Nautilus Trustee Ltd v Zedra Trustees (Jersey) Ltd

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	01 December 2016
Neutral Citation:	[2016] JRC 223
Date:	01 December 2016
Court:	Royal Court

vLex Document Id: VLEX-802609333

Link: https://justis.vlex.com/vid/nautilus-trustee-ltd-v-802609333

Text

[2016] JRC 223

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, Master of the Royal Court.

Between
Nautilus Trustee Limited
Plaintiff
and
Zedra Trustees (Jersey) Limited
Defendant

Advocate P. C. Sinel for the Plaintiff.

Advocate J. P. Speck for the Defendant.

Authorities

Fox v Wood (Harrow) Ltd [1963] 2 QB 601 .

El-Ajou v Dollar Land Holdings plc & Anor [1994] B.C.C. 143 .

Armitage v Nurse [1998] Ch 241 .

Three Rivers DC v Bank of England (No.3) [2003] 2 AC 1 .

Nolan v Minerva [2014] 2 JLR 117 .

In the matter of Il [2016] JRC 116 .

Iiyama (UK) Ltd v Samsung Electronics Co Ltd [2016] EWHC 1980 (Ch) .

Meridian Global Funds Management Agent Limited v Securities Commission [1995] 2 A.C. 500 .

AIB Group (UK) Plc v Redler & Co Solicitors [2015] A.C. 1503 .

Re Esteem Settlement [2000] JLR Note 41a .

Re Esteem Settlement 2000/150 .

Graiseley Properties Limited & Ors v Barclays Bank Plc [2012] EWHC 3093 .

Graiseley Properties Limited & Ors v Barclays Bank Plc [2013] EWHC 67 .

Home Farm Developments v Le Sueur [2015] JCA 242 .

Farah v British Airways and Ors CCRTI 1999/0917/BI .

Barrett v Enfield [2001] 2 AC 500 .

Makarenko v CIS Emerging Growth Ltd [2001] JLR 348 .

Royal Court Rules 2004, as amended.

Re Esteem [2003] JLR 188 .

Hitch v Stone [2001] STC 214 .

Trusts (Jersey) Law 1984, as amended.

Graiseley Properties Limited v Barclays Bank Plc [2013] EWCA Civ 1372 .

Trust — application by the defendant to strike out plaintiff's order of justice.

CONTENTS OF THE JUDGMENT

THE MASTER:

Introduction

1 This judgment represents my decision in respect of an application by the defendant to strike out certain paragraphs of the plaintiff's order of justice.

Background

2 In summary the allegations the defendant seeks to strike out concern the alleged manipulation of the London Interbank Offer Rate ("LIBOR") and manipulation of foreign exchange markets by Barclays Bank Plc. These allegations are based on notices issued respectively by the Financial Services Authority ('FSA') in respect of LIBOR in 2012 and by the Financial Conduct Authority ('FCA') in respect of foreign exchange in 2015. It is the parts of the order of justice that contain these allegations that the defendant seeks to strike

out.

The parties

3 The plaintiff is the present trustee of a trust established by Mr Richard Grenville Russell Evans ("Mr Evans") on 10 th August, 1982, ('the Trust'). The defendant, then known as Walbrook Trustees (Jersey) Limited ("Walbrook"), was appointed trustee of the Trust. In May 2007 Walbrook was acquired by the Barclays Group at which point it was renamed Barclays Wealth Trustees (Jersey) Limited and was wholly owned by Barclays Bank Plc through a series of intermediary holding companies which it is not necessary to describe for the purposes of this judgment.

4 In January 2016, Barclays Wealth Trustees (Jersey) Limited was acquired by an independent investment group with the result that Barclays Wealth (Trustees) Limited changed its name to Zedra Trustees (Jersey) Limited the present name of the defendant. The defendant therefore no longer forms part of Barclays Bank Plc or the Barclays Group.

5 While the name of the defendant was formerly known as Barclays Wealth Trustees (Jersey) Limited, there is also an issue between the plaintiff and the defendant as to what role was played by Barclays Bank Plc in relation to investments made by the Trust. I address later in this decision the rival contentions of the parties. It is right to record however that both the plaintiff and the defendant in their written and oral submissions referred to "Barclays Wealth" as a division or trade name of Barclays Bank Plc. For the purposes of this judgment I have adopted this terminology. Any reference to Barclays Wealth is not therefore a reference to the defendant or Barclays Wealth Trustees (Jersey) Limited, but to the private banking division of Barclays Bank Plc.

The proceedings

6 The present claim was commenced by an order of justice served on the 1 st July, 2016, alleging breach of trust in relation to certain investments made by the defendant as trustee.

7 The allegations of breach of trust include a failure to act in the best interest of the beneficiaries, a failure to preserve or enhance the value of trust property, a conflict of interest by permitting a conflict between the obligation to act in the best interest of the Trust and the defendant's interest in generating revenue for the benefit of the Barclays Group, making a secret profit for the benefit of the Barclays Group, a failure to keep accurate accounts or records, and a failure to provide complete records to the incoming trustee. It is also alleged that the breaches of trust amounted to gross negligence, wilful default, or wilful wrongdoing by the defendant.

8 The principal investment complained of concerns three structured loan notes purchased on

or around 14 th May, 2008. The notes related to the performance of certain well known banks. The particular loan notes in which the dispute is concerned carried designations SN281-08, SN282-08 and SN289-08 for £2,000,000, £3,000,000 and £2,000,000 respectively. I will refer to these notes in this judgment as the bank notes.

9 In relation to issues of LIBOR manipulation, the order of justice contains the following references in addition to the paragraphs the defendant seeks to strike out:-

> *"57.3 By 4 September 2007 LIBOR had reached 6.7975%, in excess of the Bank of England's emergency lending threshold of 6.75%, suggesting that UK banks were reluctant to lend to each other*.
>
> *57.10 On 16 April 2008 the Wall Street Journal published a report questioning the integrity of LIBOR, entitled "Bankers Cast Doubt on Key Rate Amid Crisis".* The article began "LONDON – One of the most important barometers of the world's financial health could be sending false signals."

10 The losses claimed for the bank notes are said to be in the region of £6,000,000.

11 Losses are also claimed in respect of investments in other structured loan notes numbered SN006-08, SN015-08, SN-292-08 and SN446-08 resulting in a claim of £2,118,385.

12 Losses are also claimed in respect of investments in certain commodities in particular metals in the sum of £507,096 and losses in two portfolios known as the Asia ex Japan of £198,000 and the Global Equity Trading Portfolio of £334,968.

13 The plaintiff further claims equitable compensation to reflect the earnings that should have been generated by prudent investment of the Trust's assets in accordance with the defendant's duties as trustee (see paragraph 105 of the order of justice) and an account of any secret profit made.

14 The allegations the defendant seeks to strike out relate to paragraphs 65.0 to 75.0, 78.2 and 78.3 of the order of justice, paragraphs 93.0 to 102.0 and the reference to paragraphs 93.0 to 102 in paragraph 103.0. These paragraphs state as follows:

> *"65.0 Between January 2005 and July 2009, Barclays Bank wrongfully and / or dishonestly sought to and did in fact influence and / or manipulate the level at which the London Interbank Offer Rate ("LIBOR") was set from time to time*.
>
> *66.0 In a Final Notice issued pursuant to section 206 of the Financial Services and Markets Act 2000 on 27 June 2012, the United Kingdom Financial Services Authority ("FSA") found that Barclays Bank had wrongfully sought to manipulate LIBOR to its own financial advantage ("the LIBOR Final Notice")*.

67.0 The Plaintiff adopts the definitions of "Submitters" and "Derivatives Traders" provided by the FSA in the LIBOR Final Notice. References to Submitters or Derivatives Traders are to employees, servants or agents of Barclays Bank who occupy the positions as defined by the LIBOR Final Notice. The FSA made the following findings:

67.1 "On numerous occasions between January 2005 and June 2009, Barclays' Derivatives Traders made requests to its Submitters for submissions based on their trading positions. These included requests made on behalf of derivatives traders at other banks. The Derivatives Traders were motivated by profit and sought to benefit Barclays' trading positions. The aim of these requests was to influence the final benchmark LIBOR and EURIBOR rates published by the BBA and EBF."

67.2 "Requests to Barclays' Submitters were made verbally and a large amount of email and instant message evidence consisting of Derivatives Traders' requests also exists. At times, requests made by email alone were sent by the Derivatives Traders nearly every day."

67.3 "The number of requests and the period of time over which they were made indicate that the Derivatives Traders made requests on a routine basis. Specific emails also indicate the requests were made regularly."

67.4 "The routine nature of the requests demonstrates that the Derivatives Traders considered Barclays took their requests into account when determining its submissions."

67.5 "Evidence from certain Submitters confirms that Barclays took the Derivatives Traders' requests into account when determining its submissions."

68.0 Between January 2005 and June 2009 Derivatives Traders wrongfully and / or dishonestly sought to influence the submissions presented by Submitters and thereby to influence and / or manipulate LIBOR for the financial benefit of Barclays Bank.

69.0 The aforementioned criminal fraud of Barclays Bank was liable to fact affect the share prices of UK banks, including those upon which the performance of the Bank Notes were contingent.

70.0 In particular, the aforementioned criminal fraud of Barclays Bank was liable to severely affect the share price of Barclays Bank itself, being one of the UK bank shares to which Bank Note SN282-08 was exposed. In effect Barclays Bank were causing the Trust to gamble upon the performance of its share price whilst at the same time perpetrating a serious criminal fraud by dishonestly seeking to manipulate LIBOR in the full knowledge that discovery of the same would have a devastating impact upon its share price.

71.0 Between 1 January 2008 and 15 October 2013 Barclays Bank wrongfully and / or dishonestly sought to influence and / or manipulate certain foreign

exchange ("FX") markets for its own benefit.

72.0 By Final Notice dated 20 May 2015 the UK Financial Conduct Authority ("FCA") fined Barclays Bank £284,432,000 in respect of compliance failures which allowed its employees to dishonestly attempt to manipulate certain FX markets ("the FX Final Notice"). In total it is estimated that Barclays Bank have been fined in the region of US$ 2.4 billion by regulators in relation to "Forex rigging". Defined or abbreviated terms bear the definitions attributed to them in the FX Final Notice.

73.0 In paragraphs 2.8 – 2.10 of its FX Final Notice the FCA stated:

'2.8 Barclays' failings in its FX business allowed the following behaviours to occur:

(1) Attempts to manipulate the WMR and the ECB fix rates in collusion with traders at other firms for Barclays' own benefit and to the potential detriment of certain of its clients and/or other market participants;

(2) Attempts to trigger clients' stop loss orders for Barclays' own benefit and to the potential detriment of those clients and/or other market participants; and

(3) Inappropriate sharing of confidential information internally and with third parties, including other market participants. The information included specific client identities and information about clients' orders.

2.9 In addition, Barclays' failings meant that staff in its FX options business had the opportunity to engage in attempts to manipulate fix or spot FX rates to the benefit of Barclays' trading positions in FX options and to the potential detriment of clients and/or other market participants.

2.10 These failings occurred in circumstances where certain of those responsible for managing front office matters were aware of and/or at times involved in some of the behaviours described above. They also occurred despite the fact that risks around confidentiality were highlighted when Barclays was made aware in March 2012 that certain staff in its FX business had inappropriately shared information allowing a specific client's transactions to be identified outside the firm.'

74.0 The aforementioned criminal fraud of Barclays Bank was liable to affect the share prices of UK banks, including those upon which the performance of the Bank Notes were contingent. As the FX Final Notice observes at paragraph 2.4:

'2.4 Barclays' failure adequately to control its FX business is extremely serious, especially with regard to its potential impact on the spot FX market. The importance of the spot FX market and its widespread use by market participants throughout the financial system means that misconduct relating to it has potentially damaging and far—reaching consequences for the FX market and financial markets generally. The failings described in this Notice undermine

confidence in the UK financial system and put its integrity at risk.'

75.0 In particular, the aforementioned criminal fraud of Barclays Bank was liable to severely affect the share price of Barclays Bank itself, being one of the UK bank shares to which Bank Note SN282-08 was exposed. In effect Barclays Bank were causing the Trust to gamble upon the performance of its share price whilst at the same time perpetrating a serious criminal fraud by dishonestly seeking to *manipulate certain FX markets in the full knowledge that discovery of the same would have a devastating impact upon its share price*.

78.2 The Defendant caused the Trust to invest in the Bank Notes in circumstances where Barclays Bank was itself engaged in a course of criminal and fraudulent behaviour with the object of influencing the level at which LIBOR was determined, as described in paragraphs 65 – 70 above. The Defendant ought to have known that by doing so it was exposing the Trust to the performance of:

78.3 The Defendant caused the Trust to invest in the Bank Notes in circumstances where Barclays Bank was itself engaged in a course of criminal and fraudulent behaviour with the object of influencing certain foreign exchange markets, as described in paragraphs 71 – 75 above. The Defendant ought to have known that by doing so it was exposing the Trust to the performance of:

93.0 Until it was discredited by the foregoing conduct of Barclays Bank, the level of LIBOR was a widely recognized and utilized indication of the strength of UK banks, including but not limited to those upon which the performance of the Bank Notes was contingent.

*94.0 The British Banking Association's website (www.bbatrent.*com) said of LIBOR, prior to responsibility for LIBOR being handed over to the Intercontinental Exchange Benchmark Administration Limited on 31 January 2014:

"bba libor is the primary benchmark for short term interest rates globally and is used as the basis for settlement of interest rate contracts on many of the world's major futures and options exchanges. It has also been used as a barometer to measure the health of financial money markets and is used in many loan agreements throughout global markets including mortgage agreements."

95.0 The FSA Final Notice said of LIBOR:

'The integrity of benchmark reference rates such as LIBOR and EURIBOR is therefore of fundamental importance to both UK and international financial markets.'

96.0 The widespread use of the spot FX market by participants throughout the financial system meant that its performance impacted upon activities in financial markets beyond the spot FX market itself. As the FX Final Notice observes at paragraph 2.4:

'2.4 Barclays' failure adequately to control its FX business is extremely serious, especially with regard to its potential impact on the spot FX market. The importance of the spot FX market and its widespread use by market participants throughout the financial system means that misconduct relating to it has potentially damaging and far—reaching consequences for the FX market and financial markets generally. The failings described in this Notice undermine confidence in the UK financial system and put its integrity at risk.'

97.0 By reason of the findings and conclusions of the LIBOR Final Notice and FX Final Notice described above, it is now clear that throughout the period in which Barclays Bank promoted the Bank Notes to the Trust, they were intentionally and dishonestly manipulating and / or attempting to manipulate the level of LIBOR and the performance of FX markets in the manner described in the findings made by those Notices.

98.0 Barclays Bank were thereby:

98.1 Concealing the true strength and level of performance of the UK banks upon which the performance of the Bank Notes was contingent;

98.2 Concealing the true strength and level of performance of Barclays Bank itself, upon which Bank Note SN282-08 was in part contingent; and

98.3 Engaging in a dishonest and criminal practice, the discovery of which would and did have a significant adverse impact upon the share prices of UK banks including Barclays Bank itself.

99.0 Furthermore, at all material times Barclay Bank were aware that, by intentionally and dishonestly seeking to manipulate the level of LIBOR and the performance of FX markets, they ran the risk that such conduct would become public knowledge and would have a substantial effect on the share price of Barclays Bank, being one of the UK bank shares upon which the performance of structured note SN282-08 was dependent.

100.0 In the premises the foregoing conduct of Barclays Bank amounted to fraud.

101.0 As at the date upon which the Defendant approved investment in the Bank Notes, the Defendant ought to have known that Barclays Bank had influenced and / or manipulated and continued to influence and / or manipulate, or attempt to influence and / or manipulate, the rate at which LIBOR was set and / or the performance of FX markets.

102.0 Further or alternatively the Defendant, as part of the Barclays Group, was privy to the aforementioned fraud of Barclays Bank.

103.0 By reason of the breaches of duty pleaded at paragraphs 76 – 92 and / or the matters pleaded at paragraphs 93 – 102 above the Trust has sustained

loss."

15 The events that underpin the defendant's criticisms of these paragraphs are set out at paragraph 58 of its skeleton argument as follows:-

"58. Contrary to the impression given by Nautilus' presentation, this is what happened:

a) Prior to 22 April 2008 Barclays Wealth and Mr Evans had been discussing what Barclays Wealth later described (in an email of 22 April 2008 (17:36) [Tab 8; Exhibit PLAN1, page 335) as "the UK Bank Note idea". In the light of that discussion, Barclays Wealth "priced up a few options" for Mr Evans (the email was copied to Zedra (among others)). The "idea" was that there should be acquisition of a structured note or notes linked to UK banking stocks;

b) The email referred to specific banking stocks (including Barclays) being examined "per your [i.e., Mr Evans'] enquiry". Barclays Wealth's email stated that "non-callable (or callable at issuer discretion) versions" had been looked at but that would have a negative impact on the rate of interest offered. Barclays Wealth suggested two baskets of equities, to whose performance the proposed structured notes would be linked. The details of the proposals were set out for Mr Evans;

c) Mr Evans considered these proposals and wrote an email to Barclays Wealth, copied to Zedra, at 18:16 on 22 April 2008 [Tab 8; Exhibit PLAN1, page 336] identifying the particular linked basket of equities in which he was most interested (so far as the purchase of linked notes was concerned);

d) There then took place further discussions between Barclays Wealth and Mr Evans on the afternoon of 2 May 2008 [Tab 8; Exhibit PLAN1, pages 337–338]. The consequence of those discussions was an agreement in principle that Mashiwa should invest £2 million into the 3 Year £ UK Banks *Autocallable High Coupon Note (5 banks with HBOS), £2 million into the 3 Year £ UK Banks Autocallable High Coupon Note (5 Banks with Barclays) and £3 million into the 3 Year £ UK Banks Autocallable High Coupon Note (4 Banks) (yearly observation date and coupon);*

e) Barclays Wealth emailed Mr Evans at 19:03 on 2 May 2008 [Tab 8; Exhibit PLAN1, page 341] for confirmation that he wished to proceed with those investments. Barclays Wealth then emailed Zedra on 6 May 2008 at 10:29 [Tab 8; Exhibit PLAN1, page 340] referring to the desire to make these investments as being "Dicky's request" (a reference to Mr Evans);

f) The Board of Mashiwa resolved on 6 May 2008 [Tab 8; Exhibit PLAN1, pages 343–363] to make the investments (albeit they were not completed until a later date, 14 May). The board minute set out in some detail the nature of the investments proposed and noted that Mashiwa's private bankers, Barclays Wealth (who as per the matters above worked closely with Mr Evans in the

process) had put the idea forward as “investment recommendations.”

16 An extensive answer was filed in response to the order of justice on 14 th September, 2016.

17 In respect of paragraphs 65.0 to 75.0 of the order of justice the defendant at paragraph 71 to 74 of its answer pleads as follows:-

> *“71. The Board of Mashiwa resolved on 6 May 2008 to make the investments. The board minute set out in some detail the nature of the investments proposed and noted that Mashiwa's private bankers, Barclays Wealth had put them forward as “investment recommendations”. Mashiwa relied on those recommendations.*
>
> *72. The notes which were acquired were as follows:*
>
> *(1) SN281-08: a 28.2% coupon paid in respect of a basket of underlying stocks in Lloyds TSB Group, HSBC Holdings, Standard Chartered, RBS and HBOS Plc (semi-annual observation date);*
>
> *(2) SN282-08: a 12.3% semi-annual coupon (24.6% annual coupon) in respect of a basket of underlying stocks in Lloyds TSB, HSBC Holdings, Standard Chartered, RBS and Barclays Plc (semi-annual observation date);*
>
> *(3) SN289-08: a 23.25% annual coupon in respect of a basket of underlying stocks in RBS, Lloyds, HSBC and Standard Chartered (annual observation date).*
>
> *73. It seems that although the board made its decision to invest on 6 May 2008, they nevertheless (in a manner which objectively was cautious and prudent) waited until Mashiwa had received the anticipated return of cash from MK Airlines, referred to above. On 12 May 2008 Mashiwa received £17 million in cash from MK Airlines. On 14 May 2008 Barclays Wealth wrote to Mr Evans confirming that the Bank Notes were to be bought that day.*
>
> *74. During the period when the Bank Note investment was being discussed, the prospect of another investment of similar size was being considered. Barclays Wealth gave a detailed overview of the new proposal by email to Mr Sinel of the Defendant and Mr Evans on 13 May 2008, the day before the Bank Notes were acquired. The proposed investment was a structured product based on the S&P500 Index which would pay a coupon of 7% so long as the S&P500 Index did not drop by 40% of the initial strike level. If markets performed well and the index rose 10% the note would be “auto called” albeit paying on its coupon.”*

18 In respect of paragraph 78.2, sub-paragraph 165(5) of the answer pleads as follows:-

> *“165. As to paragraph 78.2:*

(5) it is unclear from the paragraph whether the Plaintiff here alleges that the Defendant "ought to have known" of the alleged conduct of Barclays Bank Plc or of the alleged effect or likely effect of such conduct or its discovery. If such allegations be made:

(a) the pleading is defective and inadequate for the purpose and LIBOR to be struck out, as no facts and matters are identified in support of such allegation of constructive knowledge;

(b) it is in any event denied that a plea of constructive knowledge, if it be made, would be sufficient to establish or support the claims of breach of duty alleged in paragraph 78, in circumstances in particular in which the Defendant relies on paragraphs 9 and 10 of the First Schedule to the Trust Instrument."

19 A similar response to paragraph 78.3 is found at paragraph 166(5) of the answer.

20 In respect of paragraphs 93 to 102, the defendant firstly pleads at paragraph 185 that "The Plaintiff has chosen, scandalously and inappropriately, to make serious allegations of fraud and misconduct against a non-party to the proceedings, and such allegations are liable to be struck out".

21 At paragraph 186 of the answer the plaintiff repeats its assertion that the pleading is defective for the reasons pleaded at paragraph 165(5) of the answer.

22 I was also referred to other parts of the order of justice, the answer and the reply (filed on 19 th October, 2016). I refer to these paragraphs, where relevant, later in this judgment.

23 In view of how the submissions of the parties developed, it is also appropriate to set out how the plaintiff puts its case in its skeleton argument filed for this application at paragraphs 4 to 9 and 11 as follows:-

"4. The Plaintiff claims that the Defendant mismanaged the Trust during its trusteeship by causing or permitting it to make investments which were not suitable for the Trust and which, consistent with the Defendant's fiduciary obligations as trustee, should not have been made. The Defendant failed to exercise any oversight over the investments being made with the Trust's money, as a result of which the Trust accumulated an unusually imbalanced and high risk portfolio of investments. The net effect of this was that the Trust sustained a considerable loss. Among those investments were three structured notes, referred to here and in the pleadings as "the UK Bank Notes".

5. The UK Bank Notes were effectively a means of betting on the strength of several key UK banks. Their effect was that the investment in those notes (which totalled £8 million of the Trust fund) would track the performance of the

worst performing share underlying each note (i.e. the worst performing UK bank for each note). Their key terms and the effect of those terms are pleaded at paragraph 59 of the Order of Justice.

6. The Plaintiff says that the Defendant effectively delegated its investment functions to Barclays Wealth, being an investment banking division of Barclays Bank Plc. It approved every single recommendation made by Barclays Wealth without challenge. It never sought to put in place any sort of investment strategy and it failed to monitor the performance of the investments being made with the Trust's money. In effect it allowed Barclays Wealth to invest the Trust's money as it wished.

7. Barclays Wealth came up with the idea of the Trust investing in the UK Bank Notes. It devised the baskets of underlying shares (i.e. the banks which the Trust was betting on), and even included Barclays Bank itself in one of the notes. It promoted that investment to the Trust and the Defendant, in the habit of blindly acceding to every proposal made, caused the Trust to invest £8 million in these notes.

8. At the same time as devising and promoting investment in the UK Bank Notes, Barclays Bank and several others were engaged in fraudulently manipulating LIBOR and FX markets. The enormous extent of those frauds has been the subject of damning investigations and hefty fines on both sides of the Atlantic. In 2012 Barclays were fined approximately £290 million by the FSA for LIBOR rigging. They recently reached a $100 million settlement with over 40 US states in relation to LIBOR rigging. They were also recently among a group of six banks fined almost $6 billion for rigging FX markets. Barclays' share of that fine was approximately £1.53 billion.

9. Those illicit activities are directly relevant to the performance of the UK Bank Notes in which the Defendant invested £8 million of the Trust's money (and eventually lost approximately £6 million). Further, given that the Defendant effectively surrendered its investment functions to Barclays Wealth and failed to exercise any overview of the investments being made, it allowed its parent company (Barclays Bank Plc) to cause the Trust to bet on the strength of UK Banks (including Barclays itself) whilst simultaneously engaging in one of the largest frauds ever perpetrated by the banking sector. LIBOR was a key indicator of the strength of UK banks and Barclays were fraudulently manipulating it. Moreover, LIBOR was supposed to indicate the rate at which Banks could and did borrow from each other and hence their strength. LIBOR stands for London Interbank Offered Rate. In practice it was an apocryphal figure. Barclays knew that if this fraud was discovered the effect on the share prices of UK banks would be devastating.

11. Barclays Bank bought the Defendant trust business, and with it a captive client base of trust funds. The Defendant, as trustee of this Trust fund, disregarded its fiduciary duties and effectively delegated the selection of investments to its parent company, Barclays Bank. It is for this reason that the

Plaintiff has included within this claim the activities of Barclays Bank and others in fraudulently manipulating LIBOR and FX markets."

24 The plaintiff's skeleton argument also criticised Barclays Bank Plc at paragraph 15 as follows:-

"15. This conduct of Barclays Bank Plc is relevant to this claim against the Defendant for the following reasons:

15.1. At all times material to this action the Defendant was a wholly owned subsidiary of Barclays Bank Plc.

15.2. The Plaintiff's case is that the Defendant failed to act in accordance with its fiduciary duties as trustee in the context of the investments made with the Trust fund. Instead it acceded to every investment proposed by Barclays Bank Plc without question, and effectively surrendered the decision as to which investments should be made to Barclays Bank Plc without devising any strategy or parameters for such investment at all.

15.3. Colloquially, once Barclays Bank Plc acquired the Defendant, it was shooting fish in a barrel. Barclays Bank Plc proposed investments, many of which were simply unsuitable for this Trust and earned substantial profits for the Barclays group as a whole. Indeed the remuneration structure within Barclays Wealth was designed to incentivize the sale of products such as the UK Bank Notes, rather than to act in the best interests of the Trust. The Defendant simply acquiesced in each and every recommendation made by Barclays Wealth.

15.4. The Defendant has caused the Trust to make every single investment proposed by Barclays Bank Plc. None of the investments suggested by Barclays Bank Plc were ever refused by the Defendant.

15.5. The combination of acceding to every proposal made by Barclays Bank Plc and failing to put in place any strategy as to the investments being made had the practical effect of delegating to Barclays Bank Plc the role of selecting the investments to be made by the Trust.

15.6. For the reasons which are developed in the remainder of this skeleton argument, where such effective delegation takes place the knowledge of the party to whom matters are delegated may be attributed to the party which delegates them as a matter of law.

15.7. Accordingly, even if the Defendant had no actual knowledge of the nefarious conduct of Barclays Bank Plc in respect of LIBOR or FX rigging, in law such knowledge is to be attributed to it."

25 I have set out these extracts from the skeleton argument because one of the complaints of the defendant is that these paragraphs do not reflect how the plaintiff's case is put in its

order of justice.

The defendant's contentions

26 The starting point for Advocate Speck's submissions concerns paragraphs 78.2, and 78.3 of the order of justice where the plaintiff pleads that the defendant *"ought to have known"* that it was exposing the Trust to Barclays Bank Plc being involved *"in criminal and fraudulent behaviour"*. In paragraph 101 it is alleged that the defendant *"ought to have known"* that Barclays Bank Plc was influencing or manipulating LIBOR and the performance of foreign exchange markets.

27 Where allegations are made that a party ought to have known something, it was argued that the party facing such an allegation is entitled to particulars of why it ought to have acquired knowledge. He referred me to paragraph (1) of the head note in *Fox v Wood (Harrow) Ltd* [1963] 2 QB 601 which states as follows:-

> ***"(1) that it was implicit in an allegation that a person "ought to have known" something that facts and circumstances had existed from which he ought to have acquired, either by observation or by inference, the knowledge of which he was deficient, and that some fault, in the present case amounting to contributory negligence, lay upon him in having failed to note, or draw an inference from particular facts and circumstances; and that particulars of such facts and circumstances ought, therefore, to be given."***

28 Insofar as paragraph 102.0 of the order of justice referred to the defendant being *"privy to the aforementioned fraud of Barclays Bank"*, being 'privy to' something also required particulars. The defendant was entitled to require particulars to explain what *"privy to"* meant. Secondly it was not clear if the allegation was that the defendant was party to a fraud. If that was the allegation, again the defendant was entitled to particulars to know the facts relied on in support of such an allegation either to allow it to argue if it chose to do so that a case in fraud was not made out on the pleadings or to meet such an allegation at trial. Otherwise it was facing a bare assertion.

29 As all these allegations were wholly unparticularised and were bare assertions, for reasons which Advocate Speck developed, it was open to the Court to strike out such assertions at this stage.

30 Advocate Speck's criticisms of the plaintiff's pleading did not stop there. He was also critical of paragraph 105 of the reply which provides as follows:-

> *"105. As to paragraph 165(5) and 166(5), for the avoidance of doubt it is averred that the Defendant is fixed with constructive knowledge of the conduct of Barclays Bank Plc as part of the same corporate structure in circumstances*

where the Defendant has, by its conduct, effectively delegated to Barclays Wealth its functions in respect of the selection, consideration and making of investments with the assets of the Trust."

31 The allegation in paragraph 105 was therefore that the defendant had effectively delegated investment management to Barclays Wealth and accordingly, as Advocate Speck understood what paragraph 105 was trying to say, the knowledge of Barclays Wealth should be imputed to the defendant.

32 However, paragraph 105 of the reply was not easy to reconcile firstly with paragraph 92.2 of the order of justice which provided as follows:-

"For the avoidance of doubt….:

92.2 Insofar as the Defendant will aver that it has delegated the management and / or investment of Trust property to Barclays that such delegation and / or the continuation of the same amounted to gross negligence and / or was not in good faith."

The defendant has made no such assertion.

33 Advocate Speck also drew to my attention to paragraphs 23 to 25 of his client's answer which provided as follows:-

"23. On 20 September 2007 the board of Mashiwa had a meeting at which it was resolved to invest £1.2 million in the GETS fund and US$1 million in the Asia Ex Japan Discretionary Portfolio. They further agreed that Barclays Private Bank (elsewhere referred to as Barclays Wealth) should provide banking and financial services. They resolved to enter into a written agreement so that Barclays Wealth could provide "advisory, custodial and execution-only dealing services".

24. This agreement, which was supplemented by written terms and conditions, was signed on 20 September 2007. As to the advisory service, it stated that:

"We will provide advice when you request it on a wide range of transactions and investments. We may also from time to time draw your attention to investment opportunities and provide advice on them if you request it. Where you request it, we will enter into resulting transactions on your behalf or assist you to do so".

25. The agreement specifically stated that Barclays Wealth might "recommend structured capital-at-risk products". The agreement was governed by English law and subject to an exclusive jurisdiction clause in favour of the English courts."

34 The plaintiff in its reply at paragraph 35 had responded to paragraphs 23 to 25 of the

answer as follows:-

> *"35. Paragraphs 23 – 25 are admitted. For the avoidance of doubt it is denied, if it is averred, that the presence of the advisory agreement in any way abrogated or modified the duties of the Defendant as trustee to give proper and full consideration to every investment proposed to be made with the assets of the Trust and further to consider the portfolio of investments held by the Trust as a whole."*

35 By virtue of the fact that the plaintiff in paragraph 35 of its reply had admitted entering into the agreements set out at paragraphs 23 to 25 of the answer, pursuant to which Barclays Wealth were to provide advisory custodial and execution services, this admission was also inconsistent with the pleading of effective delegation at paragraph 105 of the reply.

36 The only basis upon which the plaintiff could sustain a case based on effective delegation was therefore to argue that the agreement it admitted it had entered into by paragraph 35 of the reply had to be a sham. Yet such an allegation was not made. There were certainly no particulars of any allegation of sham which had to be provided because an allegation of sham was equivalent to an allegation of fraud.

37 What seemed to be the plaintiff's case, by reference to paragraph 15.6 of the plaintiff's skeleton set out above, was that Barclays Wealth was the agent of the defendant. Accordingly, the plaintiff was arguing that the knowledge of Barclays Wealth should be attributed to the defendant. Advocate Speck in relation to this case advanced a number of propositions.

38 Firstly, he referred me to *El-Ajou v Dollar Land Holdings plc & Anor* [1994] B.C.C. 143 where at page 11 under the section headed agency, Hoffmann L.J. (as he then was) stated:-

> ***"It is established on the authorities that the knowledge of a person who acquires it as a director of one company will not be imputed to another company of which he is also a director, unless he owes, not only a duty to the second company to receive it, but also a duty to the first to communicate it."***

39 There was therefore no basis in law to impute any knowledge of Barclays Wealth to the defendant.

40 Secondly, in this case it was far from clear whether an agency relationship between the defendant and Barclays Wealth was pleaded at all. Yet it was admitted by the plaintiff that Barclays Wealth had been retained by the defendant.

41 Thirdly the defendant could not reconcile the first sentence of paragraph 36.0 of the order of justice with an allegation that Barclays Wealth was the agent of the defendant. Paragraph 36 states:-

> *"36.0 The Defendant has de facto treated Barclays Wealth as though they were investment consultants to the Trust."*

42 Advocate Speck then referred to the remainder of paragraph 36 and paragraph 37 to 39 which plead as follows:-

> *"….At no stage did the Defendant survey the range of potential investment consultants, nor make inquiries of any entity other than Barclays Wealth as to their willingness and / or suitability to act as investment consultants to the Trust. Furthermore, at no stage has the Defendant considered the suitability of Barclays Wealth to act as investment consultants to the Trust, nor reviewed the same on a periodical, or any other, basis*.
>
> *37.0 Initially Barclays Wealth would make recommendations to the Defendant as to investments which the Trust should make.* The Defendant, acting through Mashiwa, would invariably approve those recommendations and Barclays Wealth would make those investments using the Trust's assets.
>
> *38.0 In practice on many occasions Barclays Wealth made investments using Trust assets before the Defendant had approved the same.* The Defendant would invariably approve such investments shortly thereafter.
>
> *39.0 On or around 30 June 2009 the Defendant resolved to "streamline investment decisions" by any two directors to approve investment recommendations made by Barclays Wealth, which were then ratified at monthly meetings.* Thereafter, as opposed to recording minutes of the approval of investments as and when they are proposed, the Defendant held monthly meetings at which they "ratified" retrospectively investments made during the previous month. To the best of the Plaintiff's knowledge having reviewed the records of those meetings provided by the Defendant, no investments made by Barclays Wealth were ever disapproved of."

43 This language Advocate Speck argued was not the language of delegation but of the giving of advice. If this was the plaintiff's case i.e. Barclays Wealth were acting in an advisory capacity, there was no basis to attribute any knowledge of Barclays Wealth (which was not accepted in the event) to the defendant.

44 If the substance of the allegation was that Barclays Wealth was negligent, such an allegation was not set out in the present pleadings; it was also not a claim that could be made against the defendant.

45 The plaintiff's case was also confusing in that allegations of negligence against Barclays

Wealth were inconsistent with an allegation that the appointment of Barclays Wealth by the defendant was a sham. The mantra of Advocate Sinel that the defendant effectively delegated investment decisions to Barclays Wealth was not good enough. The defendant was entitled to know the case it had to meet. The defendant was furthermore entitled to know the basis upon which any agency of Barclays Wealth was alleged because it was only on the basis of an agency that attribution of any knowledge of Barclays Wealth could take place.

46 I was also reminded that, to the extent that any explanation put forward alleging sham or fraud was also consistent with an innocent explanation, it was not open to the Royal Court to find sham or fraud (see *Armitage v Nurse* [1998] Ch 241 at line 246G to 257C). The approach in *Armitage* was approved by the House of Lords in *Three Rivers DC v Bank of England (No.3)* [2003] 2 AC 1 applied by the Royal Court in *Nolan v Minerva* [2014] 2 JLR 117 at paragraph 144 and by me in *In the matter of II* [2016] JRC 116.

47 Absent any allegation of fraud, the allegation that the defendant did not challenge recommendations made by Barclays Wealth did not make Barclays Wealth the agent of the defendant.

48 Advocate Speck, on the assumption that there was an agency agreement notwithstanding his previous submissions, then submitted that knowledge of any manipulation of LIBOR or foreign exchange (which for the purposes of this part of his application it was accepted had to be assumed had occurred) could not be attributed to Barclays Wealth and therefore could not be attributed to the defendant.

49 Insofar as the defendant was relying on the decision of Morgan J. in *Iiyama (UK) Ltd v Samsung Electronics Co Ltd* [2016] EWHC 1980 (Ch), the *Samsung* decision did not help the plaintiff but instead supported the defendant's position. In the *Samsung* decision at paragraph 58(12), it was held that the fourth defendant, a subsidiary of the first defendant, had delegated all decisions in relation to pricing to the first defendant; accordingly the knowledge of individuals within the first defendant who were seconded to the fourth defendant and who dealt with pricing was attributed to the fourth defendant. On the facts of *Samsung* therefore because of the actions of the seconded employees of the first defendant, the fourth defendant was found to have had actual knowledge. The present case was very far removed from the facts in *Samsung* within the result that the plaintiff could not show attribution of knowledge of manipulation of LIBOR or foreign exchange to the individuals within Barclays Wealth who dealt with the defendant. The present case was not therefore a case where attribution was arguable.

50 There was also no reference in *Samsung* to the theory of attribution being a developing area of the law at paragraphs 64 of the judgment. Had this been the basis of the judge's decision no doubt such reasoning would have been set out. As it was not the law of attribution was therefore settled and so could not by reliance on *Samsung* be extended to the present case.

51 The knowledge the plaintiff was trying to attribute was what Advocate Speck described as *"double attribution"*. What Advocate Sinel's client was trying to do was to attribute knowledge of someone within Barclays Bank plc who knew about manipulation of LIBOR or foreign exchange through to those individuals at Barclays Wealth who dealt with the plaintiff where it was not alleged that such individuals were involved in any such manipulation. This approach of the plaintiff was contrary to the basis upon which knowledge is attributed to companies as set out in *Meridian Global Funds Management Agent Limited v Securities Commission* [1995] 2 A.C. 500 at page 506 line C to G as follows:-

> ***"The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as 'for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company' or 'the decisions of the board in managing the company's business shall be the decisions of the company.'*** There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as
>
> ***'the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company:' see*** *Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd.* [1983] Ch. 258 .
>
> ***These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business.*** Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. and having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort."

52 What the plaintiff was ultimately attempting to do was to seek to attribute to the individuals at Barclays Wealth who dealt with the plaintiff everything known by anyone within another division within Barclays Bank Plc in relation to issues concerning LIBOR or foreign exchange without pleading fraud.

53 In relation to the losses claimed, any losses claimed had to flow directly from the breach of trust by reference to the observations of Lord Neuberger in *AIB Group (UK) Plc v Redler & Co Solicitors* [2015] A.C. 1503 at paragraph 135 as follows:-

> ***"The measure of compensation should therefore normally be assessed at the date of trial, with the benefit of hindsight.*** The foreseeability of loss is generally irrelevant, but the loss must be caused by the breach of trust, in the sense that it must flow directly from it. Losses resulting from unreasonable ***behaviour on the part of the claimant will be adjudged to flow from that behaviour, and not from the breach.*** The requirement that the loss should flow directly from the breach is also the key to determining whether causation has been interrupted by the acts of third parties."

54 In the present the bank notes were acquired in 2008. Yet the FSA notice relied upon in respect of LIBOR was not released until 2012; the FCA notice in respect of foreign exchange was not released until 2015. Any loss could not flow from these notices as the bank notes had matured before the notices were issued.

55 Moreover what was said to have caused the loss, as pleaded at paragraph 60.0 of the order of justice, was that:-

> *"60.0 In the days and weeks which followed the Trust's investment in the Bank Notes the financial crisis impacted significantly upon the shares of the UK banks, upon which the performance of the Bank Notes was in turn contingent."*

56 In other words the financial crisis caused the loss not any findings of the FSA and FCA in relation to manipulation of LIBOR or foreign exchange.

57 Furthermore, the investment in bank notes which was the main claim matured in 2011. On maturity, the plaintiff received 2,240,000 shares in the Royal Bank of Scotland Group Plc. The defendant's skeleton argument at paragraph 37 contended that there was no evidence that these shares had been depreciated by reason of the allegations of misconduct. The defendant also contended in its skeleton argument that any loss claimed was premature, given that no loss of profit crystallised on redemption.

58 The loss claimed in respect of foreign exchange was even weaker because there were no currency investments made at all and no explanation as to how any alleged manipulation affected the investments made which were the subject matter of the proceedings.

59 Allegations in respect of LIBOR or foreign exchange were also irrelevant to investments in other banks. Only one of the notes contained a partial investment in Barclays Bank Plc in any event.

60 Finally, Advocate Speck criticised the order of justice for being silent on the impact of any misconduct on investments; the lack of any such pleaded case meant that there was no case for the defendant to answer and justified the strike out order sought.

The plaintiff's contentions

61 Advocate Sinel's overall approach was that the application was misconceived.

62 He reminded me of the correct function of pleadings as considered by the Court of Appeal in *Re Esteem Settlement* [2000] JLR Note 41a and the unreported judgment 2000/150. Paragraph 31(4) of the unreported judgment states as follows:-

> ***"(4) Consistently with that objective, the correct function of pleadings needs to be kept in mind.*** The function of pleadings is to set out the material facts on which the parties will rely at trial to establish their causes of action or defences, and which the parties will seek at trial to establish by relevant and admissible evidence. It is no part of the function of advocates to seek to persuade the Royal Court to strike out the whole or part of a pleading which contains plainly arguable causes of action, or to edit a pleading whether so as to improve it or to make it less effective. It is no part of the function of the Royal Court to lend itself to any such endeavours on the part of advocates. Formal pleading is an art, not a science, and to seek to achieve some abstract level of perfection in pleadings is not consistent with the objective I have stated, or of value in terms of time, effort or expense."

63 A pleading was not therefore a closing submission, nor was it the function of the Court to make pleadings perfect.

64 Advocate Sinel then asked rhetorically, what was the point of the application. The defendant was an independent trust company. Yet the submissions being made appeared in reality to be made on behalf of Barclays Bank Plc. He noted that Mr Adrian Beltrami Q.C. who was present in Court to assist Advocate Speck, had represented Barclays Bank Plc in a number of LIBOR cases before the High Court in London. This application was therefore in reality being brought by Barclays Bank Plc in an attempt to strike out any allegations concerning the conduct of Barclays Bank in relation to LIBOR and foreign exchange manipulation as Barclays Bank did not want such allegations aired in any public court.

65 There was also nothing inherently wrong in principle with pleading his client's case in the alternative. His client was therefore entitled to plead both that Barclays Wealth had been retained by the defendant to give investment advice but also there had been effective delegation.

66 It was not necessary for him to plead fraud or sham in relation to the agreement set out at paragraphs 23 to 25 of the answer and admitted at paragraph 35 of the reply. The plaintiff was entitled to contend that the parties effectively ignored the agreements they had signed and instead operated on the basis of effective delegation.

67 All the material facts relied upon to support a submission of effective delegation had been pleaded at paragraphs 44 and 77 of the order of justice including in relation to LIBOR.

68 The approach the defendant should have taken was to have requested further and better particulars. While such requests had been asked for in relation to other parts of the order of justice, no requests had been made in relation to the paragraphs the defendant now sought to strike out. Had such requests been made, they would have been dealt with.

69 The relevance of LIBOR was that by manipulating LIBOR, the share prices of Barclays and other banks was kept artificially high. Had the true position been known at the time investment was made in the bank notes, such an investment would not have been made because the true price of bank shares would have been much lower.

70 As far as the defendant was concerned allegations casting doubt on the reliability of LIBOR were already in the public domain as set out at paragraphs 57.3 and 57.10 of the order of justice.

71 Manipulation of LIBOR had also occurred prior to the investments being made which was clear from the notice issued by the FSA in 2012. The criticisms of Barclays Bank plc in the FSA notice covered the period January 2005 until the end of December 2009.

72 Yet, at the same time Barclays Wealth was promoting the bank notes when Barclays Bank Plc was involved in manipulation of LIBOR.

73 The extent of the knowledge within Barclays Bank had yet to be determined but it was arguable that this knowledge extended to senior executives. Advocate Sinel contended by reference to an article in the New York Times published on 16 th July, 2012, that a former senior Barclays executive claimed he had received instructions from the former group chief executive of the Barclays Group to lower LIBOR rates in 2008. The extent of knowledge within Barclays Group was a factual matter to be determined at trial following discovery, witness statements and oral evidence.

74 Advocate Sinel made it clear he was also critical of the defendant for not investigating matters in the public domain in deciding whether or not to make the investments, but such an argument was in addition to his contention that there had been effective delegation of investments to Barclays Wealth.

75 The basis of effective delegation was said to be set out at paragraphs 40.0 to 44.0 of the order of justice as follows:-

> *“40.0 During the currency of the Defendant's trusteeship, the Defendant caused Mashiwa to make a number of investments and investments in products*

promoted, recommended and / or provided by Barclays Wealth.

41.0 Between 5 October 2007 and 22 June 2009 the Defendant approved investments proposed by Barclays Wealth as set out in Schedule 2 to this pleading (collectively "the Investments"). The investments detailed in that schedule have been identified from the minutes of meetings provided by the Defendant to the Plaintiff. If and insofar as further investments exist and are identified, the Plaintiff will amend these particulars in due course.

42.0 As noted above, on 30 June 2009 the Defendant resolved to "streamline" investment decisions by any 2 directors to approve investment recommendations by Barclay Wealth London, which are ratified at monthly meetings. Thereafter, as opposed to recording minutes of the approval of investments as and when they are proposed, the Defendant held monthly meetings at which they "ratified" investments made during the previous month. To the best of the Plaintiff's knowledge having reviewed the records of those meetings provided by the Defendant, no investments made were ever disapproved of.

43.0 In respect of each of the Investments particularized above, and of those apparently retrospectively "ratified" by the Defendant at the monthly meetings instigated for that purpose from 30 June 2009 onwards, there is no record of the Defendant having sought investment advice in respect of the suitability of each investment, either individually or within the broader portfolio of investments, save for one occasion on 14 February 2008.

44.0 Otherwise, in respect of each of the Investments particularized above and of those apparently retrospectively ratified by the Defendant at the monthly meetings instigated for that purpose from 30 June 2009 onwards:

44.1 The Defendant failed to seek advice in respect of the suitability of the investment, either individually or within the broader portfolio, despite having appointed Walbrook Investment Consultants Limited to act as investment consultants on or around 29 March 2006.

44.2 The Defendant failed to consider the suitability of the investment, either individually or within the broader portfolio of investments within the Trust.

44.3 The Defendant failed to put in place any investment mandates save for the limited Mandates permitting a £1,200,000 investment in Global Equity Trading Strategy and a £1,000,000 investment in an Asia ex Japan Discretionary Portfolio.

44.4 The Defendant failed to consider or determine the objectives of the investments being made with the assets of the Trust and their approach towards risk in the course of such investments.

44.5 The Defendant failed to cause the same to be invested pursuant to its duty to preserve and enhance the assets of the Trust or to act as bon père de

famille."

76 Essentially the same allegations were set out in paragraph 77.

77 Advocate Sinel emphasised that investments made between 2007 and 2009 were retrospectively ratified i.e. they were effectively made by Barclays Wealth.

78 The allegations in respect of Barclays Bank Plc acting fraudulently in relation to LIBOR and foreign exchange were set out at paragraphs 97.0 to 98.0 and were clear. No further particulars were needed.

79 Paragraph 40.4 of the reply was also consistent with allegations of effective delegation which provides as follows:-

> *"40.4. Further and in particular, if and insofar as the Defendant relied upon the "recommendations" allegedly made by Barclays Wealth, the Plaintiff denies that any such reliance absolves the Defendant from liability for its persistent failure to consider the appropriateness of each investment as part of the broader portfolio of investments held (whether by Mashiwa or by the Trust as a whole), to formulate any strategy in respect of the acquisition or such investments or to assess the suitability of each "recommended" investment as against such a strategy."*

80 The skeleton was therefore no more than a summary of the material facts already pleaded. The allegation of a secret profit was made at paragraphs 82.0 to 86.0 of the order of justice. There was no attempt by the defendant to strike out these paragraphs.

81 It was perfectly arguable to seek to attribute knowledge in one part of Barclays Bank Plc to other parts of Barclays Bank Plc. Barclays Wealth was just a division or a trade name. It was Barclays Bank Plc who were producing the loan notes. It was Barclays Bank Plc who were engaged in manipulation of LIBOR and foreign exchange. It was Barclays Bank Plc who recommended that clients be persuaded to invest in loan notes when Barclays Bank Plc arguably had requisite knowledge of misconduct in relation to LIBOR and foreign exchange.

82 The present case was consistent with the approach taken in the case of *Graiseley Properties Limited & Ors v Barclays Bank Plc* [2012] EWHC 3093 (Mr Justice Flaux) and [2013] EWHC 67 (Court of Appeal).

83 In relation to the allegations at paragraph 65 to 75 of the order of justice this was no more than pleading documents in the public domain. There was no basis to strike out material in the public domain.

84 The manipulation of foreign exchange was still relevant because there was illegality on a grand scale and widespread criminality within Barclays Bank plc.

85 The allegations in respect of secret profit were also relevant to why knowledge of manipulation of LIBOR and foreign exchange within Barclays Bank Plc should be attributed to the defendant.

86 In relation to the *Samsung* case, there was no distinction between the *Samsung* case and the present case; if anything the present case was stronger. Again reliance was placed on retrospective approval. The position was certainly at least arguable in the present case.

87 It was also artificial to strike out paragraphs 65.0 to 75.0 given that LIBOR was an issue as set out at paragraphs 57.3 to 57.10 of the order of justice.

88 Events post the investments being made were also relevant because they went to what steps were taken by the defendant given the knowledge within Barclays Wealth to address losses that had been suffered.

Decision

Applicable legal principles

89 There was no dispute between the parties on the applicable principles to determine a strike out application. These were recently considered by the Court of Appeal in *Home Farm Developments v Le Sueur* [2015] JCA 242. It is appropriate to set out paragraphs 23 to 29 as follows:-

> ***"THE TEST FOR A STRIKE-OUT***
>
> ***23. We begin by addressing the legal principles which apply to the consideration of an application to strike out proceedings. An application to strike out may be granted by the Royal Court pursuant to rule 6/13 of the Royal Court Rules 2004 as amended ("the 2004 Rules"). Rule 6/13 provides:-***
>
> ***"(1) The Court may at any stage of the proceedings order to be struck out or amended any claim or pleading, or anything in any claim or pleading, on the ground that –***
>
> ***(a) it discloses no reasonable cause of action or defence, as the case may be;***
>
> ***(b) it is scandalous, frivolous or vexatious;***

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may make such consequential order as the justice of the case may require .

(2) No evidence shall be admissible on an application under paragraph (1)(a).”

24. Mr Le Sueur's application seeks to strike out the Order of Justice on the grounds specified in paragraphs (1)(b) and (1)(d) of the 2004 Rules, and the Master, the Commissioner and this Court have all been invited to look at evidence in support of the respective positions which are being advanced. Given that the admission of evidence is prohibited only in respect of an application which is advanced on the ground specified in paragraph (1)(a), the result is that the court may legitimately look at evidence for the purpose of determining an application for striking out advanced on the grounds specified in paragraphs (1)(b) and (1)(d): see *Trant v Attorney General and others* [2007] JLR 231 , ***at §23***.

25. The decision of the Royal Court in *Channel Islands and International Law Trust Company Limited v Pike* , ***which was referred to by Mr Holmes, addressed the situation where an application to strike out had been made by particular defendants upon the basis of rule 6/13 of the Royal Court Rules 1982. Those defendants relied on grounds which are equivalent to those now specified in paragraphs (1)(b), (1)(c) and (1)(d) of rule 6/13 of the 2004 Rules. In the course of argument, Tomes DB was referred to the position in England by reference to what was then Order 18, rule 19, of the Rules of the Supreme Court which was said to be very similar to the then rule 6/13. He was also referred to The Supreme Court Practice 1988 (referred to as “the White Book”). In giving the reasons of the Royal Court, the Deputy Bailiff said (at*** [1990] JLR, p. 37) ***by reference to paragraph 18/19/1 of the White Book at p. 312:-***

“In applying this rule it must be remembered that ‘it is not the practice in the civil administration of our Courts to have a preliminary hearing, as it is in crime’ (per Sellers LJ in *Wenlock v. Moloney* [1965] 1 WLR 1238 ***… It is only in plain and obvious cases that recourse should be had to the summary process under this rule … The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it ‘obviously unsustainable’ … The summary remedy under this rule is only applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of process or the case is unarguable … the powers conferred by this rule will only be exercised where the case is clear and beyond doubt …”*** .

26. Mr Holmes contends that this demonstrates that the burden on Mr Le Sueur is a heavy one. To satisfy this Court that it was “plain and obvious” and “clear and beyond doubt” that the Order of Justice was scandalous,

frivolous or vexatious, or was otherwise an abuse of process of the court, Mr Holmes argues that Mr Le Sueur must show that the Appellants brought the Order of Justice in the knowledge that it was compromised by the Settlement Agreement and would thereby not constitute a bona fide use of the court's machinery, and that vexation and oppression will be caused as a result .

27. The Deputy Bailiff in Pike referred further to the meaning of the expression "scandalous, frivolous or vexations" when he quoted (at p. 38–39) from paragraphs 18/19/14 and 15 of the White Book at pp. 322–323 – being passages which we consider to be relevant to this appeal:-

"'The Court has a general jurisdiction to expunge scandalous matter in any record or proceeding … Allegations of dishonesty and outrageous conduct, etc, are not scandalous, if relevant to the issue … But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous … By [the words frivolous or vexatious] are meant cases which are obviously frivolous or vexatious, or obviously unsustainable … For instance, it is vexatious and wrong to make solicitors or others, parties to an action merely in order to obtain from them discovery or costs …" .

28. The test in an application to strike out was considered further by this Court in the case of *Trant* ***to which we have already referred. In the course of his judgment, Beloff JA said this:-***

"22 The test on an application to strike out is well established. It is only where it is plain and obvious that the claim cannot succeed that recourse should be had to the court's summary jurisdiction to strike out. Particular caution is required in a developing field of law. Provided that a pleading discloses some cause of action or raises some question fit to be decided by a judge, jurats or jury, the mere fact that a case is weak is not a ground for striking it out. These propositions are vouched for by a wealth of Jersey authority embracing principles deployed by the courts of the United Kingdom, see e.g. *In re Esteem Settlement* ***…*** (2000 JLR at 127) ***(we note en passant that a new regime, arguably more favourable to an application to strike out, has been introduced in England and Wales by the Civil Procedure Rules)***.

23 On an application to strike out under sub-para. (a) of r.6/13(1) (that there is no reasonable cause of action) evidence is not admissible. The facts alleged in the Order of Justice must be taken as correct. However, where an application is made under sub-para. (b) (scandalous, frivolous or vexatious), or sub-para. (d) (abuse of process), or where the application to strike out is made out under the inherent jurisdiction of the court, evidence is ***admissible and may be considered by the court.*** It follows that, on this application, evidence was and is admissible."

It may be observed that the decision of the Deputy Bailiff in Pike was not

referred to in Trant but for our part we see nothing in it which could be said to demonstrate an approach which is materially different .

29. Applying these principles to the circumstances of the present case, the Appellants' Order of Justice should be struck out only if we are satisfied, based upon the conclusions which we can draw from the relevant documents and facts which are not in dispute, that any trial of the issues would be unnecessary because the claim would inevitably fail. In doing so, we acknowledge that in the particular circumstances of this case a distinction may made between paragraph (1)(b), which refers to a claim or pleading which is "scandalous, frivolous or vexatious", and paragraph (1)(d) which refers to "abuse of process". Whilst the former expression might, as the Deputy Bailiff referred to in Pike (at p. 37), suggest a degree of opprobrium about what has been pled, for example the making of unjustified allegations of outrageous conduct or the unreasonable inclusion of a solicitor as a defendant, we do not consider that the expression "abuse of process" necessarily carries the same connotation. In the context of striking out, we consider that a claim or pleading may be said to be an abuse of process where, after applying the test set out in Trant, the conclusion can be reached that to allow the proceeding to continue would be an unnecessary waste of the court's time because at the end of any trial the result would inevitably be that the claim would fail."

90 I have applied these principles, in particular bearing in mind that:

(i) an application can only be struck out when it is plain and obvious to do so;

(ii) particular caution is required in a developing field of law;

(iii) all or part of a pleading may be struck out as being scandalous, frivolous or vexatious where the pleading contains unjustified allegations of outrageous conduct; and

(iv) a pleading might be an abuse of process where to allow the allegation to continue would be an unnecessary waste of court time, because at the end of any trial the result would inevitably be that the claim would fail.

91 I have also considered the observations of the English Court of Appeal in *Farah v British Airways and Ors CCRTI 1999/0917/BI* where the Court of Appeal allowed an appeal against a decision to strike out part of the particulars of claim. At paragraph 35, Lord Woolf, Master of the Rolls stated:-

"…This is an area of developing jurisprudence. Where that is so, the question of whether or not an analogous situation should be recognised as giving rise to a duty of care, should be determined when the facts have been established."

92 Lord Justice Chadwick at paragraph 41 to 43 stated:-

> ***"41. The question raised on this appeal is whether the court can be certain at this preliminary stage in the action that — whatever, within the reasonable bounds of the claimant's pleaded case, the actual circumstances in which the incorrect and inaccurate information was provided might be held to be after a trial — the question of law raised in the action would be answered in the negative*** .
>
> ***42. As Lord Browne-Wilkinson observed in*** *Barrett v LB Islington* [1999] 3 WLR 83 , ***unless it is possible to give a certain and affirmative answer to the question whether the claim would be bound to fail, the case is not one in which it was appropriate to strike out the claim in advance of trial. Lord Browne-Wilkinson went on to point out that in an area of the law which was uncertain and developing, it could not normally be appropriate to strike out. He emphasised the importance of the principle that the development of the law should be on the basis of actual facts found at trial and not on the basis of hypothetical facts assumed (possibly wrongly) to be true on the hearing of the application to strike out. There are observations to the like effect in****Lord Browne-Wilkinson's speech X (Minors) v Bedfordshire County Council* [1995] 2 AC 633***at pages 741 and 741; and in the judgment of Sir Thomas Bingham, MR in****E (A Minor) v Dorset County Council****at page 694 in the same report***.
>
> ***43. In my view it is plain that the legal issue in this case can fairly be regarded as within an area of the law which is developing and as its boundaries become drawn through experience in the cases which come before the courts."***

93 In *Barrett v Enfield* [2001] 2 AC 500 at page 557 lines F to G Lord Browne-Wilkinson stated as follows:-

> " ***In my speech in the****Bedfordshire****case*** [1995] 2 AC 633, 740–741 ***with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out.*** I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

94 In relation to the allegations of manipulation of LIBOR rates and foreign exchange, I also assumed for the purposes of this application that such allegations are true. While the FSA and FCA have issued notices making certain findings, ultimately for the purposes of this

application, I simply need to proceed on the assumption that the allegations of LIBOR and foreign exchange and manipulation are true without having to consider the effect of the notices issued.

The function of pleadings

95 In reaching my decision I have also reminded myself of the purpose of pleadings as set out at paragraph 31(4) of the *Re Esteem judgment 2000/150* referred to at paragraph 62 above. A defendant is entitled to know the case it has to meet. It is not therefore enough to see how cases might develop during the discovery process or at trial. Pleadings also determine the parameters of what discovery has to be produced and the relevance of any oral testimony, including cross-examination at trial. While it is not for the Court to draft pleadings for the parties or to require pleadings to be perfected, a Court is entitled to order a party to make its case clear to address a lack of particulars or ambiguity in a party's case.

The order of justice

96 In relation to the defendant's criticisms of the order of justice, I firstly agree with the defendant that where a party alleges that another party *"ought to have known"* something, such an allegation should be supported by particulars as to why it is said that a party should have known something i.e. what are the material facts relied upon to invite the Court to draw an inference that a party should have known something. The order of justice at paragraphs 78.2, 78.3 and 101 should have provided such particulars. At present the order of justice does not do so and is defective to that extent. I have reached this conclusion by applying *Fox v Wood (Harrow) Limited* referred to at paragraph 27 above. What the consequences are of the decision I address later in this judgment.

97 Similarly, I agree with Advocate Speck that the allegation at paragraph 102 that the defendant was *"privy to the aforementioned fraud of Barclays Bank"* is an allegation that is also deficient. Firstly, it is deficient because the pleading does not define what is meant by *"privy to"*. In particular the pleading does not define whether the plaintiff is saying that the defendant had actual knowledge of LIBOR and/or foreign exchange manipulation, or whether the allegation is simply that the defendant 'ought to have known' because knowledge should be attributed to it in some manner. Secondly the pleading does not set out any material facts relied upon as to why the defendant was 'privy to' (once defined) such manipulation.

98 Without the plaintiff clarifying its case in relation to what is meant by privy to and without providing particulars, the Court is left with an unsubstantiated allegation of fraud (see paragraphs 33 and 34 of *Makarenko v CIS Emerging Growth Ltd* [2001] JLR 348). I also referred the parties during the course of argument to *In the matter of II* [2016] JRC 116 where at paragraphs 41 to 43 I set out extracts from *Nolan et au v Minerva et au* [2014] (2) JLR 117 and *Three Rivers D.C. v Bank of England (No.3)* [2003] 2 AC 1 in relation to when

fraud might be alleged and what is required to plead fraud. Again, in my judgment the order of justice does not at present meet these requirements.

99 I accept that the order of justice does make allegations in respect of the Barclays Group benefiting from a secret profit at paragraphs 82–86 on the basis that the defendant committed the Trust to investments in order to generate a profit for the benefit of the Barclays Group and there is no application to strike out this part of the order of justice. I also accept that the allegations of LIBOR and foreign exchange manipulation which it is sought to be struck out allege fraud expressly. The basis of the present application is not however that these allegations of fraud lack particulars but is put on the grounds I have summarised above.

100 I next deal with the criticism of the order of justice that on the one hand it claims losses due to the actions of an investment adviser retained by the defendant and yet seeks to attribute knowledge said to be within that investment adviser to the defendant. Advocate Sinel's response to this criticism was that he was entitled to plead cases in the alternative. In other words he could both claim against the defendant losses suffered due to a failure to supervise an investment adviser appointed by the defendant and in the alternative could plead that an *"effective delegation"* of investment decisions had been made to Barclays Wealth.

101 I agree with Advocate Sinel in principle that a pleading may put alternative claims along these lines. However, the order of justice at present does not do so and confuses the two allegations. Furthermore I agree with Advocate Speck that, insofar as the claim against the defendant is for failing to act as an investment adviser or for failing to review investments recommended by an investment adviser, the knowledge of that investment adviser, absent a third party claim against that investment adviser, is irrelevant. Accordingly, allegations of what the investment adviser knew in relation to LIBOR or foreign exchange manipulation is not a relevant consideration by the trial Court as to whether or not there had been proper selection of that investment adviser, or appropriate consideration of any investment recommendations made by that investment adviser. If matters stopped there, I would strike out the relevant paragraphs.

102 Whether the allegations in respect of LIBOR and foreign exchange manipulation are relevant in respect of a claim based on effective delegation is addressed later in this decision.

103 While therefore it is open to the plaintiff to plead an alternative case in respect of effective delegation based on the effective delegation by the defendant to Barclays Wealth, at present notwithstanding paragraphs 4, 6, 9 and 15 of the plaintiff's skeleton argument referred to at paragraph 23 above, an allegation of effective delegation is not made in the order of justice. Although Advocate Sinel contended that all material facts to make such an allegation had been pleaded, I disagree for the following reasons.

104 The starting point for my reasons for expressing this view is what is meant by *"effective delegation"*. I distinguish this phrase from actual delegation i.e. an actual decision of the defendant through a resolution or a duly authorised officer to delegate its functions to Barclays Wealth. In other words the plaintiff's case seems to be that as a matter of fact or in practice the defendant delegated investment decisions to Barclays Wealth even though no resolution was passed by the defendant to that effect, or no communication was sent by a duly authorised officer of the defendant to Barclays Wealth delegating investment decisions.

105 I further consider that the plaintiff, if what it means by *"effective delegation"* is as I have set out in the preceding paragraph, should make its case clear. While Advocate Sinel is correct that a pleading only needs to contain material facts (see Rule 6/8(1) of the Royal Court Rules 2004, as amended ("Rules")), and does not have to raise questions of law i.e. it may do so only, (Rule 6/8(5) of the Rules), an allegation of *"effective delegation"* is in my judgment an allegation of fact or at best a mixed question of law and fact. The allegation must therefore be expressly pleaded and it is not sufficient to plead only the material facts upon which such an allegation is based. I express this view because otherwise, if only the material facts relied on are pleaded without making the allegation of effective delegation itself, the defendant does not know the case it has to meet. At present paragraphs 44 and 77 of the order of justice only hint at effective delegation without expressly saying so. The pleading also needs to distinguish between what it is said the defendant did not do, e.g. it failed to supervise or select an investment adviser, from any allegation that in effect investment decisions were left to Barclays Wealth and therefore the defendant should be liable for any investments made by Barclays Wealth that are found to be in breach of trust. At present the order of justice does not draw this distinction clearly.

106 I do not consider however that an allegation of effective delegation as an alternative to a case criticising the defendant for poor selection of an investment adviser or poor selection of or a failure to monitor investments requires the plaintiff to plead that the agreements entered into between the defendant and Barclays Wealth referred to at paragraphs 23 to 25 of the answer (and admitted by paragraph 35 of the reply) were a sham intended to deceive third parties. The definition of sham to which Advocate Speck in his submissions alluded is found in *Re Esteem* [2003] JLR 188 at paragraph 44 where Sir Michael Birt cited with approval extracts from the case of *Hitch v Stone* [2001] STC 214 which described sham as follows:-

> ***"The particular type of sham transaction with which we are concerned is that described by Diplock LJ in*** *Snook v. London & West Riding Investments Ltd* , ***above.*** It is of the essence of this type of sham transaction that the parties to a transaction intend to create one set of rights and obligations but do acts or enter into documents which they intend should give third parties, in this case the Revenue, or the court, the appearance of creating different rights and obligations…."

107 Advocate Sinel's contention however was that the agreements referred to at paragraph 23

to 25 of the answer and signed by the defendant were not intended to give third parties the appearance of creating different rights and obligations. Rather, the agreements entered into were simply ignored and the true position was that of effective delegation. I consider Advocate Sinel is entitled to present his case on effective delegation in this manner and therefore does not have to plead or prove sham in order to succeed in his case on effective delegation.

108 It may be that the more strongly Advocate Sinel puts the case on effective delegation (and he put it in his skeleton and during oral argument forcibly) the more this might create tension with his case that the defendant failed to properly select an investment adviser or failed to supervise. However, that is a matter for Advocate Sinel. The fact that the way he puts his case on one basis may weaken or undermine his case on another basis is a matter for him; it does not justify striking out the weaker element of any claim. Provided that Advocate Sinel pleads a case of effective delegation consistent with his skeleton and there is clarity in his pleading, I consider that such a case is an arguable matter for trial. The remainder of this judgment is therefore predicated on the basis there is an arguable case of effective delegation that can be pleaded.

Attribution

109 The key argument between the parties concerned attribution of knowledge of LIBOR manipulation or foreign exchange manipulation.

110 The general approach to attribution was summarised in *Meridian Global Funds Management Agent Limited v Securities Commission* and the extract referred to at paragraph 52 above.

111 However the discussion in the judgment of Lord Hoffmann in *Meridian* continued at paragraph 507 line B to F as follows:-

> ***"The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations.*** In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person 'himself,' as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself. How is such a rule to be applied to a company?
>
> ***One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which***

created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or an unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of ***interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."***

112 He then went on to consider two well-known contrasting decisions to explain why the rule of attribution was a matter of interpretation or construction of the relevant substantive rule. The judgment therefore continued at page 508 line F to G to 509A as follows:-

"But the House of Lords held that for the purposes of deciding whether the company was in contempt, the act and state of mind of an employee who entered into an arrangement in the course of his employment should be attributed to the company. This attribution rule was derived from a construction of the undertaking against the background of the Restrictive Trade Practices Act 1976: such undertakings by corporations would be worth little if the company could avoid liability for what its employees had actually done on the ground that the board did not know about it. As Lord Templeman said, at p. 465, an uncritical transposition of the construction in *Tesco Supermarkets Ltd. v. Nattrass* [1972] A.C. 153 :

'would allow a company to enjoy the benefit of restrictions outlawed by Parliament and the benefit of arrangements prohibited by the courts provided that the restrictions were accepted and implemented and the arrangements were negotiated by one or more employees who had been forbidden to do so by some superior employee identified in argument as a member of the 'higher management' of the company or by one or more directors of the company identified in argument as 'the guiding will' of the company.'"

113 Under Article 25 of the Trusts (Jersey) Law 1984, as amended ('the Trust Law') a trustee is entitled to delegate its functions and under Article 25(3) of the Trust Law is not liable for any loss to the trust arising from "a delegation or appointment under this Article who, in good faith and without neglect, makes such delegation or appointment or permits the continuation thereof". It seems to me arguable that the plaintiff can contend that the

defendant is liable for the acts of Barclays Wealth as its effective delegate.

114 The above analysis however begs the question as to what knowledge should be attributed. Advocate Sinel argued that it was arguable that the knowledge of LIBOR and foreign exchange manipulation was well-known within Barclays Bank Plc and was known by senior management. It was also Barclays Bank Plc who were promoting the bank notes which are the main subject of the complaint. While he could not say whether or not individual investment managers who made recommendations in respect of the trust knew either of LIBOR manipulation or foreign exchange rigging that did not matter. It was open to him to argue that Barclays Bank Plc as a whole had such knowledge and accordingly the individuals within Barclays Wealth dealing with the defendant are deemed to have such knowledge. Advocate Speck described this approach as double attribution.

115 A similar but not identical argument was advanced by Barclays Bank Plc in the case of *Graiseley Properties Limited v Barclays Bank Plc* [2013] EWCA Civ 1372. The judgment at first instance was that of Flaux J reported at [2012] EWHC 3093 and the judgment of the Court of Appeal was reported at [2013] EWHC 471.

116 One of the arguments advanced by the Bank was that there was no basis for any implication of knowledge at all. Flaux J stated at paragraphs 13 to 17 as follows:-

> ***"13 It is important to have in mind and, indeed, it is accepted by Mr Beltrami QC on behalf of the bank, that at this stage all the court is concerned with is whether these proposed amendments are sufficiently arguable to go forward to trial, in the sense that they have a real prospect of success: see Civil Procedure para 17.3.6.*** Accordingly, the court is concerned not with establishing the facts as they may or may not be established at trial, nor with whether or not, if certain evidence emerges or does not emerge, the claim will succeed, but just with whether, looking forward, this pleading is sufficiently arguable that it has a real prospect of success .
>
> ***14 I should say at the outset that, having considered the various submissions on both sides, I have no doubt whatsoever that this pleading does satisfy that test and that the points that the claimants raise are clearly and properly arguable and should be allowed to go forward to trial."***
>
> ***"15 The principles according to which the Court decides whether any given representation has been made have been recently usefully summarised by Popplewell J in*** *Mabanga v Ophir Energy* [2012] 1589 (Comm) ***at [25] to [28].*** It is by reference to those principles that Mr Beltrami QC on behalf of Barclays seeks to argue that the proposed amendments have no real prospect of success .
>
> ***16 So far as the first objection is concerned, which is whether it is appropriate to imply the alleged representations at all, the United States Department of Justice found at paragraph 32 of its Statement of Facts***

(expressly accepted by Barclays, as is recorded by the Department of Justice) , ***albeit in the context of the activities of derivatives traders, that certain of those traders and rate submitters who had engaged in efforts to manipulate LIBOR and EURIBOR submissions were well aware of the basic features of the derivative products tied to these benchmark interest rates.*** Accordingly, they understood that to the extent they increased their profits or decreased their losses in certain transactions from their efforts to manipulate rates, their counterparties would suffer corresponding adverse financial consequences with respect to those particular transactions.

17 In my judgment what holds for derivative traders as to their knowledge or understanding must at least arguably also hold for those senior management of Barclays who were also responsible for manipulation of LIBOR. In those circumstances, the attempt by the defendants to argue that these implied representations do not even reach the level of "real prospect of success" for the purpose of allowing the amendments is doomed to failure. Whether the implied representations were in fact made will depend upon a number of factual issues which can only be decided at trial. It seems to me that it cannot be said that Barclays has an unanswerable case that the implied representations were not made, so the matter is quintessentially a factual one for determination at trial."

117 The matter was dealt with by the Court of Appeal at paragraphs 25 to 30.

"Put very shortly, I consider that any case of implied representation is fact specific and it is dangerous to dismiss summarily an allegation of implied representation in a factual vacuum. If the LIBOR scandal had occurred before these cases were begun and what are now the proposed pleas had been incorporated in original pleadings, they would not, in my view, be amenable to a strike out application and it is not surprising that Barclays did not, at first, seek to appeal Flaux J's decision .

26 We received sustained submissions about the true ratios of *Ward v Hobbs* (1878) 4 App. Cas 13 ***and*** *Bell v Lever Bros* [1932] AC 161 ***to the effect that there is no obligation to disclose one's own dishonesty or breach of statutory duty; such submissions would be inappropriate on a strike out application and, in my view, equally inappropriate to an application for permission to amend.*** That may be the law where nothing is said and there is no duty to speak, but even that is not wholly free from doubt see: *ING Bank N.V. v Ros Roca S.A.* [2011] EWCA Civ 353 ***and*** [2012] 1 WLR 472 ***paras 90–96 per my Lord, Rix LJ (as he then was)*** .

27 In the present case, however, the banks did propose the use of LIBOR and it must be arguable that, at the very least, they were representing that their own participation in the setting of the rate was an honest one. It is, to my mind, surprising that the banks do not appear to be prepared to accept that even that limited proposition is arguable .

> ***28 It was also submitted that doing nothing cannot amount to an implied representation.*** But it is (arguably) the case that the banks did not do nothing in that they proposed transactions which were to be governed by LIBOR. That is conduct just as much as a customer's conduct in sitting down in a restaurant amounts to a representation that he is able to pay for his meal, see *DPP v Ray* [1974] AC 370, 379D ***per Lord Reid*** .
>
> ***29 The banks' reliance on the disclaimer and entire agreement clauses is arguably misplaced when the allegation is that the contracts were fraudulently induced, as Cooke J (para 19) appeared to accept.*** At least, the point cannot be decided in the banks' favour on a summary basis. It must be said, however, that Unitech defendants' pleading on fraud is not formulated very precisely at the moment and should be formulated with greater precision after disclosure .
>
> ***30 The banks' submissions boiled down to saying that they were prepared to accept that they would do nothing dishonest or manipulative during the term of the contract and that should be enough for any counterparty.*** I can only say that, in my view, it is arguably not enough. If the day after the contracts had been made, the banks had told their counterparties that they had been manipulating LIBOR in the past and intended to do so in the future, but would be happy to pay any loss that their borrowers could prove, the borrower would (arguably) be sufficiently horrified so as to think he would be entitled to rescind the deal. The law should strive to uphold the reasonable expectations of honest men and women. If in the end it cannot do so, that should only be after a proper trial."

118 In my judgment these conclusions persuade me that it is not appropriate to strike out allegations of manipulation of LIBOR and foreign exchange on the basis that knowledge within Barclays Bank Plc cannot be attributed to the defendant even if the individuals who dealt with the defendant did not know about LIBOR or foreign exchange manipulation. In particular, the observations of Flaux J at paragraph 17 and paragraphs 25 and 30 of the Court of Appeal judgment I consider apply equally to the present case. I am therefore not prepared to strike out the present claim on the basis that knowledge of wrongdoing within parts of Barclays Bank Plc could not following discovery and a trial be attributed to at least those who were making investments within Barclays Wealth as an effective delegate of the defendant. I do not regard such a case as unanswerable. The observations in *Farah* and *Barret* cited at paragraphs 91 to 93 above also support this conclusion as I regard the claim as put by Advocate Sinel or how far knowledge be attributed as a developing area of law which requires a trial.

119 In relation to the *Samsung* case, while both parties argued that *Samsung* supported their position, I regard this decision as another illustration of why it is not appropriate to determine the plaintiff's allegations on a strike out application and why the matters raised, subject to my criticisms of parts of the plaintiff's pleading, are matters for trial.

Loss

120 There is one further part of the defendant's argument which it is appropriate to address. This is the argument that concerns the fact that the plaintiff will not be able to establish any loss because the investments matured before the relevant notices of the FSA and FCA were issued in 2012 and 2015.

121 I have approached this part of the defendant's application on the basis that any loss must ***"flow directly from the breach"*** (see paragraph 135 of *AIB Group (UK) Plc v Redler & Co Solicitors* [2015] A.C. 1503 referred to paragraph 53 above.

122 In relation to this argument I firstly deal with the allegations in respect of LIBOR. In respect of these allegations, I accept Advocate Sinel's submissions that he has an arguable case that manipulation of LIBOR was known within Barclays Bank Plc long before 2012. Indeed the FSA notice makes it clear that manipulation of LIBOR had started in 2005. I therefore consider it is not unarguable to assert that, had the true position been known, his clients would never have invested in the bank notes. I am not therefore prepared to strike out allegations of manipulation in respect of LIBOR on the basis that the FSA notice only went into the public domain in 2012 and the bank notes had matured by then.

123 I do wish to record however that in progressing this matter to any trial the plaintiff needs to give consideration as to what its loss might be. On maturity of the bank notes, it was not in dispute that the plaintiff received 2,240,000 shares in Royal Bank of Scotland Plc. Since that time based on publicly available information, the share price of the Royal Bank of Scotland shares appears to have fluctuated between £1.80 and £4 per share. This information means that there is clearly an issue on the amount of the plaintiff's loss in respect of this head of the claim (assuming liability is established). At a price of £4 per share there does not appear to be any loss. At £1.80 per share the loss is much lower than the amount claimed. I have referred to the effect of the share price to put the parties on notice that appropriate directions will need to be given in relation to identifying losses claimed and what evidence may be required in respect of such losses including whether the shares were sold or kept. The question of the extent of any losses that might be claimed also places an obligation on the parties to take a proportionate approach to this litigation.

124 In respect of the foreign exchange losses, Advocate Sinel candidly accepted in argument that these were not *"as relevant"*. In my judgment, given the investments complained of, this was a realistic concession to make. Based on the order of justice there was no direct investment in any foreign exchange. The order of justice also lacks particulars as to why it is said the foreign exchange caused the losses complained of. Any losses complained of must flow directly from the breach. An allegation that Barclays Bank Plc was generally dishonest because they had engaged in foreign exchange manipulation is not sufficient to allow such allegations to survive. Such an approach is making allegations that are scandalous by reference to the extracts from *Home Farm Developments* referred to above,

in particular at paragraphs 27 and 29.

125 This conclusion does not mean that such a case could not be brought. However, at present the reference to foreign exchange without any particulars as to what loss flowed from such foreign exchange manipulation in my judgment is scandalous. An allegation of general involvement is criminality is not enough. The loss claimed must directly flow from the alleged criminal conduct. At present the order of justice does not plead a case to make such a link.

The way forward

126 In light of my conclusions on the defendant's application, I am not prepared at this stage to strike out any part of the order of justice. However, the order of justice clearly needs revision in respect of the issues referred to in this judgment. I am therefore going to allow the plaintiff leave to amend its order of justice. The amendments must make the plaintiff's case clear and address the following:-

(i) What is meant by ought to be known and all material facts relied on in support of this allegation;

(ii) What is meant by privy to and all material facts relied on in support of this allegation;

(iii) Whether effective delegation is alleged and all material facts relied on in support of this allegation;

(iv) Any amendments must clarify whether the plaintiff's case is put on an alternative basis, making it clear what the alternative bases are;

(v) What losses are claimed in respect of the bank notes taking into account the effect of the shares received on maturity.

(vi) In respect of the allegations of foreign exchange manipulation at paragraphs 71.0 to 75.0, 78.3, 96.0, and the references in paragraphs 97.0 and 99.0 to foreign exchange, what losses is it said flowed from such manipulation. Any amendments claiming such losses must also be supported by arguable expert evidence to show that foreign exchange manipulation caused a loss to the plaintiff flowing directly from such manipulation.

127 Subject to being addressed by the parties when this judgment is handed down on the question of timing, I propose to allow the plaintiff until 13 th January, 2017, to provide an amended order of justice and the expert evidence I have referred to.

128 If any amendments proposed are consented to, I will decide whether they should be on the usual terms as to costs, when I will hear argument on costs in relation to this decision.

The parties shall also agree any time period allowing the defendant to file any amended answer and the plaintiff any amended reply. If there is disagreement on any amendments proposed or any timetable then a hearing date shall be fixed for me to adjudicate upon any such disagreement. At any such adjudication it will be open to the defendant to submit, if advised to do so, that I should refuse any proposed amendment not particularised in accordance with the reasons set out in this judgment and/or I should strike out any existing part of the order of justice.