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Case No: CL-2019-000118

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

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

Date: 04 June 2025

Before :

THE HON. MR JUSTICE JACOBS

- -

B E T W E E N:

THE PUBLIC INSTITUTION FOR SOCIAL SECURITY

Claimant

-and-

MUNA AL-RAJAAN AL-WAZZAN
(in her capacity as representative of the estate of Mr Fahad Maziad Rajaan Al-Rajaan (deceased)) and others

Defendants

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- -

Stuart Ritchie KC, Ruth Jordan, Nico Leslie, & Christopher Burdin (instructed by Stewarts Law LLP) for the **Claimants**

Joe Smouha KC, James Collins KC, Leonora Sagan, Felix Wardle, & Freddie Onslow (instructed by Willkie Farr & Gallagher LLP) for the **15th – 19 Defendants** (**the Man Defendants)**

Philip Edey KC, James Mather, & Ramyaa Veerabathran (instructed by Fladgate LLP) for the **41st Defendant (the Pensée Foundation)**

Hearing date: 16 May 2025

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Judgment on Amendment and Cross Examination Issues

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Mr Justice Jacobs:

A: PIFSS v Man amendment

Background

1. The Claimant, PIFSS, seeks to make amendments to its claim based on Article 102 (2) of the Swiss Penal Code. The claim under Article 102 (2) was first made some time ago, in an early version of PIFSS' Re-Amended Particulars of Claim (or "RAPOC"). It led to a Request for Further Information ("RFI") served in May 2021, and a response providing Further Information ("FI") in June 2021. The version of the RAPOC which contains PIFSS' currently pleaded claim, for which permission to amend was given early in the trial which commenced in March 2025, is known as the 7RAPOC: the number 7 representing the number of re-amendments. PIFSS' latest amendments are contained in the draft 8RAPOC, and they incorporate proposed amendments to the FI served in June 2021.

2. The 15th – 19th Defendants, against whom the application to amend is made, are various companies in the group of companies referred to (for simplicity in the present trial) as "Man". PIFSS' principal case against Man is that it was knowingly involved in a corrupt scheme whereby secret commissions were paid to the then Director General of PIFSS, Mr Al-Rajaan. The payment of these commissions involved the payment by Man of monies to an intermediary, Mr Mohammad El Ghazzi (the 21st Defendant). Substantial sums were then passed by Mr El Ghazzi to Mr Al-Rajaan. There is a major issue in these proceedings as to whether any relevant individual at Man knew that sums of money were finding their way to Mr Al-Rajaan.

3. PIFSS' case based on Article 102 (2) is by no means the central argument which PIFSS advances in order to establish liability on the part of Man. Its relevance, as Mr Leslie explained when he opened this aspect of the case, is that it is a route to defeat Man's reliance on a limitation defence said to be available under Swiss law. There is a substantial dispute as to whether Swiss law applies to the claims against the various Man companies. PIFSS' primary case is that Kuwaiti law is the governing law.

4. Article 102 (2) is in a criminal statute. However, PIFSS contends that an infringement of this Article can give rise to civil liability, although there are substantial issues between the Swiss law experts as to whether that is correct. Those issues do not arise on the present application.

5. The case on Article 102 was originally advanced in an unparticularised form. It alleged that "those Defendants that are corporate entities will incur criminal liability under Article 102 (2) SPC [Swiss Penal Code] for bribery of a foreign public official … or for money laundering … if the relevant offence was committed in that entity

irrespective of the criminal liability of any individual agent or employee, provided that the entity failed to take all reasonable organisational measures that were required to prevent such an offence…"

6. This led Man to request further information from PIFSS. The relevant question that was asked was as follows:

> "Please identify the reasonable organisational measures each Man entity is said to have failed to take so as to prevent the offence of bribery from being committed."

7. The answer in the FI originally provided by PIFSS was as follows:

> "Pending disclosure, PIFSS's case is that in view of (i) the matters set out at paragraph 157 of the Re-Amended Consolidated Particulars of Claim, which at their lowest evidenced an obvious risk that bribery was taking place, (ii) the strictness of the measures that it would be reasonable to take to prevent bribery of a foreign public official and (iii) the Man Defendants' failure in correspondence at any time to assert that they took such measures, it is to be inferred that such measures were not taken or were not adequate. In Switzerland such measures include:
>
> a. Establishing a code of conduct to be adhered to at all levels of management.
> b. Ensuring that such code of conduct includes definitions of corruption with examples and an explanation of how to proceed in clear cases.
> c. Rules regarding the recruitment of agents and intermediaries.
> d. A point of contact for whistleblowers.
> e. Internal monitoring, investigative and sanctioning bodies.
> f. Positive incentives, based on labour law to comply with the rules.
> g. Continuous evaluation and amendment of the compliance program in line with changing risks and new laws".

8. Following disclosure, on 10 May 2024, PIFSS amended the FI so as to delete the words "Pending disclosure". Mr Smouha KC on behalf of Man makes the fair point that this meant that PIFSS was not advancing a case which was wider than that set out above.

9. In addition to this RFI concerning bribery, a similar request was made in respect of PIFSS' case advanced under Article 102 (2) in relation to money laundering. This elicited a similar response, although the list following "In Switzerland such measures include" was somewhat different:

> "a. Rules for identifying customers including beneficial owners.
> b. Increased diligence in unusual circumstances.
> c. Notification of suspicions to MROS.
> d. Record keeping.
> e. Establishing a compliance function."

10. PIFSS' written and oral opening of its case at trial included, at least as Man perceived it, a significant widening of its bribery case under Article 102 (2). The parties corresponded on this topic, and in due course this led to a proposed amendment to

PIFSS' case as set out in the RFI (to which reference was made in the main body of 8RAPOC). The proposed amendments included the deletion of the Article 102 (2) money laundering case, because (as Mr Leslie explained in his oral submissions on the amendment application) the heart of the Article 102 (2) argument was always about bribery. The payment of bribes was the relevant money-laundering risk, and it was clearer to present the Article 102 case through the sole lens of bribery. Significantly, for present purposes, PIFSS sought to expand the bribery case set out in the RFI by adding the following:

> "4A. The inadequacy of such measures is demonstrated in particular by the following:
>
> a. Prior to 1 July 2011, such notices as the Man Defendants had in place did not require that intermediaries be assessed for bribery risks or that due diligence be performed on the basis of such risks.
> b. Until the review carried out in the context of the Bribery Act, the Man Defendants:
>
> a. did not (i) identify Mr El Ghazzi as posing bribery risks, or (ii) perform due diligence on him that reflected those risks;
> b. allowed Mr El Ghazzi to be accorded special treatment contrary to the normal treatment of intermediaries, despite evidence of potential corruption: paragraphs 157.l.a, 157.l.h and 157.m POC are repeated (the evidence of potential corruption existing for the reasons set out in paragraph 157 POC).
>
> c. The report on Mr El Ghazzi produced ahead of the senior management meeting on 17 July 2012 (the circumstances of which are set out paragraphs 146A-147V POC) was inadequate for the reasons pleaded at paragraph 147N POC."

Mr Burrell's witness statement

11. PIFSS' application to amend its RFI (and thereby the RAPOC) in this respect is opposed by Man. The reasons for its opposition were set out in the 7th witness statement of Mr Peter James Burrell, the partner at Willkie Farr & Gallagher (UK) LLP responsible for the conduct of the case. Paragraph 24 of the witness statement summarises the reasons for Man's opposition. Mr Burrell says that the amendments raise issues which would require: (i) additional disclosure; (ii) factual evidence of witnesses who are not giving evidence and who are no longer in the employment of Man in relation to matters going back nearly 25 years; (iii) factual evidence of witnesses who are giving evidence but on discrete new issues which they have not been asked to address in their statements, nor have they had the opportunity to consider documents relating to the period of the focus of the allegations; and/or (iv) expert evidence (including foreign law evidence) in an area of expertise that is not covered by existing experts and on issues on which PIFSS has never sought permission.

12. Subsequent paragraphs of his witness statement expand upon these various points, and these were relied upon and developed by Mr Smouha in his written and oral

submissions. Amongst the matters covered in Mr Burrell's witness statement were the following.

13. Man's factual and expert evidence was prepared on the basis of PIFSS' pleaded case at the time the evidence was produced. That case was understood to be narrow in scope, focusing on an alleged need to have certain codes of conduct and policies in place. Man took the view that this could properly be responded to through disclosure and its factual witnesses. The new case, as opened, was that prior to the entry into force of the UK Bribery Act in 2011, Man was required from 2003 (or perhaps earlier) to have in place policies which were equivalent to the policies it introduced in 2010-2011 as a result of the Bribery Act, and that as a matter of fact there was a breach of the policies that should have been in place.

14. Focusing on the case set out in the amended RFI, Mr Burrell said that if PIFSS had advanced its new case earlier, it would have changed Man's approach to their factual evidence. The pleaded Article 102 (2) case was carefully considered when Mr Burrell and his team were identifying potentially relevant witnesses, as well as the topics that the witnesses should cover in their statements. It was decided that the case could appropriately be covered by Mr Witschi, who had worked in Man's Swiss Compliance function from 2004, and by Mr Kidney who was Man's Head of Financial Crime Prevention from 2011. Both of them specifically addressed PIFSS' Article 102 complaints by reference to the pleaded complaints. I note that, consistent with the way in which Mr Burrell said that Man understood the RFI case advanced, those statements do indeed address the codes of conduct and policies that Man had in place. Mr Burrell said that these witnesses had not had the opportunity to address the wider complaints.

15. Mr Burrell also said that Man had been deprived of the opportunity to consider whether evidence from other individuals was required to address the new case. In this regard, his focus was on 4A (a) and (b) of the amended RFI. He said, in relation to 4A (b), that Man had lost the opportunity to consider calling witnesses from the compliance side of the business that had first hand-knowledge of Mr El Ghazzi's treatment through this period. Whilst some of these issues had been explored in other contexts, the compliance side angle had not. There were a number of potential witnesses, in particular from London compliance: for instance Mr Philip Wallace, who was Head of Compliance at Man Investments Limited from 2007. As far as concerns 4A (a): whilst it appeared superficially that this was a complaint that could be resolved simply by looking at the terms of Man's policies, that was not the case. Had the case been advanced earlier, Man would have wished to call a witness or witnesses who could give evidence about the steps that Man in fact took to assess and mitigate bribery risks across its intermediary network throughout the period from 1996 – 2011. Mr Burrell accepted that the compliance issues raised by 4A (c) (which dealt with Man's Senior Management Review, following the introduction of the Bribery Act in 2011) had been comprehensively covered by the existing factual evidence.

16. Mr Burrell then addressed the question of expert evidence. He said that if the case had been advanced earlier, Man "would have considered whether to call a Compliance expert who could opine on whether, as a matter of Swiss law and regulatory practice from 2003 through to 2011, an entity in an equivalent position to the relevant Man Defendant was required … to assess intermediaries for "bribery risks" and to perform "due diligence on the basis of such risks"". Contrary to the case as opened, such an

obligation could not simply be read across from the fact that it was required in the UK from 2011 following the introduction of the Bribery Act. The evidence would have needed to cover a number of issues concerning Swiss law and regulation, including whether Man was required to assess intermediaries for bribery risks and, if so, what that required in practice, and whether the requirement varied over the period 2003 to 2011; whether due diligence was required on the basis of such risks, and if so what was required in practice and whether the requirement varied over the period 2003 to 2011; whether such requirements, if they existed, applied to the non-Swiss Man entities; and whether the particular complaints about Mr El Ghazzi's alleged special treatment would constitute a breach of any binding Swiss law or regulation. He said that it was possible that Man would have wished to deploy expert evidence on both Swiss and UK compliance standards, and it is unlikely that an appropriate expert with the requisite knowledge and experience would have the requisite expertise of the laws, regulations and practice in both jurisdictions. Such experts may be, but are not always, lawyers: their experience in practice is usually critical to the validity of their opinions, and so will usually be practitioners rather than academics, with hands on experience of working in or advising institutions and corporates. Whilst Man had adduced expert evidence from Professor Wohlers on Swiss criminal law, he does not provide detailed evidence on the reasonable organisational measures that a Swiss corporate, in an equivalent position to Man, would have been expected to have in place in relation to anti-bribery between 2003 to 2011 for the purposes of Article 102 (2). He also said that Man had lost the opportunity to obtain expert evidence on the Swiss law requirements, if any, for the production of enhanced due diligence reports in 2012, as alleged in 4A (c).

17. Mr Burrell also addressed, specifically, PIFSS' case (as opened) that Man's internal compliance policies, implemented in 2010 – 2011 in consequence of the UK Bribery Act, reflected measures that should have been taken across the period at all times from 1 October 2003 (when the relevant Swiss law was introduced). This was an expert question of Swiss law/regulation. If it had been advanced earlier, Man would have adduced the expert evidence of a compliance expert or experts addressing compliance standards and practice in 2003 – 2011; and in particular whether the measures required in Switzerland from 2003 onwards were the same as the measures required in the UK after the entry into force of the Bribery Act in 2011. Mr Burrell said that he did not have experience of Swiss law/regulation. However, he was involved in advising companies on measures to mitigate their risks of liability for international bribery under English criminal law in the 2003 – 2011 period (and before and thereafter). In his experience, anti-bribery compliance standards and market practice changed significantly during that time, as the relevant legislative framework developed such that the position adopted in 2011 was not comparable to the position in 2003. He said that in the lead up to the introduction of the Bribery Act, many UK businesses undertook a wholesale refurbishment of their anti-bribery compliance policies and procedures; and that these tended to be far more stringent than the ones they replaced, reflecting the changed legislative and regulatory landscape.

18. I have described Mr Burrell's evidence at some length, because it underlay Mr Smouha's submissions as to the prejudice that Man would suffer by reason of the proposed amendments, if permission to amend were granted at the present stage. It seemed to me that this was evidence – from a solicitor with considerable experience of advising companies in the bribery context – which was carefully explained and could

not easily be disregarded. Indeed, I have concluded that I would not have any substantial basis for rejecting, either in whole or in substantial part, the points which Mr Burrell made.

Legal principles relating to applications to amend

19. I was referred to a number of authorities, including the recent discussion of the relevant principles by Bryan J in *Invest Bank PSC v El-Husseini* [2024] EWHC 1235 (Comm).

20. In *ABP Technology Ltd v Voyetra Turtle Beach Inc* [2022] EWCA Civ 594, [23], the Court of Appeal approved the following summary of the principles given by Coulson J in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC), [19]:

> "(a) The lateness by which an amendment is produced is a relative concept … An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.
>
> (b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date … even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason …
>
> (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise … In essence, there must be a good reason for the delay ...
>
> (d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly drawn or focused ….
>
> (e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' … to the disruption of and additional pressure on their lawyers in the run-up to trial …, and the duplication of cost and effort … at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments …
>
> (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered … Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise".

21. Both parties considered that I had sufficiently summarised the basic principles in *PJSC Tatneft v Bogolyubov* [2020] EWHC 623 (Comm) at [15]:

> "I was referred to a number of authorities as to the general principles governing permission to amend, including the decisions in *Quah v Goldman Sachs* [2015] EWHC 759 (Comm) (Carr J) and *CIP Properties v Galliford* [2015] EWHC 1345 (TCC) (Coulson J). Both of these authorities were considered by Stuart-Smith J. in *Vilca v Xstrata* [2017] EWHC 2096 (QB). It is important to note, and I agree with his approach, that if there is no good explanation as to why an amendment is being made at a late stage that is not fatal to an application to amend. It is simply one of the factors which needs to be brought into the balance in deciding where to strike a fair balance. The authorities show that the principal matters to be considered are the timing and lateness of the amendment, the reason that it has not been made earlier, the respective prejudice to the parties, and the clarity of the amendment made."

The parties' arguments

22. On behalf of PIFSS, Mr Leslie submitted that the amendments raised a serious issue to be tried. This was not really disputed by Mr Smouha on behalf of Man. In relation to the key issue of whether Man were prejudiced by the amendments, PIFSS did not accept that prejudice would be faced, whether in relation to the period prior to the Senior Management Review, or in relation to the subsequent (post Bribery Act) period.

23. In relation to the earlier period, he submitted that Professor Wohlers had already addressed the principles of Swiss law in the context of Article 102 (2). As to the possible deployment of expert evidence of Swiss and UK compliance standards, he submitted that it was most unlikely that (if the amendments had been raised earlier) Man would have sought to deploy such evidence. Man had faced a case based on overlapping bribery and money laundering offences, but did not instruct a compliance expert. The matters relied upon were straightforward matters of fact. Man's legal position, in relation to Swiss law, was that there were no relevant standards anyway.

24. As far as concerns factual evidence, PIFSS submitted that given the complete overlap of the bribery and money laundering offences, there should be no additional evidence needed. The money laundering plea included a plea that Man should have conducted "increased due diligence in unusual circumstances". The amended allegation covers the very same evidential issue as to the due diligence performed. PIFSS drew attention to its existing FI, which identified various measures which were applicable in Switzerland: in particular paragraphs 4 (c), (e) and (g) set out above. Mr Witschi had already given evidence as to those policies. The plea as to the special treatment of Mr El Ghazzi cross-referred to existing pleas, and overlapped with them. No new factual enquiry was necessitated.

25. In relation to the subsequent period, when the Senior Management Review took place, there was a simple point: that the compliance report into Mr El Ghazzi was inadequate, because it was not prepared as an objective assessment of the risks of bribery, but rather with the objective of justifying the continued relationship between Mr El Ghazzi and Man. If that simple point were established, then there would inevitably have been a fundamental compliance failure. No expert evidence was required.

26. In his oral submissions, Mr Leslie emphasised that the adequacy of Man's anti-bribery policies was part of the pleaded case, and had been addressed in Man's evidence. None

of the amendments gave rise to a new factual enquiry. He said that compliance expert evidence would not be useful or illuminating in the context of anti-bribery measures. However, if any further expert evidence were required, then there was time for it to be adduced before the expert phase of the case which is due to commence in November. There was a substantial window of 4 months during which evidence could be prepared.

27. On behalf of Man, Mr Smouha submitted that the core issues raised by the amended case were, first, the question of what the required standards were from time to time; and secondly whether there was a failure in respect of those standards.

28. The first question was, he submitted, quintessentially an expert issue. The expert discipline would be a mix of Swiss criminal law, but more centrally it raised questions of Swiss compliance regulatory practice. That was particularly so because it was common ground that there were no laws at any time which actually prescribed what the content of the policies should be. Expert evidence would be required to establish what the standards were.

29. The second issue, as to manner of implementation of its policies from time to time, was a factual question. It required witnesses with knowledge of Man's compliance processes at the relevant time, to explain not only the policies and procedures that were then in writing, but also how they were in practice implemented.

30. Overall, Mr Smouha relied upon the lateness of the amendment, and the absence of any good reason for it. He said that the prejudice to Man was insuperable. Man had been deprived of the opportunity to obtain factual evidence to address the new factual issues. The existing witnesses will not have a proper opportunity to consider and address the new matters. Man had been deprived of the opportunity to address through a compliance expert what would effectively become a negligent compliance case that PIFSS seeks to advance. He also said that Man would be deprived of the opportunity to consider the causation case that PIFSS' new Article 102 case would necessarily raise: i.e. whether any contravention of Article 102 was causative of PIFSS' losses.

Discussion

31. It is obviously accepted by PIFSS that this is a late amendment. The application to amend has been made following the oral openings of PIFSS and Man and was heard on Day 30 of the trial. The evidence of the Man witnesses is to commence immediately after the forthcoming Whitsun vacation, on what will be Day 34 of the trial. In chronological terms, this is a very late amendment – although there is authority that suggests that the concept of a "very late" amendment should be reserved for those cases where the amendment would cause the trial to be adjourned: see *Rolls-Royce Holdings PLC v Goodrich Corporation* [2023] EWHC 1637 (Comm) at [223]. However, chronologically it is very late. If there is any technical difference between "late" and "very late", it is immaterial in the context of the present arguments.

32. It is also accepted by PIFSS that there is no good reason for the delay in raising the point. As in *Rolls Royce*, this amendment arises from further analysis which has been carried out in the lead-up to the trial, where a party is required to focus hard on the precise case that it will be advancing at trial. PIFSS' case based on Article 102 (2) is some way down PIFSS' list of arguments that are being advanced against Man, and

PIFSS' focus on other primary arguments may have led to a reduced focus on the Article 102 (2) case.

33. Mr Smouha advanced a number of arguments as to the adequacy of the particularisation of the new case. I do not need to deal with these arguments in detail, since Mr Smouha accepted that these arguments were not the most significant points which he advanced. I agree with Mr Leslie that these arguments are not of great weight, since much of the amended case is pleaded by reference to existing parts of the 7RAPOC, where no complaint of lack of particularisation is made.

34. The most important question, albeit against the background of a chronologically very late amendment, with no good reason for the delay, is the question of whether Man is prejudiced by the lateness of the amendment.

35. PIFSS accepts that an amendment is indeed required in order to raise the particular points set out in the amended RFI. Whilst it is true, as Mr Leslie pointed out, that the amendment sets out further particularisation of an existing cause of action, I do not consider that this is a significant point in the context of prejudice. The existing RFI sets out the particularised case that Man was required to meet at trial, and the deletion of "Pending disclosure" reinforced the fact that this now was the entirety of PIFSS' pleaded case on this issue. The amended RFI adds further points, which (if permission to amend were granted), Man would have to address. If Man is indeed prejudiced by the lateness of the amendment, it is no answer that this is further particularisation of an existing cause of action.

36. I am persuaded by the points made by Mr Burrell in his witness statement, as developed by Mr Smouha in argument, that Man is indeed prejudiced by the lateness of the amendments. The Article 102 (2) case arises under a Swiss statute, and therefore clearly gives rise to issues of Swiss law. The Article has been addressed in the existing expert evidence, including in some detail in the Joint Expert Memorandum of Professor Pieth (for PIFSS), Professor Wohlers (for Man) and Dr Thomas Weibel (the expert instructed by various other Defendants). It is clear from that joint report that, at the material times, there were no particular Swiss law or regulations or similar provisions which would give precise content to Article 102 (2) in the context of bribery. There is a dispute between the experts as to whether this in itself means that PIFSS' Article 102 (2) case, in relation to bribery, must fail. However, the absence of such regulations or similar provisions does, as it seems to me, open the door to the potential relevance of evidence from experts on the broad questions of "compliance" and Man's practices at the material times, which are described in Mr Burrell's evidence.

37. In my view, the proposed amendments shift and widen the focus of the Article 102 (2) case which PIFSS seeks to advance. In the context of a claim based on (from the court's perspective) a foreign law, where compliance and practices are potentially relevant, a late shift in focus is in my view highly likely to be prejudicial. This amendment arises in the context of a complex area of foreign law and regulation, and it is clear that Man has given careful consideration to the case actually advanced and decided how to address that case. Indeed, their factual evidence addresses the existing RFI in express terms, dealing with each particularised point as to the measures in Switzerland which were alleged by PIFSS, in the existing RFI, to be required. I think that it is important that, in a complex area of the case – where there are issues of Swiss law, the standards

which the Man companies should have met and are alleged to have failed to meet – a party in the position of Man should be able to see, some considerable time prior to the trial itself, the full extent of the case that it is required to meet. Decisions can then be made as to how to address, in factual and expert evidence, that case. I agree with Mr Smouha that Man has been deprived of the opportunity to do this, and that this in itself is prejudicial.

38. I can see that this point might be answered if I was satisfied that Man's factual evidence would be the same as the evidence that it has already served, or that the existing witnesses could satisfactorily deal with the amended case in their evidence (whether by serving further witness statements or responding to questions in cross-examination). However, I am far from satisfied that, if PIFSS' proposed amended case had been advanced in its current form prior to the trial, Man's factual evidence would have been exactly the same as it now is. Nor is it realistic to suppose that, in the short time available before Man's witnesses start to give evidence, it would be possible for Man to prepare further factual evidence to meet the amended case. Indeed, Mr Leslie accepted that, if further factual evidence were indeed potentially required, then the amendments (under 4A (a) and (b)) should not be permitted. Nor indeed is it fair to require Man to confine its factual case to whatever answers the witnesses are able to give in cross-examination.

39. There is then the question of expert evidence. It is true that there is already some expert evidence on Swiss law which concerns Article 102 (2). However, that Swiss law evidence is not specifically focused on the case as now advanced.

40. If all that the amended case required was some further expert evidence from the existing experts on Swiss law, then there would be difficulties in opposing the amendments. Both parties have Swiss law experts, and the present trial is so lengthy that they are not going to give evidence until the autumn. However, I accept Mr Burrell's evidence, and Mr Smouha's argument, that the amended case potentially gives rise to the need for further expert evidence on compliance issues.

41. Mr Leslie points out that Man did not seek to adduce such evidence in relation to PIFSS' existing case, including PIFSS' Article 102 (2) money laundering case which alleged (prior to the deletion of that case) that in Switzerland, the reasonable organisational measures included "increased diligence in unusual circumstances". I do not consider that this is a powerful point. As one would expect, and indeed as Mr Burrell explains, Man was deciding what evidence to call – both factual and expert – in response to an existing case. They considered that that case could be addressed on the basis of factual evidence and disclosure, and without expert evidence. I cannot conclude that the approach would have been the same if Man had been considering PIFSS' amended case. It is in my view reasonably possible that, faced with that case, Man would have sought to adduce expert evidence other than from its Swiss lawyer, who is an academic specialising in criminal law.

42. Furthermore, it is also relevant to consider, in the context of the proposed amendment, whether Man can reasonably say that expert evidence is required, now that PIFSS has explained in more detail the Article 102 (2) case that is being advanced. I have no doubt that Man can indeed, and fairly, say that expert evidence is required. It was certainly not clear on the existing pleading, and indeed is not clearly spelt out in the amended

RFI, that the argument which underlies PIFSS amended case is that set out in paragraph 461 of its written opening submissions, namely:

> "As might be expected, the Man Group instituted a range of internal policies that reflected the applicable laws and regulations in the major jurisdictions in which its principal offices were located, namely England and Switzerland. The core elements of those policies were recorded in a series of internal documents circulated in 2010 and 2011 further to the Man Group's internal reviews in connection with the UK Bribery Act 2010. However, the standards set out therein reflected measures that should have been taken across the period at all times from 1 October 2003. That is because the Bribery Act required organisations to show that they had "adequate procedures" in place to prevent bribery, a standard commensurable with the test for corporate liability under Article 102(2) of the SPC". (My emphasis)

I agree with Mr Burrell that this argument does indeed give rise to issues on which expert evidence would be appropriate, if not essential.

43. Mr Leslie referred, in the course of argument, to some of the passages in the existing expert evidence addressing Swiss law, and I have subsequently read the discussion in the Joint Expert Memorandum. It is not in my view necessary to consider these materials in any detail. The Swiss law is not, in my view, straightforward. It is certainly the case that the existing Swiss law expert evidence, and indeed Man's existing factual evidence, can to a degree be read across as providing evidence which is relevant to the issues raised in the amended FI. That is unsurprising in circumstances where the issues raised by the amendment are on any view related to the issues which arise on the existing pleading. However, it by no means follows that the existing evidence, both factual and legal, covers the entirety of evidence that a party would wish to deploy in relation to the new case. Whatever similarities there may be between the existing and amended case, the fact of the matter is that PIFSS accepts that an amendment is necessary to raise the matters pleaded by the new case. The new case is therefore not covered by the existing pleading. It is therefore unsurprising that a party in the position of Man can fairly say, as Mr Burrell says, that the new case raises issues which would have been addressed differently if that new case had been known at an earlier stage.

44. In relation to expert evidence, as I have indicated, Mr Leslie argued that – if I was persuaded that Man should be given the opportunity to call further expert evidence – there was sufficient time to do so. Whilst I accept that there would be sufficient time to do this, and I recognised that there appears to be no shortage of resources on the Man side to enable this to be done, I do not consider that it would cure the prejudice to which the late amendment gives rise. There is in my view a degree of interaction between expert and factual evidence in the context of the issues, as to compliance and practice, which the amendment raises. Expert evidence may to some extent shape the factual evidence which a party may need to call. The normal position at trial is that a party knows, before calling its factual witnesses, the expert case that it is going to advance, and indeed the other party's expert case. Hence, that party can seek to ensure that its factual evidence covers factual points that one or other expert thinks important. That cannot happen here, on PIFSS' proposal, and I consider that this is prejudicial to Man.

45. Mr Leslie also submitted (and I agree) that it is necessary to look separately at each of the points raised in the amended RFI. He emphasises that 4A (c) does not – as Mr Burrell accepts – raise issues as to which further factual evidence is required. He says that any expert evidence bearing on that particular point can be accommodated later in the trial. I can see that the balancing exercise, required when considering an amendment application, is somewhat different in relation to this particular sub-paragraph. However, ultimately I think that the balance still comes down against permitting the amendment. This is a case in which the expert process has been carefully managed through a series of 10 Case Management Conferences and a Pre-Trial Review. I do not think that it is desirable, looking at the matter overall, to seek to introduce at this very late stage a new area of expert evidence, and a new expert process. Nor do I think that this is fair to Man, who can point to the fact that this amendment has only been necessitated because of PIFSS' late focus on its Article 102 (2) case, and can justifiably claim (in the words of Coulson J) that they are being 'mucked around'. I also remain concerned that no-one can know where this expert case will lead, including what points (if any) would be made by any expert that PIFSS seeks to call, and whether this might in turn lead to the need to recall some of Man's witnesses.

46. Accordingly, I consider that bearing in view of the lateness of the amendment, the absence of a good reason for its lateness, and its prejudicial effect on Man, the amendment to the RFI should not be permitted.

47. This means that PIFSS' Article 102 (2) case, as currently formulated in the 7RAPOC, remains. It also means that the Article 102 (2) case will proceed on the basis of the existing factual and expert evidence. Mr Leslie made the point that the existing Article 102 (2) case does argue that "it is to be inferred that such measures were not taken or were not adequate" in the light of three matters pleaded in the existing paragraph 4 of the FI. He also said that that existing case would still be pursued. There can in my view be no objection to that course.

B: PIFSS v the Pensée Foundation

Background

48. PIFSS alleges, as against the Pensée Foundation, that it was party to a dishonest scheme to channel secret commissions to Mr Al-Rajaan. PIFSS pleads that following the intervention of the Swiss authorities in about May 2012, Mr Al-Rajaan and Mr Antoine Nasrallah (the 7th Defendant) took steps to procure that Mr Al-Rajaan could continue to receive secret commissions from those financial institutions and intermediaries that remained willing to continue to pay them in a way that ensured that such receipt was concealed, in particular from PIFSS. To that end, PIFSS alleges that in around June/July 2013, at Mr Al-Rajaan's request, Mr Nasrallah commissioned Deltec Bank & Trust Limited ("Deltec") to create a Bahamian Foundation pursuant to the Bahamas Foundations Act 2004, namely Pensée; and that Pensée was created to receive secret commissions for the benefit of Mr Al-Rajaan and to conceal Mr Al-Rajaan's receipt and ownership thereof. Detailed particulars of that case are contained in PIFSS' existing pleading, which places reliance on a meeting held in Paris between Mr Al-Rajaan, Mr

Nasrallah and Mr Chalopin of Deltec, and a written agreement which was later signed by all three individuals.

The amendment application

49. Following opening submissions, PIFSS has sought to amend its case in a number of respects. A number of amendments plead, in express terms, that the assets of Pensée are held on trust for Mr Al-Rajaan, and that this was the agreement reached between the parties, or the intention of Mr Al-Rajaan, who was to provide, and did provide, funds to Pensée. Pensée's opposition to the amendments is largely focused on the proposed amendment to Paragraph 281H1, as follows (with proposed additional text underlined):

> "The Pensée Agreement set out or otherwise evidenced the true arrangements between Deltec, Mr Nasrallah and Mr Al-Rajaan, namely that Pensée's assets, when received, would be held by Pensée as bare trustee for Mr Al-Rajaan. Alternatively, if the correct interpretation of the Pensée Agreement is not as stated, that was the intended effect of the arrangements described … above. The Pensée Agreement is relied on by PIFSS as demonstrating that various other documents prepared and/or executed by Mr Chalopin (on behalf of Deltec) Mr Nasrallah and Mr Al-Rajaan were false and that each of them knew that."

50. The nature of the parties' arguments appears from the discussion below.

The amendment application: discussion

51. When late amendments to pleadings are opposed, it is usually on the basis that the amendments give rise to areas of factual or expert enquiry which cannot fairly be undertaken in the time available. That is not the basis for the opposition in the present case. PIFSS' factual case against Pensée is pleaded in considerable detail, and the proposed amendments do not make any significant amendment to that case.

52. The essential factual case is that it was always understood and agreed between the relevant parties (Mr Al-Rajaan, Mr Nasrallah and Mr Chalopin) that Pensée was a device to channel secret commissions to Mr Al-Rajaan, and that Mr Chalopin knew this. A central aspect of the factual case is a meeting which took place in Paris attended by Mr Al-Rajaan, Mr Nasrallah and Mr Chalopin, and this in due course led to a written agreement signed by all three of them. The two living witnesses to that meeting, Mr Nasrallah and Mr Chalopin, will be giving evidence at the trial, Mr Chalopin being the only witness to be called by Pensée. The circumstances of that meeting, and what was discussed and agreed, is a matter which is squarely raised by the existing pleadings, and is an area to which witness evidence has been addressed by Mr Chalopin and Mr Nasrallah. There is nothing in the proposed amendments which materially expands the factual enquiry as to that meeting. Indeed, the proposed amendments do not expand any other aspects of the factual enquiry to which the existing case gives rise.

53. Nor is there anything in the proposed amendments which in my view materially alters the legal conclusions which PIFSS seeks to draw from the facts which have already been pleaded. As Ms Jordan pointed out, citing *Dexia Crediop SPA v Comune di Prato* [2017] EWCA Civ 428, para [201], a pleading is required to state the material facts, not the legal result. In fact, the existing pleading does clearly state the legal results which

PIFSS seek to establish. In particular, as Mr Mather accepted in the course of his submissions, a critical issue as to whether the assets of the Pensée Foundation are beneficially owned by Mr Al-Rajaan (and now his estate) is squarely raised on the existing pleadings. Indeed, Pensée's Defence specifically disputes that Pensée's assets were beneficially owned by anyone other than Pensée itself; a proposition which reflects Pensée's understanding that PIFSS was advancing a case as to the beneficial ownership of Pensée's assets. It is therefore clear from Pensée's Defence that it considered itself to be defending a beneficial interest claim in relation to the Pensée assets.

54. Furthermore, as Ms Jordan submitted, PIFSS' case that Mr Al-Rajaan's intention in setting up Pensée, that the Pensée assets would be held by Pensée on his behalf, is at the core of the existing pleaded case in relation to the Pensée scheme. The case advanced is that the intention of all three participants in the Paris meeting was for Mr Al-Rajaan to retain control and ownership of the funds in Pensée's bank account, whilst concealing that control and ownership. There are many paragraphs of the existing pleading which, in different ways, set out that case. A number of different expressions are used in different contexts to convey the same idea: for example "on behalf of Mr Al-Rajaan"; "for the benefit of Mr Al-Rajaan"; "for the ultimate benefit of Mr Al-Rajaan"; that Mr Al-Rajaan was the "true ultimate beneficial owner of Pensée"; that the "purpose of the creation of Pensée and the Pensée Account was to enable Mr Al-Rajaan to receive unlawful/corrupt payments". Whilst it is true that the words "on trust for" or "bare trustee" are not used, and these words now appear in the proposed amendments, I do not consider that this makes any difference of substance, and would certainly not provide a reason to refuse the proposed amendment.

55. Mr Mather's principal argument was not that there was any difficulty understanding PIFSS' factual case, nor any difficulty understanding the legal conclusions which they sought to reach, but that the legal analysis by which those facts led to that conclusion had not been sufficiently explained. Pensée's written and oral submissions made it clear that they would not oppose an amendment which did no more than add a claim for declaratory relief to the effect that the assets in the Pensée Account were held on trust for Mr Al-Rajaan, and now his estate, provided that this was advanced by reference to the signed "Pensée Agreement" (in other words, the written agreement signed subsequent to the Paris meeting) alone. However, he submitted that any wider amendment, which sought to ground such a declaration on the wider facts which PIFSS had pleaded in its existing pleading, and the further amendments proposed, should be refused. This was because the pleading did not sufficiently explain the legal route and analysis by which those wider facts would lead to the destination, including the declaration as to the existence of a trust, which PIFSS sought to reach. It would, he submitted, be unfair for Pensée only to understand the case advanced in PIFSS' written closing argument. He relied upon authorities which indicated the need for any amendments to be clear, and to enable a party to understand and be able to prepare to meet the amended case.

56. I do not consider that there is any substance in this argument. It is not the function of a pleading to set out a full legal analysis of a party's case. In the present case, the existing pleading, and indeed proposed amended pleading, clearly set out the facts which PIFSS will seek to prove at trial, and the legal conclusions for which PIFSS will argue. I do not consider that PIFSS is required to do anything more. Although Mr Mather sought

to criticise the existing (unamended) pleading as lacking clarity as to the legal case advanced, there has never been an application by Pensée to strike the case out nor to pursue any application for further information.

57. Another related aspect of Mr Mather's argument, developed in his written submissions and to a lesser extent orally, was (in summary) that there was no (or an insufficient) legal basis for PIFSS' reliance on anything other than the written "Pensée Agreement" itself. Pensée thus accepts that it was permissible for PIFSS to rely upon the written document as giving rise to the beneficial interest or trust relationship which it sought to establish. However, he submitted that no case could be advanced that anything other than the written contract mattered. As part of this argument, he submitted that any prior intentions or oral arrangements, relating to the same subject-matter as the written document, would "on the face of it have been superseded by the subsequent written agreements". It was, he submitted, also impermissible to look at the parties' subsequent conduct.

58. Pensée will of course be able to argue, in due course, that the only relevant consideration, in relation to this aspect of PIFSS' claim, is the written agreement itself. However, I consider that there is a substantial argument, with a real prospect of success, that PIFSS can rely upon the arrangements between the parties outside the terms of that written document, in support of its argument that there was a trust. I was referred by Ms Jordan to the decision of the Court of Appeal in *Gill v Thind* [2023] EWCA Civ 1276. The discussion at paragraphs [47] – [60] indicates that where issues arise as to whether there was an oral declaration of trust, the court can consider not only what was said at the time of the alleged declaration, but also the parties' subsequent conduct. Furthermore, even if the present case gave rise only to a contractual analysis (i.e. rather than giving rise to arguments about a trust), there is no difficulty in principle in agreements being made partly orally and partly in writing. The judgment of Lord Hoffmann in *Carmichael v National Power PLC* [1999] 1 WLR 2042, 2049 – 2051 – referred to in *Gill* – contains a valuable discussion of this point. In the context of the present case, bearing in mind as well that the allegation in the present case is that there was an agreement between the parties to conceal the corrupt payment of secret commissions to Mr Al-Rajaan, I see no reason at all why the court's examination of the critical question – namely whether the assets of Pensée were held beneficially by Mr Al-Rajaan – is to be confined simply to the terms of the written document, which was drawn up some time after the Paris meeting itself.

59. I therefore grant permission to amend. The proposed amendment does not materially expand the case. The case to be advanced is clear, and indeed is only marginally different (if different at all) to the case which was already pleaded. There is no difficulty, in my view, in Pensée understanding the case that it has to meet. It has a real prospect of success. All of the arguments advanced by Mr Mather, in opposition to the amendment, are in my view unpersuasive.

The issue as to scope of cross-examination

60. Correspondence between the parties has led to a dispute, between PIFSS and Pensée, as to the scope of permissible cross-examination of Mr Chalopin. In the light of the debate that has developed in correspondence, PIFSS has sought an order as to the

permissible scope of cross-examination. Specifically, PIFSS seeks an order on 4 aspects of the cross-examination that will take place, as follows:

> "2.1 It is open to PIFSS to rely on Hugues Lamotte's knowledge of Mr Al-Rajaan's alleged activities when introducing Mr Al-Rajaan to Deltec and to Mr Chalopin and to cross-examine Mr Chalopin and Mr Nasrallah in relation to their awareness of Mr Lamotte's said knowledge.
>
> 2.2 It is open to PIFSS, in advancing its pleaded case as to how Deltec conducted itself in the creation and operation of Pensée and the Pensée Account, to rely on, and cross-examine Mr Chalopin and Mr Nasrallah in relation to, the knowledge and understanding of other personnel at Deltec as to the true beneficial ownership of the Pensée Account and their involvement in the drafting of the relevant Pensée documents.
>
> 2.3 It is open to PIFSS, in advancing its pleaded case as to the true arrangements, to contend, in submissions and in cross-examination, in relation to documents that appear inconsistent with those arrangements, that they are inconsistent with the true arrangements and/or create a false impression and/or conceal the true arrangements.
>
> 2.4 It is open to PIFSS to challenge Pensée's case that the Pensée Agreement is a legitimate nominee agreement."

61. Before considering the detail of each point, a number of matters are in my view relevant as a matter of background.

62. First, I consider that a judge should be very cautious about giving a hard-edged ruling as to precisely what questions are, and are not, permissible in a cross-examination that will take place in some 2 months, and without hearing the question that is actually asked. A trial, particularly a fraud trial, is not static. The evidence in the case has only just commenced. There will be one very significant witness, Mr Nasrallah, who will be giving evidence for a number of days. His evidence is of considerable importance in relation to the case against Pensée. Indeed, PIFSS' pleaded case, as to the background facts including the Paris meeting, is substantially based on his evidence. He will be cross-examined by counsel for both Pensée and PIFSS. It is not difficult to imagine that the shape of Mr Chalopin's cross-examination will be affected by answers which Mr Nasrallah gives in evidence. Furthermore, Mr Chalopin's cross-examination is anticipated to last 1-2 days, and it will itself be shaped by the answers that he himself gives in cross-examination. The evidence that will emerge is of course unknown at the present stage.

63. That said, I acknowledge the desirability of giving some guidance to the parties so as to avoid, if possible, a lengthy debate in the middle of Mr Chalopin's cross-examination as to what is or is not permissible.

64. Secondly, my essential approach is to permit questions in cross-examination which are directed towards adducing or challenging evidence which is (i) relevant to the pleaded issues, or (ii) relevant to the credibility of the witness being cross-examined. The latter is subject to the principle that answers in cross-examination which go purely to credit

are final. The former encompasses questions which are aimed at testing or challenging evidence which a witness has given in his or her witness statement. Such statements, which are confirmed at the beginning of the witness's testimony, stand as evidence in chief, and questions relating to that evidence are necessarily permissible. There are, of course, limits to the way in which cross-examination proceeds. A judge is entitled to control the cross-examination, for example by disallowing questions which have already been answered, or which a witness cannot reasonably be expected to answer. Counsel have professional duties under the BSB Handbook which are relevant to the way in which cross-examination is conducted.

65. Thirdly, I accept that a party's pleaded case will be relevant to the scope of permissible cross-examination. However, I do not accept the very wide proposition in Pensée's submission – and which lies at the heart of many of its arguments in relation to the present application – that any challenge to a witness on the basis of dishonesty must be based on a pleaded case of dishonesty, subject to it being "permissible to an extent, to explore unpleaded general challenges to credibility in cross-examination". Mr Mather referred to the decision of Carr J (as she then was) in *Baturina v Chistyakov* [2017] EWHC 1049 (Comm) at [126] – [127]. She said: "where it is intended to advance specific matters of dishonesty based on particular facts, such matters should, as a matter of fairness, be pleaded". It is important not to take such statements (which can be found in many cases) out of the context of the particular case, and the particular line of cross-examination that is in issue. I do not accept the proposition that it is only "general challenges to credibility" which can be explored in cross-examination, and in any event that expression (which was used by Carr J as describing what is permissible) involves a considerable degree of imprecision and latitude.

66. The width of permissible cross-examination, in relation to unpleaded issues of dishonesty, is illustrated by the decision of the Court of Appeal in *Fen and others v D'Cruz* [2007] EWCA Civ 319. The central issue in that case was whether a solicitor, Mr Low, had (at a meeting with the Claimants) held out a fraudster (Mr D'Cruz) as being a solicitor and partner in Mr Low's firm. The judge decided that Mr Low had indeed held Mr D'Cruz out. One of the grounds of appeal was that the judge had made "inferential findings of dishonesty, fraud and conspiracy when none of these were pleaded as causes of action". (This argument, for the unsuccessful appellant, was advanced by Ms Sue Carr QC, later Carr J and now the Lady Chief Justice). The Claimants had not pleaded fraud or dishonesty as part of their case. However, as May LJ, who gave the leading judgment, said at [24]:

> "The Claimants did not plead, and did not need to plead fraud, or dishonesty. Their case simply was that Mr Low had held out Mr D'Cruz as a member of the firm. The case was not necessarily that Mr Low was complicit in Mr D'Cruz's fraud or dishonesty. Dishonesty became an issue evidentially because, for instance, Mr Low relied on the longer version of the letter of 18 January 2005 which, on the Claimants' evidence, had to have been put together after the shorter version was written and sent. This was an evidential issue, not a cause of action issue, no different in principle from any case in which one party says that the other party's evidence is untrue and where an honest mistake is not realistic."

67. This case shows that cross-examination of a witness, on the basis that he was dishonest, may well be permissible even though dishonesty has not been pleaded. In that case, an important issue was as to which version of a letter had been sent out by Mr Low to the Claimants: see [12] – [13]. This was the issue that became an "issue evidentially" as described above. The issue was as to the authenticity of a letter sent by Mr Low, and the judge decided in favour of the Claimants' case, even though there was no pleaded case of dishonesty and even though the finding that the letter relied upon by Mr Low was inauthentic necessarily meant that he was dishonest in producing it. The case advanced by the Claimants, and the cross-examination of Mr Low, was not simply a "general challenge" to credibility: it was relevant evidentially, albeit not to the cause of action advanced, and it was permissible for the Claimants to run their case in that way and therefore for the judge to have made the findings that she did.

68. In the light of this decision, I accept Ms Jordan's argument that there is indeed a distinction between an allegation of dishonesty which is part of a claimant's cause of action (which must be expressly pleaded), and an allegation of dishonesty which arises evidentially (which need not be pleaded). Similarly, as May LJ says, one party can always say that another party's evidence on a particular issue, and indeed generally, is untrue. These are not points which need to be pleaded or particularised in advance, and this is the case even if a party is alleging that the witness is being untruthful (and not simply mistaken) in the evidence given.

69. Fourth, and again in relation to dishonesty, a party may decide in a particular case to make an allegation of dishonesty only against a particular individual. In the present case, the case of dishonesty advanced against Pensée is made against Mr Chalopin rather than against other people who worked with Mr Chalopin at Deltec (the Foundation Agent) at the time. (There are also allegations of dishonesty against Mr Al-Rajaan and Mr Nasrallah, and issues arise as to whether any dishonesty on their part can be attributed to Pensée; but that is a different point).

70. However, it does not follow that, in the absence of a case of dishonesty against anyone other than Mr Chalopin, the court must necessarily conclude as a positive fact that everyone else at Deltec was honest. Whether such a finding is or is not appropriate will depend on the evidence called. A party is entitled to be "agnostic" as to whether persons, other than those whom they positively accuse of dishonesty, are indeed dishonest: see the discussion of this and related points by Foxton J in *4 VVV v Spence and others* [2024] EWHC 2434 (Comm) at [635]. As Foxton J there points out, it may be that – as the evidence emerges or the case develops – it is appropriate to give a third party notice of an allegation being made.

71. Fifth, this is a case where a case of dishonesty has been fairly and squarely pleaded against Mr Chalopin, and indeed against Mr Al-Rajaan and Mr Nasrallah in relation to the Pensée scheme. In a case involving the allegations made in the present case, I consider it to be important that counsel for PIFSS should be able, consistent with their professional duties, to ask questions in cross-examination which are directed to the issues in the case, and the credibility of Mr Chalopin and others, without being hamstrung by artificial or complicated restraints on the manner in which cross-examination is carried out. For his part, Mr Chalopin is entitled to have the important aspects of PIFSS' case put to him, and put to him clearly, with an opportunity to answer the points. These factors, in my view, militate strongly against the placing of advance

restrictions on the questions to be asked in cross-examination. Indeed, viewed overall, it seemed to me that Pensée's objections to cross-examination, which PIFSS seeks to counter with the order which they seek, would (if sustained) potentially have the effect of seeking to tie PIFSS' counsel's hands as to the manner of cross-examining Mr Chalopin. I consider that this is most undesirable generally, but in particular in a case such as the present.

The specific issues raised

72. Against this background, I turn to the particular issues which were raised. It seemed to me that, as the argument developed, there was ultimately very little between the parties as to the way in which matters should proceed.

73. *Mr Hugues Lamotte*. There is witness and documentary evidence in the case to the effect that the introduction of Mr Chalopin to Mr Al-Rajaan and Mr Nasrallah was via Mr Hugues Lamotte, who himself worked for Deltec. In particular, Mr Chalopin gives evidence as to his dealings with Mr Lamotte.

74. Ms Jordan confirmed in the course of her submissions that PIFSS made no allegation of dishonesty against Mr Lamotte. She also said that PIFSS did not advance a positive case that Mr Chalopin's alleged knowledge of the scheme to conceal secret commissions was because of the "bridge" to Mr Lamotte. PIFSS' pleaded case is that Mr Chalopin's knowledge was based on what he was told by Mr Al-Rajaan and Mr Nasrallah, or that he worked it out for himself.

75. Given that Mr Chalopin intends to give evidence as to his conversations and dealings with Mr Lamotte, I consider that it is permissible for PIFSS to cross-examine as to those conversations and dealings. The only limitations that, at present, I would place on that cross-examination is that PIFSS cannot positively put to Mr Chalopin: (i) that Mr Lamotte was acting dishonestly; and (ii) that Mr Chalopin was told, by Mr Lamotte, that the purpose of the proposed arrangements with Mr Nasrallah and Mr Al-Rajaan was a scheme to channel secret commissions to Mr Al-Rajaan. These limitations flow from the way in which the case has been pleaded, with no case that Deltec or Pensée knew of the illicit scheme because Mr Lamotte's knowledge is to be attributed to them; and no case that Mr Chalopin knew of the illicit scheme because of what Mr Lamotte expressly told him. I say "at present", because the case may well develop in the light of Mr Nasrallah's and indeed Mr Chalopin's evidence, in which case this area may be revisited.

76. I would also consider it undesirable and inappropriate for Mr Chalopin's cross-examination to be interrupted by objections based upon arguments that the implication of questions put to Mr Chalopin as to his (alleged) dishonesty is that others (e.g. Mr Lamotte, or Deltec personnel) were dishonest as well. If the relevant question is fairly directed to the issue of whether Mr Chalopin was dishonest, then in my view that is likely to be a permissible question. Arguments (along the lines of those discussed by Foxton J in *4VVV*), as to the implications of the absence of an allegation of dishonesty against any individual other than Mr Chalopin, are a matter for closing submissions.

77. As far as concerns cross-examination of Mr Nasrallah, there has been no application to restrict his cross-examination. I do not consider, at present, that it would be appropriate to place restrictions on the way that he can be cross-examined about the Pensée scheme.

78. *Deltec personnel other than Mr Chalopin.* The work of others at Deltec, in particular those working on compliance matters, formed a significant part of the case which was opened by Mr Edey KC on behalf of Pensée. Indeed, Pensée's case is that any knowledge on the part of Mr Chalopin cannot be attributed to Pensée, and that it is only the knowledge of other people (but not any of the participants in the Paris meeting) which could potentially be attributed.

79. Mr Mather accepted that cross-examination of Mr Chalopin could appropriately cover issues such as: the extent to which Mr Chalopin relied upon what others at Deltec were doing in forming his view that there was nothing improper about the arrangements with Mr Al-Rajaan and Mr Nasrallah; and the extent to which others responsible for compliance at Deltec were told about and understood the arrangements including the written Pensée Agreement.

80. Ms Jordan made it clear, in the course of her submissions, that no case of dishonesty is advanced against anyone at Deltec other than Mr Chalopin.

81. Against that background, the only limitation that I would, at present, place on the cross-examination of Mr Chalopin as to the work and involvement of others at Deltec is that PIFSS cannot positively put to Mr Chalopin that others at Deltec were acting dishonestly.

82. *Allegations in relation to the falsity of documents.* PIFSS' case includes an allegation that "various other documents prepared and/or executed by Mr Chalopin (on behalf of Deltec), Mr Nasrallah and Mr Al-Rajaan were false and that each of them knew that". The Particulars of Claim (paragraph 281H1) then identifies a number of documents. In the course of argument, Ms Jordan made it clear that all of the documents created at the inception of the alleged scheme, where falsity was alleged, had been specifically pleaded and that PIFSS was not relying on any others.

83. She said, however, that there might be other documents created at a later stage – she gave as examples wiring instructions, backdated minutes, information provided to regulators – which PIFSS would or might say were produced fraudulently, but these were not part of the scheme at its inception. Ms Jordan submitted that these documents may well be put to Mr Chalopin in cross-examination, and that it was not necessary that each of them should be pleaded in advance. Mr Mather did not submit to the contrary, and indeed indicated that he was not objecting to such cross-examination. I agree. I consider that it cannot be objectionable for PIFSS to cross-examine on documents produced at a later stage, in support of arguments (for example) as to the credibility of Mr Chalopin and the extent to which they reflect the nature of the alleged scheme at the outset.

84. I therefore do not consider it appropriate to place any restrictions on cross-examining, save that (absent an amendment) it would not be appropriate for PIFSS to cross-examine on the basis that documents created at the inception of the scheme were false, save in respect of those documents already identified in the existing pleading.

85. *Any allegation that legitimate nominee arrangements do not, or would not, look like the arrangements in this case.* The objection to cross-examination arises out of a comment made by Mr Norbury KC in the course of his oral opening. Pensée's position, as I understand it from the submissions made by Mr Mather, and having reviewed Mr Edey's opening submissions, is as follows. Pensée's case as to whether the arrangements in issue in the present case were normal or usual does not extend beyond an argument that nominee arrangements, such as those contained in the written Pensée Agreement, are specifically contemplated by the Bahamian Foundations Act section 2. The argument therefore goes no further than saying, in the context of the written Pensée Agreement, that there is nothing surprising about the existence of a nominee arrangement. In the course of his submissions, Mr Mather made it clear that Pensée did not advance a positive case as to the normality of the wider arrangements, whatever they were: i.e. as to the normality of the "whole jigsaw", as opposed to the piece which comprised the written Pensée Agreement.

86. I do not consider it appropriate to prevent PIFSS from cross-examining, or restrict the manner of cross-examination, on the question of whether or not the overall arrangements in this case, as PIFSS allege them to be, or indeed any specific aspect of the arrangements, were usual or typical. PIFSS' case is that the overall arrangements put in place were a dishonest scheme to channel corrupt payments to Pensée for the benefit of Mr Al-Rajaan, with false documents being created as part of that scheme. It is inherent in that case that the arrangements here were not usual or typical, and I did not understand Mr Norbury KC's comment in opening to be making any different point. I also do not consider it objectionable for there to be cross-examination on the basis that the arrangements in the present case were not consistent with Mr Nasrallah acting as a simple nominee as contemplated by the Bahamian statute or the founding charter of Pensée. It will, for example, be permissible for PIFSS to ask questions as to why it was – if Mr Nasrallah was a simple and ordinary nominee for Mr Al-Rajaan in relation to Pensée – Deltec did not act on the instructions of the nominee (Deltec has stated in correspondence that it acted on the instructions of Mr Al-Rajaan), including why it was unwilling to act on Mr Nasrallah's instructions in 2017.

87. I will hear counsel in due course on the question of whether it is necessary for any of the above conclusions, as to the scope of cross-examination, to be embodied in an order. I am presently inclined to think that this judgment gives sufficient guidance to the parties, and that it is unnecessary to make any formal order.