that the energy industry has struggled for years. The [US stock market index] S&P 500 energy sector was the worst performer – by a long shot – throughout last decade. *"Portfolio managers are tired of the volatility in oil and gas prices. They don't want to be in the sector anymore.""* (JER 3.3)

618. Mr MacNamara pointed to the KPMG global survey of commodity traders published in April 2016, which, looking back at 2015, said:

> "Traders were impacted by 2015's collapse of commodity prices in almost every sector, in part due to macroeconomic changes such as a slowdown in China's growth, recession in Brazil and Russia, hesitant economic recovery in Europe and the growing strength of the US dollar. Combined, these factors produced a set of circumstances that have put enormous pressure on parts of the commodities production and trading industry".

619. Mr MacNamara considered the potential investment partners whom Mr Bosworth and Mr Hurley approached in the 'actual' world to be unpromising prospects for Arcadia 2: Tri-Ocean had been fined by the EU in 2014; Mitsui had already sold Arcadia once, in 2006, because they did not want to go in the direction Mr Bosworth was trying to take them; ETG Commodities were a SME Agri trader; and Bonroy was an LPG trader. Mr MacNamara also did not consider it likely that Arcadia 2 would have secured investment from the possible sources mentioned in Mr Scott's Appendix 7. He made the following points.

i) Trailstone pivoted to renewables, natural gas and technology in 2016, and *"Riverstone raised $ 5 billion during 2015 but only deploys $ 1.45bn of this (and half of this only in November) during the year, in just 4 investments, all in North America. Instead, apparently in reaction to the carnage in US oil sector equities already in 2014, in January 2015 this private equity investor set up a 'credit opportunities fund' (i.e. lender) called Riverstone Credit Opportunities (RCO), later Riverstone Credit Partners (RCP)."*

ii) Freepoint was very much a "*reincarnation of RBS-Sempra*". It was set up by 500 RBS-Sempra staff and therefore had "*a far more substantial heritage than the $5 million Arcadia I*".

iii) It was true that Kayne Anderson launched a 2014-15 strategy *"to target opportunistic acquisitions of long-life, low-risk onshore oil and gas assets."* However, Mr MacNamara said, *"When a US investor says, "low risk onshore oil and gas assets", in my experience they mean 'West Texas' not the Bonny River in Nigeria, never mind Bioko Island in Equatorial Guinea (where all that is left of Zafiro production is anyway offshore)."* He pointed out that the website source Mr Scott cited also referred to the objective *"Partner with experienced, talented management teams driven to build profitable, cash-flowing businesses in the North American energy space"* (emphasis added). The website listed 17 current and former energy investments, all of which were in continental USA, 15 of which are in Texas or Oklahoma. One was a pipeline (midstream) company, and the rest were all production companies; none were traders (not even "*opportunistic upstream/trading hybrids*"). All of that would have required a significant change of focus compared to Mr Bosworth and Mr Hurley's business plan.

iv) Encap similarly invested exclusively in North America.

v) As regards ExxonMobil's joint venture with SABIC, and Chevron's joint venture with Bunge Ltd, Mr MacNamara noted that both SABIC and Bunge Ltd are US-based and that those transactions dated from 2021 rather than 2015.

620. Mr MacNamara stated that the Neuberger Berman report on hedge funds painted a more nuanced picture than Mr Scott suggested. It was published on the website of NASDAQ, the most active stock trading venue by volume in the US, and the target audience for such an article would be North American. The report stated that the commodity hedge funds space *"has seen net outflows, most significantly in 2012 and 2013".* While 2015 was *"a year of modest inflows*", this period included *"a series of high-profile shutdowns".* It cited Prequin as recording that *"the peer group saw 17 shutdowns in 2015"* against 5 new launches which were *"typically spinouts from bank prop desk teams or from multi-strategy hedge funds as both groups have tended to move out of commodities".* The Neuberger Berman report summarised that *"a carefully selected portfolio of commodity hedge funds may be a valuable addition to a hedge fund or commodity investment portfolio."* It said nothing, in Mr MacNamara's opinion, about investing in start-up physical oil traders targeting most of the more difficult jurisdictions in Africa.

621. Mr MacNamara considered that publicly listed companies would also have been very unlikely to invest, given the contextual factors and pressures discussed in section (O)(1)(c) below, and also given that public listing is not an advantage for a commodity trader because *"transparency is the last thing that commodity traders want, which is why so few of them are listed at all, and why it is so difficult to retrieve financial information even on the very large ones."*

622. Mr MacNamara thus considered that the Neuberger Berman report, and the evidence generally, did not paint a picture of a strong investor environment.

623. In addition, Mr MacNamara said that in order for Arcadia 2 to obtain finance from banks, the strategic investor would have had to "Google well" (i.e. have a good reputation). He noted that that did not apply to some of the investors whom Mr Bosworth and Mr Hurley approached, and that that would have disincentivised the banks. He noted that Tri Ocean were sanctioned by the EU in 2015 and Mocoh were involved in issues with the UN Oil for Food Programme and the 2016 'Dirty Diesel' scandal: *"This sort of 'negative press' might not be terminal for a bank customer in good standing who was already onboarded, but it would certainly make NCA of a start-up Arcadia2 more problematic."* Mr MacNamara said:

> "The bottom line is that, as Mr Bosworth, Mr Hurley and Mr Scott all concede, the trading company must have LC lines, but to get those for an Arcadia2, it needs a cornerstone investor or investors with appetite for exposure both to the oil sector and to West Africa, deep pockets, who Googles cleanly, and who is/are prepared to be subordinated to the bank lenders (and with whom the management of the trading company will not fall out). In my view, such investors were simply not around in 2015 and 2016, for the reasons I set out in Section 3 below. While possibilities to find such investors thereafter may have improved somewhat thereafter, bank credit appetite was steadily moving in the opposite direction (for all the reasons outlined in Section 3 above), so I am not convinced that Mr Bosworth and Mr Hurley could have achieved the quantum of bank lines they anticipated."

624. Overall, Mr MacNamara said that the decade from 2015 to 2025 was *"the worst timing to try to attract equity investment for setting up a new crude oil trader probably in decades, and particularly for one that had as its primary target West Africa."*

My view

625. In my view, Mr Bosworth and Mr Hurley could and would, but for the Freezing Order, have approached a wide range of the credible sources of investment referred to by Mr Scott. Further, there is in my view a real and substantial chance that Mr Bosworth and Mr Hurley would have found a strategic investor willing to contribute US$ 125 million of equity to Arcadia 2, provided the expected returns seemed sufficiently attractive, though there is also a material chance that they would not have done so. There is force in Mr MacNamara's points about the challenges faced by the oil market in and around 2015, both those arising from the oil price drop and those I consider below. I also accept the points he makes to the effect that some of the literature relied on by Mr Scott includes negative commentary and in some cases is not focussed on the specific business sector that Arcadia 2 would have occupied; and that point can be made about several of the particular examples of potential investors mentioned by Mr Scott.

626. On the other hand, there was evidence of significant interest in the oil/commodity trading sector at the time, as Mr Scott's Castleton and Mubadala examples illustrate. Whilst negative in some respects, the oil price drop is likely to have created arbitrage opportunities, as Mr Scott says, and oil traders had made good returns on equity in recent years. Mr Bosworth and Mr Hurley had a very good track record at Arcadia, as regards both profitable trading and ability to maintain good relations with financing banks. Although Arcadia 2 would have been a start-up, it would in substance have

represented their combined skills and experience, which were known in the market. Further, objections in relation to particular entities as suggested investors do not mean that there is little or no chance that one could be found. Mr Scott's evidence was that there was *"a wide variety of groups of investors that could and would have invested into Arcadia 2"* based on his experience in banking the sector (Day 5/81-82). As well as the named entities, these included investment funds, who, Mr Scott said, would commonly invest a portion, such as US$ 50 to 200 million, in a business outside their primary investment strategy (later giving an example relating to an investment in Glencore), as well as hedge funds, private equity investors and high net worth individuals/families.

627. Overall, taking into account the factors set out above, as well as the business environment factors considered below in the context of trade finance and Arcadia 2's general prospects of success, there was in my view a good chance of Arcadia 2 finding the necessary strategic investment. I consider it significantly more likely than not that it would have done so, though I should make clear that there remains in my view a material risk that it would not have done so. In making that assessment I do not prejudge the terms on which the investment would have been made: as set out in section (O)(3)(e) below, I do not agree that the investor would have agreed to all of the terms Mr Scott assumes, particularly as regards equity dilution and lack of provision of investor returns during the 10-year period of the assumed investment.

(c) Trade finance

628. Both experts agreed that $150 million would have been sufficient equity for a start-up commodity trader in 2015 to attract a number of financiers. Mr Bosworth and Mr Hurley also felt that that was the minimum amount necessary to secure trade financing facilities from banks.

629. Mr Scott described equity capital as the *"entry ticket"* to securing bank finance facilities and gave the examples of Mercuria (established in 2004 with approximately $70 million of initial equity, equivalent to approximately $86.8 million in 2015) and Glencore (established in 1974 with $20 million, equivalent to approximately $100 million in 2015), although Trafigura was established in 1993 with only around $8 million (equating to $13.9 million in 2015).

630. Mr Scott said that an oil trader with approximately $100 million of equity capital could expect French and UK banks (including Société Générale, BNP Paribas, and Standard Chartered) to extend leverage through debt facilities aggregating to around $1-1.5 billion; and an oil trader with equity capital of approximately $150 million or more could expect major Japanese banks and Swiss international banks (including MUFG, Sumitomo Mitsui Banking Corporation, Mizuho, UBS, and Credit Suisse) to extend leverage through debt facilities aggregating to approximately US$1.5-2.25 billion.

631. In addition, Mr Scott stated that Arcadia 2 would have had access to additional financing from Non-Bank Financial Institutions (***"NBFIs"***):

> "[A] trader based in Geneva or London (or operating on a dual-location basis), where the management team is well known to local banks in both markets and has an established reputation and deep commodity trading experience, will often be approached by

> local FIs and NBFIs seeking to provide financing. This liquidity is typically available in addition to that provided by larger international banks with a local presence. In Switzerland, this has historically included smaller Swiss banks, domestic banks, and certain trade finance funds, alongside international banks such as UBS and, previously, Credit Suisse, as well as other international banks headquartered elsewhere but operating locally."

632. Mr Scott added that *"Arcadia's peak of US$5.5bn in bilateral and syndicated facilities across these banks (2009 2014) highlights Mr Hurley's structuring duality (syndicated and bilateral facilities), which is essential for providing working capital liquidity at scale and facilitating risk transfer."* The trust placed in Mr Hurley, even after he left Arcadia in 2013, was demonstrated by the interest from Crédit Agricole and Rabobank in supporting a potential new venture involving Mr Hurley.

633. Mr MacNamara disagreed with Mr Scott's interpretation of the success of Mercuria and Glencore based on more modest equity capital, but agreed overall that an investment of $150 million would have been sufficient in order to be able to access trade financing.

634. Mr MacNamara accepted that NBFIs actively lent to commodity traders during the period. However, he noted that "*Arcadia 1 seems to have made no use of NBFIs at all, so it is not clear that Mr Hurley has any contacts, experience or expertise with respect to non-bank funding of commodity trade finance".* In addition, the experts agreed that financing provided by NBFIs was generally more expensive than bank finance. Mr MacNamara said it was *"in fact 'very significantly higher' than bank funding"*. That meant, he said, that whilst NBFI funding might be helpful around the edges of the trading book to top up the much cheaper bank funding, if it moved to beyond 10-15% of overall funding, then it would become prohibitively expensive given the low margins involved. Further, Mr MacNamara said, NBFIs cannot issue letters of credit, which are needed for oil trading.

635. In relation to Mr Hurley, Mr MacNamara said:

> "Mr Hurley seems to have failed to have managed Arcadia1's liquidity sufficiently well to be able to repay the 2012 RCF at maturity in 2013 (in part because of the counterparty credit risks incurred precisely by Mr Bosworth's own West African trading book), without having to rely on what was effectively a shareholder bail out […] I do not say that the near-default of 2012/13 was a terminal black mark against Mr Hurley which would mean he would never get through the Credit department ever again, but neither does it impress: in my bank it would have made it much more difficult to get lines for such a new customer approved, especially if a) the entire business model of the new trader was predicated on returning to the difficult jurisdictions where they've had problem exposures before, and b) the starting point was 2015, by which time so many banks had been having their own problem exposures both in the oil sector, and in West Africa."

636. Mr MacNamara accepted that Rabobank and Crédit Agricole were interested in working with Mr Hurley even after he left Arcadia. However, he did not consider the Rabobank pitch from 2013 a reliable indicator of bank appetite, because it was out of date by 2015. He said the context in 2013 was more favourable because (i) there were many more banks active in commodity trade finance; (ii) two waves of oil sector bankruptcies (2015 to 2016 and 2020 to 2021) had yet to happen; (iii) climate change had yet to reach the top of banks' priority lists; and (iv) the global regulatory onslaught on trade finance had yet really to get underway. Mr MacNamara stated:

> "Unfortunately, there were other events afoot, both generally in the CTF market, and specifically the West African oil market, which left that plan behind (see Section 3 Background). I do not think Rabobank would have put together the same pitch two years later: times had changed quite dramatically. In my view, this early 2013 pitch underestimates the minimum TNW a start-up crude oil trader needed by 2015, even allowing for the lower oil price environment, and is over-generous about what level of trade finance lines might be achieved by the trader, for the following reasons."

637. A key point for Mr MacNamara appeared to be that contextual factors would have made trade finance more difficult to secure in 2015, and so comparisons with companies that launched in previous decades, with more favourable market conditions, were not useful.

638. First, there was a wave of bankruptcies from 2014 to 2015. The OW Bunker bankruptcy in late 2014 (whose major banking facility was a syndicated borrowing base finance, led by ING), caught seven of Arcadia 1's bank group. There was also a series of bankruptcies in West Africa that I mentioned below when I consider specific risks to West African trading.

639. Secondly, in 2014 BNP Paribas was fined for breaching sanctions in respect of a commodity trader in Sudan, Iran, and Cuba. As a result, BNP Paribas exited its relationship with Trafigura. Mr Scott acknowledged that he was *"not as confident"* that BNP Paribas would still have been available to Arcadia 2, given the events of 2014.

640. Thirdly, in 2015, Crédit Agricole was fined for breaking sanctions on countries including Sudan. Both experts agreed that there was zero tolerance from banks for trade finance business with sanctioned countries from 2015 to 2025. Generally there was increasing regulatory pressure, although the experts disagreed on how far this went: Mr MacNamara described *"radical changes in Compliance culture"*, while Mr Scott focussed on mitigation measures. I return to this below in the context of risks specific to West African oil trading.

641. Fourthly, the oil and gas sector was under particular pressure due to the doubling of US production between 2009 and 2015, thanks to the shale revolution. This was a major driver of the oil price fall of 2014/15 and was correlated with the wave of bankruptcies across the oil sector. On the topic of the shale revolution, Mr Scott notes, though, that (a) it did not eliminate demand for heavier/sour grades configured for Gulf Coast refineries in the US and (b) Arcadia 1's business model had not been dependent on importing West African crude into the US, very little of which occurred from 2008 onwards.

642. Mr MacNamara stated that, as a result of the above factors, banks of all nationalities became noticeably more cautious in 2014 to 2015. He also pointed to broader shifts in the oil trading market, related to shifting global powers and technologies, which may also have impacted the prospects of establishing and running Arcadia 2:

> "228.6. In fact, I do not see, in any of the business plans, nor indeed in the witness statements, any recognition of how far global oil markets have changed dramatically since Arcadia1's 2010 heyday. At a fundamental level, the polarities of the global oil trade have changed significantly over the subsequent decade and a half. The US has gone from the world's biggest importer to third largest exporter; refineries are shutting down across the developed world (Australia has had none for years, the UK may be next, half a dozen have closed in the US just since Covid) but developing markets go the other way: Africa has seen 15 years of decline as a producer and exporter of crude, but now with new and resurrected refineries coming online, threatens to become a products exporter rather than importer; meanwhile as immediately above, China has risen to the top of crude oil importing nations, developing a very large refining sector, while in the most recent period, developing the largest EV fleet in the world (thereby slashing domestic demand for oil products since 2024). Assuming this trend in China continues, it may well be that the Teapots and state-owned refinery sector will be allowed to pivot towards exports (just as the US changed the law a decade earlier to allow exports of crude oil), which would be yet another major shift in global trade flows in oil.
>
> 228.7 Technology, from ship tracking, to drones, to satellite-controlled production infrastructure, to AI trading models, is changing everything. Modern trading houses are investing in all of this, which does not come cheap, while those who do not, get left behind." (footnote omitted)

643. In addition to the above factors, whilst the experts appeared to agree that banks characterise all commodity trade finance as high risk for a number of reasons, Mr MacNamara highlighted particular risks associated with trading in West Africa that may also have impacted the establishment of Arcadia 2.

644. First, there was a series of bankruptcies in the West African oil trading market. The Afren plc oil fraud in Nigeria in 2015 caught three of Arcadia 1's bank group and badly impacted credit insurance appetite for West African oil sector deals. Mr MacNamara said that *"a credit default by a Nigerian oil exporter will impact the credit appetite to support those non-Nigerian firms that merely trade there. Cross contamination is endemic to the bank view."* In addition, *"Citibank was also caught by the Afren plc fraud, which cannot have helped enthusiasm. To mention is that I am aware that Citibank has a minimum equity hurdle of $ 200 million, which would rule out Arcadia2 were they to present themselves at Citibank with any lower level of Net Worth."*

645. Secondly, there were payment arrears for oil products imports (as opposed to crude oil exports) across West Africa in 2015 and 2016, in Ghana and Ivory Coast, and the actual bankruptcy of SAMIR refinery in Morrocco.

646. Thirdly, major oil traders were restructured. The serial debt restructurings of Glencore's aggregate US$ 2 billion syndicated prepayments to Chad's national oil company, SHT, ran from 2015 to 2024. Trafigura's very similar experience in Congo restructuring its $1 billion syndicated bank-funded prepayment to SNPC ran from 2015 to 2021. Related to this, Mr MacNamara said: *"The US banks have always had less appetite for Africa (not helped by what happened to AP Riggs bank over Equatorial Guinea, nor by the constraints of the US Corrupt Practices Act), although they do tend to support ExxonMobil and Chevron in West Africa. It is probably a sign of improving governance in West Africa that Citibank led one of the two syndications of Glencore's jumbo prepayments to SHT in Chad, in 2014, but unfortunately this then fell in to prolonged restructuring the following year, on the back of the oil price collapse."* (footnote omitted)

647. Fourthly, as noted earlier, regime change in Nigeria in 2015 saw further crackdowns on corruption. One of the first acts of the government of President Buhari was to investigate corruption at NNPC and implement regime change at the top of NNPC, including the group managing director and the heads of all eight of NNPC's divisions. According to Mr MacNamara's vivid phrase, Mr Bosworth and Mr Hurley would be "*children of the first wife*".

648. Fifthly, Mr MacNamara stated that West African oil trading moved towards indigenisation:

> "367. Eventually countries like Nigeria started to insist on greater indigenisation, at least of actual production, and increasingly of the marketing and finance of their oil, especially after the regime change in 2015. This was reflected in new tender arrangements for the NNPC 2015/2016 Crude Oil Term Contract.
>
> …
>
> 368. While the indigenisation process obviously has continued, of course again this mix of fraud, scandal and bankruptcy, which cost both banks and insurers money in 2015, did nothing to encourage further investment in West African oil business. Each time the market gets bitten, everyone gets more cautious."

649. Sixthly, there was an increase in banks' concerns about compliance risks. Mr Bosworth and Mr Hurley's business plan itself highlighted compliance as a significant challenge. Mr MacNamara stated that the burden of compliance reporting and regulatory fines materially reduced bank appetite for trade finance, correspondent banking, developing market risk and specifically commodity trade finance in developing markets, in the relevant period.

650. Mr MacNamara stated that these various risks eroded enthusiasm among banks and insurers for financing traders specifically in West African oil:

> "One consequence was that, when I was approached by NNPC for a potential prefinancing in late 2015 after the change of government, I had to say that Deutsche Bank was not in a position to proceed. The reason for this, which I could not share, was that I was unable to find insurance underwriters prepared to take on fresh exposure in the West African oil sector, after the credit losses on Afren and the prospect of further losses on the trader-sponsored prefinances in Chad and Congo (following). This was before I even contemplated whether my own Credit department, or portfolio managers would tolerate us taking on fresh exposure to the oil sector or to West Africa."

651. Mr Scott generally took a different view of the effect of these risks:

> "It is difficult to state that any of these cases and settlements affected the banks' appetite for the sector, but perhaps counter-intuitively, it was not entirely negative. This is because all the traders had been highly transparent with their bankers, so the main bankers were aware before the issues became public.
>
> …
>
> Such exposures prompted international banks to impose stricter due diligence. However, I do not believe, in aggregate, there was a significant difference in liquidity, as other international and local banks stepped up to replace retiring banks. This is partly because regional banks, less constrained by global compliance regimes, gradually absorbed residual financing demand, albeit within a narrower, more relationship-driven scope."

652. Mr Scott indicated that some of the risks were inherent in West African oil trading and were mitigated through a variety of different measures, particularly compliance, policy and training. For example, he provided a list of regulatory changes from the 1970s to 2020s, most of which had occurred in the 2000s, when Mr Bosworth and Mr Hurley were actively managing Arcadia's operations. He concluded:

> "In my view, although regulations and compliance standards, especially those imposed on banks and corporations, and subsequently imposed by banks on their clients, have undoubtedly increased from the 1990s through the 2000s and onward to the present day (January 2026), they did not fundamentally affect the investment case or financing necessary to establish and operate a successful oil trading business. They particularly would not have done so in circumstances where the proposed founders of such a business had shown that their group of organisations had been able to identify, structure, mitigate, and successfully manage their businesses through the core risks and to the requisite standards of the regulators they encountered. Furthermore, the principles of internal control for emerging risks remained consistent from 2015 to 2025."

653. Mr Scott noted that the core compliance risks in West African oil trading, though real, were materially comparable to other emerging market jurisdictions (e.g. Venezuela and parts of Asia); that commodity traders nonetheless lifted crude from West Africa throughout the relevant period; and that the increased scrutiny and due diligence thresholds from 2015 to 2025 did not substantially reduce trade finance appetite for properly structured West African/non-OECD trading. He expressed the view that compliance did not represent a material barrier or require materially higher capital/financing for Arcadia 2, and that:-

> "The CFO (and COO if applicable) would need to spend a little more time annually with each bank, or a group of banks (e.g. annual bank meeting for a syndicated RCF), and to a lesser degree NBFI, explaining the internal control environment. Banks would wish to be reassured through meetings with management that they were experienced in managing evolving compliance risks, understand the control environment of the commodity trader, with internal culture, checks and balances in place, i.e., internal standard operational procedures, the risk management policy (RMP), observance of policies around bribery/corruption, sanctions, TBML, PEPs, UBO opacity, fraud, ESG, CFT & Dual Use, combined with standard mitigants (verified original shipping documentation, etc), would have kept the business bankable and investable throughout."

654. So far as regime change, indigenisation and NNPC's tender conditions are concerned, I have considered the evidence in section (I)(6)(a) above. I have there accepted the evidence of Mr Bosworth, Mr Kelbrick and Mr Scott that (i) there is no historical basis why regime changes in West Africa after 2015 would have had any greater adverse impact on Mr Bosworth's and Mr Kelbrick's contacts (and their ability to originate new contacts) than regime changes in West Africa before 2015, and (ii) both Mr Bosworth and Mr Kelbrick had deep and extensive contacts within the relevant parts of the Nigerian political and industry sectors that meant they were well placed to continue doing business after the latest regime change in 2015. That is not to rule out, however, the potential for actual or perceived changes in the situation in Nigeria or other West African oil producing nations having affected financing banks' appetite for commodity trading and/or West African exposure in general.

655. In my view, there is a real and substantial chance that Arcadia 2 would have obtained the necessary bank finance and retained it during the relevant 10-year period. It was common ground between the experts that US$ 150 million would have been sufficient equity for a start-up commodity trader in 2015 to attract a number of financiers, and that examples in 2015 to 2018 might have been Rabobank and ING. As I note later, Mr MacNamara also stated that, whilst Rabobank and ING were the two banks who might have been open to a new oil trader in 2015, both committed to reducing their exposure to fossil fuel loans after the 2017 Paris Agreement, *"which makes it unlikely they would take on new oil clients"*. However, in the counterfactual, Arcadia 2 was likely to be set up in 2015, or 2015/16, before the Paris Agreement; and, once Rabobank and ING had taken Arcadia 2, it would of course no longer have been a new client. Mr MacNamara also accepted that *"once you have a core, it's much easier to get other lenders to join you"*. In addition, TXF data for the preceding period, 2013 to 2018, indicated that there

had been "*explosive growth*" in the availability of bank financing during those years; and that 2015 fell within a period of "*explosive growth*" in the availability of commodity trade finance and *"[m]ore banks entered syndicated commodity lending"*. The TXF data included RCFs, as well as bilateral letters of credit, and Mr MacNamara's evidence was that "*appetite for traders is particularly shown in RCFs*" (Day 7/16). TXF also reported that *"[g]lobal commodity finance volumes have increased to $134 billion in 2016, up from $113 billion in 2015"*. Mr Scott confirmed in his supplementary report and his oral evidence that there was "*growing publicised commodity trade financing during the 2015-2018 period"* with *"a huge amount of trade finance being offered to the oil trading sector at this time"*. Finally, the risks peculiar to West Africa should be seen in the context of the fact that the Arcadia 2 business plan was not limited to West Africa, even though that was to be one of the initial areas of focus. Overall, I consider that provided Arcadia 2 was able to secure the necessary strategic investor, then it had a very good chance of obtaining the necessary bank financing, at least in its earlier years. So far as later years are concerned, the risk of reduction or loss of bank finance is a component or potential consequence of the overall business risks to which Arcadia 2 would have been exposed during a 10-year period, which I consider below.

(d) Arcadia 2 prospects if a strategic investor and trade finance were secured

656. Both experts provided an overview of the oil market from 2015-2025. Both agreed that during 2015-2025 there were periods of high volatility. In addition to the matters referred to above, the following events were considered. These factors are relevant to the risk that Arcadia 2 might not have prospered, either because it might have encountered difficulties in maintaining its bank finance lines, or for broader business reasons.

657. First, there was a wave of bank fines from 2010 onwards for breaches of sanctions and anti money laundering regulations. Of the 15 banks that worked with Arcadia 1, they were fined $28 billion in total (excluding the $8.9 billion paid by BNP Paribas in 2014), with the majority of the fines happening in 2018.

658. Secondly, Covid induced what Mr MacNamara describes as demand destruction, and subsequent recovery, from 2020-2023. Mr MacNamara acknowledged that demand for trade finance surged during the sharp post-pandemic recovery, but said that heightened economic risks made it more difficult to secure trade finance than before.

659. Thirdly, a series of wars impacted the market. There was a short oil price war in 2020 between Saudi Arabia and Russia. The Russian invasion of Ukraine in 2022, with the ensuing oil price cap / sanctions for Russian crude and products, impacted prices from 2022 until the present day. The G7-imposed price cap on Russian seaborne crude oil, set at US$60 per barrel starting in December 2022, restricted Western services for Russian exports above this threshold.

660. Fourthly, there was a second wave of trader bankruptcies (mainly in the oil sector) in 2020:

i) ABN Amro (a former Arcadia 1 lender) exited from commodity trade finance completely, taking a reported $21 billion of credit facilities for commodity traders off the table. An NDTV Profit article titled "Why Banks Are Exiting Trade And Commodity Finance", dated 26 August 2020, read: *"The gap left by*

> *ABN Amro is likely to be the tune of $21 billion and the big banks that remain in the business may not be able to fill this, resulting in a potential liquidity freeze for commodity traders".*

ii) Fortis Bank (another former Arcadia 1 lender) was rescued and subsumed by BNP Paribas.

iii) BNP Paribas abandoned its traditional role as incubator bank to start-up traders in 2014 after its fine.

iv) Rabobank and ING also announced that they were tightening their lending criteria and cutting back their commodity trade financing in 2020 after making credit losses in 2020 mainly in the oil and gas trading sector. ING was also caught by the 2014 Glencore/Chad financing which got into trouble in 2015.

v) Generally, Mr MacNamara said there was a steady and well documented concentration of bank credit appetite on the very large Tier 1 traders, at the expense of SME traders, over the course of the relevant period.

661. Fifthly, there was a series of high-profile commodity trading frauds in Asia and the Middle East, notably Hin Leong Trading, ZenRock Commodities, and Phoenix Commodities between 2020 and 2023, together with earlier scandals such as Agritrade in 2019. Mr Scott acknowledged that this *"marked a turning point for several international banks […] and reassessments of risk appetite."*

662. Sixthly, there was an increasing shift away from fossil fuel investments. Mr MacNamara said *"[t]hree of the 15 Arcadia1 banks are gone altogether, one merged to become a different bank, three more have withdrawn from CTF and six are committed to carbon reduction of up to 50% (and have been since the 2010s). Only two remain unrepentant 'oil' banks."* As noted earlier, he said that whilst Rabobank and ING were the two banks who might have been open to a new oil trader in 2015, both committed to reducing their exposure to fossil fuel loans after the 2017 Paris Agreement, *"which makes it unlikely they would take on new oil clients"*.

663. Mr MacNamara referred to statistics from TXF Data showing that bank lending in commodities finance was down by two thirds, between the periods 2018-20 and 2021-2023, both by US$ volume of loans, and by number of participating banks, with two thirds of bank lenders active in commodity trade finance in 2018/19 having withdrawn by 2022. Mr MacNamara described the period from 2018 as witnessing a *"mass exodus"* from commodity trade financing, and said this would have particularly affected small traders. He quoted from an article from Insights Global dated 6 September 2020, titled "*Banks retreat from commodities is set to derail small traders*":

> "European banks have grown wary of financing commodity traders, raising borrowing costs and endangering smaller firms in the market for raw materials… Banks are responding to the rout in oil prices, a spate of alleged frauds, a drift into riskier forms of lending and investor pressure over climate change. Their retreat is likely to concentrate the business of transporting oil, metal and grain in the hands of large traders that still have access to cheap funding. Smaller traders, in contrast, are finding

> it increasingly difficult to borrow from banks… Some will be pushed out of business altogether, according to industry executives, bankers and lawyers."

By way of context, though, Mr MacNamara accepted in cross-examination that the TXF data for the preceding period, 2013 to 2018, indicated that there had been "*explosive growth*" in the availability of bank financing during those years. (It would have been preferable if Mr MacNamara had set that out too, as it was an important part of the picture.)

664. Mr MacNamara also cited a Reuters report dated 20 June 2019, titled "*Probes and squeezed profits change the oil trading game*":

> "For the world's biggest oil traders, it feels like a return to the 1980s when earnings were diluted by an abundance of crude. After three decades of stellar expansion and booming revenues, profit margins at Vitol, Glencore, Trafigura, Gunvor, Mercuria and other merchants have been squeezed by a market again awash with crude and amid stiff competition from national oil firms. A raft of high-profile U.S. probes into trading activities are also shaking up the business… Old business ways, such as relying on agents and intermediaries to set up contracts between state suppliers and buyers, have become a focus of investigations. U.S. Department of Justice, securities regulator CFTC and the Federal Bureau of Investigation (FBI), as well as Swiss and Brazilian prosecutors, have opened a range of probes into the use of intermediaries by several trading houses. The companies say they are cooperating with the authorities. The extra scrutiny has encouraged more investment in compliance."

Reuters reported Gunvor as stating that it had reduced the number of agents it used by a third since 2018: though, Mr MacNamara notes, Gunvor was nonetheless fined US$661 million by the US Department of Justice in 2024 for breaches of the Foreign Corrupt Practices Act by paying bribes via intermediaries to secure contracts with a national oil company over the period 2012-2020. Mr MacNamara stated that that investigation picked up on a Swiss investigation into this case and similar activities in West Africa which concluded in 2019. The 2019 Reuters article quoted Mercuria Group Chief Executive Marco Dunand as saying that *"[t]he industry and others have beefed up compliance"*; and Gunvor CEO Torbjorn Tornqvist as saying *"I've been hearing arguments about the death of trading for the past 30 years. But the reality is: there are those who adapt and those who disappear"*.

665. In contrast to Mr MacNamara's *"mass exodus"*, Mr Scott described these developments as *"a measured retreat"*. He acknowledged that *"further regulatory tightening, particularly environmental and sustainability-related requirements associated with the Paris Agreement, "Net Zero 2050" initiatives, and anticipated Basel IV impacts on trade finance, led, after 2020, to a measured retreat by some global institutions (including ABN AMRO and BNP Paribas)."* However, he said that:

> "Other international banks, notably the Japanese banks (including SMBC and MUFG), stepped in to fill the gap. For

> example, SMBC acquired a commodity client and asset portfolio from ABN AMRO, while MUFG acquired a similar portfolio from BNP Paribas. As a result, aggregate market liquidity remained broadly resilient, although smaller commodity traders reported increasing challenges, reflecting a general "flight to quality" among lenders after 2020".

Mr MacNamara countered that, whilst Mr Scott's bank SMBC increased its lending volume, that was only by 1.5%. The other Japanese banks listed (MUFG and Mizuho) were both down by 16% and 23% respectively. The bank leading the TXF lending tables in both periods was ING, but their volumes reduced even more, by 34%.

666. Mr Scott also noted that African regional banks reported appetite for commodity trading (including oil and products), so trade finance continued to expand. He concluded:

> "This evolving ecosystem of finance provision closer to the origin of commodities reflects a broader pivot towards regional and alternative financing models post-2020. From my perspective, this divergence illustrates a clear contrast between the evolving risk appetite of international banks and the increasing engagement of African and Middle Eastern lenders."

Mr MacNamara responded that local African banks would not have been immune to the contextual factors and West African risks discussed above, and noted that the TXF Data referred to earlier did not include any African lender in the top 20 lenders recorded.

667. Ultimately both experts agreed that the availability of bank financing for SME traders became more challenging from 2020 onwards. However, Mr Scott expressed the view that the environment became more favourable later. He highlighted that five of the fifteen Arcadia 1 banks participated in the Addax Energy RCF in 2024. Addax is an independent oil trader and supplier of oil and gas products and services, dealing with NOCs. Mr MacNamara noted that *"it has clearly taken Addax a good 12 years to build up to the position of being able to achieve its first RCF, from 15 banks, for an amount of $ 250 million. Clearly not every oil trader is able to take off to become the next Mercuria within three years."* Mr Scott also pointed to Glencore's investment in FincoEnergies, a private Dutch-based supplier and distributor specialising in marine fuels, biofuels, renewables, and decarbonisation solutions, though Mr MacNamara noted that those were niche products. Nonetheless Mr MacNamara acknowledged that:

> "There are several smaller financial hubs globally where some credit appetite remains. Of these Singapore was and is probably the most important by volume and number of active banks. Unfortunately, the Singapore-based banks were very badly hit by the crisis of 2020, but from my recent visits and meetings with banks there I understand that market sentiment has recovered through 2024 and 2025 on the back of some significant recoveries on the 2020 losses, through the Singapore courts."

668. Mr Scott also described "*supra-normal profitability*" in the oil market from 2020-2024, with opportunities emerging from the ramping up of the Dangote refinery in Nigeria in 2024, the post-Covid recovery (which made tenders less competitive), the

transformation of the LNG market, which evolved from a rigid, oil-indexed, government-to-government market into a fully-fledged global commodity, and increasing investments in oil storage (for example by the Parnon Energy Group). According to Oliver Wyman's 2025 analysis, annual industry-wide gross trading margins doubled from pre-2014 levels, reaching approximately US$120 billion in 2023 and remaining structurally elevated at US$95 billion in 2024 – an increase of some 80% over the previous cycle.

669. Mr Scott concluded that *"Had Arcadia 2 been launched in 2015, it would have been well positioned to take advantage of gross margin explosion that unfolded from 2020 to 2024."* He referred to the "*outsized arbitrage opportunities*" presented by the 2014/16 oil glut, the 2020 Covid negative pricing/contango, 2021/23 backwardisation surge and 2022 post-Ukraine sanctions. Mr Scott said the 2020 demand collapse produced record contango and storage plays, generating super-normal profitability for physical traders with access to storage and origination; and post-2022 Russian price cap/embargoes redirected European demand to non-sanctioned crudes, elevating West African grades to premium origin status and widening margins on sales into Europe/Africa: a structural tailwind for West African-trading which "*indirectly benefited WAF traders through redirected demand."*

670. Overall, Mr Scott said that *"The market environment from 2015 to 2025 was exceptionally favourable… For a small and growing company focussed on African origination and distribution".*

671. In reply to some of those points, Mr MacNamara expressed the view that market volatility can be a threat as well as an opportunity, as shown by substantial losses made by many traders in so-called boom years, and waves of bankruptcies across the oil sector in 2015/16 and 2020/21. He said *"I agree it was widely reported that market volatility was cited as the key driver of the record profits of recent years"* but *"no one knew for sure precisely when the market would bounce back, and in commodities, timing is everything."* He cited a Reuters article dated 8 September 2020, titled "*Big trade houses see persisting oil stocks bubble*," where Mercuria CEO Marco Dunand said that stocks were persisting in a *"mess",* that demand was not recovering as expected, and that *"[t]he market is more complex and nobody knows when demand will come back"*.

672. Mr MacNamara also cited an article from The Financial Times dated 9 June 2020, entitled "*How Vitol was blindsided by the oil price plunge*", which stated that *"Vitol has a reputation for being one of the best-run trading houses, making money whether oil prices go up or down. But its fate shows how even the shrewdest companies were blindsided by the Covid-19 crisis".* Mr MacNamara accepted that Vitol ended up having a record year in 2020, but stated that *"Vitol's record year in 2020, cited by Mr Bosworth, nevertheless came because Vitol had the very deep pockets necessary to survive the first Quarter. Others did not (see Figure 3). TNW base of Vitol in 2019 was around $ 19 billion. This provided quite some cushion against any short-term losses."* The Covid crisis was, he says, fatal for many SME oil traders, especially those attempting the contango trade in the first half of 2020. The survivors of the Russian sanctions were those with the deepest pockets rather than SMEs.

673. Overall, Mr MacNamara expressed the view that it was unlikely that Arcadia 2 would have got off the ground, given that there were so many 'Arcadia 1 casualties' in the

banking sector (Rabobank, ING, ABN Amro) from 2015-2025; and that if it had off the ground, it would not have survived the year 2020:

> "246. I would have to question whether a new small trader with limited bank credit, starting in 2017/2018 into an oil market in which both Glencore and Gunvor lost money in 2018/19 and which was generally described as one where "only the fittest firms will survive the new crisis" would then be strong enough to survive the events of 2020 (which brought down several very long established and ostensibly resilient oil trading firms). (CER 246) [footnoting the 2019 Reuters article quoted earlier, and seeing out in his Appendix C a list of selected oil trader bankruptcies 2019 to 2021]
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> …
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> 249. Further to clarify is that, in my opinion, it is also a different thing to start up an oil trading company, than to operate one successfully. Sitting in 2025, we have the hindsight knowledge that any oil trader that might successfully have gotten off the ground in the very lean years for oil of 2015/2016, would necessarily have had to be sufficiently robust already by 2019, to survive what happened next in 2020. Many long-established traders did not survive the calamities of 2020 (largest defaulter Hin Leong was founded in the 1960s). A successful trader would need to be well capitalised extremely quickly (whether by further capital injection, or retention of earnings) and I am not convinced that was plausible in the market of 2015 to 2019.
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> …
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> 273.13. I do not rule out categorically the possibility that Arcadia2 from a start in 2015 could have received offers of credit lines from some of the erstwhile banks of Arcadia1. However, I am very clear that it would simply not have been possible for them to have replicated the sort of bank support they had enjoyed three to five years earlier amid very different market conditions, assuming 2015/16 start. Further, even had they got off the ground in 2015/16 (which assumption is heavily predicated on them achieving a cornerstone equity investor, which I address next), I am equally certain that they would (at very least) have lost banks in 2020, and therefore lost trading capacity."

674. Viewing this issue in the round, I consider that weight must be given to the experts' shared view that availability of bank financing for SME traders became more challenging from 2020 onwards. I also attach importance to Mr MacNamara's views that (i) the market disruptions particularly from about 2020 presented severe risks as well as opportunities, and (ii) a relatively recently established player such as Arcadia 2 may not have had the resources to survive this period, as others did not. In my view, in assessing Mr Bosworth and Mr Hurley's losses, account needs to be taken of the risk that Arcadia 2 (a) may not have survived at all for the period from 2015 to 2025 and (b)

if it did survive, its profitability might have been badly affected by those events in the market.

(2) Did the Freezing Order affect the establishment of the business?

675. In my view it is very clear that the Freezing Order prevented Mr Bosworth and Mr Hurley from establishing and operating Arcadia 2, for several independent reasons.

676. First, Arcadia 2 would have required a substantial investment by Mr Bosworth and Mr Hurley of their own assets, probably of the order of US$ 25 million. That was precluded by the Freezing Order: both the expenditure of funds and the use of their assets as collateral in order to borrow to raise the full US$ 25 million. I have concluded in § 151 above that there was no realistic chance that the court would have varied the Freezing Order for that purpose, nor that the Claimants would have consented to it. Arcadia 2 could therefore never get off the ground. Further, for the reasons given in section (H) above, I do not consider that any of the dealings Mr Bosworth and Mr Hurley had with third parties while attempting to start a business venture of some kind are capable of establishing that establishing Arcadia 2 was consistent with the Freezing Order. They began by 'travelling hopefully', later scaling their expectations down given the evident impact of the Freezing Order, but the terms of the Freezing Order were simply incompatible with the investment required for Arcadia 2. (Even expending the funds needed to open a bank account for Arcadia 2 would have been problematic: see § 249 above.)

677. Secondly, the Freezing Order would have created a prohibitive degree of risk and uncertainty about whether Arcadia 2 could itself conduct oil trading. As Mr Bosworth said:-

> "Oil trading is an exceptionally fast-moving and dynamic business. For a trade to be successful, significant decisions about what should happen to the underlying commodity (asset) have to be taken very quickly, including decisions as to whether and when and on what terms to buy, and decisions as to whether and when and on what terms to sell (there are also many decisions on financing and logistics). An oil trader therefore needs complete freedom of action, and the ability to move quickly, in order to pursue his trade."

678. As indicated in section (N)(9) above, it would be a breach of the freezing order if Mr Bosworth or Mr Hurley had procured a disposition by Arcadia 2 reducing the value of its assets, which (*per* Sir Bernard Rix in *Lakatamia),* would be unlikely to be regarded as within the ordinary course of business). That in practice would have been likely to give rise to a degree of uncertainty liable to make the running of a business involving regular large transactions difficult or impracticable. Moreover, the ordinary course of business exception would not apply at all unless and until Arcadia 2 could be sufficiently established to be regarded as having an ordinary course of business at all (see § 149 above). Sir Bernard Rix's answer to the risk was that the matter would be debated before the court. Hence Mr Hurley was right to say that:

> "if the Mareva or freezing order was still in place, we would need to come for a variation that the letter of credit could be issued,

> one; then the contract could be approved; then we would need, as a company or as individuals, to be able to potentially sign bills of lading over to the bank. We would need to meet any number of security requirements in terms of the underlying physical commodity, which we were not permitted to do under the freezing order. So it made it unworkable whilst the freezing order was in place for us to be able to access Mitsui finance facilities, even if they were prepared to make them available to us, which I suspect they may have been." (Day 3/79-80)

The requirement in paragraph 19(2) of the Freezing Order to tell the Claimants' representatives where any money was coming from before spending it in the ordinary course of business would also have been deeply problematic in practice, when trying to run a trading business, even if the exception in principle had applied at all.

679. It is worth noting in this context that, at the relevant time, the Claimants took the approach that any company owned by the Defendants fell within the scope of the Freezing Order. On 6 December 2018, the Claimants' solicitors wrote to Mr Bosworth and Mr Hurley's solicitors accusing them of contempt of court based on lack of disclosure, asserting that their *"ownership of Arcadia Lebanon is a quintessential example of the type of asset that the wide language of the standard-form Commercial Court freezing order is drafted to cover … including any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions"*. Whether that was correct or not, it illustrated the high stakes and risks involved in attempting to carry on a business while subject to a freezing order.

680. Thirdly, the Freezing Order meant that third parties, including investors, bankers and potentially counterparties, would not wish to invest in, finance or transact with Arcadia 2. That is the case for at least two reasons. One is that the order created risk and uncertainty about the legal implications of dealing with a company owned and/or run by Mr Bosworth and Mr Hurley. Mr Bosworth's evidence was that *"[t]he main impediment that the Freezing Order created was uncertainty and doubt as to whether you can follow through on any trade you enter, and whether trading with you would bring legal risk to the counterparty or counterparties"*. Further:

> "Oil trading also requires trade finance, such as letters of credit written by banks, and these need to be secured. Colin understands this better than me but, in short, when you raise the finance to buy a cargo, you give the lender security over the cargo itself. That way, if something goes wrong, they can take it over, sell it, and make their money back. However, if there's a question over whether you're allowed to deal with that cargo, there's a question over whether you can grant security over it. If a letter of credit for a cargo might not be properly secured, the lender could be on the hook for upwards of USD 50 million. That is a risk that no lender would have been willing to take. I understand lenders make between USD 50 and 150 thousand per cargo, as a fee for putting in place a letter of credit. So if there

> was even a small chance that security might not be properly granted, a lender would not have wanted to touch a cargo."

As Mr Hurley put it, *"[y]ou also cannot go into a bank meeting, and ask for money, whether that's trade credit or finance of another kind, when you are subject to a Mareva. There is no way round it. Trying to have that conversation is, frankly, ridiculous. It is like going bankrupt and then asking for a loan …".*

681. In addition, the Freezing Order will have given credence to the allegations of fraud made in the proceedings, and resulted in third parties wishing not to deal with Mr Bosworth/Mr Hurley or any company they might seek to establish. That factor is recognised in the authorities (see §§ 528-531 above) and is neither unreasonable nor unforeseeable. It is consistent with the course of events described in section (H) above, as I summarised in section (H)(17).

682. It is also supported by the evidence of Mr Main, who said in his witness statement that *"[w]ith the Mareva in place, Peter couldn't obtain the credit facilities needed for trading. Banks wouldn't touch someone subject to a freezing order. Any serious counterparty would run compliance checks and the Mareva would raise red flags throughout the entire chain."* He said "*the Mareva created an immediate assumption of guilt across the industry"*, and recalled multiple conversations with individuals at Glencore, Trafigura and Vitol to the effect that Mr Bosworth and Mr Hurley must have committed fraud if they were subject to the Freezing Order. In cross-examination, Mr Main said *"I remember many of these conversations. There wasn't just one […] I'm paraphrasing, but they all had -- the conversations had exactly the same viewpoint. Might have been slightly different words, but the assumption was if an English court issues a Mareva injunction, they must be guilty."* One example was that Mr Main had *"first-hand experience with Claude Dauphin, the chairman and CEO then of Trafigura, probably the second biggest trading house in the world, made it very clear that his compliance would not allow him to do any business with Peter under a Mareva injunction."*

683. Mr Main also said in his oral evidence that:

> "everything that requires his [Mr Bosworth's] skills to either be employed or to start any new business requires, like any business, substantial access to credit, particularly in a trading environment, and with a Mareva injunction against you, no bank wants to deal with. No institutional shareholder wants to deal with you. Most of the big oil and gas companies don't want to deal with you, and I have seen that evidence first-hand myself."

and:

> "When a Mareva injunction is issued by an English court and the allegation is fraud, the assumption of the business community is there must be a very good reason for the English court to want to grant that Mareva injunction. So I said it's like being associated with criminality because it was an original fraud allegation and the English court granted the Mareva injunction and it lasted for

> ten years. So the general view of industry is very clear that they think that they must be guilty".

I accept Mr Main's evidence, which I found cogent and inherently probable.

684. The witness evidence about the likely effects on third parties of the Freezing Order were supported by the expert evidence.

685. The experts discussed the industry perception and effect on the viability of a proposed oil trading business of (a) fraud claims and (b) a freezing injunction obtained against the ultimate owners, senior executives and/or traders of a proposed oil trading business.

686. The experts agreed that a public allegation of fraud alone would not be significant for banks, as they are *"occupational hazards"* that banks deal with when lending to commodity traders. However, the receipt of, or knowledge or, a publicised freezing injunction would be referred to a bank's legal department and potentially trigger an *"event driven review"* – meaning an internal process to assess and resolve any resulting concerns regarding the bank's ongoing comfort with that relationship.

687. Mr Scott compared fraud allegations and Freezing Orders as follows:

> "Disputes and allegations are not uncommon in the oil trading industry and, accordingly, the existence of allegations alone is not, in itself, necessarily problematic for oil traders or oil trading firms. A freezing injunction is a particularly damaging form of Court order. Within the commodity market, it is widely understood to indicate that the Court has accepted that serious allegations merit judicial intervention against the individuals or entities concerned
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> …
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> The commodity market and its ecosystem do not typically draw a distinction between a preliminary Court order, like a freezing injunction, and a final Court order. From the perspective of a commodity trader, both tend to be regarded as the Court having endorsed an allegation. The understanding in the market is that the Court does not make these types of orders lightly, nor if there is no basis to support the allegations being made.
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> …
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> Given the practical impossibility of trading under a freezing injunction, counterparties may view it as a precursor to insolvency, prompting contract terminations or demands for enhanced security as stakeholders worry about payment. Market participants, from service providers upwards, are necessarily mercantile, wily, and quick to avoid becoming collateral damage."

His evidence in the Joint Memorandum was to similar effect (§ 4.2).

688. Mr Scott says that the Freezing Order in this case would have immediately caused reputational destruction and financial and operational paralysis (due to asset freezing and liquidity constraints). He said, *"My experience is that banks and commodity traders rarely give reasons for refusing to lend or invest, and declining to engage without providing a reason would have been the response of my team, had it been approached by persons subject to a freezing order."* He stated that *"a sufficiently broad freezing injunction makes trading with its targets (or their firms) practically impossible"* and *"[t]he market recoils from embroiling its own flows and activities in what could likely become a "legal quagmire"*.

689. That gels with the evidence of Mr Fasinro, who said in his witness statement:-

> "[21] In international business, and particularly the oil trading world, credit is key. Part of the reason for Steve's success as a trader and contract operator was that (because he was so well respected) if he needed to secure credit, he was able to. I knew that his ability to get a credit line would be significantly impacted by the Mareva. The Mareva was therefore going to make it very difficult for Steve to conduct his usual business, and I remember that I told him it was going to be a major impediment to his financial wellbeing until it was lifted."

Similarly, Mr Fasinro said that freezing orders "*affect your ability to get credit and your relationships with banks*", because banks are risk averse, and will often refuse to process payments "*involving someone restrained by a Mareva injunction*".

690. Mr MacNamara said in relation to fraud allegations:

> "In the wake of all the fines on banks in the 2010s, these Reputational Risk Committees were especially cautious … I note that the situation might be slightly different were there an allegation of fraud against the UBO of an existing customer. In this scenario, the bank already has the exposure, and a mere allegation would be insufficient grounds to cancel the facility… From the equity investor perspective, in my view the market is sufficiently idiosyncratic that the decision would be the personal choice of the investor which could go either way."

691. Mr MacNamara compared this to the effect of a Freezing Order: *"a public allegation of fraud is unhelpful and would probably trigger an encounter with the Reputational Risk Committee but is not terminal; a Freezing Order is more 'mechanical' as legal advice would tell me that either it applies or it does not apply."* However, that view ignores the reputational effect of a freezing order, which Mr MacNamara did not appear to have considered.

(3) Expected revenues of Mr Bosworth and Mr Hurley from Arcadia 2

692. In this section, I consider how to assess the compensation that Mr Bosworth and Mr Hurley should receive by reference to the likely profitability of Arcadia 2. I do this by considering, first, the evidence put forward as to Arcadia 2's likely profitability on the assumptions that Arcadia 2 would have obtained a strategic investor contributing US$

125 million and would have obtained and maintained the necessary trade finance from one or more banks. I conclude below that, subject to certain important adjustments to assumed trading volumes, Mr Scott's 'Model 2' provides a realistic guide or 'target' for the profits Arcadia 2 might have made had all gone reasonably well. I then form an overall assessment of the likelihood of Arcadia 2 having actually made those profits, taking into account all the circumstances, including the risks of not obtaining a strategic investor in the first place, not obtaining bank finance and retaining it throughout the 10-year period, and the vicissitudes of the market considered above (which make it uncertain that Arcadia 2, even if established, would necessarily have made the profits indicated by Model 2 even after the volume adjustment).

(a) Mr Scott's two models or approaches

693. Mr Scott presented two models to the court. These adopted two different valuation methodologies to calculate the expected revenues of Arcadia 2: the Top-down return on equity model (***"Model 1"***) and the Bottom-up return on equity model (***"Model 2"***). Within the models, the 'years' run from 12 February to 11 February, e.g. "Year 1" is 12 February 2015 to 11 February 2025. Since by far the largest part of each "Year" falls in the first of the calendar years, it is convenient to refer to "Year 1" as meaning 2015, and so on. (I discuss later the actual realistic commencement of trading date.)

694. The differences between the models can be summarised as follows:

i) Model 1 used an average return on equity applied every year. It "*applies post-bonus, post-tax return on equity from comparable founder-owned houses to an initial US$150 million equity base (US$25 million from founders, US$125 million from a strategic partner, per the March 2015 Business Plan), with retained earnings compounding annually."*

ii) Model 2 used profit-and-loss numbers applied year-by-year. Mr Scott said that it "*builds a year-by-year profit and loss from the Business Plan, from an initial 63,000 barrels per day in Year 1, US$0.19 million net profit before tax, scaling volumes to 623,000 barrels per day by Year 10, US$330 million net profit before tax, adjusted for 2015–2025 volatility (e.g., contango in 2015-2016/2020). However, I have incorporated relatively conservative margins, below Trafigura's margins (a comparator shown within the model for each year) and in my view this materially underestimates the returns of a small and growing company (Arcadia 2) focussed on WAF origination and African distribution."*

695. Model 1 assumes a "*historic ROE*" figure. To establish that figure, Mr Scott took the Trafigura-based return on equity (23.8% p.a. on average), the Mercuria-based return on equity (23.1% p.a. on average) and the Arcadia-based return on equity (38.0% p.a.). He then used the average of those three proxies, 33%. Mr Scott said:

> "Each proxy is rooted in the performance of directly comparable founder-owned trading houses. Averaging removes the effect of any single proxy being unusually high or low and reflects the reality that the counterfactual Arcadia business would have exhibited characteristics of all three peer groups."

696. Model 2 uses crude oil margins as a proxy to model Arcadia 2's total margins for its planned trading in *"(i) crude oil and products trading; (ii) paper trading; (iii) investments (like storage investments); (iv) and LNG trading"*. Mr Scott said:

> "Arcadia 2 would have traded in oil and products, LNG, and invested in (and traded around) assets. Arcadia 2 would also have traded paper. In Model 1, this is dealt with through the comparators chosen, who all have/had trading and assets similar to Arcadia 2's stated strategy. However, in Model 2, it would be too complex to create a model encompassing all these different trading components, and it is not possible to now identify precisely what those investment assets would have been, and how they would have appreciated. Therefore, and as a simplifying assumption, while I do assume that Arcadia 2 would have traded these other products and invested in assets, I have used the crude oil trading margin as a proxy for all of these elements."

697. In terms of volumes/turnover, Model 2 follows the 2015 Business Plan for the first three years and then increases at declining growth rates. Mr Scott said that the model *"[a]ssumes aggressive market penetration in West Africa without supply disruptions, theft, or regulatory caps."*

698. In terms of cost of goods and sales, Model 2 follows the 2015 Business Plan for the first three years, and *"subsequently, COGS are adjusted to reflect observable margins achieved by comparable commodity traders (e.g., Trafigura)"*. Operating expenses are based on those in the Business Plan for the first three years, then escalate at 45% per annum. Finance costs are assumed at 3%, which Mr Scott considered conservative. Tax is assumed at 15% based on public information about peer benchmarks.

699. Mr Scott said that Model 2 "*cross-checks*" Model 1 and he recommended taking an average of the two models:

> "The models result in average cumulative business profits of US$805 million (Model 2) - US$1,991 million (Model 1) (pre-interest / present value adjustment), with founder shares at mid-points. Model 1 provides peer-driven conservatism (diluted by global books vs. Arcadia 2's WAF focus) tempered with the addition of historic Arcadia high returns appropriate for the WAF focussed business in Arcadia 2; Model 2 incorporates granular risks using crude as a proxy. Market tailwinds (reduced tender competition 2020 to 2023, WAF demand redirection post-Russian cap (European import data, Vitol CEO statements) further support viability, while compliance remained manageable with liquidity maintained as new banks offset retreats. I therefore recommend consideration of the average of the two models."

700. The Models share common assumptions:

i) starting equity for Mr Bosworth of US$20 million and Mr Hurley of US$5 million (US$25 million combined);

ii) investors' equity of US$125 million;

iii) starting salary for Mr Bosworth and Mr Hurley of US$0.5 million, rising to US$1 million when the book value of the investors' equity doubles, and later to US$2 million: Mr Scott said these figures were commensurate with 'key man' executives running a larger, more valuable company, and were reasonable and conservative relative to observed peer benchmarks for founder-CEO/CFOs in scaling trading houses;

iv) bonus pool for Mr Bosworth and Mr Hurley, starting at 25% of profits in Years 1 to 3, then gradually reducing to 15% of profits in Year 10 (2024), which Mr Scott said was in line with industry expectations. Mr Bosworth is assumed to receive 70% of the bonus pool as CEO and head of trading, and Mr Hurley 30% as group CFO and for standing up the financing relationships and other infrastructure;

v) both Models assume that 50% of bonuses are distributed in shares in Arcadia 2 at current book value annually: Mr Scott said this would be reasonable, to demonstrate to investors Mr Bosworth and Mr Hurley's ongoing 'skin in the game' and alignment over long-term growth, with a view to maximising value for shareholders at public listing or sale;

vi) Mr Bosworth and Mr Hurley would receive 10 million shares (split 7 million / 3 million) at the end of Year 5 (2019) and Year 10 (2024), as part of a long-term investment plan. Along with the 50% bonus reinvestment mentioned above, this would drive Mr Bosworth and Mr Hurley's stake in Arcadia 2 from about 16.7% at the outset to 40.7% by 2025, which Mr Scott said was consistent with peer schemes;

vii) a tax rate of 15% applicable to Arcadia 2;

viii) as to total finance costs, Mr Scott said *"I assume (conservatively) that Arcadia 2 would borrow at much higher levels than both Trafigura and Mercuria, and at higher levels than Arcadia"*;

ix) as to cost of goods sold, Mr Scott said he had been conservative:

> "It is inevitable when comparing overheads with bigger companies, that Arcadia 2 would have lower levels of costs than both Trafigura and Mercuria, with their global offices and corporate teams, as a result of institutional 'creep' that a large commodity house will experience because of their large communications departments, stakeholder management, ESG and DEI programmes, and more, resulting in lower ROEs. This normally contrasts with a smaller, nimbler and less systemically important commodity trader such as Arcadia 2, which would also arguably have overheads at lower levels than Arcadia. However, for the purposes of modelling, I am unable to quantify these, and

> so I will be conservative again and not give any benefit of this to Arcadia 2 within the model."

701. Mr MacNamara did not present a model seeking to calculate a number for the expected revenue. He explained that:

> "In this case, we do at least have the luxury of looking backwards and therefore knowing what that oil price was (which certain knowledge would not have been in the possession of Mr Bosworth at the time), but there are still other variables which are harder to resolve with any either accuracy or fairness. Consequently, I do not propose to construct yet another model myself, but rather, from the perspective of an informed banking analysis of commodity trader management accounts, I make the following observations by way of providing a 'reality check' and suggest what ought to be taken into account to make any model more plausible."

Mr MacNamara critiqued Mr Scott's models and approach, and I take his views into account on that basis.

(b) Mr Scott's 'top-down' return on equity model (Model 1)

702. The following criticisms of Mr Scott's Model 1 were made by Mr MacNamara and/or by the Claimants in submissions.

703. First, both Models 1 and 2 use comparators with companies regarded by Mr Scott as Arcadia 2's peers. The Model 1 return on equity analysis is based on the return on equity of such entities. Model 2 incorporates cross-checks against peer benchmarks, capping margins below those of Trafigura.

704. Mr Scott explained that Trafigura, Mercuria and Arcadia 1 were the most relevant comparators for which data is available to some extent. They were also all founder-led/employee-owned, energy-focused (with varying diversification), and were all tier one traders in the pre-2015 period. They had been direct historical peers (with the qualifications mentioned in Mr Scott's first report) to Arcadia 1 in scale, notwithstanding that their lucrative earnings in the 2015-2025 period meant they had grown very significantly since the pre-2015 period.

705. Mr MacNamara did not consider it reasonable to compare Arcadia 1, still less Arcadia 2, to the top tier 1 traders Vitol, Trafigura, Glencore, Mercuria or Gunvor. He stated that, based on revenues, net worth, RCF size, traded volumes of oil and employees, all of them were many multiples the size of Arcadia 1 already in 2010-2013 (never mind 10 years later). Mr MacNamara also did not agree with the 'Net Profit %' figures which Mr Scott used for Trafigura for years 8 and 9, namely 6.47% and 8.92% respectively. Based on the Trafigura Annual Reports for the y/e September 2023, Mr MacNamara calculated the figures as 3.01% and 1.16%.

706. In addition, Mr MacNamara pointed out that not all of the companies cited by Mr Scott as 'tier 1' traders had had enormously lucrative years in the relevant period. Mercuria and Trafigura were the only two that did not make net losses in any given year in the

relevant period. Even then, Mercuria incurred significant losses on the Qingdao warehouse fraud in 2015; and Trafigura made significant losses on its business with Nyrstar in 2018, which required it to extend a USD 900 million bailout for Nyrstar, and on the Gupta nickel fraud in 2023. Although those losses related to those companies' metals trading, if they were relied on as peers then (in broad terms) one had to take the rough with the smooth. Mercuria and Trafigura were able to survive these losses because of the depth of their pockets. Similarly, Glencore's shares dived 71% in 2015, forcing the CEO to chip in USD 201 million of personal funds to help carry a group restructuring, and lost USD 400 million in 2019 in large part thanks to its oil trading in West Africa, in fact recording losses in 5 of 11 years. Mr MacNamara expresses the view that a 2015 start-up trader, even if it did get off the ground then, would not be so blessed with reserves to survive further shocks, especially of the scale and intensity seen in 2020.

707. Further, again as to the aptness of the comparison, Mr MacNamara notes that Mercuria started by trading crude from the Russian Druzhba pipeline, rather than maritime crude, meaning that the parcel size of individual trades required a less intensive use of bank lines and therefore lower equity participation than for a trader targeting West African maritime crude VLCC (Very Large Crude Carrier) cargoes. Mercuria arrived on the scene just in time to replace Yukos as the main supplier of pipeline crude to the Polish PKN Orlen refinery, when the oil price was comfortably lower than even in 2015. The timing of Mercuria's launch predated the much more restrictive (and punitive) regulatory environment for banks which followed in the 2010s, and which led to much tougher rules for on-boarding new clients. In addition, Mr MacNamara said, according to Mr Scott's information source for Mercuria in 2005, it started with a significantly higher UBO own-equity position of US$70 million than the assumed US$ 25 million to be contributed by Mr Bosworth and Mr Hurley.

708. Mr MacNamara suggested that Freepoint Commodities might be a better comparator, being an example of an established team setting up a 'new shop', in 2011. Freepoint took three years to become profitable, and eight years for its net profit to break into low three figures of millions. Mr MacNamara also noted that Rhodium, a trading company launched by ex-Cargill seniors in 2011, which grew to revenues of USD 2.6 billion by 2020, went bankrupt in 2021; and Addax Energy, a West African-focused oil trader which had a successful IPO in 2006, managed to get its first RCF (USD 195 million with 15 banks) only in 2024.

709. I consider Mr MacNamara's comments to be cogent, and that the court should be cautious about seeking to draw comparisons with Trafigura, Mercuria and Arcadia 1.

710. Secondly, the Claimants submit that Mr Scott's Model 1 is *"completely implausible"* because it produces unrealistic results.

i) Starting in 2015 with an assumed return on equity of 33%, Model 1 results in Arcadia 2 making $88 million in profit in its first year.

ii) That would have required Arcadia 2 to turn over revenue of $22 billion in its first year: whereas the 2015 Business Plan itself planned for only $2.5 billion revenue in the first year, and Model 2 only assumes revenues of $ 1.2 billion in Year 1 (2015) and does not reach US$ 22 billion even by Year 10 (2024) (even with the aggressive assumptions to which I refer in §§ 722 ff. below).

iii) $22 billion in revenue would equate to trading 440 million barrels in Arcadia 1's first year, which is double the total trading of Arcadia 1 in 2013 in all its books across the whole world.

iv) Further, $22 billion of revenue would obviously require a great deal more than the $1 billion of commodity trade finance referred to in the business plan.

v) By Year 3 (2017), Model 1 assumes that the business would have made a net profit of over US$ 150 million, far more than the US$ 44 million forecast in the business plan, and far more than the US$ 7.7 million assumed in Model 2.

711. Those points too have considerable force in my view, and call into serious question whether Model 1 could really be said to pass a 'sense check'.

712. Thirdly, account needs to be taken of the ongoing risks which I discuss in section (O)(1)(d) above. For example, Mr MacNamara stated that:

> "One of my biggest criticisms of the various business plans is they exclude the probability of making losses at some stage on a 10-year horizon, which in fact turned out to span across two separate industry crises."

and:

> "Losses are an occupational hazard of commodity trading, into which all traders will run on a regular basis. It is my experience that the overwhelming majority of traders are extraordinarily silent on the subject of trading losses, and dismissive of their significance when challenged. That said, the general philosophy of commodity traders is not that there should be no losses at all, but rather that the 80% of trades that go right should pay for the 20% of trades that go wrong and accept with stoicism that some trades will go wrong."

713. Mr MacNamara referred, for example, to the two major oil market crises during the relevant period having led to waves of bankruptcies across the sector; and the fact that sanctions on one of the largest global exporters (Russia) from 2022 "*drove large volumes of oil trading into the shadows, forcing oil traders to compete for what was left without that supplier*" (Joint Memo § 7.3). Further:

> "Industry crises / black swan events are more predictable than is often made out. A McKinsey's report identifies that "shocks that affect global production" causing disruptions of a month or longer occur on average every 3.7 years. From the perspective of a lender to, and more recently an investor in the oil sector, I would say they come around roughly once every +/- 5 years…". (footnote omitted)

Mr MacNamara cited for this view McKinsey's article "*Risk, resilience, and rebalancing in global value chains*" dated August 2020, adding that *"[w]e may not know what comes next, but the probability is high that something will come."*

714. Against that, it is true that, as Mr Scott said, the use of return on equity data over a period of years took into account there having been different levels of performance in different years over the 10-year period: with very little profits in some years and other years where Arcadia, with a focus on West Africa, East Africa, the Middle East and Asia, and the industry as a whole, would have had "*very strong tailwinds*". Nonetheless, as I note in § 672 above, Mr MacNamara's view, which seems to me cogent, is that the large players whom Mr Scott uses as comparators were able to survive lean or bad years because of their large resources: which Arcadia 2, as a relatively modestly capitalised start-up could not be assumed to have. As I say in § 674 above, weight must be given to the experts' shared view that availability of bank financing for SME traders became more challenging from 2020 onwards. I also attach importance to Mr MacNamara's views that (i) the market disruptions particularly from about 2020 presented severe risks as well as opportunities, and (ii) a relatively recently established player such as Arcadia 2 may not have had the sheer resources to survive this period, as others did not.

715. Fourthly, Mr MacNamara pointed out that return on equity proxies from a different period, i.e. Arcadia 1, were not appropriate because the regulatory and market environment were so different. Mr Scott responded that using the Arcadia 1 38% return on equity "*is justified by WAF premium tailwinds and greater proportion of highly profitable WAF in the trading book vs. global peers and because this only contributes 16.6% the overall average (being one third of 50%)*". Nonetheless, there is in my view force in Mr MacNamara's criticism of comparisons with a period of time when circumstances were relevantly different.

716. Fifthly, the Claimants submitted that it is unrealistic to think the business would have started in 2015, where on any view Mr Bosworth and Mr Hurley needed to find an investor, obtain bank lines and start trading (including first obtaining supply contracts). The Business Plan presented to Tri-Ocean in March 2014 envisaged that the first year of trading would be 2016. Mr Bosworth in his eleventh witness statement said that he and Mr Hurley *"began seriously pursuing Arcadia 2"* in 2015 (§ 52), and that *"[w]e planned to get (and could have got) Arcadia 2 up and running very quickly, within a few months at most"* (§ 54) or, depending on the investors, even faster (§ 55). Mr Bosworth did not assert, however, that Arcadia 2 would have been necessarily ready to start trading at any particular time during the 2015 calendar year, and the assumption of a 2016 start made in the business plan may be a more realistic one, or a start date in the latter part of 2015. However, that does not mean that it would be fair simply to remove the tenth year of Arcadia 2's assumed operations. Mr Bosworth and Mr Hurley's pleaded case was based on Arcadia 2's net profits *"between 2016 and 2025"* i.e. over a 10-year period (Amended Particulars § 54(2)). The fact that Mr Scott assumed the first year of operations to run from 12 February 2015 (the date of the Freezing Order) to 11 February 2016 should not in my view result in Mr Bosworth and Mr Hurley going uncompensated for the last year of the claimed 10-year period; and nor is there any particular reason to believe that Arcadia 2's likely profitability would be materially impacted by starting Year 10 on, say, 1 October or 1 November 2025 rather than 11 February 2024.

717. Sixthly, both models assume that Mr Bosworth and Mr Hurley would have received a starting salary of US$500,000 each, increasing to US$1 million once the book value of their investors' equity had doubled. There is no contemporary record of such a plan,

which, as the Claimants point out, would have depended on what Mr Bosworth/Mr Hurley sought and were able to agree with their investor. The Claimants suggest that it is quite possible that their investor would have wanted them to take smaller salaries while the business started up: the salaries assumed in the models were their salaries at Arcadia, which was a well-established business.

718. Both models also assume that a further portion of net profits would have been allocated to Mr Bosworth and Mr Hurley each year as bonuses: 25% of net profits in Years 1-3 gradually reducing to 15% in Year 10 (on the basis that they would have shared this pool over time with 4 other senior executives). Of this, 10% is said to be a management bonus replicating the arrangement at Arcadia (where Mr Bosworth and Mr Hurley were not the owners of the business). The remainder appears to derive from Mr Bosworth's evidence of the bonuses he says he would have received as bookrunner of "*the most important trading books*" (which he would have shared with Mr Hurley). Mr Scott also bases this figure on Mr Bosworth and Mr Hurley being the "*key men*" in the new company. The Claimants submit that, in addition to the question of whether an investor would have agreed to this, the contemporary documents show that, at Arcadia, the only book for which Mr Bosworth was allocated any bonus was its West African book, which made only 1% of the Group's total net profits between 2009 and 2013. If the intention was to replicate Arcadia, it is not safe to assume that Mr Bosworth would have received 10% of net profits as bookrunner.

719. I do not accept those submissions. A direct comparison of that kind with Arcadia 1 is not apt precisely because Mr Bosworth and Mr Hurley were not owners of the business: whereas in Arcadia 2, they would have been founder owners who had contributed US$ 25 million of their own funds. Moreover, they would indeed have been the 'key men': the whole burden of running the business would fall to them, rather than to the investor. I do not consider that an investor could reasonably expect, or would expect, Mr Bosworth and Mr Hurley to commit their funds and run the business without salaries and bonuses of the order of those assumed by Mr Scott. On the other hand, I do not accept the assumption that Mr Bosworth and Mr Hurley would have been able to take half of their bonuses each year in the form of shares at book cost: see section (O)(3)(e) below.

720. Viewing these matters in the round, and particularly the first and second points discussed above, I do not consider that Model 1 provides either a realistic starting-point or a useful cross-check when seeking to assess the profits Arcadia 2 would have been likely to make (had it managed to obtain a strategic investor and trade financing).

(c) Mr Scott's bottom-up model (Model 2)

721. The following criticisms of Mr Scott's Model 2 were made by Mr MacNamara and/or by the Claimants in submissions.

722. First, as noted earlier, Mr Scott's Model assumed, in his words, that Arcadia 2 would have achieved *"aggressive market penetration in West Africa without supply disruptions, theft, or regulatory caps".* The business plan itself assumes that volumes would triple in the first three years, reaching 64 million barrels, and Model 2 further assumes that they would more than triple by Year 10 (2024), reaching 22 million barrels. Since overall supply was declining rather than increasing, those projected

volumes would have involved Arcadia 2 taking enormous amounts of business away from other market participants.

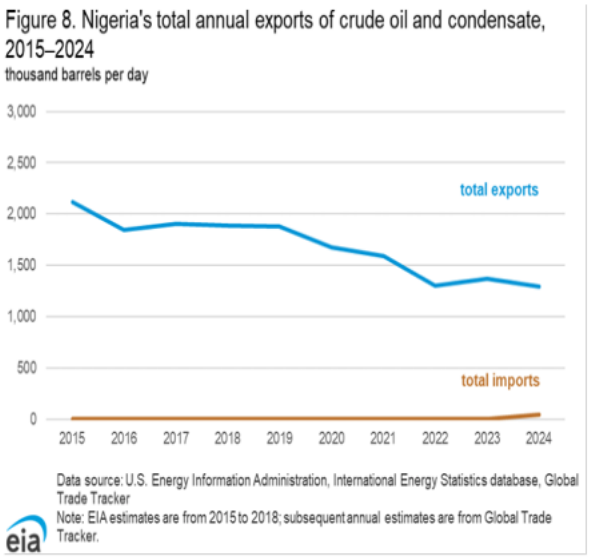
723. The experts considered how the proposed Arcadia 2 trade volumes compared to West African output (specifically, from Nigeria, Angola, Republic of the Congo, Gabon and Equatorial Guinea) over the period from 2015/16 to 2024/25. Mr Scott provided this information in a table drawn from data in the Energy Institute's 2025 "*Statistical Review of World Energy*", as follows:-

Years run 12 Feb to 11 Feb	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22	2022/23	2023/24	2024/25
	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
Oil Volumes MT's (millions) Crude (Proxy) P.A.	3.2	6.2	8.8	11.5	14.3	17.9	20.6	23.7	27.3	31.4
Oil Volumes BBLs (millions) Crude (Proxy) P.A.	23	45	64	83	104	130	150	172	198	227
MB / Day equivalent	0.063	0.123	0.175	0.228	0.285	0.356	0.410	0.471	0.542	0.623
Nigeria Output (MBPD)	2.199	1.898	1.966	2.000	2.093	1.894	1.678	1.445	1.540	1.641
Arcadia Model 2 as % Nigeria Output	3%	6%	9%	12%	14%	17%	22%	28%	37%	38%
WAF Output (MBPD)	4.70	4.32	4.31	4.22	4.23	3.89	3.44	3.22	3.28	3.41
Arcadia Model 2 as % WAF Output	1%	3%	4%	5%	7%	9%	12%	15%	17%	18%
Oil Volumes Barrels (millions)										
Crude	23	45	64	83	104	130	150	172	198	227

724. Mr Scott made the point that, having grown robustly to average around 4.8–5.0 million barrels a day between 2006 and 2013, driven by major deepwater developments in Nigeria and Angola, West African crude production declined only moderately thereafter. In 2015 West African production was 4.7 million barrels a day, and in 2019 it was 4.3 million barrels a day. Production volumes change in all producing regions globally, West African being no exception. However, that did not, he said, undermine the case for Arcadia 2. The business plan set out that Arcadia would trade less than 1% of West African's main producers (only) crude volume only in 2015 - not counting oil products, which would reduce this number further and not counting other origins of crude and products that the team would have traded. In Year 5 (2019) the percentage would equate to 7% and by Year 10 (2024) 19%. Mr Bosworth in his eleventh witness statement said the plan was to retain profits in the business, rather than stripping everything out on an annual basis, which *"could create an exponential growth in revenues and profits"* (§ 42).

725. Mr MacNamara pointed out that Nigeria's oil production fell 43% between 2005 and 2024, and Equatorial Guinea's production had fallen by 90%. To suggest that an SME trader could achieve significant percentages of national oil production (of which exports were a lower number) seemed aggressive, he said, in the context of very well established competition from oil majors, Tier 1 traders (both of which categories are not only extremely well-funded, but also involved in operating production assets), and a growing universe of indigenous traders.

726. Mr Macnama noted that the table reproduced above aggregated production (not just exports) of crude oil and condensates, and suggested that a better source for tracking Nigerian exports of crude oil and condensates was the US Energy Information Administration ("***EIA***"). Their table (below) indicated steadily falling exports:-



727. In any event, Mr MacNamara did not agree that Arcadia 2 could have achieved the volumes envisaged by Model 2 in the relevant period, particularly in the context of serial crises in the oil sector in 2015/16 and 2020/21, the retreat by banks, and concentration of investor appetite on only the largest companies. He continued:-

> "For an independent SME trader to be predicted to handle nearly 40% of Nigeria's crude oil production, and an even higher percentage of exports, up against all the competition from well-established majors, Tier 1 traders and indigenous firms, must be considered to be in the category of forecasts labelled 'heroic'." (Joint Memo § 6.5)

728. Mr Bosworth and Mr Hurley invited the court to follow Mr Scott's approach, on the basis that his Model 2 was "conservative", and Mr MacNamara did not provide any rival calculation, citing *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486 at §§ [9]-[10]. I do not accept that submission. For the reasons I give in this part of my judgment, I do not accept that Mr Scott's assumptions are conservative, and I consider that the criticisms made by Mr MacNamara and by the Claimants are in many respects very cogent.

729. Specifically as regards turnover, Mr MacNamara's reservations are to my mind realistic. The assumptions made by Mr Scott, and in turn Mr Stern, involve Arcadia 2 taking away from other market participants an ever-increasing share of a diminishing supply, culminating in taking no less than 38% of Nigeria's crude output – and 18% of the whole West African output – by Year 10 (2024). Equally, the 64 million barrels by Year 3 (2017) assumed in the business plan and in Model 2 would, as Mr Scott accepted, be significantly higher than the total that Arcadia 1 had traded on its Africa book, which ranged from 27 to 51 million barrels in the 2010 to 2013 financial years. It would also be about 25% of Arcadia 1's whole book: according to information provided to Arcadia 1's banks, its worldwide purchases of crude oil and refined products, having been 375 million barrels for the 2010 financial year, fell to 237 million barrels in the 2012 financial year and 211 million barrels in the 2013 financial year.

730. Although as the Defendants point out, the Year 1 to Year 3 assumed volumes represent 'only' 1%, 3% and 4% of total West African oil production, (a) the assumed figures ramp up hugely in subsequent years and (b) even the Year 1 to Year 3 figures assume that Arcadia 2 could procure very large volumes of oil in a highly competitive market. The Defendants highlight Mr Scott's oral evidence that:

> "having traded commodities, originated commodities and having banked commodity companies and observed small and medium-sized companies starting and ramping up their volumes, from that point on, I've -- I've put a value of 15% per annum increase, and those percentage increases I believe are highly conservative.
>
> For example, if you were to look at Mercuria, Mercuria went from trading a relatively small volume at inception to trading about 100 million -- 100 billion in turnover per year after ten years … in this model, we're a fraction of that."

However, Mercuria is a doubtful comparator for the reasons indicated in § 707 above, and it cannot be assumed that a small or medium sized start-up company, even one run by well-connected and experienced managers, would be able to take away from others in the market the very large volumes assumed in Model 2.

731. I take account of Mr Scott's point that the comparison is not quite so stark, because he used crude oil volumes partly as a proxy for other trading that Arcadia 2 could be expected to undertake, such as paper (derivatives) trading. However, the extent to which Arcadia 2 would have succeeded in trading profitably in those other areas is speculative. For example, the highly successful paper trading at Arcadia 1 was largely conducted by a small group of 'star' traders in the US, rather than by Mr Bosworth or Mr Hurley.

732. I also take account of the point that Arcadia 2 could have been expected to trade crude oil and perhaps other physical products from other regions, albeit as noted earlier, production in Equatorial Guinea had fallen dramatically. Mr Scott pointed out that Mr Bosworth had run a global team at Arcadia 1 with offices in London, Switzerland, Singapore and Australia, functioning as an international trader of crude oil and refined products, sourcing oil from a varied and adaptive range of geographic origins (including having Chinese names in the top 10 Arcadia Group suppliers as well as the top 10 buyers). Mr Scott considered that Mr Bosworth's considerable practical managerial skills would have been highly transferable to oil trading businesses within and beyond West Africa.

733. At the same, as I have noted earlier, the Arcadia 2 business plan made clear that the intention was to focus initially on West Africa, East Africa, the Middle East and Asia, though Arcadia 2 was not intended to be limited to those regions; and Mr Bosworth and Mr Hurley realistically acknowledged that the starting point would be Africa and the Middle East because that is where they felt they had a competitive advantage immediately. Equally, I think it speculative to suggest that Arcadia 2 would necessarily have been able to become a major player during the relevant period in the growing LNG market or the Singapore/Asia-Pacific market, bearing in mind that (as Mr MacNamara observed) the Information Memorandum does not indicate that Arcadia 1 had any

significant involvement or experience in those markets, and the evidence did not suggest that Mr Bosworth or Mr Hurley had any major existing relationships there.

734. All things considered, and notwithstanding Mr Bosworth's talents, experience and connections, there must in my view be a very significant risk that Arcadia 2 would not have achieved the turnover assumed in Model 2, or anything approaching it.

735. The Claimants proposed that the court should either assume turnover to be the same in Years 4 to 10 as it was in Year 3, or to assume that it would increase by 10% per annum during that period rather than the higher percentage increases assumed in Model 2. Mr Bosworth and Mr Hurley objected that either such approach would be unsupported by the evidence. However, the court is not constrained to accept an expert's assumptions, where the court considers them unrealistic, merely because the opposing party's expert has not offered a specific alternative set of assumptions. In my view, the court can and should make its own assessment of how much turnover could reasonably be assumed, in the counterfactual, to have increased during the relevant years. I have concluded that the Claimants' alternative approach is the right one, and that turnover in Year 4 should be assumed to be 10% higher than in Year 3, and to continue to increase by 10% in the subsequent years. If I have understood Model 2 correctly, that would result in assumed crude oil sales in Year 10 of 125 million barrels.

736. Secondly, the percentages for cost of goods sold (COGS) used in Model 2 for Years 1 to 3 correspond to those set out in or implied by the business plan (99.60% (gross margin 0.4%), 99.60% (gross margin 0.4%) and 99.29% (gross margin 0.71%) respectively), save that they are more conservative in the sense that the business plan cost figures include finance costs whereas Mr Scott has shown them separately. The COGS figures for Years 4 to 10 were derived by Mr Scott on the basis, he said, of his own judgment and some comparisons with available figures for Trafigura, Mercuria, Vitol and Gunvor. His assumed COGS figures are 99.30% for Year 4 (2018 – gross margin 0.7%), 99.07% for Year 5 (2019 – gross margin 0.93%), 98.25% for Year 6 (2020 – gross margin 1.75%), 97.75% for Years 7 and 8 (2021 and 2022 – gross margin 2.25%), 96% for Year 9 (2023 – gross margin 4%) and 96.75% for Year 10 (2024 – gross margin 3.25%). Thus the assumed margin in Years 1 and 2 of 0.4% grows to 4% by Year 9, a tenfold increase. The net effect, combined with the increasing assumed turnover, is that the gross profit grows from US$ 4.8 million in Year 1, based on US$ 1.2 billion of turnover, to US$ 595 million in Year 10, based on US$ 18.3 billion of turnover.

737. Mr MacNamara's evidence was that *"I would say from many years of analysing traders all over the world, it is a very consistent characteristic that the sales margin (irrespective of commodity or geography) will be between 0.5% and 4%."* In the Joint Expert Memorandum, the experts agreed that "*commodity traders typically make relatively thin Return on Sales (ROS) or net margins in the region of 4% or below*". Mr MacNamara did not disagree with the margin of 0.4% that Model 2 assumes for Years 1 to 3.

738. Mr Scott justified the large increases in assumed margin over time partly on the basis that one would expect a start-up business to have higher costs at the beginning, undermining its net margin. However, it is not obvious how that factor would radically improve gross margin, as opposed to operating expenses, which are shown separately in Model 2.

739. Mr Scott also made the point that from Year 5, there were "*super extraordinary margins prevalent in the industry from 2020 through to 2025"*, with an Oliver Wyman report referring to margins having more than doubled in the oil and gas sectors. Mr Scott said he had used Trafigura's gross and net margins as a "*guardrail*" to ensure that the Model was sane. According to Mr Scott, Trafigura's overall gross margins during this period rose as high as 8.92% in Year 9, before falling to 3.39% in Year 10 (though, as noted earlier, Mr MacNamara did not agree with those figures). However, as can be seen from its Annual Reports, Trafigura is a very diverse business, and much more diverse than Arcadia 2 was planned to be. Although it is the second largest oil trader, its business also includes shipping, non-oil commodities (including metals) and petrol stations. Even its energy segment includes investment in power and renewable energy, such as Puma Energy.

740. Mr Scott provided figures for the energy segments of Trafigura, Mercuria, Vitol and Gunvor. The average gross profit of the energy sector of Trafigura, comprising oil and oil products, gas, power and renewables, was between 1.2% and 2.7% from 2015 to 2019, 4.1% in 2020, 2.8% in 2021, 4% in 2022, 7.5% in 2023 and 4.6% in 2024. The estimated average gross profit of the energy sectors of Mercuria, Vitol and Gunvor was between 1.03% and 1.13% from 2015 to 2019, then 2.27% in 2020, 2.17% in 2021, 3.4% in 2022, 4.7% in 2023 and 3.3% in 2024. As pure percentages, both sets of figures are generally higher than the Model 2 assumed gross margins of 0.4% in 2015 and 2016, 0.71% in 2017, 0.7% in 2018, 0.93% in 2019, 1.75% in 2020, 2.25% in 2021 and 2022, 4% in 2023 and 3.25% in 2024. However, caution is needed by reason of the fact that the energy sectors of all these companies may well have been more diverse than the planned business of Arcadia 2. As already noted, the experts agreed that margins in commodity trading are relatively thin, so the margins of competitors' energy sectors as a whole may not be a reliable guide.

741. Within the figures mentioned above the 2023 and 2024 figures for Gunvor, based on actual gross profit data for the energy segment, were 2.6% and 1.3% respectively. On that basis, the Claimants submitted that even if higher margins were supportable in the later part of the period, it would be unreasonable to model margins above 2.6% in Year 9 and normalised to 1.3% in Year 10 (i.e., the Gunvor numbers), particularly bearing in mind how sensitive Mr Scott's calculations are to these figures. However, those two Gunvor figures may not be particularly informative because, as Mr Scott pointed out and as Gunvor's 2024 group results indicated, its profits were impacted by matters relating to assets, including a refinery at Rotterdam.

742. The Claimants also asked Mr Scott in cross-examination about BB Energy Trading Ltd, part of the BB Energy group which Mr Scott referred to in his supplementary report as a mid-cap comparator focussed on Mediterranean, African (especially West African) crude and products, with long-standing operations. Bloomberg data for BB Energy Trading recorded gross margin of 0.93% in 2015, 0.82% in 2016, 0.35% in 2017, 0% in 2018, 0.66% in 2019, 1.72% in 2020, 0.9% in 2021, 1.3% in 2022 and 0.91% in 2023. Mr Scott responded that BB Energy's business was a more regional business than the Arcadia 1 business and also the planned business of Arcadia 2, so he did not think they were a direct comparator. Limited weight can be attached to these figures, as it was common ground that BB Energy Trading's business was limited to Europe and the Mediterranean. The Claimants referred in closing to the annual report for BB Energy as a whole, which records turnover of $23 billion and gross profit of $298

billion, implying a gross profit margin of 1.3%. Care is, however, required about that point because (although the document was in the bundle) it was not put to Mr Scott or any of the other witnesses.

743. Overall, the assumed gross margins in Model 2 are within Mr MacNamara's general range of 0.5% to 4%, and I consider them to be sufficiently below those achieved by Trafigura, Mercuria, Vitol and Gunvor or their energy sectors during the relevant period to take account of (a) the different nature of those companies from Arcadia 2 (as discussed earlier when considering Model 1) and (b) the limitations of a comparison with competitors' energy sectors as a whole. I also remind myself that at this stage of the process I am aiming to identify a realistic guide or 'target' for the profits Arcadia 2 might have made had all gone reasonably well, prior to arriving at an overall percentage chance in section (d) below of those profits actually being generated. Bearing in mind also the general trajectory in the market, as reflected in the returns made by the other companies mentioned above, i.e. significantly elevated in 2020 to 2024 compared to 2015 to 2019, my overall view is that the assumed margins are reasonable for present purposes.

744. Thirdly, account needs to be taken of the uncertainties as to Arcadia 2's performance and survival in a market that was, at times during the relevant period, challenging: see section (O)(1)(d) and §§ 712-714 above. In my view, that should be done as part of the process of making an overall assessment, also taking into account the risks discussed earlier of not obtaining a strategic investor and/or trade finance.

745. Mr Bosworth and Mr Hurley submitted that there should be no discount to reflect the risk of Arcadia 2 failing, because the Claimants did not plead that, if established, it would have failed. The task of the court, they submitted, is to determine the profit that Arcadia 2 would have made, no doubt making certain discounts as part of that process. However, there should be no further or additional discount to reflect for the possibility of failure of the business. Mr Bosworth and Mr Hurley cited *Vasiliou v Hajigeorgiou* [2010] EWCA Civ 1475. In that case, the judge at first instance had found as a fact that the business in question (a restaurant) would have been a success which, the Court of Appeal considered, "*excluded*" any general discount to take account of the possibility of failure (§ 24) because on his findings that possibility was non-existent (§ 26). In the present case, the possibility of Arcadia 2 failing was not non-existent. The court will therefore, as it was expressed in the passage from *Parabola* quoted at § 25 of *Vasiliou*, *"estimate[] the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account".* Those factors include the risk of Arcadia 2 not surviving, or not being profitable, or being less profitable than Model 2 (even as adjusted) assumes.

746. In my view, account does needs to be taken of the risk that Arcadia 2 (a) may not have survived at all for the period from 2015 to 2025 and (b) if it did survive, its profitability might have been badly affected by those events in the market, given the various risks referred to in section (O)(1)(d) and §§ 712-714 above. Whilst business and financing risks in part underlie the considerations leading to the adjustments I have made to Mr Scott's volume assumptions, the adjustments do not fully reflect all those risks. It remains far from certain that Arcadia 2, even if it had found a strategic investor and bank financing, would have succeeded in making profits over 10 years at the levels indicated in the adjusted Model 2.

(d) Overall assessment of lost Arcadia 2 profits

747. As a realistic guide or 'target' for the profits Arcadia 2 might have made had all gone reasonably well (including assuming that it would have obtained a strategic investor contributing US$ 125 million and would have obtained trade finance from one or more banks), I consider it appropriate to adopt the trading assumptions set out in Model 2, subject to the adjustment referred to in § 735 above.

748. It is then necessary to consider how the prospects of achieving those profits, or any profits, are affected by:

i) the risk of not finding a strategic investor in the first place;

ii) the risk of not obtaining and maintaining bank financing; and

iii) market risks of Arcadia 2, even if established and able to trade, not making as much profit as Model 2 assumes (including the risk of Arcadia 2 not surviving as long as Model 2 assumes).

749. I have concluded earlier that:

i) there was a good chance of Arcadia 2 finding the necessary strategic investment: it is significantly more likely than not that it would have done so, though that there remains a material risk that it would not have done so (§ 627 above);

ii) provided Arcadia 2 was able to secure the necessary strategic investor, then it had a very good chance of obtaining the necessary bank financing, at least in its earlier years; and so far as later years are concerned, the risk of reduction or loss of bank finance is a component or potential consequence of the overall business risks referred to in (iii) below to which Arcadia 2 would have been exposed during a 10-year period (§ 655 above); and

iii) account also needs to be taken of the risk that Arcadia 2 (a) may not have survived at all for the period from 2015 to 2025 and (b) if it did survive, its profitability might have been badly affected by those events in the market, given the various risks referred to in section (O)(1)(d) and §§ 712-714 above (see § 746 above).

750. Were these various risks all independent from each other, there might be a case for compounding (or multiplying) them (see § 562 above referring to *Tom Hoskins Plc v EMW Law*), which might very significantly reduce the compensation to be awarded. However, in my view the risks here are not wholly independent but are to a degree correlated. The considerations to which I have referred that would make Arcadia 2 attractive to a strategic investor (such as the experience, expertise and contacts of Mr Bosworth and Mr Hurley, and the prospects of the relevant market) would also be likely to form part of the thinking of prospecting trade financing banks; and they would be relevant to Arcadia 2's prospects over time (bearing in mind, though, that conditions of course will have changed over time following Arcadia 2's establishment with a strategic investor and initial bank financing). In my view, it would not be appropriate simply to multiply the risks. Instead, the court needs to form a view of how it can most fairly assess the aggregation of these factors. In theory, one possible route might be to

attribute different percentage prospects to the likelihood of Arcadia 2 making the assumed profits year by year, but that would in my view be impracticable and probably artificial. I have come to the conclusion that the appropriate and fair way to reflect all these factors is simply to consider what percentage chance Arcadia 2 would have had of achieving the profits set out in Model 2 after making the volume adjustments I have explained earlier. Taking all matters into account, I conclude that the appropriate percentage is 50%.

(e) Value on ultimate sale

751. Mr Bosworth and Mr Hurley's pleaded case is that, from Arcadia 2's net trading profits, they would have received:-

> "(3)… remuneration in the form of: (i) dividends as shareholders in the Oil Trading Business (which could have been re-invested, in whole or in part, in exchange for additional equity); (ii) trader and management bonuses (including bonus reinvestment schemes in exchange for additional equity); ~~and~~ (iii) salaries; and (iv) a long-term incentive plan.
>
> (4) Accordingly, Mr Bosworth and Mr Hurley would have received, over the period 2016 to 2025, very substantial sums from the net trading profits of the Oil Trading Business. ~~The precise figures will be the subject of evidence, including expert evidence, in due course.~~ As to the level of remuneration, Mr Bosworth and Mr Hurley will rely on the expert evidence of Mr Nigel Scott." (Amended Particulars § 54(3) and (4))

The amendments shown by underlining and strike-through were made on 6 March 2026, following the service of Mr Scott's report on 23 January 2026 and Mr MacNamara's report on 20 February 2026. It was not pleaded that Arcadia 2 would have been sold at any particular time, though it seems to be implicit in the amended wording that the claim now includes one for loss of the value of Mr Bosworth and Mr Hurley's equity share in Arcadia 2.

752. Mr Scott assumed that Arcadia 2 would be valued on 15 January 2025 using an EBITDA multiple of 5.0× EBITDA (low case) to 7.2× EBITDA (high case). In Model 2 (unadjusted), that resulted in a total equity value of US$ 1.09 billion, of which Mr Bosworth and Mr Hurley's aggregate share would be 40.69%. Mr Scott says that EBITDA multiples between 5x and 8x are widely observed in strategic or private equity transactions in the commodity trading sector, i.e. energy, metals and agribusiness. He sets out publicly available multiples for various energy sectors (including oil and gas storage and transportation, pipelines, distribution, drilling and exploration, though not commodity trading as such). Mr Scott adds that Glencore's recent publicly available data supports higher values: as at January 2026 its enterprise value was 10.46 times its EBITDA.

753. However, there are in my view at least four fundamental problems with this analysis.

754. First, the Models assume that Mr Bosworth and Mr Hurley would have received half of their bonuses each year in shares (at book cost). There is no contemporary evidence to

indicate that that was part of the plan. Mr Scott said it was consistent with industry practice "*in certain companies*", without identifying any examples. Elsewhere, he said this was realistic for "*senior executives joining a large trader*". However, it would seem likely to have been unattractive for the putative strategic investor, because it would constantly dilute their shareholding.

755. Mr Bosworth said in his witness statement that Mr Dunand and Mr Daniel Jaeggi, who founded Mercuria in 2004, increased their stake in the company. Mr Scott's Models assume that new shares would be issued each year (hence the dilutive effect). Further, Mr Scott's report suggests that the equity held by Messrs Dunand and Jaeggi did not increase over time. Mr Bosworth's examples of Mr Ivan Glasenberg (CEO of Glencore) and Mr Taylor of Vitol did not address their bonus arrangements.

756. Secondly, the Models assume that Mr Bosworth and Mr Hurley would have received further shares worth, in total, US$10 million at the end of Year 5 and again at the end of Year 10, as a long term incentive plan. However, there is no reference to this proposal in the business plans, and no evidence that Mr Bosworth/Mr Hurley would ever have sought this. Nor is there any evidence that a strategic investor would have agreed to it, given its highly dilutive effect on the investor's equity. Model 2 assumes that the strategic investor's equity share, having started at 83.32% (reflecting its far greater capital contribution) would end at 59.31%.

757. Thirdly, the Models assume that all earnings after bonuses and tax are retained in the business each year, with no distributions to its shareholders in dividends. Mr Scott sought to justify this on the basis that start-up businesses often follow a retained earnings model, but there is no evidence that an investor would have agreed to this in this case, particularly while Mr Bosworth and Mr Hurley's interest in the business grew and the investor's own decreased. Arcadia 1's shareholders preferred to receive their dividends in cash each year, and I agree with the Claimants that there is no reason to assume that their next investor would have taken a different approach. Whilst there was criticism of the way in which Arcadia's shareholder stripped out almost all of the post-bonus profits each year, I do not consider it realistic that the putative strategic investor would be content to allow its US$ 125 million investment to stay in the company for a 10-year period, or anything approaching it, with zero returns in the meantime, while Mr Bosworth and Mr Hurley took substantial bonuses and ever increasing shares of the equity. Nor do I read the 'exit strategy' section of the business plan as indicating that the investor would expect to find itself in that position: it is not expressed to be exhaustive of the investor's prospective returns, says nothing about dilution of time, and in any event would not necessarily have been agreed had matters progressed to a real transaction.

758. The experts considered whether an investor would have been willing to invest on this basis. Mr Scott said:

> "For example, if the prospective CEO and CFO's personal equity investment is relatively small, e.g., a minority stake of, for example, US$25 million – compared with a financial investor(s) investing multiple times this notional amount – for example, US$125 million – the CEO and CFO founding management team could realistically negotiate a LTIP [long term incentive plan] based on sweat equity, which might involve an award of

> 10% sweat equity every 5 years, resulting in a financial investor's equity dropping from, say, 80% to 70.6% and potentially further, over the time periods of the LTIP. In my view this would align with compensation and retention schemes set out in Appendix 11 and other remuneration schemes I have formally discussed in private with clients when conducting commodity operational risk reviews annually. It is also consistent with remuneration I have seen at a commodity trader I worked for and banks I have worked for.

759. Mr MacNamara expressed the following view:

> "Mr Scott raises the valid point that equity can be grown by 'retained earnings', whereby annual net profits are not distributed (as dividends) but rather are retained in the company as part of the TNW. This is the method I saw used by Glencore and Trafigura in the 1990s, and by Gunvor and Mercuria in the 2000s. However, in all those examples, the seed capital was the 'own-capital' of the UBOs (i.e. the core founding management teams of these traders), who resisted the urge to take these funds out of the company. This model is very hard to reconcile with external investors, who will expect dividends from their investment after a reasonably short horizon. This means the choice is effectively binary: either you go with an external investor, who provides the equity base which allows immediate trading at the scale allowed by that equity base, but then will demand dividends (and expect roughly 40% equity returns), or you put up your own money, and are necessarily accept[ing] that your trading scale will be limited by whatever that level of equity is, but then the trade-off is that this lower equity base can be grown over time by steady retention of earnings." (§ 242, footnotes omitted)

or, as expressed in the Joint Memo:-

> "The choices for D1/D2 with respect to Arcadia 2's equity base were binary: either they found third party equity, on which they would need to pay Mr Scott's 38% to that third party (and would never grow the company remotely rapidly if they also stripped it for bonus payments); or they should rely on their own equity, and accept a much lower starting position (which would probably be too small to trade crude oil)"

760. In general I prefer Mr MacNamara's views on this point, which in my view are far more realistic as an assessment of how an investor would approach this start-up venture in a highly volatile and risky segment of the commodity trading industry. Mr Scott in cross-examination disagreed with Mr MacNamara's suggestion that an investor would be seeking a 38% return, suggesting that would be regarded as unrealistic. At the same time, though, Mr Scott made the point that, as a potential strategic investor in 2015, he would have been mindful of recent returns on equity for Trafigura of 39%, for Arcadia 1 of 33 to 36% and for Mercuria of 15 to 20% (Day 5/127), and would likely be seeking

"*at least double digit returns*" (Day 5/131). He made the point that a venture capital investor, for example, would invest a 'small amount of money' into unproven technologies or companies with no track record and hope to make 100% returns on one or two of twenty investments. He also said, though, that he had never heard of a venture capitalist looking to invest in the commodity trading sector:

> "Those type of investors, I have never, ever heard of a venture capitalist looking to invest in a commodity trader or indeed, frankly, the commodity sector off the top of my head and so it's an inapt kind of description. The investors that I have talked about here are ultra-high-net-worth investors who are serious, considered investors who are more PE-like, family office-like, long-term investors who would understand the need to invest at an early stage, grow, allow the profits to roll up and be retained earnings as equity and build out the company, particularly in the context of a commodity trading company, because equity and building equity means building trade finance facilities which allows growth of underlying barrels traded." (Day 5/133)

As Mr Scott accepted, when asked in 2015 to invest in Arcadia 2 the putative strategic investor would not know about the future super-normal profits that may have been made at the end of the decade. I do not consider it realistic, given the nature of the business, to consider that an investor would be content simply to leave its money in for ten years, with its equity share diluting each year, with no return at all in the meantime; and Mr MacNamara was clear that that could not realistically be expected.

761. Fourthly, Mr Scott's proposed multiples-based valuation approach is open to serious question. Mr MacNamara explains why Mr Scott's methodology is flawed, in particular by using upstream, midstream and downstream oil and gas companies (rather than traders) as a comparator. He also notes that Arcadia itself was sold by Mitsui for only US$5 million in 2006. Mr MacNamara's evidence on this point merits setting out in some detail:

> "388. Regarding Mr Scott's attempts to value Commodity Trading Companies (Appendix 8), I regret I do not see it as a helpful or valid exercise to extrapolate from market valuations of upstream, midstream or downstream energy sector companies, to the valuation of a commodity trader. He compares apples with oranges. I draw attention to the following:
>
> 388.1. As described above in Section 3, the commodity trader model is not a 'normal' corporate. It has nothing like the high-intrinsic-value fixed asset base of any upstream, midstream or downstream oil companies. It has no oil fields, no tanks (unless leased), nor pipelines or pumping stations, no tanker ships, no refinery, and no retail distribution system.
>
> 388.2. The commodity trader's number one asset is its trading team, which proverbially "walks out of the door each evening" and is easily picked off by recruitment by a competitor (as happened to the Arcadia1 Singapore trading team, see paragraph

153 above).[446] The smaller the trader, the greater the shock from this key man dependency, and risk of jump to default.

[FN 446: 446 "Our assets walk out of the door each evening. We have to make sure that they come back the next morning." This is a business management theory quote attributed to N. R. Narayana Murthy.]

388.3. All the upstream, midstream and downstream oil companies carry a very heavy base of fixed assets and extensive logistical infrastructure, typically financed through the capital markets by long term liabilities in debt and equity, matching the expected life of those assets (which could easily be 15 to 20 years). Further, the amortisation over time of these long-life fixed asset-related costs will be linear, providing quite some stability and predictability to the model for forward-looking calculations.

388.4. On top, they will have substantial headcount operating this extensive fixed asset base, the capability and performance of which will also be a factor in the valuation.

388.5. To attempt to extrapolate from Glencore PLC's financials is just nonsensical. I have already pointed out above in Section 3 that Glencore was multiples the size of Arcadia1 back in 2010 to 2013. Today Glencore is a diversified USD 230 billion Revenues natural resources group with around 150,000 staff and a massive USD 130 billion fixed asset base of its own.

388.6. The small start-up trader by contrast has on day 1 highly likely no fixed assets at all - everything necessary, from the laptop to the office to any storage they might lay their hands on, will be hired or leased. Even Arcadia1 at its peak, with all of 140 professionals, was an absolute minnow compared to the companies Mr Scott is using as comparators.

388.7. There may be profits (though this is never guaranteed, even for the very large caps) but there is almost no intrinsic value: you buy the man, possibly the name (if it has a good reputation, which I can say from my experience, is actually one of the most rare commodities of all), but until they reach a certain size of asset diversification away from pure trading, there is very little else on which to base a valuation.

388.8. I would also point out that multiples for the energy sector are variable with energy prices. When EBITDA goes up, the share price (and thus Market Capitalisation) often lags, so then the EBITDA multiple goes down: "the oversized nature of industry profits has led to EBITDA multiples declining. For example, Chevron saw its Mkt Cap increase by about 25%, however, with EBITDA increasing significantly more (around

> 87%), the Company actually experienced a decline in its LTM EBITDA multiple".[447]
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> [FN 447: Interpath presentation, 'Valuation Multiples by Industry', dated 20 March 2023 [JM02].]
>
> 388.9. Consequently, to talk of enterprise valuations based on multiples for a pure oil trader would not be appropriate.
>
> 389. Also to bear in mind is that the valuation of smaller firms is disproportionately lower than for very large firms. This discount is to take account of the following factors:
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> 389.1. Vulnerability to outside-imposed volatility/ shock;
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> 389.2. Limited supplier and customer diversification;
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> 389.3. Key man dependency; and
>
> 389.4. Uneven/ unpredictable cashflows.
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> 390. I think the only reasonable way to calculate any sort or enterprise valuation would be on a discounted cashflow basis (i.e. not on multiples of cashflow: when your key trader walks out the door, the cashflow goes with them). Even then, it must be necessary to take into account that the probability that it is highly unlikely that a commodity trader, who trades in a commodity as volatile as oil, will achieve straight line profit growth, or even sustained profitability, year after year, especially when also working in developing markets. Any discounted cashflow forecast valuation should be adjusted downwards to address the following probabilities:
>
> 390.1. A slow start (because of the difficulty start-ups have accessing bank lines in any volume);
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> 390.2. Credit losses from exposure to failed counterparties in a downturn;
>
> 390.3. At least one period of reduced profits in every five-year cycle; and
>
> 390.4. At least one significant regulatory fine in every five-year cycle."

762. I consider those objections to be compelling.

763. For all these reasons, the claim based on exit value in 2025 is in my view fundamentally flawed. Neither party advanced an alternative calculation which sought to rectify the problems identified above, and I remind myself that there are limits to the extent to which a liberal assessment can overcome shortfalls in evidence (see § 553 - 556 above). It does appear to me, though, that having rejected the notion that Mr Bosworth and Mr

Hurley would be permitted to take half of their bonuses in equity (i.e. the first problem discussed above), it would be logical instead to assume when considering Model 2 that they would have received them in cash. I did not understand it to be suggested that the assumed profits of Arcadia 2 would have been insufficient even to pay for the assumed total bonuses (currently assumed to be half cash and half equity) while leaving sufficient returns for the strategic investor. I consider it appropriate to assume that Mr Bosworth and Mr Hurley would in fact have received in cash the total bonuses resulting from Model 2, after adjusting it in the way I have already identified and after applying the percentage discount referred to in § 750 above. If I have understood the Model correctly, the effect of the adjustment, taken alone, is to make Mr Bosworth's lost bonuses approximately US$ 56.3 million and Mr Hurley's approximately US$ 24.1 million (before adjustment to present value). The effect of assuming all of their bonuses to be paid in cash is to double those figures, and the application of the overall percentage discount arrived at in § 750 above halves them again.

764. I do not entirely rule out the possibility of Mr Bosworth and Mr Hurley being able to demonstrate (without a wholesale reopening the evidence) that even after addressing the difficulties identified above they would on any reasonable view have been bound to end up with measurable value in Arcadia 2 (such as, for example, their aggregate 16.68% share of any cash balance that on any view Arcadia 2 could be demonstrated to have held in the counterfactual by the end of Year 10), over and above Mr Bosworth and Mr Hurley's assumed original investment of US$25 million: or at least the amount of that original investment discounted by the 50% overall assessment I have made in § 750 above). However, it will be a matter for further submissions (a) whether Mr Bosworth and Mr Hurley should be permitted to seek to demonstrate any such lost value and (b) if so, with what result.

(f) Mitigation

765. The Claimants purport to put Mr Bosworth and Mr Hurley to proof, in relation to this and other aspects of their claim, including as to whether they took reasonable steps to earn an income while the Freezing Order was in place.

766. This issue relates in part to the point already addressed earlier (section (G)(2)) about whether Mr Bosworth and Mr Hurley should have sought the Claimants' consent and/or applied to the court to vary the Freezing Order. I reject the Claimants' contentions in that regard.

767. The Claimants also note that Mr Bosworth gave some evidence at trial to the effect that, had he reached the point of needing to do so, he and Mr Hurley would have applied to the court for an appropriate variation. That contention does not assist the Claimants. As set out in section (G) above, the Freezing Order prevented Mr Bosworth and Mr Hurley's attempts to set up an oil trading business even from reaching the stage of a concrete proposed transaction. Had that stage been reached, I have concluded that there would have been no realistic chance of either the Claimants or the court acceding to it.

768. Insofar as the Claimants maintain any suggestion that Mr Bosworth and Mr Hurley failed to take reasonable steps to earn an income during the period of the Freezing Order, I reject that suggestion. The evidence set out in section (G) above indicates that they made many attempts to find business opportunities in the oil trading sector. It was entirely reasonable for them to seek to find incomes by that means. I reject any

suggestion that it was unreasonable for Mr Bosworth and Mr Hurley not to take more steps than they did with a view to finding employment instead of seeking to do business as principals. The course they in fact took was entirely within the range of reasonable responses.

(g) How much Mr Bosworth and Mr Hurley should receive

769. It will be necessary for the parties to seek to agree the calculations for Mr Bosworth and Mr Hurley's compensation arising from the loss of the Arcadia 2 business in the light of the conclusions I have reached above, taking account the evidence of Mr Stern (whose calculations Mr Dearman accepted were mathematically accurate) adjusted in order to reflect those conclusions.

770. The Claimants note that Mr Stern's initial assessment of the amounts available for Mr Bosworth/Mr Hurley to invest in the counterfactual did not take into account any payable income tax. On 17 April 2026 (shortly before trial), Mr Bosworth suggested that in the counterfactual he would have been subject to the 'Lump Sum Tax' regime (and so exempt from Swiss wealth or income taxes). An updated loss model for Mr Bosworth was provided with a deduction for the 'Lump Sum Tax' regime. However, the Claimants say, Mr Bosworth has not provided any credible evidence as to the applicability of this regime under the Swiss tax rules and/or under Swiss law. Save to the extent set out in paragraph 441.ii) above, Mr Hurley has not addressed his position in respect of tax at all.

771. The Claimants invite the court, in these circumstances, to apply the relevant income tax rate in Switzerland which is in the region of 37-38% (as identified by Mr Dearman) and deduct those sums from the amounts available for Mr Bosworth/Mr Hurley to invest. I do not consider that to be an appropriate course. Mr Bosworth's evidence was not challenged, and Mr Dearman did not claim to be a tax expert. In addition, the current evidence does not indicate (so far as I am aware) whether any sums received by the Defendants as result of this Inquiry will be taxable (as they might well be in the UK, for example). I consider that the parties should have a proper opportunity to assess the tax position, resorting to the court if necessary to resolve any remaining dispute.

(4) Remoteness

772. I did not understand the Claimants to contend that the loss of Mr Bosworth and Mr Hurley's opportunity to establish their own oil trading business was too remote to be recoverable. In any event, in my view it is not. It was entirely to be expected that, following their departure from Arcadia 1, Mr Bosworth and Mr Hurley – as experienced and well-connected individuals in the oil trading sector – would seek to start their own oil trading business. It was natural and eminently foreseeable that the Freezing Order would be likely to prevent them from doing so, for all the reasons considered in section (O)(2) above.

(5) Conclusions

773. For these reasons, I conclude that compensation should be paid to Mr Bosworth and Mr Hurley for the loss of the sums they would have received from Arcadia 2 over a ten-year period, as calculated using Mr Scott's Model 2, but subject to the adjustments and

caveats I have set out above, and subject to the application of the overall 50% figure I have arrived at in § 750 above.

(P) BOSWORTH AND HURLEY: LOSS OF EMPLOYMENT OPPORTUNITIES

774. Having regard to the evidence discussed in section (J) above, Mr Bosworth and Mr Hurley have not in my view shown that, on the balance of probabilities, they would have sought employment in the absence of the Freezing Order.

775. As set out there, Mr Bosworth was clear that his aim was not to work for someone else, but for him and Mr Hurley to have their own oil company, with a strategic investor. Mr Hurley said that "*by far and away the preferred route was that we would have our own trading business, and that it where the focus was*"; and that by signing an employment contract he might have been excluding himself from pursuing his ultimate objective. I have concluded in section (O) above that Mr Bosworth and Mr Hurley would have sought to set up their own oil business, and that there is a real and substantial chance that it would have been successful. Indeed, I have assessed there to be an overall 50% chance of that business being highly profitable over the course of a ten-year period. In those circumstances, there is no reason to conclude that Mr Bosworth or Mr Hurley would, at any time have decided to cease running the oil company and seek employment instead. (It is common ground that they could not have done both at the same time.) It may also be pertinent to note that, according to evidence, Mr Bosworth's meetings with Mr Dunand of Mercuria in late 2015 and Mr Taylor of Vitol in mid 2016 were not even arranged for the purpose of Mr Bosworth seeking employment; and Mr Bosworth accepted in cross-examination that he did not contact any major oil trading houses directly for employment after 2016 (albeit that was, of course, in circumstances where the Freezing Order might reasonably have been known to be a problem in that regards).

776. I have noted that, as part of his oral evidence, Mr Hurley indicated that if an acceptable opportunity arose with potential benefits of that developing business going forward, then that would have been of interest. However, I do not consider either Mr Bosworth or Mr Hurley to have shown a real and substantial chance (nor a likelihood on the balance of probabilities) of that occurring i.e. an unsolicited opportunity presenting itself and their taking it up.

777. I therefore conclude that this part of Mr Bosworth and Mr Hurley's claim cannot succeed, and I therefore do not attempt to assess the chance of employment being offered to them had they sought it.

(Q) KELBRICK: LOSS OF EMPLOYMENT OPPORTUNITIES

778. The first question here is whether Mr Kelbrick has established, on the balance of probabilities, that in the absence of the Freezing Order he would have pursued, or accepted, employment at Vitol Dubai or another trading house. In my view he has not.

779. As indicated in section (K) above, Mr Kelbrick had, over time, a series of opportunities to work for Vitol, which he declined. These arose in 1998 and again in the early 2000s, when the subject became a "*running joke*" (see § 415 above). Mr Kelbrick said that, for example, when Vitol was looking to hire a senior trader for a management role in its Singapore office, he declined the opportunity, "*on this occasion because I was not interested in relocating to Singapore at the time. I was working extensively with Mr*

Decker and Attock and making good money". Further, the evidence quoted in § 438 above tends to suggest that, even if he had had a job at Vitol, he would not have wanted to do it forever and would have seen it as a segue to getting into developing business in other places. These matters strongly suggest that, whilst Mr Kelbrick may have (in his words) "*always had it in mind that Vitol could be a potential employment option for me, as long as I maintained strong relationships within the organisation and my reputation in the business*", he would have been more likely than not to carry on running his own business provided it was operating successfully.

780. In addition, as the Claimants point out, there is little documentary evidence of interactions between Mr Kelbrick and Vitol or other major trading houses, and none of any serious attempts to pursue such a role. There are no contemporaneous records of the conversations between Mr Himsworth and Mr Taylor, such as one might expect had serious discussions occurred. Further, Mr Kelbrick did not appear to have informed himself in the detail one might expect about Vitol Dubai's business: he said in cross-examination that he had no idea how many oil traders or staff there were at Vitol Dubai or how much oil trading they were doing, and he was not sure how many books were being run out of Vitol Dubai. He was, as he put, it *"in the oil trade, until the injunction was served, as a principal"*. Mr Kelbrick's evidence that, in the period leading up to the Freezing Order, he was looking to expand Attock Dubai's activities (for instance into India) is also hard to square with the notion that he would actively have sought (or accepted if offered) employment with a trading house.

781. On the evidence as a whole, I do not consider it more likely than not that Mr Kelbrick would, assuming Attock Dubai was running successfully, have decided to close it and seek employment with Vitol or another trading house instead; nor that, if offered a job, he would have accepted it. Further, the evidence that Vitol would positively have approached Mr Kelbrick, for example as a replacement for Mr Himsworth, was also unpersuasive. Mr Himsworth's evidence was that he raised with Mr Taylor of Vitol the idea of employing Mr Kelbrick, but that was in around 2016 after Mr Himsworth knew about the freezing order. It does not provide any good reason to suppose that Vitol would have approached Mr Kelbrick in the absence of the Freezing Order in circumstances where he was actively running Attock Dubai. Mr Himsworth also said in cross-examination, as noted earlier, that he was far too junior to be involved in the process of recruiting his successor, and he did not himself at any stage arrange a meeting between Mr Kelbrick and Mr Taylor.

782. Secondly, and in any event, I do not consider that there was a real and substantial chance that Mr Kelbrick would have secured the role of Mr Himsworth's successor at Vitol. Mr Kelbrick did not have the same level or type of relevant experience as Mr Masood, who ultimately secured the role. Mr Masood held several chief executive or management type positions, for example as a global advisor for finance and M&A, and as a chief executive for a Japanese chemical company, and had held roles at private sector arms of banks. He also had experience in Pakistan, which Mr Himsworth indicated was a factor in his hiring.

783. Mr Masood's profile was more closely aligned with what Mr Himsworth said his role at Vitol Dubai was. Mr Himsworth had had significant management experience: at Conoco, his role was management focused, managing the crude oil desk and developing operational and marketing strategy. At Vitol Ghana, he managed the office day to day and focused on matters like debt-recovery owed to Vitol by the Ghanaian government.

At Vitol Dubai, he had day to day charge of traders, focused again on debt recovery and business development and "*general management*". I was not convinced by Mr Himsworth's suggestion in cross-examination that, had Mr Kelbrick been hired to replace him, the role would suddenly have taken on a very different complexion (being 'on the ground' in India or elsewhere sourcing contracts).

784. Although he had connections (including in India) that could have been valuable to Vitol or another trading house, and was well regarded as a trader, Mr Kelbrick had limited management experience, and for the years he was running Attock Mauritius and then Attock Dubai had been focused on operations and trading. Attock Dubai had only three key employees and would not have involved managerial responsibilities of any substantial scale. Business management within a large corporate is clearly a very different from the "*managing relationships*" in which Mr Kelbrick had experience. Mr Kelbrick had not since 2005 been employed at any major oil trading or other company. Even if a comparison were to be drawn with Mr Muller, Mr Muller's experience was more global than Mr Kelbrick's, having been at Shell for several decades prior and having held regional roles in London, Asia and Australia. Mr Kelbrick's experience was more limited, focusing on Western Africa and possibly India. Mr Kelbrick's experience of West African trading (albeit that was not his only focus) would have been of limited attraction in circumstances where, Mr Himsworth said, Vitol Dubai (unlike the London office) did not trade in West African crude, and the wider Vitol group already had very close connections with NNPC with a term contract in place. Mr Himsworth also accepted that the approximately nine cargoes a year Mr Kelbrick was trading at Attock Dubai was modest compared to Vitol's London traders. Mr Himsworth was not aware of Mr Kelbrick having actually traded any oil in India.

785. In all these circumstances, it is not surprising that Mr Himsworth in cross-examination, in response to the suggestion that Mr Muller was a rather more obvious recruit to Vitol than Mr Kelbrick was, said that was "*not unfair*" (Day 9/208).

786. I also do not consider that there can be said to be any real and substantial chance that Mr Kelbrick would have been offered relevantly senior role at another large trading house, or a different role at Vitol. That is mainly for the same reasons as apply to the Vitol Dubai role. Further, there is no reason to believe Mr Kelbrick would have been likely to obtain any particular role at any particular time or period: it would be entirely speculative.

787. Had I concluded that Mr Kelbrick would otherwise have had a real and substantial chance of seeking and obtaining employment, I would have accepted his and others' evidence, considered earlier, that it was the Freezing Order which prevented it, by reason of its damaging reputational effect on him.

788. Given my conclusions above, it is not necessary to consider the quantum of this part of Mr Kelbrick's claim. I shall therefore indicate only very briefly the conclusions I would have reached in that regard.

789. Generally, I would have accepted the Claimants' submission that Mr Himsworth's position within Vitol did not, of itself, equip him with reliable knowledge of the specific remuneration packages available there (or at other major oil trading houses), for example because he was not involved in setting traders' bonuses, and his views on bonus levels were inconsistent over time.

790. As to salary, I would have accepted Mr Smallbone's view, agreeing with Mr Himsworth, that a salary of around US$ $400,000 would have been realistic for the Head of Vitol Dubai role.

791. As to sign-on bonuses, both Mr Smallbone and Mr Himsworth indicated that these were generally given to persuade someone to leave employment elsewhere, which would not have been the case with Mr Kelbrick. Nonetheless, I would have accepted Mr Smallbone's view that a cash sign-on of US$1 million would have been realistic.

792. I would have concluded that an annual bonus of US$2 million would have been appropriate. That was Mr Himsworth's view, though based (it appeared from his cross-examination) on a discussion with a trader "in Pakistan", about whom Mr Himsworth was unable to say what volumes that trader was trading. However, it was also consistent with information that Mr Greenslade (formerly of Vitol) had referred to in the confidential annex to the fourteenth witness statement of Mr Kelbrick's solicitor, Ms Walker. The reference was to annual bonuses of at least $4-5m and up to $10m in annual. Mr Smallbone said that *"cash bonuses are not looked at in isolation from the share scheme. But certainly on total-compensation wise, I don't think that those figures are ridiculous I agree*" and that "*I think Mr Greenslade's figures do make sense. So yes, I'm not disagreeing with the possible amounts*" (Day 11/153-154 and 173). Mr Kelbrick also received, on average, an annual bonus over more than US$ 2 million from Attock Mauritius and Attock Dubai.

793. As regards equity participation in Vitol's annual share participation scheme, Mr Smallbone agrees that the equity participation percentage of 0.15% is realistic should Mr Kelbrick have secured Mr Himsworth's role (as the head of Vitol Dubai), and that was the percentage which Mr Himsworth had received. Mr Himsworth suggested, however, that Mr Kelbrick would have been able to negotiate a larger entitlement over the course of his employment, up to 0.9%. In my view, that was entirely speculative. Mr Himsworth's own equity share percentage itself remained the same throughout his time at Vitol. He was not in a position to speak reliably as to any increases in share scheme percentages negotiated by others. He accepted in his second witness statement that any increase would be dependent on *"if [D5's] performance at Vitol was consistent with his track record, work ethic and Vitol's expectations"*. Mr Greenslade (through Ms Walker) suggested that Mr Kelbrick's equity participation *"may have increased"* to 0.6%. However, Mr Greenslade did not provide any direct evidence before the court, and his evidence could not be tested. Mr Kelbrick submitted in closing that he was not challenged on his assertion that he would have negotiated the participation up to 0.9%. As I read his witness statements, his evidence was that he would have expected to end up with, over time, at least a 0.5% participation. The objection based on lack of challenge in my view has little force when the topic was debated at some length with Mr Himsworth, whom Mr Kelbrick put forward as the person in a position to assist on questions of likely remuneration.

794. Finally as to quantum, any compensation would have needed to be very significantly discounted to reflect the significant uncertainties about whether Mr Kelbrick would have obtained employment (even if, on balance of probabilities, he would have sought it), and if so, what employment, on what terms, and how long he would have remained in it (bearing in mind among other things his evidence that he might well have moved on from Vitol to other business). Putting a figure on the discount is somewhat artificial in circumstances where I have concluded that there was no real and substantial chance

of this occurring, but, if I were wrong about that, the prospect would in my view nonetheless have been so uncertain that a discount of the order of 80% (i.e. an award of 20% of the adjusted prospective benefits) would have been appropriate.

(R) KELBRICK: LOSS OF ATTOCK DUBAI BUSINESS

(1) Effect of the Freezing Order

795. I have concluded in sections (F) and (I) above that Attock Dubai had a regular established trading history such that future business was to be expected; and that the Freezing Order was the cause of the loss of that business (via the cessation of its supply of oil and the loss of its bank trade finance lines).

796. I have also concluded that there is no historical basis why regime changes in West Africa after 2015 would have had any greater adverse impact on Mr Kelbrick's contacts (and their ability to originate new contacts) than regime changes in West Africa before 2015, nor that changes to the tender conditions would have had such an impact, and that Mr Kelbrick had deep and extensive contacts within the relevant parts of the Nigerian political and industry sectors which made him well placed to continue doing business after the latest regime change in 2015.

797. The Claimants submit that the Court should not draw the inference that the Freezing Order was the cause of Attock Dubai's loss of business, noting in particular these points:

i) Attock Dubai was not a respondent to the Freezing Order and it is not claimed that its terms prevented Attock Dubai from continuing its business;

ii) nominations and liftings continued for several months after the Freezing Order was imposed; the Claimants say the pattern of liftings from NNPC and GEPetrol had been patchy before this, and that there is no evidence that NNPC were aware of the Freezing Order at this time and no reason to suppose that they were;

iii) trade financing was provided for three cargos, with the last in July 2015 being financed by Credit Suisse in mid June 2015; and Société Générale in particular continued to offer support after service of the Freezing Order; and

iv) the contextual factors discussed in section (I)(6) above.

798. I do not accept those submissions.

799. Although Attock Dubai was not a respondent to the Freezing Order, in my view the facts clearly point to the conclusion that the effect of the Freezing Order was to destroy its business, with resulting loss to Mr Kelbrick, most immediately by its effect on suppliers and banks. Those considerations include, but are by no means limited to, reputational impacts that are neither unreasonable nor unforeseeable (see sections (N)(2)(b) and, in relation to Mr Bosworth and Mr Hurley, (O)(2) above).

800. In section (I)(1) above I have rejected the suggestion that there were other reasons why NNPC may have ceased nominations to Mr Kelbrick's companies. In my view, it is highly probable that all the considerations referred to in §§ 677 to 689 above applied, and made the Freezing Order by far the most likely cause of both the cessation of

nominations in favour of Attock Dubai or its associated companies and the evaporation of its bank credit lines.

801. As noted in section (I)(1) above, Mr Mounzer stated that NNPC was aware of the Freezing Order by May 2015. That seems inherently likely in view of Mr Kelbrick's written and oral evidence quoted in § 313 above, which I accept, including that contacts whom he had had for years stopped answering his calls. In addition to the evidence of Mr Kelbrick and Mr Mounzer, I also take account of the lack of any other really cogent explanation for the cessation. Before the Freezing Order, the nominations from NNPC and GEPetrol may not have been monthly, but they were certainly recurring over a period of more than two years from 2013-15, and a much longer period dating back to 2009 if Attock Mauritius is taken into account. When the evidence as a whole is considered, NNPC learning of the Freezing Order, and doing so in or about May 2015, seems to me significantly the most likely explanation.

802. As well as being consistent with and supported by the evidence of Mr Kelbrick quoted in § 313 above, that view is specifically supported by the evidence of Mr Fasinro. Mr Fasinro said in his witness statement that "*I do not believe that the litigation alone caused NNPC and others to stop granting liftings to Steve and his businesses. Based on my commercial experience in the oil and gas sector in Nigeria, and in Nigerian politics, I believe that Steve was unable to get liftings more as a result of the Mareva*" (§ 29). In cross-examination, he said that NNPC would have been more concerned with the Freezing Order than the Proceedings. It was to put to him that in fact Attock Dubai had "*continued to trade cargoes sourced from NNPC after the freezing order was imposed"*, but Mr Fasinro said "*That was for a few months after, and I told you that the freezing order was for ten years"*. In response to the suggestion that the Freezing Order had no impact, he reiterated that "*The freezing order had an impact. People were aware the freezing order had an impact".* I accept his evidence.

803. I also consider it highly probable that factors of the kind referred to in §§ 677 to 689 above resulted in Attock Dubai's credit lines drying up. For completeness, I have already concluded in section (I)(3) and (5) above that the banks' dealings with Attock Dubai for a short time after the issue and service of the Freezing Order do not contradict Mr Kelbrick's claim that the Freezing Order was the cause of the company's loss of credit lines.

804. I also note, for completeness, that the Claimants themselves asserted in correspondence with Mr Kelbrick that the Freezing Order by its terms affected payments made in the course of Attock Dubai's business. On 26 November 2018, the Claimants wrote to Mr Kelbrick threatening contempt of court proceedings against him for allegedly breaching the Freezing Order. One of the alleged breaches was said to relate to African Oil Services, a company which Attock Dubai used to make payments of the costs associated with acquiring cargoes and running business in West Africa, as Attock Oil Services had done for Attock Mauritius. The letter included the following:

> "The funds in African Oil's bank accounts are a quintessential example of the type of asset that the wide language of the standard-form Commercial Court freezing order is drafted to cover in this case as set out at paragraph 9 of the Teare Order and paragraph 6 of the Flaux Order, which extends to all of a respondent's assets: "*whether or not they are in his own name*

> *and whether they are solely or jointly owned...[including] any asset which he has the power, directly or indirectly, to dispose of or deal with as*" if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions."

That was several years after the decision of the Court of Appeal in *Lakatamia*.

805. Moreover, the Freezing Order included a proprietary injunction. Paragraph 14 provided that Mr Kelbrick and Attock Mauritius must not dispose or deal with any profits "*arising out of the transactions recorded in the Attock Deal Sheet*". The "*Attock Deal Sheet*" was, Mr Adams said in his affidavit, "*a schedule of 97 transactions entered into by Attock Mauritius between August 2009 and February 2012"* (Adams Affidavit § 136); and from 26 February 2016, the order of Cooke J varied the definition so as expressly to cover the 144 Transactions which were the focus of the original fraud trial. There was thus a proprietary injunction covering the profits of Attock's ordinary business arising between 2009 and 2013.

806. In all the circumstances, I am satisfied that the Freezing Order was the cause of Attock Dubai's inability to continue trading.

(2) Loss: general

807. In the remainder of this section (R), I assess the loss suffered by Mr Kelbrick by reason of his loss of his share and role in the Attock Dubai business.

808. I have concluded above that Mr Kelbrick has not shown that, on the balance of probabilities, he would have ceased running Attock Dubai in order to take up employment. I accept his evidence that, in those circumstances, he would have continued to operate Attock Dubai, so far as possible, until his anticipated retirement in 2032 at the age of 65. I therefore consider the evidence as to what profits Attock Dubai would be likely to have made, and the recoverable benefits which Mr Kelbrick would thereby have obtained. As with Arcadia 2, I consider what might be a realistic guide or 'target' for the profits Attock Dubai might have made had all gone reasonably well; and then form an overall assessment of the likelihood of Attock Dubai having actually made those profits, taking into account all the circumstances.

(3) Volume of sales and expansion plans

809. The first quantum question is the volume of lost sales to be assumed in the counterfactual. Mr Kelbrick anticipated in his fourth witness statement that Attock Dubai would have continued to trade a minimum of 12-15 million barrels from 2015, subject to the expansion plans I refer to below. The average annual volume traded by Attock Mauritius and Attock Dubai between 2009 and 2015 was about 16.7 million barrels, and Mr Stern's Kelbrick Loss Model assumes the volume of lost sales annually was at that level. Mr Dearman adopted a volume of 12.2 million barrels per year based on the average sales for 2013 and 2014 only, excluding Attock Mauritius' trading history and trading undertaken by Attock Dubai in 2015.

810. Mr Kelbrick submitted that Mr Stern's approach provides a more reliable average based on observed data on Attock's performance. In Mr Stern's words:

> "we are potentially forecasting, subject to your findings, 18 years. Mr Dearman's approach would appear to be that every year for the next 18 years is going to be an average of 2013 and 2014 only. That doesn't strike me as reasonable; the same way it doesn't strike me as reasonable to say that every year for the next 18 years is going to be reflected by 2010 and 2011.We have six years' worth of data, so by looking at it potentially over 18 years, what I'm saying is that this could be replicated up to three times over those 18 years" (Day 8/53)

811. Further, the oil trading experts (Mr MacNamara and Mr Scott) agreed that the market was volatile during the relevant period: *"there were periods of high volatility 2015-2016 with global oil glut, a short oil price war 2020 between Saudi Arabia and Russia, Covid induced demand destruction and subsequent recovery 2020-2023, and lastly the Russian invasion of Ukraine in 2022 with ensuing oil price cap / sanctions for Russian crude and products 2022 until the present day"* (Joint Statement § 6). Mr Kelbrick submitted that taking a longer period would provide a better comparator in a market of this nature.

812. Mr Dearman's approach prioritised Attock's volume of sales in 2013-2014 on the basis that "*the most recent past performance is a better guide to future performance*", excluding Attock's performance in 2015 because he was not sure what impact the Freezing Order had on those figures. The Claimants submitted that Attock's ceasing to trade with Arcadia in 2013 was a further reason to prefer Mr Dearman's approach. However, I concluded in the Trial Judgment that Attock "*was in no sense dependent on the Arcadia group*", and that "*after the Arcadia Group ended its trading relationship with Attock Mauritius in 2013, and Attock Mauritius moved its business to Attock Dubai, it continued sourcing and selling oil to major oil traders, such as BP and Exxon*."

813. Given that Mr Kelbrick's own estimate was 12-15 million barrels per annum, I do not consider that it would be appropriate to assume a higher figure outside that range (subject, again, to the point about expansion plans). In addition, although there is some force in the points outlined above about the benefit of using a longer comparator period and about Attock not being dependent on Arcadia, there is also merit in the view that the loss of Arcadia as a major counterparty is likely to have had <u>some</u> effect on Attock's business, and that more recent years may provide something of a pointer to the future. Viewing the matter in the round, I consider the right approach would be to take a figure in Mr Kelbrick's estimated range, but slightly above the midpoint to give some weight to Attock's actual historic performance over the period 2009 to 2015. I consider the appropriate assumption to be 14 million barrels per annum, subject to the expansion issue.

814. In assessing Mr Kelbrick's lost income from Attock Dubai, Mr Stern makes the following further assumptions:

i) Attock Dubai's trading volume would have increased to 28 million barrels from 2016; and

ii) Attock Dubai's business would have expanded and doubled its profits over a period of two years from 2015.

For example, Mr Stern adjusts Mr Kelbrick's assumed lost bonuses upwards in proportion to the assumed increase in barrels sold from 16.7 million to 28 million.

815. The two assumptions may be connected in practice and are best considered together. Mr Stern assumes that the oil volume sold would have increased over time to 28 million barrels per annum on the basis that it was the level of trading Mr Kelbrick hoped to achieve. As noted in sections (I)(7) and (8) above, Mr Kelbrick's evidence was that he planned to expand Attock Dubai's business, including into new regions, paper trading and products trading.

816. Attock Dubai's *"Business Plan 2013-2014 Executive Summary"* listed the company's activities as including developing upstream activities and downstream activity (including processing and marketing of petroleum products). The section on *"Strategy and Objectives 2013-2014"* included as "*Opportunities*" "*Develop new markets in the CIS, Iraq, RSS and other African countries (the Territory)"* and among the "*Objectives 2014*" the acquisition of products and supply to West African countries and:

> "Risk Management: explicit and manage the risk related to physical trade operations, determine hedging strategies and execute these strategies with the appropriate use of crude oil and petroleum products futures markets, options, swaps, derivatives, etc."

The stated medium term objectives included developing all sectors of the energy trade, relations with oil producing countries and upstream and downstream activities.

817. As to regional expansion, Mr Kelbrick in his evidence identified North Africa, India, and South Asia as target markets. He said he had extensive contacts and experience in India; and he was referred to in an email from June 2010 from Jacqueline Macdonald (compliance head at Arcadia London) as a consultant with "*expertise*" in India, West Africa and East Africa. In 2014, Attock successfully registered with the IOC to import crude oil. In early 2015 Attock Dubai was approved as a counterparty and trading partner of ETAP, and on 10 February 2015, Attock Dubai received a fax invitation from ETAP to submit offers for cargoes of Ashtart and Zarzaitine crude oil: an opportunity which Mr Kelbrick explained he was unable to take up due to the Freezing Order.

818. Mr Kelbrick explained his expansion plans for Attock in India as follows:

> "[The] Indian market from West Africa needs something called VLCC [Very Large Crude Carrier], which is a 2 million-barrel ship. We would have, say, as we were talking yesterday, a million barrels a month roughly; okay? We could team up with a Shell, with a BP. We could have BP supply us and we could front for them. So there… were any number of combinations that we could do to supply merely the Indian Oil Corporation." (Day 4/39)

Mr Kelbrick added that Attock Dubai would have further developed its relationship with Reliance Industries:

> "we had Reliance Industries, which we knew, which we had provided Bonny Light to when its refinery had first started… that was during my term at Arcadia... So I knew Reliance very well and the key was – because they'd also tried to employ me; it was Ravi and Shashi Ruia at Essar – was to get crude oil business going with them and supply Essar." (Day 4/39-40) .

819. Mr Kelbrick said he planned for Attock Dubai to begin paper trading, i.e., trading futures, swaps and options, and intended to recruit specialist paper traders for that purpose. I found in the Trial Judgment at [169] that "*Mr Fredriksen agreed that Farahead made a 'fortune' as a result of buying Arcadia, which he attributed to the paper trading conducted by Messrs Wildgoose and Dyer*". There was substantial evidence in the Inquiry as to the benefits of paper trading: Mr Bosworth explained that *"[t]he combination of physical and paper through history in trading, oil trading, has been the best combination"*; that "*it gives you a forward view of the market or the physical market";* and that success in paper trading had resulted in Messrs Wildgoose and Dyer being paid tens of millions of dollars during their time in Arcadia (Day 3/47-48). In cross-examination, Mr Kelbrick said that his plan was initially to use Ms Driay to trade paper for Attock. She had worked as a consultant for Attock Dubai, and the plan was to convert her consultancy role into formal employment in order that she could expand the paper business. Mr Kelbrick also said in cross-examination that "*the combination of physical and paper is quite powerful*".

820. Mr Kelbrick said he intended Attock to start trading refined products, including gasoline and dual-purpose kerosene. Trading petroleum products formed part of Attock Dubai's business plan for 2013 to 2014 (see above). He explained that Nigeria was short of these products, and so (with his well-established Nigerian connections) he was well-placed to ensure Attock Dubai's expansion into products. Mr Kelbrick had strong connections at PPMC (Nigeria's national products company), including its head Reg Stanley. Mr Kelbrick had experience trading products as a consultant for Arcadia: for example, in 2013, he secured a gasoline contract from Essar in India. He described this contract in the Inquiry as follows:

> "I got them a gasoline lifting contract, a term contract actually, with Essar that was – had it been – had the book runners run it correctly, it was worth about $6 to $8 million a year, but they were greedy and overexercised options in the first two months. And Essar just said 'Steve, these people are beyond it', and that was two traders from Arcadia Singapore, George Gong and Albert Quek" (Day 4/38).

Before the Freezing Order, Mr Kelbrick had started pursuing a products trading strategy for Attock. In around May 2014, he met with Mr La Noce of Mubadala Petroleum in Abu Dhabi to discuss petroleum products business. He said in cross-examination that "*the product side was something I felt we could get going. Even the products side in India I felt we could get going quickly*" (Day 4/5).

821. Mr Kelbrick's evidence was that, taken together, he expected these areas of expansion would have doubled Attock's profits within two to three years.

822. Mr Dearman in his report said:

> "5.3.42 Whilst it is ultimately for the Court to determine find whether Attock Dubai would have expanded its business and doubled its profits, I note that, when calculating losses in similar circumstances, I would typically expect to see a business plan supporting the anticipated upside in sales volumes and other documents supporting the expansion plan, including assessments of the market, competitor analysis, consideration of barriers to entry, the investment required, regulatory requirements, budgets and forecasts showing the potential for growth and challenges and threats to achieving that growth.
>
> 5.3.43 I have seen no evidence of any expansion plan and no independent analysis by Mr Stern of the assumption that profits would have doubled. This is an assertion set out in D5's witness statement that Mr Stern adopts without question.
>
> 5.3.44 I would also expect contemporaneous evidence to support the following assumptions, for example:
>
> i) the basis on which Attock Dubai was expected to achieve trading volumes of 28 million barrels in 2016 when that level of trading had not been achieved in the previous five years (and only once in the history of the business in 2010); and
>
> ii) the basis on which Attock Dubai was going to achieve expansion over a two-year period to double the profits of the business, such as the growth achievements of other oil trading businesses demonstrating that such an assumption was realistic.
>
> 5.3.45 In addition, if Attock Dubai could have doubled its profits in two years by way of expansion, I do not consider Mr Stern's calculations for that two-year period are realistic. Mr Stern assumes an immediate increase in profits in 2015 from the expansion, whereas in reality a business will see an investment phase with initial net cash outflows ramping up to a sustained level of increased profits."

823. Mr Dearman was challenged on this evidence in cross-examination, including as follows:

> "Q. You gave some evidence earlier about business plans and needing to see a business plan. Do you accept that when you're dealing with an established business and it's looking to expand its business say to a different region or to a different market, the business plan or the existence of it or the contents of it is less significant than if it's a brand−new business?
>
> A. No, I wouldn't accept that.
>
> Q. So you're saying that there's absolutely no difference between the considerations that you would look at to see whether it's a

> plausible business or not. It's all the business plan, so the past history, past track record is not relevant.
>
> A. It's not irrelevant. It has some relevance. But if it's a new market, then I would expect an analysis of that market and the competitive environment and the customer base and a number of different metrics and the financing that would be required to enter into that market. Yes, I would expect there to be a business plan for that kind of level of expansion.
>
> …
>
> Q. Where this comes to, as far as I see it, what needs to be written down on paper for you to accept the plausibility of Attock's business?
>
> A. I would want to see a more comprehensive business plan which sets out –– that's more than a straw man, essentially, of the opportunity. We obviously have the actual trading data for the period that's covered by this document, and, as we have discussed at length about the deteriorating level of volumes traded in that period, I would want to see a far more comprehensive business plan which includes financial, estimated financial performance and forecast financial performance based on empirical data and a series of factual and driven assumptions." (Day 8/130 and 139)

824. Mr Kelbrick highlights a later passage where Attock's (unsophisticated and thin) business plan from August 2008 was put to Mr Dearman:

> "Q. Doesn't that rather tell us that business plans are largely, if not totally irrelevant and what really counts is the individuals in the business, their ability to originate cargoes, finance those cargoes and sell them on the open market?
>
> A. Yes." (Day 8/144-145)

For completeness, though, the evidence continued as follows:

> "MR JUSTICE HENSHAW: You say "relevant"; relevant to what?
>
> MR SPRANGE: To a proper assessment of the future value of a company.
>
> A. As I say, I would want to see the output from all of that to enable me to undertake a proper valuation.
>
> Q. You must agree with this, surely: that if they could do it in 2008 with the skills and so on that I have just described with a little dinky business plan like this, there's no reason why they

> couldn't do similar things in 2015 with a slightly less dinky business plan?
>
> A. I don't know. I can't comment on that." (Day 8/145)

825. I see considerable force in Mr Dearman's views. Attock was (unlike Arcadia 2) an established business, and presumably had had opportunities over the years 2009 to the start of 2015 to undertake expansion in the way suggested, but had not done so. The evidence did not suggest that the objectives for 2014 in the 2013/14 business plan in relation to new regions, products and risk management were implemented. It is of some relevance in my view that there is no concrete business plan of the kind Mr Dearman referred to: even if Mr Kelbrick's practice was not to write detailed business plans, the absence of one makes it difficult for the court (or the experts) to attempt any reliable assessment of the likely degree of expansion in the counterfactual. Further, as the Claimants pointed out, Mr Stern's assumptions include 16 liftings from GE Petrol, compared to only one actual lifting in 2014. I consider that Mr Kelbrick's plans, and the preliminary steps achieved in India and Mauritius, provide some reason to believe that a degree of expansion, compared the actual business levels in 2013 and 2014, would have been achieved, but that it is hard to assess the level of that expansion. In my view, a realistic assumption would be that business expansion would have restored the ongoing volumes to a level that is on average (from 2015 onwards) 10% above Mr Stern's base assumption of 16,676,643 barrels a year (that being the average actual annual volume of barrels traded by Attock Mauritius and Attock Dubai during the period from 2009 to 2015), namely, in round terms, 18,300,000 barrels a year from 2015 onwards.

(4) Pricing

826. Turning to pricing of oil sold, Mr Stern calculated the sales value of the lost trades by taking the average dated Brent price of crude, and then adding the average actual premium or discount per barrel observed within the actual trading activity for Attock Dubai. For the purposes of applying the actual average premium (or discount) to dated Brent per barrel, Mr Stern excluded consideration of the sales value achieved by Attock Mauritius upon its sale to Arcadia because, as Mr Kelbrick explained, Attock Dubai sold to BP and Exxon at a premium much higher than it had sold to Arcadia. Because it was outside Mr Stern's expertise to forecast future variations in the dated Brent price of crude oil, he used the 2026 dated Brent price in the US Energy Information Administration's Short Term Energy Outlook, and used the same source's forecast for 2027 onwards. Mr Dearman did not address the sales value of the lost trades in his report. I consider that Mr Stern's approach is reasonable and should be accepted.

(5) Gross margin

827. Mr Stern calculated from the audited financial statements of each of Attock Mauritius and Attock Dubai that the average gross profit margin they generated between 2009 and 2015 was c. 0.29%. In order to assess the gross profit that would have been generated by Attock Dubai, Mr Stern has applied that gross profit margin to the value of the lost sales. Mr Dearman assumed a gross profit margin of 0.14%, which is based on the average for only the years 2013 and 2014. In my view, Mr Stern's approach should be preferred, as providing a more reliable average, bearing in mind that profit

margins too are affected by volatility. Further, Mr Dearman's approach left out of account the fact that the profit margin in 2015 was 1.01%.

828. Mr Stern then deducted relevant costs, including staff salaries and benefits, administrative expenses, and certain financing costs. These were not challenged by Mr Dearman.

829. Mr Stern then calculated the net trading profit by subtracting the value of the costs from the value of the gross profits. To the annual net trading profit, Mr Stern then applied the relevant UAE corporate tax rate of 9%. After taking account of the tax, Mr Stern attributed 50% of the lost profits suffered by Attock Dubai to Mr Kelbrick as losses suffered as shareholder.

830. Mr Dearman suggested in his report that there were aspects of Mr Stern's forecasts that might require calibration, such as adjustments to net profits to calculate cash flows, maintenance of distributable reserves, surplus cash, and the timing and mechanism for any dividends paid to Mr Kelbrick. However, Mr Dearman did not give evidence on how this analysis would have affected the quantum of loss nor proposed necessary adjustments in his 'sensitivity analysis' reflecting these points.

(6) Annual salary

831. Mr Kelbrick lost his annual salary from Attock Dubai. From 1 May 2014, Mr Kelbrick was paid a monthly salary of AED129,980, equivalent to US$35,420. That equates to an annual salary of US $425,040. For years after 2015, Mr Stern has applied the consumer price index measure of inflation in the UAE to this figure to calculate Mr Kelbrick's annual loss of salary from Attock Dubai. I accept that assumption.

(7) Trading bonuses

832. In addition to his annual salary, Mr Kelbrick received U$21,231,950 by way of trading bonuses from Attock Mauritius and Attock Dubai in the period between the first full month after purchasing Attock Mauritius (October 2009) and the Freezing Order (February 2015). That equates to US$3,802,737 per year in trading bonuses, calculated by dividing $21,231,950 by 67 (the number of months from October 2009 to February 2015) and then multiplying by twelve to produce an annualised figure. If trading volumes would have increased, then I agree with Mr Stern's assumption that Mr Kelbrick would be likely to have earned commensurately larger trading bonuses.

833. Mr Dearman suggested that an annual trading bonus figure of US$2.5m should be used because, he says, "*2013 to 2014 is a more relevant period reflecting more recent performance and more indicative of future performance*". However, I agree with Mr Kelbrick that a more reliable estimate is obtained, as for trading volumes, by taking the average over the longer period from 2009 to 2015. In my view, therefore, the appropriate assumption for Mr Kelbrick's annual trading bonus is obtained by starting with US$3,802,737 and scaling it up by the proportion which my assumption (above) of 18,300,000 barrels a year bears to Mr Stern's base case of 16,676,643 barrels a year.

(8) Share of the Attock Dubai profits and market value

834. Mr Stern's calculations of lost income include sums reflecting Mr Kelbrick's 50% interest in Attock Dubai, which are in substance in the nature of assumed dividend entitlements. In principle, subject to the adjustments referred to above and the point made below regarding discounts, I would be inclined to accept them as realistic. Those claims are likely to be precluded, at least in part, by the reflective loss doctrine as indicated below.

835. In addition, Mr Stern calculates Mr Kelbrick's share of the market value of Attock Dubai by taking the amount that Mr Kelbrick and Mr Mounzer paid for Attock Mauritius in 2010 (being US$2 million) as a benchmark for the value of a legal entity that was already able to lift cargoes because it had contracts with NOCs and the necessary credit lines with banks, and then varying that figure in accordance with the consumer price inflation index for the UAE since 2010, and then dividing the result by two to assess the value of Mr Kelbrick's share.

836. On the basis of a scenario where Mr Kelbrick would not have been employed by Vitol Dubai or equivalent and would have sold his share in Attock Dubai upon retirement in December 2032, Mr Stern calculated the figure as US$1,452,208, which I understand to be net of approximately US$8.5 million assumed to have been received by Mr Kelbrick when Attock Dubai was dissolved in 2017 and to be prior to adjusting to present value (though remain open to correction if either assumption is incorrect). Mr Dearman used a different methodology to calculate Mr Kelbrick's share of the market value of Attock Dubai, using the book value of its net assets as at 31 December 2014, but arrived at a similar valuation figure of US$1.5 million.

837. Again, I would be inclined to accept Mr Stern's calculation, subject to the effect of the reflective loss principle.

(9) Reflective loss principle

838. The Claimants alleged that Mr Kelbrick's loss relating to the destruction of Attock Dubai "*entails a claim for a reflective loss*" (Cs' Re-Amended Defence to D5 § 34(3)). It is common ground that the principle does not affect sums which Mr Kelbrick lost by way of salary or trading bonuses (see, e.g., *Burnford v AADL* [2022] EWCA Civ 1943 at [30v]). However, the Claimants do rely on it as regards claims for what can properly be regarded as distributions to Mr Kelbrick as a shareholder of Attock Dubai, citing *Sevilleja v Marex Financial Ltd* [2020] UKSC 31. It is clear from *Marex* (for example) that the reflective loss principle, to the extent approved in that case, applies to distributions that a shareholder might have received from the company had it not sustained the loss, just as it does to claims for reduction in the value of the shareholder's shares (see e.g. [82] and [89]). They say that if Attock Dubai had in fact lost profits as a result of the Freezing Order, then that is a claim which Attock Dubai could pursue under the Claimants' separate undertaking in Schedule B paragraph (7) to the Freezing Order:

> "The Applicants will pay the reasonable costs of anyone other than the Respondent which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondent's assets and if the court later finds that this

> order has caused such person loss, and decides that such person should be compensated for that loss, the Applicants will comply with any order the court may make" (my emphasis)

It was confirmed in *Allied Irish Bank v Ashford Hotels Ltd* [1997] 3 All E.R. 309 at p.317 that *"...the cross-undertaking approved by the court was one designed to protect third parties from the consequences of compliance with the injunction but the scope of the protection of the undertaking has since been expanded to embrace third parties adversely affected by the injunction."*

839. Mr Kelbrick relies on the statement of Newey LJ at [30(iv)] of *Burnford* that the *"'reflective loss' principle will not be in point if, although the shareholder's loss is a consequence of loss sustained by the company, the company has no cause of action against the defendant in respect of its loss"*. It has been held that a cross-undertaking in damages is given to the court, not to the opposing party (*F-Hoffmann-La Roche & Co v Secretary of State for Trade & Industry* [1975] AC 295 per Lord Diplock at 361D); and that, as such, the respondent to an injunction is accorded no private cause of action (*Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545, 1551E per Neill LJ).

840. In the first of those two cases, Lord Diplock said:

> "The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction: see *Smith v. Day* (1882) 21 Ch.D. 421, per Brett L.J., at p. 427." (my emphasis)

In the second case, Neill LJ reiterated that:

> "(2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the p interlocutory injunction should not have been granted. (3) The undertaking is not given to the enjoined but to the court."

841. However, the majority of the Supreme Court in *Marex* confirmed that, in Lord Reed's words:

> "a shareholder is normally unable to sue for the recovery of a diminution in the value of his shareholding or in the distributions he receives as a shareholder, which flows from loss suffered by the company, for the recovery of which it has a cause of action, even if it has declined or failed to make good that loss" (§ 67)

Lord Hodge explained that:

> "108 The characteristics of a shareholding as a means of participation in a company's enterprise which are most directly relevant in the context of this appeal are the default rule of equality among shareholders and the postponement of the shareholders' entitlements on a winding up to the claims of the company's creditors. Against this background, the law's refusal to recognise the diminution in value of a shareholding or the reduction or loss of a distribution, which is the consequence of the company suffering loss as a result of wrongdoing against it, as being separate and distinct from the company's loss is a principled development of company law. It excludes the possibility of double recovery. It avoids a scramble between shareholders to establish their private claims against a wrongdoer in case the wrongdoer does not have sufficient accessible assets to meet those claims. It thereby upholds the default position of equality among shareholders in their participation in the company's enterprise: each shareholder's investment "follows the fortunes of the company". It maintains the rights of the majority of the shareholders, as the Court of Appeal stated in Prudential [1982] Ch 244, 224. And it preserves the interests of the company's creditors by maintaining the priority of their claims over those of the shareholders in the event of a winding up."

842. Both the principle and the rationale of those passages apply equally, in my view, to a situation where the company does not have a legal cause of action in the strict sense, but has an entitlement to apply to the court for compensation, in the court's discretion, pursuant to an undertaking in damages. Further, Griffiths J in *Mex Group Worldwide Ltd v Ford* [2026] EWHC 629 (KB) proceeded on the basis that the reflective loss principle could apply to a claim under the undertaking in damages. The argument failed there only because the applicants were not claiming for losses in the relevant capacity (see [50]-[51]).

843. Mr Kelbrick objects that Attock Dubai could not in fact bring a claim under the undertaking, because it was dissolved in 2017. The Claimants submit that that should make no difference. In principle, the company had a contingent entitlement under the undertaking in damages. There was no evidence to the effect that it could not have been restored to the register. If it could not, then the loss died with the company, when it was allowed to die, in circumstances where it could have been kept alive in order to pursue the prospective compensation claim.

844. It would be strange if the operation of the *"principled development of company law"*, using Lord Hodge's words, represented by the reflective loss principle (or the narrower version recognised in *Marex*) could be undone merely by allowing a company, having a cause of action, to be dissolved. As Lord Reed said in *Marex*:

> "The basis of the decisions in Prudential and Johnson is that a shareholder, whose shares have fallen in value as the consequence of loss suffered by the company for the recovery of which it has a cause of action, has not suffered a recoverable loss. That conclusion does not depend on whether the company is financially able to bring proceedings or not. If the shareholder has not suffered a recoverable loss, he has no claim for damages, regardless of whether, or why, the company may have failed to pursue its own cause of action." ([70])

845. Similarly, Lord Reed said at [83] of *Marex* that *"[t]he critical point is that the shareholder has not suffered a loss which is regarded by the law as being separate and distinct from the company's loss, and therefore has no claim to recover it."* Hence, as the Court of Appeal said in *Burnford*, the applicability of the reflective loss principle is to be tested by reference to the position when the claimant's loss is said to have been suffered, rather than when the claim is brought: see [29], citing *Allianz Global Investors GmbH v Barclays Bank plc* [2022] EWCA Civ 353, *UCP plc v Nectrus Ltd* [2022] EWCA Civ 949 and the decision of the Privy Council in *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22, [2022] 1 All ER 1219. The Privy Council in *Primeo* made clear that *"[t]he timing of the bringing of a claim and the circumstances which may pertain at that point in time are adventitious happenstance and have nothing to do with the operation of the rule"* ([59], quoted in *Burnford* at [28]), with the result that a shareholder who had suffered a loss in the form of a diminution of value of its shareholding which is not recoverable as a result of the application of the reflective loss rule cannot later convert that loss into one which is recoverable simply by selling its shareholding [61].

846. On the other hand, there may be a significant point of distinction, or possibly two, between the present case and the situations contemplated in those authorities. Neither of these was canvassed before me in submissions, and, with some reluctance, I have come to the conclusion that I should allow the parties to address me further on them.

847. The first is that the losses in the present case continued to accrue after the date on which Attock Dubai had been dissolved and hence ceased to exist. Thus it is, at least arguably, difficult to see how the ongoing loss of potential business that Mr Kelbrick suffered from the dissolution in 2017 onwards could be said to be, or to reflect, a loss (a) suffered by Attock Dubai or (b) for which Attock Dubai had a cause of action. The fact that Attock Dubai would have continued to exist in the counterfactual arguably makes no difference: the reflective loss doctrine, as I understand it, is based on the relationship between a company and its shareholders/creditors in the actual world. In addition, even if Attock Dubai could be restored to the register, it is not easy to see how it could have a cause of action in respect of losses suffered in the period from the dissolution date to the restoration date during which, as a legal entity, it did not exist.

848. The second point is that, as at the time of its dissolution, Attock Dubai arguably had at most a contingent claim under the undertaking, because the court had not yet decided

(and never would have decided in 2017) that the freezing order had been wrongly granted. There was in that sense no claim available to Attock Dubai in 2017, and its contingent claim never matured into an actual claim because it ceased to exist. On that view, it might be argued that the reflective loss principle does not bar claims even in respect of losses incurred from February 2015 to the dissolution date. I am less attracted by that line of argument, since Attock Dubai did have at least a contingent claim as regards losses incurred up to the date of its restoration, and it seems counterintuitive to think that allowing it to be dissolved (and, if feasible, not restored) would have the result that the reflective loss principle would cease to apply as regards those losses. However, in circumstances where I have decided to allow further argument on the first point mentioned above, it seems appropriate to permit submissions on this second point too.

(10) Duration of losses and percentage chance of sustained profit generation

849. The damages which can be awarded are not restricted to losses suffered during the period for which the Injunction was in force (see Gee on *Commercial Injunctions* at § 11-047). In Mr Kelbrick's case, he claims losses until such time as he would have commenced employment with Vitol (or an equivalent company in 2016-2018) or, if no such employment was forthcoming, to 2032, which is the anticipated date of his retirement. I have found the latter to be the relevant aspect of his claim. Further, I accept his evidence that he would have continued to run Attock Dubai until 2032, assuming it survived that long.

850. It is common ground that the value of future cash flows arising beyond 2025 must be discounted to reflect the time value of money and other specific risks associated with the lost stream of projected future cash flows, and a discount rate of 21.2% is also agreed between the experts (Joint Memorandum at page 11).

851. In addition, the Claimants submit that there should be a discount, achieved by applying an appropriate percentage reduction, to reflect the uncertainty that the sums estimated by Mr Stern's model (as adjusted based on my findings) would in fact have been received. By way of some guidance, they cite *Bernard Crehan v Inntrepreneur Pub Company CPC* [2004] EWCA Civ 637 at [178] and [180], where it was held that a 15% reduction in the amount claimed (which had been modelled by an expert) was "*palpably insufficient to take account of all the uncertainties over a ten-year period*" (that case being about a lost pub business). The Claimants suggest that that approach is apposite in this case, particularly given the dependence of Attock Dubai's business on third parties such as NOCs (particularly NNPC) or sponsors like Chief Anenih; and they propose a discount of 50%.

852. Mr Kelbrick disagrees, contending that Mr Kelbrick's claims for losses from the destruction of Attock Dubai's business are to be determined by reference to the 'all or nothing' balance of probabilities test because they depend on what Mr Kelbrick (or his company, Attock Dubai) would have done, citing *Palliser v Fate* (above). In my view, that is clearly incorrect. The prospects of any trading business are profoundly affected by the actions of third parties, such as (in this case) NOCs and other suppliers, prospective purchasers, trade financing banks and the oil market in general. I have considered at length in section (O) above, in the context of Arcadia 2, the business and financing risks to which that business would have been subject in the period 2015 to 2025 even if it had managed to find a strategic investor. The strategic investment risk

would not have applied to Attock Dubai, but the other risks by and large would have done, and would have been significant. Thus, as with Arcadia 2, it would have been far from certain that Attock Dubai would have achieved the levels of profits assumed by Mr Stern's model, even after making the adjustments I have referred to above.

853. I do not accept that the discount should be as high as 50% as the Claimants propose. Unlike Arcadia 2, Attock was an established business with a significant track record and which did not need a strategic investor. At the same time, the uncertainties I have alluded to would have been significant, and would have continued for years more into the future until 2032. All things considered, I consider that the appropriate discount rate is 30%: in other words, that compensation should be assessed on the basis that Attock Dubai would have had a 70% chance of making the profits indicated by Mr Stern's model after making the adjustments I have already found to be appropriate.

(11) Remoteness

854. I have already rejected the Claimants' contentions that no compensatable loss can have been caused because Attock Dubai was not a respondent to the Freezing Order and it was not claimed that its terms prevented Attock Dubai from continuing its business; and that, to the extent that any third party considered that the order against Mr Kelbrick and Mr Mounzer prevented Attock Dubai from continuing its business as it had before, that was unreasonable. I have concluded, putting it briefly, that the business was lost because suppliers and banks became aware of the freezing order and were unwilling to carry on doing business with Attock.

855. The Claimants suggest that that was unforeseeable if the Freezing Order did not by its terms prevent Attock from continuing its business. I do not agree. I have already addressed the well-known and entirely unsurprising reputational and commercial effects of a freezing order, particularly in circumstances where it has been granted and maintained in the context of claims of serious fraud. It is in my view foreseeable that such an order is liable to make suppliers and banks unwilling to continue to business, whether that be due to concerns about the creditworthiness or reliability of transactions, or purely reputational concerns, or a combination of both. Neither of these points is answered by paragraphs 29 and 30 of the Freezing Order, cited by the Claimants. Those provisions go to the legal effect of the order on persons and assets outside England and Wales. They do not address the obvious and foreseeable practical problems I have just mentioned.

856. Further, I agree with Mr Kelbrick that:

i) it was reasonably in contemplation (if not intended by the Claimants) that the Freezing Order would destroy Attock Dubai's business and cause loss to Mr Kelbrick;

ii) the Claimants knew that Mr Kelbrick owned and operated Attock Mauritius (having bought many cargoes from it between 2009 and 2013), and that Attock Mauritius' business had been transferred to Attock Dubai (and expressly stated as much in Mr Adams' Affidavit at §81). They also knew that credit facilities were essential to trading crude oil and to Attock's business;

iii) it was therefore either known or reasonably in contemplation that the Freezing Order, which the Claimants served on Mr Kelbrick and Attock's banks, would be likely to result in the termination of their credit facilities, or (at least) refusal to extend further credit or to provide subsequent support; to cause reputational damage to Attock and Mr Kelbrick; and to introduce commercial uncertainty for Mr Kelbrick's/Attock's counterparties, thereby destroying Attock's business. Those were all natural and foreseeable consequences of the Freezing Order.

(12) Mitigation

857. The Claimants submit that Mr Kelbrick failed to mitigate his losses, on the basis that (i) it was open to Mr Kelbrick to attempt to seek employment elsewhere but there is no evidence of him doing so, and (ii) as regards Attock Dubai, he could have sought an appropriate variation of the Freezing Order. I do not accept those submissions.

858. As to (i), the evidence set out in Section (K) above sets out positive steps which Mr Kelbrick took to seek employment following service of the Freezing Order, specifically by approaches to Vitol and Mercuria. Those were reasonable steps to take, and the Claimants have failed to identify, adduce evidence about or put to Mr Kelbrick in cross-examination any further steps that they say it was unreasonable for Mr Kelbrick not to take. Further, as to the position since the Freezing Order was discharged, Mr Kelbrick has been out of the oil market for the duration of the Freezing Order, a period of ten years during a prime part of his career in his 40s and 50s, during which time his skills have are likely to have atrophied and his connections dwindled. Mr Smallbone acknowledged in his report that "*if a trader has been out of the market for a significant period of time, they can quickly lose connection with, and knowledge of, the incredibly fast-moving oil market*" (§ 100). Similarly, Mr Smallbone said in cross-examination that "*if you're out of the market at all in oil trading, things do move on very quickly"*. I agree with Mr Kelbrick that any suggestion that he could now walk into (say) Vitol is unreal.

859. As to (ii), the Claimants' submission overlooks the point that the Freezing Order had the effect of destroying Attock Dubai's business in significant part because of its reputational impact and the commercial uncertainties it produced, as set out in section (I) above. Moreover, the Claimants failed to explain what variation of the Freezing Order Mr Kelbrick should have sought that would have enabled Attock Dubai to continue trading and to which either the Claimants or the court would have been likely to agree.

(13) Conclusion

860. For these reasons, I conclude that compensation should be paid to Mr Kelbrick for his lost salary and trading bonuses from Attock Dubai from 2015 to 2032, estimating using Mr Stern's model, subject to the adjustments I have set out above, and subject to the application of an overall 30% discount for the reasons given earlier.

861. As a rider to that conclusion, following sight of the draft judgment, Mr Kelbrick pointed out that the 21.2% discount rate agreed between the experts in respect of future losses arising beyond 2025 appears to have been intended to reflect not only the time value of money but also *"other specific risks associated with the lost stream of projected future cash flows*". Depending on the nature of the other risks thereby taken into account,

there is a possibility that an element of double counting of risk would be involved if the 30% discount I have arrived at were to be applied to those future cash flows as discounted by 21.2%. (Indeed, Mr Kelbrick goes further and suggests that only the 21.2% discount should be applied to future lost income: which the Claimants dispute.) In the circumstances, I think it right to allow the parties to address this point further.

(S) BOSWORTH AND HURLEY: LOSS OF INVESTMENT OPPORTUNITIES

862. I have concluded in section (L) above, first, that in the absence of the Freezing Order Mr Bosworth and Mr Hurley would have invested in bitcoin from July 2015 to January 2021, and that compensation should be assessed on the basis that they would each have invested that amount at the end of July 2015 and held it until the end of January 2021. (It follows that the disagreement between Mr Stern and Mr Dearman about intra-year volatility does not arise for determination.)

863. Secondly, I have concluded that Mr Bosworth and Mr Hurley would each have bought US$ 500,000 of Tesla shares at the start of 2020 and sold them on or about 10 March 2021; and that compensation should be assessed on the basis that they would have bought the shares on 31 January 2020 and sold them on 10 March 2021.

864. Thirdly, I have concluded that Mr Bosworth would have invested in gold in July 2020 and retained that investment, and that compensation should be assessed on the basis that Mr Bosworth would have invested CHF 1 million in gold on 31 July 2020 and retained it until now.

865. The Claimants submitted that, bearing in mind the shape of Mr Bosworth and Mr Hurley's existing portfolios as at the date of the Freezing Order, it was not foreseeable that they would make those investments, making the loss too remote. However, it was Mr Bosworth's evidence, first, that having built up his property portfolio already he would have looked for other investment opportunities. It was also Mr Bosworth's evidence that it is common for people in the oil business to pursue business opportunities outside of trading; and it is not unusual for a high net worth individual to invest a relatively small part of his/her assets in a speculative or volatile sector such as cryptocurrency, as well as investing a portion in shares and in traditional 'hedge' investments such as gold. For example, a one-off investment of US$ 100,000 in bitcoin would have been a very small proportion of the salary and bonus income Mr Bosworth and Mr Hurley had been receiving at Arcadia 1 and could foreseeably receive soon after setting up their proposed Arcadia 2. I note that it was the Claimants' submission that it was not in the reasonable contemplation of the parties that Mr Bosworth and Mr Hurley would have committed such large proportions of their disposable remuneration towards speculative high-risk investments as they had claimed. However, on the findings I have made, the investments in bitcoin, Tesla shares and gold would have been one-off investments of relatively modest proportions of Mr Bosworth's and Mr Hurley's disposable remuneration.

866. I conclude that those lost investments are sufficiently proximate to be recoverable. They were natural and foreseeable consequences of the Freezing Order. The parties/accounting experts will need to quantify the compensation due in the light of the conclusion I have reached.

867. Depending on how the calculations of Mr Bosworth and Mr Hurley's lost income from Arcadia 2 work out, the amounts which I have found they would have invested in bitcoin, Tesla shares and gold may well amount to only a part of the 50% referred to in § 339 of Mr Bosworth's evidence quoted in § 441(i) above (bitcoin and gold), the 10% referred to in § 341 (shares) and the 70% riskier investments referred to in § 135 of Mr Hurley's evidence quoted in § 441(ii) above. (I did not understand the Claimants to challenge the broad division of assumed investments set out in those paragraphs of their evidence, aside from the specific challenges made in respect of bitcoin, Tesla shares, gold and business opportunities.) I shall give the parties an opportunity to make further submissions about the consequence of that. My provisional view is that the ARC Equity Index would be a fair measure for those parts of Mr Bosworth's assumed investments over and above the portions assumed to be invested in bitcoin, Tesla shares or gold. The appropriate index by which to estimate the returns to be attributed to the 30% of Mr Hurley's income that Mr Hurley said he would have invested in 'safer' investments was (with the exception of Hammill Brickworks) agreed between the forensic accountancy experts to be the ARC US$-denominated Balanced Asset PCI.

868. Insofar as Mr Bosworth and Mr Hurley said they would have invested in business opportunities (the 20% referred to in § 340 of Mr Bosworth's witness statement and part of the 70% referred to in § 135 of Mr Hurley's witness statement), I have concluded in section (L)(4) above that the ARC Equity Index is not an appropriate proxy. I shall hear any submissions as to how, in those circumstances, the return should be assessed. My provisional view is that their loss of the use of that money falls to be compensated via their claim for interest. Further, though Mr Stern in his calculations used the rate 3% over US Prime, the question of the interest rate was not canvassed in any detail in submissions and I shall therefore give the parties the opportunity to make further submission about that matter too. Submissions may also be appropriate on how to address the question of what proportion of Mr Hurley's 70% should be assumed to have been invested in new business opportunities and what proportion in other 'risker' investment (for which one of the ARC indices might be appropriate). The appropriate index by which to estimate the returns to be attributed to the 15% of Mr Bosworth's income that Mr Bosworth said he would have invested in real estate was agreed between the forensic accountancy experts to be the 'UBS SXI Real Estate Funds ETF', which invests in Swiss property.

(T) KELBRICK: LOSS OF INVESTMENT OPPORTUNITIES

869. I have concluded in section (M) above that, in the counterfactual where no freezing order existed and Mr Kelbrick had been able to pursue Attock Dubai and/or employment opportunities, it is more likely than not that:

i) he would have invested two-thirds of his income, using an 80:10:10 split between low, medium and high risk investments;

ii) as part of the high risk element, he would have invested US$ 1 million in Zenus Bank in November 2023; and

iii) as to the remainder of the investments, compensation should be assessed using the approach set out by Mr Stern referred to in § 520 above, subject to adjusting the assumed returns from Attock Dubai in accordance with my conclusions in section (R) above.

870. I did not understand the Claimants to make any specific objection to Mr Kelbrick's claimed lost investments on the grounds of remoteness. However, I do not in any event consider them too remote. As noted earlier, it was Mr Bosworth's evidence that it is common for people in the oil business to pursue business opportunities outside of trading; and it is not unusual for a high net worth individual to invest a relatively small part of his/her assets in a speculative or volatile sector. By 2023, based on the conclusions I have reached about Attock Dubai in section (R) above, Mr Kelbrick should have been comfortably able to invest US$ 1 million in Zenus Bank as part of a 10% investment allocation to high risk investments. Further, the overall investment strategy he said he would have adopted is unexceptionable and could not be regarded as unforeseeable, and the losses were a natural consequence of the Freezing Order.

871. Accordingly, Mr Kelbrick is in my view entitled to compensation on that basis for lost investment returns on two thirds of his lost income from Attock Dubai, such lost income having been determined pursuant to the conclusions I have reached in section (R) above.

872. As regards the remaining one-third of Mr Kelbrick's lost income, I shall give the parties the opportunity to make further submissions as to the applicable rate of interest, as for Mr Bosworth and Mr Hurley (see § 869 above).

(U) SALE/LIQUIDATION OF THE DEFENDANTS' ASSETS

(1) Mr Bosworth

873. Mr Bosworth claims that he was forced to sell certain assets by reason of the Freezing Order in order to raise money to live on and to pay his legal expenses. These were:

i) a chalet in Verbier in the Swiss Alps, which he sold in October 2016; and

ii) withdrawals from his pensions between 2018 and 2020, which resulted in lost future appreciation and tax liabilities.

874. Mr Bosworth's evidence was that because of the Freezing Order, he had no source of income and needed to sell these assets for the purposes indicated above. But for the Freezing Order, he would not have sold them. He was not challenged on that evidence.

875. The Claimants suggest that (i) to the extent that Mr Bosworth sold assets in order to pay legal fees, it was the proceedings rather than the Freezing Order that caused the loss, and (ii) any such loss was too remote and/or unforeseeable, particularly given that Mr Bosworth was unemployed before the Freezing Order was made.

876. I do not accept those submissions. As to (i), it was Mr Bosworth's unchallenged evidence that but for the Freezing Order he would not have sold these assets. There is no logical reason to draw any distinction in this regard between the costs of legal proceedings and any other outgoings Mr Bosworth had. In both cases, they are outgoings which, in the absence of the Freezing Order, he would have paid from income. As Mr Bosworth put it in his witness statement:

> "During the Freezing Order, I had to live, and I had to pay the costs of the case. But because of the Freezing Order, I had no

> income. So I had to get cash in other ways. One way was to draw down my pensions." (§ 345)

877. On that basis, the 'but for' test is satisfied. Further, as to the Claimants' point (ii), the need for Mr Bosworth to sell assets in this way was a natural and foreseeable consequence of the Freezing Order. It was not suggested to Mr Bosworth that he would have had to sell them anyway because he was in fact unemployed at the time. In any event, on the findings I have made, in the counterfactual Mr Bosworth would, by the times at which he would in fact have sold these assets, been engaged in a profitable oil trading business which would have been producing significant levels and salary and bonuses, and at the very least would have been sufficiently 'bankable' for Mr Bosworth to expect to be able to borrow if necessary in order to pay his legal fees.

878. Turning to quantification of these losses, Mr Bosworth sold the Verbier property on 27 October 2016 for CHF 5,150,000, and paid capital gains tax of CHF 380,359, such that the net sum he received was approximately CHF 4,769,641. Mr Cachemaille estimates that the present value of the property is CHF 7,450,000. Mr Bosworth therefore claims to have suffered a loss of CHF 2,680,359.

879. Mr Cachemaille estimated the present market value of the property by:

i) multiplying the surface area of 224m^2 by a price per m^2 of CHF 34,000, to obtain a value of CHF 7,616,000;

ii) deducting CHF 500,000 to compensate for the absence of a renovation fund; and

iii) adding CHF 330,000 to take account of three indoor parking spaces.

880. Mr Cachemaille also noted in his supplemental report that the chalet had been sold for CHF 2,350,000 in 2003, since when prices in Verbier had risen by more than 300%, and his valuation was in line with that trend.

881. Mr Vago, by contrast, estimated the present "value" of the property as CHF 2,458,000, i.e. barely more than the price for which it was sold 23 years ago and less than half the price Mr Bosworth paid for it ten years ago. However, in speaking of 'value' Mr Vago was not referring to the price the property would achieve on the market: *"[i]t's like comparing apples and pears"*. Instead, he used a form of discounted cash flow analysis that assumed that the value per m^2 of the property would be lower "*at the end of climate change*", which Mr Vago assumed would take 41 years, and discounted the value of the property on that basis due to its anticipated effect on Alpine skiing resorts. However, Mr Vago did not suggest that current market prices reflect the decline he predicts, and accepted that the market at the present date does not take account of climate change. That was also the evidence of Mr Cachemaille, who noted that even in recent years when climate change has been well known, prices in Verbier have increased by 44% since 2016 and by 30% since 2020.

882. The Claimants submit that Mr Cachemaille's valuation should not be accepted on the basis that:

i) His valuation was inconsistent with and significantly higher than the comparables he identified. The chalet is now 24 years old and falls into the

category of an 'old construction' (based on the IMBAS Fahrlander report data on which Mr Cachemaille relied). The transaction data for Verbier records the median value per m^2 for an 'old' construction at CHF 20,700. Mr Cachemaille's value per square metre of CHF 34,000 is 70% higher than that, and also significantly higher than the average value of a new property (CHF 23,692 per m^2), and well above the highest transacting prices recorded in the region which stand at around CHF 28,000 to CHF 29,000 for old constructions and CHF 31,000 for new constructions. Mr Cachemaille's value was also significantly higher that the corresponding values of all but one of the comparables he identified, which in reality are derived from asking prices identified on property advertisement websites and which he accepted are likely to be inflated. The values of the comparables identified in his main report (notwithstanding they are based on the asking prices) were lower at CHF 21,880 per m^2 (some 55% lower), CHF 22,680 per m^2 (some 53% lower) and 26,080 per m^2 (some 46% lower). The value of the comparable identified in his supplementary report (again based on the asking price) was also lower at 26,000 per m^2 (some 46% lower).

ii) The closest in value to Mr Cachemaille's valuation was a brand-new construction. However, that was not a proper comparable at all: it relied on the asking price (rather than the transaction data) and in any event was the outlier against the remainder of the values provided. Mr Cachemaille did not identify a single comparable property which, based on the transaction price rather than the asking price, had a value per m^2 figure similar to the value allocated by him.

iii) Mr Cachemaille allocated a value of CHF 110,000 to each parking space of the Verbier property. However, in his supplementary report, Mr Cachemaille concedes that the parking spaces "*do not comfortably accommodate modern-sized vehicles*", but did not apply any discount.

iv) Mr Cachemaille did not apply any discount or sensitivity analysis to account for climate change. He did not even carry out any considered analysis of the possible impact of climate change notwithstanding he accepted that Swiss federal agencies had published findings as to the effects of climate change on ski resort properties.

v) Mr Cachemaille applied a 'gross surface' area (on the basis that this is the correct standard for Valais) rather than the net surface area (prescribed by the SIA 416 standard) notwithstanding that the IMBAS Fahrlander report itself notes the SIA 416 standard.

vi) For each of the Swiss properties he valued, Mr Cachemaille's report stated that it had been drawn up "*without a visit*". In cross-examination, Mr Cachemaille suggested he had in fact conducted an external site visit "*in the beginning of the year*". However, he did not refer (either in his main report or his supplementary report) to any external site visit nor did he record the findings of such a visit (such as for example, as Mr Vago reported in respect of the Verbier property, that access is via a steep, narrow path in a cul-de-sac). In addition, Mr Cachemaille relied on surface areas, photographs and descriptions from sales brochures prepared several years ago. He did not draw up his own plans from official land registry documents as Mr Vago did.

883. As to those points:-

i) The comparables data has to be read in the light of two important factors, which Mr Cachemaille highlighted. First, unlike in the UK, sale prices in Switzerland are not public, so valuers generally have to work without any complete set of transaction data. Second, as noted on the comparables data page in Mr Cachemaille's first report:

> "Verbier is a very special market, with prices ranging from CHF 20,000 to CHF 40,000 depending on the location. The statistical data above, which reflects an average for the village, should be treated with caution."

Mr Cachemaille said in cross-examination:

> "Verbier is quite a specific location; okay? It's one of the most prestigious mountain resorts in Switzerland ... And the prices, they differ on which location you are in the village. If you're in a certain area, it could be CHF20,000, and if you're in the best location, it would be 40. And just take into consideration that statistics, those statistics, are made on all the village, okay, and it's not really on the spot of the specific flat that has been evaluated."

Mr Cachemaille said he was able to visit and appreciate the location and surroundings of the Verbier property (described by Mr Bosworth in his witness statement as having "*the most wonderful view of the valley*"), and said:

> "Verbier is so specific. You really have to know each chalet, each street to really know the best locations and which are really sought after and those who are not attractive or less attractive for people. And this chalet is particularly in one of the best place on Verbier and it's really, really sought after."

ii) Relying on asking prices as well as actual transaction prices is appropriate because (a) as noted above, transaction prices are generally not public and (b) Mr Cachemaille's evidence, which I accept, was that in Verbier properties do not in practice sell for less than the asking price. The fact that Mr Bosworth's chalet is now an 'old' property is taken into account as part of Mr Cachemaille's overall assessment of its value, particularly given its location, and by his having applied at CHF 500,000 renovation discount.

iii) As to parking spaces, each of the three spaces was allocated a value of CHF 70,000 in the 2016 valuation done at the time Mr Bosworth bought the chalet, and CHF 110,000 by Mr Cachemaille now. Mr Bosworth said having three spaces was rare in Verbier. Mr Cachemaille accepted that, measured against current standards, the spaces do not comfortably accommodate modern-sized vehicles. Mr Cachemaille said he did not, however, reduce his valuation because in practice the buyer would have to accept the price set by the seller. I am not sure that completely answers the point, and for present purposes think it

appropriate to discount the value attributed to each space by CHF 20,000, i.e. a total of CHF 60,000.

iv) Since the objective here is to estimate the loss Mr Bosworth has in fact suffered, in my view the best measure is the price at which a party could be expected to buy or sell the property in the open market today, rather than a theoretical figure based on an objective value that the market in some sense 'should' attribute to the property. Mr Cachemaille's opinion took the former approach whereas Mr Vago's did not. To the extent that climate change in fact affects the current market value of the property, that value can be assumed to be reflected in the actual comparables cited by Mr Cachemaille and hence in his valuation of the property.

v) The comparables which Mr Cachemaille considered were in Verbier, in the Valais canton. He explained that, despite the USPI recommendation, the convention in Valais (and in Geneva) is to work on the gross area, and that it would be a "terrible mistake" to treat comparable properties in Valais as showing values based on the net area: they are based on the gross area.

vi) Mr Cachemaille explained that by "*without a visit*" he meant that it had not been possible to view inside the properties, as they were in new ownership. However, he visited each site and was able to appreciate the location and surroundings, apart from the Denens property which was fenced off. He accepted that he had not in his report stated that he had visited the properties or recorded any observations, but confirmed that he had taken his external visits into account in estimating the values. I accept that evidence. The point about the absence of floor plans was put to Mr Cachemaille in relation to Mr Kelbrick's former property, which I consider below.

884. I therefore accept Mr Cachemaille's valuation, subject only to a CHF 60,000 discount in respect of the parking spaces.

885. Mr Bosworth withdrew a total of £1,188,701.60 from his pensions between 2018 and 2020. The accountancy experts agree that, had this sum remained invested, it would have grown by a further £689,887 (equivalent to USD 928,515) by 31 December 2025.

886. In addition, Mr Bosworth became obliged to pay tax on the withdrawals from his pensions of up to 35%, which Mr Stern has calculated amounts to £416,045 (equivalent to USD 561,661). Mr Dearman notes that there may have been tax payable in any event on Mr Bosworth making withdrawals at a later date, and that the relevant tax rates may have changed over time, but he does not quantify the effect (if any) on Mr Stern's calculations. In the Joint Memorandum, the accountancy experts say:

> "The Experts agree that while the eventual withdrawal of D1 and D2's pension funds in the Counterfactual Scenario may potentially give rise to a tax liability, they are not pensions or tax experts and are, therefore, not able to assess the likely value, if any, of such a future liability. Furthermore, the Experts are not in a position to forecast any changes to the tax rates applied to such income."

887. In my view, there is not a sufficient evidential basis for me to conclude that the tax Mr Bosworth in fact incurred was any higher than he would in due course have incurred anyway. I therefore conclude that he should be compensated for the £689,887 or USD 928,515 loss (as at 31 December 2025) but not in respect of tax.

(2) Mr Hurley

888. Mr Hurley too claims that he was forced to sell certain assets by reason of the Freezing Order in order to raise money to live on and to pay his legal expenses. These were:

i) a house in Denens in the Vaud canton of Switzerland, which he and his wife sold in December 2022; and

ii) withdrawals from his pensions and investments between 2020 and 2024, which resulted in lost future appreciation and tax liabilities.

889. Mr Hurley's evidence in relation to the Denens property was that *"when the bank heard about the Mareva, they foreclosed on the mortgage. They put us on notice, and significantly increased the mortgage payments. Those payments somewhere between doubled to trebled. That increase made it unaffordable given I was also not able to earn any income. So the only option ultimately became to sell it"* (Hurley seventh witness statement § 168). That evidence was not challenged. In relation to the pensions and investments, Mr Hurley said that the Freezing Order prevented him from earning an income (in the various ways set out in his evidence and which I have already considered and accepted). As a result, his finances were extremely stretched, and ultimately he was forced to make withdrawals from his pensions to meet his obligations (including payment of his legal costs). If the Freezing Order had not been in place, he would have been able to earn an income and he would not therefore have needed to make the withdrawals.

890. I accept that evidence. Further, for substantially the same reasons as apply to Mr Bosworth, I do not accept the Claimants' submissions about the cause of the loss or that it was too remote and/or unforeseeable.

891. Turning to quantification, Mr Hurley and his wife sold their property at Denens on 14 July 2022 for CHF 6,500,000. The proceeds – net of the mortgage debt (CHF 2,901,618), taxes and transactions costs – were CHF 3,040,475 of which Mr Hurley was entitled to half (CHF 1,520,237).

892. When the net sum was eventually paid to Mr Hurley and his wife in March 2025 (the delay resulting from the Claimants' having asserted a proprietary claim to them since 2022), Mr Hurley's Swiss notary, Mr Damien Ventura, deducted a further CHF 32,054 in respect of his work, and the work of his lawyers.

893. Mr Cachemaille estimates that the present value of the Denens property is CHF 7,160,000. That valuation was made using a 'intrinsic' or 'cost' valuation, according to Swiss Valuation Standards (SVS) on "*Best Practice of Real Estate Valuation in Switzerland*", and using prices for comparable properties to sense check his valuation (which is recognised under the SVS as a "*sales comparison method*").

894. Taking into account the mortgage debt of CHF 2,901,618 produces a value of CHF 4,258,382, of which half would – but for the Freezing Order – still be owned by Mr Hurley. The value of Mr Hurley's share would therefore be CHF 2,129,191. Mr Hurley claims compensation for the difference between CHF 2,129,191 and CHF 1,520,237, namely CHF 608,954.

895. Mr Cachemaille reached his estimate of the property's value by adding together the value of the land, the house, the garage, the landscaping and the swimming pool. The estimate accorded with the trend for property prices in the area gradually to have increased. Mr Cachemaille used the "*cost approach*" to value this property, which is recognised in the Swiss Valuation Standard.

896. Mr Vago estimated the present "value" of the property at CHF 4,444,000, notwithstanding that it achieved a higher price in 2022 (CHF 6,500,000) and in 2012 (CHF 5,200,000).

897. The Claimants submit that Mr Cachemaille's valuation was flawed because:

i) The 'intrinsic value' method that Mr Cachemaille applies was based on the land value and the cost of constructing the property from scratch. It assumed that value increases linearly to the buyer with cost, which Mr Cachemaille accepted it does not. The method has been criticised in Switzerland. Mr Cachemaille accepted that although this method was popular in Switzerland "ten years ago, 15 years ago", that is changing and it is not always credible.

ii) In arriving at his value through the 'intrinsic value' method, Mr Cachemaille's report suggested that the relevant costs were "*calculated by reference to figures available in official publications*". However, he did not specify which publications these were or provide copies of them. Further, in cross-examination, Mr Cachemaille's evidence was that he had taken the figures and made tweaks or alterations (which he suggested were "an appreciation") without providing details. Absent the sources of the figures used by Mr Cachemaille or any details of the changes he has made to them, Mr Cachemaille's valuation should be treated with scrutiny and a discount should be applied to account for any inaccuracies.

898. Since there was an actual sale for CHF 6,500,000 in December 2022 and there has been a gradual upward trend in prices in the area since then, Mr Cachemaille's valuation of CHF 7,160,000 (a ten percent increase over three years) seems unlikely to be far out. He explained that the intrinsic value methodology, though not the only method, gave a good indication of the value of the property (Day 7/194). His adjustments to the publicly available figures, were "*an appreciation*" based on the quality of the particular property, and likewise when considering certain comparators (which had slightly lower implied per m^2 values). I see little force in the Claimants' complaint that Mr Cachemaille had not provided detailed sources or workings, when what in substance was involved was an exercise of professional judgement and was consistent with the general upward trend following an actual transaction in 2022. I therefore accept his valuation and the resulting loss calculation.

899. Mr Hurley withdrew a total of £1,199,350.08 from his pensions and investment accounts between 2020 and 2024. Mr Stern calculated that, had that sum remained

invested, it would have grown by a further £892,766 (equivalent to USD 1,201,569) by 31 December 2025. Overall, Mr Dearman agreed with this calculation, though he noted that he has not seen documentary evidence that all the funds (in respect of the Arcadia Singapore and ReAssure pension schemes) were in fact withdrawn. However, there was evidence before me of those withdrawals in Mr Stern's report and bank statements (respectively).

900. Mr Hurley also incurred a tax liability of £319,610.69 in respect of his withdrawals other than those from his Arcadia Singapore pension. Assuming that tax applied to withdrawals from the Arcadia Singapore pension in the same proportion as it did to Mr Hurley's other withdrawals, Mr Stern calculated a further tax liability of £388,589 (equivalent to USD 524,595). However, as with Mr Bosworth, there is in my view not a sufficient evidential basis for me to conclude that the tax Mr Hurley in fact incurred was any higher than he would in due course have incurred anyway. I therefore conclude that Mr Hurley should be compensated for the £892,766 or USD 1,201,569 loss (as at 31 December 2025) but not in respect of tax.

(3) Mr Kelbrick

901. Mr Kelbrick claims that was forced to sell certain assets by reason of the Freezing Order in order to raise money to live on and to pay his legal expenses. These were:

i) a chalet at the Alpine resort Haute-Nendaz in the Valais canton of Switzerland, which he sold in June 2020; and

ii) shares in Navig8 Limited, which he sold in 2020.

902. Mr Kelbrick's evidence in his witness statement is that:

> "I sold Chalet Lily to cover the legal costs arising from the Proceedings and the Freezing Injunction. As my income dwindled, and I began to appreciate how long the Proceedings might take and how much they might cost, I began to consider how I might realise cash from some of my assets. Chalet Lily was my family's ski chalet and while it was not in frequent use, I would rather not have sold it. But by 2020, the Proceedings had been ongoing for 5 years and the Freezing Injunction had remained in place for that entire period. Without the means to earn a living, I was running out of the means to continue to pay my lawyers. I was also concerned about being able to meet the not inconsiderable running and maintenance costs of the chalet. There was an outstanding mortgage, and I recall that the wood that the chalet was made of required varnishing, at a cost of, I think around CHF 26,000. At the time, I did not think my family and I had the money to pay. The sale became necessary to meet those obligations." (§ 105)

and:

> "In 2020, as I was unable to earn a proper income given the direct impact of the Freezing Injunction, I had no alternative but to sell

> my Navig8 shares for around US$1.3 million to cover my legal costs in these Proceedings. This sale valued the shares at approximately US$2,669 per share. I sold the shares because I needed the cash. I would not have sold these shares at that time had I had a regular source of income, and would likely have held them to this day." (§ 103)

903. I accept that evidence. Further, for similar same reasons to those applicable to Mr Bosworth and Mr Hurley, I do not accept the Claimants' submissions about the cause of the loss or that it was too remote and/or unforeseeable. I have concluded that by 2020, when he sold these assets, Mr Kelbrick would, but for the Freezing Order, have been continuing to operate Attock Dubai very profitably for some years.

904. Mr Cachemaille estimated Chalet Lily's current value at CHF 1,570,000, based on an intrinsic or cost-based valuation, using comparables as a sense check.

905. The Claimants submit that Mr Cachemaille's valuation was flawed because he:

i) (as with Mr Hurley's property) relied on figures taken from official publications which he adjusted but without providing the sources for those figures or the alterations he made;

ii) used the flawed 'intrinsic value' method, albeit in this instance his valuation was in line with the comparables;

iii) relied, in the absence of floor plans, on an assumption as to floor area previously made by Savills rather than drawing up his own plans from official land registry documents as Mr Vago had done;

iv) looked at the 'gross surface area' rather than the SIA 416 standard measure of the net surface area; and

v) failed to apply any discount or sensitivity analysis to account for the impact of climate change.

906. I do not accept points (i) and (ii) above, for the same reasons as apply to Mr Hurley, and consider that the closeness of Mr Cachemaille's estimate to the comparables in this instance tends to support his methodology. I do not accept point (iv) for the same reason as applies to Mr Bosworth's former property, both properties being in the Valais canton. I do not accept point (v), for the same reasons as apply to both Mr Bosworth's and Mr Hurley's properties. As to point (iii), Mr Cachemaille explained in cross-examination that:

> "So in the absence of a visit and in the absence of plans, we have to rely on documents and numbers that we have. For this one, Chalet Lily is a quite tricky one because there are plans, so surfaces everywhere in the house. It's quite complicated. So without plans, it's difficult to have a certainty about this -- this number." (Day 7/151)

and that he considered that it would be too complicated and imprecise to attempt a measurement based on land registry records as Mr Vago had done (ibid.). Moreover, Mr Vago's estimated areas was in fact the same as the one Mr Cachemaille had adopted, viz 180m^2. Mr Vago said that he had included the walls, but that is consistent with the use of the gross area approach used in Valais. In all the circumstances, I accept Mr Cachemaille's estimate.

907. Mr Kelbrick sold his (and/or his companies') 500 A and Preference shares in Navig8 Limited (Navig8) for approximately $1.3 million in 2020. He claims for $6,770,000, being the difference between the price at which he sold the shares, and their current market value.

908. The current value of the Navig8 shares according to Mr Stern is U$8,104,000, based on the price paid by the Abu Dhabi National Oil Company for the purchase of Navig8 TopCo Holdings Inc in January 2025. Following service of Mr Dearman's supplemental report, by letter dated 28 April 2026, Reed Smith confirmed that Mr Dearman recalculated Mr Kelbrick's loss in respect of Navig8 at US$6,894,361 (i.e., $124,361 higher than Mr Stern's calculation). In the circumstances, I accept Mr Stern's calculation of the loss at US$ 6,770,000.

(V) MONITORING FREEZING ORDER AND OTHER COSTS

909. Mr Bosworth employed an accountancy firm called Bruellan Associates to ensure that he remained compliant with the Freezing Order. Their total invoices in respect of the Freezing Order were CHF 40,000 (equivalent to USD 43,853), as verified and agreed by the accountancy experts. Mr Bosworth said that, but for the Freezing Order, he would not have incurred these costs. The Claimants accepted this claim in their written opening.

910. Mr Bosworth also claims that, as a result of the financially precarious position that the Freezing Order put him in, he (i) instructed Mt Fort Advisers in 2023 to seek to obtain additional financing secured against his residence in Switzerland; (ii) instructed Rey Property Consulting in 2024 to obtain a mortgage over his property in Ibiza; and (iii) was unable to make regular repayments in respect of the mortgage on his home in Switzerland, such that he was charged penalty interest in 2025. His evidence on these matters was not challenged. The accountancy experts agree that costs in question were: (i) CHF 4,846.50 (equivalent to USD 5,397); (ii) €10,781.10 (equivalent to USD 11,664); and (iii) CHF 454,562.65 (equivalent to USD 548,710). The total is US$ 565,771. I am satisfied that those costs would not have been incurred but for the Freezing Order, and that they were foreseeable and not too remote. I shall allow these claims.

(W) GENERAL DAMAGES

911. Mr Bosworth and Mr Hurley submit that the Freezing Order had a profound effect on their day-to-day lives, for which they seek compensation in an amount to be assessed by the court. They say the Claimants engaged in surveillance of them with drones and placed intolerable pressure on them and their families.

912. Given the severity of the Freezing Order's effects upon Mr Bosworth and Mr Hurley the immense pressure that the Claimants applied to them, over the course of a decade,

it is submitted that the sum of US$ 2,000 per week, or US$ 8,000 per month, to each of Mr Bosworth and Mr Hurley, would be appropriate. US$ 2,000 was the sum which Mr Bosworth and Mr Hurley were allowed to spend per week towards their ordinary living expenses pursuant to Teare J's order. They maintain that this is the appropriate measure because the Freezing Order destroyed their lives for a decade. In round terms, US$ 2,000 a week over ten years would amount to US$ 1 million each.

913. Mr Kelbrick seeks a sum in excess of US$ 1 million. He says the Freezing Order destroyed his professional and personal life, and that he should recover at least US$ 2,000 a week, which was the maximum living expense he was permitted under the order, on the same basis as Mr Bosworth and Mr Hurley. Mr Kelbrick submits that such a figure would fairly reflect the length of time for which the order was imposed and the considerable distress caused to him and his family. He and his family were concerned that he might go to prison, because of the penal notice on the order. Shortly after the proceedings and the Freezing Order, Mr Kelbrick was prescribed anti-depressants. His daughter suffered with anorexia and was admitted as an inpatient to (costly) psychiatric hospitals on multiple occasions, which conditions were, he says, at least exacerbated by the Freezing Order and the proceedings. Mr Fasinro gave uncontested evidence that the order had *"a devastating impact on [Mr Kelbrick's] health and wellbeing, including on his relationship with his wife, Claire, and their children*". In his lay opinion, Mr Fasinro thought Mr Kelbrick suffered from depression as a result of the Freezing Order and the proceedings.

914. The Claimants do not challenge the Defendants' evidential account of the effects of the Freezing Order on each of them personally, or that the court can properly award compensation for that. They submit that the appropriate level should, however, be no more than £100,000 per Defendant. That is on the basis that (even if such loss can be proved), the damages award should be modest: see *Mints* (quoted in § 570 above) and *Abbey Forwarding* (where damages of £750 per month were awarded).

915. The Claimants make the point that in relation to any general reputational damage, the court must also be satisfied that the stigma was caused by the restraint which the Freezing Order imposed on the Defendants, and not other factors such as the proceedings. Further, any such damage caused by a misconception amongst third parties that the Freezing Order lent credence to the allegations of dishonesty against the Defendants (especially if sophisticated or well-advised) should also be treated as irrecoverable under the cross-undertaking (citing *Harley Street*, which I considered earlier).

916. The Claimants take issue with some of Mr Bosworth/Mr Hurley's complaints about the manner in which the Claimants "policed" the Freezing Order. They submit that general allegations about surveillance and threats of a private prosecution are not compensatable under the cross-undertaking. Mr Bosworth also alleges that the Claimants made claims that he had breached the Freezing Order which were untrue, and implies that the application by Jones Day to that effect in 2019 was therefore inappropriate and motivated by an improper desire to put pressure on Mr Bosworth and his family. However, the Claimants say, there is no proper basis on which to conclude that the application was inappropriate or improper.

917. Further, the Claimants engaged Diligence, a firm of corporate investigators. However, they deny that they acted wrongfully as to the notification of third parties of the order.

They also defend their approach to Mr Hurley's sale of his property, Chemin du Bonderet, on the basis that they were concerned that there might be a proprietary claim to the proceeds of sale.

918. The Claimants submit that, should the court find that losses were caused by the way in which they operated the Freezing Order, then any associated damage should be accounted for as part of the award of general damages, rather than making a separate award of aggravated damages (citing *Abbey Forwarding* at [118] and [121]).

919. This is *par excellence* an area where the court must apply a 'broad axe'. The Claimants have accepted the Defendants' basic account of the effects of the Freezing Order on their lives. It is not appropriate for the court to seek to resolve detailed disputes about the manner in which the Freezing Order was policed. I also have to bear in mind that (a) some of the distress caused to the Defendants and their families is bound to have resulted from the proceedings as distinct from the Freezing Order, (b) the length for which the Freezing Order was in place was in large part driven by Mr Bosworth/Mr Hurley's decision to mount a jurisdiction challenge, which was ultimately pursued all the way to the CJEU and back again, and (c) elsewhere in this judgment I have concluded that the Defendants are entitled to very substantial sums of money to compensate for their primary losses resulting from the Freezing Order. Against that, it remains the case that the Claimants maintained the Freezing Order during that whole period, on the basis of a claim that turned out to be baseless, and it undoubtedly had a profound effect on the Defendants' lives. In my view, these circumstances call for significant compensation to the Defendants, albeit not at the levels sought. I consider the appropriate award to be US$ 250,000 to each of Mr Bosworth, Mr Hurley and Mr Kelbrick.

(X) APPLICATION TO SET ASIDE COSTS ORDERS

(1) Overview of Mr Bosworth's/Mr Hurley's application

920. On 6 March 2015, the Claimants served the Claim Form on Mr Bosworth and Mr Hurley. On 9 March 2015, Mr Bosworth and Mr Hurley applied for an order that the claims against them be dismissed on the grounds that the English Court had no jurisdiction. Mr Bosworth and Mr Hurley relied on the witness statement of Ms Mona Vaswani dated 9 March 2015 ("*Vaswani 1*"). In summary, Vaswani 1 advanced the point that Mr Bosworth and Mr Hurley were domiciled in Switzerland, and that the English court had no jurisdiction by virtue of Articles 18(1) and 20(1) of the Lugano Convention.

921. Vaswani 1 set out the bases upon which the Claimants sought to found the court's jurisdiction as follows at § 17: *"[t]he first is that Arcadia London has suffered damage within the jurisdiction. The Claimants rely on Article 5(3) of the Lugano Convention for this purpose. The second is that there are 'anchor defendants' within the jurisdiction […] The Claimants here rely on Article 6(1) of the Lugano Convention."*

922. The key provisions of the Convention were these:

i) Article 5(3) provides that *"[a] person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued […] in*

matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur".

ii) Article 6(1) provides that *"[a] person domiciled in a State bound by this Convention may also be sued […] where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*".

iii) Article 18(1) provides that *"[i]n matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Articles 4 and 5(5)."*

iv) Article 20(1) provides that *"[a]n employer may bring proceedings only in the courts of the State bound by this Convention in which the employee is domiciled".*

923. To prevail in the jurisdiction challenge, the Claimants had the burden of demonstrating a good arguable case that the English court had jurisdiction. Accordingly, it was necessary for the Claimants to demonstrate both: (i) a good arguable case that Articles 5(3) and/or 6(1) applied; and (ii) a good arguable case that Articles 18(1) and 20(1) did not apply.

924. A summary of the jurisdiction challenges is provided in [2021] EWCA Civ 687 (14 May 2021) at [22]-[29]. In short, on 1 April 2015, Burton J dismissed Mr Bosworth and Mr Hurley's jurisdiction challenge ([2015] EWHC 1030 (Comm)). That decision was upheld by the Court of Appeal on 19 August 2016 ([2016] EWCA Civ 818). On further appeal to the Supreme Court, the Court made a reference to the CJEU on a question concerning the Lugano Convention. Following the CJEU's decision, the Supreme Court remitted the case to the Commercial Court. Sir Michael Burton GBE handed down the Judgment on 19 October 2020 dismissing the jurisdiction challenge, and that decision was finally upheld by the Court of Appeal at [2021] EWCA Civ 687.

925. Mr Bosworth and Mr Hurley submit that those judgments and the relevant costs orders were obtained by means of the allegations referred to in §§ [138(i) to (v)] above. Mr Bosworth and Mr Hurley submit that the Claimants thereby *"consciously and deliberately made dishonest representations to the Court"* (Amended Particulars § 108). Accordingly, the judgments and orders should be set aside following the principle that *"fraud unravels all"* (*Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450 at [43]-[46]), and/or pursuant to CPR 40.8A and/or 3.1(7). For convenience, I shall refer to Mr Bosworth and Mr Hurley as "*the Defendants*" in the remainder of this section.

(2) Applicable principles

(a) Applications to set aside on ground of fraud

926. To set aside a judgment for fraud, the following elements must be established:

i) conscious and deliberate dishonesty by the winning party (or someone for whom it has taken responsibility);

ii) that the dishonesty was "material" to the Court's judgment; and

iii) that the evidence or material relied upon by the applicant to set aside the first judgment was not available to him at the time the first judgment was given.

927. CPR 40.8A provides that a party against whom a judgment has been given or an order made may apply for relief "*on the ground of matters which have occurred since the date of the judgment or order*". CPR 3.1(7) also gives the court the power to vary or revoke an order, but where CPR 40.8A is applicable, that is the power under which the application should be made: *Cabo Concepts Ltd v MGA Entertainment (UK) Ltd* [2026] EWHC 768 (Ch) at [78], per Bacon J; *Motorola v Hytera* [2025] EWCA Civ 1667 at [113]-[114].

928. Where the original judgment has been unsuccessfully appealed (without knowledge of the fraud), the court may set aside appellate orders upholding the original judgment: Grant & Mumford *Civil Fraud* 1st Ed. at [38-026]; *Kuwait Airways Corp v Iraqi Airways Co* [2003] 1 Lloyd's Rep 448.

929. The test for materiality was stated in *Royal Bank of Scotland Plc v Highland Financial Partners LLP* [2013] EWCA Civ 328 at [106]:

> "The principles are, briefly: first, there has to be a "conscious and deliberate dishonesty" in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be "material". "Material" means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence." (footnotes omitted)

That statement of the principles was stated and approved, albeit *obiter*, by Lord Kerr in *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450 at [57], with whom the majority of the Supreme Court agreed.

(b) Dishonesty

930. Cogent evidence is required to justify a finding of fraud or other discreditable conduct, and this must be commensurate with the seriousness of the allegation: *Jafari-Fini v Skillglass Ltd*. [2007] EWCA Civ 261 at [73] *per* Moore-Bick LJ, and *JSC BTA Bank v Ablyazov* [2013] EWHC 510 (Comm) at [76]. This approach "*reflects the court's conventional perception that it is generally not likely that people will engage in such conduct*": *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [1438].

931. Motive is an important consideration and an appropriate starting point: see *Innovate v University of Portsmouth* [2024] EWHC 35 (TCC), where dishonesty was considered in the context of a contractual claim (at [279] and [285]). Motive was described in *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch) at [858] as *"a vital ingredient of any rational assessment"* of dishonesty. If a motive cannot be detected or plausibly suggested, then a wrongful intention (to tell a deliberate lie in order to deceive) is less likely; and *"[t]he less likely the motive, the less likely the intention to deceive"*: *Mortgage Agency Services Number One Ltd v Cripps Harries LLP* [2016] EWHC 2483 (Ch) at [88].

932. In addition to any incentives for dishonesty, assessing a party's motive requires taking into account the disincentives; this includes the *"disinclination to do that which is immoral, but also the risk of incurring long-term damage to the commercial reputation of a business enterprise, and the personal risks to the careers and even liberty of the individuals involved, if found out and brought to justice*": *Bank of Tokyo-Mitsubishi* at [858].

933. The starting point indicated above means that even on the civil burden of proof, the evidence needed must be all the stronger: *Fiona Trust* at [1438], citing *Markel v Higgins* [2009] EWCA Civ 790 at [50] *per* Rix LJ. Mere carelessness or negligence is not sufficient: *Innovate* at [265]. It is not open to the court to infer dishonesty from facts which are consistent with honesty or negligence: there must be some fact which tilts the balance so as to justify a finding of dishonesty, and this fact must be both pleaded and proved: *Three Rivers District Council v Bank of England* [2003] 2 A.C. 1, [55]-[56] per Lord Hope and [184]-[186] per Lord Millett.

934. It was suggested in *Jafari-Fini* at [49] that unless the court is dealing with known fraudsters, it should start from a strong presumption that the innocent explanation is more likely to be correct. However, that statement needs to be treated with some caution, bearing in mind the later observations in *In re B* [2009] 1 AC 11 that *"[i]t would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred"* ([15] *per* Lord Hoffmann) and that *"there is no logical or necessary connection between seriousness and probability"* ([72] *per* Lady Hale). Further, it was stated in *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 294E-F that where a party has not pleaded a positive case that the relevant individuals held an honest belief in the relevant allegations, and did not call those individuals to provide evidence of any such belief, the court should not assume such a belief. I would add that it does not follow, in those circumstances, that the court should assume a lack of honest belief: it should form a view on the basis of all the available evidence, including any adverse inference that it may be appropriate to draw.

935. It is legitimate to have regard to other findings of dishonesty when considering the inherent probabilities of the same individual having behaved dishonestly in other respects: *Fiona Trust v Privalov* [2010] EWHC 3199 (Comm) at [1440]-[1441].

936. It has been observed that witnesses can "*misremember*" and *"[s]ometimes they convince themselves of what they think must have happened, and their memories conform to that"*, so that "*false memories can easily take the place of genuine ones, and can be as convincing as any to the witness*": *Rogers v Wills* [2025] EWHC 1367 (Ch) at [22]. This is "*not unexpected*" where witnesses have had a long time to think about events that happened many years ago: *Cotham School v Bristol City Council* [2025] EWHC 1382 (Ch) at [81].

937. The process of civil litigation subjects the memories of witnesses to powerful biases and introduces considerable interference with accurate recollection: *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [19]–[20].

938. The evidential rule in respect of drawing adverse inferences from the absence or silence of a witness is a "*fairly narrow one*" and "*the drawing of such inferences is not something to be lightly undertaken*": *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [154(i)]. It is for the party seeking the inference to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the absent witness would have material evidence to give on that issue and (iii) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue: *Magdeev* at [154(ii)].

939. There must be some evidence adduced by the party seeking the inference: in other words, there must be a case to answer on that issue: *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 at p.340 per Brooke LJ. If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified: *Wisniewski* at p.340.

(c) Attribution

940. Where allegations of dishonesty are made against corporations, it must be shown that the dishonesty was evidenced through one or more natural persons: *Morjaria v Mirza* [2025] EWHC 1961 (Ch) at [586].

941. Attribution must be established, the question for the court being *"whose act or knowledge or state of mind is for the purpose of the relevant rule to count as the act, knowledge or state of mind of the company"*, a context-specific question: *Bilta (UK) Ltd (In Liquidation) v Nazir* [2016] A.C. 1 at [41]. The answer to the question of attribution is generally found in (i) the primary rules of attribution under the company's constitution or under company law, and (ii) the general rules of agency and vicarious liability: *Bilta* at [67], citing the Privy Council decision in *Meridian Global Funds Management Asia Ltd v The Securities Commission* [1995] 2 A.C. 500. *Bowstead & Reynolds on Agency* (23rd Ed, 2023) at [1-028] notes that it does not follow that "*everything shareholders or directors do is as agent for the company*". In principle that statement appears cogent, since under ordinary company law principles an

individual director, other than chief executive officer or equivalent, does not necessarily have power to act on the company's behalf.

942. In exceptional cases the court will "*fashion a special rule of attribution for the particular substantive rule*": see *Meridian* at p.507B and E, and *Bilta* at [190]-[191], which entails the identification of the 'directing mind and will' of the company for the purpose in question: see *Bilta* at [202]:

> "It is clear from those cases that a finding that a person is for a specific purpose the "directing mind and will" of a company, when it is not merely descriptive, is the product of a process of attribution in which the court seeks to identify the purpose of the statutory or common law rule or contractual provision which might require such attribution in order to give effect to that purpose."

943. A 'shadow director' is "*a person in accordance with whose directions or instructions the directors of a company are accustomed to act*": section 251 of the Companies Act 2006. The identification of a 'shadow director' entails ascertaining whether that particular individual exercised "*real influence in the corporate affairs of the company*": *Smithton Ltd v Naggar* [2013] EWHC 1961 (Ch) at [54] by reference to the decision of Morritt LJ in *Secretary of State for Trade v Deverell* [2001] Ch 340. *Palmer's Company Law* notes at [8.218] that, for this to be the case, "*the whole board, or at least a consistent majority…has to act in accordance with the shadow director's instructions or directions*."

944. The Defendants also relied on *Odyssey Re (London) Ltd v OIC Run Off Ltd* (13 March 2000, unrptd., CA), citing the summary in *Grant and Mumford "Civil Fraud" (1st ed.)* § 38-027-028:

> "What of the situation where the earlier judgment has been obtained as a result of the fraudulent evidence (or suppression of facts) of or by a witness who is not himself the party in whose favour the judgment was given? A number of propositions can be stated:
>
> (1) It is necessary for the fraud which was an operative cause of the judgment to be that "of the party" to the proceedings. Accordingly, the fraudulent evidence or concealment of a "mere witness" cannot be a basis for setting aside a judgment.
>
> (2)Where the party is a natural person, it appears to be the settled position that, for the relevant evidence to be treated as that of the party, the party must have suborned or knowingly adopted the false evidence.
>
> (3)Where the party is not a natural person (the most obvious example being a company), it is not enough that the witness gives evidence "on behalf of" the company: the general position is that "a person who gives evidence on behalf of a company does not do so as its agent"

> (4) Equally, it would not appear to be necessary to go as far as to show that the company suborned the false evidence or adopted it knowing of its falsity.
>
> The question of when the evidence of a witness will be attributed to a company (or other non-natural person) for these purposes is more difficult to pin down. The leading authority is the decision of the Court of Appeal in *Re Odyssey (London) Ltd v OIC Run-Off*, where the outcome of the later fraud proceedings turned (in part) upon the question of whether the perjured evidence of a witness at the first trial could be treated as that of the party who had succeeded. The dishonest witness had been director and general manager of the previously successful party at the time the relevant event had occurred, but by the time he came to give evidence he had retired. It was held that, even though the company did not know of his perjury, nonetheless his evidence should be attributed to it. The majority of the Court of Appeal said the relevant question was whether the witness had the status (as opposed to the authority, which was a misleading concept in the relevant circumstances) necessary to make his evidence that of the company. This is obviously an open-textured question which allows for a range of considerations to be taken into account; but material pointers towards the conclusion that the witness's evidence should be treated as that of the company included, on the facts of that case: the centrality of the witness to the success of the case (he was a "vital" witness); the fact that the witness, although no longer part of the organisation, had been personally responsible for the relevant transaction about which he gave evidence; and the fact that he subsequently became part of the litigation effort (as opposed to just a witness in it), <u>being part of the decision making team in the first claim and thus identifying himself with the company's interests</u>."
>
> (footnotes omitted, my emphasis)

945. That last phrase, which I have underlined in the quotation above, is important. It has subsequently been confirmed by the Court of Appeal several times that a key factor in *Odyssey* was that (on the findings of the majority of the Court of Appeal there) the witness had been made a part of the team which took decisions on how the party's case was to be presented, thus identifying him with the party's own interests and itself: see *Royal Bank of Scotland Plc v Highland Financial Partners LLP* at [155]. In *Cinpres Gas Injection v Melea Limited* [2008] EWCA Civ 9, the Court of Appeal stated that *"it is not enough that a witness's evidence is vital, he must be a committed member of the team which takes decisions about the litigation"* [64]. Most recently, in *Lindsay's Estate v Outlook Finance* [2026] EWCA Civ 1005 the court stated that *"fraudulent evidence given by a witness for a party is not enough, unless the witness' evidence is vital to the party's case and the witness was an integral part of the litigation team"* [48].

(3) Materiality in the present case

946. I am not persuaded of the materiality, in the context of the jurisdiction application, of the allegedly dishonest allegations on which the Defendants rely.

947. First, jurisdiction was founded under the Lugano Convention. The starting point under the Brussels Convention/Regulation and the Lugano Convention was that jurisdiction was founded as of right and without requiring the court's permission to serve proceedings out of the jurisdiction. The usual service out requirement to show a serious issue to be tried on the merits did not apply.

948. In some Regulation/Convention cases, where there was a contested issue about a fact going specifically to jurisdiction, a good arguable case had to be shown on that fact. An example was where jurisdiction was purportedly founded on the Defendant's domicile, but there was a dispute about their place of domicile. Another example was the need to show a good arguable case (or, possibly, a serious issue to be tried) that a contract existed in order to found jurisdiction in the alleged place of performance of the obligation (see Case C-38/81 *Effer SpA v Kantner* [1984] 2 C.M.L.R. 667, *Tesam Distribution Limited v Schuh Mode Team GmbH and Commerzbank AG* (CA) [1989] 10 WLUK 250, [1990] I.L.Pr. 149 and *New England Reinsurance Corp and First State Insurance Co v Messoghios Insurance Co SA* [1992] 2 Lloyd's Rep. 251).

949. However, where jurisdiction was founded on the basis that damage alleged to have been caused by a tort was suffered in the jurisdiction, then (assuming there to be no dispute as to the location of the damage) the claimant did not in my view need to show a good arguable case on the merits of their tort claim. Any other approach would reintroduce by the back door the merits test applicable to cases where the court's permission was required to serve proceedings out of the jurisdiction.

950. I do not consider *Vilona v Delorenzi* [2002] EWHC 3016 (Comm) to provide any cogent support for the Defendants' approach. It was an *ex tempore* judgment in which Cresswell J accepted, without further consideration, a submission made by counsel in a case against an unrepresented party. The other case relied on by the Defendants, *Sandvik Intellectual Property AB v Kennametal UK Ltd* [2010] EWHC 3417 (Pat), appears to have been an ordinary service out case rather than a Regulation/Convention case.

951. Hamblen J in *Brown v Innovatorone Plc (In Liquidation)* [2010] EWHC 2281 (Comm), [2011] ILPr 9 at [23] stated:

> "… in *Boss Group Ltd. v. Boss France SA* [1997] 1 WLR 351 , the Court of Appeal emphasised, in the context of an Article 5(1) case, that the court must be astute to prevent rules of special jurisdiction being invoked in cases where there is no serious issue to be tried as against the party over whom the special jurisdiction is sought to be exercised"

However, with respect, I consider that to overstate the point the Court of Appeal was making in *Boss Group*, which was to the following more limited effect:

> "It is of course the case that the English courts look very carefully at proceedings for negative declarations: see Guaranty Trust Co. of New York v. Hannay & Co. [1915] 2 K.B. 536 and Camilla Cotton Oil Co. v. Granadex S.A. [1976] 2 Lloyd's Rep. 10 , 14, per Lord Wilberforce. This does not, however, mean that caution in this regard can be used as a substantive ground for declining jurisdiction under the Convention, for this would derogate from the Convention. What it does mean is that the court will be astute in such cases to prevent the article from being used in frivolous or vexatious cases, just as it is astute to stop summarily cases where the plaintiffs seeking to establish a contract cannot show that there is a serious issue which calls for a trial for its proper determination: see Tesam Distribution Ltd. v. Schuh Mode Team G.m.b.H. [1990] I.L.Pr 149 . In such cases the court is simply preventing the party concerned from abusing its process." (p.358)

952. It is true that where jurisdiction was based on there being a related 'anchor defendant' in the jurisdiction (in the Lugano Convention, under Article 6), then the claim against the anchor defendant had to be sustainable and genuine (*PJSC Commercial Bank Privatbank v Kolomoisky* [2019] EWCA Civ 1708). Further, Hamblen J in *Brown v Innovatorone Plc (In Liquidation)* [2010] EWHC 2281 (Comm), [2011] ILPr 9 at [25] stated:

> "I accept that in order to show that it is expedient to hear the claims together, it will generally be necessary for the claimant to establish that there is a serious issue to be tried against the co-defendant as well as the anchor defendant. This is because, if the court concludes that the claim against the co-defendant is not seriously arguable, then it is unlikely to be expedient to determine it together with the claim against the anchor defendant since there is no sufficiently arguable claim to found the requisite connection, and there is unlikely to be any risk of irreconcilable judgments since, even if the proceedings could be and were brought elsewhere, the outcome would be the same, if there is no seriously arguable claim."

However, in the present case, jurisdiction under Article 6.1 seems to have played little or no part in the jurisdiction challenge. Burton J in his judgment in 2015 made no mention of Article 6 jurisdiction, and the Court of Appeal mentioned it only "*for completeness"* (§ 4).

953. Against this legal background, it is not surprising that Burton J's judgment does not address the merits of the Claimants' claims at all: not even to record it as a threshold which the Defendants did not contest had been overcome. The judgment is concerned entirely with the characterisation of the Claimants' claims, in order to decide under which provision of the Lugano Convention the claims, as framed, fell. The same is true of the decision of the Court of Appeal, which also observed that:

> "… Still further, the Respondents have submitted (without contradiction) that the Appellants have opted to be taxed in

> Switzerland under a regime which precluded any employment or gainful activity in Switzerland; hence the Appellants' choice of employment with Arcadia Singapore rather than Arcadia Switzerland. In cases such as this under the Convention, the "merits" may matter little – and I do not rest my judgment on them – but a "reality check" can be worthwhile." [71] (my emphasis)

954. Secondly, the beneficial ownership of Arcadia Lebanon in a legal sense (or, more precisely, a common law sense) was only one part of a much broader picture. The overarching allegation made in Mr Adams's affidavit related to large-scale diversion of profits involving various entities:

> "The Applicants allege that they have been the victims of a substantial and sustained fraud. In summary, that fraud has taken (subject to variations and differences as discussed further below) the following form:
>
> 11.l. In the course of trading transactions in which an entity within the (legitimate) Arcadia Group was buying and selling crude oil, entities that were not part of the Arcadia Group but rather were beneficially owned by and/or controlled by and/or associated with some or all of the First to Sixth Respondents (including in particular the Seventh to Ninth Respondents), were, at the instance of, on the instructions of, with the knowledge of and/or with the involvement of the First to Sixth Respondents, "inserted" into the chain of transactions between the legitimate Arcadia Group entity and its buyer and/or seller;
>
> 11.2. These entities so "inserted" into the relevant transactions extracted profit that would otherwise, but for the "insertion", have accrued to the entity within the (legitimate) Arcadia Group, whilst often leaving the entity within the (legitimate) Arcadia Group in question (or another entity within the (legitimate) Arcadia Group) bearing all or part of the expenses associated with the transaction (such as transportation and insurance costs) and/or the risks associated with the transaction and/or otherwise providing support for the transaction in some fashion;
>
> 11.3. Furthermore, trading transactions into which an entity within the (legitimate) Arcadia Group would or should have entered, were, at the instance of, on the instructions of, with the knowledge of and/or with the involvement of the First to Sixth Respondents, diverted to, and entered into by, other entities that were not part of the Arcadia Group but rather were beneficially owned by and/or controlled by and/or associated with some or all of the First to Sixth Respondents (including in particular the Seventh to Ninth Respondents), with the result that profits that would and should have accrued to an entity within the (legitimate) Arcadia Group instead accrued to those other entities; and

> 11.4. In addition, entities within the (legitimate) Arcadia Group entered, at the instance of, on the instructions of, with the knowledge of and/or with the involvement of the First to Sixth Respondents, into loss making transactions for the sole or dominant purpose of ensuring that profits accrued to and/or losses were avoided by other entities that were not part of the Arcadia Group but rather were beneficially owned by and/or controlled by and/or associated with some or all of the First to Sixth Respondents." (§ 11)

955. Thus, the allegation in relation to Arcadia Lebanon was that it was one of three entities, the others being Arcadia Mauritius and Attock Mauritius, who were "*beneficially owned by and/or controlled by and/or associated with*" the First to Sixth Respondents, who included Mr Bosworth, Mr Hurley and Mr Kelbrick. The Adams affidavit told the court that Arcadia Lebanon had been the subject of discussion with Mr Fredriksen and Mr Trøim, who *"understood ... that this company was owned and controlled by Mr Bosworth and Mr Hurley but that ultimately the benefit of the particularly lucrative contract would come back to the Arcadia Group and/or Farahead"*, and were assured that 70% of the net profit made on the contract would be returned to Farahead (§ 97). The Adams affidavit also said that:

> "Discussions were held with Mr Bosworth and Mr Hurley during the course of 2008 and the first half of 2009 regarding the payment of a dividend by Arcadia Lebanon of between US$10 million and US$15 million to the Arcadia Group, although no clear record has now been identified showing if this payment was ever made." (§ 98)

and:

> "Starting in early 2008, attempts were made by Farahead to formalise the control structure for Arcadia Lebanon, Mr Bosworth and Mr Hurley emphasised to Farahead the importance of this entity remaining outside of the Arcadia Group although any reasons that may have been given for this appear not to have been recorded at the time … Given the importance attached to the entity remaining outside of Farahead itself, the plan was formulated to incorporate a new standalone Liberian company, Beirut Holdings Limited, to hold the shares in Arcadia Lebanon and for Mr Bosworth and Mr Hurley to enter into declarations of trust prepared in respect of the shares held by them in Arcadia Lebanon. …" (§ 99)

956. Thus, Arcadia Lebanon was not presented as being a wholly clandestine operation, but rather one that had been discussed between the parties and was the subject of a financial arrangement that might also have led to the payment of a "*dividend*". The real issue was whether Mr Bosworth and Mr Hurley had been able to operate it in order to divert profits to themselves that belonged to the Arcadia Group. The Claimants' investigations had indicated that large amounts of money, of the order of £286 million (Adams affidavit § 13), could not be accounted for. The full picture as to what had become of the funds later emerged from the factual and expert evidence served, and

ultimately considered at trial, about the essential payments made to service providers and intermediaries in order to obtain the volumes of oil that Arcadia Lebanon and Arcadia London traded (see e.g. the discussion in Trial Judgment section (F)), and about the genuine arm's length nature of the Kelbrick companies who transacted with Arcadia as principals i.e. the other two entities referred to in the Adams affidavit.

957. Thirdly, though the limited purpose, dormancy and cessation representations were an important part of the Claimants' overall case at trial, it is debatable how material they were to the jurisdiction application. They were set out in the Adams affidavit, but were not referred to by Burton J or the Court of Appeal. Although the Claimants have accepted that the Court of Appeal proceeded on the basis of their amended pleading (which now relied on the alleged misrepresentations as a further unlawful means of the conspiracy), they have denied the materiality of that amendment.

958. Fourthly, the Defendants submit that the GEPVTN Allegation was important because it showed that Arcadia Lebanon was continuing to make regular payments in respect of oil trading into at least 2011. The GEPVTN Allegation as set out in the Adams affidavit was:

> "210. One of the entities recorded as having received payments from Arcadia Lebanon is GEPVTN Ltd (GEPVTN). GEPVTN is a Cypriot company wholly owned by VTN Holding Ltd which is, in turn, owned by Farahead. It was incorporated in 2007 pursuant to a joint venture agreement between GE Petrol and VTN Ship Management Co. Ltd (also a wholly owned subsidiary of VTN Holding Ltd). The purpose of the joint venture was to establish an entity which would have the exclusive right to arrange the provisions of vessels to transport any reserve of crude oil in which GE Petrol had an interest in Equatorial Guinea. The venture was essentially initiated and run by Mr Scheepers, who was a director of both VTN Ship Management Co. and VTN Holding Ltd before he left the Arcadia Group to join Mr Kelbrick as a shareholder and director of South Energy in mid-2010. However, this always remained a small and relatively insignificant operation and, accordingly, little attention was paid to it by Farahead. Indeed, GEPVTN's turnover for the financial year ended 31 March 2013 was only US$34,000 and it made a net loss of US$12,593. Farahead has only ever received one dividend payment from GEPVTN in the amount of US$1,000. It appears from transfer instructions that have now been identified that Arcadia Lebanon made payments to GEPVTN for freight services on transactions involving the lifting of Zafiro grade oil. Farahead was not aware at the time that GEPVTN had received payments from Arcadia Lebanon."

i) The documents that have since come to light contradict the statement in § 210 of the Adams affidavit that Farahead was not aware at the time that GEPVTN had received payments from Arcadia Lebanon, and hence was still clearly trading, because they show that Mr Hannas did know that. The documents were of some significance at trial for the reasons given in § 396 of the Fraud Trial Judgment. On the other hand, it is questionable whether they would, if known

> to the court on the jurisdiction challenge, have had a major bearing on the fundamental issues in the case. In principle, Arcadia Lebanon, an entity indisputably known to Farahead, could in principle have been used as one of several vehicles to divert profits whether or not it was making payments to GEPVTN until 2011 or later.

959. The Defendants submit that it was "*patently implausible*" that Arcadia Lebanon would be making payments to a Farahead company (GEPVTN) as part of a fraud on Farahead, citing Trial Judgment § 395. That paragraph of the judgment said this:

> "Somewhat remarkably, the Claimants in their 144 Transactions case stated that they did not admit the "legitimate purpose and/or commercial benefit to the Arcadia Group (alternatively such as to justify the amount)" of the payments to GEPVTN, despite GEPVTN being a Farahead company. Eventually in their written opening, the Claimants accepted that Arcadia Lebanon's payments to GEPVTN were a legitimate expense. Mr Fredriksen was asked how this squared with the Claimants' fraud case:
>
> > "Q. Did you never question whether it was plausible to say there is a fraud involving Arcadia Lebanon, because a Farahead company is getting payments from Arcadia Lebanon?
> >
> > A. I think these people, the various market paid out some peanuts money to Farahead. But of course they made hundreds of millions. What happened to those money? That is what I told you yesterday. …
> >
> > Q. Why would they be paying peanuts to a Farahead company as part of a fraud?
> >
> > A. To imply that we are involved in it. Obviously."
>
> That last answer was patently implausible. It was also illustrative of Mr Fredriksen's state of mind, as a person who had, for whatever reason and seemingly regardless of the facts, apparently convinced himself that he had been the victim of a fraud."

It was indeed implausible to suggest that the payments to GEPVTN were themselves part of the alleged fraud. It did not follow, though, that (viewing the matter from the Claimants' perspective at the time of the jurisdiction application) Arcadia Lebanon was not at the same time perpetrating a large-scale fraud on Farahead.

960. The GEPVTN point appears to have been included in the Adams affidavit essentially as a defensive point, as reflected in the fact that it did not feature in the Particulars of Claim. It is not mentioned in the judgments of Burton J or of the Court of Appeal. In my view it was not material.

961. For these reasons, I am not persuaded that any of the allegedly dishonest allegations relied on was material to the jurisdiction challenge, in the sense of being an operative cause of the courts' decisions to give judgment in the way in which they did.

(4) Overarching submissions on dishonesty

962. The Defendants make a number of overarching submissions, which in outline are as follows.

i) The Claimants have not adequately explained how they ever believed the allegations to be true. The Claimants' fraud claim never had any tenable basis. It was (as I found) a "*key plank*" of the Claimants' case that the ongoing activities and profits of Arcadia Lebanon were concealed from Farahead, Mr Fredriksen and Mr Trøim by the dormancy and cessation representations. I found the dormancy allegation to be entirely unsupported by the evidence, and the trade cessation allegation to be entirely unsustainable and inconsistent with the documentary evidence. Yet the Claimants have not adequately explained how they ever believed the allegations to be true.

ii) The Claimants' claim was motivated by a desire for retaliation, not by any honest belief that they had been victims of fraud. Mr Fredriksen instructed a claim to be commenced as retaliation against Mr Bosworth and Mr Hurley for losses he considered he had incurred as a result of the Atlantic and Capital transactions; in consequence, Mr Trøim set the 'bloodhounds' on Mr Bosworth and Mr Hurley. The outcome of Mr Adams's and Mr Francisco's 'investigation' into Mr Bosworth and Mr Hurley was a claim completely lacking in substance.

iii) The Claimants destroyed relevant documents. Deliberate destruction of documents creates the strongest possible presumption that the documents were unfavourable to the Claimants' case: *The Ophelia* [1916] 2 AC 206, PC at 229.

iv) The Claimants otherwise suppressed evidence and did not act as might be expected of parties who honestly believed themselves to be victims of fraud. The Defendants point among other things to the settlement agreements with Mr Gibbons and Mr Mounzer.

v) Even on the Claimants' case, they were reckless, for example by pleading or submitting that Mr Fredriksen did not read the Adams affidavit or the Particulars of Claim in full or closely; that Mr Adams relied on information provided to him by others; and that Mr Hannas may not have read the Adams affidavit or the Particulars of Claim.

vi) Adverse inferences should be drawn from the Claimants' failure to call Mr Fredriksen, Mr Adams, Mr Hannas or Mr Francisco as witnesses in the Inquiry.

963. I see force in some, though not all, of those points.

i) Point (i) above has some force at the general level. However, when considering the present application, it is necessary for the court to form an assessment, on an individual by individual level, of what they said and believed. By way of example only, if a pleaded allegation has never been properly supported by the

evidence of the relevant witness, the question then arises whether or not the way in which the case was framed in the Adams affidavit or the Particulars of Claim necessarily means that the witness must have given a false explanation from which they have later tried to row back; and, if not, whether that means Mr Adams must have been dishonest. Equally, where a witness has stood by an allegation because he still believes it to be true (despite the court having found to the contrary), there may be no explanation to give other than that remains his recollection. It is unrealistic to expect that there would necessarily be (as the Defendants put it) any evidence to support a case of an individual having misremembered something. The passage of time and the fallibility of human memory may have been factors at play.

ii) In my general assessment of Mr Fredriksen as a witness at § 22 of the Fraud Trial Judgment, from which the Defendants quote (in part), I said:

> "Mr Fredriksen by the time of trial was 80 years old, not in the best of health and found giving evidence tiring. His recollection of many matters was limited. At the same time, he was not averse to making serious accusations to the effect that the Defendants and others were "crooks" (a word he used four times in his oral evidence) without a basis in first-hand or even necessarily second-hand evidence. Although he had authorised this litigation for many years, Mr Fredriksen said he had never seen Mr Adams's affidavit in support of the worldwide freezing order which the Claimants obtained near the outset of the case, nor the Claimants' original Particulars of Claim or Reply. At one point in his evidence, Mr Fredriksen suggested that the Defendants had "made apparently hundreds of millions of dollars", basing that statement on a report by Ernst & Young ("EY"). He said he had not, however, read the EY report though an expert specialist had "gone through this" for a number of years. Mr Fredriksen struck me as someone who had convinced himself that he had been defrauded, and was unwilling to reflect on that belief even where the facts suggested otherwise (one illustration being the remarkable answer to which I refer in § 395 below)."

The end of that paragraph refers to § 395 of the judgment, which I have quoted a little earlier, and where (in addition to the implausible final answer) Mr Fredriksen said "*But of course they made hundreds of millions. What happened to those money? That is what I told you yesterday."* My assessment at trial was that Mr Fredriksen had a genuine, but wrongheaded, conviction that he had been defrauded. Such a state of mind is not incompatible with having made dishonest allegations on matters forming part of the story, but neither is it necessarily suggestive of that.

iii) I agree that Mr Hannas's destruction of documents is a strong point against him and could form the basis of an inference against him or the Claimants. In the Trial Judgment at § 59, I recorded that Mr Hannas denied that he had destroyed the notebooks on the instructions of Mr Fredriksen, something which Mr Fredriksen also denied. I said it would be somewhat surprising if Mr Hannas

had destroyed documents relating to Mr Fredriksen/Mr Trøim's business entirely of his own accord, but that I did not feel able to draw any firm conclusion on that point based on the available evidence. That remains the case.

iv) I have already commented on the propriety of the Claimants' settlement agreement with Mr Mounzer, and its effect on the trial, and similar considerations apply with Mr Gibbons. It is not clear, though, precisely what inference can properly be drawn from that, and in any event the witness statement of Mr Mounzer was available to the court.

v) The authorities do not support the view that mere recklessness is sufficient, and the Defendants' own pleaded case is solely one of conscious and deliberate dishonesty. I would add that for a deponent to provide evidence, overtly, on the basis of information provided by another person, without making further enquiries, does not of itself indicate recklessness. It all depends on the circumstances.

vi) I have already rejected the suggestion that I should draw an adverse inference from Mr Fredriksen's non-attendance at trial. I consider the position in relation to Mr Adams and Mr Hannas below. I see no clear basis on which to draw an adverse inference from the Claimants' not having called Mr Francisco to give evidence. The Claimants rely, in a general sense, on the amount of investigatory work done and the results of the investigation. Those results, and the assumptions made, are apparent from the EY reports. Anything Mr Francisco might add would be marginal given his lack of involvement in the underlying events.

964. The Claimants make the following overarching points.

i) The Claimants' witnesses were giving evidence in these proceedings several years after the time period to which the allegations relate (which concern events taking place in or around 2006-2009). By way of example, Mr Fredriksen's first witness statement was given 8 years later, his second witness statement 12 years later and his third, fourth and fifth witness statements some 15 years later. If he and other witnesses are wrong about what they said (as the court has found in some respects) that is because they have genuinely misremembered.

ii) In respect of a number of the allegations, the evidence provided by the Claimants' witnesses was based on their recollection of what they were told orally or what they understood; such recollections are susceptible to error particularly where they relate to historic events, as well as confirmation bias and "groupthink" but they are not without more indicative of dishonesty. In particular:

a) In relation to each of the allegations relating to Arcadia Lebanon (the Beneficial Ownership Allegation, the Limited Purpose Allegation and the Dormancy Allegation), Mr Fredriksen and Mr Trøim's knowledge was derived from what they say they were told or understood from their conversations with Mr Bosworth and Mr Hurley. For example, in relation to the Beneficial Ownership Allegation and the Limited Purpose Allegation, Mr Fredriksen's and Mr Trøim's evidence was that some

time after the event, Mr Bosworth had told them that he and Mr Hurley had set up Arcadia Lebanon in their own names, and that it had been set up for a particular opportunity involving a limited number of specific trades. The Adams affidavit referred to what the "*Farahead Representatives were told by D1*" and what was "*understood by the Farahead Representatives*". In relation to the Dormancy Allegation, Mr Fredriksen and Mr Trøim gave evidence as to the understanding that they had formed about Arcadia Lebanon's activity from what they were told it was. The Adams affidavit referred to what Farahead had "*understood*".

b) In relation to the Trade Cessation Allegation, Mr Fredriksen's evidence was in respect of what he recalled being told by Mr Bosworth and Mr Hurley and the understanding he had formed from that. Mr Trøim's evidence was similarly about what he had been told. Likewise, in the Adams affidavit Mr Adams said that Mr Fredriksen and Mr Trøim were "*assured by Mr Bosworth that the Arcadia Group had ceased its regular trading activities in West Africa*". Mr Adams's own evidence on the other hand was that he understood the Arcadia Group to continue to trade in West Africa at the time.

Where allegations concerned what Mr Fredriksen and Mr Trøim were told or understood, rather than something they themselves said or did, it is all the easier to see the risk of genuine mistake. Moreover, as Mr Trøim explained, his and Mr Fredriksen's meetings with Mr Bosworth and Mr Hurley would typically take place in person, over lunch or drinks and would usually be disorganised and "*constantly interrupted by Mr Bosworth taking calls and going outside to smoke*". Mr Fredriksen's evidence in his fourth and sixth witness statements was to similar effect. A person who receives information, particularly orally and in an informal setting, may misinterpret it or simply not appreciate its full meaning at the time. But that is not dishonesty.

iii) In respect of Mr Fredriksen in particular, his age and health are likely to have impacted his recollection. As recognised in the Fraud Trial Judgment, his recollection of many matters was limited, he was 80 years old (at the time) and not in the best of health. At the Fraud Trial, he was candid as to the limits of his memory, which was impacted by his age.

iv) Each of Mr Fredriksen and Mr Trøim had little and high-level involvement with matters relating to the Arcadia Group. Unlike with some of his other companies, Mr Fredriksen spent very little time (no more than four or five hours a month) on matters relating to the Arcadia Group. Mr Trøim spent a similar amount of time and did not take on any executive role within the Arcadia Group. Neither was a director of any of the Claimant companies. Any misunderstanding of what they were told is a foreseeable consequence of their peripheral role and does not support an inference of dishonesty.

965. I broadly accept those submissions, with the caveats that (a) as regards points (i) and (iv), the appropriate starting point is that any error *may be*, not necessarily "*is*", a consequence of misremembering and/or having had a peripheral role; and (b) as regards

point (iii) above, the points about Mr Fredriksen's age and health do not apply (or, as to age, to the same degree) as at the time of the jurisdiction challenge.

(5) Mr Trøim

966. The attachment to Freshfields' letter of 18 July 2015 identified Mr Trøim as the sole source of the Limited Purpose allegation and the Dormancy Allegation, and identified him and Mr Fredriksen as the sources of the Cessation Allegation.

967. The attachment did not identify any source for the Beneficial Ownership Allegation, presumably because the Adams affidavit did not specifically state that that information had come from Farahead or from the Farahead Representatives. In response to a query from the Defendants, the Claimants' solicitors on 14 May 2026 indicated that no written instruction to EY had been identified in any repository. The Defendants in their Particulars of Loss did not allege any particular source for that allegation, though they did allege that it was supported by the Limited Purpose Allegation. According to that allegation, Mr Bosworth and Mr Hurley told Mr Fredriksen and Mr Trøim that Arcadia Lebanon was a "*separately owned company*" established for one particularly lucrative contract.

(a) Attribution

968. By the time the Freezing Order was obtained and the proceedings were brought, Mr Trøim was not a director of any of the Claimant companies. His relationship with them had ceased in 2014, following his falling out with Mr Fredriksen, and since then he had not been involved in the business affairs of any of those companies.

969. The Defendants do not rely on any of the ordinary bases of attribution referred to in section (2)(c) above. However, they say Mr Trøim's actions are to be attributed to the Claimants for present purposes because:

i) Mr Trøim was described in the Adams affidavit as a 'Farahead Representative' and was one of the ultimate decision-makers at Farahead;

ii) the Claimants launched a fraud claim on the basis of the information that Mr Trøim gave them when he was a decision-maker;

iii) he was listed 41 times in the Freshfields attachment as a source of information for the Adams affidavit; and

iv) his first witness statement in 2016 expressly stated that he was authorised by the Claimants to provide that witness statement on their behalf, and the Claimants "adopted his evidence".

970. In my view, none of these arguments makes Mr Trøim's activities in relation to the litigation attributable to the Claimants. The fact that he was formerly a Farahead representative cannot make his subsequent evidence attributable to the Claimants. Nor can the fact that he provided information to the Claimants for the purpose of the litigation, nor the fact that he appeared as a witness for them, with or without the (standard form) statement that he was authorised by the Claimants to provide the evidence: see the passage from *Grant and Mumford* quoted above. The evidence does

not establish that the claim was launched on the basis of information Mr Trøim provided while he remained a decision-maker at Farahead (even if he did have that status), as opposed to information he provided after his departure. He said he provided information "*some time in the second part of 2014*" (Day 9/76), having parted ways with Mr Fredriksen and Arcadia in October 2013 (Day 9/61 and 63), and by early 2014 was no longer giving instructions about the case (Day 9/71).

971. Nor does the evidence show that Mr Trøim was a member of the decision-making team in respect of the litigation: to the contrary, it clearly indicates that he was not. He left the Group well before the Freezing Order was obtained and the proceedings commenced. He confirmed in his fifth witness statement that he had no role in pursuing the proceedings or the Freezing Order and had never had any personal economic interest in them, nor been compensated for the time he spent in connection with them.

972. On that basis it is not strictly necessary to go any further in relation to Mr Trøim, but I do in light of the seriousness of the allegation and the possibility of Mr Trøim's recollections having affected the information or evidence provided by others.

(b) Dishonesty

973. In my view, Mr Trøim had no motive to provide dishonest information or evidence for the Claimants.

i) Mr Trøim had nothing to gain from providing dishonest evidence in support of the claim. He himself has never been a claimant nor had any business relationship with the Claimants since formally leaving the Arcadia Group in June or July 2014 after parting ways with Mr Fredriksen in October 2013 (as Mr Trøim confirmed in cross-examination in the Inquiry Trial). In his oral evidence at the Inquiry Trial, he said:

> "… I have always said that I had no interest in the case because kind of I am not a part of it. I've not been involved in the freezing order. I have not been involved in economic compensation. I have not been -- had any kind of payment for doing this service in court or coming up with this statement. I'm totally without economical interest in this. I just came here because I feel that the honest truth about what was been going on was -- had to be presented by somebody." (Day 9/134)

ii) Mr Trøim also explained in his evidence that he was not obliged to assist with this case as part of any "*divorce deal*" with Mr Fredriksen; rather he had "*no obligation to this case whatsoever from the day [he] left".*

iii) It was suggested to Mr Trøim in cross-examination that Mr Fredriksen *"blamed [him] for putting at risk the Farahead security package",* that *"Mr Fredriksen was angry with [him] for not monitoring Arcadia's finances"* and that in order to "*shift the blame*", Mr Trøim decided to "*scapegoat*". It was also suggested to Mr Trøim that if he did not assist Mr Fredriksen, that Mr Fredriksen would "*lash out*" at him. However, I find it implausible to suggest that Mr Trøim would provide untrue evidence, a number of times over several years (including at Trial and in the Inquiry), at his own time and cost, exposing himself to detailed

cross-examination, merely in an attempt to appease Mr Fredriksen, with whom he has had no ongoing personal or professional relationship since around 2014.

iv) I can see no credible reason why Mr Trøim would risk his personal and professional reputation through providing dishonest evidence (and making himself vulnerable to findings of dishonesty), not least where this would secure no corresponding benefit for him.

974. As to the detailed allegations made against Mr Trøim in this regard, the way in which the Limited Purpose, Dormancy and Trade Cessation Allegations were expressed in the Adams affidavit was as follows:

> [Limited purpose]
>
> "97. Shortly after the acquisition, the Farahead Representatives were told by Mr Bosworth that he and Mr Hurley had secured a particularly lucrative oil trading contract for Arcadia London. However, because they did not want to share the 30% bonus 'pot' (as described at paragraph 92.3 above) with the remainder of Arcadia London's trading team in relation to this particular contract, they had established a separately owned company, Arcadia Lebanon, for the sole purpose of being the counterparty to this particular contract. It was understood by the Farahead Representatives that this company was owned and controlled by Mr Bosworth and Mr Hurley but that ultimately the benefit of the particularly lucrative contract would come back to the Arcadia Group and/or Farahead. Indeed, the Farahead Representatives received express assurances from Mr Bosworth at that time that 70% of the net profit made on the contract would be returned to Farahead consistent with the arrangement set out at paragraph 92.3 above." (§ 97)
>
> [Dormancy] (after describing the discussions about formalising Arcadia Lebanon's ownership position as quoted in § 955 above)
>
> "However, it appears that Mr Bosworth and Mr Hurley never entered into the transfer and in the event these documents were never executed. By the latter part of 2008 it was understood by Farahead from Mr Bosworth and Mr Hurley that the contract for which Arcadia Lebanon had been established had come to an end and the company had become dormant. Accordingly, this issue was not pursued further." (§ 99)
>
> "Based on what is now known about Arcadia Lebanon's activities in this period, it is evident that Arcadia Lebanon was not simply used by Mr Bosworth and Mr Hurley to receive the profits of a single particularly lucrative contract (for which profits were to be remitted to the legitimate Arcadia Group) before becoming dormant by around 2009, as Mr Bosworth had represented to the Farahead Representatives (see paragraphs 97 to 99 above). It is clear that Arcadia Lebanon remained

operational and entered into a number of different oil trading transactions throughout the period up until at least as recently as November 2011. Further, it appears to have paid significant sums of money to a variety of entities, with payments being made up until at least March 2012." (§ 211)

[Trade Cessation]

"111. The Farahead Representatives also raised with Mr Bosworth the need for adequate controls within the Arcadia Group in the light of the new anti-bribery and corruption regime that was to be introduced in the UK in 2010 (the Bribery Act 2010). This was seen as important because of the Group's high risk physical trading activity in West Africa. However, at that time, they were assured by Mr Bosworth that the Arcadia Group had ceased its regular trading activities in West Africa because of the increased risks involved, and that the necessary training and guidance was being provided to the Arcadia Group's staff in relation to the Group's ongoing activities elsewhere.

112. This first assurance was supported by the book-by-book profit/loss and bonus figures that were presented to the Farahead Representatives by Mr Bosworth and Mr Hurley at the time, which showed very little or no activity in West Africa (the little there was being explained away by Mr Bosworth and Mr Hurley as the result of legacy issues). This assurance in particular was an important one; the Farahead Representatives believed, as a result of what they were told, that the Arcadia Group was not engaged in any regular ongoing trading in West Africa. I was not aware at the time that this representation was being made. At the time, even from my US base, I understood that the Arcadia Group continued to trade in West Africa. It is clear that this representation to the Farahead Representatives was not true and that the Arcadia Group continued to be involved in extensive trading in West Africa, albeit the benefit of that trading was being diverted away from the Arcadia Group as is further described below.

…

114. From 2011 onwards, difficult market conditions for WTI trading saw the profits relating to the Arcadia Group's paper trading decline substantially, with a commensurate impact on the Arcadia Group's results as a whole. …

115. Reduced income from WTI trading highlighted to the Farahead Representatives that total overhead costs for the Arcadia Group had escalated dramatically in recent years. The Farahead Representatives questioned Mr Bosworth and Mr Hurley about the substantial costs that appeared to be attributable to West Africa and, in particular, Mr Bosworth's continuing

> frequent travel to the region and other costly associated overheads. This was at odds with their having been explicitly told by Mr Bosworth that the Arcadia Group was no longer trading in West Africa. This was met with generalised explanations and assurances offered by Mr Bosworth who maintained that his visits to West Africa were important for his understanding of wider oil markets because it provided an insight into what was happening in a major producing region. Whilst this explanation sufficed to discourage further investigation at that time, it did not fully assuage doubts about the disproportionate extent to which Mr Bosworth was committing time and resources in West Africa." (§§ 111, 112, 115, also picked up in § 148)

975. The Defendants submit that Mr Trøim knew the Beneficial Ownership Allegation to be untrue because at the Inquiry he said he understood the concept of beneficial ownership, and gave this evidence:

> "A. It was owned by these two people, but there was a kind of quasi situation in -- since we controlled 70% of the economical interest, but legally, technically speaking, it was owned by these two shareholders.
>
> Q. You asked Mr Francisco and Mr Hannas to investigate the Arcadia Lebanon dividend in 2013 because you knew that Arcadia Lebanon was a Farahead company, didn't you?
>
> A. I think I've already answered it. I said the company was owned by Pete Bosworth and Colin Hurley from the beginning, but we had a 70% economic interest, which was our understanding, with these people. And the company was obviously called Arcadia Lebanon as well, so it kind of clearly belonged into the group, but we weren't the actual owners." (Day 9/23-24)

In addition, Mr Trøim was involved in discussions in 2008 about Arcadia Lebanon's ownership arrangements and the taking of dividends from it. Further, Mr Trøim said in cross-examination at the Inquiry Trial that he thought the Hannas Note "*was created more for Mr Fredriksen than for me*"; and so, the Defendants suggest, Mr Trøim must have seen the Hannas Note when it was created, probably in 2013.

976. The Defendants further submit that:

i) Mr Trøim knew the Limited Purpose Allegation to be untrue because in his first witness statement, made in July 2016 in opposition to the Defendants' application to set aside the Freezing Order, he referred to "*specific trades*" (plural) and likewise at trial he referred to "*those initial contracts*"; because he knew Arcadia Lebanon was not separately owned from the Arcadia Group; and because his reference at the Inquiry to Farahead having a 70% economic interest in Arcadia Lebanon meant that dividends were expected from the company's ongoing activities.

ii) He knew the Dormancy Allegation was untrue because he knew Arcadia Lebanon was not dormant in 2008 and did not say in his witness statement for trial that the dormancy representation had been made.

iii) He knew the cessation allegation to be false because he received regular updates on Arcadia's West African trading activities, and accepted at the Fraud Trial that no such representation had been made.

977. In relation to each of these matters, Mr Trøim was giving evidence of what he was told by Mr Bosworth/Mr Hurley in oral discussions which had taken place several years prior to the time period(s) in which he provided information or evidence. As noted earlier, there is evidence indicating that those meetings tended to be informal and disorganised, with frequent interruptions. Any inaccuracies in Mr Trøim's evidence may, particularly in these circumstances, be explicable as resulting from the fallibility of human memory.

978. I have already noted that Mr Trøim is not alleged to have been the source of the Beneficial Ownership Allegation. Mr Trøim did not himself refer in his witness statements to Mr Bosworth/Mr Hurley being the beneficial owners of Arcadia Lebanon. Indeed, the Adams affidavit, quoted earlier, did not so say either: rather, it said Arcadia Lebanon and other entities were beneficially owned by and/or controlled by and/or associated with Mr Bosworth and Mr Hurley. That in itself could hardly be said to be dishonest, given that Mr Bosworth and Mr Hurley were the legal owners of the company's shares and were in day to day control of its operations. Mr Trøim's evidence in his witness statements and at both trials was substantially consistent insofar as he said that Arcadia Lebanon was established without his knowledge or authority by Mr Bosworth/Mr Hurley in their own names but that there was an arrangement that 70% of its net profits would be remitted to Farahead. That was based on what Mr Trøim says he was told by Mr Bosworth/Mr Hurley, several years prior to providing information or evidence. His apparent continuing view that Mr Bosworth and Mr Hurley were the company's beneficial owners and that the company was separately owned appears to have been based on Mr Bosworth and Mr Hurley having been the registered shareholders, notwithstanding the 70% economic interest to which he referred. He regarded the two concepts as distinct: see the evidence from the Inquiry Trial quoted in §§ 81 and 155.i) above.

979. As to the Limited Purpose Allegation and the Dormancy Allegation, the evidence Mr Trøim gave in his first witness statement in July 2016 was this:

> "6. Arcadia Lebanon was established by Mr Bosworth and Mr Hurley without my or Mr Fredriksen's knowledge or authority. When Mr Bosworth later told us, after the event, that he and Mr Hurley had set up Arcadia Lebanon in their own names, he told us that they had established the company in order to carry out a very limited number of specific trades because he and Mr Hurley had wanted those specific trades to be separate from the bonus pool arrangements in which the Arcadia Group's traders as a whole participated.
>
> 7. Mr Fredriksen and I were very unhappy about the arrangement and made it clear to Mr Bosworth that this sort of thing could not

> and must not happen again, that the situation needed to be regularised by the return of 70% of the net profits from these trades to Farahead (in accordance with the bonus agreement made with Mr Bosworth and Mr Hurley in relation to the profits of the Arcadia Group more generally) and that, in future, all profits and losses for all trading activity must be included within the profit and loss reports provided to us by Mr Bosworth and Mr Hurley on a daily basis. We were assured by Mr Bosworth that Arcadia Lebanon was only being used for the specific trades and that Farahead's 70% share of the net profit on the limited number of specific trades that had been put through Arcadia Lebanon would be transferred to Farahead in accordance with the general bonus arrangement referred to above.
>
> …
>
> 9. Mr Bosworth also alleges that he never told me or Mr Fredriksen that Arcadia Lebanon had ceased trading and was dormant … that we were "well aware of the continued existence and purpose of Arcadia Lebanon beyond 2008" …and that Farahead was "fully aware that Arcadia Lebanon was trading in West African crude oils long after late 2008 and until late 2011" … This is also not true.
>
> 10. As I have explained above, it was my clear understanding based on what was told to me by Mr Bosworth that Arcadia Lebanon had been used by Mr Bosworth and Mr Hurley for only a very limited number of specific trades over a very short time span of activity. It was also my clear understanding that Arcadia Lebanon was not to be involved in any further trades and that it was dormant and was in the process of being closed down. I was not told by Mr Bosworth or Mr Hurley, and I was not aware, that Arcadia Lebanon had been involved in any further trading activity in West Africa or elsewhere, other than this limited number of specific trades, until it was discovered during the course of the investigations leading to these proceedings."

980. Mr Trøim's evidence in his third witness statement, for the Fraud Trial, included the following:

> "78 I remember that Mr Bosworth and Mr Hurley told me that they had established an entity in Lebanon (which I now understand to be Arcadia Petroleum SAL Offshore, or "Arcadia Lebanon"), in their own names, to carry out a very limited number of specific trades over a very short time span of activity.
>
> 79 I do not recall precisely when I found out about this, save that I recall that the company was already in existence when I was told. Grosvenor Law has advised me that Arcadia Lebanon was set up in July 2006, so it must have been sometime after that.

80 I recall that Mr Bosworth told us that he and Mr Hurley had set up this company this because they wanted one specific trade or counterparty trades to be separate from the rest of the Arcadia Group business. I recall that this trade or counterparty may have been related to Sao Tome and Principe but I cannot be sure so many years later.

81 Mr Bosworth said to me that he and Mr Hurley had done this because they wanted those specific trades to be separate from the bonus pool arrangements in which the Arcadia Group's traders as a whole participated (and which I have described above) because they were particularly lucrative.

82 At the time, my response (beyond being unhappy at being told about this after the event) was to request that the situation to be regularised by the return of 70 per cent of the net profits from these trades / counterparty transactions to Farahead and that, in future, all profits and losses for all trading activity must be included within the profit and loss reports provided to us by Mr Bosworth and Mr Hurley on a daily basis.

83 At the time, I was assured by Mr Bosworth that Arcadia Lebanon was only being used for this specific trade and that Farahead's 70 per cent share of the net profit from the same that had been put through Arcadia Lebanon would be transferred to Farahead in accordance with the arrangements we had made.

84 I understood clearly from the explanation above Mr Bosworth told us that Arcadia Lebanon would not be involved in any ongoing activity after those trades had been completed. My clear understanding was that, once those trades were complete, it was no longer active and was to be closed down.

85 I was not told by Mr Bosworth or Mr Hurley, and I was not aware, that Arcadia Lebanon had been involved in any further trading activity in West Africa or elsewhere (beyond the specific trades for which I was told it had been established).

…

89.5 It was suggested to me that Arcadia Lebanon profits would flow to the Arcadia Group/Farahead; I would not have agreed to any other approach. Indeed, had I been consulted before the event rather than after the event, I would not have agreed to any approach that saw profits accumulate in a company that was not part of the Arcadia Group.

…

91 I am also told by Grosvenor Law that Mr Bosworth and Mr Hurley further allege that John and I somehow approved the

> establishment of Arcadia Lebanon, that we required Mr Bosworth and Mr Hurley to hold shares in Arcadia Lebanon to Farahead's instruction or order so that Farahead "*could have ultimate control and direction over Arcadia Lebanon*", that we required Mr Bosworth and Mr Hurley personally to hold the shares so as to avoid Arcadia Lebanon being part of the Arcadia Group and to protect the Claimants (and me and John) from the risks associated with West African trading (including the possibility of regulatory investigation), and that we directed that Arcadia Lebanon was to be used to make or receive high-risk payments on behalf of Arcadia London (later the Arcadia Group) in respect of its West African oil trading activities. I am told it is also said that John and I insisted on Mr Bosworth and Mr Hurley holding the shares in Arcadia Lebanon over their express hesitation and concerns and that Farahead determined the ownership arrangements for Arcadia Lebanon.
>
> 92 Again, these allegations are all untrue, as Mr Bosworth and Mr Hurley will know. Specifically:
>
> 92.1 John and I did not direct the establishment of Arcadia Lebanon.
>
> 92.2 We never provided any authority to Mr Bosworth or Hurley to hold the Arcadia Lebanon shares on Farahead's behalf.
>
> 92.3 We never asked or "required" them to hold the shares.
>
> 92.4 We never asked Mr Bosworth or Hurley to make or receive "high risk" payments.
>
> 93 As I have explained above, neither John nor I was involved in the daily operational detail of the Arcadia Group business. We were not oil trading experts. We would not be involved in this level of detail and we left the operational aspects of the oil trading business to the experts, Mr Bosworth and Hurley.
>
> (2) Farahead's attempts to set up governance over Arcadia Lebanon
>
> 97 In 2008, Farahead attempted to formalise the ownership of Arcadia Lebanon – so far as we were concerned it was a normal part of the group and ought to be treated as such. I do not believe that these efforts were ever ultimately successful, though I do not recall the particular steps taken. As I have explained in paragraph 61 above], I decided not to press these issues, given the profitability of the Arcadia Group around this time."

981. It will be noted, first, that whereas the Adams affidavit indicated that the Defendants had told Mr Trøim that Arcadia Lebanon had been established for the purpose of one contract, Mr Trøim's 2016 and 2023 witness statements referred to a limited number of

specific trades (plural), adding in 2023 that this "*trade or counterparty*" may have been related to Sao Tome and Principe but that he could not be sure so many years later. It should be borne in mind that references to a "*contract*" or "*trade*" in this context may refer not to a single sale and purchase transaction but to a term contract, under which multiple individual transactions may have occurred over a number of years: as was the case with the Sao Tome contract for example. The difference (singular vs plural) between the Adams affidavit and Mr Trøim's witness statements is not of itself a reason to impute dishonesty to Mr Trøim. It is possible in theory that Mr Trøim dishonestly provided information to Mr Adams, directly or indirectly, to the effect that only one contract was involved, and then set out a different version in his witness statements (and his evidence at the Fraud Trial). However, another possibility is that the information Mr Trøim provided was misunderstood when the Adams affidavit was prepared. I would accept that it would have been open to the Claimants, in the Inquiry Trial, to waive privilege and disclose all the communications leading to the production of the Adams affidavit, but their having refrained from doing so does not mean the court should necessarily infer that dishonesty was involved.

982. Secondly, the evidence in the Adams affidavit as to dormancy is somewhat guarded. It does not allege a specific statement, but rather that *"[b]y the latter part of 2008 it was understood by Farahead from Mr Bosworth and Mr Hurley that the contract for which Arcadia Lebanon had been established had come to an end and the company had become dormant"*, and, later, that the understanding was that Arcadia Lebanon had become dormant "*by around 2009*". In Mr Trøim's 2016 witness statement, he said it was his "*clear understanding*", seemingly from Mr Bosworth and Mr Hurley (reading the first two sentences of § 10 together), "*that Arcadia Lebanon was not to be involved in any further trades and that it was dormant and was in the process of being closed down*". His 2023 witness statement was perhaps more guarded still:

> "I understood clearly from the explanation above Mr Bosworth told us that Arcadia Lebanon would not be involved in any ongoing activity after those trades had been completed. My clear understanding was that, once those trades were complete, it was no longer active and was to be closed down." (§ 84)

983. Mr Trøim was cross-examined both at the Fraud Trial and at the Inquiry Trial about how he could have had such an understanding, in the light of the reports received indicating continuing trading activity. His response was to the effect that the profit and loss accounts indicated little activity, and that he accepted that Arcadia Lebanon had not closed down by late 2008 because it still held cash of which Farahead had not yet received its 70% share (see, e.g., the evidence quoted at § 469 of the Fraud Trial Judgment). Similarly, at the Inquiry Trial he gave the evidence quoted in § 155(ii) and (iii) above. The Defendants say Mr Trøim accepted that he knew in 2008 that Arcadia Lebanon was "*still active*", but that is an incomplete quotation of the relevant passage in his cross-examination, which was:

> "Q. And you knew that Arcadia Lebanon, in late 2008, had not closed down, didn't you?
>
> A. Yes, because there was clearly money in the company which belonged to the 70% holder which was not distributed out in compensation. It was not dividended. It was compensation

> and that was not done. So the company clearly was sitting on cash and the company still was active from that perspective." (Day 9/111, my emphasis)

Contrary to another submission of the Defendants, Mr Trøim did not say in cross-examination that he knew at the time that there was a "*massive amount of trading*" (Day 9/123).

984. The broad thrust of Mr Trøim's evidence was that he still thought that "*the way it came across the first time they approached me*" was that Arcadia Lebanon had been set up for a particular lucrative contract, but that the most important thing for Farahead was that it would receive its 70% economic benefit from the company, regardless of who owned the shares.

985. Mr Trøim was also cross-examined about how he could have had the understanding set out in his witness statement, given his involvement in discussions in 2008 about Arcadia Lebanon's ownership arrangements and the taking of dividends from it. My overall assessment of his evidence in the Fraud Trial Judgment was:

> "Mr Trøim represented Farahead during the relevant period. He had not been involved with any of Mr Fredriksen's businesses since he and Mr Fredriksen parted ways in 2014, and said he had not spoken to Mr Fredriksen in more than 10 years. He said he had no vested interest in the outcome of the case. At times he appeared to me a candid witness. Nonetheless, in other respects his evidence was unsatisfactory. It was notable that the Hannas Note, to which I refer later, recorded or referred to a series of significant communications between June 2008 and September 2009, in which Mr Trøim had been involved in discussions about Arcadia Lebanon's financial statements, the extraction of a dividend from it, and ultimately an instruction not to make any more enquiries about Arcadia Lebanon (see §§ 469 and 482-483 below). In his witness statement for trial, Mr Trøim did not refer to any of those discussions, or the fact that a dividend was in fact obtained from Arcadia Lebanon, apart from saying that he recalled receiving the company's 2007 financial statements. In cross-examination he said he had not remembered the dividend payment itself, and that he did not see any particular reason to mention the discussion about obtaining a US$15 million dividend from Arcadia Lebanon. Given the centrality of Arcadia Lebanon to this case, that was an unfortunate omission. At another point, Mr Trøim said "*There is a lot of stuff I don't mention in my witness statement. I tried to focus on the important things.*"" (§ 23)

986. In the Inquiry Trial this topic was picked up again in the cross-examination quoted at § 155.i) above. Consistently with Mr Trøim's view about the distinction between Farahead's 70% economic interest and the concepts of ownership and shareholding, he took issue with the notion that the contemplated/actual payments made by Arcadia Lebanon for Farahead's benefit were 'dividends'. That could be regarded as a legalistic quibble, when the broader point was the light which those arrangements shed on

Farahead's awareness and intentions as regards Arcadia Lebanon's ongoing activities and function in the Group.

987. As I said in the Fraud Trial Judgment, it was an unfortunate omission that Mr Trøim did not mention in his 2023 witness statement the discussion about obtaining a US$15 million dividend from Arcadia Lebanon. At the same time, § 98 of the Adams affidavit clearly flagged the fact there were documents existing indicating that there had been such discussions. That would at least make it unlikely that there was any concerted attempt by the Claimants to conceal the whole topic of a dividend payment. Further, the payment by Arcadia Lebanon to Farahead of US$ 15 million in 2008 would not in itself necessarily have been inconsistent with an understanding on Mr Trøim's part that the company had been used for the purposes of one or a small number of particularly lucrative contracts but was no longer active.

988. Moreover, both § 99 of the Adams affidavit and Mr Trøim's 2023 witness statement mentioned that there had been discussions starting in early 2008 about formalising the control or ownership of Arcadia Lebanon, Mr Trøim going so far as to say that "*so far as we were concerned it was a normal part of the group and ought to be treated as such*" (§ 97). I do not find it easy to square those parts of the Claimants' evidence (particularly Mr Trøim having volunteered the rather candid statement I have just quoted) with the notion of a dishonest attempt to mislead the court about Arcadia Lebanon's status and activities.

989. I also do not accept that I should infer, from Mr Trøim's evidence at the Inquiry Trial that the Hannas Note "*was created more for Mr Fredriksen than for me*", that Mr Trøim himself must have seen the Hannas Note when it was created (probably, the Defendants say, in 2013). Mr Trøim made clear that he could no longer remember which documents he saw when he signed his 2023 witness statement (Day 9/81). Even if he did see the Hannas Note in 2013, it would not follow that he would necessarily have recalled its details or significance when providing information and evidence in 2014 and subsequently.

990. I also note that at the Inquiry Trial, Mr Trøim was candid and took responsibility for the lack of any clarity in his witness statements, as well as further explaining what his understanding of a dormant company (or area of trade) was:

> "A. That might be correct. I think there is one thing which kind of -- I want to kind of -- the different -- your Honour, that's -- there is a difference between a dormant activity in the trading industry and a liquidated company. A dormant activity is what I would consider a company with no specific (inaudible), but it's not liquidated. There is still funds in there, there's still audit and there is some minimum activity. That's also the same situation for the West African thing, which we're going to be -- we also have had this discussion about; what's a dormant company? A dormant company for me is a company which had very kind of small little position changes where you might do trades through them, but they're not kind of effectively this whole or liquidated. I think that's -- in retrospect, I wish my kind of explanation was more clear about this, but -- because if a company is liquidated, then the company doesn't exist, and it's clearly that both West

> African trading, which was part of the book every day, which was reported, and also Arcadia Lebanon, which was called Arcadia Middle East or whatever it was called, both existed prior -- after that date, and I think that's the thing. The only shock I really got was when Tom Francisco started to look into Arcadia Lebanon and he found out that there was massive amounts of trade which had taken place there which -- we weren't aware of the size of activity. But it hadn't influenced the P&L, so you never saw it in the way we reported, but on the revenue side, there was massive amounts of trading going on. (Day 9/107-108)

and:

> "Q. The allegation that Mr Bosworth had told you and Mr Fredriksen that Arcadia Lebanon had ceased trading and was dormant, that allegation was not true.
>
> A. I think it was dormant, was what he effectively told us, but kind of ceased trading –– I can see that kind of in retrospect, it was kind of wrong way to describe it, because we knew that the company was still existing and it was there. The size of the –– the reason why it was set up so specifically; trade was executed and that was not the reason any longer, and I think the rest of what was coming inside there we didn't have any kind of good feeling for. But I can clearly see that this could have been presented by me in a different way when it was presented in the affidavit." (Day 9/109)

991. Turning to the Trade Cessation Allegation, Mr Trøim in his 2016 witness statement said:

> "13. What Mr Adams explained in his affidavit was that Mr Fredriksen and I believed, as a result of what we were told by Mr Bosworth, that the Arcadia Group "was not engaged in any regular ongoing trading in West Africa" …. In light of the focus on the point now, I explain the position more fully below.
>
> 14. When Farahead acquired Arcadia London in March 2006, Mr Fredriksen and I understood that Farahead was principally buying a West African trading operation. We purchased Arcadia London because we believed there was a potential opportunity for an oil trading business such as Arcadia London to profit from synergies with the large tanker fleet run by Frontline Limited, which would give the business more operational flexibility in the way that it traded. We thought that physical trading of West African oil was the backbone of Arcadia London's business and understood Mr Bosworth to primarily be a West African trader. We were told by Mr Bosworth during the negotiations for the purchase of Arcadia London that he was able to bring with him a number of valuable physical trading contracts to lift oil out of

> West Africa which would be transferred to Arcadia London after the purchase.
>
> 15. However, as time went on, we picked up from the profit and loss figures in the daily reports that were provided to us that, increasingly, the West African book did not appear to be making much, if any, profit. Mr Fredriksen and I asked Mr Bosworth and Mr Hurley on a number of occasions why that was the case and why they were spending so much time and resources in West Africa when the West African book never showed any significant profit. We were told during the course of those conversations that the Arcadia Group had lost a number of its large physical oil trading contracts in West Africa and that operations there had been significantly scaled back."

Mr Trøim went on to say that, in the context of concerns discussed in around 2009 about bribery and corruption risks, Mr Bosworth again said that the level of trading activity in West Africa had been "*significantly scaled back*", but that it was important to continue doing some trading in order to remain in touch with the market and intelligence in case further business might be done in the region in the future. Mr Trøim said this appeared to be confirmed by daily reports and annual bonus figures showing little, if any, profits being generated by the West African book.

992. Mr Trøim gave evidence to similar effect in his 2023 witness statement. In his oral evidence at the Fraud Trial, Mr Trøim said Farahead was never told that West African trading had stopped, but he understood it to have been reduced down to a level where there was no hard political risk in any of the contracts, and that it would be "*stupid*" to suggest it had stopped because Farahead was receiving a report every day showing it was still going on (Fraud Trial Judgment § 529). As with the Limited Purpose Allegation (§ 981 above), it does not necessarily follow from any discrepancy between the Adams affidavit and Mr Trøim's evidence that Mr Trøim (or anyone else) must necessarily have been dishonest.

993. The Defendants drew attention to Mr Adams's proposal, on 8 June 2011, to "*significantly reduce our exposure*" to West African trading, and to a meeting with Mr Trøim and Mr Fredriksen to discuss that proposal on 9 June 2011. In the Fraud Trial Judgment I said:

> "Mr Adams's suggestion that Arcadia should significantly reduce its exposure to West African trading again cuts against the Claimants' allegation that Farahead had believed and relied on a deceitful misrepresentation that Arcadia had ceased regular West African trading by 2009 ("the Farahead Representatives believed, as a result of what they were told, that the Arcadia Group was not engaged in any regular ongoing trading in West Africa"). Mr Adams was in this email writing to Mr Trøim on the footing that Arcadia was, by June 2011, still engaged in West African trading on a scale large enough for consideration to be given to whether to "significantly reduce our exposure". I find it difficult to see how, in those circumstances, Mr Adams could properly have given sworn evidence to the effect quoted in § 533

> above" (viz to the effect that Farahead was told in 2009 that regular West African business had ceased). [609]

In addition, the Defendants referred to an email from Mr Adams dated 27 March 2013, the date of Mr Bosworth's departure, referring to Arcadia's "*existing West African crude and products portfolio*", and to Mr Trøim having approved the text of the announcement of Mr Bosworth's departure which *inter alia* said, *"The Group will exit from our existing West African crude and products portfolio and no longer pursue West African development projects"*. That point was not, though, put to Mr Trøim in the Inquiry Trial.

994. The Defendants submit that these matters show that Mr Trøim, as well as Mr Fredriksen, Mr Hannas and Mr Adams, were well aware, long after 2009, that the Arcadia Group's West African business had not ceased, and that the Arcadia Group's ongoing West African business was not being concealed from Mr Fredriksen, Mr Trøim, or Farahead. They submit that in those circumstances the Trade Cessation Allegation, including the statement that the Farahead Representatives relied on it, was dishonest.

995. In cross-examination in the Inquiry Trial, Mr Trøim maintained that West African trading "*had, of course, at that time been already significantly reduced at that time*" and *"[t]he regular West African trading which we bought in 2005 has effectively been dormant because it wasn't that activity level any longer*"; and he did not consider the note of the June 2011 meeting to be inconsistent with that.

996. I do not consider this matter sufficient for me to conclude that Mr Trøim acted dishonestly. It relies on the proposition that Mr Trøim must, when he provided information and evidence in 2014 and subsequently, have recalled that a proposal had been made three or more years previously whose premise was (arguably) inconsistent with West African trading already having been significantly scaled back by 2008/09. All of this evidence involved efforts by Mr Trøim to recollect what he and Mr Fredriksen had been told years previously, and imprecise concepts such as 'scaling back' or cessation of 'regular ongoing' business. It remains distinctly possible that Mr Trøim simply misremembered parts of the story, and I am unable in all the circumstances to conclude that he has been dishonest.

997. Having considered all these matters in the round, I am unable to conclude that any of the information or evidence provided by Mr Trøim was dishonest.

(6) Mr Fredriksen

998. The attachment to Freshfields' letter of 18 July 2015 referred to Mr Fredriksen as having been, along with Mr Trøim, the source of the Cessation Allegation but none of the other allegedly dishonest allegations in the Adams affidavit on which the Defendants rely. The Defendants submit, though, that he must also have been the source of the Beneficial Ownership Allegation.

(a) Attribution

999. Mr Fredriksen has never been a director of any of the Claimants. However, the Defendants submit that his relevant actions should be attributed to the Claimants on either of two bases.

1000. First, the Defendants submit that Mr Fredriksen was a shadow director of the Claimants, because he was the person in accordance with whose directions and instructions their directors were accustomed to act. They make the following points.

i) Mr Fredriksen appointed Mr Adams to chair Arcadia's management committee; Mr Adams was Arcadia's de facto CEO although he was not a director of any Arcadia company. Mr Adams reported directly to Mr Fredriksen, or (prior to Mr Trøim's falling out with Mr Fredriksen) to Mr Trøim as a representative of Mr Fredriksen. On 21 March 2013, Mr Adams sought the "*Owners approval*" of the announcement made to staff regarding "*significant job losses*" following Mr Bosworth's departure and the timing of that announcement; and "*Owners agreement*" to bonus payments.

ii) Mr Francisco was the de facto CFO; he also said "*I just report directly to JF*". Mr Francisco was also described as a "*shareholder representativ*e".

iii) Mr Hannas gave evidence that he needed instructions from Mr Fredriksen to liquidate GEPVTN.

iv) On 15 January 2015, Mr Francisco sent a business plan to Mr Hannas that was "*approved in our meeting with JF*". The following day, Mr Hannas checked with Mr Francisco whether the "*attached resolution [is] satisfactory?"* and Mr Francisco approved the resolution. The draft resolution said that it was made *"[a]fter discussion and consideration*" of the business plan; but the reality is that Mr Fredriksen had approved the business plan and the board rubber stamped the approval.

v) Mr Trøim's evidence in the Inquiry was consistent with this position:

"Q. Mr Fredriksen controlled Farahead, didn't he?

A. I would assume so."

1001. Secondly, the Defendants say Mr Fredriksen was the key decision-maker on the part of the Claimants in respect of the proceedings and his evidence was critical to the Claimants' case. He authorised the litigation and was closely involved throughout the proceedings.

i) Mr Fredriksen said that Mr Trøim had the "*larger role in the supervision of the Arcadia Group on behalf of Farahead"*, but after the fall-out in October 2013, Mr Fredriksen became closely involved himself. Mr Fredriksen started "*running the business*", and described himself as a detail-oriented person.

ii) Mr Fredriksen must have authorised Mr Adams to sign the Adams affidavit and the original Particulars of Claim on behalf of Farahead. When the Claimants commenced the claim in February 2015, Mr Fredriksen was the only remaining

"*FH Representative*" following the fall-out with Mr Trøim. There is no Farahead resolution authorising Mr Adams to sign the Particulars of Claim and Mr Hannas's evidence was that no-one from Farahead did approve the Particulars of Claim (Day 8/109/5-7). Mr Fredriksen authorised Mr Adams to sign the Adams affidavit and the Particulars of Claim notwithstanding that Mr Fredriksen said that he himself had not read either document (Day 10/160/15-22).

iii) Mr Fredriksen was listed as the "*source of the information provided to the deponent*" twenty-seven times in the attachment to Freshfields' letter of 18 July 2015.

iv) From the documents that have been disclosed relating to Mr Fredriksen's role in the litigation, it is clear that Mr Fredriksen was closely involved throughout the proceedings. The Defendants cite an email from July 2017 about Mr Fredriksen's involvement in the size of EY's charges; an email in March 2021 (the substance of which is redacted) from Mr Mills-Webb of Seatankers sending Mr Fredriksen a "*Legal Claims Update 9 March";* an email to Mr Fredriksen in October 2023 sending him a "*Weekly report October 13, 2023*" containing "*an update on what we have had focus on lately and going forward*" (the substance of which is redacted); and an exchange of texts from September 2021 including a message from Mr Adams to Mr Lance saying that it was *"pointless to speculate on how JF will respond"*.

v) A letter from Grosvenor Law dated 31 May 2024 said "*Mr Fredriksen is in a position to and has authorised the Claimants to bring and maintain these proceedings"*; "*this firm is satisfied that Mr Fredriksen properly and sufficiently understands the factual and legal basis of the serious allegations of fraud being made against the remaining Defendants and that his authority to pursue the proceedings has been given on this basis*"; and "*Mr Morrison was expressly authorised to sign the statements of truth on behalf of the Claimant entities and has explained to Mr Fredriksen (and other Claimant representatives) the effect of his signature*". Indeed, by this stage Mr Fredriksen was the only individual left at the Claimants who was involved in the underlying events.

vi) Mr Fredriksen gave evidence at the Fraud Trial that he gave instructions for the Claimants in the proceedings: at Day 11/27-29 he gave this evidence:

> "Q. Grosvenor Law need to act on instructions from someone at the claimants in order to sign statements of truth. Who at the claimants is giving instructions in this case?
>
> A. I'm obviously one of them, but that is regarding part of it.
>
> Q. Well, who else?
>
> A. It's -- I don't know. It is Cyprus office or something like that.
>
> …

> Q. And it's not clear to me at the moment who at the claimants is running the case for the claimants making these very serious allegations. Do you understand that?
>
> A. Yes, I do.
>
> Q. So I'm going to ask you one more time: who is giving instructions for the claimants in this case currently?
>
> A. I guess a part of it is me.
>
> Q. Who else?
>
> A. It is also partly Cyprus office.
>
> Q. Who at the Cyprus office?
>
> A. Various. A new CEO.
>
> …
>
> Q. I'm asking about the current position. Who in the Cyprus office is currently giving instructions?
>
> A. This is the new CEO.
>
> Q. And this new CEO, he had nothing to do with the material events, did you?
>
> A. Not really, no.
>
> Q. When did he become CEO?
>
> A. A few years ago.
>
> Q. When?
>
> A. I don't exactly remember.
>
> Q. After 2015?
>
> A. Yes."

1002. I do not consider the evidence to establish that Mr Fredriksen was a shadow director of any of the Claimants, applying the test I have summarised earlier. Each of the Claimant companies had a properly constituted board of directors, and there is evidence that they exercised their own independent judgment. For example:

i) In an email exchange between Mr Trøim and Mr Hannas in October 2013 (to which Mr Fredriksen was copied), evidently in relation to a payment of USD 135 million to buy the Atlantic claim out from Arcadia, Mr Trøim said to Mr Hannas:

> "Dimitris. In line with the decision from the Board you need to make sure that USD 135 million is available later in the week, to buy the Atlantic claim out from Arcadia. Tom can you please advice Dimitris on the timing. Dimitris - Please do not release the funds before final approval for transfer is given from the Board." (emphasis added)

ii) In an email dated 7 October 2013, Ms Daly wrote to the directors of Farahead seeking their approval in relation to certain novation and prepayment agreements:

> "Dear Directors
>
> Some of your (sic) will recall that Arcadia Energy (Suisse) SA entered into a Prepayment Agreement with Atlantic Energy Drilling Concepts Ltd in 2011…
>
> ….Pertaining to the aforementioned we provide you the following for your consideration and approval:
>
> * Novation Agreement;
>
> * Prepayment Agreement; and
>
> * Written Resolution
>
> Can I kindly ask you to review and confirm your agreement by duly signing the written resolution and returning it to me by pdf with originals to follow."

1003. Mr Trøim's evidence at the Inquiry Trial supports the view that the Claimants were independently run by their respective boards. Mr Trøim did not accept that Mr Fredriksen wanted to "*control everything*" (in the context of questions about whether the boards were puppets for him and Mr Fredriksen) or that the boards were administrative ciphers for Mr Fredriksen. In particular, Mr Trøim gave this evidence:

> "Q. The boards of the Arcadia companies were merely administrative ciphers for Mr Fredriksen, weren't they?
>
> A. No, a board is a board. I think everybody who goes into a board have their own responsibility as board members."
>
> "Q. Mr Fredriksen wants to control everything, doesn't he?
>
> A. No. He's a good businessman. When you -- when you have created a fortune of $25/30 billion and you run some of the most successful companies in the world and you run them on the New York Stock Exchange with SEC rules, you are a professional businessman. That's what I can say about him."

Mr Trøim said that, unlike with some of Mr Fredriksen's other businesses, he and Mr Fredriksen had no experience of the oil trading business and were in that sense dependent on others to run the business:

> "Q. Mr Fredriksen did want to control everything in respect of Arcadia, didn't he?
>
> A. I think it comes to the story. Herman Billung runs the dry bulk company for John Fredriksen. Dry bulk is a business John Fredriksen knows better than anybody. So from that point of view, obviously he has some control on that one. When comes to the oil trading business, we had no experience. We had no knowledge about it so we had to trust people, and that's what we did and sadly enough ..."

Mr Trøim did not accept that the directors of the boards of the Arcadia companies "*always did what [he] and Mr Fredriksen wanted them to do*":

> "Q. The directors of the boards of the Arcadia companies always did what you and Mr Fredriksen wanted them to do, didn't they?
>
> A. I think the story about the investment in Capital and Atlantic shows that the people who really decided in this company was management. It was not the shareholders.
>
> Q. Listen again to the question. The directors of the boards of the Arcadia companies always did what you and Mr Fredriksen wanted them to do, didn't they?
>
> A. It is a board. They're responsible as board members. I think they listen to advice from -- from the shareholders, but of course they are still a board and they kind of don't underestimate the role a board member have. It's kind of certain obligations you have as a board member. You're responsible for your own action. I think if you listen to advice from the shareholders as a board or director, you certainly have director's functions. You're not -- you're not a puppet head for anybody.
>
> Q. The Arcadia boards were puppets for you and Mr Fredriksen, weren't they?
>
> A. If they were puppets for anything, they were more puppets for Colin and Paul. They ran the business the way they wanted it, and I think the way this ended with the Capital and Atlantic shows that -- who was really in control of running this company; certainly not the shareholders."

The Atlantic and Capital sagas strike me as compelling examples of how Mr Fredriksen was <u>not</u> controlling the actions of Arcadia's directors.

1004. Similarly, Mr Trøim did not accept that Farahead controlled the Arcadia business; rather, he said *"Farahead controlled the capital provided to Arcadia to run Arcadia's business and Arcadia was controlled by Arcadia's management and Arcadia's board*." He said that it was the *"[b]oard, who was running the company"*; and he referred to the board authorising him to terminate Mr Hurley's employment. Mr Trøim also stated that Mr Adams reported to the board of Arcadia, rather than to Mr Fredriksen and himself.

1005. The Defendants object that Mr Adams, in his fourth witness statement (for the jurisdiction challenge), suggested that the companies' boards merely performed administrative functions. However, the point Mr Adams was making was that, in practice, the strategic direction and day to day management of the companies was in the hands of Mr Bosworth as CEO and Mr Hurley as CFO, and, specifically, not in the hands of Mr Fredriksen or Mr Trøim.

1006. Mr Fredriksen in his witness statement for the Inquiry (his sixth witness statement) confirmed that, as he had previously stated, he devoted no more than four or five hours a month on average between 2006 and 2013 to matters relating to the Arcadia Group, though he may have had slightly more involvement in the transitional period after Mr Trøim decided in October 2013 to leave the business and as Mr Adams began to assume greater responsibility. He added:

> "From time to time, the directors or management of the Claimant companies would seek my advice or opinion, given my significant experience across different types of businesses. On such occasions, I would provide my opinion or advice, but the ultimate decision-making authority remained with the board. In some 'bigger picture' areas, such as significant financing, security packages, credit lines or overall strategy, my opinion would carry more weight. My role and involvement in relation to the Claimant companies was in this way different from my role in many other companies where I did hold the position of a director. For example, as I say at paragraph 23 of JF 4, I was formerly a director of Seadrill, in relation to which I took a very hands-on role as I did as a director of Frontline and Golden Ocean Group Ltd." (§ 13)

That evidence appears to me plausible and is in line with what I would expect based on my understanding of the operations of Mr Fredriksen's businesses gained during the Fraud Trial. I bear in mind that the Defendants did not have the opportunity to test that evidence in cross-examination.

1007. The Defendants suggest that Mr Adams, as acting CEO of Arcadia from April 2013, and Mr Francisco as acting CFO, were "*reporting to*" Mr Fredriksen. However, I do not consider that any of their examples establish that Mr Fredriksen was a shadow director. It is not surprising, within a group of companies, for parent or ultimate beneficial owner approval to be needed, in practice, for major strategic decisions such as significant business plans, redundancies or bonus payments, the liquidation of companies within the group, or the handling of investigations into serious problems within the group (such as arose in the present case). High level strategic influence of that sort does not establish that the subsidiary companies' directors are 'accustomed to

act' on the parent/owner's instructions such as to render them shadow directors. Equally, the practice of having a shareholder's representative on a company's board does not make the shareholder itself a shadow director of the company. Nor does the fact that the shareholder ultimately, and in a legal sense, "*controls*" the subsidiary.

1008. As to the Defendants' second route for attribution, in my view the evidence falls some way short of showing that Mr Fredriksen was a committed or integral part of the litigation team, or otherwise in a position that would make it appropriate to attribute his actions to the Claimants. He was the person ultimately interested (via discretionary trust) in the Farahead group, including the Claimants. It is natural that he would take an interest, at a high level, in the litigation, especially when he was giving evidence in it, and that he would receive updates on it from time to time. In his sixth witness statement, Mr Fredriksen said he did not authorise the Claimants' legal representatives to sign statements of truth contained in the Claimants' statements of case. He said he would have agreed and approved the bringing of the fraud claim in general terms but did not agree or approve the contents of any statement of case. That is consistent with the Claimants' admission that Mr Fredriksen "*authorised this claim in the sense that he agreed and approved of it"* (Inquiry Defence D1/D2 § 10(2)). Mr Fredriksen said that to the best of his recollection, in 2015 when the case started, Mr Adams, the de facto CEO of the Arcadia Group at the time, was generally making decisions in relation to the proceedings. (Again, I bear in mind that the Defendants did not have the opportunity to test that evidence in cross-examination.) These matters do not in my view reach the threshold set out in the case law to which I have referred.

(b) Dishonesty: Arcadia Lebanon and West African trading

1009. I am not persuaded that Mr Fredriksen had any plausible motive for giving dishonest information or evidence. I would accept that he was very displeased about the Equinox, Atlantic and Capital transactions. On the other hand, by early 2015 there had been very substantial recoveries made, following efforts made by Mr Bosworth in particular. In any event, I doubt that Mr Fredriksen would commence and pursue a decade of enormously expensive commercial litigation to retaliate against certain former employees of the Claimants who had already left the companies, purely for retaliation. That was also not my assessment of his evidence at the Fraud Trial. As noted earlier, he struck me as someone who had convinced himself that he had been defrauded. As the Claimants point out, Mr Fredriksen was already in his seventies when these proceedings were commenced and by the time of trial was 80 years old and in poor health yet submitted himself to multiple rounds of witness evidence and days of demanding cross-examination in the proceedings. Moreover, I agree with the Claimants that the reputational risk of pursuing a dishonest case to Mr Fredriksen (who is involved in various listed businesses) would have been a strong countervailing disincentive.

1010. The Defendants also mentioned a WhatsApp conversation between Mr Fredriksen and his daughter on 1 March 2021:

> "[daughter]:
>
> I don't think more lawyers will manage to solve the Arcadia case, something dirty has to be done to thieves like these
>
> "[Mr Fredriksen]:

> Yes that's the only option we have now
>
> We have to take the house in Switzerland and in Ibiza".

I do not consider that exchange, which occurred several years after the evidence impugned on the present application, to evidence dishonest intent on Mr Fredriksen's part.

1011. Turning to the allegedly dishonest allegations, Mr Fredriksen's witness evidence, particularly his first witness statement made in July 2016, was expressed in very similar terms to Mr Trøim's. That included his evidence in relation to the Cessation Allegation, in relation to which both Mr Fredriksen and Mr Trøim were identified as the sources, though Mr Fredriksen expressed his recollection of the initial 'scaling back' conversation in this way:

> "I recall being told by Mr Bosworth and Mr Hurley during the course of those conversations that the Arcadia
>
> Group had lost a number of its large physical oil trading contracts in West Africa and that regular trading operations there had been significantly reduced to what was essentially only legacy business and just enough activity to maintain their contacts in the region in case we ever wanted to start up that business again. It also, Mr Bosworth suggested, helped him to keep close to people there and to be alive to developments in the market." (§ 15)

In addition, Mr Fredriksen said he "*particularly recall[ed]"* Mr Bosworth telling him, in the context of the later bribery/corruption discussion "*that the Arcadia Group was not engaged in any significant ongoing trading in West Africa*" and "*was not involved in regular ongoing trading activity in West Africa*" (§ 16). He said he recalled this because *"it was in this context that we continued to ask why, therefore, Mr Bosworth personally continued to travel frequently to the region (and Nigeria in particular) and so much resources continued to be spent in West Africa"*; to which Mr Bosworth replied that it was to keep close to the market and maintain his contacts there.

1012. Mr Fredriksen gave evidence to the same effect in his 2023 witness statement for the Fraud Trial, except that he said it was "*by about 2009*" that he understood Arcadia Lebanon to be no longer involved in any ongoing activity and was to be closed down (§ 87). That was different timing from the pleaded case, though it is notable that the Adams affidavit quoted above referred to both "*the latter part of 2008*" (§ 99) and "*by around 2009*" (§ 211).

1013. In his oral evidence at the Fraud Trial, Mr Fredriksen accepted that a daily P&L report from January 2010 showed that West African trading was still ongoing, and said he was not suggesting that the trading had been hidden from anyone: he saw the case as being about where the profits had gone (Fraud Trial Judgment § 530). As I noted in § 532 of that judgment, both Mr Trøim and Mr Fredriksen had said in their witness statements that regular West African trading had been *"significantly scaled back"* (both using the same form of words): a departure from the Claimants' pleaded case, which was nonetheless maintained.

1014. The Defendants note that the EY Report said "*we are instructed that Arcadia Lebanon has never been a part of the Arcadia Group"*. They submit that the only individual who could have provided factual instructions of that sort to EY was Mr Fredriksen, and refer to evidence from Mr Trøim in cross-examination that *"I assume Tom – Tom Francisco could have done it on his [Mr Fredriksen's] behalf"*. That is not, however, a fair account of the relevant part of Mr Trøim's cross-examination, which was as follows:

> "Q. Mr Fredriksen gave the instructions to Ernst & Young, didn't he?
>
> A. I wouldn't assume so.
>
> Q. He's the only person who could have given instruction to Ernst & Young; correct?
>
> A. I assume Tom -- Tom Francisco could have done it on his behalf.
>
> Q. Who instructed Ernst & Young that Arcadia Lebanon was not part of the Arcadia Group?
>
> A. I have no idea.
>
> Q. Who instructed Ernst & Young that Arcadia Lebanon was not a Farahead company?
>
> A. I have no idea." (Day 9/72)

Mr Fredriksen in his various witness statements did not in terms comment on Arcadia Lebanon's beneficial ownership. He referred to it as a company that Mr Bosworth and Mr Hurley had set up in their own names, for the purpose of some particular trades, and that Farahead were promised 70% of the net profits from those trades. I see no reason to assume that Mr Fredriksen would, in instructions to EY or Mr Adams, have gone beyond that evidence and expressed a view on the company's beneficial ownership.

1015. I also do not accept the Defendants' submission that, had Mr Fredriksen instructed EY that Arcadia Lebanon was a Farahead company, there would have been no case that profits had been diverted from the Arcadia Group. As I noted earlier, the Claimants' case extended beyond the use of Arcadia Lebanon to other entities, and given Arcadia Lebanon's unusual status in the group it could in principle have been used for the diversion of profits whether or not it was strictly part of the Group.

1016. The Defendants refer to the evidence about Mr Lance's lunch and email to Mr Adams in August 2016 referred to in section (F)(4) above. They invite the inference that Freshfields will have realised that the minutes of the 15 October 2008 meeting were important and discussed them with Mr Fredriksen, who later referred to them in his

second witness statement in August 2020, and with Mr Hannas. The Defendants suggest that these events show that Mr Fredriksen and Mr Hannas knew in August 2016 that Arcadia Lebanon had paid a dividend to Farahead. I do not agree. As indicated in § 463 of the Fraud Trial Judgment, the minutes indicated that, at the meeting, the board was told that it was the intention of the group to distribute an amount of cash to Farahead over the coming months in the form of loan repayments, dividends and redemption of preference shares; the reference to *"other sources"* formed part of an *"estimated repayment schedule"*; and the Hannas Note recorded a conversation the following day saying *"Skilton - $15m dividend from [Arcadia Lebanon] to Beirut Holdings??"* These documents did not establish that a dividend was in fact paid. They were not obviously inconsistent with the statement made in the Adams affidavit that there had been discussions in 2008/09 about Arcadia Lebanon paying a dividend of between US$10 million and US$15 million to the Arcadia Group although "*no clear record*" had been identified showing if this payment was made. I also note that the exchanges in August 2016 post-dated the Adams affidavit and the evidence served on the jurisdiction challenge.

1017. I mentioned earlier that Mr Trøim said he thought that the Hannas Note "*was created more for Mr Fredriksen than for me*". Mr Fredriksen in his sixth witness statement said:

> "As far as I can recall, I had not seen this document until a few days prior to being asked about it in cross-examination at trial. I have no memory of having seen it before then nor do I recall being aware of it at the time at which I provided my previous witness statements in these proceedings."

1018. As already noted, the Defendants did not have an opportunity to test that evidence in cross-examination. However, I do not accept that Mr Trøim's evidence puts the position beyond doubt (as the Defendants suggest) or means that Mr Fredriksen must have seen the Hannas Note, whether in 2013 or at any other time. The origins and purpose of the Hannas Note remain as unclear as they were at the time of the Fraud Trial Judgment. I am not willing to infer that Mr Fredriksen is bound to have seen the Hannas Note. Even if he did, he may not have appreciated its implications, bearing in mind also that, as I have already indicated, the existence of Arcadia Lebanon and discussions about it paying a dividend were already set out in the Adams affidavit.

1019. I have reflected carefully about Mr Fredriksen's evidence on all of these points. I bear in mind that, like Mr Trøim, Mr Fredriksen was giving evidence of what he had been told, or what he understood from what he had been told, in discussions many years previously that generally appear not to have been formal or uninterrupted. Moreover, this was a business to which he devoted relatively little of his time and of which he had little experience or knowledge. There is ample room for errors in recollection in such circumstances.

1020. Mr Fredriksen maintained the gist of his evidence through the ensuing years and the Fraud Trial. As noted earlier, it is well recognised that witnesses sometimes convince themselves of what they think must have happened, and their memories conform to that, so that false memories take the place of genuine ones, especially where witnesses have had a long time to think about events that happened many years previously. At the same time, there were differences between Mr Fredriksen's evidence and the

Claimants' pleaded case, for instance as to the timing of the dormancy representation and the nature of the cessation representation. Those differences tend to support the view that Mr Fredriksen was setting out genuine, even if mistaken, recollections.

1021. Further, the relevant discussions appeared to have taken place with both Mr Fredriksen and Mr Trøim. It was Mr Fredriksen's evidence that Mr Trøim played the larger supervisory role on behalf of Farahead. In these circumstances, it is possible, as the Claimants somewhat inelegantly put it, Mr Fredriksen's evidence was affected by 'groupthink', and he might have come to share the same genuine (even if mistaken) understanding as Mr Trøim of the oral discussions they had had several years prior. That ought not to happen, of course, and it is troubling that Mr Fredriksen's and Mr Trøim's 2016 witness statements are in many respects identically worded, although with some differences (e.g. as noted in § 1011 above) indicating that their own separate recollections had been probed. Where that does happen, one possible explanation is that the witnesses have knowingly concocted an untrue story. Another, however, is that they have discussed matters together over time and their recollections have become infected without either being dishonest. I bear in mind also that solicitors' drafting practices in relation to witness statements have generally improved since 2015/16 in terms of the care taken to set out the witness's own uncontaminated recollections.

1022. Bearing all these matters in mind, as well as having regard to the matters considered in section (c) below, I have not been persuaded that Mr Fredriksen provided information or gave evidence about any of these matters dishonestly.

(c) Dishonesty: employment relationship

1023. The Defendants advance a separate allegation of dishonesty against Mr Fredriksen in respect of the jurisdiction application.

1024. Following the CJEU's decision, the Supreme Court remitted the case to Burton J to hear evidence on the issue of whether D1/D2 were in a "*relationship of subordination*". This issue arose because during the appeal to the Supreme Court, the Claimants withdrew a concession they had previously made that Mr Bosworth and Mr Hurley were employees of one or more of the Claimants for Lugano Convention purposes. That resulted in the Supreme Court referring four questions to the CJEU, one of which was:

> "(2) If a company and an individual enter into a "contract" (within the meaning of Article 5(1)) of the [Lugano II] Convention), to what extent is it necessary for there to be a relationship of subordination between the company and the individual for that contract to constitute an "individual contract of employment" for the purposes of Section 5 [of that Convention]? Can such a relationship exist where the individual is able to determine (and does determine) the terms of his contract with the company and has control and autonomy over the day-to-day operation of the company's business and the performance of his own duties, but the shareholder(s) of the company have the power to procure the termination of the relationship?"

The CJEU's answer was:

> "a contract between a company and a natural person performing the duties of director of that company does not create a relationship of subordination between them and cannot, therefore, be treated as an 'individual contract of employment', within the meaning of those provisions, where, even if the shareholder(s) of that company have the power to procure the termination of that contract, that person is able to determine or does determine the terms of that contract and has control and autonomy over the day-to-day operation of that company's business and the performance of his own duties."

1025. The CJEU in fact reached the conclusion, applying that test, that there was no relationship of subordination because Mr Bosworth and Mr Hurley had a non-negligible ability to influence Arcadia, and the fact that they were answerable to the Arcadia Group shareholders, who through Farahead had the power to hire and fire them, was irrelevant in that regard. However, the Supreme Court considered that the facts underlying that conclusion had not been considered or found by Burton J in his original jurisdiction ruling, so the subordination issue was remitted to him. It is nonetheless of note that the CJEU said as part of its legal reasoning that:

> "As the Advocate General noted in point 46 of his Opinion, neither the general directives which a director may be given by the shareholders of the company he directs for the orientation of that company's business nor the legal mechanisms for control by shareholders point, in themselves, to the existence of a relationship of subordination, and therefore the mere fact that the shareholders have the power to revoke a directorship is not sufficient for the conclusion to be drawn that such a relationship exists." (*Bosworth v Arcadia Petroleum* [2019] ILPr22 at [33], quoted in Burton J's judgment at [2020] EWHC 2757 (Comm) at [15])

1026. In his judgment following the remission, Burton J rejected an argument by the Defendants that the question was whether they had the ability to influence Farahead, as the controller of Arcadia ([21] and [24]-[25]). The question was therefore whether the Defendants were able to influence the Arcadia companies, not Farahead, in the sense identified by the CJEU, i.e. whether they were able to determine or did determine the terms of their contracts with Arcadia, and had control and autonomy over the day-to-day operation of the Arcadia companies' business and the performance of their own duties.

1027. As part of his consideration of the facts, Burton J considered witness statements from the Defendants and from Mr Fredriksen. Mr Bosworth's witness statement included the statement that:

> "I did not determine the terms on which I was employed. Instead, I carried out my duties at Farahead's direction and was under its control. I was responsible for day-to-day management of Arcadia Group business, but that was only because of the authority that had been delegated to me by Farahead, which Farahead could take away at any time. The ultimate decision-

> making power in relation to the Arcadia Claimants lay with Farahead (and Mr John Fredriksen and Mr Tor Olav Troim in particular). I received my instructions from them and was subject to their direction and control. Their instruction or authorisation was necessary in relation to strategic decisions by or relating to the Arcadia Claimants, and often necessary in respect of more minor decisions too."

Mr Fredriksen's witness statement included the following:

> "9.1 Mr Bosworth and Mr Hurley had and exercised control and autonomy over the day-to-day operation of the business of the Arcadia Group. They had and exercised control and autonomy over the performance of their own duties. They were able to, and did, determine how and when and where they worked. They were able to, and did, determine how the Arcadia Group operated….
>
> 9.3 The involvement I (and indeed Mr Troim) had with the Arcadia Group was on behalf of Farahead (and not on behalf of the Arcadia Companies, as Mr Bosworth and Mr Hurley no seek to suggest), as Farahead sought to look out for its interests as shareholder and financier/guarantor. None of that involvement, however, negates the fact that it was Mr Bosworth and Mr Hurley who, in simple terms, "ran the show" at the Arcadia Group.
>
> ...
>
> 10.6 Once Farahead had purchased the Arcadia Group business, it operated exactly as I had intended - that is to say, Mr Bosworth and Mr Hurley were left to get on and run the business as they saw fit, and Farahead oversaw the business as shareholder and as financier/guarantor."

The final sentence of § 93, not quoted by Burton J, said *"Mr Bosworth is simply wrong to say that Farahead, Mr Trøim or I "called the shots"."*

1028. Burton J had particular regard to a witness statement made in March 2015 by Ms Vaswani of Allen & Overy, the Defendants' solicitor at an earlier stage of the proceedings when, Burton J said, no issue as to Article 18 employment had arisen. Ms Vaswani relied on certain paragraphs of the Adams affidavit which she quoted:

> "18… Mr Adams said as follows:
>
> > "As CEO, Mr Bosworth exercised extensive powers on behalf of the Arcadia Group and made strategic and operational decisions that bound the companies in the Group. For example, he: (a) was the driving force behind decisions as to when and where to open Arcadia Group offices; (b) had oversight of and was accountable for the Arcadia Group's trading activities; and (c) made decisions to appoint, transfer

> and terminate the employment of the Group's employees and determined their salaries, bonuses and employment terms. In summary, he performed the duties and exercised all the usual powers of CEO".
>
> 19 Mr Adams said of Mr Hurley:
>
> "… He exercised extensive powers to act on behalf of the Arcadia Group and made strategic and financial decisions that bound the companies in the Arcadia Group. For example, he: (a) was responsible for the management and control of the Arcadia Group's finances; (b) oversaw the preparation of its financial records and accounts and was responsible for financial reporting to the Farahead Representatives; (c) opened, operated and terminated the Arcadia Group's bank accounts, credit facilities and other banking arrangements and managed the Groups relationships with its banks; and (d) was involved in decisions to appoint, transfer and terminate the employment of the Arcadia Group's employees within the finance function and the determination of their salaries, bonuses and employment terms. In summary, he exercised all the usual powers of a CFO"
>
> 20 Mr Adams could not have been clearer about the "employment status" of Mr Bosworth. …"

1029. Burton J among other things considered two Singapore Investment Memoranda dated 2010 and 2012, prepared by or under the directions of the Defendants but approved by Farahead, which Burton J said referred to the important role of Mr Fredriksen and Farahead but spoke powerfully of the role of the Defendants [28].

1030. Burton J also considered at [34] documents relied on by the Defendants said to record emphasis given by tax advisers in 2008 that Farahead as holding company should be seen to control the Group for tax reasons. These included the PwC memo of 12 September 2008 about which Mr Fredriksen was cross-examined at the Fraud Trial as summarised in § 438 of the Fraud Trial Judgment. Those documents indicated that the taxation objectives were consistent with each company's board managing its own business, provided that all strategic decisions and core matters were decided at Farahead level. Mr Bosworth's evidence was that the Arcadia companies in fact, though, followed Farahead's instructions.

1031. Burton J concluded:

> "I am left to decide the question on the basis of this very contested and untested evidence, which I have carefully considered, both before and at the hearing and, as Lord Templeman once advised, in my room afterwards, as to whether the Defendants were in a relationship of subordination to the Arcadia companies because of the degree of control of the companies and of the Defendants by Farahead (and Mr Fredriksen). Just as the Advocate General pointed to the fact (at

> paragraph 41 of his Opinion) that in Holterman the Court "stated that a director having a sufficient share of the capital to influence in a 'non-negligible' manner the persons normally competent to give him instructions and to supervise their implementation cannot be subordinate to the company", so the Claimants can say here that these Defendants between them, without a shareholding, had such power over the Arcadia companies that they were in a position to exercise that same influence. Whether the Defendants had the same powers as, or greater powers than, a normal CEO and CFO in such a situation, and in a case in which Farahead is in Cyprus, Mr Fredriksen in London and the Defendants are running an international group of companies, I do not need to decide. I am entirely clear however that, on the basis that the Claimants bear the onus to establish jurisdiction and my task has been to set their evidence against the rival evidence for the Defendants, and weigh it all in the context of such contemporaneous documents as are before me, I am satisfied that the Claimants have a good arguable case that there is not such a relationship, in that the Defendants had a more than negligible ability to influence the Arcadia companies. If I have, after such a difficult task, to conclude, on my assessment of the present evidence, without cross-examination, weighing the balance of the two Schedules, and taking into account, in addition to the submissions and evidence of the parties before me, in particular the Singapore Investment Memoranda and the witness statement of Ms Vaswani, that the Claimants have the better case, I do so. I am in any event satisfied, with reference to limbs (ii) and (iii) of the Brownlie test, that they have a plausible evidential basis." [36]

1032. The Defendants' present submission is that Mr Fredriksen's evidence must have been dishonest in the light of the evidence he gave at the Fraud Trial referred to in § 438 of the Fraud Trial Judgment. Mr Fredriksen had been taken to the PwC memo, and an email from Mr Skilton of 8 July 2008 which said:

> "In general terms I cannot emphasise enough the importance I attach to Farahead being in control of the group and for this control to be exercised from Cyprus. Farahead must receive full reporting from its subsidiaries on their activities and approve intercompany arrangements. I do not like Farahead 'delegating' authority to Arcadia Management etc, Farahead should have the opportunity to discuss at Board level all important decisions and especially those decisions which require it to be party to agreements/contracts etc."

Mr Fredriksen then gave this evidence:

> "Q. That is why Farahead needed to be in control of the Arcadia Group, Mr Fredriksen.
>
> A. I understand what you are saying. Okay.

> Q. But do you accept then that Farahead did control the Arcadia Group, not just as a shareholder but did exercise mind management and control?
>
> A. That never happened in practice: that is for the taxman to find out.
>
> Q. Right, so it is for the taxman to find out.
>
> A. I don't know if that happened.
>
> Q. Do you accept that the Swiss or the Cypriot tax authorised from their perspective were being told by Farahead that it did not exercise -- that it did exercise mind management and control of Arcadia?
>
> A. I do not -- I can't answer you this one. I would have to check it. But I understand I'm in the same situation in the UK. I can take no decisions in the UK myself otherwise I will be taxable (inaudible – audio distortion) I understand the principle.
>
> Q. Is it fair to say that to preserve the tax position, Farahead needed to call the shots for the Arcadia business?
>
> A. At least according to business regulations.
>
> Q. Farahead had to call the shots because otherwise Farahead's tax advantages would be at risk, wouldn't they?
>
> A. That I understand.
>
> Q. Well, do you agree?
>
> A. Yes, I agree."

1033. In my view there is nothing in the Defendants' contentions on this matter, for four reasons.

1034. First, Mr Fredriksen made clear twice during the course of the cross-examination that it "*never happened in practice*" that Farahead exercised "*mind management and control*" over Arcadia: Fraud Trial Day 12/80/20 and 84/9. Moreover, the evidence I refer to in §§ 1002-1007 above supports that view.

1035. Secondly, the question Burton J had to address was whether the Defendants had a more than negligible ability to influence the Arcadia companies. That would not have been negated by Mr Fredriksen or Farahead having strategic involvement. The CJEU's decision made clear that the relevant question was whether the Defendants influenced the day-to-day operation of that company's business, and that "*general directives which a director may be given by the shareholders of the company he directs for the orientation of that company's business*" do not give rise to the required relationship of

subordination. It was never Mr Fredriksen's evidence that Farahead, rather than the Defendants, ran the Arcadia companies' day to day operations.

1036. Thirdly, I see no inconsistency between Mr Fredriksen's evidence in the witness statement considered by Burton J and his evidence at the fraud trial. His witness statement made clear that Farahead sought to look out for its interests as financier/guarantor as well as its interests as shareholder. His evidence at trial did not in my view go further than that.

1037. Fourthly, I see no basis on which to conclude that any of that evidence was dishonest. Particular care would be needed when seeking to base a finding of dishonesty on such a vague and colloquial phrase as "*call the shots*", which is clearly open to different interpretations. The question on the jurisdiction application was very different from that which arose in 2008 in relation to taxation. I read Mr Fredriksen's evidence as having been consistent whichever of the two meanings is used. He had always accepted strategic influence but not that he or Farahead ran the Arcadia companies' day to day operations.

(7) Mr Adams

1038. The Defendants alleged that Mr Adams knew that the Beneficial Ownership Allegation and the Trade Cessation Allegation were untrue.

(a) Attribution

1039. It is common ground that Mr Adams's actions are to be attributed to the Claimants for present purposes. He was the acting CEO, and on Mr Fredriksen's evidence took the lead in making decisions in relation to the litigation.

(b) Dishonesty

1040. In my view there is no credible motive for Mr Adams to have given dishonest evidence. The Defendants suggested that "*Mr Adams agreed with FH / Mr Fredriksen to receive at least US$5m to assist the Cs with the proceedings*". That was based on evidence in Mr Bosworth's seventh witness statement in November 2023 about what he had been told by Mr Mills-Webb, in-house counsel at Seatankers, at a meeting in January 2022:

> "At this meeting, Mr Mills-Webb told me that Tom Francisco had told him that Mr Adams had reached an agreement with John Fredriksen where he was paid USD 5 million for providing Farahead with assistance to pursue these proceedings against me and Colin." (§ 269)

1041. However, the Claimants' solicitor, Mr Hewetson, in his third witness statement stated, in the context of disclosure of Mr Adams's devices:

> "As regards Mr Adams's personal devices, these are not within the Claimants' control. Without waiver of privilege, my firm has made enquiries with Grosvenor Law (the Claimants' former solicitors) and Edward Mills-Webb (former in-house Counsel of Seatankers from January 2021) as to the existence of any

> employment contract and/or cooperation agreement which would provide the Claimants with access to such devices. On the basis of those enquiries, the Claimants can confirm that they are not aware of any such employment contract and/or cooperation agreement. I note that in Greeno 36, it is alleged (by reference to Bosworth 7, para 269 {D2.1/1/86}) that Mr Mills-Webb supposedly told Mr Bosworth that Mr Adams "agreed to receive" at least USD 5 million to assist the Claimants with the proceedings. I can confirm, having taken instructions, that the Claimants' position is that no such statement was made by Mr Mills-Webb to Mr Bosworth in respect of Mr Adams entering into any such agreement and that no evidence of any such payment has been identified. Indeed, as the Court will recall, Mr Adams did not ultimately give oral evidence at Trial: see paragraph 41 of the Trial Judgment." (footnotes omitted)

1042. That evidence, which I would accept, does indeed seem consistent with the fact that Mr Adams was not produced to give evidence for the Claimants at the Fraud Trial. Moreover, even if Mr Adams had been paid for his help in relation to the proceedings, giving dishonest evidence would always have carried the risk of damage to Mr Adams's personal and professional reputation. Even on the basis of Mr Bosworth's recollection, there is no suggestion that Mr Adams was paid to give evidence to a particular effect, and given his very limited involvement in the underlying events he could hardly have been expected to do so.

1043. As regards the Beneficial Ownership Allegation, the Adams affidavit stated that Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, were "*beneficially owned by and/or controlled by and/or associated with*" the First to Sixth Respondents, who included Mr Bosworth, Mr Hurley and Mr Kelbrick. The affidavit also stated that Arcadia Lebanon was not part of the Arcadia Group (§ 31), that it was a privately owned entity (§ 40), and that Mr Bosworth/Mr Hurley had said Arcadia Lebanon was a "*separately owned company*" established for a particular purpose (§ 97). Based on the undisputed fact that Mr Bosworth and Mr Hurley set Arcadia Lebanon up and were its shareholders and directors, together with the information evidently received from Mr Trøim about what he and Mr Fredriksen were told about the company and its purpose, I do not see how those statements in the Adams affidavit could be said to have been dishonest.

1044. The Claimants' Particulars of Claim, which were exhibited to the Adams affidavit in draft and in due course supported by a statement of truth signed by Mr Adams, made the more specific allegation that Mr Bosworth and Mr Hurley both beneficially owned and controlled Arcadia Lebanon (§§ 15.5 and 40.4). I rejected that case in the Fraud Trial Judgment. However, I am unable to conclude that that would not have been an inference that could honestly be drawn from the known facts referred to above, particularly in circumstances where the Adams affidavit disclosed the conversations between Farahead and the Defendants about Farahead being entitled to 70% of the profits arising from the trade(s) entered into by Arcadia Lebanon.

1045. The Defendants submit that Mr Adams must have known of the Hannas Note before he swore the Adams affidavit. As noted earlier, the affidavit in § 98 referred to discussions in 2008 and the first half of 2009 about the payment of a dividend by Arcadia Lebanon

of between US$ 10 million and US$ 15 million to the Arcadia Group. The Hannas Note included a 9 December 2008 entry saying "*TOT [Mr Trøim] - $15m AL dividend will be used to reduce PB loan from Fulham*", and a 24 June 2009 entry saying "*CH [Mr Hurley] – advised of $10m (e) AB profits for 2008*". The Defendants say that *"[o]ut of the hundreds of thousands of documents in the Cs' disclosure, the Hannas Note is the only one that refers to an AL dividend of between USD10 million and USD 15 million, consistently with the Adams Affidavit"*. They also note that there are four versions of the Hannas Note, indicating that someone took three photocopies of it and distributed it to Farahead representatives.

1046. I do not consider that this evidence enables me reliably to conclude that Mr Adams must have seen the Hannas Note before he swore the Adams affidavit. Even if he did, however, it is significant that he chose to disclose in his affidavit what may well have been, at the stage of investigations he had reached, the known information about the dividend. (The Adams affidavit made clear that the inquiries to date had to a degree been limited: it indicated in § 12 and elsewhere that a significant volume of investigatory work that might reveal further information regarding the apparent fraud had not, to date, been possible, for fear of tipping off the alleged wrongdoers, and that those further investigations would be carried out once the intended proceedings had been commenced.) Mr Adams's disclosure in his affidavit of those discussions in my view tells strongly against the suggestion that he was giving dishonest evidence.

1047. It is true that, if Mr Adams did read the Hannas Note, he would also have seen the entry for 25 February 2008 stating *"Mark [Lance] – Arcadia Lebanon = Fredriksen's stand alone company"*. If so, that ought to have led to enquiries about the company's status in practical terms in the Group. It nonetheless remains the case, in my view, that had Mr Adams wished dishonestly to mislead the court, it is more likely that he would have omitted reference to the dividend discussions altogether. His disclosure, not only that there had been discussions but that there were documents on the topic, might naturally have been expected in the ordinary course to lead to requests for disclosure of those documents. It would, I consider, be far too speculative to think that Mr Adams must have taken the view that he could rely on the Hannas Note not being disclosed because privilege would be claimed for it.

1048. Turning to the Trade Cessation Allegation, the contents of the Adams affidavit and the Particulars of Claim were essentially drawn from information provided by Mr Fredriksen and Mr Trøim. I have noted above that the witness statements of Mr Fredriksen and Mr Trøim referred to West African trading having been "*significantly scaled back*", whereas the Adams affidavit and Particulars of Claim referred to "*regular*" or "*regular ongoing*" West African trading having ceased. To the extent that there is a difference between the two versions, I can see no reason why Mr Adams would dishonestly have misstated the information provided by Mr Fredriksen and Mr Trøim, not least given that they could reasonably be expected to adhere to their accounts in due course when providing evidence.

1049. Mr Adams himself knew that West African trading was still ongoing, as even he could see from his base in the US. He said so in § 112 of the Adams affidavit quoted earlier. Consistently with that, as the Defendants point out, Mr Adams was one of the authors of a new Arcadia website developed in around 2010 which among other things referred to Arcadia's diversified portfolio of oil and customer bases in West Africa.

1050. The Defendants also refer to Mr Adams's own proposal on 8 June 2011 to "*significantly reduce our exposure*" to West African trading, and the meeting on 9 June 2011 to which I have referred earlier in respect of Mr Trøim. As noted there, in § 609 of the Fraud Trial Judgment I concluded by saying that I found it difficult to see how, in those circumstances, Mr Adams could properly have given sworn evidence to the effect that Farahead was told in 2009 that regular West African business had ceased.

1051. I have reflected further on this point in the context of the allegations currently being pursued, bearing in mind also that Mr Adams volunteered in § 112 of his affidavit that from his base in the US he understood that the Arcadia Group in fact was continuing to trade extensively in West Africa. The question is whether he must have been dishonest in relying on the information evidently provided on this subject by Mr Trøim and Mr Fredriksen, to which I have already referred, about what they understood on this topic. Insofar as the dishonesty suggestion is based on the discussion at the June 2011 meeting, it implies that Mr Adams when swearing his affidavit in 2015 is bound to have recalled a meeting some four years earlier with Mr Fredriksen and Mr Trøim that, arguably, proceeded on the premise that there was still extensive West African trading going on (otherwise there would have been nothing to scale back), and therefore must have known that the information they were now providing to him was untrue. I do not consider that to be a fair assumption.

1052. In addition, had Mr Adams's objective been to mislead the court, it is perhaps surprising that (albeit in support of the case against the Defendants) he volunteered that he was aware at the relevant time that extensive West African trading was indeed continuing: that fact might well have implied that West African trading was in fact well known within the Group, which in turn would have tended to undermine the case being put forward.

1053. It is true that it would have been more satisfactory if these matters could have been explored with Mr Adams at the Inquiry Trial. The Defendants submit that an adverse inference should be drawn from the Claimants' not having called him to give evidence, in circumstances where:

i) Mr Adams was the only individual able to give evidence as to his knowledge and belief when he signed the Adams affidavit.

ii) the Claimants positively relied on the alleged "*significant amount of work carried out*" by Mr Adams prior to the application for the Freezing Order in support of their denial that the Claimants knew that the allegations in the Adams affidavit were false;

iii) the Claimants called Mr Trøim as a witness, notwithstanding their denial that Mr Trøim's knowledge is to be attributed to them. By contrast, it is undisputed that Mr Adams's knowledge is attributable to the First to Third Claimants in relation to (at least) the Adams affidavit and the Particulars of Claim which were signed by him;

iv) Mr Adams agreed with Farahead / Mr Fredriksen to receive at least US$5m to assist the Claimants with these proceedings. (I have already addressed this point);

v) the court drew no inference from Mr Adams's absence at the Fraud Trial on the basis that the Claimants said Mr Adams "*had indicated that he did not want to be involved in this litigation and was not willing to do so voluntarily*" (Judgment § 41). That is no longer the position: Mr Adams assisted the Claimants in the Inquiry and consented to provide his devices to the Claimants on a voluntary basis; and

vi) in the circumstances, the unexplained failure to call Mr Adams gives rise to the inference that he would not or could not rebut the allegation of dishonesty made against him personally; and/or that he would not or could not support the Claimants' case that they believed the Freezing Order had been sought and obtained honestly.

1054. I do not accept that submission. Mr Adams has left the Claimants' group and lives in the US. The evidence I have accepted indicates that, although Mr Adams cooperated with them, the Claimants were not in a position to compel him to attend the Inquiry Trial, any more than they could compel him to attend the Fraud Trial. He may have had personal reasons for not wishing to attend trial on either occasion, and it would not in my view be correct to conclude that his non-attendance can only be because he would have no answer to the criticisms or allegations made against him.

1055. Bearing all these matters in mind, I am not persuaded that Mr Adams acted dishonestly in relation to his evidence or the litigation.

(8) Mr Hannas

1056. Mr Hannas was identified in the attachment to Freshfields' letter of 18 July 2015 as the source of the GEPVTN Allegation. The Defendants submit that he was also dishonest in relation to the Beneficial Ownership Allegation and the Trade Cessation Allegation.

(a) Attribution

1057. The Defendants submit that Mr Hannas's actions should be attributed to the Claimants because he was a director of Farahead from 2005 to November 2016. I do not accept that submission. Under the ordinary principles referred to earlier, Mr Hannas's status as an individual director of Farahead did not make his actions attributable to Farahead, still less to the Arcadia Claimants. Nor does the evidence indicate that he was a committed or integral member of the litigation team: he was merely a provider of information or evidence.

(b) Dishonesty

1058. My overall assessment of Mr Hannas in the Fraud Trial Judgment was this:

> "Mr Hannas was the managing director of Seatankers between 1996 and 2017. Seatankers administered Farahead's books and finances. Mr Hannas was a director of Farahead, a director of Arcadia London from March 2006 to April 2008 and a director of Arcadia Singapore from August 2006 to January 2009. He was in frequent contact with Mr Trøim, who described Mr Hannas as a *"very detail oriented guy"*. I regret to say that Mr

> Hannas was a highly unsatisfactory witness. He destroyed relevant, potentially highly relevant, documents during the course of the litigation and then gave evidence about that matter which I consider to be untruthful (see section (E) below). He was also the source of untrue evidence about Arcadia Lebanon's dealings with GEPVTN, a joint venture involving a Fredriksen company, which was contradicted by documents he had seen and dealt with at the relevant time (also set out in section (E) below). He seemed to accept in one of his more recent witness statements that he had access to the Hannas Note when making his previous witness statements (which included his main witness statement for trial). The "***Hannas Note***" is a page of manuscript notes written by Mr Hannas, recording a series of 19 conversations between February 2008 and September 2009, which was provided to the Defendants a few months before trial. Mr Hannas said that when preparing his trial witness statement he had *"overlooked"* entries in the Hannas Note about Arcadia Lebanon providing a dividend to Farahead and its connection with the Fulham Properties loan (as to which see later). He similarly said in cross-examination that he *"may have overlooked"* an entry suggesting that Mr Hurley was talking to him in June 2009 about Arcadia Lebanon's 2008 financial statements, contrary to the impression given in Mr Hannas's witness statement that Mr Hurley hid information about Arcadia Lebanon from Mr Hannas. His approach to all of these matters was thoroughly unsatisfactory." [24]

1059. If, contrary to the conclusion I reach above, Mr Hannas's actions were to be attributable to the Claimants for present purposes, the question would then be, bearing in mind those conclusions, whether Mr Hannas provided information or evidence dishonestly that was material to the courts' consideration of the jurisdiction application.

1060. Although the Defendants draw attention to the fact that the Freshfields attachment gave Mr Hannas as the source of information provided for the Adams affidavit thirteen times, the only one relevant to the present application was the GEPVTN Allegation. However, that allegation was not material for the reasons I gave earlier.

1061. So far as the other allegations are concerned, the Claimants plead that Mr Hannas *"was not aware that this evidence [from Mr Adams] was being given at the time of the Claimants' application for the Freezing Order*" because Mr Hannas could not "*recall receiving or reading the Adams Affidavit or the POC at this time*". The Defendants submit that it is implausible that Mr Hannas, a director of Farahead, supplied relevant information to Mr Adams without being aware that Mr Adams was going to use that information to obtain the Freezing Order. The Claimants accept that Mr Hannas gave "*assistance to Freshfields and his colleagues in the process of obtaining the Freezing Order and afterwards*". At trial, Mr Hannas gave evidence that he "*may have heard about*" the application for the Freezing Order; and accepted that he understood his assistance "*was going to be used for the case*". However, none of that indicates that Mr Hannas was positively aware that the Beneficial Ownership Allegation or the Trade

Cessation Allegation were being made in the Adams affidavit or the Particulars of Claim.

1062. The Defendants submit that an adverse inference should be drawn from Mr Hannas's failure to give evidence at the Inquiry Trial. However, the Claimants' Defence (supported by a statement of truth) stated:

> "In relation to Mr Hannas, he is not aware that anyone on behalf of the Claimants has ever deliberately misrepresented any fact for the purpose of these proceedings. He himself gave limited assistance to Freshfields and his colleagues in the process of obtaining the Freezing Order and afterwards. He does not recall speaking to anyone other than Freshfields or Mr Francisco at this time. Nor can he recall receiving or reading the Adams Affidavit or the POC at this time. Accordingly, he was not aware of any such specific allegations being made. Further, Mr Hannas received chemotherapy treatment five years ago which he maintains has impacted his memory. His position is that if he gave any inconsistent evidence at trial, that was not deliberate, and he has never given any dishonest evidence in these proceedings. He stands by that evidence, including as to his limited role in relation to the Arcadia Group's business."

1063. Given Mr Hannas's absence from the jurisdiction and health problems, it is not appropriate to draw an adverse inference.

1064. I am therefore not persuaded that Mr Hannas provided dishonest information or evidence that was material to the jurisdiction application.

(9) Conclusion

1065. For all these reasons, the application to set aside the jurisdiction application costs orders must be dismissed.

(Y) OVERALL CONCLUSIONS

1066. The Defendants are entitled to compensation pursuant to the Claimants' undertaking in damages on the bases I have set out in this judgment.

1067. The application to set aside the jurisdiction application costs orders must be dismissed.

1068. I record with gratitude and pleasure the significant role taken by junior counsel in the oral, as well as written, advocacy at the Inquiry Trial, which forms part of an increasing and welcome trend in this court.