Neutral Citation Number: [2025] EWHC 91 (Comm)

Case No: CL-2015-000047

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 22/01/2025

Before :

THE HONOURABLE MR JUSTICE HENSHAW

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Between:

(1) ALTA TRADING UK LIMITED (formerly known as ARCADIA PETROLEUM LIMITED) **(2) ARCADIA ENERGY (SUISSE) SA** **(3) ARCADIA ENERGY PTE. LTD.** **(4) FARAHEAD HOLDINGS LIMITED**	**Claimants**
- and -	
(1) PETER MILES BOSWORTH **(2) COLIN HURLEY** ~~**(3) STEPHEN CLIVE LANGFORD GIBBONS**~~ ~~**(4) MARK RICHARD LANCE**~~ **(5) STEVEN KELBRICK** ~~**(6) SALEM CHUCRI MOUNZER**~~ **(7) ARCADIA PETROLEUM SAL OFFSHORE** **(8) ARCADIA PETROLEUM LIMITED, MAURITIUS** **(9) ATTOCK OIL INTERNATIONAL LIMITED, MAURITIUS** ~~**(10) THE CORNHILL GROUP LIMITED**~~	**Defendants**

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Alec Haydon KC, David Heaton, Emily Albou, Ali Al-Karim, Danielle Carrington and Amber Turner (instructed by **Grosvenor Law LLP**) for the **Claimants**
Richard Eschwege KC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **First and Second Defendants**
Tom Sprange KC and **Freddie Popplewell** (instructed by **King & Spalding International LLP**) for the **Fifth and Ninth Defendants**
The Seventh and Eighth Defendants did not appear and were not represented

Hearing dates: 7-10, 13-17 and 20-23 May, 4-5, 10-11, 17-21 and 24-28 June, 1-5, 22-23, 25-26 and 28 July 2024
Draft judgment circulated to parties: 16 December 2024

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Approved Judgment

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Mr Justice Henshaw:

(A) INTRODUCTION

1. This case relates to a course of events which the Claimants, members of the Arcadia Group, allege amounted to *"a substantial and sustained fraud".* The events involved 144 crude oil purchase and sale transactions between April 2007 and May 2013 relating to oil originating in West Africa.

2. In simple terms, the Claimants allege that fraudulent transactions were carried out in this way. In the course of trading transactions in which an entity within the (legitimate) Arcadia Group was buying and/or selling crude oil, fraudulent entities which were not part of the Arcadia Group, but rather were beneficially owned and/or controlled by some or all of the individual Defendants, were 'inserted' into the chain of transactions between the legitimate Arcadia Group entity and its buyer and/or seller. The 'inserted' entities extracted profit that would otherwise have accrued to the legitimate Arcadia Group. On other occasions, trading transactions into which an entity within the legitimate Arcadia Group would or could have entered were diverted to fraudulent entities which were not part of the Arcadia Group, but rather were beneficially owned by and/or controlled by some or all of the individual Defendants. In addition, entities within the legitimate Arcadia Group were caused to enter into loss-

making transactions for the sole or dominant purpose of ensuring that profits accrued to and/or losses were avoided by entities beneficially owned by and/or controlled by individual Defendants.

3. The Claimants allege that the First and Second Defendants, Mr Bosworth and Mr Hurley, *"were centrally involved in the conception and operation of the fraud perpetrated on them and are likely to have been the primary architects of and beneficiaries from the fraud"*. The Claimants allege that the Fifth Defendant, Mr Kelbrick, *"played an active and essential role in the fraud perpetrated on them"*, was closely associated with the relevant trading activities as well as with Mr Bosworth and Mr Hurley, *"played an important and active role in the operations of the fraudulent companies"* – including the Ninth Defendant Attock Oil International Limited, Mauritius ("***Attock Mauritius***") – and was beneficially interested in *"entities who appear to have profited from the fraud".*

4. Mr Bosworth and Mr Hurley counterclaim for certain bonuses and similar sums which they allege remained unpaid when they departed from the Arcadia Group in 2013.

5. The case was tried before me over a period of approximately 10 weeks, during which I heard evidence from, among others, the ultimate owners of the Arcadia Group, the individual Defendants (Messrs Bosworth, Hurley and Kelbrick), and expert witnesses on oil trading practice, Swiss law and forensic accountancy. There was voluminous evidence, though as I indicate below there were also certain unsatisfactory gaps in the available documentation.

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

   i) the Claimants have failed to establish their case against any of the Defendants;

   ii) Mr Bosworth's counterclaims succeed in part; and

   iii) Mr Hurley's counterclaim succeeds.

(B) OVERVIEW OF PARTIES AND CLAIMS

7. I set out at this stage a brief overview of the companies and individuals involved and the composition of the Claimants' claims, as an aid to comprehension of the factual narrative that begins in section (G) below.

8. The First Claimant ("***Arcadia London***") was established in 1988, the Second Claimant ("***Arcadia Switzerland***") on 1 February 2007 and the Third Claimant ("***Arcadia Singapore***") on 2 June 2006. They are private companies which during the relevant period were engaged in the trading of physical crude oil and oil derivatives.

9. Until 16 March 2006, Arcadia London was 100% owned by the Japanese conglomerate, Mitsui. On 16 March 2006, the Fourth Claimant ("***Farahead***"), a Cypriot holding company, completed its acquisition of Arcadia London from

Mitsui, as I explain in more detail later. Arcadia Switzerland and Arcadia Singapore have always been, and continue to be, 100% owned by Farahead.

10. Farahead was and is owned by a discretionary trust settled by Mr Fredriksen, a Norwegian/Cypriot shipping magnate, for the benefit of members of his family. Farahead's function was to act as the group parent company for Arcadia London, Arcadia Switzerland and Arcadia Singapore. Mr Fredriksen and his then deputy Mr Trøim were the ultimate decision-makers at Farahead. It is common ground that Mr Fredriksen and Mr Trøim were the Farahead shareholder representatives and acted on behalf of Farahead at all material times. Discretionary trusts settled by Mr Fredriksen for the benefit of members of his family own (directly or indirectly) various shipping and oil exploration businesses, including Frontline Ltd ("***Frontline***"), which has the largest oil tanker fleet in the world, Seadrill Ltd ("***Seadrill***"), at one stage the world's largest deep-water drilling-rig provider, Golden Ocean Group Limited, a large dry container shipping business, and Seatankers Management Company ("***Seatankers***").

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

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

13. The Fifth Defendant, Mr Kelbrick, was employed as an oil trader at Arcadia London between 1998 and 2004. Thereafter, he worked for a Chinese State oil company, PetroChina, and then set up various companies through which (at least on his case) he undertook oil consultancy services on his own account: South Energy Consulting SARL ("***South Energy***"), Blacksea Petroleum Offshore SAL ("***Blacksea***"), Multiford Enterprises Limited ("***Multiford***"), and Proview Enterprises Inc ("***Proview***"). He is a specialist in originating and trading West African crude oil and has spent long periods of time living and working in West Africa, in particular in Nigeria. It is common ground that Mr Kelbrick has never been a director of any of the Arcadia Group companies, and did not at any relevant time owe any members of the Arcadia Group any duties, fiduciary or otherwise.

14. The Seventh Defendant, Arcadia Petroleum SAL Offshore ("***Arcadia Lebanon***", sometimes referred to as "***AL***") is a Lebanese company whose registered owners were Mr Bosworth and Mr Hurley and their nominees. From 2013 it was allowed to wind down with a view to dissolution. It is a central subject of this litigation, but did not participate in the trial and no claims were advanced against it at trial.

15. The Eighth Defendant, Arcadia Petroleum Limited, Mauritius ("***Arcadia Mauritius***"), was incorporated in August 2001 as a 'shelf' company for Arcadia London potentially to use in its trading activities. In December 2003, Arcadia

London sold Arcadia Mauritius to Mr Jean-Pierre Decker ("***Mr Decker***"), a West African oil trader who set up the Tristar Petroleum group of companies. Some years later, in September 2009, Mr Kelbrick acquired Arcadia Mauritius from Mr Decker. From then on, Mr Kelbrick was its sole director, shareholder, and beneficial owner. The company is believed to have been dissolved some time after April 2011.

16. The Ninth Defendant, Attock Oil International Limited, Mauritius ("***Attock Mauritius***"), was incorporated in 1998, and since then has been engaged in originating and trading crude oil, and in the trade finance of crude oil and related products. It was acquired by Mr Kelbrick from Mr Decker in September 2009. The Claimants advanced claims against Attock Mauritius similar to those against Mr Kelbrick, and it was represented by the same legal team.

17. Three other individuals and one company were formerly defendants to the Claimants' claims:

    i) The former Third Defendant, Mr Stephen Gibbons ("***Mr Gibbons***"), held various positions in the Arcadia Group, including General Manager of Arcadia London from about 2001 to 2008, and CEO of Arcadia Singapore from about 2009 to December 2011. The Claimants settled with Mr Gibbons on terms which, at least purportedly, prohibited Mr Gibbons from assisting or co-operating with the other Defendants in these proceedings. (No specific submissions were made about the propriety of such restrictions, though counsel for Mr Bosworth/Mr Hurley suggested that they were inappropriate, and for that reason I refrain from making any findings or observations on that topic.)

    ii) The former Fourth Defendant, Mr Mark Lance ***("Mr Lance***"), was the Arcadia Group's corporate secretary from about March 2006 to March 2016, and was a director of Arcadia London between 16 March 2006 and 13 March 2015. The Claimants settled with Mr Lance on terms which required him to co-operate with and assist the Claimants in the litigation.

    iii) The former Sixth Defendant, Mr Salem Mounzer ("***Mr Mounzer***"), was and is a 50% shareholder in and director of Attock Mauritius. The Claimants settled with Mr Mounzer on terms which required him to co-operate with and assist the Claimants and, at least purportedly, not to co-operate with any of the other Defendants. He was responsible, among other things, for Attock Mauritius's finances and document management.

    iv) The former Tenth Defendant, The Cornhill Group Limited, is a corporate services company owned by Mr Lance. The Claimants settled with the Cornhill Group. A member of the Cornhill group of companies, Cornhill Secretaries Limited, of which Mr Lance is the sole director, remains the corporate secretary of Arcadia London.

18. The 144 Transactions in respect of which the claims are brought concern the sale of crude oil under term contracts with three West African national oil companies (*"**NOCs**"*). The transactions fall into two main groups.

19. In the first 67 transactions, the "***Arcadia Lebanon Transactions***", Arcadia Lebanon acquired crude under three term contracts with West African NOCs:

    i) the Zafiro Contract, a term contract to lift Zafiro crude with the NOC of Equatorial Guinea, GEPetrol (45 transactions);

    ii) the Sao Tome Contract, a contract to lift Nigerian crude, which the Nigerian NOC, NNPC, had originally supplied to the Sao Tome government (5 transactions); and

    iii) the Senegal Contract, a contract to lift Nigerian crude with the Senegalese NOC, Petrosen (17 transactions).

20. In the remaining 77 transactions, the ***"Attock Transactions"***, the Attock group (at least on the Defendants' case) sourced crude from NOCs for its own account and then sold it at market prices to Arcadia London or Arcadia Switzerland. The Attock Transactions took place from September 2009, after Mr Kelbrick and Mr Mounzer had acquired Attock Mauritius. The Attock Transactions can be categorised by reference to the purchase of crude from different NOCs: 61 involved the purchase of crude from NNPC, 14 the purchase of crude from GEPetrol, and one a purchase from Ontario. One of the Attock Transactions did not involve a sale to the Arcadia Group.

(C) WITNESSES OF FACT

21. The Claimants called Mr Fredriksen, Mr Trøim, Mr Dimitris Hannas, Ms Irene Theocharous and Mr Jonathan Dodgson to give evidence at trial.

22. Mr Fredriksen by the time of trial was 80 years old, not in the best of health and found giving evidence tiring. His recollection of many matters was limited. At the same time, he was not averse to making serious accusations to the effect that the Defendants and others were *"crooks"* (a word he used four times in his oral evidence) without a basis in first-hand or even necessarily second-hand evidence. Although he had authorised this litigation for many years, Mr Fredriksen said he had never seen Mr Adams's affidavit in support of the worldwide freezing order which the Claimants obtained near the outset of the case, nor the Claimants' original Particulars of Claim or Reply. At one point in his evidence, Mr Fredriksen suggested that the Defendants had *"made apparently hundreds of millions of dollars"*, basing that statement on a report by Ernst & Young ("***EY***"). He said he had not, however, read the EY report though an expert specialist had *"gone through this"* for a number of years. Mr Fredriksen struck me as someone who had convinced himself that he had been defrauded, and was unwilling to reflect on that belief even where the facts suggested otherwise (one illustration being the remarkable answer to which I refer in § 395 below).

23. Mr Trøim represented Farahead during the relevant period. He had not been involved with any of Mr Fredriksen's businesses since he and Mr Fredriksen parted ways in 2014, and said he had not spoken to Mr Fredriksen in more than 10 years. He said he had no vested interest in the outcome of the case. At times he appeared to me a candid witness. Nonetheless, in other respects his evidence

was unsatisfactory. It was notable that the Hannas Note, to which I refer later, recorded or referred to a series of significant communications between June 2008 and September 2009, in which Mr Trøim had been involved in discussions about Arcadia Lebanon's financial statements, the extraction of a dividend from it, and ultimately an instruction not to make any more enquiries about Arcadia Lebanon (see §§ 469 and 482-483 below). In his witness statement for trial, Mr Trøim did not refer to any of those discussions, or the fact that a dividend was in fact obtained from Arcadia Lebanon, apart from saying that he recalled receiving the company's 2007 financial statements. In cross-examination he said he had not remembered the dividend payment itself, and that he did not see any particular reason to mention the discussion about obtaining a US$15 million dividend from Arcadia Lebanon. Given the centrality of Arcadia Lebanon to this case, that was an unfortunate omission. At another point, Mr Trøim said *"There is a lot of stuff I don't mention in my witness statement. I tried to focus on the important things."*

24. Mr Hannas was the managing director of Seatankers between 1996 and 2017. Seatankers administered Farahead's books and finances. Mr Hannas was a director of Farahead, a director of Arcadia London from March 2006 to April 2008 and a director of Arcadia Singapore from August 2006 to January 2009. He was in frequent contact with Mr Trøim, who described Mr Hannas as a *"very detail oriented guy"*. I regret to say that Mr Hannas was a highly unsatisfactory witness. He destroyed relevant, potentially highly relevant, documents during the course of the litigation and then gave evidence about that matter which I consider to be untruthful (see section (E) below). He was also the source of untrue evidence about Arcadia Lebanon's dealings with GEPVTN, a joint venture involving a Fredriksen company, which was contradicted by documents he had seen and dealt with at the relevant time (also set out in section (E) below). He seemed to accept in one of his more recent witness statements that he had access to the Hannas Note when making his previous witness statements (which included his main witness statement for trial). The "***Hannas Note***" is a page of manuscript notes written by Mr Hannas, recording a series of 19 conversations between February 2008 and September 2009, which was provided to the Defendants a few months before trial. Mr Hannas said that when preparing his trial witness statement he had *"overlooked"* entries in the Hannas Note about Arcadia Lebanon providing a dividend to Farahead and its connection with the Fulham Properties loan (as to which see later). He similarly said in cross-examination that he *"may have overlooked"* an entry suggesting that Mr Hurley was talking to him in June 2009 about Arcadia Lebanon's 2008 financial statements, contrary to the impression given in Mr Hannas's witness statement that Mr Hurley hid information about Arcadia Lebanon from Mr Hannas. His approach to all of these matters was thoroughly unsatisfactory.

25. Ms Theocharous was Chief Accounting Officer at Seatankers, reporting to Mr Hannas, becoming the Chief Financial Officer in 2016 and by November 2016 a director of Farahead. She worked with Farahead's directors, Mr Hannas and Mr Pallaris. Ms Theocharous liaised with Arcadia and Farahead's auditors (PKF Savvides & Co) to prepare Farahead's consolidated accounts and management accounts. She has since retired. Ms Theocharous was a straightforward witness.

26. Mr Dodgson is a former Arcadia Group employee and an IT specialist. From 2009, he had responsibility for the Arcadia Group's reporting. From 2014, he was the Head of Energy Trading Risk Management and Business Intelligence Systems, with primary responsibility for the Trade Capture system and data. He now works elsewhere. Mr Dodgson was a straightforward witness.

27. Mr Bosworth and Mr Hurley gave evidence themselves, and also called as witnesses Ms Jacqueline McDonald, Mr Jan Scheepers, Mr Paul Duncan, Ms Candice Achkouti, Mr Osagie Akpata and Mr Paul Main.

28. Mr Bosworth produced ten witness statements and four affidavits over the course of this litigation, and was cross-examined at trial over a period of almost four days. My overall impression of Mr Bosworth's evidence, both written and oral, is that it was candidly given. There were numerous passages in both where he was tentative and careful about the limits of what he could remember, or how clearly he could remember things years later. His evidence as a whole was broadly consistent with the documents as they emerged, including documents such as the Hannas Note that were not available when he made his witness statements. I am completely satisfied that his evidence was honestly given, and overall I found him an impressive witness.

29. The Claimants criticised Mr Bosworth on the basis that some of his oral evidence was not reflected in contemporary documents or his written evidence. I find that unsurprising given the scope of the allegations advanced at trial, many of them unpleaded as I indicate later in this judgment. They make specific criticism of one piece of late recollection, a criticism which in my view is unfounded for the reasons I give later (see § 286); and an apparent departure from his written evidence in relation to a peripheral matter regarding the Calabar project (see § 674 below). The Claimants seek to criticise Mr Bosworth in relation to an allegation of a concealed interest in a company, ArcAfrica, which was the subject of a proposed amendment which I disallowed. I reject the criticism in § 254 below. The Claimants also sought to advance, unheralded in any pleading or other form, a suggestion that Mr Bosworth had been involved in paying a bribe to a Sudanese government minister in 2012. An allegation of specific dishonesty or illegality of that kind cannot fairly be advanced for the first time in cross-examination, even in cross-examination as to credit, still less by reference to documents dating from some 12 years ago about a matter which the witness will have had no particular reason to revisit. Mr Bosworth denied the allegation and I accept his evidence.

30. Mr Hurley provided in total six witness statements and four affidavits in this case. He was cross-examined for almost three days. Though on one or two occasions he was slightly argumentative, I am satisfied that his evidence was honestly given. I reject the Claimants' suggestion that, by saying that he deferred to Mr Bosworth's business judgement on payments to service providers, Mr Hurley demonstrated *"at least 'blind eye' knowledge sufficient to establish dishonesty on his part"*. I also reject the contention that he tailored his oral evidence to match that of Mr Bosworth. The Claimants also make criticisms in relation to certain payments to Mr Hurley by Proview and Cathay Holdings, and an unpleaded allegation of an interest in a company called Arcadia Global Assets Ltd. I reject the Claimants' contentions on these points

in §§ 980-984 and 985 respectively. Particularly when viewed in the light of the evidence as a whole, I do not consider any of them to reflect adversely on Mr Hurley's credibility.

31. Ms McDonald was formerly employed by Arcadia London, from 2008 to 2013, as a compliance officer. Before that, she had worked in operations handling West African oil lifting contracts. She was a straightforward witness.

32. Mr Scheepers was head of shipping at Arcadia and controller of VTN Shipping, the Farahead group's shipping arm. His background is in shipping and commodity trading. At Arcadia, he was head of shipping. He was involved in the establishment of GEPVTN and was one of its directors along with Mr Hannas. He was a straightforward witness.

33. Mr Duncan was head of operations at Arcadia from 2007 to March 2012. His evidence explained oil companies' use of special purpose vehicles to carry on West African trading and covered some of Arcadia's West African trading activities. He too was a straightforward witness.

34. Ms Achkouti is an office manager. She worked as a secretary at Arcadia Lebanon and was responsible for its administration. When Arcadia Lebanon closed down in 2013, she agreed to act as Arcadia Lebanon's director for the purpose of its liquidation. I am satisfied that her evidence was honestly given.

35. Mr Akpata is the CEO of Azenith Energy Resources Limited, which operates as a service provider in the Nigerian crude oil industry. His relationship with Arcadia dates back to the 1990s. He explained the roles of service providers in West African oil trading, the work that he did to assist Arcadia in that trading, and the payments that service providers receive. Despite a slightly confusing passage in his oral evidence about whether he had been angry with Mr Kelbrick for using Mr Akpata's company's name on one occasion, I found Mr Akpata's evidence as a whole cogent and truthful.

36. Mr Main is a businessman involved in asset-based mining and oil/gas opportunities. In the mid-2000s he worked on a joint venture with Mr Fredriksen and Arcadia to develop mining activities in Africa. His companies included Concerto, to which Arcadia Lebanon made payments on behalf of Arcadia. He was a good witness. His evidence was clear and cogent, and in my judgment truthful. I specifically reject later the Claimants' suggestions that Mr Bosworth held interests in certain of Mr Main's companies (§§ 253-254 below).

37. Mr Kelbrick gave evidence himself, and also called as a witness Ms Elizabeth Driay. He has provided three witness statements and nine affidavits in these proceedings, and was cross-examined for 2½ days. He was a good witness. He gave his oral evidence calmly and patiently. There were several occasions where I felt he was candid in admitting matters that could have been considered adverse. At other times, he appeared genuinely to be searching his recollection. He was frank in acknowledging when he could not remember things. I have no doubt whatsoever that his evidence was honestly given. The Claimants' highly selective and disparaging attempts, in their comments on witnesses, to belittle his role are unfounded. The Claimants also suggested in closing that Mr

Kelbrick gave *"false information"* on a peripheral matter regarding the ownership of Attock Lebanon from 2011, without having suggested to Mr Kelbrick that that evidence was false or misleading. I reject that suggestion in § 544 below. None of the Claimants' criticisms of Mr Kelbrick's evidence in my view has any real force.

38. Ms Driay worked as Arcadia Switzerland's West African crude oil trader from October 2010 to March 2013. She explained in her evidence, both written and oral, why Arcadia needed to retain a presence in crude physical trading and described her West African oil trading with the Attock group. She was a good witness.

39. As the Claimants candidly accepted in their submissions, none of their witnesses had anything to do with the 144 Transactions which are the subject of this claim. The Claimants did not call a number of individuals who were involved in the relevant events and who either had provided written evidence or had agreed (in their settlement terms) to co-operate with the Claimants. These were Messrs Paul Adams, John Skilton, Charles Tuke, Lance and Mounzer.

40. Mr Adams is an ex-employee of the Arcadia Group, living in the USA, who was based there while employed by the Arcadia Group. He succeeded Mr Bosworth in 2013, and made the detailed affidavit on the basis of which the worldwide freezing order was granted in 2015. He provided four interlocutory witness statements and in October 2023 a 7-page witness statement for trial (after he had left the Claimants' employment in March 2022).

41. The Claimants draw attention to the fact that, in 2016, Mr Bosworth and Mr Hurley pointed out that Mr Adams joined the Arcadia Group only in 2009, had no formal responsibilities outside the USA or detailed information about the trading (until 2013), and visited Europe or the trading offices only occasionally. Nonetheless, the documents suggest that Mr Adams knew in June 2011, for example, that Arcadia was still engaged in regular West African trading (contrary to an alleged representation which in his affidavit he alleged to have been made); and knew about Arcadia's use of service providers in West Africa (including being involved in the drafting of service provider agreements and organising compliance sessions for them). In a letter of 12 April 2024, shortly before trial, the Claimants said they had decided that it was *"not necessary"* to call him. In a further letter of 19 April, they said he had indicated that he did not want to be involved in this litigation and was not willing to do so voluntarily. In these circumstances, I do not consider that I should draw any particular inference from his absence. The respects in which his affidavit has turned out to be incorrect may in due course be relevant to applications which the Defendants have said they intend to make should they succeed in this case (in particular, arising from the Claimants' undertaking in damages recorded in the freezing order), but that is for another day. I take this opportunity to record that I reserve for future consideration any further factual findings that might be necessary in that context.

42. Mr Skilton looked after Mr Fredriksen's corporate affairs. Mr Fredriksen said Mr Skilton helped *"on the tax side and also on the legal side"*. Mr Skilton gave a previous witness statement and the Claimants listed him as a witness for the

trial. They then decided not to call him, saying that on reflection it was not necessary to do so. Mr Skilton was involved in several of the important events, and his name appears several times in the Hannas Note, including particularly significant entries about Farahead obtaining a dividend from Arcadia Lebanon, and an instruction from Mr Fredriksen/Mr Trøim that *"we should not make any more enquiries on [Arcadia Lebanon]"*. Moreover, Mr Skilton was the author of the meeting note to which I refer in §§ 430-434 below, on the basis of which the Claimants made and pursued an allegation of deliberate misrepresentation by Mr Bosworth/Mr Hurley said to have concealed their alleged fraud from the Claimants. As I say there, I would if necessary have drawn an adverse inference against the Claimants on that issue by reason of their unexplained failure to call Mr Skilton to give evidence.

43. Mr Tuke was a director of Arcadia London until November 2023. He previously gave a witness statement in these proceedings. Mr Tuke became a director of Arcadia London in July 2012, and was a director of Arcadia Switzerland until April 2012. Mr Tuke was one of Arcadia's paper traders, and signed service provider agreements with Equinox and Azenith Nigeria. His evidence might have assisted the court on Arcadia's own use of service providers and the relationship between the West African physical trading and the paper trading. It is unnecessary to consider drawing any inference from his absence.

44. Mr Lance was the Fourth Defendant. His company, Cornhill Group, was the Tenth Defendant. Mr Lance was Arcadia's corporate secretary, and Cornhill provided compliance and secretarial services to Arcadia. Mr Lance was involved in incorporating Arcadia Mauritius and Arcadia Lebanon. The Claimants alleged that he was a conspirator, but settled with him in April 2016. The Claimants make the point that they could not have been expected, in these circumstances, to have called Mr Lance as a witness of truth (cf *Kazakhstan Kagazy plc v Zhunus* [2017] EWHC 3374 (Comm) at [57]). That point would ordinarily have had some force. However, there is evidence that the Claimants continue to use his services, and that Cornhill Secretaries Limited remains Arcadia London's corporate secretary.

45. Mr Lance was heavily involved in the establishment of Arcadia Lebanon, the use of service providers, and the proposed restructuring of the Arcadia Group. Questions were put to Mr Bosworth and Mr Hurley about Mr Lance, his role, and documents which he authored or was provided with. The first entry in the Hannas Note records Mr Lance as having said Arcadia Lebanon was Mr Fredriksen's *"stand-alone company"*, and the Claimants sought to explain that recorded statement as meaning something other than its apparent natural meaning. In these circumstances, adverse inferences can properly be drawn (to the effect that the entry can be read at face value, absent any contrary explanation from Mr Lance), though none of the findings I make on that or other matters relevant to Mr Lance is dependent on such inferences.

46. Mr Mounzer, the former Sixth Defendant, worked with Mr Decker at the Tristar group, and became Mr Kelbrick's business partner. Mr Mounzer is the 50% owner of Attock Mauritius. The Claimants alleged that Mr Mounzer was party to the conspiracy, but in July 2018 they settled with him. The settlement

agreement indicates that Mr Mounzer provided extensive documents and assistance to the Claimants. I do not, however, consider that any adverse inference can be drawn from his absence.

(D) EXPERT EVIDENCE

47. The Claimants and the Defendants called evidence on West African oil trading practice from Liz Bossley and Peter Hendry respectively.

48. Ms Bossley has since 1999 run an energy trading consultancy. This work has included engaging actively in contract negotiations in West Africa, in particular advising and sometimes negotiating sales on behalf of non-NOC West African producers to traders or end-user refining companies. That has involved discussions with senior managers in NNPC, for example discussing the pricing for a new grade of crude oil in Nigeria. Ms Bossley said she had not, however, been personally involved in sourcing or operating term contracts with West African NOCs, and had met, but never dealt with, intermediaries and service providers in West Africa. Before starting her consultancy, Ms Bossley worked from 1978 to 1985 as a crude oil trader for the British National Oil Corporation (trading particularly in UK Continental Shelf oil), and from 1985 to 1999 as Head of Marketing for Enterprise Oil plc, where she was responsible to the board for all issues concerning Trading, Operations, Shipping and Risk Management, and controlled trading staff who were trading North Sea, Mediterranean, Indonesian and US Gulf crudes and LPG. Ms Bossley accepted that some of the expert issues were outside her areas of expertise.

49. Mr Hendry has over 30 years' experience in the oil and gas industry. He has worked as a crude oil trader and in petroleum products. He originally worked during the early 1990s for Caltex Oil, based in Cape Town and then Singapore, as a crude oil trader. From 1997 to 2008 he specialised in petroleum products, holding various senior positions. From 2008 to 2012 Mr Hendry worked for Optima Energy in Geneva as a trading manager. Optima was orientated towards West African physical oil trading (with associated hedging) and had offices in Lagos and Abuja. Mr Hendry oversaw the work of four other traders based in Geneva, and liaised regularly with the traders in Nigeria. During this period, Optima obtained a crude oil term supply contract from NNPC. Optima had a sponsor for that contract, who Mr Hendry believed to be a local tribal chieftain, but used its own staff as service providers (albeit Mr Hendry added that the contract might have been more successful had they employed a service provider). Mr Hendry encountered service providers when Optima was seeking to obtain crude oil contracts with neighbouring countries including Senegal, and when service providers from time to time offered services to Optima. From 2012 to 2013 Mr Hendry had a trading and managerial role at JP Morgan Commodities in Geneva, focussing among other things on physical and derivatives oil trading.

50. I am satisfied that both experts were expressing their genuine opinions and doing their best to assist the court.

51. The parties called expert evidence on Swiss law. The Claimants called Professor Hans-Ueli Vogt (civil law) and Professor Marc Thommen (criminal

law). The Defendants called Professor Peter Forstmoser. Each of them was appropriately qualified to express the opinions he gave, and set out his opinions fairly and with a view to assisting the court.

52. The parties also called expert evidence in the field of forensic accountancy. The Claimants called Richard Abbey, a partner in Forensic & Integrity Services at EY. The Defendants called Mr David Stern, a partner in StoneTurn. Both were good witnesses and gave evidence fairly and clearly with a view to assisting the court. I do not accept the Defendants' criticism of the decision to instruct Mr Abbey given his firm's previous role in the investigation carried out on behalf of the Claimants. Mr Abbey made clear that his role was clearly distinct from that previous role and did not depend on the accuracy or otherwise of the conclusions EY had previously reached. I would accept that, since Mr Abbey had not been instructed to look at the Defendants' witness statements, it may not have been correct to use the phrase *"many gaps in the explanation and evidence of payment provided by the Defendants"*. However, Mr Abbey fairly made clear in his evidence the limits of his task and the conclusions he reached, and that he was merely trying to explain what he had and had not been able to substantiate from the materials provided to him.

(E) DOCUMENTS

53. Although a large number of searches had been undertaken on both sides, and voluminous documents were disclosed, there remained certain unsatisfactory gaps in the documentation available at trial. I shall not burden an already long judgment with a detailed account, but consider it necessary to highlight a few conspicuous points.

54. Mr Hannas said he regularly deleted many of his emails, in order, he said, to free up space. However, he undoubtedly also destroyed relevant documents during the course of this litigation. Mr Hannas said that during his time at Seatankers he kept handwritten notes in notebooks, mainly notes of telephone calls. He had maybe 20-25 notebooks each of 30 or 40 pages, stored in a locked box. Nobody else knew about them. He said that when he retired in 2017, he destroyed most of them, and then took home other notebooks:

> "which I thought were particularly important or could be helpful to refer back to if my former colleagues had questions about ongoing matters".

55. However, Mr Hannas later destroyed those remaining notebooks too:

> "I destroyed these remaining notebooks about a year ago as they were of no use to me and I did not think, at the time, that they would have been of use to anyone else. I was concerned that the documents could still be commercially sensitive, so I shredded them…."

That statement was made in Mr Hannas's 3rd witness statement, dated 1 November 2023. He was therefore saying that he shredded the remaining notebooks in late 2022.

56. Mr Hannas destroyed the two sets of notebooks despite the fact that he knew the litigation was ongoing, and had given witness statements in July 2016 and August 2020. He also accepted that he had been told not to destroy the notebooks. He said, in relation to the first set:

> "I destroyed them … because although the lawyer from the first hearing told me to keep them, I destroyed them simply because I forgot."

57. In relation to the second set, Mr Hannas was unable to explain the inconsistency between his evidence that (a) he took them home because they were particularly important or could be helpful in answering queries and (b) he did not think they would have been of use to anyone. Mr Hannas said he could not *"distinct* [sic] *the fine difference between these two"*. I found that answer wholly implausible, particularly from a person for whom record-keeping was a significant part of his role. In relation to the second set of notebooks, Mr Hannas said *"I certainly did not destroy them on purpose. I simply forgot that I had to keep them."* He said he had not heard from anyone about the case between August 2020 and late 2022, or been asked for the notebooks, and thought he had assumed that the case was concluded.

58. The timing of the destruction of the second set of notebooks is potentially significant, because the first CMC was in late October 2022 and largely concerned disclosure, a matter which the parties had been discussing for some months. The Claimants' solicitors said in early August 2022 that they were in the process of identifying whether hard copy documents held in Cyprus duplicated electronic records. In a further witness statement, served the day of the Claimants' written opening, Mr Hannas said that he may have destroyed his remaining notebooks *"somewhat sooner"* than 2022, and that *"I am not sure of the precise timing, but I think it would have been in the first half of 2021 when I destroyed my notebooks"*, in preparation for moving house. In his oral evidence, Mr Hannas said he destroyed these notebooks "*Maybe 2021, maybe 2022*". A difficulty with his change of evidence is that if, as he now says, Mr Hannas destroyed the notebooks in the first half of 2021, that would have been only a few months after he gave his witness statement in August 2020 in the jurisdiction challenge. Mr Hannas would have had no conceivable basis on which to conclude that the case had already concluded by early 2021 and that his notebooks could no longer be required; and I find it entirely implausible that he did so conclude. Nor, for that matter, would Mr Hannas have had any plausible basis to have reached that conclusion in late 2022, if that is when he destroyed the notebooks. I regret to say that I consider Mr Hannas's evidence about the destruction of these notebooks to have been untruthful.

59. Mr Hannas denied that he had destroyed the notebooks on the instructions of Mr Fredriksen, something which Mr Fredriksen also denied. It would be somewhat surprising if Mr Hannas had destroyed documents relating to Mr Fredriksen/Mr Trøim's business entirely of his own accord. However, I do not feel able to draw any firm conclusion on that point based on the available evidence.

60. A second point of concern arises from the late disclosure of the *"Arcadia Beirut"* box held in Mr Hannas's office, the contents of which turned out to be difficult to square with evidence previously given on the Claimants' behalf. In particular, Mr Adams's affidavit in support of the freezing order said that during the relevant period, Farahead was *"not aware at the time that GEPVTN had received payments from Arcadia Lebanon"* and that this had come to light only from Arcadia Lebanon transfer instructions to GEPVTN *"that have now been identified"*. GEPVTN was a joint venture between VTN Ship Management (an indirect subsidiary of Farahead) and GEPetrol. Mr Hannas was identified as the source of that information for the affidavit. In July 2016, Mr Hannas made a statement (after Mr Bosworth/Mr Hurley had raised material non-disclosure in respect of GEPVTN) in which he said that he did *"not know that GEPVTN did business with Arcadia Lebanon at any time…The first time I became aware that GEPVTN did business with Arcadia Lebanon was when this was discovered in the course of the …investigations into the alleged fraud"*. In his witness statement for trial, Mr Hannas he said he *"was not aware that [GEPVTN] traded with Arcadia Lebanon"*.

61. In Mr Hannas's Seatankers office there was a locked box, labelled *"Arcadia Beirut"*. The Claimants gave disclosure of (hard-copy) documents from the box only in October 2023. During cross-examination, Mr Hannas was shown one such document. In late January 2009, Mr Hannas asked Ms Theocharous to print out the GEPVTN records that contained Arcadia Lebanon's payments to GEPVTN because he wanted to review Arcadia Lebanon's financials for Mr Fredriksen/Mr Trøim. During cross-examination, Mr Hannas was shown a hard-copy GEPVTN ledger that recorded Arcadia Lebanon's payments, found in the Arcadia Beirut box and apparently printed out on *"Tue 20 Jan/09 15:57"*. That is the same day on which Mr Hannas emailed Mr Fredriksen and Mr Trøim about Arcadia Lebanon and its financial statements (see § 496 below). The hard-copy ledger has manuscript additions (circling the word 'GEPVTN' and underlining the words 'ARCADIA PETROLEUM SAL (LIBANON)' [sic]), which Mr Hannas denied he had made, and he denied that the ledger had come from his office. It was put to Mr Hannas that Mr Adams's evidence was untrue because Mr Hannas knew at the time that GEPVTN received payments from Arcadia Lebanon since he had printed out the ledger showing it; to which he replied, "*I cannot recall*". He continued to insist that his own evidence quoted above was true. Later, Mr Hannas said he could not remember whether he looked at the ledger at the time (January 2009) and *"Okay, maybe I looked. Maybe – I don't know for what purpose."* I find that implausible. It is evident from the documents that the interest in Arcadia Lebanon at the time concerned its profits, which in due course led to a dividend being taken, and that Mr Hannas's evidence was untrue.

62. In addition to the above points, the email mailbox of Mr Fredriksen's secretary, Gunn Skei, was not preserved. That is significant because Mr Fredriksen did not use email personally.

63. Separately, Arcadia's trading data, including data on the Transactions, was recorded in its Trade Capture system. The Claimants disclosed Trade Capture data in December 2022. However, during the course of these proceedings they

deleted the software (the 'FR9' application and servers) that provided a particular facility for the interrogation of the system, save in relation to closed trades before March 2009. That limited the Defendants' ability to access, view or search the data in one of the ways that a user of Trade Capture at the relevant times would have been able to do.

64. Other potentially important documents no longer exist, such as Mr Trøim's notebooks, but explanations have been given for their loss which mean their absence cannot be regarded as culpable.

65. As to the Defendants' disclosure, the Claimants make a number of points about the Defendants' unwillingness to comply with certain disclosure requests and resistance to certain disclosure applications. They also say that Mr Kelbrick did not take steps to preserve all his email accounts. They refer to correspondence from his solicitors dated 22 November 2022, indicating that there were eight mailboxes that had been within his or Attock Mauritius's control but for which control had been lost. In his oral evidence, Mr Kelbrick could not recall whether he was asked in February 2015 to preserve two of the mailboxes, or whether he had tried in 2015 to obtain access to the emails sent and received at three others. He accepted that he used the accounts skelbrick@southenergyconsulting.com and sk@southenergyconsulting.com, though it appears that the South Energy servers were removed and wiped in 2013 (before this litigation began). Mr Kelbrick's counsel made the point, however, that these various complaints had for the most part not been raised before, for example in correspondence, and the Claimants do not seek to demonstrate the contrary. In these circumstances, I do not consider it appropriate to draw any particular inference from the loss of these accounts.

(F) WEST AFRICAN OIL TRADING

(1) Risks, use of contract holders and sleeving

66. The events from which this case arises need to be considered in the context of the nature and exigencies of oil trading in West Africa during the relevant period. Mr Hendry described it as being *"not for the faint hearted"*, and said it was essential to have *"boots on the ground"* in order to build up contacts and develop close and long-lasting relationships with local traders and NOCs.

67. West African NOCs usually supplied crude oil pursuant to term contracts, as opposed to 'spot' contracts (one-off sale contracts). Term contracts prescribed the volumes of crude to be sold/delivered over a set time-period, usually not less than a year. The company that entered into the term contract with the NOC and bought the oil was the 'contract holder'. West African governments sometimes allocated oil contracts to other governments (in 'government-to-government' contracts). Some governments did not have the ability or interest to lift oil allocated under such a contract and therefore needed the help of an oil trader.

68. There was considerable agreement between the oil trading experts about the risks involved in West African oil trading at the relevant time. These included physical, performance, financial, legal, anti-corruption, reputational, operational and market-related risks. Mr Hendry said that:

> "[c]orruption of various kinds was widespread and frequently encountered, which caused issues with compliance and corporate reputation. Access to cargoes, whether for purchase or for sale, was often subject to an opaque allocation process, greatly influenced by various forms of patronage which in turn predicated the employment of intermediaries who were familiar with local customs and practices and so capable of safely navigating these local idiosyncrasies."

69. It was particularly risky to buy oil directly from a West African NOC under term contracts. Mr Hendry explained that:

> "70. Commodity trading firms frequently operate in countries in which corruption is rife, making the firms vulnerable to running afoul of anti-corruption laws in the USA, Europe, and elsewhere. Reputable lifting companies operating under strict anti-corruption rules can encounter compliance issues when dealing within WAF, where the practice of paying signature bonuses, as well as other rewards and incentives, are the norm. It is often the case that the NOC will be the centre for a nexus of patronage involving politicians, regional governors and tribal heads and as such, there are problems when dealing with what the banks refer to as *"politically exposed persons"* – or PEPs ….
>
> 71. Moreover, commodities are sometimes the subject of trade sanctions. …
>
> 72. As a consequence of the above, trading firms often wish to deal with NOCs that reside in difficult jurisdictions via intermediate entities, rather than directly. … in summary, and in my experience it was common for oil companies during the Relevant Period [2005 to 2013] to structure their operations so as to provide a degree of separation between the principal (i.e. the oil trading company) and the NOC. Individual structures varied based on individual company needs, but included the use of sleeving – including the creation of special purpose companies incorporated in offshore jurisdictions to undertake their operations and structure their ownership when operating in WAF, as well as utilising intermediate entities to sit in the transaction chain between the buyer and the seller of the crude oil."

70. Mr Hendry defined a *"sleeve"* as *"[a] company within the deal chain, usually required by one of the principal players. Such an insertion may be undertaken for a number of reasons and a sleeve may turn up anywhere in the ownership chain, depending upon their function. They are usually well-known to the players whom they stand between"*. He said *"sleeving is a long-standing technique used in the energy and commodities trading industry"*. Mr Bosworth's evidence was that the *"use of sleeves was typical of all oil companies operating in that region during this time, everybody used them – including Arcadia, Glencore, Trafigura, Vitol and the other main players in*

West Africa"; and that Arcadia used them *"as a means of creating a corporate barrier between off the books Arcadia entities (such as [AL]), and the Arcadia group, reducing the compliance risk associated with West African trading"*. Mr Scheepers also said it was *"normal procedure"* to use intermediaries because of the desire to avoid contracting directly with the NOCs. He said: *"this is not only happening here in Arcadia, it happens with Vitol, it happens with Trafigura, with all the big major traders. It's a common industry practice"*.

71. Mr Hendry defined a *"contract holder"* as *"usually a company that has succeeded in gaining an award of crude oil volumes from a WAF NOC, but which may not have the wherewithal to perform. Sometime[s] may be known as "briefcase" company"*.

72. Ms Bossley similarly said:

> "I would not take issue with Mr. Hendry's description of the routine existence and use of intermediaries, sleeves, service providers, however described, to distance companies that are sensitive about their reputation from the accusation of involvement in bribery and corruption This distancing could be arranged in a number of different ways. ..."

Ms Bossley acknowledged in her report that: *"There are marked cultural differences between how business is done in WAF compared with the large global financial centres"*. She said there was *"invariably"* a risk of bribery or corruption in the procurement of term contracts from NOCs. Ms Bossley said that:

> "Companies may wish to deal through intermediaries…to put some distance between themselves and the NOCs in case they are subject to investigation by the regulatory authorities."
>
> "Given the potentially large rewards that are on offer in the oil trading business, it is unsurprising that companies may attempt to find a halfway house by outsourcing to third parties activities that they do not wish to undertake in their own name."
>
> and:
>
> the "existence and use of intermediaries, sleeves, service providers, however described, to distance companies that are sensitive about their reputation from the accusation of involvement in bribery and corruption" is *"routine"*.

Ms Bossley agreed in her oral evidence that because of the compliance risks, it was common practice for oil trading companies to use intermediaries to create distance and separation between the NOC and the oil trading company; and that the big traders and the oil majors used intermediaries as sleeves and to obtain term contracts.

73. Mr Hendry helpfully elaborated on the types of risks that might arise, in this passage in the experts' joint report:

> "[T]here are certain risks to an IOC [i.e. an international oil company] which are exacerbated within the WAF region. For example, in introducing the sponsor, the service provider needs to be confident that the candidate will maintain sufficient leverage over the duration of the contract and not be ousted and replaced by someone who is less favourable towards the IOC. In Equatorial Guinea, for instance, there is an on-going family squabble about who will succeed President Obiang. At least two of his sons both want the job. In Nigeria, the GMD of NNPC and the oil minister are frequently changed. Another non-regional (and historic) example might be the sudden jailing of the Malaysian Deputy- Prime Minister, Anwar Ibrahim, by Dr. Mahathir, the Prime Minister, on trumped-up charges. If you lose your sponsor the chances are you will lose your business. So, the risk of early contract termination can be lessened by backing a good sponsor. But precisely because of this reliance on patronage to acquire business in the WAF region, an IOC can quickly become exposed to reputational and compliance risks e.g. by engaging with politically exposed persons (PEPs), which in-turn can often complicate the IOC's relationship with their trade financier, who, if they are based in USA or Europe, will need to closely follow international guidelines to counter bribery and corruption. To identify a sponsor who is not a PEP can be a difficult task and so these risks must be accepted. So, by utilizing sleeving entities and alternative finance and other intermediaries, it is possible to create some distance between what happens in the WAF region, and what is seen to happen in the IOC's home country. Their involvement created some clear space between IOCs and NOC which helped to safeguard the reputational risks of the IOC."

74. Mr Duncan said it was common for trading companies to use special purpose companies that they did not officially own, or which were not officially part of the group, for West African oil trading. He said that while he was working for Trafigura, for example, they used a company called Delaney to support Trafigura's Nigerian operations. Delaney was not formally owned, but was still effectively directed, by Trafigura for its business operations in Nigeria. It dealt with operational, logistical, and administrative matters in Nigeria (where Trafigura had no physical office), but would also help the Trafigura traders get new business in Nigeria by arranging meetings with local contacts and would make sure that the correct people were attending those meetings. It was necessary, he said, to have a company like Delaney in Nigeria to get to know the Nigerian governmental and private sector people involved in the oil industry; and there was no point in sending someone from London who did not know the people and the environment. Mr Duncan said many major players in the oil and energy sectors, including Vitol, Glencore, Gunvor, and Mercuria used such companies.

(2) Obtaining term contracts, sponsors and service providers

75. As to how term contracts were obtained from West African NOCs, Mr Hendry explained in the joint report that:

> "Personal relationships with decision makers within the NOC were key to obtaining contracts. Usually, it was necessary to enlist well-connected individuals to further these relationships. To achieve a close relationship with any WAF NOC producer will be of significant benefit to a trader, especially with a NOC like NNPC, which is routinely able to supply large quantities of high quality, highly desirable crude oil. Many WAF crudes, especially those from NNPC, are readily able to arbitrage north, south, east or west and are widely accepted in most markets."

and

> "It was a virtual necessity to use third party service providers so the practice was commonplace. Many IOCs engaged intermediaries during the RP [Relevant Period]. The reason for IOCs to use third party service providers is to enhance their chances of being allocated export volumes within the NOC tenders. All IOCs operating in the WAF region will have attempted to form close direct relationships with the NOCs, but even when supposedly succeeding in this goal, they may not succeed in getting what they most desire – a steady high volume of crude oil, awarded through a term tender. In the case of NNPC, there are so many potential lifters competing for the same supply that demand always outstrips supply and NNPC usually *"rations"* their awards. As a result, no one company gets all the oil. Even equity producers who co-produce with the NOC (in the case of Nigeria, NNPC has around 60% share) usually submit bids to buy more volume through the annual tenders but not even they can guarantee any success and they also resort to third-party assistance. Once an award is made these same third-party service providers help to ensure optimal operations on an on-going basis."

That is not a view from which Ms Bossley dissented in the joint report, albeit she suggested that it was difficult to generalise. She added:

> "The range of activities might include anything from simple introductions and socializing with influential persons to applying pressure or incentives to those in a position to grant contacts or allocate the most valuable cargoes and exercise operational preference in, for example, berthing order."

76. To similar effect, Mr Hendry said in the joint report:

> "Although the sponsor would not usually continue to be so *"hands on"* after the contract was agreed, the involvement of the third-party service provider would be on-going.
>
> The use of local sponsors and/or introducers and/or third parties was of the utmost importance in obtaining term contracts with NOCs during the RP. During the RP, some well-known refiners may have succeeded in winning allocations within NOC tenders. This can be seen from the published results (where available) and from the lifting schedules but what is less clear is precisely how they managed to win those awards. No-one is willing to reveal or to publish this information. After all, ultimately no one is paying a higher price than that set by the NOC within their official selling price (OSP). Some refiners, who might not normally need, say, NNPC crude, also participated and won from time-to-time. There can be no doubt that the chances of a successful award were significantly enhanced by forming a relationship with the right third-party service provider.
>
> …
>
> For a successful award of volume potential awardee will principally rely upon the services of their sponsor to steer an allocation their way. The potential awardee will, in turn, rely upon their service provider to facilitate the introduction to the best sponsor (or contract-holder). A symbiosis develops. The sponsor must rely upon the buyer to successfully perform the contract, while the buyer is relying upon the sponsor to ensure an award. The Service Provider has risk both ways, both with the sponsor and with the buyer."

Mr Hendry used the term *"sponsor"* to mean *"usually a family or a respected individual possessing the power to influence the award of oil e.g. such as within a term tender"*, and by *"service provider"* meant:

> "A deal facilitator who seeks out and develops relationships with key personnel in the target area, with the aim of spotting an opportunity, creating and developing business. Initially, to provide a bridge between sponsors/ contract-holders to IOCs. Once any contract is concluded, the service provider is usually expected to perform a myriad of further tasks during the lifetime of the contract and so plays an integral role throughout."

For example, Mr Hendry said that when he was working for Optima and it acquired a term contract from NNPC, Optima had used a sponsor in the form of a local tribal chieftain in the Delta region. I accept Mr Hendry's evidence on these matters.

77. Ms Bossley agreed that the use of local sponsors, introducers and/or third parties was important in obtaining term contracts with NOCs during the relevant period. She said in her report that *"Business in WAF is still a 'relationship'*

business…in WAF I understand that who you know and how you socialise with them remains important in establishing relationships with NOCs"; and in oral evidence that the process for obtaining a term contract from a NOC was *"opaque"*. She said she *"agree[d] with Mr. Hendry that acquiring a term contract with a NOC in WAF typically involves the assistance of service providers or intermediaries"*, and that *"the services provided by these intermediaries might include introductions, preferential access to cargoes, beneficial prices, optimisation of cargo quantities, amendments to contractual terms and logistical "on the ground" support"*.

78. Mr Bosworth's evidence was that in order to obtain a term contract from NNPC, the approval of politically significant individuals was generally required, because in Nigeria term contracts with NNPC were approved by the President or the Minister of Petroleum. Sponsors therefore tended to be powerful and politically connected individuals, and using a sponsor significantly increased the chances of obtaining a term contract. Indeed, Mr Bosworth said that without a sponsor's access to high-level decision makers, a term contract application *"would be a waste of time"*. Mr Akpata, who acted as a service provider in Nigeria from 1992, said:

> "The main thing that we do as service providers is procure oil trading business in West Africa for international oil trading businesses. We assist these oil traders with identifying and winning opportunities that they themselves are unable to find or win without local help. Most oil trading opportunities in West Africa are largely controlled by national oil companies and Nigerian private producers. It is very difficult to gain an audience with, let alone secure business from, the decision makers in these oil companies without local knowledge, local contacts and local assistance. Service providers sometimes have enough influence with national oil companies or private producers to influence the allocation of the contract and help make sure it goes to an oil trader they work with."

and:

> "… one of the most important services I provided to Arcadia was making introductions to Nigerian traditional rulers, chiefs and retired military officers or ministers…because from them could come opportunities to win or bid for valuable contracts"

He said service providers *"have to put in time to build and maintain relationships with [significant figures in the Nigerian oil sector]. You have to chase them up for meetings. You have to spend a lot of time getting through the layers of bureaucracy that surrounds them"*.

79. The Claimants accepted that term contracts were *"difficult to acquire"*, Mr Kelbrick described the process as *"incredibly competitive"* and Mr Akpata said it was *"highly competitive"*. Mr Bosworth said obtaining a term contract with NNPC was *"a complicated awarding system. It is political"*, and that even BP obtained an NNPC term contract only on the occasion when it had a joint

venture with a service provider called Niger Med (Mediterranean). He described having spent considerable time on the ground in Nigeria, trying to build relationships with powerful tribal and religious leaders, such as the Shehu of Borno and the Sultan of Sokoto, both of whom ultimately acted as sponsors for the Arcadia Group (via special purpose companies) to obtain term contracts. Mr Kelbrick said *"[d]eveloping these local relationships is demanding on your time but its value cannot be underestimated"*, and that relationships in West African oil are *"all about the individual"* and *"all about trust"*. I accept the evidence of Mr Bosworth, Mr Kelbrick and Mr Akpata on these points.

(3) Service providers' ongoing role

80. As indicated in some of the evidence quoted above, the role of a service provider did not end when a term contract had been obtained. Mr Hendry confirmed in the joint statement that the use of local sponsors, introducers and/or third parties was necessary to facilitate the operation of term contracts:

> "and in particular the continued hands-on involvement of the third-party service provider, who often bears most responsibility for the smooth running and optimization of the term contract. From a buyer's perspective, the seller (the NOC) holds virtually all the cards. The NOC can choose not to supply, or to offer a sub-optimal grade, or to provide an undesirable loading window. Such operational enhancements can sometimes be positively influenced by the service provider, who will also be relaying vital operational and market information, to all parties."

Mr Hendry noted that in 2017, for example, NNPC granted 396 companies term contracts, in excess of the available supply of oil.

81. Mr Hendry emphasised services providers' ongoing role in his evidence in the joint report:

> "… service providers did provide routine operational services but crucially much more besides, particularly with regards to services like introductions and facilitation to large contracts, which wouldn't have been possible without the service provider's participation.
>
> So no, it was not unusual. It was part and parcel of the role of many service providers to provide continuous on the ground operational and logistical support, for the duration of any term contract, especially parallel communications with the NOC to ensure optimal performance of the contract but also in expediting general operations and logistics.
>
> The service providers were expected to get involved from top to bottom, i.e. from the NOC and sponsor at one end, to the guy manning the pump at the other end. *"Operations"* usually refers to everything related to the physical loading of the cargo onto the ship. Some service providers would be expected to positively

> influence all aspects of operations by providing continuous support. Although just about every aspect of operations is critical, of particular importance (and where a good service provider could influence events), would have been in the choice of the crude grade allocated by the NOC and in the loading window given. Although all grades of Nigerian crude oils are desirable, some are more desirable than others. Equally, loading windows at the very beginning and at the very end of the month can, sometimes, also enhance profitability. Other operational support might include, enhancing reaction time to loading instructions, expediting documentation, facilitating customs documentation, liaising with agents, inspectors and freight forwarders, etc., but maybe only stepping in if a situation demanded their attention."

82. Ms Bossley also noted the importance of operational services on the ground:

> "…success or failure in the physical oil trading business is heavily dependent on logistics. A transaction that looks on paper to be a highly profitable, well-hedged arbitrage when it is constructed, can turn into a loss maker if the logistics come unstuck. Late loading, short loading, substitution of grades, contamination or other quality issues, delays to cargo documentation and export licences can cause a, supposedly *"locked in"*, profit to leak away into loss."

83. The experts' evidence is consistent with evidence from Mr Kelbrick and Mr Akpata, some of which I quote later on the same topic. Mr Kelbrick said that ensuring that the company would obtain its allocation of crude oil under the term contract was the 'number one' job of a service provider, because obtaining a term contract did not guarantee that the NOC would supply the agreed volumes of crude oil, or in fact any oil at all. Mr Akpata said *"you have to fight tooth and nail to make sure that you get the volume against that contract"*. As Mr Hendry said in his report, *"in order for [international oil companies] to gain access to crude volumes in the Relevant Period, service providers were absolutely critical, not only to the initial award of these contracts but also playing a crucial role in the optimal performance and smooth operation of those contracts, thereafter"*. This was particularly so as the NNPC term contract did not specify the type of crude grade that will be allocated, and some grades were far more attractive than others. Mr Akpata said getting the right grade was a very important service, potentially of great value to the trading company, especially when there was competition over a particular grade in the market; and, as he pointed out, the trader may already have entered into an obligation to deliver a particular grade to an end-buyer. Mr Kelbrick said, *"my job was to get the grades they wanted"*. I accept their evidence.

84. Mr Akpata said that service providers also assisted with the allocation of particular loading dates within a window. Mr Hendry said such allocation could have a significant impact on profitability for a trading company, especially whenever there was a steep contango or backwardation in the forward market. It was also, Mr Akpata said, important because of hedging arrangements.

85. Service providers also assisted with operations on the ground, resolving logistical issues and handling paperwork. Mr Akpata said it was *"critical"* to have people on the ground in West Africa, *"[i]n those days it was impossible to do without."* Mr Hendry said:

> "For example, any delay to a loading usually has detrimental consequences, which can include the need for letter of credit amendments, extra demurrage costs, hedging inefficiencies, added costs and onward customer problems. Cargoes are often expedited and delays avoided by the employment of local third parties, who are knowledgeable as to local customs and practices, and who are able to oversee and facilitate smooth operations."

Mr Akpata elaborated that:

> "In addition to providing these introductory or brokerage services, service providers also often help traders with operational issues. For example, something might go wrong in the process of moving a cargo of crude oil onto a vessel and out of a port, such as a customs issue or an inspection issue. It is often very difficult to resolve such problems in Nigeria without actually going to meet the people causing the holdup and speaking to them. It is often difficult for Westerners to do this because most oil traders are based in London, Geneva, the USA or somewhere else outside Nigeria. There are also cultural and linguistic differences. To fix an operational problem of this kind, a service provider like me would go in on the ground and talk to the people who can actually fix the problem for the oil trader."

86. A further complication was that communication with the NOCs in the relevant period was not straightforward. Mr Bosworth said NNPC did not communicate electronically in the 2000s, and telephone lines were poor, so everything had to be done in person. Mr Akpata said that in 2002 he would have received documents by fax or letter. Mr Duncan said that during his time at the Arcadia Group and Trafigura, communication with NOCs (mainly NNPC) was *"on a paper basis"* and there was no electronic communication, though he accepted the position appeared to have been different in Equatorial Guinea. Ms McDonald also said that in her experience, *"it was really hard to even make a phone call to NNPC"* in the 1990s and in the relevant period communications were still not good.

(4) Remuneration of intermediaries and service providers

87. Turning to remuneration, the experts were asked whether, *"in general"*, the level of remuneration varied as between sponsors, introducers, third parties and service providers. Ms Bossley's response was that without further details concerning what each of these parties actually did, it was impossible to say. Since the question related to the general position, that was perhaps somewhat uninformative. Mr Hendry was able to provide the following evidence, set out in the joint statement:

> "The amounts paid to the various categories of intermediaries will alter with their role and the extent of their work, and also by the expected profitability of the deal. For instance, someone who simply makes an introduction might just get 1-2 cents per bbl [barrel], a briefcase company will have very little to do after it hands over the contract to the IOC and so might also be paid a relatively small commission, but this is highly negotiable, too. Alternatively, another contract holder may be expected to continue to show face to the NOC and so provide a screen for whoever stands behind it. They may also have to provide a security deposit and open letters of credit, to pay for the cargoes. Inevitably, the contract holder will have greater cost to bear than the briefcase company whereas the sponsor and the service provider might expect considerably more, eg. 20-60 cents per bbl each, but such rewards might also be paid as a fixed fee, or as a profit share or both."

88. Similarly, in response to a question in the joint statement about remuneration for operational support, Mr Hendry said:

> "In my opinion, typical remuneration might fall somewhere between $0.2 - $0.6/bbl but might vary with market conditions, expected workload and whether or not a profit share was involved. Profit share varied widely between, say, 5% and 60% with expectations rising throughout the RP. Some service providers might have considered winning an allocation within the tender as being the meat of their work done but many service providers would often have been expected to be hands on, and to provide logistics support, for the entire duration of the contract."

and:

> "In my opinion, the payments made by Arcadia Lebanon and by Attock Mauritius to service providers were pretty average."

89. As to the latter point, Ms Bossley said the levels of payments made were unusual *"[i]f this refers to "normal" services such as brokers, independent inspectors or cargo agents"*. However, as indicated above, that was not the general nature of services provided by sponsors and service providers; and as indicated later, it was not the nature of the services provided by Proview, for example, in the present case. Ms Bossley said she could not give any evidence about the levels of remuneration payable to service providers who generate and operate term contracts without details of exactly what they were doing; and she had not been personally involved in term contracts with West African NOCs.

90. Mr Hendry in his supplementary report said:

> "11. Paragraphs 112-115 of LB1 [Ms Bossley's first report] imply that the level of fees paid to service providers was dependent only on which end of the *"spectrum"* a company was willing to go towards the payment of bribes, and that the services

provided by a service provider simply depended on how far along that *"spectrum"* the company / service provider was prepared to travel. I do not agree with this. The level of remuneration paid to service providers would vary considerably for reasons other than at which end of the spectrum the service provider was considered to inhabit – and in my experience depended on the services they provided, their position in the market, their ability to procure and maintain term contracts and their relationship with NOCs (see [JM/13], at 2.8 and paragraphs 99-102 of my First Report). The more influence a service provider had, and the more active a role it continued to play in connection with a relevant contract, the higher the levels of remuneration it would be paid.

12. The fees paid to service providers would likely have been negotiated on a contract-by-contract basis and therefore would have varied over time.

13. At paragraph 116 of LB1, Ms Bossley states that *"Winning term contracts in WAF usually does not involve brokers but does involve the more the proactive involvement of companies prepared to bid in their own name for contracts"*. I do not agree with this, although I am not clear what Ms Bossley is referring to when she uses the term *"brokers"*. As I explain in my First Report …, virtually all participants in WAF oil trading found it necessary to engage the services of local third parties to act as service providers / intermediaries. I also do not agree that winning term contracts in WAF involved only companies *"prepared to bid in their own name"*. I explain in my First Report … that it was common in Nigeria to see many more buyers chasing allocations within the official crude tender than there were contracts and cargoes awarded and so it was common practice for oil trading companies to not only participate directly and openly in the tenders, but also through intermediaries (such as indigenous companies and special purposes companies).

14. … as I explain in the Joint Memorandum [JM/18], profit shares in WAF could range between 5-60%. With respect to other Arcadia London Service Providers, the document shows profit shares of 10% and fees per barrel of between 2 and 15 cents per barrel. Again, I do not think that this is an unusual level of remuneration for a service provider who might provide the types of services which I explain in my First Report might be expected of service providers (i.e. assisting in obtaining term contracts, and the operation and facilitation of those contracts throughout their lifetime). As I also explain in the Joint Memorandum [JM/18] expectations of service providers as to the levels of fees they expected rose throughout the Relevant Period."

91. Ms Bossley said it was unusual for services providers to be paid a profit share *"for routine operational services"*; but, as indicated above, the role of a service provider would generally go far beyond services of that nature. Ms Bossley said in cross-examination that she could not give any evidence about the levels of remuneration payable to service providers who generate and operate term contracts. Mr Hendry said:

> "… in my opinion, with regards to a service provider, a profit share was not uncommon to see, especially towards the end of the RP but it was often part of the negotiation, ultimately resulting in a smaller commission with a larger profit share or vice versa. Sometimes, the profit share might be very significant e.g. at 60%. A 50% profit share became quite common. And, as it was the IOC who was keeping the books, the recipient of the profit share would need to trust that IOC if he expected fair recompense.
>
> I have never heard of a profit-sharing scheme (of this nature) where any losses would be shared by the service provider.
>
> Once again, my explanation of the role of a *"service provider"* … should be seen to encompass far more than an agent that provided just routine services."

92. Mr Hendry in his supplementary report referred also to an email in 2000 suggesting that Arcadia London agreed a 50/50 profit share with a service provider called Milio, who assisted in relation to Russian crude oil. The documents also include draft amendments dating from May 2002 which would apparently have altered that to a 20% profit share (along with a fixed fee of US$ 0.02/bbl and a discretionary bonus of up to US$ 0.15/bbl). However, the Claimants were not able to locate any executed or final agreement, and did not suggest to any of the witnesses of fact that the profit share had been reduced.

93. Mr Hendry in his oral evidence also referred to a Financial Times article, which recorded BP being offered terms of a 50% profit share plus US$ 0.30/bbl for NNPC oil in November 2017, and said he believed this to be the going rate from probably the mid 2000s onwards. Mr Hendry said that service provider remuneration depended on the state of the market and the value of oil at the time, and that when *"Brent was above US$100, the people on the ground were looking for larger rewards"*. He added that if the result of a service provider's work was that the trader *"receive[d] the desired cargo, the desired quality, the desired timing at the desired price, if the service provider has been instrumental in facilitating that, he has done a good job"* and depending on the potential profitability of the deal, *"you would expect the potential reward remuneration paid to the service provider to reflect that"*.

94. Mr Hendry accepted in cross-examination that in his first report he did not mention any percentage higher than 50%, but made the point that it was challenging to find evidence in black and white of what service providers were paid: service agreements were *"rare beasts to see in black and white"*. I am satisfied, however, that Mr Hendry was qualified to give all this evidence from

his experience over the years of observing and being offered the assistance of service providers. He agreed he was not personally aware of a higher percentage, and appeared to accept that the figure of 60% was a higher one given without explanation. The latter answer was, however, interrupted by counsel, and Mr Hendry had just made the further point that it was an *"elastic"* number. He also agreed in cross-examination that the 65% paid to Sonergy was *"definitely the upper echelon of what I would expect"* and beyond what he would expect. He was then asked about the fact that, in addition to Sonergy's 65%, other service providers on the Zafiro Contract received payments bringing the total to 80%, leading to the following evidence:

> "Q. So we can't really call that pretty average, can we?
>
> A. No, I would say it was upper echelon and out of the average.
>
> Q. Out of the average?
>
> A. For what I have seen but as I say, I have never done an Equatorial Guinea contract and I certainly have not done an Equatorial Guinea crude contract. The potential profitability because of the pricing that was made available to the buyer being able to choose a five-day date range retrospectively, one would consider that to be a very profitable option for the trader to exercise and so somebody orchestrating such a deal might feel that they were entitled to a bigger profit share. I don't know.
>
> Q. Orchestrating such a deal and operating a contract?
>
> A. Yes.
>
> Q. And negotiating those prices?
>
> A. Yes."

95. In relation to the Senegal Contract, with Petrosen for the supply of oil produced by NNPC, he said the 70% ultimately payable to Proview was *"a higher echelon"*, but was asked whether there was also a fixed fee, leading to these exchanges:

> "A. Well, if somebody is negotiating both a fee per barrel for their service plus an eventual profit share if fee per barrel negotiated is low, the profit share might be expected to be higher and vice versa.
>
> Q. But you are aware -- 70% of gross profits can't be regarded as pretty average given what you have referred to in the joint statement, can it?
>
> A. No, I think 70% is a higher echelon. Was there a fix fee paid, can you remind me?
>
> Q. No?

> A. No, so if there was no fixed fee paid then you might expect a higher echelon profit share. That is logical I think.
>
> Q. I think you will agree with me that neither the percentages of profit share under the Zafiro contract nor Proview's 70% under the Senegal contract can fairly be described as pretty average, can they?
>
> A. No, they are higher than I would say is normal. But again, you have to look at whatever services are being provided by the service provider if there are finances being paid, finance being offered in some way, or what service is being provided generally."

96. I accept Mr Hendry's evidence on these matters.

97. Mr Akpata's evidence was that one form of service provider renumeration was a profit share, and he said: *"The split could vary quite a lot depending on the relative bargaining power of the oil trader or service provider, or the relationship that existed between them. However, 50/50 was not unusual. Sometimes you saw 60/40"*. Mr Akpata said he was *"totally, completely"* aware of service provider and profit share deals of this kind, although not ones specifically involving the Arcadia Group. There was also this exchange:

> "Q. If Mr Kelbrick is very well connected within NNPC, he is carrying out some of the services you have just described, would it be a surprise to you if he is getting the kind of commissions that you refer to -- sorry profit shares that you refer to in paragraph 58; 50/50, sometimes 60/40?
>
> A. Well, yes, because he didn't do more than I did and from what I can see he got more profit share than I did. But based on that, it wouldn't be, generically speaking. Once you get to that level, which was my gripe, I spent 30/25 years getting to that point, getting paid.
>
> Q. It may irritate you that he did, but it didn't surprise you?
>
> A. But it doesn't surprise me, no. That's what was supposed to happen.
>
> …
>
> Did you say that, Mr Akpata; that's what is supposed to have happened?
>
> A. Yes.
>
> MR JUSTICE HENSHAW: Well, it can be checked.
>
> A. Yes. That was, in my understanding, at that level that was what the remunerations were supposed to be. Yes."

(5) Special purpose companies

98. To secure term contracts, oil trading companies often established special purpose companies, which would act as a 'front' for the transaction. Both Mr Hendry and Mr Bosworth said this was common practice in West Africa in the 1990s/2000s. One reason for it was that NOCs would typically award each term contract to a different company rather than awarding multiple term contracts to the same company. Since it was practically impossible to increase volumes under a term contract, an oil company wanting to secure greater volumes of crude needed to submit multiple applications. Mr Bosworth and Mr Hurley said Arcadia had many 'off the shelf' special purpose companies, incorporated in different jurisdictions, available for use in the course of its oil trading; and that Mr Lance and Cornhill organised the incorporation of such companies.

(G) PRE-2005 ACTIVITIES OF ARCADIA, ATTOCK AND MR KELBRICK

(1) Origins and development of the Arcadia Group and Attock Mauritius

99. The oil trader Marcus Green established Arcadia in 1988, with the backing of the Mitsui group (*"**Mitsui**"*), which became its sole shareholder. Mr Green recruited Mr Bosworth in 1992 to be the team leader for trading West African crude oil. To obtain the volumes necessary to support its expanded trading, Arcadia sought to enter into term contracts with West African NOCs, and entered into its first term contract with NNPC in the early 1990s. Mr Bosworth's evidence was that he did extensive work during that period to search for new sponsors, work with service providers and build relationships with key individuals in the region.

100. Entirely separately from the Arcadia Group, Attock Mauritius was incorporated in 1998, after which it engaged in originating and trading crude oil, and in the trade finance of crude oil and related products. (It may be that the Attock business in fact began earlier, through another Attock entity. Mr Bosworth in his oral evidence said that in the past there had been an Attock Refining in Pakistan and an Attock Trading, and a split had occurred with Mr Imtiaz Dossa taking over the company following an insolvency at some stage.) Attock Mauritius was run by Mr Dossa, and was one of the largest lifters of crude oil in Nigeria, among other countries. By the time Mr Kelbrick acquired it in 2009, it had obtained crude oil contracts from a number of NOCs, including in Algeria, Bahrain, Cameroon, Ghana, India, Iran, Malaysia, Nigeria, Saudi Arabia, United Arab Emirates, and Venezuela; and it sold oil to major counterparties, such as Agip, BP, Chevron, Total, Exxon, Petrobras and Shell. Mr Akpata said in his oral evidence that "*Attock had a very solid reputation in the 90s. Very, very solid. It was one of the most well-known traders in Nigeria…With Nigerians, in NNPC. With Nigerians, with people in the know in the industry, it was thought of what you would call a five-star boutique*". Mr Bosworth explained in his oral evidence that he had had a long-term relationship with Attock's former owner, Mr Dossa, when he (Mr Bosworth) had worked for Sun, and that Attock/Mr Dossa "*was one of the largest lifters of crude oil in Nigeria and Sun Refining and Marketing was the largest refiner of Nigerian crude oil at the time*". He said that in the 1990s, Attock was an "*established Premier League Club*" in West African trading and was a "*household name*" in Nigerian

oil (a view that Mr Scheepers agreed with). Ms Driay likewise said that "*Attock was known in the West African crude oil trading market*."

101. Similarly, a Credit Enquiry response dated 8 May 2002 referred to a term contract that Attock Mauritius had had with NNPC since at least 2001 – in which the Arcadia Group had no involvement – stating that "*they buy 60MBD crude oil from NNPC under a term contract which was renewed in Oct 2001"*. It listed Attock Mauritius's buyers as including Shell, ChevronTexaco and TotalFinalElf. Mr Kelbrick's evidence was also that in 2004 Attock Mauritius had an ongoing term contract with NNPC. An Attock Dubai business plan in February 2013 said that:

> "Attock Oil International Limited ('AOIL') is incorporated in Mauritius and has approximately 20 years trading crude oil and refined products under long-term contracts from a number of national oil companies, including those of Abu Dhabi, Algeria, Bahrain, Cameroon, Ghana, India, Iran, Malaysia, Nigeria, Saudi Arabia and Venezuela".

There is no evidence that Attock Mauritius sold any oil to the Arcadia Group until 2005.

102. I conclude, on the evidence as a whole, that Attock Mauritius had a substantial, well-established and successful business and presence in West African oil trading long before the transactions the subject of the present case, including one or more term contracts with NNPC, and was in no sense dependent on the Arcadia Group. Further corroboration for that view of Attock Mauritius can be found in its post-Arcadia activities. As Mr Kelbrick points out, after the Arcadia Group ended its trading relationship with Attock Mauritius in 2013, and Attock Mauritius moved its business to Attock Dubai, it continued sourcing and selling oil to major oil traders, such as BP and Exxon. After the Arcadia Group ceased trading with Attock, Attock Dubai entered into 20 transactions with Exxon and BP, in which it earned US$27,292,814 in gross profits, and an average of US$1,364,640 gross profit per transaction, which is comparable to the average amounts Attock Mauritius made on the Attock Transactions in the present case. As Mr Kelbrick said in oral evidence, the Arcadia Group "*didn't have any obligation to me. If they had turned round – as they did in the end – and said tomorrow we don't do, I could have gone and found another buyer and that could easily have been a Vitol or a BP*", which is what happened after June 2013.

103. After Mr Green died in 1999, Mr Bosworth became Arcadia's joint head of trading, and then CEO in 2000. Mr Bosworth reported to Mitsui, which had a permanent representative (Mr Takeshi Yamada) based in Arcadia's London office who was on Arcadia London's board. Mitsui provided Arcadia London with a parent company guarantee to assist it with its trading, enabling Arcadia London to benefit from Mitsui's favourable credit terms in the market. Mitsui monitored and approved Arcadia's trading counterparties.

104. The evidence indicates that from the 1990s to the mid-2000s, Arcadia had a West African trading desk with substantial overheads, comprising several

traders (both crude oil and products traders) and operations staff. Nigeria was the most productive and economically important oil-producing country in West Africa at this time. Arcadia London was one of the major lifters of physical Nigerian crude oil and had a direct term contract with the Nigerian NOC, NNPC, as well as indirect access to NNPC crude. Equatorial Guinea was the second major oil-producing country in West Africa. Crude oil was discovered in Equatorial Guinea in the mid/late 1990s and the Equatoguinean NOC, GEPetrol, was incorporated in 2001. Arcadia began to lift physical Equatoguinean crude oil direct from GEPetrol in late 2005.

105. Mr Kelbrick graduated from the University of Liverpool in 1990 with a degree in Mechanical Engineering and Industrial Management, and immediately began work in the oil industry at Shell. Between 1990 and 1998, Mr Kelbrick worked at various Shell Group companies, variously selling and trading bulk and special purpose oil and products and beginning to develop his contacts in West Africa.

106. Mr Kelbrick was recruited to join Arcadia London in 1998 by its founder, Marcus Green. After Mr Bosworth became Head of Trading in March 1999, Mr Kelbrick began to travel to West Africa more regularly to develop contacts there, including meeting with refiners, suppliers, and producers. Mr Kelbrick built contacts across the spectrum of seniority, from administrative assistants, to operational and sales associates, and ultimately the group managing director of NNPC, with whom he regularly played golf in Nigeria. His evidence was that building these relationships took many forms, including assisting NNPC with written presentations, assisting NNPC in running training courses in Abuja, and attending NNPC quarterly marketing reviews. Mr Kelbrick recalled that in the late 1990s, Arcadia London was trading up to about 8 million barrels a month of West African crude oil each month. In 2001/2, Mr Kelbrick originated a swap contract for NNPC oil between Arcadia London and the Indian Oil Corporation ("***IOC***") and arranged for IOC to visit Nigeria and negotiate contracts directly with NNPC.

107. As I explain later, Mr Bosworth's role and responsibilities at the Arcadia Group grew, Mr Bosworth travelled to West Africa less frequently, and Mr Kelbrick increasingly travelled there on his own. As a result, Mr Kelbrick said, Mr Bosworth lost some of his connections in the region, and Mr Kelbrick became NNPC's 'go-to' person in Nigeria for Arcadia London.

(2) Physical and paper trading

108. The Defendants' evidence is that Arcadia's trading of physical crude not only created an opportunity for direct profit from particular trades, but was also important to its oil business more generally. Trading in physical West African crude oil enabled Arcadia to participate in derivatives linked to the Dated Brent pricing structure of crude oil and provided market intelligence, which helped its traders in other markets. It also supported Arcadia's WTI trading in the US, whose traders could not generally participate in such large-scale derivatives trading without a substantial portfolio of physical crude oil. Thus, it is said, Arcadia's West African physical trading had a value to Arcadia beyond each cargo's basic profit and loss, across the business as whole.

109. Ms Driay said in her first witness statement:

> "Despite the risks associated with trading in West Africa, this kind of trading brought with it distinct advantages. At a basic level, West African crude is of a very high quality (with a low sulphur content) and physical trading provides liquidity to the paper traders. Further and in particular, West African crude is useful for hedging and paper trading purposes, as trading in it gives access to a large amount of market information which is valuable in respect of paper trading. For example, physical trading gives information as to who is buying the crude, and where this crude is being shipped to. This can have long and short term effects on the global pricing of crude and is very valuable information in itself. Even knowing what pricing dates and components other market participants are attempting to negotiate is useful, given that it indicates the view those participants are taking on market movements. Oil markets are inter-linked, and West African crude oil is priced by reference to the price of Brent. This sort of information is not just useful to traders - I recall that shippers would call Arcadia up to try and obtain our market intelligence."

110. She was asked about this passage in cross-examination, leading to the following exchanges:

> "A. … But in a place like West Africa, particularly Nigeria, to know the disruption would be useful and to know whether it is going east or whether it is going west, whether it is going by small tankers of 1 million barrels or by VLCC with longer routes. Yes, it is very interesting. I'm sure you could see in the press what happens when the Suez Canal is being disrupted.
>
> Q. But that news travels quite fast, doesn't it?
>
> A. What, that the Suez Canal is disrupted? That one, yes, but to know two months in advance more or less what will be the requirement for shipping one month to seven weeks ahead of time is an interesting position for demand in the shipping market.
>
> Q. I'm interested in the information used by traders. You have explained that you were not on Nick Wildgoose's team so you don't really know exactly what information he was using?
>
> A. I know when he was not happy, that was very clearly stated. They would shout loud enough and I won't repeat his language, but -- so I knew exactly what he wanted because I had been doing that long before. He wanted to know the swing, he wanted to know the pace of sells, when the programmes were out. He wanted to know what were the tenders going east as well as the people in Singapore office. So they were very tough, obnoxious and arrogant in getting this WAF tracking and not happy because

> I was putting in horizontal rather than vertical what they wanted and vice versa.
>
> Q. But the information that you were able to obtain was available to other traders as well, wasn't it? You didn't have a particular insight into the information that Mr Wildgoose wanted?
>
> A. Within Arcadia I did.
>
> Q. Yes, but other traders would have access to the same information?
>
> A. The people active in the market would spend time collecting that information as well, yes.
>
> Q. There's a free exchange of information between the traders?
>
> A. It's not free -- well, it is free in the sense that you are not paying. It's not free in the sense that information is key so there is need to be a give and take in information. And that is why being active, having a cargo, gave you a chance to call the people and tell them, "I have this cargo, which cargo do you have, what are you asking, what are you showing, what are you seeing?" Commerce."

Mr Nicholas Wildgoose was, along with Mr James Dyer, one of Arcadia's key paper traders.

111. Ms Driay explained in her oral evidence that "*the whole point of half of the oil market*" was to take a position in the physical crude oil market in order to create exposure that could be used to facilitate paper (derivatives) trading. Her oral evidence also included the following:

> "Q. It has been suggested in the course of these proceedings that buying physical oil somehow allows Arcadia to get into the paper market but it is true that this pure paper trading can take place without any physical trading?
>
> A. It can take place, whether it can be traded and exercised in the full knowledge, you have to go to Morgenstern's theory of utility with passion, knowledge and full knowledge. So as we were talking yesterday, the more in the future you are going, the more it is closer to financial and GDP and type of very financial markets, the closer it goes, the more it is a physical market and the more it is linked with supply and demand and price discovery.
>
> Q. If you wanted particular exposure to Brent, there are other ways of obtaining exposure to Brent through physical trading than buying West African crude?

> A. There are plenty of ways, but West African is the first one to –– because of the programming of the loading, and the timing of exchange, the one that is trading physically, the most forward and it is the balanced barrels that are going eastwards and westwards as well as remaining in Europe. This gives the trade –– the pace of trading physical West African is giving a huge incentive to understand what is happening on the balance on the market."

112. Ms Driay explained that such information was important to paper traders because of the intelligence as to where the crude was being shipped. For example, if crude was going west, "*it had an impact on the global volume of oil traded in the USA which was of very big interest to Mr Wildgoose's team*". Further, information as to pricing dates was also important.

113. Similarly, Mr Kelbrick said he understood his role as "*getting oil so that it could be sold to Arcadia to feed the paper machine in London […] I knew how important it was for them to have physical oil to feed that paper machine in London and Switzerland*".

114. This evidence was supported by the expert evidence of, in particular, Mr Hendry. In the Joint Statement, he said:

> "No, I firmly believe that the best market intelligence is to be had via providing boots on the ground, whether or not these boots belong to an employee, or to an affiliated intermediary.
>
> So, providing there is some local representation, such as via a good, active, service provider, an IOC should be able to receive the same level of market intelligence as by having their own personnel in situ – perhaps even better, as the service providers tend to be extremely well plugged-in. Of particular interest would be an early indication of the loading program and whether there were any unsold cargoes from the previous month that were being carried over. This is an indication of the OSP being set too high but more importantly can be an indication of an over-supplied market. In general, Nigerian grades are very desirable, due to their fungible quality and, as they are used by refiners located at all points of the compass, any observation of unsold cargoes is important information to possess. When injection cargoes are observed they compete with the next month's loading program, so, should such a situation be observed a seller would sometimes be wise not to chase the last cent on his re-sale and to off-load his own cargo quickly." (§ 7.1)
>
> "As per 7.1 above, a presence in WAF trading can give vital intelligence as to market conditions. Nigerian crude is an excellent barometer and therefore an early warning system for market change. For example, an early observation of say, a surfeit of WAF crudes, would be a bearish signal for Mediterranean crudes and vice-versa. If there is strong buying

> interest from China or India for example, which would be known by the number of calls to check avails, this would be a bullish signal. If there is a large number of unsold cargoes to be injected into the following month's loading program, this would be a bearish signal. (On occasion, NNPC has had over 35 unsold cargoes carried over). Rapid, early assimilation of such quality market intelligence into the trading book can influence subsequent decisions in other trading spheres, such as, USGC, USAC, Brazil, NW Europe and Med. By having a known presence in the market, you are able to tap into the information highway." (§ 7.4)

115. Ms Bossley did not fully support this evidence, stating that whilst more information including local knowledge was always helpful, many oil trading companies did not have West African positions or local offices in the seat of production or refining; that it would be an exaggeration to suggest that a West African position would give an edge in calling the market for other positions (though she acknowledged that talking to brokers and other trades *"can be very informative about the WAF situation"*); and that she *"would say that the financial derivatives markets assist participation in the WAF market, not the other way around"*. I prefer the evidence of Ms Driay and Mr Hendry on these points. It is cogent, and reflects Ms Driay's actual day-to-day experience while working in the business and Mr Hendry's wider experience than Ms Bossley. Further, to suggest that derivatives markets support physical West African trading rather than the other way around creates a false dichotomy. It was certainly the case that Ms Driay from time to time placed derivatives positions in order to hedge uncovered trading exposures. However, that is in no way inconsistent with Ms Driay's and Mr Hendry's compelling evidence about the advantages for Arcadia's derivatives trading operation of information which Ms Driay was able to provide them as a result of her trading in physical West African crude. Mr Fredriksen and Mr Trøim themselves considered physical oil trading to support the paper trading: see § 169 below.

116. The evidence also indicated an additional advantage for the paper traders of Arcadia engaging in physical trading in West African crude. Mr Hendry said in the Joint Statement:

> "Exchanges, like CME and ICE, in order to reduce the opportunities for market squeezes, limit the number of paper trades that can be done in say Brent and WTI, as the date for contract expiry approaches. A trader that is seen to trade physical crude oil may apply to the Exchange for an exemption from these position limits as he will likely be adjusting his hedges until the cargo is placed and, should this be granted, that trader will have an advantage over those that do not have such an exemption." (§ 7.5)

117. Ms McDonald explained that:

> "One of my responsibilities as Compliance Manager from 2008 was to organise trading limits with the exchanges on which the

> Arcadia Group did its *"paper"* trading (i.e. its trading of financial derivatives that were linked to the price of oil). The CFTC would not allow traders to engage in paper trading above a certain threshold unless they did a certain amount of physical oil trading too. As such, it was important for us to be able to say to the CFTC that we had a major physical business. The West Africa book was one of the biggest physical books and we would usually rely on it when we asked the CTFC for bigger trading limits".

118. In Mr Bosworth's words, "*this meant that West African crude oil trading had a value to Arcadia beyond the basic profit or loss that it made by selling a cargo for a different price to the one at which it bought it*". Mr Trøim accepted in cross-examination that physical cargoes supported the paper trading.

119. Similarly, Ms Driay said in her trial witness statement:

> "… around 2010/11, the ICE and Nymex exchanges, where Brent and WTI future contracts were being traded, imposed new position limits and rules regarding the exiting of positions ahead of their expiry. These limits would vary depending on the nature of the business being carried out by the trading company in question and the volumes of physical trading being conducted. I believe that these restrictions were introduced following the major market disruptions in 2008/09. Trading companies willing to trade paper could apply for an exemption or extension to their limit if they could cite bona fide hedging purposes to cover the market exposure created by a physical trade. Additionally, if there was no exemption granted, those trading companies with paper positions would have to *"exit and roll"* their position to a later maturity a certain number of days ahead of the expiry date. To the best of my ability, I recall that different fees were also charged by exchanges depending on the nature of the crude volume *"within hedging"* or *"out of hedging"*. As such, by around 2011, Arcadia's offices and trading desks, including mine, would be asked by those in charge of Arcadia Group's paper trading to detail the volumes of their physical trading business so that Arcadia could apply to increase its position limits based on its bona fide hedges (as opposed to speculative hedging being carried out by paper traders). That these applications were being made must have been known to the main individuals involved in Arcadia's Brent TI trading, including Paul Adams and Nick Wildgoose, as those individuals were subject to CFTC scrutiny." (§ 17, footnotes omitted)

120. Ms Driay maintained this evidence in her oral evidence, stating that the paper traders used Arcadia's exemption to 'play the expiry' i.e. profiting from taking positions close to the expiry of the trading periods for crude oils. The exemption depended on being able to demonstrate to the exchange that the company held physical positions in crude, and its purpose was to permit hedging of such positions. In fact, though, Ms Driay's evidence indicates that the paper traders

at Arcadia (Wildgoose and Dyer) could and did take advantage of the exemption for their own trading. That is because the exemption was purely volume based, rather than tied to particular physical cargos, and so it was possible for the paper traders, in Ms Driay's words, to *"keep[] this volume for themselves"*. (Ms Driay did not require the exemption for such hedging positions as she placed herself, because she hedged off-exchange using Contracts for Differences pursuant to ISDA terms.) I accept Ms Driay's evidence on this matter too.

121. The CFTC's Complaint against Parnon Energy Inc. ("***Parnon***"), Arcadia London, Arcadia Switzerland, Mr Wildgoose and Mr Dyer in May 2011 indicated that obtaining a physical trading position between (i) crude oil deliveries in the near month and (ii) crude oil deliveries in the following month was *"generally understood to be the best representation of WTI physical supply and demand"*. Traders could *"trade this differential via a "calendar spread," i.e. a pair of contracts, one for the purchase of oil deliverable in one month and one for the sale of the same quantity of oil deliverable in a subsequent month"* in their physical or derivatives (i.e., paper) books. Between January 2008 and April 2008, while making a physical trading loss of US$15 million on physical trades, Parnon and Arcadia were able to generate trading profits of over US$50 million in their paper books by trading these *"spread"* prices (Complaint § 52). When taken to this passage of the Complaint, Mr Fredriksen accepted that the making of physical losses in lieu of paper gains for a net profit was *"part of the game or trade"*: which was consistent with Mr Kelbrick's evidence about feeding the Arcadia Group's *"paper machine"* requiring the Arcadia Group to hold physical cargoes.

(3) Service providers

122. Arcadia had a network of service providers in various parts of the world, including West Africa. The evidence indicates that Arcadia had extensive direct dealings with West African service providers from the 1990s to the mid-2000s. Mr Bosworth said that "*going back to 2000*", oil trading in Africa and Nigeria in particular at that time were "*close to the wild west*".

123. In respect of its operations in Nigeria sourcing crude oil from NNPC, Arcadia London had dealings with Mr Osagie Akpata ("***Mr Akpata***") and his company Azenith Resources Limited ("***Azenith Nigeria***"). Mr Akpata's work for Arcadia dated from the early 1990s. Mr Akpata explained in his evidence his role in assisting Arcadia in its relationship with NNPC.

124. Arcadia also dealt with Mr Mohammed Asibelua ("***Mr Asibelua***"), a Nigerian businessman with strong connections in the oil and gas industry. His companies included Equinox Oil & Gas Limited ("***Equinox***") and Pang Ling Nigeria ("***Pang Ling***"). Mr Asibelua assisted Arcadia in its Nigerian trading operations throughout the 1990s and 2000s. Pang Ling assisted Arcadia London in obtaining crude oil contracts in Nigeria, including through connections with the Sultan of Sokoto.

125. In about 2000, Mitsui authorised the establishment of a special purchase company, Arcadia Petroleum Nigeria Limited ("***Arcadia Nigeria***"). NNPC had expressed a wish for major oil trading companies to have a presence in the

country, and Arcadia Nigeria could act as a vehicle to bid for contracts in Nigeria. Mr Bosworth and Mr Asibelua were Arcadia Nigeria's original shareholders, and Mitsui became a shareholder.

126. Turning to the position in Equatorial Guinea, the evidence indicates that in the early to mid 2000s a French oil trader, Jean-Paul Driot ("***Mr Driot***"), effectively controlled international oil traders' access to GEPetrol and Equatoguinean crude oil exports. Mr Bosworth in his witness statement said:

> "78. In the around the early 2000s, I was introduced to Jean-Paul (JP) Driot. I do not now recall how I came to know Mr Driot, but it may have been through Steve Kelbrick. At this time, Mr Driot had a small trading company called Stag. I recall that, as a trader, I would track which cargoes went to different companies in order to be able to analyse the fundamentals of the West African market. Stag was a company frequently on that list. Mr Driot had also been involved in Nigerian and Cameroonian crude oil and petroleum product businesses as well as in Equatorial Guinea. I believe Mr Driot first went to Africa when he worked for Renault.
>
> 79. While in Equatorial Guinea as part of his role at Renault, JP Driot developed a relationship with the President of Equatorial Guinea and they became personal friends. JP Driot told me that at one stage the President fell ill and he funded the President's flight and medical treatment in Europe (France or Germany I believe). JP Driot later left Renault and that is when he developed his own oil trading business in the name of Stag.
>
> 80. Arcadia began its relationship with Stag by buying spot cargoes of Zafiro grade crude oil from Stag which had its own contract with the Equatorial Guinean government. Arcadia would then sell those cargoes on the open market. I remember that Glencore and Vitol also had their own contracts around that time with the Equatorial Guinean government. After a period of buying spot cargoes from Stag (I do not recall the precise length of time) and as I explain further at paragraph 130, I believe that I approached JP Driot (or he may have suggested to me) and we discussed the idea of Arcadia being able to obtain its own term contract with the Equatorial Guinean government."

I refer later to Mr Bosworth and Mr Kelbrick's evidence about the significance of Mr Driot and Stag given in the context of the Zafiro Contract (§§ 229 ff below).

127. An article published later, in 2009, in Harper's Magazine entitled *"Invisible Hands: The secret world of the oil fixer"*, said:

> "So whenever oil business is conducted around the world, it's quite common to find middlemen at the heart of the deal - even if most of their operations are significantly more limited in scope

> than were those of the old guard. In Equatorial Guinea, a former top Elf executive named Jean-Paul Driot now has an exclusive agreement to market the government's share of its international production through his company, Stag Energy."

Similarly, an article in *"Energy Compass"* on 27 February 2004 stated that Stag Energy *"lifts the government's equity share of Zafiro crude"* and referred to Stag as *"something of a mystery"* run by *"Jean Paul Driot, a well-connected Frenchman"*. The journal Africa Energy Intelligence reported on 22 September 2009 that Stag *"sells the government's share of oil and gas production"*. The same journal on 7 November 2012 reported that Mr Driot, a former executive of Marathon and Gulf Oil, *"[t]hrough another of his firms, Stag Energy, … has been selling the government share in the country's oil output for over 10 years"*, and that that contract made Mr Driot one of the most influential figures in presidential circles in Malabo (Equatorial Guinea's capital). An internal Arcadia email dating from 15 February 2008 made reference to the risk that irritating Mr Driot *"may well prejudice your Zafiro relationship"*. These materials are consistent with Mr Bosworth's and Mr Kelbrick's evidence about the significance of Mr Driot and Stag to an entity's ability to purchase crude oil from GEPetrol during the relevant period.

128. Arcadia began to trade cargoes with Mr Driot in the early 2000s. Mr Driot became a close contact of the Arcadia Group and attended events hosted by Arcadia London that Mr Fredriksen also attended. In 2002, Arcadia hired Mr Driot's son, Gregory, as one of its West African traders. Subsequently, through Mr Driot, Arcadia had dealings with an Equatoguinean service provider, Sonergy Limited ("***Sonergy***"), that enabled Arcadia to source crude oil directly under a term contract with GEPetrol in December 2005.

129. Ms McDonald and Mr Akpata explained in their evidence the services that service providers undertook for Arcadia. Service providers might introduce Arcadia to business opportunities, in particular to their contacts at West African NOCs and be involved in the negotiations of term contracts. Some service providers were involved in aspects of the operation of the relevant term contract for Arcadia. West African oil trading could be highly bureaucratic. Arcadia could not navigate the issues from its London office, but relied on service providers with local contacts to obtain the relevant permits, clearances, and meet the key individuals at NNPC's offices. Azenith and Equinox, for example, assisted in obtaining approvals of letters of credit or clearances from NNPC needed to load cargo. Because the service providers were 'on the ground', they could physically go to the NOC's office to 'find the right person to talk to'. Ms McDonald said in her statement that *"The service providers were not big companies. They did not need much except local contacts to do what they did. It was really all about relationships – knowing who to call when there was an issue and how to persuade them to help."* I discuss the evidence about service providers in general in sections (F)(2)-(4) above.

130. Arcadia kept due diligence files in respect of service providers with which it had dealings (the "***Service Provider Files***"). Ms McDonald's role as Arcadia's Compliance Manager included maintaining a file on each service provider and carrying out checks for corporate documents and ultimate ownership records.

Arcadia would sometimes instruct Clearwater or other risk consultants to investigate and produce reports. The Service Provider Files also included agreements between Arcadia and service providers. These were prepared by Arcadia's compliance department, using draft templates provided by Arcadia's solicitors, Clifford Chance LLP. Clifford Chance and Dewey & Le Boeuf LLP also advised from time to time on issues relating to service providers.

131. The service providers invoiced Arcadia for their services, based on monthly fees or fees paid on a per barrel or profit share basis. Trading data for Arcadia's trades was contained in Arcadia's "*Trade Capture*" system. The payments that Arcadia made to the service providers were recorded and shown as transaction costs in Arcadia's Trade Capture database and in its audited accounts. Each cargo on Trade Capture had its own P&L record. Arcadia's arrangements with service providers could be the subject of scrutiny during audits. Before the transfer of Arcadia's dealings with service providers to Arcadia Lebanon, summarised below, there were (as I summarise later) a number of audit queries in respect of Arcadia's West African service providers.

132. Among other things, Trade Capture recorded transaction costs, including payments to service providers in respect of West African crude trades. A user of the Trade Capture system could generate trading reports or deal sheets on each trade, including profit/loss and costs information. In addition to the Trade Capture information, there were also hedging reports. Mr Bosworth gave evidence that Trade Capture at the time had an interface to the data that allowed a user quickly to produce reports with relevant costing and operational data within seconds.

133. A spreadsheet recording the amount spent by Arcadia London on service providers for the year ended March 2003 indicated a total of 14,340,545 (presumably in US$, like most of the other financial records in evidence).

134. As the Defendants point out, the use of service providers was not a secret inside or outside the Arcadia Group. There was a considerable volume of emails and paperwork relating to the use and payment of service providers, sent from and to many Arcadia Group employees, as well as directors. Mr Bosworth said the use of service providers was *"common daily knowledge amongst the management, including the operations people, finance people"*. Outside of the Arcadia Group, the payments to service providers were known to the Arcadia Group's lawyers (Clifford Chance and Dewey & LeBoeuf) and auditors (Moore Stephens LLP). In January 2004, Deloitte (on behalf of Arcadia London) appear to have written to HM Inspector of Taxes, noting that US$16 million had been spent on service providers in the year up to 14 November 2003 and attaching a list of the service providers used by Arcadia London. Ms McDonald, Arcadia London's Compliance Manager, explained in her evidence that *"Arcadia London had a network of service providers working for it around the world. I personally worked with service providers in West Africa, Yemen, and Ecuador"*; and an Arcadia Group document explained that her job description included the *"Preparation of new Service Provider and Consultants contracts and administration thereof"*.

(4) Pang Ling

135. As mentioned earlier, in the 1990s and early 2000s Arcadia engaged Pang Ling to assist in its Nigerian trading. Pang Ling provided operational services to Arcadia in Nigeria, including in relation to the NNPC pricing options. Pang Ling also helped Arcadia London obtain a term contract. Pang Ling was remunerated on various bases. It appears that some of the profit share arrangements between Arcadia London and Pang Ling were unwritten.

136. Arcadia's auditors, Arthur Andersen, queried Arcadia London's payments to Pang Ling. They resigned on 20 July 2001 and Deloitte replaced them. Mitsui explained to Deloitte the amounts that Arcadia London had paid Pang Ling, and stated: "*we genuinely believe that the services we received from Pang Ling were of significant value*". Pang Ling invoiced Arcadia London for approximately US$19 million for the year ended 31 December 2000, in respect of 13 cargoes, an average of about US$1.46 million per cargo. Arcadia London entered into written agreements with Pang Ling dated 26 September 2001 and 18 February 2002. Arcadia paid Pang Ling directly: the payments were in Arcadia's records, disclosed to the auditors and claimed as tax-deductible transaction costs with HMRC. On 14 November 2001, Mr Yamada emailed Mr Alistair Gordon, Mr Bosworth, and Mr Hurley in relation to Pang Ling, noting that *"Having had PL's assistance, APL succeeded in renewing the crude oil purchase contract with NNPC for another one year from Oct/01. PL has requested for higher remuneration after the renewal because of time, work and value of services they devoted.*" Mr Bosworth in an interview with the FSA said that for the first few of those 13 cargoes, Pang Ling received 50% of the profits plus about US$150,000 for their costs, and for the last four Pang Ling received 60%.

137. Arthur Andersen had reported the Pang Ling activity to the Financial Services Authority, and in 2002 the FSA investigated Arcadia's relationship with Pang Ling, in particular whether Pang Ling was involved in making potentially corrupt payments or bribes. The FSA did not take any action against Arcadia, but it sent warning letters dated 1 November 2002 to Mr Bosworth and Arcadia London about Pang Ling. At or around the same time, the Tokyo Public Prosecutor investigated a Mitsui employee on suspicion of bribing a Mongolian official in relation to power generation projects. This resulted in significant pressure on Mitsui and led to the chairman's resignation. Mr Bosworth explained that "*the scrutiny of all of the subsidiaries of Mitsui, of which Arcadia was a wholly owned subsidiary, was increased*". Mitsui reported to Mr Bosworth that Deloitte in its role as auditor would pay special attention to compliance.

138. The Claimants suggest that, following the FSA Investigation in 2002, Arcadia London began to pay Pang Ling (and later Equinox: see below) only cents on the barrel with the potential for a bonus payment. They refer to a written agreement between Arcadia London and Pang Ling dated 26 September 2001, referring to a payment of US$0.06 per barrel, and a bonus of up to US$3 million in any one year. However, a bonus at that level might still have been as large as a percentage of profits: in the absence of the relevant operational files for the Sao Tome Contract, such as the deal sheets, it is not possible to say. Moreover that agreement predated the FSA investigation, so there is no reason to believe

the bonus provision it contained reflected a reduced level of remuneration caused by the impact of the FSA investigation. Further, in the light of the evidence I consider elsewhere about the vital importance of service providers for both obtaining and operating term contracts, and the bargaining position they held, it seems inherently unlikely that Arcadia would have been able substantially to reduce its payments to Pang Ling and yet have retained the same supplies of oil.

(5) Tristar, Mr Decker and Arcadia Mauritius

139. It appears that, in the light of the FSA investigation and broader auditor scrutiny of its compliance record, Mitsui wished to minimise compliance risks including in relation to Arcadia's West African oil trading. In 2003 Mitsui instructed Arcadia to avoid direct acquisition of crude oil from NNPC. Mr Bosworth said in his oral evidence that "*Mitsui requested that we not have an Arcadia contract with Arcadia London with NNPC because West Africa was deemed to be potentially high risk*." In addition, both Mitsui and Mr Bosworth disposed of their shares in Arcadia Nigeria.

140. Mitsui nonetheless wished Arcadia to continue to trade West African crude and maintain a relationship with NNPC. At about this time, in 2003 Arcadia invited Mr Decker to join its West African team. Mr Decker was a senior and very well-connected West African oil trader, who had previously worked for Addax Petroleum and had strong connections to NNPC and Nigeria generally.

141. Mr Decker declined Arcadia's approach. Instead, he set up his own business, the Tristar group, to source and trade crude oil. Mr Decker's business partner, Mr Mounzer, handled the financial/corporate administration for the Tristar group. It became a substantial trading operation, with a range of suppliers and customers, including the Arcadia Group, and had turnover of some US$6 billion trading 30-50,000 barrels of oil a day in 2004-2005.

142. Mr Bosworth's evidence is that in the light of Mitsui's instruction to avoid direct trading with NNPC and minimise compliance risks, Arcadia and Mr Decker agreed that Mr Decker would source crude oil from NNPC for Arcadia, with one of his companies, rather than Arcadia acting as the contract holder with NNPC. Crude oil lifted under this term contract (or its volumetric equivalent) would be transferred to Arcadia by a Tristar entity under a sleeving arrangement.

143. Arcadia had had a good relationship with NNPC, which regarded it as a reliable lifter of crude. In December 2003 Arcadia (with Mitsui's approval and with the assistance of Cornhill/Mr Lance) transferred to Mr Decker an inactive Arcadia shelf-company (bearing the 'Arcadia' name), Arcadia Mauritius, for Mr Decker to use as the contract holder in the term contract with NNPC. Mr Bosworth explained that the use of a company with the 'Arcadia' name enabled Mr Decker to present the company (and himself) to NNPC as being associated with Arcadia and thus as a credible buyer and lifter of the crude. Arcadia Mauritius had been incorporated in August 2001 as a shelf company for potential use as a trading entity. The Claimants, in their closing, suggest that it was a company Mr Lance had on his books for Mr Bosworth's and Mr Hurley's use, citing a paragraph of

Mr Bosworth's trial witness statement. That is not, however, an accurate statement of his evidence, which was as follows:

> "I do not recall precisely when Arcadia Mauritius was established but I do recall that it was established as an 'off the shelf' company – i.e. the company was incorporated so that the Arcadia name could be reserved, should Arcadia wish to later use it for its trading activities. I believe that Arcadia Mauritius would have been set up by Mark Lance or someone like him and held in their name. Arcadia Mauritius was therefore an 'off the books' company – i.e. it was not owned or controlled by the Arcadia group or Mitsui. I was never a shareholder in Arcadia Mauritius nor did I hold any beneficial or legal interest in it. I also did not control it." (§ 93)

Further, the pleaded case of Attock Mauritius (on which the Claimants place reliance in this context) is that Arcadia Mauritius was originally incorporated, in 2001, as a company that might be used to bid for contracts on Arcadia Group's behalf: not that it was transferred to Mr Decker for that purpose.

144. The Claimants suggest that Arcadia Mauritius was transferred to Mr Decker for him to operate *"for the benefit of the Arcadia Group"* and that it was acting as agent for Arcadia London. However, I do not consider the evidence to support that view. The arrangement (from late 2003) was for Arcadia Mauritius, now a Decker company, to contract with NNPC and then to on-sell to the Arcadia Group as contractual counterparty via an intermediate entity or 'sleeve' (a member of the Tristar group). There is no evidence that Mr Decker, or Arcadia Mauritius, agreed to or did contract as agent for any entity in the Arcadia Group. Moreover, the arrangement did not even involve particular cargoes to the Arcadia Group. Instead, it operated on a volumetric basis. Mr Decker's companies had several NNPC term contracts, of which the Arcadia Mauritius contract was only one, and he met his volume commitments to Arcadia London using crude sourced under any of those contracts. The commitment was for Arcadia London to receive the same volume of crude as it would have had if it had a term contract directly with NNPC. Neither Mr Bosworth nor the Arcadia Group retained control either of Arcadia Mauritius or of the contracts it entered into with NNPC.

145. The Claimants suggest that a passage in Mr Hurley's oral evidence shows that he agreed that Arcadia Mauritius was being used by Mr Decker as an agent of the Arcadia Group. I disagree. Mr Hurley was being asked general questions about using entities outside the Arcadia Group to make payments to service providers. The following exchange then occurred:

> "Q. So these are entirely independent third parties you are referring to, who are holding the contracts; is that right?
>
> A. Not necessarily, no.
>
> Q. So are they working for Arcadia as an agent?

> A. There was one in particular that I know was working for Arcadia.
>
> Q. Which one are you referring to?
>
> A. I think it is -- I think it's Arcadia Mauritius but I'm not certain and then there was another company I think in between. But I can't remember the details of that."

I do not regard that as evidence that Arcadia Mauritius, after its transfer to Mr Decker, was Arcadia's agent. The answer given is plainly uncertain as to the entity Mr Hurley was trying to recall, and was entirely unspecific as to timing.

146. The 'sleeve' company was Tristar Petroleum SA ("***Tristar Switzerland***"). Since Arcadia Mauritius was a shell company with no financial strength, Tristar opened a letter of credit in Arcadia Mauritius's favour to pay NNPC for the oil. Arcadia agreed to pay Tristar Switzerland a fee for its services as a sleeve, calculated in part by reference to its start-up costs and structured as a commission payable on a per barrel basis. The fee included Tristar Switzerland's financing costs.

147. Mitsui approved the transfer of Arcadia Mauritius to Mr Decker and the sleeving arrangements with Mr Decker/the Tristar group, as a means of avoiding direct acquisition of oil from NNPC. The arrangements took some months to implement. In emails exchanged with Tristar on 9 October 2003, Mr Hurley referred to December 2003 as "*the deadline given by Mitsui for APL [Arcadia London] to transfer said contracts*". In his oral evidence, Mr Bosworth described a "*process*" during which Mitsui obtained information that ultimately led to its approval of the use of Arcadia Mauritius and Tristar as part of Arcadia London's trading. On 29 October 2003, Mr Yamada emailed Mr Hurley to inform him that he was "*drafting an application to Mitsui to buy NNPC oil through Tristar*". Mr Bosworth confirmed in cross-examination that Mitsui approved the transfer. His evidence was that Arcadia London would not have entered into this contract without Arcadia Mauritius and Tristar Switzerland's involvement, because of Mitsui's then concerns regarding compliance issues associated with West African oil trading. Arcadia London began to trade with Tristar by April 2004. I note that – as the Defendants point out – the transactions forming part of the contract chain involving Arcadia Mauritius and Tristar Switzerland are not alleged to be fraudulent by the Claimants, but the structure of those transactions was very similar to the Arcadia Lebanon Transactions now alleged to be fraudulent by reason of their very structure.

148. As I explain later, Mr Decker later (in 2005) went on to buy Attock Mauritius, which also began to do business with Arcadia.

(6) The Sao Tome Contract

149. In around 2002, Arcadia secured a supply (or a renewal of a supply) of crude from the Sao Tome government, with which it entered into an agreement on 26 August 2003. Mr Asibelua's company, Pang Ling, witnessed the signing of the contract. NNPC supplied crude to Sao Tome under a government-to-

government contract between Nigeria and Sao Tome, under which the latter had an allocation of 30,000 barrels a day. The Sao Tome government needed an oil trading company to lift the oil, hence its appointment of Arcadia under the Sao Tome Contract. In return, Arcadia agreed to pay Sao Tome a fee, which for 2006 was US$0.15 per barrel. The government of Sao Tome granted Arcadia London a power of attorney to deal directly on its behalf with NNPC.

150. The evidence indicates that the Sao Tome Contract was achieved by virtue of Mr Asibelua's relationship with the Sao Tome government. In Mr Bosworth's words:

> "Mohammed Asibelua was the service provider who brought the Sao Tome Contract to Arcadia… Mr Asibelua had spent one or two years developing his relationship with the President and government in Sao Tome. I recall that Mr Asibelua assisted the President of Sao Tome in preparing the application/letter to the Nigerian government for a crude oil contract… It was Mr Asibelua alone who developed the relationship with between Sao Tome and Arcadia London. It would not have been possible for Arcadia to, for example, pick up the phone to the President of Sao Tome and simply request a contract. We therefore had to go through someone who was well connected with the Sao Tome Government, and this was Mohammed Asibelua."

Arcadia paid Mr Asibelua's companies, Pang Ling and later (by 2005) Equinox, remuneration in relation to the Sao Tome Contract.

151. For its work on the Sao Tome Contract, Equinox received a fixed per barrel fee of US$0.04 (originally US$0.02) on each cargo. The Sao Tome government's fee of US$0.15 (originally US$0.11) per cargo was also paid to Equinox's bank account, for onward distribution by Equinox. In addition, the Defendants say that Arcadia London was paying Equinox profit shares similar to its previous payments to Pang Ling. An *"Analysis of Other Charges"* for Arcadia London covering the period April 2005 to March 2006, apparently prepared for the auditors, states that payments to Equinox in that period totalled US$2,717,900.26. That sum exceeds by US$1,584,872.02 the total of the Equinox and Sao Tome government 'per barrel' fees in respect of to the seven Sao Tome cargoes that Arcadia London lifted during that period (totalling 6,664,872 barrels). The Claimants counter that the analysis does not identify why the payments were made, and suggest that Equinox may also have been involved in products trading, citing an email from Equinox in December 2006 referring to invoices for product imports totalling around US$1 million and dated between April 2005 and January 2006. The email chain does not indicate whether or not the invoices were paid. Such fragmentary data as has been preserved and disclosed does not enable me to form a clear view on the true extent of Arcadia's payments to Equinox. However, as I say above in relation to Pang Ling, it seems to me unlikely that Arcadia would have been able to make substantially reduced payments to Equinox, compared to those it paid Pang Ling in 2000, and yet have retained the supplies of oil.

152. Mr Bosworth's evidence was that the Sao Tome Contract was a stepping stone for Mr Asibelua, who wished to move on to wider opportunities. Arcadia London therefore turned to Mr Kelbrick (who had by then left the Arcadia Group: see below) to manage the Sao Tome Contract. In his oral evidence about his role on the Sao Tome Contract, Mr Kelbrick said "*maintaining it is a better way of putting it, but not sourcing it*" and *"... I took over the management and the handling once again from the NNPC side of that contract"*. I deal with Mr Kelbrick's role in more detail in section (I)(3) below. Contemporary documents in 2007/8 referred to as the 'Cargo P&Ls' indicate that there was an apportionment to Mr Kelbrick's company of 53.75% of the difference between the quotation unit sale and purchase prices, multiplied by the number of barrels (see also § 240 below as to the concept of quotation differential profit).

153. By early 2005, Arcadia wanted to expand its business beyond Nigeria. Equatorial Guinea had large reserves of Zafiro crude. The evidence indicates that Mr Driot controlled access to the state oil company GEPetrol and its allocations and export of Equatoguinean crude: see §§ 126-127 above and 229-232 below. His company, Stag Energy ("***Stag***") had a term contract with GEPetrol. Mr Bosworth had been introduced to Mr Driot in the early 2000s. Arcadia began to buy from Stag cargoes of Zafiro crude that Stag had lifted under its term contract.

154. The documents also include an existing contract between Arcadia London and GEPetrol dated 14 February 2004. However, there is no evidence that any cargoes were actually supplied under it. Mr Bosworth's evidence, which I accept, is that *"[s]igning a piece of paper is one thing. Enacting a contract is another"*, and that it was only when Arcadia employed Sonergy that cargoes began to flow.

(7) Mr Kelbrick leaves Arcadia

155. Mr Kelbrick left Arcadia in 2004 to become head of trading at PetroChina, a Chinese state oil company. PetroChina recruited him to assist it in the West African market. While he was there, Mr Kelbrick in 2004 originated a one-year NNPC term contract for PetroChina, and also a term contract from the Algerian NOC, Sonatrach, for Saharan blend crude oil.

156. After about a year, Mr Kelbrick left PetroChina in 2005, due (he said) to lack of autonomy at the company leading to a desire to set up on his own. Mr Bosworth tried to bring him back to work for Arcadia, and Vitol also offered him a job. However, Mr Kelbrick chose to pursue a career as an independent trader and consultant.

157. By this stage, Mr Kelbrick had come to be well-acquainted with Mr Decker, whom Mr Kelbrick had met on a number of occasions in Nigeria. In 2005, Mr Decker approached Mr Kelbrick and asked for his help. Mr Decker wanted to spend less time in Nigeria and to move back to Switzerland, while maintaining his local relationships on the ground in West Africa. Mr Kelbrick agreed, and in 2005-2006 worked as a service provider for Mr Decker, being paid by Mr Decker for his consultancy work via Blacksea. As part of that work, in 2005 Mr Kelbrick secured a term contract with NNPC for a Tristar Group company.

Mr Kelbrick also continued to develop his own contacts in West Africa, and later (in 2007) used his companies South Energy and Proview to manage his business interests.

158. In addition, documentation indicates that Mr Kelbrick provided services for Arcadia in relation to work in India and Nigeria (including, for example, an invoice for US$1 million for *"Services in India and Africa for crude oil and products cargoes"* for the period ended 31 December 2006). The following passages from Mr Kelbrick's witness statement illustrate the context in which he operated and the services he was providing:

> "12. After Mr Green passed away, I became more involved in the regular travel down to Nigeria to meet with people there and to make my own contacts. As I was not spending much time in the office (and was also less familiar with the paper side of Arcadia's business) Arcadia employed David Ford who was also able to undertake much of the work I would have carried out in London while I travelled to West Africa. At the start, I effectively shadowed Mr Bosworth, who then spent approximately half of his time in West Africa and already had a large network of his own contacts there. Mr Bosworth introduced me to various of his contacts, but I had also begun to make my own contacts and build a name for myself in Nigeria. Mr Bosworth became a close friend during the period that we worked together, and I was grateful for him teaching me about the West African crude market.
>
> 13. The oil industry in West Africa is enormous. Being present in West Africa was (and is) important in order to ensure a successful trading practice as people there want you to be visible and available for face-to-face meetings at a moment's notice in order to create trust, failing which they may well take their business elsewhere. Developing these local relationships is demanding on your time but its value cannot be underestimated. In addition, people within NNPC changed on a regular basis and it was important to be physically present in Nigeria to maintain or create new relationships.
>
> 14. When travelling to the region I would meet with local businesspeople who held various roles from the top of the chain to the bottom, from the wellhead to customer. This included meeting with refiners, suppliers and producers; at NNPC I met with everyone from the group managing director (with whom I regularly played golf) to the administrative assistants. I had contacts who worked in the operational, finance and sales departments. Employees moved up quickly and around frequently, so an administrative assistant could well be leading the trade desk in 4-5 years' time or so.
>
> 15. Building relationships could take many forms. For example, if the Head of Marketing at NNPC had to give a written

presentation I would try and assist them by providing certain information relevant to the presentation. In addition, I flew trading experts from London to run training courses in Abuja for NNPC staff and I went to the NNPC quarterly marketing reviews. At those meetings I took the opportunity to speak about the markets, the global outlook, what geopolitical changes might have an impact on the price of crude, and gave NNPC an overview as to what factors traders took into consideration when purchasing crude. I also monitored cargo tracking for crude oil and spoke to people in other trading companies to share market information, and get a view as to who sold what to whom and at what price. I knew that all of this supply and demand market information was valuable to Arcadia's paper trading department when creating its position in WTI and Brent and the spreads therein, even though I was not involved in the paper trading element of the business."

"27. Also in 2005, Mr Decker approached me and asked whether I could assist him. Mr Decker told me that he wanted to spend less time in Nigeria and wanted to move back to Switzerland but needed to maintain his local relationships on the ground in West Africa in order to keep his businesses going. I agreed to assist him on the ground in West Africa as a consultant while at the same time trying to develop my own business. As part of my services for Mr Decker, I secured a contract with NNPC for a Tristar Group company. I used a shell company, Blacksea Petroleum Offshore SAL ("*Blacksea*") that I acquired from Mr Decker himself (I believe, but cannot now recall, for a nominal fee) for my consultancy work. ... This was my first involvement with offshore companies, and I recall travelling to Lebanon to establish Blacksea's bank accounts. Mr Decker paid Blacksea for the services I was providing to him in Nigeria.

28. In 2005-2006 I spent on average at least 15 days a month in Nigeria. I was working for Mr Decker and further building up my contacts in order to focus on building my own business, but my family remained in England. I did not enjoy working alone in Nigeria and this was not a happy period in my life."

"70. At the time of the 144 Transactions (i.e., between 2007 and 2013), obtaining a contract from a national oil supplier was incredibly competitive. Obtaining term contracts requires business relationships with the national oil company and/or key individuals related to them. There could be as many as 250 companies applying for a contract, and initially only 25 companies or so would be successful. Unsuccessful companies may then lobby to be included in the list of successful companies such that the initial number went up. Whatever the eventual number, there is only so much oil to go around. Even if successful, the amount that was awarded under a contract always

far exceeded what was actually available. NNPC typically kept the only copies of the signed contract, which provided a maximum volume a contract holder could lift. This maximum volume was no guarantee of the amount that would be lifted – in reality there was still a great deal of competition for cargoes and a wide variety of reasons why a contract holder would not be able to lift, including production shortages, pipeline issues or a poor track record with NNPC.

71. If trading with a national oil company, therefore, it was essential to have people on the ground; first to ensure that it was your company who was awarded a contract in the first place, and second to ensure that – having secured the award of a contract – your company was then actually nominated to lift a cargo under that contract. This was the focus of my work for Blacksea, Arcadia and AOIL, making sure that, a contract having been secured, the nomination to lift the cargo also followed. Simply put, even if a company secured a contract with a national oil company, unless it had people on the ground to lobby and keep track of cargoes, it was unlikely to actually lift.

72. Each of the following was important for the success of prospective lifters at the time in West Africa:

72.1 Good track record: It was much easier to renew a contract than to be a new market entrant as NNPC wanted reliable buyers that they were familiar with. During the tender process, you had to submit banking and trading references to NNPC. Generally, turnover had to be in excess of US$500 million per year, which amounted to at least 6-7 cargoes a year. This was more easily satisfied if the contract was a renewal. This is why the acquisition of companies which already had contracts (like AOIL) was so appealing. Having secured a new contract or a renewal part of my role was then to ensure that the contract holder performed, i.e., that the contract holder lifted on time, had the requisite financing in place and paid on time.

72.2 Multiple bids: obtaining a contract from the NNPC was something of a numbers game. Simply put, the more companies I had applying for a contract from NNPC, the greater the chance that I was able to lift oil. It was widely accepted practice in West Africa to apply for crude oil contracts using a variety of companies' names. When I worked at Arcadia London, we would:

72.2.1 make applications in Arcadia's own name and in the name of a number of their affiliated companies, including a company called Arcadia Mauritius. After I bought AOIL, I applied for contracts in AOIL's name, but also in the name of Arcadia Mauritius, Azenith, Crudex and Cathay Petroleum. I explain more about these companies below; and

72.2.2 make applications in the names of third-party companies (with the permission of those third parties). The third parties would consent to our use of their company name in return for giving them first option on the oil, alternatively a referral fee). As I recall, Arcadia had arrangements with private companies and state companies such as SK Co. Ltd, Petrobras, Sunoco, and the IOC.

72.3 Relationships with local sponsors: In Nigeria certain local businessmen would on occasion have the power to *"sponsor"* a contract with the NNPC. They would offer their support to a particular company, which meant it was more likely to obtain a contract. The sponsors would offer traders the name of the company to be granted an oil contract in return either for a referral fee and/or profit share. Over the years I had developed relationships with various sponsors in West Africa. When I worked at Arcadia, Arcadia had a relationship with a Mr Osagie Akpata, a local businessman and sponsor.

72.4 Local presence: It would be near impossible to lift cargoes from a national oil company in West Africa without people on the ground. I attended NNPC's offices regularly to ensure that the company for whom I was working (initially Arcadia, then Mr Decker's contract holders, and then AOIL (or its contract holders)) lifted the correct grade of oil, in the correct quantity, at the right time.

Service Providers

73. The success of any oil trader's business depends largely on how reliably it can acquire oil and deliver it to its buyers. In West Africa at that time, there were a number of third-party service providers, whose business it was to assist traders in ensuring that they were able to deliver the right grade of crude, in the right volumes and at the right time. If you get one of those three elements wrong, it can result in a multi-million-pound loss. During the period that I worked at Arcadia London up to 2004, it engaged the services of various service providers under service agreements, including Sonergy, and companies owned by Mr Akpata, such as Azenith Resources Nigeria.

74. Third party service providers were often well-connected, and would lobby national oil companies to ensure that a given contract holder was allocated a cargo. They were also a valuable source of information as to the likelihood of securing a cargo, and whether lifting would proceed as expected. Even after a cargo was allocated, the services provided by these third parties included securing a given grade or quality of cargo and overseeing the inspections of the same, assisting with the time charters of the vessels and recovering outstanding payments.

> …
>
> Associated Risks
>
> 76. Between 2007 and 2013, at the time of the 144 Transactions, there were real risks with dealing with national oil companies in West Africa. The national oil companies had all of the power, and there was very little recourse available to contracting parties if the national oil companies acted unreasonably or in apparent breach of a contract – a challenge to the behaviour might require litigation in the local courts (which nobody wanted to do), and/or result in the loss of a contract renewal.
>
> 77. Delivery of cargoes were often delayed due to operational issues. A change in laycan date would change the pricing period and so could amount to a significantly different price for the oil, which price risk had to be carried by the contract holder. Loading delays could also result in major demurrage claims.
>
> 78. In addition, it is well documented that (at that time in particular) West African oil trading was opaque and carried with it a high corruption risk, which in turn presented a serious reputational risk to its counterparties. The global reach of the UK Bribery Act 2010 was a concern for many oil traders with a presence in the UK."

159. Mr Akpata described Mr Kelbrick in oral evidence as *"very well connected in NNPC"*, and as someone who knew who needed to be accessed and how to access them, including, for example, playing golf with key individuals at the Abuja Golf Club. (Mr Kelbrick played golf with the head of NNPC and the head of the Petroleum Pipelines Marketing Corporation ("***PPMC***"), the Nigerian state-owned product supply company.) One of the reasons why Mr Kelbrick became well-connected in NNPC was, as Mr Akpata explained, because he lived in Nigeria when Mr Bosworth did not. Mr Akpata said: "*You had to be in Nigeria a lot, which Pete in the beginning was but then couldn't be any more*" and that being on the ground in Nigeria was *"critical"* and *"impossible to do without"*. Mr Kelbrick's own evidence was that: *"By spending less time in Nigeria, it was challenging for Mr Bosworth to maintain the depth of contacts in the country, including because his contacts were replaced by people that Mr Bosworth did not know"*. Mr Kelbrick said in his oral evidence that by 2004, Mr Bosworth *"wasn't travelling there quite as much. I was there a lot, lot more"*. Mr Kelbrick said *"I had lived there [in Nigeria], I had been working for NNPC since 1998, and I had gained by this time [2009]…11 years in I had gained my own network of people in West Africa"*. He identified a number of those connections in oral evidence, including Chief Lulu Briggs, Chief Anenih, Mr Akpata, the Emir of Kano, and the whole of the Crude Oil Marketing Department at NNPC, including its head, Aminu Babu-Kusa.

160. Mr Duncan, who said he had not got on well with Mr Kelbrick, nonetheless described the operational services Mr Kelbrick performed as a service provider and consultant on the ground in Nigeria as *"vital"* and *"very valuable and important"*. Similarly, Mr Scheepers said that Mr Kelbrick was regularly in Nigeria because *"the day-to-day interface with the trading side and the local Nigerian side involved constant meetings"*. Mr Scheepers described being in Nigeria as *"an absolutely necessity or a must…because your competitors are doing exactly the same and if you are not present you will simply not get the business and in most situations there is one such person per geographical location or country …and in this case Steve was that for Nigeria, exactly that. That's what he has been doing for most of his career"*.

161. Mr Bosworth in his oral evidence described Mr Kelbrick as being experienced in Nigeria, including because he lived there, and experienced in other countries in West Africa, as well as in Sudan, Kenya, and India. He described Mr Kelbrick as *"a hybrid type of individual"*, because he had his own trading company (Attock Mauritius), worked as a service provider via Proview, and performed consultancy services for the Arcadia Group through South Energy. Asked about the fact that Arcadia Lebanon did not enter into new contracts after 2009, Mr Bosworth said *"I didn't source those contracts"* and *"[t]he business that I sourced went to Arcadia Lebanon. The business that Mr Kelbrick and whoever else worked with him sourced went to their own trading company"*.

162. I return again later to Mr Kelbrick's role as service provider for Arcadia Lebanon under the Sao Tome and Senegal Contracts: see section (I)(3)).

(H) FARAHEAD'S ACQUISITION OF ARCADIA AND SURROUNDING EVENTS

(1) Principal Search briefing paper

163. Arcadia was profitable under Mitsui's ownership, but some types of trading opportunity were outside Mitsui's own risk appetite. At the same time, Mr Fredriksen and Mr Trøim were interested in the possibility of becoming involved in the oil trading business. In late 2004/early 2005, they engaged a Paul Chrispin of Principal Search to help them. This led to an approach by Mr Chrispin to Mr Bosworth.

164. In February 2005, Mr Chrispin prepared a briefing paper for Mr Fredriksen and Mr Trøim entitled "*Current Oil Trading Situation*" which described two potential acquisitions – the business of a Swiss company, Projector SA ("***Projector***") and Arcadia's trading team – and some potential "*individual hires*". It included this passage about Mr Bosworth:

> "As agreed, we got in touch with Peter Bosworth, Executive Vice President of Arcadia Petroleum Ltd to ascertain his interest in discussing a senior role in building the Frontline commodities business. He has a reputation through his staff of being a good manager to whom people were loyal.
>
> …

> Peter Bosworth is 42, British, and has been running Arcadia for seven years
>
> Personality wise he is:
>
> - Approachable, team orientated, motivated
>
> - Communicates well - an obvious leader
>
> By way of background, Peter and Arcadia had a legal dispute about seven years ago with a US oil company, which also involved a fight with their Auditors. They were not found to [be] in the wrong but it took two years and a lot of funds to sort out the mess.
>
> Because of this Peter is strict on compliance matters and runs a very tight ship guided by his lawyers / consultants based in London (not Monaco or the Lebanon where compliance is much looser).
>
> **Interest:**
>
> Peter said that he would be very interested in talking to an established company that is serious about building an oil trading business in a professional way - a major shipping company would be attractive. He believes that there could be a win / win situation for both parties, though he does not know Frontline's identity yet. The Arcadia business is its people and Peter firmly believes he could *"transplant"* all the people he wanted to move"

165. About Arcadia, the briefing paper said:

> **"What is Arcadia?**
>
> Primarily a crude trading operation. The business has definite strengths but does not cover a lot of the market yet, little of the trading is products based. Mitsui owns 100% of Arcadia Peter says that the only support that he receives is from parent company guarantees to the likes of Shell ($150 million per month) and BP. There is no flow of business or information from Mitsui, also all the trading contracts are in his name, not Mitsui's."
>
> **"Product / Geographic / Risk Management Breakdown:**
>
> 1. Crude Oil 90-95%
>
> 2. Petroleum Products 5%
>
> The primary business is physical crude oil trading and ships.

Currently trading around 500,000 barrels per month of which half is Nigerian Crude and approx 100,000 barrels is Med related."

and:

"Turnover/Profit:

Peter says that Arcadia turns over approx $1 bill per month of physical trading. The average profit over the seven years since he has been in charge is about $40 mill per annum. There has been one losing year. Year ending March 2005 profits should be around $110 million.

On profits everything over an agreed overhead (currently approx $20 mill) is divided 30% to Peter's team and 70% to Mitsui. If there is a loss Mitsui take it.

He believes he works a fair bonus system and creates a good team morale. All traders including Peter are on three months notice and bonuses will be paid in July.

Conclusion

Peter definitely has interest; he seems to be frustrated by the Japanese methods of doing business. He is currently negotiating for the company VAR to move up to $6mill. He says that all physical contracts are in his name not Mitsui's. He says that all staff are loyal to him and that he would want to take the majority with him to a new house Mitsui apparently know that they do not have the contacts nor the relationship with the staff to retain any of them. He believes that there would be an immediate profit from front end physical shipping where his team have a lot of strength. Most importantly he seems like a real businessman."

166. Later in the briefing paper were the following significant passages:

"ARCADIA PETROLEUM LTD

1. Overview of Current Business

Physical Term Business

(It should be noted that all the contracts referred to hereunder included assignment clauses as a matter of course).

Nigeria: Arcadia has very recently renewed its term contracts with the NNPC, for total of 160,000 bbls/day. In addition we have secured under contract a further 85,000 bbls/day from indirect sources of Nigerian crude oil. We have also concluded a term deal with the Indian Oil Corporation whereby they will

allocate to us the Nigerian crude oil under their 40,000 bbls/day contract with the NNPC.

We have a first class relationship with a Nigerian-owned equity producer, and have just renewed our contract with them to market 20,000 bbls/day of their own production. In total, therefore, Arcadia markets 285,000 bbls/day of light sweet Nigerian crude oil.

…

Equatorial Guinea: We have just concluded a term supply purchase of Zafiro crude oil with the Govt., via a fronting company, for a volume of 20,000 bbls/day.

…

Spot Business

Nigeria: In addition to our base position in Nigeria and West Africa in general, we run an active spot book, buying from both majors and traders, with an average volume of 100,000 bbls/day. This, together with our term availability, makes Arcadia one of the biggest volume traders in the whole of the West African market, rivalling many major equity producers.

…

2.Company Profile

Arcadia was founded in 1988 by Marcus Green as a 100% subsidiary of Mitsui and Co, Tokyo. After Marcus' death in 1999, Peter Bosworth assumed the role of CEO.

The company's profile, as well as its volume of business, has grown steadily over recent years. We have estimated our annual budget to be in the area of 50 to 120 million USD. The expected profitability of the company for the year 2004/05, (the financial year ends on 31st March 2005) is expected to be in the region of 120 million USD. In considering this result, one must take into account that Arcadia is limited by Mitsui to VAR of 3.5 million USD. We believe that if such a severe restriction were to be withdrawn or revised to a more workable level, then the profit potential of the company would be significantly increased. We feel that our budget target could be reasonably set at between 100 and 250 million USD with the necessary VAR and position/volume limits. We must note with regret, however, that such an eventuality is unlikely to be granted by the current Mitsui management.

In addition, we face further limitations in that we are only permitted to trade in the relatively narrow field of crude oil trading. In the course of our business associations with various energy groups, a number of investment opportunities have arisen which we have been unable to take advantage of due to the restrictive environment in which we operate.

3. Synergies: Arcadia/Front Line

• Greater flexibility and less restrictive practise would add to the profitability across all existing businesses.

• Our cargo tracking system on all physical crude markets increases Front Line's understanding of tonnage demands and timing in all major crude oil supply areas.

• Arcadia's crude oil trading expertise can secure cargoes for Front Line tonnage as and when it is deemed economic and viable across both trading and freight profit books.

• We can switch the emphasis of our trading away from FOB deals to CIF or delivered sales to create 'in-house' business for the freight book.

• Jointly, we can expand our involvement in the FFA market either speculatively or as a hedge mechanism. In addition, we would like to develop this market to such a degree where we could present our ideas to institutional investors, creating liquidity and position with fixed profit margins.

• By utilising our considerable experience in Risk Management, we can work with Front Line's fuel department to establish a Bunker hedging strategy which would reduce the risk of extreme market volatility in the key area of tonnage costs.

• Our special relationship with a number of crude oil producers over the years has given us an excellent insight into the planning and political views of the OPEC cartel Our intelligence has proved to be accurate on a number of occasions in respect to OPEC out-put.

4. Investment Opportunities

Our broad-based level of contact in the State organisations of many producing countries can presents us with diverse investment opportunities.

For example, we have been approached to supply and maintain a FPSO unit for the off -shore production of a West African oil producer.

> • We have been offered a term LNG contract, also in West Africa. We are currently prohibited in concluding this by Mitsui.
>
> • We have, on several occasions, been offered the rights to buy lucrative blocks for E and P purposes in West Africa and elsewhere. We have had the opportunity to obtain licenses with proven reserves and/or existing production. On each occasion our application to Mitsui to invest in such projects has been rejected. Our aim in this area of business is to acquire a block with a minimum 250 million barrels of proven reserve, with a view to look to an IPO or sell privately to a mid-range E and P Company.
>
> • Arcadia has been requested to invest in product storage facilities, and given the opportunity to secure such rights and land necessary to build significant storage units at strategically important ports in West Africa.
>
> • By using vessel storage made available by Front Line, we believe there are substantial savings to be made in providing logistical flexibility to product deliveries in West Africa, where certain products are in tight supply and an off-shore storage unit would prove to be invaluable."

(2) Frontline's objectives

167. Mr Fredriksen and Mr Trøim wished to hire an oil trading team, or at least an individual who would help them build a trading business. As reflected in the Principal Search briefing paper, they saw potential synergies between Arcadia's oil trading and Frontline's shipping business, not least because they had (as Mr Trøim said in oral evidence) a "*lot of tonnage in Frontline which traded a lot in West Africa in particular in Suezmax*" and transporting crude oil from West Africa was a "*major part of the [Frontline] business*". Mr Fredriksen said in his oral evidence that, in addition to making money, an oil trading business would help Frontline get "*more information and more flexibility on the market*". Although in his witness statement Mr Fredriksen said he had no experience of the oil trading industry, he had been involved in shipping crude from West Africa and dealing with oil traders such as Shell and Trafigura.

168. Mr Fredriksen and Mr Trøim hoped to develop a large trading concern. Mr Fredriksen said: "*the intention was to build up a big trading company like Glencore and go to the Stock Exchange with it, that was the ambition*". Mr Trøim said:

> "We thought that we could effectively compete with Vitol and Glencore and Trafigura and the other people. We had been to see Mercuria which was one of the companies we had considered to buy at that time, or buy into, which had been very, very successful."

and:

> "I think Ian Taylor kind of, Marc Rich and these people are friends of John and he saw how successful they were and in many ways he wanted to have a bit of the cake and that is why we started. I think we mainly started because we had the fleet, we thought we had something. What the traders do is they trade without having the assets and we had the assets in the companies so we thought that we could be successful on that basis."

169. One area of interest to Mr Fredriksen and Mr Trøim was the combination of physical and paper (derivatives) trading in respect of oil. Mr Fredriksen agreed in cross-examination that physical trading supported the paper trading, and that one could potentially make a lot of money on the paper market using the physical market to support it. Mr Trøim said "*I would say physical and financial positions works well together"*, and:

> "I think the physical was important in order to understand, as Pete always said, to understand the financial and to trade the financial but I think what we betted on, if you look at the people we hired trading the paper books, we hired a team from Goldman Sachs which had a historic record."

In the end, Mr Fredriksen agreed that Farahead made a 'fortune' as a result of buying Arcadia, which he attributed to the paper trading conducted by Messrs Wildgoose and Dyer. (See further §§ 697 and 937 below.)

(3) Frontline comparison document and April 2005 meeting

170. On 29 March 2005 Mr Chrispin emailed Mr Trøim the *"Current Oil Trading Situation"* briefing paper and a *"Frontline Comparison"* document, which compared different options for the acquisition of an energy trading business. A meeting was arranged with Mr Bosworth for Saturday 2 April 2005 at Mr Fredriksen's house in London. A document which appears to have been the Frontline Comparison document summarised the Arcadia and Projector businesses and gave overviews of other options. In relation to Arcadia, it noted that Mr Hurley had prepared a preliminary business plan outlining some of the synergies and opportunities, that a full budget would be ready before Easter, and that Mr Bosworth would be available to discuss an in-depth proposal the following week. The summary stated that profit would be "*substantially higher with a more aggressive owner in charge*". I have quoted extracts from the business plan earlier. As part of his cross-examination Mr Fredriksen was asked about the reference in the document to the Zafiro crude being bought via a fronting company. He indicated that he understood that one company could enter into a term contract and that the oil might be transferred via a chain to Arcadia, and said *"I think it happens all over the world, this similar situations"*, and that *"It can happen in some cases, [oil trading companies] use [a] front company"*.

171. On 2 April 2005 Messrs Fredriksen, Trøim and Bosworth met at Mr Fredriksen's house in London. Mr Fredriksen and Mr Trøim had a briefing paper entitled "*Frontline Oil Market Entry Options*", which was an expanded version of the Frontline Comparison document and contained the Arcadia

business plan and the full budget. The budget ("*Arcadia Costings Profile*") started by saying:

> "The company shall operate from four regional offices – London, Geneva, Beirut and Singapore. The company shall trade crude oil and oil products encompassing risk management, shipping management, operational and financial arrangements. In addition the company shall develop opportunities identified in energy related assets to include crude oil upstream projects. The company shall trade approximately 1,000,000 barrels per day of physical crude oil supplemented by paper trading activity of up to 5,000,000 barrels per day through either exchange trader or OTC derivative products."

The latter numbers give some hint of the perceived importance of the intended paper trading.

172. The Options document identified Tristar as Arcadia's key spot trading customer. It also included reference to proposed guarantees for "*regular trading partners*". In that context, Mr Fredriksen agreed in cross-examination that it was mutually beneficial to help a regular trading partner finance its business. The document also included overhead expense budgets for each of the four offices: US$21.5 million for the London office, US$2.7 million for Geneva, US$1.46 million for Singapore and US$1 million for Beirut. Mr Trøim suggested that this showed that the Beirut office was intended to be no more than a 'rep office', whereas Mr Bosworth said the budgets for the non-London offices did not include trader salaries and were merely base costs subject to the number of traders and amount of activity carried out at each office. I do not consider that any clear conclusions can be drawn from these figures, which may have been more or less provisional and subject to decisions yet to be taken about how the business would be organised.

(4) Service providers, risks and Beirut office proposal

173. As at April 2005, the available financial statements for Arcadia were those for 2003 and 2004. (The 2005 statements were not published until 8 July 2005.) Mr Fredriksen agreed in his evidence that it was most likely that he looked at the financial statements, though Mr Trøim doubted that he would have looked at any of the detail, as they had a team of people do to that.

174. Note 3 of the accounts in the 2003 financial statements stated:

> "**PAYMENTS TO SERVICE PROVIDERS**
>
> Cost of sales includes US$16 million in respect of amounts payable in the year ended 31 March 2003 to service providers in Nigeria, the Middle East, and other countries (2002 – US$16 million) where Arcadia have no offices, to provide assistance in the execution of purchase contracts with local suppliers"

This cost of US$16 million was clearly very substantial when compared to Arcadia's gross profits for the year of US$12 million and net profits after taxation of only US$337,000 on turnover of about US$6.459 billion. The 2004 financial statements contained the same note on payments to service providers, save that the payments to service providers totalled US$15 million. For that year there was an operating loss of US$19 million on turnover of about US$7.9 billion.

175. Mr Trøim said in his witness statement that he was *"not aware of commission payments being made to so-called "service providers" and what their role may have been in relation to West African oil trading"*. However, such payments were clearly disclosed in the accounts, and not hidden. In cross-examination Mr Trøim gave this evidence:

> "Q. You were being told by the accounts that the service provider payments were to assist Arcadia in the execution of purchase contracts with local suppliers; correct?
>
> A. I can probably say maybe in the naivety, the fact that John and I didn't know this business very well, we said that if an auditor goes good for an account including the payment to service provider and they have the boxes to check about payments to related party transactions, all the stuff they need, if it is good enough for auditors, it is good enough for us.
>
> Q. That is why because payments to service providers are not necessarily wrongful or necessarily bad, are they?
>
> A. No, I don't think so. But of course, it depends a certain amount of KYC linked to it and it depends on the fact that they really do the service for the thing. That is the auditor's mission. I think kind of running four public companies, this is a big part of our kind of story every time you are ending up on the audit when it gets questioned about that and everybody in the organisation has to sign off. It is a very proper process."

176. Mr Fredriksen and Mr Trøim had some awareness of the risks of West African crude trading. The Claimants' Reply said:

> "Farahead, in particular Mr Fredriksen and Mr Trøim, understood as at March 2006 (when Farahead acquired Arcadia London) that physical trading of West African crude oil purchased from national oil companies was Mr Bosworth's principal activity."

and:

> "It is admitted that Farahead, and Mr Fredriksen and Mr Trøim, were aware, in general, of some risks presented by West African oil trading, in particular that involving purchases from national

> oil companies, and were concerned to prevent these eventuating …, including risks of bribery and corruption.'

177. Mr Trøim in his cross-examination appeared to backtrack from that position, disputing the idea that direct dealings with NOCs were particularly risky, and suggesting that it was worse, not better, to have intermediaries in between. I find that evidence hard to accept. As the Claimants accept, dealing with NOCs carried a particular risk of bribery and corruption problems, which they were keen to avoid. In addition, the due diligence enquiries in relation to Pang Ling, to which I refer shortly, brought those issues clearly to the attention of Mr Fredriksen and Mr Trøim. It is precisely because they were aware of the risks that, on their own evidence, Mr Fredriksen and Mr Trøim would have raised this matter in the course of the pre-acquisition discussions. Mr Trøim in his witness statement said:

> "43 Throughout my career I have sought to make sure that the businesses I have been involved with act lawfully, including not engaging in corruption. John and I operated in highly regulated environments given we were in control of sizeable listed companies, several of them being listed on the New York Stock Exchange and on Nasdaq and which were regulated by the SEC. The reputational damage from corruption allegations would have been very serious.
>
> 44 I do not recall specific discussions on this topic during the negotiations for the acquisition, but I believe that I would have raised this issue during the talks with Mr Bosworth and Mr Hurley. I was aware generally that the oil trading sector did not have the best reputation in terms of corruption and was concerned that John and I did not end up on the front page of the Financial Times because of a couple of trades in a small subsidiary."

178. Mr Bosworth's evidence was that a Beirut office was proposed as a way of mitigating compliance risks of this kind. In his witness statement, after referring to the draft budget for a Beirut office, he said:

> "120. … Having had my memory refreshed by reference to these documents, I recall that we discussed with John and Tor Olav possibly opening an office in Beirut early on in the process of their takeover. I do not however remember the precise details of those discussions as they took place almost 20 years ago. I do however remember that John and Tor said at this time that it was very important for John to be distanced from the potentially riskier aspects of Arcadia's business in West Africa, and I believe that the discussion of a Beirut office was part of the discussion of how to distance and protect both John (and his business interests) and the Arcadia group from any [of] the compliance risks associated with Arcadia's West African trading activities. This is just one example of the way in which John wished to be insulated from the Arcadia business and the lengths

> he went to so as to ensure that there was a separation between him and any risk to his other business interests (I explain … below further instances of this, including the instruction from John and Tor that we should no longer send emails about Arcadia's daily reporting to John's personal email address). It had been communicated to me by John and/or Tor Olav on a number of occasions that the risk to John's business interests of any compliance-related issue would be critical, and – this was something John and Tor said several times, I think as a way of hammering home the message – that Arcadia could never make enough money to make up for such an issue.
>
> 121. As far as I can remember, the commercial rationale for opening an office in Beirut rather than some other country would be to take advantage of the low compliance environment (it being outside of the UK and the US and with as I understand it less strict legislation on anti-corruption practices) and banking secrecy laws. There was not (as far as I can recall) any other business case for establishing an office in Beirut. If Arcadia wanted to expand in that geographical area, we would have established an office in Dubai, rather than Lebanon."

Mr Bosworth said he thought the jurisdiction of Lebanon was probably recommended by one or both of Mr Hurley and himself, then agreed to by Mr Fredriksen and Mr Trøim as suitable. Mr Bosworth added that he understood from what Mr Fredriksen told him at the time, as well from publicly available sources, that Mr Fredriksen had close political ties with the hierarchy in Lebanon, and believed that Mr Fredriksen actually lived there while he was trading oil for a period of time.

179. In cross-examination, Mr Bosworth confirmed that:

> "The principal reason for establishing an office in Beirut was to have a lower compliance environment. We were instructed to own the company on John and Tor's behalf. This would allow a distancing for John Fredriksen himself if there was a problem."

Pressed on this, he was clear that Mr Fredriksen's and Mr Trøim's objective was for any potentially high risk business to be distanced from the group as far as possible. As to the timing, Mr Bosworth gave this evidence:

> "Q. Are you suggesting that you discussed the company, Arcadia Lebanon, in late 2005? Or are you saying, as I think you have said a couple of times, that actually you didn't consider moving the contract to Arcadia Lebanon until auditors raised a problem with this Contract [the Zafiro Contract concluded in December 2005]?
>
> A. We raised right at the beginning the potential of having a Beirut office for compliance reasons. We continued that conversation as you can see with a potential budget. And later

> on, having entered into this contract in the interim period between Mitsui and John Fredriksen, we entered into this contract and this was one of the contracts where we discussed and it was agreed or we were instructed to move it to Beirut."

180. It was suggested to Mr Bosworth that a later document, an email from Mr Lance to Moore Stephens dated 27 April 2006, showed that the reason for using a Lebanese company was to conduct Middle Eastern trading. However, Mr Bosworth made clear that that was not his understanding of the position, whatever Mr Lance may have told the auditors. It was not, of course, possible to ascertain Mr Lance's thinking on this matter as he was not called to give evidence. I found Mr Bosworth's evidence on this matter, both in his witness statement and his oral evidence, to be measured and plausible.

181. Mr Hurley said in his witness statement:

> "85. As for Beirut, the only recollection I have of Lebanon being discussed at any time during Farahead's takeover was as a non-group, or standalone, company, not as an office for the Arcadia Group.
>
> 86. This was part of the proposal as to how to handle the service provider payments that caused them concern. Beirut would be an operational office, but not in the group – that is the only conversation I can recall with regards to Lebanon. I cannot recall any discussions of other business being run through Lebanon, only that it would act in a way that would provide the necessary shield under the structure proposed for the Arcadia Group.
>
> 87. I have refreshed my memory on this subject by looking at a spreadsheet that I sent to Trøim on 15 September 2005. The spreadsheet has 5 tabs – including the overhead expense budget for the Singapore office, which was a proposal, as we did not have an office there yet. Then there is a tab titled 'Beirut'. The costs were fairly low on the whole, around USD 1 million including all overhead costs. I remember that we didn't plan to have any traders in that entity, nor would any have gone to Beirut. It can be seen from the salary budget, which is quite low. It wasn't proposed as a trading office, it doesn't involve any traders' salaries, just the salaries for operational and support staff. What was being proposed for Beirut was a limited operation that would enable us to book certain trading in that location. That is my only understanding of any discussions about a Beirut office in 2005."

182. Mr Fredriksen and Mr Trøim in their written evidence did not address the presence in the 2005 pre-acquisition documents of a budget for a Beirut office. In cross-examination, Mr Fredriksen gave this evidence about it:

> "Q. So this is what was presented to you at the time?

A. I can seriously not recall to have seen this document, number one. And I still wonder why a headhunter would make a document like this. Somebody must have prepared a document.

Q. Yes, it comes from Arcadia, a presentation for you and Mr Trøim to discuss at the Old Rectory in early April 2005; do you understand?

A. I understand what you are saying but I don't believe it.

Q. Okay. Let's have a look at what is said, {I/9039/68}. The proposal that is coming from Arcadia: "The company shall operate from four regional office ... " Do you see that?

A. Yes.

Q. So the proposal in the business plan is for Arcadia company to have four offices in the world; yes?

A. Yes, I see that.

Q. And you knew that one proposed office was in Beirut?

A. I didn't know.

Q. Well, you are being told at the time, "This is the proposal".

A. No, I don't accept that.

Q. Why don't you accept that?

A. Because I can't recall it.

Q. So is your evidence that you can't recall as opposed to I deny. Do you understand the difference?

A. I deny.

Q. Why do you deny?

A. Why did that happen at that office in Beirut?

Q. I think the transcriber didn't get the answer there. I was asking why you deny?

A. I didn't know about it, put it that way, whatever that means. I didn't know about the Beirut office.

Q. You are being told --

A. I might have been told but I can't recall and I never accepted any Beirut office.

> Q. Yes, but do you understand the distinction between not being able to recall something and --
>
> A. I understand that.
>
> Q. -- actually positively saying that didn't happen?
>
> A. This didn't happen. Beirut office didn't happen."

and, later:-

> "Q. From the outset of the discussions with Mr Bosworth and Mr Hurley to acquire Arcadia, Farahead, you and Mr Trøim, were discussing the establishment of an Arcadia office in Beirut; that's right, isn't it?
>
> A. It could be, but I don't remember and also, it never happened so, not as far as I know. I'm not sure I was in that meeting. I don't recall seeing this document.
>
> Q. So your evidence is you don't recall seeing this document?
>
> A. No, I don't recall seeing the document. That is the reason."

183. I find this evidence unsatisfactory. It would have been understandable if Mr Fredriksen had simply said that he could not remember this matter, given the lapse of time. However, the flat denials quoted above are hard to credit bearing in mind that (a) the business plan, which must have been a key document at the time, clearly included a budget for a Beirut office and (b) a Beirut office was indeed established in due course: see section (I)(1) below. Mr Fredriksen accepted that he knew that the compliance regime in Lebanon was looser than in "*some places of the world*".

184. Mr Trøim in his cross-examination said the budget in the business plan related to *"a rep office the way we saw it, for doing business in the Middle East. We never saw this as a commercial office. You can't run a commercial trading operation with US$ 1 million in fees, it is impossible."* He denied that the Lebanese office would be a place through which to book trades. Further:-

> "Q. You knew that in Lebanon, the compliance environment was more relaxed than it was in London, didn't you?
>
> A. I don't think we knew that but it was stated in that document so if we had read that document thoroughly which you said, it said that there was less compliance there. But we never paid any attention to that."

Mr Trøim also suggested that if one wanted to be close to the Middle East, Beirut was *"a very natural place to be because that is where the Middle Eastern activities are driven, to a large extent from"*.

185. I do not find that evidence entirely satisfactory either. If the objective was simply to have an office for Middle Eastern business, or as a rep office for such business, it is unclear why one would select Beirut or Lebanon for that purpose, given the reference to a looser compliance environment. There is no contemporary evidence that any of the commercial people (including Messrs Fredriksen, Trøim and Bosworth) were in fact envisaging using a Beirut office to conduct Middle Eastern oil trading; and nor is there any evidence that Arcadia Lebanon was in fact so used. It seems to me far more plausible that, as Mr Bosworth and Mr Hurley explained, the budget for a Beirut office was in the plan for a particular reason, viz a potential response to compliance concerns arising from West African oil trading that might be harder to manage in jurisdictions with tighter compliance environments such as the UK and Switzerland. Subsequent events, showing the way in which Arcadia Lebanon was in fact deployed, tend to bear this out, as do the entries in the Hannas Note.

186. The tax environment in Lebanon also appears to have been favourable. Arcadia Lebanon, as a Lebanese offshore company, paid low levels of tax on profits. For example, its 2009 audited financial statements indicated that it paid US$663 of tax on profits of US$5.7 million. Mr Fredriksen gave this evidence:

> "Q. And is it fair to say that when you were looking at the Arcadia business, you wanted to set up offices in the world that had tax and compliance advantages; is that fair?
>
> A. That's true, but so do all the oil companies, Shell, BP, everybody in the world do the same so that is the reason why I don't understand your concern.
>
> Q. There is nothing necessarily wrong, is there?
>
> A. Because it is what you are saying, it is common for all of this type of business."

(5) Alleged Bosworth continuing control of Arcadia Mauritius

187. The Claimants suggest that the passages in the February 2005 briefing documents quoted in §§ 164-166 above stating that "*all the trading contracts are in his name, not Mitsui's*" and "*all physical contracts are in his name not Mitsui's*" showed that Mr Bosworth must have told Principal Search that he personally held the term contracts. The Claimants hence plead that:

> "In the course of the negotiations, Mr Bosworth told Mr Trøim (acting on behalf of Farahead) that some of the principal trading contracts under which Arcadia London operated in Africa were held by and in the name of an entity in Mauritius which was owned or controlled by Mr Bosworth (as opposed to being owned by Arcadia London). The Claimants aver that the entity being referred to by Mr Bosworth was Arcadia Mauritius. Mr Bosworth expressly represented to Mr Trøim that after the acquisition by Farahead, such a practice would be brought to an end, and those contracts would be transferred to Arcadia London

> (i.e. cease to be held in the name of Arcadia Mauritius and rather be held in the name of and by Arcadia London)."

At the same time, the Claimants also plead that Arcadia Mauritius was beneficially owned by Mr Decker, possibly through Tristar Switzerland. This case was repeated in Mr Adams's affidavit in support of the Claimants' application for the worldwide freezing order obtained in February 2015. The source of this information was later said to have been Mr Trøim (attachment to Freshfields letter of 17 July 2015).

188. By the time of his witness statement for trial, Mr Trøim's evidence introduced the possibility of Mr Bosworth owning or controlling Arcadia Mauritius only indirectly. He said that Mr Bosworth told him certain valuable West African term contracts "*were held in the name of an entity in Mauritius, and that this was owned or controlled by Mr Bosworth, possibly via one of his close associates, for the benefit of Arcadia London, with the profits ultimately being passed through to Arcadia London*" and that "*this arrangement gave him some leverage to secure a favourable deal with Mitsui"*. Mr Fredriksen and Mr Trøim's written evidence was to the effect that, during the subsequent acquisition negotiations, Mr Bosworth told them that he would bring with him personally a number of valuable physical trading contracts to lift oil out of West Africa, which would be transferred to Arcadia London after the purchase.

189. However, the briefing document is unclear about the person or entity in whose name the contracts were held. As quoted above, it also includes the statements that "*Arcadia has very recently renewed its term contracts with the NNPC, for total of 160,000 bbls/day*", that "*we have secured under contract a further 85,000 bbls/day from indirect sources of Nigerian crude oil*" and that, in Equatorial Guinea *"[w]e have just concluded a term supply purchase of Zafiro crude oil with the Govt., via a fronting company*" (emphasis added in each case). The first reference is plainly to Arcadia, as opposed to Mr Bosworth personally, and *"we"* in the second and third statements also naturally refers to Arcadia itself, which is the entity who had for example entered into the Sao Tome Contract. It seems more likely that the emphasis in the earlier parts of the briefing document is on the contracts being held by Arcadia as opposed to Mitsui. Further, none of the other contemporary documents suggests that any contract was held in the name of Mr Bosworth or a nominee for him.

190. Mr Bosworth's written evidence was that:

> "I told Mr Trøim that one contract (singular) was held by an entity in Mauritius but I never said that it was owned or controlled by me as it never was. I have never held shares in Arcadia Mauritius or otherwise controlled it. As I have already explained (see above), Arcadia Mauritius was transferred to JP Decker from (I believe) Mark Lance with the full knowledge and approval of Mitsui. I never said that the contract (there was only one) would be transferred to Arcadia London (and it never was)."

That evidence is in my view entirely plausible. In the light of Mr Decker's position as an established oil trader and the arrangements made in relation to

Arcadia Mauritius (see §§ 15 and 140-147 above), it is inherently unlikely that Mr Bosworth retained any control over Arcadia Mauritius, or that he would have told Mr Trøim that he did. Arcadia Mauritius was fully under Mr Decker's control, with Arcadia having merely a generic volumetric entitlement to certain quantities of oil.

191. In cross-examination, Mr Bosworth explained that Mr Chrispin had prepared the briefing document after a couple of conversations with Mr Bosworth in a pub, and that Mr Bosworth had not written the passages about holding the term contracts in his own name. He said *"It wasn't true that I personally owned or controlled those contracts. What I was saying to him was that those contracts were not in Mitsui's name, they were in other people's name[s] and therefore if [Mr Fredriksen] wanted to buy the company [i.e. Arcadia], Mitsui could not squeeze him as a result of the contracts"*. One of the companies holding a contract with NNPC was Arcadia Mauritius, and, Mr Bosworth said, he would have hoped to be able to move it from Mitsui to Mr Fredriksen, and *"the same would have applied to their other term contract holders, who were refiners, that if they changed I would be able to get them"*. However, he could not be sure of this because *"Mr Decker at any point in time could turn to me and say no".*

192. Mr Trøim in the course of his oral evidence said he knew Arcadia Mauritius was not owned by Arcadia London; that he thought he was told that Mr Bosworth *"controlled directly or indirectly some of the major contract to Arcadia Mauritius"*, and that "*I think it was controlled by some people he knew and that is the way he described it*." There was also this exchange:

> "Q. … Mr Trøim, Mr Bosworth did not say that he owned or controlled Arcadia Mauritius, did he?
>
> A. He didn't say that he controlled that contract/contracts. We still don't know what kind of volume of contracts we are talking about, but he said that was part of the leverage to get the deal out from Mitsui. He said several times that he controlled subcontracts through that group. He said he didn't, him personally, but he controlled, which he probably did, through friends."

and:-

> "A. He said he controlled it, because that surprised me a bit, and he could use that as a leverage but I don't think he could say that was specifically him. It was some close friends, from what I remember."

That evidence is considerably more tentative and limited than the Claimants' longstanding assertion in their pleaded case, and in Mr Adams's affidavit in support of the freezing order, that Mr Bosworth told Mr Trøim that some of the principal trading contracts were held in the name of an entity in Mauritius *"owned or controlled by Mr Bosworth".*

193. Mr Trøim also said in evidence that he and Mr Fredriksen would not have entered into an agreement where Mr Bosworth had a 'side business' where he could make significant money on the side, and that buying a company meant buying the contracts and everything that was in it. However, that point would be relevant only if Arcadia Mauritius was (or was represented to be) a business in which Mr Bosworth had an interest and from which he could make money outside of Arcadia London's business. There is in fact no evidence that Arcadia Mauritius was in fact such a company, and I do not accept Mr Trøim's evidence that Mr Bosworth told him anything to that effect.

194. Mr Fredriksen's written evidence included the statement, early in his fourth witness statement, that:

> "… during negotiations, Mr Bosworth told me and Mr Trøim that certain contracts for West African trading were held outside the Arcadia Group by him through an entity in Mauritius, and these would be transferred to Arcadia London following the acquisition." (§ 6.4)

On the other hand, later on in the same witness statement Mr Fredriksen said:

> "As I have previously explained in my first witness statement, I have a recollection that, during the negotiations, Mr Trøim and I were told by Mr Bosworth that he (Mr Bosworth) was able to bring with him a number of valuable physical trading contracts to lift oil out of West Africa, which would be transferred to Arcadia London after the purchase. Given the passage of time, I cannot be more specific about when Mr Bosworth told me this or what precise words he used. I am however clear that this is what I was led to believe. As far as I recall, I wasn't told the name or further details about the entity at the time" (§ 42)

It is notable that the Claimants' pleaded case was that the alleged statement about Mr Bosworth's ownership or control of Arcadia Mauritius was made to Mr Trøim, not to both Mr Fredriksen and Mr Trøim. In his oral evidence, Mr Fredriksen said *"I never heard about Mauritius before later, afterwards"*. He was asked about § 6.4 of his witness statement:

> "Q. … Can I take it that that is not your evidence from what you recall at the time; is that right?
>
> A. Give me a second ... No, I did not. Mauritius came later. I heard Mauritius. But what happened was that Arcadia was whatever it was. Arcadia was Arcadia, so I didn't pay any attention to it, if you understand what I mean."

195. I return later to the meeting summary dating from much later, in March 2008, on which the Claimants also place reliance in this regard.

196. Based on the evidence as a whole, I find that (i) Arcadia Mauritius, following its transfer by Arcadia to Mr Decker, was controlled by Mr Decker; (ii) it was

not owned or controlled by Mr Bosworth at any time; (iii) Mr Bosworth did not tell either Mr Fredriksen or Mr Trøim that he owned or controlled Arcadia Mauritius, or that its contracts would be transferred to Arcadia London; and (iv) at most, Mr Bosworth told Mr Fredriksen and Mr Trøim that he hoped, given his relationship with Mr Decker, to be able to bring the benefit of the Arcadia Mauritius contract with him.

(6) Sleeving arrangements

197. At the same time, the fact that the briefing document referred to Arcadia obtaining some of its oil via a 'fronting company', and the fact that Mr Bosworth told Mr Fredriksen and Mr Trøim about Arcadia Mauritius (Mr Trøim confirmed in cross-examination that he was broadly aware of the existence of Arcadia Mauritius and that it held certain contracts), has significance in two respects. First, the fact that Arcadia Mauritius was disclosed at all does not fit easily with the Claimants' case that it formed part of a fraud by which the benefit of valuable contracts was secretly diverted away from Arcadia London. Secondly, it is to be considered alongside Mr Bosworth's evidence that the concepts of front and sleeve companies were discussed with Mr Fredriksen and Mr Trøim before they acquired Arcadia. Mr Bosworth said that, although he could not remember the detail, the principle of sleeving would have been discussed with them and they were well aware of it. Though he could not remember whether he discussed the name "*Tristar*" as being the sleeve (or seller of record to Arcadia), Tristar was identified as a key customer in the documents made available to Mr Fredriksen and Mr Trøim, including the Arcadia budget forming part of the Principal Search briefing document. Tristar Petroleum was indeed listed as a major spot seller of crude to Arcadia in that document.

198. Mr Fredriksen in his witness statement denied that he had been told about the contract holding arrangements between Arcadia Mauritius, Tristar and Arcadia London; but in cross-examination he veered between maintaining that he had never heard of Tristar and accepting that he could not remember. He accepted in principle that it could be quite normal to have an intermediary between a seller and buyer of a cargo:

> "Q. Is it right to say that the concept of sleeving isn't particularly difficult; it's not a difficult concept, is it?
>
> A. No, but I have never used the expression in my line of business.
>
> Q. It is about the terminology, the language?
>
> A. Yes, that is what I'm saying.
>
> Q. Because if you have an entity that sits between a buyer and a seller in the middle, Mr Bosworth and Mr Hurley might call it a sleeve, what would you call it?

> A. For me it looks like a back-to-back operation. They are paying off somebody and they are back-to-back, they sell the cargo and make some margin. That is the way it looks to me.
>
> Q. There is an intermediary there in the middle, isn't there, an entity in the middle?
>
> A. It could be, yes.
>
> Q. And there might be all sorts of reasons why you have that entity in the middle?
>
> A. Yes.
>
> Q. So there is nothing particularly unusual about having an intermediary between the buyer and the seller?
>
> A. That's -- it can be quite normal."

199. Mr Trøim in his witness statement said he was not familiar with the concept of a 'sleeve' or the use of 'contract holding' entities in oil trading. In his oral evidence he said he had no idea of the existing arrangement between Arcadia Mauritius, Tristar and Arcadia London, and denied being aware that Mitsui knew about them. When it was pointed out that Mr Adams, in his affidavit, said that Mr Trøim *"does not now recall whether he was told that Mitsui was aware of this arrangement"*, Mr Trøim said *"I say now I don't know if we were aware of the arrangement"*. He accepted that the concept of sleeving was later referred to in an email Mr Adams sent him in 2011 and which Mr Trøim printed out; and in Arcadia's restructuring plan in August 2013 (though he was unable to confirm whether or not he saw it at the time). In addition, in the context of a question about the Deloitte management letter (see below), Mr Trøim gave this evidence:

> "Q. … Now, you had been told about Arcadia's use of service providers in the financial statements, hadn't you?
>
> A. I think, as I said yesterday, we were told that contracts was hold outside the contracts, that is later defined as sleeve contracts. Sleeve contracts I first noticed in 15/16 but it is the same as the contract that is held in Mauritius, it is just another name for it. But it is the same thing. When it comes to service provider, I said yesterday that we are used to paying commission for getting ships fixed and we are paying that regularly to institutions and that is a part of the business."

200. In the light of the evidence as a whole, I consider it more likely than not that Mr Bosworth did explain the concept of sleeving, in the context of West African oil trading, to Mr Fredriksen and Mr Trøim.

(7) Summer 2005 discussions of bonuses

201. During the acquisition negotiations, Mr Fredriksen/Mr Trøim agreed with Mr Bosworth and Mr Hurley that the Arcadia traders/staff would receive 30% of the net trading profits (as they had under Mitsui), with Farahead to receive 70%. The share was later increased from 30% to 35%.

202. Mr Adams said in his affidavit:

> "The 30% bonus entitlement initially agreed to by Farahead was understood at the time to be in excess of the bonus percentages which traders within other similar energy trading companies could expect to receive. This was agreed to by Farahead in recognition of the need to retain and incentivise Mr Bosworth and Mr Hurley and also reflected the fact that no 'signing on' bonuses or other lump sums were being paid at the point of purchase."

The source of information for that evidence was said to be Mr Fredriksen. However, Mr Fredriksen accepted in cross-examination that the 30% share was the same as applied during Mitsui's ownership of Arcadia.

203. It is Mr Bosworth's case that, since the profit share remained unchanged when Farahead bought Arcadia, more needed to be done in order to incentivise and retain Mr Bosworth, particularly bearing in mind that (as Mr Trøim put it in his witness statement), the "*real assets of the business*" were the traders and "*we were, in essence, buying Mr Bosworth, Mr Hurley and their traders*". It is common ground that there were discussions about providing a U$20 million loan to Mr Bosworth to purchase a house in London. Early on in the acquisition discussions, on 19 May 2005, Mr Fredriksen arranged for a company to be incorporated in Liberia, Fulham Properties (Belgravia) Limited. In his witness statement, Mr Fredriksen said:

> "During the negotiations for the acquisition of the Arcadia Group, I had agreed that I would personally loan Mr Bosworth the sum of US$20 million to buy a house in London – this loan was made entirely outside of the Arcadia Group, essentially a personal matter between me and Mr Bosworth."

204. According to Mr Adams's affidavit, a Cypriot entity, also called Fulham Properties (Belgravia) Limited, in fact entered into the loan agreement. On 11 August 2005, a loan facility letter was signed between Fulham Properties (Belgravia) Limited and Mr Bosworth (and his wife). On 12 August 2005, a charge was registered over the house, referring to Cyprus as being the lender's country of incorporation. Mr Fredriksen said in cross-examination that he *"absolutely"* expected the loan to be repaid: it was not a gift.

205. According to Mr Bosworth, Farahead agreed to pay him a US$20 million bonus, payable over the following years, to incentivise him to stay at Arcadia. Mr Bosworth says the figure was chosen to correspond to the amount of the loan, which Farahead could convert into bonus (as, he says, occurred in 2011).

206. I consider the merits of Mr Bosworth's retention bonus claim in section (M)(2) below.

(8) Linklaters due diligence and Pang Ling

207. Farahead instructed Linklaters to undertake due diligence on Arcadia. Mr Trøim said in his oral evidence, "*we were very afraid of buying a company…that there was no legacy issues in the company, which occur mostly the day after*". Linklaters produced a memo dated 13 July 2005, addressed to Mr Trøim and Mr Erling Lind. Mr Lind was a Norwegian lawyer with whom Mr Trøim had worked since 1996 and whom he trusted.

208. The Linklaters memo included the following sections relevant to the Pang Ling episode:

> "3.6 **FSA private warning letter**
>
> We have seen two letters from the FSA dated 1 November 2002, one addressed as a private warning to Mr Peter Bosworth, the other addressed to Arcadia. Both letters concern Mr Bosworth's failure to inform the auditors of material information and his management of a specific trading contract. The FSA decided not to make a formal determination or enforcement action. We note that the FSA could take this matter into account in future applications for approval of Mr Bosworth or enforcement actions against Arcadia generally, although we are not aware of any such action having occurred."
>
> "5.1 **Tax query regarding contracts with Pang Ling**
>
> We have been informed that Mitsui will not be providing any warranties on a potential tax dispute that may arise as a result of agreements with a Nigerian company, Pang Ling Nigeria Limited (*"Pang Ling"*). We have been provided with various correspondence between the Inland Revenue and Deloitte & Touche, Arcadia's auditors.
>
> Pang Ling was retained as a consultant under various agreements dated between January 2000 and February 2002. Pang Ling's role was to provide various oil brokerage services in Nigeria to Arcadia. Originally Pang Ling was remunerated on a discretionary basis. Arcadia nominated on which cargo or cargoes Pang Ling's right to remuneration would arise. For such cargoes Pang Ling was entitled to a *"share of the profit"*. We understand that this was arranged on an ad-hoc basis between Peter Bosworth, on behalf of Arcadia, and Pang Ling.
>
> However, an agreement dated 18 February 2002 provides that Pang Ling is entitled to a fee of *"US$0.10 for each and every net US barrel lifted during the term of the agreement pursuant to any contract for the sale of Nigerian crude oil entered into by*

> *Mitsui or Arcadia and the Nigerian National Petroleum Corporation"*. Pang Ling was also entitled to a discretionary bonus at the option of Arcadia, such bonus never to exceed US$3,000,000 in any one year.
>
> In each case Pang Ling was to invoice Arcadia for any amounts due to it under the agreements.
>
> We have been informed by Arcadia that the [sic] it has a potential exposure to taxation liability in relation to these payments of US$19million, but that this is theoretical as there is no basis for any such liability and there is no dispute with the Inland Revenue.
>
> It is not readily apparent what any dispute with the Inland Revenue would concern. We have been provided with correspondence between the Inland Revenue and Deloitte & Touche. In this correspondence the Inland Revenue has only asked for further information from Arcadia regarding its arrangements with Pang Ling. The Inland Revenue has thus far requested evidence of invoices, copies of correspondence between Pang Ling and Arcadia and copies of the agreements between the two companies. The majority of the requests relate to the financial year ending December 2000.
>
> We are unable to assess whether the Company is exposed to any taxation liability and Arcadia have requested that we do not discuss the issue with Deloitte & Touche at this stage."

209. It is common ground that the acquisition discussions between Messrs Fredriksen, Trøim, Bosworth and Hurley covered the FSA investigation of the Arcadia Group in relation to Pang Ling, though the Claimants say Farahead understood the issue to have been resolved by that time.

(9) Discussions and events in autumn 2005

210. The discussions with Farahead continued into autumn 2005.

211. On 15 September 2005, Mr Hurley emailed Mr Trøim financial information about Arcadia, attaching a draft budget for *"Arcadia existing and proposed offices*", including the US$1 million overheads budget for a Beirut office. Mr Trøim sent the email to his secretary Ms Turnbull with the instruction *"pp"*, meaning *"please print"*. In cross-examination, Mr Trøim said that he read *"kilos of paper every week"* and *"read through reports and everything"*, though given the extent of his other responsibilities he did not think he would have bothered about *"a 1 million-dollar management fee for an office in Beirut"*. Mr Fredriksen said he could not recall whether he read the print-out of the draft budget, but accepted that he and Mr Trøim were considering Arcadia's existing and proposed offices at this time. On balance I consider it more likely than not that Mr Fredriksen and Mr Trøim did read the draft budget.

212. As part of the acquisition documentation, Mitsui as seller provided a disclosure letter dated 4 October 2005 addressed to the Farahead directors. The documents disclosed to Farahead included trading-related documents such as deal sheets, trading contracts and correspondence, Arcadia's contracts with Pang Ling, the Pang Ling company brochure, Pang Ling invoices to Arcadia and the FSA warning letter.

213. On 13 October 2005, Farahead and Mitsui entered into a sale and purchase agreement ("***the SPA***"), with completion to follow upon fulfilment of regulatory conditions.

214. Shortly afterwards, Deloitte issued their management letter for the Arcadia audit for the year ending 31 March 2005. The management letter was dated 9 November 2005 and was provided to Farahead and to Mr Lind. The first page of the letter explained that:

> "The primary purpose of this letter is to draw your attention to the areas which gave rise to concerns during the course of our audit. We have also, as a separate section within the letter, carried forward and updated those points raised in our previous audit letters which we still consider to be pertinent. We consider those areas prioritised as *"high"* within this letter to be of major importance to ensure compliance with the statutory and regulatory obligations of the Company and its management, and for managing the risks faced by the Company. Those areas prioritised as *"medium"* and *"low"* do not majorly impact the ability of the company to comply with its statutory and regulatory obligations but still require attention from management in order to improve the company's internal control environment. You will be aware that during prior years' audits we have discussed with management significant specific matters of control and operations which have given cause for us to have concerns relating to the overall corporate governance structure within the Company and to its oversight and control from within the overall Mitsui Group. During the current year we have seen that management have made significant improvements in the areas of corporate governance, compliance and information technology and have considered all and acted on the majority of comments raised in prior years' management letters."

215. The attachment to the Deloitte management letter was divided into sections. Section 1, on *"Brokerage transactions"*, noted that during the year ended 31 March 2005 Arcadia had paid US$5.9 million in physical brokerage to 12 different brokers. "Signed agreements" setting out the brokerage services to be provided and the brokerage per barrel were in place for only six of these brokers. All of these agreements had been signed by the traders rather than by the directors. US$1.6 million of physical brokerage in total was paid to the other six brokers during the year without any agreements in place. In addition, due diligence procedures had been carried out on only 3 of the 12 brokers. Deloitte's recommendation was:

> "Given the fact that many of these brokers are based in countries with poor regulatory records and that substantial payments are made to the brokers by Arcadia, it is essential that signed agreements are in place with all brokers which fully detail the services to be provided and the specific remuneration arrangements. These need to be put into place with immediate effect. Traders should also maintain a regular log of services provided by each broker so there is formal documentation of the exact nature of these services. It is also vital that all such agreements entered into with brokers are properly authorised by the Arcadia Internal Committee (*"AIC"*) and that formal due diligence procedures are carried out on all new brokers used, and existing brokers on a five year rotational basis, going forwards."

216. The Deloitte management letter also recorded the management's response on this topic:

> "Please refer to the AIC Meeting minutes on 19 May 2005 which were forwarded to you. We believe that all brokerage payments represent valid commercial transactions and the level of brokerage is in the normal practice in the industry. Further, a number of the brokerage payments are with FSA registered entities. As the above minutes mentioned, the AIC decided that in order to avoid confusion in the future, all brokerage contracts being revolved, together with any new brokerage contracts, shall be formally ratified by the AIC."

217. Section 10 of the Deloitte letter was headed *"Due diligence reports on service providers"*. It stated:

> "There has been a fairly significant change in Arcadia's business in that they are no longer sourcing oil directly from national oil companies such as NNPC and therefore are no longer using their service provider network in sourcing this oil. As a result Arcadia have terminated their contracts with service providers and now buy oil from the secondary market. Hence the issue regarding regular due diligence reports on service providers being commissioned is no longer relevant."

That passage made clear that, if and when Arcadia were to buy oil direct from NOCs such as NNPC, it would, or would be likely to, need to use service providers again.

218. Deloitte recommended that:

> "Should Arcadia choose to employ service providers in the future then management's proposals for the AIC to appoint an independent research firm to carry out a programme of ongoing due diligence, in such a way that all service providers were covered at least once every five years and that this due diligence

> work would be put out to tender on the basis of criteria set by the AIC, would again become relevant."

The management response was:

> "As you point out, Arcadia is no longer sourcing crude oil directly from national oil companies such as NNPC and therefore is no longer using its service provider network. It is certain that should Arcadia employ service providers in the future then all relevant details will be included in the relevant agreements and discussed by the AIC for its approval"

219. The Deloitte letter also noted that Arcadia's head trader (Mr Bosworth) had a non-Arcadia-related business arrangement with Arcadia's principal Nigerian broker, namely joint directorship of a London-based restaurant. That was a reference to Mr Asibelua.

220. Mr Fredriksen in his witness statement said:

> "I understand from Grosvenor Law that Mr Bosworth and Mr Hurley also allege that I was aware at this time and in March 2006 that the use of so-called *"service providers"* was *"necessary to acquire West African oil"*, and that *"it was not possible for Arcadia London to conduct West African oil trading ... without the use of and/or payment of commissions and/or fees to service providers"*. These allegations are also untrue. Many of my businesses are listed on the New York stock exchange. I would risk serious penalty, including potential criminal sanction and imprisonment if my companies participated in bribery. I would not have entertained the prospect of this, particularly in relation to a company which represented such a small and frankly insignificant part of my business interests" (§ 48)

221. He was asked about this in cross-examination by reference to Arcadia's financial statements and the Deloitte management letter, in particular his statement that he did not know that Arcadia could not conduct West African oil trading without using and paying service providers:

> "Q. You had been told about the use of service providers in the financial statements; yes?
>
> A. Yes, I see it but I hadn't been told. Okay."
>
> …
>
> *[in relation to the Deloitte management letter]*
>
> "Q. So what Farahead is being told at the time is that Arcadia has a network of service providers which is no longer necessary because Arcadia Group is no longer sourcing oil directly from the national oil companies; yes?

A. Yes.

…

A. I haven't read this. As I tried to say -- you have to listen for two seconds -- I have seven or eight big companies, huge companies, on the New York Stock Exchange, believe it or not, and we have 40 or 50,000 employees. How can I -- we have people to check this for us.

Q. The reason I ask the question, Mr Fredriksen --

A. And this is a small detail. The question is was it stolen or not stolen. This is what it is all about.

Q. The reason I ask the question, Mr Fredriksen, is you are the Farahead representative at the time.

A. I'm not the Farahead representative. I have been referred to, yes, but I'm not. It was done by Trøim more than me and our lawyers.

…

Q. Right. If we go then back to paragraph 48 then of your statement … just so I understand exactly what the evidence is, you accept that Farahead was told about the service providers, not you. Your evidence is that you were not told but do you accept that Farahead was told?

A. Yes, I can -- service provider.

Q. And do you also accept that Farahead was told about a service provider network to acquire the crude directly from the national oil company?

A. Yes.

Q. Is it right to say that of course if Arcadia was to source the crude directly, there would be a risk?

A. Risk?

Q. A risk to Arcadia. If Arcadia uses its service provider network, there are risks, aren't there?

A. There is always risk in business. What can I reply to these questions?

Q. Well, you wanted to minimise those risks?

A. Of course, obviously."

222. Mr Trøim in his witness statement said he understood from his experience in the shipping industry that commission payments to regulated brokerages were common practice, but that he was not aware of commission payments being made to *"so-called service providers"*. When asked about the Deloitte management letter, Mr Trøim said that he and Mr Fredriksen had a team of auditors and, in particular, Mr Lind to review the documents and make sure they were happy with the transaction. He confirmed that Mr Lind was representing Farahead in the transaction, and that he trusted Mr Lind, who was *"a very experienced lawyer and he has good judgment and he makes business decisions as well"*. He assumed that Mr Lind would have looked at the Deloitte management letter. Asked whether Deloitte were telling Farahead about payments to service providers in 2005, Mr Trøim said *"It was in the document. They didn't tell me. But it was in the document, so if I read the document properly, I would be able to pick it up*". He was willing to accept that Deloitte *"told our lawyer"* about service provider payments, and was willing to take responsibility for what the lawyers ultimately did, adding that *"you trust the lawyer and trust that he gives you the good advice".*

223. In addition, Mr Trøim accepted that (as the documents indicate) he recalled the issues regarding Pang Ling some years later when in 2013 he asked Mr Lind to investigate Equinox and wondered whether the matter could be linked to Pang Ling. He also gave this evidence:

> "Q. You say in paragraph 51:
>
> "I certainly would not have accepted potentially unlawful payments being made, particularly those giving rise to compliance risks."
>
> Do you see that in your statement?
>
> A. Yes.
>
> Q. Is it right that your concern at the time was about Arcadia itself making payments to service providers; correct?
>
> A. I think that was from the beginning and as I said yesterday, we are a big group. I think to kind of come in under compliance problems ... but an assurance of that was of course also the report provided by the headhunter who said that this group was kind of super compliant and everything was fixed in order, which later on found was not the case."

224. This evidence taken as a whole indicates, first of all, that there was no secret about the fact that Arcadia had made payments to service providers, significant enough to merit mention as a matter of concern in the Deloitte management letter. Secondly, it was clear, and no secret, that Arcadia would need to resume making payments to service providers should it again contract to buy oil direct from a NOC in West Africa. Thirdly, the issue would have been sufficiently prominent in the context of the acquisition of Arcadia to have come to the attention of at least Mr Trøim, and probably also Mr Fredriksen; and that is to a

degree borne out by Pang Ling coming to Mr Trøim's mind some years later. Whether or not Mr Fredriksen and Mr Trøim recollect their state of mind in 2005/6 now, some 19 years later, I consider it more likely than not that they were aware, by the time the Deloitte letter had been reviewed and considered, of the service provider issue, including the potential resumption of payments to service providers (and consequent risks) in the event of resumption of direct NOC business.

(10) Business with Attock Mauritius

225. In July 2005, still well before any of the events said to form part of the alleged conspiracy in the present case, Mr Decker bought Attock Mauritius. Its owner, Mr Dossa, wished to sell Attock Mauritius, and offered the company to Arcadia. Mitsui did not want to add new entities to its group and so Arcadia declined. Mr Decker bid for the company, in competition with Glencore and Vitol. However, to strengthen its business relationship with Mr Decker (see section (G)(5) above), Arcadia provided a US$13 million loan to Mr Decker (which was subsequently repaid) to assist in his purchase of Attock Mauritius. In return, Attock Mauritius supplied Arcadia with Nigerian crude sourced from NNPC. Asked about the loan in cross-examination, Mr Bosworth said this:

> "So, Attock was an offshoot, Attock Trading was an offshoot of a Pakistani refinery company. It was run by a gentleman called Imtiaz Dossa. I had had a long term relationship with him when I was working for SUN. He was one of the largest lifters of crude oil in Nigeria and SUN Refining and Marketing was the largest refiner of Nigerian crude oil at the time. So we had a good relationship with him. [The company] was owned by a gentleman called Ghaith Pharaon, who was somewhat of a colourful character.
>
> …
>
> Ghaith Pharaon is my best recollection. He ran a bank or owned a bank called BCCI which went belly up. All of the financing for Attock at the time was done by BCCI. Mr Dossa took over the entity from Ghaith Pharaon is my recollection. We, as SUN at the time, financed him on one of the cargoes in order to keep the relationship with him going. He then continued. At a certain point in time, Mr Imtiaz Dossa put the company up for sale. He approached us, he approached Vitol, he approached Glencore. I duly approached Mitsui who rejected it and said, *"We don't want another entity to be purchased"*, and Mr Decker took over the entity. And there was a loan from Mitsui/Arcadia to Mr Decker to buy what was in the bank, I understand. I don't know if I will get the terminology right, but one is not allowed to do financial assistance, or something like that. So, yes, we lent Mr Decker the money. He bought the name. It was much to the chagrin or discomfort of Vitol who were very keen to do it and he bought the name and paid Mitsui back.

…

> MR HAYDON: Now, again, I suggest to you that Attock Mauritius, having been procured in this way, you had a sufficient interest in Attock Mauritius to be able to insist that Mr Decker transfer it to Mr Kelbrick and Mr Mounzer in 2009?
>
> A. Not correct."

I accept that evidence.

226. An email dated 17 October 2005 shows Mr Hurley and Ms Takahashi waiting for counterparty approval from Mitsui in relation to Attock Mauritius. That approval was granted by Mitsui by 31 October 2005, when Attock Mauritius appeared on the approved counterparty list. It is notable that Attock Mauritius's status as an approved counterparty for the Arcadia Group happened at a time when Mr Kelbrick was not employed by Arcadia London, and before he acquired Attock Mauritius. The counterparty approval decision was taken by Mitsui, and Mr Hurley said, it involved considering Attock Mauritius's creditworthiness and track record, along with KYC checks.

227. In December 2005 (again prior to the 144 Transactions), Arcadia London started buying Nigerian oil cargoes from Attock Mauritius and selling them on. Later, in 2007, the Arcadia Group and Attock Mauritius did petroleum products business together, in which Attock Mauritius bought fuel oil from the Arcadia Group for around US$8 million (another transaction that does not feature in the 144 allegedly fraudulent transactions). Attock Mauritius continued to feature on the Arcadia Group's approved and assessed counterparty list during the period to which this claim relates.

(11) The Zafiro Contract and Sonergy

228. In December 2005 Arcadia London entered into a term contract with GEPetrol to lift Zafiro crude oil. The contract was for cargoes of 1,000,000 barrels (+/- 5%) of Zafiro blend crude oil, scheduled to be lifted whenever there was a cargo nomination according to the monthly loading program at Serpentina Terminal in line with the terms and conditions of the contract (§ 1). Clause 7, dealing with "*Price*", stated:

> "The price in US Dollars (U.S. $) FOB FPSO Serpentina terminal offshore Equatorial Guinea in barrels of the bill of lading will be determined in the following way:
>
> P = Dated Brent plus or minus a differential X in USD per net barrel X is a differential to be negotiated for each cargo strictly on the basis of the market conditions between the Seller and the Buyer, by mutual agreement latest 28 days prior to the first day of the preliminary loading dates range of two days. Dated Brent corresponds to the arithmetic average of five (5) consecutive mean quotations of the Dated Brent published by PLATT'S Crude Oil Marketwise during the month of loading and shall be

> advised by the Buyer to the Seller latest the second working day of the month following the month of loading."

229. I referred earlier to the role and influence of Mr Driot and Stag in relation to GEPetrol. Prior to the Zafiro Contract, Arcadia's relationship with GEPetrol was limited to some cargo purchases from Stag. Mr Bosworth's evidence was that the Zafiro Contract flowed entirely from, and depended on, having a relationship with Mr Driot/Stag. In his witness statement, he gave this evidence:

> "130. It was through JP Driot that I travelled to Equatorial Guinea. By this stage, Arcadia was already purchasing spot cargoes from JP Driot's company, Stag. However, I wanted to expand Arcadia's business with Equatorial Guinea. I do not now recall whether it was me who brought up the idea of Arcadia entering into a term contract directly with the Equatorial Guinean Government or whether this was something JP Driot proposed to me. I would imagine it was me, but as I say I am not sure about this. Whoever started the discussion, at some point JP Driot suggested that I should travel to Equatorial Guinea. He made all of the necessary arrangements.
>
> 131. During my trip to Equatorial Guinea I was introduced by Mr Driot to representatives from GEPetrol (Equatorial Guinea's state oil company) and some of the traditional rulers who Mr Driot told me were associated with a company called Sonergy Limited. As I explain below, Sonergy was the sponsor in the term contract which Arcadia London ultimately secured with GEPetrol. I do not recall precisely the name of the individuals that I met with. Mr Driot had built these relationships from his time working in Equatorial Guinea. I understood at this time that Mr Driot had a close relationship with the owners of Sonergy and that he provided them with assistance and services in relation to crude oil trading and other businesses. I recall that Sonergy were involved in other assets in Equatorial Guinea aside from crude oil contracts.
>
> 132. Sonergy could not trade on its own because it did not have the expertise, the contacts or the resources to do so. It needed an oil trading company to sell its crude oil into the international market, similarly to how the Equatorial Guinean Government used JP Driot's company, Stag. Sonergy was not a trading company.
>
> 133. Arcadia London entered into the term contract with GEPetrol to lift Zafiro grade crude oil in December 2005. ...
>
> 134. It was because of JP Driot that we were able to secure the Zafiro Contract. He sourced the opportunity and introduced us to Sonergy. In return for this, we agreed to pay him a profit share. I do not remember exactly what the share was. I believe from memory that he used his company, Bergamot, to receive them.

I believe that Bergamot signed a service provider contract with Arcadia London at about this time but I have not seen that document. All the payments to Bergamot were made by Arcadia London.

135. As I note above, the sponsor was Sonergy. Arcadia paid Sonergy a profit share in return for securing and maintaining the Zafiro Contract for Arcadia. I believe from memory that it was about the same as the profit share later paid by Arcadia Lebanon, i.e. about 60 or 65% of the gross profit. My belief and understanding at the time was that Sonergy acted as a sponsor for multiple trading companies, including Stag, but I didn't have any concrete information showing this.

136. For all intents and purposes, while the Zafiro Contract was in the name of Arcadia London, it was in substance Sonergy's contract. It was Sonergy who held great power with GEPetrol. They decided which oil trading company would get the Zafiro Contract and whether they would get to keep it. For example, if Sonergy decided that they did not like Arcadia and they wanted to go with a different company, they had the ability to annul the contract with around three months' notice.

137. JP Driot's main role in the trading under the Zafiro Contract was negotiating the price paid by Arcadia London (and later, Arcadia Lebanon) to GEPetrol. The price Arcadia London was to pay GEPetrol for cargoes lifted under the Zafiro Contract was not fixed. Rather, JP Driot negotiated with GEPetrol the price of each cargo. He tried to agree with GEPetrol purchase prices which were lower than Arcadia London's sale prices. The price paid to GEPetrol was based on the average of the Dated Brent pricing measure over a five day period, normally falling within the month of loading. To the best of my understanding at the time, this was a cargo by cargo negotiation between Mr Driot and GEPetrol, and took place after the cargoes had been lifted, not before. This was how the Zafiro Contract worked throughout its entire existence, including after it moved to Arcadia Lebanon. Mr Driot frequently negotiated a price that was lower than the price Arcadia London sold the cargoes for. This produced a profit which we shared with Mr Driot's companies and Sonergy. (When I talk about 'profit share' with sponsors and service providers, I am talking about this profit, the simple profit resulting from the difference between the purchase prices negotiated by Mr Driot / Sonergy and the sale prices achieved by Arcadia London. i.e. the gross trading profit on the physical cargo. Arcadia did not share the profits that we made in other ways such as from contracts for difference trading.)

138. To the best of my recollection and knowledge, the Zafiro Contract became operational at the very end of 2005. From the last couple of days of 2005 through into 2006, Arcadia lifted

> Zafiro Contract cargoes. I have been shown an email from Ann Bickerstaffe (Arcadia's West Africa operations manager) sent to me and a number of other Arcadia traders / employees (as well as Mr Kelbrick) dated 14 December 2005. I am reminded by this document that Arcadia London lifted its first cargo pursuant to the Zafiro Contract in or around 30-31 December 2005. I have also been show a further email from which I can see that the cargo was carried on a vessel called *"MT Front Energy"*. The MT Front Energy was a ship owned by Mr Fredriksen's shipping company, Frontline."

Mr Bosworth similarly said that *"it was Sonergy and Mr Driot who held the real power in Equatorial Guinea. The commercial reality was that this was Sonergy's contract, and the only reason they used Arcadia was of their inability to trade it themselves"*.

230. Mr Bosworth's written evidence about negotiation of the price for cargoes under the Zafiro Contract is consistent with the terms of the contract quoted above, clause 7 of which provides for the price differential to be negotiated on a cargo by cargo basis.

231. In his oral evidence, Mr Bosworth confirmed that Sonergy's blessing was needed for Arcadia to obtain the Zafiro Contract, *"and without them, we would not have got the contract and if they decided to take that contract somewhere else, which they did later on, to Mercuria, we wouldn't have been able to lift the oil"*. He said Sonergy provided the contract, and that *"[w]e are to all intents and purposes the junior partner in this relationship"*. He said the meeting with the traditional rulers was handled by Mr Driot, and *"laid down what in effect were their terms"*.

232. Mr Kelbrick's evidence was to similar effect:

> "Q. The reason why any oil company in West Africa needs to pay Mr Driot and his companies is because he controlled access to GEPetrol, didn't he?
>
> A. Yes.
>
> Q. So if Arcadia wanted oil from GEPetrol, it was necessary to get the oil to pay Mr Driot and his companies?
>
> A. True.
>
> Q. And those payments were to Arcadia's commercial benefit because Arcadia secured the oil; correct?
>
> A. Yes, they were to Arcadia's benefit in total, yes.
>
> Q. Because if Mr Driot wanted to, he could simply move any GEPetrol contract to a competitor?
>
> A. And he threatened that almost constantly."

233. Mr Bosworth also confirmed in his oral evidence Mr Driot's role in negotiating cargo prices. He was asked about the part of clause 7 of the Zafiro Contract allowing the buyer to advise the seller, by the second working day of the month after loading, which five consecutive mean quotations of published Dated Brent would apply (see § 354 below). Mr Bosworth said it was *"a negotiation"*, and:

> "my recollection of this is Mr Driot would negotiate on our behalf as Arcadia, both when this contract was in Arcadia London and when it was moved to Arcadia Lebanon. And he would negotiate with GEPetrol a five-day pricing period"

Further:-

> "A. To the best of my recollection on this, this was a negotiation.
>
> Q. But the contract allows you to pick a five-day period?
>
> A. It does. In Africa, certainly at this time, a contract may say what it did there but in my experience of watching this when Mr Driot was doing this, it was a negotiation.
>
> Q. So there would be some records of this negotiation, wouldn't there? Some correspondence?
>
> A. No. This was a time when one used facsimiles, so probably not.
>
> Q. No, we have not seen any evidence of any negotiation of price?
>
> A. I wouldn't expect there to be."

Mr Bosworth also explained that it was possible that Mr Driot's son, Gregory, or Mr Kelbrick sometimes acted on Mr Driot's behalf in this regard, but that from his (Mr Bosworth's) perspective, it was always Mr Driot who handled the negotiation on Arcadia's behalf. Mr Kelbrick similarly said in his oral evidence that, despite the word *"advise"* in the contract, in practice it was always a matter of negotiation. That was, he said, why an analysis showed that there were some cargoes where Arcadia Lebanon could (in theory) have negotiated a lower or more favourable purchase price that it in fact paid. I accept their evidence on this point.

234. The Claimants at trial sought to put an unpleaded case that Sonergy was in fact owned not by traditional rulers but by a member of the ruling family of Equatorial Guinea; and that Obexys and Rodexkia were owned by Mr Oburu of GEPetrol. The Claimants then alleged in their written closing that:

> "Not only was PB prepared to expose the Arcadia Group and Farahead to high risks of reputational and compliance issues, contrary to Farahead's instructions. In the case of the Zafiro Contract, he knew (or turned a blind eye) to the fact that bribery was involved, as Sonergy was connected to the family of the

> President of Equatorial Guinea and Obexys/Rodexkia were companies owned by Mr Oburu who was an official at GE Petrol who dealt with pricing …"

235. That allegation was based in part on a due diligence report obtained by Mr Bosworth in relation to Sonergy in 2019. The report said that Sonergy was formed in 2002 to acquire an interest in the Luba Oil Terminal (or "*Loteg*"), and that it was part of the Abayac group, a *"regional enterprise"* set up by Mr Driot and the Lebanese businessman, Mr Hassan Hachem. The Tacoma oil group originally had a majority shareholding in Loteg, with GEPetrol holding 19% and Sonergy 1%. However, the report said, Sonergy rapidly bought out GEPetrol and went on to build a terminal next door. Tacoma closed in 2008 and its supply contracts were passed on to Mercuria, a Swiss-based trading house. However, Mercuria later lost those contracts as Sonergy's management placed them with Tradex, which may have had links to the ruling family of Equatorial Guinea. The report goes on to say:

> "[Sonergy] is currently controlled by Justo Obiang, one of the sons of President Teodoro Ngema Mbaso Obiang. He was 16 at the time Sonergy was formed and only became involved at the time of the acquisition of the shares from Tacoma. The takeover of the Tacoma shares is understood to have been the start of increasing influence over the company by a branch of the President's family led by his wife, Constancia Mangue Nsue Okomo, and this takeover involved the buy-out of a local traditional ruler who set-up the company. But it is known that the family only fully assumed control of Sonergy in 2015 when Justo severed the relationship with Mercuria."

236. The report thus indicated that it was only in 2015, some two years after the last of the transactions to which the present case relates (and long after the formation of the Zafiro Contract), that Sonergy became fully controlled by the ruling family; and that the takeover of the Tacoma shares involved the buy-out of a local traditional ruler who set up the company: consistent with Mr Bosworth's evidence about having met traditional rulers with Mr Driot. In oral openings, counsel for Mr Bosworth and Mr Hurley made brief reference to the report. The Claimants cross-examined Mr Bosworth on the basis that the report indicated that the ruling family began to exert control from 2008, when it said Tacoma closed, to which Mr Bosworth replied *"It is possible, I certainly didn't know at the time"* and *"The people I met in their presentation to me that they were traditional rulers which seems to be supported here"*. Later in the cross-examination of Mr Bosworth, the following exchanges occurred:

> "Q. It is inconceivable that you did not know who was behind Sonergy either. You did know who was behind Sonergy?
>
> A. I had no idea who was behind Sonergy. Firstly, when I met with Sonergy, with Mr Driot, they presented themselves, the gentlemen, as traditional rulers. And if, later on, it became apparent to the world that Sonergy was associated with the President, I didn't know at the time at all. No, I didn't.

> Q. You must have known, Mr Bosworth, you would have asked and that is what you would have been finding out when you went there?
>
> A. No.
>
> Q. And in the absence of any other credible explanation as to why this payment was made to Sonergy, it should be regarded as a bribe?
>
> A. No.
>
> Q. And you knew that payment had no legitimate purpose, didn't you?
>
> A. Absolutely not.
>
> Q. And nor did the payments to Mr Driot's companies since he is being paid for giving access to Oburu and Sonergy?
>
> A. No, Mr Driot brought us the opportunity. It was not access. He brought us the opportunity and we paid him commensurably with that."

237. As I have indicated, there was no such pleaded allegation. The Claimants did not plead that Sonergy was under the ownership of the ruling family of Equatorial Guinea, nor that Mr Bosworth knew any such fact, nor that any payments to Sonergy – or, for that matter, any other service provider – was a bribe. The Claimants' approach to this matter was in my view unacceptable. Nor, in any event, did the due diligence report provide any basis for concluding that the ruling family acquired control over Sonergy at any particular time between 2008 and 2015, still less that Mr Bosworth knew any such thing. Mr Bosworth's evidence on this point was entirely credible and, in my view, honestly given. I accept his evidence.

238. Similar considerations apply to the Claimants' unpleaded allegations regarding Obexys and Rodexkia. The Claimants referred to Mr Bosworth/Mr Hurley's statement of case indicating that Rodexkia was *"currently"* owned by Mr Oburu and/or members of his family or entourage; evidence from Mr Scheepers that the VTN/Rodexkia agreement had been given to him by Mr Oburu; and to email communications between Ms Azzariti and Mr Oburu/Obexys/Rodexkia apparently connecting Mr Oburu with the two companies. However, Mr Bosworth's evidence in cross-examination was he did not at the time know of a connection between Mr Oburu and Obexys/Rodexkia, having learned of it only in the last couple of years from a journalist who had spent some months investigating a possible connection between Mr Oburu and Rodexkia. Mr Bosworth added that it was difficult to get a due diligence report in Equatorial Guinea at the time of the transactions. He said Mr Driot introduced Rodexkia and Obexys to both Arcadia Lebanon and to GEPVTN, and that it was Mr Driot who negotiated the service provider agreements. Mr Oburu was at the time working for GEPetrol in operations, assisting in the shipping of Zafiro cargoes

for both Arcadia and GEPVTN. Mr Bosworth said he dealt with Mr Driot, not Mr Oburu, and was not involved in the details of the operational and invoicing matters. I accept his evidence.

239. In connection with the Zafiro Contract, on 24 March 2006 Arcadia London entered into a contract with Sonergy (prepared with the assistance of the Arcadia Group's solicitors, Clifford Chance). The recitals to the contract provided that Sonergy was an Equatoguinean company with expertise and knowledge in relation to crude oil, with a business network of professionals and contractors it could call on, from which the Arcadia Group wished to benefit in trading oil in Equatorial Guinea. Clause 18 provided that Sonergy was entitled to a payment of US$1,128,480 for office and set-up costs, and §§ 19 and 20 provided:

> "19. During the term of this Agreement, Arcadia may pay the Service Provider in its sole and unfettered discretion at the end of each loading month and upon receipt of invoice, a bonus of such amount as it may decide in response to any request or proposal made from the Service Provider at any time and from time to time (never in a sum exceeding US$2.000.000 or equivalent per bonus).
>
> 20. Without in any way fettering Arcadia's discretion under clause 19 above, Arcadia may take into account the following factors when considering whether to make any payments under clause 19 above, and if so, how much, namely: the volumes, grades, timing of crude oil lifted by Arcadia under its contracts of sale with GEPetrol [La Compania Nacional de Petroleos de Guinea Ecuatorial], the overall demurrage liabilities incurred by Arcadia; the net profits per cargo made by Arcadia the performance by the Service Provider of the Services set out in Schedule One of this Agreement; and any other special factors which Arcadia may consider to be relevant for the period to which any such request or proposal relates. The decision of Arcadia to award commission or bonus, or as to the amount of any commission or bonus if it decides to make such an award, shall be final and binding between the Parties, and the Service Provider shall not be entitled to know or be advised of the internal process (if any) it applied. The Service Provider will be notified in writing by Arcadia of the amount of any commission or bonus which Arcadia may decide to pay."

The Table of Services in Schedule One was blank.

240. When the Zafiro Contract was transferred to Arcadia Lebanon (whose role I explain later) a replacement service provider agreement was signed with Sonergy. In that contract, Schedule One (*"Services"*) stated that Sonergy would *"[a]t the request of [Arcadia Lebanon]: Introduce to [Arcadia Lebanon] crude oil purchase opportunities in Equatorial Guinea and manage the operations of those deals"*. Schedule Two provided that Sonergy's profit sharing percentage would be 65% of the difference between (A) the average of the five Dated Brent quotations after the bill of lading date and (B) the average of the five Dated

Brent quotations for the elected pricing period (the latter being, in effect, the price at which Arcadia Lebanon bought the oil). The difference was referred to as the "***Quotation Differential Profit***". Arcadia also paid 5% of the Quotation Differential Profit to each of Mr Driot's three service providers Bergamot Assets SA ("***Bergamot***") (incorporated in mid-January 2006 around the time the Zafiro Contract commenced), Fenton Advisors Corp ("***Fenton***") and Orange ("***Orange***"). In addition, Arcadia Lebanon paid a commission based on the discount that it obtained on each cargo purchase, as negotiated by Mr Driot. This was the "***Discount Differential Profit***" and was paid to two of Mr Driot's service providers. Mr Bosworth explained that Sonergy, Mr Driot and the other service providers associated with Mr Driot received substantial sums under the Zafiro Contract, because they had originated the contract for Arcadia London, and without them Arcadia London would not have been able to obtain the oil.

241. An Arcadia accounting spreadsheet dating from 31 May 2007 (disclosed by the Claimants only in October 2023) lists *inter alia* four payments to Sonergy totalling US$11.3 million, including three between September 2006 and March 2007 specifically referenced to various Zafiro cargoes. The documents show that these were disclosed to the auditors. On 31 May 2007 Mr Gingell of Moore Stephens, the auditors, requested breakdowns of various *"Other costs"* including payments to Sonergy totalling US$11,259,342, to MRS Oil and Gas totalling US$4,140,920 and to Projector totalling US$987,578. In response, Mr Fox of Arcadia sent Mr Gingell the same day a spreadsheet entitled *"Audit – Other Chgs – Testing – MS"* including details of the payments.

242. In addition, the documents include a handwritten table listing vessels names, bill of lading dates (all in 2006), sums of money in a column headed *"P/S"* and payment dates between 21 March 2006 and 15 September 2006. This was referred to at trial as the "*Driot Schedule*". Mr Bosworth in his witness statement referred to the document as a handwritten document prepared by Mr Driot showing ten cargoes lifted pursuant to the Zafiro contract. He said he believed that *"P/S"* meant *"profit share"*.

243. The provenance of the Driot schedule was not entirely clear. In cross-examination, it was suggested to Mr Bosworth that two columns of the table referred to portfolio and allocation numbers in Arcadia's Trade Capture system, which Mr Bosworth said he doubted, *"if"* the table was prepared by Mr Driot. He also said in his witness statement:

> "Having refreshed my memory by reference to the Driot Schedule, I can see that Arcadia London made payments to Sonergy and/or Bergamot and/or other of Mr Driot's associated companies from 21 March 2006 to 15 September 2006. I recall that the majority of the *"profits"* made by Arcadia London in connection with its contract with GEPetrol were passed on to Sonergy and JP Driot (via his companies). This made commercial sense because, as I explain above, it was Sonergy and Mr Driot who held the real power in Equatorial Guinea. The commercial reality was that this was Sonergy's contract, and the only reason they used Arcadia was of their inability to trade it themselves." (§ 145)

244. The Trade Capture system referred to a number of Arcadia payments whose dollar amounts matched those on the Driot schedule and/or the information given to Mr Gingell in May 2007 mentioned above. Trade Capture variously gave 'payee' references as 'Arcadia Petroleum UK', 'GE Petrol', Bergamot, Fenton and Orange (the latter three being Driot companies). For example, the spreadsheet given to Mr Gingell included a payment of US$43,195,754 made in September 2006 with the description *"Other Chgs: Sonergy"* said to relate to three cargoes, one of which was the *"Mayfair"* cargo with bill of lading dated 7 August 2006. The *"Mayfair"* amount was said to be €1,067,909 = $1,368,061. The Driot Schedule similarly included an entry for the *"Mayfair"* cargo stating the same bill of lading date and dollar sum, with payment date 15 September 2006. Trade Capture showed the same details, but identified the payee as *"Arcadia Petroleum UK"*. As Mr Bosworth pointed out, it made no sense for Arcadia to be paying itself these sums. There is no reason to believe this payment was not made to or for the benefit of Sonergy as the auditors were given to understand. Equally, there is no evidence that Arcadia was paying GEPetrol commissions on each cargo. Trade Capture variously recorded the 'cost code' as 'Zafiro' or 'Confee' (e.g. 'Confee' in the case of the Mayfair payment). Again, it is difficult to see any real significance in that.

245. The Claimants suggest that insofar as some of the payments recorded in the Driot Schedule were made, it has not been proven that they were received by Sonergy, because the payments were:

i) paid by cheque, without leaving a trace in the bank accounts (save for annotations presumably made by those whom Mr Bosworth/Mr Hurley trusted within the Arcadia Group accounting team). The Claimants say there is "*no better way to conceal the true recipient of the payments*" than to pay by cheque; that Mr Hurley in cross-examination could not be sure the payments reached Sonergy; and that "*this is another red flag that indicates that the payments were not legitimate commercial payments*";

ii) concealed in Arcadia's Trade Capture system, by being entered either as (i) additional payments to the NOC (GEPetrol) or (ii) payments by Arcadia to itself (without a unit cost);

iii) in large part concealed in Arcadia London's SUN accounting system, until the auditors enquired about them; and

iv) accepted as costs by the auditors only on the basis of information supplied by Mr Hurley, which he was careful to courier to the auditors (leaving no record) (citing an email dated 7 June 2007).

246. That line of argument may form part of an unpleaded case of bribery, which cannot fairly be advanced. There is no pleaded case that the Defendants made payments by cheque in order to conceal the true recipients, or that any of these payments was illegitimate. It is inappropriate for the Claimants to seek to advance submissions to that effect. Moreover, the Claimants' points are inherently illogical. The *"Mayfair"* payment I mention above was an example of a payment recorded on Trade Capture as payment by Arcadia to itself. That

would be sufficiently obvious as an anomaly to be an ineffective form of concealment. The details of that and other payments were disclosed to the auditors by return, in the form of an emailed spreadsheet (not a couriered document), as soon as they enquired about the composition of the 'other charges' sum of which it formed part. The point about the sending of documents to the auditors by courier was never put to Mr Hurley. The notion that one might seek to conceal anything improper by sending it to the auditors, but taking care to do so by courier so as not to leave a record, is nonsensical. The Claimants' concealment suggestion is entirely without merit.

247. The Claimants also submit that as not all of the payments were included in the information sent to Mr Gingell, the remainder were not brought to the auditors' attention at all and were not (it can be strongly inferred) paid to Sonergy at all. Given the paucity of the available records, I do not consider it correct to draw either inference.

248. I have already outlined above the evidence of Mr Bosworth and Mr Kelbrick about why it was necessary to make payments to Sonergy and Mr Driot. Mr Fredriksen was not in a position to dispute this evidence:

> "Q. … Mr Bosworth says that he was able to secure the Zafiro contract because of someone called Mr Driot, Jean-Paul Driot, do you see that in paragraph 134?
>
> A. Yes.
>
> Q. And he also says that it was necessary to have a sponsor called Sonergy, in paragraph 135; do you see that?
>
> A. Yes.
>
> Q. And you yourself, you have no basis to say that it was not necessary for Mr Bosworth to obtain the Zafiro contract without the assistance of Mr Driot and Mr Sonergy?
>
> A. I don't know the actual details but it could have been like this. I'm not --
>
> Q. Because you left it to the experts, the oil traders?
>
> A. I was that much involved in this. I don't really recall it, but it could have happened.
>
> Q. So you don't say that the payments that Arcadia made to Sonergy were not necessary to obtain this contract?
>
> A. I don't know.
>
> Q. And likewise, you don't say that payments that Arcadia made to Mr Driot and Bergamot were not necessary for Arcadia to obtain the Zafiro contract?

> A. I don't know the details.
>
> Q. And you don't know the details because you left it to Mr Bosworth to obtain and secure the contracts; is that correct?
>
> A. That's correct.
>
> Q. And you were happy or you were content for Mr Bosworth to obtain and secure the contract as he saw fit?
>
> A. That was his job.
>
> Q. And it is right also that you don't say, do you, that the payments that Arcadia made to service providers under your ownership to carry on West African trading are somehow wrong or illegitimate; that's right, isn't it ?
>
> A. It depends on the circumstances, but as we spoke about yesterday, that happened from time to time, that much I know. But I don't call it -- I would call it rather the correct word, a commission. A commission, that is what I would call it.
>
> Q. Insofar as Arcadia was making commission payments to Sonergy or Mr Driot's company, there is nothing wrong in that, is there?
>
> A. As long as it is done in a legally correct way, there is nothing wrong with it.
>
> Q. If it is important for those payments to be made to obtain the business, you would be content with those payments; yes?
>
> A. As long as it is done correctly. It happens."

249. Mr Trøim also accepted that he had no basis to dispute what Mr Bosworth said about the Sonergy contract, or that Arcadia's payments to Mr Driot were necessary for Arcadia to secure and maintain the Zafiro Contract, adding that he and Mr Fredriksen were simply presented with the contract.

250. The Claimants submitted that the payments to Sonergy cannot have been necessary because no payment was made to it in relation to a final Zafiro cargo in October 2013: I address this point in §730 below. The Claimants also submit that the payments were not commercially justified, citing the brevity of the description of services in the written agreement that Arcadia Lebanon in due course entered into with Sonergy (which Ms McDonald said was less detailed than she would normally expect), the size of the Sonergy profit share (at the upper echelon of what the Defendants' expert Mr Hendry would expect) and the lack of detail in Sonergy's invoices about what services they provided. They point out that Mr Bosworth in cross-examination said Sonergy *"may well have assisted Jean-Paul Driot, they didn't directly assist us, because he managed"* the Zafiro Contract. However, the Claimants have (despite the warning given by Bryan J on this point referred to in § 757 below) pleaded no case on oil

trading practice, and no positive case to the effect that any of the service provider payments were commercially unjustifiable. In any event, the evidence given by Mr Bosworth and Mr Kelbrick on these topics to which I have already referred was, in my view, credible and consistent. I reject the Claimants' contentions.

(12) Completion of Farahead's purchase of Arcadia

251. Farahead's purchase of Arcadia was completed on 16 March 2006. It paid US$5.66m, a sum equivalent to Arcadia's cash at bank. Mr Fredriksen and Mr Hurley both said in evidence that Mitsui were keen to dispose of Arcadia. Though Mr Trøim suggested in his oral evidence that the price was so low because Mr Bosworth controlled Arcadia's contracts, the evidence as a whole does not support the view either that he did control them or that that was any part of Mitsui's thinking.

252. Following the acquisition, with Mitsui's backing gone, Farahead pledged a portion of its share portfolio in support of Arcadia's credit facilities. In return, Farahead received a guarantee fee of some US$67 million a year.

(13) Memorandum of Understanding with Concerto

253. On 1 April 2006 Arcadia entered into a Memorandum of Understanding with Concerto, a member of a corporate group held by Mr Main's family trust, the Highland Trust. The Memorandum of Understanding provided for Concerto to identify and appraise mining opportunities for Arcadia in sub-Sahara African countries, in respect of which Arcadia would pay the costs and fees. This followed Mr Bosworth having introduced Mr Main to Mr Fredriksen in 2005, and Mr Fredriksen taking Mr Main on a shooting trip. They had met several times and discussed the idea that (as Mr Main put it in his evidence) *"Arcadia Petroleum should become like some of the other trading, oil trading houses that had become also involved in mining such as Glencore and Trafigura"*. (The discussions had also included the Pangea Diamonds opportunity referred to later). Subsequently, in February 2007 Mr Main set up Arcadia Energy and Mining Limited ("***Arcem***") to represent the joint venture's interests. Mr Main's evidence was that he found and evaluated the opportunities; and if Arcadia wanted to participate, then it would fund the costs in return for share of future profits (if any). Mr Main used Pareto Securities to advise on potential funding options for certain transactions. Pareto was the Norwegian investment bank that Mr Fredriksen also used for his shipping activities. In late 2006 and 2007, Arcadia made payments to Concerto in respect of business development costs to investigate African asset opportunities. The payments were made pursuant to the terms of the Memorandum of Understanding. In July 2007, Mr Main renamed another of his Highland Trust companies (established in February 2005) as Arcafrica Holdings Limited ("***Arcafrica***").

254. The Claimants at trial sought to advance a case (for which permission to amend had been disallowed) that the payments to Concerto were for Mr Bosworth/Mr Hurley's benefit, and that Mr Bosworth was the ultimate beneficial owner of Arcafrica. Quite apart from that case being unpleaded, it was not supported by the evidence. The documents indicate that the company, originally known as

Mining Development Africa Limited, was incorporated in Mauritius in February 2005. It changed its name to Arcafrica on 20 July 2007. Its sole shareholder was a nominee company called Aculsha Nominees Ltd until 14 August 2007, when the shareholding was transferred to Maitland (Mauritius) Nominees. Aculsha and Maitland share the same address as Concerto in Barkly Wharf Port Louis, Mauritius. From December 2013 onwards, the sole shareholder of Arcafrica was Southern Ocean Holdings Limited as trustee for the Highland Trust. Mr Bosworth's evidence was that he contemplated taking an interest in Arcafrica at one stage, but decided not to. In that connection, a company called Great Lakes BVI was set up in August 2011 and dissolved on 11 November 2011. Mr Main's evidence, unequivocally, was that *"[t]he only owner of ArcAfrica from inception until today has always been the Highland Trust', which was 'my family trust"*, and that Mr Bosworth was not (as was suggested to him) the ultimate beneficial owner of Arcafrica: *"Not from inception, never has been and is still not today in 2024."* I accept his evidence.

(I) SUBSEQUENT EVENTS

(1) Establishment of Arcadia Lebanon

255. A significant factual issue between the parties is the reason for the use of Arcadia Lebanon as a contracting entity in oil trading contracts.

(a) The parties' cases

256. The Claimants' pleaded case is that Arcadia Lebanon is a private offshore company owned by Mr Bosworth and Mr Hurley which *"has never formed, part of the Arcadia Group"* and *"On the contrary … has been centrally involved in, and has profited from, the fraud perpetrated on the Claimants"* (RRRRAPC § 15). As elaborated later, their case is the fraud was perpetrated by "*inserting*" Arcadia Lebanon and other entities into transactions involving Arcadia London, thus using Arcadia Lebanon to divert profits that ought to have been made by Arcadia London.

257. However, it is not alleged that Arcadia Lebanon's existence was concealed from Mr Fredriksen and Mr Trøim. Rather, it is said to have been explained to them in the following way:

> "53. Shortly after the acquisition of Arcadia London, Farahead was told by Mr Bosworth that he and Mr Hurley had secured a particularly lucrative trading contract, but that because they did not want to share the 30% *"bonus pot"* with the remainder of Arcadia London's trading team and staff in relation to this particular contract, they had established a separately owned company, Arcadia Lebanon, for the sole purpose of being the counterparty to this particular contract.
>
> 54. In connection with this:
>
> 54.1. Mr Bosworth assured Farahead that the Arcadia Group would ultimately receive 70% of the net profits generated by

> the *"particularly lucrative contract"* held by Arcadia Lebanon, and as a result that 70% of the net profit would be received by Farahead in due course.
>
> 54.2. Whilst discussions took place in the course of 2008 and early 2009 relating to the payment by Arcadia Lebanon of a *"dividend"* of c. US$10 to 15 million to the Arcadia Group or Farahead, no record has yet been found of any such payment (or any further *"dividend"* payments) having been made. The Claimants' rights in this regard are reserved at present.
>
> 54.3. In late 2008 Mr Bosworth and Mr Hurley represented to Farahead, that the contract for which Arcadia Lebanon had been established had come to an end and that the company had become dormant. As such, as Farahead understood the position, no purpose was to be served by the bringing of Arcadia Lebanon under its control, since it was no longer active, and the issue was not pursued further by Farahead.
>
> 55. This last statement was false, and was known by Mr Bosworth and Mr Hurley to be false, since Arcadia Lebanon was not dormant in late 2008; on the contrary, it was an active company, and an active participant in the fraud being perpetrated on the Claimants. This statement served to conceal the fraud from the Claimants, as, it is averred, it was intended to." (RRRRAPC)

258. Mr Bosworth's and Mr Hurley's case is encapsulated in the following paragraphs of their Amended Defence and Counterclaim:

> "24. Farahead's acquisition of Arcadia London completed on 16 March 2006. Mr Fredriksen and Mr Trøim were sensitive about regulatory issues, in particular corruption allegations, because of previous investigations into Mr Fredriksen's businesses. Mr Fredriksen and Mr Trøim wanted Arcadia London to continue its higher-risk West African crude oil trading, but in a way that mitigated the regulatory and reputational risks to Arcadia London, Farahead and (above all) to Mr Fredriksen and Mr Trøim themselves.
>
> 25. Accordingly, in around late spring/early summer 2006, Mr Fredriksen and Mr Trøim instructed Mr Bosworth and Mr Hurley to establish a new company in an offshore jurisdiction whose purpose was to handle and/or facilitate the higher risk oil trading business on behalf of the Arcadia Group. This company was Arcadia Lebanon. Farahead (in particular Mr Fredriksen and Mr Trøim) required Mr Bosworth and Mr Hurley personally to hold the shares in Arcadia Lebanon (such that it was not officially part of the Arcadia Group), but to hold the shares to Farahead's instruction and/or order. Farahead (in particular Mr Fredriksen and Mr Trøim) at all times had the ability to

> determine Arcadia Lebanon's activities. Mr Fredriksen and Mr Trøim negotiated a profit share with Mr Bosworth and Mr Hurley in respect of any of Arcadia Lebanon's net trading profits. The profit share arrangement in respect of Arcadia Lebanon reflected the wider profit share arrangements between the Claimants (and Farahead in particular) and the Arcadia Group's management and traders. As such, Mr Bosworth and Mr Hurley became entitled to retain at least 30% (subsequently 35%) of Arcadia Lebanon's net trading profits; the remaining net trading profits were to be paid to Farahead or otherwise used for the Claimants' benefit.
>
> 26. In summer and/or autumn 2006, Mr Fredriksen instructed Mr Bosworth to move Arcadia London's high risk term contracts with West African national oil companies (and its dealings with the associated service providers) to Arcadia Lebanon and to establish sleeving arrangements to insulate the Claimants (and Mr Fredriksen) from the risks associated with such contracts. In particular, Mr Fredriksen instructed Mr Bosworth to move the Zafiro Contract to Arcadia Lebanon. The Sao Tome Contract was also required to be moved to Arcadia Lebanon.
>
> 27. Over the following months Arcadia Lebanon became operational, and it became the contract holder (i.e. the immediate buyer of the crude oil) for the Zafiro Contract and Sao Tome Contract by around April 2007. The Arcadia Group and Arcadia Lebanon established sleeving arrangements so that the latter could transfer the cargoes which it had acquired under its term contracts to the former. In order to make the sleeving arrangements effective (see paragraphs 124 to 126 below), Arcadia Lebanon could not contract directly with the Arcadia Group. Instead, arrangements were made to sell the crude oil to Attock Mauritius/Tristar group entities. Such entities acted as sleeve entities through which crude oil acquired by Arcadia Lebanon was transferred to the Arcadia Group. "

The Claimants' allegation that Arcadia Lebanon was later, in 2008, represented to have become dormant is denied. It is also denied that Farahead ever understood Arcadia Lebanon to have become dormant. To the contrary, Mr Bosworth and Mr Hurley say, Arcadia Lebanon was under Farahead's ultimate control at all times, and in spring 2009 Farahead arranged for Arcadia Lebanon to pay it dividends (ADC § 228 ff).

(b) Witness statements

259. Mr Fredriksen said in his witness statement:

> "6.9 … some time after the acquisition of Arcadia London, Mr Bosworth and Mr Hurley indicated to us that there was a Lebanese entity that they had established for a particularly lucrative oil trading contract involving a handful of trades, which

I refer to as *"Arcadia Lebanon"*. While I was not happy about this arrangement, I did not object strenuously to it or seek to stop it at the time. I accepted assurances from Mr Bosworth and Mr Hurley that it was a one-off, and would not be repeated, and that 70% of the profits would be paid to Farahead. I also understood from Mr Bosworth in particular that, after the small number of trades was complete, this entity would not carry out any further trading, and would be closed down. Mr Trøim and I were only informed of this after the company had been set up.

6.10 Mr Bosworth and Mr Hurley suggest in these proceedings that I directed the establishment of Arcadia Lebanon, that it be held outside of the Arcadia Group in order to distance the Arcadia Group generally and me personally from *"high risk"* business, that I was aware of the payments made by Arcadia Lebanon to what Mr Bosworth and Mr Hurley call *"service providers"* and that I was aware of who some of those *"service providers"* are, what they did and how they were used and the very large payments made to them. This is simply not true. They also suggest that dividends were paid to Farahead by Arcadia Lebanon and that I and Mr Trøim authorised Arcadia Lebanon to pay away various funds. These allegations are also untrue."

"84 Mr Bosworth and Mr Hurley told me and Mr Trøim, as best I recall in 2008, that they had established an entity in Lebanon, which I refer to as *"Arcadia Lebanon"*, in their own names, to carry out a small number of African trades under a particular oil trading contract or opportunity. Mr Bosworth indicated that he and Mr Hurley did not want to share their bonus on these trades, which were highly profitable, with their Arcadia Group colleagues pursuant to the 70/30 bonus pot arrangements. Arcadia Lebanon was therefore established without my knowledge or authority and, so far as I am aware, without Mr Trøim's knowledge or authority either.

85 I was not at all happy with this arrangement. However, Mr Bosworth assured me and Mr Trøim that 70% of the net profits from these trades would be returned to Farahead (which mirrored the bonus pot arrangement for the trading profits of the Arcadia Group more generally), and because this was to apply only to the handful specific trades in issue, as a short term arrangement. So far as I was concerned, this was a problem that had already happened.

86 I fully believed that Arcadia Lebanon ought to be treated as a part of the Arcadia Group – it did after all have the Arcadia name. My concerns were really ones of corporate governance – it would never have occurred to me that this was not a legitimate part of the Arcadia business. I would certainly not have entertained the idea of some sort of shadow group company being used to engage in borderline illegal trading – I would not

risk my reputation, nor the success of the multi-billion dollar companies that I run, for the sake of a couple of trades in small part of my business.

87 I also understood from the explanation above and what Mr Bosworth told us that Arcadia Lebanon would not be, and was not, involved in any ongoing activity after those trades had been completed, was (by about 2009) no longer active and was to be closed down. Given the passage of time, it is difficult now to remember precisely on what occasions which discussions took place. I am, however, clear that this is what I was led to believe by Mr Bosworth (in particular) and Mr Hurley. I am also clear that neither Mr Bosworth nor Mr Hurley ever told me that Arcadia Lebanon had been involved in any further trading activity in West Africa or elsewhere (beyond the specific trades for which I was told it had been established) and I did not know about its ongoing involvement in West African oil trading until it was discovered during the investigations leading to these proceedings.

…

90.1 I did not instruct Mr Bosworth or Mr Hurley to establish Arcadia Lebanon to deal with high-risk business or otherwise. Rather, as I have explained, the true position is that Mr Bosworth and Mr Hurley told me about it after it had been established, as best I recall in early 2008.

90.2 I did not entertain the idea of some sort of shadow company being used to engage in *"high risk"* business. I did not direct this. This idea is fanciful. My reputation is very important to me and my companies. Allegations of bribery against any of my companies would put it in jeopardy. I would not have risked my reputation, and with it the success of the multi-billion dollar companies that I ran and run (and which I have worked very hard to build up, as I have explained) the sake of a small and relatively insignificant company. If Mr Bosworth and Mr Hurley had told me this was *"high risk"* business or I had thought it might be illegitimate, I would have told them not to do it, unless and until they had proper processes to reduce the risk to acceptable levels and ensure the Arcadia Group was not doing anything unlawful.

91 I am also told by Grosvenor Law that Mr Bosworth and Mr Hurley further allege that Mr Trøim and I approved the establishment of Arcadia Lebanon, that we required Mr Bosworth and Mr Hurley to hold their shares in Arcadia Lebanon to Farahead's instruction or order so that Farahead *"could have ultimate control and direction over Arcadia Lebanon"*, that we required Mr Bosworth and Mr Hurley personally to hold the shares so as to avoid Arcadia Lebanon being part of the official Arcadia Group and to protect the Claimants (and me and Mr

> Trøim) from the risks associated with West African trading (including the possibility of regulatory investigation), and that we directed that Arcadia Lebanon was to be used to make or receive high-risk payments on behalf of Arcadia London (later the Arcadia Group) in respect of its West African oil trading activities. I am told it is also said that Mr Trøim and I insisted on Mr Bosworth and Mr Hurley holding the shares in Arcadia Lebanon over their express hesitation and concerns and that Farahead determined the ownership arrangements for Arcadia Lebanon.
>
> 92 Again, none of this is true.
>
> 93 It is moreover bizarre to suggest that I would think that the Arcadia Group and Farahead would be protected by requiring Mr Bosworth and Mr Hurley - the Arcadia Group's Group CEO and Group CFO - to hold shares in Arcadia Lebanon - an entity with *"Arcadia"* in its name, so that Farahead could control them, and by using this company to make *"high-risk payments"* on behalf of the Arcadia Group. How such an arrangement could offer any protection at all to any of the Claimants or to me and Mr Trøim is not apparent to me. The suggestion seems silly to me. That idea that I would have directed and insisted upon it is ridiculous. So too is the idea that we required Mr Bosworth and Mr Hurley personally to hold the shares or (otherwise) determined the ownership arrangements for Arcadia Lebanon.
>
> 94 I am told by Grosvenor Law that Mr Bosworth and Mr Hurley allege that: (i) in *"summer and/or autumn 2006"*, Mr Bosworth and I discussed the Arcadia Group's existing West African business, *"including in particular its payment of large commissions to service providers such as Sonergy and Mr [Jean Paul] Driot's companies"*, at my office at Sloane Square and during drinks at a hotel in that location later that day; (ii) given the establishment of Arcadia Lebanon (of which it is seemingly suggested I was aware) I instructed Mr Bosworth to move Arcadia London's dealings with GEPetrol *"and the associated service providers (including Sonergy and Mr Driot's companies), including the Zafiro Contract, to Arcadia Lebanon and to establish a sleeving arrangements to insulate the Arcadia Group from the risks associated with those dealings"*; and (iii) (it seems) I required the *"Sao Tome Contract and associated dealings with Equinox"* to be moved to Arcadia Lebanon.
>
> 95 Once more, none of this is true, except that we would have discussed the Arcadia Group's business generally and, as mentioned, I would have known this was or included West African trading, because that is what Mr Bosworth did."

260. Mr Trøim was stated to have been the source of the information set out in Mr Adams' affidavit reflected in § 53 of the Particulars of Claim (quoted above),

which referred to Farahead having been told that Arcadia Lebanon was established for the purpose of one particular lucrative contract. In his witness statement for trial, Mr Trøim gave this evidence:

> "78 I remember that Mr Bosworth and Mr Hurley told me that they had established an entity in Lebanon (which I now understand to be Arcadia Petroleum SAL Offshore, or *"Arcadia Lebanon"*), in their own names, to carry out a very limited number of specific trades over a very short time span of activity.
>
> 79 I do not recall precisely when I found out about this, save that I recall that the company was already in existence when I was told. Grosvenor Law has advised me that Arcadia Lebanon was set up in July 2006, so it must have been sometime after that.
>
> 80 I recall that Mr Bosworth told us that he and Mr Hurley had set up this company this because they wanted one specific trade or counterparty trades to be separate from the rest of the Arcadia Group business. I recall that this trade or counterparty may have been related to Sao Tome and Principe but I cannot be sure so many years later.
>
> 81 Mr Bosworth said to me that he and Mr Hurley had done this because they wanted those specific trades to be separate from the bonus pool arrangements in which the Arcadia Group's traders as a whole participated (and which I have described above) because they were particularly lucrative.
>
> 82 At the time, my response (beyond being unhappy at being told about this after the event) was to request that the situation to be regularised by the return of 70 per cent of the net profits from these trades / counterparty transactions to Farahead and that, in future, all profits and losses for all trading activity must be included within the profit and loss reports provided to us by Mr Bosworth and Mr Hurley on a daily basis.
>
> 83 At the time, I was assured by Mr Bosworth that Arcadia Lebanon was only being used for this specific trade and that Farahead's 70 per cent share of the net profit from the same that had been put through Arcadia Lebanon would be transferred to Farahead in accordance with the arrangements we had made.
>
> 84 I understood clearly from the explanation above Mr Bosworth told us that Arcadia Lebanon would not be involved in any ongoing activity after those trades had been completed. My clear understanding was that, once those trades were complete, it was no longer active and was to be closed down.
>
> 85 I was not told by Mr Bosworth or Mr Hurley, and I was not aware, that Arcadia Lebanon had been involved in any further

> trading activity in West Africa or elsewhere (beyond the specific trades for which I was told it had been established).
>
> …
>
> 89.1 I did not instruct Mr Bosworth or Mr Hurley to establish Arcadia Lebanon, whether to deal with high-risk business or otherwise.
>
> 89.2 I was told about the existence of Arcadia Lebanon after the acquisition by Farahead and at some point after the incorporation of Arcadia Lebanon.
>
> 89.3 It was Mr Bosworth who told me that he had set up Arcadia Lebanon and it was in respect of one specific trade or counterparty (which I believe may have had some connection to Sao Tome).
>
> 89.4 I had no knowledge and was not told that Arcadia Mauritius or Arcadia Lebanon were being used as intermediaries (or *"sleeves"* or *"contract holders"*).
>
> 89.5 It was suggested to me that Arcadia Lebanon profits would flow to the Arcadia Group/Farahead; I would not have agreed to any other approach. Indeed, had I been consulted before the event rather than after the event, I would not have agreed to any approach that saw profits accumulate in a company that was not part of the Arcadia Group."

261. Mr Bosworth gave this evidence in his witness statement, which I quote at some length in order to give the flavour of his recollection and manner of expressing it:

> "120. … Having had my memory refreshed by reference to [an email dated 15 September 2005 from Mr Hurley to Mr Trøim attaching a draft budget, including a budget relating to a Beirut office], I recall that we discussed with John and Tor Olav possibly opening an office in Beirut early on in the process of their takeover. I do not however remember the precise details of those discussions as they took place almost 20 years ago. I do however remember that John and Tor said at this time that it was very important for John to be distanced from the potentially riskier aspects of Arcadia's business in West Africa, and I believe that the discussion of a Beirut office was part of the discussion of how to distance and protect both John (and his business interests) and the Arcadia group from any the compliance risks associated with Arcadia's West African trading activities. This is just one example of the way in which John wished to be insulated from the Arcadia business and the lengths he went to so as to ensure that there was a separation between him and any risk to his other business interests (I explain at

> paragraph 179 below further instances of this, including the instruction from John and Tor that we should no longer send emails about Arcadia's daily reporting to John's personal email address). It had been communicated to me by John and/or Tor Olav on a number of occasions that the risk to John's business interests of any compliance-related issue would be critical, and – this was something John and Tor said several times, I think as a way of hammering home the message – that Arcadia could never make enough money to make up for such an issue.
>
> 121. As far as I can remember, the commercial rationale for opening an office in Beirut rather than some other country would be to take advantage of the low compliance environment (it being outside of the UK and the US and with as I understand it less strict legislation on anti-corruption practices) and banking secrecy laws. There was not (as far as I can recall) any other business case for establishing an office in Beirut. If Arcadia wanted to expand in that geographical area, we would have established an office in Dubai, rather than Lebanon.
>
> 122. I also do not specifically recall who came up with the idea of establishing an offshore vehicle for engaging in Arcadia's riskier oil trading activities, but I do remember that the idea was proposed as a way of solving John's desire to be distanced from the riskier aspects of Arcadia's business in West Africa, as I have already explained. As I have said, this was a long time ago and I am not sure, but I think it was probably either Colin or myself who raised the idea – we were the ones who had been tasked with finding a specific solution to the problem John had identified. Our discussions at that time mostly took place at John's office in Sloane Square (I recall that as you walked into the Sloane Square offices and turned right, there were two meeting rooms, and the one that we held most of these discussions in was the large meeting room on the right hand side, close to the kitchen). Similarly, I think that the jurisdiction of Lebanon was probably recommended by one or both of Colin and I, then agreed to by John and Tor Olav as suitable. I understand from what John told me at the time as well from publicly available sources that John had close political ties with the hierarchy in Lebanon and I believe that he actually lived there while he was trading oil for a period of time."

262. Mr Bosworth said that, in the course of the early discussions at Mr Fredriksen's offices in Sloane Square, he and Mr Hurley agreed with Mr Fredriksen and Mr Trøim that Mr Bosworth and Mr Hurley were entitled to a share of Arcadia Lebanon's profits that was at least the same as the share the traders received of the Arcadia Group profits, i.e. at least 30-35% of Arcadia Lebanon's profits, adding *"I say 'at least' because Colin and I wanted more, but the final split was never definitively settled with John and Tor.*" The 30-35% would go only to Mr Bosworth and Mr Hurley, because other Arcadia Group employees did not play

a role in the Arcadia Lebanon business *"and because of the personal risks which Colin and I were taking by being named personally as shareholders of Arcadia Lebanon"*.

263. Later in his statement, Bosworth said this:

> "164. … I do not recall much about the process by which Arcadia Lebanon was incorporated and set up. ...
>
> 165. John and Tor Olav told Colin and I that we would have to hold the Arcadia Lebanon shares on behalf of Farahead and this is what we did.
>
> 166. Upon incorporation, Arcadia Lebanon did not have any members of staff or offices. This came later in early 2007 when the company become operational. I remember that in one or several of the management meetings in (to the best of my recollection) the latter part of 2006, John and Tor Olav instructed Colin and I to make Arcadia Lebanon operational towards the end of the 2006 financial year. I believe that was because there were anticipated questions from the auditor due to sizeable funds being paid to Sonergy in connection with the Zafiro Contract which I describe above. As such, the Zafiro Contract was transferred from Arcadia London to Arcadia Lebanon. I believe that this probably took place in early 2007 and we would have had to inform the Equatorial Guinean government. At or around the same time, the Sao Tome Contract was also transferred to Arcadia Lebanon."
>
> "183. From the period when Arcadia Lebanon became operational until its entry into a liquidation process in 2013 ...it continued to operate the Zafiro, Sao Tome and Senegal Contracts until they were not renewed by the relevant governments. Arcadia Lebanon assumed the risks associated with those contracts and had dealings with, and made payments to, the relevant service providers. During this time, I would typically have to travel to Lebanon for short periods of time. This was purely for administrative purposes for example signing off on payments and making sure all documentation was in order."
>
> "185. I understand from Quinn Emanuel that the Claimants state in their Re-Re-Re Amended Particulars of Claim that shortly after the acquisition, I told John and Tor that Colin and I had secured a *"particularly lucrative"* trading contract but that because we did not want to share the bonus pot with the remainder of Arcadia London's trading team and staff, we had established Arcadia Lebanon for the sole purpose of being the counterparty to the contract. This is false. I do not know which contract John and Tor are referring to and I understand from my solicitors that they have so far refused to say. The only significant new contract that I can remember being secured in

2005 or 2006 was the Zafiro Contract. If John and Tor are referring to that contract, I would not describe it as *"particularly lucrative"*. There was very little risk or downside to Arcadia because JP Driot had negotiated favourable pricing at which the oil was lifted and so it was unlikely that Arcadia would lose money. But it was not especially *"lucrative"*.

186. I also did not say that the reason that Arcadia Lebanon was to be established was because I did not want to share the bonus pot with the other Arcadia group traders. This is simply false. While it is true that Arcadia Lebanon's profits were agreed (with Farahead) to be split at least 30-35% to Colin and me and 65% to Farahead under the Arcadia Lebanon Profit Share Agreement (see paragraphs 157 and 159), this was not the reason for the establishment of Arcadia Lebanon or the transfer of the Zafiro Contract and the Sao Tome Contract to Arcadia Lebanon. I explain the reasons for their transfer at paragraph 166 above.

187. I also understand that in their Re-Re-Re-Amended Particulars of Claim, the Claimants allege that in late 2008 I told Farahead that the contract for which Arcadia Lebanon had been established had come to an end and that the company had become dormant. This is not true, I never said this and it is inconsistent with the payments made by Arcadia Lebanon to GEPVTN which continued well after 2008 (see paragraph 184 above). The only contract that was operated by Arcadia Lebanon that came to an end in 2008 was the Sao Tome Contract. Farahead knew about and authorised Arcadia Lebanon's activities from 2008 until it ceased operating in 2013.

…

189. Quinn Emanuel have told me that in Mr Fredriksen's first witness statement dated 15 July 2016, he states that he had authorised Arcadia Lebanon to participate only in *"a handful of specific trades"* or *"a very limited number of specific trades over a very short time span of activity"* This is not true. There was never any time limit imposed by John / Farahead on Arcadia Lebanon's trading activity. I also don't believe that John / Farahead told us that we could only use Arcadia Lebanon for specific trades. However, the fact is that the only trades which Arcadia Lebanon entered into were pursuant to three specific contracts, i.e. trades under the Zafiro Contract, the Sao Tome Contract and the Senegal Contract …

190. Quinn Emanuel have also told me that Mr Fredriksen said in the same that evidence that Arcadia Lebanon's authorised purpose was only: *"to carry out a small number of African trades under a particular oil trading contract or opportunity"*. I don't know what *"opportunity"* means or what the *"particular opportunity"* is supposed to be, and I understand from Quinn

> Emanuel that the Claimants have refused to say. I don't think I used the words *"particular opportunity"* and it doesn't sound like something John would say – it sounds like a lawyer has written this. As I have explained above, the Zafiro Contract and the Sao Tome Contract were transferred from Arcadia London to Arcadia Lebanon and then later Arcadia Lebanon entered into the Senegal Contract directly. There was not any *"particular opportunity"* that was discussed, as far as I can remember. ... As I've explained above, the conversations about Arcadia Lebanon began, at the latest, in 2005. It is true that John and I discussed several times the fact that Arcadia Lebanon was being used for the Arcadia Group's West Africa trading but I never told John that Arcadia Lebanon was no longer being used for regular, ongoing West African trading. I also never told John that Arcadia Lebanon had ceased its operations. ... "
>
> "208. Mr Fredriksen and Mr Trøim also knew that as part of its West African trading Arcadia established *"off the books"* or *"front"* companies like Arcadia Lebanon and Arcadia Mauritius. Such companies were used on John Fredriksen's instructions to manage the compliance and other risks of the trading. As I have said, we set up Arcadia Lebanon because Mr Fredriksen told us to, and we became and remained its shareholders for the same reason. It was not our choice and it was certainly not our preference. As I will explain, there were numerous discussions about Arcadia Lebanon both with Mr Fredriksen and Mr Trøim and their helpers, like Dimitris Hannas and John Skilton. Mr Fredriksen and Mr Trøim at least knew why we had companies like Arcadia Lebanon and why they were necessary to do business in West Africa."

264. Mr Hurley's witness evidence included this:

> "85. As for Beirut, the only recollection I have of Lebanon being discussed at any time during Farahead's takeover was as a non-group, or standalone, company, not as an office for the Arcadia Group.
>
> 86. This was part of the proposal as to how to handle the service provider payments that caused them concern. Beirut would be an operational office, but not in the group – that is the only conversation I can recall with regards to Lebanon. I cannot recall any discussions of other business being run through Lebanon, only that it would act in a way that would provide the necessary shield under the structure proposed for the Arcadia Group.
>
> 87. I have refreshed my memory on this subject by looking at a spreadsheet that I sent to Trøim on 15 September 2005. … The spreadsheet has 5 tabs – including the overhead expense budget for the Singapore office, which was a proposal, as we did not have an office there yet. Then there is a tab titled 'Beirut'. The

costs were fairly low on the whole, around USD 1 million including all overhead costs. I remember that we didn't plan to have any traders in that entity, nor would any have gone to Beirut. It can be seen from the salary budget, which is quite low. It wasn't proposed as a trading office, it doesn't involve any traders' salaries, just the salaries for operational and support staff. What was being proposed for Beirut was a limited operation that would enable us to book certain trading in that location. That is my only understanding of any discussions about a Beirut office in 2005.

88. To be clear on my terminology, when I refer to 'offices', I'm not talking about subsidiaries necessarily, or even at all. I'm not talking about trading operations. I'm simply talking about the locations for offices, a building with some employees, whether they were inside or outside the Arcadia Group. Obviously, there would have to be an entity to own all of that. But it was clear in these discussions that the Lebanese entity would not be a group company.

89. In the course of these meetings, Lebanon was proposed by Pete, I believe, as a jurisdiction to help address the compliance issues, and it was decided that we would incorporate a standalone company in that jurisdiction. Fredriksen and Trøim approved of it, and instructed Pete and I to become the shareholders. Fredriksen may have even jabbed his finger at us physically to emphasise the point.

90. In the same discussions, we agreed with Fredriksen and Trøim that we would get at least the same percentage bonus from the Arcadia Lebanon distributable profits as the Group traders got from the Group bonus pool. The remaining amount would be for Fredriksen to decide how to use. The arrangement was not an exact copy of the bonus arrangements at Arcadia London, but the central tenets were the same. ...

91. As I have said, the Arcadia Lebanon Profit Share Agreement was analogous to the bonus policy in place at the Arcadia Group. The policy changed a little over time but it was always along the same lines. When Farahead took over, the arrangement was that a similar percentage of the Group's net trading profits would go into a bonus pool to be distributed among the traders. ...

92. The Arcadia Lebanon Profit Share Agreement was reached during the discussions with Fredriksen and Trøim in which they told us to incorporate the company, which I have addressed above at paragraph 89. The discussions were face to face and took place (I think) at Fredriksen's offices at Sloane Square. I think they were all in 2005 (and if so in the latter part of 2005) or 2006. It was not a very detailed or completely thought-through agreement. There was no contract or anything like that.

> I regarded it as a stopgap while more formal arrangements were concluded, but as I said Farahead did not follow through with more formal arrangements but just left things as they were."

> "119. At Fredriksen's instructions, Pete and I were appointed the main shareholders of Arcadia Lebanon on Fredriksen's behalf. The intention, as far as I'm concerned, was for that to be the temporary measure. Farahead were going to find a permanent solution to the ownership of Arcadia Lebanon. I didn't want to be a shareholder at all. To me, it was a risk and responsibility that I did not believe I should be required to take on. To this end, Farahead vaguely explored measures to regularise this entity, which I have discussed below. None of the measures were ever seriously pursued, and none happened ultimately."

(c) Documents

265. In considering these competing accounts, I begin with some of the context and the contemporary documents.

266. Part of the context was that Mr Fredriksen and Mr Trøim were having frequent discussions with Mr Bosworth and Mr Hurley, partly because (as Mr Fredriksen accepted in cross-examination) they wanted to understand the Arcadia business and the details of how the oil trading business worked. Further, they wanted Arcadia to expand, and (as Mr Trøim said) encouraged Mr Bosworth and Mr Hurley to grow the business by doing *"new deals, new profitable leads".*

267. At the same time, Mr Fredriksen and Mr Trøim knew, at least in general terms, of some of the risks of West African oil trading, in particular that involving purchases from NOCs, and were concerned to prevent them from eventuating: see §§ 176 above. They knew that Arcadia had made payments to service providers in the past, significant enough to merit mention as a matter of concern in the Deloitte letter, and about the potential resumption of payments to service providers and consequent risks in the event of resumption of direct NOC business (§ 224 above). They knew about the problems such payments, to Pang Ling, had created in the past.

268. Furthermore, in December 2005 Arcadia entered into the Zafiro Contract, thus contracting directly with a NOC again, and on 24 March 2006 entered into a service provider agreement with it. The text of the agreement was based on a draft that Arcadia's lawyers, Clifford Chance, had specifically prepared. On 27 March 2006, Mr Hurley provided the draft Sonergy agreement to Arcadia's incoming auditors, Moore Stephens (who had replaced Deloitte) to ensure that they were satisfied with it. Mr Hurley's email forwarded Clifford Chance's advice in relation to its drafting, in particular the remuneration provisions. Mr Hurley's email said:

> "Please see below a service provider agreement drawn up by Clifford Chance in respect of our business with Equatorial Guinea. As we expect to be appointing you as auditors of the

> company we wanted to be certain that this was sufficient for audit purposes."

The Claimants have not disclosed Moore Stephens' response. Mr Hurley's oral evidence was that they had no objection to it.

269. Turning to documents about Arcadia Lebanon, these indicate that in late April 2006 Mr Lance enquired with a Moore Stephens contact in Beirut about incorporating a company in Lebanon. Mr Lance said *"The company is to be called "Arcadia Petroleum Limited" and it is intended that the company will trade crude oil".* The contact put Mr Lance in touch with Mr Nadi Najjar of the firm's affiliate law office. In an email of 27 April 2006 to Mr Najjar, Mr Lance said:

> "Initially the new Lebanese Company will be formed to protect the name in Lebanon. However the plan is that it will be used for Middle Eastern oil trading activity. It will open a bank account in Beirut and it may have an office. It will not be trading with any Lebanese entities. Initially its director and shareholder will be a British national, resident in Dubai. Obviously we want the new company to be as tax efficient as possible. I am assuming therefore that it can be a Lebanese offshore company"

On 2 May 2006, Mr Lance said, in an email to Mr Najjar:

> "The client is Arcadia Petroleum, one of the largest crude oil traders in the word. … I am a director of Arcadia and am able to sign the proxy to which you refer. Arcadia is also a client of Moore Stephens London. Arcadia will not be the registered shareholder of this entity – we will use nominee shareholders."

Arcadia Lebanon was to be like a number of the other Arcadia offshore shelf companies, held by nominees, and ready to be used to further Arcadia's business as and when necessary. Mr Lance kept a roster of companies that Arcadia could use for its business, some of which bore the name 'Arcadia', but which Arcadia did not necessarily directly or formally own. In late May 2006, Mr Lance discussed with Mr Hurley the business set-up costs and told Mr Hurley that the name 'Arcadia Petroleum Limited' was available for use as a Lebanese company.

270. It is therefore evident that the Defendants made no attempt to keep the creation of Arcadia Lebanon a secret. On the contrary, it was done through Mr Lance, Arcadia's corporate secretary; and Mr Lance in turn chose to approach a contact at the group's auditors, Moore Stephens, about setting the new company up.

271. It was suggested to Mr Bosworth in cross-examination that he must have told Mr Lance that Arcadia Lebanon was going to be used for Middle Eastern trading activity, as indicated in Mr Lance's email to Mr Najjar. Mr Bosworth said he did not recall talking to Mr Lance about that, *"but in practical terms, Beirut was set up to handle high risk or potentially high risk payments to service providers in West Africa".* If Mr Bosworth is right about that, then it seems fairly unlikely

that Mr Lance would have put it in those terms to Moore Stephens, Beirut, i.e. that Arcadia wished to take advantage of the 'much looser' compliance standards in Lebanon. Further, as I note earlier, there is no contemporary evidence that any of the commercial people were in fact envisaging using a Beirut office to conduct Middle Eastern oil trading, and it was not so used.

272. The court did not have the benefit of Mr Lance's evidence on this point, as the Claimants chose not to call him, in the circumstances outlined in § 44 above. However, there is some contemporary evidence of Mr Lance's actual understanding of Arcadia Lebanon's purpose dating from a little under two years later, recorded in the Hannas Note. The Hannas Note is an important document, in four versions (textually the same apart from highlighting and annotations), which the Claimants eventually disclosed in March 2024 i.e. a few weeks before trial after some debate about privilege. As I mention earlier, it is a page of manuscript notes written by Mr Hannas, recording a series of 19 conversations between February 2008 and September 2009. Mr Hannas said he made the entries in the Note by copying or reproducing the telephone logs in his notebooks, which he then destroyed. In cross-examination he said that he prepared the Note by "*flicking through my notebooks and if any conversation was related, important information related to Arcadia Lebanon, I would summarise it here*." The Hannas Note is therefore a copy or reproduction of other contemporaneous (and non-privileged) notes that have been destroyed.

273. It is convenient to set out at this stage a transcription of the Hannas Note in full:

> "25.02.2008 Mark [Lance] – Arcadia Lebanon = Fredriksen's stand alone company
>
> 16.04.2008 Skilton – Arcadia Lebanon shares to a Liberian co.
>
> 12.06 Skilton – Arcadia London meeting in London yesterday – Arcadia Lebanon kept out of discussion per Fredriksen/Trøim
>
> 24.06 Skilton – Advised of Arcadia London meeting in Limassol with 3rd party present
>
> 08.07 Skilton – Saleh memo on reporting requirements
>
> 06.10 Skilton – Trøim told him that it was not necessary for him to participate in the Arcadia London meeting in Limassol
>
> 07.10 Skilton – asked me to request from Hurley financials of Arcadia Lebanon
>
> 13.10 Skilton – Frederiksen advised him not to bother attending Arcadia London meeting in Limassol
>
> 16.10 Skilton - $15m dividend from Arcadia Lebanon to Beirut Holdings??

> 03.11 Erling [Lind] – he advised that transfer of shares of Arcadia Lebanon to Beirut Holdings are on hold – he will talk to Skilton
>
> 05.11
>
> 05.11 Skilton – Trøim should advise Arcadia Lebanon dividend payment and how
>
> 09.12 Trøim - $15m Arcadia Lebanon dividend will be used to reduce Bosworth loan from Fulham
>
> 22.01.2009 Skilton – Arcadia Lebanon financial from Trøim
>
> 10.03 Hurley – Arcadia Lebanon accounts 31.12.2008 are being reviewed.
>
> 26.03 Skilton – discussed meeting in London between Farahead/APL – Erling [Lind] is drafting minutes
>
> 24.06 Hurley – advised of $10m (e) Arcadia Beirut profits for 2008
>
> 25.08 Hurley – advised that he is talking to Fredriksen/Trøim re Arcadia Lebanon cash availability
>
> 04.09 Skilton – pointed out that we should chase "them" for Arcadia Lebanon info
>
> 09.09 Skilton – he was advised by Fredriksen/ Trøim that we should not make any more enquiries on Arcadia Lebanon"

I have replaced initials by names.

274. The first entry refers to "*Mark*". Mr Hannas said the entry reflected a call with Mr Lance on 25 February 2008:

> "in which he told me that Arcadia Lebanon was Mr Fredriksen's stand-alone company. I understand it to mean that Arcadia Lebanon was not under Farahead's ownership, but was held for Mr Fredriksen's benefit (or for the benefit of entities associated with him)."

Similarly, Mr Lance stated in his Defence in these proceedings that he believed at all times that Arcadia Lebanon *"was operating for the benefit of Mr Fredriksen"* (§ 37(4)).

275. Mr Hannas went on to say that he believed that *"stand alone"* was used in the same sense as in the notes of a meeting on 11 March 2008 – which Mr Hannas did not attend – to which I refer later. He highlights a passage that read *"Shares should be transferred to 'stand alone' Liberian Company".* Mr Hannas also said it was not his understanding that Arcadia Lebanon was set up at Mr

Fredriksen's direction or with his knowledge, but then added that *"I was not aware of how Arcadia Lebanon had come to be incorporated"*. In cross-examination, Mr Hannas agreed that, as the person in charge of corporate administration for Arcadia, Mr Lance was the individual who would know about the Arcadia subsidiaries and their set-up. Mr Lance explained to him that the company *"is not owned by the group formally but it was a standalone of JF";* and, Mr Hannas accepted, it was Mr Fredriksen's company. This evidence, and the first entry in the Hannas Note, are more consistent with the First and Second Defendants' account than with the notion that Messrs Fredriksen and Trøim were told that Arcadia Lebanon was a company to be used by Mr Bosworth and Mr Hurley for a discrete transaction in order to avoid having to share bonuses.

276. The documents also include correspondence in June 2007 opening an account for Arcadia Lebanon at Credit Agricole (Suisse), including an unsigned form on which Mr Bosworth/Mr Hurley were said to be its ultimate beneficial owners. However, as the Defendants point out, even if it was submitted in that form, Mr Bosworth/Mr Hurley may have been reluctant to be open about the fact that they held the shares as nominees for Mr Fredriksen, in case that undermined the objective of setting up a 'stand alone' Fredriksen company outside the Arcadia Group. I refer later to subsequent discussions in August 2008 about the basis on which the shares in Arcadia Lebanon were held.

277. The Claimants note that Arcadia Lebanon's offices were in the same building (308 Sursock, Beirut) in which Mr Bosworth bought his first apartment in Beirut on 21 April 2007; and that Arcadia Lebanon used the same auditors, an individual from Eura Audit International, as Attock Mauritius. In circumstances where Arcadia Lebanon was set up as a new presence in Lebanon, I do not consider any real significance can be ascribed to either of those matters.

278. The Claimants also note that from April 2007 Mr Bosworth/Mr Hurley recruited Cristina Azzariti and Sergio Morgado (a married couple) to work for Arcadia Lebanon in Nigeria. They were originally employed as junior support staff in Nigeria by Arcadia London, and Mr Morgado sometimes signed term sheets on Arcadia London's behalf. In addition, Ms Azzariti and Mr Morgado sometimes performed tasks for Mr Decker and his team representing Attock Mauritius in Switzerland. While in Nigeria, Mr Morgado dealt with Ms Felica Sanni, who was in charge of operations for Attock Mauritius. In an email exchange in March 2008, Mr Morgado said *"Whatever Peter or Steve ask me to do I will do it for them and it will be a pleasure to be there for them as I know they are there for me"*, and that although Ms Sanni worked for Mr Kelbrick, *"we still work in the same company"*. Mr Bosworth was asked about this, and said Mr Morgado did work for him at some stage, and Mr Kelbrick may also have used his services; and that Ms Sanni worked for Mr Kelbrick. It was not suggested to Mr Bosworth that any of this showed that Arcadia Lebanon was Mr Bosworth's own company, though the Claimants did put the (unpleaded) suggestion that Mr Morgado held Attock Lebanon as nominee for Mr Bosworth (which Mr Bosworth denied). Mr Kelbrick was also asked about the Morgado/Sanni email exchange. He said Mr Bosworth was Mr Morgado's boss and he, Mr Kelbrick, was Ms Sanni's boss. He said he would from time to time give instructions to Mr Morgado, but worked mainly with Ms Sanni. I do not consider that any of

this evidence gives any significant support to the proposition that Arcadia Lebanon was run by Mr Bosworth and Mr Hurley for their own purposes, as opposed to in the interests of the Arcadia Group.

279. I should record that Mr Bosworth also volunteered the following somewhat troubling evidence:

> "We had approached Cristina Azzariti and Morgado I phoned them probably a year or so ago to see if their situation had changed from what it was previously. I spoke to her son, Azzariti's son, which is Morgado's son as well. And he said, look, my mum can't and won't speak to you. The reason for that, my Lord, is when -- just before Freshfields left, I believe, I received a call from Azzariti in a very distressed state from Dubai saying that she had been approached by two gentlemen in a shopping mall on behalf of Tom Francisco [of Arcadia] who was having a coffee close by and he wanted to have a word with her. Upon saying no, she didn't want to, the two gentlemen said to her if she did not cooperate with -- I think the law firm was Jones Day, that it was possible they would bring criminal action against her and under Dubai law, that meant she could potentially lose access to her children. So I would love for Morgado and Cristina to have come here but unfortunately, I don't have access to them, they did sign with Jones Day, and I have not spoken to them since so that is by way of background to this."

There was no disclosure of any agreement between the Claimants and Ms Azzariti. I should also record that, asked about this matter in correspondence, the Claimants' then solicitors, Freshfields, stated that they were instructed that no threats had been made; and I make no findings about the matter.

280. The Claimants make the point that no contemporaneous record has been found of instructions from Farahead for the establishment or use of Arcadia Lebanon. That is not, however, a compelling point in circumstances where, as noted earlier, there has been significant loss of documents on the Farahead side, including the destruction of Mr Hannas's notebooks (save to the extent that certain key extracts have been preserved via the Hannas Note). I also note the evidence given by Mr Hurley that Mr Fredriksen and Mr Trøim "*don't put anything in writing, hardly at all. It is very, very rare that you will see something from these two individuals that is in writing. Most of the communication you have with John and Tor Olav is oral*".

(d) Defendants' oral evidence

281. Mr Bosworth was cross-examined about the accuracy of his recollection, including whether there could have been discussions about Arcadia Lebanon back in 2005 when the company was incorporated only in 2006; why, in that event, Arcadia London would have entered into the Zafiro Contract in its own name; and why Arcadia Lebanon remained inactive until April 2007 when it lifted its first cargo. It was also pointed out to Mr Bosworth that in his third affidavit, sworn in 2016, Mr Bosworth had provided less detail, saying only that

Mr Fredriksen knew about the use of third party service providers and that it would not be possible to conduct West African oil trading without paying them.

282. In his oral evidence, Mr Bosworth said he raised at the outset the potential of having a Beirut office for compliance reasons, but the plan was not implemented until 2006. As to the Zafiro Contract, he said:

> "… at that time we were in between the two and we didn't know whether this would be a problem internally. The problem was always going to come, potential problem, from the auditor and at that time we didn't know and so we put the deal in Arcadia London. They were aware of it. And once there was an indication of a potential issue with the auditor, we then enacted what had been discussed before was the setting up of Arcadia London."
>
> and:
>
> "Look, we had a situation whereby you start one way, you have a plan if something goes wrong. If it continued and there was no problem, then no problem. But there became a potential issue with the auditor and therefore it was moved out."

The following exchanges also occurred:

> "Q. How do you account for the fact that if you had instructed them to move everything to Arcadia Lebanon, you didn't do it until March 2007?
>
> A. Because the -- we were instructed to set it up, to do it, a trigger for that was the movement or the questioning at certain points in time by the auditor of payments to Sonergy. That became the trigger for the enactment.
>
> Q. But the summer of 2006, we might be talking about eight months to implement your alleged instruction.
>
> A. We had set it up ready to go. It was a name that was held, but it was not enacted.
>
> Q. Well, if you had been given an instruction, you could have done it quickly, wouldn't you?
>
> A. I had a day job which was running or trying to be a CEO of a business which my boss used to describe as moment to moment intensity. So perhaps I could have done. But I didn't.
>
> Q. On your case, on your recollection, this was important to Mr Fredriksen. You have explained that no amount of money could be worth taking a risk. You wouldn't have just left it lying there while you did your day job?

> A. There were lots of things that we were involved in. The timing of doing it, trying to get there, setting it up etc took time. That is perfectly normal."

283. Mr Bosworth accepted that Arcadia Lebanon had been established *"pre-emptively"*, and he did not know whether Messrs Fredriksen and Trøim were aware of its incorporation at the time, as opposed to when the company became operational. When the company was set up, he said, he and Mr Hurley owned it because somebody had to own it. There was also the following exchange (whose value is somewhat undermined by the fact that the answer was cut off by counsel's next question):

> "Q. When you spoke to Mr Trøim about Arcadia Lebanon for the first time, he was simply told that it was owned by you and Mr Hurley?
>
> A. When it was originally set up. There was then a later discussion as to the enactment of it which had been ..."

However, Mr Bosworth's evidence was clear that there had been discussions with Mr Fredriksen and Mr Trøim at the operational stage, and that those had not been confined to a limited or specific trade. There were, he said, *"discussions of examples of what we would move there and I believe that two contracts discussed were GEPetrol and Sao Tome but it was a principle that was agreed with them that these things, if they occurred again, we should handle them out of Lebanon."* As to ownership of the Arcadia Lebanon shares, he added:

> "Later on, when the decision was gone through with John and Tor, authorised by them, we remained at their request the shareholders, holding the shares in effect -- I don't know the legal term but to their benefit"

This evidence is consistent with the documents I refer to later about formalising the ownership structure of Arcadia Lebanon.

284. Mr Bosworth said the instruction from Mr Fredriksen and Mr Trøim was that *"[t]hey wanted to be distanced from any high risk areas as best we could do. That was our instruction".* Asked whether he sought permission to put the later Senegal Contract (entered into in November 2007) directly into Arcadia Lebanon's name, Mr Bosworth said *"No, I don't think I did. But it came under the umbrella of the reason for moving the first two contracts there was exactly the same there".* The Claimants highlight a later passage where Mr Bosworth said the shareholders *"were aware of the contract, they had authorised the set-up that we had and they knew about its ongoing activity"* as indicating that the discussions about Arcadia Lebanon were limited to a single contract. That is a false point. Mr Bosworth at this stage in his evidence was being asked about a specific contract; and, in any event, his reference to authorisation of the 'set-up' is capable of general application, particularly when seen in the light of his evidence as a whole. Elsewhere, Mr Bosworth said, in response to a suggestion that Arcadia Lebanon was not Mr Fredriksen's standalone company, *"Yes. They*

had the rights to close it down, they gave us instructions to set it up and they gave us instructions of what to do with the money."

285. The Claimants also note that Mr Bosworth said the Zafiro Contract had "*limited downside*", suggesting that that fits their version of events, in which Arcadia Lebanon had been put forward as a vehicle for a particularly lucrative contract. To the contrary, however, Mr Bosworth in the same answer specifically rejected the idea that the Zafiro Contract was particularly lucrative. His evidence contradicted rather than supported the Claimants' case.

286. Mr Bosworth rejected the notion that Arcadia Lebanon would have been used merely as a vehicle to avoid sharing bonuses on particular contracts: *"it's not the reason for setting it up in any way, shape or form. I could have told the traders in London you don't get a share of it, full stop".* The point about bonuses was merely *"part of the discussion"*: *"The reason for setting it up was the compliance issues and I will have said to [Mr Trøim] that I don't anticipate having to share that bonus pool with anybody who is not involved in that aspect of it".* Mr Bosworth reiterated his evidence about why Arcadia Lebanon was in fact set up:

> "Q. You did not tell Mr Fredriksen or Mr Trøim that it was necessary to engage service providers to acquire West African oil, did you?
>
> A. You cannot engage in West African crude oil trading without a service provider is my experience over the last 30 years.
>
> Q. Mr Fredriksen and Mr Trøim had no reason to suggest to you that an offshore vehicle should be set up for engaging in Arcadia's riskier oil trading activities, did they?
>
> A. They agreed to it. … Or instructed it."
>
> "Q. Sleeving arrangements are not used to hide transactions from a company's auditors, are they?
>
> A. They are used in this, in what we did, to hide the significant payments to service providers for the business from Arcadia Lebanon.
>
> Q. That must mean that you recognised that the payments to the Zafiro service providers were unjustifiable?
>
> A. No, not at all. They were part of the contract. That is the way that contract was done. It is the way you enter into the contract. And if you don't want to do it, then you don't get the contract.
>
> Q. You would be unable to demonstrate to the auditors that the service provider payments served any legitimate and commercial purpose?

> A. We would be able to show them as to why the service provider was there. But it may not have been sufficient for the western auditor, London auditor to accept. Hence the concept of Arcadia Lebanon.
>
> Q. Because they would have had the same concerns that Andersen had, about Pang Ling.
>
> A. They may have done."

and:

> "Q. Mr Trøim and Mr Fredriksen, they are rational businessmen, aren't they?
>
> A. Most of the time.
>
> Q. If you described this contract as high risk business, you would have at least have had to demonstrate that the risk was worth taking, wouldn't you?
>
> A. No, with the conversations with John and Tor, that was not the way the relationship was. We didn't go into those details unless we were asked.
>
> Q. But you are suggesting that they gave you permission to run a high risk business?
>
> A. They didn't give me permission to do it, they asked us to -- well, our business is a high risk business, all of it is. So by buying the company, John knew that, and he asked us to move it out into an entity called Arcadia Lebanon, to distance himself if anything went wrong."

287. At one or two points in his oral evidence Mr Bosworth suggested that the trigger to making Arcadia Lebanon operational was some queries from the auditors about payments under the Zafiro Contract, but later qualified this saying *"[Mr Fredriksen] and [Mr Trøim] may not have known that the auditors were asking questions at that time, or potentially, it was anticipated questions from the auditors which came later on".* So far as one can tell from the documents, the auditors' queries seem to have begun around May 2007. However, that is consistent with Mr Bosworth's evidence, quoted in § 282 above, about *"potential problem"* and *"potential issue"* with the auditors. Mr Bosworth was very clear that such concerns led him to incorporate Arcadia Lebanon. He was equally clear that the company would not have been made operational without Mr Fredriksen's/Mr Trøim's approval, and that (as he put it) *"We were trying to protect our boss as requested to by …"* and *"We are protecting our boss. He has requested that we put this offshore. That's what we did"*.

288. As part of his evidence, in response to a suggestion than he had no recollection in 2006 of a discussion with Mr Fredriksen about payments to service providers, Mr Bosworth said:

> "If I may, I will tell you why I recall it very well, because I went for a beer with Mr Fredriksen outside of his offices, outside the hotel, and there was a gentleman, there is a square in Sloane Square and there was a gentleman sitting on one of the benches and John explained to me it is better to talk like that [covering his mouth] because some people can be lip readers."

Mr Bosworth did not provide that degree of detail in any of his witness statements, and the Claimants submitted that he was making it up. I do not accept that submission, for a number of reasons. First, as a general matter, it sometimes happens that evidence about an encounter, or the detail of an encounter, appears for the first time in the witness box. Whilst that may indicate that the evidence is not genuine, it can also arise for other reasons, for example due to a recollection being triggered after the proofing process has occurred. Secondly, my overall impression of Mr Bosworth's evidence, both written and oral, is that it was candidly and cautiously given. There were numerous passages in both (including in some of the extracts quoted above) where he was tentative and careful about the limits of what he could remember, or how clearly he could remember things, so many years later. Thirdly, late recollection was not in any sense a recurring example of Mr Bosworth's evidence. Fourthly, his evidence as a whole was broadly consistent with the documents as they emerged, including documents such as the Hannas Note that were not available when he made his witness statements. Overall, I consider that his evidence was honestly given, including on this point.

289. Mr Hurley in his oral evidence did not suggest that Mr Fredriksen and Mr Trøim had been told at the time about Arcadia Lebanon's incorporation, but that *"We spoke to them about potentially having it as a Beirut office under the structure that I have described before".* He said they had agreed that the structure would be implemented to accommodate the Zafiro Contract *"and contracts that were similar to this"*. Mr Hurley said "*We told them [Farahead] the structure was in place and they were the ones that approved the structure and accepted it*"; and that Farahead accepted the Arcadia Lebanon structure "*to mitigate the risk as best we could and to their satisfaction*". Mr Hurley added:

> '[W]e were working with them on was to find a solution that we had discussed and implement it. So we had already discussed the solution with them, which was to have the company outside of the group, Arcadia Lebanon or as it was referred to on the budget, the Beirut office. That was part of the solution.'

(e) Claimants' oral evidence

290. Mr Fredriksen said in his oral evidence that he accepted the risks of the oil trading industry, but he wanted to take the opportunity presented by oil trading in a way that did not expose him to reputational risk. He was willing to allow Mr Bosworth/Mr Hurley to manage the risks:

> "… But I trusted Bosworth and company to take care of all this, being the CEO of the company.
>
> Q. So if they could manage the risks, you were content?
>
> A. As long as they were legal, yes.
>
> Q. So as long as Mr Bosworth and Mr Hurley managed the risks legally, using structures in oil trading that were commonplace, you were content with their activity in West Africa, yes?
>
> A. As long as they were legal, yes."

291. Mr Fredriksen said that, as far as he was concerned, the Beirut office *"might have been discussed, but it was never set up"*, and that *"it could have happened"* that Farahead discussed a Beirut office with Mr Bosworth. He agreed that the Zafiro Contract raised again potential compliance issues regarding payments to service providers:

> "The problem with Arcadia purchasing oil directly from GEPetrol under the Zafiro contract is that it raised concerns about compliance when dealing directly with national oil companies and service providers; that's right, isn't it?
>
> A. Yes, it happened sometimes.
>
> Q. So you had these concerns, but at the same time, you wanted to expand the Arcadia business?
>
> A. Yes, over business: normally if you buy a business, it is to expand.
>
> Q. So you needed to find a way for Arcadia to expand the West African business but also manage and minimise the compliance risk; correct?
>
> A. Yes, you can say it like that. Yes."

292. Mr Fredriksen agreed that it made sense to move high risk crude oil business involving purchases from NOCs to Lebanon where compliance was more relaxed:

> "Q. Do you remember, Mr Fredriksen, you appreciated that purchases from national oil companies carry particular compliance risks; do you remember that?
>
> A. Yes, of course. But those days it was different.
>
> Q. In those days, purchases from national oil companies involved potential risks concerning bribery and corruption, didn't they?

> A. Oh yes, they always do that. Yes.
>
> Q. So that is why it would make sense for that high risk business involving purchases from West African national oil companies to move to Lebanon, correct; from your perspective?
>
> A. It is hard for me, whether it is Lebanon or wherever but of course generally speaking, if you are in the borderline situation, better to get it to a place like Lebanon or Dubai or wherever. That I accept."

293. Mr Fredriksen denied or said he could not recall giving an instruction to Mr Bosworth/Mr Hurley to set up the Beirut office to handle the higher risk West African business, but confirmed that he was content for Mr Bosworth to make the decisions on these matters:

> "A. … this was left to Bosworth, all this decision was left to Bosworth. He was running the company and he had the experience.
>
> Q. And you were content for Mr Bosworth and Mr Hurley to structure the trading in a way that they saw fit to protect Arcadia; yes?
>
> A. I guess so."

Similarly, Mr Trøim agreed that he did not need to know the details of the transactions, because there was daily reporting on the results of the trading.

294. Mr Fredriksen denied having instructed Mr Bosworth and Mr Hurley to hold the shares in Arcadia Lebanon to his order, though when asked whether *"Farahead"* could have asked Mr Bosworth and Mr Hurley to hold the shares in Arcadia Lebanon as nominees for Farahead, he replied *"I don't know"*. Asked about the bonus share arrangements, Mr Fredriksen said they applied worldwide, though in response to the question whether he was able to impose them because Farahead controlled Arcadia Lebanon he said *"No. Not as far as I know."* He said he did not know about Arcadia Lebanon until later.

295. Mr Fredriksen's witness statement had referred to 'an opportunity' to be transferred to Arcadia Lebanon, which (as quoted earlier) he said was discussed in 2008 to be best of his recollection. It was pointed out to him that the Claimants' pleaded case was that they were told about Arcadia Lebanon *"[s]hortly after the acquisition of Arcadia London"*, based on information given by Mr Trøim to Mr Adams in 2015, to which Mr Fredriksen replied *"It could be … Arcadia for me was Arcadia, wherever it was … I didn't pay attention to these things"*. In response to the suggestion that he too knew about Arcadia Lebanon before 2008, Mr Fredriksen said he could not recall and didn't pay attention to it. Asked about the *"small number of African trades"* referred to in § 84 of his witness statement, he did not seem to dispute that they were the Sao Tome and Zafiro Contracts:

> "Q. So those were two term contracts, Sao Tome and Equatorial Guinea, the one we have just been talking about; yes?
>
> A. Yes.
>
> Q. And that was the opportunity, wasn't it, that you were being presented with for Arcadia Lebanon; correct?
>
> A. I guess so."

296. As to whether Mr Fredriksen had authorised Arcadia Lebanon to carry on the Sao Tome and Zafiro Contracts, Mr Fredriksen gave this evidence:

> "Q. And you authorised Arcadia Lebanon to carry on those term contracts, Sao Tome and Equatorial Guinea; yes?
>
> A. I did not.
>
> Q. When you say you did not, you can't recall the position, can you?
>
> A. No, I cannot."

When the question was put more generally as relating to authorisation by Farahead:

> "Q. What happened, Mr Fredriksen, was that during the summer and autumn of 2006 after Arcadia Lebanon had been set up, Farahead instructed Arcadia's crude oil West African trading to be transferred to Arcadia Lebanon; correct?
>
> A. Not as far as I know.
>
> Q. So once Arcadia London was up and running, Arcadia Lebanon stepped into the shoes of Arcadia in its dealings with the West African national oil companies and the service providers; yes?
>
> A. No. I don't know.
>
> Q. You don't know?
>
> A. No. It could happen. I'm not denying that.
>
> Q. And Farahead authorised Arcadia Lebanon to have that role as the contract holder with the national oil companies?
>
> A. I don't think they authorised it.
>
> …
>
> Q. And likewise, Farahead authorised Arcadia Lebanon to have this contract holding role for the Sao Tome contract; yes?

A. I paid some contracts.

Q. The Zafiro contracts; yes?

A. Yes.

Q. And later on, the Senegal contract; yes?

A. That I don't recall. But it could have happened. I don't ..."

297. Mr Fredriksen was then asked about the rationale for Farahead to have agreed to Arcadia Lebanon taking on the role of contract holder:

> "Q. And the reason why Farahead wanted this to happen, ie for Arcadia Lebanon to have the contract holding role, was that minimised the risk of any audit investigation into Arcadia; correct?
>
> A. It could be, yes.
>
> Q. And that was an advantage to you and Farahead, wasn't it?
>
> A. It depends how you look at it. But we didn't get any money out of it. That is the whole point. Whatever you say, we didn't receive anything.
>
> Q. We'll come to the money later. At the moment, it was of benefit to Farahead for Arcadia Lebanon to have the contract holding role for the Sao Tome contract, the Zafiro contract and the Senegal contract; correct?
>
> A. It could be the case, yes.
>
> Q. Because that minimised an audit investigation into Arcadia; do you understand that?
>
> A. Yes.
>
> Q. And that would protect not just Arcadia, but Farahead from any investigation; correct?
>
> A. If they did something illegal, I agree with that. As long as the –
>
> Q. Because you wanted to minimise any possibility of an auditor raising questions about this risky West African business; yes?
>
> A. I hear what you say but of course we don't want to take any unnecessary risks.
>
> Q. And you accept I think that Arcadia Lebanon was making what you call commission payments; yes?

> A. On certain business deals, I accept it, yes.
>
> Q. And there was –
>
> A. This has happened in time of history in the business. It is quite normal in the business.
>
> Q. In particular it would be normal in a West African oil trading business for these commission payments to be made; yes?
>
> A. Yes."

298. The Claimants complain that some of the questions put to Mr Fredriksen were vague and hypothetical, and did not address Arcadia Lebanon specifically. However, the exchanges I have quoted in the two preceding paragraphs above included questions specifically relating to Arcadia Lebanon and Farahead's willingness for it to take on a contract-holding role. They show, in my view, that Mr Fredriksen was not really in a position to say that Farahead had given no such authorisation.

299. Mr Trøim in his oral evidence initially denied that he knew in spring 2006 that Arcadia Lebanon was being set up. Mr Trøim later accepted in his oral evidence that he knew Arcadia Lebanon was in the process of being set up in April or May 2006:

> "Q. So you knew before Arcadia Lebanon had been actually formally incorporated that Arcadia Lebanon was being set up; correct?
>
> A. But you already told me yesterday that Arcadia Lebanon was set up in 2005, in the budget.
>
> Q. No, it is set up in July 2006, Mr Trøim?
>
> A. You said it was in the budget in 2005.
>
> Q. Just answer the question. You knew in April or May 2006 that Arcadia Lebanon was in the process of being set up; correct?
>
> A. Yes, that I knew at that time."

The documents support the view that Mr Trøim knew, in principle, about Arcadia Lebanon by spring 2006. On 13 June 2006, Mr Hannas emailed Mr Trøim about a new Farahead business, Exoil Petroleum. Mr Trøim's response was *"Exoil is that the New Business in Lebanon".* When asked about this email, Mr Trøim response was:

> "As I said, that is from me. I don't know what the date on the Sao Tome contract when that telephone came to me and they wanted to put that into Lebanon but it must have been before there."

Mr Trøim thus also seemed to recall a telephone conversation (not mentioned in his witness statement) about transferring the Sao Tome Contract to Arcadia Lebanon.

300. Mr Trøim was asked about the compliance problems that the Zafiro Contract raised:

> "Q. The expansion of the new Equatorial Guinea business raised exactly the problem about compliance, didn't it, that Deloitte had warned about, ie contracting directly with national oil companies. Do you remember that?
>
> A. Yes, I remember it from you showed me the document.
>
> Q. And the concern was that you didn't want there to be another Pang Ling investigation to risk into Arcadia; correct?
>
> A. I don't think we assumed it would be another Pang Ling investment because I think we assumed that the guys would follow the rules and thereby you don't have a problem."

301. At points in his oral evidence, Mr Trøim suggested that Arcadia Lebanon was put forward as relating (at least in part) to bonus arrangements:

> "Q. Effectively you agreed to replicate the arrangement that had happened under Mitsui with Arcadia Lebanon; correct?
>
> A. We did that because we were presented with a fait accompli. This is the way we are going to do it and we are going to run it here and then we effectively don't have to share the bonus pool with the rest of the people and your economic interest is kind of the same as it was before."

302. At the same time, however, Mr Trøim did not appear to dispute the notion that Arcadia Lebanon was to be used to mitigate compliance risks: the point he wished to emphasise was that it was not his idea, merely one that he had gone along with:

> "Q. And the Lebanese company was to be outside the official group, wasn't it, to distance and protect you from the risks of West African oil trading?
>
> A. That was the idea Pete Bosworth had when he came up and said he had the contract, that he wanted to take it out and he wanted to organise it through Lebanon and he wanted to kind of -- effectively they owned the shares and that was the story."
>
> "Q. And the reason why you were going to transfer the higher risk business to Lebanon was to ensure that Arcadia itself wouldn't have problems in the future with the auditors; correct?

> A. You should not ask me about this question. I said we never came up with this idea, it came from Paul and Pete and -- from Colin and Pete and you should ask them why they did it.
>
> Q. The advantage of Lebanon was that it offshored the risks, didn't it?
>
> A. You should ask Pete and Colin about it.
>
> Q. I'm asking you, Mr Trøim?
>
> A. We never came up with the idea.
>
> Q. But you knew about the idea, didn't you?
>
> A. No, because they presented us with a fait accompli and said, "We are going to do it this way".
>
> Q. And you agreed to the idea, didn't you?
>
> A. We agreed to the idea subject to the fact that our economic interest in the transaction became the same 70%."

Similarly, Mr Trøim said "*Neither Mr Fredriksen or I came up with this design, it was totally driven by Pete Bosworth and Colin Hurley*."

303. Mr Trøim insisted that the idea was presented as relating to a limited amount of business:

> "Q. And the advantage from your point of view was that Arcadia Lebanon could make the payments to the service providers, not Arcadia London; correct?
>
> A. You are putting words in my mouth which I don't like. Listen to what I'm saying. This was presented to us as a way to do it and in retrospect, stupidly enough agreed to do it for that limited amount of trades which we talked about which was kind of I think originally talked about an amount of USD6 million to USD8 million, something like that. It was not to establish a big business with a lot of trades. That was never ever, ever discussed. The first time I actually heard about it was when Tom Francisco started to dig into what had happened in that company."

Mr Trøim accepted that the figure of US$6 to 8 million he had mentioned did not appear in any of his witness statements or in the Particulars of Claim. Similarly, Mr Trøim said:

> "We allowed Arcadia Lebanon to operate that contract based on the recommendation they had and when they had the set-up arranged, in hindsight we should never have done it, but that is the mistake. It was made with a very clear purpose, that this was

> a very kind of small trade with a kind of very limited economical effect."

304. As noted earlier, the Claimants' pleaded case dating from 2015 is that the Arcadia Lebanon arrangement was said to concern *"a particularly lucrative trading contract"*, that information having been said to come from Mr Trøim. In his witness statement, in November 2023, Mr Trøim said he recalled Mr Bosworth having set Arcadia Lebanon up because he and Mr Hurley had wanted "*one specific trade or counterparty trades to be separate from the rest of the Arcadia Group business. I recall that this trade or counterparty may have been related to Sao Tome and Principe but I cannot be sure so many years later*" (§ 80). In his oral evidence, though, Mr Trøim went further, referring first to "*those initial contracts*":

> "Q. You mentioned Farahead's ownership arrangements earlier, didn't you? You instructed Mr Bosworth and Mr Hurley to hold Arcadia Lebanon shares subject to your instruction or order; correct?
>
> A. No. I said that also two or three times. They came up with the whole idea. They would park those initial contracts in that company and that we would hold harmless economically that they will receive 70% and they will be kept outside the bonus pool. But the 70% will go back to kind of the shareholder in Arcadia."

and then:-

> "Q. Yet nine years later in your third statement you now say the counterparty may have been related to Sao Tome. You have no basis to say that at all, do you, Mr Trøim?
>
> A. I think part of the reason is that I had — that comes back recollection because I have spent some time in Equatorial Guinea over the last years doing Golar business and then I remember the story and then it came to me. But as I said, have I not given any guarantees. I said it was most likely the Sao Tome contract.
>
> Q. Your memory has improved over nine years; is that right?
>
> A. Yes, because I have been down to the country and I was kind of recollecting the story.
>
> Q. So you have experience –
>
> A. But I have also done it with reservation. I tried to help the court, to advise in one direction but I have not given any assurance that was the case but there was a specific thing. My strong feeling is that it was linked to the Equatorial Guinea/Sao Tome set up with (indistinct).

> Q. Exactly. The business that was being talked about was Equatorial Guinea, wasn't it?
>
> A. Yes. That is the Sao Tome/Equatorial Guinea structure.
>
> Q. That was the opportunity that Arcadia Lebanon was going to take, wasn't it?
>
> A. I have now said that for the fifth time, this was an opportunity, this was an executed contract which they wanted to find a home for."

That evidence is consistent, in my view, with the Arcadia Lebanon arrangement having, at least in the first instance, covered both the Sao Tome and the Zafiro Contracts (the latter relating to Equatorial Guinea).

305. Asked about the first entry in the Hannas Note, Mr Trøim said this:

> "Q. We were discussing Mr Lance yesterday. He is the Arcadia secretary; yes?
>
> A. Yes.
>
> Q. Mr Hannas is recording that Arcadia Lebanon is Mr Fredriksen's standalone company. Do you see that?
>
> A. Yes.
>
> Q. And the reason why Arcadia Lebanon was the standalone company was because Arcadia Lebanon was Mr Fredriksen's company; correct?
>
> A. That is legally wrong.
>
> Q. So in substance, it is the stand-alone Fredriksen company; correct?
>
> A. No, it is a company where effectively we have a 70% economical interest."

306. The Claimants highlight evidence from Mr Trøim to the effect that using Arcadia Lebanon would not provide any protection:

> "Q. But it is right, Mr Trøim, that after Arcadia Lebanon is set up and the term contracts are transferred, there was not any audit enquiry or investigation into Arcadia's West African activities, was there?
>
> A. No, but what was more important, there was even no reporting to the 70% economic holder. So this was totally hidden from us.

> Q. But the arrangements meant that the auditors no longer raised any questions about payments to service providers; correct?
>
> A. I don't know what kind of audit there is in Lebanon but kind of I assumed there is an audit there as well, if it's not that kind of thorough. But it was not part of the group company because it was owned by Pete Bosworth and Colin Hurley.
>
> Q. And because --
>
> A. But when I see this list, it is far in excess of what was agreed to when they started this company.
>
> Q. Because there was no audit enquiry, you and Mr Fredriksen were able to protect your reputation?
>
> A. If you want to protect your reputation, I think it is pretty stupid to call the company Arcadia Lebanon.
>
> Q. Why do you say that, Mr Trøim?
>
> A. Because that will naturally belong to part of the Arcadia Group.
>
> Q. But Arcadia Lebanon is hidden from the auditors, isn't it; correct?
>
> A. Yes, but if something comes out that you have paid your own money, it does not come out necessarily from audit."

307. Mr Fredriksen gave similar evidence in this witness statement. However, it failed to address the point that the use of Arcadia Lebanon mitigated the risk of a repetition of the problems that had arisen with Pang Ling and had been highlighted in the Deloitte letter. Those problems arose because Arcadia London made payments to service providers, which led to audit enquiries. If Arcadia London purchased the oil from Arcadia Lebanon, which itself paid the service providers, then Arcadia London was no longer taking the associated risks, and no payments to service providers appeared on Arcadia London's books. Arcadia London's involvement became simply a purchase of crude oil from Arcadia Lebanon (or, as the arrangements, were implemented an intermediary company which had itself purchased the oil from Arcadia Lebanon). As Mr Trøim noted in his last answer quoted above, risks might emerge other than from the audit process. However, it did not follow that the Arcadia Lebanon arrangement did not provide a benefit or perceived benefit. The plan was to mitigate the risks, not to eliminate them. The Claimants object that Arcadia Lebanon's name meant that it could not realistically be used for the purpose alleged by the Defendants. This too misses the point. The idea was never to pretend to the NOCs that Arcadia was not purchasing the oil. My understanding of the evidence is that the idea was, rather, for the service provider payments not to be made by (or appear on the books of) Arcadia London, where the rigours of the UK audit regime might lead to questions that

would be difficult to deal with, since it would be hard to provide detailed documentary support for the payments. In the words of Mr Hurley as part of his oral evidence:

> "[T]he entity that is being audited Arcadia Petroleum Limited and latter Arcadia Energy Swiss did not have service provider agreements, so nothing was being hidden from the auditors because they didn't have any contractual obligation to do that. That was in the circumstance we are talking about here, with Arcadia Lebanon."

and:

> "What is happening is that the Arcadia Lebanon entity that has us as the registered shareholders at the instruction of Mr Fredriksen, that entity does mitigate the risk. That is the entity that is taking the risk. So the risk is out of the group and into the non-group entity which it achieves. It does mitigate the risks to that extent."

(f) Conclusions

308. Weighing up this evidence as a whole, I am unable to accept the Claimants' allegation that Mr Bosworth assured Farahead that Arcadia Lebanon was established merely to be the counterparty to one particularly lucrative trading contract in order to avoid having to share bonus payments with other traders (Particulars of Claim §§ 53, 54.1 and 54.3). I find Mr Bosworth's and Mr Hurley's account of the matter far more plausible, as well as being consistent with the contemporary documents. In light of the Pang Lang experience and the Deloitte letter, there was good reason to believe that compliance issues were likely to arise again now that Arcadia had, with the Zafiro Contract in December 2005, entered into another term contract with a NOC directly. The documents show that a Beirut office was being considered by the time of the business plan in 2005, and Arcadia Lebanon was incorporated in spring 2006. The choice of Lebanon is consistent with the reference in the business plan to a looser compliance regime, and to Mr Fredriksen's acceptance in oral evidence that it would be a good choice of venue for 'borderline' business. I find that at least Mr Trøim was aware of its incorporation at or about that time. Mr Bosworth's evidence on this topic was in my view plausible both in itself and against that context. It was also consistent with Mr Lance's later reference, recorded in the Hannas Note, to Arcadia Lebanon as Mr Fredriksen's 'stand alone' company, as well as with later events recorded in the Hannas Note to which I come later (see, in particular, sections (I)(10)(d), (e), (f) and (i) and (I)(11)(b) and (e) below).

309. It is not surprising that Mr Bosworth did not have complete recollection of the chronology, given the passage of time since these events. However, (a) he was clear from the outset, in his witness statements, about the limits of his recollection, and (b) the broad chronology is plausible: the Zafiro Contract was entered into in December 2005, Farahead's acquisition of Arcadia was completed in early 2006, and by that stage it could readily be anticipated (given

the Pang Ling experience) that in due course the auditors might start to ask questions about service provider payments, all the more so if the business were expanded and further contracts entered into direct with NOCs. Mr Hurley's evidence was similarly clear and consistent. I accept their evidence that it was agreed that Arcadia Lebanon would be used as a contract holder in order to mitigate compliance risks of West African oil trading; that the Sao Tome and Zafiro Contracts should be migrated to it; and that later similar contracts should be treated in the same way.

310. Conversely, the Claimants' account has shifted over time and lacks plausibility. The pleaded case was that Arcadia Lebanon was presented as a way of avoiding bonus sharing on one particular contract. By the time of trial, even on the Claimants' evidence it extended in substance at least to the Zafiro and Sao Tome Contracts. It was never explained why, if the objective were merely to affect bonus distribution – a matter within Mr Bosworth's gift anyway as CEO, as he pointed out – it would be necessary to go to the lengths of setting up a new company and redesigned contractual chains. Moreover, as set out above, Mr Fredriksen and Mr Trøim in parts of their oral evidence did not feel able to dispute that compliance concerns played a part in the reasons for Arcadia Lebanon's involvement, although they maintained that that was Mr Bosworth's idea rather than theirs. I do not accept the Claimants' case that Mr Fredriksen and Mr Trøim did not wish to take any risks, and that the Defendants' explanation for Arcadia Lebanon's purpose makes no sense. To the contrary, I conclude that Mr Fredriksen and Mr Trøim were willing to accept the risks inevitably involved in West African oil trading, including with NOCs, and agreed that they should be mitigated by the use of Arcadia Lebanon and of sleeving arrangements.

311. More generally, even at this stage in the chronology, the Claimants' essential case that Arcadia Lebanon was an instrument of fraud used dishonestly to divert profits from Arcadia London, begins to appear counter-intuitive. Far from Arcadia Lebanon being established and used secretly, it was openly discussed with Mr Fredriksen and Mr Trøim, and placed into at least the Zafiro and Sao Tome Contracts with, at the very least, their acquiescence. It was a company in which Mr Trøim regarded Farahead as having a *"70% economic interest"*. That is a strange way in which to commence a pattern of fraudulent diversion of funds.

312. I return later to the allegation in Particulars of Claim § 54.3 about the alleged false representation in late 2008 that Arcadia Lebanon had become dormant: see §§ 468-475 below.

(2) Arcadia Lebanon becomes operational

313. It took some time to transition the contracts to Arcadia Lebanon. The company was registered with the Lebanon Ministry of Finance on 6 October 2006, and became operational in about April 2007. Mr Hurley explained that there were contractual, operational and financial transitions to be made, and I accept that evidence.

314. GEPetrol entered into a contract with Arcadia Lebanon, dated 2 April 2007, though signed on 14 May 2007, for supply of Zafiro crude; and the existing Zafiro Contract with Arcadia London was terminated. The first Arcadia Lebanon transaction under the Zafiro Contract had a bill of lading dated 25 April 2007. The Zafiro Contract continued until 2013.

315. Similarly, Arcadia Lebanon took over the lifting under the Sao Tome Contract. Instructions were given on 19 April 2007 directing that all further cargoes would be lifted by Arcadia Lebanon. Arcadia Lebanon lifted its first Sao Tome cargo on 22 May 2007 (or possibly 4 June 2007), and later entered into a formal lifting agreement on 5 November 2007 (though NNPC continued to send letters to Arcadia London in relation to the contract until at least October 2007). However, the Sao Tome Contract expired in early 2008 and was not renewed.

316. Arcadia Lebanon also took over Arcadia's arrangements to pay the service providers, and entered into its own service provider agreements similar to Arcadia's arrangements. Arcadia London's agreement with Sonergy was terminated on 23 March 2007 and on 1 April 2007 Arcadia Lebanon entered into service provider agreements with Sonergy and Bergamot. Some of the payments made under these arrangements were recorded in a document referred to at trial as the 'Arcadia Lebanon Profit Share Schedule'. For instance, it indicates that in relation to the Zafiro Contract Sonergy received, in broad terms, 65% of the profit represented by the difference between the prices at which Arcadia Lebanon bought and on-sold the oil, and Mr Driot's companies received 15%. For some of the earlier transactions, between April and July 2007, Arcadia London rather than Arcadia Lebanon made the payments to Sonergy. This may have been the case for the cargoes referred to at trial as EY Deals 1, 2, 4, 5 and 7. In relation to EY Deals 4 and 5, there are bank transfers consistent with Arcadia Lebanon having subsequently reimbursed Arcadia London for the payments to Sonergy, which Mr Bosworth explained may have occurred as this was a *"transitionary period"* close to when Arcadia Lebanon became fully operational.

317. Further, it appears that Arcadia Lebanon also took over responsibility for Arcadia's investments in the Concerto/Main projects I referred to earlier, as evidenced for example by an 18 October 2007 invoice issued to Arcadia London which Concerto reissued on 20 November 2007 and which Arcadia Lebanon settled. Most of the payments to Concerto were for projects in Angola, the DRC and Sudan. One concerned the acquisition of an interest in the Indarama gold mine in Zimbabwe, to which I return later.

(3) Mr Kelbrick's role as service provider to Arcadia

318. In spring 2007, Mr Kelbrick moved to Switzerland for professional and health reasons. However, he said he continued to travel to Nigeria almost every other week to maintain his contacts, as well as undertaking legacy work via Blacksea for Mr Decker. In July 2007, Mr Kelbrick established a separate entity in Switzerland, South Energy, through which to provide his consultancy services. South Energy entered into a consultancy agreement with Arcadia on 1 March 2007.

319. While Arcadia Lebanon became operational, Mr Kelbrick also began to work as service provider for Arcadia. Mr Kelbrick said that South Energy's consultancy services for the Arcadia Group included providing assistance with the administration and logistics of the Arcadia Group's existing business in West Africa, Sudan and India, maintaining commercial relationships, seeking to obtain new supply contracts, providing any information that Arcadia Group used to assist its paper trading (including operational and market information from Nigeria), and attending meetings on Arcadia's behalf. This included travelling to India with Arcadia Singapore employees to introduce them to Mr Kelbrick's Indian contacts at Reliance and ESSAR. Mr Scheepers said South Energy paid Arcadia Switzerland rent to use their offices and had separate IT systems.

320. Mr Kelbrick also set up a new company, Proview, which he and Mr Bosworth agreed would handle all the operations etc in Nigeria on behalf of Arcadia Lebanon, especially all of the operations within NNPC. Proview became operational at about the end of 2007 and received payments from Arcadia Lebanon starting in July 2008. Mr Kelbrick provided services in respect of the Sao Tome Contract (and later the Senegal Contract) in respect of which he received a profit share. Mr Kelbrick operated the Sao Tome Contract from June 2007 to January 2008 for Arcadia Lebanon. He said he maintained and handled the contract *"from the NNPC side"*. Mr Asibelua/Equinox had the relationship with the Sao Tome Government, but it was Mr Kelbrick's relationship with NNPC that operated the term contract and secured the lifting of the crude oil for Arcadia Lebanon. Mr Bosworth said Mr Kelbrick lived in Nigeria and *"had access to everybody that Arcadia or Sao Tome needed to handle the contract"*. Mr Bosworth's evidence was that Mr Kelbrick's role on the Sao Tome Contract was to handle all of the operations in Nigeria because the Arcadia Group did not *"have people on the ground"* in Nigeria.

321. Mr Bosworth and Mr Kelbrick explained that the only local personnel that Arcadia London could for a time call on in Nigeria were Mr Morgado and Ms Azzariti, both foreigners and too junior to be given significant responsibility (and remunerated far less than service providers). Mr Bosworth explained that Mr Kelbrick and his companies performed a similar role to that previously performed by Pang Ling and Mr Asibelua (in the early 2000s, when the latter was Arcadia's principal Nigerian broker).

322. Mr Kelbrick said that, in relation to the Sao Tome Contract between June 2007 and January 2008, he assisted in handling the operational aspects of the contract, principally ensuring that Arcadia Lebanon actually obtained oil in the first place, and then ensured it got its preferred grade of oil and timing from NNPC. His work also included arranging letters of credit, shipping operations, banking operations and pricing operations. Mr Kelbrick also recalls work in relation to the Sao Tome Contract involving chartering a small plane and travelling to São Tomé. As to his remuneration, he said in oral evidence:

> "I don't recall the percentage or the basis for the agreement. I knew that I was working to get the cargoes and for Arcadia and that is all that I can really recall"

and:

> "I don't recall a profit share agreement but if I have been running a contract, if I have been managing a contract, if I'm the only option that they have on the ground, right, then - - and to my knowledge, I was the only option because you know you couldn't go and hire other people that had the expertise…so these monies would have been due because there are gross profits associated with them. I would have been involved in ensuring that gross profit was made"

323. The evidence indicated that there were a number of important facets to the services Mr Kelbrick (and similar service providers) provided.

324. A number of witnesses gave evidence about the importance and difficulty in getting the right grades and volumes of oil at the right time, which is one of the main services Mr Kelbrick said he and Proview provided under both the Sao Tome and Senegal Contracts. Messrs Hendry and Kelbrick gave evidence that obtaining a term contract did not guarantee the supply of oil for the contract holder, because NNPC in particular would generally agree to provide more oil than it in fact had. Mr Kelbrick said NNPC *"committed far too much contractually than can be met"*, and once one had a term contract, one had *"to fight tooth and nail to make sure you get the volume against that contract"*. He explained that:

> "Within NNPC, you have the crude oil marketing department. Within the crude oil marketing department, you then have the programming department and those are the people that have to try to ally all their commitments with what the production is going to be. And the reason I make it ally like that is you are always going to leave people out, because you have committed the politicians. And everybody else has committed far too much contractually than can be met, especially when there are community disturbances, pipelines broken".

Similarly, Mr Bosworth said *"Start with a contract. The contract may say 30 or 60,000 barrels per day. There is no guarantee that you will get that amount of oil"*. Thus, even after a company had secured a term contract, it would need operational assistance on the ground in West Africa to obtain the right volume and grade of oil at the desired time and place. A report by the Oxford Institute for Energy Studies stated that *"Adding to the complexity of Nigerian oil contracts is that they allow contract holder to nominate five grades of crude acceptable to the buyer. NNPC can deliver any of these grades of their own choosing. It is not clear what method NNPC uses to allocate these barrels. There is no guarantee on the NNPC part to supply the agreed volumes."*

325. As I noted earlier, Mr Hendry's evidence in his report was that obtaining *"the correct cargo, with the required quantity, on the stipulated dates, can in fact be challenging"* to achieve, and *"[t]he NNPC term crude contract, for example, does not specify which of two dozen or so different Nigerian crude grades will be allocated. Some grades are far more attractive than others. The allocation*

of particular loading dates within a stipulated month can have a significant impact on the trader's profitability, especially whenever there is steep contango or backwardation in the forward market". In oral evidence, he added that *"NNPC gives NNPC the right not to supply if they don't wish to. So you may have the allocation of oil but you may not get it, you may not get the oil you want, you may not get it in the timing you hoped to receive it"*.

326. Consistently with that evidence, Mr Kelbrick said that about 6-8 weeks before loading, he would be asking which grades Arcadia Lebanon wanted, when it wanted them in the month, and then when the programme came out 6 weeks in advance, he *"would sit with [NNPC] for hours on end and make sure that we got the right grade, the right time in the month"*. He said emphatically, *"getting the right oil at the right time. Getting the correct laycan. Making sure there are no difficulties in loading etc, etc, is – I'm sorry if everybody thinks that is an easy task but it really isn't".* Mr Kelbrick described his job as follows: *"to get the grades they [Arcadia Lebanon] wanted - - well, number one was to get the molecules…It was number two to get the correct molecules. Number three, to make sure they were arranged on the appropriate dates for the customer"*. He described in his witness statement how he *"attended NNPC's offices regularly to ensure that the company for whom I was working…lifted the correct grade of oil, in the correct quantity, at the right time"*.

327. Likewise, Mr Akpata when asked to give an example of a particularly important part of service providers' work, he said: *"Getting grades and getting dates. Those are significant. You know, dates can go into things like getting a month, getting the right month. Then you go into the right decade and then the right two days. That becomes very specific"*. Mr Akpata said to achieve this, one had to *"sit with"* and *"harass"* individuals at NNPC until you got what you wanted. He said *"you can have a situation where everybody wants a certain date. So in the market, the traders know, for example, oh Bonga is good, we need this decade …So if three, four people are looking for Bonga, everyone is looking for Bonga, and there is only so many Bongas… There is only so many. So you have to make sure that your guy is the one who gets that"*. Mr Akpata said the operational and logistical services provided made traders a lot of money. Conversely, Mr Kelbrick explained: *"If you get one of those three elements wrong [grade, volume, timing], it can result in a multi-million-pound loss"*. For example, Mr Kelbrick said, a change in the laycan date would change the pricing period and so could result in a significantly different price for the oil. Thus, securing the right grade of oil in the right quantity at the right time had a significant impact on the profitability of the potential trades.

328. Others gave similar evidence. Ms McDonald said that *"if a service provider didn't procure or help procure the cargo, Arcadia Group wouldn't make any money so without them there may not have been a deal"*. Mr Duncan said it was *"vital"* to get the right grade of oil at the right time, and *"the grades are allocated on set dates. The challenge is to meet those dates. So – and a lot can go wrong in terms of meeting those dates. You can have civil unrest, you can have power outages, you can have piracy, you can have a whole bunch of things"*. He agreed that providing these operational services was highly valuable and important to anybody trading West African crude oil.

329. Mr Kelbrick said, *"the smallest thing can trip you up"*. Mr Kelbrick mentioned as an illustration a deal between Arcadia London and IOC in September 2007 where the vessel nomination/loading dates changed. As a result, Mr Duncan noted in an email that IOC had *"gone nuts"* because IOC said the change in dates *"will severely hamper our refineries operations due to crude shortage"*. Mr Duncan's contemporaneous response to this problem was *"Kelbrick on the case"*.

330. Significant operational and logistical issues had to be addressed. Mr Duncan said in oral evidence that one of Mr Kelbrick's services and skills as a service provider was resolving operational issues, which he repeated was *"vital"* (notwithstanding his evidence that he *"did not get on well at all"* with Mr Kelbrick). Ms McDonald said that *"A lot can go wrong"* in trying to secure and lift the right cargo.

> "For example in Nigeria, when you would load a cargo of crude oil, you might get it inspected and find that it had a large proportion of water, so you would be paying for water, not oil. Sometimes the quality was not what it should be, so you would have to have it inspected at load port and then you might have to negotiate. Cargoes could be held up because of other vessels in port, they could miss a delivery window, the buyer would say they are not going to receive it now because you have missed your delivery window so you would have to sell it as a distressed cargo. There were lots of things that would go wrong".

She said that in situations like these, service providers come into their own by resolving these issues.

331. Mr Bosworth said there were *"significant amounts of work"* involved in the logistical and operational services Mr Kelbrick provided, which included handling letters of credit, shipping operations, banking operations, and pricing operations. Nominating a vessel in Nigeria was *"not a straightforward operation"*. Shipping documents had to go through the Department of Petroleum Resources and any delay could cause significant problems with loading, with the terminal, and with the relationship with NNPC. Mr Kelbrick explained that he had to be sure of all the documentation for NNPC because his biggest risk was non-performance, that the cargo could not be lifted. He had to spend hours on end in NNPC's offices to ensure cargoes were lifted.

332. The Claimants sought to minimise the nature of the services Mr Kelbrick provided, but I found his explanations credible and indeed compelling. The following example gives a flavour of his oral evidence:

> "Q. But these are described as logistical or administrative services, aren't they; making sure the documents are filed?
>
> A. Well, perhaps in any other country and certainly in other countries I have been to, it can be a fairly straightforward task. Finding the right person, getting into NNPC, literally getting into the building itself some days could be a nightmare. I was fenced

> at the gate for days on end. There could be any number of things that meant you couldn't get in there and once you were in there, you made sure you stayed there because you weren't going to necessarily come out and go back unless everything was more routine. There were times at NNPC genuinely where I would go in the jeep and I would sit there and they would just wave and say go, just pass, we don't want you here. So, it was -- I do understand from your perspective about thinking it's normal. It is really not normal. I lived there as well and I spent a lot of time away from my family, just working hard and doing all of these tasks that everybody thinks is mundane. And it really isn't because if it isn't hit, and if somebody decides to take exception, then again the last thing I want is to be picking up the phone to somebody in Arcadia and saying, *"We have a problem"*.
>
> Q. Mr Kelbrick, this is all very interesting, but it is all a matter that should have been explained in your witness statement, isn't it, if it were true?
>
> A. It is true.
>
> Q. You talk about filing, shipping and letters of credit documents. The only difficulty referred to is not being allowed access to the building. And yet you say you regularly attended day-long meetings for programming?
>
> A. No. I would get into what was called the crude oil marketing department, COMD, I would get in there at 8 o'clock in the morning and you just had to pick off whoever was coming. There was no *"I will see you at 10.35"*, it just didn't work that way. I had to be on the ground in front of people's faces to get things done.
>
> Q. But what you are describing are things that could have been done by any local Nigerian as well?
>
> A. Not necessarily, no."

333. I reject the Claimants' suggestion that Mr Kelbrick, in giving this and similar evidence, was going beyond his witness statement. In my view, the evidence he gave was entirely in line with the contents of his statement, including the passages I have quoted in § 158 above. I bear in mind that, as the Claimants point out, there is little documentation on this topic. However, Mr Kelbrick's evidence was that his work *"was not paper-heavy, it required a lot of face-to-face meetings and telephone calls"*; that he did not have significant administrative support; and that he was primarily concerned with operating on the ground in West Africa rather than the preparation of paperwork. I accept that evidence. In addition, his evidence about his work as a service provider is consistent with the evidence from Mr Hendry, Mr Akpata, Ms McDonald, Mr Duncan and Mr Bosworth about the nature of the role.

334. The Claimants sought to compare Mr Kelbrick with Ms Azzariti and Mr Morgado. I agree with Mr Kelbrick that the comparison was inapt. Mr Kelbrick was very well connected in NNPC. He was a specialist in originating and operating West African crude contracts. By contrast, Ms Azzariti and Mr Morgado were – as Mr Bosworth explained – *"very junior"*. Mr Kelbrick said, *"that sort of person doesn't generate contracts and doesn't generate worth"*. Mr Bosworth also rejected the notion that Mr Kelbrick could simply have been replaced by a modestly-remunerated Arcadia employee. For example:

> "Q. All you are talking about, handling all the operations on the ground, you could have employed someone specifically to do that at a fraction of the cost. A full-time employee in Nigeria, how much do you think you might have spent on that?
>
> A. It's not quite as simple; it's not as black and white as that in that employing somebody who has no experience or employing a local employee is part of the package. In order to get someone who really knows, and as I said before, Mr Kelbrick lived in Nigeria I think at this time or around that time, so he had access to everybody that Arcadia or Sao Tome needed to handle the contract.
>
> Q. And who might that be?
>
> A. Everybody within NNPC, everybody within government, everybody outside of it as well."

I accept his and Mr Kelbrick's evidence on this matter.

335. Mr Bosworth explained that *"it's not an easy job"* because *"It is a complex job getting documents across a country where there is little or no communications at that time"*. Ms McDonald said of pricing declarations that *"there was no guarantee it was going to get to the right person, so that is why we would use the service provider"*. When asked about whether certain services are administrative in nature by Mr Haydon KC, Mr Hendry said that *"nothing in Nigeria works the way it does in any other country"*, and *"dealing with NNPC, nothing is routine"*. In Mr Kelbrick's words, *"It was not a case of just me waltzing in [to NNPC] and dropping papers et cetera"*.

336. A number of witnesses also gave evidence that working in the Nigerian oil sector in the relevant period was dangerous. Mr Kelbrick gave evidence that throughout his time in Nigeria, he used bulletproof cars, and all of the doors in his apartment, including the internal doors, were bulletproof. He said, understandably, that he *"did not enjoy working alone in Nigeria and this was not a happy period in my life"*. Mr Bosworth said of Mr Kelbrick's work as a service provider on the ground that it *"is not an easy job and it's not a safe job either"*, and when he (Mr Bosworth) had been in Nigeria, one of his expense accounts included a bulletproof vest. Ms Bossley also said she had had some *"pretty hair-raising experiences"* in Nigeria, and Mr Akpata too referred to needing bulletproof cars when travelling to certain places during "*kidnap season*".

337. It was also suggested to Mr Kelbrick that he was paid far more for the same job than Mr Akpata had been (whose March 2002 agreement provided for per barrel fees along with bonuses not exceeding US$250,000 a year), by reference for example to an invoice from March 2002 setting out activities Mr Akpata carried out on administrative tasks, document handling and advising. Mr Kelbrick explained, however, that this was several years earlier and, in any event, these charges did not relate to Mr Akpata having in substance provided oil: *"he hasn't brought crude oil to the Arcadia stable"*. As set out earlier, Mr Akpata himself said his own complaint was that he did not receive more, rather than that Mr Kelbrick was overpaid: once one reached Mr Kelbrick's level, his remuneration was *"what was supposed to happen"* (see § 96 above).

(4) Audit enquiries

338. As part of the audit of Arcadia for the 2006/2007 year, Moore Stephens raised a number of queries about payments that Arcadia had made to service providers, including to Sonergy and Equinox. These related to the period before the Zafiro and Sao Tome Contracts were transferred to Arcadia Lebanon. The Arcadia audit committee met on 30 April 2007, and on 6 June 2007 Moore Stephens wrote to the committee to identify matters arising from the audit. Moore Stephens identified payments to Sonergy, Equinox, MRS and Concerto (included in 'Other charges'), among others, for further investigation. The documents suggest that a meeting of Arcadia London's audit committee, comprising Mr Hurley, Mr Lance and David Ford, with Geoff Woodhouse, the partner at Moore Stephens with carriage of the audit and financial statements, took place on 6 June 2007, with review of draft financial statements being the first agenda item. Mr Woodhouse emailed Mr Hurley on Monday 9 July 2007 to say that he would meet Mr Hurley that Friday 13 July 2007 to finalise the audit and financial statements and then have lunch.

339. On 12 July 2007, Moore Stephens sent Arcadia a form of representation letter dated 13 July 2007, to be signed by the board and sent back to Moore Stephens. The letter identified that Arcadia's 'cost of sales' included a charge of US$11.3m payable to Sonergy and that the agreement with Sonergy had been approved by the Arcadia board. The letter was formatted so as to be signed by Mr Hurley on behalf of the board and countersigned by Mr Lance, Mr Hannas and Mr Pallaris as directors attesting to the following statements:

> "Each of the countersignatories below, each of whom is a director at the time when the directors' report is approved, in signing this letter confirms that:
>
> (a) so far as each director is aware, there is no relevant audit information of which the company's auditors are unaware; and
>
> (b) each director has taken all the steps that ought to have been taken as a director, including making appropriate enquiries of fellow directors and of the company's auditors for that purpose, in order to be aware of any information needed by the company's auditors in connection with preparing their report and to

> establish that the company's auditors are aware of that information."

340. Later the same day, Mr Hurley emailed Mr Woodhouse to say that he had invited Mr Lance and Mr Ford (of Arcadia) to join the lunch the next day. Mr Woodhouse responded at 17:31, "*Many thanks and I look forward to seeing you at midday — I will be bearing ten copies of the 2006/07 financial statements for signing which I will swap for our letter of representation.*" Mr Hurley was asked in cross-examination whether he would have been able to sign the representation letter in person at the lunch, to which he replied "*As one person, if it was brought along, I would be able to sign it*." I do not read that as meaning that Mr Hurley considered that his signature alone would have been sufficient for the auditors to sign off on the accounts. However, it appears from the documents that the financial statements themselves were signed by Mr Lance, who was due to attend the 13 July 2007 meeting, and that Moore Stephens signed off on the audit on the same day.

341. The Claimants' disclosure does not include a signed copy of the letter, and no communication has been found sending the representation letter to Mr Hannas. Mr Hannas in cross-examination confirmed that the 2006/07 audit was completed, and that the auditors would not sign off on the accounts unless these sorts of letters were signed. He said he could not recall signing the letter, nor any reason why he would not have signed the letter. Mr Hannas said he was not involved in the commercial operation of the group and could not remember seeing Arcadia London's agreement with Sonergy. The Claimants suggested that Mr Hurley had not sent the representation letter to Mr Hannas.

342. The previous year, 2006, the auditors had sent the representation letter to Mr Hurley, who had replied *"No problem I can sign but the two directors in Cyprus may take some time does this have to happen before we can sign the financial statements?"* The auditors replied that the other directors' signatures could follow in due course by pdf or fax. The documents suggest that Mr Hurley then signed the signature page and sent that page only to Mr Hannas for signature. There is no record of a message sending Mr Hannas (or Mr Pallaris, who also signed) the full text of the letter. In addition, the documents suggest that in 2013 Moore Stephens accepted a representation letter signed by Mr Lance but not the other director, Mr Tuke. Conversely, though, it is notable that the auditors in 2006 contemplated that signatures might be provided by fax, and it is possible that Mr Hannas received the 2007 representation letter, and provided his signature to it, by fax.

343. In the absence of the complete documentation for 2006/07 it is difficult to draw clear conclusions about this matter. Despite the (limited) evidence about what happened in 2013, six years later, I consider it more likely than not that Mr Hannas would have signed the representation letter at some stage, on the basis that in the ordinary course of events the auditors would expect his signature on it (as they evidently did in 2006). The evidence does not indicate whether or not Mr Hannas saw, or asked to see, the full text of the representation letter or the Sonergy agreement. Conversely, though, there is no evidence of any attempt to conceal the representation letter or its contents from Mr Hannas (or anyone else).

(5) Examples of transaction chains involving Arcadia Lebanon

344. The Claimants highlighted a selection of examples taken from the 144 Transactions, used to illustrate the matters said to found their claim. It is convenient to mention two of them here as they related to cargoes lifted pursuant to the Sao Tome and Zafiro Contracts (even though the second of them occurred a little later than the stage in the chronology I have reached).

(a) Pricing under the Term Contracts

345. It is first necessary to summarise the pricing arrangements under the Sao Tome and Zafiro Contracts.

346. The NNPC term contracts in this case, such as the Sao Tome Contract, priced the oil by reference to the average of prices published by Platts for Dated Brent over a 5-day period defined by reference to the bill of lading date. NNPC published Pricing Schedules setting out an Official Selling Price or "*OSP*". The OSP was a combination of the average of published Dated Brent prices over three possible periods (the "*Absolute Price*") plus a premium or less a discount according to the grade supplied. The pricing periods were:

i) "*Prompt*", corresponding to the 5 days after (and excluding) the Bill of Lading ("**B/L**") date;

ii) "*Advanced*", corresponding to the 5 days before (and excluding) the B/L date; and

iii) "*Deferred*", corresponding to the 5 days commencing after the Prompt period (i.e. starting on the sixth day after the B/L date).

347. The default charging period was "*Prompt*". An "*option fee*" (usually US$ 0.05/bbl) was charged to a buyer if it wanted to select either Advanced or Deferred pricing. If the option was not exercised, the period used would be "*Prompt*".

348. Under NNPC Term Contracts, a cargo was the subject of a nomination which specified an anticipated loading period of the cargo — a window within which the cargo was expected to be loaded and lifted — the "*Laycan*". The B/L would be expected to be issued within that period, but there could be delays.

349. The buyer had to declare its chosen pricing option by the sixth Nigerian working day before the commencement of the agreed loading date range. At the time the option was required to be exercised, the Advanced period would not have started.

350. To help gauge what the best option might be, it was possible to consult the futures or Contract for Difference market to determine forward prices and compare prices being offered for delivery in each of the three periods. In cases where there was a steep difference in prices being quoted, it might be possible to see value in paying for and exercising the option to select Advanced or Deferred instead of the default pricing period of Prompt.

351. Two industry terms are used to describe the structure of the forward curve: when a market is in "*contango*", the spot price (price for delivery soon) is lower than the futures price (price for delivery in the future), which is reflected in an upward sloping "*forward curve*"; "*backwardation*" is where the spot price is higher than future prices, so the forward curve slopes down. Where there is a steep curve one way or another, it might make sense to exercise the option and pick "*Deferred*" or "*Advanced*" averaging periods to determine the price paid. Mr Hendry said, *"this pricing optionality allows traders to take a view of the market and to exploit differences in value that can occur during the available pricing windows offered"*. As Mr Kelbrick explained, if a buyer purchased oil from NNPC using the *"Advanced"* option and sold the oil using the *"Prompt"* pricing option, it would make money if the price of Dated Brent rose between: (i) the five-day period before the bill of lading (advanced pricing); and (ii) the five-day period after the bill of lading (prompt pricing). It would lose money if the price of Dated Brent fell across the same two periods. Further, he said, under the terms agreed:

> "If Arcadia wanted to exercise a pricing option, the sale contract provided that it had to declare the same to me on or before the 7th Nigerian working day prior to the first day of the pricing option. This was in order that I could then declare AOIL's pricing option to NNPC. I could either follow the pricing window elected by Arcadia, and take on no pricing exposure, or elect a different pricing window, in which case AOIL took on pricing exposure." (§ 66)

352. The Claimants suggested at trial that the one-day difference between the dates on which Arcadia and then Mr Kelbrick had to make a pricing decision gave him an advantage and was what enabled him to make large profits on the transactions. There was no plea to that effect and no evidence in support of it, whether of fact or from the experts. Nor does the point have any inherent logic. It is obvious that Mr Kelbrick's company would need to know Arcadia's election so that it could decide what election to pass down the chain, and there can be nothing remotely objectionable about building in a day for that to occur. As Mr Kelbrick said in cross-examination, the additional day might be an advantage or might be no advantage whatsoever: *"the purpose was to make sure that I never let Arcadia down on putting the pricing option in".* Building in a day was obviously prudent in circumstances where, as he put it, *"nobody in Nigeria can be certain of anything".* Nor was there any evidence that the one-day 'advantage' had any intended or actual causal link to the profits made. Nor was there any suggestion that the Arcadia Group elected its pricing period to Attock Mauritius anything other than freely and independently. To the contrary, Ms Driay said *"I would typically be given the option to elect a pricing basis by all of the entities I bought crude from (including Attock)"*, and there was no evidence that she made that decision according to anything other than her own judgement. As Mr Kelbrick also said, he passed the pricing option on to Arcadia – something he did not have to do – and they could choose whether or not to pass it on to their on-purchaser. Yet further, their *modus operandi* was, as he understood it, different from his:

> "So the idea of them, their MO as a portfolio company being the same as my MO as a small trader, smaller trader before we go any further, their MO is different. Their MO was to stack their paper positions, to stack their Brent positions, to stack their TI positions and my MO was to make money operationally at the front end.
>
> Q. But surely Arcadia would have made money at the front end, if they could, by exercising the option?
>
> A. But they didn't have access to the oil. I was the one who got the contracts. I had those contracts. They were mine to operate and to sell as Attock to Arcadia."

353. The Claimants point out that the majority of the profits made by Arcadia Lebanon or Attock Mauritius were made when the price averaging period selected by Arcadia London/Arcadia Switzerland was different from the price averaging period selected by Arcadia Lebanon/Attock Mauritius. The Claimants say Arcadia Lebanon/Attock Mauritius always selected the more favourable price averaging period, apart from EY Deal 130 where it is apparent that Attock Mauritius made a mistake by notifying NNPC of its preferred price averaging period too late.

354. Under the Term Contracts made with GEPetrol for the supply of Zafiro or Ceiba Crude Oil, the buyer was at least ostensibly permitted to select a price averaging period retrospectively, after the Bill of Lading date. For example, clause 7 of the Zafiro Contract provided:

> "7. PRICE
>
> The price in US Dollars (U.S. $) FOB FPSO Serpentina terminal offshore Equatorial Guinea in barrels of the bill of lading will be determined in the following way:
>
> P = Dated Brent plus or minus a differential X in USD per net barrel X is a differential to be negotiated for each cargo strictly on the basis of the market conditions between the Seller and the Buyer, by mutual agreement latest 28 days prior to the first day of the preliminary loading dates range of two days.
>
> Dated Brent corresponds to the arithmetic average of five (5) consecutive mean quotations of the Dated Brent published by PLATT'S Crude Oil Marketwise during the month of loading and shall be advised by the Buyer to the Seller latest the second working day of the month following the month of loading."

355. Ms Bossley described such clauses as *"peculiar"*, as they allowed the buyer to make a retrospective selection of the applicable five-day price averaging period from the previous month. Mr Hendry commented that: "*To be able to buy at the lowest price possible is a very enviable style of contract*."

356. In reality, however, the pricing was a matter for negotiation: see § 233 above. In most of Arcadia Lebanon's negotiations with GEPetrol – conducted by Mr Driot until December 2010 and thereafter, by Mr Kelbrick – Arcadia Lebanon did not in fact secure the most advantageous pricing period within the month of loading of the relevant cargo. Of the first 12 cargoes lifted under the Zafiro contract, the most advantageous pricing period was only obtained on 4 occasions by Arcadia Lebanon (33% of the time). The same is true for GEPetrol's negotiations with (i) Arcadia Lebanon after 2011 – when Mr Kelbrick conducted the relevant cargo-by-cargo negotiations following Mr Driot's departure from Arcadia Lebanon – and (ii) Attock Mauritius under the Attock Transactions referred to later. Of the 26 cargoes lifted by Arcadia Lebanon after 2011 under the Zafiro Contract and by Attock Mauritius under the Attock-GEPetrol Contract, the most advantageous pricing period was only obtained on 7 occasions by Arcadia Lebanon/Attock Mauritius (as the case may be), i.e. approximately 27% of the time.

357. The Claimants nonetheless make the point that five-day periods were consistently selected retrospectively that generated significant profits for Arcadia Lebanon under the Zafiro Contract and for Attock Mauritius under the Attock/GEPetrol Contract; and they refer to Mr Bosworth having accepted in cross-examination that the pricing mechanism under the Zafiro Contract was such that *"you would break even at worst*".

358. In relation to both the NNPC and the GEPetrol contracts, however, there is no positive case about the pricing basis for the transactions or that it in any sense amounted to or demonstrated diversion of opportunities. Moreover, on the footing that neither the Arcadia Lebanon Transactions nor the Attock Transactions involved diversion of any opportunities from Arcadia – as I later conclude – the fact that Arcadia Lebanon or Attock managed, by negotiation or by skilful selection of price averaging periods, to obtain advantageous terms, or was successful in its pricing elections, is beside the point.

359. Aside from the possibility of making a profit by reason of its pricing period election, a participant in a transaction would make a turn by charging its buyer an agreed additional premium (a number of cents per barrel) in excess of the premium that they had been charged by the NOC or other immediate seller.

(b) EY Deal 6

360. EY Deal 6, in May 2007, related to a cargo bought from NNPC under the Sao Tome Contract.

361. Each trade under the Sao Tome Contract had six stages in contractual terms:

i) Stage 1 NNPC to Sao Tome: NNPC sold the cargo to Sao Tome under the government-to-government contract. Arcadia Lebanon arranged all the financing and operational matters.

ii) Stage 2 Sao Tome to Arcadia Lebanon: Sao Tome sold the cargo to Arcadia Lebanon. Arcadia Lebanon's pricing election determined the

price pursuant to which Arcadia Lebanon had an option to elect one of three pricing bases (advance, prompt or deferred) on the Dated Brent measure, plus an OSP premium. Arcadia Lebanon's gross receipts were the difference between the price it paid to Sao Tome and the price it sold the cargo for at Stage 3. From the gross receipts, Arcadia Lebanon paid the service providers (which under the Sao Tome Contract were Equinox and, later, Proview) and had other costs, such as payments of the US$0.15 fee to Sao Tome.

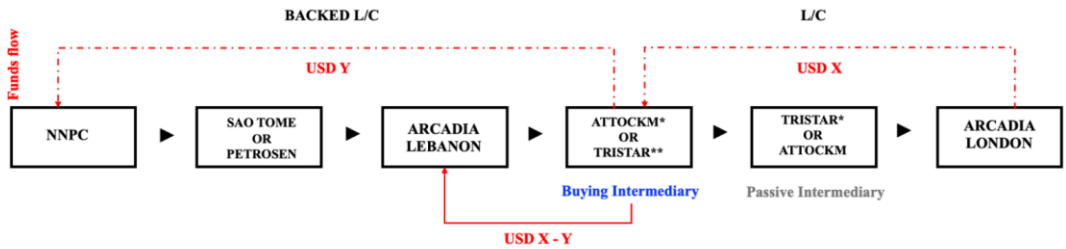
iii) Stage 3 Arcadia Lebanon to Tristar/Attock: Arcadia Lebanon sold the crude to the Tristar group/Attock group as a back-to-back onward sale. In the case of transaction EY Deal 6, Arcadia Lebanon sold to Tristar Energy. The price that Tristar/Attock paid to Arcadia Lebanon was calculated on the basis of the sale price to Arcadia, plus a modest fee for Tristar/Attock's services as a sleeve and any costs Tristar/Attock incurred in relation to the cargo.

iv) Stage 4 Tristar/Attock to Attock/Tristar: a back-to-back sale between members of the Tristar and Attock groups. In the case of EY Deal 6, Tristar Energy sold to Attock Mauritius.

v) Stage 5 Attock/Tristar to Arcadia London: Tristar group/Attock group sold the cargo to Arcadia as a back-to-back onward sale. Arcadia's pricing election determined the price. In the case of EY Deal 6, Attock Mauritius sold to Arcadia London.

vi) Stage 6 Arcadia London to third party: Arcadia London sold the cargo to a third party counterparty (e.g. a refinery, oil major or other trading company): in the case of EY Deal 6, this was Nexen. The true extent of Arcadia London's profits on this trade would need to take account of the hedging, contract for difference trading and any other paper trading associated with or facilitated by the trade (or, at least arguably, the course of physical West African crude oil trading in general).

362. The transactions can be shown in diagrammatic form (including the associated letters of credit) as follows:



(The alternative reference to Petrosen concerns the Senegal Contract: see later.)

(c) EY Deal 19

363. EY Deal 19, in January 2008, related to a cargo bought from GEPetrol under the Zafiro Contract.

364. Each trade under the Zafiro Contract had five stages in contractual terms:

i) Stage 1 GEPetrol to Arcadia Lebanon: GEPetrol sold the cargo to Arcadia Lebanon. The price was determined by negotiation between Mr Driot and GEPetrol, based on the average of the Dated Brent measure over a five day period and a discount. Arcadia Lebanon's gross receipts were the difference between the price it paid to GEPetrol and the price it sold the cargo for at Stage 2. From the gross receipts, Arcadia Lebanon paid service providers (which in the case of the Zafiro Contract were Sonergy and Mr Driot's other service provider companies) and incurred other costs, such as payments to GEPVTN.

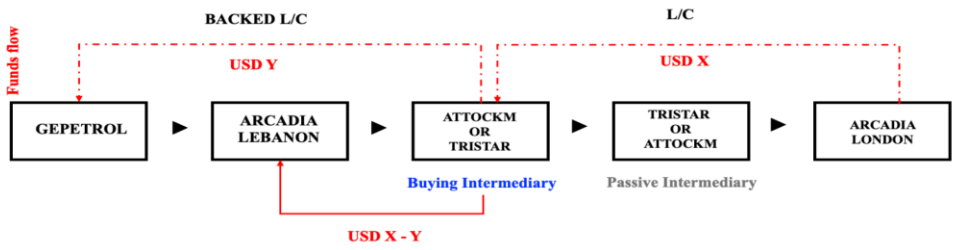
ii) Stage 2 Arcadia Lebanon to Tristar/Attock: Arcadia Lebanon sold the cargo to the Tristar group/Attock group as a back-to-back onward sale. In the case of EY Deal 19, Arcadia Lebanon sold to Attock Mauritius. The price that Tristar/Attock paid to Arcadia Lebanon was calculated on the basis of the sale price to Arcadia, plus a modest fee for Tristar/Attock's services as a sleeve and any costs Tristar/Attock incurred in relation to the cargo.

iii) Stage 3 Tristar/Attock to Attock/Tristar: a back-to-back sale between members of the Tristar and Attock groups. In the case of EY Deal 19, Attock Mauritius sold to Tristar Energy.

iv) Stage 4 Tristar/Attock to Arcadia: Tristar group/Attock group sold the cargo to Arcadia as a back-to-back onward sale. In the case of EY Deal 19, Tristar Energy sold to Arcadia London. Arcadia London determined the price that Arcadia paid. The purchase price was at or below market price.

v) Stage 5 Arcadia to third party: Arcadia sold the cargo to a third party counterparty (e.g. a refinery, oil major or other trading company): in the case of EY Deal 19, this was Cepsa. The true extent of Arcadia's profits on this trade would need to take account of the matters referred to in §361(vi) above.

365. The transactions can be shown in diagrammatic form (including the associated letters of credit) as follows:



366. The Claimants set out the chronological steps involved in EY Deal 19 as follows:

i) GEPetrol sent to Arcadia Lebanon the final lifting programme which nominated Arcadia Lebanon to take a cargo of 1,000MB Zafiro 8-9 February 2008.

ii) The sale from Arcadia London to Cepsa was recorded by Arcadia London on 2 January 2008 and a price averaging period 5 days after the B/L was selected.

iii) The cargo was loaded on board TEIDE SPIRIT with B/L of 10 February 2008. Accordingly, the price averaging period used to determine the price Cepsa would pay Arcadia London became 11-16 February 2008.

iv) Arcadia Lebanon's Pricing Declaration was made a month later on 4 March 2008, selecting a price averaging period of 7-13 February 2008.

v) Arcadia London was paid US$91,485,979 by Cepsa and was charged US$91,416,677 by Attock Mauritius, making a small profit of US$69,302.

vi) In this case, Attock Mauritius paid GEPetrol US$88,091,156.27 and paid the balance (the profit) to Arcadia Lebanon in the amount of US$3,295,819.86.

vii) A payment to GEPVTN (US$43,923.25) was required, which reduced Arcadia Lebanon's net gain.

viii) On the Defendants' case, Arcadia Lebanon also made payments to service providers: Sonergy (EUR 1,165,320), Bergamot (US$130,140), Obexys (EUR 89,674.00), Fenton (US$247,508.25) and Orange (US$247,508.25). Taking account of those payments would reduce Arcadia Lebanon's net profit (before overheads) to US$663,968.23. The Claimants did not accept that these were legitimate and commercial costs.

(6) Senegal Contract

367. In late 2007, Mr Driot and Mr Kelbrick originated/introduced a number of opportunities to Arcadia to carry on business with various Senegalese national energy companies. The Senegalese NOC, Petrosen, purchased crude on a

monthly basis from NNPC (under a government-to-government contract) but wanted Arcadia to lift the crude. The Senegalese opportunities consisted of Arcadia: (i) lifting crude under the term contract with Petrosen (the Senegal Contract); (ii) selling crude to the Senegalese refining company Société Africaine de Raffinage ("***SAR***"), a joint venture between the oil major Total and the Senegalese state; (iii) arranging with the investment bank Renaissance Capital the potential refinancing of SAR; and (iv) developing a products business in Senegal (such as the sale of fuel products to the Senegalese national electricity company Senelec). Mr Driot used Bergamot as his vehicle for each of these opportunities. A note of a management meeting between Mr Bosworth/Mr Hurley and Mr Fredriksen/Mr Trøim on 5 September 2007 indicates that *"Shareholders were given a brief summary of the on-going discussion with the Govt of Senegal regarding the re- scheduling of USD 130 million debt, and the possible commercial benefits of crude and product business in Senegal"*.

368. NNPC invited Petrosen to enter into a term contract on 18 October 2007. Mr Kelbrick described the ensuing events as follows in his witness statement:

> "In addition to assisting Mr Decker with his business, I was continuing to develop contacts in West Africa for my own business. It was in this context that, in or around 2007 I became aware that NNPC and the state-owned oil company of Senegal, Société Des Petroles Du Senegal (*"PetroSen"*) had agreed a government-to-government contract under which PetroSen had an obligation to lift approximately 30,000 barrels of crude oil per day from NNPC (this equated to approximately 1 cargo a month).
>
> NNPC asked me to meet with them and an official from PetroSen in Abuja. At the meeting, PetroSen confirmed they were happy for me to operate the contract with NNPC for and on PetroSen's behalf. Accordingly, in August 2007, I was granted a power of attorney from PetroSen which gave me the right to execute contracts for sale of oil to third parties on PetroSen's behalf. While PetroSen had the right of first refusal, in practice it did not have the refinery capacity for the volume contracted for, and instead sought companies to lift the cargo in return for a payment of a number of cents per barrel. I therefore had autonomy as to who to would be granted the right to lift the cargoes. This was a large business opportunity for whoever PetroSen contracted with.
>
> I approached Arcadia to see if they would be interested in lifting the oil under PetroSen's contract, which they were. I brought the opportunity to Mr Bosworth at Arcadia first out of loyalty, and because I had seen Arcadia lift in government-to-government deals before, including in Guinea, Kenya and Togo, and knew it would be reliable, but I could have offered it to any trader.

> PetroSen then entered into a lifting agreement with Arcadia Lebanon; Mr Hurley signed on behalf of Arcadia Lebanon, and I signed on behalf of PetroSen. Arcadia Lebanon never contracted with NNPC directly. As I explain below, I understood that Arcadia Lebanon had been established by Arcadia for the purpose of the contract with PetroSen; but how Arcadia chose to structure its deals was not my concern and I did not give it much thought." (§§ 31-34)

369. Mr Bosworth explained that Mr Kelbrick's role focused on the Nigerian side of the Senegalese business opportunities, because that was his area of expertise, whereas Mr Driot had the relationships in Senegal. There is support in emails dating from 2009 for the point that Mr Driot had influential connections in Senegal. Similarly, Mr Kelbrick said in his oral evidence that "*Jean Paul was very influential in Senegal. I was fairly decent in Nigeria and with NNPC and other Nigerian lifters. NNPC introduced me to Petrosen. I spoke with Jean Paul and he said he had already been working the Senegalese side of things and that I should just carry on doing my stuff in Abuja*". At around the same time (early 2007), Mr Driot was also assisting Arcadia in respect of its other West African activities in Equatorial Guinea, such as bidding for an exploration block.

370. The Claimants make the point that the power of attorney granted to Mr Kelbrick dated 1 September 2007 refers to him as being *"of Arcadia Petroleum"*, followed by Arcadia London's address; and suggest that there was no other reason why Mr Kelbrick should have been able to persuade NNPC to grant the term contract, other than his being held out as representing Arcadia London. However, that ignores all the evidence I have summarised already about Mr Kelbrick's connections with NNPC and Nigeria. Mr Kelbrick gave this response in his oral evidence:

> "Well, the appointment -- no, it was my power of attorney, because I had had the meeting with NNPC and with PetroSen in the towers and NNPC is the party that put me forward to manage this contract. Yes? So at that point, once again, you know, I could have gone anywhere with it, and out of loyalty and out of history and also out of knowing the people, then I offered it to Peter Bosworth and then I can't speak to that wording because I don't -- I'm not sure it was my wording. I don't know why it is there. But it was my power of attorney because NNPC had told PetroSen that they wanted me to manage the contract. I think they wanted somebody they trusted that they understood and that they had worked with, because I had been there for a long time.
>
> Q. They wanted Arcadia, didn't they, because they wanted a reliable lifter of the oil to be managing this contract?
>
> A. No, I don't think -- I think once again the power of attorney was struck in my name. Where the Arcadia thing comes from, I can't speak to.

> Q. It's an important part of this actually, isn't it, Mr Kelbrick? It's not just Mr Kelbrick passport number. It specifically identifies Mr Kelbrick of Arcadia.
>
> A. That is what it says here.
>
> Q. And that would have been an important part of this document, wouldn't it?
>
> A. Again, I don't know how important because it was -- West Africa is down to an awful lot of individuals and if you trust the individual, then you will trust the organisation that they represent."

I accept that evidence.

371. On 5 November 2007, Petrosen then entered a lifting agreement with Arcadia Lebanon ("***the Senegal Contract***"). Mr Hurley signed on behalf of Arcadia Lebanon and Mr Kelbrick signed on behalf of Petrosen. The Senegal Contract provided for the sale of 30,000 barrels/day of oil from Petrosen to Arcadia Lebanon, from 1 December 2007 to 29 February 2008. Arcadia Lebanon sold the oil to Arcadia London via a sleeving arrangement with the Tristar group, and a lifting agreement was entered into between Arcadia Lebanon and Tristar on the same date.

372. Mr Bosworth's evidence, which I accept, is that he regarded the use of Arcadia Lebanon again as coming "*under the umbrella of the reason for moving the first two contracts[;] there was exactly the same there*". Conversely, the Senegalese opportunities other than the Senegal Contract itself (which involved the purchase of crude from direct from a NOC) were not taken up through Arcadia Lebanon: consistently with the understanding that Arcadia Lebanon's role was to mitigate compliance risks on high risk business. The other opportunities did not give rise to such risks. For example, Mr Hurley explained in his witness statement that *"The SAR contract was perceived as a lower compliance risk than a term purchase contract with a West African government. This is because not only was it a contract in which Arcadia supplied (rather than purchased) crude oil but also because SAR was a joint venture between the well-known oil major, Total, and the Senegalese state"*.

373. The Claimants suggest that there was confusion internally about whether the lifting agreement should be in the name of Arcadia London or Arcadia Lebanon, which they say contradicts the idea that any instruction had been given to Mr Bosworth/Mr Hurley that the contract should be entered into in Arcadia Lebanon's name. That suggestion is based on an email from Mr Hurley to Mr Mounzer dated 6 November 2007 attaching a draft lifting agreement between Arcadia London and Petrosen. However, the point was not put to Mr Hurley and I do not consider that any particular conclusions can be drawn from it.

374. In connection with the Senegal Contract itself, Arcadia Lebanon made payments to service providers. Mr Driot/Bergamot received fees for originating and maintaining the Senegal Contract, the level of fees having been negotiated by

Mr Bosworth and Mr Driot as noted earlier. Mr Kelbrick said that Mr Driot controlled access to GEPetrol; that in order to obtain oil from GEPetrol it was necessary to pay Mr Driot; and that Mr Driot *"threatened… almost constantly"* to move GEPetrol contracts to a competitor, as he ultimately did. Mr Bosworth said Proview was paid by Arcadia Lebanon for having originated the opportunity to buy the oil from Petrosen and for Mr Kelbrick's operational work on the ground. Mr Kelbrick recalled that there was no formal profit share arrangement between Arcadia Lebanon and Proview, but that the amount received by Proview was calculated by reference to the costs of a given cargo. Proview was also paid sums by Arcadia Lebanon in order to pay some relevant service providers who helped to ensure that Arcadia Lebanon lifted the right grade in the right quantity at the right time.

375. The Claimants submitted there was no *"credible explanation of what SK did so as to receive very large payments from Arcadia Lebanon on Senegal Contract cargoes"* In fact, however, Mr Kelbrick originated the Senegal Contract for Arcadia Lebanon, and it was hugely lucrative for Arcadia Lebanon. Across 17 cargoes, the Senegal Contract generated US$50,344,445 in gross profits for Arcadia Lebanon. In addition, as with the Sao Tome Contract, Mr Kelbrick operated the Senegal Contract, which included securing the right grades and volumes of oil on the right dates, which was a hugely competitive and difficult exercise and one which was crucial to Arcadia Lebanon's profitability. Mr Kelbrick said, *"the legitimacy of [Proview's services] was that, as I said, the crude oil was there every month. And that is the evidence that we have for commercial services; that actually the cargoes were there to be lifted. As I mentioned earlier, I saw that as my key role, to provide this West African crude to Arcadia. Also having, you know, been part of originating the contract"*. He added *"[I] certainly was operating [the] Sao Tome [Contract] and certainly I brought Senegal's liftings from NNPC to Arcadia Lebanon."* I accept the evidence of Mr Bosworth and Mr Kelbrick on these matters.

376. A further contract was entered into in February 2008 (the "***SAR Contract****"),* under which Arcadia sold Nigerian crude to SAR. Later documents dating from 2009 suggest that Mr Driot was also involved in this contract and, for example, was in a position to hold discussions with the Minister of Energy about it. Mr Bosworth in his oral evidence described the Senegal Contract and the SAR Contracts as "*an amalgamation of two contracts, one was the sales contract to Senegal [the SAR Contract] and one the lifting agreement [the Senegal Contract]*"; and that Arcadia London did not operate the Senegal Contract but *"operated the other half of it, which was the deliverables to Senegal"*. Bergamot received a service provider fee in respect of the SAR Contract. Arcadia made some of the payments to Bergamot, but Arcadia Lebanon also made service provider payments to Bergamot in respect of the SAR Contract, despite the fact that Arcadia Lebanon was not otherwise involved in the SAR Contract (and received none of its profits). Mr Kelbrick was not involved in the SAR Contract. He said: "*I didn't have the relationship with SAR there to supply the crude oil to SAR so that is the side that Jean-Paul [Driot] was involved in*".

377. In late January 2008, Stag's solicitor sent Mr Ford of Arcadia a draft service provider agreement between Bergamot and Arcadia Lebanon; it covered each

of the different Senegalese opportunities with various remuneration arrangements. Later, in July 2009 Bergamot entered into a service provider agreement with Arcadia Lebanon only for the Senegal Contract. Arcadia Lebanon paid Bergamot a fee per barrel on the Senegal Contract cargoes.

378. Altogether the service provider fees paid in respect of the Senegal Contract were as follows:

i) Mr Driot's companies Bergamot and Acacia were paid fees based on cents per barrel. From mid-2009, Arcadia Lebanon also paid 5% of its gross receipts to each of Bergamot and Mr Driot's company Darkblue.

ii) The Cargo P&Ls indicate that there was an apportionment to Mr Kelbrick's company Proview (described as South Energy) of 70% of the difference between the quotation unit sale and purchase prices, less the cost of exercising the NNPC pricing option.

379. There were several operational problems with certain SAR Contract cargoes, including difficulties with the financing bank, BNP, and problems with SAR's unloading of the cargoes. Mr Driot coordinated the communications with Senegalese officials that were necessary to resolve these problems, and he reported his work directly to Arcadia. Mr Driot provided updates on lifting programmes from NNPC, relevant both to the Senegal Contract and the SAR Contract, liaised with the Minister of Energy and SAR officials, and updated Arcadia on relevant political developments in Senegal.

380. The Senegal Contract was in place for about a year. Thereafter, the evidence of Mr Bosworth and Mr Kelbrick was that Mr Driot caused it to be moved to a competitor, Mercuria, who were willing to pay more.

381. EY Deal 27, another of the Claimants' example transactions, related to a cargo of oil bought ultimately from NNPC in June 2008 under the Senegal Contract. The cargo was loaded on board MT *"Olympic Future"* in the measured quantity of 997,425 barrels. Each trade under the Senegal Contract had six stages in contractual terms:

i) Stage 1 NNPC to Petrosen: NNPC sold the cargo to Petrosen under the government-to-government contract. Arcadia Lebanon arranged all the financing and operational matters.

ii) Stage 2 Petrosen to Arcadia Lebanon: Petrosen sold the cargo to Arcadia Lebanon. Arcadia Lebanon's pricing election determined the price pursuant to which Arcadia Lebanon had an option to elect one of three pricing bases (advance, prompt or deferred) on the Dated Brent measure, plus an OSP premium. Arcadia Lebanon's gross receipts were the difference between the price it paid to Petrosen and the price it sold the cargo for at Stage 3. From the gross receipts, Arcadia Lebanon paid service providers (which in the case of the Senegal Contract were Proview and Mr Driot's companies: Bergamot, Acacia and Darkblue) and its other costs. Arcadia Lebanon's profits for the trades were set out in its audited financial statements.

iii) Stage 3 Arcadia Lebanon to Tristar/Attock: Arcadia Lebanon sold the crude to the Tristar group/Attock group as a back-to-back onward sale. In the case of EY Deal 27, the sale was to Tristar Energy. The price that Tristar/Attock paid to Arcadia Lebanon was calculated on the basis of the sale price to Arcadia, plus a modest fee for Tristar/Attock's services as a sleeve and any costs Tristar/Attock incurred in relation to the cargo.

iv) Stage 4 Tristar/Attock to Attock/Tristar: a back-to-back sale between members of the Tristar and Attock groups. In the case of EY Deal 27, Tristar Energy sold to Attock Mauritius.

v) Stage 5 Tristar/Attock to Arcadia: Tristar group/Attock group (in this case, Attock Mauritius) sold the cargo to Arcadia London as a back-to-back onward sale. Arcadia's pricing election determined the price.

vi) Stage 6 Arcadia to third party: Arcadia sold the cargo to a third party counterparty (e.g. a refinery, oil major or other trading company), in this case Petrobras. The true extent of Arcadia's profits on this trade would need to take account of the hedging, contract for difference trading and any other paper trading associated with or facilitated by the trade (or, arguably, the course of physical West African crude oil trading in general).

382. The transaction can be represented diagrammatically in the way set out in § 362 above (ignoring for these purposes the reference to Sao Tome).

383. The Claimants set out the chronological steps involved in EY Deal 27 as follows:

i) On 17 July 2008, Arcadia London agreed to sell the cargo to Petrobras at Prompt plus OSP differential and a premium of US$ 0.30/bbl.

ii) On 14 August 2008, Arcadia London agreed to buy the Cargo from Attock Mauritius at Prompt plus OSP differential and a premium of US$ 0.36/bbl.

iii) Arcadia London's loss was US$ (0.30 – 0.36) × 997,425 = (US$59,845.50), before taking account of costs.

iv) Arcadia Lebanon's option was not passed on, so there was no choice of averaging period to make and Arcadia London bought at Prompt. Accordingly, the difference in pricing up the chain was simply a function of the relative size of the premium charged by one entity in the chain to another.

v) Attock Mauritius and the intermediaries made a fixed margin from being in the chain. None of them would ever suffer a loss. In this transaction, on 14 August 2008:

a) Arcadia Lebanon sold to Tristar at Prompt plus OSP differential and a premium of US$ 0.24/bbl;

b) Tristar sold to Attock Mauritius at a premium of US$ 0.35/bbl;

c) Attock Mauritius sold to Arcadia London at a premium of US$ 0.36/bbl.

vi) Accordingly:

a) Tristar's profit was (US$ 0.35 – 0.24) × 997,425 = US$109,716.75;

b) Attock Mauritius's profit was (US$ 0.36 – 0.35) × 997,425 = US$9,742.50.

c) Tristar's profit of US$109,716.75 can be compared to Arcadia London's loss of (US$59,845.50).

vii) NNPC's invoice issued to Petrosen on 17 September 2008 shows that Arcadia Lebanon exercised its option to base the price on *"Deferred"*. As a result, NNPC calculated the price due to be US$104,208,969.15.

viii) Arcadia Lebanon charged Tristar by reference to the *"Prompt"* pricing period, the OSP differential premium of US$ 3.85/bbl and the additional premium of US$ 0.24/bbl.

ix) Tristar was charged US$112,805,775.23 in total and was directed to pay US$104,208,969.15 to NNPC and the balance of US$8,596,806.07 to Arcadia Lebanon.

x) On the Defendants' case, Arcadia Lebanon made payments to service providers of US$5,850,196.85 to Proview (being *"70% reserved against South Energy Consultancy SARL"* as stated in the Cargo P&L for this voyage, US$69,819.75 to Bergamot and US$169,562.25 to Acacia. Taking account of those payments would reduce Arcadia Lebanon's net profit (before overheads) to US$2,537,149.98. The Claimants did not accept that these were legitimate and commercial costs.

384. The fourth of the Claimants' example transactions, EY Deal 56, concerned another cargo bought pursuant to the Senegal Contract, in autumn 2009.

(7) Arcadia Lebanon payments to GEPVTN

385. On 29 March 2007, shortly before Arcadia Lebanon lifted its first cargo under the Zafiro Contract, a Farahead company, VTN Ship Management Company Ltd ("***VTN Ship Management***") entered into a joint venture with GEPetrol. VTN Ship Management was a subsidiary of VTN Holdings Ltd ("***VTN Holdings***"), which was wholly owned by Farahead. VTN Ship Management were described in the agreement as exclusive agents for Frontline Limited, and the joint venture provided an opportunity for Mr Fredriksen's Frontline business to manage GEPetrol's shipping needs. In his oral evidence, Mr Trøim said that the establishment of GEPVTN was part of Mr Fredriksen's idea to "*bundle shipping and the oil in one go*".

386. The agreement provided that the joint venture should be named *"GEPVTN Limited"*, and Farahead arranged for the incorporation of a company of that name (*"**GEPVTN**"*) on 7 May 2007. Messrs Hannas and Pallaris, who were both Farahead directors, also became directors of GEPVTN; and Farahead's company secretary Mr Saveriades became GEPVTN's company secretary.

387. The joint venture provided for GEPetrol to grant GEPVTN the exclusive right to arrange the provision of tankers for the transportation of oil from Equatorial Guinea in which GEPetrol had an interest. GEPVTN's principal activity was that of a commission agent. The basic idea of the JV was that GEPetrol would require those lifting its crude oil either to use GEPVTN to ship the crude, or pay 2.5% of the freight to GEPVTN.

388. GEPVTN's finances and accounts were run out of a small Cyprus office that also housed Seatankers, Mr Hannas, and Ms Theocharous. Roy French, a former Arcadia Group trader, worked in the office, handling operational matters for GEPVTN. Mr Hannas was, he accepted, a signatory on the GEPVTN account, along with Ms Theocharous, Mr Pallaris and Mr French, though he said he was not involved in the day to day operational running of GEPVTN (which Mr French carried out).

389. Mr Scheepers, Arcadia's Head of Shipping, explained that Mr Bosworth introduced him to Mr Driot, and that he (Mr Scheepers) knew that Mr Driot's company Stag used to lift most of the crude oil contracts from Equatorial Guinea. He explained that GEPVTN was established after discussions with Mr Driot and Mr Oburu (head of crude oil sales at GEPetrol), and:

> "As a part of the GEPVTN framework, a profit share arrangement was agreed. GEPVTN's profits would be shared with GEPetrol, and companies nominated by Jean-Paul. Two of these entities were Obexys and Rodexkia. The names of the participants in the profit plan were provided to Dimitris, who managed GEPVTN's finances on behalf of Seatankers. I did not know much about these companies, but it wasn't surprising to me that there should be profit share arrangements with various companies in relation to GEPVTN. Such arrangements were commonplace in the businesses I worked on."

Mr Scheepers added in his oral evidence that Mr Driot also introduced a third company, Oken Consulting, which he understood to be a Driot company.

390. On 24 June 2007, Mr Scheepers updated Mr Fredriksen/Mr Trøim with his weekly report on current shipping projects, which on this occasion included GEPVTN. Mr Scheepers said Mr Fredriksen approved the joint venture. The 24 June report referred to the work to put the first million barrels of Zafiro crude oil through the joint venture, and said "*our man in GEPetrol is really supporting our shipping venues in Equatorial Guinea and working hard to get this done*". Mr Scheepers in his oral evidence said that was a reference to Mr Oburu.

391. On 6 August 2007, GEPetrol informed Arcadia Lebanon of GEPVTN's freight and operational procedures with which it had to comply when lifting Zafiro

cargo. GEPVTN regularly invoiced Arcadia Lebanon in relation to Equatoguinean crude oil cargoes, including transactions involving the lifting of Zafiro crude. Arcadia Lebanon in turn regularly made payments to GEPVTN in respect of such transportation and freight services, and such payments continued at least into 2011 and amounted to at least US$939,000 in total.

392. The joint venture agreement provided for profits to be shared 50/50 between GEPetrol and VTN, but in summer VTN's share was increased to 80% (because, Mr Scheepers said, GEPetrol was not going to bring much to the table). VTN itself shared the profits it extracted from GEPVTN with the other companies that Mr Driot nominated, including Obexys and Rodexkia.

393. Mr Hannas was aware of these arrangements. In email correspondence beginning in May 2008, Mr Hannas asked for further details of the profit-sharing arrangements. Mr Scheepers explained on 3 July 2008 that VTN's new 80% profit share would be divided into quarters, 25% for VTN itself, 25% for a consultant, and 25% each for two third party individuals. His email said *"we have documentation"* for the consultant and one of the two third party individuals, and referred to having just sent all the documentation by DHL to Mr French. In his oral evidence, Mr Scheepers said *"we had all the service agreements, we had the originals and they were all given to Seatankers".* On 10 July 2008 Mr Hannas emailed Mr Scheepers saying, among other things, *"I received the original agreements apart from the last one as per your below. I know is confidential but we should know who are the individuals/beneficiaries of these commissions"*. The same day, Mr French emailed Mr Hannas setting out his understanding of how the profits should be distributed. This included VTN's 80% share split between *"3 partners"* viz 25% to Oken Consulting, 25% to Obeyxs Ltd and 25% to "*Partner C*". ('Partner C' was in fact Rodexkia.) Mr Hannas on 23 July replied about payment arrangements, also noting that he would like a response about the beneficiaries behind each agreement. Mr Hannas said he never learned who the individuals were. He said he was not sure, but believed he would have raised the issue with Mr Fredriksen or Mr Trøim, explaining in his oral evidence that he would have wanted their approval to sign agreement with parties that were *"not acquainted to us"*. In due course, service agreements were signed with Oken, Obexys and Rodexkia, which Mr Hannas thought would not have happened unless Mr Fredriksen or Mr Trøim had given their approval.

394. The payments that Arcadia Lebanon made to GEPVTN were recorded in the Seatankers accounting records. A GEPVTN ledger card (with entries ending in 2011) refers to Arcadia Lebanon and has a tab showing 'Arcadia' invoices, listed under the heading *"LEDGER: [5175] ARCADIA PETROLEUM SAL (LIBANON)"* [sic]. Ms Theocharous's evidence was that this was a Seatankers document. Another ledger card directly identified payments from *"Arc.Petrol (Lib)"* in a ledger named *"ARCADIA PETROLEUM SAL (LIBANON)"*. Ms Theocharous said in cross-examination:

> "Q. Mr Hannas told the court that he asked you to print out document for him. Do you remember that?

> A. Not 100%, but probably he is correct because, okay, I had noticed at that stage somewhere the name of Libanon mentioned, together with Arcadia Petroleum and I was wondering if we had done a mistake and we did not include this specific company under the consolidation when we were doing the Farahead consolidation. Probably Mr Hannas asked me to print out the letter so he could see what did we have under GEPVTN for this specific company and I printed that and gave it to him. After that, I remember that he returned to me and he told me that company, it's private and should not be consolidated.
>
> Q. As I say, I'm going to come back to that but just on your evidence, Mr Theocharous, can you recall Mr Hannas asking you about Arcadia Petroleum's payments to GEPVTN?
>
> A. Probably he was not asking me. I went, I remember specifically, I went and asked him if he knew anything about that company and then he came back to me and asked me: where did you see that name? And then I went back to him and I told him, okay, I gave him this ledger, probably it was an invoice that I saw or this ledger that I saw, I'm not sure, but one of them and I asked him and I don't know, he questioned somebody, I don't know who, and his response was that it was not consolidated because the shareholders have a private company and we were correct of not consolidating the actual company with the rest of the group.
>
> Q. But this was all in 2009; yes?
>
> A. It must have been then because this is the print-out, yes and I remember also that I was a bit, I don't know, how can you call it, my English is not perfect because it is my second language over here, I was a bit frustrated, you could say, because I thought, okay, 2009 and we have consolidations for 2006/2007. Did I make a mistake to consolidate this company or I missed something out in between but he told me after that that, no, we didn't make a mistake. The accounts were correctly consolidated."

20 January 2009 was in fact the same day that Mr Hannas emailed Mr Trøim/Mr Fredriksen in respect of Arcadia Lebanon's financials (see § 497 below).

395. Somewhat remarkably, the Claimants in their 144 Transactions case stated that they did not admit the *"legitimate purpose and/or commercial benefit to the Arcadia Group (alternatively such as to justify the amount)"* of the payments to GEPVTN, despite GEPVTN being a Farahead company. Eventually in their written opening, the Claimants accepted that Arcadia Lebanon's payments to GEPVTN were a legitimate expense. Mr Fredriksen was asked how this squared with the Claimants' fraud case:

> "Q. Did you never question whether it was plausible to say there is a fraud involving Arcadia Lebanon, because a Farahead company is getting payments from Arcadia Lebanon?
>
> A. I think these people, the various market paid out some peanuts money to Farahead. But of course they made hundreds of millions. What happened to those money? That is what I told you yesterday.
>
> …
>
> Q. Why would they be paying peanuts to a Farahead company as part of a fraud?
>
> A. To imply that we are involved in it. Obviously."

That last answer was patently implausible. It was also illustrative of Mr Fredriksen's state of mind, as a person who had, for whatever reason and seemingly regardless of the facts, apparently convinced himself that he had been the victim of a fraud.

396. The payments to GEPVTN are in fact of some significance bearing in mind that, as Mr Bosworth/Mr Hurley point out:

i) For Mr Bosworth/Mr Hurley to have caused Arcadia Lebanon to make regular payments to GEPVTN is hard to square with the notion that they were using Arcadia Lebanon to carry out a clandestine trading fraud on the Claimants (and Farahead in particular).

ii) The payments make it likely that Farahead, or at least its staff, knew that Arcadia Lebanon was continuing to conduct West African business well after the end of 2008.

iii) One reason why Farahead authorised Arcadia Lebanon's continued West African trading was because Farahead benefited from Arcadia Lebanon's trading over and above any direct profits that Farahead might receive. GEPVTN was an example, since it provided an opportunity for Frontline to manage GEPetrol's shipping needs.

iv) The same people directed GEPVTN's operations, as well as Farahead's, from the Seatankers office. Mr Hannas says that he "*believed that GEPVTN's operations were dedicated to West African oil*", not least because the "*JV partner was GEPetrol*"; and he knew that GEPVTN was a commission agent in respect of oil trading in Equatorial Guinea. Mr Hannas was a director of GEPVTN at all times, and stayed on in his role as a director after Mr Scheepers resigned. He was also a director of VTN. Mr Scheepers said Mr Hannas had insight into the GEPVTN project's operations, and was well aware of GEPVTN's role.

v) Farahead knew that Arcadia Lebanon made regular payments to GEPVTN in respect of Zafiro crude oil. Mr Trøim accepted that Arcadia Lebanon's payments to GEPVTN were 'not hidden' from Farahead.

vi) Arcadia Lebanon made payments to GEPVTN of at least US$939,083. Payments continued well after the end of 2008 into at least 2011.

vii) Seatankers maintained the GEPVTN invoice register and ledger that recorded the Arcadia Lebanon payments. Mr Hannas denied that he had access to the invoice register, but he sent a version of it to Mr Scheepers in July 2008. He did not deny that the reason that he sent the register to Mr Scheepers was because he wanted to discuss with him the payment arrangements for GEPVTN. As noted earlier, Mr Hannas specifically asked Ms Theocharous to print out the GEPVTN ledger for him on 20 January 2009.

viii) Farahead controlled the accounts and financial records of all VTN companies and received a share of GEPVTN's profits. Farahead received weekly reporting on GEPVTN's financial position, including VTN cash flow reports that Ms Theocharous prepared, which listed the Arcadia Lebanon payments. Farahead, VTN Holdings and/or VTN Ship Management received dividend payments from GEPVTN.

ix) Mr Hannas accepted he was involved in setting up GEPVTN's profit structure from an administrative standpoint. He also approved service provider agreements between VTN and its partners, Oken, Obexys and Rodexkia. VTN made payments to Oken, Obexys and a further 'partner' (i.e. Rodexkia) every year from 2007 to 2013. The payments to Oken, Obexys and Rodexkia were expressly identified in the cashflow reports that Seatankers prepared. In his oral evidence, Mr Fredriksen agreed that VTN would not be making payments to partners that were not legitimate companies.

(8) Autumn 2007

397. Minutes of meetings in autumn 2007 indicate that Farahead was interested in Arcadia pursuing a range of projects, including developing a partnership with the Nigerian national shipping line NUL; a joint venture involving the vessel 'African Horizon' and the opportunities in Senegal mentioned earlier.

398. There is some evidence of pressure on Arcadia's cashflow during this period. Minutes indicate that as at 1 October 2007 the group had US$22 million of available cash, which reduced by US$10 million by 12 December 2007. Mr Bosworth said *"in 2007, the market was extremely volatile and we had very, very limited cash within the company. Sometimes that got down to, as I recall, less than USD3 million to run a 20 billion turnover company and working capital I believe means that the USD4 million was transferred for that reason, that Arcadia London needed the cash".* The reference to US$4 million was to a payment in that amount which on 1 November 2007 Mr Hurley arranged for Arcadia Lebanon to make to Arcadia London. Mr Hurley recalled that cash was needed to meet various margin calls. An email exchange between Mr Bosworth

and Mr Trøim the same day, following a request from Mr Hurley to Farahead for cash to meet margin calls, indicated that Mr Trøim complained about lack of proper cash forecasting and said he *"can not afford a situation where I will have to [go] back to JF during the next weeks asking for even more cash".*

399. The Claimants suggest there is no evidence that Arcadia had any cashflow difficulties, citing a note of a meeting on 9 October 2007 recording that *"[Mr Trøim] commented that at a recent open meeting, all APL traders had confirmed to him that they had not experienced any restrictions to their business due to lack of credit lines"*, and a 'treasury.xls' spreadsheet as at 31 October 2007, indicating US$76.36 million in credit and a further US$30 million available from the Farahead facility. However, credit lines for trading purposes are not the same as available cash to meet margin calls. The evidence of the cash position is as I indicate in the preceding paragraph; and the 1 November 2007 emails speak for themselves: it is clear that Arcadia was indeed encountering a cash flow squeeze. Mr Hurley's recollection (which the Claimants criticised as being 'unsatisfactory' and 'absurd') was in fact correct.

400. The US$4 million payment was connected with a transaction between Arcadia London and Mr Asibelua's company, Equinox Exploration Limited. In December 2006, Arcadia London had lent Equinox US$5.5 million in connection with an exploration and production opportunity known as "*OPL 286*" which it appears Equinox had brought at a time when Arcadia was seeking to expand into asset investments. Equinox had in June 2006 been awarded a 10% interest in OPL 286 as a consortium member, with BG Exploration and Production ("***BG E&P***") (a British Gas company) as operator. A condition was the consortium paying a US$55 million signature bonus, of which Equinox Exploration's 10% share was US$5.5 million. In December 2006 Mr Bosworth arranged for Arcadia London to advance that sum to Equinox so that it could satisfy the condition. Mr Bosworth said he planned also to invest up to US$1 million of his own money in the project, and told Farahead so. The payment was invoiced to Arcadia London as a loan, though for some reason it was recorded in Arcadia London's management accounts as a trade debt.

401. In submissions and cross-examination, the Claimants sought to advance an unpleaded complaint to the effect that Mr Bosworth did not have Mr Fredriksen's or Mr Trøim's authority (and, by necessary implication, that Mr Bosworth would for some reason have required such authority, despite being Arcadia London's managing director and *prima facie* having all the powers vested in such an officer). However, it is unnecessary to reach any conclusions about that matter. Nor would it be fair to do so, given that as an unpleaded allegation it has not been subjected to the usual litigation processes, and is not one that the Defendants could reasonably expect to meet at trial.

402. Almost a year later, on 1 November 2007, Mr Hurley directed Stefan Gallimore of Credit Agricole Switzerland to transfer US$4 million from Arcadia Lebanon to Arcadia London. Mr Gallimore asked for an invoice. Mr Hurley produced an invoice from Arcadia London to Arcadia Lebanon *"RE: EQUINOX INVESTMENT"* for US$4 million for *"EQUINOX FUNDING PARTICIPATION"*. Mr Hurley then emailed the invoice to Mr Gallimore. Arcadia London accounted for Arcadia Lebanon's payment as a part repayment

of an outstanding loan to Equinox (*"EQUINOX OIL AND GAS RTND INVESTMENT PART OF $5M"*), as also reflected in the Arcadia Group's December 2007 management accounts, where the amount outstanding from Equinox Exploration was reduced to US$1.5 million.

403. The Claimants suggest that Arcadia Lebanon's US$4 million payment provided no benefit to Arcadia London, because it merely *"replaces missing funds"* i.e. money owed by Equinox. That suggestion is, however, commercially nonsensical. Arcadia London had an urgent need for cash. There can have been absolutely no certainty about when (if ever) it would be repaid by Equinox. The payment from Arcadia Lebanon meant it received, to the extent of the US$4 million, immediate repayment. As the Defendants suggest, Arcadia Lebanon was in substance providing a treasury function to Arcadia London in this transaction. The transaction is hard to square with the Claimants' case that Arcadia Lebanon was a vehicle used by Mr Bosworth and Mr Hurley dishonestly to divert funds from Arcadia London for their own benefit.

404. In late 2007, Mr Trøim asked Mr Skilton to review the financial arrangements between Farahead and Arcadia. In early December 2007, Mr Skilton asked Mr Lind to draft a memo on financing. The memo explained the financing arrangements, in particular the security structure. Mr Skilton, however, wanted Mr Lind to focus on "*the extent to which the shareholders of Farahead could be pursued in the event that Arcadia and/or Farahead were to encounter trading problems or default the guarantee arrangements etc*.". On 11 December 2007, Mr Lind sent Messrs Skilton and Hannas a further memo, which considered the issues of shareholder liability and Farahead's financing of Arcadia's activities.

405. During this period (and continuing into later years), in addition to regular meetings, Mr Fredriksen and Mr Trøim received twice-daily reports on Arcadia's trading activity (including West African activity), daily profit and loss statements, weekly reports and monthly reports. Farahead received monthly management accounts concerning Arcadia's operations, business and profits. Arcadia's accounts were consolidated at Farahead level. The format of the P&L front sheet format used was recorded as having been reviewed at a meeting on 4 September 2007 *"and in general met with a favourable response from Shareholders"*. Minutes of a meeting on 1 October 2007 indicated that *"Shareholders expressed their approval and satisfaction at the current level of intra-day reporting of open position. The lunchtime report should continue in its current form…"*. Minutes of a 13 October 2007 meeting recorded that *"Shareholders were happy with the current level and method of reporting but did ask for a little more on market view to be included in the closing report."* Mr Ford in January 2008 specifically asked Farahead for any comments on the format of the reports.

(9) Arcadia's products business: MRS and the African Horizon

406. One of Arcadia's objectives was to expand its products business. The April 2005 business plan referred to Arcadia's aim, using its *"extensive contacts in Nigeria"*, to make sales of 6 to 9 cargoes of gasoline a month into Nigeria. PPMC was a major purchaser of products for the domestic market at this time. The commercial opportunity to sell products into Nigeria was highly attractive:

Mr Kelbrick explained that Nigeria was rich in crude oil but short in oil products. The April 2005 business plan stated that, to support the expansion into products, which were not a traditional area of Arcadia's trading operations, Arcadia should invest in product storage facilities around strategically important ports in West Africa. In addition, it suggested that *"by using vessel storage made available by Front Line, we believe there are substantial savings to be made in providing logistical flexibility to product deliveries in West Africa"*.

407. MRS was one of Nigeria's leading downstream products suppliers. It was owned by Mr Sayyu Dantata, one of Nigeria's most influential businessmen. An MRS presentation from its website stated, as of 2013, that it was "*one of the largest and leading marketer of refined products, including quality gasoline, marine and aviation fuels in the downstream industry in Nigeria. We market premium fuels under the MRS brand across 416 retail service stations strategically spread all over Nigeria*". It is not difficult to see how a relationship with MRS could be beneficial for Arcadia, as an oil trading company seeking to expand into the Nigerian products market.

408. When Farahead acquired Arcadia in 2006, Arcadia already had an established relationship and history of trading with MRS and Mr Dantata. Mr Akpata had introduced Arcadia to Mr Dantata and MRS in about 1999/2000, and Arcadia had lifted significant volumes of fuel oil from MRS in the years thereafter. When MRS began trading crude oil in the mid-2000s, having secured an NNPC crude oil contract, its partner was Arcadia.

409. In 2007, Arcadia developed its existing products business with MRS further with a joint venture with MRS. Arcadia would work with MRS to sell cargoes to PPMC. Mr Scheepers explained that the idea was to use a vessel as floating products storage in a joint venture with MRS. The initial plan indicated in the documents from autumn 2007 was to buy a Frontline vessel, the 'Front Horizon' (later renamed the '*African Horizon'*), and use it for floating storage. Farahead was to retain ownership of the vessel, and Arcadia London would *"act as vessel operator, and would conduct 100% of the trading and hedging required"*. MRS would be the *"JV partner"*. Mr Fredriksen oversaw the project. There were meetings between Mr Dantata and Mr Fredriksen in 2007, attended by Mr Akpata, who said in evidence that he had introduced Arcadia to MRS some years before. The African Horizon project was a topic of discussion at a series of Farahead/Arcadia meetings.

410. Mr Kelbrick was aware of the joint venture between Arcadia and MRS, and that MRS and Arcadia had agreed to use the African Horizon for offshore products storage.

411. By early summer 2008, the project changed. The value of the vessel had increased significantly in the market, and MRS said that it wanted itself to buy the African Horizon for products storage. A Farahead nominee company, Thistle Marine, arranged to sell the vessel to MRS. Mr Fredriksen and Mr Trøim received regular reports on the transaction's progress. Mr Akpata explained that, late in the negotiations, with a purchase price agreed in principle, Mr Fredriksen increased the price by US$6 million, so MRS had to find

additional money to complete the deal. Mr Kelbrick assisted in the transaction, visiting Nigeria in late June to help finalise it. Mr Bosworth reported to Mr Fredriksen and Mr Trøim that *"Steve Kelbrick in Nigeria this week to try to finalise african horizon"*. The terms of the sale of the African Horizon are set out in a *"memorandum of agreement"* between Thistle Marine and MRS dated 21 July 2008, under which MRS agreed to pay a total purchase price of US$52 million. Mr Fredriksen realised a profit of about US$7 million on the sale.

412. Mr Bosworth's evidence was that Arcadia's products relationship with MRS, selling cargoes to PPMC, continued throughout this period, both before and after the sale of the African Horizon. In the period from 2007 to 2013, Arcadia delivered a large number of products cargoes (55 in total) to PPMC. MRS was Arcadia's local partner in this products business, assisting Arcadia with the provision of products to third party buyers, providing logistical support, such as shipping and storage facilities, and receiving commissions in return. As part of the trading relationship, Arcadia had a storage agreement with MRS. Arcadia therefore needed to make commission payments to MRS in respect of its services assisting Arcadia's products business. Later, minutes of a meeting on 23 February 2011 recorded that "*Arcadia and MRS have been collaborating informally in the wholesale supply of refined product to Nigeria and surrounding countries for several years. The two companies have held discussions over this period regarding the formalising of the relationship with a joint venture trading company*"; and recorded discussions about the creation of such a new joint venture company.

413. The documents indicate that in 2008, Arcadia Lebanon made payments of US$8,666,875 to MRS in respect of its services. Mr Bosworth's evidence was that the sums paid to MRS covered a range of activities in connection with the products sales. Payments by Arcadia Lebanon to MRS were set off against some of Proview's profit shares on the Senegal Cargoes. It appears that Proview agreed that certain of Proview's profit shares could be paid to MRS directly instead of to Proview. Mr Kelbrick said he had agreed to this in order to support Arcadia's products business with MRS, at Mr Bosworth's request. He believed this to be to his advantage, saying *"I wanted everything to grow. I didn't want anything to wither on the vine. These things take time and effort"*. The documents produced by Ms Azzariti indicate that, in all, Arcadia Lebanon allocated US$10.279 million of payments to MRS against sums otherwise due to Proview in respect of Senegal Contract cargoes. In addition, Mr Kelbrick said he was interested in developing his own business, including in products trading. Proview itself therefore made some payments to MRS direct (US$2.15 million on 9 December 2008 and US$4.3 million on 10 February 2009). Two payments, totalling about US$2 million, were made not to MRS itself but to a builder, B Stabilini, at the request (Mr Bosworth said) of MRS's principal, Mr Dantata. That fact does not, however, shed any light on the purpose for which the payments were made i.e. in return for what services from MRS.

414. The Claimants suggest that Mr Bosworth/Mr Hurley are required to show that the payments made to MRS were for the benefit of the Arcadia Group. I do not agree. It is not part of the Claimants' pleaded case that payments to MRS were part of the alleged fraud. The alleged fraud consists, in simple terms, of the

insertion of Arcadia Lebanon and other 'fraudulent entities' into the transaction chains. It is only if the Claimants could establish that the receipt of funds by Arcadia Lebanon was fraudulent that any question of accounting for payments made to MRS could, in theory, arise. It is for the Claimants to establish that premise. Nothing about the payments by Arcadia Lebanon to MRS is alleged to, or does, in any way support the Claimants' fraud case. The Claimants complain that the Defendants have given inconsistent explanations for payments made to MRS, which is perhaps unsurprising given the passage of time and their limited relevance to the case, and that they have not been shown to have been for the Arcadia Group's benefit. However, to the extent that they discharged sums otherwise due to Proview, then they were for the Group's benefit. At any rate, there is no pleaded case and no evidence that the payments constituted any form of fraudulent diversion of funds away from the Arcadia Group.

(10) Events in 2008

(a) Review of Farahead governance

415. From January 2008 to about June 2009, Mr Skilton and Mr Hannas, assisted by Mr Lind and reporting to Mr Fredriksen/Mr Trøim, reviewed the corporate governance and structure of Farahead's subsidiaries, addressing the treatment of their profits and bonuses and the return of dividends to Farahead. The eventual outcome of the governance review was a set of draft Farahead minutes and a draft Corporate Governance Bible Index, both dated about June 2009.

416. At the start of this process, in January 2008, Mr Skilton prepared a memo for Mr Fredriksen/Mr Trøim about the current state of the Arcadia governance structure. On 10 January 2008, Mr Skilton emailed a draft of the memo to Mr Hannas for comments. Mr Hannas marked up the draft in manuscript, and noted on the covering email some headline points including "*Actively involved in the setting up and funding approvals of new offices/FH subsidiaries*".

417. The draft memo observed that Arcadia's operations were not self-financing, as Farahead had originally wanted, and noted Farahead's financial exposure. It then stressed the need for Farahead, not Arcadia, to deal with all the subsidiaries in order to preserve Farahead's tax position:

> "Of equal importance is that APL should NOT under any circumstances be entering into obligations of any nature *"on behalf"* of Farahead. This simply should NOT happen and could lead to argument from the UK revenue that APL and Farahead are one and the same operation and therefore Farahead should be taxed in the UK on any profits etc. (- at the very least it will not enhance the defence of the guarantee fee arrangements when faced with attack from the UK revenue-). It is Farahead which should be dealing with its subsidiaries NOT APL."

Mr Hannas wrote next to that text the *words "e.g. setting up new companies and operations (US/Swiss/Spore/Beirut)"*.

418. The draft memo had a section on reporting, which included the following:

> "It is clear that there is a general lack of reporting from APL. This to an extent is understandable – APL has moved from a controlled environment under Mitsui to a situation where it is largely autonomous. HOWEVER the current situation is surely untenable.
>
> For Example:-
>
> **Beirut Office**: Farahead has no information on this structure which we understand now — not just to be a simple representative office of Arcadia but rather a corporate entity which is owned by Colin Hurley and Pete Bosworth!!?? .WHY? Has this company been funded? How has this been accounted for considering it is *"not part of the group"* ?"

419. The memo made recommendations to strengthen Farahead's control of the business, including:

> "The motives of management need to be monitored: It is important that shareholders are in a position to fully understand the motives/rationale of the management and traders in order to assess whether such actions are in the interests of the shareholders or whether there is a hidden agenda in operating the business in a *"particular"* way for their own ultimate objectives. (eg: Beirut office — why has it been set up in this way with no explanation to shareholders??)"

420. Mr Trøim's reaction to this last passage, in his oral evidence, was to say *"But the shareholders had been told about it."* He also said that Mr Skilton was *"pretty remote to this process"* and had no administrative role in the company.

421. Mr Skilton updated this draft later in the day on 10 January 2008, and sent the revised version to Mr Hannas. The updated draft included these passages:

> "**Of equal importance is that APL should NOT under any circumstances be entering into obligations of any nature *"on behalf"* of Farahead**. This simply should NOT happen and could lead to argument from the UK revenue that APL and Farahead are one and the same operation and therefore Farahead should be taxed in the UK on any profits etc. (- at the very least it will not enhance the defence of the guarantee fee arrangements when faced with attack from the UK revenue-). **It is Farahead which should be dealing with its subsidiaries NOT APL**.
>
> **PRESENT SITUATION is of concern:**
>
> There are a number of companies now established (-and seemingly operating-) in various jurisdictions —eg: Switzerland, Singapore, Beirut etc. It is understood that these companies

> *"should"* be owned by Farahead. **HOWEVER** Farahead does not have any information whatsoever nor have they been involved in the establishment of any *"subsidiary"*. The overseas companies have been established by the management of APL with no reporting to Farahead and a number of inter-company loans have been established between APL and the overseas companies.
>
> With such non-existent reporting to Farahead and given the manner in which these *"subsidiaries"* have been established and their financial arrangements with APL — it would be reasonable to assume that the said overseas companies/subsidiaries are nothing short than an extension of the operations of APL and therefore should be fully subject to UK taxation etc etc. This is surely **NOT** the intention!' (emphasis in original)

422. The memo included the same passages as the draft about the Beirut office. In its conclusion, the memo set out a number of recommendations for Farahead to implement. It suggested that Ms Elbjorg Sture, who had worked at DNB bank and was involved in other Fredriksen companies, assist with a better reporting system.

423. Mr Trøim in cross-examination said he did not recall the memo, and that Messrs Hannas and Skilton reported as much to Mr Lind and to Mr Fredriksen as they did to him. However, given the purpose and importance of the memorandum in the context of group taxation, it seems likely that at least the gist of it was conveyed to Mr Trøim at or around this time. Mr Fredriksen also said he did not recall the memo, but said it made sense that Mr Skilton wanted to formalise the position in respect of all the Arcadia subsidiaries so that there were structures in place to preserve the tax advantages for Arcadia and Farahead. Consideration of the memo may have led to the discussions I mention shortly about formalising the arrangements regarding the ownership of Arcadia Lebanon.

424. On 3 March 2008, at one of the regular meetings with the Arcadia management, Farahead was informed that West African crude had had a 'poor year'. Nevertheless, Farahead set a 2008/2009 trading target of US$20 million/US$25 million for Arcadia's West African crude trading. The minutes referred to Arcadia's plans to expand its products business in West Africa. They recorded that current cash stood at US$8 million.

(b) Indarama project and Concerto

425. The 3 March 2008 meeting also discussed various projects, one of which was a potential acquisition of a Zimbabwe-based ore and minerals company, Indarama. This was an opportunity which Mr Main/Concerto had identified. The meeting minutes said:

> "This Zimbabwe based ore and minerals company (mainly gold, but they do own some rigs) is still available to acquire at USD 7 million with additional cost of USD 3 million to cover the first

> year over-head. We are awaiting a report from Pareto, who will view the asset in the near future, to get a better understanding of what value we could see in acquiring this business."

As I have noted already, Pareto was a Norwegian investment bank with whom Farahead worked.

426. The Claimants at trial sought to advance an unpleaded complaint to the effect that Mr Bosworth/Mr Hurley had no authority to make payments to Concerto. However, aside from being unpleaded, the argument had no merit. As Mr Bosworth said in his oral evidence:

> "I was given the normal powers of a CEO over a company which was involved in oil trading and I was instructed or authorised to expand that business to become like a Glencore or Trafigura or Vitol ie into the asset businesses which may be oil related and some of them not oil related."

It could not be realistically suggested that the Memorandum of Understanding with Concerto was unauthorised; and the payments were made pursuant to the joint venture for which it provided.

427. Mr Ford's 10 March 2008 weekly report to Farahead included a brief update about the Indarama project ("*Indarama Gold: Pereto [sic] in Zimbabwe this week. Hold option until 19th March with payment due 5 working days later*").

428. Mr Trøim in his oral evidence said he would never have authorised a mining investment, having lost money on mining in the past. However, there is no evidence that Mr Bosworth was told not to continue investigating the project after March 2008, and it was *prima facie* within his ordinary powers (and the general mandate mentioned above) for him to do so. In the second half of 2008 Farahead decided to ask for Arcadia's money back from Concerto, but it does not follow that any expenditure up to that date was improper, and there is no pleaded case to that effect.

429. In early April 2008, Arcadia Lebanon paid US$7.5 million to Concerto, and Concerto paid the same amount to Arcadia London. The evidence of Mr Bosworth and Mr Hurley was that this in substance represented Arcadia Lebanon assuming the expenses that Arcadia London had incurred on Concerto projects, consistent with Arcadia Lebanon having taken over responsibility for Concerto project payments. Including that US$7.5 million, Arcadia Lebanon paid a total of US$15 million to Concerto from November 2007 to June 2008 as contributions to the costs of the joint venture.

(c) Alleged statement about closure of Arcadia Mauritius

430. The minutes of the 11 March 2008 meeting, prepared by Mr Skilton, include an entry stating that "*[Mr Bosworth] and [Mr Ford] have confirmed that Arcadia Mauritius has been closed and that business had been moved to London and "products" business to Switzerland*". It is notable that (i) the statement is said to have been made by Mr Ford as well as Mr Bosworth, and (ii) it refers to

Arcadia Mauritius having had, and moved, a products business. The Claimants allege:

> "51. In early 2008, Farahead was told by Mr Bosworth that Arcadia Mauritius had been closed and its business had been moved to Arcadia London or to Arcadia Switzerland.
>
> 52. This statement was false, and was known by Mr Bosworth to be false, since Arcadia Mauritius had not been closed in or by early 2008, nor had all of its business been moved to Arcadia London or Arcadia Switzerland; on the contrary, it remained an active company, and an active participant in the fraud being perpetrated on the Claimants. This statement served to conceal the fraud from the Claimants, as, it is averred, it was intended to."

431. Mr Skilton was not called to give evidence. As noted above, Mr Trøim's evidence was that Mr Skilton was not closely involved in the operational side of the business. Mr Trøim in his witness statement said he did not recall the specifics of the meeting, but that the entry accurately reflected what he recalled to be his understanding at the time. However, he described Mr Ford as being, despite loyalty to Mr Bosworth and Mr Hurley, *"a proper gentleman"*. No allegation has ever been made against Mr Ford, who is recorded as having made the statement along with Mr Bosworth. That is a problem for any case based on Mr Skilton's minute as recording a statement made dishonestly in order to conceal a fraud. Further problems about the entry are that (i) there is no evidence that Arcadia Mauritius ever had a products business as the entry suggests; (ii) the first transaction with Arcadia Mauritius alleged in these proceedings to have been part of the fraud occurred in September 2009, making it difficult to see what a statement made in March 2008 would have been intended to conceal; and (iii) Arcadia Mauritius was Mr Decker's company, not Mr Bosworth's company, making it difficult to see why Mr Bosworth would have known, or wished to make a statement about, whether it had been closed. (In addition, late disclosure by the Claimants of documents from Mr Lance includes his notes of a meeting with Farahead on 23 June 2008 which has a line referring to Arcadia Mauritius, though the content of the discussion is unclear.)

432. Mr Bosworth in his witness statement said:

> "175. While I do not specifically recall this meeting, I believe that the person who prepared this summary is likely someone from Farahead who misinterpreted or misunderstood what I (or David Ford) had said. I believe this because Arcadia Mauritius had no other business that I was aware of except the NNPC contract – it had no *"products"* business. Nor was any such business transferred to Arcadia London or Arcadia Switzerland – and I would have no reason to tell Farahead that it had been.
>
> 176. I have been shown a copy of an email from John Skilton dated 15 March 2008 in which he sent a copy of the 11 March 2008 minutes to me, Colin and David Ford. I note that Mr Skilton

> says in this email *"Please give me a shout if you have any queries etc (-or if I have misunderstood anything!-)."*. I do not remember receiving this email and nor do I remember whether I reviewed the minutes.
>
> 177. At this time, while I do not recall specifically given the passage of time, I believe that Arcadia Mauritius might have been dormant (although I wouldn't have used the word *"dormant"* in any discussions with Farahead, as this is not a term that I would have used). I never told Farahead that Arcadia Mauritius had closed down. While it is true that Arcadia London's product business was moved to Arcadia Switzerland, that had nothing to do with Arcadia Mauritius.
>
> 178. Farahead was at all times aware of the sleeving structure with respect to Arcadia Mauritius – I had informed them that this is how the contract operated and I never told them that it had come to an end. I understand from Quinn Emanuel that none of the 144 transactions which the Claimants allege to be fraudulent concern this sleeving arrangement."

433. Asked in cross-examination about receipt of the minutes, Mr Bosworth added that it tended to be Mr Ford and to an extent Mr Hurley who would deal with such matters, and he did not know whether Mr Ford had phoned Mr Skilton or not.

434. I consider it very unlikely that Mr Bosworth made the statement recorded in the minutes. His evidence was that he would not have done so; Mr Trøim was unable to say positively that Mr Bosworth had done so; and for the reasons given in § 431 above, it is inherently unlikely that the statement was made, and more likely that the minute is simply inaccurate. I conclude that the alleged representation was not made. I would add that, had it been necessary, I would have drawn an adverse inference (as to the accuracy of the minute) from the Claimants' failure to call Mr Skilton to give evidence, something which would appear to have been within their power to do, given their heavy reliance on his meeting note as the basis for an important and serious allegation of deliberate deception.

435. At about this time, Farahead instructed Mr Bosworth/Mr Hurley not to send reports about Arcadia by email to Mr Fredriksen's private email address, but instead to email his secretary, Ms Gunn Skei. The Claimants have stated that her email account has been lost.

(d) Proposed restructuring

436. At around this time, Farahead embarked on a restructuring of the Arcadia group, for tax reasons, including moving Arcadia's trading operations from the UK to Switzerland, where Arcadia Switzerland had been established on 7 February 2007. In this context, Farahead instructed PwC to review Arcadia's corporate structure. PwC prepared a memo dated 28 March 2008 about the restructuring of the Arcadia Group. On 23 April 2008 Mr Ford emailed Mr Trøim and others

the PwC memo. PwC warned about the risk to Farahead of moving the management of the group to Switzerland. The Swiss authorities had granted a 0% withholding tax rate on the dividend paid to Farahead because *"the Cyprus holding company had a real holding function"*. Farahead's functions were described as *"the control of the shareholdings, the decisions relating to the acquisition and sale of a shareholding, the strategic decisions for the group, etc. Those types of activities must be differentiated from a simple administrative activity."* No doubt reflecting this advice, Mr Skilton in an email to Mr Hannas on 8 July 2008 said:

> "In general terms I cannot emphasise enough the importance I attach to Farahead being in *"control"* of the group and for this control to be exercised from Cyprus. Farahead must receive full reporting from its subsidiaries on their activities and approve inter-company arrangements etc. I do not like Farahead *"delegating"* authority to Arcadia management etc. Farahead should have the opportunity to discuss at Board level all important decisions and especially those decisions which require it to be party to agreements/contracts etc."

437. A further PwC memo dated 12 September 2008 reiterated the risks, stating that Farahead *"cannot delegate the power to decide"*. Mr Ford summarised the position in a manuscript note as being that *"Farahead may delegate a supervisory role"* to the Swiss subsidiary, *"providing all strategic decisions and core matters at decided at Farahead level !!"*.

438. Mr Trøim appeared to suggest in his oral evidence that Farahead did not take the strategic decisions, though he accepted that Farahead could demand answers from Mr Bosworth/Mr Hurley at any time. Asked whether he accepted that Farahead exercised 'mind management and control' over the Arcadia Group, Mr Fredriksen said "*That never happened in practice: that is for the taxman to find out"*. Further:-

> "Q. Is it fair to say that to preserve the tax position, Farahead needed to call the shots for the Arcadia business?
>
> A. At least according to business regulations.
>
> Q. Farahead had to call the shots because otherwise Farahead's tax advantages would be at risk, wouldn't they?
>
> A. That I understand.
>
> Q. Well, do you agree?
>
> A. Yes, I agree."

439. In accordance with the restructuring plan, from late 2008 many of the London operations migrated to Switzerland, and Arcadia Switzerland rather than Arcadia London began to conduct Arcadia's principal trading activities in the Western hemisphere.

(e) Discussions about ownership of Arcadia Lebanon

440. During spring and summer 2008, there were also discussions relating specifically to the ownership structure of Arcadia Lebanon. It is necessary to go back slightly in the chronology in order to explain these.

441. As noted earlier, the first entry in the Hannas Note records a conversation between Mr Lance and Mr Hannas on 25 February 2008 in which Mr Lance said Arcadia Lebanon was *"Mr Fredriksen's stand alone company"*. Mr Hannas did not recall who had called whom, but said the conversation took place because he was enquiring about Arcadia Lebanon, and Mr Lance *"called me to explain this is not owned by the group formally but it was a standalone of JF"*. Mr Hannas agreed several times in cross-examination that he knew Arcadia Lebanon was *"Mr Fredriksen's company"*.

442. Mr Skilton's note of the 11 March 2008 meeting included a section relating to Arcadia Lebanon:

> "8. Beirut Dimitris and Colin to travel together to Beirut. Shares should be transferred to *"stand alone"* Liberian Company. Company administrators/lawyers to be changed to those already known to Farahead Dave F confirmed that there were no inter-company balances/loans with this Beirut Co All details ie: management accounts since incorporation, name of administration office in Beirut & list of assets should be passed to Dimitris asap"

443. Mr Hannas in his witness statement said:

> "60 I remember independently that, at some point (I do not recall when), Mr Trøim and Mr Fredriksen were informed by Mr Bosworth and Mr Hurley that Arcadia Lebanon had profits to distribute to Farahead of up to US$15 million, and that I was then instructed to take the steps necessary to take over ownership of Arcadia Lebanon and therefore enable the payment of a dividend from Arcadia Lebanon to a Farahead entity. Without ownership, there would be no connection through which to bring the dividends into Farahead. I recall, however, that this is not what ultimately happened, and to the best of my knowledge, the ownership structure of Arcadia Lebanon never changed."

444. However, he accepted in cross-examination that the matter of the US$15 million dividend came up only later in 2008. Asked what the purpose was of formalising the structure, Mr Hannas gave this evidence:

> "A. Maybe it was to divert the shareholders of Arcadia Lebanon who at that time was Mr Bosworth and Mr Hurley, to divert it to a company or two individuals as nominees from our group.

> Q. Yes, what you wanted to do was to, as you say, formalise the position; the reality was Arcadia Lebanon was a standalone Fredriksen company; yes?
>
> A. Yes.
>
> Q. And you wanted to formalise the position with a different corporate structure; correct?
>
> A. That's right.
>
> Q. But to retain the standalone status of Arcadia Lebanon?
>
> A. This was my understanding at that time. Yes."

445. Mr Hannas said Liberia was chosen because Liberian companies were accepted in the world of trading and shipping, and might be able to issue bearer shares. Asked who the bearer would be, Mr Hannas said they might have been held in his office or in Mr Fredriksen's or Mr Trøim's office. The idea of transferring the shares in Arcadia Lebanon to a Liberia company is reflected in the second entry in the Hannas Note (*"Skilton – AL shares to a Liberian co"*).

446. The share ownership of Arcadia Lebanon was on the agenda for a meeting on 25 April 2008, and the summary of the meeting (in the form of an action list) included *"[Mr Hurley] and [Mr Bosworth] to sign appropriate declaration of trust"* and *"Administration office of Company to be moved to office of [Farahead] lawyers"*. Mr Skilton emailed the summary to Mr Trøim on 30 April 2008 for his approval.

447. Subsequently, Mr Skilton emailed Mr Hannas's private email address (to which, Mr Hannas said, only he had access) on 5 June 2008 saying he was trying to get Mr Bosworth and Mr Hurley to sign a declaration of trust, and that they had told him that the Beirut operation must be kept outside Farahead. It was suggested to Mr Bosworth that it was he and Mr Hurley who were the ones insisting on that, to which he replied *"No. It had to be kept outside of Arcadia Group Inc over here but it was up to Mr Fredriksen and co whether it went to Farahead directly or didn't or was held in trust by a third party."* Mr Skilton's email went on to ask Mr Hannas whether Mr Hannas had a standalone company that he could name as the 'beneficial owner' in the declaration of trust, and whether he had received any further information about the Beirut operation such as the company name and administrators' address.

448. Mr Hannas first sent Mr Skilton an email from his official Seatankers address, not responding directly to Mr Skilton's queries, but listing various action points regarding the Group's operations including one on 'Arcadia Beirut' saying *"No development so far most probably due to political situation, but as discussed earlier it will be interesting to find out how the operations/office is funded and what the status of the profits is (if any were distributed) and the bank balances"*. Three hours later Mr Hannas did reply to Mr Skilton's message (from his private email account), to which Mr Skilton's message had been sent), saying:

> "JOHN
>
> I TRIED TO CALL YOU BUT YOU MUST BE VERY BUSY
>
> I WILL PROVIDE TO YOU WITH ALL THE INFORMATION AND DOCUMENTS YOU REQUIRE LATER ON TODAY BUT WHEN YOU HAVE TIME PLEASE GIVE ME A CALL.
>
> BEST REGARDS
>
> DIMITRIS"

The electronic copies of this message have been lost from both Mr Hannas's and Mr Skilton's email accounts. Mr Hannas's practice, he said, was to print out important emails but then delete any electronic record of them. Only a hard copy which Mr Hannas had printed out was disclosed, following a specific disclosure application. There is also no record of the call Mr Hannas asked Mr Skilton to make, if it occurred.

449. The following day, 6 June 2008, Mr Hannas replied again to Mr Skilton's queries, but this time from his official email account, saying:

> "The name of the company is *"ARCADIA PETROLEUM SAL (OFFSHORE)"* but I do not know who are the administrators although apart from Pete and Colin the board consists of another 2 directors Naji Mouzannar and Youssef Mouzannar - who together with Sally Sfeir were the founders of the company. Please also note that according to the incorporation documents of the company, out the 100,000 shares (of $2.50 each) of the company *"every director shall own at least three shares during this period in office"*.
>
> I hope the above is of some assistance."

450. The 'Beirut Operation' was on the agenda for a meeting at Sloane Square on 11 June 2008, with a note stating *"Status: see item 9 meeting note of 25th April"*. That was a reference to the action list referred to in § 446 above, which included reference to Mr Bosworth and Mr Hurley signing a declaration of trust and Arcadia Lebanon's administration office being moved to Farahead's lawyers' office. However, the minutes of the 11 June 2008 meeting record no discussion about any of this. The Hannas Note records a conversation with Mr Skilton the following day:

> "Skilton – [Arcadia London] meeting in London yesterday – [Arcadia Lebanon] kept out of discussion per [Mr Fredriksen/Mr Trøim]"

451. Asked about this, Mr Trøim gave the following evidence:

> "Q. So you decided to take the item of Arcadia Lebanon off the agenda, didn't you?

A. Yes, because we said can it remain like this. There was kind a lock box effectively where some profit had been made on initial contracts and there was no further activity going on.

Q. No, Mr Trøim, you decided at this time when Mr Skilton was wanting to formalise the arrangements, to take Arcadia Lebanon off the agenda, didn't you?

A. I don't think it was specifically that but this company -- we didn't own this company. It was owned by two of our employees who owned the company. So from a corporate way, it didn't fit in here. That is another discussion.

Q. You don't refer to this direction in your witness statement, do you?

A. What is wrong with the witness statements? What are you lacking?

Q. You saw this note, didn't you?

A. I specifically said I didn't know if I saw that note. I saw it when I went to the documents here. What should I have added?

Q. You wanted to keep references to Arcadia Lebanon to a minimum because --

A. Because it was not owned by us.

Q. You had concerns, didn't you, that if the structure was formalised, that could create a paper trail that would lead back to Farahead; correct?

A. The money had to be paid back to Farahead/Arcadia anyway.

Q. By --

A. The 70%.

Q. By creating another paper trail, correct?

A. Yes, if you send money, I get the paper trail."

452. I find that explanation unconvincing. It would have made no sense for Farahead to be planning to seek a declaration of trust in respect of the Arcadia Lebanon shares, and moving the company's offices to those of Farahead's lawyers, if Farahead understood the company to be an inactive one owned by Mr Bosworth and Mr Hurley that had undertaken only a very limited number of specific trades over a very short time span (that having been Mr Trøim's evidence in his witness statement). Nor do any of those matters explain why Mr Trøim would positively wish the matter to be omitted from the discussion at the meeting (or the minuting of it). It is considerably more likely, in my view, that the reason for the

instruction reflected a desire to reduce or eliminate references to Arcadia Lebanon in Arcadia London's official documents, such as meeting minutes. Farahead wished to have control over the shares in Arcadia Lebanon, but it also wished to avoid a paper trail. Both matters are difficult to square with the Claimants' thesis that Arcadia Lebanon was presented as a discrete operation used for a small amount of business but was then used as a vehicle for Mr Bosworth and Mr Hurley to perpetrate a large-scale fraud on Arcadia London and Farahead.

453. On 17 June 2008 the auditors signed off on Arcadia Lebanon's financial statements for 2007. Mr Hurley said he provided a copy to Mr Trøim in Farahead's Sloane Square offices, and a copy of them was disclosed from a Frontline file. They recorded a net profit for the year of US$7,268,005 and shareholders' equity of US$7,508,979.

454. On 18 June 2008, a Farahead group structure chart was updated to remove reference to 'Arcadia Beirut', which in the 2007 version of the same chart had been shown as a Farahead subsidiary.

455. On 23 June 2008, Farahead met the Arcadia management in Cyprus. Mr Lance's notes of the meeting contain a heading *"Beirut"* but there is no record of the/any discussion. The Hannas Note records a conversation the following day in which Mr Skilton *"[a]dvised of [Arcadia London] meeting in [Limassol] with 3rd party present".*

456. On 28 August 2008, Mr Lind emailed Mr Skilton and Mr Hannas saying:

> "I have completely run out of excuses in relation to my non-performance of the tasks I was assigned responsibility for in our meeting in respect of Arcadia on 11 June. Please forgive me. Having finally found the time to attack my file on this, I can report back as follows:
>
> **1. Arcadia Petroleum SAL (Offshore)**
>
> I have noted the Legal Opinion provided by Mr. Elie Chamoun of the law firm Abouhamad, Merheb, Nohra, Chamoun, Chedid of 13 March 2007. This provides relevant information on Arcadia Petroleum SAL (Offshore) which appeared to be in good corporate order in March last year. I have also made a quick check on the law firm and can confirm that it is one of the most reputable in Beirut. What we need to do is obviously to document, in relation to the current 4 recorded shareholders, that they agree and accept to act as nominees for the beneficial shareholder, Beirut Holdings Limited. In order to complete this, I need to make contact with the law firm and ask them to help us preparing the documents required in order to have the shares now held by these nominees transferred to Beirut Holdings as their beneficial owner in undated form so that we can have the shareholders execute these and allow us to keep it and be ready to execute a transfer if and when we feel this is required. I need,

> in this connection, to find out whether the shares are evidenced by physical share certificates or not. We could, in this connection, also ask Mr. Chamoun to update his Legal Opinion so that we are certain that no changes have taken place which we have not been informed of. In so doing we should obtain a copy of the Company" s Articles of Association. Finally, we need to establish some form of communication between the directors of Arcadia Petroleum SAL (Offshore) and Cyprus so that we can keep an eye on the company's accounts and other activities. I attach a draft letter agreement between the nominal shareholders and Beirut Holdings Limited for your review and comments."

It appears from the opening of this letter that Arcadia Lebanon was in fact discussed at the 11 June 2008 meeting, which might indicate that the Fredriksen/Trøim instruction referred to in Mr Skilton/Mr Hannas conversation the following day was that discussion of Arcadia Lebanon should not be minuted, rather than that no discussion should occur. However, that point was not explored in cross-examination and I make no finding about it.

457. Mr Lind's understanding that there was a need to keep an eye on Arcadia Lebanon's accounts and other activities is consistent with the company being viewed by Farahead as still active, and inconsistent with the notion that Farahead believed Arcadia Lebanon to be inactive or dormant.

458. Mr Lind's email attached a draft letter to be sent by Beirut Holdings Limited to Mr Bosworth/Mr Hurley and the two Mouzannar shareholders of Arcadia Lebanon, saying:

> "We write to you to document our joint understanding and agreement on the ownership and corporate governance of Arcadia Petroleum SAL (Offshore) (the *"Company"*).
>
> By way of background the following should be noted:
>
> …
>
> (v) You are the shareholders of record in the Company, its shares being distributed between you as follows:
>
> Mr. P. Bosworth 49,999 shares
>
> Mr. C. Hurley 49,999 shares
>
> Mr. N. Mouzannar 3 shares
>
> Mr. Y. Mouzannar 3 shares
>
> 100,000 shares
>
> (vi) You constitute the Company's board of directors with Mr. Bosworth being the chairman.

> (vii) Mr. Hurley has been appointed the Company's manager with responsibility for its day-to-day operations.
>
> Based on this, we have the following joint understanding and agreement:
>
> 1. You are holding the shares in the Company which are nominally registered in your name as nominees for ourselves and have done so since you subscribed for the same.
>
> Accordingly, you recognize that we are the true and beneficial owner of the said shares.
>
> 2. You agree to continue as nominee shareholder on record in the Company on our behalf and will, as such, not sell, transfer, encumber or, in any other way, dispose over the shares in the Company without our prior written approval having been obtained.
>
> …
>
> 5. You confirm that you, in your capacity as registered shareholders in the Company, will ensure that you are present, by proxy or in person, on the Company's general meetings.
>
> You will seek our instructions prior to voting on the items on the agenda for the Company's general meeting.
>
> Failing receipt of such instructions, you shall vote in the general meeting according to your best business judgment, always provided that:
>
> - you shall never vote in favour of any dividend or other distribution from the Company;
>
> - you shall never vote in favour of any payment, distribution or other consideration to yourself, whether as nominal shareholders or directors; and always having the Company's and our best interests in mind.
>
> …
>
> 8. You will supervise and operate the Company as you have in the past, always having our best interests as the Company's sole beneficial shareholder in mind.
>
> 9. You will keep us regularly informed of the activities of the Company and provide us with a copy of the Company's annual accounts as and when the same become available."

459. Clearly, Mr Bosworth and Mr Hurley had not always held their shares in Arcadia Lebanon as nominees for Beirut Holdings, which was a new company.

However, it was their case that they had always held them as nominees for Farahead and that Arcadia Lebanon was operated in the interests of the Group as a whole and subject to Farahead's ultimate control. In that sense, §§ 1, 2 and 8 of the draft letter were entirely consistent with their case. Mr Trøim was hard pressed to dispute this point in cross-examination:

> "Q. That was the reality, wasn't it? Mr Lind was putting into paper the reality that since 2006, Bosworth and Hurley held the shares as nominees for you; correct?
>
> A. I don't know if you can call it nominee. As I said, the important thing in that telephone call will come when they are effectively asked to close the trade to Lebanon office. Effectively what we reacted to was we said that is fine, as long as we keep the 70% and they hold the shares, that's what they said."

At the more general level, though, Mr Trøim appeared willing to accept that the proposed formalisation was intended to do no more than record the actual position:

> "Q. Let's go to paragraph 97 of your statement, {Mr Bosworth.2/1/19}. You say in 2008 Farahead attempted to formalise the ownership of Arcadia Lebanon and then you say that *"as far as we were concerned it was a normal part of the group"*. Do you see that?
>
> A. Yes.
>
> Q. So from your perspective, Farahead's perspective, Arcadia Lebanon was just like any other Arcadia company, a normal part of the group; correct?
>
> A. Yes.
>
> Q. And that is why you wanted to formalise the position. You wanted to put into effect legally, formally, what was already the informal position, yes?
>
> A. That is what is stated there.
>
> Q. No. You wanted to put into effect legally what was already the informal position; correct?
>
> A. Yes."

(f) Other events of mid 2008

460. On or about 8 April 2008, Arcadia Lebanon paid US$2 million as a signing-on bonus for Albert Quek, a trader employed by Arcadia Singapore. This payment may later have been reimbursed, in March and April 2009, by Cathay Petroleum Holdings.

461. In September 2008, Farahead was informed at one of the regular meetings that the business in West Africa remained very limited, but that Arcadia wanted to expand its West African activities and increase its cargoes from 2 to 5 per month.

462. On 14 October 2008, Mr Bosworth told Mr Trøim that the Arcadia business plan was 'retrenching to core business' and that it would now concentrate its efforts on seven of its books: which included West African crude oil physical trading.

(g) Discussion of Arcadia Lebanon dividend

463. At a Farahead/Arcadia quarterly meeting on 15 October 2008, the board was told that it was the intention of the group to distribute an amount of cash to Farahead over the coming months in the form of loan repayments, dividends and redemption of preference shares. The summary of the *"estimated repayment schedule"* was recorded as including US$15 million from *"other sources"*. A manuscript note on a copy of the minutes indicated that Mr Lance had said that that was a reference to Arcadia Lebanon. The Hannas Note recorded a conversation the following day: *"Skilton - $15m dividend from [Arcadia Lebanon] to Beirut Holdings??"*

464. Mr Hannas, who was at the meeting, accepted in cross-examination that there was discussion of a US$15 million payment at the meeting and that everyone in attendance knew that this payment was to come from Arcadia Lebanon. He also accepted that the reason for the minutes' circumspect language was the need to comply with the Fredriksen/Trøim instruction to minimise the references to Arcadia Lebanon in the documentation so far as possible. Further:-

> "Q. And these minutes are the sorts of documents that an auditor perhaps would look at?
>
> A. Mm−hm.
>
> Q. Sorry, Mr Hannas, when you nod, you need to say either yes or no.
>
> A. Yes, sorry .
>
> Q. So, yes. So you agree that the minutes are potentially the sort of important documents that go on the file which, later on, an auditor or an investigator might look at?
>
> A. Yes.
>
> Q. And that is why, in this minute, there was no reference to Lebanon. Correct?
>
> A. Yes"

That evidence is consistent with Mr Bosworth/Mr Hurley's case, and inconsistent with the Claimants' case as to their alleged understanding of the

position regarding Arcadia Lebanon. As the Defendants point out, there would be no reason, on the Claimants' case, for Farahead to give instructions to avoid references to Arcadia Lebanon in auditor-facing documents.

465. In the end, however, the plan to formalise the position regarding Arcadia Lebanon was not carried through. Mr Hurley said in his witness statement:

> "In the end, it would appear that Farahead decided that something more formal actually carried more risk, and it may be better to just leave things as is. The risk profile was considerably lower if it were Pete and I as directors and shareholders, because Farahead could then attempt to claim ignorance at all points."

The Hannas Note records a conversation between Mr Lind and Mr Hannas on 3 November 2008:

> "Erling – he advised that transfer of shares of Arcadia Lebanon to Beirut Holdings are on hold – he will talk to Skilton"

466. Mr Trøim confirmed in his oral evidence that Mr Lind took his instructions from Mr Fredriksen and himself (and Mr Fredriksen, asked about this matter, said *"Remember Trøim was running the company, not me"*). Mr Trøim insisted that the reason for the decision was that Arcadia Lebanon was a *"dormant company … It was a box with USD15 million to USD18 million in it and that was it"*: in other words, the same explanation as Mr Trøim had given for the formalisation plan to be devised in the first place. However, as I explain below, there is no evidence that Arcadia Lebanon was dormant by late 2008 – it was not – and no plausible evidence that Farahead was told that it was. It was also a different explanation from that given in Mr Trøim's witness statement, where he said:

> "I do not believe that these efforts were ever ultimately successful, though I do not recall the particular steps taken. As I have explained in paragraph 61 above, I decided not to press these issues, given the profitability of the Arcadia Group around this time"

467. At about this time, Mr Trøim considered how Farahead could extract money from Arcadia Lebanon given the lack of any formal structure. He said in cross-examination:

> "The accountants met and it was a matter of how those monies could be recouped to us and I said let's find a way to do that in a smart way. It was also overhanging the agreement which is touched upon in my affidavit, that they owed Mr Bosworth some money if the transaction turned out to be a good transaction."

The Hannas Note records Mr Skilton saying to Mr Hannas on 5 November 2008:

> "Mr Trøim should advise Arcadia Lebanon dividend payment and how".

(h) Alleged deceitful misrepresentation that Arcadia Lebanon dormant

468. The Claimants allege that:-

> "54.3 In late 2008 Mr Bosworth and Mr Hurley represented to Farahead that the contract for which Arcadia Lebanon had been established had come to an end and that the company had become dormant. As such, as Farahead understood the position, no purpose was to be served by the bringing of Arcadia Lebanon under its control, since it was no longer active, and the issue was not pursued further by Farahead.
>
> 55. This last statement was false, and was known by Mr Bosworth and Mr Hurley to be false, since Arcadia Lebanon was not dormant in late 2008; on the contrary, it was an active company, and an active participant in the fraud being perpetrated on the Claimants. This statement served to conceal the fraud from the Claimants, as, it is averred, it was intended to."

469. The alleged representation was set out in Mr Adams's affidavit, and the Claimants identified Mr Trøim as its source. However, Mr Trøim made no such suggestion in his witness statement. In cross-examination, Mr Trøim gave this evidence:

> "Q. Just go back to the question. Is your evidence that in late 2008, Bosworth and Hurley did not make any representation that Arcadia Lebanon had become dormant?
>
> A. I think the best I can say about this is that they presented us a P&L which didn't move which had effectively then come up to the 15/16 million and which was constant there. There was no activity going on.
>
> Q. You knew that in late 2008, Arcadia Lebanon had not closed down, didn't you?
>
> A. It hasn't closed down but the 70% was not distributed and the money was there.
>
> Q. Exactly. Shall we go to the Hannas note, please, at bundle {I/880.2/1}. You can see that in late 2008, you were discussing money and activity in Arcadia Lebanon, weren't you; yes?
>
> A. Yes.
>
> Q. So if you look at the entry for 5 November, 9 December, there is a highlighted reference about the USD15 million dividend?
>
> A. Yes.

> Q. So you knew in 2008 Arcadia Lebanon is still in business; correct?
>
> A. Yes, because we hadn't got our cash out from the …., Farahead hadn't got the money out from the company.
>
> Q. You don't mention in your statement these discussions about the Arcadia Lebanon dividend in late 2008, do you?
>
> A. I can't remember exactly what I said in the statement but I don't think so.
>
> Q. Despite the fact that you had looked at this note for witness statement; correct?
>
> A. Yes."

470. That evidence provides no support for the deceitful misrepresentation alleged in the Particulars of Claim. The allegation was denied by Mr Bosworth, who said in his witness statement:

> "187. I also understand that in their Re-Re-Re-Amended Particulars of Claim, the Claimants allege that in late 2008 I told Farahead that the contract for which Arcadia Lebanon had been established had come to an end and that the company had become dormant. This is not true, I never said this and it is inconsistent with the payments made by Arcadia Lebanon to GEPVTN which continued well after 2008 (see paragraph 184 above). The only contract that was operated by Arcadia Lebanon that came to an end in 2008 was the Sao Tome Contract. Farahead knew about and authorised Arcadia Lebanon's activities from 2008 until it ceased operating in 2013." (§ 187)

471. It was not even suggested to Mr Bosworth in cross-examination that he had made the alleged misrepresentation in 2008, let alone that he had done so with intent to deceive. The Claimants now seek to rely on the following passage of his cross-examination:

> "Q. [Mr Trøim] said once the trades under the particular contract had stopped, it was no longer active and was to be closed down?
>
> A. Well, Zafiro by way of example continued through the whole period.
>
> Q. Yes, it did.
>
> A. So it is clearly not true.
>
> Q. He didn't know that.
>
> A. He had access to know that.

> Q. You didn't tell him it was still running?
>
> A. I don't know if I did or I didn't. But we did discuss it with -- and we were well aware of GEPVTN which shows ongoing activity right through the period, nothing hidden. … There was a company that was set up between VTN, the shipping entity, which was based in Cyprus, and GEPetrol as a joint venture which basically charged a levy on lifters --
>
> …
>
> MR HAYDON: You didn't tell him about the features of the Zafiro contract, did you, in terms of the ones we have been looking at, the pricing mechanism.
>
> A. I told him it had limited risk. How much detail I went into about the limited risk, I don't recall."

Again, this provides no support for the alleged deceitful misrepresentation.

472. Mr Fredriksen in his witness statement said nothing about any misrepresentation in late 2008 as alleged in the Particulars of Claim. He gave the evidence in §§ 84-87 of his witness statement quoted in § 259 above which I have already considered. That included reference to an understanding arrived at *"by about 2009"* that Arcadia Lebanon was no longer active and to be closed down. Similarly, in § 117 he said:

> "As I have explained in paragraph 87 above, I understood from what Mr Bosworth and Mr Hurley said that, from around 2009, Arcadia Lebanon was no longer active, so would not be generating further profits from crude oil trading."

473. In cross-examination, Mr Fredriksen gave this evidence:

> "Q. If we go back to the Hannas note, please, bundle I/8802.2/1}, June 2008, at this point Arcadia Lebanon is obviously not dormant; correct?
>
> A. What date did you say?
>
> Q. This is June 2008.
>
> A. I don't know on this, whether it was dormant or not. obviously thought it was dormant but I cannot say yes or no on it.
>
> Q. Well, I wanted to ask you that, Mr Fredriksen. In the middle of 2008, you are talking about Arcadia Lebanon with Mr Skilton, aren't you?
>
> A. I don't recall that.

> Q. Is it fair to say that you wouldn't have been talking about Arcadia Lebanon with Mr Skilton if you knew that Lebanon in mid-2008 was dormant?
>
> A. I don't know. I don't recall it.
>
> Q. It's not likely that you would have spoken about Arcadia Lebanon with Mr Skilton in mid-2008 if in fact, Arcadia Lebanon was already dormant; correct?
>
> A. This -- I had no idea when this company was closed or dormant. I have no idea which year or when."

and:-

> "Q. In the pleaded case, it is said that at the end of 2008, there was a representation to Farahead that the company, Arcadia Lebanon, had come to an end and now was dormant. Yes?
>
> A. Yes.
>
> Q. It is right that you don't yourself give any evidence as to what was happening in late 2008 concerning Arcadia Lebanon?
>
> A. I was not involved in the details.
>
> Q. Yes. So, well, you then say that you were aware that by about 2009, Arcadia Lebanon was no longer active. Yes?
>
> A. Yes.
>
> Q. But Arcadia Lebanon on the pleaded case had already closed down by 2008; yes?
>
> A. I don't exactly remember it."

474. Mr Hannas accepted in cross-examination that he was never told by Mr Fredriksen or Mr Trøim that Arcadia Lebanon was dormant.

475. Viewing the evidence in the round, the making of the alleged representation about Arcadia Lebanon being closed or dormant is in my view entirely unsupported by the evidence, and (if it was ever properly made) should have been withdrawn at the latest by the time the Claimants served their witness statements.

476. Moreover, any suggestion that Mr Bosworth or Mr Hurley dishonestly intended to conceal Arcadia Lebanon's activities from Farahead is irreconcilable with the evidence as a whole. Quite apart from the dealings referred to in the Hannas Note, Arcadia Lebanon's trading and continued existence was known to numerous people within the Arcadia operation. One of them was Mr Ford, who was involved in the plans to formalise the company's ownership in April 2008, the plans in late 2008 and 2009 for Arcadia Lebanon to pay a dividend, and

meetings at which Arcadia Lebanon was discussed with Farahead (until Mr Fredriksen/Mr Trøim in June 2008 gave the instruction that the company be 'kept out' of discussions). Arcadia Lebanon continued to make payments to GEPVTN until at least 2011. In May 2010, Mr Espen Westeren of Frontline, an associate of Mr Fredriksen who was based in the Sloane Square office, stayed at Mr Bosworth's flat in 308 Sursock Street in Beirut, which also housed Arcadia Lebanon's office. Mr Westeren visited again in May 2012.

(i) Further discussion of Arcadia Lebanon dividend

477. A Farahead Group cash liquidation report as at 30 November 2008 records a US$5 million dividend payment from Arcadia Lebanon.

478. The Hannas Note records a conversation between Mr Trøim and Mr Hannas on 9 December 2008 as follows:

> "[Mr Trøim] - $15m [Arcadia Lebanon] dividend will be used to reduce PB loan from Fulham"

479. Neither Mr Trøim nor Mr Hannas made any mention of this conversation, or the decision it reflected, in their witness statements for trial. Mr Hannas, to the contrary, in his witness statement for trial said:

> "I understand from Grosvenor Law that it is alleged in these proceedings that the US$5 million payment was in fact a payment of a dividend from Arcadia Lebanon, in a manner directed by Farahead. This is not correct, as far as I recall and can see. I do not understand this allegation. As I have described above, the US$5 million payment was initially understood to be a loan repayment and was ultimately applied for that purpose, even if there was some doubt for a period and, in consequence, we held the payments in a suspense account. Mr Bosworth had the benefit of that payment when he redeemed the Fulham Loan.
>
> In those circumstances, I do not understand how this payment could be considered a dividend from Arcadia Lebanon. As I note above, I was generally aware that Mr Fredriksen and Mr Trøim had anticipated receiving dividends from Arcadia Lebanon when I asked about this. I was not aware of any agreement on this, however, or how this would operate in practice. Certainly, it would not in my view make any commercial sense for a dividend to be paid via repayment of the Fulham Loan, as this would mean not only that Farahead gave up the dividend, but also that Mr Fredriksen via Fulham Properties effectively gifted Mr Bosworth the same amount again as a loan reduction." (§§ 96 and 97)

480. In his later witness statement, after the Hannas Note had finally been disclosed, Mr Hannas backtracked, saying:

> "This entry reflects a conversation between me and Mr Trøim (*"TOT"*) on 9 December 2008, in which Mr Trøim told me that Arcadia Lebanon would pay a USD 15 million dividend which would be used to reduce the Fulham Loan …, which was outstanding from Mr Bosworth to Fulham Properties. I explained in Hannas3/97 … that it would not in my view make any commercial sense for a dividend to be paid via repayment of the Fulham Loan. However, I think I would have thought at the time that Mr Trøim's comment made sense if this were a way for a bonus to be paid to Mr Bosworth.
>
> As I have mentioned, Arcadia Lebanon did not pay a USD 15 million dividend or otherwise pay this amount to Farahead. I have addressed at Hannas3/89–97 … a USD 5 million payment that was ultimately applied to reduce to the Fulham Loan, which Mr Bosworth and Mr Hurley say originated from Arcadia Lebanon. I am not aware of Mr Bosworth having treated this amount as part of his bonus."

481. Mr Hannas said in cross-examination that he knew that Mr Trøim wanted to get the dividend payment from Arcadia Lebanon, and that he had a conversation with Mr Trøim on 9 December 2008 about the mechanics of it. He did not dispute that Mr Trøim told him that the Arcadia Lebanon dividend was going to be used to reduce the Fulham Properties loan. Mr Hannas said the omission of this from his witness statement was an oversight.

482. In the evidence quoted in § 469 above, Mr Trøim similarly accepted that he wished to get the dividend from Arcadia Lebanon, but made no mention of it in his witness statement despite having looked at the Hannas Note for his witness statement.

483. Given the allegations the Claimants had made about Farahead's knowledge of Arcadia Lebanon and its activities, these dividend discussions were clearly a relevant matter that ought to have been addressed in order for Mr Trøim's and Mr Hannas's witness statements to give a fair account of their involvement, and their notable omission from their trial witness statements makes them unsatisfactory.

484. There was a meeting between Farahead and Mr Bosworth/Mr Hurley on 16 December 2008. The pack of papers for the meeting included a cash repayment schedule and some handwritten notes. Mr Bosworth said *"the purpose of the meeting was all about cash, and how much cash we had and where we could get more from"*. Mr Trøim accepted he was interested in the cash available from Arcadia Lebanon. Someone marked the net profit figure in a copy of Arcadia Lebanon's financial statements. Mr Hurley made the handwritten notes on the cash repayment schedule. These notes include: (i) a reference to *"2nd April"*, with arrows showing a payment of US$15 million, and another payment of US$7.5 million with an arrow pointing towards the words *"Leb → UK"*; (ii) a reference to *"August 22"* followed by *"→ 7.5m → Lebanon."*; and (iii) an entry saying *"PPMC Settlement $21m Mar/April - $14m Leb + 7m"*.

485. Mr Trøim agreed in cross-examination that there was a discussion at the meeting about *"how to get the money out of Arcadia Lebanon"* and *"how is Arcadia Lebanon to transfer value from Lebanon to London. Transfer money back to the group"*. He said *"I think we needed to have the money back and there were some different feelings in the group, if we should take it back as a dividend or how we should organise, or if it should wait since the cash was there anyway".* Further:

> "Q. You discussed with Mr Fredriksen how to get the Arcadia Lebanon dividend payment from Lebanon to Farahead; yes?
>
> A. What I said earlier which is in line with what I said two minutes ago, we were considering how to get that profit out from Arcadia Lebanon. One thing, if there was USD15 million there, was to effectively let them take the company which they already owned and they took the 15 million and then we would have that retention bonus which I talked about several times. Another alternative was effectively to forgive that Fulham Properties property loan at some stage if you felt it had been a successful business, to compensate their obligation which was there –– undocumented from 2005 if this turned out very good, that there should be some extra money for Pete Bosworth.
>
> Q. And this was discussed with Mr Fredriksen, wasn't it?
>
> A. Yes."

486. Another version of the board meeting pack includes a manuscript note saying *"Seatankers invoice 2 x 2.5 PC"*, which may reflect a discussion about what in due course became the two payments of US$2.5 million each that Mr Bosworth and Mr Hurley in due course made, referred to in §§ 499 and 502 below.

487. There was also discussion of bonuses at the 16 December 2008 meeting. Manuscript notes made by Mr Bosworth on the meeting pack appear to envisage bonus payments to various traders: 'JD' (Mr Dyer), 'NW' (Mr Wildgoose) and 'GA'/'DS' (Mr Antonucci and Mr Striano, who ran the Mediterranean book). Mr Trøim in cross-examination was willing to accept that one way for Arcadia Lebanon to transfer money back to the Arcadia Group was for Arcadia Lebanon to pay bonuses:

> "A. You can say –– because that is Arcadia's responsibility so if you use Arcadia's cash which they belong from Lebanon to pay their bonuses, that is kind of within the same pocket."

488. The word *"Concerto"* appears a number of times in the manuscript annotations. As I have mentioned, Farahead by this stage wanted the money that Arcadia had invested in Concerto to be refunded. The manuscript notes record the US$15 million paid to Concerto that Farahead wanted back, and a payment of US$7.5 million that Concerto had paid to Arcadia in early April 2008, to which I referred earlier. Mr Trøim said that he did not know that Arcadia Lebanon had paid US$15 million to Concerto, whereas Mr Bosworth said that *"I think the 15*

million Concerto was discussed at the time and getting it back". The manuscript annotations tend to support Mr Bosworth's recollection on this point.

489. The manuscript note *"August 22"* followed by *"→ 7.5m → Lebanon"* may be a reference to a transfer of US$7.5 million which Arcadia Lebanon made to Arcadia London on 22 August 2008. An email to Mr Hurley the preceding day indicated that Arcadia London needed to pay US$7.17 million immediately to cover a margin call, and that Arcadia London's cashflow situation was tight at that time.

490. The manuscript note *"PPMC Settlement $21m Mar/April - $14m Leb + 7m"* appears to refer to transactions with Projector. Since the early to mid 2000s, Arcadia London had had a joint venture with Projector, under which Projector sourced products for Arcadia London to sell to PPMC. The joint venture ended in about spring 2008, and on 19 March 2008 Arcadia Lebanon paid Projector its US$3,305,525 profit share in respect of venture. However, PPMC still owed money for the products, which was not paid until March 2009: see § 515 below.

(11) Events in 2009

(a) The Attock/GEPetrol Contract

491. In about January 2009, Attock Mauritius entered into a term contract with GEPetrol for the purchase of Ceiba grade crude oil (the "***Attock/GEPetrol Contract***"). An unsigned term contract dated 8 January 2009 envisaged a quantity of 1,000,000 barrels/year and a price of Dated Brent plus or minus a market differential to be agreed between the parties. (A later email from Mr Mounzer in January 2010 suggested that Attock Mauritius's term contract with GEPetrol was for 15,000 barrels/day.)

492. At this stage, January 2009, Attock Mauritius was still owned by Mr Decker: Mr Kelbrick did not acquire it until much later in 2009. Nonetheless, the Claimants submit that the transactions by which Arcadia went on, between September 2009 and November 2012, to buy 14 cargos of oil from Attock Mauritius, sourced via this term contract, were opportunities that had been fraudulently diverted from Arcadia London to Attock Mauritius. It is unclear why Mr Bosworth might be thought to have wished to divert opportunities to Attock Mauritius, thereby benefitting Mr Decker, who is not a Defendant and has never been alleged to have formed part of the conspiracy. Mr Bosworth's evidence was that *"it [was] an Attock contract"* and that Mr Driot *"did not offer us the term contract"*. Similarly, Mr Oburu of GEPetrol on 13 July 2009 emailed Attock Mauritius and Mr Paul Greenslade of Vitol (in relation to September 2009 Ceiba cargoes) saying: *"Let me remind you that Vitol and Attock shares the GEPetrol Ceiba cargoes on a 50% basis. And this is Attock's turn"*. That piece of contemporary evidence strongly supports the view that – as one would expect – the contract belonged to Attock, Mr Decker's company, and had nothing to do with Arcadia.

493. The Claimants submit that it can be inferred that the term contract was in fact an Arcadia opportunity, because:

i) around the same time Arcadia Lebanon was a party to the Zafiro Contract, and any further opportunity from GEPetrol would "*naturally*" have come first to Mr Bosworth/Arcadia;

ii) Mr Bosworth had *"the relationship"* with Mr Driot (in relation to the Zafiro Contract) and so would have been involved in negotiating the Attock/GEPetrol Contract; whereas GEPetrol had no existing relationship with Attock Mauritius before January 2009 (and GEPetrol would not have been aware of its involvement as a sleeve under the Zafiro Contract, where its name was deliberately kept off the letter of credit documents);

iii) GEPetrol had in September 2008 offered Arcadia Lebanon one Ceiba spot cargo for November 2008, which Mr Bosworth believed Arcadia Lebanon took up; and

iv) Mr Kelbrick's explanations of the matter are said to be unconvincing.

494. I do not accept that any such inference can be drawn (still less that an inference of fraud is more probable than an innocent explanation). As Mr Bosworth said, it would be entirely up to Mr Driot where he took the term contract. Mr Oburu's email, quoted above, makes clear that GEPetrol was selling to both Vitol and Attack: there is no basis for the suggestion that any GEPetrol term contract would 'naturally' go to Arcadia. Arcadia Lebanon, having taken up one spot cargo, did not (as was put to Mr Bosworth) *"give you the opportunity to discuss with GEPetrol a term contract in relation to Ceiba oil"*. Given the existing relationships with GEPetrol as summarised earlier, that suggestion strikes me as completely unrealistic. Mr Bosworth responded *"I didn't have discussions with GEPetrol about term contracts. This was handed – this opportunity was given to us by Mr Driot. We lifted the cargo and after that, we didn't lift any more."* He felt sure that GEPetrol would have regarded Mr Driot as reliable, and that Mr Driot would be likely to have been involved in providing the opportunity to Attock. So far as Mr Kelbrick was concerned, he was not in a position to explain exactly how Attock, then under Mr Decker, had obtained the term contract, and his evidence carries matters no further.

495. In my view, the evidence does not come close to establishing that the term contract was diverted from the Arcadia Group, still less that it was fraudulently or dishonestly diverted.

(b) Arcadia Lebanon profits and dividend

496. On 20 January 2009, Mr Hannas emailed Mr Fredriksen/Mr Trøim, email subject 'ARCADIA BEIRUT', saying

> "[a]s soon as I feel there is some peace/security, I will visit Beirut's offices. I understand that you have the company's last financials and I would like to have a copy of them plus any management accounts they have prepared afterwards. Please ask Maria to make copies and courier to me."

'Maria' was Maria Turnbull, Mr Fredriksen's and Mr Trøim's secretary. Mr Fredriksen's secretary, Gunn Skei, was copied in, and Mr Hannas had written 'cc John Fredriksen'. Mr Trøim forwarded the email to Ms Turnbull. Ms Skei printed out emails that she received for Mr Fredriksen. Mr Hannas accepted in cross-examination that the reason for which he requested the 2007 accounts was that he knew that Mr Trøim had devised a plan to extract a US$15 million dividend from Arcadia Lebanon.

497. On the same day, 20 January 2009, Mr Hannas arranged for the Seatankers ledger 'ARCADIA PETROLEUM SAL (LIBANON)' for Arcadia Lebanon's payments to GEPVTN to be printed out for him by Ms Theocharous.

498. On 22 January 2009, Ms Turnbull wrote to Mr Hurley: *"Tor Olav is after the accounts for the Beirut office? Please let me know when he may expect them"*. In response, on 26 January 2009 Mr Hurley said Mr Trøim should already have the accounts for the year ending 31 December 2007, but in a response to a request from Ms Turnbull to send them, he arranged for them to be couriered over to her. Ms Turnbull confirmed receipt the same day, and then emailed the accounts to Mr Hannas on 4 February 2009.

499. Under the Arcadia Lebanon profit sharing arrangement, Farahead was supposed to receive 70% of Arcadia Lebanon's net trading profits. The 2007 accounts showed net profits of US$7,268,005, 70% of which would be approximately US$5 million. Mr Hurley's evidence was that Mr Trøim required a payment to Farahead of that amount (having originally wanted Arcadia Lebanon to declare a dividend of around US$10 million), regardless of cash availability, even if it meant the share due to Mr Bosworth and Mr Hurley could not be paid until later. Mr Hurley continued:

> "140. As a result, we declared a dividend of USD 6 million in early 2009. This resulted in USD 3 million being paid to Pete and I each. From these amounts, we each paid USD 2.5 million in accordance with Farahead instructions. This constituted a dividend distribution to Farahead of USD 5 million in total. Pete and I retained USD 500,000 each on account of the amounts due to us under the Arcadia Lebanon Profit Share Agreement. This was well below the minimum amount that Pete and I should have received in accordance with the Profit Sharing Agreement. We retained the residual amount of the dividend payment (USD 500,000 each) in order to partially cover our bonuses due under the Arcadia Lebanon Profit Share Agreement.
>
> 141. Once we had declared the 2009 dividend, I was told by Trøim that Pete and I would receive instructions from Hannas as to how, when and where the payment(s) due to Farahead should be paid. In due course, Pete and I received invoices from Hannas, which were in the name of an entity called 'Fulham Properties'. Pete and I were to pay USD 2.5 million each to an account which was held by Fredriksen's Seatankers Greenwich group of companies. Seatankers was Fredriksen's chosen vehicle through which to receive this payment. This USD 5 million

> amount appeared on many spreadsheets that I gave to Farahead as 'other dividend' or 'other payment'. They saw this amount described in this manner on a regular basis and knew exactly what it was.
>
> 142. The structure in place for the dividends and invoices was in line with Farahead's instructions. Therefore, in order to facilitate payment of Farahead's share of the profits of Arcadia Lebanon in accordance with Farahead's instructions we first had to declare a dividend that would be paid to Pete and me as shareholders of Arcadia Lebanon. Only then did Hannas provide instructions for how this money was to make its way to Fredriksen's nominated account.
>
> 143. Other than that, I don't know what Fulham Properties is. I don't know what role it plays nor why it was Fulham Properties that was invoicing us. It was made clear to me by Trøim that I would receive payment instructions from Hannas and that I was to comply with those instructions. You don't question these things. I got the invoice, I paid the money. There was no in-depth conversation about it, at least not with me. It would just be to the tune of "this is the amount that we are getting and this is the invoice. Let me know when you have paid it".
>
> 144. A year later, on 17 June 2010, following receipt of further payments made to Arcadia Lebanon, we declared a further dividend of USD 2 million, out of which Pete and I received an additional USD 1 million each, which we retained to bring the amount held back towards the ratio agreed in accordance with the Arcadia Lebanon Profit Share Agreement."

500. The dividend was paid to Mr Bosworth and Mr Hurley on 13 January 2009. As noted earlier, the Hannas Note recorded that Mr Trøim had on 9 December 2008 said that the dividend (at that stage anticipated to be US$15 million) should be *"used to reduce PB loan from Fulham"*; and Mr Trøim gave oral evidence that one potential route for extracting a dividend from Arcadia Lebanon was to forgive part of the Fulham Properties loan thereby fulfilling the undocumented 'obligation' to give Mr Bosworth a bonus if Arcadia turned out to be successful: see § 485 above.

501. On 4 February 2009, Mr Hurley emailed Mr Hannas noting that he had yet to receive Farahead's instructions specifying the means by which it wished to receive the sum of US$5 million. Mr Hannas drafted repayment letters in Fulham Properties' name. On 10/11 March 2009, he emailed Mr Hurley at his Arcadia Lebanon email account with the subject *"Loan repayment"*, even though Mr Hurley did not have a loan from Fulham Properties. On 24 March 2009, Mr Hannas emailed Mr Hurley at his Arcadia Lebanon address, asking *"whether the $5m has been transferred"*. Mr Hannas referred in his email to a meeting later that morning with Mr Fredriksen and Mr Trøim. An email from Mr Hurley two days later indicates that, at the meeting, Mr Hurley told Mr

Fredriksen and Mr Trøim that there had been a delay in the payment because the bank had for some reason put funds on a time deposit.

502. On 15 April 2009, Mr Hurley transferred US$2.5 million to Fulham Properties, making payment to a Seatankers account. On 29 April 2009, Mr Hannas asked when Mr Bosworth would pay US$2.5 million, and said *"Also advise whether there will be any dividends for the year 2008 and whether any accounts have been done for this year"* (which Mr Hannas in his witness statement said he assumed related to dividends and accounts for Arcadia Lebanon). Mr Bosworth made the payment of U$2.5 million on 7 May 2009.

503. On 8 May 2009 Mr Hurley advised Mr Hannas that Arcadia Lebanon's 2008 audited accounts had not yet been produced, but that he would *"advise when we have expected date which will determine any available dividend payment"*.

504. On 18 May 2009, Ms Theocharous emailed Mr Bosworth about the Fulham Properties loan. She indicated that the total of US$5 million received on 11 May 2009 had been converted into sterling, as per the original loan, and:

> "We have arranged settlement of the interest and the balance against the Principal amount due.
>
> As at 11.05.09 your loan balance is Stg 9,363,877.
>
> Please confirm that you are in agreement with our attached calculations."

505. However, it seems that the US$5 million payment originating with Arcadia Lebanon was not, at least at this stage, shown as a dividend receipt in the records held at Seatankers. Instead, in a memo dated 23 June 2009 Mr Hannas asked Ms Theocharous to account for the sum as *"Creditors"* and *"not as reduction of the loan"*. Mr Hannas said in a witness statement that he did not recall writing the note, could not remember, but did not believe that he would have made such a request on his own initiative, so he believed this would have been based on something Mr Trøim or Mr Fredriksen had said. In his oral evidence, Mr Hannas said that was *"because we were waiting for further instructions from Mr Trøim to tell him about this"*; and he agreed that the reason why the money was not put against the Fulham Properties loan straight away was that it was an Arcadia Lebanon payment into the group. At the same time, there may well have been reluctance to record the payment as an Arcadia Lebanon dividend. As noted earlier, Mr Trøim had wished to keep Arcadia Lebanon 'out of discussion'. In cross-examination, Mr Hannas accepted that he deleted the electronic copies of his email exchange with Mr Hurley over 10-11 March 2009 in relation to the dividend. He also admitted destroying the electronic copy of Ms Turnbull's email sending him the Arcadia Lebanon financial statements for 2007. The documents showing the dividend from Arcadia Lebanon to Farahead were printed off and kept hidden in a locked filing cabinet in Mr Hannas's offices. It was only much later, in mid 2011, that Farahead's records showed the US$5 million payment as reducing the Fulham Properties loan.

506. The Claimants conceded on the second day of trial that the US$5 million payment by Arcadia Lebanon had been a dividend payment. Their pleaded case was that no record had been found of any payment by Arcadia Lebanon of any dividend to the Arcadia Group or Farahead, and to deny that Mr Fredriksen, Mr Trøim or Mr Hannas (or Farahead in general) were aware of the payments by Arcadia Lebanon (Reply §§ 69 and 73.4). Mr Fredriksen in his witness statement said it was *"untrue"* that the Bosworth and Hurley payments derived from Arcadia Lebanon were in fact dividends from Arcadia Lebanon made by a structure that he and Mr Trøim instructed them to use. Further, in his oral evidence he denied (despite the Claimants' concession) that the US$5 million was a share of profits from Arcadia Lebanon. Mr Trøim said nothing in his witness statement about the US$5 million divided or how it was applied. Mr Hannas in his witness statement denied that the US$5 million was an Arcadia Lebanon dividend. Instead, he said he recalled that at some point he had been asked to take the steps necessary to take over ownership of Arcadia Lebanon so that it could distribute profits of US$15 million to Farahead. However, the contemporary documents and evidence given at trial, to which I refer above (in particular at §§ 478, 479, 485, 500 and 505 above) flatly contradict the Claimants' denial that Mr Trøim and Mr Hannas (at least) were aware of the payments by Arcadia Lebanon.

507. The Claimants in their submissions maintained that the US$5 million payment from Arcadia Lebanon was applied for Mr Bosworth's benefit, and not by way of part payment of a bonus due to him, hence (by implication) not for Arcadia London's benefit at all. However, that submission is inconsistent with Mr Trøim's own evidence quoted in § 485 above and with the fact that Mr Trøim was so concerned to extract the payment from Arcadia Lebanon at all. He would hardly have had any such interest in procuring a payment from Arcadia Lebanon to Mr Bosworth that did not in some way benefit the Arcadia Group.

(c) Withdrawal from Concerto joint venture

508. As noted in §§ 488-489 above, it is likely that there was discussion at the 16 December 2008 meeting about getting back the money Arcadia had invested in Concerto joint venture projects. Mr Bosworth said, *"we asked to try and get back as much as we could for the group"*. Mr Main arranged for the Highland Trust group to pay back Arcadia; it sold a 60% stake in the Indarama gold mine to raise funds to do so. Thereafter, Concerto (and other Highland Trust companies) made a series of repayments to Arcadia and/or Arcadia Lebanon.

509. On 8 April 2009, Arcadia London invoiced Concerto to remit US$9.8 million to Arcadia London for *"Reimbursement of expenses"*. A Highland Trust company paid that amount on 14 April 2009. As Mr Hurley noted, the money *"would otherwise have been due back to Lebanon who incurred the expense"*. For the purposes of Arcadia London's accounts, the money was allocated against various items. In substance, Mr Hurley said, there was an *"internal transfer in effect between two group companies"*, and *"[i]t is a loan in effect between Lebanon and London because the 9.8 could be repaid to Lebanon because that is who has paid the initial amount out"*.

510. The Claimants suggested at trial that there was in fact no net benefit to Arcadia London, because the US$9.8 million was used to satisfy debts owed to it by Equinox, MRS and Concerto itself. However, (as the Claimants' solicitors pointed out in a letter of 4 May 2024) Arcadia London had debited the outgoing payments to those entities (which occurred at various times in December 2007, May, September and November 2008) to an "Other Charges" account *"that is, an expense account where there is no expectation of repayment".* It is only after the US$9.8 million was received in May 2009 that the accounting treatment was changed to reflect them as debts which had been repaid. Since the payments out were made with no expectation of repayment, the benefit to Arcadia London from the Concerto payment is clear. The Claimants also referred to an email of 8 April 2009 from Mr Fox to Arcadia to Mr Hurley, asking whether he was right to think that the incoming payment from Concerto related to US$3.75 million CNL (Concerto) and MRS, US$5.8 million Equinox and *"$250k = balance (assume interest)*"; to which Mr Hurley replied *"[t]hat is correct but will say fee rather than interest as not allowed to make loans".* That exchange does not, however, demonstrate that the amounts did in fact reflect loans, and the accounting treatment suggests that they were not. Even if they were loans, there remained a benefit to Arcadia London in receiving actual payment of sums whose recovery may well have been uncertain as to occurrence and/or as to timing.

511. In May 2009, Arcafrica paid US$3 million to Arcadia Lebanon. Arcafrica also paid CHF 2.892 million to a Swiss notary in respect of a property purchase by Mr Bosworth in Switzerland.

512. By summer 2009, Mr Main's group had refunded the Arcadia contributions in respect of the various projects that the joint venture had pursued. Mr Main said this *"was very costly to us"*; in the Highland Trust's view, it had overpaid its refunds to Arcadia, but it wanted to settle and move on.

513. Viewing the figures in the round, Arcadia London had payments to Concerto of about US$12 million, but was repaid US$17.3 million in total. Arcadia Lebanon had made payments of about US$15 million, but was repaid only US$3 million. Arcadia London was thus made whole, and received an overpayment (of US$5.3m), and Arcadia Lebanon bore the remaining costs. In that sense, there was a transfer of value from Arcadia Lebanon to Arcadia London, and this was an example of Arcadia Lebanon contributing funds to Arcadia London. Moreover, since Arcadia Lebanon, not Arcadia London, bore the overall costs, this was to the financial detriment of Mr Bosworth/Mr Hurley because it reduced Arcadia Lebanon's net trading profits to which Mr Bosworth/Mr Hurley had a profit share.

514. Following the end of the joint venture, Mr Main changed Arcem's name to ARCEM Resources Limited. However, Mr Main continued to carry on business both with Arcadia and Mr Fredriksen's other companies. For example, Mr Main continued to assist Arcadia in trying to obtain onshore oil and gas licences in Angola as well as offshore oil and gas licenses in Mozambique; and on 28 March 2012 there were discussions of an effort to build a products business in Mozambique. This was discussed with Farahead on 8 May 2012 and 30 October 2012. This ongoing assistance for projects that Mr Main provided is likely to

explain further payments that Arcadia Lebanon made to ARCEM Resources in 2009 and 2012. Mr Fredriksen also asked Mr Main to assist him with a number of issues that he had in Angola (where Mr Main had strong relationships) to sell a ship to Sonangol, the Angolan state oil company; and also to assist with drilling opportunities for Seadrill.

(d) Projector payments

515. On 9 April 2009 Arcadia Lebanon paid US$13,972,585 to Arcadia London. This followed a payment by Projector to Arcadia Lebanon of US$21,939,533 on 27 March 2009 arising from the joint venture with Projector mentioned earlier. Mr Hurley explained this in his witness statement:

> "202. Between 2007 and 2009, Arcadia Lebanon made two major payments to Arcadia London. One was a payment of c. USD 14 million made in April 2009, which was related to a former joint venture between Arcadia London and Projector SA. My understanding is that Projector sourced products which Arcadia London would sell to PPMC. In March 2009, PPMC made a delayed payment of funds owed to Arcadia London. Arcadia London had nominated Arcadia Lebanon to receive these funds, as Arcadia Lebanon had already incurred some of the liabilities of the costs attached to this joint venture. And so PPMC paid Arcadia Lebanon. Arcadia Lebanon, after deducting its own costs and payments made to Projector and others, possibly MRS, paid USD 14 million to Arcadia London."

(e) Further events/discussions concerning Arcadia Lebanon

516. In late April 2009, Mr Bosworth attended a meeting with Farahead, after which Mr Bosworth travelled straight to Beirut to visit the Arcadia Lebanon office. He said in his witness statement that Mr Fredriksen and Mr Trøim were aware he was travelling to the Beirut office directly after the meeting. Steven Eglin, the head of chartering at Frontline, who was at the meeting, emailed Mr Bosworth *"have fun in Beirut"*. I accept Mr Bosworth's evidence on this point.

517. In or around June 2009, Mr Lind produced a set of draft Farahead minutes and a draft Corporate Governance Bible Index. Neither made any mention of Arcadia Lebanon being dormant, even though the draft minutes recorded that another group company (Thistle Maritime Co Ltd) had become dormant. Nor was anything said about remaining undistributed profits in Arcadia Lebanon.

518. Mr Bosworth's evidence was that, after the payment of the Arcadia Lebanon dividend for the 2007 year, there was a further discussion with Farahead as to the sums that would be available to be distributed as future Arcadia Lebanon dividends. Mr Fredriksen said he recalled *"some discussions between me (and Mr Trøim) and Mr Bosworth and Mr Hurley regarding a dividend in 2008 and early 2009, and my recollection is that we discussed an amount of dividend of US$10-15 million"*.

519. The Hannas Note records that on 10 March 2009, Mr Hurley said Arcadia Lebanon's 2008 accounts were being reviewed, and that on 24 June 2009 Mr Hurley:

> "advised of US$10 million [Arcadia Beirut] profits for 2008".

The audited accounts for 2008 ultimately recorded net profits of US$9,844,054. Mr Hannas accepted in cross-examination that the Hannas Note indicated that Mr Hurley was telling him about expected Arcadia Lebanon profits, and said he did not mention this in his witness statement because he *"overlooked it"*. His witness statement was clearly unsatisfactory in circumstances where the Claimants were alleging that they had been (fraudulently) told that Arcadia Lebanon was used for a single transaction and had become dormant by some time in 2008.

520. The Hannas Note also records that on 25 August 2009 Mr Hurley:

> "advised that he is talking to [Mr Fredriksen/[Mr Trøim] re [Arcadia Lebanon] cash availability"

Mr Fredriksen accepted in his oral evidence that he was *"apparently"* talking about Arcadia Lebanon's cash position at that time.

521. On 27 August 2009, Mr Hannas emailed Mr Trøim (copying in Mr Fredriksen) to report that he had spoken with Mr Hurley about Arcadia Lebanon's cash availability for the 2008 year and that Mr Hurley replied *"that he has discussed this with you"*. Mr Trøim said nothing about this in his witness statement. In his oral evidence, he said "*I think we saw this as a closed issue. We kind of did a deal we originally agreed to and we wanted the money out from what we deserved on our 70%"*. However, as Mr Fredriksen accepted in cross-examination:

> "Q. ..The reason why Farahead is interested in the financial statements for Arcadia Lebanon is because those statements set out the Arcadia Lebanon profits, don't they?
>
> A. Yes, that must be correct."

522. The Hannas Note records that on 4 September 2009, Mr Skilton *"pointed out that we should chase "them" for [Arcadia Lebanon] info"*. However, it then records, as the final entry, that on 9 September 2009 Mr Skilton said:

> "he was advised by [Mr Fredriksen]/[Mr Trøim] that we should not make any more enquiries on [Arcadia Lebanon]"

Neither Mr Fredriksen nor Mr Trøim made any mention of that instruction in their witness statements.

523. The question thus arises of why, in circumstances where Mr Hurley had advised of US$10 million Arcadia Lebanon profits for 2008, Mr Fredriksen and Mr Trøim gave that instruction to Mr Skilton to stop making enquiries about Arcadia Lebanon. Mr Bosworth said in his witness statement:

> "I recall that after the 2009 dividend payment described above, there was a request from Farahead as to how much would be available to distribute as a dividend from Arcadia Lebanon. I recall informing Farahead that there was around USD 11 million in profits from Arcadia Lebanon that could be distributed. I had discussions, I believe with either John Fredriksen and/or Tor Olav as how payment of that USD 11 million could be made to Farahead. I think ultimately I suggested that instead of there being a dividend payment and therefore a trail of this payment to Farahead, that Arcadia Lebanon would pay costs on behalf of Arcadia group which would otherwise be paid by the group. This was a means of therefore reducing the costs of the Arcadia group by the amount which Arcadia Lebanon would pay to third parties on behalf of the Arcadia group. I discuss in detail further at paragraphs 236 to 246 the specific payments made by Arcadia Lebanon on behalf the group." (§ 201)

> "There were a number of payments made by Arcadia Lebanon, as recorded in the Arcadia Lebanon bank account statements, which were made by Arcadia Lebanon on behalf of the Arcadia group. As I explain above, this was discussed with Farahead and it was decided that Arcadia Lebanon's profits would be used to reduce the costs payable by the Arcadia group, which was a means of Farahead transferring value from Arcadia Lebanon to the group without having to pay dividends from Arcadia Lebanon to Farahead directly, which would have left a trace. This would have undermined the purpose of having Arcadia Lebanon be an offshore, "off the books" company, its purpose to engage in Arcadia's potentially riskier oil trading business and keep Farahead and the Arcadia group insulated from the compliance risks associated with that business." (§ 236)

In cross-examination, Mr Bosworth said he could not recall precisely when the discussion occurred, but it was *"a discussion that we had and again, there was no authorisation in writing but it was agreed that we would spend that money on costs for the group, be those trading costs and/or other cost"*.

524. Mr Fredriksen in his witness statement denied that he had been part of or known about any such agreement. He insisted that he understood Arcadia Lebanon to be no longer active from "*around 2009*". In cross-examination, Mr Fredriksen gave this evidence:

> "Q. …But in 2009, do you recall, you or Farahead, you agreed that Arcadia Lebanon would use its cash to pay the costs and expenses of Arcadia, the Arcadia Group, instead of distributing those profits via a dividend payment to Farahead. Do you recall that agreement?
>
> A. I don't recall it, no.

> Q. Do you recall that the reason for the agreement was if Arcadia Lebanon paid Arcadia's costs, that would reduce Arcadia's costs, yes?
>
> A. That I accept in principle what you are saying.
>
> Q. That would of course mean that Arcadia's profits would be higher, net profits would be higher, of the group?
>
> A. That's correct, yes.
>
> Q. And that would mean that Farahead and of course the mechanism for Farahead to get its profits from Arcadia Group was set in stone, was in place; yes?
>
> A. Depends on the certain circumstances. I don't know the details on this.
>
> Q. But in principle, that would be a more effective way -- Arcadia Lebanon is reducing Arcadia London's costs such that Arcadia London's profits were higher, that is a more effective way for you, Farahead, to get money out of the Arcadia pockets; correct?
>
> A. Yes, I see what you are saying.
>
> Q. And just to show what Mr Bosworth says, at his seventh statement, paragraph 201, … he says -- well, you see what he says there, Mr Fredriksen. And that's right, isn't it: there was this agreement to use the Arcadia Lebanon cash to pay Arcadia Group's expenses; yes?
>
> A. Yes. I hear what you are saying but I cannot recall the reason and I'm not an auditor or anything like that. I understand what you are saying to me…."

and:

> "Q. The reason why there were not going to be any further enquiries is because of this agreement with Mr Bosworth and Mr Hurley for Arcadia Lebanon to make the payments. That is why there was no need for Mr Skilton and Mr Hannas to make further enquiries, was there?
>
> A. It could be, I don't know."

525. Mr Trøim also denied in his witness statement that any such understanding had been reached, adding he would not have agreed to Arcadia Lebanon's profits being used in this way without knowing exactly how they were going to be used. I find the latter proposition hard to accept: Mr Fredriksen and Mr Trøim had vested Mr Bosworth with all the usual powers of a chief executive in relation to Arcadia London/Switzerland, and trusted him to run that business. If Arcadia

Lebanon was to make payments to cover Arcadia London expenses or otherwise for its benefit, it is difficult to see why, logically, Mr Trøim would expect to know exactly how Arcadia London was spending that particular portion of the funds available to it. In cross-examination, Mr Trøim said he had not said anything in his statement about telling Mr Skilton to stop making enquiries about Arcadia Lebanon because he could not specifically remember it, and:

> "I was focused because there was a hunger to get the dividend out quickly and we said we need to be careful how this dividend is taken out and we still probably owed Pete Bosworth some money if things have worked out in the way it has worked out until that date."

526. Yet Mr Trøim knew that there was another US$10 million in Arcadia Lebanon, which (Mr Trøim said) *"was standing there as cash anyway"*. He was not aware of any further payment via Fulham Properties, yet continued to deny that he authorised Arcadia Lebanon funds to be used to pay Arcadia London expenses. It is unclear how, on Mr Trøim's approach, the money remaining in Arcadia Lebanon would ever be realised for the benefit of the group. It seems unlikely that it would simply have been left there. Mr Bosworth's explanation seems to me more inherently probable. It is also more consistent with the fact that, as I outline elsewhere, Arcadia Lebanon did go on to make certain payments for the benefit of the Arcadia Group (see §§ 403, 489, 509-513, 580, 648 and 677).

(f) Alleged cessation misrepresentation

527. The Claimants alleged that:

> "60. In around 2009, and in light of (a) (as Farahead understood it) the Arcadia Group's engagement in physical trading activity in West Africa; and (b) the forthcoming anti-bribery and anti-corruption regime that was to be introduced in the United Kingdom the following year, Farahead raised with Mr Bosworth the need for there to be adequate training and controls within the Arcadia Group.
>
> 61. In response to this, Mr Bosworth told Farahead that the Arcadia Group had ceased its regular trading activities in West Africa.
>
> 62. This assertion was re-affirmed thereafter by the book-by-book profit/loss and bonus figures that were presented to Farahead by Mr Bosworth and Mr Hurley, which purported to show little or no activity in West Africa (with such activity as there was being explained by Mr Bosworth and Mr Hurley as being the result of legacy issues).
>
> 63. From these statements (and each of them), Farahead understood that by and from 2009 the Arcadia Group was not engaged in any ongoing regular trading activities in West Africa.

> As was known to Mr Bosworth and Mr Hurley, however, this was not true: the Arcadia Group had not in, by or from 2009 ceased its regular trading activities in West Africa; on the contrary, it remained actively engaged in ongoing regular trading activities in West Africa. These statements served to conceal the fraud from the Claimants, as, it is averred, they were intended to." (RRRRAPC)

528. This serious allegation was in fact entirely unsustainable. Starting with the documents, Farahead received regular updates on Arcadia's West African trading activities.

i) Until 2013, it received on a daily basis reporting that showed Arcadia's daily ongoing West African oil trading. Arcadia's daily profit and loss statements to Farahead identified the profit and loss for each of Arcadia's trading books, including the West African trading book. The statements identified the West African trading book (whether as 'West Africa' and/or 'LDN Nigeria' and/or 'CH WAF' and/or 'WAF Profits'), and showed continued and ongoing West African oil trading on a daily basis and year to date from 2008 to 2013. For example, as at 28 March 2013, 'CH WAF Crude' trading (i.e. the Arcadia London's West African crude oil trading) recorded a year to date profit of US$9.54 million. The changing figures for Arcadia's West African trading each year made clear that the business was continuing.

ii) Farahead was also sent twice-daily trading updates, weekly reports, monthly reports and monthly management accounting reports on Arcadia's operations and business. Such reports contained and/or referred to Arcadia's West African oil trading activities and/or its West African trading book (see § 405 above).

iii) West African activities were a frequent topic of discussion at meetings with Farahead. For example, in September 2008, minutes recorded that Arcadia wanted to expand its West African trading activities in 2009, and in February 2009 Farahead encouraged Arcadia to do so (in the sense that the board expressed disappointment with the current West African results given Arcadia's former degree of activity and knowledge of this market), and Arcadia advised that it was working on expanding the products business in Nigeria).

iv) In 2010 Farahead approved a bonus policy scheme that included the West African book: see §§ 548-549 below.

v) Farahead approved finance documents referring to Arcadia's West African crude trading: see § 583 below.

vi) Rather than reducing its West African activities, Arcadia looked to expand them and to do so together with Mr Fredriksen's other business interests. Farahead approved Arcadia's purchase of vessels to carry out or assist in its West African oil trading activities. For example, in late 2011/2012, Arcadia and a Nigerian joint venture partner, Capital Oil &

> Gas ("***Capital***"), acquired another Frontline vessel, the Front Hunter, which was renamed Mongolia. Arcadia sold it to Capital for use as floating storage between Arcadia and Capital. On 21 October 2011, Mr Fredriksen (copying in Mr Trøim) asked *"what is in it for VTN/Arcadia".* Farahead approved the deal.

529. Mr Hannas in his statement said *"at no point was I aware of any specific representations about the continuation or stopping of oil trading in West Africa, either before or after 2009"*. Mr Trøim in his witness statement said the daily P&L reports, which he looked at, *"did sometimes indicate some limited West African trading"*, but *"I do not consider that these reports can be fairly described as disclosing material or ongoing West African oil trading"*. However, confronted with a daily report from January 2010, he accepted that it showed a daily change in the West African book, and that that indicated that the business was regular and ongoing. More generally, he accepted that the information he was receiving showed the activity was still going on, claiming instead that he did not know the size of the operation. Mr Trøim said *"[w]e were never informed that the West African trading had stopped"*. When asked about the statement to that effect in Mr Adams's affidavit, Mr Trøim said:

> "But as I said, it's too stupid because we got a report every day, as you just showed me. I think what he can mean, when it is said there, reduced activity level down to a level where there was no hard political risk in any of the contracts but that you can trade. The fact is here, they traded West Africa. They sent us a report every day where we had West African trading in there."

and:

> "As I said, this must stand for him. I never said that we stopped the trade in West African oil. How can I say that when I get a report every day which shows that there is a result on West African trading? I'm not stupid."

530. Mr Fredriksen similarly accepted that he knew that there was West African trading: *"I knew what was happening, obviously"*. In his witness statement, he had referred to a *"representative example"* of a daily P&L report, from 14 January 2010, which he had claimed was unintelligible. The report indicated that the West African book had had the largest P&L change of the main trading books. (The Claimants are wrong, in my view, to suggest the contrary. The report included a column for *"Daily"* P&L movement.) In cross-examination he said:

> "Q. So looking at this particular report, you can see that West Africa is changing on a daily basis, isn't it ?
>
> A. Yes, but that's normal. This changed every day, this market.
>
> Q. It's regular?
>
> A. Every second of the day.

> Q. It is regular and ongoing; correct?
>
> A. Yes. Whether it is regular, I don't know."

Mr Fredriksen accepted that Arcadia's West African trading had not been hidden from anyone: *"No, I'm not saying that, but I'm saying what happened to the profits, where did they go? In which pockets? That is what it is all about, the whole case";* and said:

> "A. I am not worried about the trading in West Africa, as long as it was done in the proper matter.
>
> Q. And of course profit, you get profit after paying costs, don't you?
>
> A. Correct."

531. Arcadia's direct West African profits in fact increased in 2011-2013 after a slump in the 2010-2011 year (as at the end of March 2011), when Mr Adams had said there was a difficult trading environment.

532. Both Mr Trøim and Mr Fredriksen in their witness statements for trial suggested that Mr Bosworth had told them, not that regular West African trading had ceased (i.e. the Claimants' allegation), but that he said it had been *"significantly scaled back"* (both using the same form of words). That was a notable departure from the Claimants' pleaded case, which was nonetheless maintained. On 8 June 2011 (in the context of the difficult trading environment), Mr Adams emailed to Farahead a proposal to restructure the Arcadia business, which included an option to "*significantly reduce our exposure*" for the West African book. That is in itself hard to square with Mr Fredriksen's and Mr Trøim's belated evidence that they had been told two years previously, in 2009, that the business had already been significantly scaled back.

533. It is also difficult to see how, in those circumstances, Mr Adams could have given evidence on affidavit to the effect that Farahead was told in 2009 that regular West African business had ceased altogether. In his affidavit he said:

> "111. The Farahead Representatives also raised with Mr Bosworth the need for adequate controls within the Arcadia Group in the light of the new anti-bribery and corruption regime that was to be introduced in the UK in 2010 (the Bribery Act 2010). This was seen as important because of the Group's high risk physical trading activity in West Africa. However, at that time, they were assured by Mr Bosworth that the Arcadia Group had ceased its regular trading activities in West Africa because of the increased risks involved, and that the necessary training and guidance was being provided to the Arcadia Group's staff in relation to the Group's ongoing activities elsewhere.
>
> 112. This first assurance was supported by the book-by-book profit/loss and bonus figures that were presented to the Farahead

> Representatives by Mr Bosworth and Mr Hurley at the time, which showed very little or no activity in West Africa (the little there was being explained away by Mr Bosworth and Mr Hurley as the result of legacy issues). This assurance in particular was an important one; the Farahead Representatives believed, as a result of what they were told, that the Arcadia Group was not engaged in any regular ongoing trading in West Africa. I was not aware at the time that this representation was being made. At the time, even from my US base, I understood that the Arcadia Group continued to trade in West Africa. It is clear that this representation to the Farahead Representatives was not true and that the Arcadia Group continued to be involved in extensive trading in West Africa, albeit the benefit of that trading was being dive1ied away from the Arcadia Group as is further described below." (§§ 111 and 112)

and:

> "The transaction structures used were concealed from the Arcadia Group's owners and appear to have led to the diversion of substantial profits to entities outside of the Arcadia Group. This is all the more striking given that, for much of the period in question: (a) the Farahead Representatives had been told that the Arcadia Group had ceased its regular trading activities in West Africa…" (§ 148)

Although in that evidence Mr Adams said he was not aware of the alleged representation at the time, and himself was aware of continuing West African activity, his evidence also appears to be the source of the allegation that the representation was made and that Farahead was misled by it. It is entirely unclear, given the documentary records and the evidence given at trial, how Mr Adams could have been in a position to say so. As already noted, Mr Adams was not called to give evidence so that he could explain himself.

534. In my view, the Claimants' case on this matter is wholly unsatisfactory and inconsistent with the documentary evidence. There is no tenable evidence in support of the allegation of deception made in §§ 60-63 of the Particulars of Claim, and it is not clear to me that there ever was.

(g) The Arcadia Mauritius/NNPC Contract

535. In around June 2009, Arcadia Mauritius entered into a term contract with NNPC for 60,000 barrels/day (the "***Arcadia Mauritius-NNPC Contract***"). Attock Mauritius then entered into a lifting agreement with Arcadia Mauritius pursuant to which Arcadia Mauritius transferred title to the oil to Attock Mauritius. Arcadia London/Switzerland went on to buy 20 cargoes of oil from Attock Mauritius sourced under this term contract.

536. Similarly to the Attock/GEPetrol term contract in January 2009, the Arcadia Mauritius/NNPC Contract was obtained while both companies were owned by Mr Decker. As described earlier, Arcadia London (with Mitsui's knowledge)

had transferred Arcadia Mauritius to Mr Decker in 2003. Thereafter, it was Mr Decker's company until September 2009, when Mr Kelbrick bought it (see below). Mr Kelbrick bought Arcadia Mauritius from Mr Decker because it had a term contract with NNPC, and that is what made it an attractive purchase: see section (I)(11)(h) below. Mr Kelbrick said:

> "My understanding is that Arcadia Mauritius was set up by the Claimants and subsequently transferred to Mr Decker. All I knew at that time was that Mr Decker had a company which had a long history of lifting cargoes from NNPC and an ongoing contract and I was offered the chance to acquire the company which held the contract. It did not occur to me to change the name or the stationery of Arcadia Mauritius, which I inherited from Mr Decker. It would have defeated the purpose, which was simply to continue the business as it had been successfully operating for a number of years in order that its contract with NNPC would be renewed."

537. The Claimants nonetheless suggest that this contract was obtained by Mr Bosworth using the Arcadia Group's name and network. Their chain of reasoning is as follows:

i) Arcadia Mauritius was incorporated in August 2001 and was one of the many shelf-companies Mr Lance had on his books for Mr Bosworth and Mr Hurley's use. (I have already rejected this contention: see § 143 above.)

ii) Mr Kelbrick says that Arcadia Mauritius was a front company which had been incorporated with others for the purpose of bidding for Term Contracts on behalf of Arcadia London to maximise the chance of winning.

iii) Mr Bosworth and Mr Hurley assert that "*as part of the arrangements*" relating to the agreement with Tristar (following the Pang Ling issue), Arcadia Mauritius was transferred to Mr Decker's ownership in late 2003.

iv) Mr Bosworth and Mr Hurley explain they wanted to continue using a company bearing the Arcadia name as the immediate counterparty with NNPC. They say this was to "*facilitate the contract transfer and to preserve a measure of continuity in the relationship with NNPC*". They explain that "*The use of a company with the "Arcadia" name enabled Mr Decker to present the company (and himself) to NNPC as associated with Arcadia London and thus as a credible buyer and lifter of the crude oil*." At trial, Mr Bosworth gave evidence that Mr Decker would have explained to NNPC that the oil or its equivalent volume would end up with Arcadia and that using the name Arcadia would be "*an added advantage…because of our relationship, long-term relationship with NNPC*."

v) Mr Hurley accepted that Arcadia Mauritius was effectively being used as an agent of the Arcadia Group while owned by Mr Decker. (I have already rejected that contention: see § 145 above.)

vi) In the course of negotiating the sale of Arcadia London to Farahead, Mr Bosworth told Mr Fredriksen and Mr Trøim that he could bring the Arcadia Mauritius contract with him. (I rejected this contention in §§ 187-196 above.)

vii) NNPC dealt with Arcadia Mauritius believing it to be part of the Arcadia Group (and for Mr Kelbrick to suggest he was not aware of this is not credible).

viii) So far as NNPC was concerned, it remained connected to Arcadia London. It held a term contract from 2003 until at least January 2009. During this time, NNPC was offering term contracts to Arcadia London (i.e. to the Arcadia Group).

ix) Mr Kelbrick states that he "*inherited*" Arcadia Mauritius from Mr Decker because it had an ongoing term contract with NNPC and he continued to use it as contract-holder.

x) Mr Bosworth confirmed that "*Attock Mauritius got a term contract with NNPC using the name just as the same way as Mr Decker had done previously*".

xi) Mr Bosworth was able to ensure that Mr Decker transferred Arcadia Mauritius to Mr Kelbrick. Having done so, Attock Mauritius took advantage of the Arcadia Mauritius-NNPC Term Contract.

xii) There is no difference at all between (a) the structure in which Arcadia Mauritius was first in the chain with Attock Mauritius between Arcadia Mauritius and Arcadia London/Arcadia Switzerland and (b) the structure that continued to be operated with Arcadia Lebanon first in the chain and Attock Mauritius the sole intermediary between Arcadia Lebanon and Arcadia London/Arcadia Switzerland. The only difference was that instead of transferring large amounts of money to Arcadia Mauritius (as it did for Arcadia Lebanon), Attock Mauritius kept the money.

538. I do not accept that line of argument. The evidence indicates that Arcadia London, back in 2003, transferred Arcadia Mauritius to Mr Decker for his use. It appears to have been considered mutually beneficial that he should be able use a company with the Arcadia name, and then contract to supply oil to the Arcadia Group. As I have found earlier, there is no evidence that Arcadia or Mr Bosworth thereafter retained any control over or interest in Arcadia Mauritius, still less that Mr Bosworth was "able to ensure that Decker transferred Arcadia Mauritius to Mr Kelbrick". Moreover, by 2009 Mr Decker had for four years owned Attock, with its long history of oil trading in West Africa and other places, including with NNPC. The fact that, when selling oil to Arcadia, Mr Decker used transaction chains (involving contract holders and sleeves) similar to those used by Arcadia Lebanon is entirely unsurprising: they reflected

common practice. Overall, there is simply no evidence to indicate, or from which any reliable inference could be drawn, that term contracts obtained by Arcadia Mauritius after 2003 were opportunities diverted by Mr Bosworth away from the Arcadia Group.

(h) Mr Kelbrick's acquisition of Attock Mauritius, Arcadia Mauritius and Attock Lebanon

539. From late 2007, Mr Decker fell ill and began to wind-down his business activities. In so doing, he put Arcadia Mauritius and Attock Mauritius up for sale. In late September 2009 Mr Kelbrick and Mr Mounzer acquired Arcadia Mauritius, and Mr Kelbrick acquired Attock Mauritius, becoming its sole director and shareholder. Mr Kelbrick explained in his witness statement that he had known the previous owner of Attock, Mr Imtiaz Dossa, at least from when Mr Kelbrick was working for PetroChina in 2004. Attock Mauritius had, he said, an ongoing crude oil supply contract with NNPC. It was Mr Kelbrick who had later introduced Mr Decker to the idea of buying Attock Mauritius from Mr Dossa, which Mr Decker did in 2005. Mr Kelbrick said that Mr Decker used Attock Mauritius to lift crude oil from West Africa and to provide trade finance to companies within the Tristar Group as well as third parties. When the opportunity to buy Attock Mauritius arose in 2009, Mr Kelbrick said it was attractive:

> "45. I acquired AOIL [Attock Mauritius] jointly with Mr Salem Mounzer, who had previously worked with Mr Decker at one of his other companies, Tristar. Mr Mounzer and I were of equal seniority at AOIL, I cannot recall what formal titles we used at the time. I knew Mr Mounzer through Mr Decker. Mr Mounzer had provided financing services to Tristar, and I think he may also have been Tristar's accountant. Purchasing AOIL made total commercial sense for me; Mr Mounzer and I could each carry on the same type of work we were already doing but become principals in the business.
>
> 46. AOIL was such an attractive investment because it already had contracts with national oil companies, and already had credit lines with banks that would enable it to lift cargoes. AOIL had extensive credit lines with Credit Agricole, Credit Suisse, ING, and Société Générale. Mr Mounzer and I therefore acquired a ready-made business, which we continued to run. AOIL already regularly sold cargoes to Arcadia, which also continued after we acquired the company on 26 September 2009.
>
> 47. AOIL and Arcadia were therefore counterparties in the transactions which the Claimants now object to. I expand on how AOIL's business operated elsewhere in this statement. At all times AOIL acted in accordance with its own commercial interests. It was not required to act in accordance with Arcadia's own commercial interests. Mr Mounzer and I acquired the company on a 50/50 basis and granted AOIL subordinated loans totalling US$6 million in the process."

540. Mr Kelbrick added:

> "48. To the best of my knowledge, neither Mr Bosworth nor Mr Hurley has ever had any interest or control over AOIL. They certainly had no ownership or control over the company after its acquisition by Mr Mounzer and me."

Mr Kelbrick said in oral evidence that operating the contract with NNPC was the whole point of his having bought Attock Mauritius: *"the attraction was that it had I think it might have been 30,000 barrels a day contract with NNPC"*.

541. The Claimants submit that Mr Bosworth/Mr Hurley had and retained an interest or control over Attock Mauritius. They note that, as I have already said, Arcadia lent US$13 million to Mr Decker to purchase it (which Mr Bosworth said was repaid). The Claimants says it is to be inferred that Mr Bosworth/Mr Hurley retained control and were able to ensure that Mr Decker transferred the shares to Mr Mounzer and Mr Kelbrick in 2009 so that it could continue to be used in the scheme. They refer also to the following matters:

i) On 7 September 2009 Mr Mounzer sent Mr Lance a draft amendment or addendum to the Memorandum and Articles of Association, a Shareholders Agreement (with the names of "Sh1" and "Sh2" blank, though these were presumably to be Mr Kelbrick and Mr Mounzer) and a draft Board Resolution, asking him to check them. Mr Lance forwarded these to Mr Hurley noting that "The Salemisation of Attock has arrived!", saying he assumed that Mr Hurley wanted him to "thrash out something that is workable" with Mr Mounzer, and listing a number of matters which Mr Lance considered unnecessary and unworkable. Among the "significant issues" Mr Lance noted were:

> "Shares - he has created some complicated transfer rules. Pre-emption rights exist at the moment. We could a provision that where a shareholder want to sell and there is no 3rd party offer shares be offered to existing shareholder and an independent auditor fixes value if the shareholders can't agree amongst themselves. Tag along rights might be worth considering if you think it likely that there might be a sale to a third party in the future."

The draft shareholders agreement envisaged two shareholders, holding 501 and 499 shares in the company respectively. There is no evidence of any response from Mr Hurley. The cross-examination of Mr Bosworth on this point was as follows:

> "Why would Mr Hurley be involved in reviewing this shareholders agreement with Mr Kelbrick and Mr Mounzer?
>
> A. I can't comment on an email from Mr Lance to Mr Hurley or speculate on it. I'm going to -- there is a number of scenarios why he would do that but you would really need to have Mr Lance here to ask him.

> Q. So it is not because you had an interest in Attock Mauritius, which is what I'm putting to you.
>
> A. No."

Mr Hurley said he did not know why Mr Lance was asking him about this matter, and that it appeared Mr Lance was frustrated with whatever Mr Mounzer was suggesting to him and was seeking Mr Hurley's advice about how to respond. Mr Hurley said he never had a beneficial interest in Attock Mauritius, did not know whether he had ever reviewed these documents, and was not familiar with the concept of tag-along rights. Mr Kelbrick said Mr Hurley did not have a beneficial interest in Attock Mauritius and did not know what was in Mr Lance's head when he wrote it. He noted that he, Mr Kelbrick, had not been copied into the email.

ii) Some months after Mr Decker had transferred Attock Mauritius to Mr Kelbrick and Mr Mounzer in September 2009, he sent an invoice to Mr Mounzer at Attock Oil Services Limited, Beirut, for a US$2 million premium on the sale of Attock Mauritius, asking for the funds to be sent to an account of a Swiss notary, reference Mr Decker. The payment was in fact made by Attock Mauritius itself. However, on 13 July 2010 Mr Decker had sent an email to CH at Arcadia London headed "Notary details" asking him to transfer "the funds" in CHF, to the same Swiss notary account. The Claimants say there is no explanation as to why CH should have been asked to pay the sum due.

iii) After the transfer, Mr Hurley sent Mr Mounzer an email asking to know "*what password you have in the system for me to access using admin*". It was suggested that this meant the password for the email account admin@attockltd.com from which Mr Mounzer's email was sent. Mr Hurley in cross-examination said it was possible it meant that, but he was not sure. It was put to Mr Hurley that Ms Azzariti and Mr Mounzer used that email address, to which he replied "*So this could be a way of finding out what the finance information was relating to the transactions between the companies*".

The Claimants say it is to be inferred from these matters that Mr Bosworth and/or Mr Hurley had/retained an interest in, and exercised some degree of control over, Attock Mauritius despite its formal ownership by Mr Mounzer and Mr Kelbrick.

542. Having considered these points carefully, individually and in the context of the evidence as a whole, I do not consider them to demonstrate that Mr Hurley, let alone Mr Bosworth, had a beneficial interest in Attock Mauritius. The email exchange mentioned at (i) above refers to an assumption made by Mr Lance, an individual whom the Claimants chose not to call to give evidence despite the fact that it appears he continues to provide services for them. As Mr Bosworth said, there are a number of situations in which it is possible to envisage Mr Lance seeking advice from Mr Hurley. (One possibility, though it is speculative, might be that Mr Kelbrick had sought Mr Hurley's help, as someone he had worked or done business with for a long time and trusted, and

as someone familiar with corporate documentation, about the documentation of this new venture with Mr Mounzer.) Without evidence from Mr Lance, or any documentation showing what happened next, and absent any actual recollections from Mr Hurley or Mr Kelbrick, I do not think it correct to infer that Mr Hurley must have had a beneficial interest in Attock Mauritius. As to point (ii), as Mr Hurley points out, the email was sent to his Arcadia account, rather than to any personal account (or to Arcadia Lebanon), and neither Mr Hurley nor the Arcadia Group in fact made any payment. These circumstances are not suggestive of Mr Hurley having a beneficial interest in Attock Mauritius, and seem more likely to have been a mistake as Mr Hurley suggested. I do not consider point (iii) probative, in circumstances where it is unclear precisely what Mr Hurley was seeking to be able to access, and it seems possible that it was indeed connected with the logistics of transactions between Attock and Arcadia Lebanon or the Arcadia Group. Viewed together, and in the light of the totality of the evidence about the Attock group, I do not consider these matters to indicate that Mr Bosworth or Mr Hurley had a beneficial interest in Attock Mauritius or other Attock companies.

543. It was also suggested to Mr Bosworth that he 'procured' Mr Decker to sell Arcadia Mauritius to Mr Kelbrick, and was able to do so because he (Mr Bosworth) had retained control of Arcadia Mauritius. I have already rejected the premise that Mr Bosworth retained any control over Arcadia Mauritius, and there is no basis on which to consider that he procured its sale to Mr Kelbrick (which he denied).

544. A third company which Mr Kelbrick acquired from Mr Decker in around September 2009 was Attock Oil Services Lebanon ("***Attock Lebanon***"), a Lebanese company. Mr Kelbrick explained that Mr Decker had used Attock Lebanon to make the payments of the costs associated with acquiring cargoes and running business in West Africa. Mr Kelbrick and Mr Mounzer used Attock Lebanon in the same way, including through a co-operation agreement between Attock Mauritius and Attock Lebanon dated 2 January 2009. Typically, service providers invoiced Attock Lebanon for their services, and Attock Lebanon invoiced Attock Mauritius for payment. Later, in 2011, Mr Kelbrick transferred Attock Lebanon to Mr Morgado, albeit he said in cross-examination that he retained a beneficial interest in it. It was suggested to Mr Bosworth and Mr Kelbrick in cross-examination that Mr Bosworth was the beneficial owner of Attock Lebanon, despite the Claimants in their statements of case having made no such allegation save to the extent that it might be implicit (on one reading) in an allegation in the 144 Transactions Case that:

> "Attock Mauritius, Attock Lebanon and Arcadia Lebanon all operated out of premises at 308 Sursock Street, Beirut, in which building both Mr Decker and Mr Bosworth also owned properties. In light of the overlap of staff between the three entities, the Claimants aver that it is likely that all three companies were in fact operated out of the same premises (by the same people)." (§ A42)

Mr Bosworth denied that he had any interest in Attock Lebanon. He confirmed that, having worked for Arcadia for a time, Mr Morgado went to work for

Attock. There is in my view no cogent evidential basis for the suggestion that Mr Bosworth had an interest in Attock Lebanon, and I accept his evidence on this point. The Claimants also suggested, in their written closing, that Mr Kelbrick gave *"false information"* in his witness statement, where he said:

> "Sergio Morgado was Ms Azzariti's husband. Mr Morgado was also employed by AOS and also occasionally provided operational services to AOIL. I transferred the shares in AOS to Mr Morgado in 2011 as I understood from Mr Mounzer at that time that the owner of a Lebanese company had to be resident in Lebanon under local law."

In oral evidence, Mr Kelbrick said he nonetheless retained the beneficial interest in the company, having transferred the shares in order to comply with the Lebanese law he mentioned. It was not put to Mr Kelbrick that he had therefore given *"false information"* and I reject that suggestion.

545. Having acquired Attock Mauritius, Mr Kelbrick and Mr Mounzer used entities in the Attock group to source West African crude on behalf of the Attock group and/or its own trading purposes. Mr Kelbrick sourced crude oil from the NOCs and Attock Mauritius arranged the finance for the purchases. Mr Kelbrick subsequently sold such crude oil through Attock Mauritius to Arcadia and to other third parties. Arcadia Lebanon was not involved in any of these transactions. The Claimants put to Mr Kelbrick in cross-examination the point that if a crude oil supply chain included Attock Mauritius rather than Arcadia Lebanon, then Attock Mauritius rather than Arcadia Lebanon would make profits. That was, however, merely a statement of the obvious: as Mr Kelbrick said, *"I knew that if we as Attock … if we were the contract holder, it was up to us to make money".* In addition, Mr Kelbrick said:

> "The requirements were aligned. I needed Attock when I bought to make money. Arcadia needed to buy the oil from Attock to make money.
>
> Q. It wouldn't have needed to buy the oil from Attock if it had made the term contracts for its own benefit, would it?
>
> A. You and I said should it have so wished it could have gone and done it. If it had set up its own office in Nigeria, if it had hired somebody like me, then that would have been a lot of money."

546. Further, the notion that the Defendants introduced Attock Mauritius as a replacement for Arcadia Lebanon does not ring true: as the Defendants point out, there were crude oil transactions involving Arcadia Lebanon after, as well as before, Arcadia London began purchasing oil from Attock Mauritius.

(i) Continued West African Updates

547. Arcadia's West African traders regularly emailed 'West African Updates' and 'West African Wraps' to a large number of Arcadia individuals, including Mr

Adams. The West African Updates gave general updates on Arcadia's oil trading in West Africa and referred to particular West African oil transactions, including those involving Attock Mauritius. Arcadia also held annual conferences for its traders at which Arcadia's trading books were discussed. One such conference took place in October 2009. The conference papers included a presentation on 'West Africa crude'. At the October 2010 Singapore group conference, there was another presentation on Arcadia's West African oil trading; Mr Adams attended. Ms Driay said information about Arcadia's West African dealings was widespread: *"[n]othing about the ongoing Arcadia West African oil trading was hidden"*; and that Mr Fredriksen himself met Ms Driay on the West African trading desk.

(12) Events in 2010

(a) Arcadia bonus scheme

548. In 2009/2010, Farahead put in place arrangements for an Arcadia bonus scheme to cover 2009 to 2012: the scheme made specific provision for bonus payments for West African oil trading each year. On 26 April 2010, Mr Lind emailed a draft of the group bonus scheme to Mr Hurley, Mr Trøim and Mr Skilton. Section 5 of the scheme identified eight bonus pools, by reference to the trading portfolios of the Arcadia Group, which included the *"West Africa Trading Book (the "West Africa Pool")"*. Mr Hannas said of this document:

> "Looking at it now I do not find it surprising that West African trading was included in the draft bonus scheme. This is because, as I noted above, I was aware that at some point Arcadia conducted trading in West Africa and I was never told or became aware that this had stopped, so it would make sense for that trading, like the other trading, to be included in a bonus scheme."

549. The Arcadia bonus calculations and overhead allocation documents that Mr Bosworth/Mr Hurley provided every year to Farahead and which Farahead approved, specifically identified Arcadia's West African trading and the traders in the West African pool. The documents identified the 'West African' book and the trading. The total gross trading profit for the West African crude trading book between 2009 and 2013 was approximately US$24.6 million, comprising US$3 million in 2009, US$7.3 million in 2010, a loss of US$210,000 in 2011, US$4.8 million in 2012 and US$9.5 million in 2013.

(b) The Crudex/NNPC Contract

550. In January 2010, Mr Kelbrick incorporated a company called Crudex Oil International Limited ("***Crudex***"), which in about March 2010 entered into a term contract with NNPC for the purchase of 30,000 barrels/day (the "***Crudex/NNPC Contract***"). Attock Mauritius then entered into a lifting agreement with Crudex. Mr Kelbrick's evidence was that one of his contacts in Nigeria was a local sponsor called Chief Tony Anenih, whom Mr Kelbrick had pursued after learning that Chief Anenih had an oil contract with NNPC to offer. Mr Kelbrick said he persuaded Chief Anenih to sponsor him to operate that contract. Chief Anenih instructed Mr Kelbrick to use the name 'Crudex' as the

name of the company that Chief Anenih would sponsor to lift the oil, and Mr Kelbrick duly incorporated Crudex. Mr Kelbrick used Crudex as a contract-holder in 19 of the 144 Transactions.

551. Mr Kelbrick said in his witness statement:

> "Deals in which Crudex was the contract holder came about as a result of a local sponsor in Nigeria called Tony Anenih. I got Tony Anenih's phone number from someone at NNPC while I was in Nigeria because somebody told me he was going to have a contract for the supply of crude oil. I rang his mobile, introduced myself and he invited me to meet with him. Tony Anenih was a very respectable man and I sat down with him and explained how I would operate a contract. I know that, at that time, Total, Vitol and BP were also actively pursuing Tony Anenih for his contract rights. Tony Anenih gave me the name Crudex as the name of the company he would sponsor to lift oil. He told me to go away and make sure it happens. I therefore incorporated Crudex in January 2010. At Mr Mounzer's suggestion, Mr Lance and the Cornhill Group Limited provided administrative support. It is a measure of my relationship with Tony Anenih that the Crudex contract was regularly renewed. [Arcadia Mauritius] (via [African Oil Services]) paid Tony Anenih a referral fee in return for his sponsorship and for bringing the contract to [Arcadia Mauritius] (using Crudex as the contract holder)."

552. Mr Bosworth said in his evidence that he had never met Chief Anenih and did not know him; and that *"without [Mr Kelbrick's] relationship with Anenih, I would not have had access to that crude"*. Mr Kelbrick said "*without me being there on the ground being known by NNPC, and without me being able to go at the drop of a hat because I was there all the time to see Chief Anenih…this oil would not have gone to Arcadia*".

553. On 28 December 2009, Mr Kelbrick had drafted a letter of comfort to be sent from Mr Bosworth addressed to Chief Anenih. The draft letter stated:

> "We as the Arcadia Group of Companies wish to convey our sincere thanks for opening a dialogue and consummating business together in the form of the 30,000 bbls/day Crudex contract.
>
> We also wish to underline our commitment to you in this matter by stating that where cargoes are scheduled by NNPC under the NNPC/Crudex contract, we as Arcadia Group commit to lifting said volumes irrespective of prevailing market conditions."

554. The disclosed letter is in draft form only and there is no evidence that it was in fact sent. There is no other evidence of any communication or relationship between Mr Bosworth and Chief Anenih. The draft letter did not state who originated the contract. Mr Kelbrick said *"… Chief Anenih had some advisers*

and one of the advisers came to him and said perhaps this would be a good idea…it was … supposed to give a degree – if it was required and I just don't think it was required …if Chief Anenih raised anything with me, then I would be equipped to say that we would be selling to this group of companies". Mr Bosworth said Mr Kelbrick had requested the letter and he had no problem in giving it to him. He said the reference to a contract with Chief Anenih was incorrect because he did not have a deal with Chief Anenih, and doubted the letter would have been sent in this form. Mr Bosworth said the reference to a commitment by Arcadia was relatively standard wording that *"we did give to more than one person on occasions"*.

555. As quoted above, Mr Kelbrick's evidence was that Mr Lance and the Cornhill Group provided administrative support in setting Crudex up. An email from Mr Lance on 9 April 2010 contained a list of *"Arcadia companies"* which included Crudex. Mr Bosworth and Mr Kelbrick indicated that that must have been an error. Mr Kelbrick said this:

> "No. I think Mr Lance, that is an error, why he put there, I don't know. Crudex was Chief Anenih's -- well, my company that Chief Anenih sponsored, we then took the oil into Attock and then sold it to Arcadia. It wasn't an Arcadia company.
>
> Q. And he reflects the fact that it was Arcadia who had arranged for the Crudex company to be set up.
>
> A. Arcadia hadn't, no. I had told Salem to set up Crudex and he said it will be in Mauritius. I believe that he had -- he used Mark Lance to do that, because I think that is what Cornhill -- that was their business. And that's that. There was no mention of Arcadia."

556. In June 2010, Mr Hurley told Moore Stephens that Arcadia London had paid NNPC the US$2.5 million deposit in relation to the Crudex/NNPC Contract. Mr Hurley said in an email to Moore Stephens on 28 June 2010:

> "This was paid to lift a third-party cargo (Crudex). The $2.5m will be deducted from a cargo being loaded in June (scheduled). NNPC demand a prepayment of $2.5m on all new contracts. We have paid previously or new contracts and renewals and have always recovered."
>
> and in his oral evidence said:
>
> "Why wouldn't we do that? It seems perfectly normal…the trader may have agreed to make that payment on behalf of Attock, if they were receiving the cargo which…I suspect we [the Arcadia Group] may have done".

Mr Bosworth said that it was *"quite normal"* to assist business partners with putting up deposits, that they always get deducted from the first cargo, and *"That is what you do in this business. We did it for other people as well"*. Mr

Kelbrick said: *"I don't see that as particularly unusual because they knew they were going to get the money back and again they were happy with the reliability of it…the objectives of the two companies were to make money"*.

557. Mr Kelbrick said in cross-examination that the fee for Chief Anenih's sponsorship was paid via a company called Stratar, which was the Chief's service provider company. On 28 December 2009, Mr Kelbrick sent Mr Bosworth an email headed *"agreement for Chief company"* asked him to see whether the attachment looked ok. Attached was a draft agreement between Arcadia London and Stratar Energy Resources Limited, to be dated as of 4 January 2010. The recitals stated:

> "(A) The Service Provider is a company incorporated in Nigeria and by virtue of its activities globally has developed extensive expertise and knowledge specifically in relation to Crude oil, products and oil derivatives.
>
> (B) As a direct result of the services and extensive work performed by the Service Provider, a supply contract was awarded to Crudex Oil by NNPC for the delivery of Nigerian crude oil of 30,000 bbls per day, and that said contract shall be exclusively executed and operated by Arcadia Petroleum Limited.
>
> (C) The Service Provider has developed an extensive business network of professionals and subcontractors located globally on whose expertise it can call.
>
> (D) Arcadia Petroleum Limited to benefit from the Service Provider's activities and expertise for the purpose of assisting Arcadia Petroleum Limited in oil and products trading business globally, including assistance in logistics and operations as well as in the smooth performance of concluded contracts."

The proposed operative provisions appointed Stratar as a service provider for a year in return for a per barrel fee together with discretionary additional renumeration by way of additional fees. Mr Kelbrick said he did not recall this document but it might have been another type of comfort that may not have in fact been provided to Chief Anenih.

558. Mr Andre Gagiano sent an email to Mr Mounzer on 5 April 2011, stating:

> "Morning Salem, please find attached crude contracts which banking details are provided on the second page. Please commence with Crudex Azenith please prepare but don't do anything as of yet. Any questions please speak with SK."

The email appears to have attached two Crudex offer letters and an Azenith Crude Contract. The Claimants point out that Mr Gagiano was formally employed by the Arcadia Group at the time, albeit Mr Akpata said Mr Gagiano was working in his office by this time, and the email quoted above was sent

from a personal yahoo address. The contents of the email are cryptic. Mr Bosworth thought perhaps Mr Gagiano was merely providing documents to Mr Kelbrick or his staff while they were abroad, as Mr Gagiano *"doesn't give instructions to commence with Crudex"*. Mr Kelbrick similarly thought he might have asked Mr Gagiano to help him in some way with documents.

559. The Claimants submit that:

i) Mr Kelbrick was speaking to Chief Anenih on behalf of Arcadia;

ii) Chief Anenih required Arcadia's assurance that it would perform the contract;

iii) Mr Kelbrick must have made clear to Chief Anenih that Crudex had the backing of Arcadia, which was going to ensure the contract was fulfilled;

iv) the draft letter seemed to contemplate that the term contract would be for Arcadia, not Attock Mauritius, as it was copied to several people within Arcadia London;

v) the draft service provider agreement also contemplated that the contract awarded to Crudex by NNPC would be "*exclusively executed and operated by*" Arcadia London;

vi) those points show that the original discussion with Chief Anenih at the end of 2009 had been for the contract to be operated through Crudex for the benefit of Arcadia, who would pay the Chief;

vii) Mr Lance's email said Crudex was an Arcadia company, and that was because it had been set up to obtain the cargoes for the benefit of the Arcadia Group;

viii) the Defendants had no coherent explanation for why Arcadia paid the deposit under the contract;

ix) Mr Gagiano's continued involvement, giving instructions in relation to the contract, showed that the contract was an Arcadia opportunity; and

x) Mr Bosworth's evidence that he could not have obtained the contract for the benefit of the Arcadia Group, having no relationship with Chief Anenih, was untrue.

560. I am unable to accept those submissions, or that the Crudex/NNPC Contract was diverted from Arcadia to Attock, fraudulently or otherwise. There is no evidence that Mr Bosworth had a relationship with Chief Anenih or would have been able to obtain this term contract for Arcadia by himself. Conversely, given Mr Kelbrick's extensive and current relationships with NNPC and in Nigeria generally (which Mr Bosworth lacked, certainly by this stage), it is entirely plausible that Mr Kelbrick obtained the opportunity in the way he suggested. Whether or not Mr Kelbrick in the event found it helpful or necessary to be able to tell Chief Anenih that Arcadia would be his onward purchaser, or even that Arcadia would agree to make service provider payments to him, that would not

mean that the opportunity had been diverted. It remained a Kelbrick opportunity. I see nothing implausible about the evidence given by Mr Bosworth, Mr Hurley and Mr Kelbrick about the practice in relation to the temporary funding of term contract deposits. The provision of assistance from the Cornhill Group as to the mechanics of incorporation are, in context, of no significance; and it is perfectly possible that, having incorporated the company, Mr Lance erroneously listed it as an Arcadia company. Mr Lance was the Claimants' witness to call: their settlement agreement with him stipulated that he would co-operate with them, and he continues to provide services to them via Cornhill, yet they chose not to call him. No conclusions of any kind can be drawn from the cryptic email sent by Mr Gagiano, from a personal email address, over a year later.

561. I have also considered the Claimants' point, made in relation to this and the other term contracts pursuant to which oil was supplied under the Attock Transactions, that Mr Kelbrick has disclosed no copies of any paperwork produced for his applications for the contracts. However, leaving aside the point that the first two contracts were obtained by Mr Decker rather than Mr Kelbrick, Mr Kelbrick's evidence (also quoted earlier in the context of service provider work) was that his work *"was not paper-heavy, it required a lot of face-to-face meetings and telephone calls"*; that he did not have significant administrative support; and that he was primarily concerned with operating on the ground in West Africa rather than the preparation of paperwork. I accept that evidence.

562. Further, for the reasons given above and elsewhere in relation to the other term contracts (which I have considered in the round), I do not agree with the Claimants that such documentation as exists or the evidence as a whole indicates that Mr Bosworth was involved in obtaining them.

563. In all the circumstances, I reject the Claimants' case about this contract.

(c) The Attock Mauritius/NNPC Contract

564. In or about May 2010, Attock Mauritius entered into a term contract with NNPC. Attock Mauritius then sold that oil on to the Arcadia Group, pursuant to 8 of the 144 Transactions, between July 2010 and February 2011.

565. An email dated 7 May 2010 from Mr Mounzer to Mr Dos Santos, copying Mr Kelbrick, said *"As per documents attached, you'll see that we have two new contracts to start as soon as Steve would have signed with NNPC. The signing is taking place next week in Nigeria"*. There is no documentary evidence at all that Mr Bosworth or Arcadia London originated it.

566. The Claimants' basis for alleging that this term contract was fraudulently diverted from the Arcadia Group is paper thin. They submit that:

i) Attock Mauritius had no established relationship with NNPC;

ii) there is no evidence of any term contract between NNPC and Attock Mauritius between 2003 (when Mr Decker bought the trading name) and 2009. Attock Mauritius's only transactions had been in connection with

the Arcadia Lebanon transactions, procuring the issue of third party letters of credit on which its name did not appear; and

iii) Mr Kelbrick would have been approaching NOCs with the benefit of his reputation as a representative of the Arcadia Group, which he had established over the years both in the capacity of an employee and consultant, and most recently in the context of the Sao Tome and Senegal Contracts. He held himself out as a representative of the Arcadia Group during this period.

567. Those points ignore the facts that Attock, which Mr Decker acquired in 2005 and Mr Kelbrick bought in 2009, was well-established, with a reputation and extensive experience of crude oil trading, including in West Africa and with NNPC specifically. Further, as I mention earlier, Mr Kelbrick's evidence was that in 2004 Attock had an ongoing term contract with NNPC. I have already set out the evidence about Attock Mauritius's long history as a *"five star boutique"* with NNPC, dating back to the 1990s, and Mr Kelbrick's connections in West Africa, including Nigeria and NNPC. Further, there is no evidence, or reason to believe, that Mr Kelbrick in obtaining this term contract was holding himself out as representing Arcadia. The Claimants have failed to establish that this was an opportunity diverted by Mr Bosworth (or anyone else) from the Arcadia Group, still less that it was fraudulently diverted.

(d) The Cathay/NNPC Contract

568. Also in or about May 2010, Cathay Petroleum International Limited ("***Cathay***") entered into a term contract with NNPC for the purchase of 30,000 barrels of crude oil per day (the "***Cathay/NNPC Contract***"). Attock Mauritius then entered into a lifting agreement with Cathay to take the oil under the Cathay/NNPC Contract. It on-sold oil to Arcadia pursuant to 5 of the 144 Transactions.

569. Mr Kelbrick in his witness statement said that, after he bought Attock Mauritius, Cathay was one of the companies in whose names he applied for contracts (along with Attock Mauritius itself, Arcadia Mauritius, Azenith and Crudex). He said he did not own Cathay, but used it as a contract holder for the benefit of Attock Mauritius. He added:

> "114. Cathay Petroleum was the contract holder in 5 transactions of the 144 Transactions after Mr Mounzer and I acquired AOIL in September 2009. Cathay Petroleum operated slightly differently to Azenith and Crudex, as I did not own the company. My memory of Cathay Petroleum is poor, but to the best of my recollection, Cathay Petroleum was a company owned by, or at least associated with an individual named Jason Chen, who I knew from his dealings with Arcadia, through Mr Gibbons.
>
> 115. Otherwise, the deals operated in a similar fashion to those where Azenith or Crudex was the contract holder. Cathay Petroleum and AOIL entered into a lifting agreement, and

> Cathay Petroleum sent letters of authorization to AOIL's banks confirming that AOIL was authorized to open letters of credit using Cathay Petroleum's name, in favour of the NNPC, and at AOIL's risk"

570. Mr Adams in his affidavit stated that one of Mr Gibbons' close business associates, Jason Chen was believed to be a shareholder in and managing director of Cathay, and that the focus of Mr Chen's and Mr Gibbons' business interests was believed to be in the Far East. Mr Adams said Cathay was incorporated in Hong Kong in 2003, and since March 2008 its majority shareholder had been Cathay Petroleum Holdings Limited with Mr Chen retaining a minority stake. Mr Chen had been a director throughout. The Claimants in their closing referred to a document from February 2011 in which it was said that Cathay was recorded as stating itself to be a wholly owned subsidiary of *"Arcadia Energy"*, but that point was not put to any of the witnesses.

571. The term contract offer letter to Cathay dated 3 May 2010 bore the name of the then previous Minister of Petroleum, Dr Rilwanu Lukman. By 20 May 2010, letters from NNPC bore the name of Dr Lukman's replacement, Mrs Diezani Alison-Madueke. In his oral evidence, Mr Kelbrick said that though he did not recall much about Cathay itself, he remembered how this term contract came about. He said:

> "I can tell you exactly how it came about because this was a period of flux in Nigeria in terms of the power of sponsors, the arrival potentially of -- there was a new oil minister and so everything in terms of cargoes, everything in NNPC was up in the air. It was a time of real -- what's the word, not foment. It was just a chaotic time and NNPC knew that I would operate anything that they gave to me. I don't know how many, there weren't many contracts -- sorry, liftings under the Cathay contract so I think that indicates that when all the sponsors had finished their turf wars etc, Cathay didn't have a sponsor. It was a name I had given to NNPC and they gave me those liftings, I don't know how many liftings, half a dozen liftings I think it was. That is how it came about.
>
> Q. You say "NNPC knew I would operate anything that came to me" and that is because they knew you had the backing of the Arcadia Group?
>
> A. It's not because of that, it is because they knew Steven Kelbrick.
>
> Q. Jason Chen was a friend of Mr Gibbons, wasn't he?
>
> A. I don't know how friendly they were, but he was involved, I think, in the Far East.
>
> Q. And Mr Gibbons worked for Arcadia Singapore?

> A. Post Arcadia London, yes, I believe anyway. I don't know where he was employed but I started with him. I was in London with him when I started with Arcadia. He had joined before me. And then I think he went to be head of Singapore."

572. Mr Kelbrick was shown an email chain on 10-11 May 2010 initiated by Tony Cartwright of Arcadia Switzerland, in which Mr Chen said he would be visiting Geneva and that Mr Mounzer would pick him up and go to a few banks *"as per Pete [Mr Bosworth] instruction"*. Later in the exchange, Mr Hurley said *"[Mr Mounzer] and [Mr Chen] with the banks is not a good approach"*. Mr Gibbons asked how Mr Mounzer got involved; Mr Hurley responded that he did not know Mr Mounzer was *"part of the equation on this"*, and Mr Gibbons replied *"I check – perhaps its coz [Mr Bosworth] got cathay a nigerian contract but even then salem not introduce to all"*. Mr Kelbrick in his oral evidence said:

> "Pete didn't get Cathay a Nigerian contract. Now, whatever Gibbons says or intends or whatever, there, I can't speak for him. Nor was I copied on any of this because had I been copied on it, I would have corrected him immediately"

and:

> "Q. And you haven't explained in your witness evidence how you got either of them.
>
> A. I would have thought it was fairly evident the amount of time and efforts I put in as to who exactly obtained these. Given that Bosworth was seldom in Nigeria, seldom on the ground, was seldom in NNPC Towers, then as far as I'm concerned, I know what I did and I obtained both of these contracts."

573. Mr Bosworth, in his (10th) witness statement, said he was not and never had been a shareholder in Cathay Petroleum Holdings, which in 2009 made certain payments to Arcadia Lebanon, nor at any time held any beneficial or legal interest in it. Mr Bosworth in his oral evidence said Mr Chen was similar to Mr Kelbrick but operated in the Far East; he had at least one trading company, Cathay, and was also a service provider. He thought Cathay had been a consultant or broker to Arcadia London in the past when Arcadia was owned by Mitsui. He was shown an email from June 2003 where Arcadia talked about a potential agreement with Cathay, but did not recall it. Asked about Mr Gibbons' email comment, Mr Bosworth said:

> "Well, I didn't get Cathay the contract. I don't know the sponsor for Cathay's contract. I think what happened here was Mr Kelbrick asked if we could provide them or assist them with a company name and I put forward, having spoken to Gibbons, Cathay to him and hence the confusion as to whether it was Arcadia's contract or Kelbrick's contract. But in all the circumstances I did not get Cathay the contract. Mr Gibbons, sitting in Singapore, I would understand him not being close to this and thinking that I did but I didn't. Mr Kelbrick was

> responsible for getting the contract. I may have assisted him or we may have assisted him in introducing him to Mr Chen for the use of that name. But I didn't get Cathay the contract."

574. As noted earlier, the Claimants not only refrained from calling Mr Gibbons from giving evidence, but also made a settlement agreement with him including a provision prohibiting (or purporting to prohibit) him from assisting other Defendants. The net result is that the Defendants and the court were unable to explore why Mr Gibbons had, in this email, suggested that Mr Bosworth had, or might have, obtained a Nigerian contract for Cathay, or which contract, or how. Further, Mr Gibbons was not a West Africa oil trader, and was based in Singapore. In these circumstances I can ascribe little weight to Mr Gibbons' unexplained hearsay assertion.

575. Mr Hurley in his witness statement referred to Mr Kelbrick having asked Cathay Holdings to lend Mr Hurley some money to buy a house in Switzerland, which he said Cathay Holdings agreed to do. The Claimants rely on a payment made by Cathay to Mr Hurley, in March 2013, of US$2.7 million to buy the house in Switzerland, and Mr Hurley's explanation to his financial intermediary that *"I do not have a contract with Cathay but I have helped them in all financial issues for financing of their business including arranging finance facilities, deal structuring for trade finance and tax optimisation"*. Mr Hurley gave this evidence in cross-examination:

> "Q. … So no reference to any arrangement with Mr Bosworth but you are saying you are being paid by Cathay for helping them with their financial arrangements?
>
> A. I had to give a reason to the bank as to why I was receiving the money and Cathay I think wanted it to be as a consultant or service fee, something of that nature. I gave them the details and it's not -- I had helped Cathay or Arcadia Petroleum Limited as a group had certainly helped Cathay in the past as well. So a part of that is a justification. But that is not -- it's not the only reason. It is Cathay providing the money to me and I'm going to say as a loan, because if all of the bonus payments came in, I would expect Cathay to be repaid.
>
> …
>
> Q. And what you are telling them, information to be provided to a bank as to a reason for payment to Collafin, is that you are to [be] paid by Cathay for having helped them in relation to finance – the business including arranging finance facilities and that is the truth, isn't it?
>
> A. No, it's not. It is the fact that it is a loan being made to me but Cathay wanted it as a service or consultancy agreement.
>
> Q. There is no reference to any loan there?

> A. No, there isn't, because we have said what it is for, which is for helping them in other services but the real purpose is a loan.
>
> Q. This is a reference to the work you did for them in connection with the arrangements with Attock Mauritius?
>
> A. That is simply not true.
>
> Q. It was part of the profit share arrangement with Mr Bosworth and Mr Kelbrick?
>
> A. Also not true."

576. Viewing this evidence in the round, I consider it most likely that Cathay was, as Mr Bosworth said, a company with whom the Arcadia Group had cooperated from time to time, as they had (on a larger scale) with Mr Decker and Mr Kelbrick and their companies, but which nonetheless remained an independent company in which the Arcadia Group, Mr Bosworth, Mr Hurley, and indeed Mr Kelbrick, had no interest or control. The evidence does not, in my view, provide any basis for concluding that the Cathay/NNPC Contract was an Arcadia opportunity that Mr Bosworth (or anyone else) diverted from the Arcadia Group, still less that it was fraudulently or dishonestly diverted.

(e) Other events in 2010

577. On 3 March 2010, Arcadia Lebanon paid US$3.045 million to Scantic Assets Corporate, a Panamanian company. The evidence of Mr Bosworth and Mr Hurley was that this was the corporate vehicle of the Arcadia traders of Mediterranean crude oil, Guilio Antonucci and Dario Striano, who wanted their Arcadia bonus to be paid offshore because they wished to handle their own tax affairs rather than for tax to be deducted at source.

578. The documents indicate that bonus allocations of Messrs Antonucci and Striano were reduced in Arcadia's records as compared to the allocated bonuses, reflecting the fact that Arcadia Lebanon paid the remainder to Scantic. A bonus report for the 2009 year emailed on 8 September 2009 recorded them as having a total bonus allocation of US$5.25 million, with the note 'pd' i.e. paid. A set of bonus figures which Mr Hurley later emailed to Mr Francisco on 22 May 2013 had the note 'pd' removed. On 4 July 2013 Mr Francisco emailed Mr Hurley a further schedule indicating that for the 2009 year Arcadia paid Messrs Antonucci and Striano US$1.88 million. Mr Bosworth/Mr Hurley point out that the US$3.37 million difference between the US$5.25 million allocated to the two traders and US$1.88 million that Arcadia paid them approximates to the sum Arcadia Lebanon paid to Scantic.

579. Mr Hurley gave this evidence in re-examination:

> "Q. Why in this document are the bonus payments for Mr Antonucci and Mr Striano different from the bonus payments that we saw in the September 2009 schedule?

> A. The amounts that we've got here -- this is Mr Francisco's schedule, so I'm suggesting he has been through the payroll records and found this is what was paid by the group.
>
> Q. And can you recall why there would be a change in Arcadia's records, the group's records, of the bonuses for Mr Striano and Mr Antonucci?
>
> A. Yes, because they were paid from somewhere else.
>
> Q. And where was that?
>
> A. Arcadia Lebanon.
>
> Q. Via?
>
> A. Via Scantic."

Mr Duncan likewise gave evidence (in connection with a personal transaction in 2010) that Messrs Striano and Antonucci had told him that Scantic was their company.

580. The Claimants suggest that there is no documentary support for the view that Scantic was the traders' company or that they had requested this payment. They also note that the previous year, in May 2009, Arcadia Lebanon paid US$3,165,975 to Proview and Proview paid US$1.4 million to Scantic; and suggest that Proview's involvement is impossible to understand and casts doubt on the payment being for Arcadia's benefit. In my view, however, the combination of the documentary and witness evidence summarised above points to the conclusion that the payment was made as part payment of bonuses due to Messrs Striano and Antonucci, and hence was made for the benefit of the Arcadia Group.

581. On 5 July 2010 Arcadia Lebanon made a payment of US$3,250,030 to Hansa, and on 26 August 2010 it paid US$2,500,020 to Froreiep Renggli. Mr Bosworth in his witness statement explained those payments as follows:

> "244. Arcadia Lebanon made payments for expenses in connection with exploration and production blocks owned by the Arcadia group which included blocks in the Falklands, Namibia and Australia. All of these assets I believe started within the group and at various stages were either removed and put back in, or removed altogether. This is because at a certain point John did not want them to be in the group. I believe that Namibia was removed out of the group and then put back in. I recall John requested that the Falklands assets be removed from the group as John had certain interests in Argentina and faced a number of queries about these assets. Various members of Arcadia management had interests in these projects – when John decided that he didn't want Farahead or Arcadia to invest, he was happy for us to take them forward on the basis that he could always tell

> us to give them back or require us to pay him a share of the returns. The [above] payments were made in relation to such projects."

That evidence was not challenged.

582. In August 2010 Mr Bosworth and Mr Hurley made a proposal to Farahead to set up an Arcadia management committee, which would be authorised by Farahead to take the decisions for all subsidiaries. On 20 August 2010, Mr Hurley emailed the proposal to Mr Trøim. Mr Trøim emailed Mr Fredriksen. Mr Hannas replied:

> "To me this will result in shifting management and control out of Cyprus with all possible adverse tax consequences. This is a very serious issue".

The proposal was not accepted.

583. An Arcadia Singapore Information Memorandum dated 3 September 2010, a copy of which was sent to Mr Trøim at this request, referred to Arcadia's *"particularly strong position in procuring and securing crude supplies from Africa…"* and gave details of its oil trading in Africa. It also noted that Arcadia's trading limits were *"approved by the ultimate beneficial controller"*. A bank presentation dated 7 September 2010 made a similar statement, as did an Arcadia Singapore Information Memorandum dated 23 August 2012 (and listing Attock as one of Arcadia's key suppliers). A Press Release sent for Mr Trøim's approval in November 2010 said Arcadia had, since inception, maintained very long-lasting relationships with key counterparts in Africa and the Middle East.

584. In around December 2010, Arcadia developed a new website with the involvement of Mr Adams. In conjunction with the new website, an Arcadia Group Company Overview was drafted for client presentations. Mr Adams was one of the authors. The Company Overview section made repeated reference to Arcadia's West African oil trading. It noted that *"Arcadia has been and continues to be involved in Government contracts with a number of African nations including, Nigeria, Guinea, Benin, Kenya (NOCK), Togo and Senegal"* and had a specific section on 'West African Focus', setting out the diversified portfolio of oil and customer bases.

585. As I have summarised in §§ 539-546 above, in 2009 Mr Kelbrick bought Attock Mauritius and began to use entities in the Attock group to source West African crude in its own right; and on-sold the oil through Attock Mauritius to Arcadia and other third parties under transactions in which Arcadia Lebanon was not involved. The fifth and sixth of the Claimants' example transactions were of this kind: EY Deal 101 and EY Deal 118.

586. EY Deal 101 was initiated in December 2010. The chronological steps were:

i) On 15 December 2010, NNPC nominated Attock Mauritius to take a cargo of 997.5MB Erha TBN 21-28 February 2011. On 16 December

2010, Attock Mauritius communicated the nomination to Arcadia Switzerland (although both Attock Mauritius and Arcadia Switzerland record the agreement to sell the cargo to Arcadia Switzerland on 15 December 2010). The cargo was loaded on board BOUBOULINA with B/L on 24 February 2011.

ii) On 16 December 2010, Attock Mauritius booked the cargo as sold to Arcadia Switzerland. The price recorded was NNPC OSP Prompt (average Dated Brent, 5 consecutive days after B/L date) minus a fixed discount of US$ 0.24 per barrel. (This appears to have been an error: the price in fact included a premium, rather than a discount, of US$ 0.24 per barrel.)

iii) On 21 January 2011, Arcadia Switzerland agreed to sell the cargo to Sun at Prompt plus a premium of US$ 2.12 per barrel. The pricing option was not passed to Sun. This was a discount of US$ 0.03 per barrel on NNPC OSP differential premium of US$ 2.15 per barrel.

iv) Attock Mauritius formally advised Arcadia Switzerland of the terms of the sale on 8 February 2011 and Arcadia Switzerland confirmed acceptance on 14 February 2011. The price was stated to be OSP differential US$ 2.15 per barrel plus a fixed premium of US$ 0.24 per barrel regardless of the Option chosen.

v) Arcadia Switzerland elected Prompt pricing, paying Attock Mauritius US$ 0.27 (0.24 + 0.03) per barrel more than Arcadia Switzerland had sold the cargo to Sun for.

vi) Arcadia Switzerland made a gross loss of US$256,571.28 (US$ 0.27 per barrel x 950,264 barrels): Arcadia Switzerland was paid US$110,064,327.80 by Sun (US$ 115.83 per barrel), but paid US$110,320,899.08 to Attock Mauritius (US$ 116.10 per barrel).

vii) Arcadia Switzerland also incurred costs logged to Trade Capture of US$83,741 charged by Mizuho Bank and US$3,427 charged by Q and Q Inspection, increasing Arcadia Switzerland's net loss to US$343,739.

viii) Attock Mauritius elected Advanced pricing, and incurred the modest fee of US$ 0.05 per barrel fee for exercising its option.

ix) Attock Mauritius made a gross profit of US$8,095,299.02: it paid US$102,225,600.06 to NNPC and was paid US$110,320,899.08 by Arcadia Switzerland. Attock Mauritius did not hedge its position so incurred no costs or liabilities in that regard.

587. It is convenient also to refer to EY Deal 118 here. It took place in July 2011. The chronological steps were:

i) On 15 July 2011, NNPC nominated Azenith to take a cargo of 975MB Agbami TBN 21-30 September 2011.

ii) On 18 July 2011, Attock Mauritius forwarded a message received from its supplier (NNPC) notifying it of a cargo with earliest laycan 29 September 2011 and requiring Attock Mauritius to open a letter of credit which Attock Mauritius asked Arcadia Switzerland to treat as coming from Attock Mauritius. The cargo was loaded on board ARCHANGEL B/L on 30 September 2011.

iii) On 18 July 2011, Attock Mauritius produced a crude oil deal sheet recording a purchase from Azenith Mauritius and a sale to Arcadia Switzerland with no terms agreed.

iv) On 21 July 2011, Arcadia Switzerland nominated the cargo to Shell Western under its term contract. Internal emails confirming this were copied to Mr Kelbrick (stevekelbrick@hotmail.com) and Mr Bosworth (Management Singapore). The pricing agreed was set out in a deal recap on 5 August 2011; it provided for the NNPC OSP for Crude Oil relevant to the month in which the Bill of Lading fell (Dated Brent plus a premium published by NNPC) with "*a premium of USD 0.28 per net US Barrel*" and with the pricing period to be at the Buyer's option, to be declared latest 6 working days prior to the first day of the agreed delivery period.

v) On 29 August 2011, Elizabeth Driay at Arcadia Switzerland logged the acquisition of the Agbami crude from Attock Mauritius at a premium of US$ 0.24/bbl. Attock Mauritius confirmed the terms of the sale to Arcadia Switzerland by fax on 5 September 2011 allowing the buyer the option of Prompt, Deferred or Advanced plus a fixed premium of US$ 0.24/bbl.

vi) Shell Western missed the Dated Brent price option expiry deadline and defaulted to Prompt pricing.

vii) On 19 September 2011, Arcadia Switzerland declared its pricing option to Attock Mauritius as Deferred, copying Ms Driay, Mr Kelbrick and "Ops-Morges". (In other words, Arcadia Switzerland made a trading decision to elect for that pricing period.)

viii) On 28 September 2011, on account of the mismatch between the averaging periods applying to Arcadia Switzerland's purchase and sale, Ms Driay made hedging arrangements with Vitol SA swapping:

a) a fixed price of US$ 106.46/bbl for a floating rate by reference to the average price of Dated Brent over 3–7 October 2011; and

b) a fixed price of US$ 106.06/bbl for a floating rate by reference to the average price of Dated Brent over 10–14 October 2011.

ix) As it turned out, the "Prompt" period pricing was beneficial to Shell Western but was saved for Arcadia Switzerland by the hedging arrangements, making a net profit of US$500,471. Arcadia Switzerland made a gross loss of US$6,961,280.61: it received US$102,596,318.25

from Shell Western and paid Attock Mauritius US$109,557,598.86. The loss was offset by the hedging arrangements made by Ms Driay. Hedging receipts of US$7,523,125 converted the gross loss to a profit.

x) NNPC produced a valuation based on Prompt as the default option. Attock Mauritius made a gross profit of US$7,234,081: it charged Arcadia London US$109,557,598.86 and was charged Attock Mauritius US$102,323,517.89 by NNPC.

xi) Attock Mauritius did not itself make payments to service providers directly. It had a General Cooperation Agreement with Attock Lebanon pursuant to which it was charged profit shares and referral fees. Attock Mauritius retained a substantial amount of net receipts from Arcadia London/Arcadia Switzerland after passing payments to Attock Lebanon. The amount paid to Attock Lebanon was more than the amount then paid out by Attock Lebanon to service providers with the result that both Attock Mauritius and Attock Lebanon retained gross profits.

(13) Events of 2011

(a) The Azenith Nigeria/NNPC Contract

588. In 2011, a company called Azenith Energy Resources Ltd, Nigeria ("***Azenith Nigeria***"), owned by Mr Akpata, acquired a term contract with NNPC but did not have the credit lines to lift the cargoes. Mr Kelbrick incorporated another company, called Azenith Energy Resources Ltd, Mauritius ("***Azenith Mauritius***"), to operate the contract using Attock Mauritius's credit lines. Attock Mauritius (via Attock Lebanon) paid Azenith Nigeria a fee for sourcing the contract and allowing Mr Kelbrick to use the Azenith name. Mr Kelbrick then used Azenith Mauritius as a contract-holder, and on-sold oil to Arcadia in 9 of the 144 Transactions.

589. Mr Kelbrick in his witness statement said:

> "110. Azenith was the contract holder in 9 of the 144 Transactions after Mr Mounzer and I acquired AOIL in September 2009. There are two companies with near identical names – Azenith Energy Resources Ltd, Nigeria ("Azenith Nigeria") and Azenith Energy Resources Ltd, Mauritius (Azenith). Azenith Nigeria was the company of Mr Akpata; he was a former consultant for Arcadia and a contact of Mr Bosworth, which is how I first met him in around 1999. When Mr Akpata moved away from Arcadia, he started trading a number of things including products, doing business with Total and BP.
>
> 111. Azenith Nigeria secured a crude contract with NNPC but did not have the credit lines to lift the cargoes. Mr Akpata came to me and we agreed that I would incorporate Azenith to operate the contract, using AOIL's credit lines. I was the owner of, and controlled, Azenith. AOIL (via AOS) paid Azenith

> Nigeria a fee for sourcing the contract and allowing me to use the Azenith name."

590. In his witness statement, Mr Akpata did not appear to remember this transaction (if he was asked about it). He said he recalled that Mr Kelbrick had at some unspecified time incorporated a company called Azenith Mauritius without telling him, in order to benefit from Azenith's goodwill, and that he found out two years later. The Claimants highlighted, however, parts of Mr Akpata's witness statement describing dealings he had had with Arcadia and Mr Bosworth, occasions on which he acted as a service provider obtaining contracts for Arcadia, and the following paragraphs about a company called Arcadia Nigeria:

> "Around 2000, a company called Arcadia Nigeria was set up. Peter and Mohammed Asibelua were the original shareholders. Later that year, Mitsui became a shareholder. Eventually, it was only myself and Mohammed who were the shareholders. The idea was to have a company in Nigeria that Mohammed and myself could use to bid for business opportunities. At the time, the Arcadia name carried a lot of weight in the market; there was a lot of brand recognition.
>
> 47. As well as my Arcadia UK business card, I also had an Arcadia Nigeria business card. It was useful to have both of these cards. They could be used as a shortcut to show that I had a bona fide connection with Arcadia. Sometimes, if you weren't sure of the people that you were approaching for a potential deal were serious, or they hadn't yet been properly vetted, I would give them my Arcadia Nigeria card. If things developed, I would then share the details of Arcadia London so that we could move things forward. In this way, we were able to effectively engage with opportunities that may or may not lead to a deal, without having to rope in London unless the deal was a serious one. Arcadia Nigeria itself never did any transactions, but it was a useful vehicle nonetheless for the reasons I have just described."

591. It was suggested to Mr Kelbrick that being able to present himself as backed by the Arcadia Group enabled Mr Akpata to obtain this term contract for Azenith Nigeria. Mr Kelbrick responded:

> "Not to my knowledge. I think Osagie had sponsors that were the ones that helped him get the contract rather than anything to do with, you know ... there is, even when you are applying for a contract, they only ask for turnover etc, etc. They don't ask for who you are selling to. They need to know that you are a bona fide company, which Attock was. So, what Osagie did in the period of military leadership of the country from 2000 onwards, until the interim government came in about 2008 I can't speak to."

592. In addition, Mr Kelbrick was asked about the email of 5 April 2011 from Mr Gagiano to Mr Mounzer, which I quote in § 558 above, which includes the line *"Azenith please prepare but don't do anything as of yet"*. It was suggested that that showed that Arcadia was in control of this contract, to which Mr Kelbrick replied *"I don't think so, no"*. Asked about the setting up of Azenith Mauritius, Mr Kelbrick said:

> "[Mr Akpata] didn't have the ability to open an LC, to my knowledge. And then we would have to open the LC for and on behalf. As far as Mounzer told me, the banks would only do it if we had full control of the company. So that is why Crudex was -- sorry, Azenith was set up.
>
> …
>
> Azenith Mauritius was set up so that Salem and I, as far as I can recall from Salem, we would be able to show that we had control of it so that we could open an LC and then there was an agreement signed between Azenith Nigeria and I think -- I think Azenith Mauritius somewhere that shows that I think Osagie [i.e. Mr Akpata] knew from the start. There was no need to hide anything from Osagie."

Mr Kelbrick also denied the suggestion that Mr Bosworth *"remained the point of contact in relation to the Azenith Nigeria term contract"*.

593. Mr Bosworth in cross-examination said he did not arrange for the Azenith Contract to be used for the benefit of Attock Mauritius. He said he permitted Mr Akpata to use an Arcadia business card in the early days, up to the early 1990s, but did not believe Mr Akpata was doing so in 2010. Further:

> "Q. So, in this paragraph he is talking about working with Mr Kelbrick as someone working with Arcadia, all the way through to 2013, isn't he?
>
> A. I kept working with him until 2013. And he said -- you will have to ask him about the timing of these things. It would not surprise me, he is the first point of call for trading matters. Mr Kelbrick was the West African trader when he worked for us and they continued the relationship."

Insofar as any part of that answer might suggest that Mr Bosworth would not have been surprised if Mr Akpata continued to link Mr Kelbrick to Arcadia in his mind, that does not appear to be reflected in Mr Akpata's actual thinking according to his oral evidence summarised below. In any event, Mr Bosworth was very clear that he had no involvement in the allocation of the term contract, and was not in control of the relationship between Azenith Mauritius and Azenith Nigeria.

594. Mr Akpata in cross-examination said he obtained the contract for his own company, not for Arcadia, and did not tell NNPC that Arcadia would be backing

it. He said Mr Gagiano would have been working in his office around this time. Further:

> "Q. But he is acting for Arcadia at this time?
>
> A. Perhaps, yes.
>
> Q. And he has a copy of the term contract?
>
> A. Yes. Because if he is in the office and we have just won a term contract or whatever, he is there. He is right there. The first person one of my staff may have given a copy to is him and send to your people because we would have got in touch with a number of trading companies to say, oh, we have a contract. But in my mind, I was always sure it was going to go to Steve, in my mind. It was always going to go to my group which is either Steve, Arcadia, or one of them.
>
> Q. In your mind, you said, it was always going to go to Steve?
>
> A. Yes, Steve Kelbrick. Why? Because I had already had a discussion with Arcadia, and they unfortunately were not ready to help with the financing in terms of my company going its own way. For that to happen, they needed to basically join -- we needed to join together and do a joint finance arrangement, but Arcadia were not ready to do that for me, whereas Steve was. So that was the main -- it was not about -- even if another company offered a bit more money, in this instance I wouldn't have gone for it. It was important to grow to be independent and that meant you needed to get your own finance.
>
> Q. So you say got this for Mr Kelbrick?
>
> A. I didn't get it for him. I got it for myself, but when I realised I got it, I offered it to him."

595. Asked about § 48 of his witness statement (regarding Mr Kelbrick setting up Azenith Mauritius without telling him), Mr Akpata said:

> "Basically what happened, which is what I was saying, when Steve and I discussed this contract, he had suggested that we would be able to get finance from ING in Switzerland and in order to do that, obviously Azenith is the principal of this finance so obviously you would need Azenith papers, CAC, which is registration documents and all the vital details in order to present them to ING. And that is what I did, I gave to him. In the first instance, he is like, oh, it is still taking some time, we are going to have it to do it like this. Then in the end, it was they are not going to do it, and then it turned out that he had done Azenith Mauritius as the way of getting across Azenith having finance in its name. And that is the point I got pissed off -- excuse the

> language, I got bothered and, yes, I now found out I could get my own finance, which I then did. I got finance on my own for the second year."

596. In relation to the lifting agreement between his company, Azenith Nigeria, and Mr Kelbrick's new company, Azenith Mauritius, Mr Akpata said:

> "This is the thing. It was only later I became aware of this contract, as it were. This is my financial -- yes, my accountant person, as opposed to my trader. Yes, so basically in these years, a lot of the back office stuff, a lot of the documentation was done by my staff. I was on the road a lot, like 80% of the time on the road. So a lot of this stuff was done by them and in this base, you have to remember, whether it is Arcadia or Steve, I had known at that point for 13/14 years and worked with. Sometimes documents can come after the fact or whatever. So yes, all I have asked my team is have you signed, yes, but they didn't tell me what they had signed was a service agreement because that was what they were used to and this was the first time we were having our own contract so I guess they didn't think to do a sales/purchase agreement as opposed to a service agreement which they had usually done over the years."

597. Mr Akpata was then taken back to § 17 of his witness statement, part of a section on *"My early relationship with Arcadia"*, where he said:

> "I also worked a lot with Steve Kelbrick, a senior West Africa trader who worked for Mr. Bosworth. I interacted with Mr. Kelbrick a lot over the 2000s and 2010s. He was my first port of call for trading matters. I kept on working with him until 2013, when my trading relationship with Arcadia came to an end. Prior to working with Mr. Kelbrick, I had worked with his predecessor, Yasmina, who worked at Arcadia during the 1990s."

598. It was suggested to Mr Akpata that that meant that until 2013, he dealt with Mr Kelbrick because of his (Mr Akpata's) relationship with Arcadia. Mr Akpata said he had met Mr Kelbrick through Arcadia, but they both decided to set up on their own. He said Mr Kelbrick understood that Mr Akpata was trying to grow his own business and did not want to carry on being a service provider for other companies forever. Mr Akpata said he *"never discussed Azenith business with Peter, with Arcadia"* and this contract *"was solely with Steven and his team"*. Asked about being upset with Mr Kelbrick, Mr Akpata said *"that was the reason why I wasn't dealing with APL [Arcadia London] and so forth, because they were constantly short-changing me …"*. Mr Akpata went on to confirm that he understood Mr Kelbrick and Mr Mounzer to be operating Attock Mauritius after 2009, and that because of the financial matters he had referred to, he did not want to offer the Azenith Contract to Arcadia.

599. The Claimants submit that Mr Akpata's oral evidence about why he gave the term contract to Mr Kelbrick was 'new evidence'. They submit:

> "What emerges is that Mr Akpata obtained the contract for himself and had in mind giving it to Arcadia or SK and it went to Attock Mauritius.Cs maintain that it was agreed between PB and SK that Attock Mauritius should take the benefit of this contract."

600. In my view, the evidence fails to support that contention. The evidence indicates that it was Mr Akpata's opportunity and he decided, for his own reasons, to give it to Mr Kelbrick. There is no coherent basis for concluding that Mr Bosworth had any involvement in that decision, still less that he fraudulently diverted the opportunity away from the Arcadia Group.

(b) Further compliance training

601. With the forthcoming implementation in July 2011 of the Bribery Act 2010, Arcadia provided significant further compliance training to its staff.

602. On 15 April 2011, Ms McDonald circulated to Mr Bosworth, Mr Hurley and Mr Adams a list of current service providers that Arcadia had invited to attend the compliance sessions. Mr Adams and Mr Bosworth considered the list and indicated who should attend. Azenith Nigeria, Equinox and South Energy were all on the list. Mr Fredriksen in oral evidence said Mr Adams did not tell him that he had arranged training for these service providers.

603. As part of the compliance training, Arcadia engaged Peter Crowther of Dewey & LeBoeuf LLP, who gave training sessions in May 2011. At the same time, Arcadia reviewed its service provider contracts. The Dewey presentation referred to the risks of bribery and specifically noted the use of a *"Service Provider"* in the transaction chain between *"Arcadia"* and a *"Third Party"*. Arcadia's anti-bribery manual, which referred to dealings with service providers and the potential risks, was updated. The lawyers evaluated compliance risks arising out of Arcadia's direct agreements with service providers and made recommendations.

(c) Business plan

604. In 2011 Arcadia experienced a decline in profitability, during the difficult trading environment to which Mr Adams had referred. In addition, on 24 May 2011 the US Commodities Futures Trading Commission ("***CFTC***") filed a Complaint against Arcadia in the US courts. The CFTC had for several years been investigating price manipulation in Arcadia's US oil trading activities.

605. Farahead asked Mr Bosworth and Mr Adams to review the future of the Arcadia business. Mr Fredriksen remembered discussing with Mr Bosworth the Arcadia business given the downturn in Arcadia's profitability.

606. On 18 May 2011, Mr Bosworth emailed Mr Trøim and Mr Fredriksen to say that Arcadia had completed its last compliance session in advance of the introduction of the Bribery Act (which was to come into force on 1 July 2011). The email continued:

> "I have now had time to consider fully my answer to your question, about where we should take the company. We agreed the path forward was either to expand the company or to reduce its size: staying as we are is not an option for the management or shareholders. I would like the opportunity to discuss my ideas, preferences and concerns at your convenience.
>
> I feel we have been moving towards a cross roads over the last year or so and it is time for decisive action."

607. On 6 June 2011, Mr Bosworth emailed Mr Trøim, copying in Mr Adams, in advance of a meeting *"to discuss the business plan"* arranged for 9 June 2011, and on 8 June Mr Adams sent the business plan (which took the form of an email) to Mr Trøim. The email set out three options for Arcadia. The first was:

> "(A) Continue with the existing book structures and personnel.
>
> To do so would presume that each book/business (i) projects to be cash flow positive, (ii) has known and manageable downside potential, and (iii) has material standalone potential, of say $10-15M/year or synergy or information advantage to other company business. This is not our belief and therefore is not the recommended way forward."

Option (B) was to *"[c]ut the businesses that do not fall into the above criteria"*, and option (C) was to close all businesses except for WTI (West Texas Intermediate) and related physical/grade trading in Parnon.

608. The email elaborated what option B would involve on a business by business basis. In relation to West African crude, it said:

> "Competitive advantage; pricing optionality, however with the high flat price, potential cash requirements for operating the pricing options have been prohibitive for last year and this. Risk associated with the options and consistently high OSP's mean we recommend restructuring this business in order to keep the information flow but significantly reduce our exposure. Personnel 1 trader 1 operator (we will let the trader go once we have trained someone internally to manage the physical positions)."

In relation to West African products, it said:

> "Competitive advantage; MRS joint venture could give the largest single gasoline short in West Africa, it also allows for a potential investment in the company. Fuel oil sourcing for AFI. Risk factors are high with regard to operational inefficiencies and delayed payment. We recommend keeping this business basis the profit potential $15 million but will not sell to PPMC until payments of outstanding reconciliations are made. Personnel 2 traders 2 operators."

The email expressed this view as between the options:

> "Our preferred option- to reduce the company's footprint as described in (B) above- reaffirms the long term strategy of the company. It keeps the cost base of Arcadia small, the competitive advantage of which is being revalidated in 2011 as larger competitors struggle. Furthermore, this footprint affords good global information and access to a steady stream of both trading and asset opportunity, i.e. it is a cheap "call option"."

609. The reference to "*information flow*", including specifically in relation to West African crude oil trading, is consistent with and supports the conclusions I reach in section (G)(2) above about the links between physical and paper oil trading. In addition, Mr Adams's suggestion that Arcadia should significantly reduce its exposure to West African trading again cuts against the Claimants' allegation that Farahead had believed and relied on a deceitful misrepresentation that Arcadia had ceased regular West African trading by 2009 ("*the Farahead Representatives believed, as a result of what they were told, that the Arcadia Group was not engaged in any regular ongoing trading in West Africa*"). Mr Adams was in this email writing to Mr Trøim on the footing that Arcadia was, by June 2011, still engaged in West African trading on a scale large enough for consideration to be given to whether to "*significantly reduce our exposure*". I find it difficult to see how, in those circumstances, Mr Adams could properly have given sworn evidence to the effect quoted in § 533 above.

(d) Planned engagement of EY

610. Also in mid 2011, consideration was given to engaging Ernst & Young ("***EY***") (with whom Mr Fredriksen had an existing relationship) to review Arcadia's risk management and internal controls. On 11 May 2011, Farahead met EY London to discuss this. On 18 May 2011, EY Cyprus emailed Mr Trøim setting out a summary of the issues. Farahead had concerns about the falling profitability and wanted EY to investigate the accounting of the physical trading transactions. In his oral evidence, Mr Trøim added that *"it was a much tougher market to trade in as well"*. A further meeting took place on 7 June 2011.

611. On 20 June 2011, EY sent a draft proposal for a risk management and control review across the business, in case any activities caused reputational harm to Farahead. EY would undertake an in-depth internal audit after Arcadia's statutory audit. The scope of the work was set out in a draft engagement with EY dated 28 July 2011. Ultimately, however, in October 2011 Farahead decided not to proceed with EY or an internal audit; instead, it appointed a Frontline accountant, Grant Creed, to take oversight of Arcadia's accounting system. Later, in August 2012, Farahead engaged EY in August 2012 to review Arcadia's trading lines.

(e) Bosworth retention bonus payment

612. In July 2011, it appeared that Mr Bosworth would sell his house on which the Fulham Properties loan was secured. On 8 July 2011, Mr Skilton asked Mr Hannas for a statement detailing the outstanding capital and interest due on the

loan. As noted earlier, the US$5 million that Farahead had received as the Arcadia Lebanon dividend in April 2009 had not in fact been applied at that stage, in the company's books, to reduce the Fulham Properties loan. Now, the decision was taken to apply the US$5 million against the loan. Mr Hannas in his witness statement said he believed this would have been based on an instruction from Mr Trøim or Mr Fredriksen or something one of them said. Mr Trøim in his oral evidence said *"I don't have a problem in saying that I was involved in kind of making that 5 million against Fulham Properties loan".* He said this was not the final settlement with Mr Bosworth but *"a kind of intermediate – the balance was 20 million. We reduced the balance to 15 but they didn't kind of give away the possibly that you can still come back and claim for the 20 again"*.

613. One of the concerns that Messrs Trøim, Hannas and Skilton had at the time was that the loan had been advanced in sterling, but was booked in the Seatankers records in US dollars. This exposed Mr Fredriksen to a currency loss upon repayment by Mr Bosworth, which they wished to avoid.

614. In the event, Mr Bosworth did not manage to sell his house until summer 2012. At that point, the question of the currency loss again became relevant, but there was also a further problem. There had been a mix-up in the charge documentation. The charge deed referred to Cyprus as the place of incorporation of the Fulham Properties entity. The Cypriot entity had (presumably) advanced the loan. However, Mr Hannas had accounted for the loan in the similarly named Liberian entity. Mr Hannas noted in an email to Mr Nordbaek of 11 June 2012 that this was *"my mistake"* because *"we will have to pay taxes on the loan interest"*. To resolve the problem, they managed to rectify the charge deed so that it referred to the Liberian entity instead.

(f) Equinox

615. In June 2010 Arcadia entered into a pre-financing agreement with Mr Asibelua's company, Equinox, in respect of the development of an exploration and production project under which Arcadia had the right to lift any oil produced. Two further pre-financing loans were advanced in February 2012. The loans totalled about US$16 million and Equinox made significant repayments. Mr Bosworth in his witness statement said the loans were secured and Arcadia had the first right of refusal to lift oil if oil was produced. Mr Hurley said:

> "We advanced several short term loans to Equinox, probably totalling USD 16 million across 2 or 3 different advances. These advancements were to be used for the development of one of the upstream projects that Equinox were working on – I think it was called Tom Shott. It was a production project, with proven reserves. It was a project to get the oil up and running, and get it to the market.
>
> This was with the aim of Arcadia becoming the lifter of any crude that became available to Equinox from an investment in that project. The end goal was to get oil without having to go

> into tenders with the government, where you might get awarded oil one year and not get it the next year. There was a clear policy to engage with indigenous oil companies to try and secure a supply of oil, independent from government tenders. Our contact was Mohammed Asibelua, who was very well known to Pete, and it would have been a conversation between them that led to us having this opportunity. It is my opinion that it was perfectly within Pete's remit to try to secure this volume for Arcadia.
>
> There were other operations in similar regions that were up and running, producing oil. So there was no reason why this shouldn't end up with oil coming to the market. Of course, the profits would have depended on the oil price and commercial viability. But I was quite confident that Arcadia would have gotten oil at some point. I thought it was fine to advance this money.
>
> Given the amounts involved in these loans, I would not say it was necessary to report to Farahead as a specific item, or seek specific approval. These amounts would have been on the receivables list included in Arcadia Group management accounts. If Farahead wanted to know what these receivables were, they could have obtained a detailed breakdown from the accounting team in Arcadia London, who had a full list. It was within Pete and my remit to do such a thing. I don't think we needed shareholder approval from a company with a turnover of tens of billions of dollars and profits that amounted to c. USD 600 million dollars over six year to extend a short term loan for USD 5 million at a time. For context, a single crude oil cargo could have a value in excess of USD 100 million.
>
> To add, I believe they repaid significant portions of these amounts, and that there was only a residual amount left for Equinox to repay, around USD 5 million. What happened with regards to that, I don't know, because I wasn't with Arcadia any longer. I also do not know whether the money was recovered from the particular project it was earmarked for, or from other operations of that company. But I firmly believe that everything would have been repaid if Arcadia had handled the negotiations well. Had Pete in particular still been in place, I am confident that every dollar of that amount would have been repaid." (§§ 180-184)

616. The loan agreement was signed by Mr Lance, Arcadia's corporate secretary at the time. Mr Fredriksen was asked about these loans in cross-examination:

> "Q. What is the basis to complain about a loan that the current company secretary signed off on?
>
> A. I can't -- I don't know the details, I'm sorry.

> Q. There is no basis, is there?
>
> A. I don't know even who authorised that money, so they must have done that on their own.
>
> Q. The board?
>
> A. I don't know."

617. The Claimants' RRRRAPC alleged that, like the Atlantic and Capital transactions which I consider later, the Equinox loans were poorly secured and concealed from Farahead, or that Farahead was misled about them. No further details are given there. At trial the Claimants also sought to advance unpleaded complaints of *"misconduct"* in that that the loans were undocumented or inadequately documented, and were made on terms favourable to Equinox; that Mr Bosworth used Arcadia's funds to advance his *"personal interests in Equinox"* (I am not clear whether this allegation was withdrawn, as part of the withdrawal of a similar allegation in § 1106 of the Claimants' written closing); and that Mr Hurley helped Equinox get a more favourable release when the Claimants were attempting to settle Equinox's loans. None of these latter allegations can be fairly advanced in circumstances where they were unpleaded and so not subject to the usual processes of litigation, all the more so when they related to details of transactions some 12-14 years ago which the Defendants cannot fairly be expected to address when raised in oral evidence at trial. As to the complaint that the loans were inadequately secured, Mr Bosworth made the point in cross-examination that as Defendants they would not have access to the security documentation unless the Claimants had disclosed it. Mr Bosworth insisted that there was security. It was then put to him that *"the security was not effective"*, to which he replied *"I can't comment on that. There was security at the time. If my memory is correct, there was a company on the Stock Market in Canada that was associated."* Consistently with Mr Bosworth's evidence, the document include a Loan Facility Agreement dated 10 February 2012, a Charge on Shares in Mira Resources Corp (a Canadian natural resources company) and a Letter Agreement dated 24 June 2012 which refers to the existence of a such security. The Claimants did not explain, or put to Mr Bosworth or Mr Hurley, in what respects those documents did not constitute security for the loans or such security was inadequate. I consider the Claimants to have failed to establish any misconduct in relation to these loans.

618. From around July 2011 to June 2012, another of the companies with which Mr Fredriksen was concerned, Seadrill Partners LLC ("***Seadrill***"), was in negotiations with Equinox to enter into a joint venture for offshore drilling opportunities in Nigeria. Mr Fredriksen was Chairman and a director of Seadrill from 2005 until 2019. Contemporary emails show that Farahead was aware of a proposed joint venture between Seadrill and Equinox. Further, in an email of 12 March 2012 to Mr Fredriksen and Mr Trøim, Mr Bosworth said *"Equinox chairman Mohammed Asibelua is a friend for over 20 years and is extremely well connected politically, whilst knowing and understanding western compliance concerns."* He continued:

> "He has built a company involved in a number of businesses centred in Nigeria. They have a property portfolio, have a construction division and are a shareholder in a marginal field called Tom Shot Bank. They have been successfully active in a number of different aspects of the oil industry from trading to tank farms I believe the Nigerian Government is serious about indigenisation in a number of sectors and any service provider from rigs to shipping not complying will be at a competitive disadvantage in the near future. I believe working with a local company and thus complying with the new law-, will ensure the current business continues. If the business in Nigeria is not important, then better not to engage a partner and wait to see what happens. Most importantly if you go the route of having a partner then I recommend Equinox because I trust the owner and can get him to comply with your requirements rather than impose his own. For the record I have no personal interest in his business and will not benefit from any transaction concluded with Sea Drill."

(g) Atlantic Nigeria

619. As part of Arcadia's continuing West African oil trading, it sought to diversify its supply sources of crude oil. In September 2011, Farahead approved a loan from Arcadia Switzerland to a Nigerian private oil producer, Atlantic Nigeria ("***Atlantic***"). Atlantic had been set up by Mr Kolawole Aluko, a business partner of Mr Akpata. It had an agreement to lift crude oil from certain oil mining leases that the Nigerian government had granted. Mr Akpata introduced the opportunity for Arcadia to enter into a pre-financing arrangement with Atlantic pursuant to which Arcadia would make advance payments to purchase the crude that Atlantic lifted.

620. Arcadia Switzerland and Atlantic entered into a Crude Oil Sales Agreement dated 30 September 2011 and a Prepayment Agreement. The advance payments were by way of loans and the collateral consisted of security rights over delivery of the crude oil. Pursuant to Addenda to the Prepayment Agreement, the amount advanced was increased from US$50 million to US$100 million in June 2012, and to US$150 million in September 2012. Arcadia Switzerland advanced US$50 million in October 2011, June 2012 and (in two tranches) September 2012. The Prepayment Agreement provided that Atlantic Nigeria would give first priority to delivery of crude oil to Arcadia under the Sales Agreement. The files include a memo from DLA Piper, prepared for Arcadia, summarising the transaction. It is reasonable to infer that Arcadia took legal advice about it from them, and Mr Hurley's evidence quoted below indicates that Arcadia did indeed involve lawyers in the transaction.

621. Mr Bosworth explained the attraction of the deal in his witness statement:

> "The Atlantic transaction had a number of advantages because Atlantic was not a government entity, but a private company and there were a number of reasons for working with a private company. Term contracts with NNPC only tended to be for one

> year and so, after that year, you would have to start the process all over again to renew the contract and there was no certainty that you would get the same volume. Where you had a deal with a private entity, it was different. You could negotiate a much longer contract where you would have certainty and security regarding volumes of crude oil – this was beneficial for trading. In addition, when you were dealing with a private partner, you would have access to additional information about production volumes and cargoes. To take Atlantic as an example, Atlantic was a producer in an oil field called Forcados. As such, they had access to what is called the "curtailment meeting" i.e. the production figures and information about how many cargoes would be available in the following month and whether there were, for example, maintenance works planned so that there might be fewer cargoes available. This was all valuable information to trade off, and which Arcadia had access to by virtue of its pre-finance with Atlantic." (§ 213)

622. Mr Trøim accepted that he understood the structure of the Atlantic deal:

> "A. …It's a very common way of financing oilfield developments that you actually prepay cargoes and help them getting the oil on-stream.
>
> Q. There is nothing unusual about this structure?
>
> A. It is the main business for Trafigura and other people.
>
> Q. So you understood the structure, didn't you?
>
> A. Yes.
>
> Q. You were [not] misled about it in any way?
>
> A. No.
>
> Q. You knew about Atlantic and Mr Aluko, the chairman, do you remember him?
>
> A. As I said, several times, I'm bad at remembering these specific Africans but I confirmed that we approved a US$100 million financing."

623. Between October 2011 and October 2012, Arcadia pre-financed US$150 million under the facility. Emails indicated that Mr Bosworth and Mr Hurley kept Farahead informed of developments in the Atlantic transaction; and Mr Hurley's evidence was that Farahead was aware of the crude volumes that Arcadia was buying from Atlantic.

624. In September 2012, Mr Bosworth/Mr Hurley sought to increase the amount of the financing by a further US$125 million. However, in March 2013 Farahead

refused to provide further financing, and Atlantic took its business elsewhere. Mr Hurley said in his witness statement:

> "The Atlantic deal was structured as a prepayment for crude oil over a period of time, whereby the amount advanced would be repaid, but with a deduction made from the price per barrel of the oil delivered. So, for example, if the oil price was $100, we might pay Atlantic $80 and offset the remaining $20 as a repayment of the loan. Atlantic still needed a revenue flow to cover their costs.
>
> So it's a loan that is being repaid over a period of time, and the surety for that is the oil in the ground. Initially, we rolled over the loan when the amounts were repaid. This roll-over guarantees us further deliveries. It extended the term of the loan, which was in effect being repaid and topped up each time, until the parties agreed that the loan would no longer be rolled-over. Then, we started to have repayments to reduce the loan. All in accordance with the contract. At the time that I left, everything was in accordance with the agreement.
>
> It was quite a common type of facility to enter into. We did it with Arcadia lawyers involved, with the full approval of the shareholders via Fredriksen and Trøim. Farahead rarely gave written approvals for anything, we got the approvals for this in meetings at their offices. That was the practice. There was nothing unusual about it, as far as I'm concerned. Most companies operating in that region either had or would want such a contract. This was Arcadia utilising Atlantic's strategic alliance agreement with the Nigerian government. It was a good deal for Arcadia. It was exactly the kind of opportunity John and Tor Olav wanted us to look at – whereby we were not dependent solely on government tenders to receive crude oil. This was a private transaction with a private company. In order to lift the oil, we had to provide the finance facility, which we did.
>
> I have refreshed my memory by reviewing an email chain between the Farahead auditor (Christos), Hannas and me in July 2012 about the amounts lifted under the agreement with Atlantic. Farahead were aware of the volumes that Arcadia was lifting from Atlantic. In particular, this email also highlighted the roll-over practice I discussed above.
>
> It progressed well, as I remember. Oil flow started and we were receiving crude cargoes, we were making money on the deal, and while I was still employed, it was progressing in accordance with the contract. You do get interruptions from time to time. I think there were operational issues at the terminal or pipeline from time to time, such as force majeure delays, which is perfectly normal. ...

> The collateral for this deal was the right that Arcadia would have over the delivery of crude oil. This was not just a loan which Atlantic promised to pay back – we would get their crude oil from the production facility until the loan was repaid. Farahead had every opportunity to look at the security before approving it. They had access to all the documentation they needed to see. I don't know whether they read it – that was for them. Farahead knew or could have known the outstanding amount of the loan at any point in time, so they would be aware of the roll-over I describe above.
>
> To me, the security was good enough. I believe this facility was repaid in full in the end, with perhaps an argument over the final element of it, the last USD 5 million, which is again quite normal. I'm not being flippant, as that is still a large number, but other than that, it worked well. We received the oil, we made money on the oil, the loan was repaid, and we received interest on it. As for the residual USD 5 million, I don't know the details of that, because I was no longer in the company.
>
> There is a second amount that Atlantic asked us for, of USD 125 million, in addition to the original USD 150 million. This would have given us additional volume. We approached Fredriksen and Trøim to seek approval to increase the loan amount from USD 150 million to USD 275 million. I had a verbal approval from them over the phone to go ahead and do that. I communicated that to Atlantic, and then, a few days later, Farahead reneged on that. We did not go ahead with it. They absolutely walked after I had committed to a company, they didn't care about the difficult position they had put me in or about putting my professional reputation on the line. They asked me if I had paid the money, I said no, of course I hadn't yet, so they saw nothing to worry about. They were flippant about it and reversed their decision. It's not how I conduct myself, but I was forced to on this occasion, and then had to relay that to Atlantic that we were going to pull out.
>
> We tried to find someone else to back it, but couldn't. I believe that Glencore then entered into this contract, and I think that performed extremely well. I don't know the details or numbers for that." (§§ 162-170)

625. In the RRRRAPC, the Claimants alleged:

> "65. Also in this period, Mr Bosworth and Mr Hurley approached Farahead to seek approval and additional funding to increase an existing loan made by Arcadia Switzerland in September 2011 to a Nigerian entity, Atlantic Oil and Gas Co ("Atlantic").

> 66. The enquiries made by Farahead as a result of that request revealed: (a) that the Arcadia Group, at the instance of (at least) Mr Bosworth and Mr Hurley, had made substantial loans to and/or extended substantial credit to, Nigerian entities engaged in the oil and gas business which were long overdue and poorly secured and that, inter alia, left the Arcadia Group exposed to significant losses; and (b) that the true situation in relation to these transactions had been concealed from Farahead and/or Farahead had been misled in relation to the true situation in relation to these transactions. Such transactions included transactions with, at least: Atlantic; Capital Oil & Gas Limited; and Equinox Oil and Gas Limited and Equinox Group Limited.
>
> 67. The discovery of the Arcadia's Group exposure in connection with such transactions, and of the associated concealment and/or misleading of Farahead, resulted in increased scrutiny from Farahead of the business and operations of the Arcadia Group."

626. In the Reply it was said that Mr Bosworth and Mr Hurley concealed from Farahead the fact that the loan was *"poorly secured"*, whereas Mr Fredriksen and Mr Trøim *"understood from Mr Bosworth and Mr Hurley that the loan … was secured with excellent collateral and that a parallel contract ensured the Arcadia Group had access to Nigeria crude oil on preferential terms".* Reply § 103(b) admitted that the RRRRAPC did not provide details of the Atlantic Nigeria transaction, saying that was of no relevance *"as these matters merely form background to the claim"*. Paragraph 103(c) alleged that *"as at 27 July 2012, Mr Bosworth and Mr Hurley had procured the Arcadia Group to make yet further payments to Atlantic Nigeria when it lifted crude oil cargoes on 20 February 2012, 9 April 2012, 4 June 2012 and 10 July 2012, and had not procured that payments for these cargoes were set off against the US$150 million already advanced to Atlantic Nigeria under the Prepayment Agreement"*; and that this was in order to assist Atlantic Nigeria to obtain bank facilities and contrary to Arcadia's interests.

627. However, as quoted above, Mr Trøim accepted in this evidence both that he had had approved the transaction from the outset, and that he was not misled about it in any way. Mr Bosworth gave this evidence in cross-examination:

> "Q. Mr Bosworth, the assurances you gave Mr Fredriksen about there being excellent collateral were not correct, were they?
>
> A. There was good collateral. This is exactly what -- every pre-finance, be it in the North Sea or in West Africa against production is normally a good -- what is the right word ... can't think."

and:

> "Q. The reason why Mr Fredriksen and Mr Trøim rejected your request for additional funding was because of the large existing exposure; right?
>
> A. They said yes on the Friday and on the Monday they say no.
>
> Q. And the absence of security?
>
> A. There was security in terms of oil coming out of the ground.
>
> Q. It's not traditional security?
>
> A. Yes, it is in pre-financing oil.
>
> Q. And your earlier misrepresentations to them that there was excellent security?
>
> A. That is not a misrepresentation. In our business, that was good security.
>
> Q. You were unable to say whether Atlantic was good for the 150 million you had advanced it?
>
> A. In terms of the offtake, whether they were as a company I couldn't comment, that is not my area of expertise. But in terms of lifting the oil, then we would get our money and we would make money."

628. Mr Hurley in cross-examination said this:

> "Q. In relation to the Atlantic deal which we have spoken about, Mr Fredriksen's evidence is that when the loan was first approved, it was on the basis that you and Mr Bosworth had told it him that it was secured with excellent collateral and that a parallel contract gave the Arcadia Group access to Nigerian crude oil on preferential terms. That's right, isn't it?
>
> A. I don't recall that wording.
>
> Q. Mr Hurley, you thought the collateral was good, didn't you?
>
> A. I believe the collateral was good and if you refer to Tom Francisco's message to Tor Olav in June, I think, or July of 2013, I think he agrees with me, to say even if the company becomes insolvent, they expect to be able to lift the oil and be fully repaid.
>
> Q. If you look at paragraph 167 of your fourth witness statement, you say the collateral for this deal was the right that Arcadia would have over the delivery of crude oil. But that is just a contractual right, isn't it?
>
> A. As opposed to what right?

> Q. A proprietary right of any kind.
>
> A. The way the deal is constructed is through a strategic alliance agreement, I believe, for the volume for Atlantic. So you don't actually have the oil in the ground but you have the oil once it is out of the ground and ready for delivery is my understanding.
>
> Q. And you just had a contractual right to that, didn't you? There was no security interest at all?
>
> A. I think if we look at Tom Francisco's message to Tor Olav, he will also put that in his explanation which might be useful.
>
> Q. There was no charge or proprietary interest in the oil, was there?
>
> A. Oil in the ground, I'm not sure, but rights to the oil once it was capable of being delivered, yes."

629. The Claimants submit that that evidence was *"vague and evasive".* I do not agree. Mr Hurley was explaining the nature of the collateral in commercial terms. It was the Claimants' premise, not his, that nothing short of a charge or proprietary interest could amount to good collateral for a deal of this kind (and, indeed, there was no evidence that security of that kind would even have been feasible in the circumstances). As quoted above, Mr Bosworth too considered the arrangements to provide *"good security"* in the business context in question. The fact that Arcadia took advice from DLA Piper on the transaction also makes it less likely that the Defendants improperly failed to obtain security that ordinarily would and could have been obtained for a transaction of this kind.

630. Mr Hurley's reference, in the evidence quoted above, to a letter from Mr Francisco was probably to an email Mr Francsico sent Mr Trøim on 7 August 2013. This attached an updated cover letter to the auditors, including an explanation of the Atlantic and Capital transactions, *"which now includes changes from the shareholders".* I infer that Mr Fredriksen and/or Mr Trøim had seen and approved the text of the letter. In relation to Atlantic, the letter said:

> "Atlantic Energy Drilling Concept Nigeria Limited (Atlantic) Prepayment- Arcadia Energy (Suisse) SA has a US$150 million pre-payment for Forcados crude oil with Atlantic as at FYE 31 March 2013. Operational problems have caused deliveries of oil for repayment of the loan amount to be erratic. Amortisation of the prepayment facility commenced in May and the balance currently stands at approximately US$146 million. The facility is ultimately repayable in February 2014, at which time the balance is estimated to be approximately US$110 - 120 million. Management is working closing with Atlantic in order to identify a mechanism to allow for early repayment of this facility. Shareholder commentary: The Atlantic and Capital contracts were executed without the shareholders understanding the risks

> inherent in these deals. In order to address this issue, changes have been made to the Arcadia management team, and additional controls implemented within the business. Management and shareholders are fully focused on the recovery of both of these outstanding balances.
>
> As a result of the Atlantic and Capital contracts, there is a risk that payment is not received prior to the expiration or extension of the revolving credit facility (RCF). The shareholders have, within the context of the guarantee agreement with Arcadia, expressed willingness to provide liquidity should the need arise as a result of the timing of these collections."

This communication tends to suggest that the problem was not that anyone was misled, but simply that Mr Fredriksen and Mr Trøim did not understand the risks.

631. In the light of the evidence as a whole, I consider that the Claimants have failed to establish that Mr Fredriksen or Mr Trøim were misled, or that Mr Bosworth/Mr Hurley failed to obtain security that could and should have been obtained as part of the transaction.

632. The Claimants at trial complained that Mr Fredriksen and Mr Trøim were not asked to approve the June 2012 extension of the facility. However, there is no pleaded allegation to that effect. In any event, it assumes that approval would have been necessary, which is highly questionable in circumstances where Mr Bosworth had all the usual powers of a chief executive officer of Arcadia.

633. It was also alleged in the Reply that, in an email of 27 July 2012, Mr Hurley discussed the Arcadia transaction with Farahead's auditors but *"did not mention that he and Mr Bosworth intended to increase the exposure to Atlantic Nigeria by US$100 million"*. At trial, that was elevated into a complaint that Mr Hurley had misrepresented the matter to the auditors, by telling them that US$50 million had been advanced to Atlantic but not that the amount had, by the date of the email, increased to US$100 million in June 2012. Mr Hurley replied that he imagined he was giving the figure relevant as at the year-end (31 March), which was US$50 million. The query from the auditors on its face related to the financial statements for the period ended 31 March 2012. The auditors asked for details of purchases made from the start of the contract to date; and, in addition, asked for the estimated monetary commitment in order to put a note in the financial statements. I do not consider that it would have been obvious to Mr Hurley that the latter query called for post-year-end details. Further, given that Mr Trøim accepted that he had approved US$100 million of financing, it is unclear why Mr Hurley would have had any reason to seek to mislead Farahead's auditors about the increase in June 2012 from US$50 million to US$100 million.

634. As noted above, the Reply included a complaint that, as at 27 July 2012, Mr Bosworth and Mr Hurley had procured the Arcadia Group to make yet further payments to Atlantic Nigeria when it lifted crude oil cargoes on 20 February 2012, 9 April 2012, 4 June 2012 and 10 July 2012, and had not procured that

payments for these cargoes were set off against the US$150 million already advanced to Atlantic Nigeria under the Prepayment Agreement. This seems to be a complaint about the practice of rolling over the loan (as Mr Hurley put it), rather than making deductions so as to reduce the loan transaction by transaction, as summarised in the evidence from Mr Hurley quoted in § 624 above. Section 4.4.2 of the Prepayment Agreement provided that Arcadia had made an advance payment of US$20 for each barrel. This meant that Arcadia had the right to deduct the US$20 advance payment from the price of oil purchased from Atlantic.

635. The email which Mr Hurley in his witness statement said highlighted the roll-over practice was the 27 July 2012 email to the auditors, mentioned above, which included the following:

> "We continue to roll the amount forward to be deducted from a cargo in the future. Standard business practice - we are looking to assist Atlantic in obtaining a bank facility of circ $300m in the near future and will continue to lift the volume and roll the loan during this period."

636. It was suggested to Mr Hurley in cross-examination that Arcadia was waiving the US$20 per barrel advance payment that was supposed to be repaid on each cargo. He said:

> "A. It's not a waiver. It's not how I would describe it. It is a rollover. So what you do is you can get yourself more deliveries. So you are rolling the loan continually from one cargo to the next. So if under the agreement you were only going to get for example 10 cargoes, in effect they are paying and then we are relending. It is just a rollover of the loan and that way you get additional volume. And that was known because there is communication with Dimitrios Hannas on that. He knew that that is what we were doing. There is an email or a correspondence with the group auditor. So he was aware that is what we were doing.
>
> Q. Whether it is a rollover or whatever, you were waiving your present right to repayment, weren't you?
>
> A. No, we were not waiving. We were rolling the loan over. We were extending it. We weren't waiving any repayment, we were changing the time."

637. Mr Hurley accepted that the February 2012 Addendum to the Prepayment Agreement said that Arcadia had *"agreed to waive the $20/barrel advance payment"*, but maintained that in substance the loan was being rolled over so that the period was extended and additional volumes could be loaded. Further:

> "Q. You seem to have retained the right to apply the USD20 per barrel reduction against future cargoes, if you look down, but

> what you are not doing is enforcing your present right to repayment?
>
> A. No, because I'm rolling it to the month later. The full amount still remains outstanding and we have the right to take USD20 per barrel on future cargoes until the amount is fully repaid."

That is consistent with the relevant paragraphs of the Addendum, which read:

> "Further to discussions between Atlantic and Arcadia, Arcadia has agreed to waive the $20/barrel advance payment for the lifting occurring on Bill of Lading date 20 February 2012 and shall not deduct this Advance Payment from the purchase price of the 906,027 barrels purchased from Atlantic. Arcadia shall, however, retain the right to apply this $20/barrel deduction against future cargoes, and this addendum in no way reduces the overall obligation of Atlantic with regard to the Agreement."

638. The documents include email exchanges between Mr Bosworth and Mr Trøim on this subject in March 2013. On 24 March 2013, Mr Trøim said:

> "refer to our conversation earlier today. The shareholders of Arcadia would if possible like to see an earlier repayment of the existing USD 150 million Atlantic loan. In line with what we discussed you will work with Atlantic to seek to arrange a take out of Arcadias existing USD 150 million facility prior to scheduled repayment in 2014. Until such repayment take place it is of vital importance that we stick to the existing agreement which gives Arcadia the right to net USD 20 per barrels of any sale of Atlantics oil cargos. Such proceeds will be used to reduce the outstanding loan balance. Please confirm your commitment to this."

and the following day:

> "Sorry for being a pain in the neck, however we would appreciate if you can confirm that we will use the USD 20 per barrels net of for all planned Atlantic cargoes, and thereby not wave the right to net of as Arcadia has done so far."

639. On 27 March Mr Bosworth told Messrs Trøim, Adams, Hurley and Lance:

> "I was not able to meet face to face with Atlantic today, due to their travel arrangements. However I had a good discussion and made it clear my priority is to have Arcadia paid back its money as soon as possible. They confirmed they have two NDA's signed and are negotiating with a view to getting the new off taker/financier to take Arcadia out of its current position. We have agreed to meet next thursday in Swiss to agree a timetable for actions to be taken by both parties. I will update you if I hear

> anything further and would like to have a call to discuss strategy next wednesday."

Mr Trøim responded:

> "We appreciate the update.
>
> 1. Did you also inform them that Arcadia is likely to use their contractual right to net off USD 20 per barrels for future cargoes?
>
> 2. Did you get an overview cargo program including Arcadia lifting's?"

Mr Bosworth replied:

> "I pointed out we had not elected the $20 per barrel discount but did not threaten them. I will request the overview for my meeting next week."

640. Asked about this in cross-examination, Mr Bosworth said *"It was a tense situation. That was my view at the time and I told Tor Olav what it was."* There was also the following exchange:

> "Q. And you waived the repayment for the USD20 per barrel mechanism?
>
> A. Perhaps on one occasion we may have done, I don't recall.
>
> Q. It is on over 4 million barrels of oil which would be special times USD20 per barrel, that is 80 million repayment that had been waived?
>
> A. I don't know if that is accurate or not.
>
> Q. {I/7146/1} please. Yes. There is the reference to the 4 million on the second paragraph --
>
> A. No, I'm not doubting the volumes. I'm saying --
>
> Q. That is a matter of documentary record which we will refer to.
>
> A. I'm not doubting that.
>
> Q. Again, this is gross misconduct in relation to the management of Arcadia's money.
>
> A. No, it was not."

641. In their closings, the Claimants submitted that Mr Bosworth's and Mr Hurley's failure to exercise the deduction right *"constituted a deliberate decision to avoid an opportunity to reduce Arcadia's significant exposure to Atlantic"*. In my

view the evidence does not establish that. Rather, it appears to have been a matter of business judgement on how best to promote Arcadia's interests. Moreover, the notion that Mr Bosworth or Mr Hurley deliberately set out to damage Arcadia's interests makes little sense in circumstances where (i) they prospectively stood to benefit from Arcadia via bonuses and (ii) even after his departure from Arcadia, Mr Bosworth continued to provide assistance in recovering money owed by Atlantic, Capital and Equinox (see below).

642. No cause of action is pleaded in relation to the Atlantic transaction. However, the Claimants seek to rely on their gross misconduct allegation as part of their defence to the Counterclaims, which I consider later.

643. Three final points arise from the Atlantic transaction.

644. First, Mr Bosworth's evidence was that there was a profit sharing arrangement between Arcadia Switzerland, Azenith Nigeria (Mr Akpata's company) and Earnshaw (Mr Aluko's company) who had brokered the transaction. He said:

> "238. Arcadia Lebanon made a number of payments to Azenith Energy Resources Limited and Earnshaw Associates including payments made on 20 March 2012 and 7 September 2012 of USD 967,030 and USD 250,035 respectively. This was in connection with a contract held by Arcadia Switzerland with Atlantic Petroleum which was fully authorised by Farahead. Pursuant to that contract, there was a profit share agreement whereby Arcadia Switzerland, Azenith Energy and Earnshaw Associates were each entitled to 1/3 of the profits. These payments made by Arcadia Lebanon to Azenith Energy and Earnshaw Associates were pursuant to that profit sharing arrangement with Arcadia Switzerland."

645. Mr Akpata in his witness statement explained the situation and his role and that of Mr Aluko in this way:

> "63. In the 2000s, the crude oil business in Nigeria began to change a little bit. The traditional form of 'sponsorship' by contract holders, often retired generals and traditional rulers, remained, but new players started entering the scene. These were often Nigerian companies which had been granted permission by the Nigerian government to extract and sell crude oil, and were known as private producers. Previously, only NNPC and foreign majors like Shell had been able to extract crude oil from Nigerian oil fields and sell this on the international oil markets. Over time, however, more Nigerians in private business acquired more of the knowhow needed to manage crude oil production. Oil traders would seek to enter into contracts with these private producers just as with NNPC.
>
> 64. One of these private producers was a company called Atlantic Energy Drilling Concepts Nigeria Limited. Atlantic was owned by various Nigerians, one of the most influential of which

was a man called Kola Aluko. Mr. Aluko was someone I had come to know as a prominent figure in the Nigerian energy sector. Atlantic had been granted licences and an opportunity to extract crude oil from a particular set of oil fields. One of the major deals that I helped Arcadia win was a contract with Atlantic, which was entered into on 30 September 2011. Atlantic been granted the rights to extract crude oil in certain Nigerian oil fields. However, as is often the case with private producers in Nigeria, Atlantic did not have the financial firepower to fund the process that would allow it to exploit the rights it had been granted.

65. Atlantic was therefore looking for a foreign partner to help fund the extraction and lift the crude oil. Atlantic could have offered the opportunity to any number of oil traders. I know, for example, various of the big oil traders, such as Trafigura, were competing for the opportunity.

66. The kind of contract that Atlantic was contemplating entering into was a "pre-finance" contract. A pre-finance contract is where a buyer advances to the producer the sums of money necessary to start producing the crude oil. The outside investor is then repaid in barrels of crude oil once production comes online. Arcadia did a pre-finance deal with Atlantic, in which it advanced USD 150 million to Atlantic. This became the Atlantic contract.

67. I was, I think it is fair to say, instrumental in securing the Atlantic contract for Arcadia. A couple of years before the Atlantic contract, I became aware of what Atlantic was doing and that it was looking for a partner. In order to try and win this opportunity for Arcadia, I spent many months working hard to persuade Mr. Aluko and Atlantic that Atlantic should work with Arcadia as their lifter when production started. The process of securing Atlantic's favour towards Arcadia was long and took a lot of effort. I handled this work for Arcadia, which, essentially, consisted of fronting its bid for the Atlantic contract. I arranged for and attended a number of meetings with Atlantic at which I advocated for Arcadia to be granted the Atlantic contract. Critical meetings took place with Arcadia both in London and in Switzerland between Atlantic and Arcadia from an early stage. I arranged lots of those meetings but I did not always participate. What they were negotiating was technical and specific and that part I had to leave to them, it was outside my expertise. In many respects, this work was similar to the work I did in trying to obtain sponsorship for Arcadia from contract holders in respect of oil contracts, when it bid for crude oil contracts with NNPC or products contracts with PPMC.

68. Mr. Bosworth and the other traders at Arcadia were not very involved in this work, just as they were not normally involved in

> most of the negotiations for other crude oil contracts or products contracts. They left this work to me. As a Nigerian active in the Nigerian oil sector, I was far better placed than Mr. Bosworth or his colleagues in London and Geneva to do this work. I don't think they could have done it to themselves, even if they had had the time to around their day jobs as oil traders. I chased the business down, especially with Mr. Aluko. All in all it was about two years of work. And in the end, Arcadia beat off other bids from other major oil traders to win the Atlantic contract.
>
> 69. I would normally expect to be paid a substantial fee by Arcadia for my work securing the Atlantic contract on the barrels lifted under the Atlantic contract. But instead, I negotiated a profit share, and everyone was receptive to that. From memory, a third was kept by Arcadia, a third went to Mr. Aluko, and a third went to me. On this occasion, Arcadia did pay me my share of the profit share and the fee I was due."

646. Mr Akpata in his oral evidence agreed that Mr Aluko was one of the owners of Atlantic (as he had said in his witness statement). He was taken to certain invoices for profit sharing which he had addressed to Mr Hurley rather than Arcadia (though one was addressed to Arcadia Lebanon), and did not know the reason for that. He had not been able to locate any written profit share agreement with Arcadia Switzerland. It was not suggested to Mr Akpata that his evidence was untrue or that he had not been entitled to a profit share (although it was suggested that there would be no reason for Arcadia to pay Mr Aluko).

647. In cross-examination, Mr Bosworth agreed that the Crude Oil Sales and Prepayment Agreements did not refer to a profit sharing agreement, but said that *"I wouldn't expect them to because those were with Arcadia Switzerland and pursuant to our agreement with John and Tor to pay bills on behalf of Switzerland, I wouldn't expect them to"*. He agreed that Mr Aluko was also an owner of Atlantic, was asked these questions:

> "Q. Now you are paying side payments to the owner of Atlantic?
>
> A. That is what he requested.
>
> Q. For no legitimate commercial purpose?
>
> A. It was the joint venture that we had with him in order to be able to get the contract and if we hadn't done it, for sure our competitors would have done."

648. One of the problems with this line of questioning is that there was no extant pleaded allegation that these payments were made for no proper purpose. A late amendment, to the effect that the allegation of a profit share was false, was disallowed for the reasons given in the Annex to this judgment. In any event, on the available evidence I am not persuaded that there was no profit sharing arrangement. I found Mr Akpata's evidence on that point, as well as Mr

Bosworth's, plausible and coherent. One consequence of that is that payments which Arcadia Lebanon made for Azenith Nigeria in 2011 and 2012 pursuant to the profit sharing arrangements are likely to have been made for the benefit of Arcadia Switzerland, thus supporting Mr Bosworth/Mr Hurley's case about the understanding referred to in section (I)(11)(e) above.

649. The second further matter arising in relation to the Atlantic transaction is how it could square with the Claimants' allegation that they were told that Arcadia had ceased all regular trading activities in West African business by 2009. In their Reply, the Claimants said that they had, since Mr Adams's first affidavit, stated that it was *"a particular and specific exception to Mr Fredriksen's and Mr Trøim's general understanding that the Arcadia Group had ceased ongoing regular crude oil trading in West Africa"* (§ 96) and that Mr Fredriksen and Mr Trøim were willing to agree to it as a project not involving purchasing crude oil from a NOC (§ 107.10). I have already found that there was no such understanding. It is therefore unnecessary to consider whether the Claimants' allegation could be reconciled with the position regarding Atlantic.

650. The third matter is that the Claimants sought to advance an entirely unpleaded allegation that Mr Bosworth and Mr Hurley had a personal interest in a company called Ark Exploration, to which Arcadia Lebanon paid US$1,000,030 on 10 October 2011. Once again, that is not a contention that could or can fairly be advanced. I am in any event unpersuaded that it had any merit. Ark was owned by Mr Aluko, the owner of Atlantic. As noted earlier, Arcadia Switzerland and Atlantic entered into a Crude Oil Sales Agreement dated 30 September 2011 and a Prepayment Agreement, under which Arcadia Switzerland obtained NNPC crude oil. The invoice for the payment in question included the description *"ratification of NNPC crude lifting schedule contract for 2012 on OML 4 and 41"*. Blocks OML 4 and 41 were not referred to in the Atlantic agreement but were referred to in a term sheet for loans to Arcadia Upstream, a company set up by Mr Hurley/Mr Bosworth in connection with the Seven Energy project. The Claimants suggested in cross-examination that the payment thus related to Arcadia Upstream's investment with Seven Energy rather than to Arcadia's own business. Mr Bosworth said that he believed the payment did relate to Arcadia Switzerland's lifting of the oil under the Atlantic contract. Mr Bosworth/Mr Hurley point out that, whereas Arcadia Switzerland did continue to lift crude in 2012 under the Atlantic contract, it was Shell who lifted crude for blocks OML 4 and 41: by the time of the invoice, Arcadia Upstream had decided not to participate in OML 4 and 41 any longer and had reached an agreement for Seven Energy to buy out its interest (as evidenced by a letter of 28 September 2011 from Arcadia upstream to First Bank of Nigeria). I agree with Mr Bosworth and Mr Hurley that the rubric of the invoice is more likely simply to have resulted from a clerical mix-up by someone working for Mr Aluko.

(h) Capital Oil & Gas

651. I noted earlier that Arcadia sought to expand its activities in West Africa to include products business. Trading in West African products also involved Arcadia entering into service provider agreements, although the risks involved

in products trading were somewhat reduced compared with trading in West African crude.

652. Arcadia Switzerland had service provider agreements in respect of West African products. These agreements included two dated 1 April 2011, one with Equinox and one with Azenith Nigeria. Both were signed by Mr Tuke. Until 30 November 2023, Mr Tuke was a director of Arcadia London, along with Mr Mills-Webb, the Seatankers in-house counsel in charge of this litigation.

653. Between 2011 and 2012, as part of that expansion, Arcadia Switzerland contracted to deliver gasoline to Capital in Nigeria. Arcadia arranged the sale of one of Frontline's vessels (the '*Mongolia'*) to Capital to help deliver the cargoes.

654. It appears from a witness statement of Mr Duncan dated 28 December 2012, sworn in Rotterdam proceedings for the arrest of the 'Mongolia', that Arcadia's deliveries of cargoes of gasoline to Capital were originally secured by letters of credit. However, for a transaction in December 2011 relating to a cargo on the 'Arctic Flounder', Capital, having agreed to provide a letter of credit, was unable to do so (apparently due to cash-flow difficulties arising from delays in local subsidy payments from the Nigerian Petroleum Products Pricing Regulatory Authority (*"**PPPRA**"*)). Mr Duncan said that in discussions in early 2012, Patrick Ubah (the owner of Capital) said it was usual for companies in the region to trade on terms where payment was due 60-90 days after delivery, to give the purchaser time to receive the subsidy before paying for the cargo. Those were not the terms on which Arcadia usually operated. However, as the oil price was rising, and in an attempt to accommodate Capital's payment difficulties, Arcadia agreed to change to a bills of collection system for the Arctic Flounder cargo. Mr Duncan said that in practice, payments and deliveries were piecemeal, and that Arcadia decided to change the payment terms with a view to preserving the relationship with Capital and helping it through a period of financial difficulty; and also in an attempt to ensure that payments from Capital were made more frequently and on time.

655. Mr Cartwright sent an email to Mr Hurley on 19 April 2012 stating *"UBA are not going to sign the documentation we presented, this is going to take some serious work to get all this fully documented and operating as we want. The attached is from Capital and I have asked UBA to confirm that they will honour these instructions. At this point in time we will get no better so we have to make a call on whether we go with this or not."* Mr Hurley responded: *"This I agree is now pure judgment call as to whether we release any further volume my concern is that unpaid amounts on vessel plus accrued charges plus 20 kt of product removes any real leverage in terms of collateral value we would otherwise have."*

656. By June 2012, in light of Capital's continuing failures to pay for the cargoes and to honour Mr Ubah's repeated promises to pay, Messrs Bosworth, Hurley, Duncan and Cartwright considered alternative payment mechanisms. They received legal advice from their Nigerian lawyers, Olaniwun Ajayi LP, on an arrangement between Arcadia and Capital. This email was forwarded to Mr Bosworth and Mr Hurley on 13 June 2012. In Olaniwun Ajayi LP's email, the

existing supply structure and payment mechanism between Arcadia and Capital were summarised as follows:

i) Arcadia Switzerland supplied gasoline to Capital;

ii) Payment for the gasoline was made on the basis of documentary collection from UBA (Capital's bank) in a 60-day credit cycle;

iii) Before payments were made to Arcadia, Capital would sell the gasoline onwards and credit the proceeds of the sale into their account with UBA;

iv) This was credited in Naira (Nigerian currency);

v) Capital's account with UBA was registered in the joint names of Capital and Arcadia;

vi) The funds in this account were not to be released until Arcadia gave UBA instructions to use the funds to bid for US dollars;

vii) These US dollars would then be credited to Arcadia's account.

657. The situation deteriorated, and by the end of 2012 Capital owed around US$71 million to Arcadia. In addition, there was an investigation into Capital by the Nigerian Special Fraud Unit in October 2012. Asked whether Capital had a reputation, Mr Duncan said in cross-examination *"Yes, they did, but so did every other local company unfortunately."* Arcadia arranged for the Mongolia to sail to Rotterdam so that the oil on board could be restored and sold after sitting on the vessel for some months. However, Capital's bankers Access Bank arrested the ship and cargoes. Arcadia was able to have the arrest over the ship lifted but not the arrest over the cargo. By mid 2013 the exposure was about US$494 million (or possibly US$124 million: the evidence is not quite clear).

658. On 23 May 2013 Mr Trøim sent an email to Mr Bosworth and Mr Hurley referring to a meeting the previous day *"where we informed that Arcadia have an outstanding claim against Capital Oil & Gas of up to USD94 million. We are shocked and disappointed that this information has not provided to us earlier"*; and requesting a memo providing full details. Mr Bosworth replied stating that the debt would be paid in full. On 27 May, Mr Trøim complained that Mr Bosworth had effectively hidden a material exposure, and repeated his request for a memo. Mr Bosworth, replying the same day, did not respond to the complaint that the exposure had been hidden; but he reported that the board of AMCON (the Asset Management Corporation of Nigeria) had approved a loan to Capital subject to legal documentation, which was being finalised, and that various further steps then needed to be taken leading to payment being made. On 28 May Mr Bosworth explained that AMCON was set up in July 2010 and its remit now included bailing out industries deemed to be of vital national interest, including petroleum product distributors; and that Capital had been able to negotiate the full payout of its debts including those owed to Arcadia Switzerland and VTN. He added:

> "Be assured that we are monitoring the situation within Amcon and Capitol from various outside and inside sources. I am personally in regular dialogue with the Chairman of Capitol and the CEO/MD of Amcon. Unfortunately patience is required in these circumstances because of the bureaucratic nature of the Nigerian government and the highly political nature of such transactions. However I firmly stand by my schedule outlined earlier today and believe any aggressive intervention at this point in time would be counter productive to ensuring a full and timely repayment of the debt."

In response to the question who in Arcadia knew about the unpaid debt, Mr Bosworth said that he, Mr Hurley, finance, accounts, mid-office, Paul Duncan (operations) and Bob Haines (trading) knew about it.

659. It appears that Mr Bosworth's effort bore fruit, in that in an email of 18 June 2013 Mr Francisco reported to Mr Trøim and Mr Adams that *"we heard from Patrick Ubah yesterday (via Pete) that the final Ancom-Capital agreement has been fully signed".*

660. The Claimants alleged in the RRRRAPOC that the Capital transaction (along with the Atlantic and Equinox transactions) was one where *"the true situation"* had been concealed from Farahead and/or Farahead had been misled. No further details were stated. In the Reply, it was suggested that Mr Bosworth and/or Mr Hurley had procured or suffered Arcadia Switzerland extending Capital credit of over US$122 million by April 2013 for gasoline delivered to it, *"for which Arcadia Switzerland received inadequate security".* As with the Atlantic transaction, no cause of action is pleaded in respect of the Capital transaction. However, the Claimants seek to rely on it as part of their defence to the Counterclaims, which I consider later.

661. Mr Bosworth in his witness statement said he did not have a very good memory of the finer details of the transaction, but recalled that Arcadia Switzerland extended credit terms to Capital as part of the delivery of that gasoline, such that cargoes were delivered with payment becoming due thereafter; and that this was part of Arcadia's continued expansion of its products business into West Africa. After his resignation from Arcadia in March 2013, Mr Bosworth said *"Arcadia / Farahead requested my assistance in obtaining repayment of the funds owed to it by Capital and Atlantic. This involved me, often at my own expense but sometimes paid for by Arcadia's external counsel at that time (DLA Piper), travelling to and from Nigeria and across Europe in an attempt to broker and assist in negotiations between Arcadia, Equinox, Atlantic, Capital and AMCON".*

662. In relation to Capital, Mr Bosworth recalled that he and Mr Duncan managed to convince Mr Ubah to approach AMCON and reach an agreement whereby AMCON took over the debt owed by Capital to Arcadia. He believed AMCON agreed to take over any debt up to the tune of around US$120 million, which (he recalled) more than covered the exposure of the Arcadia group in connection with the Capital transactions. Mr Bosworth recalled he and/or Mr Duncan advising Arcadia that they should try to sell in the market AMCON's written

obligation to take over the debt at a discount and get out the money which they were owed. He also recalls their advising Arcadia to accept payment of the debt in Nigerian Naira, in order to get the money out; but that Mr Adams did not take his and Mr Duncan's advice on these points.

663. In cross-examination, Mr Bosworth explained that:

> "… there were a number of large independent distributors of product into Nigeria and what we were trying to do was to expand our business profile in Nigeria away from just dealing with government on delivering products. This is gasoline and gas oil. And we had concentrated up until then, and probably were still continuing to do so, on working with a company called MRS. We were introduced to capital as another significant distributor, both of them probably in terms of size were in the top three or five distributors in Nigeria. And Mr Okeke assisted us in developing that business with a gentleman called Patrick Ubah. They came from the same village, in the east"

664. Mr Bosworth agreed that it was likely he read a due diligence report provided to him at Arcadia in July 2009 advising that caution should be exercised in dealing with Mr Ubah and that Capital had defaulted on banking facilities. Mr Bosworth said *"I think you have to take risk in this type of business and that is exactly why we enlisted the services later on of Mr Okeke, as the securest way of doing that".* Asked about security and prepayment, he said *"I'm not aware of many Nigerians who are capable of pre-paying"*, and that he could not recall the details as regards security. The cross-examination included the following passage which the Claimants highlight:

> "Q. And then in February 2013, you learned that capital was seeking to settle claims of over USD100 million against it, didn't you?
>
> A. I think -- when? February?
>
> Q. 6 February 2013. I'm going to show you a draft settlement agreement between Capital --
>
> A. I think we were aware of issues with him prior to that.
>
> Q. Can you tell us what those issues were before February2013?
>
> A. I think we moved the vessel some time towards end of 2012 out of the territorial waters of Nigeria, or it was moved and it went to Rotterdam. And either the ship or the cargoes were arrested at that time by Access Bank.
>
> Q. Right, so problems emerge in December 2012.
>
> A. I don't know which month it was. I'm saying it was towards the end of 2012.

> Q. I see. If we go to bundle {I/7177.2/1} this is an email from Mr Ubah to you asking you to comment on a draft settlement agreement that has been prepared for him, with Access Bank. And if we look at -- so you see that? You have actually been asked to comment on the draft settlement agreement so you are going to now review the settlement agreement which you can find at bundle {I/7177.3/1}?
>
> A. I didn't quite see where I comment on it.
>
> Q. No, he is asking you to comment on it. So, this is the attachment and if you go to {I/7717.3/3} paragraph 5, you can see that it is referring to the fact that Capital owes 133 million.
>
> A. Okay.
>
> Q. And none of this at the time is disclosed to Farahead.
>
> A. No."

Mr Bosworth went on to say that he could not recall whether the position had been discussed with Farahead prior to May 2013. He recalled the problem had arisen from a legal complication about the time at which title to the 'Arctic Flounder' cargo had passed, which had resulted in Access Bank having priority. Mr Bosworth denied a suggestion of gross misconduct and said *"It was my job to do things like that".*

665. Mr Hurley in his witness statement said:

> "Arcadia was selling products such as gasoline to Capital on an open account basis, making small product cargo deliveries over a period of time. There were subsequently issues in Nigeria. The government of Nigeria used to pay a subsidy for certain products, which formed part of the revenue for the local companies and enabled them to sell at a discounted price to the people. The government withdrew this subsidy, whether permanently or temporarily, I don't know, and that caused cash flow issues. Capital's cash flow and ability to pay us was massively reduced. In addition, there was an issue with a vessel that was involved – ...
>
> The approximate USD 122 million was the total amount that became outstanding as a result of a number of different transactions and events, including a profit for Arcadia. This is a build-up of amounts due from Capital to Arcadia after the delivery of products. We may have extended payment terms to them, I can't remember, but we may have given them 30, 60, 90 days to pay. It wasn't a formal loan agreement, it would have just been payment terms under the contract.

> Now, I don't recall when this was put in place, but we had a guarantee from the Asset Management Company of Nigeria, or AMCON, which is state owned. This guarantee was for AMCON to repay every single dollar that was due to us from Capital. I think DLA Piper acted for us in this regard in putting this guarantee together. I believe other companies received payments from AMCON as well, not necessarily for product deliveries but certain asset investments as well, and financial exposure was covered by these guarantees, and I believe they were paid. So my comfort was that we had this government guarantee to be repaid in full.
>
> Anything that Capital couldn't pay us, AMCON would. This included a profit element as well for Arcadia. There were also built in profits in the economic analysis that was presented as the amount due. I had confidence in the guarantee, and that Pete's local knowledge and ability to function in Nigeria would have made the guarantee work.
>
> Farahead knew about the situation, and I think Trøim instructed the lawyers when they were appointed. They knew about the AMCON guarantee as well.
>
> …
>
> The AMCON guarantee covered everything. If Arcadia or Farahead did not get everything back, in my opinion, they did something wrong. We should have received repayment in full, including a profit element, if Farahead had let competent people run the negotiations rather than Paul Adams and Tom Francisco, who were in my opinion not experienced enough to handle it." (§§ 173-179)

666. Mr Hurley in cross-examination accepted that the situation was problematic, but said it built up over a period of time for a number of different reasons. He said Arcadia would not necessarily have exposed the matter to Farahead until they knew what the solution was going to be or was to be pursued. He said *"it was not hidden. Whatever was in the accounts, was in the accounts. It don't know how it was recorded but they would be there."* In response to the suggestion that the situation was problematic because he had not disclosed the escalating exposure to Farahead, Mr Hurley said:

> "No, my behaviour doesn't cause a problem with a company that is not paying for a ship or the ship gets arrested or, I think, an integral part of the difficulty to pay or to ship was that I believe the Nigerian Government removed the subsidy. So you couldn't deliver product in without taking a huge loss whilst the subsidy was removed. "

As regards the transaction terms, he said *"I can't remember all the details I'm afraid, but the sale to them I believe was an appropriate thing at that time and*

we are in a trading environment and sometimes difficulties do arise and what happens then is you find a solution and that is what was found".

667. Finally, the letter to the auditors to which I refer in § 630 above, indicated an acceptance that the shareholders (i.e. Mr Fredriksen, Mr Trøim and/or Farahead) had not understood the risks inherent in the deal. It did not suggest that Mr Bosworth or Mr Hurley had misled anyone or committed some form of misconduct.

668. Viewing this evidence in the round, I am not persuaded that any of it amounted to misconduct, still less fraud. As Mr Hurley aptly put it in his April 2012 email referred to in § 656 above, he and Mr Bosworth had to make judgement calls. They were, as he said in cross-examination, operating in a particular trading environment, in which it was (as Mr Bosworth said) necessary to take risk: and, not unreasonably, Mr Bosworth regarded as his job to do so where he considered it appropriate. So far as the 'concealment' allegation is concerned, there can be no suggestion that the Capital transaction and indebtedness was hidden from Arcadia's accountants, auditors or staff. The complaint is simply that Mr Bosworth and Mr Hurley did not tell Mr Fredriksen and Mr Trøim about it until the outstandings had become large. They were not strictly obliged to do so: as the company's CEO and CFO it was their job to run the company, and to comply with audit requirements. It might have been good practice, in the context of the Farahead group as a whole, to have reported the increasing debt to Mr Fredriksen and Mr Trøim at an earlier stage. It seems Mr Bosworth and Mr Hurley did not want to do so until they had a solution or at least a proposed solution. It does not appear to me that their approach could fairly to be said to amount to 'concealment'.

(14) Events in 2012

(a) Summary of investment status

669. On 9 March 2012, Mr Hannas emailed Mr Fredriksen's pilot, Kjell Nordbaek a *"summary of the investment status in Arcadia"* to be provided to Mr Fredriksen. Mr Nordbaek forwarded the copy to Mr Trøim. Mr Fredriksen agreed that he often asked for such updates. The summary attached to the email set out Farahead's total investments and payments into Arcadia, and the money that it had received out, by way of dividends and guarantee fees. The Arcadia subsidiary offices were listed. A note at the foot of the summary said: *"Dividends received/paid from Arcadia Beirut – not included"*.

(b) Cakasa

670. On 28 March 2012, at a meeting with Farahead, Mr Bosworth discussed a further West African project in Calabar, Nigeria, to construct an oil depot and tanker truck loading facility. The board paper provided to Farahead at the meeting said:

> "Arcadia Petroleum Limited has a successful physical oil trading track record in Nigeria spanning several decades. Arcadia would like to build on the successful oil trading track record and strong

> relationships in Nigeria by increasing the refined products trading opportunities in Nigeria, both imports and exports.
>
> Arcadia recognises that the competitive nature of refined products trading increasingly requires the investment in mid-stream infrastructure e.g. pipelines, tankage, in order to create a sustainable competitive advantage. Arcadia together with a local partner has identified the opportunity to design, construct and operate a refined products depot in the free trade zone (FTZ) in Calabar.
>
> The investment in depot infrastructure in Nigeria creates net asset value for Arcadia, provides the physical infrastructure to sustainable enhance the refined product trading activities in Nigeria and surrounding areas and serves to strengthen key local relationships."

671. The local partner was Samon Petroleum, which was owned by Mr Okeke, who was also involved in the Capital transaction (see §§ 663-664 above). It is common ground that the Calabar project was a legitimate Arcadia project. The board paper indicated its current status as project approved, site acquired, engineering contractor appointed and legal/regulatory approvals almost complete. A Confidential Information Memorandum dated 10 April 2012 indicated that DLA Piper were the legal advisers and Cakasa were the engineering contractors. The overall estimate project cost was approximately US$32 million. Calabar had previously been mentioned, as a project in appraisal, in a Farahead Group Asset Investment Schedule dated 31 January 2012. Mr Okeke had been head of PPMC but, Mr Bosworth said, retired in mid 2011.

672. On 3 April 2012, a few days after the meeting update quoted above, Arcadia Lebanon paid US$2 million to Cakasa Nigeria, which Mr Bosworth/Mr Hurley pleaded as an example of a payment made in relation to the Calabar project, and hence in respect of the Arcadia Group's business development activities. The Claimants in Reply admitted the payment but otherwise made no admission. A month later, on 4 May 2012, as part of an email updating Mr Trøim on agenda items for the next meeting, Mr Hurley said, as a *"Calabar update"*, that *"[t]he partner ha[s] paid usd 2 mill"*.

673. In his witness statement, Mr Bosworth said the payment on 3 April 2012 was "*in connection with a project I believe between Arcadia London and Samon Petroleum which was building a tank farm in a place called Calabar in Nigeria. Part of the costs involved in the Calabar tank farm were borne by Arcadia Lebanon. Some of the other costs were borne by Arcadia London. My recollection is that the costs borne by Arcadia London was around USD 800,000*" (the latter figure having been corrected from US$8 million at the start of Mr Bosworth's evidence). Mr Hurley similarly said the payment was made *"towards a terminal in Calabar"*, though he said he did not know the details. At trial, Mr Bosworth said this about the payment:

> "This is post Mr Okeke having left, retired from the corporation some time in the middle of 2011. We had enlisted him to assist us with working with independent distributors in Nigeria, one of which was Capital and he had a very close relationship with him. And this was a payment to him for those ongoing services. He requested it to go into what had I think by that time had become solely their own project. We were not going ahead with it corporately. And he requested we pay it to a company called Cakasa and Cakasa was an old and publicly quoted engineering entity, I remember the name of the CEO, although I never met him, he was a man called Mr Yaro. So he requested his payment for his consultancy services to be paid into Cakasa Nigeria."

674. The Claimants criticised Mr Bosworth on the basis that this was a different version of events from that set out in his witness statement. To a degree it was, since it meant that although the payment was still in connection with the Calabar project, it was a payment for Mr Okeke's services which he directed should be used for his own investment in Cakasa. On the other hand, Mr Bosworth's explanation was consistent with a document that the Claimants disclosed during trial but did not put to Mr Bosworth, namely an email to Arcadia dated 17 April 2012, two weeks after the payment, from Cakasa's managing director, Mr Yaro. The email said "*we are pleased to inform you that our company – Cakasa Nigeria Co. Ltd. – is committing US$2,000,000.00 (Two Million Dollars) on behalf of Samon Petroleum FZE to kick-start the project with the execution of critical works as detailed in the BOQ and in line with the IFC Drawings*" (my emphasis), i.e. indicating that Samon had just invested US$2 million in the project. Mr Bosworth's evidence at trial was also probably consistent with Mr Hurley's email of 4 May 2012, mentioned above, indicating that *"the partner"* (presumably meaning Samon) had paid US$2 million. Further, Mr Okeke was indeed a service provider to Arcadia. Arcadia signed a service provider agreement with Samon dated 5 July 2012, and later engaged him to help recover money from Capital. Whilst the Claimants suggest no problems emerged with Capital such as to require Mr Okeke's services until July 2012 i.e. later than the 3 April 2012 payment, Mr Bosworth's evidence about Mr Okeke's services was not limited to that period or that particular problem: see the evidence quoted in §§ 663 and 673 above.

675. The Claimants in their cross-examination of Mr Bosworth, and their closings, embarked on a lengthy attempt to advance an unpleaded case, relying among other things on details of the invoicing process, to the effect that the payment did not relate to the Calabar project at all (a contention belied by the Yaro email I mention above) but instead concerned *"[Mr Bosworth's] own business dealings with Ifesinachi Okeke"* and/or a personal interest held by Mr Bosworth in the Calabar project, which Mr Bosworth specifically denied. The Claimants also suggested in closing that Mr Bosworth had admitted in cross-examination (in the passage quoted above) that by the time of the 4 April 2012 payment, Arcadia Group had withdrawn from the project altogether. However, if Mr Bosworth meant to say that, then he was evidently mistaken. The board papers mentioned above suggested that it was very much a live project for Arcadia, as does Mr Hurley's 4 May 2012 email a month later. It was only later in the year

when the documents indicate that the project had been placed on hold. It was also suggested that Mr Duncan, in a letter and invoice later in 2012, assumed the Calabar project to be Mr Bosworth's own personal project, which Mr Duncan did not accept (*"I'm sending it to him as the head of Arcadia"*).

676. Mr Bosworth also made two payments from his own money to Cakasa, a year later in February and March 2013, which he said were for the benefit of Mr Okeke (and paid to Cakasa at Mr Okeke's request) in connection with their attempts to recover Arcadia's money from Capital/AMCON (see §§ 658-687 above), and which he said he informed Mr Francisco about. The Claimants suggest that it made *"no commercial sense"* for Mr Bosworth to pay Mr Okeke personally in relation to Capital after his departure from the Arcadia Group. However, in my view it is consistent with Mr Bosworth's ongoing post-resignation role to which I refer in § 687 below, which Mr Bosworth set out in his witness statement (including referring to travelling a great deal often at his own expense trying to broker deals for Arcadia with Equinox, Atlantic, Capital and AMCON), and which Mr Adams reported internally had been very conscientious and supportive (as Mr Trøim in cross-examination also accepted).

677. Having carefully considered the evidence, including listening to and re-reading the cross-examination, I consider that the Arcadia Lebanon payment on 3 April 2012 was made for the benefit of the Arcadia Group, because (a) it was made to Mr Okeke in respect of services rendered to the group to help it develop business opportunities and (b) he invested it in the Calabar project, which was itself in the interests of the Arcadia Group. I reject the suggestion that the payment was made for Mr Bosworth's personal benefit, whether directly or indirectly.

(c) The Arcadia website in 2012

678. The Arcadia website gave a breakdown of its trading volume of oil by region: barrels per day in Africa were the largest trading segment (260,000 barrels out of a total of 930,000 barrels per day).

(15) Events of 2013

(a) Attock Dubai

679. In mid 2012, Mr Kelbrick said, he and Mr Mounzer decided to set up a new company in Dubai to carry on Attock Mauritius's business, while benefitting from the tax advantages in the UAE; and they transferred Attock Mauritius's business to Attock Dubai.

680. The documents indicate that Attock Dubai then carried on business as an oil trading company, originating West African oil and on-selling it to BP and Exxon. In the transactions between Attock Dubai and BP, the additional premium which Attock Dubai charged on top of the OSP was considerably more per barrel than Attock Mauritius had charged Arcadia. Between June 2013 and January 2015, Attock Dubai bought 20 crude cargoes from NNPC and GEPetrol and sold them to BP and Exxon, earning gross receipts of US$27,292,814.39 on these 20 transactions, at an average of US$1,364,640.72 per cargo.

(b) Mr Bosworth's resignation

681. Mr Bosworth resigned from Arcadia in March 2013 for personal reasons. On 27 March 2013, Mr Adams emailed Arcadia to announce Mr Bosworth's departure. Mr Trøim approved the text of the announcement. Mr Adams's email referred to Farahead and said:

> "The owners took this opportunity to reiterate their commitment to Arcadia, but ordered a review of the company's operations. They have endorsed a plan in which we will continue with the core crude oil trading run from Europe and the crude and products trading from Singapore. The Group will exit from our existing West African crude and products portfolio and no longer pursue West African development projects. Simplifying the portfolio allows us to consolidate into fewer offices and significantly reduce overhead expenses. …"

The statement accordingly implied that, as late as 2013, the Arcadia Group did indeed have, openly, West African crude and products portfolios and had been pursuing West African development project.

(c) Arcadia restructuring plan and investigations

682. Mr Adams started work on a restructuring plan for Arcadia.

683. After Mr Bosworth's departure from Arcadia, Farahead appointed Mr Adams to chair Arcadia's management committee and to act as the CEO. Farahead also retained one of EY's team, Mr Francisco, to analyse the Arcadia portfolio; he joined Seatankers to carry out a *"further review"* of the Arcadia business. Farahead also appointed Mr Francisco to the management committee. Mr Fredriksen says that he and Mr Trøim were "*keen for Mr Francisco to investigate and understand the financial exposures of the Arcadia Group, particularly in light of the developments in relation to Atlantic…*". By March 2013, Farahead determined that it would not support further advance payments to Atlantic.

684. By late May 2013, Mr Trøim asked Messrs Adams and Francisco to *"investigate the Capital transaction"*. On 27 May 2013, Mr Bosworth emailed Mr Trøim to update him about the AMCOM guarantee and the process to recover money from Capitol. Mr Trøim by mistake replied to all the email recipients, saying:

> "He just continues to avoid answering what we're asking about. We don't have a choice, we have to pick someone.
>
> "Bloodhounds" during the week…….I'll talk to Paul..."

In cross-examination, Mr Trøim said that the 'bloodhounds' were people *"who could collect money to get it back to us",* and that Messrs Francisco and Adams were *"part of that team"*. The same day, Mr Trøim asked Messrs Francisco and Adams to investigate the Capital transaction.

685. Mr Fredriksen was asked in cross-examination about the 'bloodhounds' email, and this exchange occurred:

> "Q. Is it fair to say that that is really what motivated this claim, that you lost a lot of money on Atlantic and Capital; is that fair?
>
> A. That's correct."

686. On 7 August 2013, Mr Francisco circulated the cover letter to the auditors referred to in § 630 above.

687. After Mr Bosworth had resigned, Farahead asked him to assist it to obtain repayment of the funds that Atlantic, Capital and Equinox owed Arcadia. Mr Bosworth (at his own expense) attempted to broker and assist in the negotiations. Mr Adams noted in March 2013 that Mr Bosworth *"has been extremely supportive of my efforts"* and was *"being very conscientious about this"*; and Mr Trøim *"appreciate[d] that Pete wants to be helpful"*. For example, Mr Bosworth and Mr Duncan worked to structure a deal to recover money from Capital, in particular in respect of negotiations with AMCON to pay out Arcadia under the guarantee (see earlier). Mr Trøim confirmed in his oral evidence that Mr Bosworth *"was helpful in trying to sort it out"*.

(d) Enquiries into Arcadia Lebanon dividend

688. Going back a few weeks earlier in the chronology, in late June 2013 Mr Fredriksen/Mr Trøim asked Mr Francisco to *"understand the historical equity invested and dividends paid by/to the owners of Arcadia/Parnon over the years"*. On 28 June 2013, he emailed Ms Theocharous. She sent him a pdf document which she described as a *"summary that was arranged previously and given to"* Mr Trøim. This was the schedule of *"Arcadia Group Investments"* that had been sent to Mr Fredriksen and Mr Trøim in March 2012, referred to in § 0 above. Ms Theocharous said that she would update the schedule.

689. On 1 July 2013, Ms Theocharous sent Mr Francisco a schedule of *"consultancy fees"* that Farahead Investments paid to Mr Bosworth/Mr Hurley.

690. On 2 July 2013, Ms Theocharous emailed Mr Francisco an *"updated summary as of today"*. The attachment was an excel spreadsheet called *"Arcadia Cash Utilisation 30.06.2013.xls"*. The Claimants did not disclose a native copy of that spreadsheet. The disclosed hard copy of the email is accompanied by two documents both dated *"as at 30.6.13"* and entitled *"Arcadia Petroleum Summary of payments to Farahead Holding"*. These list payments Farahead made into Arcadia (e.g. payments to acquire the Group or bonus payments), and funds that Farahead received out, by way of financing fees and dividends.

691. One version of the summary includes two entries under the heading *"Other Payments"* stating:

> "25.05.2011 Peter Bosworth 30,000,000"

Arcadia Beirut 15,000,000"

The summary appears to be in draft, since the 15,000,000 figure is struck out in manuscript and next to it is a manuscript annotation written by Ms Theocharous saying:

> "DH [Mr Hannas] to check – to exclude – may have – may have been rec'd & then paid. [He or We] did not find anything".

Ms Theocharous said she recalled discussing this entry with Mr Hannas, and said that Mr Hannas checked and could not find a record or confirmation of this payment either.

692. In the other version of the spreadsheet, this entry is not present.

693. Ms Theocharous said in her witness statement that she would have prepared this summary by going through the relevant financials in order to create an updated version of the 2 March 2012 summary. She said she included the Arcadia Beirut entry in her draft as the saw it was on Mr Hannas's summary, but later excluded it. She said:

> "Looking now, I think that, because I could not find any record of a USD 15 million dividend from "Arcadia Beirut" in the accounts, even though that entry had been in the earlier version, I made my note explaining that we (I and my team) or he (Mr Hannas) had not found such a payment. I have a recollection of discussing this with Mr Hannas, who is "DH" (Dimitris Hannas) in my note, and that Mr Hannas checked and could not find a record or confirmation of this payment either. While I cannot be sure whether I have written "We" or "He" in my note, I remember that me, my team and Mr Hannas all checked and did not find anything. Accordingly, I removed the entry for the USD 15 million from the final version of the Table I prepared, as can be seen from the version I sent to Mr Francisco. 8" (2nd witness statement, § 14)

694. In fact, though, Mr Hannas's March 2012 summary did not contain the US$15 million figure: it simply had a footnote stating *"Dividends received/paid from Arcadia Beirut – not included"*. In cross-examination, Ms Theocharous agreed with that, and said (according to the transcript) *"He didn't have an amount over there but I did ask orally to include the amount because I didn't know the amount myself. So someone must have called me, Mr Hannas; correct?"* and *"somebody must have told me"*.

695. On 4 July 2013, Mr Francisco emailed Mr Lance a summary of bonuses for the traders.

696. On 30 July 2013, the auditors reported on their audit for the Farahead group accounts. They identified various sums owed to Arcadia, including US$2.2 million from Mr Bosworth. However, on the basis of their work reconciling

payments, they noted that, on a net basis, in fact Farahead owed sums to Mr Bosworth:

> "Pete Bosworth: There is no change in this balance from the prior period. The total balance is expected to be recovered in full when amounts are paid owed to him by Farahead. It is our understanding the position within the group is actually in a net liability position…."

The auditors' email was sent to Mr Hannas and Mr Trøim. Mr Trøim said in cross-examination:

> "A. Yes. But that is back to what I said in my witness statement which reflects that when that deal was entered into in 2005, there was a general understanding that if this business became very, very good for us and things were developing properly, that there was a bonus to be paid to Pete Bosworth, I think that is what we talked about yesterday which you then kind of said was 20 million, which was never agreed as the amount, but I think it was in the 10/20 million depending upon the results. I think we have now seen nothing of 64 million or whatever it was but forget that -- I'm standing by and I might have a different view than Fredriksen on this but I am standing by that there was a commitment because he didn't have a finders' fee when we got it originally. Then you showed me yesterday that we had already at that time advanced a host loan but that was a loan; that it was not a gift. So he had – in bringing us the transaction, he had not been paid $1 from that time.
>
> Q. If you go to page 1, please, the auditors' view is sent to you by Mr Hannas; do you see that?
>
> A. Yes.
>
> Q. And it is right, isn't it, that Farahead/Arcadia owe Mr Bosworth money, don't they?
>
> A. It doesn't say here. But can you --
>
> Q. That is my question to you. In the light of this document, Farahead, the Farahead group, owes Mr Bosworth money; correct?
>
> A. No, that is not correct with what happened. It would have been correct if he had kind of delivered a solid project without any fraudulent transactions and without trying to hidden deals, but that disqualifies everything."

697. On 5 August 2013, Mr Hannas emailed Mr Francisco a summary of Farahead's investment in Arcadia and the sums it had received, in preparation for a meeting in London on 19 August 2013. The attached summary was the version of the

schedule that Ms Theocharous had previously provided not including the 'Arcadia Beirut' entry. The schedule indicated that Farahead made US$463 million from the Arcadia investment and paid only US$3.17 million in tax. Mr Fredriksen in cross-examination at one stage said he recalled that Mr Hannas had been looking for the US$15 million Arcadia Lebanon dividend, but then said he did not particularly remember that. He said it *"could be"* that in 2013, when the bonuses and reconciliation were being discussed, one of the points to consider was what had happened to the US$15 million Arcadia Lebanon dividend.

(e) Creation of the Hannas Note

698. Mr Bosworth and Mr Hurley suggest that, in order to investigate the position about both the Arcadia Beirut dividend and its amount, Mr Hannas checked his notebooks and created the Hannas Note. They point out that the Hannas Note focuses on the Arcadia Lebanon dividend, and the entries are directed at the US$15 million dividend or the cash to be distributed from Arcadia Lebanon. The version of the Note that contains the least highlighting (and thus may be the closest to the original) has one highlighted entry: Mr Trøim's direction that *"$15m Arcadia Lebanon dividend will be used to reduce PB loan from Fulham*".

699. In his 5th witness statement, Mr Hannas said he did not remember exactly when he created the Note, but having looked through his GEPVTN folder *"I am sure that I produced the Note to answer questions from Freshfields, whether asked to me by Freshfields directly or relayed by Tom Francisco, for the purpose of the case", "I'm sure I used the note to respond to questions from Freshfields or Mr Francisco or both",* and it was very likely that he used it in that way on one or more of the several calls with them on 26 and 27 October 2015. It was suggested to Mr Hannas in cross-examination that he prepared the Hannas Note during this period, as part of the process of checking the position regarding a US$15 million dividend from Arcadia Lebanon to Farahead. Initially, when asked how he prepared the Note, Mr Hannas said it was *"[d]uring the course maybe of my first statement with Freshfields and discussions maybe with London"*. A little later, he said he made the Note in *"late 2007, I guess"*, and then *"maybe at the time that we started thinking about the restructuring"* (which was 2013). He said it was *"possible"* that he produced the Note earlier than when he had to answer questions from Freshfields. Asked why there were four copies of the Note, with different highlighting/annotation, he said he could not remember, and then *"[m]aybe the first version that we have now in our screen, it was about the discussion with somebody, not only the lawyers Freshfields but somebody internally to discuss their 15 million dividend. And I may have highlighted this in order to see it when I was talking to the opposite guy".* Mr Hannas was at that stage being asked about the version of the Note in which the only highlighted passage is the entry for 9 December 2008 recording Mr Trøim having said words to the effect *"$15m [Arcadia Lebanon] dividend will be used to reduce [Mr Bosworth] loan from Fulham*". He went on to say that the Note was *"definitely not"* created in 2015 but that he may have prepared it around the time of his first witness statement, in 2016, for the purpose of

discussions with either Freshfields, Mr Francisco or somebody else in the group, maybe Mr Lind or maybe Mr Trøim.

700. Another version of the Hannas Note has a handwritten note made by Mr Hannas referring to invoices from GEPVTN to Attock and Arcadia Lebanon, sent by Ms Azzariti using different emails. Mr Hannas in his 5th witness statement said he was sure he made this additional version shortly after the rest of the Note, having reviewed the invoices, again in order to answer Freshfields' questions. Freshfields asked questions about GEPVTN in August, September and October 2015. However, Mr Hannas accepted that the Hannas Note contained no reference to GEPVTN, apart from that manuscript note on one of the four copies of the Note. He accepted that the focus of the Hannas Note was on the payment of the Arcadia Beirut dividend. He also agreed that in July 2013 he was investigating whether or not there had been a payment or a dividend from Arcadia Beirut of US$15 million, and then sent the updated summary to Mr Francisco on 5 August 2013 omitting the reference to Arcadia Beirut. Further:

> "Q. And in order to check the position, Mr Hannas, you looked in 2013 at your notebooks, didn't you?
>
> A. Maybe I did.
>
> Q. And when you were looking at your notebooks, you drew up a note that focused on the 15 million Arcadia Beirut dividend, didn't you?
>
> A. Yes, I may do that.
>
> Q. And that is why you highlighted the entry in the {I/8802.2/1}. Correct?
>
> A. Maybe that is the reason but maybe, as I said, it was highlighted because it was the subject of discussions with somebody within the group."

Despite that evidence, Mr Hannas went on to say the Hannas Note was *"definitely not"* drafted in July 2013. He was reminded that he had also said the Note may have been prepared around the time of the restructuring, which was in August 2013; he reverted to insisting that the Note was prepared for the purpose of answering Freshfields' questions and preparing his witness statement. Finally, there was the following confusing exchange:

> "Q. You wrote the Hannas note, the original version, as part of the investigation into whether or not that dividend had been paid; correct?
>
> A. The 15 million?
>
> Q. Yes.
>
> A. No, it was not because of that.

> Q. And it happened before these proceedings commenced in February 2015; correct?
>
> A. Correct.
>
> Q. So you created the note before these proceedings commenced in February 2015?
>
> A. That is what my recollection."

701. It is not strictly necessary to reach a conclusion on this evidence, because the Claimants made clear that no objection was taken (on grounds of privilege) to the use of the Hannas Note in evidence. In addition, though this was not the subject of argument, it may be that the Note would in any event have been admissible as containing extracts (made by a non-lawyer) of non-privileged documents, namely Mr Hannas's notebooks, that have been lost. I would observe, nonetheless, that I found Mr Hannas's evidence on this point unsatisfactory. It seemed to me that he veered between (a) giving answers to the effect that he was unsure when he created the Note, and that it may have been created in 2013, and (b) expressions of certainty that the Note was created only in 2015 or 2016 for the purpose of these proceedings. I am bound to say my impression was that the latter answers reflected a desire to seek to assist the Claimants rather than honest testimony about his recollections.

(f) August and September 2013; departure of Mr Hurley

702. Mr Francisco met Mr Fredriksen/Mr Trøim in London on 19 August 2013. No minutes of the meeting have been disclosed, but there is a handwritten note made by Mr Francisco recording those present as being himself, Mr Fredriksen and Mr Trøim. The note includes an entry stating *"[Mr Bosworth]/[Mr Hurley] bonus paid from Cyprus (included in Tom's schedules)"* and another saying *"Compare [Ms Theocharous] with [Mr Francisco] summaries"*.

703. On 24 August 2013, Mr Francisco emailed Messrs Lance, Adams and Hurley, asking whether a draft reorganisation plan would be ready to be sent to Mr Trøim over the weekend. His email continued, *"I believe we created the expectation with him last week that we would have a draft this weekend, and if that is not going to be the case I need to manage that with him sooner rather than later"*.

704. On 1 September 2013, Mr Adams emailed Mr Trøim with some proposals to remove Mr Hurley. Mr Adams suggested not to do anything until the extension of the Revolving Credit Facility in mid-October 2013, but he understood if Mr Trøim *"believe[d] we need a more aggressive approach and move to replace Colin at the first opportunity…"*. Mr Trøim in cross-examination agreed that he wanted to get rid of Mr Hurley straight away *"because we had no trust in him because it became clear from the evidence that he was a big part of the fraudulent transaction which are discussing in this court."*

705. On 2 September 2013, Mr Fredriksen and Mr Hurley met Mr Bosworth and Mr Hurley.

706. On 25 September 2013, Ms Turnbull sent Mr Hurley an email saying that Mr Trøim would like him to come in for a meeting the following day. Mr Hurley said he was dismissed at that meeting. Mr Hurley's evidence in his witness statement was:

> "153. I was verbally dismissed in Trøim's office. During the same meeting, I asked him about the USD 3 million bonus, to which Trøim said "sue me". It was clear that it wasn't going to be paid, and it still hasn't been. As with many things, there was nothing in writing.
>
> 154. I was in shock after that meeting, and called Mark Lance as soon as I left the building. He suggested that it would be better for me if I put in a letter of resignation, rather than receiving a letter of termination. Earlier, I believe that Mark had been asked to sign a letter dismissing me from my employment, and had refused to do so. I recall that Francisco briefly entered the room while I was meeting Trøim, and either whispered something to him or took him outside for a brief period. If I had to guess, I believe Francisco was telling Trøim that Mark had not signed the letter – maybe this is why they had to dismiss me verbally. In my opinion, they were originally hoping to give me the termination letter signed by Mark.
>
> 155. While Farahead have a letter of resignation from me, it was something I signed after they had fired me. I didn't think a great deal about it, as my head was all over the place, but it seemed like a sensible idea at the time."

707. Mr Trøim in his witness statement said:

> "142. Mr Hurley resigned in September 2013, pre-empting his being fired. John and I had decided that it would be best if Mr Hurley was fired. I am reminded by an email from Mr Adams to me I have been shown that this decision had been made by 1 September 2013. I had invited Mr Hurley for a meeting for those purposes, although I do not remember the precise date of that meeting or timing of his resignation."

708. On 26 September 2013, the day of the meeting, Farahead sent to Mr Hurley a *"Notice of termination of employment"* stating that *"It is clear that you have been guilty of very serious irregularities amounting to gross misconduct on your part. We are therefore entitled to and hereby do, terminate your Contract of Employment with Arcadia AI Arabiya DMCC with immediate effect. For the same reason, Farahead Holdings Limited will hereby terminate with immediate effect any and all directorships which you hold with any of the Arcadia Group Companies."*

709. It was put to Mr Trøim in cross-examination that he summonsed Mr Hurley to his office and dismissed him, to which Mr Trøim responded:

> "As I said, you need to make sure you do kind of what we said from the shareholders that we have no faith in you any longer and we will probably kind of talk to our shareholder representative to get you dismissed, but that is the way it has to act. But I think kind of in general you describe we had no trust in him and from that point, we had a kind of hard part forward."

and:-

> "We felt probably, and me in particular, responsible for the security package, felt that the Farahead Group which at that time was coming up to be around USD16 billion in value had significant power to get that banking group to kind of back us and not back a guy who we effectively felt had carried out unauthorised trading"

710. Mr Trøim said the board terminated Mr Hurley's employment:

> "Q. The reason why there is a notice of termination, from the official position, is Mr Hurley is still employed at the 26th and therefore you terminate his employment, don't you?
>
> A. The board terminates it."

Mr Trøim agreed that if Mr Hurley had already resigned (as the Claimants allege) then there would have been no need for a termination letter.

711. Mr Hurley was cross-examined about the fact that in a witness statement dated 10 July 2020 for the jurisdiction challenge, in which he said *"[o]ver the period from 2006 (when Farahead acquired the Arcadia Group) to about September 2013 (when I was forced to resign – I did not want to leave), I had the following job titles …"*; and about the letter of resignation referred to in §§ 154 and 155 of his witness statement quoted above. Mr Hurley said:

> "A. I was forced to resign. I was fired so then I arranged for a resignation letter to follow that. That was on Mark Lance's suggestion, by the way.
>
> Q. You had not yet been fired, you took action to pre-empt that.
>
> A. I was verbally fired and they were waiting and I think eventually they got Hannas to sign a letter that fired me. So I was fired and I submitted the resignation letter once I left the meeting. I was verbally fired and then they followed that up with a letter. I was fired. I did not want to resign and I was shocked."

712. Viewing this evidence in the round, I am satisfied that Mr Hurley was dismissed, and do not understand Mr Trøim's evidence, taken as a whole, to dispute that. The dismissal occurred orally at the meeting on 26 September 2013, followed up by the notice of termination.

713. Reverting to the reorganisation plan, on 10 September 2013, Mr Lance emailed Mr Francisco and Mr Hannas to report on a proposal to transfer the Atlantic receivable out of the group to a SPV. One Farahead idea was to use an SPV in Liberia. Mr Lance noted that the banks: *"don't like Liberia (it triggers enhanced due diligence) and the Marshall Islands is an unknown"*. On 11 September 2013, Mr Francisco sent a draft reorganisation plan to Mr Hannas. The plan was for *"new monies introduced by the owners"* to be used to purchase the Atlantic receivable, which would be transferred to a SPV in order to take the receivable out of the group; followed by a reorganisation in which the old Arcadia group would support the reorganised new group on a 'nominee sleeve deal' basis.

714. By October 2013, there was a 'New Arcadia' business plan. Among other things, it noted that:

> "Early in 2013 the long-standing group CEO, Peter Bosworth, resigned from the company following a review and restructuring initiated by the owners. The outcome of this was the to cease all new business in West Africa, with the result that the offices in Switzerland and Dubai were closed and about 40 staff left the company."

715. Mr Bosworth's evidence was that, following his resignation, he and Mr Hurley met Arcadia Lebanon's Lebanese lawyer, Mr Chamoun, in order to close Arcadia Lebanon. Ms Achkouti recalled also being present. This was, Mr Bosworth said, because following his departure, Farahead decided that the Arcadia Group should cease its West African oil trading and no longer pursue West African development opportunities. Mr Bosworth and Ms Achkouti said Mr Chamoun advised that, because of the significant amount of bureaucracy involved in closing a Lebanese company, it would be best to leave Arcadia Lebanon in a state of inactivity such that after 5 years (under Lebanese law) it would automatically enter liquidation. I accept that evidence.

716. For that reason, on 1 July 2013 Mr Bosworth and Mr Hurley transferred the shares in Arcadia Lebanon to Ms Achkouti and Mr Nagi Mouzannar. Ms Achkouti and Mr Mouzannar held the shares as nominees for Mr Bosworth and Mr Hurley. There is no evidential basis for the Claimants' suggestion that the nominee arrangements were *"efforts made to disguise PB/CH's continuing interest in Arcadia Lebanon"*. On 2 August 2013, Mr Bosworth/Mr Hurley resigned as Arcadia Lebanon directors.

(g) 2013 Attock Dubai transaction

717. The cargo under EY Deal 142 was lifted on 12 April 2013. The nomination of Arcadia Lebanon for the lifting of the cargo, and the actual lifting of the cargo took place either side of Mr Bosworth's resignation from the Arcadia Group in March 2013. Mr Bosworth said EY Deal 142 was due to be the last cargo Arcadia Lebanon lifted.

718. However, there was one outstanding transaction involving Arcadia Lebanon, though not one of the 144 transactions which the Claimants seek in these

proceedings to impugn, because at some stage prior to 2 July 2013 GEPetrol had nominated to Arcadia Lebanon a Zafiro cargo for provisional lifting in August 2013. At around this time, Mr Bosworth had travelled to Lebanon to begin the process of liquidating Arcadia Lebanon, where he met Mr Chamoun in early July 2013. Mr Bosworth said in his (4th) witness statement:

> "34. In the second half of 2013, I became aware that GE Petrol had nominated Arcadia Lebanon to lift a cargo for it. I did not think it would be appropriate for Arcadia Lebanon to lift the oil given that it had entered a liquidation process (or was about to). I recall at least one conversation with Mr Kelbrick, who was one of the people who ran Attock Dubai, at about this time in which I asked whether it was possible for someone other than Arcadia Lebanon to lift the cargo. Mr Kelbrick told me it was too late to renegotiate with the seller. Attock Dubai handled the operational, financial, and all other aspects of the trade. I was not involved. Arcadia Lebanon received a pass-through payment from Attock Dubai of about 3.6m, which it later paid onto another company controlled by or associated with Attock Dubai's owners. This can be seen in bank accounts for that company, named Greenfields Services Limited Offshore, which (without prejudice to any privilege) I understand from my solicitors are exhibited to Mr Kelbrick's Ninth Affidavit dated 31 January 2019 and exhibited for ease of reference at [PMB4/152-159]. [KS_002449] Arcadia Lebanon did not receive any fee or benefit for its role in this trade.
>
> 35. I am not sure exactly when these exchanges occurred, but I note that Mr Mounzer says that Attock Dubai started the trade "in July 2013". To the best of my recollection, that is about right. I may even have found out about the trade when I visited Beirut to wind the company up.
>
> 36. The trade was not part of any ongoing business of Arcadia Lebanon. …"

719. Ms Achkouti said in her (1st) witness statement:

> "By October 2013, Arcadia Lebanon's business had ceased. Mr. Mouzannar and I were just waiting for the necessary time to pass before liquidating the business.
>
> 14. Sometime around then, either Arcadia Lebanon's bank (Bank Med) or one of Salem Mounzer or Steve Kelbrick, called me saying that Arcadia Lebanon would soon receive money from a trade and that the money should be paid onto a company called Greenfields. I called Mr. Bosworth because I was alarmed and upset that I was being asked to deal with a payments relating to an oil trade. To be clear, I had no part in the operational aspects of the trade at all. By the time I heard about it, it was already underway. I had believed that there would be no more trading

> activity. I did not sign up for that. I do not know how to run an oil trading company and my expectation when I agreed to help liquidate Arcadia Lebanon was that there would be no operational work at all.
>
> 15. I remember that Mr. Bosworth got very angry when I told him that Mr. Kelbrick and Mr. Mounzer had set up this transaction. He said that the company was meant to have stopped operating and that it should not be taking on new business. We had several calls. Eventually, Mr. Bosworth told me that he had found out that the deal was meant to be a pure pass-through and that Arcadia Lebanon would not receive any financial benefit or have to actually do anything. It would just receive a payment that it would pay onto Greenfields. I received the invoice with the necessary bank details for the payment to be made to and from Arcadia Lebanon. Although I felt uncomfortable about it, because again as previously said, this was not what I signed for when I accepted to take the shares, I asked Bank Med to make the payment to Greenfield, and that was the end of it. There was no more operational work to do after this. This happened over a period of a few weeks or months. I do not remember the exact dates."

Her 2nd witness statement contained evidence to similar effect.

720. Ms Azzariti had some involvement in the arrangements, but I see nothing surprising about this in circumstances where Arcadia Lebanon was necessarily involved as contracting party in the transaction chain but, commercially, wanted to be rid of it.

721. In cross-examination, it was suggested to Mr Bosworth that he did not in fact intend to wind Arcadia Lebanon up, because on 8 July 2013 Mr Hurley signed a power of attorney in favour of Credit Suisse authorising Attock Dubai to issue Third Party letters of credit in the name of Arcadia Lebanon, explaining that Arcadia Lebanon *"will be entering into contracts covering our purchasers with different suppliers"* and *"in order to facilitate this business, we would like to authorise [Attock Dubai] to instruct Credit Suisse to issue the required Letters of Credit…on our behalf and to act as our attorney"*. The Claimants submit that *"it was plainly the intention of PB/CH that Arcadia Lebanon should continue to be used for the benefit of AttockDub in the same way as the other front companies which continued to hold Term Contracts would be".* Mr Bosworth said it would have been executed, using a standard wording, but for the purpose of that specific cargo, which he did not wish to lift and wanted nothing to do with. Asked whether he asked Arcadia permission to continue using Arcadia Lebanon, he said *"No, I didn't. That is why I wanted to give back this cargo".* He said he handed dealing with the cargo over to Mr Kelbrick, including payments to the service providers in respect of it, which he assumed Mr Kelbrick would have made.

722. Mr Bosworth was also asked whether he *"could have just called GEPetrol and said [he] didn't want the cargo"*. He replied that it was Mr Driot, not him, who

had the relationship with GEPetrol. He said he had asked Mr Kelbrick or Mr Driot whether the transaction could be cancelled, and one or other of them said it could not. He suspected that he had previously sent GEPetrol a termination of the contract, or he was led to believe there had been one, and this transaction (which came up some months after the last cargo in April) came as a surprise. The Claimants say in their written closing that the foregoing was evidence Mr Bosworth had given 'for the first time' in oral evidence and was not supported by any documentation. Those criticisms are wide of the mark in circumstances where this transaction was never pleaded as one of the Claimants' 144 Transactions. I accept Mr Bosworth's evidence on this matter.

723. Mr Hurley likewise said the power of attorney was a generic document in standard form of the kind banks ask for when requested to open letters of credit. He said:

> "… the way that Arcadia Petroleum SAL would become ultimately wound down was to go into something of a dormant phase but this residual transaction had to go through that company for the reasons he discussed with you, that he couldn't cancel that particular lifting and I think if you did that, and it was associated in any way with Arcadia's name, that that from a reputational point of view would be extremely bad for the group; you fail to perform on a contract with a state oil company"

724. Mr Hurley said the power of attorney was signed so that the particular cargo could be lifted, in order to avoid defaulting on a transaction that could not be cancelled. The Claimants in closing say if Arcadia's reputation was at stake that would be *"all the more reason to consult Arcadia"*, but that point makes no sense. Mr Bosworth and Mr Hurley were acting on behalf of Arcadia in making the arrangements, consistent with their understanding of their duties, for the transaction to be taken away from Arcadia but without Arcadia being seen to renege on a deal with GEPetrol. The same applies to the Claimants' complaint that the trade, and its profit, *"belonged"* to Arcadia Lebanon and could not be moved without the permission of Mr Fredriksen or Mr Trøim. Farahead had decided to cease West African oil trading, and it was consistent with that decision for this transaction not to be carried through as an Arcadia Lebanon transaction. Again, the point is unpleaded.

725. Ms Achkouti in cross-examination said, as she had in her witness statement, that Mr Bosworth was angry: *"he went mad as well because he didn't know had about coming, about this thing. And because he wanted – he stopped all the operations in the company and suddenly we had this and we wanted to put the company into liquidation, yes."*; and *"[Mr Bosworth] was frustrated. And then he found out it was a pass through Arcadia and we keep nothing for Arcadia."* It was not suggested to Ms Achkouti that her recollection of Mr Bosworth being angry and frustrated about this transaction having emerged was untrue or unreliable.

726. Mr Kelbrick said in his (3rd) witness statement:

> "28. Ms Achkouti describes an instance in which monies were received by Arcadia Lebanon for a transaction which took place in October 2013, after the company had stopped operating (Achkouti 2 53). [CJAWS_02/9] The monies were paid on to a company owned by me, Greenfield Services Limited Offshore, which I set up specifically for a new opportunity with GEPetrol.
>
> 29. The background to this transaction is that at some point in 2013, GEPetrol had learned that Mr Bosworth had left Arcadia and that Arcadia was no longer trading in West Africa. I do not know who told GEPetrol this, but it was not me. I received a call from GEPetrol explaining that there was a cargo that had previously been allocated to Arcadia but which was now available, and GEPetrol offered it to me.
>
> 30. The offer of this cargo was made to me, I believe, because of the relationships I had spent many years building in West Africa. I accepted the GEPetrol offer, acting always in my own commercial interests, and met the GEPetrol representative in Madrid to sign the relevant papers.
>
> 31. I do not know how the funds ended up being paid to Arcadia Lebanon, I assume there was some kind of mix up. As Ms Achkouti says, the monies were paid straight to my company Greenfields and that was the end of it."

In cross-examination, he said *"the whole thing was a mix-up"*. He received a call from Mr Oburu, who was 'in a flap' about what was going on, and who said he wanted Mr Kelbrick to lift the cargo. Mr Kelbrick said it was too late to stop the transaction, but the issue was resolved with Attock handling all the operational and financial aspects. Mr Oburu met him in Madrid to sign all the papers. Mr Kelbrick confirmed that, so far as he was concerned, the cargo was offered to him rather than to Arcadia.

727. Because of delays, the cargo was ultimately lifted on 6 September 2013. On 30 September 2013, Arcadia Lebanon made its Pricing Declaration to GEPetrol. A substantial profit was made as a result of the different price averaging periods applying to the purchase and sale. Attock Dubai made US$175,228.73 on the sale. Attock Dubai was directed to make the payment due to GEPetrol and to pay the balance of US$3,610,713.04 to Arcadia Lebanon directly. Arcadia Lebanon received that sum from Attock on 10 October 2023. Arcadia Lebanon paid Savion US$166,817 on behalf of Attock on 18 October 2013. Later, on 21 February 2014, Arcadia Lebanon paid US$3,666,484.52 to Mr Kelbrick's company, Greenfields. (The Claimants suggest in their written closing that Arcadia Lebanon thus paid Greenfields slightly more than it had received from Attock Dubai, and represented the balance of funds available to Arcadia Lebanon. That was, however, a point that was neither pleaded nor put to any of Mr Bosworth, Mr Hurley or Mr Kelbrick in cross-examination, and in my view no conclusion can be drawn from it.)

728. I reject the Claimants' assertion that this transaction shows that Mr Bosworth and Mr Hurley in reality wished to continue to use Arcadia Lebanon and to do so for their own benefit. It was not only their evidence but also that of Ms Achkouti that they had decided to let Arcadia Lebanon lapse into activity; and that Mr Bosworth was surprised and angry about the emergence of this further transaction. No suggestion was made that Ms Achkouti was lying or misremembering those basic points. Nor is there any reason to disbelieve Mr Hurley's evidence, which seems inherently likely, that in order to obtain a letter of credit so that the transaction could proceed, it would be necessary to execute of power of attorney in a standard form referring, in generic language, to the customer's desire to undertaking transactions (plural). More generally, I found the Defendants' evidence on this matter coherent and plausible.

729. The Claimants make the further unpleaded complaint that the Zafiro Contract was on 1 October 2013 assigned by Arcadia Lebanon to Attock Dubai, which is said to be inconsistent with the proposition that Arcadia Lebanon was held for the benefit of Mr Fredriksen/Mr Trøim. The point was not covered in any of the witness statements but it was put to Mr Bosworth in cross-examination that the assignment would not have been agreed without his authority. Unsurprisingly, he could not remember such an assignment, though he was clear that *"Arcadia Group did not wish, following Mr Adams' takeover of the group, to be involved in West African trading so they didn't want it"*. Even then, it was not even put to Mr Bosworth that – as the Claimants now seek to contend in closings – that *"PB arranged for the assignment of the contract because he treated Arcadia Lebanon as his own company and was entirely happy for the benefit of the contract to be passed on to AttockDub".* Any such contention now is impermissible. In any event, I am satisfied that it is wrong. Even if Mr Bosworth did authorise an assignment, it was consistent with his account of Arcadia Lebanon's position and role.

730. The Claimants also suggested that payment to Sonergy was *"dispensed with"* on the Attock Dubai cargo, and that the assignment of the Zafiro Contract *"without any mention of Sonergy"* showed that there was never any need to make payments to Sonergy. I do not accept those suggestions. Mr Bosworth explained that the cargo was handed over to Mr Kelbrick to handle, so Arcadia would not itself have paid Sonergy. Mr Kelbrick did not know whether or not he had arranged for Sonergy to be paid, but that is unsurprising given that this was one transaction more than 10 years ago which was unpleaded and had not been raised in the Claimants' evidence. In relation to the assignment, Mr Kelbrick said:

> "Q. But in terms of the assignment that is being referred to, which is the assignment of the Arcadia obligations under the Zafiro term contract to Attock, there is no suggestion that Attock should start paying Sonergy?
>
> A. I think that if you are doing business in that part of the world, then there were some well known service providers and I think that if you were going to lift Zafiro on some sort of –– it says here term contract, then one would expect to pay the same. So I

> would expect to pay the same service providers as I did for example on the Ceiba"

The Claimants suggest that that answer was evasive. I do not agree. In substance, the point Mr Kelbrick was making that (contrary to the Claimants' thesis) he would expect to have needed to pay the relevant service providers on this cargo, and all other cargoes under the assigned contract, in the usual way. Had the matter been put in issue, then no doubt further enquiries could have been made to establish the position. However, it was not, and the resulting dearth of evidence must be laid at the door of the Claimants rather than the Defendants.

(h) Pass-through payments

731. In 2010, there was an opportunity to invest in the assets of a Nigerian oil company called Seven Energy. Arcadia had had previous dealings with Seven Energy. The project was proposed to Mr Fredriksen/Mr Trøim, but they declined to participate (though, Mr Hurley said, Mr Fredriksen did later invest in Seven Energy). Mr Bosworth and Mr Hurley decided to participate in their own right, and assisted Seven Energy to raise funds. Their company Arcadia Upstream obtained a loan from the First Bank of Nigeria. There was no exposure to the Arcadia Group. Ultimately, Seven Energy wished to buy Arcadia Upstream out. In May 2013, Seven Energy paid US$6 million to Arcadia Lebanon in respect of Arcadia Upstream's investment. From that sum, Mr Hurley was due US$2 million, which Arcadia Lebanon transferred to his company Collafin. This was one of several payments referred to by Mr Hurley in his witness statement:

> "204. There are also payments to Collafin, Atlantic and Equinox. As I explain elsewhere, these are all non-Arcadia payments. Money came in before money went out. They went through the Arcadia or Arcadia Lebanon bank accounts, but had nothing to do with the Arcadia Group at all. None of them were related to Arcadia Group business or Arcadia Lebanon business. For Arcadia Nigeria and Collafin, as I explain below, these were payments related to Arcadia Upstream Assets Limited, which didn't have its own bank account. So the amounts came through Arcadia Lebanon."

It was suggested to Mr Hurley that he was thus treating Arcadia Lebanon as if it were his own company. He replied:

> "No, we treated it as if it were a company that we owned the shares of but on behalf of Mr Fredriksen. We were ensuring as part of this is concerned that there were absolutely no exposures to Arcadia Lebanon and therefore in the same way that we would have treated a group company, there is no exposure to Arcadia Lebanon because as I say earlier, the money came in before any money went out and it was not related to Arcadia business."

I accept that evidence.

(16) 2014 and 2015

732. After Mr Bosworth's departure, Farahead put Mr Adams and Mr Francisco, who had become Arcadia CFO in April 2014, in charge of the 'investigation' into Mr Bosworth. There were a number of meetings with Mr Bosworth. Mr Bosworth's evidence was that on 2 April 2014, Mr Adams told Mr Bosworth in Geneva that Mr Fredriksen had said that if Mr Bosworth did not recover the monies owed to Arcadia in respect of the Atlantic and Capital transactions, then Mr Fredriksen would start proceedings against Mr Bosworth for *"fraud"*.

733. In early April 2014, Farahead instructed EY to carry out a *"fact-finding investigation"* into Arcadia's West African trading. This work resulted in EY's first report ("***EY1***").

734. On 12 February 2015, the Claimants (relying on EY1) obtained from Teare J an *ex parte* freezing and proprietary injunction against Mr Bosworth and Mr Hurley, and thereafter issued the present claim. The Claimants provided the Trade Capture data to EY in March 2015. EY constructed its own model from the Trade Capture data (the "***EY Database***"), and produced a further report, "***EY2***", in November 2015.

(J) THE CLAIMANTS' CLAIMS

(1) The pleaded case

735. The core of the Claimants' case is set out in § 31 of the RRRRAPC. It is that paragraph which sets out the fraud which the Claimants alleged was perpetrated by the Defendants. Paragraph 31 states:

> "31. To the best of the Claimants' present knowledge and belief (as detailed above and further below), the fraud perpetrated on them has, subject to the variations and differences detailed further below, taken in broad terms the following form:
>
> 31.1. In the course of trading transactions in which an entity within the (legitimate) Arcadia Group was buying and/or selling crude oil, entities that were not part of the Arcadia Group but rather were beneficially owned by and/or controlled by and/or associated with some or all of the Individual Defendants (including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius), were, at the instance of, on the instructions of, with the knowledge of and/or with the involvement of the Individual Defendants, "inserted" into the chain of transactions between the legitimate Arcadia Group entity and its buyer and/or seller.
>
> 31.2. These entities so "inserted" into the relevant transactions extracted profit that would otherwise, but for the "insertion", have accrued to the entity within the (legitimate) Arcadia Group, whilst often leaving the entity within the (legitimate) Arcadia Group in question (or another entity within the (legitimate)

> Arcadia Group) bearing all or part of the expenses associated with the transaction (such as transportation and insurance costs) and/or the risks associated with the transaction and/or otherwise providing support for the transaction in some fashion.
>
> 31.3. Furthermore, trading transactions into which an entity within the (legitimate) Arcadia Group would or could have entered, were, at the instance of, on the instructions of, with the knowledge of and/or with the involvement of the Individual Defendants, diverted to, and entered into by, other entities that were not part of the Arcadia Group but rather were beneficially owned by and/or controlled by and/or associated with some or all of the Individual Defendants (including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius), with the result that profits that would and could have accrued to an entity within the (legitimate) Arcadia Group instead accrued to those other entities.
>
> 31.4. In addition, entities within the (legitimate) Arcadia Group entered, at the instance of, on the instructions of, with the knowledge of and/or with the involvement of the Individual Defendants, into loss-making transactions for the sole or dominant purpose of ensuring that profits accrued to and/or losses were avoided by other entities that were not part of the Arcadia Group but rather were beneficially owned by and/or controlled by and/or associated with some or all of the Individual Defendants.
>
> 31.5. Other fraudulent transactions, whether or not similar to the foregoing and whether or not involving entities other than those presently identified, may well have been entered into; the Claimants' investigations remain are ongoing and their position continues to be is reserved."

736. Reflecting this, § 5 of the Reply to Mr Bosworth/Mr Hurley states:

> "The Claimants' claim as set out in the RRRRAPC is in essence that Mr Bosworth and Mr Hurley, the ringleaders: (i) inserted entities (the "Inserted Entities") that they owned, controlled and/or from whom they received benefits into oil trading transaction chains in which the First to Third Claimants (the "Arcadia Claimants" or "Arcadia Group") ultimately purchased oil; (ii) diverted profits on those transactions from the Arcadia Claimants or some of them to the Inserted Entities and/or third parties to whom the Inserted Entities made payments; (iii) themselves received diverted profits or their benefit; and (iv) thereby perpetrated a serious and sustained trading fraud upon the Claimants, in particular in breach of the fiduciary and other duties Mr Bosworth and Mr Hurley owed to the Arcadia Claimants or some of them. "

737. The Claimants allege that:

i) Mr Bosworth and Mr Hurley were the principal shareholders and directors of Arcadia Lebanon;

ii) Mr Kelbrick was, from September 2009, sole owner of Arcadia Mauritius and its chairman and CEO in 2010;

iii) in addition, Arcadia Mauritius is or was, wholly or in part, beneficially owned by, and controlled by, most probably, Mr Bosworth and/or Mr Hurley and/or Mr Kelbrick;

iv) Mr Kelbrick owned 50% and was a director of Attock Mauritius;

v) in addition, Attock Mauritius was, wholly or partly, beneficially owned and controlled by, most probably, "*Mr Bosworth and/or Mr Hurley and/or Mr Kelbrick*";

vi) Mr Kelbrick was sole owner and director of Attock Lebanon;

vii) Mr Kelbrick and his wife owned and were the directors of South Energy, until June 2010 when Mr Scheepers became co-owner with Mr Kelbrick;

viii) Mr Kelbrick was the shareholder and director of Crudex, in whose management and control Mr Bosworth and Mr Hurley also 'appear' to have been involved; and

ix) Mr Kelbrick owned and/or received benefits and/or profits from Proview and Azenith Energy Resources Limited, which were participants in the fraud.

738. The Claimants also pleaded that they believed Mr Bosworth and Mr Hurley were likely to have been beneficially interested in, and/or to have received (directly or indirectly) benefits and/or profits from other corporate participants in the alleged fraud, including other "Corporate Defendants" (defined as the Seventh to Tenth Defendants in these proceedings); and that they reserved the right to plead further in this regard as and when further information and/or evidence was obtained. However, the Claimants did not do so.

739. As against Mr Bosworth and Mr Hurley, the Claimants plead that they were *"the principal architects of, and beneficiaries from, the substantial and sustained fraud perpetrated upon"* the Claimants. The central allegations against them are that:

> "71.1. At their direction and/or with their agreement and knowledge, fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, were deliberately, and falsely, presented to the outside world as being legitimate entities forming part of the (legitimate) Arcadia Group and/or legitimate, arms-length third party entities with which the Arcadia Group was doing business.

> 71.2. At their direction and/or with their agreement and knowledge, contracts were taken up in the name of fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, rather than entities within the (legitimate) Arcadia Group and/or fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, were "inserted" into transactions in which entities within the (legitimate) Arcadia Group were engaged.
>
> 71.3. Fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, having taken up contracts in their own name and/or having been "inserted" into transactions in which entities within the (legitimate) Arcadia Group were engaged, at Mr Bosworth's and Mr Hurley's direction and/or with their agreement and knowledge, the entities within the (legitimate) Arcadia Group were caused to contract with and/or deal with the fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, on terms which:
>
> > 71.3.1. Ensured that profits which would otherwise have accrued to the entities within the (legitimate) Arcadia Group in fact accrued to the fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius; and/or
> >
> > 71.3.2. Ensured that the entities within the (legitimate) Arcadia Group bore all, or substantially all of, both the risks associated with, and the costs and expenses associated with, the transactions; and/or
> >
> > 71.3.3. Ensured that the entities within the (legitimate) Arcadia Group otherwise provided direct or indirect support to the fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, in a manner that was intended to result in, and did in fact result in, the fraudulent entities profiting at the (direct or indirect) expense of the entities within the (legitimate) Arcadia Group.

740. The Claimants alleged that, in so acting, Mr Bosworth and Mr Hurley:

> "71.4. … acted for the purpose of and/or with the intention of enriching themselves and/or the other Individual Defendants, and also with the purpose of injuring or causing financial loss to the Claimants.
>
> 71.5. … breached the fiduciary duties that they owed to Arcadia London and/or Arcadia Switzerland and/or Arcadia Singapore. In this regard, it is averred that they:

> 71.5.1. Failed to act with single-minded loyalty to Arcadia London and/or Arcadia Switzerland and/or Arcadia Singapore or any of them;
>
> 71.5.2. Failed to act in good faith and honestly in the best interests of Arcadia London and/or Arcadia Switzerland and/or Arcadia Singapore or any of them;
>
> 71.5.3. Placed themselves (and deliberately placed themselves) in a position in which their interests and the duties they owed to Arcadia London and/or Arcadia Switzerland and/or Arcadia Singapore and each of them would (and did) conflict;
>
> 71.5.4. Made unauthorised and/or secret profits and/or commissions (and/or otherwise received sums as a result of their breaches of fiduciary duties) without the informed consent of Arcadia London and/or Arcadia Switzerland and/or Arcadia Singapore or any of them; and
>
> 71.5.5. Failed to disclose their own misconduct to Arcadia London and/or Arcadia Switzerland and/or Arcadia Singapore or any of them."

741. Paragraph 72 contained similar allegations against Mr Gibbons and Mr Lance.

742. As against Mr Kelbrick (and Mr Mounzer, who is no longer a Defendant), the Claimants plead that:

> "73.1. With their participation and/or agreement and/or knowledge, fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, were deliberately, and falsely, presented to the outside world as being legitimate entities forming part of the (legitimate) Arcadia Group and/or legitimate, arms-length third party entities with which the Arcadia Group was doing business.
>
> 73.2. With their participation and/or agreement and/or knowledge, contracts were taken up in the name of fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, rather than entities within the (legitimate) Arcadia Group and/or fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, were "inserted" into transactions in which entities within the (legitimate) Arcadia Group were engaged.
>
> 73.3. Fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, having taken up contracts in their own name and/or having been "inserted" into transactions in which entities within the (legitimate) Arcadia Group were engaged, with their participation and/or agreement

> and/or knowledge, the entities within the (legitimate) Arcadia Group were caused to contract with and/or deal with the fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, on terms which:
>
> > 73.3.1. Ensured that all, or substantially all, of the profits which would otherwise have accrued to the entities within the (legitimate) Arcadia Group in fact accrued to the fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius; and/or
> >
> > 73.3.2. Ensured that the entities within the (legitimate) Arcadia Group entities bore all, or substantially all of, both the risks associated with, and the costs and expenses associated with, the transactions; and/or
> >
> > 73.3.3. Ensured that the entities within the (legitimate) Arcadia Group otherwise provided direct or indirect support to the fraudulent entities, including in particular Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius, in a manner that was intended to result in, and did in fact result in, the fraudulent entities profiting at the (direct or indirect) expense of the entities within the (legitimate) Arcadia Group.
>
> 73.4. With their participation and/or agreement and/or knowledge, the foregoing matters were concealed from Farahead.
>
> 73.5. In so acting, it is averred that Mr Kelbrick and Mr Mounzer acted for the purpose of and/or with the intention of enriching themselves and/or the other Individual Defendants, and also with the purpose of injuring or causing financial loss to the Claimants.
>
> 73.6. In so acting, it is averred that Mr Kelbrick and Mr Mounzer deliberately and dishonestly assisted Mr Bosworth and/or Mr Hurley … in their breaches of fiduciary duty and/or beneficially received monies knowing the same to be the proceeds of the fraud and to have been transferred in breach of fiduciary duty, such that it would be unconscionable for Mr Kelbrick and Mr Mounzer to retain such monies."

743. In response to a plea of limitation by Mr Bosworth and Mr Hurley, the Claimants plead:

> "The Claimants' allegations of breach of fiduciary duty in the RRAPOC amount to allegations of a fraudulent breach of trust, to which no limitation period is applicable." (Reply § 200.1)

This further underlines the nature of the pleaded claim.

744. The claim is accordingly founded on an alleged fraud. The central allegation is that *"fraudulent entities"* were used to divert profits that should have accrued to the Arcadia Group, amounting to a fraudulent breach of trust. In their written closing, the Claimants summarised their case as being that *"Ds operated a dishonest scheme involving the insertion of various entities in the supply chain between and NOC and Arcadia London/Arcadia Switzerland to siphon off money for the benefit of Ds ("the Scheme")".* They alleged that Mr Bosworth, Mr Hurley and Mr Kelbrick each, whether personally or through companies they owned or controlled, *"provided his own valuable assistance to the operation of the Scheme. They operated in concert and each of them acted dishonestly."*

745. To recap, the causes of action advanced against the Defendants are:

i) unlawful means conspiracy;

ii) (as against Mr Bosworth and Mr Hurley) breach of fiduciary duty;

iii) dishonest assistance;

iv) knowing and/or unconscionable receipt; and

v) committing, or in the case of Mr Kelbrick and Arcadia Mauritius knowingly/dishonestly aiding and abetting, breaches of fiduciary duties and/or criminal mismanagement contrary to the Swiss Penal Code.

746. The case on unlawful means conspiracy is that:

> "At or around the time that Farahead acquired the Arcadia Group, the Individual and Corporate Defendants, entered into a combination or understanding with each other with an intention to injure or cause financial loss to the Arcadia Group (as it existed at that time and as it would come to exist in the future upon the formation or incorporation of any future entities or subsidiaries within the Group) and/or to Farahead by use of unlawful means and/or reached an understanding to embark upon a course of concerted action with an intention to use unlawful means to injure or cause financial loss to the Arcadia Group (as it existed at that time and as it would come to exist in the future upon the formation or incorporation of any future entities or subsidiaries within the Group) and/or to Farahead, and as a consequence loss and damage was in fact caused to the Arcadia Group and/or Farahead." (RRRPC § 76.1)

The unlawful means are said to have included the alleged breaches of fiduciary duty, dishonest assistance, knowing and/or unconscionable receipt, aiding and abetting tortious acts under Swiss law and the making by Mr Bosworth and Mr Hurley of *"the continuing deceitful statements and/or continuing fraudulent misrepresentations set out in paragraphs 51-52, 53-55 and 61-63 above."* The latter are the alleged misrepresentations (a) in early 2008, that Arcadia Mauritius had been closed down; (b) shortly after Farahead acquired Arcadia,

that Arcadia Lebanon had been set up for the sole purpose of a particular contract; (c) in late 2008, that that contract had come to an end and Arcadia Lebanon had become dormant; and (d) in around 2009, that the Arcadia Group had ceased its regular trading activities in West Africa. I have considered and rejected those allegations of deceitful/fraudulent misrepresentation in sections (I)(10)(c), (I)(1), (I)(10)(h) and (I)(11)(f) above respectively.

747. The alleged breaches of fiduciary duty are premised on the matters set out in RRRRAPC §§ 71 and 72, quoted above, as made clear by RRRRAPC § 77.3:

> "The manners in which Mr Bosworth, Mr Hurley … breached such duties are set out in paragraphs 71 and 72 above"

Contingent upon such liability being established, the Claimants plead that:

> "in the event that Mr Bosworth, Mr Hurley, … or any of them were to make an unauthorised and/or secret profit and/or commission in breach of his fiduciary duties owed to Arcadia London, or to receive sums as a result of such breaches of fiduciary duty, not only would he be liable personally to account to Arcadia London for such unauthorised and/or secret profit and/or commission and/or sums received, but also any such unauthorised and/or secret profit and/or commission and/or sums received would be held by him on trust for Arcadia London" (RRRRAPC § 21, my emphasis)

Similarly, in § 82 the Claimants say that:

> "As to the claims advanced by the Claimants in respect of the unlawful means conspiracy pleaded and/or the breaches of fiduciary duty pleaded and/or the breaches of contractual duty pleaded and/or the claims for dishonest assistance pleaded and/or the claims for knowing (and/or unconscionable) receipt pleaded:
>
> 82.1. As noted above, Arcadia London and/or Arcadia Singapore assert all relevant and available proprietary claims in respect of all secret and/or unauthorised profits and/or commissions obtained by Mr Bosworth, and Mr Hurley, and Mr Gibbons and Mr Lance, and/or all sums received by them as a result of their breaches of fiduciary duties owed to Arcadia London and/or Arcadia Singapore or any of them (subject always in the cases of Mr Bosworth and Mr Hurley to the limitations set out in paragraphs 77.A1 and 77.A2 above).
>
> 82.2. Arcadia London and/or Arcadia Switzerland and/or Arcadia Singapore assert all relevant and available entitlements to orders for accounts to be taken and for the payment of all sums found to be payable by such accounts. Accordingly:

> 82.2.1. Arcadia London and/or Arcadia Singapore seek as against Mr Bosworth, and Mr Hurley, and Mr Gibbons and Mr Lance orders for an account of all secret and/or unauthorised profits and/or commissions obtained by them, and/or all sums received by them as a result of their breaches of fiduciary duty or any of them, and an order for the disgorgement of such monies (subject always in the cases of Mr Bosworth and Mr Hurley to the limitations set out in paragraphs 77.A1 and 77.A2 above);
>
> 82.2.2. Arcadia London and/or Arcadia Switzerland and/or Arcadia Singapore seek as against Mr Bosworth, Mr Hurley, Mr Gibbons, Mr Lance, Mr Kelbrick, Mr Mounzer, Arcadia Lebanon, Arcadia Mauritius, and Attock Mauritius and The Cornhill Group, orders that each such Defendant do account to them for the loss caused to them by the breaches of fiduciary duty in which they have dishonestly assisted, and an order that they do pay them all sums found to be due on the taking of such accounts; and
>
> 82.2.3. Arcadia London and/or Arcadia Switzerland and/or Arcadia Singapore seek as against Mr Bosworth, Mr Hurley, Mr Gibbons, Mr Kelbrick, Mr Mounzer, Arcadia Lebanon, Arcadia Mauritius and Attock Mauritius orders that each such Defendant do account for the value of the benefit each of them has knowingly (and/or unconscionably) received, and an order that they do pay them all sums found to be due on the taking of such accounts. ”

In the Prayer, the Claimants seek *inter alia*:

> “(5A) A declaration that each of the First and Second Defendants has dishonestly assisted the breaches of fiduciary duty on the part of the other Defendants owing fiduciary duties and accordingly that each of the First and Second Defendants is liable personally to account to the First and/or Third Claimants for the loss caused to them by the said breaches of fiduciary duty and/or for the value of the benefit that each of them has received.
>
> (5B) An order that each of the First and Second Defendants do account to the First and/or Third Claimants for the loss caused to them by the said breaches of fiduciary duty and/or for the value of the benefit that each of them has received…;
>
> …
>
> (5D) A declaration that each of the First and Second Defendants has knowingly (and/or unconscionably) received proceeds of the breaches of fiduciary duty on the part of the other Defendants owing fiduciary duties and accordingly that each of the First and Second Defendants is liable personally to account to the First

> and/or Third Claimants for the value of the benefit each of them has received;
>
> (5E) An order that each of the First and Second Defendants do account to the First and/or Third Claimants for the value of the benefit each of them has received, and an order that they do pay the First and/or Third Claimants all sums found to be due on the taking of such accounts"

748. The case on dishonest assistance and knowing or unconscionable receipt is:

> "81.1.1. That Mr Kelbrick and Mr Mounzer deliberately participated in the fraud perpetrated on them, thereby dishonestly assisting Mr Bosworth, Mr Hurley, … in their breaches of fiduciary duty as set out above; and
>
> 81.1.2. That Mr Kelbrick and Mr Mounzer have knowingly (and/or unconscionably) beneficially received proceeds of the fraud perpetrated on them.
>
> …
>
> 81.1A.1 That each of Mr Bosworth, Mr Hurley, … also dishonestly assisted the other three fiduciaries in their respective breaches of fiduciary duty as set out above; and,
>
> 81.1A.2 That each of Mr Bosworth, Mr Hurley … also have knowingly (and/or unconscionably) beneficially received proceeds of the fraud perpetrated on them.
>
> 81.2 … the Corporate Defendants all also deliberately participated in the fraud perpetrated on them, thereby dishonestly assisting Mr Bosworth, Mr Hurley, Mr Gibbons and/or Mr Lance in their breaches of fiduciary duty set out above. …"

749. The case on breach of Swiss law is that:

i) the breaches of duty alleged against Mr Bosworth and Mr Hurley identified in § 77 (meaning, in effect, those set out in RRRRAPC §§ 71 and 72) "amounted also to acts of criminal mismanagement pursuant to Article 158 of the Swiss Penal Code. which constitute unlawful conduct for which they are each liable to pay compensation under Article 41(1) of the Swiss Code of Obligations and/or to disgorge profits under Article 423 thereof" (RRRRAPC § 81.3A.2); and

ii) the remaining Defendants, thus including Mr Kelbrick and Attock Mauritius, are liable as accomplices for aiding and abetting such unlawful conduct (RRRRAPC § 81.3A.3);

iii) further or alternatively, the remaining Defendants aided and abetted Mr Bosworth and Mr Hurley's acts of criminal mismanagement, dishonestly

assisted those acts, received proceeds of the fraud perpetrated on Cs, and did so dishonestly and knowingly (RRRRAPC § 81.3A.4).

750. It is thus clear from RRRRAPC that the alleged fraud comprised (a) the fraudulent "*insertion*" into transaction chains of Arcadia Lebanon, Arcadia Mauritius, Attock Mauritius or other *"fraudulent entities"* beneficially owned and/or controlled by individual defendants, and (b) diversion of transactions to such entities so that they entered into them instead of members of the *"legitimate"* Arcadia Group. RRRRAPC alleges that the Claimants *"have to date identified 144 fraudulent crude oil transactions"*. However, the RRRRAPC provide relatively few particulars of these transactions. Bryan J on 28 October 2022 directed the Claimants to serve a further statement of case setting out their case on the 144 Transactions. It was served on 19 December 2022.

751. Of the transactions set out in the Claimants' Statement of Case on the 144 Transactions ("***the 144 Transactions Case***"):

i) 67 Transactions involved Arcadia Lebanon. Arcadia Lebanon was the contract holder, i.e. the counterparty under the term contract with the West African NOC. Of the Arcadia Lebanon Transactions:

a) 5 concern the Sao Tome Contract;

b) 45 concern the Zafiro Contract; and

c) 17 concern the Senegal Contract.

37 of the Arcadia Lebanon Transactions pre-date the end of 2008.

ii) The other 77 Transactions ("***the Attock Transactions***") did not involve Arcadia Lebanon. On the Defendants' case, they were ordinary course of business dealings in which the Attock group sourced crude from West African NOCs and then sold the cargoes to Arcadia. The Attock Transactions took place from September 2009, after Mr Kelbrick/Mr Mounzer had acquired Attock Mauritius. On Mr Kelbrick's case, in a typical Attock Transaction, Attock as contract holder purchased the oil from the NOC, and Arcadia was not involved in that process. Arcadia purchased the crude from the Attock group, on market terms and at or about market prices. Of the Attock Transactions:

a) 61 concern the purchase of crude from NNPC;

b) 14 concern the purchase of crude from GEPetrol;

c) 1 concerns a purchase from Ontario; and

d) 1 did not involve a sale to Arcadia.

752. The 144 Transactions Case reiterates the essential nature of the Claimants' case as set out in the RRRRAPC:

> "6 The Claimants' claim as set out in the 4APOC is in essence that Mr Bosworth and Mr Hurley, the ringleaders, in combination with and/or assisted by Mr Kelbrick, Attock Mauritius and the other Defendants:
>
> 6.1 Inserted entities (the "Inserted Entities") that they owned, controlled and/or from whom they received benefits into 144 oil trading transaction chains in which the First to Third Claimants (the "Arcadia Group") ultimately purchased oil (save in 2 instances);
>
> 6.2 Diverted profits on all 144 transactions from the Arcadia Group or some of them to the Inserted Entities and/or third parties to whom the Inserted Entities made payments;
>
> 6.3 Themselves received diverted profits or their benefit; and
>
> 6.4 By some or all of these means, perpetrated a serious and sustained trading fraud upon the Claimants.
>
> 7 The Claimants have identified 144 such transactions, being the 144 transactions."

753. It states that the Inserted Entities were Arcadia Lebanon, Arcadia Mauritius, Attock Mauritius, Tristar Energy, HFE, Crudex, Cathay, China Oil and Azenith.

754. A further summary (or purported summary) of the claim is set out in §§ 13-17:

> "13 By way of background, as particularised in the 4APOC, the other pleadings mentioned in paragraph 2 above and (as to each of the 144 transactions) in Part C above, the Claimants' case is in summary that:
>
> 13.1 The 144 transactions, and the opportunity and/or information required for the Inserted Entities to participate in them, arose by virtue of Mr Bosworth's and Mr Hurley's positions as Group CEO and Group CFO of the Arcadia Group
>
> ...
>
> 13.2 The Defendants together combined to carry out the 144 transactions, as pleaded in, for the reasons set out in and with the knowledge and/or intentions alleged in the 4APOC and, in the case of Mr Kelbrick and Attock Mauritius, in the D5/D9 RFI Response. Without prejudice to the generality of the foregoing, as set out in those pleadings, Mr Bosworth and Mr Hurley assisted one another, and Mr Kelbrick and Attock Mauritius assisted Mr Bosworth and Mr Hurley, in carrying out the 144 transactions, and each received the proceeds of the 144 transactions, with the knowledge and/or intention there pleaded.

13.3 The Inserted Entities (or some of them) received significant amounts from their participation in each of the 144 transactions (as particularised in Part C above).

14 In the case of each of the 144 transactions, in the circumstances set out in paragraph 13 above:

14.1 The transaction, including the involvement of and receipt of amounts by the Inserted Entities, constituted the exploitation of an opportunity and/or information arising by virtue of Mr Bosworth's, Mr Hurley's, Mr Lance's and/or Mr Gibbons' fiduciary positions; and/or

14.2 In any event, the amounts received by the Inserted Entities were not received for or on behalf of the Arcadia Group (or any of them) and, accordingly, their profits were secret profits received by those entities and/or diverted from the Arcadia Group to those entities by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them).

15 Further or alternatively, in the case of each of the 142 Arcadia transactions (being all but EY Deals 2 and 71):

15.1 There was no legitimate reason for, or commercial benefit to the Arcadia Group from, the inclusion by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them) of any of the relevant Inserted Entities in the transaction;

15.2 Further or alternatively, the opportunity to participate in the transaction without any of the Inserted Entities, including to receive such profits as each Inserted Entity received, was diverted by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them) from the Arcadia Group (and each of them);

15.3 Further or alternatively, had the Inserted Entities not been included in the transaction by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them), the Arcadia Group could and would have participated in the transaction and received such profits as each Inserted Entity received;

15.4 Further or alternatively, there was no legitimate reason for, or commercial benefit to the Arcadia Group from, the inclusion by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them) of more than one Inserted Entity in the transaction (as occurred in all but 21 of the 144 transactions, namely, all but EY Deals 58, 62, 67, 73, 79, 82, 84, 88, 91, 94, 99, 100, 101, 102, 108, 112, 115, 120, 127, 131, 138);

15.5 Further or alternatively, the opportunity to participate in the transaction without more than one of the Inserted Entities, including to receive such profits as the additional Inserted Entities received, was diverted by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them) from the Arcadia Group (and each of them) in the 123 transactions identified in paragraph 15.4 above;

15.6 Further or alternatively, had more than one of the Inserted Entities not been included in the transaction by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them), the Arcadia Group could and would have participated in the transaction and received such profits as the additional Inserted Entities received in the 123 transactions identified in paragraph 15.4 above;

15.7 Further or alternatively, any legitimate reason for, or commercial benefit to the Arcadia Group from, the inclusion by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them) of each of the relevant Inserted Entities in the transaction (which reason and benefit is denied) did not provide a commercial justification for the amounts (and profits) received by each Inserted Entity, having regard in particular to the level of profit of the Arcadia Group entity relative to that of the Inserted Entity or Entities;

15.8 Further or alternatively, the opportunity to participate in the transaction without each of the Inserted Entities receiving any amount (and profit) that was not commercially justified, including to receive those amounts (and profits), was diverted by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them) from the Arcadia Group (and each of them); and

15.9 Further or alternatively, had the Inserted Entities not been included in the transaction by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them), the Arcadia Group could and would have participated in the transaction and received such commercially unjustifiable amounts (and profits) as each Inserted Entity received.

16 Further or alternatively, as to the 2 of the 144 transactions in which no entity from the Arcadia Group was included (EY Deals 2 and 71):

16.1 There was no legitimate reason for, or commercial benefit to the Arcadia Group from, its exclusion from the transaction;

16.2 Further or alternatively, the opportunity to participate in the transaction, including without any of the Inserted Entities and to receive such profits as each Inserted Entity received, was

> diverted by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them) from the Arcadia Group (and each of them);
>
> 16.3 Further or alternatively, had the Arcadia Group been afforded the opportunity to participate in the transaction and/or had the Inserted Entities not been included in the transaction by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them), the Arcadia Group could and would have participated in the transaction and received such profits as each Inserted Entity received;
>
> 16.4 Further or alternatively, paragraphs 15.4–15.9 above are repeated mutatis mutandis in respect of these transactions and the exclusion of the Arcadia Group from them by Mr Bosworth, Mr Hurley, Mr Lance and/or Mr Gibbons and the other Defendants (or some of them).
>
> 17 The Arcadia Group did not give its fully informed consent to the matters in paragraphs 13–16 above. ”

755. The 144 Transactions Case proceeds to allege that the Defendants thereby breached their duties, cross-referring to the RRRRAPC, and sets out details on a transaction by transaction basis. It also sets out the Claimants' response to explanations which the Defendants had given for the transactions. As part of that response, the Claimants set out their position in relation to the Attock Transactions. They refer to affidavit evidence which Mr Kelbrick had given that, for these transactions, his contract-holding company "*itself undertook the transactional risk as principal*, *"the originated crude oil was proprietary to [Attock Mauritius] and [the other Kelbrick Entities]"*, *"AOIL generated and implemented the trade and assumed all the associated trade risks for these transactions"*, and "*the oil was sold to the Arcadia Group at market rates*"; and to Mr Bosworth's and Mr Hurley's pleaded case that the Tristar and Attock groups of companies were independent of Mr Bosworth, Mr Hurley and the Arcadia Group, that sales between the Tristar and Attock groups of companies and the Arcadia Group were at arm's length, that the prices of such sales were set independently and at arm's length from Mr Bosworth and Mr Hurley, and that, in purchasing oil from oil producers, the Attock and Tristar groups of companies were acting on their own behalves, on their own account and for their own trading purposes, and not on behalf of the Arcadia Group. The Claimants' case in response is:

> "38.1 Mr Bosworth, Mr Hurley, Mr Kelbrick, Mr Mounzer and Mr Decker had a large number and range of mutual engagements and interactions, and very close relationships, which, the Claimants aver, shows a close relationship of mutual trust between them and companies associated with them. The Claimants rely upon the matters set out in Schedule A, … many of which are part of Mr Bosworth and Mr Hurley's and/or Mr Kelbrick's pleaded cases. They further rely upon the payments between Mr Kelbrick and/or Mr Mounzer (or associated

entities), on the one hand, and Mr Bosworth and/or Mr Hurley (or associated entities), on the other, set out in Schedule B, … for which there appears to be no proper explanation and which appear to be dealings with the proceeds of the alleged fraud. It is to be inferred from those matters, and the further matters set out immediately below, that dealings between these individuals and entities associated with them were not dealings between independent parties at arm's length.

38.2 Without prejudice to the generality of the foregoing, the Attock group's business from 2006 to 2013 was all but exclusively with the Arcadia Group. On Mr Kelbrick's and Mr Mounzer's affidavit evidence, the 97 crude oil transactions (all but 1 of which are with the Arcadia Group), 4 products transactions (2 of which are not with the Arcadia Group) and 13 chartering transactions (all of which are with the Arcadia Group), which are recorded in the Updated Attock Deal Sheet, … constituted the entirety of the Attock group's business in the period it covers, namely, August 2009 to May 2013.

38.3 (At least) Attock Mauritius, Crudex, Tristar Switzerland, Tristar Energy and HFE were presented to Farahead and the outside world as being legitimate, arm's-length third party entities with which the Arcadia Group was doing business. In particular, the name "Attock International Oil Limited, Mauritius" created the misleading impression that it was part of the Attock Group, a well-known Pakistan-based oil conglomerate; and the name Crudex created the misleading impression that it was part of or associated with a well-known Russian commodity trading company with the same name.

38.4 Arcadia Mauritius, Attock Mauritius, Crudex, Azenith, Cathay (that is, the Kelbrick Purchasing Entities), Tristar Switzerland, Tristar Energy, HFE and Proview (that is, entities in the Attock group) were not in fact legitimate, independent third party entities with which the Arcadia Group was doing business at arm's-length. They were entities that (i) through the people that controlled and/or operated them (in particular Mr Decker, Mr Mounzer and/or Mr Kelbrick) possessed very close relationships with the Arcadia Group, in the persons in particular of Mr Bosworth and Mr Hurley and (ii) in the case of Arcadia Mauritius, Attock Mauritius, Crudex and Azenith had substantially no business (and, in the cases of Tristar Switzerland and Tristar Energy, had limited business) other than with the Arcadia Group.

38.5 By this artifice, Mr Bosworth and Mr Hurley, along with Mr Kelbrick and Attock Mauritius (and the other Defendants), diverted substantial amounts (gross profits) from the Arcadia Group." (144 Transactions Case § 38)

756. In simple terms, the Claimants' case is that Mr Decker's/Mr Kelbrick's companies, including the Tristar and Attock groups and Arcadia Mauritius, were nothing more than sham entities with no business of their own, used fraudulently to divert profits from the Arcadia Group.

757. The Claimants have never pleaded any positive case on West African oil trading practice. Bryan J at the first CMC in this case, in October 2022, made clear that any such cases would need to be pleaded. Bryan J was narrowly persuaded that expert evidence of West African oil trading practice should be permitted. He noted that the Claimants said they were far from convinced that there was any scope for such evidence, and took a neutral position on the application. As the Claimants were not advancing any positive case, he was persuaded that reports should be served sequentially, with the Defendants going first. At § 30 of his judgment Bryan J said:

> "30. However, I will say this: if the Claimants wish to go so far as to advance their own positive case in relation to West African oil trading, then a positive case would require an amendment to the pleading, and they would be well advised to make any such application at the same time as they were serving any expert evidence, but I cannot bind them as to the approach they adopt, and I make no order in that regard. Equally, it could be that there are simply certain matters of West African oil trading practice that the Claimants want to correct or clarify, as it were, so not so much a positive case, but simply pointing out the areas where something was not accepted, and where their own expert would be explaining why that wasn't correct. That would not necessarily require an amendment to their pleaded case."

In addition, in the context of a Request for Further Information which the Claimants had served on the Defendants, Bryan J said:

> "35. By way of riposte, the defence say that that is really just not the right way to go about it. There should be a pleading supported by a statement of truth in relation to the matters underlying these transactions, and once that has been done, that can be responded to. Having explored the matter with the Claimants in oral argument, Mr Pilbrow sees the force of that submission and the judicial indication in that regard that I do consider that there should be a freestanding pleading in relation to these transactions setting out the Claimants' positive case with a weather-eye on the matters identified in the RFI, because this document is going to be used as a pleaded vehicle for the Defendants to respond to. It is to be hoped that if the Claimants plead with proper particularity, and then the defence plead back in a proper manner with proper particularity, and pleading a positive case and not simply denying or not admitting things (which would be an inappropriate approach), then such defence pleading should obviate the need for the Request for Further Information."

758. It follows that the Claimants cannot fairly seek at trial to advance a positive case on matters of West African oil trading practice. That includes any positive case to the effect that service providers were unnecessary, unusual or illegitimate; that 'sleeving' or the use of intermediaries was unnecessary, unusual or illegitimate; or about the levels of payments that were usually made, or sometimes made, or could properly be made, to either of those categories of person involved in West African oil trading transactions.

(2) The diversion case in overview

759. The Claimants contend that the Defendants operated a dishonest scheme involving the insertion of various entities in the supply chain between a NOC and Arcadia London/Arcadia Switzerland to siphon off money for the benefit of the Defendants, which they define as "*the Scheme*".

760. They say the Scheme involved using the Arcadia Group's name and backing to obtain term contracts from NOCs on favourable terms which enabled crude oil to be purchased at low prices, and the Defendants taking the benefit of those prices for themselves. Arcadia London/Arcadia Switzerland were not given the benefit of those low prices even though they bought almost all the oil supplied under these term contracts and the Arcadia Group's credit facilities underwrote the purchase of each cargo.

761. On average, cargoes were around 950,000 barrels and were sold to Arcadia for around US$85 million each. The Claimants contend that the Defendants "*siphoned off*" US$2.25 million per cargo. In all but two of the 144 Transactions, the Claimants say, the Defendants' gain was funded by the payments made by Arcadia London or Arcadia Switzerland for the oil.

762. The Claimants say they have *"chosen to bring claims in relation to transactions which took place after Arcadia Lebanon began to be used in the supply chains from April 2007"* and that they *"do not need to prove any fraud prior to the use of Arcadia Lebanon, because it is not part of their case, but, … that does not in any way imply an admission that there was no fraud being carried out by the Ds on Arcadia London before then"*. The 144 Transactions took place between April 2007 and May 2013. They were originally identified and listed in the two reports produced by EY in 2015, hence each transaction has an "*EY Deal*" number from 1 to 144 by which the parties refer to them for convenience.

763. The Claimants say the gross profits of the 144 Transactions, which they define as the difference between the price for which Arcadia London or Arcadia Switzerland sold the oil to third parties and the (lower) price paid to the oil producer, amount in total to US$334.5 million.

764. Compared to those total 'gross profits', the Claimants say Arcadia London made a gross loss of US$3.5 million and a net loss of US$7.8 million from the 144 Transactions, and Arcadia Switzerland made a gross profit of US$12.6 million and a net profit of only US$4.1 million. Arcadia London and Arcadia Switzerland together made gross profits of US$9 million (2.7% of the total) and a net loss of US$3.7 million from these transactions.

765. The Claimants say the remainder of the 'gross profits', i.e. the difference between the price which Arcadia London/Arcadia Switzerland paid for the oil and the price paid by the contract-holder (Arcadia Lebanon or Attock Mauritius) for the oil, totalling US$325.4 million, were made by what the Claimants call *"[t]he Intermediaries — companies outside the Arcadia Group, owned or controlled by [the Defendants]"*.

766. It is worth noting at this stage that that formulation of the case, set out in § 193 of the Claimants' written closing, is in a fundamental respect inconsistent with the Claimants' pleaded case (as well as the evidence), since it assumes that all service providers and other third parties – even those not owned or controlled by Mr Kelbrick – were owned or controlled by the Defendants. That has never been the Claimants' pleaded case. As quoted earlier, the case set out in the RRRRAPC, the 144 Transactions case and the Reply is that profits were diverted to *"the Inserted Entities and/or third parties to whom the Inserted Entities made payments"* (my emphasis). There is no evidence for the proposition that any of the Defendants owned or controlled, for example, Sonergy or Mr Driot's companies.

767. The Claimants allege, by way of breakdown of the above figures, that 'gross profits' totalling US$220,467,657 were diverted from Arcadia London and US$104,973,631 from Arcadia Switzerland.

(3) The case in relation to the Arcadia Lebanon transactions

768. As regards the Arcadia Lebanon transactions, the Claimants say Mr Bosworth and Mr Hurley did not hold the shares in Arcadia Lebanon on behalf of Farahead or at Farahead's direction, and did not agree with Mr Fredriksen/Mr Trøim that Arcadia Lebanon would exist outside the Arcadia Group to conduct higher risk business. That was, they say, completely inconsistent with their evidence that Mr Fredriksen and Mr Trøim impressed upon Mr Bosworth and Mr Hurley that they did not want to take such risks. Rather, it was Mr Bosworth and Mr Hurley's decision to incorporate Arcadia Lebanon, and Arcadia Lebanon was always their company.

769. The Claimants say Mr Bosworth and Mr Hurley's ownership of Arcadia Lebanon is demonstrated by the way in which Arcadia Lebanon was used and other matters. They refer to:

i) The lack of correspondence between Mr Bosworth/Mr Hurley and Farahead about the incorporation of Arcadia Lebanon.

ii) Arcadia Lebanon's office, auditing and staffing arrangements.

iii) The information provided to Credit Agricole (Suisse) about Arcadia Lebanon's beneficial ownership.

iv) The discussions with Farahead in 2008/09 about transferring the shares in Arcadia Lebanon to Arcadia Beirut having come to nothing.

v) Mr Bosworth and Mr Hurley's lack of complaint about being the shareholders in Arcadia Lebanon.

vi) The alleged absence of discussion with Mr Fredriksen, Mr Trøim or Farahead about Arcadia Lebanon's business from 2009 to 2013; the alleged failure to provide to Farahead Arcadia Lebanon's financial statements for the years 2008 to 2013 inclusive; and the failure to "*account*" for the expenditure of Arcadia Lebanon's net receipts from its trading at any time.

vii) Mr Bosworth and Mr Hurley using Arcadia Lebanon for their own business and without seeking consent from Mr Fredriksen. In particular, Mr Hurley in his evidence referred to certain non-Arcadia related payments from Arcadia Lebanon to Collafin, Atlantic and Equinox; and sums received from Septa (a company related to Seven Energy) and then paid out to (the Claimants say) Mr Bosworth, Mr Hurley, Afrinvest and/or Atlantic Energy.

viii) Mr Bosworth and Mr Hurley having arranged to wind Arcadia Lebanon up in 2013 without consulting Mr Fredriksen or Mr Trøim.

ix) Mr Bosworth and Mr Hurley having appointed their own nominee shareholders of Arcadia Lebanon in 2013 without consulting Mr Fredriksen or Mr Trøim.

x) The power of attorney signed in July 2013, by which Attock Dubai was empowered to apply to Credit Suisse for the issue of third party letters of credit in the name of Arcadia Lebanon with a view to Arcadia Lebanon supplying cargoes to Attock Dubai.

xi) The October 2013 Zafiro/Arcadia Lebanon/Attock Dubai transaction, done without reference to Mr Fredriksen or Mr Trøim.

xii) The assignment of the Zafiro Contract to Attock Dubai in December 2013.

xiii) The payment of approximately US$3.6 million to Greenfield in 2014.

770. The Claimants submit that the use of Arcadia Lebanon (a company owned and controlled by Mr Bosworth and Mr Hurley) to conduct business which would otherwise have been conducted by Arcadia London or Arcadia Switzerland required the authorisation of Farahead. However, Mr Trøim was not presented with full information about how Arcadia Lebanon was to be used, and such information as was provided was misleading. In particular, the Claimants submit, Mr Bosworth/Mr Hurley did not disclose that Arcadia Lebanon was to be used for *"high risk"* business which involved the making of large payments to service providers and which carried with it the risk of regulatory investigation and non-compliance with anti-bribery regulations; nor that Arcadia Lebanon would be buying crude oil and selling it on to Arcadia London or Arcadia Switzerland with the result that any *"profit"* made by Arcadia Lebanon would be funded by money derived from Arcadia London or Arcadia Switzerland; and

nor was there was any explanation of *"sleeving"* or of Arcadia Lebanon's role in any *"sleeving"* arrangement. It is pertinent to note, however, that the Claimants' only pleaded case as to non-disclosure or misrepresentation in this regard is as follows:

> "Farahead, including Mr Fredriksen, Mr Trøim and Mr Hannas, did not know about, and did not authorise or agree to, the use of "sleeve" entities for the Arcadia Group's trading activities, including the use of Arcadia Lebanon as a "sleeve". Mr Fredriksen, Mr Trøim and Mr Hannas had no knowledge of or familiarity with "sleeve" entities or their use and purpose in oil trading, an industry with which none of them was at any material time familiar." (Reply § 107.7) "Farahead, in particular Mr Fredriksen and Mr Trøim, were told by Mr Bosworth (after Arcadia Lebanon had been established) that: (i) he (Mr Bosworth) and Mr Hurley had set up Arcadia Lebanon in their own names; (ii) they had done so in order to carry out only a small number of African trades under a particular oil trading contract or opportunity; (iii) this was because they did not wish to share their bonus on these highly profitable trades with their colleagues under the Arcadia Group's normal bonus arrangements; and (iv) 70 per cent of the net profits on these trades would be returned to Farahead in accordance with the agreement as to the normal bonus arrangements. Farahead, in particular Mr Fredriksen and Mr Trøim, accordingly understood that Arcadia Lebanon would not be involved in any ongoing trading activity after those trades were completed (or for any other purpose), would no longer to be active and would be closed down." (Reply § 107.8)

771. The Claimants rely on the fact that intermediaries were included in the transaction chains for the 144 Transactions. From 2007 to 2009, there were usually two entities (normally Attock Mauritius and Tristar) inserted between Arcadia Lebanon and the Arcadia Group company (Arcadia London or Arcadia Switzerland). The position of Attock Mauritius and Tristar in the chain varied from cargo to cargo. Sometimes Attock Mauritius came first, and at other times it was Tristar. From 2009, the Tristar Group was no longer involved and only Attock Mauritius was, the Claimants suggest, the intermediary.

772. The Claimants submit that there was no commercial justification for the use of the intermediaries.

i) They were not needed in order to finance the transactions. Under the Arcadia Lebanon transactions involving two intermediaries, Arcadia London or Arcadia Switzerland would pay one of the intermediaries (the "Buying Intermediary") under a third party letter of credit issued in the name of its immediate supplier (the "Passive Intermediary"); the Buying Intermediary would then pay the NOC under a back-to-back third party letter of credit issued in the name of Arcadia Lebanon and obtained using the Arcadia Group's letter of credit as security; the money received by the Buying Intermediary from the Arcadia Group would be used to

reimburse the bank and the excess would be paid to Arcadia Lebanon. From 2009, a direct letter of credit was issued in favour of Attock Mauritius; and using the Arcadia Group letter of credit as security, Attock Mauritius continued to obtain a third party letter of credit with which to pay the NOC in the name of Arcadia Lebanon.

ii) There was no need to insert Arcadia Lebanon or intermediaries into the supply chain in order to maintain distance and separation between the Arcadia Group and the purchases of oil from West African NOCs and service provider payments, i.e. sleeving. Using a company called "Arcadia" Lebanon, owned by Mr Bosworth and Mr Hurley and held out as part of the Arcadia Group in order to obtain term contracts, could never have been intended to protect the Arcadia Group from regulatory investigation. Moreover, there were many transactions between Arcadia Lebanon and Arcadia London (including direct payments made by Arcadia Lebanon to Arcadia London which would have been obvious to Arcadia London's auditors), and extensive documentation sent between persons Mr Bosworth/Mr Hurley, Mr Kelbrick, Mr Mounzer, Mr Duncan, Mr Grimes, Mr Cartwright and Mr Gardiner within the Arcadia Group referring to Arcadia Lebanon. Ms Bossley considered the suggestion that the structures accorded protection to be obviously wrong. Furthermore, the use of third party letters of credit involved the skipping of links in the payment chain, which undermines the appearance of a series of independent companies buying and on-selling the oil which is essential to effective sleeving. The use of these arrangements hid the extent and nature of Arcadia Lebanon's activities from Farahead. If the true purpose of the insertion of the intermediaries was to hide Arcadia Lebanon's payment of service providers from the Arcadia Group's auditors, that was not a legitimate purpose served by sleeving."

773. The Claimants note that the 144 Transactions were not, as a matter of chronology, created in the order of the contractual chain i.e. starting with the sale of oil by the NOC. Instead, it appears that the first event to occur was the sale of the cargo by the Arcadia Group to a third party, as set out below.

i) Nomination of Cargo:

a) The NOC nominated a cargo for lifting within a window of time, one or two months later.

b) The fact of the nomination was communicated via Arcadia Lebanon/the intermediaries to Arcadia London/Arcadia Switzerland.

ii) Sale of the Cargo by Arcadia London/Arcadia Switzerland to a Third Party:

a) In advance of the lifting window, Arcadia London/Arcadia Switzerland would sell the cargo to a third party.

b) The third party would normally nominate the vessel to take delivery of the cargo.

iii) Sales up the chain from Arcadia Lebanon to Arcadia London/Arcadia Switzerland:

a) After Arcadia London/Arcadia Switzerland had sold the cargo to a third party and before the cargo was loaded (the B/L date), the sales up the chain would take place at around the same time:

b) Arcadia Lebanon sold the cargo to the Buying Intermediary (either Attock Mauritius or Tristar);

c) The Buying Intermediary sold the cargo to the Passive Intermediary;

d) The Passive Intermediary sold the cargo to Arcadia London/Arcadia Switzerland.

iv) Sale by the NOC to Arcadia Lebanon:

a) At some point, a price was agreed between Arcadia Lebanon and the NOC. There is not always evidence of the agreement or pricing declarations being made on a particular day.

b) The invoice issued by the NOC would identify the price averaging basis applied.

v) Back-to-Back letter of credit Financing:

a) Arcadia London/Arcadia Switzerland would ask its bank to issue an export letter of credit in favour of the Buying Intermediary. In cases where there was a Passive Intermediary between Arcadia London and the Buying Intermediary, Arcadia London would arrange for a letter of credit to be issued in the name of (by order of) the Passive Intermediary for the benefit of (in favour of) the Buying Intermediary.

b) The Buying Intermediary would ask its bank to issue an import letter of credit in favour of the NOC in the name of Arcadia Lebanon referring to the issue of the export letter of credit by Arcadia London/Arcadia Switzerland. Arcadia Lebanon (represented by Mr Bosworth or Mr Hurley) would authorise the bank issuing the import letter of credit to allow the Buying Intermediary to request an import letter of credit in its name using the pro-forma document. Mr Bosworth/Mr Hurley would sign these authorisations.

c) In earlier deals, for example in EY Deal 27, on 15 August 2008, different banks might be used: on Arcadia London's instructions, Fortis Bank issued an letter of credit in the name of Attock Mauritius for the benefit of Tristar; then, at Tristar's request,

Credit Agricole issued the letter of credit in the name of Arcadia Lebanon by which NNPC would be paid.

d) Efforts were made to ensure that the same bank that issued the export letter of credit would open the import letter of credit. For example, in EY Deal 56, on 19 November 2009, ING opened both the letter of credit by which Arcadia London was to pay Attock Mauritius and the letter of credit issued at Attock Mauritius's request in the name of Arcadia Lebanon to pay NNPC.

e) In any case, back-to-back letters of credit would be issued to facilitate the necessary payments, with the same documentary instructions triggering payment under each so that effectively the bank issuing the letter of credit at the request of the Buying Intermediary had the security of the letter of credit issued by Arcadia London or Arcadia Switzerland.

vi) Payments

a) Pricing was always finally measured by reference to the quantity of oil actually loaded on board the vessel as shown in the B/L.

b) Arcadia London/Arcadia Switzerland would pay the Buying Intermediary.

c) The invoice issued by Arcadia Lebanon to the Buying Intermediary would inform the Buying Intermediary of the total amount due and direct that the amount of the NOC's invoice should be paid to the NOC directly, with the balance paid to Arcadia Lebanon.

vii) Profits:

a) Under the Zafiro Contract, large profits were made by Arcadia Lebanon arising from the different price averaging periods used for the purchase and the sale.

b) Under the Sao Tome Contract and the Senegal Contract there was not always a difference between the pricing period selected by the Arcadia Group company and the pricing period selected by Arcadia Lebanon. In those cases, only a relatively small amount of gross profits were diverted, accounted for by reference to the premia charged by Arcadia Lebanon and the intermediaries on their onward sales. Where, however, there was a difference between the pricing period used to determine the price for Arcadia Lebanon's purchase and the pricing period used to determine the price for Arcadia Group's acquisition, very large gross profits accumulated in Arcadia Lebanon.

774. By reason of these matters, the Claimants allege that the total amount of US$186,694,710 in 'gross profits' was 'diverted' to Arcadia Lebanon from Arcadia London/Arcadia Switzerland. Arcadia London claims that US$153,642,716 was diverted from it as follows:

i) US$17,437,415 under the Sao Tome Contract;

ii) US$52,080,877 under the Senegal Contract;

iii) US$84,124,424 under the Zafiro Contract; and

Arcadia Switzerland claims that US$33,051,994 was diverted from it under the Zafiro Contract.

775. Of these gross profits, other intermediaries between Arcadia Lebanon and Arcadia London/Arcadia Switzerland in the supply chain retained US$6.6 million from Arcadia London/Arcadia Switzerland (including US$3.7 million received by Attock Mauritius) but a significant amount of Arcadia London and Arcadia Switzerland's money was paid to Arcadia Lebanon. Arcadia Lebanon received US$180.1 million and then:

i) paid US$0.9 million to GEPVTN (which the Claimants accept was a legitimate expense);

ii) paid up to US$129.6 million to service providers according to Mr Abbey, or up to US$147.8 million according to Mr Stern.

776. After taking into account those payments, Arcadia Lebanon retained net receipts of either:

i) US$49.6 million, according to Mr Abbey, which assumes payments to MRS are not taken into account as payments to service providers (as to which see §§ 413-414 above); or

ii) US$31.4 million, according to Mr Stern.

777. The Claimants contrast the profits made by Arcadia Lebanon with the net losses made by the Arcadia Group on the Arcadia Lebanon Transactions. On those transactions, Arcadia London and Arcadia Switzerland between them made gross profits of US$1,447,629 and net losses of US$411,976. Arcadia London made gross losses of US$5,656,335 and net losses of US$3,766,303. Arcadia Switzerland made gross profits of US$7,103,964 and net profits of US$3,354,327. I note that those figures take no account of hedging gains or losses or, particularly importantly, of the large paper trading profits which I refer to earlier (along with their link to the physical oil trading and the information flow which it provided).

778. As regards the sharing of Arcadia Lebanon's profits, the Claimants suggest that it is 'common ground' that it was agreed that Mr Bosworth/Mr Hurley would pay a share of Arcadia Lebanon's profits to Farahead. (As I set out in the Annex, regarding the amendments, it is in fact not common ground that any binding or final agreement was reached.) The Claimants add:

> "In the course of oral Opening Submissions, Cs conceded that the USD 5 million paid by PB and CH to Fulham Properties in April/May 2009 had indeed been the payment of a profit share (or Dividend). Between them, PB and CH received USD 8,099,760 in dividends. The USD 5 million – more or less – reflects the split that had been discussed."

779. The Claimants deny any agreement that further net receipts that accumulated in Arcadia Lebanon were to be spent for the benefit of the Arcadia Group, or that that in fact occurred. They say (though their belated attempt positively to plead to this effect was disallowed) that the nine categories of payments to which the Defendants refer constituted payments away in breach of fiduciary duty of money obtained from Arcadia London/Arcadia Switzerland. The Claimants say that they *"put PB and CH to proof of their assertions that money derived from the 144 Transactions was spent for the benefit of the Arcadia Group".*

780. The Claimants also make lengthy submissions about Arcadia Lebanon's payments to service providers, including but not limited to Mr Kelbrick's company Proview. I summarise these below, prefaced by the point that the Claimants:

i) (as already noted) have never pleaded a case on West African oil trading practice, notwithstanding the indication given by Bryan J at the first CMC;

ii) accordingly have never pleaded any positive case to the effect that service providers were unnecessary, unusual or illegitimate; that 'sleeving' or the use of intermediaries was unnecessary, unusual or illegitimate; or about the levels of payments that were usually made, or sometimes made, or could properly be made, to either of those categories of person involved in West African oil trading transactions;

iii) have not pleaded any positive case as to whether, and if so why, the making or quantum of any particular service provider payments in the present case, whether by Arcadia London, Arcadia Switzerland or Arcadia Lebanon, were commercially unjustifiable; and

iv) have not pleaded any case that payments to the service providers were, or that any of the Defendants knew or believed them to be, or knew of a risk that they were in fact, bribes or other corrupt payments.

The RRRRAPC make no reference to service providers at all, save insofar as a general allegation is made that Proview was a corporate participant in the fraud allegedly perpetrated on the Claimants. The 144 Transactions Case merely complains that Mr Bosworth and Mr Hurley, who in their Defence referred to payments to service providers, had failed to identify any services or other benefits provided by them; alleges that payments by Arcadia Lebanon to Proview between July 2008 and February 2011 totalling US$31,777,948 *"represent the proceeds of the three fraudulent transactions"*, namely payments received by Arcadia Lebanon from Attock Mauritius representing the proceeds of EY Deals 21, 23 and 24; and alleges that a payment by Arcadia Lebanon to

Proview in December 2009 of US$250,030 *"represents the proceeds of the six fraudulent transactions"*, namely payments received by Arcadia Lebanon from Attock Mauritius or Tristar Energy pursuant to EY Deals 43-48. The gist of the case set out against Proview is that it was not a legitimate, independent third party entity at all (§ 38.4). The Reply contains extensive non-admissions about service providers and their roles.

781. With that preface, I summarise the Claimants' submissions on this topic. They say:

> "The amounts paid to SPs are extraordinarily large. These payments were made to SPs despite the known risk that SPs would themselves make payments to third parties which might breach anti-corruption legislation or compliance provisions to which the Arcadia Group was subject (although [Mr Bosworth/Mr Hurley] say no bribes were paid). Payments were sometimes made without any Service Provider Agreement being in place and in any event, there is no documentary evidence of any services having been provided by any of them. Where agreements do exist they provide only vague descriptions of what each was required to do; Ds themselves, and the invoices (where they exist), give wholly vague descriptions of what they actually did and how they earned the vast sums of money paid to them." (footnotes omitted)

782. The Claimants deny that these were legitimate and necessary commercial expenses incurred in order to gain access to the cargoes of oil, and in any event, that Farahead had sufficient knowledge of or gave sufficient consent to the Arcadia Lebanon Transactions and (must have realised) that payments to service providers were inevitable. They say rational businessmen with as much at stake as Mr Fredriksen/Mr Trøim would not knowingly take such risks for the kind of profits Mr Bosworth/Mr Hurley contend were to be made by Farahead. This aspect of Arcadia Group business was insignificant both (i) for the Arcadia Group itself and, even more so, (ii) in the context of Mr Fredriksen/Mr Trøim's wider business interests. The Claimants add that some alleged payments were not made; for others, there is no evidence tying them to the Arcadia Lebanon Transactions. In many cases, multiple service providers were paid in connection with the same transaction, without explanation of why each had to be paid or the role they each played. They contend that the burden is on Mr Bosworth/Mr Hurley to demonstrate that the payments to service providers were made and that they were legitimate commercial expenses necessarily incurred to obtain the crude oil from the NOCs. They rely on the "*absence of any serious enquiry*" as to who the service providers were or why they needed to be paid to rebut Mr Bosworth's insistence that they were necessary.

783. In relation to Proview, the Claimants submit that the need for its involvement is entirely unclear given that Arcadia London was not paying any service provider in relation to the Sao Tome Contract before it was moved to Arcadia Lebanon; and that the payments made to Proview under the Sao Tome and Senegal

Contracts were not justified for the work which the Defendants contend was done by Mr Kelbrick.

784. Turning to the individual contracts, the Claimants submit that the Defendants' reliance on the fact that Arcadia London paid service providers in relation to the Zafiro Contract before that contract was transferred to Arcadia Lebanon does not suggest it must have been legitimate. Arcadia London did not make those payments independently of Mr Bosworth and Mr Hurley. At all material times, it was Mr Bosworth who arranged for the payments to be made and Mr Hurley who facilitated them. In any event, the Claimants rely on the fact that prior to the transfer of the Zafiro Contract from Arcadia London to Arcadia Lebanon, payments to Sonergy were discretionary but subsequently they were expressed in terms of an obligatory profit share in an amount far in excess of what anyone would consider normal. Further, it is said that the Defendants cannot properly explain the somewhat complicated arrangements under the Zafiro Contract which resulted in more than 80% of Arcadia Lebanon's gross receipts being paid to service providers (including a further *"Discount Differential Profit"* which Arcadia London never paid).

785. As to the Sao Tome Contract, the Claimants say that from the point when it was transferred to Arcadia Lebanon, a large share of profits (53.75%) was paid to Proview, in addition to payments to Equinox of US$ 0.04 per barrel and to Sao Tome of US$ 0.15 under the Lifting Agreement. There was no written agreement with Proview and the terms agreed (if any) are entirely unclear. The introduction of Proview as a service provider was a means by which to siphon off money paid by Arcadia London/Arcadia Switzerland for the oil to a company outside the Arcadia Group.

786. The Claimants say there is no evidence that Pang Ling (re-named as or replaced by Equinox) had been receiving a large profit share in relation to the Sao Tome Contract while it was held by Arcadia London. Following the FSA Investigation in 2002, the Claimants say, Arcadia London had been paying Pang Ling/Equinox only *"cents on the barrel"* with the potential for a bonus payment.

787. As to the Senegal Contract, the Defendants identified payments made by Arcadia Lebanon to companies said to be associated with Mr Driot (Bergamot and Acacia) of US$ 0.07 and US$ 0.17 each, and 70% of the profit being paid to service providers associated with Mr Kelbrick. Bergamot and Acacia's cut also increased, to 5% each, so that a total of 80% was paid to service providers. The Claimants say this arrangement is unexplained and unjustifiable, and was *"simply a means to siphon off money paid for the oil by Arcadia London/Arcadia Switzerland outside the Arcadia Group"*.

(4) The case in relation to the Attock Transactions

788. After 2009, Arcadia London, Arcadia Switzerland and Arcadia Lebanon did not enter into any new term contracts. The Claimants contend that:

> "… PB and CH no longer wanted to share the profits made under Term Contracts with Farahead and instead diverted opportunities

> for new Term Contracts from the Arcadia Group to Attock Mauritius which had previously functioned only as an Intermediary between Arcadia Lebanon and Arcadia London."

789. Their case is that opportunities for new term contracts were found by Mr Bosworth and came to his attention as a representative of the Arcadia Group. These opportunities were diverted to Attock Mauritius. The Attock Transactions involved crude oil obtained under at least six contracts. These were the contracts to which I refer in sections (I)(11)(a) and (f), (12)(b), (c) and (d) and (13)(a) above, i.e. the Attock/GEPetrol Contract, the Arcadia Mauritius/NNPC Contract, the Crudex/NNPC Contract, the Attock/NNPC Contract, the Cathay/NNPC Contract and the Azenith/NNPC Contract.

790. The Claimants deny that Attock Mauritius was dealing with Arcadia London/Arcadia Switzerland at arm's length or independently, and say that the Defendants have offered no evidence about how these contracts were obtained. They say Mr Kelbrick has disclosed no copies of any of the paperwork produced for his applications for the contracts, but that such contemporaneous documentation as there is confirms the involvement of Mr Bosworth in the process of obtaining them.

791. The Claimants say Mr Bosworth and Mr Hurley made an agreement with Mr Kelbrick that Arcadia London or Switzerland would buy all the oil under these contracts from Attock Mauritius, and all but two cargoes supplied under them were in fact sold by Attock Mauritius to Arcadia London or Arcadia Switzerland. Attock Mauritius was not in a position to operate the contracts independently of the Arcadia Group, which in fact supported it. Mr Bosworth and Mr Hurley also made arrangements for the Arcadia Group to support Attock Mauritius's trading and the development of its business, including, in particular, by providing letters of credit to be used as security by Attock Mauritius for the issue of its own letters of credit to pay for the oil on a back-to-back basis.

792. The Claimants say that Attock Mauritius *"was always a vehicle for [Mr Bosworth], [Mr Hurley] and [Mr Kelbrick]'s scheme and played the same role throughout. Attock Mauritius never functioned independently of [Mr Bosworth/[Mr Hurley]".* In support of that contention, the Claimants rely on, in summary, the following matters:

i) Attock Mauritius having few staff and sharing offices with Arcadia Lebanon in Beirut, with Ms Azzariti and Mr Morgado working for both companies and Mr Gagiano on behalf of Arcadia monitoring Attock Mauritius's performance of the term contracts.

ii) Email correspondence in September 2010 and May 2012 in which Mr Bosworth asked his contact Chief Etete to provide a local Nigerian partner for Attock to use in a crude application, along with Mr Bosworth's evidence in cross-examination:

> "71:13 …Mr Kelbrick had asked, I believe me and a number of people, if there was a – he had a partner in terms of the sponsor that needed, a local company, and I asked Etete whether he had

> one and these are the things that Mr Kelbrick required. I'm giving him assistance.
>
> Q. Because you have an interest in getting term contracts for Attock Mauritius.
>
> A. No, I had an interest in getting term contracts for Arcadia if Attock got them, as best we could. They were a junior partner. That is what you do in business, you help people.
>
> Q. When you say 'they' were a junior partner, that is 72:1 Attock you are referring to?
>
> A. Yes, they were a – we worked with them. They were smaller than we were. So if you can give – I probably used the wrong word 'partner'. In the legal terms, that is not correct, but you give them assistance.
>
> Q. It accurately reflects your relationship, which is one of partnership?
>
> A. No."

iii) Mr Kelbrick not dealing with the Arcadia Group at arm's length, as evidenced (it is said) by his multiple roles (consultant, intermediary and purported independent company), by Arcadia Group often having sold in the market cargoes to be purchased from Attock Mauritius weeks ahead of getting a price from Attock Mauritius, and on one occasion (EY Deal 118) by Mr Kelbrick being copied to an email chain which included Arcadia's pricing terms with its purchaser.

iv) Mr Kelbrick having referred to Arcadia acting *"almost as a term customer"* and being a regular reliable off-taker, which was important for Attock's credit lines, Ms Driay having said Arcadia always tried to lift cargoes offered by Attock regardless of grade/timing and before having an on-purchaser. Mr Bosworth said Arcadia was in effect back-to-back on the term contract, which he said was no different from Arcadia's relationship with Shell, IOC and other entities; with the difference, the Claimants say, that those companies were not reliant on Arcadia's credit lines in the way Attock was.

v) The financing of Attock Mauritius transactions by the Arcadia Group. The Claimants refer to Attock Mauritius's dependence on a letter of credit issued by the Arcadia Group in order to fund its purchases of oil. They say Arcadia Mauritius had no infrastructure or financial backing when Mr Decker acquired it: it relied on Arcadia's support. Mr Hurley introduced Tristar to its banks, including Fortis, originally and again in 2009, and Mr Mounzer told banks Arcadia was Tristar's strategic partner. Mr Bosworth said it was "*in the Arcadia Group's interest to ensure that any entities that it used as sleeves in its oil transactions had access to trade finance facilities* and there was nothing unusual about it.

In order to carry out oil trading transactions, Attock Mauritius was required by its banks to have back-to-back letters of credit in place. Though Mr Kelbrick said that would have been provided by whoever the buyer was, in practice it was almost always Arcadia. By contrast, Arcadia, with its own revolving credit facility, could buy cargoes without providing sold the cargo first.

vi) Attock Mauritius showed a lack of financial resources on EY Deal 130, where after suffering a US$4 million loss due to a pricing declaration error, Mr Mounzer internally suggested seeking an arrangement with Arcadia Lebanon (which was not involved in the transaction). On EY Deal 115 (the "***Ontario Transaction***"), which does not appear to have been carried out under any of the term contracts, Attock Mauritius bought a one-off cargo from Ontario and sold it on to Arcadia Switzerland. Arcadia Switzerland on-sold it at a profit. The contract required Arcadia Switzerland to procure a letter of credit to pay for the cargo. The Claimants say *"This is not a term that an independently operating and independently financed company would have needed to include"*, and that, had Attock Mauritius been independent, it would have made the profit itself.

vii) As noted earlier, the Claimants suggest that Mr Bosworth/Mr Hurley had/retained an interest or control over Attock Mauritius, referring to their having caused Arcadia to lend US$13 million to Mr Decker to purchase it, and to the communications which I consider in §§ 541-542 above.

viii) There was a plan to develop Attock Mauritius's business with Arcadia's support, and Mr Bosworth and Mr Hurley did work with the Attock Group after they had left Arcadia. In 2009 an email referred to Attock Mauritius issuing its own letters of credit and making a purchase *"so as to develop their own business"*. Mr Hurley worked for the Attock group in 2014 as a consultant (albeit he said unpaid) and helped Attock Dubai draft a crude oil contract proposal. Mr Kelbrick and Mr Hurley in September 2014 were registered as traders on behalf of Attock Dubai with a brokerage. In May 2014 Mr Hurley had a business card referring to him as chairman of Attock Holdings Limited.

793. The Claimants submit that, apart from the fact that Attock Mauritius did not allow profit to accumulate in any of the front companies, the structure of the supply chains involving those front companies was the same as the Arcadia Lebanon Transactions after the Tristar Group was no longer involved. There were no intermediaries between Attock Mauritius and the Arcadia Group. The difference between the Attock Mauritius and the Arcadia Lebanon Transactions was that the difference between the price paid by Arcadia London/Arcadia Switzerland for the oil and the price paid to the NOC was retained by Attock Mauritius instead of Arcadia Lebanon. The steps involved were:

i) Nomination of Cargo: Attock Mauritius told Arcadia London/Arcadia Switzerland that it had been nominated to lift a cargo under one of the term contracts with NNPC or GEPetrol.

ii) Sale of the Cargo by Arcadia London/Arcadia Switzerland to a Third Party: Arcadia London/Arcadia Switzerland sold the cargo to a third party, who nominated the vessel to take delivery of the cargo.

iii) Sales up the chain from Attock Mauritius to Arcadia London/Arcadia Switzerland

a) There were no intermediaries between Attock Mauritius and Arcadia London/Arcadia Switzerland. There was just a sale by Attock Mauritius to Arcadia London/Arcadia Switzerland.

b) The Attock/GEPetrol Contract was granted on the same terms as the Zafiro Contract had been granted to Arcadia Lebanon, allowing the selection of a pricing period after the date of the B/L. The same facility was not granted by Attock Mauritius to Arcadia London/Arcadia Switzerland.

c) In the Attock Mauritius Transactions involving the acquisition of oil from NNPC, Attock Mauritius passed the pricing option up to Arcadia London/Arcadia Switzerland, leaving Arcadia London/Arcadia Switzerland free to elect between Advanced, Prompt and Deferred. The Arcadia Group was, however, required to notify Attock Mauritius of its preferred pricing period 7 working days in advance of the laycan rather than the 6 working days which NNPC required under its T&C.

iv) Sale by NOC to Attock Mauritius

a) Sales with GEPetrol under the Attock/GEPetrol Contract were negotiated on a cargo-by-cargo basis.

b) Under NNPC's terms and conditions, Attock Mauritius was required to notify NNPC of its preferred pricing period within 6 working days of the laycan. The majority of pricing declarations have not been disclosed. The NNPC invoice identifies the price averaging period elected by Attock Mauritius. In many cases, Mr Kelbrick chose a different pricing period than the one chosen by Arcadia London/Arcadia Switzerland and, as a result, invariably made considerable profits.

v) Back-to-back letter of credit financing

a) Attock Mauritius would inform Arcadia London/Arcadia Switzerland which banks it proposed to use and seek information from them as to which banks they would be using.

b) Attock Mauritius would make its application for a letter of credit by telling the bank the terms of the sale, telling it that the Arcadia Group would be buying the cargo and identifying the bank that would be issuing the export letter of credit.

c) When Attock Mauritius was using one of the Kelbrick entities as a contract holder, the position was no different, save that Attock Mauritius procured a Third Party letter of credit to be issued in the name of the front company for the benefit of the NOC (in the same way that was necessary for the contracts involving Arcadia Lebanon).

d) With the benefit of that backing credit, Attock Mauritius obtained a back-to-back letter of credit (or at least a letter of credit secured by the letter of credit issued by the Arcadia Group) with which to pay the NOC.

vi) Payments

a) Where a front company was involved as contract-holder with NNPC, there was no sale between the contract-holder and Attock Mauritius. Mr Kelbrick explains that none of the front companies earned any money because none of them was really buying the oil.

b) Attock Mauritius paid the NOC for the oil with a letter of credit obtained in the name of the front company.

vii) Profit Allocation in Supply Chain

a) Under the Attock/GEPetrol Contract, with the benefit of the retrospective pricing clause, Attock Mauritius enjoyed (the Claimants say) a huge advantage over Arcadia London/Arcadia Switzerland as it was impossible for it to lose money and, in almost every case, it was possible to find a price averaging period which would generate large profits.

b) With the benefit (the Claimants say) of the additional day to make his nomination, Mr Kelbrick explains that, once he had received the Arcadia Group's nomination, he had an opportunity to select a different pricing period:

> "If Arcadia wanted to exercise a pricing option, the sale contract provided that it had to declare the same to me on or before the 7th Nigerian working day prior to the first day of the pricing option. This was in order that I could then declare [Attock Mauritius's] pricing option to NNPC. I could either follow the pricing window elected by Arcadia, and take on no pricing exposure, or elect a different pricing window, in which case [Attock Mauritius] took on pricing exposure."

c) There was not always a difference between the pricing period selected by the Arcadia Group company and the pricing period selected by Attock Mauritius. In those cases, only a relatively small amount of gross profits are diverted, accounted for by

> reference to the premium charged by Attock Mauritius to Arcadia London/Arcadia Switzerland on the onward sales. Where, however, there was a difference between the pricing period used to determine the price for Attock Mauritius's purchase and the pricing period used to determine the price for Arcadia Group's acquisition, Attock Mauritius made very large profits.

794. Two of the Claimants' six example transactions are Attock Transactions: EY Deals 101 and 118 summarised in §§ 586 and 587 above. EY Deal 101 is an Attock Mauritius Transaction involving Attock Mauritius buying directly from NNPC and selling to Arcadia Switzerland. EY Deal 118 is an Attock Mauritius Transaction involving a Kelbrick entity (Azenith Mauritius) as a front company buying from NNPC and selling to Attock Mauritius who sold to Arcadia Switzerland.

795. The Claimants say it is irrelevant that Attock Mauritius supplied oil to Arcadia London/Arcadia Switzerland *"generally at or below market price"* (per Mr Bosworth/Mr Hurley) or *"at market rates"* (per Mr Kelbrick). The six contracts were diverted opportunities, so the question is simply how much money Attock Mauritius made at the expense of Arcadia.

796. In addition, the Claimants complain that under the Attock/GEPetrol Contract, Attock Mauritius was given the opportunity to purchase oil at a lower rate than Arcadia would pay. In the case of the contracts with NNPC, there were three *"market prices"* for any cargo of oil, depending on the price averaging period selected (Prompt, Advanced or Deferred). It so happened that Attock Mauritius was able consistently to select a price averaging period for its acquisition which resulted in it paying less for the oil than the Arcadia Group paid to Attock Mauritius. According to the Claimants:

> "The only explanation offered for Attock Mauritius's ability to do so is the advantage of deciding on a price averaging period one day closer to the laycan. This was afforded to Attock Mauritius by agreement between PB and SK as the terms on which Arcadia bought oil from Attock Mauritius required it to give 7 days' notice of its nomination rather than 6. That appears to have made all the difference, no other account being provided of how SK was able consistently to outwit Arcadia's traders."

797. The total amount claimed to have been diverted is US$138.7 million, of which:

i) Arcadia London claims that US$66,824,941 was diverted from it; and

ii) Arcadia Switzerland claims that US$71,921,637 was diverted from it.

798. From the US$138.7 million it received from the Arcadia Group, Attock Mauritius transferred US$91.6 million to Attock Lebanon leaving Attock Mauritius with net receipts of US$47.1 million between 2009 and 2013. From the US$91.6 million, Attock Lebanon paid up to US$51.1 million to companies alleged to be service providers, leaving it with net receipts of at least a further US$40.5 million. Even taking into account the whole amount of that US$51.1

million, Attock Mauritius and Attock Lebanon between them retained net receipts of US$87.6 million.

799. By contrast, Arcadia London and Arcadia Switzerland between them made gross profits of US$7,598,311 and net losses of US$3,255,143 on the Attock Transactions:

i) Arcadia London made gross profits of US$2,109,907 and net losses of US$4,407,299;

ii) Arcadia Switzerland made gross profits of US$5,488,404 and net Profits of US$792,156.

800. The Claimants say Mr Kelbrick has provided no *"account"* of payments made to service providers in relation to each contract or cargo, and seemed to be unable to recall how or why vast sums had been paid out by Attock Lebanon, an entity of which he was the sole shareholder from September 2009. There is no suggestion that any of the net receipts of Attock Mauritius or Attock Lebanon were used for the benefit of the Arcadia Group.

(5) The dishonesty case

801. The Claimants' case as to dishonesty may be summarised as follows.

(a) Roles and collusion

802. The Claimants rely on Mr Bosworth, Mr Hurley and Mr Kelbrick as having played central roles in the 144 Transactions. Mr Bosworth was responsible for trading and arranging the term contracts, and Mr Hurley for the financing. Mr Hurley was also the compliance officer. Mr Kelbrick dealt with NNPC in relation to the Sao Tome and Senegal Contracts (including pricing), later took over pricing under the Zafiro Contracts, and controlled Attock Mauritius *"from September 2009 at the latest"*. It is alleged that Mr Bosworth also decided how much the Arcadia Group would pay Arcadia Lebanon for the oil under the Arcadia Lebanon Transactions. The Claimants cite, on to the latter point, the Defendants' statements of case indicating that (a) under the Zafiro Contract, Mr Bosworth determined the price the Arcadia Group paid to the Tristar/Attock group, seeking to ensure that Arcadia purchased at or below market price, with the pricing election made by Arcadia's on-purchaser, and (b) under the Sao Tome Contract, Arcadia's traders made the pricing election, and Mr Bosworth determined the grade differential based on his view of the market at the time.

803. The Claimants say collusion is to be inferred from the Defendants' coordinated actions and roles in the schemes and their benefit from it.

804. As to benefit, the Claimants say they have identified and pleaded payments made personally to Mr Bosworth and Mr Hurley and derived from the proceeds of the fraud as follows:

i) Mr Kelbrick paid Mr Bosworth US$1 million on 27 October 2011.

ii) Proview paid Mr Hurley sums of US$500,000 on 9 September 2008, US$500,000 on 6 October 2008 and US$250,000 on 11 December 2009, i.e. a total of US$1,250,000.

iii) US$1,885,755.61 paid by Mr Kelbrick in two tranches on 14 October 2011 and 24 January 2012 to a lawyer in Barbados to part-fund the acquisition of a villa (*"High Spirits"*) there for Mr Hurley. In his witness statement Mr Hurley said this payment was made pursuant to an arrangement between Mr Bosworth and Mr Kelbrick so that Mr Bosworth could cover a bonus due to Mr Hurley.

Those sums total US$1 million paid to Mr Bosworth and US$3,135,755 paid to Mr Hurley, though as I note later, the payment to Mr Bosworth was not put to him in cross-examination at all, and thus cannot fairly be relied on as evidence of dishonesty.

805. The Claimants also seek to rely on several entirely unpleaded alleged benefits:

i) US$928,503 paid by Proview to Alain Joseph Faraj, a firm of architects, to cover the cost of refurbishing Mr Bosworth's flat in Beirut.

ii) US$332,532 paid by Proview to Kwok Gallery for some jade antiquities.

iii) US$2.7 million paid by Cathay Holdings to Mr Hurley in March 2013 to assist him to buy property in Switzerland, which Mr Hurley in cross-examination said was a loan arranged by Mr Bosworth to cover a bonus due to Mr Hurley. (As well as being unpleaded, this alleged benefit was not mentioned in the Claimants' opening submissions.)

806. As regards benefit to Mr Kelbrick, the Claimants refer to:

i) Receipt by Mr Kelbrick's company, Proview, of between US$31.8 million and US$41.6 million from Arcadia Lebanon.

ii) Receipt by Attock Mauritius (of which the shares were held 50/50 by Mr Kelbrick and Mr Mounzer) of the proceeds of the Attock Mauritius Transactions, whose 'gross profits' were US$138.7 million, of which Attock Mauritius and Arcadia Lebanon between them retained 'net receipts' of at least US$87.6 million.

iii) Pleaded receipt by Mr Kelbrick personally of US$11.2 million of the proceeds of the fraud. Further, section 6 of Mr Stern's expert report seeks to identify *"Any amounts received personally by Mr Kelbrick as a consequence of the relevant transactions"*. These include at least US$16.2 million received from Attock Lebanon and 3.27 million received from Attock Mauritius.

(b) Dishonesty alleged against Mr Bosworth

807. The Claimants rely on the following matters as against Mr Bosworth.

808. First, it is said that Mr Bosworth did not honestly tell Farahead how Arcadia Lebanon would be used. He gave the misleading impression that Arcadia Lebanon had been set up for *"a new, particularly lucrative contract"* to be kept separate; did not tell Farahead there were Zafiro and Sao Tome contracts which would be moved to Arcadia Lebanon; did not tell Farahead that Arcadia Lebanon would take up the Senegal Contract; and did not tell Farahead that Arcadia London would be paying for the oil procured by Arcadia Lebanon.

809. Secondly, the Claimants say Mr Bosworth dishonestly (in cross-examination, it seems) sought to justify payments to service providers; and was prepared to expose the Arcadia Group and Farahead to high risks of reputation and compliance issues contrary to Farahead's instructions.

810. The Claimants here add the unpleaded suggestion that Mr Bosworth *"knew (or turned a blind eye) to the fact that bribery was involved, as Sonergy was connected to the family of the President of Equatorial Guinea and Obexys/Rodexkia were companies owned by Mr Oburu who was an official at GE Petrol who dealt with pricing"*.

811. Thirdly, it is alleged to have been dishonest for Mr Bosworth to pay large amounts to Proview in relation to the Sao Tome and Senegal Contracts, when there was no need to do so; and that the purpose of paying Proview was to siphon off money from the Arcadia Group to a company owned and controlled by Mr Kelbrick *"who would then share the proceeds with Mr Bosworth/Mr Hurley"*.

812. Fourthly, the Claimants say Mr Bosworth dishonestly failed to explain to Mr Fredriksen/Mr Trøim the size of the service provider payments being made under the Zafiro Contract, the Sao Tome Contract (after it was moved to Arcadia Lebanon) or the Senegal Contract; and did not explain the large payments made to Sonergy and Mr Driot's companies. (I note that this too is an unpleaded allegation.)

813. Fifthly, Mr Bosworth is said dishonestly to have led Farahead to believe, in 2009, that Arcadia Lebanon was no longer trading.

814. Sixthly, the Claimants say Mr Bosworth dishonestly diverted opportunities to Attock Mauritius pursuant to an agreement with Mr Kelbrick; and that *"it is to be inferred that Mr Bosworth, Mr Hurley and Mr Kelbrick agreed to share the profits (as they had shared the profits made by Proview)"*.

815. Seventhly, the following rather telling submission is made:

> "378 While it will be said in relation to some of the payments made to SPs that there was no motive for PB to agree to pay them if they were not legitimate and commercial payments since (apart from payments to Proview) he did not benefit personally from those payments, in fact:
>
> 378.1 Insofar as it was necessary to pay third parties to get access to the Zafiro Contract, then the motive was to ensure that,

> in due course, a company owned and controlled by PB/CH (Arcadia Lebanon) obtained the benefit of that contract; and
>
> 378.2 As was put to PB [Bosworth XX {Day19/13:18 – 16:11}], more generally, he was willing to pay SPs to curry favour with people influential with governments and State oil companies (as PB/CH emphasise Mr Driot was, for example) who might provide investment opportunities in Africa." (footnote omitted) The latter proposition, as put to Mr Bosworth in cross-examination, was clarified as concerning investment opportunities for his own personal benefit.

The Claimants then refer to (a) a general statement by Mr Main about Arcadia in 2003 *"dealing with presidents and ministers and people at the top level of many major oil-producing countries"* and that "*with all the relationships Arcadia Petroleum had, there were other business opportunities apart from oil trading*"; and (b) opportunities outside the Arcadia Group which Mr Bosworth/Mr Hurley are said to have accessed. Those opportunities are said to have been (i) an investment by Mr Hurley's company, Arcadia Upstream, in Seven Energy: an opportunity which Mr Fredriksen and Mr Trøim declined to participate in; (ii) the unpleaded (and in any event denied) allegation that Mr Bosworth had a personal interest in Equinox; and (iii) the unpleaded (and in any event denied) allegation that Mr Bosworth had a personal interest in ArcEM Resources (formerly Arcadia Energy & Mining Ltd) along with Mr Main.

816. Eighthly, payments received by Mr Bosworth. Apart from the unpleaded allegations of payment by Proview to Mr Faraj (US$928,503) and Kwok Galleries (US$332,532) said to have been made for Mr Bosworth's benefit, which cannot assist the Claimants, the only personal benefit alleged is a payment of US$1 million paid by Mr Kelbrick to Mr Bosworth on 27 October 2011. Mr Kelbrick's evidence was that that was a loan, albeit one he did not mention in his asset disclosure affidavit in this litigation.

(c) Dishonesty alleged against Mr Hurley

817. The Claimants rely on the following matters as against Mr Hurley.

818. First, Mr Hurley is said to have made the same dishonest statements as Mr Bosworth to Farahead about the intended use of Arcadia Lebanon and its having ceased to trade.

819. Secondly, the Claimants say, Mr Hurley dishonestly deferred to Mr Bosworth's judgment on the matter of payments to service providers, even though payments were for millions of dollars. He said in his witness statement that payments deemed to have a higher risk element for the Arcadia Group would need to originate with Arcadia Lebanon, and that Mr Bosworth would make that judgement call, which Mr Hurley would not question.

820. In addition, the Claimants relied on some cross-examination of Mr Hurley in relation to payments to Concerto, in relation to which Mr Hurley said that Mr Bosworth had a mandate from Mr Fredriksen and Mr Trøim to look at asset

opportunities, which those payments fell within, and *"If my CEO decides there is an investment opportunity that he wishes to look at and therefore we will pursue it in the early stages, then absolutely, I think that is doing what we should do. You need for your company to invest to grow it."* Despite there being no pleaded allegation of dishonesty in relation to Concerto, the Claimants pray that evidence in aid of the contention that Mr Hurley failed to consider whether payments to service providers *"and other parties"* were in Arcadia Group's best interests, and that *"[t]hose are not the actions of an honest Chief Financial Officer"*.

821. Thirdly, it is said that Mr Hurley dishonestly made payments to Proview, knowing that that would lead to money being paid back to him *"because there was an agreement between him, Mr Bosworth and Mr Kelbrick that the money should be shared"*, and having no belief that they were in the Arcadia Group's best interests or for commercially valuable services.

822. Fourthly, it is said that Mr Hurley dishonestly arranged for the Arcadia Group to provide financial support to Attock Mauritius for the purpose of the Attock Mauritius Transactions through the introduction of Attock Mauritius to Arcadia's banks as its *"strategic partner"* and by arranging letters of credit to be used by Attock Mauritius as security for the issue of its own letters of credit to pay the NOCs for the oil. The Claimants say Mr Hurley had no reason to believe the arrangement with Attock was to benefit the Arcadia Group. Further, *"it should be inferred that PB, CH and SK agreed to share the profits (as they had shared the profits made by Proview)"*, since all three *"were interested in Attock"*, and Mr Bosworth and Mr Hurley can be shown to have received some benefit from the Attock Transactions.

823. Fifthly, the Claimants say Mr Hurley had a motive to commit fraud because (i) he was a 50% shareholder in Arcadia Lebanon and so would share profits equally with Mr Bosworth, whereas he would receive less than Mr Bosworth under the normal bonus arrangements, and (ii) he knew that Mr Bosworth would look after him financially (having said in evidence that Mr Bosworth was at one point willing to lend him amounts totalling around US$10 million pending receipt of bonus payments from the Arcadia Group).

824. Sixthly, it is said that Mr Hurley knew Mr Bosworth was procuring or permitting the use of Arcadia London's money indirectly to fund Arcadia Lebanon's net receipts on the Arcadia Lebanon Transactions, and that Arcadia London's funds were accumulating in Arcadia Lebanon as its *"purported profits"* on the Arcadia Lebanon Transactions.

825. Seventhly, the Claimants say Mr Hurley provided a wholly implausible account to the effect that he regarded three payments made to him by Proview between 9 September 2008 and 11 December 2009, totalling US$1.25 million, as a magnanimous gesture. The Claimants also seek to rely on the unpleaded alleged benefits referred to in § 805(iii) and (iv) above.

(d) Dishonesty alleged against Mr Kelbrick

826. The Claimants rely on the following matters as against Mr Kelbrick.

827. First, the Claimants say Mr Kelbrick knew Proview's services did not justify the payment of a large profit share, and could not remember the discussion in which its level was agreed. The Proview invoices were generically worded, could not by tied to specific cargoes, and *"were created to give the appearance of legitimacy to the transfer of money from Arcadia Lebanon to Proview and the money was parked in Proview to be used for the benefit of him, CH and PB"*.

828. Secondly, Mr Kelbrick's Defence states that he was involved in providing operational services to Mr Decker and Tristar Group from around 2007, and the Claimants say there is no doubt he and Attock Mauritius assisted Mr Bosworth/Mr Hurley after September 2009 in carrying out the Arcadia Lebanon Transactions. It is said that Mr Kelbrick knew Arcadia Lebanon was owned and controlled by Mr Bosworth and Mr Hurley, that Arcadia Lebanon was on-selling to Arcadia London/Arcadia Switzerland *"(so that Arcadia London's money was accumulating in Arcadia Lebanon)"*; and that Mr Kelbrick knew *"that [Mr Bosworth] and [Mr Hurley] were not acting in the best interests of the Arcadia Group by using Arcel to pay Proview unjustifiable amounts of money"*. The Claimants say that a number of *"false justifications"* were put forward for the way Arcadia Lebanon was used, namely that:

i) the oil was sold to Arcadia at market prices: the Claimants say that is irrelevant;

ii) Proview made some payments to other service providers on behalf of Arcadia Lebanon: the Claimants say that makes no sense given that Proview was itself a service provider (and that Mr Bosworth acknowledged that); and

iii) that whilst Mr Kelbrick said Arcadia made large profits from its paper trading which the physical trading was feeding, he did not have the expertise to say so.

829. Thirdly, the Claimants say Mr Kelbrick has disclosed no documentation showing how he obtained any of the term contracts, and knew that Mr Bosworth was instrumental in obtaining them for Attock. Further:

> "419 While Attock Mauritius allowed Arcadia the option of choosing the price averaging period in its contract with Attock Mauritius, SK knew that PB was allowing Attock Mauritius an advantage over Arcadia by agreeing that Arcadia would give 7 days' notice of its nomination of the price averaging period rather than 6 days. Apart from this one day of difference, no explanation has been provided as to how SK was able regularly to take advantage of more favourable price averaging periods compared to Arcadia's chosen period."

In addition, the Arcadia traders had no idea how much money Attock was making from the transactions.

830. Fourthly, the Claimants say Mr Kelbrick made payments to Mr Bosworth and Mr Hurley claiming they were loans when there was no documentation to

support that view. In reality, it had been agreed that Mr Bosworth and Mr Hurley should share in Proview's profits. The Claimants again rely on the payments in 2008/09 to Mr Hurley totalling US$1.25 million, and seek to rely on the unpleaded alleged benefits via payment to Faraj architects.

831. Fifthly, Mr Kelbrick received large sums personally or through Attock Mauritius: see § 806 above.

832. Sixthly, the Claimants submit that Mr Kelbrick has *"implausibly claimed memory failure"*. This allegation is based on part on §§ 102 ff of Mr Kelbrick's 9th affidavit. In those paragraphs, Mr Kelbrick set out his recollection in relation to 69 entities whom the Claimants alleged had wrongly received funds. In some instances, he said he could not remember. There were a total of US$16.2 million payments by cheque, payments of US$650,000 to Concerto and a payment to HT Investment of US$2.5 million from his personal bank account on 28 March 2011 following receipt of a payment from Arcadia Lebanon. HT Investment was linked to Mr Main and, the Claimants say, the payment was connected with Arcadia Energy & Mining. I note that there is, however, no pleaded case about alleged dishonest misappropriation via such payments by cheque, payments to Concerto, payments in connection with Arcadia Energy & Mining or payments to HT Investments.

(K) APPLICABLE PRINCIPLES

(1) Causes of action

833. The causes of action advanced are:

i) unlawful means conspiracy;

ii) (as against Mr Bosworth and Mr Hurley) breach of fiduciary duty;

iii) dishonest assistance;

iv) knowing and/or unconscionable receipt; and

v) committing, or in the case of Mr Kelbrick and Arcadia Mauritius knowingly/dishonestly aiding and abetting, breaches of fiduciary duties and/or criminal mismanagement contrary to the Swiss Penal Code.

834. All are said to be established by the alleged fraudulent diversion of profits referred to in section (J)(2)-(4) above.

835. It is not alleged that Mr Kelbrick or Attock Mauritius owed any fiduciary or other duties to the Claimants. Those Defendants accordingly point out that they were entitled to act, at all material times, in their own legitimate commercial interests, and had no duty to act in the Claimants' commercial interests at all, let alone in preference to their own. They refer to the observations in *JSC BTA Bank v Ablyazov (No 14)* [2020] AC 727 of Lord Sumption and Lord Lloyd Jones that *"…one man's gain may be another man's loss. The successful pursuit of commercial self-interest necessarily entails the risk of damaging the commercial interests of others"* (§ 6); and that: *"A person has a right to advance*

his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right affords a just cause or excuse. Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right." (§ 10)

(2) English law

(a) Dishonesty

836. To prove dishonesty, the claimant must establish that the defendant did not act as an honest person would in the circumstances: *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) at [388], followed in *Group Seven Ltd v Nasir* [2020] Ch 129 (CA) at [33]-[35]. The court must: (i) ascertain the relevant facts, including the defendant's actual state of knowledge and belief as to relevant facts, and then (ii) appraise those facts against the objective standard of honesty: *Group Seven* at [58] citing *Ivey v Genting Casinos* [2018] AC 391. For the purpose of the first stage of the analysis, knowledge means actual or 'blind-eye' (or 'imputed') knowledge, and does not include suspicion falling short of 'blind-eye' knowledge: *Group Seven* at[59]-[61].

837. In *Suppipat v Narongdej* [2023] EWHC 1988 (Comm) at [901]-[904], Calver J recently summarised the proper approach in civil fraud trials to: (i) the burden of proof; (ii) the standard of proof; and (iii) inferring fraud or dishonest conduct generally:

> "901. The Claimants' case is that the defendants were all parties to a dishonest conspiracy to deprive them of their REC Shares and then payment for them. As I stated in *ED&F Man v Come Harvest and others* [2022] EWHC 229 (Comm), I bear in mind at all times that where fraud is alleged, cogent evidence is required by a claimant to prove it.
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> 902. In *Foodco UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), at [3] Lewison J stated that:
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> > "The burden of proof lies on the [claimants] … Although the standard of proof is the same in every civil case, where fraud is alleged cogent evidence is needed to prove it, because the evidence must overcome the inherent improbability that people act dishonestly rather than carelessly. On the other hand inherent improbabilities must be assessed in the light of the actual circumstances of the case."
>
> 903. In other words, the cogency of the evidence relied upon must be commensurate with the seriousness of the allegation: *JSC BTA Bank v Ablyazov* [2013] EWHC 510 (Comm) per Teare J at [76]. See also *Bank of St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408 at [44]-[47] per Vos C and [117] per Males LJ.

> 904. I also bear in mind that as to inferring fraud or dishonest conduct generally:
>
> a. It is not open to the Court to infer dishonesty from facts which are consistent with honesty or negligence, there must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved: *Three Rivers District Council v Bank of England* [2001] UKHL 16; [2003] 2 AC 1, [55]-[56] per Lord Hope and [184]-[186] per Lord Millett.
>
> b. The requirement for a claimant in proving fraud is that the primary facts proved give rise to an inference of dishonesty or fraud which is more probable than one of innocence or negligence: *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20] per Bryan J; *Surkis & Ors v Poroshenko & Anr* [2021] EWHC 2512 (Comm) at [169 (iv)] per Calver J.
>
> c. Although not strictly a requirement for such a claim, motive "is a vital ingredient of any rational assessment" of dishonesty: *Bank of Toyo-Mitsubishi UFJ Ltd v Baskan Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch) at [858] per Briggs J. By and large dishonest people are dishonest for a reason; while establishing a motive for conspiracy is not a legal requirement, the less likely the motive, the less likely the intention to conspire unlawfully: *Group Seven Ltd v Nasir* [2017] EWHC 2466 (Ch) at [440] per Morgan J.
>
> d. Assessing a party's motive to participate in a fraud also requires taking into account the disincentives to participation in the fraud; this includes the disinclination to behave immorally or dishonestly, but also the damage to reputation (both for the individual and, where applicable, the business) and the potential risk to the "liberty of the individuals involved" in case they are found out: *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch) at [858], [865] per Briggs J. …"

838. The court should assess the evidence in relation to these transactions in its cultural and regional context: *Avonwick Holdings Ltd v Dargamo & Ors*, [2020] EWHC 1844 (Comm) at [104]-[106], and *Berezovsky v Abramovich* [2012] EWHC 2463 (Comm) at [38], where Gloster J said:

> "The dispute between the two men has to be evaluated against the sometimes turbulent political and economic backcloth of Russia in the late 1990s and early 2000s, and in the context of the deterioration of their relationship. Nonetheless, the dispute is in essence a commercial one, which, like any other tried in this court, has to be decided on the factual evidence, both oral and documentary, relating to the specific transactions in issue. And,

> although this court necessarily views that evidence 'Under Western Eyes', it has to be careful about applying what it might regard as conventional Western European business standards to judge the conduct of businessmen operating in the very different, and largely unregulated, commercial and political environment of Russia at the material times. As I remind myself: '… this is not a story of the West of Europe'".

(b) Unlawful means conspiracy

839. The essential elements of unlawful means conspiracy were summarised in *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [94], adopted in *Suppipat* at [1568] as:

i) a combination or agreement between a defendant and one or more others;

ii) an intention to injure the claimant;

iii) use of unlawful means, carried out pursuant to the combination or agreement, as a means of injuring the claimants; and

iv) which causes loss to the claimant.

840. A combination, arrangement or understanding requires the parties to it to be sufficiently aware of the surrounding circumstances and share the same object, so that it can properly be said that they were acting in concert at the time of the acts complained of: *Kuwait Oil Tanker SAK v Al Bader* [2000] 2 All ER 271 (CA) at [111]; *FM Capital Partners* at [94(i)]. The combination can be an understanding as opposed to a formal agreement.

841. Unlawful means are not limited to torts. Recent cases proceed on the basis that a breach of fiduciary duty may amount to *"unlawful means"* (see, eg, *Keymed Ltd v Hillman* [2019] EWHC 485 (Ch) at [122]; *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) at [172]; *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [455]–[456]). The weight of authority supports the view that unlawful conduct under foreign law may be relied on, at least where an equivalent prohibition exists in England and Wales and there are no countervailing policy considerations (see *Loreley Financing (Jersey) No.30 v Credit Suisse Securities (Europe)* [2023] EWHC 2759 (Comm) at [492]-[493]).

842. Intention to injure requires more than foreseeability or recklessness: it must be established that harm to the claimant is either: (i) the end sought by the defendant, (ii) the means by which the defendant seeks to secure some other end or (iii) the known necessary consequence of the defendant's actions: *ED&F Man Capital Markets Limited v Come Harvest Holdings Limited* [2022] EWHC 229 (Comm) at [487]-[489]. It is not necessary to show a predominant intention to injure. The defendant does not need to know the means are unlawful (*Racing Partnership Ltd v Done Bros Ltd* [2020] EWCA Civ 1300, [2021] Ch 233 at [139] and [171]). A defendant will have no liability for specific losses incurred

or caused before that defendant became a party to the conspiracy: *ED&F Man* at [472]. As Briggs J stated in *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida* [2009] EWHC 1276 (Ch), *"where a bit-player in a multifaceted fraud knows only of one aspect of the fraud, and is ignorant of the others, he may not be liable for anything more than the loss properly attributable to that part of the fraud of which he is aware"* (at [846]).

(c) Breach of fiduciary duty

843. The general duties of a director under English law are set out in sections 171 to 177 of the Companies Act 2006. It is common ground that during the time periods appropriate to each of them (i.e. subject to certain time bars), Mr Bosworth and Mr Hurley each owed Arcadia London the usual duties of a director in his role, whether in equity or pursuant to sections 171 to 177 as appropriate, including fiduciary duties.

844. The Companies Act duties include the following:

> **"172 Duty to promote the success of the company**
>
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.
>
> …
>
> **173 Duty to exercise independent judgment**
>
> (1) A director of a company must exercise independent judgment.
>
> …
>
> **174 Duty to exercise reasonable care, skill and diligence**

(1) A director of a company must exercise reasonable care, skill and diligence.

(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with–

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and

(b) the general knowledge, skill and experience that the director has.

175 Duty to avoid conflicts of interest

(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).

(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

(4) This duty is not infringed–

(a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or

(b) if the matter has been authorised by the directors.

(5) Authorisation may be given by the directors–

(a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or

…

(6) The authorisation is effective only if–

(a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and

(b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

…

176 Duty not to accept benefits from third parties

(1) A director of a company must not accept a benefit from a third party conferred by reason of–

(a) his being a director, or

(b) his doing (or not doing) anything as director.

(2) A "third party" means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate.

…

(4) This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

…

177 Duty to declare interest in proposed transaction or arrangement

(1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.

(2) The declaration may (but need not) be made–

(a) at a meeting of the directors, or

(b) by notice to the directors in accordance with–

(i) section 184 (notice in writing), or

(ii) section 185 (general notice).

…

(4) Any declaration required by this section must be made before the company enters into the transaction or arrangement.

…

(6) A director need not declare an interest–

(a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;

> (b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or
>
> …"

845. Section 170 of the Act provides *inter alia* that:

> "(3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
>
> (4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.
>
> (5) The general duties apply to a shadow director of a company where and to the extent that they are capable of so applying."

846. Case law indicates that the duty to act in the company's best interests, reflected in section 172, is a duty to exercise his discretions *bona fide* in what the director considers, not what the court may consider, is in the interests of the company. The test is subjective: the question is whether the director honestly believed that his act or omission was in the interests of company: *Regentcrest Plc v. Cohen* [2001] BCC 494 at [120] per Jonathan Parker J; Grant & Mumford, "*Civil Fraud*", paras 11-153 to 11-154.

847. The purpose of the no conflict rule, reflected in section 175, is to prevent the fiduciary from being swayed by considerations of his personal interests: *Ultraframe v. Fielding* [2005] EWHC 1638 (Ch.) at [1307]-[1308] per Lewison J; Snell's Equity 34th ed., para. 7-018.

848. The 'no profit' rule is part of the no conflict rule. Equity prohibits a fiduciary from making a profit out of his fiduciary position for his personal advantage: see *Recovery Partners v. Rukhadze* [2018] EWHC 2918 (Comm) at [48]-[50]:

> "48. The distinguishing obligation of a fiduciary is the obligation of loyalty. To put the matter negatively, a fiduciary relationship is one in which the fiduciary is not free to pursue their separate interests (Meagher, Gummow & Lehane, 5th Ed, 2015, page 143). Or, as it was put in Mothew: "*The principal is entitled to the single-minded loyalty of his fiduciary*."
>
> 49. This has for current purposes two salient aspects: the no-conflict and no-profit rules. These were highlighted by Lord Neuberger in the *FHR* case at [5]:

> "…an agent owes a fiduciary duty to his principal because he is *"someone who has undertaken to act for or on behalf of [his principal] in a particular matter in circumstances which give rise to a relationship of trust and confidence"*. Secondly, as a result, an agent *"must not make a profit out of his trust"* and *"must not place himself in a position in which his duty and his interest may conflict"* and, as Lord Upjohn pointed out in Phipps v Boardman [1967] 2 AC 46 , 123, the former proposition is *"part of the [latter] wider rule"*. Thirdly, *"a fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other"*. Because of the importance which equity attaches to fiduciary duties, such *"informed consent"* is only effective if it is given after *"full disclosure"*, to quote Jessel MR in Dunne v English (1874) LR 18 Eq 524 , 533."
>
> 50. Equity prohibits a fiduciary from making a profit out of his fiduciary position for his personal advantage. As a result, a fiduciary is required *" to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it "*: Chan v Zacharia (1984) 154 CLR 178 at 198."

849. The rules against conflicts and profits prevent a fiduciary from, among other things, diverting the company's current business and also *"from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing"* , a phrase which originated in the Canadian decision *Canadian Aero Service Ltd v O'Mailley* (1973) 40 DLR (3d) 371, 382, and is used in subsequent English cases.

850. The leading cases include *Regal (Hastings) v Gulliver* [1967] 2 AC 134 (considered below) and *Boardman v Phipps* [1967] AC 46 (HL). In *Boardman*, the solicitor to a trust along with a beneficiary of the trust were held accountable for profits made from a personal investment in shares in which the trust had invested, without the plaintiff beneficiary's informed consent. The consent had not been fully informed because (as held by the first instance judge at [1964] 1 WLR 993 (Ch)):

i) Boardman and Phipps failed to disclose the lengthy and protracted negotiations which had been required for Boardman and Phipps to extract information from the company;

ii) they *"wholly failed to make available or to indicate the existence of the mass of knowledge which Boardman had accumulated"* (p. 1013);

iii) they did not disclose that they were not personally committed to purchase until they had satisfied themselves about the company's Australian business and assets; and

iv) they did not disclose that they were able to obtain finance for the acquisition of the shares on terms that limited their risk while leaving them with the greater part of any profit.

Similarly, there was inadequate disclosure in *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048, [2004] 1 BCLC 131, where a managing director whose own company made a large loan to the claimant company did not disclose that it had made a large profit by acquiring the currency lent at a huge discount, the other directors knowing only that he was making an undisclosed profit of uncertain dimensions: they did not know the source and scale of the profit. In *Rossetti Marketing Ltd v Diamond Sofa Co Ltd* [2012] EWCA Civ 1021, [2013] 1 All ER (Comm) 308 there was no informed consent, where an agent for a certain furniture manufacturer also started to act for two other manufacturers without telling its principal in terms that it was doing so, nor that the other manufacturers were in direct competition with the principal.

851. The 'no profit' rule does not depend on proof of fraud or absence of bona fides – see *Regal (Hastings) v Gulliver* [1967] 2 AC 134, 144G-145A (HL) – though that point has little, if any, relevance in the present case given the nature of the breaches alleged against the Defendants. Further, a trustee is not permitted to take an asset for his own benefit even if it would have been impossible to obtain it for the benefit of his beneficiary: see *Keech v Sandford* (1726) Sel. Cas, t. King 61. Similarly, a company director was liable for obtaining a contract for his own benefit, the opportunity having come to him as a result of being the plaintiff's managing director in *Industrial Development Consultants v Cooley* [1972] 1 WLR 443, even though there was little chance of the plaintiff obtaining the contract because the counterparty disapproved of the organisations such as the plaintiff. After citing authorities including *Keech, Regal* and *Phipps v. Boardman* [1967] 2 AC 46, Roskill J concluded that *"it was his duty once he got this information to pass it to his employers and not to guard it for his own personal purposes …"* (pp 452-453). The Court of Appeal took a similar approach in *Bhullar v Bhullar* [2003] EWCA Civ 424, citing *Cooley.* The defendant there had taken a benefit by buying a property next door to the company's investment property without telling the company. The Court of Appeal concluded that "*[w]hether the Company could or would have taken that opportunity, had it been made aware of it, is not to the point: the existence of the opportunity was information which it was relevant for the Company to know, and it follows that the appellants were under a duty to communicate it to the Company."* (at [41])

852. At the same time, where a company has rejected an opportunity, there may be no conflict and hence no scope for the application of the 'no profit' rule. Cockerill J in *Recovery Partners* said (*obiter*):

> "66. … it must be an opportunity which the company/person to whom duties are owed is *"actively pursuing"*. In this case this potentially feeds in to complex factual debates about the latter phase of SCPI's relationship with the Family and whether the opportunity had been essentially abandoned. The Defendants say that a director or other fiduciary will cease to owe duties in respect of an opportunity if the company decides not to pursue

> the opportunity, leaving the director or other fiduciary free to do so and rely on Queensland Mines Ltd v Hudson (1978) 18 ALR 1 and Peso Silver Mines Ltd v Cropper [1966] SCR 673 . The Claimants submit that these cases are best seen as cases where there was no breach because the principal had given informed consent.
>
> 67. I accept these submissions in broad terms. The Queensland case does indeed seem to have been a case about consent, with Lord Scarman expressly referring to the facts of full knowledge and assent. The Peso Silver Mines case however is in my view much more akin to In Plus in that it was a case where the business opportunity was effectively at an end, in that it had been definitively rejected by the board of the company. I conclude that while *"active pursuit"* will be fact sensitive, the cases indicate that a clear dissociation of the principal from the opportunity will be necessary to justify a conclusion that there is no longer active pursuit of a business opportunity which would otherwise be regarded as a maturing one."

853. Infringement of the 'no profit' rule at least *prima facie* requires personal receipt of a benefit. For example, in *Regal (Hastings)* the claim was based on the plaintiff's former directors having profited from the acquisition (alongside the plaintiff itself) and sale of shares in a subsidiary company. Whilst the other defendants subscribed for shares in the subsidiary, one of them – Mr Gulliver – did not. He promised to find other people to subscribe for 500 shares, which they did. 200 of the shares were subscribed and paid for by a company (South Downs Land Co.) of which Mr Gulliver was a director and which later received the sale proceeds of those shares. Another 200 were subscribed in Mr Gulliver's name, paid for by a Swiss company (Seguliva) of which he was a director and into whose account the sale proceeds were later paid. Mr Gulliver was a minority shareholder in both South Downs Land and Seguliva. The House of Lords rejected a contention that the trial judge found the companies to be merely aliases for Mr Gulliver and that the sale proceeds in fact belonged to him (p. 151D). The House also rejected an argument that Mr Gulliver was liable because he was a shareholder in the two companies who had subscribed for and profited from the shares in the subsidiary:

> "It was further said that Gulliver must account for whatever profits he may have made indirectly through his share holding in the two companies, and that an inquiry should be directed for this purpose. As to this, it is sufficient to say that there is no evidence upon which to ground such an inquiry. Indeed, the evidence so far as it goes, shows that neither company has distributed any part of the profit. Finally, it was said that Gulliver must account for the profit on the 200 shares as to which the certificate was in his name. If in fact the shares belonged beneficially to the Swiss company (and that is the assumption for this purpose), the proceeds of sale did not belong to Gulliver, and were rightly paid into the Swiss company's banking account. Gulliver accordingly

made no profit for which he is accountable. As regards Gulliver, this appeal should, in my opinion, be dismissed." (p.152A-C)

854. Lewison J took the same approach in *Ultraframe (UK) v Fielding* [2005] EWHC 1638 (Ch):

> "1575. As I have said, in *Regal (Hastings) Ltd v. Gulliver* , Mr Gulliver was held not to be accountable for profits made by companies in which he had shareholdings. Lawrence Collins J [in *CMS Dolphin v. Simonet* [2001] 2 BCLC 704] said of that case that it was not authority *"for the proposition that where a director puts the profit into a company in which he has an interest he is not accountable for profits"*. This way of putting the point, in my respectful opinion, blurs the distinction between a case in which the director himself receives the trust property which he later *"puts"* into a company, and a case in which he never receives it at all. In the former case he would himself be personally liable to account on the basis of knowing receipt and his subsequent disposal of the trust property would be nothing to the point. That was in fact the case that Lawrence Collins J was considering because the business was diverted first to Millennium (the partnership) and only afterwards from Millennium to Blue (the company). It is the latter case which i[s] the more difficult. I find it difficult to see how Regal (Hastings) Ltd v Gulliver can be other than authority for the proposition that a fiduciary is not liable to account for a profit that he has not made. Turning to Lawrence Collins J's reasons for distinguishing Regal (Hastings) Ltd v Gulliver:
>
> i) Acting in good faith. The directors in *Regal (Hastings) Ltd v Gulliver* were potentially primarily liable as fiduciaries (rather than secondarily liable as knowing recipients or dishonest assistants) so their good faith cannot have had any bearing on the appropriate remedy. The *"no profit rule"* applies to a fiduciary acting in good faith;
>
> ii) Company not established to take the benefit. The fact that Mr Gulliver did not establish the companies to take the shares is undoubtedly true, but it did not form part of the reasoning of the House of Lords;
>
> iii) No evidence that the companies knew of the breach of duty. Mr Gulliver was a director of one of the companies which subscribed for the shares; and the managing director of the other. In those circumstances, one might have thought that his knowledge (although not his actions) might readily have been attributed to the two companies. I do not therefore agree that there was no evidence that the companies (of which he was a director) had no knowledge of the facts. But the House of Lords did not discuss this question at all, presumably because it was legally irrelevant;

> iv) Minority interest . It is true also that Mr Gulliver had only a minority interest in the two companies, but this fact, too, played no part in the reasoning of the House of Lords. The finding that he made no profit was a finding that he personally made no profit; and that is why he escaped liability.
>
> 1576. I regret, therefore, that I do not find these reasons provide a sufficient basis for distinguishing *Regal (Hastings) v. Gulliver*; and I do not consider that *Cook v. Deeks* supports the proposition that Lawrence Collins J derived from it. It seems to me, therefore, that the mere fact that a fiduciary has a substantial interest in a company which knowingly receives trust property does not, in my judgment, make the fiduciary personally accountable for the receipt. However, the company will itself be liable to any remedies available against a knowing recipient. The case is otherwise where the company is a mere cloak or alter ego of the fiduciary, in which case it may be appropriate to pierce the corporate veil and treat the company's receipt as the fiduciary's receipt. Different considerations may also apply where the fiduciary receives the profit and then diverts it to a company."

855. As Lewison J indicated in the last passage quoted above, the position is different if a company is a mere cloak/alter ego or nominee for the fiduciary. Thus in *Petrodel Resources v Prest* [2013] UKSC 34 at [31], Lord Sumption said:

> "31. In *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734, the plaintiff made a large number of claims against a former director, Mr Dalby, for misappropriating its funds. For present purposes the claim which matters is a claim for an account of a secret profit which Mr Dalby procured to be paid by a third party, Balfour Beatty, to a BVI company under his control called Burnstead. Rimer J held, at para 26, that Mr Dalby was accountable for the money received by Burnstead, on the ground that the latter was *"in substance little other than Mr Dalby's offshore bank account held in a nominee name"*, and *"simply ... the alter ego through which Mr Dalby enjoyed the profit which he earned in breach of his fiduciary duty to ACP."* Rimer J ordered an account against both Mr Dalby and Burnstead. He considered that he was piercing the corporate veil. But I do not think that he was. His findings about Mr Dalby's relationship with the company and his analysis of the legal consequences show that both Mr Dalby and Burnstead were independently liable to account to ACP, even on the footing that they were distinct legal persons. If, as the judge held, Burnstead was Mr Dalby's nominee for the purpose of receiving and holding the secret profit, it followed that Burnstead had no right to the money as against Mr Dalby, who had in law received it through Burnstead and could properly be required to account for it to ACP. Burnstead itself was liable to account to ACP because, as the judge went on to point out, Mr Dalby's knowledge of the prior

> equitable interest of ACP was to be imputed to it. As Rimer J observed, *"the introduction into the story of such a creature company is … insufficient to prevent equity's eye from identifying it with Mr Dalby."* This is in reality the concealment principle. The correct analysis of the situation was that the court refused to be deterred by the legal personality of the company from finding the true facts about its legal relationship with Mr Dalby. It held that the nature of their dealings gave rise to ordinary equitable claims against both. The result would have been exactly the same if Burnstead, instead of being a company, had been a natural person, say Mr Dalby's uncle, about whose separate existence there could be no doubt."

On the facts of *Petrodel*, the Supreme Court affirmed the Court of Appeal's finding, arrived at by way of inference, that properties legally owned by a husband's companies were in fact legally owned by the husband.

856. Grant & Mumford, *"Civil Fraud"* (1st edn.) § 11-026 (under the heading *"Fiduciary Duties in the Commercial and Contractual Context"* states:

> "Further, even within the established categories, the scope and content of the fiduciary duties which are presumed to be owed can be modified and attenuated by the agreement of those to whom they are owed. In the case of the relationship between director and company, Articles of Association may define the director's duties in specified situations and provide for a narrower duty than might ordinarily apply, or exclude the application of a particular duty in those situations altogether: for example, the standard form Articles of Association in Table A of the Companies Act 1948 and 1985 relaxed the self-dealing rule for directors (as to which see paras 11-086–11-088 below), provided that disclosure of the nature and extent of the director's interest was made to the Board. An agreement made between all of the shareholders and the company itself and which is stated to take precedence over the Articles of Association is also capable of modifying the duties which would otherwise rest on a director. Moreover, *"agreement"* in this context is not limited to contracts in the strict sense: what is permissible within the bounds of a fiduciary's duties will be affected by considerations such as the terms of any contract of engagement, the scope and nature of the business in which his principal is engaged, his role within that business and any understandings between the parties (which may fall short of having contractual force and may be manifested only in a course of dealings) as to the other activities in which he might properly engage." (footnotes omitted)

The last sentence quoted above cites the Privy Council's decision in *New Zealand Netherlands Society "oranje" Inc v Laurentius Cornelis Kuys* [1973] 1 W.L.R. 1126 (PC), holding there to have been an arrangements which displaced any potential fiduciary relationship to hold in trust for an incorporated

society a newspaper which the defendant had acquired by virtue of his position as secretary of the society. The Privy Council added:

> "Their Lordships entirely accept, as a matter of law, that if an arrangement is to stand, whereby a particular transaction, which would otherwise come within a person's fiduciary duty, is to be exempted from it, there must be full and frank disclosure of all material facts. But the appellant was quite unable to point to any matter relevant to the establishment of the newspaper or which, had it been disclosed, could have affected the society's decision that, on the facts found, had not been disclosed by Kuys. It is apparent from the judgments that even if the argument as to non-disclosure was advanced in the courts below it was not accepted. There are no grounds on which it can be accepted in this appeal." (pp1131-1132)

857. In the section on *"Defences: Fully Informed Consent of the Principal"*, Grant & Mumford say:

> "11-137 Since the essence of a fiduciary duty is loyalty and the subordination of the fiduciary's interests to those of his principal, it is possible for the principal to relax the obligation by consent, either generally, or with respect to the particular dealing that might otherwise put the fiduciary in breach.
>
> 11-138 The attenuation of strict fiduciary duties where the possibility of conflict or profit is inherent in the contractual or like arrangements from which the fiduciary relationship arises has been considered above.
>
> 11-139 Outside such circumstances, for consent to provide a defence to a claim that a fiduciary obligation has been breached it must be fully informed, following full and frank disclosure by the fiduciary of both the fact and the nature of his potentially conflicting interest. It is not enough for the fiduciary to disclose simply that he has an interest, or to make statements that put the principal on inquiry. Thus for a director to avoid having to account for a profit that he stands to make personally from his position, he must disclose not just the nature of his interest, but also the source and scale of the profit in question. Likewise, a broker who earns a commission must usually disclose not just the fact of the commission, but its amount, to avoid being accountable. That said, there is support in the authorities for the proposition that where there is a customary usage of charging commission to the counterparty in a particular market, and the amount of the commission is standard and ascertainable on enquiry, a claimant who is deemed to be on notice of the market practice and who failed to make enquiry as to the amount will be fixed with knowledge, and thus consent. Ultimately, whether there has been sufficient disclosure will depend on the facts of each case, given that the requirement is for the principal's

> informed consent to his fiduciary acting with a potential conflict of interest.
>
> 11-140 Where there is a deficiency in disclosure, it is not sufficient for the fiduciary to demonstrate that the principal would still have consented, had full information been provided. The test for the materiality of what was not disclosed is whether it might have affected the principal's decision, not whether it would have done. Nor is the sufficiency of disclosure sensitive to the level of risk of conflict of interest.
>
> 11-141 However, consent need not precede the breach (a principal can consent so as to absolve his fiduciary of liability after the event), and in appropriate circumstances it can be inferred or implied. Thus, for example, where directors of one company were at the request of that company appointed directors of another company and given qualification shares in the latter company by the former company so that they could hold that second office, their remuneration as directors of the second company was not something for which they were accountable: it was a fair inference from the circumstances that the first company had agreed to them receiving it." (footnotes omitted)

citing for § 11-138 the section containing § 11-026 quoted above, and for § 11-141 *Re Dover Coalfield Extension Ltd* [1907] 2 Ch. 76, as explained in *Re Macadam* [1946] Ch. 73, 82.

858. The position of Mr Garton in *Regal (Hastings) v Gulliver* may be a case in point. Mr Garton was the company's solicitor, who made a profit from a similar dealing in the shares (which he took up at the directors' request) and also earned professional fees from the transaction. Lord Russell said:

> "There remains to consider the case of Garton. He stands on a different footing from the other respondents in that he was not a director of Regal. He was Regal's legal adviser; but, in my opinion, he has a short but effective answer to the plaintiffs' claim. He was requested by the Regal directors to apply for 500 shares. They arranged that they themselves should each be responsible for £500 of the Amalgamated capital, and they appealed, by their chairman, to Garton to subscribe the balance of £500 which was required to make up the £3,000. In law his action, which has resulted in a profit, was taken at the request of Regal, and I know of no principle or authority which would justify a decision that a solicitor must account for profit resulting from a transaction which he has entered into on his own behalf, not merely with the consent, but at the request of his client." (p. 152)

Similarly, Lord Macmillan said:

> "The position of the respondent Garton is quite different. He was the solicitor of the plaintiff company and in no sense a trustee for it. True, he made a profit, as did the four directors, but he subscribed for his shares not only with the knowledge, but at the express request, of his clients, and I know of no principle on which he could be held accountable to them for any resultant profit to himself." (p. 153)

859. In *Boulting v. Association of Cinematography* [1963] 2 QB 606, it was held that joint managing directors of a company (who were also employees) were not precluded by their fiduciary duties from being members of a trade union. Lord Denning MR, dissenting, considered that it was unlawful for an employees' union to include managing directors among its members unless some provision is made to ensure that they are not required to act disloyally to their companies. The majority (Upjohn and Diplock LJJ), however, disagreed. In particular, Upjohn LJ referred to the no conflict principle, including its strictness, but went on to say:

> "Like all rules of equity, it is flexible, in the sense that it develops to meet the changing situations and conditions of the time …" (p.636A)

> "The rule, however, is one essentially for the protection of the person to whom the duty is owed. … But the person entitled to the benefit of the rule may relax it, provided he is of full age and sui juris and fully understands not only what he is doing but also what his legal rights are, and that he is in part surrendering them. Thus the company may, in its articles of association, permit directors to be interested in contracts with the company. It may go further, and articles may validly permit directors to be present at board meetings and even to vote when proposed contracts in which they are interested are being discussed; provided, of course, that they make full disclosure of their interests. … Thus in *Regal (Hastings) Ltd. v. Gulliver*, the reason why Garton, the company's legal adviser, was not held liable to account for the profit that he made was that he entered into the impugned transaction not merely with the consent but at the request of his client (see per Lord Russell of Killowen). … The reason why the law permits the rule to be relaxed is obvious. It is frequently very much better in the interests of the company, the beneficiaries or the client, as the case may be, that they should be advised by someone on some transaction, although he may be interested on the other side of the fence. Directors, trustees or solicitors may sometimes be placed in such a position that though their interest and duty conflict, they can properly and honestly give their services to both sides and serve two masters to the great advantage of both. If the person entitled to the benefit of the rule is content with that position and understands what are his rights in the matter, there is no reason why he should not relax

> the rule, and it may commercially be very much to his advantage to do so. ...
>
> To sum up the position, it is clear that the person entitled to the benefit of this positive rule is the person who is protected by it, but he, and he alone, can in proper circumstances relax it to such extent as he thinks proper. It cannot be used as a shield by the person owing the duty; that is clear; it is a sword and as such only can it be used by the person entitled to the benefit of it, and he may sheath the weapon.
>
> There was some discussion before us as to the ambit of the rule. It was submitted that it could not apply to cases where a managing director negotiates too high a salary with his company or takes too long a holiday, or stays at an unnecessarily luxurious hotel when on the company's business. However, a broad rule like this must be applied with common sense and with an appreciation of the sort of circumstances in which over the last 200 years and more it has been applied and thrived. It must be applied realistically to a state of affairs which discloses a real conflict of duty and interest and not to some theoretical or rhetorical conflict. … But it would be quite wrong to attempt any definition of the ambit of the rule. It is there, firm and untrammelled, waiting to be applied to the changing times and conditions of the times as circumstances may require, only to be relaxed where those entitled to the benefit of it are of full age, sui juris and have all the requisite knowledge, not only of all the relevant facts but of their rights." (pp. 636-638)

860. Similarly, in *Sharma v Sharma* [2013] EWCA Civ 1287, [2014] BCC 73 a dentist (*"A"*) owned a dental practice, became married to Sunny (*"S"*), whose family carried on an extensive family business, and became the director of a company formed to acquire certain dental practices for the benefit of the family business (with A, S, S' mother *"K"* and S' father *"R"* as shareholders). A, S K and R attended a meeting before the company was formed where it was agreed that, if A wished to do so, she could acquire other dental practices outside the company and in her own name. Jackson LJ (with whom the other members of the court agreed) referred to *Boardman v Phipps* as illustrating the strictness with which the courts will enforce fiduciary duties (even where the beneficiary would have been unable to take advantage of the relevant potential benefit), and that the beneficiary's consent does not absolve the fiduciary unless he has disclosed all material facts. (§ 43). Further:

> "… In this summary 'statutory duty' means the statutory duty imposed by s 175 of the 2006 Act.
>
> (i) A company director is in breach of his fiduciary or statutory duty if he exploits for his personal gain (a) opportunities which come to his attention through his role as director or (b) any other opportunities which he could and should exploit for the benefit of the company.

> (ii) If the shareholders with full knowledge of the relevant facts consent to the director exploiting those opportunities for his own personal gain, then that conduct is not a breach of the fiduciary or statutory duty.
>
> (iii) If the shareholders with full knowledge of the relevant facts acquiesce in the director's proposed conduct, then that may constitute consent. However, consent cannot be inferred from silence unless:
>
> (a) the shareholders know that their consent is required, or
>
> (b) the circumstances are such that it would be unconscionable for the shareholders to remain silent at the time and object after the event.
>
> (iv) For the purposes of propositions (ii) and (iii) full knowledge of the relevant facts does not entail an understanding of their legal incidents. In other words the shareholders need not appreciate that the proposed action would be characterised as a breach of fiduciary or statutory duty."

On the facts, the Court of Appeal held that full disclosure had been made, and that at the meeting K, the dominant force in the family business, had given *"express consent"* to A acquiring dental practices outside the company and in her own name, with S and R acquiescing by their absence of dissent at the meeting.

861. Whether there has been sufficient disclosure, i.e. disclosure of all material facts, depends on the facts of the case: *Hurstanger v. Wilson* [2007] 1 WLR 2351 at [35]. Sufficiency of disclosure may depend on the sophistication of the person to whom disclosure is required: Snell's Equity 34th ed., para. 7-015. Authorisation or consent can be express, implied, verbal or by conduct: cf *Schofield v. Schofield* [2011] EWCA Civ. 154 at [32]. Consent can be inferred where the circumstances are sufficiently clear to justify such an inference: *Kelly v. Cooper* [1993] AC 205, 215; *Bristol & West BS v. Mothew* [1998] Ch. 1 at [18]-[19]. The principal needs to be told all the material facts: see e.g. *FHR European Ventures LP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250 at [5]. The question is whether the missing information might, not would, have affected the principal's decision (see e.g. *Cedar* at first instance, [2011] EWHC 2308 (Ch) at [79]).

862. As noted in Snell's Equity 34th ed., para. 20-012 fn 9, *"Company directors are not accountable for the company s property unless they themselves receive it, although they may be liable on other bases for misuse of their powers of disposal: Barnett v Creggy [2015] P.N.L.R. 13 at [74]"*. Hence, as noted earlier, insofar as the Claimants' pleaded claims seek an account, they are premised on the Claimants having first established one or more of the breaches of fidicuary duty which they allege.

863. An account of profits is measured by the personal gain that the wrongdoer makes. It is essential to identify the profits that the person liable has *"actually derived from the wrongful conduct which made them liable in the first place. That accords with the equity of the situation"*: *Lifestyle Equities v. Ahmed* [2021] EWCA Civ. 675 at [16].

864. If a fiduciary is held to be liable to account, then he has the onus of showing that the profit is one for which he should not have to account (*Murad v Al-Saraj* [2005] EWCA Civ 959 at [77]: "*Again, for the policy reasons, on the taking of an account, the court lays the burden on the defaulting fiduciary to show that the profit is not one for which he should account …"*, referring to cases about the mingling of profits for which the fiduciary is accountable with profits attributable to his own efforts).

865. Where profits have been diverted, any liability to account is for net, rather than gross, profits: see Lewin on Trusts, para. 45-085; *Regal (Hastings) Ltd v. Gulliver* [1967] 2 AC 134, 154; *Clegg v. Pache's Estate* [2017] EWCA Civ. 256 at [46]-[62]. In assessing the net profit and the advantage gained, it is necessary to *"look at the situation in the round"*: *Patel v. Brent LBC* [2003] EWHC 3081 (Ch.) at [29]. Net profit is calculated by deducting from gross revenue/turnover (i.e. gross profits) any direct costs incurred and any other costs such as overheads and fixed costs. Thus, for the purposes of an account of actual/net profit, costs and expenses which were properly incurred, and are properly attributable to the gross receipt, will be deducted from the gross profit to determine the amount for which the fiduciary must account: Snell's Equity 34th ed., para. 7-055; *Gray v. Global Energy Horizons Corp* [2020] EWCA Civ. 1668 at [230], [233].

866. The Court has a discretion under section 1157 of the 2006 Act to grant relief to a director from liability for breach of a fiduciary duty owed to the company if he "*acted honestly and reasonably, and that having regard to all the circumstances of the case… ought fairly to be excused*". This provision can also be applied to de facto or shadow directors: *Instant Access Properties v. Rosser* [2018] BCC 751 at [352]-[355].

867. Relief by way of an account of profits is discretionary. The court may grant a defaulting fiduciary who is liable to account an equitable allowance to curtail any unjust enrichment of the beneficiaries: *Recovery Partners v. Rukhadze* [2023] EWCA Civ. 305 at [112]-[123]. Ultimately, to give regard to the 'cardinal principal of equity', the remedy *"must be fashioned to fit the nature of the case and the particular facts"*: *Recovery Partners* (CA) at [62] and [77] per Popplewell LJ.

(d) Dishonest Assistance

868. The elements of a claim for dishonest assistance were summarised in *Group Seven Ltd* at [29] as:

i) a breach of a trust or fiduciary duty owed by the fiduciary to the claimant;

ii) the defendant having assisted the trustee or fiduciary to commit that breach; and

iii) the assistance having been dishonest.

869. There can be no breach of fiduciary duty in a diversion of opportunity claim unless the diversion is of an opportunity that the principal was "*actively pursuing*": *Recovery Partners GP v Rukhadze & Others* [2018] EWHC 2918 (Comm) at [65]-[67].

870. The assistance must have played more than a minimal role in the breach carried out: *FM Capital Partners* at [82(iv)]; *Group Seven* at [110(1)].

871. A person held liable for knowing assistance can be liable for loss suffered by the claimant over and above any benefit received by the defendant: see, e.g., *Trustor AB v Smallbone (No.3)* [2000] EWCA Civ. 150 at [97]; *Hotel Portfolio II UK Ltd v Ruhan* [2023] EWCA Civ 1120 at [45], and *Ultraframe* at [1600].

(e) Knowing Receipt

872. The elements of a claim for knowing receipt were summarised in *El Ajou v Dollar Land Holdings plc* [1994] BCC 143 (CA) at [154], cited with approval in *Byers v Saudi National Bank* [2022] 4 WLR 22 (CA) at [14] and [17], as follows:

i) a disposal of the claimant's assets in breach of fiduciary duty;

ii) beneficial receipt by the defendant of assets which are traceable as representing the claimant's assets; and

iii) knowledge by the defendant that the assets received are traceable to a breach of fiduciary duty.

873. In relation to the third requirement, knowledge, the claimant must establish that the recipient's state of knowledge was such as to make it unconscionable for them to retain the benefit of the receipt: *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 455, approved in *Byers* at [15] and [18]. Lord Burrows noted in *Byers* that *"terminology of unconscionability has unhelpfully obfuscated the answer to the important question of whether the required knowledge for knowing receipt extends beyond actual knowledge to include constructive knowledge"* (at [101]), but that it was unnecessary to decide that issue in that case.

874. A five-fold classification of knowledge was set out by Peter Gibson J in *Baden v Société Générale SA* [1993] 1 WLR 509 at [250]: (1) actual knowledge; (2) wilfully shutting one's eyes to the obvious; (3) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (4) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (5) knowledge of circumstances which would put an honest and reasonable man on inquiry. In a commercial context, *Baden* types (1) – (3) knowledge render the receipt of trust property 'unconscionable'. *Baden* types

(4) – (5) knowledge may also satisfy the knowledge requirement for knowing receipt, if, on the facts actually known to the Defendant, *"a reasonable person would either have appreciated that the transfer was probably in breach of trust or would have made inquiries or sought advice which would have revealed the probability of the breach of trust"* (*Armstrong GmbH v Winnington Networks Ltd* [2013] Ch. 156 at [132]).

875. A recipient need not necessarily have any knowledge or even notice of any breach of fiduciary duty at the point of receipt. It is sufficient if the defendant received the property without notice that it was trust property but subsequently discovered the facts while in possession of it. What matters is that the recipient's state of knowledge should have become such as to make it unconscionable for him to retain the benefit of the receipt (assuming he still has it at the time he discovered the facts: knowledge and possession must coincide, as indicated in *Byers v Saudi National Bank* [2024] 2 WLR 237 at [20]).

(3) Swiss law

876. Arcadia Switzerland's claim is brought under Swiss law. It alleges that:

i) Mr Bosworth and Mr Hurley owed Arcadia Switzerland the duties in Article 717 of the Swiss Code of Obligations ("***SCO***");

ii) they breached those duties and are liable to pay compensation and/or disgorge profits. Mr Bosworth/Mr Hurley are liable for damages under section 754, and liable to disgorge profits, including profits diverted to third parties *"arising from bad faith breaches"* of Article 717, pursuant to Article 423;

iii) the breaches also amounted to 'acts of criminal mismanagement' under Article 158 of the Swiss Penal Code ("***SPC***") (which the other Defendants aided and abetted), such as to constitute unlawful conduct under Article 41(1) of the Swiss Code of Obligations for which Mr Bosworth/Mr Hurley are liable to pay compensation;

iv) Mr Bosworth/Mr Hurley are liable to Farahead as Arcadia Switzerland's shareholder and creditor for any breach of duty to Arcadia Switzerland. However, it is common ground that Farahead has no claim against Mr Bosworth/Mr Hurley under Swiss law that is independent of Arcadia Switzerland's claim. As a shareholder of Arcadia Switzerland, Farahead can only have a claim for 'performance to the company', i.e. for payment of damages to Arcadia Switzerland. Farahead has no claim as a creditor because Arcadia Switzerland was not insolvent; and

v) Mr Kelbrick and Attock Mauritius are liable as accomplices for aiding and abetting Mr Bosworth/Mr Hurley's unlawful conduct, and are liable under Articles 41(1), 41(2), 50(1), 51, 722, and/or 423 SCO, and Article 25 SPC. The Claimants' case against Mr Kelbrick and Attock Mauritius is based on accessory liability only: it is common ground that Mr Kelbrick was not an organ of Arcadia Switzerland.

(a) Article 717 SCO

877. Article 717(1) provides:

> "The members of the board of directors and third parties engaged in managing the company's business must perform their duties will all due diligence and safeguard the interests of the company in good faith."

878. Article 717 includes a duty of care and a duty of loyalty. Professor Vogt elaborated those duties as involving duties (i) to act with single-minded loyalty; (ii) to act in good faith and honestly in the best interests of the company; (iii) to take appropriate measures if conflicts of interest arise; (iv) to not make unauthorised or secret profit/commission out of their position; (v) to disclose misconduct; (vi) (under the duty of care) to act in a way which may reasonably be expected of a diligent person in the particular circumstances. Professor Forstmoser was asked about (i) to (v) of these and said he agreed with them. He was also asked whether under the duty of loyalty, organs must not act for their own benefit or for the benefit of a third party without the principal's informed consent, to which he agreed with the rider that it *"might be an informal consent. If under 717(1) the company knows and accepts these other activities, that is okay"*.

879. Like English law, Swiss law distinguishes between *de jure* and *de facto "organs"* of a company, and both are subject to these duties. Professor Vogt said that a parent company can be a factual organ of the company if it controls the make-up of the company's board, or if the parent company operates the mind, management and control of the company. Further, individuals who manage the parent company (as opposed to non-executive members of the parent's board) can be factual organs of the subsidiary, for example if they *"get involved and they take decisions that are reserved for the subsidiaries"*.

880. As to the duty of care (reflected in point (vi) in § 878 above), it must be assessed in the context of the particular company and determined in the specific circumstances, including the taking of entrepreneurial risks. Professor Vogt agreed that the scope of the duty *"does depend on the instructions which [the instruction giver] gives"*.

881. In the context of the duty of care, Swiss law applies a *"business judgment"* rule, which applies where a formal business decision has been taken by unbiased organs who have taken due care in developing the decision (including gathering sufficient information and examining possible alternatives), following a correct decision-making process and acting in good faith (which is presumed not to be the case if the decision is manifestly unreasonable). In those circumstances, the court will refrain from examining the content of the decision. As to information-gathering, Professor Vogt accepted the view stated in the commentary by Professor Böckli that *"[o]nly if a business decision is made on the basis of obviously insufficient information does the protective effect cease to apply."*

882. Professor Vogt also gave this evidence:

> "Q. But the standard of care needs to be assessed in the context of taking entrepreneurial risks, doesn't it?
>
> A. Yes, of course.
>
> Q. And in a high risk business, the standard of care might be different from a low risk business?
>
> A. That is true, but maybe if I might make an addition regarding risk. Risk has a lot to do with the company itself, the company we are talking about, it has a lot to do with the capability of the company to take risks. It has to do with the necessity to take risks in view of the goals of the company etc. So risk has to be seen and looked at with respect to the particular company, its possibilities, its financial means etc.
>
> Q. You refer to the goals of the company so I want to look at that. The purpose of the business may require the assumption of particular risks and that would not be a breach necessarily of article 717, would it?
>
> A. It would not, of course.
>
> Q. In fact, to fulfil the duty, you might need to take the risk?
>
> A. Absolutely."

883. Professor Vogt agreed that the notion of furthering the company's interests can (as Professor Böckli has said) include *"a duty to proceed and initiate and a duty to strive and dare"*. As the Swiss Federal Supreme Court has held, the assumption of a higher business risk can be justified if it is linked to the opportunities associated with the risk, and a failure to assume the risk could appear to be a breach of duty (BGer 4A_626/2013 of 8 April 2014).

884. The directors are given a wide discretion to determine what is in the company's interests. Professor Vogt gave this evidence:

> "Q. But to determine what is in the interests of the company, that is an assessment that the director takes. It is in his view what best promotes the interests of the company, assuming the director acts in good faith?
>
> A. It is, as a practical question, but of course the board members have to ask themselves what is in the best interests of the company. It's not that they are free to decide whatever they think, but they have to strive to find out what pursuing the interests of the company means in any particular situation.
>
> Q. But that is why there is a wide discretion is given to the directors; yes?
>
> A. Yes, I agree."

885. Further, the company's best interests are not necessarily to be equated to profit. Prof Vogt said *"it is still necessary to put it this way: profit is not everything to be subsumed under the interests of the company"*. In addition, so far as profit is concerned, it is long-term profitability rather than short-term profit realisation that matters.

886. The duty of loyalty is a duty to put the company's interests ahead of the director's own and third parties' interests. However, even if the duty of loyalty is treated as including, in the broader sense, acting in good faith and honestly in the best interests of the company, the points made above continue to apply. Thus, from Prof Vogt's oral evidence:

> "Q. And so you first of all talk about (ii), a duty to act in good faith and honestly in the best interests of Arcadia Switzerland; yes?
>
> A. Right.
>
> Q. And we need to read into that a duty to act in good faith and honestly in the way a director considers to be to promote the best interests of the company; yes?
>
> A. As I said before, as a practical matter, it is for the board members to determine what in a particular situation is in the best interests of the company but that is not exactly the same as to say the board is free to determine what is in the best interest.
>
> Q. But there is a large measure of discretion?
>
> A. There is, of course.
>
> Q. So assume that the decision-maker acts in good faith and takes a decision in the normal course of trading; yes? Make that assumption. But for whatever reason, that decision turns out badly for a company, there is a loss. Maybe it's a huge loss. The fact that the decision turns out badly does not mean there is a breach of article 717; correct?
>
> A. That's correct."

887. Similarly, in re-examination:

> "Q. … You were asked by Mr Eschwege about the circumstances in which the business judgment rule would apply and the degree of deference that a court would accord to a decision taken by a factual organ. And do you see at the start, you say when assessing a potential violation of the duty of care, can I first ask: does the business judgment rule apply when you are considering breaches of the duty of loyalty?
>
> A. It does not.

> Q. What does that mean in practical terms, when a court is adjudicating upon a dispute in Switzerland, what – if the business judgment rule does not apply, what degree of deference will it accord to the decision that is under challenge?
>
> A. So if it is then a case of the duty of loyalty and if we are dealing with a case where conflicts of interest are in question, the court would consider whether there was a conflict of interest and whether it was appropriately managed. The business judgment rule does not apply, neither to the question of whether there is a conflict of interest, nor does it technically apply to the question whether the conflict was properly managed if there was one.
>
> Q. So will the court decide whether the decision was in the best interests of the company for itself?
>
> A. You mean in a duty of loyalty case?
>
> Q. Yes.
>
> A. Well, in a duty of loyalty case, it will define what is the interest of the company and whether the person who was potentially acting under a conflict first of all disclosed it and whether then appropriate measures were taken. That is the analysis to be conducted.
>
> MR JUSTICE HENSHAW: Can I just ask a question on that. Can there be circumstances where deciding what is in the company's interests is itself a question of business judgment? And if so, will the court necessarily substitute its own view as to that for the view of the company's management?
>
> A. Thank you. So, first of all, to confirm, step one is of course to identify what are the company's interests in any particular matter, that is absolutely correct. Technically as what the business judgment rule is as crafted by our Supreme Court, it does not apply to this question. But of course, there is vast discretion as for the board members and management to define what corresponds to the interests of the company in a particular situation. It is just not technically a business judgment rule matter because we are not talking about duty of care."

888. It is not necessarily a breach of duty to refrain from taking up a particular opportunity: it depends on the circumstances, including potentially the position of related companies. Professor Forstmoser gave this evidence:

> "Q. I'm now going to ask you some questions about the application of article 717. And what I would like you to consider is whether there would be a breach; whether the factual organs of a company commit a breach of article 717 in the following

> circumstances. So, suppose you have an organ of a company who diverts profits away from a company, do you consider that this would be a breach of article 717's duty of loyalty?
>
> A. Yes, I agree.
>
> Q. And what about circumstances in which an organ diverts corporate opportunities away from a company? Do you consider this to be a breach of article 717?
>
> A. Well, this is more difficult to be answered. I mean, theoretically you have an enormous amount of opportunities and it may well be that you decide to follow/pursue one of these opportunities and to omit to pursue the other one.
>
> Q. But if pursuing the corporate opportunity is in the best interests of the company which you are an organ of, it is a prima facie breach of the duty of loyalty to divert that opportunity away from the company.
>
> A. Yes, if you say divert, I agree. If you just have an opportunity, then being the organ of two companies having to decide where to appropriate it, I would not agree.
>
> Q. Would it in your evidence be a breach of article 717 if, the consent of the company, the organ diverted profits to a company which he owns or controls?
>
> A. Yes.
>
> Q. And what about if he diverts corporate opportunities to a company he owns or controls, would that breach the duty of loyalty?
>
> A. Again, this is more difficult to be answered. If it is from a bench of opportunities open to both companies, and you select one or the other one, this might be okay and this might have to be accepted in a situation where you have a board member which is also a member of other boards, but if no such wave of interests is needed, then yes."

889. A potential breach of the duty of loyalty consisting of a conflict of interest can be authorised or ratified. The authorisation can be 'express' or 'tacit', or by subsequent approval. In terms of the level of information that a director is required to disclose in advance, when managing conflicts of interest, the 'essential' elements of the potential conflict need to be disclosed, as opposed to every last detail. The same level of disclosure is true for the purposes of giving informed consent after the conflict has arisen. A shareholder can therefore instruct a director to undertake a course of business and approve a potential conflict of interest where the essential elements of the potential conflict have been disclosed to the shareholder.

890. Professor Forstmoser noted that a company may have many opportunities, and it *"may well be that you decide to follow/pursue one of these opportunities and to omit to pursue the other one."* Further, if the sole shareholder of a company does not wish the company to take the opportunity and that opportunity is passed to a third party, that may be relevant to whether or not there is a breach of Article 717.

891. The experts' evidence made clear that a potential breach of the duty of care is not assessed in the abstract or with hindsight. A director is entitled to use his business judgment in the pursuit of entrepreneurial activities. The practice of market participants is one element to take into account. Swiss law applies the business judgment rule when assessing a potential breach of a duty of care; the rule recognises that managers of a company are entitled to exercise a large element of discretion. As to the 'formality' of a business decision, there does not need to be a formal document or minute for the relevant decision. Professor Vogt agreed that the business judgment rule does not require a 'box-ticking exercise' for the decision-making process. The rule applies not just to boards taking decisions, but board members taking decisions as well. If the business judgment rule does not apply to a situation, that does not mean that there is a breach of duty, but the alleged breach must be assessed on its own facts.

(b) Article 754 SCO

892. Article 754(1) provides:

> "The members of the board of directors and all persons engaged in the business management or liquidation of the company are liable both to the company and to the individual shareholders and creditors for any losses or damage arising from the intentional or negligent breaches of their duties."

893. It requires (i) the occurrence of financial damage; (ii) a breach of a duty; (iii) causation; and (iv) fault. Damage can be either a decrease in net assets or a loss of profits. Loss of profits requires an assessment of a hypothetical course of events. The realisation of profits must be 'customary' or 'otherwise certain'.

(c) Article 423 SCO

894. If the criteria of a claim for damages of lost profits are not fulfilled, then disgorgement of profits may be required under Article 423(1):

> "Where agency activities were not carried out with the best interests of the principal in mind, he is nonetheless entitled to appropriate any resulting benefits…."

895. Professor Vogt stated that Article 423 applies only if the 'agent' acts in bad faith, which Professor Forstmoser agreed includes *"when its author knows or ought to know that he is interfering in the sphere of others without having any reason to do so."* If the agent passes the profits to a third party, he is liable to the principal unless he acted in good faith when passing the profits. Any claim

is restricted to 'net' profits. If the 'agent' has himself earned nothing, then there is nothing to return.

896. In his report, Professor Vogt suggested that if the 'agent' passed the profits to a legal entity which he 'controls' he could be liable to return the net profits if the legal entity was 'economically identical' with the agent according to the doctrine of Durchgriff (piercing the corporate veil). As Professor Vogt explained, the application of that doctrine requires more than economic identity, but also requires a legal abuse. The doctrine has not been pleaded in the present case.

(d) Article 41 SCO and Article 158 SPC

897. SCO Article 41 is the general tort provision. Article 41 provides:

> "(1) Any person who unlawfully causes damage to another, whether wilfully or negligently, is obliged to provide compensation.
>
> (2) A person who wilfully causes damage to another in an immoral manner is likewise obliged to provide compensation."

898. Article 41(1) SCO has four elements: (i) financial damage, (ii) unlawfulness, (iii) causation, and (iv) fault. As to the unlawfulness limb, there is no Swiss law decision where a breach of Article 717 SCO has constituted the relevant unlawfulness for the purposes of an Article 41(1) claim, and Professor Vogt accepted that it would be novel.

899. The Claimants also rely on Mr Bosworth/Mr Hurley's alleged breach of SPC Article 158 to constitute the requisite unlawful act under Article 41. The Claimants' case is, of course, of intentional breach of duty rather than negligence. SPC Article 158(1) provides:

> "Any person who by law, an official order, a legal transaction or authorisation granted to him, has been entrusted with the management of the property of another or the supervision of such management, and in the course of and in breach of his duties causes or permits that other person to sustain financial loss shall be liable to a custodial sentence not exceeding three years or to a monetary penalty."

900. Professor Thommen explained that, while the behaviour potentially covered by the Article 158 offence was broad, the requirement for the breach of duty narrowed down the possible acts that might be punishable. In particular, not every violation of a civil duty amounts to an offence under Article 158.

901. Swiss commentary suggests that 'serious' breaches of the duty of loyalty might be punishable under criminal law (Forstmoser, Meier-Hayoz, Nobel, Swiss Company Law, ch. 28 para. 30). Professor Thommen preferred to talk in terms of a breach of a 'qualified' duty (rather than a qualified breach of duty); he accepted that the qualified duty itself was at a higher or more serious level than

an ordinary duty. Thus, Professor Forstmoser said, the breach of the qualified duty reflect the principle that criminal law deals with serious or severe violations of the law. The decisions to which Professor Thommen referred reflected such serious violations. One case involved forgery and 'possible fraud', making the point that criminal protection is needed where there is fraud. Another case concerned dishonest mismanagement of a company, involving embezzlement and a blatant breach of trust. Professor Thommen agreed that *"article 158 is really about when an offender abuses his position dishonestly"*.

902. Prior informed consent to the relevant transaction in issue constitutes a defence.

(e) Article 43 SCO

903. The court can, in is discretion, reduce damages awarded under Article 43. One factor to take into account would be the good faith of the putative wrongdoer.

(f) Accessory liability

904. If Mr Bosworth and/or Mr Hurley is liable, Arcadia Switzerland then alleges that Mr Kelbrick and Attock Mauritius are liable as accomplices for aiding and abetting Mr Bosworth/Mr Hurley's unlawful conduct.

905. Professor Vogt set out the legal basis for three potential routes to liability for Mr Kelbrick and Attock Mauritius under Swiss law:

i) First, that Mr Bosworth and Mr Hurley breached their duties under Article 717 SCO or committed criminal mismanagement under Article 158 SPC, which amounted to unlawful acts under Article 41(1) CO, and Mr Kelbrick was an accomplice under Article 50 SCO.

ii) Secondly, that Mr Bosworth and Mr Hurley breached their duties under Article 717 SCO, and Mr Kelbrick aided and abetted those breaches, so as to constitute immoral conduct under Article 41(2) SCO.

iii) Thirdly, that Mr Bosworth and Mr Hurley committed criminal mismanagement under Article 158 SPC and Mr Kelbrick satisfied the criteria of criminal law complicity.

906. Each of those 'routes to liability' is addressed below.

907. As to route (1), Article 50 SCO provides:

> "(1) Where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the person suffering damage.
>
> …
>
> (3) Abettors are liable in damages only to the extent that they received a share in the gains or caused damage due to their involvement."

908. Professor Vogt said it is necessary that the accomplice knew or should have known that his act or omission was aiding a tort committed by another. There needs to be a *"common will"* between the accomplice and the principal. The abetted person's violation of duty must have been unlawful under Article 41(1), though the abettor himself does not have been in breach of Article 41(1).

909. As to route (2), Article 41(2) requires wilfulness, and so (Professor Vogt agreed) would require Mr Kelbrick to know that Mr Bosworth and Mr Hurley were breaching their duties. There is no Swiss law decision where a breach of Article 717 SCO has been the relevant unlawfulness for the purposes of an Article 41(2) SCO claim. According to the Swiss Federal Supreme Court, liability under Article 41(2) SCO will arise only *"in exceptional cases"*, should be used *"with the greatest reluctance"*, and *"must not serve to undermine the requirement of unlawfulness"* (decision (BGE) 124 [1998] III 303). Professor Forstmoser was willing to accept that intentionally inducing a person to breach his duty of loyalty under Article 717 SCO would be an example of the type of conduct prohibited by Article 41(2) SCO, on the basis that it would violate the general sense of decency and values inherent in the legal system as a whole.

910. As to route (3), Professor Vogt confirmed that the only distinction between his first and third 'routes to liability' is that the third requires the criminal law criteria of complicity to be satisfied, as opposed to the civil law criteria of complicity. Article 25 SPC provides:

> "Any person who wilfully assists another to commit a felony or a misdemeanour shall be liable to a reduced penalty."

911. Professor Thommen stated that under Article 25 SPC:

> "Complicity objectively requires that (a) the principal offence is (b) supported by the accomplice. Subjectively (c), the accomplice must be proved both to have acted with intent in relation to the support and the principal offence. As with the principal offence, (d) unlawfulness and (e) culpability must also be established here."

912. He said the element of subjective intention requires *"double intention"*, i.e. the accomplice must intend that the principal offence takes place and he must intend to assist the principal offence, and confirmed that that requirement applies to each transaction.

913. Professor Thommen confirmed that, unless the *actus reus*, *mens rea*, and unlawfulness requirements are made out for the principal offender, there can be no accessory liability.

(L) EVALUATION OF THE CLAIMANTS' CLAIMS

(1) General matters

914. In evaluating the Claimants' claims, I begin with the following preliminary observations.

915. First, as set out in section (J) above, the Claimants' claims are premised on an alleged fraudulent diversion of profits and/or opportunities, by the use of *"fraudulent entities"*, the whole amounting to a *"serious and sustained trading fraud"*. That allegation is the beginning, and, if it fails, the end of the claim. One consequence of that is that the Claimants cannot now seek to fall back on lesser contentions, for example to the effect that Defendants acted negligently, or honestly failed to act in accordance with the Claimants' best interests. Such a case has never been pleaded; had it been, the course of the litigation, including the factual and expert evidence, would no doubt have been very different (and even more voluminous) than the evidence actually served.

916. Another consequence concerns the Claimants' repeated assertion that Mr Bosworth and Mr Hurley had some form of duty to 'account'. Such a duty would be likely to arise in the event that the Claimants established their claim of dishonest diversion. However, short of that, no basis has been pleaded or established for a duty to account.

917. Secondly, despite this litigation having been extant since 2015, the Claimants in the weeks leading up to trial, and at trial, repeatedly sought to rely on new allegations relating to specific transactions and the ownerships of particular entities. As set out in the Annex, the Claimants sought by an Amended Reply served on 8 April 2024, less than three weeks before written openings were due for a trial commencing on 7 May 2024, to introduce a raft of new allegations relating to transactions with, and the beneficial ownership of, entities including Concerto, MRS, Cakasa, ArcAfrica and Equinox – under the guise that they were 'consequential' to a brief amendment which the Defendants had made consequentially on the Claimants having been permitted to advance a new alternative claim in RRRRAPC served on 20 March 2024. I disallowed the amendments to the Reply for the reasons given in the Annex. Nonetheless, the Claimants frequently sought to resort to essentially the same allegations, on the basis that they went either to the ownership of Arcadia Lebanon or to credit. Whilst I gave the Claimants a certain degree of latitude in that regard, what the Claimants cannot do is now to seek to revive the allegations as instances of fraudulent diversion of funds or opportunities. That would be unfair in circumstances where such reliance would have required the matters in question to be pleaded long ago, as they could have been, so that the Defendants had a fair opportunity to prepare for them through the usual processes of disclosure, evidence of fact and (if appropriate) expert evidence. It is unacceptable for a claimant to seek to bolster a fraud case by raising new allegations or particulars at the last minute and then invite inferences from the Defendants' ability or otherwise to deal with them on the hoof.

918. Thirdly, it was a key plank of the Claimants' case that the ongoing activities of Arcadia Lebanon, and its profits, were concealed from Farahead, Mr Fredriksen and Mr Trøim by the alleged deceitful misrepresentations referred to in sections (I)(10)(c) and (h) and (I)(11)(f) above. For the reasons given in those sections, the Claimants' case as to those matters turned out to be untenable or non-existent. On the contrary, the evidence established that Mr Fredriksen, Mr Trøim and officers of Farahead knew very well that Arcadia Lebanon was being

used for the purpose for which it was in fact used, and were keen to take advantage of the profits it made by doing so.

919. Fourthly, of relevance to motive and hence a matter to take into account when assessing the inherent probabilities, on the Claimants' pleaded case (and in the light of the Claimants' concession concerning the Arcadia Lebanon dividend) Mr Bosworth received at most (indirectly) US$1 million and Mr Hurley received at most (indirectly) US$3.135 million. I consider in section (L)(4) below whether those alleged benefits can be established, concluding that they cannot. Even if they could, it would mean that the Claimants were alleging that Mr Bosworth and Mr Hurley orchestrated a US$325 million fraud from which they received, in total, a tiny fraction of the proceeds: sums which, moreover, were very small in the context of the bonuses and profit shares which the Claimants do not dispute Mr Bosworth and Mr Hurley were entitled to from their work at the Arcadia Group.

(2) The Arcadia Lebanon Transactions

920. The essence of the claim in relation to these transactions is that, through deception, Mr Bosworth and Mr Hurley were able to continue using Arcadia Lebanon, a 'fraudulent entity', for their own benefit, dishonestly diverting away from the Claimants opportunities and profits that were rightfully theirs.

921. However, the evidence I consider in section (I) above does not support any such case. On the contrary, it supports the opposite case.

922. First, far from being established and used secretly and dishonestly, as a *"fraudulent entity"*, Arcadia Lebanon was openly discussed and used, with the acquiescence of Mr Fredriksen, Mr Trøim and Farahead in general, as a way of mitigating compliance risks: see my detailed findings and conclusions in sections (H)(4) and (I)(1) above. It was agreed that Arcadia Lebanon would be used as a contract holder in order to mitigate compliance risks of West African oil trading; that the Sao Tome and Zafiro Contracts should be migrated to it; and that later similar contracts should be treated in the same way. Arcadia Lebanon was openly discussed with Mr Fredriksen and Mr Trøim, and placed into at least the Zafiro and Sao Tome Contracts with, at the very least, their specific acquiescence. It was a company in which Mr Trøim regarded Farahead as having a *"70% economic interest"*. Moreover, as I conclude above, in November 2007 Arcadia Lebanon made a US$4 million payment to help Arcadia London with cashflow demands and, over time, other payments for the benefit of the Arcadia Group (see §§ 403, 489, 509-513, 580, 648 and 677 above).

923. There is no merit in the suggestion that Mr Bosworth/Mr Hurley misrepresented the purpose for which Arcadia Lebanon was to be used: see section (I)(1) above. There was no failure to disclose the intended or actual use of intermediary or 'sleeve' companies: see section (H)(6) above. Nor, in any event, was there in my view any need specifically to disclose that matter. The use of sleeves and other intermediaries (such as contract holders) was within the ordinary course of business of purchasing crude oil from NOCs under term contracts (see section

(F) above), and within Mr Bosworth's usual powers as Arcadia's CEO. There was nothing unusual or special about it.

924. Formalisation of the ownership of Arcadia Lebanon was then the subject of a substantial amount of discussion in spring and summer 2008, in which Farahead and Mr Trøim were involved, and Mr Trøim made clear that references to Arcadia Lebanon in documents should be minimised. Mr Lind prepared a draft letter written on the express premise that Mr Bosworth and Mr Hurley had already held Arcadia Lebanon to Farahead's direction (§§ 456-459 above). As I state in § 452 above, it would have made no sense for Farahead to be taking any of these steps had Farahead understood the company to be an inactive one owned by Mr Bosworth and Mr Hurley that had undertaken only a very limited number of specific trades over a very short time span. Nor do any of those matters explain why Mr Trøim would positively wish the matter to be omitted from the discussion at the meeting (or the minuting of it). All of this is very difficult to square with the Claimants' contention that Arcadia Lebanon was presented as a discrete operation used for a small amount of business but was then used as a vehicle for Mr Bosworth and Mr Hurley to perpetrate a large-scale fraud on Arcadia London and Farahead.

925. The alleged deceitful misrepresentation in late 2008 that Arcadia Lebanon became dormant had no coherent basis whatsoever and should never have been pursued (see §§ 468-475 above); just as there was no basis for the alleged subsequent misrepresentation that the Arcadia Group had ceased its regular West African trading activities (§§ 527-534; see also section (I)(12)(a) above regarding the Arcadia bonus scheme, §§ 583 and 584 above regarding the Information Memorandum and website in late 2010, and §§ 607-609 about the 2011 business plan). Nor, indeed, was there any attempt to hide Arcadia Lebanon or its ongoing activities (see, e.g., § 476 above). The complete lack of substance in both of those long-pursued but unmeritorious allegations of deliberate deception undermines the Claimants' case that the Defendants' activities were carried on secretly, consistently with the Claimants' fraud case.

926. It is also very significant that Farahead went on, in 2009, to extract a dividend from Arcadia Lebanon (see §§ 477-485 and 499-507 above): a matter which the Claimants finally conceded at trial, having for years not accepted it and having denied that Mr Fredriksen, Mr Hannas or Farahead was aware of the relevant payments. Yet further, Farahead took a close interest in Arcadia Lebanon's profits for 2008, actively contemplated extracting another dividend, but instead decided to use it to help fund Arcadia London/Arcadia Switzerland's activities: see §§ 518-526 above. Arcadia Lebanon also continued making payments to GEPVTN, in which Mr Fredriksen's company VTN was a joint venture partner and whose finances and accounts Mr Fredriksen's Frontline staff ran, until at least 2011 (section (I)(7) above).

927. The evidence as a whole shows that it was and, indeed, and remained Mr Fredriksen's 'stand alone' company, as the Hannas Note recorded Mr Lance as saying: see, in particular, sections (I)(1), (10)(e), (g) and (i) and (11)(f) above.

928. Secondly, it was the Claimants' pleaded case that Farahead, and Mr Fredriksen and Mr Trøim, were aware, in general, of some risks presented by West African

oil trading, in particular that involving purchases from national oil companies, and were concerned to prevent these eventuating, including risks of bribery and corruption. Mr Fredriksen agreed in cross-examination that purchases from NOCs involved potential risks concerning bribery and corruption. As to how that would affect his business dealings, he said that personally he would not deal directly with a NOC. On that basis, the opportunities which Arcadia Lebanon took were ones that Arcadia London/Arcadia Switzerland did not themselves wish to take, having decided not to enter into those contracts themselves for the very reasons that Arcadia Lebanon was used, namely to mitigate compliance risks. That is inconsistent with a claim for diversion of opportunities (see *Recovery Partners GP v Rukhadze* [2018] EWHC 2918 (Comm) at [65]-[67]; [2019] Bus LR 1166). There was, adopting Cockerill J's phraseology in that case, a clear dissociation of Arcadia London/Arcadia Switzerland from the opportunities for which Arcadia Lebanon was used instead. (See also section 175(4) Companies Act 2006: a director's duty to avoid conflicts of interest "*is not infringed if the situation cannot reasonably be regarded as likely to giving rise to a conflict of interest*".)

929. Thirdly, I do not consider the points summarised in § 769 above demonstrate Mr Bosworth's/Mr Hurley's beneficial or economic ownership of Arcadia Lebanon.

i) I deal with the incorporation of Arcadia Lebanon in section (I)(1) above. As I set out there, Mr Lance was involved in, and Arcadia's auditors were aware of, the incorporation of the company, and there was no secrecy associated with it. The gaps in the Claimants' documentation further undermine their point: see § 280 above.

ii) Arcadia Lebanon's office, auditing and staffing arrangements do not support the inference the Claimants apparently seek to draw: see §§ 276-278 above.

iii) The same applies to the information provided to Credit Agricole (Suisse) about Arcadia Lebanon's beneficial ownership: see § 276 above.

iv) The discussions with Farahead in 2008/09 about transferring the shares in Arcadia Lebanon to Arcadia Beirut, to which I refer in section (I)(10)(e) above, support the Defendants' case rather than the Claimants'. They indicate that everyone, including Farahead, was working on the assumption that Arcadia Lebanon was indeed a company held and operated for the benefit of the Arcadia Group; and that the reason why the discussion came to nothing was Mr Trøim chose, for his and/or Mr Fredriksen's own reasons, to end the discussion (or, at least, any recording of it).

v) Mr Bosworth and Mr Hurley's lack of complaint about being the shareholders in Arcadia Lebanon is, in circumstances where the *modus operandi* was well established between all the participants, a matter of no real significance.

vi) Arcadia Lebanon's business remained a topic of discussion with Mr Fredriksen, Mr Trøim and Farahead well into 2009: see sections (I)(11)(b) and (e) above. Given Mr Trøim's instructions to Farahead to cease making enquiries about Arcadia Lebanon (see §§ 450-452 and 522-526 above), it is unsurprising that there is a lack of recorded discussion about it in subsequent years. I also repeat the point made above about the Claimants' documents. Given that point, it is not possible to be sure whether Arcadia Lebanon's financial statements for 2009 to 2013 were in fact provided to Farahead or not. In fact, however, Arcadia Lebanon made losses in 2010, 2012 and 2013, so the company would have been of little interest as a potential source of further dividends for Farahead during that period. The Claimants' point about a failure to "*account*" for the expenditure of Arcadia Lebanon's net receipts from its trading is in my view fallacious. Arcadia Lebanon's net profits and losses were set out in its accounts, which were audited. Farahead was in a position to see them, or call for them, at any time. Farahead was able to make such enquiries as it wished, but, as already noted, took a decision to cease doing so from late 2009 onwards.

vii) As to the submission regarding the use of Arcadia Lebanon as a vehicle through which to pass non-Arcadia funds for Mr Bosworth/Mr Hurley's own benefit, the Claimants rely on certain non-Arcadia related payments from Arcadia Lebanon to Collafin, Atlantic and Equinox; and sums received from Septa (a company related to Seven Energy) and then paid out to *inter alia* Mr Bosworth and Mr Hurley. I refer to these matters in § 731 above. It was perhaps unorthodox for Mr Bosworth or Mr Hurley to use Arcadia Lebanon as a conduit in this way (albeit the understanding that they would have a 35% share in the company's profits makes it less surprising that they might pass some of their own money through it). However, it does not in my view have any greater significance. Considered as part of the weight of the evidence I summarise above relating to the ownership and use of Arcadia Lebanon, I do not believe it points to the conclusion that Mr Bosworth and Mr Hurley were diverting profits to Arcadia Lebanon for their own benefit or otherwise dishonestly.

viii) In circumstances where Farahead had decided to cease all new business in West Africa (§ 714-715 above), it was obvious that Arcadia Lebanon would need to be wound up, and I see no reason why it should have been necessary for Mr Bosworth and Mr Hurley specifically to consult Mr Fredriksen or Mr Trøim in that regard (if they did not do so, as to which it is not possible to be sure). The same applies the practical arrangements, including temporary nominee shareholders, made in that regard: §§ 715-716 above.

ix) I have already rejected the Claimants' case regarding the power of attorney signed in July 2013 and the Zafiro/Arcadia Lebanon/Attock Dubai transaction, including the payment to Greenfields: see section (I)(15)(g) above. It provides no support for the Claimants' case that

Arcadia Lebanon was in substance Mr Bosworth's and Mr Hurley's own company which they used for their own economic benefit.

In my view, Arcadia Lebanon was not beneficially or 'economically' owned by Mr Bosworth and Mr Hurley. They were the legal shareholders, but held it to Farahead's order and operated Arcadia Lebanon in substance as an Arcadia Group company.

930. Fourthly, there were widely accepted commercial reasons for the transaction chains to include intermediaries as sleeves in addition to Arcadia Lebanon, and they in any event were and are not an indicator of fraud. As set out in section (F)(1) above, the use of such intermediaries was commonplace, as a way of mitigating compliance risks. The Claimants' suggestion that using a company called *"Arcadia"* Lebanon could not help to maintain distance and separation is wrong: see § 307 above. The arrangements made did in fact succeed, in that there was no audit or regulatory investigation regarding the Arcadia Lebanon transactions.

931. Further, it does not assist the Claimants to assert, now, that the use of sleeves was in some way not *"legitimate"*. They wished to trade in oil from West Africa, and knew that that involved risks: that is precisely why they understood the use of Arcadia Lebanon to be necessary or appropriate (see the whole of section (H)(4) above). There is no pleaded case that any of the Defendants were involved or complicit in bribery. Moreover, as Mr Hendry explained (§ 73 above), it was difficult to identify whether a sponsor was a politically exposed person or not, so it was in substance a question of risk; the risks were unavoidable; and the use of sleeving to create distance between the transaction in West Africa and the Western oil trading company was standard practice. Purchasing the oil from Arcadia Lebanon enabled Arcadia London to avoid the risks that could arise from purchasing direct from NOCs and paying service providers.

932. Mr Bosworth/Mr Hurley make the following points as regards the detailed structure of the chains:

i) Arcadia Lebanon was the contract holder. It acted as such because Farahead had agreed with Mr Bosworth/Mr Hurley that they should reduce the risks of Arcadia dealing with West African NOCs and service providers. Arcadia Lebanon, therefore, became the counterparty to the West African NOC under the term contract and took the over dealings with and made payments to the service providers. Arcadia Lebanon carried out the same functions that Arcadia otherwise would have had to undertake, including payments to service providers (which functions Arcadia had undertaken when it had been the direct counterparty to the term contracts).

ii) Arcadia Lebanon could not sell the crude directly to Arcadia. If it had done so: (i) Arcadia Lebanon would have appeared in Arcadia's trading/financial records as Arcadia's direct counterparty; and (ii) Arcadia Lebanon's appearance in Arcadia's trading/financial records might have invited auditor scrutiny of Arcadia Lebanon's activities (and

its payments), which would have defeated the whole purpose of Arcadia distancing itself from dealings with West African NOCs and service providers.

iii) Arcadia Lebanon therefore needed to sell the crude oil to a third party 'sleeve' entity, which could then transact with Arcadia. As a result, only Arcadia's payment to the sleeve entity would appear in Arcadia's trading/financial records. Such payment to a third party could not implicate Arcadia in any dealings with or payments to service providers, and would satisfy any auditor scrutiny. There was no payment transaction between Arcadia and Arcadia Lebanon.

iv) This sleeving arrangement therefore created sufficient distance between Arcadia and West African NOCs and service providers such as to reduce and/or minimise compliance risks for Arcadia of engaging in West African oil trading. The involvement of the Tristar group/Attock Mauritius as sleeve entities in the Arcadia Lebanon Transactions was necessary to comply with Farahead's instructions to minimise the risks.

Those points are in my view cogent, and in line with the expert evidence considered in section (F) above and the factual evidence considered, in particular, in sections (H)(4) and (I)(1) above.

933. Fifthly, the transaction structures used were essentially similar to those which Arcadia was using well before the Farahead acquisition and well before the establishment of Arcadia Lebanon: see §§ 143, 146 and 147 above.

934. Equally, the chronology of the transaction chains, with Arcadia London or Switzerland often agreeing its on-sale before its purchase, and before earlier links in the contractual chain were put in place, is neither unusual nor in any way indicative of fraud.

935. Sixthly, the Claimants' repeated assertion that the way in which the transactions were financed in some way involved defrauding Arcadia London/Arcadia Switzerland is misplaced. The purchases of oil by Arcadia Lebanon were 'funded' by Arcadia London/Arcadia Switzerland only in the same sense that any purchase transaction in a chain could in a sense be regarded as being 'funded' by the receipts from the on-sale. Equally, the fact that letters of credit put in place using Arcadia London/Arcadia Switzerland's credit facilities were used as part of the transaction chain is neither unusual nor significant. Ms Bossley's evidence was that the use of back-to-back letters of credit by oil trading companies in West Africa during the relevant period was *"not unusual"*, and, in the context of the Attock Transactions, she said she would not describe the Arcadia Group as *"funding"* Attock Mauritius. Mr Hurley's evidence was that *"[i]t was common practice throughout the industry to use back-to-back L/Cs"*. As Mr Bosworth said, on the Claimants' logic the Arcadia Group's purchase of the oil was also financed by its own third-party purchaser: "*if you want to take that on to the next step, Arcadia London sold to somebody else. Are you saying that they funded it as well [?] I don't understand your—the line which goes that Arcadia London funded it. Arcadia London would have received – let's call it USD100 or USD100 million from their purchaser and*

they are not the funder of Arcadia Lebanon." Mr Kelbrick made the same point in his oral evidence. Moreover, Arcadia London used back-to-back letters of credit in other transactions, which are not alleged to be fraudulent: for example a purchase of a West African oil cargo from Tristar on 18 June 2008, on-sold to Trafigura, where a letter of credit was opened by Credit Agricole on behalf of Trafigura in favour of Arcadia London before Arcadia London applied to Credit Suisse for its letter of credit in favour of Tristar; and a purchase of an oil cargo from Phibro in October 2013, on-sold to Trafigura, where Trafigura issued a letter of credit in favour of Arcadia London and Arcadia London issued a back to back letter of credit in favour of Phibro. I agree with the Defendants that the use of back-to-back letters of credit is in no way probative of who originated a term (or spot) contract.

936. Equally, there is no merit in the suggestion that Mr Bosworth and Mr Hurley failed to disclose (even if disclosure were required) to Farahead that Arcadia London/Switzerland would be purchasing oil from Arcadia Lebanon as part of the transaction chains. For the reasons given in the preceding paragraph, there was nothing in any way untoward about that fact. On the contrary, it was beneficial for Arcadia London/Switzerland to be involved in the physical oil purchases in order (a) to have the opportunity to take a 'turn' when on-selling the oil to third parties and (b) probably more significantly, to gain the benefits for the paper trading business (trading limits and information flow) referred to in section (G)(2), resulting in very large profits for the group. Moreover, it was obvious to all concerned that the oil would be and was being sold by Arcadia Lebanon to Arcadia London/Switzerland and then on-sold. The transactions formed part of the latter companies' books and accounts, and there was no evidence that anyone contemplated that Arcadia Lebanon, which lacked Arcadia London/Switzerland's trading team – would itself be selling the oil into the market direct. (In addition, Mr Trøim appeared to recognise this point in a passage of his oral evidence, where in giving his account of the Arcadia Lebanon arrangement he said *"This also has to do with the way the financing arrangement was arranged. I said you can't finance a group outside of the original group so that is why we accepted it …"*.)

937. Seventhly, the point that Arcadia London and Arcadia Switzerland made modest profits, or in some cases, losses on the transactions (albeit that fails to take account of their own hedging profits or losses on the transactions) is beside the point, for two main reasons. The first reason is that profits were made by Arcadia Lebanon, as Farahead intended, and were used for the Arcadia Group's benefit in the ways I have already outlined. The second reason is that, as set out in sections (G)(2) above, the direct profits of the physical oil trading (and any associated hedging) were only part of the picture. The most substantial profits were available to be made, and were made, from the paper (derivatives) trading, and that trading heavily depended on the physical trading both for information flow and for trading limit exemptions. Very large profits were made. A particular snapshot is provided by the CFTC Complaint referred to earlier, instancing paper profits of US$50 million during a 4-month period when Arcadia and Parnon made physical oil trading losses of US$15 million. Mr Fredriksen accepted that Farahead had made a fortune from this business (§169 above; see also § 697 above).

938. Eighthly, the investments which Mr Bosworth and Mr Hurley caused Arcadia to make in activities other than crude oil trading did not amount to diversions of funds. They were within their authority as Arcadia London/Arcadia Switzerland's CEO and CFO, they considered the investments to be in the companies' best interests, and they were (for good measure) within the scope of the direction of business which Mr Fredriksen and Mr Trøim had encouraged: see §§ 168, 253 and 426 above. They included the joint venture with MRS discussed in section (I)(9) above; an ongoing joint venture with Projector (§§ 490 and 515 above); the Indarama gold mine venture with Concerto discussed in §§ 425-428, 488 and 508-513 above; the pre-financing agreement with Equinox (section (I)(13)(f) above); the Atlantic Nigeria pre-financing arrangements (section (I)(13)(g) above) and the Capital Oil & Gas product supply agreements (section (I)(13)(h) above).

939. Ninthly, as set out in more detail in section (L)(4) below, the Claimants cannot show that Mr Bosworth received any of the proceeds of the alleged fraud; and the evidence does not support the view that Mr Hurley received any such benefit either. At best, Mr Hurley received certain loans from Proview and Mr Kelbrick (totalling US$3,135,755) while he was awaiting bonus payments from Arcadia. Set in the context of an alleged fraudulent diversion of some US$325 million of money away from the Arcadia Group, alleged benefits on that scale scarcely amount to a plausible motive for the fraud alleged.

940. Tenthly, as already noted, I have concluded that an understanding was reached that any further Arcadia Lebanon profits would be used for the benefit of the Arcadia Group: see section (I)(11)(e) above. Further, the evidence includes examples of payments which Arcadia Lebanon did in fact make for the benefit of the Arcadia Group: see §§ 403, 489, 509-513, 580, 648 and 677 above. The Claimants' suggestion that Mr Bosworth/Mr Hurley have a duty to 'account' for, or are 'put to proof' of, the manner in which Arcadia Lebanon's funds were disbursed is misconceived. The Claimants claim is for alleged fraudulent diversion of funds away from Arcadia London/Arcadia Switzerland to Arcadia Lebanon or (as regards the Attock Transactions) to Attock entities, and, in part, to Mr Bosworth, Mr Hurley or Mr Kelbrick themselves. If that claim fails, as it does, there is no remaining pleaded, or logical, basis for a duty to account.

941. Eleventhly, insofar as complaint is made about the use by Arcadia Lebanon of Proview and other service providers, the first point is that, as already noted, the Claimants chose not to plead a case about West African oil trading practice. It is not therefore open to them to allege, for example, that service providers were unnecessary, nor that there was any practice regarding documentation of service provider agreements or the levels of service provider remuneration from which the arrangements in the present case departed. Nor, by the same token, is it open to the Claimants to suggest that the manner, extent or cost of use of service providers in the present case is indicative of fraud by reason of any departure from usual, accepted practice.

942. Moreover, as regards Mr Kelbrick and Proview too, the Claimants' case is a fraud case, and nothing else. The case would have to be that Proview (which is not a Defendant) was paid without performing any services at all, i.e. a sham; or that Mr Bosworth and Mr Hurley deliberately chose to pay Proview amounts

that they could not honestly have believed were justifiable, and that Mr Kelbrick knew that. In the absence of a pleaded case on West African oil trading practice, it is difficult to see how any such contention could be made, absent perhaps some evidence tantamount to an admission or otherwise clearly establishing bad faith. In any event, the evidence shows that the service providers were essential, for the reasons given in sections (F)(2) and (3), (G)(3), (H)(11) and (I)(3) and (6) above, and that the individual defendants honestly believed that to be the case.

943. The expert and factual evidence made clear that term contracts could not be obtained without sponsors, and could not be obtained or operated successfully without service providers. As well as the practical impossibility of obtaining a term contract from a West African NOC without their services, the same evidence shows that the ongoing use of service providers was essential for a host of reasons during the operation of a contract, not least to ensure that the NOC actually allocated to the contract holder the quantities and grades of oil it needed. The evidence about Mr Driot's position and influence in Equatorial Guinea referred to in §§ 126-128 and 229-236 above underlines and illustrates these points. Even while Arcadia was owned by Mitsui, it found it necessary to employ Pang Ling in order to obtain and operate term contracts in West Africa: section (G)(4) above, with Mitsui writing that it genuinely believed Pang Ling's services to be of significant value.

944. The evidence shows that the Sao Tome Contract would not have been obtained but for the help of Mr Asibelua, who controlled Pang Ling and Equinox (§§ 149-150 above), and required his, and later Mr Kelbrick's, assistance to operate it successfully: § 152, section (I)(3) and § 369 above. As I indicate, I found the evidence of Mr Kelbrick and other witnesses compelling as to the large range and essential nature of the activities he carried out as service provider. The Zafiro Contact would not have been obtained but for the services of Mr Driot and those connected with him, including Sonergy: see section (H)(11) above. The Senegal Contract required the services of both Mr Driot and his associates, at the Senegal end, and Mr Kelbrick, at the Nigerian end: see section (I)(6) above, in particular §§ 367-369, 374-375 and 380 above.

945. In addition, as I conclude in § 224 above, there was no secret about the fact that Arcadia had made payments to service providers, significant enough to merit mention as a matter of concern in the Deloitte letter. It was clear, and no secret, that Arcadia would need to resume making payments to service providers should it again contract to buy oil direct from a NOC in West African. Further, the issue would have been sufficiently prominent in the context of the acquisition of Arcadia to have come to the attention of at least Mr Trøim, and probably also Mr Fredriksen. It is more likely than not that they were aware by the time the Deloitte letter had been reviewed and considered of the service provider issue, including the potential resumption of payments to service providers (and consequent risks) in the event of resumption of direct NOC business.

946. As to the amounts paid to service providers, the expert and factual evidence summarised in section (F)(4) above indicates that it was not at all uncommon for them to be remunerated by a profit share; that a 50% profit share was

common; that a profit share might be higher, for example, 60%; and that expectations in this regard increased as time went on during the relevant period (2005 to 2013).

947. I noted earlier that for the year ended December 2000, Arcadia London owed Pang Ling US$19 million in relation to 13 cargoes, equating to approximately US$1.46 million per cargo. By way of rough comparison, Proview was paid US$31,776,952 by Arcadia Lebanon in relation to 22 cargoes, which equates to approximately US$1.44 million per cargo. Mr Bosworth said in oral evidence that the amounts paid to Proview by Arcadia Lebanon were comparable to the amounts paid by Arcadia London to Pang Ling. I dealt earlier with the Claimants' suggestions that, following the FSA investigation, Arcadia paid far lower amounts to Pang Ling, and in due course Equinox, under the Sao Tome Contract (see §§ 138 and 151 above).

948. The Defendants have also, within the constraints imposed by the available documents, attempted to compare the payments made under the Zafiro Contract by Arcadia London before the contract was transferred to Arcadia Lebanon. The Defendants showed Trade Capture data suggesting that, before the Zafiro Contract was transferred to Arcadia Lebanon, Arcadia London was paying on average about 71% of gross receipts to service providers overall. Even after removing items which the Claimants in their cross-examination of Mr Stern suggested should be removed, the figure remained about 65%. An *"Allocation PL"* disclosed by the Claimants shortly before trial, which appears to have printed off from the Trade Capture system, reported on one particular Arcadia purchase of Zafiro crude from GEPetrol, on-sold to Repsol. From the information it provides, it can be calculated that the payment made to Sonergy for that cargo of US$1.57 million equated to 62% of Arcadia's quotation differential profit for the transaction. A broader calculation based on Trade Capture data indicates that (a) Arcadia London paid an average of 63.12% of the quotation differential profit to Sonergy, compared to 63.26% paid by Arcadia Lebanon, and (b) Arcadia London's overall payments to service providers amount to an average of 78.79% of the quotation differential profit, slightly more than the average of 76.35% of quotation differential profit that Arcadia Lebanon paid. I would accept the Claimants' point that these payments were not made independently of Mr Bosworth and Mr Hurley, but they tend to undermine any notion that the levels of payments to service providers in some way supports the Claimants' case that Arcadia Lebanon was introduced as a fraudulent entity designed to divert profits away from Arcadia London.

949. The Arcadia London-Sonergy Contract dated 24 March 2006 provided for remuneration of up to US$24 million a year. (That is a figure greater than the sums which the Claimants say Arcadia Lebanon paid Sonergy in respect of the Zafiro Contract, totalling approximately US$56 million over a period of about three years.) The agreement was drafted by Clifford Chance, who when sending the draft to Mr Hurley and Mr Bosworth said:

> "1) From a commercial perspective, if you can avoid fixing into the contract an obligation to pay a fixed fee per barrel for every barrel lifted, then I can see that this would be advantageous for you, as it gives you the flexibility to reward the S/P if the cargoes

> have been profitable, and not to reward the S/P, if they have not…
>
> 3) I think you had in mind that you could cover all this by building into the lump sum payment for the office costs, a substantial margin and reward the S/P an annual discretionary bonus (or even a discretionary fixed fee per barrel, agreed at the outset of each quarter, based on the profitability of the cargoes lifted in the previous quarter)…
>
> 4) We have suggested paying office costs and a basic fee for carrying out the services, and thereafter, a discretionary bonus (quarterly or whenever)."

950. As noted earlier, Mr Akpata, who has worked as a service provider in West Africa, considered the levels of payments made to Proview to be such as was "*supposed to happen*". I have accepted Mr Kelbrick's evidence about the role he played in the obtaining and operation of term contracts for the Arcadia Group and Arcadia Lebanon, leading to substantial remuneration for Proview and South Energy. Mr Bosworth said of sponsors and service providers such as Pang Ling and Proview that *"they are courted by many of the large trading companies, so you have to negotiate to the best of your ability but the upper hand is always with the sponsor/service provider"*; and that *"individuals such as Mr Kelbrick, Mr Driot, are being courted by our competition"*. Mr Bosworth also made the important point that he had consistently preferred to remunerate service providers using profits shares rather than fixed fees (which, to replicate profit shares would have to be large) because that meant the service provider to a degree shared in Arcadia's fortunes rather than receiving a large sum even if Arcadia made a trading loss. That approach was, in my view, indicative of a wish to protect the Group's best interests.

951. The Claimants also refer to the brevity, or in some cases absence, of service provider agreements and other documentation. The Claimants' written opening, and one theme of the Claimants' cross-examination, complained about the service provider documentation. They refer to an alleged failure to follow Deloitte's November 2005 recommendations for Arcadia's service provider agreements, as regards the Arcadia Lebanon service provider agreements, suggesting that they mean Mr Bosworth/Mr Hurley were not acting in Arcadia's best interests of Arcadia.

952. However, there is no pleaded case that Mr Bosworth/Mr Hurley acted in breach of any duty as a result of any alleged failure to follow compliance recommendations, or by reason of the quality or absence of service provider documentation. Their case on breach of duty has nothing to do with any failure to follow compliance recommendations.

953. In any event, these criticisms are in my view wide of the mark for a number of reasons. One is that it was not unusual for service provider agreements to be brief. Mr Hendry said he thought the *"beauty of these things is their simplicity"*, and *"if the consultant is not earning their keep you dump them and choose a different consultant"*. As Ms McDonald said, just because service provider

agreements were not detailed in their descriptions did not mean that they were not providing services. Arcadia London's service provider agreements, on which the Arcadia Lebanon agreements were based, were drafted using Clifford Chance templates. Deloitte observed in November 2005 that, for the year ending 31 March 2005, Arcadia London had paid US$5.9 million to service providers/brokers with whom signed agreements were not in place with those entities; but nonetheless felt able to state that *"we believe that all brokerage payments represent valid commercial transactions and the level of brokerage is in the normal practice in the industry"*.

954. In addition, a reason for introducing Arcadia Lebanon was to move the West African NOC business to a jurisdiction, Lebanon, where the compliance environment was thought to be more relaxed. In any event, Arcadia Lebanon did keep the relevant service provider documentation for audit purposes. Service provider agreements were located (though it is of course possible that others existed) between Arcadia Lebanon and (a) Bergamot, Sonergy and Whitegrove, dated 1 April 2007; (b) Obexys, dated 2 January 2008; (c) Fenton, dated 18 June 2008; (d) Rodexkia, dated 2 February 2009; (e) Savion, dated 3 January 2011; and (f) Orange. Further, the Deloitte recommendations concerned the compliance regime for Arcadia London under Mitsui's ownership in the light of the 2005 audit. They did not necessarily reflect the requirements under the relevant Lebanese regime: in Mr Bosworth's words, *"we were in Arcadia Lebanon not under those rules"*; and Mr Hurley's evidence was to similar effect. Arcadia Lebanon was itself audited, and its auditors would have had to be satisfied that any applicable requirements were complied with in order to be able to sign off on the company's financial statements. Further, as the Defendants point out, no case is advanced to the effect that, if Mr Bosworth/Mr Hurley had arranged for Arcadia London to enter into service provider agreements in respect of each of the term contracts, then the Claimants would have been prepared for Arcadia London to be a direct counterparty to a West African NOC under a term contract.

955. As to Proview in particular, Mr Kelbrick said that one reason why there was no written contract between Arcadia Lebanon and Proview in relation to the Senegal Contract was because he was dealing with people he had known professionally for a long time and whom he trusted: *"I had known these people since 1998. I had worked closely with them since 1998 as an employee and as a consultant…I had arranged their cargoes for years on end. So, I mean, once again not everything was documented"*. That may be an example of what Ms Bossley referred to as *"marked cultural differences between how business is done in WAF compared with the large global financial centres"*.

956. As to the delay between June 2007, when Proview was first entitled to payment, and August 2008, when Proview first received payment, Mr Kelbrick said he "*would definitely have been expecting the payments, yes. Definitely*". He said that he chased Mr Bosworth for payment, but that "*these things with Peter, they would accumulate, accumulate, accumulate…if he owed people money, it was difficult to get it*". As to the generic nature of the descriptions of work done in Proview's invoices, and their tendency to agglomerate sums due for different pieces of work, Mr Kelbrick said he *"didn't have a team of administrative*

people to follow me round etc. So very often I would just put in a generic line after "Africa and India" and at least I knew that it would cover the services that I would have provided", and *"I didn't have a huge admin department. If it is a cut and paste or if it is a generic type of invoice, then that's what it is"*. Mr Scheepers said generic descriptions in service provider agreements and invoices were *"quite normal"*. Mr Bosworth said, *"Mr Kelbrick would invoice us from time to time rather than perhaps on a cargo by cargo basis"*. I accept that evidence.

957. The Claimants also pointed out that the amounts paid to Proview cannot readily be tied to particular transactions. On the other hand, it appears from the documents that the amounts paid to Proview, in aggregate, are less than the sums allocated to Proview in the Cargo P&Ls. Those P&Ls for the Sao Tome Contract indicate that sums due to Proview were calculated as the number of barrels multiplied by 53.75% of the difference between (a) the quotation unit sale price, plus the NNPC OSP, and (b) the quotation unit purchase price, plus OSP. For the first twelve Senegal Contract cargoes, the Cargo P&Ls used the number of barrels multiplied by 70% of the difference between: (i) the quotation unit sale price; and (ii) the quotation unit purchase price, deducting the cost of exercising a pricing option with NNPC. For the other Senegal Contract cargoes, the 70% was split between Proview (28.5%) and Marathon (35%) (and presumably others). Marathon was a service provider associated with a Nigerian businessman, Oscar Egwuonwu, which Mr Kelbrick said he employed to ensure that he received the cargoes every month. Given that Mr Kelbrick originated the Senegal Contract, it is not surprising that his profit share for that contract was higher than under the Sao Tome Contract. The Defendants have calculated that the aggregate allocation to Proview for transactions under the two contracts was US$41,639,019, though Proview in fact received US$35,976,952 from Arcadia (US$31,776,952 from Arcadia Lebanon and US$4,200,000 from Arcadia London).

958. Attock Mauritius made the vast majority of its gross receipts (totalling US$138,746,577) from the Attock Transactions, in which it acted as a contractual counterparty. Its profits from the Arcadia Lebanon Transactions was much lower, reflecting its more limited role in those transactions. From these, it earned US$3,710,763, of which US$1,192,031 was earned on transactions preceding 26 September 2009 and US$2,518,732 was earned on transactions after 26 September 2009. In these transactions, Attock Mauritius paid the NOC the purchase price via a third party letter of credit, issued in the name of Arcadia Lebanon in favour of the NOC. Attock Mauritius had credit lines with various banks including Crédit Agricole, Crédit Suisse, ING, and Société Générale. The Arcadia Group paid Attock Mauritius a small fee for having opened the letter of credit. Mr Kelbrick stated that Attock Mauritius:

> "was simply putting in place letters of credit to enable Arcadia Lebanon to take delivery of the oil. In return, [Attock Mauritius] charged Arcadia a modest fee which was commensurate with the services it provided Arcadia Lebanon (most significantly, opening a letter of credit in its favour). As a result, and given our respective expertise and focus, I was much less involved in

> the Financing Transactions than in [Attock Mauritius's] proprietary trades. Mr Mounzer was far more involved in the Financing Transactions."

and:

> "Arcadia Lebanon asked [Attock Mauritius] to be involved in these trades to provide the finance. As Arcadia Lebanon was a new company, it would not have had its own credit lines that would allow it to lift the crude. At the time, it was a chance for [Attock Mauritius] to work more closely with Arcadia. I believe [Attock Mauritius] was providing Arcadia with a valuable service by giving Arcadia Lebanon access to [Attock Mauritius]' credit lines, also leaving the Arcadia Group's other credit lines free for other business, and by providing further distance between Arcadia Lebanon and the Arcadia Group."

Mr Bosworth similarly said *"There was no finance for Arcadia Lebanon"*. The fact that (as the Claimants point out) *"Arcadia Group had extensive financing facilities for physical oil purchases"*, and that the Arcadia Group *"would have been able to finance"* the transactions without Attock Mauritius, does not meet the points that (a) Arcadia Lebanon (the contract holder) did not have credit lines, and (b) under the sleeving arrangements, the Arcadia Group was not supposed to provide letters of credit in favour of the NOCs.

959. For all these reasons, even had there been a pleaded case, I do not consider that the levels of remuneration paid to service providers, or the other matters of which the Claimants complain summarised above, lead to or support the inference that any of the Defendants was diverting profits from the Claimants, still less doing so dishonestly.

960. Finally, the Claimants make the additional point that not all payments identified by Mr Bosworth/Mr Hurley as made by Arcadia Lebanon to service providers can be tied back both to invoices referencing the 67 Arcadia Lebanon Transactions and to payments in Arcadia Lebanon's bank statements. In other cases, payments cannot be tied back to an invoice or, in some cases, a service provider agreement either. The Joint Statement as between the forensic accounting experts called by the Claimants and Mr Bosworth/Mr Hurley identifies that out of the US$144.9 million of payments identified by Mr Bosworth/Mr Hurley as paid to service providers or other third parties in connection with the Arcadia Lebanon transactions, the forensic accounting expert called by the Claimants, Mr Abbey, could tie only US$90.024 million back to (a) payments in the Arcadia Lebanon bank statements and (b) invoices or other documentary evidence.

961. The Claimants say the Defendants therefore cannot show the expenditure was necessary, so any claimed set-off fails. That point would be pertinent, however, only if the Claimants were able to establish a liability against which the Defendants needed to establish a right of 'set-off' (or to show the *prima facie* quantum of unlawfully diverted profits should be reduced). The difficulties in seeking to reconcile, years after the event, multiple payments over a period of

years, do not support the Claimants' case that there was a fraudulent diversion in the first place (and I did not understand the Claimants even to suggest that to be the position). Further, Arcadia Lebanon was audited, and its audited financial statements set out its income and expenditure year by year, ending with a closing equity balance of approximately US$3.8 million. Indeed, Mr Abbey made clear that he did not seek to give any view or opinion on whether or not the gross profits of the trading transactions were diverted profits: his instructions were to work out, assuming that they were, what happened to them when they went into each entity.

962. For completeness, though, the position on the accounting exercise is in any event not nearly as stark as the Claimants suggest. Their approach to the exercise, or the conclusions that might be drawn from it, are open to question in a number of respects:

i) (As Mr Abbey accepted) it is not always straightforward to seek to tie payments to transactions, because in practice Arcadia Lebanon sometimes made single payments in respect of multiple transactions.

ii) Mr Abbey had identified that the bank statements showed payments of about US$140 million with the same descriptions as payments tied to the 144 Transactions.

iii) Mr Abbey did not consider Arcadia's Cargo P&Ls as sufficient evidence on their own to tie payments to transactions, even though he did use them as the source for his profit figure.

iv) On top of the US$90 million, there were about US$3.7 million of payments to two of Mr Driot's companies, Bergamot and Stag, which although not specifically identified in Mr Bosworth/Mr Hurleys response to the 144 Transactions Case were referenced in contemporaneous documents and Mr Bosworth/Mr Hurley's witness evidence.

v) There were payments to Sonergy totalling US$6.2 million in relation to EY Deals 1, 2, 4, 5 and 7. The Arcadia Lebanon Profit Share Schedule referred to in § 316 above indicates that for EY Deals 1 and 2, Arcadia London made the payments to Sonergy, totalling approximately US$2 million; and for EY Deals 4 and 5, Arcadia London made the payments, but Arcadia Lebanon reimbursed Arcadia London for the payments, via a loan of US$3 million from Attock Mauritius. Mr Bosworth explained in his 10th witness statement that, whilst he did not specifically recall why Arcadia London made these early payments to Sonergy on behalf of Arcadia Lebanon, this was a transitionary period and was close to the time when the Zafiro Contract was transferred from Arcadia London to Arcadia Lebanon. Mr Bosworth explained that Arcadia Lebanon borrowed US$4.2 million from Attock Mauritius, which paid that amount to Arcadia London, and then Arcadia Lebanon reimbursed Attock Mauritius. That US$4.2 million appears to have funded the payments to Sonergy for EY Deals 4,5 and 7. Thus for EY Deals 1 and 2, Arcadia London had paid the US$2 million but not been reimbursed.

That seems consistent with an email of 20 March 2008 from Arcadia London to Arcadia Lebanon saying *"Essentially all the payments should have been made by you, but London paid and as we did not have provisions to pay for these, we needed to be reimbursed. I think that is the issue in a nutshell"*. Accordingly, Arcadia Lebanon in principle appears to have been left with a liability to Arcadia London of US$2 million, which at least arguably should be taken into account (in addition to the US4.2 million of actual payments).

vi) A total of US$37.2 million of payments were made to Proview that could not be directly tied to EY Deals. The point made in (i) above may explain the difficulty in tying the payments to particular deals. The difference between the experts was that Mr Abbey did not include the payments made to MRS, pursuant to the arrangement I refer to in § 413 above. However, there is no reason in principle for them not to be counted. Mr Abbey agrees that on the face of Arcadia Lebanon's internal accounting documents, payments to MRS were being allocated against payments due to Proview.

vii) There were also potential payments to service providers, totalling US$10.7 million, referred to in the contemporary documents but which could not be tied to bank statements. On the other hand, the bank statements showed payments to service providers totalling US$4.4 million which could not be matched to particular deals but which, on the evidence as a whole, need to be taken into account. For example, US$2.65 million was paid to Marathon, which the evidence indicates was a service provider. Mr Abbey considered that the balance of about US$6.2 million was unlikely to represent payments actually incurred. However, they should at least arguably be taken into account as payables, particularly if seeking to make a like for like comparison with the profit figure (which was stated on an accounting as opposed to a cash basis, and hence included EY Deals 49 and 60 for which the receipts could not be identified in the bank statements). There was no evidence that these apparent payables should for some reason be written off, and no such proposition was put to the witnesses of fact.

963. After taking account of these various points, Mr Stern's total figure for payments to service providers/third parties was US$147.7 million, indicating that there was no unexplained shortfall. (Mr Abbey's figure was US$129.6 million.) Mr Stern's resulting net profit figure, by deduction from the total gross receipts of US$180.1 million (stated on an accounting basis, as I note above) on the Arcadia Lebanon transactions, was US$32.3 million (compared to Mr Abbey's figure of US$50.4 million). The Claimants conceded that Arcadia Lebanon paid a dividend of US$8 million for the 2007 year, shared between Farahead (US$5 million) and Mr Bosworth/Mr Hurley (US$3 million), reducing Mr Stern's figure to US$24.3 million (and Mr Abbey's to US$42.5 million). Applying the same sharing percentages, Mr Bosworth/Mr Hurley could reasonably have expected to receive 35% of Arcadia Lebanon's other net profits, which would further reduce Mr Stern's figure to US$15.8 million (and Mr Abbey's to US$27.6 million). Those figures, however, take no account of

substantial payments made by Arcadia Lebanon for the benefit of the Arcadia Group of the kind I refer to in §§ 403, 489, 509-513, 580, 648 and 677 above. These considerations merely underline the point that the accounting exercise could not on any view form a basis for concluding that unlawful diversion of funds had occurred.

964. My overall conclusion is that the Arcadia Lebanon Transactions did not form part of any fraudulent diversion scheme at all. They were entered into honestly, in what both Mr Bosworth and Mr Hurley reasonably believed to be in the best interests of the Arcadia Group, and within the discretion afforded to them as CEO and CFO respectively. From the perspective of Mr Kelbrick and his companies, they were honestly and legitimately involved as service providers and/or intermediaries, and had no reason to believe, and did not believe, that either the transactions themselves or their own involvement in them formed part of any kind fraud on the Arcadia Group.

(3) The Attock Transactions

965. I have set out my findings and conclusions about the origination of the Attock/GEPetrol Contract, the Arcadia Mauritius/NNPC Contract, the Crudex/NNPC Contract, the Attock Mauritius/NNPC Contract, the Cathay/NNPC Contract and the Azenith Nigeria/NNPC Contract in sections (I)(11)(a) and (f), (12)(b), (c) and (d) and (13)(a) respectively. Those are the six term contracts pursuant to which Mr Kelbrick and his companies purchased oil which he then on-sold to Arcadia. I concluded in those sections that the Claimants have not established any the contracts to have been diverted from the Arcadia Group, still less fraudulently. They were contracts which Mr Kelbrick obtained by virtue of his own connections and work, and not opportunities found by or available to Mr Bosworth, Mr Hurley, Arcadia Lebanon or the Arcadia Group.

966. I also reject the notions that Attock Mauritius or the Attock group had no real independent existence, and that they could not trade oil without Arcadia's support. It is clear that the Attock group was extremely well-established with a solid reputation well before it became involved in transactions with Arcadia; and that it transacted with NOCs including in Nigeria before, during and after its relationship with Arcadia (§§ 100-102 above).

967. So far as Arcadia Mauritius is concerned, it was an Arcadia shelf company transferred to Mr Decker in 2003 for his own use, in conjunction with the Tristar group which he and Mr Mounzer had set up and which was a successful enterprise in its own right (section (G)(5) above). Thereafter, Mr Bosworth and the Arcadia Group had no interest in or control over Arcadia Mauritius (see sections (G)(5) and (H)(5) above). The alleged false statement at a meeting on 11 March 2008, that Arcadia Mauritius had been closed and its business moved to Arcadia London/Arcadia Switzerland, was not made: see §§ 430-434 above.

968. As to the Claimants' reliance on back-to-back letters of credit for the Attock Transactions, I have addressed the general point in § 935 above. In addition, the suggestion that Attock Mauritius could obtain term contracts only with Arcadia Group's financial backing is inconsistent with (a) the numerous oil

cargoes that Attock Mauritius traded without any involvement of the Arcadia Group, including NNPC term contracts in the 1990s and early 2000s, which it sold to Shell, ChevronTexaco, and TotalFinalElf; (b) the fact that in EY Deal 71, Attock Mauritius bought the oil from GEPetrol under the Attock Mauritius-GEPetrol Contract and sold it directly to Hovensa, an oil refinery in the US Virgin Islands, without any involvement of the Arcadia Group; and (c) the 20 cargoes that Attock Dubai sold to BP and Exxon between June 2013 and January 2015, in which the Arcadia Group had no involvement. The evidence indicates that Attock Mauritius had its own banking relations with financing facilities exceeding US$1 billion, and Mr Mounzer had his own banking contacts. Ms Driay said in evidence that Attock Mauritius *"had a very good relationship with the banks, which assisted greatly with securing financing for the buying of oil from them"*.

969. Mr Kelbrick, following his departure from the Arcadia Group in 2004, built up his own successful business and his own contracts, demonstrating an ability to obtain term contracts and more generally to act as a service provider: particularly in Nigeria where he was extremely well connected and had invested a great deal of time and effort: see section (G)(7) above. In due course, he acquired Attock Mauritius, Attock Lebanon and Arcadia Mauritius in his own right, and, once again, I have concluded that neither Mr Bosworth nor the Arcadia Group had any interest in any of those companies: see section (I)((11)(g) above. There is no merit in the contentions that Attock Mauritius was always a vehicle for Mr Bosworth, Mr Hurley and Mr Kelbrick's *"scheme"* and played the same role throughout, and that Attock Mauritius never functioned independently of Mr Bosworth/Mr Hurley. As to the matters relied on by the Claimants summarised in § 788 above:

i) (As with Arcadia Lebanon), Attock Mauritius's office, auditing and staffing arrangements do not support the inference the Claimants apparently seek to draw: see §§ 208-209 above. Further, as already noted, it was Mr Kelbrick's evidence that he worked mainly face to face or by telephone, without significant administrative staff. He did not require much in the way of staff or office space.

ii) Mr Bosworth's evidence that, at least at certain stages, Arcadia had a cooperative relationship with Attock and Mr Kelbrick does not support the view that Attock never functioned independently and was merely a vehicle for a fraudulent diversion scheme.

iii) There is nothing inherently surprising or odd about Mr Kelbrick having, at different times or at the same time, acted in different capacities on different transactions. He was, in Mr Bosworth's phrase, a kind of 'hybrid' individual. Nor is there anything odd about Arcadia committing to sell oil before having placed its purchase contract. No real significance can in my view be attached to Mr Kelbrick having been included in an email chain on EY Deal 118, given his involvement as supplier in the logistics that the transaction would entail. His company, Attock Mauritius, was already involved in the transaction by the time of the emails into which he was copied.

iv) No adverse inference can be drawn from Attock being regarded as a reliable supplier, or from the use of back-to-back contracts.

v) I have already rejected the Claimants' argument by reference to the use of back-to-back letters of credit. The fact that Arcadia might be able to buy oil on open credit terms, or provide letters of credit without back-to-back letters of credit in place, does not mean that entities such as Arcadia Mauritius who needed back-to-back letters of credit lacked independence or were not genuine treading entities. The use of back-to-back contracts and back-to-back letters of credit was commonplace in the market.

vi) EY Deal 130, in which Attock Mauritius suffered a US$4 million loss due to a pricing declaration error and Mr Mounzer internally suggested seeking an arrangement with Arcadia Lebanon (which was not involved in the transaction), can hardly serve as evidence of Attock's lack of independence from the Arcadia Group. Attock Mauritius made a gross loss of US$4.03 million, whereas Arcadia Switzerland made a gross loss of US$228,000. Attock Mauritius suffered such a large loss because an error was made in calculating the deadline for the pricing declaration, due to the Queen's Diamond Jubilee in 2012. Attock Mauritius was committed to buy the oil on the *"prompt"* basis, but to sell to Arcadia Switzerland on the *"deferred"* basis, during which time the price of oil fell. NNPC rejected Attock Mauritius's protest. Mr Kelbrick said in his evidence that Arcadia Switzerland/Mr Bosworth were "*not willing to compromise*", and in re-examination Mr Kelbrick said that Mr Bosworth was less than co-operative and in substance said *"forget about it, we are not paying"*. If anything, this transaction tends to underline the fact that Arcadia and Attock were independent of each other.

In EY Deal 115 (referred to at trial as the Ontario Transaction and sometimes given deal number 116), Attock Mauritius purchased oil on a spot basis from Ontario Trading SA Limited, a private company incorporated in Ghana. The purchase was unrelated to the Attock term contracts. Mr Kelbrick said Attock Mauritius seldom bought on a spot basis. Attock Mauritius bought 905,258 barrels of Qua Iboe crude from Ontario for US$106,917,307.61. The price per barrel was calculated on the basis of the average of Dated Brent quotations as published in Platts for the five consecutive dates immediately following the date of the bill of lading, plus a premium of US$1.30. Attock Mauritius sold the cargo to Arcadia Switzerland for US$106,944,464.35, the price per barrel being calculated on the basis of the same quotations plus a premium of US$1.33. Accordingly, Attock Mauritius made a profit of 3 cents per barrel, or US$27,158. Arcadia Switzerland on-sold the cargo to Tamoil for US$109,848,478.46, the price per barrel being calculated on the basis of the same quotations plus a premium of US$4.90. Accordingly, Arcadia Switzerland made a profit of US$3.57 per barrel, or US$2,904,014.11.

Mr Kelbrick in oral evidence accepted that he could not remember EY Deal 116 very well, but said *"[b]y the looks of it, Arcadia didn't want to*

deal directly for some reason with Ontario because in that particular instance it looks to me – again, I can't recall this, but it would appear to me that it's almost a service fee for Arcadia using Attock there as a sleeve, because it wouldn't have been able to acquire the cargo any other way", and *"it appears to me that Arcadia Suisse has used Attock as a sleeve"*. Arcadia Switzerland's Deal Pack for the trade included a *"Company Status Report"* on Ontario, which recorded a restriction on dealings with Ontario namely that *"international suppliers deal on a strictly cash or prepaid basis"*. The report said it was unable to give Ontario a trade risk classification, as it had not been possible to secure evidence of (i) current trade experience of payments; and (ii) Ontario's presence at its registered address. On 19 July 2011, Ms Driay emailed Mr Mounzer (with Mr Kelbrick in copy) details of the agreement *"reached on your behalf with ontario"*. On 22 July 2011, Ms Jessica Hill of Arcadia Switzerland's operations department cleared the terms of the purchase of crude oil from Ontario, including the fact that the purchase would be by Attock Mauritius, with Arcadia Switzerland's credit department. These matters support Mr Kelbrick's evidence that it was a sleeving arrangement for the Arcadia Group's benefit. Arcadia Switzerland made a gross profit of US$2.9 million on this transaction, far in excess of the US$27,000 that Attock Mauritius earned. The Claimants' suggestion that the contractual term requiring Arcadia Switzerland to procure a letter of credit is not one that an independently operated and financed company would have needed to include, and that any independent company would have made the profit itself, is wide of the mark. Quite apart from the point I have already made about the routine nature of back-to-back letters of credit, this was a transaction where the whole point was for Arcadia Group to make the profit, with Arcadia Mauritius agreeing to act as a sleeve.

vii) I have already addressed the Claimants' suggestions that Mr Bosworth/Mr Hurley had/retained an interest or control over Attock Mauritius, referring to their having caused Arcadia to lend US$13 million to Mr Decker to purchase it, and to various communications in 2009 following Mr Kelbrick's acquisition of Attock: see §§ 225 and 541-542 above. I do not consider any of those matters to indicate that Mr Bosworth/Mr Hurley retained control of Attock Mauritius or were able to ensure that Mr Decker transferred the shares to Mr Mounzer and Mr Kelbrick in 2009 so that it could continue to be used in the alleged scheme.

viii) In late September 2009, Mr Grimes of Arcadia in an internal email exchange said he understood or assumed Arcadia had given Attock *"backing for 4th [quarter] allocation. So Arcadia would supply to Attock by a sale/purchase agreement"*. Mr Cartwright (who is not alleged to have been part of the conspiracy) replied *"No Attock are to issue their own [letters of credit' and purchase so as to develop their own business"*. That is not in itself, in my view, indicative of any dishonest plan to divert profits to Attock. About 5 years later, after being fired from Arcadia, Mr Hurley worked for the Attock group as a consultant

(and, the Claimants alleged, as chairman of Attock Holdings Limited). I see nothing surprising in that, given the course of events, nor anything indicative of a dishonest conspiracy during Mr Hurley's tenure with the Arcadia Group to divert profits to Attock so that Mr Hurley could, some years later, secure a position with them.

970. Insofar as the Claimants rely on the similarity of the contractual chains as between the Arcadia Lebanon Transactions and the Attock Transactions, including the order of transacting and the use of back-to-back letters of credit, there was nothing untoward about them: see §§ 933-935 above. I have already addressed the unpleaded and unmeritorious point about Attock gaining a supposed advantage by reason of having a day to pass the Arcadia Group's pricing election down the chain: see § 351-352 above.

971. Insofar as the Claimants complain that, although Attock Mauritius sold oil to Arcadia at market rates, Attock managed to make large profits by purchasing oil at lower prices, it does not advance the Claimants' case. The evidence indicates that Attock Mauritius made the vast majority of its profits as a result of market movements in the market price of oil, having selected a different pricing period on its purchase from that selected by Arcadia's traders on their purchase from Attock. (About 94% of its gross receipts from the Attock Transactions were made on transactions where it elected a different pricing period as between its purchase and its sale.) As I have already said, there is no evidence that Arcadia made its pricing elections anything other than freely and independently. Mr Kelbrick and Attock were entitled, as contractual counterparties in the chain, to make their own elections and, if successful, profit accordingly. Thus, for example, on EY Deal 58 Attock made gross profits mainly because it elected 'advanced' pricing on its purchase from GEPetrol, Arcadia elected 'prompt pricing, and the price of oil rose between the two periods. A similar pattern occurred on EY Deals 73 and 125, where Attock elected earlier pricing periods on its purchase from NNPC than Arcadia elected on the on-sale. Where the pricing periods were the same on both limbs, much smaller profits were made, reflecting only Attock's per barrel premium or 'turn' (e.g. EY Deals 85 and 143).

972. There is no merit in the Claimants' complaint that Mr Kelbrick has provided no *"account"* of payments made by Attock Lebanon to service providers or others. Mr Kelbrick owed no duties to the Arcadia Group at any relevant time, and was under no duty to provide any such account. Nor is there any pleaded case that any payments by Attock Lebanon (or Arcadia Mauritius) to service providers was wrongful.

973. Further, there was never any secret about Arcadia's purchases of oil from Attock. Attock was given counterparty approval from Mitsui in 2005 (after Mr Kelbrick had been employed by Arcadia London and long before he acquired Attock) (see § 226 above). A significant number of employees at the Arcadia Group beyond Mr Bosworth and Mr Hurley, such as crude oil traders, operations team members and trade finance team members, must have been aware of the terms on which the Arcadia Group was purchasing Nigerian and Equatoguinean oil cargoes from Attock Mauritius. There is no evidence that any of those individuals – who are not said to have been a part of the alleged

conspiracy – expressed any surprise or concern that the Arcadia Group was buying oil from Attock Mauritius, rather than, for example, directly from the NOCs. They included Ann Bickerstaffe, who was not called by the Claimants as a witness but was involved in detail in the execution of the transactions.

974. As to the forensic accounting exercise in relation to the Attock Transactions, I repeat the general points I make in § 961 above. The Claimants in their closing highlight the section in the Joint Statement as between the forensic accounting experts called by the Claimants/Mr Kelbrick/Arcadia Mauritius in which the experts agreed as follows:

> "12. The Experts agree, based on Attock Lebanon Bank Statements, that in the period from March 2009 to August 2013 Attock Lebanon made payments to the parties identified by the Fifth Defendant as Service Providers totalling US$51,099,85743 of which:
>
> a. The Experts agree that US$22,232,872 has been agreed to invoices and tied to EY Deals …
>
> b. The Experts agree that a further US$7,307,821 has been agreed to invoices as shown in Appendix 3 but cannot be tied to EY Deals. Of these, US$6,684,651 related to invoices from Rainbow International Associates Ltd for purchase of automotive gasoil in bulk and not to the provision of crude oil lifting services and trade in West Africa. The remaining US$623,170 relate to payments to Stratar Energy Resource Limited where the invoice referenced the Service Provider agreement.
>
> c. The Experts agree that, for the balance of US$21,559,164 no invoices were identified to them. The Experts agree that they have seen Service Provider Agreements for five entities that received US$17,549,395 of this balance.
>
> d. For four entities identified by the Fifth Defendant as Service Providers, being C Nergy SA, Equinox Oil and Gas Ltd, Nigerpet Limited and P. Wadhumal Trading Pte LTD no invoice, Service Provider agreements or other supporting documentation were identified to the Experts. Payments to those four entities totalled US$4,009,769 (being US$21,559,164 less US$17,549,395). ..." (footnotes omitted)

As with the Arcadia Lebanon Transactions, these considerations provide no support for the Claimants' case of fraudulent diversion.

975. My overall conclusion is that the Attock Transactions did not form part of any diversion scheme either. They were entered into honestly, in what both Mr Bosworth and Mr Hurley reasonably believed to be in the best interests of the Arcadia Group, and within the discretion afforded to them as CEO and CFO

respectively. From the perspective of Mr Kelbrick and his companies, they were legitimate commercial transactions which he had no reason to believe, and did not believe, involved any fraud on the Arcadia Group.

(4) Dishonesty

(a) Roles and collusion

976. It is correct that, in different ways, each of Mr Bosworth, Mr Hurley and Mr Kelbrick played central roles in some or all of the 144 Transactions. For completeness, on the specific matter of Arcadia's pricing decisions, the Defendants admit that Mr Bosworth had the roles identified in §802 above in relation to Arcadia's purchases under the Zafiro and Sao Tome Contracts. I repeat, however, that there is no evidence of Arcadia's traders making the pricing decisions under the Attock Transactions otherwise than independently. Nor, insofar as Mr Bosworth made any pricing decisions in relation to any transactions, have the Claimants shown that he did so other than in accordance with what he genuinely and reasonably considered to be in the Arcadia Group's best interests.

977. So far as concerns Mr Bosworth's alleged benefits from the fraud, by the time of closing submissions the Claimants were unable to allege that Mr Bosworth or Mr Hurley received any improper benefit from Arcadia Lebanon direct.

978. Further, as regards Mr Bosworth, the only pleaded allegation of benefit maintained against him at all was that he received US$1 million from Mr Kelbrick on 27 October 2011. However, that payment was never put to Mr Bosworth in cross-examination. It follows that the Claimants cannot properly allege any benefit at all on Mr Bosworth's part from the alleged fraud. For completeness, I record that that was one of the payments described by Mr Kelbrick in his witness statement, as follows:

> "129. Following the termination of Arcadia's relationship with AOIL and South Energy, I learned from Mr Bosworth and Mr Hurley that they were owed tens of millions of dollars from the Claimants in unpaid bonuses. They had also lost their source of income. This was not the case (at that stage) for AOIL, which began to trade with BP. I loaned Mr Bosworth US$2,200,000 in 2014 to support him at this time. This was not the first time I had advanced sums I understood were owed to Mr Bosworth and Mr Hurley by the Claimants:
>
> 129.1 In September and October 2008, Proview (under my ownership) made two payments totalling US$1,000,017.72 to Mr Hurley.
>
> 129.2 In December 2009, Proview (under my ownership) paid US$250,029.74 to Mr Hurley.
>
> 129.3 On 27 October 2011, I made a payment of US$1,000,000 to Mr Bosworth.

> 129.4 In October 2011 and January 2012, I made two payments totalling US$1,885,775.61 to a lawyer called Ms Zarina Khan. I now understand that these funds were used to purchase a property in Barbados beneficially owned by Mr Hurley.
>
> 130. As stated above, I made these payments at the request of Mr Bosworth and Mr Hurley. They advised me that they were owed the sums by the Claimants in the form of bonuses and would repay me once they were paid by the Claimants. I agreed to make the payments, I did not ask what the payments were for. I did not think there was a risk of non-repayment, but assumed that the sums which were owed to Mr Bosworth and Mr Hurley had caused them cash-flow issues. I had known Mr Bosworth and Mr Hurley for a long time and trusted them and knew that they were good for the money. Moreover, I always had in mind that I would likely work with (and even potentially for) Arcadia in the future, and therefore it made sense to assist the company's CEO and CFO where I could. Although not something I discussed with either of them, my bigger aspiration was that, in the future, Mr Bosworth and Mr Hurley might potentially want to join AOIL as principals and that we could grow the company together, including by expanding into paper trading. It felt good to have worked myself to a position where I was able to loan these sums to Mr Bosworth and Mr Hurley when asked to do so, not least as it was Mr Bosworth who I had shadowed at the beginning of my career in West Africa."

I accept that evidence.

979. It follows that the Claimants cannot point to any benefit received by Mr Bosworth from the impugned transactions. That fact is in my view a strong pointer against their fraud case against him, and more broadly the credibility of their case as a whole given Mr Bosworth's alleged central role in virtually all the matters complained of.

980. The only pleaded benefits to Mr Hurley were the payments totalling US$3,135,755 referred to in §§ 129.1, 129.2 and 129.4 of Mr Kelbrick's evidence quoted above. As set out there, Mr Kelbrick's evidence was that these payments were loans, made as a matter of goodwill, having regard in part to possible future cooperation. Mr Hurley in his witness statement said he could not remember what the first three payments (totalling US$1.25 million) were for and had not solicited them. He speculated they might have been a magnanimous gesture, bearing in mind the help he had given Mr Kelbrick over his career in various ways. In relation to the 'High Spirits' payments, Mr Hurley said he had committed to buy the property while awaiting bonus payments expected from Farahead; that he approached Mr Bosworth for help; and that Mr Kelbrick had provided money at Mr Bosworth's request, though he did not know what arrangement Mr Bosworth had made with Mr Kelbrick. Mr Kelbrick in a further witness statement said he agreed that Mr Hurley had helped him in his career, but did not believe he would not have made a magnanimous payment

of US$1.25 million and continued to recollect that the money was *"advanced by me as a placeholder for sums which were owed to Mr Bosworth and Mr Hurley by the Claimants, but which were as yet unpaid".*

981. In cross-examination, Mr Kelbrick confirmed that he meant (as he had said in his original witness statement) that it was a loan. Asked why he did not disclose the loan as an asset in his affidavit of assets in these proceedings, Mr Kelbrick gave this evidence:

> "Q. Wouldn't you have had to disclose this loan in your asset disclosure if you had advanced a loan to Mr Hurley?
>
> A. I thought I had disclosed everything.
>
> Q. … And if we go over the page, you don't refer to any other loans. So that, if that had been a loan to Mr Hurley, you would have disclosed it, wouldn't you?
>
> A. I would have thought so, yes.
>
> Q. But you didn't, because it wasn't a loan, was it?
>
> A. As far as I'm concerned, it was.
>
> Q. That is now what you have come up with as an explanation, but the money you pay Mr Hurley was never to be repaid, was it?
>
> A. Yes, it was.
>
> Q. And you don't consider yourself to be entitled to be repaid it?
>
> A. Yes, I do.
>
> Q. You have never asked him to repay it?
>
> A. I have asked.
>
> Q. Nothing in writing asking him to repay it?
>
> A. No, there is nothing in writing.
>
> Q. It was an outright transfer of funds from Proview to Mr Hurley?
>
> A. As a loan."

982. Mr Kelbrick was also asked about an entry in Mr Hurley's bank statement recording the 9 September 2008 payment as relating to *"consultancy services"*. He candidly accepted that that description was not suggestive of a loan, but maintained that it was a loan. Mr Hurley in cross-examination agreed that it was not common for sums of the order of US$1 million to be received into his

bank account, said he nonetheless still had no actual recollection of the payments. He denied that the payment was a 'cut' of profits made by Proview. Mr Bosworth in cross-examination also denied that Proview's payments to Mr Hurley reflected any arrangement with Mr Kelbrick for Mr Bosworth and Mr Hurley to (as it was put in cross-examination) *"get some benefit from the payments made by Arcadia Lebanon to Proview"*. As regards the High Spirits payment, Mr Bosworth confirmed that *"I couldn't assist Mr Hurley and I asked [Mr Kelbrick] if he could assist and after that, I left it to them"*.

983. I have carefully considered all this evidence. I bear in mind that, by the time the Claimants pleaded the Proview payments totalling US$1,250,000 in their Reply in April 2022, even the most recent of those payments had occurred some 12 years previously, and by the time of trial was 14 years old, making it highly likely that recollections will have faded. I also bear in mind that Mr Hurley's primary evidence in his witness statement was that he simply did not remember what they were for, whereas Mr Kelbrick was (in my view) clear in his evidence that they were, and would only ever have been, loans. I consider the most likely explanation to be that Mr Kelbrick is correct, and that he was persuaded (by either Mr Bosworth or Mr Hurley) to advance these funds to Mr Hurley to help him out, pursuant to an informal understanding that they would be repaid as and when Mr Hurley was able to do that. I do not consider there to be any cogent reason to conclude that these payments, disparate in timing and amount, and very small in comparison to the sums which on the Claimants' case were fraudulently diverted to Proview, support the view that the Defendants were complicit in fraud.

984. In addition to the pleaded alleged benefits referred to above, the Claimants seek to rely on the unpleaded matters referred to in § 805 above. However, it would be unfair to allow them to do so. For completeness, however, I see nothing implausible in the explanation Mr Bosworth provided in his oral evidence that Mr Kelbrick was willing to pay for some of the renovation costs of the Beirut flat because he quite often stayed there; and that, so far as Mr Bosworth could recall, the jade elephants were gifts for business contacts. Equally, it was suggested to Mr Hurley in cross-examination that a payment of US$2.7 million from Cathay Holdings (a company associated with Mr Gibbons, with whom Claimants settled before trial) to assist with a purchase of a Swiss residence (Chemin du Bonderet) was part of the sharing of proceeds of fraud; which Mr Hurley denied. Mr Hurley said (confirming the evidence in his witness statement) that it was an advance made at a time when he was awaiting bonus payments from Farahead. Again, I found his evidence plausible. It is not open to the Claimants to rely on this payment as evidence of fraud.

985. The Claimants also sought to advance at trial unpleaded allegations that Mr Bosworth/Mr Hurley had hidden interests in Arcafrica (which I have already rejected), Pangea Diamonds, Arcadia Global Assets and the Tom Shot Bank field. None of those contentions can properly be advanced. For completeness, I record that the evidence indicated that Mr Bosworth caused Arcadia London to invest in Pangea, pursuant to his powers as CEO and pursuant to the objective of (as he said) having been *"instructed and authorised to go and build Arcadia to become a Glencore or a Vitol"*. Farahead decided not to proceed further with

the investment, but Mr Bosworth invested some of his own money in two stages (the money being taken from his bonuses). A Declaration of Trust signed by Mr Hurley dated 1 December 2014 (well after, and unconnected with, the 144 Transactions) indicates that Arcadia Global Assets was beneficially owned by Mr Aluko. Although in an email six months earlier Mr Hurley had told a bank that he himself was the ultimate beneficial owner, his evidence at trial was that the company did indeed belong to Mr Aluko, albeit he had set the company up for Mr Aluko and was involved in running it on his behalf. A payment by Mr Bosworth in October of US$4 million to Arcadia Nigeria did not relate to any interest in the Tom Shot Bank field. It was his share of the Seven Energy payment of $6 million referred to in § 929.vii) above. Mr Bosworth said he arranged for Arcadia Lebanon to pay it to Mr Asibelua's company, Arcadia Nigeria, and requested that Equinox then use it to help repay the Arcadia loan. Bearing in mind that these points are all unpleaded, there is no proper basis on which to seek to go behind the evidence given.

986. There is no doubt that Mr Kelbrick and his companies received benefits from the transactions. However, his case is that he and they participated as independent service providers, sleeves or counterparties in the 144 Transactions. The benefits are of no significance unless either Mr Kelbrick was himself a participant in a fraud, or knew that Mr Bosworth/Mr Hurley were perpetrating a fraud and knowingly helped them do so or knowingly took the benefits.

987. One further point relevant to benefit is that according to Arcadia Lebanon's audited financial statements, it made net profits in 2007, 2008, 2009 and 2011. The net profits for 2007 and 2008 alone amounted to approximately US$17.1 million in aggregate. Mr Bosworth and Mr Hurley's 35% 'share' of that amounted to just under US$6 million. In fact, however, they collectively only ever received dividends of US$3 million from Arcadia Lebanon.

(b) Dishonesty alleged against Mr Bosworth

988. My overall impression, having considered the evidence as a whole, and having heard Mr Bosworth give evidence at length in the trial, is that he acted honestly throughout the transactions complained of.

989. I deal below with the specific points made by the Claimants in that regard which I summarised earlier.

990. First, Mr Bosworth did not give the misleading impression that Arcadia Lebanon had been set up for *"a new, particularly lucrative contract"* to be kept separate: see section (I)(1) above. It was agreed that Arcadia Lebanon would be used as a contract holder in order to mitigate compliance risks of West African oil trading; that the Sao Tome and Zafiro Contracts should be migrated to it; and that later similar contracts should be treated in the same way: *ibid.*. It was agreed that Arcadia Lebanon would be used as a contract holder, and it was obvious that the Arcadia Group would be part of the contractual chain (as would its on-purchaser).

991. Secondly, I consider that Mr Bosworth's evidence about payments to service providers was honestly given and, moreover, that at the time of the transactions he acted honestly, in what he genuinely and reasonably believed to be the Group's best interests in making those payments, and within the discretion afforded to him as CEO. Far from inappropriately exposing the Arcadia Group and Farahead to high risks of reputation and compliance issues, he did his best to mitigate them, within the context of the inherently risky business which Farahead was willing to carry on. I have rejected the unpleaded and unfounded allegation that Mr Bosworth knew or turned a blind eye to bribery in connection with Sonergy, Obexys and Rodexkia: see §§ 234-237 above.

992. Thirdly, it was not dishonest for Mr Bosworth to pay large amounts to Proview in relation to the Sao Tome and Senegal Contracts. The payments were necessary, and Mr Bosworth honestly and reasonably believed them to be in the best interests of the Arcadia Group. Payments to Proview were not made in order to siphon off money from the Arcadia Group to a company owned and controlled by Mr Kelbrick *"who would then share the proceeds with Mr Bosworth/Mr Hurley"*, and nor did any such sharing occur.

993. Fourthly, Mr Bosworth did not dishonestly fail to explain to Mr Fredriksen/Mr Trøim the size of the service provider payments being made under the Zafiro Contract, the Sao Tome Contract (after it was moved to Arcadia Lebanon) or the Senegal Contract, or to explain the large payments made to Sonergy and Mr Driot's companies. The whole purpose of the Arcadia Lebanon arrangement was to mitigate the risks arising from the need to make substantial payments to sponsors and service providers in order to obtain and operate term contracts for West African crude oil. There is no pleaded allegation that Mr Bosworth was under any duty to tell Mr Fredriksen or Mr Trøim the exact quantum of payments made to date or due to service providers; and any failure to do so was in any event not dishonest.

994. Fifthly, Mr Bosworth did not dishonestly lead Farahead to believe, in 2009, that Arcadia Lebanon was no longer trading: see section (I)(11)(f) above.

995. Sixthly, Mr Bosworth did not dishonestly divert opportunities to Attock Mauritius pursuant to an agreement with Mr Kelbrick. No such diversion occurred: see section (L)(3) above; and nor was any such agreement made. There was no agreement to share profits, and no sharing of profits.

996. Seventhly, Mr Bosworth and Mr Hurley did not pay third parties to get access to the Zafiro Contract in order for Mr Bosworth or Mr Hurley to benefit from it personally (so insofar as they might legitimately become entitled to bonuses in the ordinary way). The profits made by Arcadia Lebanon were treated as belonging to the Arcadia Group, save to the extent of the bonus sharing understanding reached with Farahead. There is no evidence in support of the unpleaded proposition that Mr Bosworth caused payments to be made to service providers in order to curry favour with people influential with governments and State oil who might provide investment opportunities in Africa for his own benefit.

997. Eighthly, I have already rejected the Claimants' allegations regarding personal benefit to Mr Bosworth. To the contrary, the lack of such benefits tends to undermine their case.

(c) Dishonesty alleged against Mr Hurley

998. As with Mr Bosworth, my overall impression, having considered the evidence as a whole, and having heard Mr Hurley give evidence at length in the trial, is that he acted honestly throughout the transactions complained of.

999. I deal below with the specific points made by the Claimants in that regard which I summarised earlier.

1000. First, for the same reasons as I give in relation to Mr Bosworth, Mr Hurley made no dishonest statements to Farahead about the intended use of Arcadia Lebanon or its having ceased to trade.

1001. Secondly, Mr Hurley did not dishonestly defer to Mr Bosworth's judgement on the matter of payments to service providers or other third parties. He was entitled to rely on the business judgement of Mr Bosworth as his chief executive in circumstances where there was no reason to believe that Mr Bosworth was acting dishonestly or contrary to the Group's best interests. In any event, Mr Bosworth was not acting dishonestly and the payments were reasonably considered to be in the Group's best interests.

1002. Thirdly, Mr Hurley did not dishonestly make payments to Proview, knowing that that would lead to money being paid back to him *"because there was an agreement between him, Mr Bosworth and Mr Kelbrick that the money should be shared"*, and having no belief that they were in the Arcadia Group's best interests or for commercially valuable services. Mr Hurley did not act dishonestly, had not agreed to share the money paid and did not share it. The payments were made for commercially valuable services which were required in order to advance the Group's best interests. It could not access the oil without those services.

1003. Fourthly, for the reasons I have already given, there was nothing untoward or unusual, still less dishonest, in the way in which letters of credit were used in the 144 Transactions. The Attock Transactions were reasonably believed to benefit the Arcadia Group, both in terms of potential direct trading profits to be made and in terms of facilitating the paper trading (see section (G)(2) above). There is no evidence of, and no basis on which to infer, any agreement to share profits with Attock; nor that either Mr Bosworth or Mr Hurley was interested in Attock; nor that either benefitted personally from the Attock Transactions (save insofar as those transactions made profits to which Mr Bosworth or Mr Hurley was entitled to a bonus in the ordinary way).

1004. Fifthly, Mr Hurley did not fraudulently agree to or participate in the use of Arcadia Lebanon because he stood to gain a larger share of profit than he would had the transactions been entered into by Arcadia London, nor because Mr Bosworth might himself gain a larger profit share which (at some undefined time) enable Mr Bosworth to assist Mr Hurley. The transactions were entered

into by Arcadia Lebanon rather than directly by Arcadia London for the reasons given in sections (H)(4) and (I)(1) above.

1005. Sixthly, Arcadia London was purchasing the oil (via an intermediary) from Arcadia Lebanon, and, naturally, paying for it. There was nothing untoward or dishonest about that: it was how everyone intended the transactions to work, and how – completely openly – they did work.

1006. Seventhly, I have already addressed the Claimants' allegations regarding alleged personal benefits to Mr Hurley. I do not consider that Mr Hurley's account, which was essentially to the effect that he could not recall, to have been implausible.

(d) Dishonesty alleged against Mr Kelbrick

1007. Mr Kelbrick too gave oral evidence at length at trial, which I have considered along with all the other evidence. I am fully satisfied that he acted honestly in relation to the transactions he was involved in.

1008. I deal below with the specific points made by the Claimants in that regard which I summarised earlier.

1009. First, Mr Kelbrick genuinely and, in my view, reasonably considered Proview's services to justify the payments it received. The payments made to Proview were legitimate payments for commercial valuable services. I have already rejected the inference which the Claimants invite from the brief nature of the descriptions on Proview's invoices.

1010. Secondly, Mr Kelbrick was involved in the Arcadia Lebanon Transactions only to the extent that he and his companies acted legitimately as services providers or intermediaries. The evidence does not support the view that Mr Kelbrick knew Arcadia Lebanon was owned and controlled by Mr Bosworth and Mr Hurley, and in substance it was not. Mr Kelbrick did not know *"that [Mr Bosworth] and [Mr Hurley] were not acting in the best interests of the Arcadia Group by using Arcel to pay Proview unjustifiable amounts of money"*, and they were not doing so. The oil was indeed being sold to Arcadia at market prices. There is no pleaded case that payments made by Proview to other service providers were improper or part of any dishonest scheme, and no inherent illogicality in the notion that one service provider might in turn pay another. Nor did Mr Bosworth accept that there was (as the Claimants suggest). Mr Kelbrick correctly understood the Arcadia Group to be making large profits from its paper trading. None of the points made by or on behalf of Mr Kelbrick was in my view dishonest.

1011. Thirdly, I have already rejected the Claimants' case about the obtaining of the Attock term contracts, and the inference which they seek to draw from the lack of documents in that regard: see sections (I)(11)(a) and (f), (12)(b), (c) and (d) and (13)(a) above. I have also rejected their complaint based on Arcadia having to give 7 days' notice of its pricing election versus 6 days for Attock further up the chain: see §§ 351-352 above. There was no reason for the Arcadia traders

to know how much money Attock, as a contractual counterparty, was making from the transactions.

1012. Fourthly, I have accepted Mr Kelbrick's evidence that the (very limited, in the context) payments Mr Kelbrick made to Mr Bosworth and Mr Hurley were intended as loans, and reject the suggestion that he made or sought to explain them dishonestly. There was no agreement that Mr Bosworth and Mr Hurley should share in Proview's profits.

1013. Fifthly, the receipt of large sums by Mr Kelbrick personally or through Attock Mauritius is not evidence of dishonesty. They derived from legitimate transactions in which he had either provided commercially valuable service or had made profits dealing on his companies' own account.

1014. Sixthly, it would be unfair to draw an adverse inference, based on what the Claimants call an implausible claim to memory failure, in respect of transactions (including many unpleaded) forming part of a large scale and complex series of transactions spread over a period of years.

(e) Conclusion as to alleged dishonesty

1015. In the light of all these matters, and my overall assessment of their evidence as a whole, I conclude that no dishonesty has been established on the part of any of Mr Bosworth, Mr Hurley and Mr Kelbrick. I am satisfied that they acted honestly in relation to all of the impugned transactions.

(5) Conclusion on the Claimant's essential case

1016. It follows from the considerations set out in sections (L)(1)-(4) above, including the conclusions I reach in §§ 964, 975 and 1015 above, that the Claimants have failed to prove their case. They have failed to prove any part of the alleged fraudulent diversion set out in §§ 31, 71 and 73 of their RRRRAPC, § 5 of their Reply and §§ 6 and 13-17 of their 144 Transactions Case. As a result, the alleged unlawful means conspiracy, breaches of fiduciary duty, breaches of the Swiss Code, dishonest assistance and knowing or unconscionable receipt are not made out. On the contrary, Mr Bosworth and Mr Hurley acted in what they honestly and reasonably considered to be in the Arcadia Group's best interests, and within the discretion afforded to them as CEO and CFO respectively of the companies whom they served. Mr Kelbrick acted honestly as a service provider/intermediary or counterparty in relation to the Arcadia Lebanon Transactions and the Attock Transactions respectively, and was not aware or on notice of any breach of duty by Mr Bosworth or Mr Hurley (of which, as I have said, none has in any event been established).

1017. Since the Claimants sought to shift the focus at trial onto alleged breaches of fiduciary duty or similar duties under Swiss law, I set out the following matters for completeness.

1018. First, I repeat that the pleaded breaches of fiduciary duty and of Swiss law are a fraudulent breach of trust comprising the alleged diversion of contracts and

profits to fraudulent entities pleaded in RRRRAPC § 71: see § 747 above. I have rejected that case in its entirety.

1019. Secondly, and in any event, I am satisfied that no question of diversion of opportunities or profits could arise, because (a) Arcadia London/Switzerland had clearly and definitely dissociated themselves from the contracts/opportunities Arcadia Lebanon entered into in the Arcadia Lebanon Transactions, (b) the contracts and opportunities taken up by Attock entities in the Attock Transactions never belonged to Arcadia London or Arcadia Switzerland in the first place and (c) Arcadia Lebanon was in substance an Arcadia Group company. As to (a), the decision to use Arcadia Lebanon, referred to in sections (H)(4) and (I)(1) above, was one taken in good faith and in the interests of Arcadia London (with the same considerations applying later to Arcadia Switzerland) and with Farahead's agreement, that Arcadia London should refrain from entering into contracts with NOCs and paying service providers, leaving it to Arcadia Lebanon to undertake those tasks instead. Thus the whole purpose of the exercise was for Arcadia London positively to avoid taking up those potential opportunities.

1020. Thirdly, for the reasons I have already set out in this judgment, Mr Bosworth and Mr Hurley acted in this, and all other relevant respects, in good faith, within the broad discretion afforded to them by reason of their offices, honestly, with due care and single-minded loyalty, in the interests of the Arcadia Group.

1021. Fourthly, there was no conflict of interest. It was in the interests of Arcadia London, Arcadia Switzerland and the Arcadia Group as a whole for Arcadia Lebanon to engage in the transactions, for the reasons I have already set out. Further, Mr Bosworth and Mr Hurley had no personal interest in any of the transactions, save to the extent that they stood legitimately to gain bonus payments (in proportions agreed with Farahead) from the companies' success.

1022. Fifthly, Farahead (including Mr Fredriksen and Mr Trøim) were apprised of all the material facts and consented to the relevant dealings. They knew that Arcadia Lebanon, rather than Arcadia London or Arcadia Switzerland, would enter into transactions, for the reasons I have already summarised, and on-sell to Arcadia London/Arcadia Switzerland. They knew that the shares in Arcadia Lebanon were held by Mr Bosworth and Mr Hurley. They knew that Arcadia Lebanon would generate profits, and kept a close eye on them so that they could be used for the Arcadia Group's purposes. They wanted Arcadia Lebanon to enter into the transactions so that the Group could obtain all the benefits of involvement in the purchasing of oil from NOCs, including the large gains to be made in the paper market but without Arcadia London or Arcadia Switzerland running the risks involved; and they saw themselves as having a 70% economic interest in Arcadia Lebanon. Knowledge of the material facts did not require Farahead to know the details of each of many dozens of transactions over several years, and they had no wish to receive any such information: what mattered was the arrangements, to which they gave (in the event that it was required) informed consent. Far from Mr Bosworth and Mr Hurley withholding information from Farahead, it was Mr Trøim who in September 2009 instructed the Farahead directors to stop making enquiries about Arcadia Lebanon. So far as the Attock Transactions are concerned, no

question of diversion of opportunities or profits could on any view arise for the reason already given: the contracts and opportunities taken up by Attock entities in the Attock Transactions never belonged to Arcadia London or Arcadia Switzerland in the first place.

1023. Sixthly, Mr Bosworth and Mr Hurley received no personal benefit, and had no personal interest, in respect of which any question of liability to account could arise: see sections (K)(2)(c) and (3)(a) (law) (L)(4)(a) (facts) above. There was no breach of the 'no profit' rule. Arcadia Lebanon was neither a cloak nor alter ego used by Mr Bosworth/Mr Hurley to receive funds on their behalf, nor a nominee for a defaulting fiduciary to receive secret profits.

1024. Seventhly, had it been the case that any of the transactions involved in this case involved a pleaded and proven breach of fiduciary duty, I would have granted relief from liability on the grounds that Mr Bosworth and Mr Hurley acted honestly and reasonably, and having regard to all the circumstances of the case ought fairly to be excused. For similar reasons, I would have refused to order an account, on the ground that it would be liable to result in unjust enrichment of the Claimants and would have operated inequitably vis-à-vis Mr Bosworth and Mr Hurley.

1025. Given my conclusions on the issues of liability, issues of causation, loss and damage do not arise. Equally, it is unnecessary to address any questions of limitation. I should record, though, that the orders of Burton J and the Court of Appeal have the effect that (i) Arcadia London has no claim against Mr Bosworth purely for any breach of fiduciary duty by him occurring on or before 4 September 2009 and (ii) Arcadia London has no claim against Mr Hurley purely for his own breach of fiduciary duty.

(M) THE COUNTERCLAIMS

1026. Mr Bosworth and Mr Hurley counterclaim against the Claimants in respect of sums which they say were left unpaid when they left the Arcadia Group's employment. I consider these in turn below.

(1) Bosworth investment in Cushing storage project

1027. Mr Bosworth's pleaded counterclaim (supported by a statement of truth) in this regard is as follows:

> "322. As CEO of the Arcadia Group, Mr Bosworth was paid a salary and various bonuses by the Claimants.
>
> 323. As set out at paragraph 239 above, in respect of asset-investment projects, Farahead required and/or expected the Arcadia Group's senior management and/or senior traders themselves to participate in the relevant asset project and/or contribute their own funds or capital towards the acquisition and/or investment costs for the assets. In particular:

(1) The *"Farahead Group Asset Investment Schedule"* records that such assets projects had a *"Farahead Participation"* and a *"Required Management Participation"* on an approximate 70/30 split between the capital contributions of Farahead and those of the Arcadia Group's senior management. The relevant participations and/or capital contributions of Farahead and *"Management"* were also set out in the Arcadia Asset Investment Monthly Management Reports provided to Farahead.

(2) Any profits (and likewise any losses) from the asset projects were split between Farahead and the Arcadia Group management on a 70/30 basis. A proportion of the bonuses of the Arcadia Group's senior management and/or senior traders was therefore used towards participation and/or investment in various Arcadia Group asset projects.

324. In 2008, Mr Bosworth, Mr Fredriksen and Mr Trøim discussed a project to construct storage and tank facilities for West Texas Intermediate oil, which was to be based at Cushing, Oklahoma, USA (the *"Cushing Storage Project"*).

325. Farahead proceeded to invest in the Cushing Storage Project and did so on a 70/30 basis with the Arcadia Group senior management and traders. Accordingly, at the direction and/or instigation of Farahead (and Mr Fredriksen and Mr Trøim in particular), in around late 2008 or early 2009 Mr Bosworth agreed with Farahead to defer payment of US$2m of his 2008 bonus, and in the second half of 2009 to defer payment of US$5m of his 2009 bonus on the basis that: (i) these deferred bonus payments would be invested in and/or contribute to the Cushing Storage Project; and (ii) Mr Bosworth would receive his deferred bonuses payments together with a pro rata share of 30% of any profits (or losses), as allocated to the Arcadia Group senior management and traders, upon the disposal of the Cushing Storage Project.

326. Construction of the storage facilities for the Cushing Storage Project began in 2008 and the tanks were completed in 2009. Two Arcadia Group companies, Parnon Gathering Inc and Parnon Storage Inc, held the relevant equity interests of both Farahead and the Arcadia Group management in the Cushing Storage Project (as shown in the Arcadia Asset Investment Monthly Management Reports).

327. On 14 March 2012, Mr Hurley reported to Mr Trøim that JP Energy Partners LP (*"JPE"*) had approached the Arcadia Group to purchase Parnon Gathering and Parnon Inc. On 2 August 2012, at Farahead's instruction, Parnon Gathering and Parnon Inc were sold to JPE, generating a significant profit for the Cushing Storage Project.

> 328. A Farahead Investment Allocation document shows that the contribution of Mr Bosworth's 2008 and 2009 bonuses to, and his share of profits on the disposal of, the Cushing Storage Project amount in total to US$11.7m. The same document shows shares of profits due to James Dyer, Paul Adams and Nicholas Wildgoose, the other senior traders involved in the Cushing Storage Project.
>
> 329. In breach of the aforesaid agreement in paragraph 325 above, Farahead has failed to pay and/or procure payment to Mr Bosworth of the 2008 and 2009 deferred bonuses awarded to him and/or pay to Mr Bosworth his US$11.7m share of profits on the disposal of the Cushing Storage Project or any part thereof."

1028. In his witness statement, Mr Bosworth dealt with this matter quite briefly:

> "234. When it came to business development costs associated with investment opportunities, John and Tor requested (which was not as far as I recall ever recorded formally in writing) that Arcadia management and Arcadia employees who wished to invest in additional projects should split these costs with Farahead and any proceeds out of those investments were to be split usually on around a 65/35 or 70/30 basis in favour of John and Tor Olav. Sometimes we used our personal money to invest in these projects, but usually we would forgo bonuses / salaries owed by the company and trusted that we would be made whole in due course. This request was made by Farahead because they were usually willing to invest their own money alongside us and to *"win or lose"* with us. One example of this was Parnon, which was a project to construct storage and tank facilities WTI oil, which was to be based at Cushing, USA. I invested into this project, alongside Jimmy Dyer, Nick Wildgoose and Paul Adams from Arcadia, and Farahead also invested. I never received from Arcadia what I was owed in connection with this investment following my resignation from the group in March …"

1029. Mr Trøim confirmed in his oral evidence that Farahead wanted Arcadia's senior management and traders to participate with Farahead in certain asset projects. As regards the existence of an agreement, Mr Trøim gave this evidence:

> "Q. And if we go, please, to page {F/82/13}, there was an email to you that gave the details of the bid and the potential return. And it is right, isn't it, Mr Trøim, that there was an agreement in place between Farahead and the traders that when Cushing was sold, the traders would get back the bonuses they had invested plus any of the upside. That was the agreement, wasn't it?
>
> A. I don't remember the agreement specifically, as I said, about now. But I find it natural that what you are saying is correct."

1030. In response to substantially the same question, Mr Fredriksen said *"I guess that's correct"*, though he went on to say that he could not remember an agreement, had not seen one in writing, and was sure he never agreed to it himself though *"[t]here might have been discussion about it"*.

1031. On 5 December 2012, Mr Hurley circulated to the traders a spreadsheet document named *"investment allocation.xlsx"* with a page entitled *"Investment allocation"* showing the respective contributions and the profits available to be distributed to each of them (Mr Bosworth, Mr Dyer, Mr Wildgoose and Mr Adam) on the disposal of the Cushing project. On 16 April 2013, Mr Wildgoose asked for prompt payment. For example, Mr Adams invested his 2010 and 2011 bonuses, and Farahead paid him back his bonus plus the profit, amounting to US$5.9 million. The spreadsheet indicated that Mr Bosworth had foregone US$2 million of bonus for 2008 and US$5 million for 2009, and that the bonus plus profit attributable to him was US$11.7 million. Mr Trøim in cross-examination accepted that Mr Adams had been paid US$5.9 million; and, asked whether likewise that Farahead owed Mr Bosworth US$11.7 million, said *"[i]f the calculation is correct"*. Mr Fredriksen said he most likely left this to Mr Trøim. Rows 48 and 49 of the spreadsheet read:

> "48 This shows the distribution for the entire profit associated with Gathering and Storage.
>
> 49 In 2010 a distribution was taken from Storage in the amount of $3.29m and added to the WTI bonus pool. This amount must now be deducted from the WTI bonus pool."

1032. In their Defence to Counterclaim the Claimants admitted that Mr Bosworth appeared to have foregone US$7 million of bonus, and in their written opening the Claimants accepted that Mr Bosworth *"forewent"* US$7 million and contributed this to the Cushing project in 2008 and 2009. However, in their oral opening they withdrew the concession, saying that only US$2 million was contributed. That was based on a hard-copy schedule that Mr Bosworth sent to the Claimants in 2018 (before the Claimants' Defence to Counterclaim) as part of a data subject access request. The Claimants themselves did not disclose this document either in hard copy or in electronic form. The document is headed and laid out in the same way as the *"Investment allocation"* spreadsheet referred to above. At the foot of the page, the words *"investment allocationrevised.xlsx"* appear. This document does not record Mr Bosworth as having invested any 2009 bonus, only US$2 million of 2008 bonus, and his bonus plus profit allocation is shown as US$6.7 million rather than US$11.7 million. In addition, the notes in rows 48 and 49 do not appear in this version of the document.

1033. There is a third version of the same page, showing Mr Bosworth as having foregone both the US$2 million and the US$5 million amounts in 2008 and 2009 respectively, which was provided by the Claimants to Mr Bosworth, with other entries redacted, in response to a subject access request which he made of them in May 2018. This document does not seem to have been disclosed by the Claimants as part of their disclosure. It seems (though it is not clear) that this version too contained the notes in rows 48 and 49, but that they are redacted in this version.

1034. It was suggested to Mr Bosworth in cross-examination that it was at least a coincidence that the difference of US$5 million was the same as the US$5 million paid to Fulham Properties in 2009 (which I discuss earlier), to which Mr Bosworth replied *"Not from my perspective there isn't".* As noted earlier, the US$5 million Arcadia Lebanon dividend in 2009 had not yet been applied to the Fulham Properties loan: it was in July 2011 that Farahead allocated it to the loan. The investment allocation spreadsheet referred to in § 1031 above post-dated that allocation yet still showed Mr Bosworth as having foregone US$5 million of 2009 bonus for the Cushing project. There is no witness evidence that that was later changed. Further, it might be thought slightly more likely that the notes in rows 48 and 49 would have been added in rather than taken out, making the § 1031 version more likely to be the most up to date version, though I am not convinced that would be a safe assumption. In addition, the evidence I refer to in §§ (I)(10)(g) and (i) above about the US$5 million Arcadia Lebanon dividend points towards it being used towards a retention bonus for Mr Bosworth rather than in settlement of his ordinary 2009 bonus: see §§ 485, 500 and 612 above.

1035. However, there are two points which points towards the versions of the spreadsheet without the US$5 million 2009 bonus figure being the more recent ones:

i) The version of the spreadsheet including the US$5 million (§ 1031 above) is named *"investment allocation"* whereas the second version of the spreadsheet (§ 1032 above) is entitled *"investment allocationrevised"*.

ii) The figures in the two versions seem to make sense if the version with the US$5 million figure came first and that figure was then removed, i.e. the § 1032 version is the later one. The version including the US$5 million 2009 bonus figure for Mr Bosworth indicated the same figures for him as for Mr Wildgoose: US$2 million of 2008 bonus, US$5 million of 2009 bonus, and net profit share of US$4.7 million, giving a total of US$11.7 million. The version without the US$5 million 2009 bonus figure for Mr Bosworth still shows the same net profit share, US$4.7 million. If this latter version had come first, it might seem surprising that Mr Bosworth would have the same profit share as Mr Wildgoose even though Mr Bosworth had foregone only US$2 million of bonus compared to US$7 million for Mr Wildgoose. The force of this point is possibly slightly diminished by the fact that Mr Dyer has the same net profit even though he forewent greater bonuses, totalling US$9.5 million, albeit the difference related to a later year viz his 2011 bonus. Despite that point, the figures for Mr Bosworth and Mr Wildgoose still seem more readily comprehensible if the US$5 million was included in the earlier version of the spreadsheet but then removed, as if Mr Bosworth had received a US$5 million payment for his 2009 bonus: whether via the Fulham Properties allocation or in some other way.

1036. Viewing this evidence in the round, and bearing in mind the onus of proof is on Mr Bosworth in this regard, I consider that any entitlement in respect of the Cushing bonus is more likely to be for US$6.7 million than for US$11.7 million.

1037. The Claimants also refer, however, to an email from Mr Hurley to Mr Bosworth of 11 August 2013 headed *"Payments et al"*, stating:

> "Pete,
>
> I think amounts due are
>
> Asset sale 4.7m net
>
> Bonuses
>
> WAF 2013 1.8m
>
> Against this issues probably raised would be
>
> Dubai receivable for you 890k
>
> Mo/Chief
>
> Advances 680k
>
> Merck Kiymetli 1.lm - chief investment
>
> Think these both should be recovered but aren't yet
>
> You/me
>
> 2013 1.7m (not yet confirmed)
>
> 2012 5.55
>
> Withheld as part of 15m from you/me 0.5
>
> …"

1038. The line *"Asset sale 4.7m net"* might indicate that Mr Bosworth had in fact already received both the US$2 million previously foregone 2008 bonus and the US$5 million from 2009, leaving only the profit share element of US$4.7 million outstanding. However, that would depend on (a) whether the following line, *"Bonuses"*, was exhaustively represented by what followed it i.e. a reference to 2013, and (b) whether Mr Hurley's understanding was in any event correct. (Mr Bosworth's response, if any, has not been located.) Mr Hurley in cross-examination said he had *"made an assumption"* that the prior year amounts had all been paid. I do not consider that any clear conclusions can be drawn from his email.

1039. Aside from the numbers, the Claimants submit that Mr Bosworth has no legal entitlement to any sum connected with the Cushing investment in any event.

1040. First, they say Mr Bosworth is not entitled to recover any such sums due to (i) his dishonest breaches of fiduciary duty and/or failure to disclose wrongdoing to Claimants in breach of fiduciary duty (which enabled him to earn the alleged entitlements), or (ii) an implied term preventing fraudulent or dishonest

conduct. However, I have already concluded that Mr Bosworth did not commit any dishonest breaches of fiduciary duty, or other fraudulent or dishonest conduct. The pleaded breach of fiduciary duty is the alleged diversion, which I have found did not occur.

1041. In cross-examination and closings, the Claimants purported to develop a new and unpleaded case to the effect that the Atlantic, Capital and/or Equinox transactions involved gross misconduct, or otherwise precluded any entitlements to bonuses. There is no pleaded case either of gross misconduct, nor that Mr Bosworth/Mr Hurley acted dishonestly in respect of those transactions. The Claimants are not entitled to advance any such case. In any event, for the reasons given earlier, I do not consider that any of these transactions did involve misconduct, of any kind.

1042. Secondly, the Claimants say Mr Bosworth is not entitled to recover because he resigned from the Arcadia Group. The logic of that contention is not explained save insofar as it is linked to the next point below.

1043. Thirdly, it is said that because the so-called *"investment"* in the Cushing project was done by Mr Bosworth *"foregoing"* his bonus, and thus took the place of a bonus entitlement, the same terms and conditions for payment of bonuses necessarily attach to it. The Claimants plead that:

> "209.2 Those annual bonus payments were absolutely discretionary and not contractual in nature. In particular, if a staff member left the Arcadia Group before any bonus had been paid, they did not (and had no entitlement to) receive it. (Alternatively, this was a term of any contractual agreement, which is denied.)
>
> …
>
> 209.4 Senior managers' participations in assets by foregoing their bonuses was of the same absolutely discretionary nature or, alternatively, subject to the same terms."

1044. No authority was cited for those propositions and I do not accept them. In particular, if Mr Bosworth had already been awarded bonuses, as the evidence suggests, and then agreed with Farahead to invest them in a project alongside Farahead in return for a share of any upside, then it is inherently likely that such an agreement was intended to be binding. Otherwise, by agreeing to co-invest with Farahead a bonus, instead of taking the cash, the employee would have been reliant on Farahead's discretion a second time in order to realise his investment. It is very unlikely that the parties would have intended to contract on that basis.

1045. Fourthly, the Claimants say the payment of returns from the Arcadia Group senior management's investment into the Cushing project (including Mr Bosworth) was governed by an oral agreement that was too uncertain to give rise to any contractually binding obligations on the part of Farahead. They say essential matters were left unresolved, so that no complete or binding contract arose. The alleged terms are too uncertain: at most, what is alleged is an

agreement to agree. An agreement will not be a binding contract where it fails to resolve *"a number of very significant issues"*, including *"issues which the parties intended, or which, judged objectively, they are to be taken to have intended, as essential to be resolved before there was a binding contract"* (quoting *Rotam Agrochemical v GAT* [2018] EWHC 2765 (Comm) at [154]). I do not agree. Each employee agreed to forego a defined amount of bonus, and the proportionate profit or loss on the project was in principle readily capable of calculation. The court should strive to uphold a bargain where the parties have, in this way, agreed to invest substantial sums of money in a joint commercial venture in the expectation of a shared return. Further, as noted above, Mr Trøim accepted that there was an agreement to pay, provided the calculation was correct.

1046. Fifthly, as to the calculation, I have considered the evidence above. As set out there, I consider that any entitlement in respect of the Cushing bonus is more likely to be for US$6.7 million than for US$11.7 million. I consider that Mr Bosworth has established an entitlement to the former sum, but not the latter. His counterclaim in respect of the Cushing project therefore succeeds to the extent of US$6.7 million (plus interest), subject to any question of set-off: see below.

(2) Bosworth retention bonus

1047. Mr Bosworth's pleaded case as to this bonus is as follows:

> "333. In 2005, while Farahead was negotiating with Mitsui the acquisition of Arcadia London, Mr Fredriksen and Mr Trøim also discussed with Mr Bosworth and Mr Hurley the future direction and management of Arcadia London's business: see paragraph 196(2) above. In the course of those discussions, Mr Fredriksen and Mr Trøim negotiated with Mr Bosworth the terms on which they planned to retain him as Arcadia London (later Arcadia Group) CEO. Mr Fredriksen and Mr Trøim repeatedly told Mr Bosworth that he would become entitled to a substantial bonus upon Farahead's completion of its acquisition; the parties discussed a sum of US$20m.
>
> 334. At this time, upfront and/or joining and/or retention bonuses of this magnitude were not uncommon in the oil trading industry. The amount of the retention bonus reflected Mr Bosworth's seniority and market standing and the fact that Farahead wanted Mr Bosworth to preside over the global expansion of Arcadia London and its profitable trading activities for several years at least.
>
> 335. In about summer 2005, Mr Bosworth requested that, in addition to any bonus, Mr Fredriksen and Mr Trøim make a mortgage loan available to him so as to enable him to purchase a new residence. Mr Fredriksen and Mr Trøim agreed, and on 11 August 2005 Fulham Properties (a Fredriksen company)

advanced a loan of £10,583,455 to Mr Bosworth and his wife, to acquire their new residence (and secured against it).

336. In the light of the aforesaid discussions, in early 2006 in the course of several meetings between Mr Fredriksen, Mr Trøim, and Mr Bosworth Farahead (Mr Fredriksen and Mr Trøim) agreed with Mr Bosworth that Mr Bosworth would become entitled to a bonus of US$20m upon the completion of the acquisition. The precise date(s) on which the bonus would be paid to Mr Bosworth was left open, but the parties agreed that the bonus would, so far as practicable, be paid out of the Arcadia London (late Arcadia Group) profits in the subsequent years. The fact that payment of the bonus would take place over the coming years reflected its nature as a retention bonus, i.e. it was designed to retain Mr Bosworth's services for the Arcadia Group.

337. Farahead's acquisition of Arcadia London completed on 16 March 2006. In accordance with the aforesaid agreement, Mr Bosworth became entitled to the US$20m bonus.

338. Following Farahead's acquisition, Mr Fredriksen and Mr Trøim regularly discussed with Mr Bosworth the means by which they would pay Mr Bosworth his retention bonus. Mr Fredriksen and Mr Trøim wanted to ensure that payment (whether structured as one or a succession of payments) was made out of the Arcadia Group's profits/cash without Farahead having to pay over any cash that Arcadia Group had paid to it as a dividend (or otherwise). In particular, over the course 2006 to 2013, Mr Trøim regularly asked Mr Hurley, as the Group CFO, to devise a means of achieving this outcome.

339. Without prejudice to the generality of the foregoing and pending disclosure, Mr Fredriksen and/or Mr Trøim discussed with Mr Bosworth and/or Hurley possible ways of paying Mr Bosworth the US$20m bonus on at least the following occasions:

(1) On 10 June 2008, Mr Fredriksen's secretary Maria Turnbull sent an email on behalf of Mr Fredriksen to Mr Hurley, copying in Mr Fredriksen, Mr Trøim and Mr Bosworth, in respect of a meeting with Mr Fredriksen and Mr Trøim the following day. There were a number of agenda items about the allocation of bonuses, including *"outstanding amount to Pete Bosworth"*. The to-do list annexed to the 11 June 2008 meeting minutes records, among various other *"amounts which need to be paid"*, sums due *"to PB as 06/07 bonus"*. Mr Bosworth's *"06/07 bonus"* included his US$20m retention bonus. The to-do list records that Mr Hurley was instructed to provide information *"as to how above figures [i.e. including the PB bonus for 06/07] can be distributed"*.

> (2) In about late 2008 or early 2009, in the course of their regular meetings, Mr Trøim and Mr Hurley discussed the possibility of using Farahead's share of the Arcadia Lebanon's profits to pay part of the US$20m retention bonus due to Mr Bosworth. One possibility that Mr Trøim and Mr Hurley discussed was that Arcadia Lebanon's profits might be used ostensibly to discharge Mr Bosworth's loan from Fulham Properties, which would, in effect: (i) enable Farahead to extract profits from Arcadia Lebanon in a tax-efficient way; (ii) do so in a manner that did not establish obvious financial links between Farahead and Arcadia Lebanon; and (iii) enable Farahead to pay Mr Bosworth part of his bonus without having to use its own cash. It is noted that paragraph 98 of Mr Adams's first affidavit refers to the potential application of Arcadia Lebanon's profits to the bonus entitlements of Mr Bosworth and Mr Hurley.
>
> (3) On 9 October 2009, Mr Bosworth sent an email to Mr Trøim setting out an agenda for their next meeting included as an item *"P.B. deal"*.
>
> (4) On 28 March 2012, the first item on an agenda for a meeting between Mr Fredriksen and/or Mr Trøim and Mr Bosworth and/or Mr Hurley was *"PB Compensation"*." An email from Mr Trøim to Mr Bosworth two days previously, on 26 March 2012, said *"... When it comes to your bonus we only need outstanding amount before compensation for initial deal"*; to which Mr Bosworth replied (on 27 March) *"to be discussed, awaiting Colin to confirm outstanding amount this afternoon"*.

1048. The Claimants deny that Farahead (including Mr Fredriksen and Mr Trøim) said or suggested to Mr Bosworth in 2005 that he would receive a retention bonus upon Farahead's acquisition of Arcadia London, and deny that any agreement was ever reached to pay a retention bonus. They say the documents do not evidence any such agreement. In any event, the Claimants say any agreement to pay a US$20 million retention bonus was an unenforceable agreement to pay a secret commission (while Mr Bosworth owed duties to Mitsui as well as Arcadia London); that it was forfeited due to Mr Bosworth's dishonest conduct; that (as for the Cushing monies) it is irrecoverable as having been received by virtue of Mr Bosworth's breaches of duty; that it is time barred; and that it is subject to set-offs.

1049. Mr Bosworth in his witness statement said:

> "162. Separately from the [Fulham Properties] loan, I agreed in my early conversations with John – it is hard to remember exactly when, but we talked about it more than once in the early meetings in about 2006 – that I would receive a USD 20 million retention bonus to be paid in due course. I don't think we agreed when it would be paid except that it would not be on signing –

> as I have said, I wanted to show that I was willing to work before I was paid. …"

In his oral evidence, he maintained that *"there was an agreement"*.

1050. Mr Trøim in his witness statement said:

> "I did not agree to pay Mr Bosworth a retention bonus (of US$20 million or otherwise) when Farahead was negotiating to buy Arcadia London. There were some discussions to the effect that Mr Bosworth would be compensated if the acquisition of the Arcadia Group was a success, but there was never any discussion of the quantum of such compensation, nor any solid understanding as to what might trigger such a payment,
>
> I was aware that John agreed to loan Mr Bosworth US$20 million to purchase a house in London. That was not any kind of bonus (or a gift). I had understood that this loan was made personally by John to Mr Bosworth, not through the business."

1051. Mr Trøim gave this oral evidence about the alleged retention bonus and its link with the US$5 million Arcadia Lebanon dividend and what at one stage was believed to be US$15 million available in Arcadia Lebanon:

> "A. "The important thing was to –– I think there was even discussed at this stage –– I think I have in my witness statement that there was an overall agreement with or not an agreement, an understanding that when Pete Bosworth brought this into us, he initiated the deal and he came and there was a discussion between Pete Bosworth, John and me that if this became very, very successful, he would have some kind of extra compensation at some stage. I don't think any specific numbers were mentioned but US$10 million/US$20 million, something like that. I think in connection with this, which was a company he owned, the easiest way would be to say you can take over that company, that is the cash and you don't need it back again because that was the compensation."
>
> "Q. You discussed with Mr Fredriksen how to get the Arcadia Lebanon dividend payment from Lebanon to Farahead; yes?
>
> A. What I said earlier which is in line with what I said two minutes ago, we were considering how to get that profit out from Arcadia Lebanon. One thing, if there was USD15 million there, was to effectively let them take the company which they already owned and they took the 15 million and then we would have that retention bonus which I talked about several times. Another alternative was effectively to forgive that Fulham Properties property loan at some stage if you felt it had been a successful business, to compensate their obligation which was there ––

undocumented from 2005 if this turned out very good, that there should be some extra money for Pete Bosworth."

"And that's right, isn't it? The 5 million was used to pay part of Mr Bosworth's bonus, wasn't it?

A. I have said that several times.

Q. So the answer is yes?

A. No. I have said this was not the final settlement of Mr Bosworth, but it was a kind of intermediate – the balance was 20 million. We reduced the balance to 15 but they didn't kind of give away the possibility that you can still come back and claim for the 20 again."

"Q. You said earlier there was a 20 million retention bonus that had been agreed with Mr Bosworth?

A. No, I never said that. I said there was an amount, there was no specific amount but there was an understanding that it was USD10/USD20 million is the best kind of recollection I have, if this became very successful. Of course, we paid Mr Bosworth serious amounts of money during the whole operation. He received massive amounts of money out of Arcadia because of the profitability."

"Q. And because the 20 million sum bonus reflected the loan amount that Mr Fredriksen had loaned, that is the reason why the 5 million was set off against the Fulham Properties loan; correct?

A. Yes. Those 5 million which came in was used to reduce the loan balance.

Q. Because the 20 million loan reflected the 20 million retention bonus?

A. No, no. That was just -- it was not like the retention bonus was set at exactly like the price you bought the house for. I think the retention bonus was totally discretionary. There was not any kind of specific amount. We discussed some things because we paid the broker a lot to do the deal as well. Then Pete says if this goes well, I would have some extra money on it. And then we talked about an amount that was 10/20 but this 20 has nothing to do -- there was no agreement, there was nothing in there which kind of linked that to that specific amount at the time."

"If you remember what I said three minutes ago, I said that I'm surprised how little focused he was on that retention bonus but he had, contrary to my recollection, outstanding the house loan

> which had been there all the time so he felt probably that was some kind of guarantee, that he is pretty safe."
>
> [In relation to the 26 March 2012 email referred to above]
>
> "Q. There was a deal, wasn't there, the initial deal; yes?
>
> A. I described it in my witness statements. But there was a soft deal. There was never any kind of specific amount or a contract linked to this one.
>
> Q. The initial deal was USD20 million; correct?
>
> A. No, that is what you have assumed and that is not correct. I think it is -- I appreciate if you are not listening to me when I'm saying that, because it is the third time you have put words into my mouth when it comes to the 20 million."
>
> " … when that deal was entered into in 2005, there was a general understanding that if this business became very, very good for us and things were developing properly, that there was a bonus to be paid to Pete Bosworth, I think that is what we talked about yesterday which you then kind of said was 20 million, which was never agreed as the amount, but I think it was in the 10/20 million depending upon the results. I think we have now seen nothing of 64 million or whatever it was but forget that -- I'm standing by and I might have a different view than Fredriksen on this but I am standing by that there was a commitment because he didn't have a finders' fee when we got it originally. Then you showed me yesterday that we had already at that time advanced a host loan but that was a loan; that it was not a gift. So he had – in bringing us the transaction, he had not been paid $1 from that time."

1052. Some of this evidence is unclear, in particular the statement about the use of the US$5 million Arcadia Lebanon dividend to pay a bonus having reduced *"the balance"* from US$20 million to US$15 million. Even if Mr Trøim in that answer had in mind the 'balance' of a retention bonus, as opposed to the balance of the loan, the thrust of his evidence quoted above as a whole is that there was no firm commitment to pay a retention bonus of US$20 million, or of any other particular amount: rather, there was an understanding that if the business went well, then Mr Bosworth would stand to receive something of the order of US$10, 15 or 20 million.

1053. Mr Fredriksen in his witness statement said:

> "I did not agree to pay Mr Bosworth a retention bonus (of US$20 million or otherwise) when Farahead was negotiating to buy Arcadia London. Nor, to my knowledge, did Mr Trøim.
>
> There were some discussions to the effect that Farahead would make sure that Mr Bosworth and his team were appropriately compensated if the acquisition of the Arcadia Group was a success, but we never discussed or agreed any specific payment. My view is that Mr Bosworth was very amply compensated for what the work he did in any event.
>
> As I have explained above, I agreed that Mr Bosworth would have a loan of US$20 million to purchase a house in London. This was not, however, a bonus or gift."

1054. In cross-examination, Mr Fredriksen denied that he agreed with Mr Bosworth a lump sum to incentivise him or that a figure of US$20 million was agreed.

1055. As to the documents relied on:

i) The 10 June 2008 email, sent the day before a Farahead/Arcadia meeting, referred to the *"outstanding amount to Pete Bosworth"*, made no reference to a US$20 million retention bonus and may well have referred simply to ordinary annual bonuses. The *"to-do list"* annexed to minutes of that meeting, held on 11 June 2008, included a task for Mr Hurley to prepare an opening balance sheet as at 1 April 2008 detailing *"[a]mounts which need to be paid"* including *"[t]o PB as 06/07 bonus"* and *"07/08 bonuses"*: again not referring specifically to a retention bonus, or at least one of any particular amount. The minutes themselves referred to a discussion of the 2007/08 annual bonuses:

> "Consolidated profits for 2007/08 indicates total bonus of maximum $3million according to old agreement. However, due to new agreement with WTI trading team and separate agreement with Charlie and Frode and the general staff, Farahead confirms willingness to consider bonus up to $15.8 million to sort things out and get renewed employment contracts under the new scheme."

Another set of minutes, prepared by Mr Ford, recorded discussion under the headings *"Bonus scheme"*, *"Senior management bonus scheme"* and *"Group Profits and bonus provisions for 2007/08"*, without reference to any retention bonus.

ii) The Hannas Note entry for 9 December 2008 stated *"[Mr Trøim] - $15m [Arcadia Lebanon] dividend will be used to reduce PB loan from Fulham"*. As quoted above, Mr Trøim in cross-examination said about this note:

> "One thing, if there was USD15 million there, was to effectively let them take the company which they already owned and they

> took the 15 million and then we would have that retention bonus which I talked about several times. Another alternative was effectively to forgive that Fulham Properties property loan at some stage if you felt it had been a successful business, to compensate their obligation which was there –– undocumented from 2005 if this turned out very good, that there should be some extra money for Pete Bosworth."

Mr Hannas said the 9 December entry *"made sense if this were a way for a bonus to be paid to Mr Bosworth"*.

iii) The 9 October 2009 email from Mr Bosworth to Mr Trøim, included *"P.B deal"* as an agenda item for their next meeting, but, if that were an allusion to a retention bonus, it was very unspecific.

iv) Item 1 on the agenda for the 28 March 2012 meeting was *"PB compensation"*, which again was unspecific. The accompanying documents for the meeting including, in relation to item 1 (behind tab *"PB"*) a general 2011 Bonus Calculation. The reference in the 26 March 2012 from Mr Trøim to Mr Bosworth to "*compensation for initial deal*" could have been to a retention bonus in connection with Farahead's acquisition of Arcadia London, but even on that basis the exchange is inconclusive as to whether or not any firm binding agreement had been reached and, if so, as to what amount.

v) The Farahead document prepared on 30 June 2013 referred to in § 691 above includes, in one version, two entries under the heading *"Other Payments"* stating:

"25.05.2011 Peter Bosworth 30,000,000"

Arcadia Beirut 15,000,000"

These entries do not obviously connect Mr Bosworth with a payment of 15 million: the two items appear to be separate.

vi) In an 18 March 2013 email, Mr Bosworth asked Mr Trøim and Mr Hurley for an appointment to finalise his outstanding remuneration as of 1 April 2013. He said: *"I am not sure what the understanding is with regard to bringing the Arcadia deal to the table is for the whole period"*: an indication that no binding or certain agreement had been concluded.

1056. The 9 December 2008 Hannas Note entry quoted above, read alongside the phrase *"and they took the 15 million and then we would have that retention bonus"* from Mr Trøim's oral evidence, may indicate that, at a time when Farahead believed there to be US$15 million of cash available in Arcadia Lebanon, Mr Trøim and/or Mr Fredriksen decided to use that money to give Mr Bosworth a bonus of US$15 million (by paying down the Fulham Properties loan). It would not necessarily follow, though, that it had ever been agreed with Mr Bosworth that he would have such an entitlement. If not, then (to state the obvious) if in due course it became apparent that there was not US$15 million

available from Arcadia Lebanon, Farahead would have no obligation to pay Mr Bosworth US$15 million (or any other amount).

1057. I do not accept the suggestion that the agreed bonus amount tallied with the size of the Fulham Properties loan. There is no necessary correlation between the two. Clearly, any bonus up to and including the amount of the loan could conveniently be given by way of loan forgiveness, and in a sense that also meant Mr Bosworth might feel 'safe' (as Mr Trøim put it) that he would in practice be able to secure a retention bonus; but it does not follow that an agreement had been reached to a pay equal to the full amount of the loan.

1058. I would accept Mr Bosworth's general point that, when Farahead acquired Arcadia, it was essential to Farahead's plans for the Arcadia business that Mr Bosworth remain at Arcadia, and that would have been a reason why a retention bonus might have been agreed. However, the question is whether the evidence shows that such a bonus was agreed, and in terms sufficiently certain to be contractually binding. Mr Bosworth points out that the Claimants have not pleaded that any retention bonus understanding was a mere 'agreement to agree'. They have pleaded that no agreement or understand was reached at all. However, it does not follow that, if some form of understanding was reached, then Mr Bosworth's case that it was a binding agreement to pay US$20 million must be accepted.

1059. Though he says he recalls an agreement for a bonus of US$20 million, Mr Bosworth admits that it is hard to remember exactly when it was made, and says he did not think it was agreed when the bonus would be paid (other than that it would not be immediately). There is, in my view, no documentary evidence that lends any clear support to the view that a US$20 million bonus was agreed. Further, if it were to operate as a retention bonus, one might reasonably have expected consensus about when it would fall due: a period agreed between the parties over which the success or otherwise of the business would be assessed. Yet even on Mr Bosworth's pleaded case and evidence, there is no indication as to what that period was. Moreover, even in a group where much was done informally, one might reasonably expect there to have been some documentary record had a contractually binding commitment been made to pay US$20 million at some future point.

1060. All these considerations in my view indicate that there was an understanding, but with no fixed amount or time; and that it was a mere understanding rather than a contractual agreement. This is not in my view a case of an otherwise uncertain but partly performed agreement that the court should strive to uphold (cf *Mamidoil-Jetoil v. Okta Crude* [2001] EWCA Civ. 406 at [69(vi)-(vii)] per Rix LJ). Rather, I think it more likely than not that the parties never made an agreement, intending to create contractual relations, to pay any particular retention bonus or necessarily any such bonus at all. For completeness, I would add that, even if the parties had intended to create legal relations, there is no proper basis on which the court could decide for itself the amount of the bonus. I see no logic in Mr Bosworth's submission that, even if the parties had not agreed on the quantum of the bonus agreement, it was *"at least the amount of the US$15 million Arcadia Beirut dividend"*. I see no coherent basis on which

that figure could be presumed to reflect either the parties' consensus or an objectively-determined 'reasonable sum' for the bonus.

1061. Accordingly, Mr Bosworth has not established this counterclaim.

(3) Bosworth unpaid annual bonuses

1062. Mr Bosworth alleges that for each financial year from 2006-2013, the Claimants agreed to pay and award him a bonus as part of his remuneration, but did not pay all those bonuses.

1063. Mr Bosworth's pleaded case is that, based to documents he has seen, he was awarded bonuses which included US$17.5 million for 2009, US$15 million for 2010, US$8.61 million for 2011 and at least US$3.5 million for 2012; and that in respect of those years (and partly other years) he had received:

i) US$2,701,895 for 2009 plus US$5 million invested in the Cushing project;

ii) US$26,238,694.39 paid in June 2011 *"in respect of outstanding previous bonuses"*; and

iii) US$3.5 million paid on or about 31 July 2012 *"in respect of his 2012 bonus"*.

1064. Mr Bosworth said it was hard to identify the precise sums owed, due to the passage of time and unsatisfactory state of the Claimants' disclosure (albeit the Claimants make the point that it was for Mr Bosworth and Mr Hurley, in charge of Arcadia, to ensure proper records were kept). However, Mr Bosworth relies on a spreadsheet that Mr Francisco sent to Mr Lance in on 4 July 2013 which appears to record individual bonus awards and payments for *"Management and Traders"* from 2006 to 2012, though the bonuses for 2008 are missing.

1065. This spreadsheet indicates that Mr Bosworth was awarded total bonuses of US$64.8 million, of which US$6.059 million remained unpaid. The unpaid amount appears to reflect, or at least coincide with, the sum of US$510,000 unpaid of the 2011 bonus and an unpaid 2012 bonus of US$5,549,000. Mr Bosworth says the spreadsheet is the best contemporaneous evidence as to what the Claimants owed Mr Bosworth, and shows that he is owed at least US$6.059 million.

1066. The Claimants point out, first, that a few weeks before the Francisco spreadsheet of 4 July 2013, Mr Hurley sent an almost identical spreadsheet to Mr Francisco, on which the Francisco spreadsheet appears to be based. Thus, they say, the data is not independent of Mr Hurley. Secondly, no other document has been found showing the US$5.549 million figure for the 2012 bonus, so it is unclear on what basis Mr Hurley inserted it. Thirdly, Mr Hurley in his oral evidence showed some uncertainty about what had and had not in fact been paid, undermining the reliability of the spreadsheets. Fourthly, the fact that the spreadsheets do not record the US$3.5 million that Mr Bosworth pleads he received in respect of his 2012 bonus indicates that they are unreliable. Fifthly,

there is no evidence of Farahead ever in fact awarding bonuses in the amounts shown. Sixthly, Mr Hurley's email of 11 August 2013, quoted earlier, indicates that the only outstanding annual bonus for Mr Bosworth was US$1.8 million in respect of 2013.

1067. This is not an easy issue to resolve. I do not consider that the fact that the spreadsheet appears to have originated with Mr Hurley undermines its probative value. I have rejected the Claimants' allegations of dishonesty against Mr Hurley, and see no compelling reason to believe he would have been inaccurately recording bonus figures in May 2013. Although it is not possible to find separate verification from the disclosed documents as to what amounts were awarded and paid, the spreadsheets are prima facie reliable records of this, particularly in the absence of any evidence from Mr Francisco to contradict them. That in my view remains the case notwithstanding the possibility that the spreadsheets may erroneously fail to record the payment of US$3.5 million in July 2012 (a year earlier) that Mr Bosworth pleads. I do not accept the Claimants' submission that Mr Hurley in his oral evidence was reluctant to accept what Mr Bosworth had been paid, or that that undermined the reliability of the contemporaneous spreadsheet. My impression was that he was simply doing his best to remember. In addition, I do not accept that Mr Bosworth's counterclaim is undermined by Mr Hurley's 11 August 2013 email, which is unclear and in any event appears to be based merely on an assumption. The spreadsheet he created in May 2013 is likely to have been based on a review of underlying records and more reliable than the email.

1068. Further, the Claimants provided no authority to the effect that, even once awarded (pursuant to a discretion to do so), such awards remained a matter of pure discretion as opposed to entitlement.

1069. As to the US$3.5 million payment, Mr Bosworth relied in closing on the facts that (a) the payment voucher does not refer to a bonus, stating only *"Pete Bosoworth [sic] – Trf"*, and (b) Ms Theocharous in her oral evidence said that payment did not include any bonus or consultancy. It is not clear on what basis she was able to confirm that. More broadly, in circumstances where Mr Bosworth has pleaded receipt of that payment against his 2012 bonus, it would be unfair in my view for him now to advance a case on a contrary basis (depriving the Claimants of the opportunity to meet that revised case). Mr Bosworth also says that, if the US$3.5 million payment did relate to his 2012 bonus, then the handwritten note entry referred to in § 702 above (stating *"[Mr Bosworth]/[Mr Hurley] bonus paid from Cyprus (included in Tom's schedules)"*) indicates that the $3.5 million payment had already been taken into account in the Francisco schedule. In effect, that would mean that the 2012 bonus awarded was $3.5 million greater than US$5.549 million. However, the handwritten note is vague as to which bonus it refers to, and I do not think it possible to draw the inference Mr Bosworth invites. I have taken into account Mr Bosworth's point that the Claimants have said in affidavit evidence that from April 2006 to March 2013 they paid Mr Bosworth *"at least US$48 million"* in bonuses, i.e. figure markedly less than the total bonuses due to Mr Bosworth of US$64,804,667 for that period indicated in the spreadsheets. However, the words *"at least"* indicate that the amount paid cannot be assumed to be no more

than US$48 million, so the point does not assist. Mr Bosworth also appeared to suggest that the spreadsheets indicate that the bonus of US$32.5 million awarded for 2009 was not paid or not paid in full. However, I do not consider that that conclusion can be drawn from them. They have an 'unpaid' column to the right of the 2009 bonus column, which is empty.

1070. Conversely, I see no reason to assume that the US$3.5 million was paid in full satisfaction of Mr Bosworth's 2012 bonus entitlement, or even of his 2011 and 2012 bonus entitlements (a possibility which the Claimants moot). There is no evidence of any agreement by Mr Bosworth to accept a lesser sum in this way.

1071. In these circumstances, and subject to any set-off, I consider that the evidence as a whole makes it more likely than not that Mr Bosworth is owed unpaid bonus payments for 2011 of US$510,000 and for 2012 of US$2.049 million, being the spreadsheet figure of US$5.549 million less the US$3.5 million received on 31 July 2012. That makes a total of US$2.559 million. No limitation issue arises in respect of bonuses for those years.

(4) Hurley unpaid bonus

1072. Mr Hurley pleads in his Counterclaim, filed (originally) in October 2021, that:

> "In March 2013, Mr Bosworth resigned as Arcadia Group CEO. At or around this time, Mr Hurley considered resigning as well.
>
> 352. In circumstances in which Farahead was reviewing and reorganising the Arcadia Group operations and management, Mr Trøim sought to persuade Mr Hurley to remain and/or stay as Arcadia Group CFO and work for the Arcadia Group for at least another year in order to help manage the leadership transition. Mr Trøim offered Mr Hurley a US$3m bonus if he would do so. Mr Hurley accepted the offer.
>
> 353. Thus, by an oral agreement in or around March 2013 Mr Trøim (on behalf of Farahead) and Mr Hurley agreed that Farahead (or a Farahead entity at Farahead's direction) would pay Mr Hurley a bonus of US$3m bonus on the basis that Mr Hurley would not resign but agree to continue as Arcadia Group CFO for at least another year.
>
> 354. In accordance with the aforesaid agreement, Mr Hurley did not resign as Arcadia Group CFO, but continued his work in his role as Arcadia Group CFO.
>
> 355. In September 2013, Mr Trøim summoned Mr Hurley to Mr Fredriksen's Sloane Square office. At the meeting, Mr Trøim told Mr Hurley that he was dismissed and he would shortly receive a letter to that effect. Mr Hurley asked for payment of his US$3m bonus (as agreed). In response, Mr Trøim refused, and told Mr Hurley that he would have to sue for it. On or around 26

> September 2013, Farahead (wrongly) terminated Mr Hurley's employment and/or role as Arcadia Group CFO."

1073. The Claimants denied that there was any such agreement. In the alternative, they said it was conditional on Mr Hurley staying for a further year without resigning or being dismissed. The Claimants alleged that Mr Hurley resigned on 26 September 2013, and denied any allegation that Farahead or the Arcadia Group lacked proper and ample grounds for dismissing him. However, no positive case as to such grounds was pleaded, save in the sense that the Claimants:

i) relied on an implied term that if Mr Hurley engaged in dishonest and/or wilful misconduct to the detriment of Farahead or Arcadia London, any such bonus would be forfeited, and said Mr Hurley did engage in such conduct *"by virtue of the matters set out in the RRAPC"* (§ 263); and

ii) contended that Mr Hurley received the alleged bonus by virtue of his breaches of fiduciary duty *"as set out in paragraphs 203-206 above"*. The latter paragraphs rely on the alleged significant and sustained fraud, and the allegation that on the Claimants' case as set out in the RRRRAPC and the Reply, Mr Bosworth and Mr Hurley breached their fiduciary duties. As I have already noted, the pleaded breaches of the fiduciary duty are themselves based on the alleged fraud i.e. the diversion of profits/opportunities by means of insertion of fraudulent entities.

1074. In his witness statement for trial, Mr Hurley said:

> "152. There was a USD 3 million bonus that was agreed with Trøim in April 2013, for me staying on after Pete left. This was in lieu of my participation in the bonus pool, and that regardless of any result, I would get USD 3 million for staying on for another year. My understanding was that this would be paid on or around April 2014, but Trøim fired me, and never paid the bonus. They tried to say that I resigned, which is why they weren't paying it, but that's not true.
>
> 153. I was verbally dismissed in Trøim's office. During the same meeting, I asked him about the USD 3 million bonus, to which Trøim said *"sue me"*. It was clear that it wasn't going to be paid, and it still hasn't been. As with many things, there was nothing in writing."

1075. This evidence put the date of the alleged agreement in April 2013, as compared to *"in or around March 2013"* in the Counterclaim.

1076. Mr Fredriksen in his witness statement said he did not agree to make such a bonus payment, and that nor to his knowledge did Mr Trøim, adding that *"[g]iven that at that time it had become apparent that the Arcadia Group had incurred huge, unauthorised liabilities, offering a bonus to the CFO of the group does not seem to me to be a reasonable decision"*. Mr Trøim in his witness statement said:

> "159 I understand from Grosvenor Law that Mr Hurley alleges that, after Mr Bosworth resigned from the Arcadia Group around February 2013, I agreed that he should be entitled to a US$3 million bonus if he remained in post for a year.
>
> 160 I am not aware of any such agreements, although I do recall that there may have been some general discussions around additional compensation for Mr Hurley given his importance following the departure of Mr Bosworth. Given the passage of time, I do not recall any specific details of these discussions."

1077. In his 5th witness statement (a supplementary witness statement dated 20 December 2023), Mr Hurley said:

> "The $3 million bonus payment referred to at paragraph 158 of Fredriksen 4 … was something that I agreed with Trøim around February 2013 when I agreed to stay on and work under Paul Adams. My understanding was that this was an incentive for me to assist Arcadia in its transition to a new CEO."

1078. The February 2013 date appears to reflect what had been communicated to the Claimants' solicitors prior to Mr Trøim's witness statement, but is two months earlier than the April 2013 referred to in Mr Hurley's main trial witness statement and different from (or at least slightly more specific than) the timeframe given in the Counterclaim. That reflects Mr Hurley's evidence at trial that he could not remember the exact date.

1079. On 19 March 2013 Mr Trøim sent an email to Mr Bosworth, in response to one from Mr Bosworth about his renumeration, expressing concern about the position with Atlantic about which Farahead had asked for *"some fundamental information"*: which might have made him cautious about agreeing a substantial package for Mr Hurley at least until the Atlantic position was fully understood. On 28 March 2013, Mr Adams sent Mr Trøim an email saying *"Just a heads up, Colin is very keen to meet with you to finalise his package"*, suggesting that no agreement had been reached by that date. Mr Trøim replied:

> "I will meet him but I don't like his negotiation tactics particularly with the Atlantic money still not repaid. The responsibility for the bank lines comes back to the shareholders' credibility anyway and if needed, Farahead could be prepared to help"

1080. A later email from Mr Adams, dated 1 September 2013, suggested that Farahead ask Mr Hurley to remain in position until a successor was appointed, *"accepting that he may not be very co-operative during that period but will likely stay as he otherwise forfeits any bonus he is due"*.

1081. Mr Trøim gave this evidence in cross-examination:

> "Q. The discussion was to finalise the package that Mr Hurley was going to get for him to remain in the group; yes?

A. I think this also had -- there were two reasons to keep him there afterwards or to have a kind of relationship with him. Obviously one thing was to sort out this thing which had he set up to a large extent, and also the fact that we had banking lines outstanding which was sizeable which was leveraged against the 300 and we wanted that one to -- the banks indicate not to be too influenced by what was coming on.

Q. So it was important for Mr Hurley to stay in the group to maintain banking confidence in the group; would that be fair?

A. If the chief executive and the chief financial officer goes at the same time, it raises a big question about lines and you would see banks withdrawing the lines and effectively you have to be forced to accelerate out of the position and that would create a lot of problems and that could hurt the kind of collateral which I have talked about several times.

Q. To avoid those sorts of problems, in April 2013 you agreed with Mr Hurley that Farahead would pay him a USD 3 million bonus for Mr Hurley to remain for the following calendar year; yes?

A. I don't remember the amount but I remember there was some discussion about having some retention on him if he stayed on and helped us with this thing. I don't specifically remember the number.

Q. But there was an agreement for him to stay and be compensated?

A. I think the people who dealt with the agreement was Paul Adams but I think generally kind of I think both Mr Fredriksen and I were supportive to the fact that if he stayed on and had value in order to unwind his position and to keep the quietness in the bank, that should be compensated.

Q. It was Mr Adams who agreed on behalf of Farahead?

A. Paul Adams was not Farahead, he was of course Arcadia at that time. But he was then appointed I think at that time as a chief executive to run the business after Pete left if I remember right, or at least he was kind of the man we related to. I don't know who had the physical position but he was the one who then negotiated with Colin on these things.

…

Q. ... Mr Hurley's evidence is that there was a USD3 million bonus agreed with you in April for staying on after Pete left; that's right, isn't it, you agreed that bonus with Mr Hurley?

> A. I don't specifically recollect the USD 3 million amount but I specifically can confirm that there was an agreement that he should have a compensation if he stayed on and this is obviously subject to the fact that he had done a diligent job and there was no fraud in there in the job he had executed to that date."
>
> "As I said, you need to make sure you do kind of what we said from the shareholders that we have no faith in you any longer and we will probably kind of talk to our shareholder representative to get you dismissed, but that is the way it has to act. But I think kind of in general you describe we had no trust in him and from that point, we had a kind of hard part forward. When it comes to the 3 million bonus which I can confirm that there was an understanding of a bonus if he helps us out, we felt that if you discover that people have executed fraud, you are not obliged to pay bonus."
>
> "Q. If the termination was wrong, should never have taken place, then Mr Hurley should have got his bonus, shouldn't he?
>
> A. If he was absolutely clean on that thing, then there was a bonus to be paid according to the agreement we entered into when he continued to work for the group earlier in 13."

1082. I have not found this point easy to resolve. There is no contemporary documentation recording any agreement or understanding about a US$3 million bonus, though I accept Mr Hurley's evidence that in the environment of this particular group much was unwritten and it was not always politic to create a record by sending a message to Mr Fredriksen or Mr Trøim. I also note that Mr Hurley's evidence about the date on which the agreement is said to have been made is unspecific. On the other hand, Mr Trøim was very frank in saying that there was *"an agreement"* made in early 2013 to pay a bonus. Although it is possible that an agreement was made without it being intended to be legally binding, on balance I think it more likely that it was intended to be binding, given that it was the premise for Mr Hurley staying with the group for another year. Mr Hurley has been consistent in saying that the agreed amount was US$3 million; and Mr Trøim, while saying he did not recall the amount, did not suggest that that figure was wrong or unlikely to be correct. With some hesitation, I have concluded that Mr Trøim did agree, on behalf of Farahead, that Mr Hurley would receive a US$3 million bonus provided he remained for another year.

1083. Mr Hurley did not remain for another year, but that was because he was (as I found earlier) dismissed on 26 September 2013. I reject the Claimants' case that they were entitled to dismiss him for the dishonesty and/or breach of fiduciary duty as alleged, for the reasons given elsewhere in this judgment. The Claimants also sought to contend at trial that they were entitled to dismiss him for gross misconduct in relation to the Atlantic, Capital and Equinox transactions. However, there is no pleaded case of gross misconduct in relation

to those matters, and the Claimants are not entitled now to seek to advance any such defence. In any event, I have found that no misconduct occurred in relation to those transactions. The Claimants are not entitled to rely on their own wrongful conduct in terminating Mr Hurley's employment to deny Mr Hurley his bonus entitlement; and indeed Mr Trøim accepted in cross-examination that if Mr Hurley was not involved in the alleged fraud, then *"it wouldn't have been any reason to fire him"* and that he would be entitled to the bonus.

1084. I therefore conclude that Mr Hurley is entitled to the agreed US$3 million bonus, plus interest.

(5) Set-off against Mr Bosworth entitlements

1085. The Claimants in their Defence to Counterclaim state that they are entitled to set off, in law or in equity, against any amounts due to Mr Bosworth *"any amounts he owed to any of the Claimants when he resigned"*; and that they *"may in due course choose to exercise their right to set off such amounts"*. Paragraph 253.2 states:

> "Between at least July 2005 and February 2009, Mr Bosworth used Arcadia London to pay for an array of personal expenses totalling US$2,260,753.55, which are particularised in Annex E below and include: (i) purchases at retail shops, interior and landscape designers, an art gallery, a bookseller specialised in rare and antique books, a car dealership; (ii) transfers of funds to a real estate agency in Verbier, where Mr Bosworth used to have a property; and (iii) multiple payments to Mr Bosworth's then wife and for the restaurant she ran at the time (in which Mr Bosworth had a 50% interest)."

1086. Annex E contains a list of 21 payments dated from 8 July 2005 to 25 February 2009 compiled using a spreadsheet entitled *"Arcadia Petroleum Management Accounts Bonus Provision Utilisation as at 31 March 2007 (RE: March 2006)"*. The Claimants add that it appears that Mr Bosworth might have repaid Arcadia London GBP 200,000, equivalent to US$368,540.00, on 4 July 2006, but that they are not aware of any further repayments.

1087. The Claimants did not call any oral evidence in support of their entitlement to these sums, but put Annex E to Mr Bosworth in cross-examination:

> "Q. And you didn't refer to any of these points in your witness statement, I think.
>
> A. It's possible I didn't. You would have to look quite frankly, I think at the end of each year to see what was reserved in the accounts.
>
> Q. ... The total is USD2.26 million. And then we give some credit I think for some payments in the following paragraphs. But you haven't taken issue with that table?

> A. I can't comment. I can comment that the amounts were drawn down by me, but what I can't comment on is at the end of each year, these would not have been rolled over from an accounting perspective. I'm not an accountant but normally those things wouldn't be. So they may already have been applied. "

1088. The electronic version of the bonus utilisation spreadsheet shows the first 8 of the 21 items and a (redacted) hard copy version shows the first 18 items.

1089. However, the Claimants have not established that the sums in question remain unpaid. Aside from the specific repayment mentioned above, which is shown on the electronic spreadsheet as a *"receipt into Barclays"*, the spreadsheet as a whole is entitled *"bonus provision utilisation"*. It may well be, therefore, as Mr Bosworth pointed out in his evidence quoted above, that the remaining sums have been applied against what would otherwise be his bonus entitlement. There is no evidence from the Claimants about that, or, hence, to demonstrate that there represent debts still due from Mr Bosworth to Arcadia. I therefore do not consider them to have established an entitlement to set these amounts off against the sums I have held them liable to pay Mr Bosworth. It is therefore unnecessary to consider the limitation point which Mr Bosworth raised in relation to the set-off argument.

(6) Interest

1090. Mr Bosworth's and Mr Hurley's counterclaims are for sums in US dollars. They claim interest pursuant to section 35A of Senior Courts Act 1981. The default interest rate for US$ awards in the Commercial Court is US Prime: *Delivery Hero v. Mastercard Asia* [2023] EWHC 1827 (Comm) at [48]-[50]. Mr Bosworth and Mr Hurley submit that the appropriate rate should be US Prime plus 1%. Mr Bosworth says interest should run for the Cushing bonus from 2 August 2012, and for the other bonus claims from 31 March 2013. Mr Hurley seeks interest from 30 April 2014. I am inclined to think they are correct in these submissions, but will deal with interest as a consequential matter and hear further submissions as appropriate.

(N) CONCLUSIONS

1091. For the reasons set out in this judgment, the Claimants' claims fail. Mr Bosworth's counterclaims succeed in part. Mr Hurley's counterclaim succeeds.

1092. I am grateful to all counsel for their written and oral submissions. I wish to record particularly that, in addition to written submissions, significant parts of the cross-examination and oral submissions were conducted by junior counsel, in each case with notable skill.

ANNEX – THE APPLICATION TO AMEND

Introduction

1. Shortly before the Pre-Trial Review (PTR) on 12 March 2024, nine years after commencing this claim and little more than two months before the start of the trial, the Claimants applied for permission to advance a proposed "*Alternative Claim*". The proposed claim, set out in four paragraphs of a draft Re-Re-Re-Re-Amended Particulars of Claim, was said to be based on an agreement alleged in Mr Bosworth's and Mr Hurley's own pleaded case as set out in §§ 205 and 206 of their Defence and Counterclaim dated 15 October 2021 (but denied by the Claimants).

2. The parties agreed, in advance of the PTR, that the amendment should be permitted "*subject to all questions as to whether the claim is arguable and whether CPR r.17.4 applies to it*" being reserved to the trial judge. (Mr Bosworth/Mr Hurley point out that that reflected the court's approach in *Libyan Investment Authority v. King* [2020] EWCA Civ 169 at [22] per Nugee LJ and *IBM United Kingdom v. LZLABS GmbH* [2023] EWHC 3015.) The sealed consent order following the PTR for some reason did not reflect the reservation as to arguability, but no point was taken on that and the arguments before me proceeded on the basis that arguability remained a pre-condition to the amendment being (ultimately) allowed.

3. The PTR order provided for the amended claim to be served within 7 days of the PTR, i.e. by 19 March 2024. Mr Bosworth and Mr Hurley were given permission to make *"consequential amendments as so advised to their respective Defences",* to be filed and served by 26 March 2024. The Claimants were given permission to make *"consequential amendments as so advised to their Replies"* within 7 days of the date of service of any such Amended Defence.

4. The Re-Re-Re-Re-Amended Particulars of Claim were formally served on 20 March 2024, and on 26 March 2024 Mr Bosworth and Mr Hurley served an Amended Defence responding in new §§ 360A to 360I to the Claimants' alternative claim.

5. 13 days later, on 8 April 2024, the Claimants served an Amended Reply containing in the region of twenty pages of amendments, including numerous new positive allegations of payments of funds other than in the Arcadia Group's interests and/or for Mr Bosworth/Mr Hurley's own benefit, false accounting and other intentional wrongdoing.

6. Matters came to a head during trial. The parties served written submissions on 28 May 2024 (Defendants), 30 May 2024 (Claimants) and 31 May 2024 (Defendants in reply) on the topic of the amendments and related issues concerning the scope of cross-examination. I heard oral submissions on 4 and 5 June 2024. On 6 June 2024, as envisaged at the end of the hearing the

preceding day, I provided written rulings, with reasons to follow at a later stage. The rulings were as follows:

> "1. Farahead's proposed alternative claim, set out in RRRRAPoC §§ 81A to 81D, is not arguable, based on the paragraphs of the Defence on which it is premised, nor (if relevant) on the evidence. Permission to amend is refused and the conditional permission granted at the PTR is withdrawn. Alternatively, the alternative claim must be struck out.
>
> 2. In any event, the proposed alternative claim falls within CPR 17.4, it being (at least) reasonably arguable (even after considering the Claimants' contention in Amended Reply § 200A.2 that section 32(1)(a) and/or (b) of the Limitation Act 1980 applies) that the proposed alternative claim is brought after the end of an applicable limitation period. The proposed alternative claim would add a new claim that does not arise out of the same facts or substantially the same facts as are already in issue on a claim in respect of which Farahead has already claimed a remedy in the proceedings. Accordingly, the amendment to plead the alternative claim cannot be permitted. That constitutes a further ground on which permission to amend must be refused and the conditional consent granted at the PTR must be withdrawn, alternatively the alternative claim must be struck out.
>
> 3. It follows that the basis on which permission was granted to make consequential amendments to the Defence, and in due course to the Reply, falls away. Permission to make both those sets of amendments is accordingly also refused, and the conditional permission granted at the PTR for them is withdrawn. Alternatively, both sets of amendments must be struck out.
>
> 4. I would in any event have concluded that the amendments to the Reply (apart from §§ 182A, 182B, the first sentence of § 182C, § 182C.3 and §200A) were not consequential on the amendments made to the Defence consequentially upon Farahead's alternative claim, and were therefore made without permission.
>
> 5. I refuse the Claimants' applications, made to me, for permission to amend.
>
> 6. The Claimants are not entitled to cross-examine the Defendants or their witnesses on the basis of unpleaded allegations of dishonesty or other intentional wrongdoing (including such allegations for which there is no subsisting plea pursuant to rulings 1-5 above), save to the extent that the court may in its discretion permit such cross-examination on matters going purely to credit and not to any of the issues in the case.

> 7. Pursuant to 6 above, the Claimants are not entitled to cross-examine on the basis that any of the Defendants dishonestly or deliberately wrongfully obtained/exercised the opportunity to select retrospectively the pricing basis for crude oil trading transactions. More generally, consistently with the marker laid down by Bryan J at the CMC, the Claimants are not entitled to cross-examine on the basis of any unpleaded case on oil trading practice, nor any unpleaded objection to the terms of any of the 144 Transactions.
>
> 8. Nothing in trial to date has precluded the Defendants from seeking, or the court from making, rulings on the above matters at this stage of the trial."

This Annex sets out my reasons for those rulings.

Key procedural stages

7. By way of context, I begin by mentioning the dates of some key procedural stages in this case.

8. The Particulars of Claim were served in February 2015.

9. Mr Kelbrick and Attock Mauritius served their Defences in November 2015. Mr Bosworth and Mr Hurley challenged the jurisdiction. The jurisdiction challenges took a long time to resolve, including hearings in the Supreme Court and the Court of Justice of the EU.

10. Thereafter, Mr Bosworth and Mr Hurley's Defence and Counterclaim was served on 15 October 2021.

11. The Claimants served their Reply to Mr Bosworth and Mr Hurley's Defence and Counterclaim in April 2022.

12. At the CMC on 28 October 2022, Bryan J directed the Claimants to serve a further statement of case, setting out their case on the 144 Transactions. That document was served on 19 December 2022.

13. Extended disclosure was given on 30 June 2023, and trial witness statements were served in October/November 2023.

14. Mr Abbey's report on forensic accounting was served on 22 December 2023.

15. The Claimants put forward their proposed alternative claim in correspondence on 7 February 2024.

16. Mr Stern's report on forensic accounting was served on 8 March 2024.

17. As noted above, the PTR took place on 12 March 2024. Thereafter, the Claimants' Re-Re-Re-Re-Amended Particulars of Claim were served on 20 March, Mr Bosworth and Mr Hurley's Amended Defence on 26 March 2024 and the Claimants' Amended Reply on 8 April 2024.

18. The Claimants' written opening was served on 24 April 2024, and that of Mr Bosworth and Mr Hurley on 29 April 2024. The latter document highlighted Mr Bosworth's and Mr Hurley's objection to the Claimants' alternative claim and to the amendments to their Reply. It submitted that the alternative claim was not arguable, both as to its substance and because it was time barred. As to the Reply amendments, Mr Bosworth and Mr Hurley stated that those made a host of new allegations that could not properly form part of a reply pleading, and were not consequential on their own case or evidence. Mr Bosworth and Mr Hurley further noted that the Claimants' written opening made *"a host of allegations that do not appear in the RRRRAPOC or the unamended version of the Reply"*, and recorded that they *"object in the strongest terms to the Cs' attempt to use their written opening to make new serious unpleaded allegations or to shift their case from its pleaded basis"*.

19. The trial started on 7 May 2024. During the oral openings, I asked how the parties envisaged the dispute about the proposed amendments should be resolved. Leading counsel for Mr Bosworth and Mr Hurley said:

> "My Lord, we haven't discussed it. The position is what has happened is, as your Lordship knows, these amendments were not served in draft at all. We haven't had a time for proper disclosure [or] the witness evidence. I accept of course that there is material in the bundle that goes to them and so to that extent, my learned friend may wish to put questions.
>
> I suggest that we deal with that in closing, frankly. I am going to make a strong objection to an attempt by the claimants to allege dishonesty in respect of particular invoices which have not been alleged before. It's not appropriate in a reply to say an invoice is not [genuine] or to accuse people of very serious allegations of dishonesty. That should be in the particulars of claim, not the reply. But, my Lord, I need to be pragmatic, we need to get on with the witnesses. My view is we should deal with it ultimately in closing; we will have a much better idea of where the trial is at that point, but I will be objecting to this attempt by the claimants to bring in these serious allegations at this late stage after the PTR. It's not appropriate, my Lord."

20. This exchange took place with Leading Counsel for the Claimants:

> "MR HAYDON: Look, I agree with my learned friend that we should be proceeding to witnesses. Obviously we have very different ideas about the amendments and whether they are permitted within the existing order or whether they are consequential etc. But if you are content, my Lord.
>
> MR JUSTICE HENSHAW: It will be, frankly, much easier for me to deal with it at that stage than trying to do it now.
>
> MR HAYDON: You will have a much better idea of the case as a whole.

MR JUSTICE HENSHAW: Yes. Thank you very much."

21. However, as the evidence proceeded, it became clear that it was necessary to grasp the nettle and deal with the disputed questions about the alternative claim and the Reply amendments. One factor in that context was that the Claimants continued to provide new disclosure to Mr Bosworth and Mr Hurley during the course of the trial. There had been, counsel for Mr Bosworth and Mr Hurley informed me, eight batches of such new disclosure, including documents relevant to the allegations put forward for the first time in the Amended Reply.

22. The Claimants suggested in their written submission that the exchanges quoted above prevented Mr Bosworth and Mr Hurley from seeking rulings during the trial, and that the matter had to be held over for closings. However, in my view it could not realistically be suggested that the parties or the court were bound by the exchanges above. They reflected the preferred approach of the parties and the court at the stage of oral openings. However, it remained a matter for the court to determine when those issues should be resolved. Further, there would be no unfairness in doing so during the trial rather than only at or after the stage of closings. To the extent that either side might need to adjust its lines of questioning, there was time to do so in the context of a trial listed for some three months. To the contrary, it was likely to be fairer to all concerned to determine the issues before, rather than after, the Claimants began their cross-examination of Mr Bosworth, Mr Hurley and their witnesses.

Arguability of Farahead's alternative claim

23. The alternative claim is set out in RRRRAPOC §§ 81A-D, as follows:

> "81A. Mr Bosworth and Mr Hurley dispute the Claimants' case set out in paragraphs 53-54 above as to Farahead's understanding of the limited purpose to be served by Arcadia Lebanon, contending, in paragraph 205 of their Defence, that Arcadia Lebanon was to conduct higher risk aspects of the Arcadia Group's West African business and in paragraph 206(2) that it was agreed that Farahead would receive at least the proportion of Arcadia Lebanon's trading profits that it received from the net trading profits made by the Arcadia Group (***the "Alleged ArcLeb Agreement"***). The Claimants' case as to these allegations is set out in paragraphs 158 and 159 of their Reply.
>
> 81B. The true profits made by Arcadia Lebanon were wholly concealed from the Claimants until disclosure of its bank statements was made in these proceedings and remain obscure pending an account of the payments made and received by Arcadia Lebanon.
>
> 81C As stated in Section H of the Reply:
>
> (a) it is denied that Mr Bosworth and Mr Hurley have either paid, or procured Arcadia Lebanon to pay, any "dividend"

> payments or shares of profit to Farahead or to third parties at Farahead's direction; and
>
> (b) it is denied that payments made by Arcadia Lebanon to third parties were made for the benefit of the Arcadia Group and/or at Farahead's direction.
>
> 81D If (which is denied, in paragraphs 107, 149, 158 of the Reply inter alia) the Alleged ArcLeb Agreement was made, then:
>
> (a) on Mr Bosworth and Mr Hurley's own case, Farahead is entitled to 70% of all of Arcadia Lebanon's trading profits made before around 2009 and 65% of Arcadia Lebanon's profits made thereafter;
>
> (b) Mr Bosworth and Mr Hurley are in breach of contract for failing to pay Farahead the sums it was and is entitled to receive; and
>
> (c) Farahead is entitled to payment of the sums due or, alternatively, damages to be assessed for breach of the Alleged ArcLeb Agreement. Farahead is unable presently to particularise the amount to which it is entitled pending Mr Bosworth and Mr Hurley's account of payments made and received by Arcadia Lebanon."

24. The alternative claim is thus for breach of an alleged contractual agreement between Farahead and Mr Bosworth/Mr Hurley "*that Farahead would receive at least the proportion of Arcadia Lebanon's trading profits that it received from the net trading profits made by the Arcadia Group (the "Alleged ArcLeb Agreement").*

25. The alternative claim is not based on any aspect of the Claimants' primary case or any of the Claimants' written or oral witness evidence (which has now, i.e. by the time of my rulings, closed). The Claimants' case is that there was no such agreement; and none of the Claimants' evidence supports the making of any such agreement.

26. The Claimants' existing case does refer to a bonus pot agreement in relation to Arcadia London, namely an agreement between Farahead and Mr Bosworth/Mr Hurley that Mr Bosworth/Mr Hurley would be entitled to a 'bonus pot' of 30% of the net profit on all trades conducted by Arcadia London, to be allocated by them among the trading team and other staff at Arcadia London (Particulars of Claim § 48). It is also pleaded that that bonus pot was later increased to 35% (Particulars of Claim § 58). Even in relation to Arcadia London, however, there is no allegation of any contract by which Mr Bosworth and Mr Hurley personally agreed to procure that Farahead would receive (presumably by way of dividend) at least 70%, or later 65%, of Arcadia London's net profits.

27. The Claimants' existing case also refers to a discussion about the position regarding Arcadia Lebanon, which company the Claimants say Mr Bosworth

and Mr Hurley told them had been established only to carry out one particularly lucrative trading contract (Particulars of Claim § 53). As regards that trading contract, the Claimants allege that "*Mr Bosworth assured Farahead that the Arcadia Group would ultimately receive 70% of the net profits generated by the "particularly lucrative contract" held by Arcadia Lebanon, and as a result that 70% of the net profit would be receive by Farahead in due course*" (Particulars of Claim § 54.1, my emphasis). The plea is thus of an assurance, as distinct from a binding contract between Farahead and Mr Bosworth/Mr Hurley personally.

28. The Claimants' new alternative case is, by its terms (see quoted § 81A above), said to be wholly based on Mr Bosworth and Mr Hurley's case as set out in §§ 205 and 206(2) of their Defence, which the Claimants deny in Reply §§ 158-9. So it is necessary to look carefully at what Mr Bosworth and Mr Hurley do plead in those paragraphs.

29. I look first at how Mr Bosworth and Mr Hurley deal with the Arcadia London bonus pot arrangement.

30. In Defence § 197(1), Mr Bosworth and Mr Hurley state that it was agreed between Mr Fredriksen/Mr Trøim and Mr Bosworth/Mr Hurley that 30% of Arcadia London's net trading profit could be retained by Arcadia London as a bonus pot, and a further smaller amount for non-trader staff. The Defence adds that "*The remaining net trading profit, generally slightly less than 70%, was to be retained for the ultimate benefit of Farahead*", and was generally paid to Farahead but sometimes reinvested in the Claimants' operations.

31. The essence of that plea is that Mr Fredriksen and Mr Trøim, on behalf of the Farahead group, agreed that Arcadia London (of which Mr Bosworth and Mr Hurley were the CEO and CFO respectively) could use 30% or so of its net profits to pay bonuses. There is no plea of any promise by Mr Bosworth and Mr Hurley personally to procure that Arcadia London would pay any particular amount to Farahead: indeed, the plea is inconsistent with any such notion.

32. In Defence § 205, Mr Bosworth and Mr Hurley plead that in or around 2006 (i.e. shortly after his group bought the Arcadia Group), Mr Fredriksen instructed Mr Bosworth to use Arcadia Lebanon for particular trading purposes and to move Arcadia London's dealings with GEPetrol and associated service providers to Arcadia Lebanon and establish sleeving arrangements. In Defence § 206, they then plead:

> "Mr Fredriksen and Mr Trøim repeated the instructions in paragraph 205 during the course of further meetings with Mr Bosworth and Mr Hurley. During the course of those discussions:
>
> (1) Mr Fredriksen and Mr Trøim did not want Mr Bosworth and Mr Hurley to receive a share of Arcadia Lebanon's net trading profits which was greater than the share of the Arcadia Group's net trading profits given to the Arcadia Group traders under the Arcadia Group profit share/bonus arrangements with Farahead.

> As to those arrangements, in 2006 the Arcadia Group traders were allocated 30% of the Arcadia Group's net trading profits (from 2009 at the latest it was 35%). After a much smaller (and variable) bonus provision was made for staff other than traders, the remaining balance (i.e. the majority of the net trading profits) was to Farahead's benefit: see paragraph 197(1) above. Mr Fredriksen and Mr Trøim wanted the same arrangement to apply to Arcadia Lebanon.
>
> (2) Mr Bosworth and Mr Hurley wanted to receive a share of Arcadia Lebanon's net trading profits which was higher than the share which applied in the Farahead/Arcadia Group traders split because of the personal risks which they assumed in holding the Arcadia Lebanon shares and acting as its directors (such as the risks arising from Arcadia Lebanon's involvement in paying AL Service Providers). The precise split was never finally agreed with Mr Fredriksen and Mr Trøim, although it was to be at least the level that applied in the Farahead/Arcadia Group traders split.
>
> (3) The Arcadia Lebanon profit share reflected the fact that Arcadia Lebanon was ultimately under the control and direction of Mr Fredriksen and Mr Trøim via Farahead. Farahead had the power to dictate what happened to the vast majority of Arcadia Lebanon's net trading profits and/or distributable profits, and exercised such power: see paragraph 230 below."

33. As noted above, the Claimants allege in their alternative claim at § 81A, that Defence § 206(2) contains an allegation of an agreement between Farahead and Mr Bosworth/Mr Hurley "*that Farahead would receive at least the proportion of Arcadia Lebanon's trading profits that it received from the net trading profits made by the Arcadia Group (the "Alleged ArcLeb Agreement").* In my view it plainly contains no such allegation.

    i) Defence § 206(2) contains no allegation of a concluded agreement. It states the respective positions the parties took, and that the precise split was never agreed. (Mr Bosworth's witness statement similarly states that the final split was never definitively settled.)

    ii) Insofar as the phrase *"although it was to be at least the level that applied in the Farahead/Arcadia Group traders split"* might be thought to allege some kind of agreed fallback position, it does not support the Claimants' allegation. It suggests that the bonus pot was to be *"at least the level"* that applied in the Farahead/Arcadia Group traders split i.e. at least 30/35%. That is the opposite way round from the way the Claimants seek to put the matter now. On Mr Bosworth's/Mr Hurley's case (both as thus pleaded and in their evidence), Farahead could hope to receive <u>at most</u> 65/70%, not <u>at least</u> 65/70%. It is impossible to see how Farahead could sue on a promise, even if there had been one, that it would receive <u>at most</u> a certain amount.

iii) In any event, Defence § 206(2) does not allege any personal promise (a) by Mr Bosworth/Mr Hurley, or (b) to Farahead, or (c) that Farahead would "*receive*" any particular amount at all.

iv) Nor does § 206(2) allege that any agreement made was, or was intended to be, a contractually binding agreement as between Farahead and Mr Bosworth/Mr Hurley.

v) Defence § 206 also has to be read in conjunction with Defence § 231(3), where Mr Bosworth/Mr Hurley say:

> "As noted in the Claimants' affidavit evidence and in paragraph 54.2 of the RRRRAPOC, Farahead discussed with Mr Bosworth a dividend of between US$10-US$15m from Arcadia Lebanon to Farahead and/or Mr Fredriksen's companies. This discussion took place after the US$5m payment to Farahead in April 2009: see paragraph 230 above. After the payment of that dividend to Farahead, Mr Fredriksen, Mr Trøim, Mr Bosworth and Mr Hurley discussed payments by Arcadia Lebanon as a way of returning Arcadia Lebanon's net profits to the Arcadia Group. In particular, on one occasion in 2009, following a request from Mr Fredriksen and/or Mr Trøim, Mr Bosworth informed Mr Fredriksen and Mr Trøim that Arcadia Lebanon had US$11m in available net profits to distribute. Mr Fredriksen and Mr Trøim agreed that Arcadia Lebanon should continue to use part of its net profits from crude oil trading to pay commissions and other expenses on behalf of the Arcadia Group. This effectively transferred Arcadia Lebanon's net trading profits to the Claimants (because Arcadia Lebanon's profits were used to pay expenses that the Arcadia Group would otherwise have had to pay itself, and Arcadia Lebanon's net profits were thereby reduced)."

That is flatly inconsistent with what the Claimants suggest is alleged in Defence § 206(2), because it contradicts the notion of a promise to remit to Farahead all profits over and above Mr Bosworth/Mr Hurley's profit shares.

vi) It is true that in Defence § 248, Mr Bosworth and Mr Hurley reserve the 'right' to recover all sums owed to them in respect of the Arcadia Lebanon profit share arrangements. That paragraph may imply that they claim a legal entitlement, against one or more of the Claimants, for their bonuses. It does not, however, on any view affect any of points (ii), (iii) or (v) above, nor indeed point (iv) above since Defence § 248 does not allege an agreement with Farahead. Nor do Mr Bosworth's and Mr Hurley's Counterclaims for bonuses rely on any such alleged agreement. They are based on Farahead having in fact agreed or approved specific bonuses for specific purposes or for specific years.

34. Since Defence § 206(2) is the sole basis on which the Claimants' proposed alternative claim rests (and *a fortiori* in circumstances where the claim is

unsupported by any evidence), it follows that the alternative claim is unarguable, even before considering limitation. It should therefore be disallowed.

35. For completeness, I also consider briefly whether the alternative claim is time barred. The framework is conveniently set out in the judgment of the Court of Appeal in *Mulalley v Martlet* [2022] EWCA Civ 32:

> "36. Section 35 of the Limitation Act 1980 provides, at sub-section (1), that "*any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced …on the same date as the original action*." Sub-section (3) provides that a new claim will not be allowed after the expiry of any time limit, save as provided for in sub-section (4) and (5). Sub-section (5) permits the addition of a claim involving a new cause of action "*if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made*."
>
> 37. These provisions are given effect by CPR 17.4, which provides:
>
> "(1) This rule applies where –
>
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under –
>
> (i) the Limitation Act 1980;
>
> (ii) the Foreign Limitation Periods Act 1984; or
>
> (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."
>
> 38. It is conventional to say that four questions need to be answered when considering r.17.4 (see *Ballinger v Mercer Limited* [2014] EWCA Civ 996; [2014] 1 WLR 3597 and *Hyde v Nygate* [2019] EWHC 1516 (Ch)). They are:
>
> i) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?

> ii) Did the proposed amendments seek to add or substitute a new cause of action?
>
> iii) Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim?
>
> iv) Should the Court exercise its discretion to allow the amendment?"

36. As to question (iii) above, the Court of Appeal emphasised that "*substantially the same*" does not mean the same as "*similar*" ([50]). The court noted that the test may be satisfied where a claimant wishes to amend in order to 'reflect' the defendant's defence back at him, for example by alleging that even if an accident happened in the way the defendant alleges, he was nevertheless negligent, and *"does not want to rely on any facts which will not flow naturally from the way [the defendant] sets up the evidential basis of his defence at the trial"* (at [56]-[57], quoting *Goode v Martin* [2001] EWCA Civ 1899; [2002] 1 WLR 1828). However, that principle is not limited to cases where the new claim relies on no new facts or matters at all beyond those pleaded in the defence: there is *"some modest degree of leeway permitted for expansion or elaboration or explanation"* over and above the facts already put in issue by either side (*Mulalley* at [71]-[81]).

37. In the present case it is reasonably arguable that the alternative claim was pleaded after the end of the limitation period. Mr Bosworth/Mr Hurley plead that Arcadia Lebanon last made a net trading profit as at 31 December 2011, so that the claim would have been time barred by 31 December 2017; alternatively, that it became time barred at the latest by 31 December 2019 (six years from when Arcadia Lebanon ceased trading and entered a liquidation-like procedure).

38. In response the Claimants do not dispute that the alternative claim is a new claim, as it clearly is: adding an entirely fresh cause of action based on the breach of a previously unpleaded contract. However, the Claimants plead that:

> "200A.1 The Alternative Claim arises out of the same or substantially the same facts as are already in issue on the Claimants' other claims.
>
> 200A.2 In any event, section 32(1)(a) and/or (b) of the Limitation Act 1980 applies since Mr Bosworth and Mr Hurley:
>
> (a) fraudulently failed to account to Farahead for the trading of Arcadia Lebanon, the money received by it, and the proceeds of its investments; and failed to pay the amounts due to Farahead to it; and/or
>
> (b) deliberately concealed the same from Farahead."

39. Considering the latter plea first, section 32(1) provides that:

> "…where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

40. The alternative claim does not fall within (a) or (c). As to (b), the facts relevant to that claim are the extent of Arcadia Lebanon's profits and the sums actually remitted from Arcadia Lebanon to Farahead. It is at least reasonably arguable that no such facts were concealed. Arcadia Lebanon's oil trading transactions were entered into openly, recorded in its books and records, known to numerous members of staff and reflected in its audited accounts. As counsel for Mr Bosworth/Mr Hurley submitted, the concealment argument could realistically have worked only if Mr Bosworth/Mr Hurley had (as the Claimants allege) deceived them into believing that Arcadia Lebanon was dormant. The evidence that has emerged, including the oral evidence of the Claimants and the Hannas Note, seriously undermine that contention. More broadly, the Hannas Note entries about Arcadia Lebanon's accounts/profits/dividends and Mr Trøim's instruction to stop making enquiries about Arcadia Lebanon, underline the point that there was no concealment of Arcadia Lebanon's profits.

41. Insofar as the Claimants suggested in their submissions that the new material sought to be introduced in (in particular) § 76 of the Amended Reply shows concealment within section 32, I do not agree. Amended Reply § 76 is neither expressed to be, nor in substance comprises, a plea of concealment of wrongdoing such as might defer the commencement of the limitation period. The essential complaints in § 76 are that Mr Bosworth/Mr Hurley have not provided an adequate "*account*" to the Claimants of the money received and expended by Arcadia Lebanon "*and in particular the use to which Arcadia Lebanon's receipts and profits from the 144 transactions were put*", and that Arcadia Lebanon paid out various sums that were not for the benefit of the Arcadia Group. However, it is not suggested (at least overtly) that the matters then complained of had the effect that Arcadia Lebanon's net trading profits were wrongly understated in its audited accounts (which would have been likely to involve Mr Bosworth and Mr Hurley producing false financial statements and misleading the auditors, among others). Rather, the complaint seems to be that the profits were dissipated in various ways. However, the Claimants' ability to advance the alternative claim does not depend on knowledge of such matters: the premise of the claim is that any net trading profits over and above the traders' profit shares was required to be remitted to Farahead. To advance such a claim would in principle merely require one to establish that the profits had not been remitted to Farahead. At the very least, it is reasonably arguable that the limitation period has not been deferred under section 32.

42. Turning to the CPR 17.4(2) test, the additional claim does not in my view arise from the same or substantially the same facts as are already in issue on the existing claim or defence. The Claimants' existing claims do not allege any profit distribution of the kind they now seek to allege in the additional claim. Further, as noted earlier, Mr Bosworth's/Mr Hurley's defence to the Claimants' existing claims, and their Counterclaims, are also not based on any profit distribution agreement, particularly not one which required profits to be remitted to Farahead. On the contrary, a facet of Mr Bosworth's/Mr Hurley's case is that Farahead accepted that Arcadia Lebanon should, after a certain stage, not remit any more money to Farahead. The additional claim would involve substantial new inquiries not arising from or closely connected to the matters already pleaded.

43. For these reasons, I would conclude that the alternative claim, in addition to not being arguable as a matter of substance, has been brought after the expiry of the limitation period and cannot be permitted pursuant to CPR 17.4(2).

44. On the footing that the alternative claim is disallowed, the relevant Defence amendments fall away i.e. Defence §§ 306A to 360I, and the Reply amendments must equally fall away or be disallowed.

Whether Reply amendments are consequential

45. In case I am wrong in the conclusions I reach above, I go on to consider whether the Claimants' amendments to the Reply are consequential to Amended Defence §§ 306A to 360I.

46. I note that the Claimants initially, in correspondence, did not suggest that the amendments were consequential, stating instead that they were put forward in order to address matters raised in the most recent witness statements of Mr Bosworth and Mr Hurley (their 10th and 6th witness statements respectively). Indeed, the length and complexity of the amendments make it appear doubtful that they were produced in response to the amendments to the Defence at all, during the 13-day period between the Amended Defence and the Amended Reply, as opposed to having been planned and prepared in advance as a means of bolstering the Claimants' existing fraud case.

47. In my view the bulk of the Reply amendments are not consequential on the amendments to the Defence.

48. Amended Defence §§ 306A to 360I deny that Defence § 206(2) alleges an agreement of the kind the Claimants suggest, and make the point that the Claimants' alternative claim is in any event not a proper plea of a contract, is positively inconsistent with the Claimants' fraud claim, and in any event is time barred.

49. In the course of denying that the existing Defence alleges an agreement of the kind that the Claimants suggest, Amended Defence § 306D points out that the Claimants ignore Defence § 231(3) – which I have quoted in § 33(v) above – and goes on to say:

> "As set out therein, in 2009 Mr Fredriksen and Mr Trøim agreed that Arcadia Lebanon should continue to use its net profits from crude oil trading to pay commissions and other expenses on behalf of the Arcadia Group, such that Arcadia Lebanon's net trading profits were effectively transferred to the Claimants. For the avoidance of doubt, Mr Bosworth and Mr Hurley did comply with all such profit share arrangements with FH in respect of Arcadia Lebanon. In the premises, the alternative claim does not arise on Mr Bosworth's and Mr Hurley's case as alleged, but advances and pleads a different case from that set out in the Amended Defence (but without giving proper particulars)."

Amended Defence § 306F is to similar effect.

50. There is nothing new in that. It has always been part of Mr Bosworth and Mr Hurley's case, in response to the Claimants' fraud case, that such an agreement (using the term neutrally) was made in 2009. It has also always been part of Mr Bosworth's and Mr Hurley's case that Arcadia Lebanon's money was used to pay Arcadia Group expenses. Defence § 231(3) itself says so, and Defence §§ 232ff and 235-248 set out in some detail ways in which Arcadia Lebanon did so. The Defence amendments simply repeat, in response to the new Farahead claim for breach of contract, some of the same averments as have existed in the Defence since it was served in October 2021.

51. Amended Defence § 306E pleads to the Claimants' new § 81B, which alleges that Arcadia Lebanon's "true profits" *"were wholly concealed from the Claimants until disclosure of its bank statements was made in these proceedings and remain obscure pending an account of the payments made and received by Arcadia Lebanon".* I observe in passing that (a) according to Mr Bosworth's and Mr Hurley's counsel, Arcadia Lebanon's bank statements were provided to the Claimants in October 2019, and (b) any entitlement to an account is contingent on the Claimants establishing breaches of fiduciary duty in the first place, which of course has not yet occurred and may or may not occur in future. The response given in Amended Defence § 306E is that:

> "Paragraph 81B is denied. At Farahead's request, it was provided with Arcadia Lebanon's audited financial statements. Arcadia Lebanon's audited financial statements set out authoritatively Arcadia's Lebanon's profits, in particular any net trading profits that were subject to the profit share arrangement with Farahead. Further, Farahead, including at a minimum Mr Trøim and Mr Hannas, sought and received such information regarding Arcadia Lebanon's profits and available cash as it required from Mr Hurley (at a minimum) and Mr Bosworth. Accordingly, it is denied that any profits were concealed from Farahead."

Again, there is nothing new in that. It has always been Mr Bosworth's and Mr Hurley's case that there was no secret about Arcadia Lebanon or its activities.

52. Amended Defence § 306G states:

> "As to paragraph 81D(a), it is denied that the matters alleged are Mr Bosworth's and Mr Hurley's "own case". Paragraph 306D above is repeated. In the light of the matters pleaded in paragraph 306D, insofar as there was any legally binding agreement as to the profit share (which is denied), in 2009 Farahead varied the Alleged ArcLeb Agreement and/or waived any entitlement to any Arcadia Lebanon trading profits that it otherwise might have had. If Farahead received sums from Arcadia Lebanon in addition to Arcadia Lebanon paying the costs and/or expenses of Arcadia, Farahead would have received a double benefit from Arcadia Lebanon. In such context, from late 2009 Messrs Fredriksen and Trøim instructed Messrs Hannas and Skilton to stop making further enquiries into Arcadia Lebanon. Given the sums that Arcadia Lebanon paid for and/or on behalf of and/or to the benefit of the Arcadia Group, Farahead is not entitled to any further profit share from the Arcadia Lebanon net trading profits."

The Claimants suggest that the last sentence quoted above adds a new positive case that everything Arcadia Lebanon paid away was for the benefit of the Arcadia Group. I do not agree. First, it was already at least implicit in § 231(3) of the Defence that no sums had been paid away for non-Arcadia Group purposes. Secondly, Amended Defence § 306G is in response to § 81D(a) of the alternative claim, which goes only to the question of whether Farahead was in principle entitled to have 70% of all trading profits remitted to it. It does not, and does not need to, go further than denying that entitlement. Thirdly, Amended Reply § 76 cannot realistically be construed as responding to § 306G, to which it makes no reference.

53. The Claimants' Amended Reply responds to Amended Defence §§ 306A-I in §§ 182A-C. Among other things, § 182C denies what is said to be *"[t]he allegation in paragraph 206D that Mr Bosworth and Mr Hurley have complied with all profit share arrangements they allege were made"* and alleges that they *"dishonestly failed to account for the profits made by Arcadia Lebanon and concealed the same"*. The Amended Reply then sets out new allegations of concealment and misappropriation in § 182C.4.

54. Further, Amended Reply § 182C.1 states that no proper account has been provided of the money Arcadia Lebanon received and expended, and that:

> "Paragraph 76 above is repeated".

However, that is not, of course, merely a reference to § 76 of the existing Reply, which formed part of the Claimants' plea of the fraud case, and proceeded mainly by way of non-admission. Original Reply § 76 was the Claimants' response to Defence §§ 235-248, which (as I have mentioned) set out details of the ways in which Arcadia Lebanon made payments of Arcadia Group expenses.

55. Paragraph 76 of the Amended Reply introduces large swathes of new allegations and runs in total for some 26 pages. It includes new allegations:

i) that payments made by Arcadia Lebanon to third party entities (Concerto, MRS, Cakasa and Scantic) were in fact made for Mr Bosworth's/Mr Hurley's benefit (e.g. §§ 76.6A, 76.7(b3), (d9) and (e1) (Concerto), 76.8(c9) (MRS) and § 76.12(b2) (Scantic); or otherwise were not made for the benefit of the Arcadia Group (e.g. § 76.10 relating to Azenith Nigeria and § 76.13 relating to Equinox);

ii) that some such entities were actually beneficially owned by Mr Bosworth/Mr Hurley (e.g. § 76.7(d) (ArcAfrica));

iii) that Mr Bosworth/Mr Hurley made use of bogus invoices and other false accounting (e.g. § 76.7(d6)(ii) (Concerto) and § 76.8(d3) (Cakasa)); and

iv) regarding payments by Mr Kelbrick's company, Proview (§ 76.7(d2) and (d11), § 76.8(c1), § 76.12(b2) and Annex A §§ A.12A to D).

56. The Claimants submit that all these allegations are consequential on Mr Bosworth's and Mr Hurley's response to the Claimants' new alternative claim, because in responding to that claim Mr Bosworth/Mr Hurley "*chose to attempt to buttress their defence to the main claim by reference to the Alternative Claim*". However, the passages of the Amended Defence on which the Claimants rely are those I have already quoted, which merely cross-refer to the existing defence stated in Defence § 231(3). As the Claimants say, in § 39.2 of their written submission, the Defence purports to particularise in § 235-248 "*how D1/2 complied with the agreement alleged*", as the Claimants put it. Yet Defence §§ 235-248 are part of Mr Bosworth and Mr Hurley's existing case, present since October 2021, and are left entirely untouched in the Amended Defence. In my view, the suggestion that all these amendments to the Reply are consequential on the Amended Defence is without merit.

57. The Claimants rely on the approach taken by the Court of Appeal in *Squire v Squire* [1972] Ch 391 (CA). The claimant there alleged a conspiracy. At trial he was given permission to amend to plead a wider, and hence different, conspiracy. The court held that the defendant was entitled to make a consequential amendment to plead *inter alia* limitation, which would be a defence to the whole claim. The court referred at p398F-G to a definition of 'consequential' that "*was, we understand, found acceptable to both sides*", viz that "*it does not permit amendments of the defence which relate only to those allegations or contentions contained in the statement of claim that are not affected by amendments to the latter*". On the facts, the court found that the claimant's amendment pleaded "*a different and wider conspiracy, … Alternatively it alleges as a new and separate conspiracy the addition to the first conspiracy*". The defendant's limitation plea was allowed: it could not be said to "*relate only to allegations or contentions contained in the statement of claim that are not affected by the amendments to the latter"* i.e. to the statement of claim (p400B-C).

58. The Claimants in the present case say their amendments to the Reply are 'consequential' on the amendments to the Defence because they relate both to Mr Bosworth's and Mr Hurley's Defence to the alternative claim and to Mr Bosworth's and Mr Hurley's original defence to the fraud claim. I do not agree.

The only respect in which Mr Bosworth's and Mr Hurley's Amended Defence added to their existing Defence was to deny any agreement to remit to Farahead all profits over and above the traders' bonuses. The amendments to the Reply are in no sense consequential upon that plea. Rather, they amount to (a) a new positive case of breach of an agreement or understanding that Mr Bosworth and Mr Hurley pleaded from the outset and whose existence the Claimants have always denied, and (b) new positive allegations in support of the Claimants' fraud case, despite the fact that the amendments to the Defence made no alteration to Mr Bosworth's and Mr Hurley's defence to the fraud case. The Claimants' amendments are, moreover, not amendments in the nature of a Reply at all: they would require to be set out in the Particulars of Claim (see § 64 below) and would require permission.

59. The Claimants also suggest that the Reply amendments are consequential because they set out the Claimants' answer (viz concealment) to Mr Bosworth's and Mr Hurley's time bar defence to the new alternative claim. I disagree, for the reasons I give in § 41 above.

60. I would add two points. First, on the facts of *Squire*, the claimant's amendment altered, not merely added to, its original case: it recast the nature of the (single) alleged agreement on which the claim was founded. In the present case, Mr Bosworth's and Mr Hurley's Amended Defence leaves their original defence unaffected: it merely repeats it in part. The situation is thus distinguishable from that in *Squire*.

61. Secondly, and in any event, *Squire* is in my view not authority for the proposition that a claimant, who would require permission to make amendments to (say) particulars of breach can bypass that requirement by (a) amending to add a claim relying on the same particulars, (b) to which the defendant responds by repeating his defence to the original particulars of breach, and (c) then pleading the new particulars of breach, without permission, by way of so-called consequential amendments to a Reply. Such amendments could not be regarded as 'consequential' in any ordinary sense of that word, and to allow them without permission would be unjust. The same applies in the present case.

62. *A fortiori*, it cannot be permissible to make, by way of 'consequential' amendments to a Reply, new positive allegations of fraud and other intentional wrongdoing.

63. I therefore conclude that, with a few exceptions, the amendments to the Reply were not consequential on the amendments to the Defence and would be disallowed in any event. The exceptions are § 182A, § 182B, the first sentence of § 182C, § 182C.3 and § 200A.

Unpleaded allegations of dishonesty or other intentional wrongdoing

64. The general rule is that such allegations must be pleaded. CPR 16.4 (1)(e) and PD16 para. 8.2 identify matters that a claimant "*must specifically*" set out in the particulars of claim if the claimant wishes to "*rely on [the matters] in support of the claim*". Those matters include:

> "(1) any allegation of fraud;
>
> (2) the fact of any illegality;
>
> …
>
> (5) notice or knowledge of a fact;
>
> …
>
> (7) details of wilful default;…".

(See also *Three Rivers* [2003] 2 AC 1 at [55]-[56] per Lord Hope, [184]-[186] per Lord Millett.) PD16 § 9.2 makes clear that a Reply must not bring in a new claim.

65. The dictum of Longmore LJ in *Crown Bidco v. Veru Holdings* [2017] EWCA Civ. 67, regarding a "*minor qualification*" to the effect that it "*might*" be sufficient for notice to be given in a witness statement or other document, does not alter the basic rule, which Longmore LJ recited at [56]. In principle, a claimant (particularly in a fraud claim) cannot proceed with new unpleaded contentions, for which permission to amend would not be granted or has been refused, by arguing that sufficient notice has been given by providing the text of the proposed but non-permitted amendment.

66. It follows that the Claimants are not entitled to cross-examine the Defendants or their witnesses on the basis of unpleaded allegations of dishonesty or other intentional wrongdoing (including such allegations for which there is no subsisting plea pursuant to my rulings 1-5 above), save to the extent that the court may in its discretion permit such cross-examination on matters going purely to credit and not to any of the issues in the case. Even in that context, I note the statement of Carr J in *Baturina v. Chistyakov* [2017] EWHC 1049 (Comm) at [126]-[127], cited in Grant and Mumford on *Civil Fraud* (1st edn.) § 34-056, that where a claimant intends to advance specific allegations of dishonesty based on particular facts in cross-examination, such matters should, as a matter of fairness, be pleaded even where the allegations are not part of the claim being made, in order to ensure that the defendant has a proper opportunity to consider the allegations and decide how he may wish to defend himself. Males J in *Grove Park Properties v Royal Bank of Scotland* [2018] EWHC 3521 (Comm) at [53]-[54] explained that principle as applying where a party seeks to advance in submissions and cross-examination a new and unpleaded case of deceit.

67. As a facet of the point made above, the Claimants are not entitled to cross-examine on the basis that any of the Defendants dishonestly or deliberately wrongfully obtained/exercised the opportunity to select retrospectively the pricing basis for crude oil trading transactions. More generally, consistently with the marker laid down by Bryan J at the CMC (referred to in my main judgment at § 757), the Claimants are not entitled to cross-examine on the basis of any unpleaded case on oil trading practice, nor any unpleaded objection to the terms of any of the 144 Transactions.

Permission to amend

68. As a fallback, the Claimants seek permission to amend. They have not produced a draft amendment to their Particulars of Claim, but maintain that the proposed amendments are appropriate for inclusion in an Amended Reply.

69. In considering whether permission should be granted, I have had regard to the authorities cited, including Bryan J's consideration of the principles under CPR 17.3 relating to amendments in the recent case *Steenbok v. Formal Holdings* [2024] EWHC 1160 (Comm), where the judge had to consider at a pre-trial review substantial proposed amendments in a fraud claim.

70. In the present case, the amendments to the Reply (leaving aside the consequential amendments I would have permitted, referred to in § 63 above) involve new allegations of dishonesty and other intentional wrongdoing. They were put forward approximately three weeks before trial, and have already led to numerous batches of new disclosure by the Claimants, seriously disrupting ongoing trial preparation. For the most part, they are based on the Claimants' own documents, together with Arcadia Lebanon bank statements to which the Claimants had access since October 2019. Some of them were even the subject of correspondence (between the Claimants and Mr Main) as long ago as mid 2021. To the (limited) extent to which the new allegations rely on documents provided by the Defendants, disclosure was given in June 2023 i.e. a year ago. I do not accept that the amendments arise from Mr Bosworth's 10th or Mr Hurley's 6th witness statements: aside from one minor exception relating to reimbursement of a bonus payment to a trader, Albert Quek, the proposed amendments neither refer to nor rely on evidence given in those witness statements. No explanation has been provided for the extreme lateness of the amendments. Allowing them would be gravely detrimental to the Defendants, by opening up significant new issues arising from complex transactions that occurred many years ago, at a time when they are in the middle of an already long and complex trial. Insofar as refusing the amendments might cause prejudice to the Claimants, the problem is of their own making. They could have put forward these new allegations much earlier, probably years ago but at the very latest shortly after receiving extended disclosure in June 2023. In all these circumstances, I have no hesitation in refusing permission to amend.

71. I add for completeness that the allegations in question could not properly be made by way of Reply. They contain matters falling within CPR 16.4 (1)(e), quoted earlier, and (whether ostensibly put forward in support of the Claimants' alternative claim or put forward in support of their fraud claim) are positive averments said to support the Claimants' claims. They would accordingly have needed to be set out in Particulars of Claim. That is a further reason why permission to amend should be refused.