Neutral Citation Number: [2012] EWHC 3703 (Ch)

Case No: HC10C04266

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2012

Before :

MR JUSTICE VOS

- -

Between:

Global Energy Horizons Corp	**Claimant**
- and -	
Robert Gresham Gray	**Defendant**

- -
- -

Mr Richard Snowden QC and Mr James Potts (instructed by Rosenblatt Solicitors) for the Claimant

Mr Stephen Atherton QC, Mr Andrew Clutterbuck and Mr Joseph Wigley (instructed by Holman Fenwick Willan LLP) for the Defendant

Hearing dates: 14th to 16th November 2012, 19th to 22nd November, 26th to 28th November, and 6th to 7th December 2012

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Judgment

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Mr Justice Vos:

Introduction

1. In this action, the Claimant, Global Energy Horizons Corp ("GEHC") claims that Mr Robert Gresham Gray, the defendant ("Mr Gray"), breached fiduciary duties that he owed to GEHC. Mr Gray denies that he owed any such duties, and alleges that, even if he did, GEHC gave its informed consent to the activities about which it complains.

2. This case involved three commercial projects in the energy, oil and gas sector as follows:-

   i) First a project concerning the so-called "Energy Bond" or "Energy Bonds", which was a form of securitisation to be used by energy companies to raise capital. This project later became known as the "Plasma" or "Mandalay" project.

   ii) The second was a project called the "Acquisition Strategy" that concerned ultrasound technology or Acoustic Well Stimulation ("AWS" or "ultrasound") technology, which was intended to increase production from inaccessible oil and gas reserves particularly in mature and underperforming wells. The concept behind the Acquisition Strategy was to acquire such underperforming oil wells and utilise the AWS technology in them so as vastly to increase their remaining production.

   iii) The third was a project that came to be known as the "Alfredo mandate", whereby Mr Alfredo Zolezzi ("Mr Zolezzi") asked GEHC to assist in arranging the sale of some of his minority shareholding in Klamath Falls Limited, a BVI company ("Klamath Falls"), which owned the AWS technology.

3. Stripped of all its complexity, GEHC's complaint is that Mr Gray took personal advantage of the opportunity to obtain a financial interest in the special purpose vehicle ("SPV") that was formed to exploit the AWS technology, to the exclusion of GEHC, at a time when he owed GEHC fiduciary duties as a member of GEHC's "deal team" that had been established in relation to the Acquisition Strategy.

4. As a matter of fact, Mr Gray did obtain an indirect personal financial interest in the profits that would flow from the SPV that was formed to take a licence of the AWS technology from Klamath Falls. That SPV was called RegEnersys Investment 1 Ltd. There are various RegEnersys entities, and, for most purposes, the difference between them is irrelevant to the matters I have to decide. Accordingly, I shall use the general term "RegEnersys" to describe one or more of these entities, only specifying the specific RegEnersys entity where the difference is material.

5. GEHC was a company established by a Mr Brian de Clare ("Mr de Clare") in 2004 after Mr de Clare retired from ABN Amro at the end of a successful career as a banker. At the same time, Mr de Clare emigrated to Canada, where GEHC was incorporated. He had known Mr Gray for many years, initially as colleagues in the 1990s at Bankers Trust and its acquirer, Deutsche Bank. In 2004, they bumped into each other in the City of London and renewed their acquaintance. It was then that

they began to discuss the new venture that became GEHC, since both of them had reached the age where they were contemplating leaving their banks and finding pastures new.

6. In the result, Mr Gray, who was still working at Deutsche Bank, stayed on as a full time employee as Global Head of Natural Resources up to December 2004, and as Chairman of UK Investment Banking thereafter, becoming a part time consultant to Deutsche Bank in April 2006.

7. Mr de Clare assembled a team of people to work with him on GEHC's various projects. These included Mr Garrett Lambert ("Mr Lambert"), Mr Richard Redoglia ("Mr Redoglia"), Mr Terry Burgis ("Mr Burgis"), Mr Martyn Turner ("Mr Turner"), the Hon. Mr Tony Abbott ("Mr Abbott"), Dr Peter Elphick ("Dr Elphick"), and Mr James Elphick ("Mr Elphick"). All but Mr Turner were based in North America. Mr de Clare organised GEHC to operate in the deal teams that I have already mentioned, so that his colleagues were not employed by GEHC but were to receive agreed profit percentages from the individual projects on which they worked. It is common ground that Mr Gray and Mr de Clare discussed GEHC before it started and that Mr de Clare offered him a major shareholding in the company. Ultimately in December 2005, Mr Gray acquired 31.33% of the shares in GEHC, but, formally at least, he never became a director. It is for that reason that the question of whether Mr Gray owed GEHC fiduciary duties has been hotly contested, as has the issue of whether Mr Gray ever formally joined the Energy Bonds and Acquisition Strategy deal teams.

8. There are complexities too on the selling side of the AWS deal. But, put shortly, Mr Zolezzi and his Russian scientist partners (referred to collectively as the "Russians") who had invented the AWS technology, owned shares in Klamath Falls through an entity called Technological Research Limited ("Technological Research"), another BVI company, the remaining shares in Klamath Falls being owned or controlled by a Chilean billionaire, Mr Juan Hurtado ("Mr Hurtado"). Mr Zolezzi and Technological Research appear to have owned more than 50% of Klamath Falls up to December 2005 when they sold some shares to Mr Hurtado's interests, and he became the controlling owner. The precise nature of the ownership and control of Klamath Falls was never clear and created significant difficulty between Mr Gray and Mr de Clare amongst others. Suffice it to say at this point that, in personality terms, Mr Zolezzi was seeking to sell shares in Klamath Falls, and Mr Hurtado was the effective seller of the licence to the AWS technology.

9. The next important group of people are the investors and purchasers with whom GEHC became involved. The first such person was Ms Lisa Stewart ("Ms Stewart"), a friend of Mr Gray and the President of a mid-size US gas and oil exploration company called El Paso Exploration and Production Company ("El Paso"). El Paso was introduced to the project by Mr Gray in January 2005 and undertook testing of the AWS 'tools' in its oil wells in Utah during 2005 financing the US$2-3 million cost of so doing. The results came along in November 2005 and were, in Mr Gray's words, "*extraordinary*". But in August 2006, Ms Stewart left El Paso, and, despite attempts to interest her successor, Mr Bill Griffin ("Mr Griffin"), El Paso ceased to be involved at that time.

10. The second investor is more central to the case. He was Mr Pieter Heerema ("Mr Heerema"), a Dutch billionaire, who owns the Heerema group, which has a business

principally comprising the fabrication, transportation and installation of offshore oil and gas production facilities as well as deep water pipe-laying. Mr Gray was a friend and colleague of Mr Heerema, having served on an informal supervisory board of one of his companies, Heerema Marine Contractors Holding BV from 2002 until 2009. Mr Gray introduced Mr Heerema as a potential investor in the AWS project in December 2005, following Mr Heerema's approach to him to ask him to set up and manage a US$500 million fund to hold energy-related private equity investments predominantly in sub-scale and late-life oil and gas fields. Mr Heerema did ultimately make an investment in AWS technology. In June 2007, through RegEnersys, he bought some of Mr Zolezzi's shares in Klamath Falls (which it will be recalled owned the AWS technology), and took a licence of the AWS technology at the same time.

11. If (and it is a big 'if') Mr Gray did indeed owe GEHC fiduciary duties as claimed by GEHC, the main issue in the case will shift to the question of whether Mr Gray either successfully terminated those duties, or sought and obtained consent to take a personal stake in RegEnersys. Mr Gray's interest was taken directly, but he provided advisory services through a service entity called ReVysion LP. Again, there are a number of ReVysion entities, but I shall use the general term "ReVysion" to refer to one or more of them, unless the identity of the specific entity is material. Mr Gray had undoubtedly told Mr de Clare in December 2005 and in 2006 that he would be working for Mr Heerema, who was known to be interested in purchasing Mr Zolezzi's shares in Klamath Falls, for whom GEHC was acting under the Alfredo mandate, and to be interested in acquiring a licence to the AWS technology. Moreover, in December 2006, there was something of a falling out between Mr Gray and Mr de Clare, which led to an important exchange of emails in which Mr Gray made clear that he was intending to make a personal investment. One essential question will be as to the legal effect of these exchanges and others that occurred before and afterwards. After December 2006, Mr de Clare's hopes that GEHC would gain a 'carried interest' in the Acquisition Strategy SPV which took a licence from Klamath Falls, were effectively dashed, but he did not give up all hope and he continued for some time to maintain tolerably cordial relations with Mr Gray. GEHC was indeed paid a fee by Mr Zolezzi or Technological Research when the share sale completed in June 2007. GEHC, according to Mr de Clare, is still holding Mr Gray's share of that fee for him. Mr Gray's case is that he had made clear he could not accept such a fee, since he was and was known to be acting for Mr Heerema and RegEnersys on the other side of the transaction.

12. Some subsidiary issues dominated the evidence – namely whether Ms Stewart ever 'agreed' that GEHC could be given a 20% carried interest in the Acquisition SPV, if El Paso were to be involved. This issue was really whether Mr Gray ever told Mr de Clare that Ms Stewart had indicated such agreement. The second such subsidiary issue was whether Mr Heerema ever 'agreed' that GEHC could be given a 25% carried interest in the Acquisition SPV, when RegEnersys was involved. Again, the real issue was whether Mr Gray ever told Mr de Clare that Mr Heerema had indicated such agreement.

13. Another subsidiary, but perhaps slightly more important question arose as to whether Mr Gray ever joined the Energy Bonds deal team in relation to the first project that I have mentioned above. That was important, not because the Energy Bonds project was related to the AWS projects, but because if Mr Gray had joined the Energy Bonds

deal team, it was argued by GEHC that it was more likely that he had joined the Acquisition Strategy and Alfredo mandate deal teams. Ultimately the role that Mr Gray agreed to play in GEHC is critical to the issues I have to decide. Mr Gray's case is that he acted always for Deutsche Bank or Mr Heerema and RegEnersys, and never for GEHC. Mr de Clare's case is that Mr Gray was a founding partner in GEHC and was, throughout, its fiduciary agent in relation to the AWS technology and the Acquisition Strategy and the Alfredo mandate deal teams. GEHC contends that Mr de Clare and Mr Gray had "equalisation agreements" whereby they agreed to share 50/50 (subject to any other interests they might agree to allocate) in all these projects.

14. Before turning to the chronological background, it is useful to say something about the AWS or ultrasound technology. The details are not relevant to the issues I have to decide. In essence, the technology applies ultrasound stimulation to the wellbore area in order to diminish wellbore damage and restore or enhance production in low-performing or late-life wells. The tools delivering the AWS technology are inserted into the wellbore area and apply a wide range of frequencies and power in continuous or pulse modes, designed to stimulate oil and gas production.

Chronological background

15. The parties agreed 16 bundles of documents arranged in chronological order, but, unfortunately, no core bundle that they were able to utilise. This was partly because many of the presentation documents that were created throughout the history of the project were both relevant and voluminous but it made the mastery of the chronological background more difficult. It is hard to over-emphasise the importance of preparing a core bundle so that the documents that are genuinely important can be isolated and receive the special attention that they deserve.

16. With that introduction, I have attempted to summarise in this section, the most relevant chronological events and documents. Necessarily the section is not short, but it should provide a foundation for my treatment of the evidence and the issues which follows.

17. In 2002, Mr de Clare, who was then working for ABN Amro, first met Mr Zolezzi to discuss the development of ultrasound technology for the non-ferrous metals industry.

18. At the end of 2002, ABN Amro's senior management in Chile discontinued its involvement with Mr Zolezzi due to the Chilean government having accused Mr Zolezzi's investor of a fraud. At about this time, Mr de Clare suggested to Mr Zolezzi that he might investigate whether his ultrasound tool might be applied to the oil and gas industry.

19. In late 2003, Mr Zolezzi telephoned Mr de Clare (whilst he was still at ABN Amro) to say that he and his Russian partners had adapted the ultrasound tool so as to increase the production of oil and gas.

20. In December 2003, at Mr Zolezzi's suggestion, Mr de Clare met Mr Hurtado in London to discuss the commercialisation of the ultrasound technology.

21. In or about January 2004, Mr de Clare met Mr Gray at Liverpool Street Station, and they went to a café together. They discussed both the setting up of a business and the ultrasound technology. Mr Gray expressed initial scepticism about that technology.

22. On 15th April 2004, GEHC was incorporated by Mr de Clare under the Canadian Business Corporations Act.

23. In mid-2004, the "handshake" or "equalisation" agreement in relation to the Energy Bonds project was allegedly made between GEHC and Mr Gray.

24. On 16th July 2004, Mr de Clare and his family relocated to Victoria, Vancouver Island, Canada ("Victoria"), he having left ABN Amro.

25. On 11th August 2004, Mr Gray emailed Messrs Michael Cohrs ("Mr Cohrs"), Mr Anshu Jain ("Mr Jain"), Mr David Fass ("Mr Fass"), Mr Rajeev Misra, and Mr Thomas Gahan, all members of senior management at Deutsche Bank, in relation to Energy Bonds. Mr Gray wrote: "*I have been working on the idea of new asset classes for energy for a long time both internally and also in consultation with [Mr de Clare] ex Head of Commodities and Trading at ABN (formerly at [Bankers Trust]) who has now set up [GEHC] to explore these concepts. … I attach a document I have worked up … We have the opportunity to develop what I believe will be an inevitable major market development and will constitute major asset classes within a few years. I solicit your institutional support and seed capital to bring this about*".

26. In the latter part of 2004, Mr de Clare says that GEHC developed the Acquisition Strategy, already explained - to employ the ultrasound technology by buying mature and depleted oil and gas fields.

27. On 20th October 2004, Mr Gray emailed Mr de Clare a copy of the Energy Bonds Presentation that was to be put to senior management at Deutsche Bank.

28. On 8th November 2004, Mr Gray presented the Energy Bonds paper to the board of Deutsche Bank.

29. On 29th November 2004, Mr Gray emailed Mr de Clare saying that: "… *getting attention has been hard but [Mr Fass] is very influential and his and my patronage should get us there …*" and later: "*I so enjoyed getting motivated again. We need to decide where best to deploy me and on what timescale*". Mr de Clare's evidence was that these emails reflected that Mr Gray owed his primary obligations to GEHC in relation to the Energy Bonds project.

30. On 29th November 2004, a Co-operative Research and Development Agreement (the "CRADA") was entered into between Klamath Falls and the US Department of Energy (the "DoE"), so that the DoE's testing of the ultrasound technology could begin.

31. On 2nd December 2004, Mr de Clare emailed Mr Gray saying: "*I MUST MUST speak to you asap re Ultra-sound!!!!*".

32. On 2nd December 2004, Mr de Clare wrote to Mr Redoglia and others (but not to Mr Gray) explaining how the deal team concept at GEHC would work. The letter ended

by saying that they needed: "*.. a firm understanding and a clear undertaking that discussions and exchange of information between yourself and GEHC will be subject to strict confidentiality. It goes without saying that the duty of confidentiality will extend to information concerning each project whether or not you are a member of the project team. Additionally, you will undertake that whilst you are associated with GEHC you will not, except with the express informed and written consent of GEHC, participate in or associate yourself with or become involved in any other energy projects or serve as advisor to any of [GEHC's] clients or customers*".

33. On 10th December 2004, Mr Gray emailed Mr de Clare in relation to Energy Bonds saying that "*we need to start firming heads of agreement between [GEHC] and [Deutsche Bank] and I plan to ask [Mr Fass] to appoint someone other than me for obvious reasons*". Mr Gray says that he wrote this because a bond expert was needed for this function. Mr de Clare says that he did so because he recognised a potential conflict of interest.

34. On 12th December 2004, Mr de Clare held GEHC's first "off-site meeting" at the Union Club in Victoria attended by Mr Redoglia, Mr Garrett, Mr Burgis and Mr Elphick. Mr Zolezzi gave a general presentation about the AWS technology. Mr Gray did not attend.

35. On 14th December 2004, Mr Gray emailed Mr de Clare confirming that Deutsche Bank was fully committed to the Energy Bond concept, and saying that Mr Fass would ask Mr Philip Southwell of Deutsche Bank ("Mr Southwell") to "*discuss and agree heads of agreement/framework agreement for [GEHC]*".

36. On 14th December 2004, Mr Gray emailed Mr de Clare saying that he had told Mr Fass (to whom Mr Gray then reported at Deutsche Bank) "*of my intention to become a significant shareholder and involved in GEHC. He was fine about it but obviously I will have to go through Compliance. We therefore need to formalise the handshake between us*".

37. On 14th December 2004, the DoE CRADA Phase 1 test results in relation to the ultrasound technology were produced, and were transmitted by Mr de Clare to Mr Gray and others.

38. On 16th December 2004, Mr de Clare emailed Mr Gray asking him to confirm his agreement for GEHC to proceed with the Energy Bonds' patent and continued: "*For the purpose of clarification, it is our hand shake agreement that we both personally hold the creative rights to the Energy Bond and we will share equally in [its] revenues. There are of course, costs and we both agree to share those costs equally too. … Until now, it has been impossible to have those pre-agreed with you, however, going forward, with you on the board of [GEHC] I expect we will both have a marketing and business plans agreed between us to develop the Energy Bond. I must say [Mr Gray] that I am very enthusiastic about working with you once more, there really are exciting, creative times ahead for us both. Let's work on getting you into GEHC and also a legal agreement between GEHC and both you and I. All the best [Mr Gray] and here's to a new adventure*".

39. On 16th December 2004, Mr Gray replied saying: "*I agree. Fine by me. If you let me have your account details I can wire my half and then send your account details on to Lagos*".

40. On 16th December 2004, Mr de Clare replied again to Mr Gray saying:- "*Now I know the REAL reason why I had to go to Lagos with you 4 or 5 years ago and suffer all those tetanus jabs etc in one day!! I will set the wheels in motion on the patent and also start the ball rolling with the GEHC lawyer (Mr Keith Reed ["Mr Reed"]) to draft an agreement between GEHC and both yourself and myself. I'll check an approximate cost and revert before authorising [Mr Reed] to proceed*". He concluded by inviting him to Whistler for skiing in New Year 2005 to "*sit around a table and outline out [sic] thoughts on GEHC, Energy Bonds, Ultra-sound …*".

41. On 16th December 2004, Mr Gray emailed Mr de Clare noting his agreement to the proposal, and asking for bank details to provide his 50% share of the costs of the Energy Bonds patent application.

42. On 16th December 2004, Mr de Clare emailed Mr Turner and others concerning the "*1st global meeting*" and saying that Deutsche Bank "*have asked that [Mr Gray] is appointed to the board of GEHC and they have introduced another senior individual from [Deutsche Bank] to work with GEHC on the contract that will exist between GEHC and [Deutsche Bank]*".

43. Between the 14th and 19th December 2004, according to paragraph 128 of Mr de Clare's witness statement, Mr Gray told Mr de Clare that GEHC should approach El Paso to conduct commercial testing on the ultrasound technology with a view to becoming GEHC's partner in the Acquisition Strategy, and Mr Gray agreed to share 50/50 with Mr de Clare on the ultrasound project as he had for the Energy Bonds project.

44. On 19th December 2004, Mr de Clare and Mr Zolezzi met Mr Hurtado in Miami, and Mr de Clare suggested El Paso to him as a strategic oil and gas partner.

45. On 21st December 2004, Mr Gray first signed himself on his emails as "Chairman of Deutsche Bank's UK Investment Banking".

46. On 23rd December 2004, Mr Zolezzi emailed Mr de Clare saying that he would tell Mr Hurtado that he was asking GEHC to become his financial adviser.

47. On 29th December 2004, Mr de Clare emailed Mr Gray saying "*[m]essage to the 'Chairman of UK Banking' from the lowly 'President' of GEHC*" wishing him a happy new year. Mr de Clare accepted in evidence that this email reflected what he understood Mr Gray's role to be.

48. On 10th January 2005, Mr Gray emailed Ms Gillian Looney of Deutsche Bank ("Ms Looney") and Mr Fass saying "*As I mentioned to [Mr Fass] some weeks ago, I have been invited to take a passive minority interest in [GEHC]. … [GEHC] is a fledgling energy advisory boutique …[GEHC] was founded last year by [Mr de Clare] … [GEHC] has limited execution and has already had numerous discussions with [Deutsche Bank] on implementation of specific projects in California. [GEHC] is not currently in a position to execute M&A transactions and its products principally*

relate to creation of innovative solutions and investment structures to partner with selected banks. The $ value of my participation has yet to be fixed". Mr Gray apparently received no answer to this email.

49. On 13th January 2005, Mr de Clare provided Mr Gray with GEHC's confidential business plan in relation to ultrasound technology saying "*needless to say, this is only for your eyes as an impending GEHC bod!!! Keep to yourself!!*".

50. On 16th January 2005, Mr Gray met Mr Zolezzi for the first time at Mr Gray's home in Hampshire.

51. On 17th January 2005, Mr Gray called Ms Lisa Stewart of El Paso to discuss the ultrasound technology.

52. On 18th January 2005, Mr de Clare emailed Mr Gray, copied to GEHC's lawyer, Mr Reed, saying that he was keen to sort out the equity position in GEHC, and that Messrs Redoglia, Lambert and Turner wanted to purchase equity. Mr de Clare said that he had made it clear to all GEHC personnel that the Energy Bonds concept was a 50:50 position with Mr Gray, and "*also that it is intended that you will come onto the board of GEHC as well as purchase into the shares with a priority ahead of ALL other suitors. It has been made clear to all of them that no share dealings take place until you are in GEHC. Because of that, there are some things we must sort out quickly …*". The things that needed sorting out were the sharing of the costs: "*[a]s discussed , you need to assume a position on the board of GEHC asap … We cannot go ahead with the structuring of the company if you are about to take a position both as a strategic shareholder as well as a board member*", and "*[t]o do this, we have to establish the equity position you want to take … Once we have that out of the way, you become a legitimate board member of GEHC as well as a significant shareholder. We can then get to grips with the structure of the company and also pave the way for you come fully into GEHC once you depart [Deutsche Bank]!*".

53. On 19th January 2005, Mr Gray forwarded to Mr de Clare an email he had sent to Ms Stewart saying that Mr Zolezzi and the Russians had: "*come to me through one of my best friends and one of the most honest and capable bankers I know – [Mr de Clare] – with whom I have worked on Energy Bonds …. [Mr de Clare] now has his own group, [GEHC]*". He then referred to "*we at [Deutsche Bank] and [GEHC]*" getting together with El Paso to "*finance and acquire as much relevant real estate and tried production as we can*".

54. On 21st January 2005, Mr de Clare, Mr Zolezzi and Ms Stewart met in Houston with Mr Gray attending by telephone. Mr de Clare says that after this meeting, Mr Gray told him on the telephone to stop approaching other possible partners for the Acquisition Strategy.

55. On 10th February 2005, Mr de Clare sent Mr Zolezzi a draft of the Alfredo mandate between Klamath Falls and GEHC.

56. On 18th February 2005, Mr de Clare emailed Mr Fass, Mr Gray and Mr Southwell thanking them for their interest (which had by then concluded) in the Energy Bonds project.

57. On 14th March 2005, GEHC's Acquisition Strategy document jointly prepared by Mr Gray, Mr de Clare and Mr Turner was sent to Mr Zolezzi. It proposed:-

    i) Klamath Falls, El Paso and GEHC would together own an Acquisition SPV (then called Ultramax) which would acquire mature and depleted oil and gas wells;

    ii) raising a fund of US$10 billion with US$2 billion equity and US$8 billion debt to finance the acquisitions;

    iii) equity being provided by as yet unidentified hedge funds;

    iv) debt finance being provided by Deutsche Bank, ABN Amro or HSBC;

    v) El Paso would operate any assets acquired;

    vi) Deutsche Bank would work with El Paso and GEHC to determine acquisition targets and as financial advisor and capital provider to the SPV; and

    vii) GEHC would deliver the Acquisition Strategy, and provide advisory services by aligning financing, sourcing investors, determining key purchasers of the oil and securing potential buyers for the eventual sale of assets.

58. On 17th March 2005, Mr Gray emailed Mr Fass and Ms Looney at Deutsche Bank again, copying his 10th January 2005 email, and asking if she was the right person to help him process this. He said that GEHC would outsource capital and execution "*where relevant to [Deutsche Bank] – and e.g. if [Deutsche Bank] declines as it has on one occasion – another. There are some ideas in the pipeline which could very much benefit [Deutsche Bank] on the M&A leveraged finance and commodities side … I do not think it is in mainstream conflict with [Deutsche Bank's] activities in any way and is far more likely to turn to [Deutsche Bank] and provide revenues rather than disintermediate*". Ms Looney replied saying she was on her way back from Moscow, that she recalled the original query and that she thought she had forwarded it to compliance for some reason, but she needed to check.

59. On 28th March 2005, Mr Zolezzi signed the Alfredo mandate. Mr de Clare vividly recalled this date as it was his birthday.

60. On 2nd April 2005, Mr de Clare emailed Mr Gray saying that GEHC could not be aligned with El Paso as Deutsche Bank were, and that GEHC had to be aligned with Klamath Falls. Mr de Clare explained in his evidence that GEHC could not get fees from El Paso, as Mr Zolezzi wanted, as Deutsche Bank would be doing so.

61. On 9th April 2005, Mr Gray emailed Mr de Clare to tell him to stop panicking about the lack of response from El Paso: "*there is zero to suggest that El Paso is not acting honourably*".

62. On 19th April 2005, Mr de Clare emailed Mr Gray with a spreadsheet showing his 25% interest in GEHC at US$200,000 and his interests in the two deal teams at US$1,487,500, concluding: "*Can't wait to have you on board*". Shortly afterwards, according to Mr de Clare, they discussed the numbers.

63. On 28th April 2005, Mr Gray, signing as Chairman of Deutsche Bank's UK Investment Banking, sent Mr Zolezzi a letter (intended for Mr Hurtado) confirming Deutsche Bank's enthusiasm and saying that Mr Fass was looking forward to the test results to see how Deutsche Bank could be aligned with the Acquisition Strategy. He said "*[t]his would allow us to team with sources of equity capital, a key operator, e.g. El Paso and an M&A team which I would head up*", concluding: "*[y]ou may trust me on this because I will only ever be paid through SPV equity!! There would be no risk whatever to the Klamath Falls equity. [Klamath Falls] would simply grant an exclusive licence to the SPV for a period of time*". Mr de Clare interpreted the letter as meaning that it was Mr Gray and GEHC which would only be paid through SPV equity, whilst Mr Gray said that he was talking about an "*equity kicker*" for Deutsche Bank.

64. An exchange of emails between Mr Zolezzi and Mr de Clare on 28th April 2005 discussed the terms of Mr Gray's formal letter. Mr de Clare said "*[h]e even managed to get a reference to the equity in as well!!*" The question was whether Mr de Clare was referring to Deutsche Bank equity or GEHC equity.

65. On 29th April 2005, Mr Gray emailed Mr Zolezzi saying: "*An acquisition strategy is an almost risk free way to print money. We are not going to over-pay for anything and we are buying real assets in the ground for their current appraised worth of the currently recovered barrels. We then re-hab the properties to get more barrels using the AWS and we sell the extra barrels which we have got for no cost. I believe that if we can persuade [Mr Hurtado] of this, that you should be a part of a strategy with your [GEHC] hat where [Klamath Falls] grants [GEHC] an exclusive licence for a finite period of time – you will still be carrying out follow-on tests post Utah in any event – for us to assemble a portfolio of properties to exploit. If [Mr Hurtado] does not want direct investment involvement we can offer him an economic return via the licence fee on a cents per extra barrel recovered basis or similar. I am baffled that he does not see this potential*".

66. In May 2005, Mr Gray and Mr de Clare visited Mr Hurtado in Santiago, Chile.

67. On 6th June 2005, Mr de Clare sent Mr Gray's draft valuations for the ultrasound technology based on preliminary chemical test results showing a net present value of some US$3 billion. Mr de Clare's email to Mr Zolezzi of the same date records that Mr Gray had telephoned him to say that he wanted to invest US$500,000 in Klamath Falls.

68. Between 11th and 14th July 2005, the second "off-site meeting" took place in Victoria. Messrs de Clare, Gray, Redoglia, Abbott, Burgis and Lambert, amongst others, attended (the "second off-site meeting").

69. On 18th July 2005, Mr Lambert sent an email to Mr Turner describing what happened at the second off-site meeting and saying that Mr Gray had said in relation to the ultrasound technology that "*we'll get nothing out of [Mr Hurtado] until he's confident something will happen*". He also said: "*[t]he Management topic basically got nowhere. Clearly [Mr de Clare] and [Mr Gray] will run the show*".

70. On 27th July 2005, Mr de Clare sent his note of the proceedings at the second off-site meeting to Messrs Turner, Lambert, Redoglia, Elphick and Burgis, but not to Mr Gray.

71. On 5th October 2005, according to Mr de Clare, Mr Gray spoke to Mr de Clare and agreed that he would purchase ⅓ of the share capital of GEHC for US$260,000, and that 1% would be allocated to the 6 other members reducing their respective shareholdings to 31⅓%. Mr Gray asked for a shareholders' agreement to be drawn up.

72. On 13th October 2005, Mr Gray was, according to Mr de Clare, given access to GEHC's confidential intranet.

73. On 8th November 2005, Mr de Clare emailed Mr Gray saying: "… *here is the official deal allocation sheet for the acquisition strategy. Bear in mind that you own 31.66% of the 30% in GEHC also. There is potentially a LOT of money at stake here so we have to be very careful how we deal with this as GEHC has a legal obligation to those deal members (including you and I !!!!*". Mr Gray responded by saying: "*I'm Flexible too!*"

74. On 11th November 2005, Mr de Clare emailed Mr Gray and others the draft results from the second phase of AWS testing by El Paso, showing oil recovery increased by up to 600%.

75. On 11th November 2005, Mr Gray responded to Mr de Clare saying that they were extraordinary results and, in relation to Crown Prince Faisal "*if we can crack Saudi!!!! He is hugely interested*".

76. On 23rd November 2005, Mr de Clare emailed Mr Gray a copy of a draft "*GEHC Team Participation Agreement*" covering the formal aspects of the relationship between Mr Gray and GEHC. Mr Gray never signed such an agreement.

77. On 15th December 2005, Mr de Clare sub-divided his single class B share in GEHC into 1,000 class B shares.

78. On 16th December 2005, Mr de Clare emailed Mr Gray in relation to the draft Shareholders' Agreement saying "*I know you have already cleared the ownership with [Deutsche Bank] compliance, however are you allowed to be a director of GEHC … Either way, I believe we are in agreement on the [Shareholders' Agreement], the funds must be remitted ahead of the [Shareholders' Agreement] being signed by all of us …*". According to Mr de Clare, this question was prompted by the draft Shareholders' Agreement that permitted him to appoint a director.

79. On 17th December 2005, Mr Gray left a voicemail for Mr de Clare saying "*there is a God, there is a God*", in relation to Mr Heerema wishing to invest in upstream oil production.

80. Mr Gray says that between 17th December 2005 and early January 2006, he told Mr de Clare that he planned to act as an adviser to the proposed fund of Mr Heerema's family interests.

81. After a chasing email, on 20th December 2005, Mr Gray emailed Mr de Clare saying: "*Remind me how much we agreed on?!*" Mr de Clare responded: "*Useless!!!!!! One of your BIGGEST most important investments (let's not say anything about being the Founding partner!!!!!!) and you cannot even remember … US$260,000*".

82. On 21st December 2005, Mr de Clare emailed Mr Gray in relation to a proposed meeting with Mr Heerema on 18th January 2006 talking about the preparation of spreadsheets and slides, and saying: "*I spoke to [Mr Zolezzi] and I convinced him that he really ought to meet up with you, myself and [Mr Heerema] on the 18th in London. It looks as though he feels he ought to bring [Mr Hurtado]. Did you read the Agreement for [Mr Zolezzi] [i.e. between GEHC and Mr Zolezzi on the Alfredo mandate]? We ought to get this out to him before we go too far down the road*".

83. On 21st December 2005, Mr Gray responded to Mr de Clare saying: "*[t]he spreadsheets are entirely academic unless there is a deal to be had – which I am increasingly pessimistic about. Also spreadsheets will only further reflect the scale of the opportunity to [Mr Zolezzi] and [Mr Hurtado] if shared with them. We know it is a lot. On [Mr Zolezzi], the reality is that he will not sell anything for cash until there is a business plan and an agreement from [Mr Hurtado] to accept outside shareholders against a plan going forward. You need to deliver this AND [Mr Zolezzi] after all the work and value from El Paso. Signing a piece of paper with [Mr Zolezzi] is fine but nothing will come of it unless he surfaces it with [Mr Hurtado]. I swapped calls with [Ms Stewart] and will try again today. We need to articulate a scenario with her around El Paso and possibly bidding on the whole lot of [Klamath Falls] with outside finance. The other company is Heerema. Please do not confuse activity on this with progress. Unless [Mr Zolezzi] recognises GEHC input and insists on this recognition with [Mr Hurtado], GEHC will be screwed. All the signs are that [Mr Zolezzi] will not do this and wants to bury the GEHC involvement to date. A simple appointment letter helps but does not cure that*".

84. Mr de Clare's response also on 21st December 2005 was to say that Mr Gray had "*made a grab for the emergency cord when there is no emergency*". He continued:-

> "*1. I agree, the spreadsheets are NOT for [Mr Hurtado] or [Mr Zolezzi]. At no time have you and I said they were going to them. The spreadsheets are for our own benefit to understand the profitability of the Acquisition strategy and run scenario analysis. They are also to be used in demonstrating the structure and opportunity to [Ms Stewart] in a proposal around the Acquisition strategy. I merely wanted you to fully understand the workings of the sheet [Mr Burgis] came up with it's not easy as [Mr Burgis] adopted a standard Schlumberger model that he is used to. Whilst there is good information there, this does not necessarily come across in the way that the SPV ought to be structured. [Mr Turner] is very good at modelling those types of spreadsheets and structures. It was my idea to ask him to speak to you to offer his help (you had mentioned before that you were unable to do this as [Deutsche Bank] now has a new, more constraining model in allocating resources). I can put this together as well but I know you have firm opinions on the structure and you are much, much closer than anyone to [Ms Stewart] to understand better what may fly.*

2. [Mr Zolezzi] has already said that he will fully support GEHC on the Acquisition strategy. His previous issue was the paranoia about [Mr Hurtado] and the IP rights (that I am sure [Mr Hurtado] has warned [Mr Zolezzi] about). In a call a couple of weeks ago, I buried that paranoia (at least relative to the Acquisition strategy) and [Mr Zolezzi] said he will support our position fully on this with [Ms Stewart]. He also has convinced [Mr Hurtado] that the License must be made available to the SPV or El Paso and we now simply need to get to the negotiation table on this.

3. Again, I agree there are TOTALLY differing projects running here. The Acquisition strategy is one and [Mr Zolezzi's] seeking equity is another. The Heerema deal is another separate one too. You have an opportunity with them that is great whether or not we can link this with Klamath Falls depends on [Mr Hurtado] (even more so now that he has the [Russians] under his wing) and how comfortable you are with any relationship between Heerema and Klamath Falls. [Mr Zolezzi] can influence this but we have seen that [Mr Hurtado] will not provide [Mr Zolezzi] with a business plan and nor will he provide [Mr Zolezzi] with any promise that limits [Mr Hurtado's] options in monetizing Klamath Falls eventually. The license to the SPV/El Paso was hard fought for by us both.

Thus, in summary, the Acquisition platform is fully supported by [Mr Zolezzi]. He can easily convince [Mr Hurtado] of our involvement as we have been present over many months (both in the foreground and the background) on this with [Mr Hurtado], Pedro, El Paso and many emails and discussions between Pedro and [Mr Zolezzi] on the merit of the Acquisition SPV. Hence the clear indications that [Mr Hurtado] will agree to a license. It is up to us (El Paso and GEHC) now to begin to negotiate those terms.

The equity offering from [Mr Zolezzi] is wholly separate and in addition to any Acquisition strategy. It may well work together with it, however, it is (as you say) another separate deal. It is precisely because it is another deal that we need [Mr Zolezzi] to sign an agreement that exclusively binds his request to monetise 10% of Klamath Falls to GEHC. We have the document template all ready to sign (the one I got to you [yesterday]). If he does not sign this then there is no role for GEHC as we cannot work without a clear sign of our role and remuneration.

We also need to remember that (as part of the initial $20 million offering from [Mr Zolezzi]), whilst we saw no buyer emerge in the summer, GEHC is still entitled under that Agreement to receive the full 7% of the investment monies. This contract term lasts for two years beyond the Agreement".

85. On 28th December 2005, Mr Gray emailed Mr de Clare asking him to re-send account details to his private email and asking "*[h]ow are my GEHC expenses etc. of the last 18 months to be treated?*". Mr de Clare responded by giving details of the treatment of expenses suggesting that expenses related to the "*Energy Bond and Alfredo we split 50/50 and those that related to the various deals in the whole of GEHC we split according to the value of the percentage of your equity in GEHC (thus your investment in each deal)*".

86. On 29th December 2005, Mr de Clare sent Mr Gray execution copies of the Share Purchase Agreement, the Shareholders' Agreement (between Mr Gray, Mr de Clare, Mrs Ann-Marie de Clare ("Mrs de Clare") and GEHC – the "Shareholders' Agreement"), a direction to trustee, and a sale agreement relating to the sale of shares to Mr Redoglia and Mr Burgis. Mr Gray paid the US$260,000, but sent back a signed copy of the Share Purchase Agreement alone. Mr Gray said in his witness statement that he believed that he signed the Shareholders' Agreement. It is dated 30th December 2005, and it provided that no party intended, by the agreement or the investment, to become a partner, and that "*except as otherwise set out in this [Shareholders' Agreement] or any other agreement executed by the applicable [party]*", the Shareholders' Agreement was not intended to impose upon any party any fiduciary duty "*by reason of the [party] carrying on the [party's] separate activities, investments or undertakings*".

87. On 30th December 2005, Mr de Clare transferred 500 class B shares to Mrs de Clare.

88. Also on 30th December 2005:-

    i) Each of Mr and Mrs de Clare transferred 66⅔ B shares to Mr Gray.

    ii) Mrs de Clare transferred 10 B shares to Mr Abbott;

    iii) Mrs de Clare transferred 10 B shares to Garrett Lambert Associates (Mr Lambert's company);

    iv) Mr de Clare transferred 10 B shares to Mr Elphick.

    v) Mrs de Clare transferred 10 B shares to Mr Burgis.

89. On 30th December 2005, Mr de Clare emailed Mr Gray saying: "*just a short note to thank you for your great support since our first 'coffee shop' meeting and also to welcome you to the next decade (at least) as part of a unique partnership of the two of us. Who knows where this venture will lead to but, as we agreed on the phone yesterday, at least we know that on this occasion if we fail then we only have ourselves to blame. However success will be so much more rewarding*".

90. On 10th January 2006, Mr de Clare emailed Mr Gray saying that Mr Zolezzi had called asking for help in putting the presentation together for Mr Heerema, and saying that Ms Stewart had not called and he wondered if Mr Gray knew if she was back yet.

91. On 12th January 2006, Mr de Clare emailed Mr Gray under the heading "*acquisition strategy*" telling him how to obtain Mr Zolezzi's presentation from the GEHC website for he and Mr Heerema to view at the meeting in Holland using Mr Gray's password, and concluding: "*Good luck man!*". On the same day, Mr Gray met Mr Heerema in the Netherlands, having been provided with presentational materials on the AWS technology by Mr de Clare and Mr Zolezzi, and some confidential materials for "*your eyes only*" by Mr de Clare. After the meeting, Mr de Clare emailed Mr Zolezzi to say that the meeting went "*VERY well*".

92. On 16th January 2006, Mr de Clare emailed Mr Zolezzi and Mr Gray concerning the meeting that Mr Gray had arranged with Mr Heerema on 18th January 2006 in

London. The email is relied upon by both sides as constituting a critical stage in the parties' relationship. For that reason, I set out the bulk of the email as follows:-

> "*1. [Mr Heerema] and [Mr Gray] are close friends with them knowing each other for 10 years or so. During most of that time [Mr Gray] has been on the main board of [Mr Heerema's] company based in the Netherlands.*
>
> *2. [Mr Heerema] called [Mr Gray] over the Christmas period and told him that his company is flush with cash and that those funds are dragging the results of the company. As a result, they need to do something with those funds and invest them in an area that aligns with [Mr Heerema's] core knowledge.*
>
> *3. As a consequence, [Mr Heerema] and the Trustees of the assets have asked [Mr Gray] to control their funds and channel them into an investment that brings their company into the upstream oil business.*
>
> *4. The vision of an Acquisition Strategy was proposed by [Mr Gray]. This would be a vehicle that [Mr Gray] would run on behalf of [Mr Heerema] and will purchase a group of smaller oil assets disposed of by the majors.*
>
> *5. [Mr Gray] informed [Mr Heerema] of the Ultrasound technology and (in complete confidence) told him of the tests undertaken at the US [DoE] as well as those in Utah with El Paso. [Mr Gray] proposed to [Mr Heerema] that this may be a quicker way of achieving Heerema's goals.*
>
> *6. Potentially a group comprising of El Paso (managing the assets), Heerema (equity plus management), [GEHC] (structuring and management) and Klamath Falls (license) was outlined and went down very well with [Mr Heerema]. This could secure the Heerema group with [its] desired objective of an entry into the upstream business in a way that could quickly get Heerema's assets working.*
>
> *7. With [Mr Zolezzi's] request to possibly offer equity in Klamath Falls came an additional perspective that might or might not align itself with the vision for [Mr Heerema's] fund.*
>
> *8. With this in mind, [Mr Gray] visited [Mr Heerema] last week to outline his thoughts and see if [Mr Heerema] was interested to add this equity potential to the acquisition idea.*
>
> *9. It is important that we all understand that [Mr Heerema's] instructions to [Mr Gray] are to invest and run a vehicle that will invest in the upstream business of oil. By investing in Klamath Falls [Mr Heerema] does not actually invest in upstream oil as it is [Mr Hurtado's] stated strategy that Klamath Falls will not be an oil company.*
>
> *10. However, if it makes sense for [Mr Heerema] to invest in Klamath Falls IN CONJUNCTION with an Acquisition Strategy then there may be a great deal of sense for everyone – [Mr Hurtado] included.*

> *11. To do this, [Mr Gray] has to be able to convince [Mr Heerema] that the equity investment is a clear way to add value to any Acquisition Strategy and there also has to be an obvious entry point for him. This does not merely mean the cost but, crucially, the ability to make sure [Mr Hurtado] and [Mr Heerema] can be aligned.*
>
> *12. [Mr Zolezzi] needs to monetise some of his holding in Klamath Falls. This can be structured perhaps through a down payment followed by an escalation clause linked to some benchmark (for example the SPV's earnings or production etc). ...*
>
> *The combination of the Acquisition Strategy plus the Service platform can deliver the goods to [Mr Hurtado], Klamath Falls, [Mr Zolezzi] and his team plus El Paso. [GEHC] ([Mr de Clare] and Mr Gray]) have been working on this structure solely and believe that we now POSSIBLY have the right people aligned as well as the right timing.*

[Mr Gray accepted in cross examination that this part of the email put him firmly in GEHC's camp]

> *We hope to come out of the meeting on the 18th with alignment between all attendees. Will [Mr Heerema] agree to a payment for the equity? We do not know and we will not know until after the meeting and [Mr Gray] and [Mr Heerema] have their talk.*
>
> *My feeling [Mr Zolezzi] is that, as long as [Mr Heerema] can see a clear strategy that gets him his upstream acquisition then I am sure [Mr Gray] can deliver. For this to happen we need a price to start the ball rolling and we all need [Mr Hurtado] to agree to bring in an outside partner – one that WILL add value (huge value) to Klamath Falls. I recall you said that [Mr Hurtado] was not against you selling to a third party as long as it made sense……* "

93. On 18th January 2006, Mr de Clare sent Mr Gray a briefing paper about GEHC in preparation for his meeting with Mr Heerema, describing Mr Gray as "*[f]ounding partner of GEHC*" and "*[c]urrently Global Head of Deutsche Bank's energy business and Chairman of the UK investment banking operations*".

94. On 18th January 2006, Mr Gray met Mr Heerema in London, but Mr Zolezzi was unable to attend.

95. On 23rd January 2006, Mr Heerema met Mr Zolezzi in Amsterdam.

96. On 23rd January 2006, Mr de Clare emailed Mr Gray concerning the deal team percentages for the Acquisition Strategy saying: "*... this is the Deal team for the Acquisition strategy. [Mr Redoglia] currently has a 6% share and wants to increase that. I am not sure if Tony and [Mr Burgis] may be small sellers but I do not think [Mr Lambert] is*". On 24th January 2006, Mr Gray emailed Mr de Clare asking: "*What are our percentages*?", to which Mr de Clare responded: "*[GEHC] has 30 pct plus [Mr de Clare] has 22 pct you also have the additional 22 pct and we have a*

additional 8 pct floating yet to allocate". On 25th January 2006, Mr Gray responded to Mr de Clare saying: "*I thought we had an equalisation agreement?*"

97. On 23rd January 2006, Mr Paul Cambridge ("Mr Cambridge"), one of Mr Gray's former colleagues, emailed Mr Gray saying he had had a great conversation with Mr de Clare, that it was an exciting idea and that hopefully there was a role for him to play. He thanked Mr Gray for thinking of him and ended "*[h]ope life at [Deutsche Bank] is bearable*".

98. On 30th January 2006, Mr de Clare emailed Mr Gray saying that he thought "*we need to agree on a single, clear course of action for our meeting in Houston [on 8th February 2006]. Let me know what you think, however, this could be outlined to both [Mr Heerema] and [Ms Stewart] before so that there are no surprises*". He attached a slide presentation showing GEHC having a 20% carried interest in the Acquisition Strategy for its structuring and advisory role.

99. On 31st January 2006, Mr Gray emailed Mr de Clare saying that "*this is all fine in theory but we do not know 1. the appetite of [Ms Stewart] and El paso to become involved with or without partners 2. whether or not [Mr Heerema] and/or El paso would want to try and buy the technology from [Mr Hurtado] and [Mr Zolezzi] 3. whether [Mr Hurtado] would sell – or [Mr Zolezzi] could make him do so. I will have an answer to some of these questions on Tuesday evening next week when I stay with [Ms Stewart] and [Mr Mike Stewart]*".

100. On 8th February 2006, Mr Heerema met Ms Stewart, Mr de Clare and Mr Gray at El Paso's offices in Houston.

101. On 9th February 2006, Ms Stewart emailed Mr Gray saying that she hoped she had not been "*an embarrassment as usual*" at the 8th February 2006 meeting.

102. On 10th February 2006, Mr Gray responded to Ms Stewart saying that she had been inspired and fun, and that: "*I will clear my diary and get across next week – it may be too fine to judge to try for a Friday plane and afternoon meeting. I had a lunch fixed with Steve Theede of Yukos which I can easily move (great mate and what a book that will be) and dinner with Nader\Sultan of KPC (ditto) – but much better to fly out on the Thursday I think so will aim to do that and fly back Friday*".

103. On 13th February 2006, Mr de Clare emailed Mr Gray a briefing document for the meeting due to take place with Ms Stewart and Mr Hurtado on the 18th February 2006, saying: "*[w]e believe that [Mr Hurtado] has now more than 50% of Klamath Falls*".

104. On 18th February 2006, Ms Stewart met Mr Hurtado, Mr Zolezzi, Mr Gray and Mr de Clare in Houston.

105. On 21st February 2006, Mr de Clare emailed Mr Gray and others concerning the courting of Mr Cambridge to join GEHC. The email attached revised deal team percentages for the Plasma project including Mr Cambridge and, according to Mr de Clare, continued to reflect the equalisation agreement made between Mr Gray and Mr de Clare.

106. On 12th March 2006, Mr Redoglia emailed Mr Gray saying that he needed his sign off on the new deal team structure for Mandalay (the Plasma project).

107. On 13th March 2006, Mr Gray emailed Mr Redoglia saying "*fine by =e [sic]! I am sure that between you this will be a great =ooperation [sic]*", i.e. agreeing to the new deal team structure for the Plasma project.

108. On 13th March 2006, Mr Gray informed Ms Stewart that he was "*about to pull the plug*" with Deutsche Bank and had agreed terms with Mr Heerema to run a US$500 million fund.

109. On 17th March 2006, Mr Nicolaas Pronk ("Mr Pronk"), who worked for Mr Heerema, sent Mr Gray an email summarising their discussions referring to: "*[w]e are going to capitalise HOGD(s) as thinly as possible. You will have 20% of the ordinary shares (All cumpref shares will be Heerema's*", the hurdle rate of 6%, and suggesting that Mr Heerema wanted Mr Gray to join the board of the "*GP [General Partner]*", and mentioning a 2% management fee, and a section on GEHC saying "*[a]s we discussed decisions on the involvement of [GEHC] will be [Mr Heerema's call]*", and including a section on AWS saying: "*[m]y understanding of the AWS scenario is as follows: We would set up a SPV with El Paso, Heerema and [GEHC] (40%, 40% and 20%). Since [GEHC] is in on a carried interest, Heerema and El Paso would fund on a 50/50 basis. Investment for 30% of AWS would be around USD 10 million, meaning USD 5 million for Heerema. You indicated that you are fine with a co-investment of USD 1 million or 20%. As I informed you the 20% is very much appreciated by us and would not be fixed at USD 1 million. However, I think you should indicate what your cap is in case the total investment will exceed USD 10 million*". Mr Pronk concluded by saying "*Hope you agree with the above and can help on certain outstanding issues*".

110. On 21st March 2006, Mr Gray told Mr de Clare in relation to Deutsche Bank that he had "*pulled the trigger yesterday*". In the result, Mr Gray agreed to become part time with Deutsche Bank from April 2006.

111. On 22nd March 2006, Mr Gray replied to Mr Pronk accepting the hurdle rate and other suggestions including a capped 2% of committed funds by way of management fee, and saying in relation to GEHC: "*there will be things they can help with but we need [Mr Heerema's] sign off. This could be a GP board item in any event. I feel much more comfortable this way*". The email does not end with any sign off, and I wonder whether the version in the bundles is complete, since Mr Gray did not respond to the section in Mr Pronk's email on AWS technology.

112. On 4th April 2006, Mr de Clare sent the draft of the Alfredo mandate between Mr Zolezzi and GEHC to Mr Gray for his comments.

113. On 8th April 2006, Mr Gray responded to the draft of the Alfredo mandate as follows: *[i]f you feel that getting [Mr Zolezzi] to sign up puts us in a better position, I have no problem with that other than we will be on the other side with a [carried] interest and I will be putting in real money – and GEHC will be trying to represent [Mr Zolezzi] in getting more for less. The real issue … is that [Mr Zolezzi] has been dishonest. I have put my friendship with [Ms Stewart] on the line on the basis of representations by him to me and to her … and he does not have the courage or decency to follow*

through or confront [Mr Hurtado] …". Mr Gray accepted in cross-examination that that email implied that GEHC would be getting a carried interest.

114. On 11th April 2006, Mr de Clare emailed Mr Gray saying that Mr Zolezzi had called Mr Hurtado to remind him of Klamath Falls's obligations to El Paso and the help given by Ms Stewart to Klamath Falls, and that Mr Hurtado had agreed to do something about it. Mr Gray responded saying: "*we still need an option to buy. Particularly as GEHC stands to have a 20% interest*".

115. On or about 13th April 2006, SJ Berwin sent an undated letter to Mr Pronk saying that it was "*proposed to set up a private equity fund structure between Heerema (a Panamanian company) and [Mr Gray] … whereby Heerema would be the sole investor and [Mr Gray] would receive a management charge of 2% of commitments and a carried interest of 20% (with a 6% hurdle and full catch-up) on the profits from the fund*".

116. On 24th April 2006, Mr Gray emailed Ms Stewart saying:- "*[s]ilence does not denote inactivity. The dodgy [Mr Hurtado] continues to prevaricate … My view is that it is simply that he wants – whimsically – to keep control of Alfredo. He knows that the minute that Alfredo has any money, he will vamoooooose. I have seen this control behaviour many times. … I am agreeing severance with [Deutsche Bank] right now – I will stay on a consulting retainer which works for me – and the fund is going forward. We would be VERY happy to work with any CEO that you may know who has been inducted into the Tulsa Hall of Fame [as Ms Stewart apparently had] on any acquisition program. We speak for $500 million of single source equity right now and there are quite a few funds knocking. Happy to fly over any time*".

117. On 25th April 2006, Mr Hurtado emailed Ms Stewart saying that "*The idea is to find somebody who wants an initial stake in our company and then commercialize the technology together with sharing the benefits. For the time being there is nothing concrete we can offer you; if you have any comments or ideas that you would like to share we are very please (sic) to consider them*".

118. On 27th April 2006, Mr Redoglia emailed Mr Gray congratulating him on his retirement from Deutsche Bank and saying "*now it is time to get to work …*".

119. On 15th May 2006, Mr Gray emailed Mr Heerema, Mr Pronk and Ms Stewart, copied to Mr de Clare, saying: "*[i]t appears that we finally have the opening to move forward. [Mr de Clare] reports that [Mr Hurtado], Pedro and the board decided on Friday to follow [Mr Zolezzi] and work with us. It would appear that J P Morgan [which had been seeking to commercialise the ultrasound technology for Mr Hurtado] got nowhere in bringing quick results*".

120. On 27th May 2006, a meeting took place between Ms Stewart, Mr Gray, Mr Zolezzi and Mr de Clare at which Ms Stewart lost her temper with Mr Zolezzi about his inability to procure a licence from Klamath Falls for the ultrasound technology.

121. On 1st June 2006, Mr de Clare emailed Mr Gray indicating ideas for the "*contract between GEHC and El Paso*" including a "*20% carried interest in the Acquisition Vehicle*", with "*[Mr Gray] as CEO*" and "*[Mr de Clare] as Board Director*

responsible for risk management" and "*GEHC has role as adviser to [El Paso] on hedging … GEHC agent for [El Paso] for Canada*".

122. On 26th June 2006, Ms Stewart wrote to Mr Hurtado and Mr Zolezzi with a proposal giving the El Paso Consortium a 10% interest in the proposed SPV.

123. On 13th July 2006, Mr de Clare emailed Mr Gray saying that he had the feeling that whole project was "*getting close to make or break*". He said that "*having been working on this now for the best part of 3 hard sweaty and bloody years, I almost have a [psychic] sense of [its] movements*". He continued by saying that he and Mr Gray should focus their attention on: "*1. Getting [Ms Stewart] and [Mr Zolezzi] to talk directly and negotiate directly … 2. .. I am very concerned that we get an agreement in place with El Paso. Right now, we are working on the close relationship that you and [Ms Stewart] have. Once a structure and equity piece is in place with Klamath Falls our bargaining position falls away. … We will be fighting hard to keep our 20% … 3. … what is [Mr Heerema's] position now? As far as I can judge the cash up front and the testing costs plus the final payment of $7 million are all from Lisa. Am I correct? Maybe I missed something here and those payments are joint ones or you have advised [Mr Heerema] to keep his tinder dry until the Acquisition funding is needed*".

124. On 14th July 2006, Mr Gray emailed Mr de Clare saying that: "*Heerema will still go 50/50 in EPC [El Paso Consortium]. [Ms Stewart] is aware of the GEHC involvement in originating this and getting it this far. However, we have not delivered anything yet in terms of getting [Mr Hurtado] to the table and [Ms Stewart] considers herself – understandably – out of pocket and up against an intransigent party – correct. She feels they are behaving badly. The time to push for our share is when there is a meeting to engage and move forward…*".

125. Later on 14th July 2006, Mr de Clare wrote to Mr Gray saying: "*I agree that "The time to push for our share is when there is a meeting to engage and move forward", however, that is when we need to sign up and finalise. You and I know how long that may take to finally agree between GEHC, El Paso and Heerema. All I am saying is that we need to get the ball rolling on actual negotiations whilst we still have some control over the lorry … I trust you well enough to make the right judgments and this note is merely an input for you to make those judgments*". In cross-examination, Mr Gray accepted that he was acting for GEHC in this regard and that Mr de Clare was trusting him to advance GEHC's interests.

126. On 17th July 2006, Mr de Clare emailed Mr Gray with a final Power Point for "*Silver Grand*" showing Mr Gray as "*Founding Partner*" and a number of previous M&A deals of "*Members of GEHC*". Mr Gray replied saying that he had looked at it and "*I think that if [Deutsche Bank] ever sees it they will confiscate my rolled up comp as things stand. I thought it would be simply a back up CV as a non-exec as I am currently configured. This is highly worrying. Who will get to see this?*" Mr de Clare responded saying he was sorry about the misunderstanding, but he had taken the quotes from his email, and had "*checked with Justin (you were unavailable) 3 days ago after I sent the last version to your [Deutsche Bank] email and she told me she had downloaded the presentation and printed it off. She said if there had been a problem with it, you would have mentioned it to her*", and "*the other point … is that, as a non-executive director, we are allowed to use your name in presentations. This*

is a normal situation for non-exec's and there is nowhere on the presentation that we have indicated that you are part of the deal team".

127. On 19th July 2006, Mr Gray emailed Mr de Clare again in relation to a draft GEHC presentation saying that: "*It would take less than a nano-second for [Mr Cohrs] to flip from my photo to the deal list – many of which have been done with [Deutsche Bank]. I think we need to reconfigure and re-send it with me shown as a shareholder and supporter and with the deals I outlined. Don't wish to be a pain but they will simply fire me for cause if they see this as it is and I lose my pension … If we can re-configure I will send a copy to [Mr Fass] and [Mr Cohrs] so they know*". Mr de Clare replied saying: "*I am misunderstanding something altogether here. Surely [Deutsche Bank] know that you are leaving and that you are working more and more closely with GEHC/Heerema etc? … I was under the assumption that you would be able to operate with GEHC (and for Heerema) and retain your pension as well as continue to receive some remuneration from [Deutsche Bank]. If my understanding is incorrect then we will be facing this difficulty for all deals going forward* ".

128. On 20th July 2006, Mr de Clare sent an email to "*Silver Dragon*" copied to Mr Gray concerning the revised presentation explaining that the correct version showed Mr Gray as "*Founding Partner and non-executive Director*".

129. In late July 2006, Mr Gray told Mr de Clare that Ms Stewart was leaving El Paso.

130. On 24th July 2006, Mr de Clare emailed Mr Gray about exploring other alternatives "*now that [Ms Stewart] is flying from the nest*", saying that they needed to come up with an investor who had the funds and was known to Mr Hurtado et al and preferable El Paso: "*Step up – [Mr Heerema]*". He suggested a deal in which GEHC had a 20% carried interest.

131. On 25th July 2006, the DoE's final report concluded: "*By developing and proving AWS technology, Klamath Falls Inc has made it possible for oil and gas operators to dramatically increase the recovery factor of damaged wells and wells with heavy or waxy oil. The results of the testing illustrate the potential of AWS technology to significantly enhance recovery rates within existing oil and gas wells. If the technology becomes widely adopted in the United States and throughout the oil and gas industry, there may be a large increase in production of hydrocarbon fluids. The resulting increase in domestic production could decrease the dependency of the United States on foreign oil*".

132. On about the 2nd August 2006, Ms Stewart left El Paso.

133. On 22nd August 2006, Mr de Clare emailed Mr Gray in relation to how a basic deal might look saying that "*The [Acquisition Vehicle] would be, initially, set up with [Mr Heerema] as 75% equity and GEHC with 25% carried equity. [Mr Heerema] will need to be aware that the SV [sic] may well be interested in an equity stake in the [Acquisition Vehicle] (yet to be determined). Should this be the case then [Mr Heerema's] 75% will need to be diluted. What do you think [Mr Gray]? Clearly a good deal is on [Mr Heerema's] willingness to step into the hole created by [El Paso]. However, for that the gets a much bigger piece of the [Acquisition Vehicle] and pretty much total control (through you!)*".

134. On 30th August 2006, Mr de Clare emailed Mr Gray asking him to approve a draft letter to Mr Griffin at El Paso saying that the deal had been introduced by GEHC to El Paso and that Mr Gray and Mr de Clare were representing GEHC.

135. On 31st August 2006, Mr Gray emailed Mr Zolezzi at Mr de Clare's request, copied to Mr de Clare, saying that: "*[Mr de Clare] and I still think that further co-operation with [GEHC] and El Paso serves the immediate and long term ambitions of you and [Mr Hurtado] … My partner and backer, [Mr Heerema], is also still keen on the project and prepared to commit significant capital through his investment vehicle (RegEnergy) upon my advice. … He is keen to move forward. We also have a (as you do) a lot of blood sweat and tears in this and we have years of loyalty to you. … Our idea … is … We would establish a testing and acquisition vehicle which would be owned by a Consortium made up of El Paso, the Heerema group, RegEnergy and [GEHC], you personally and/or Klamath Falls. … [GEHC] would have arrangement fees and a carried equity interest in the SPV. The SPV would contract with [Klamath Falls] to use the technology under the combined testing and acquisition [licence]*".

136. On 31st August 2006, Mr de Clare emailed Mr Zolezzi saying he had discussed the potential for him (Mr Zolezzi) to sell equity with Mr Gray: "*[Mr Heerema] is keen to get into the upstream oil business. [Mr Gray] and I believe that [Mr Heerema] can buy your equity as part of a package to get him into upstream oil in the Acquisition Strategy. He is keen to do this. You and I ought to talk confidentially prior to sending a response to [Mr Gray] (in other words [Mr Heerema]) and myself!*"

137. On 4th September 2006, Mr Zolezzi replied to Mr Gray saying that there were some assumptions in his email of 30th August 2006 that were not accurate and not possible, and "*I remember you that [Mr Hurtado] is the controlling partner and the one who makes all this possible*".

138. On 11th September 2006, Mr de Clare emailed Mr Gray about Mr Zolezzi's plans to monetise 10% of Klamath Falls by selling to Mr Heerema. Mr de Clare said Mr Zolezzi had discussed with Mr Hurtado an approach from Mr Heerema through Mr Gray (acting as advisor to Mr Heerema's fund) and GEHC acting as advisor to Mr Zolezzi, and suggested a conference call with Mr Gray acting for Mr Heerema and Mr de Clare acting for Mr Zolezzi.

139. On 22nd September 2006, Mr Gray sent Mr Heerema and Mr Pronk a draft term sheet for their intended acquisition of 10% of Klamath Falls from Mr Zolezzi for US$20 million including a condition providing for: "*[a]pproval by RegEnersys of the commercial plans of Klamath Falls and in particular being a party to any current negotiations taking place with regard to the sale or licensing of the AWS technology and approving any agreement resulting from such negotiations*".

140. On 26th September 2006, Mr Gray sent Mr de Clare a copy of the draft term sheet for the purchase of shares in Klamath Falls by RegEnersys from Mr Zolezzi.

141. On 3rd October 2006, Mr Heerema spoke on a telephone conference (from his sick bed) with Mr Hurtado and Mr Zolezzi about the proposed deal.

142. On 4th October 2006, Mr de Clare emailed Mr Gray asking for his comments on a draft to be sent to Mr Griffin at El Paso saying: "*[w]ithin the last few days I am*

pleased to say that considerable progress has been made by us and [Mr Heerema] on receiving positive indications from the owners of Klamath Falls to both pursue the Acquisition Strategy as well as allowing equity in Klamath Falls". The document also showed Mr Gray and Mr de Clare as representing GEHC. Mr Gray accepted in cross-examination that he was "*certainly trying to act in [GEHC's] best interests*" at this stage.

143. On 9th October 2006, Mr Zolezzi emailed Mr de Clare saying that equity and the Acquisition Strategy were separate issues: "*[p]lease make a simple mandate and charge a market fee, remember that is an introduction fee, the value comes from the technology and I am not charging to promote the Utah testing to the service company, to make feasible your [Acquisition Strategy]*".

144. On 16th October 2006, Mr Gray emailed Mr Hurtado and Mr Zolezzi, copied to Mr de Clare, saying that Mr Heerema was looking forward to "*progressing discussions with [Mr Hurtado and Mr Zolezzi] on the prospective investment in [Klamath Falls]*", and was keen to meet Mr Hurtado, and that "*as prospective a (sic) co-investor along with Mr Heerema with my own capital – I think we should press on with scheduling and analysis …*". This is what Mr Gray described as Mr Heerema's concern that he should have some "*skin in the game*" in order to show his commitment. Mr de Clare said that he understood from a conversation with Mr Gray at this time that Mr Gray would be buying some of Mr Zolezzi's shares in Klamath Falls, rather than an interest in RegEnersys.

145. In mid-October 2006, Mr Gray (through ReVysion – which was not yet formed) engaged Mr Cambridge to assist on RegEnersys's project.

146. On 22nd October 2006, Mr Gray emailed Mr Zolezzi copied to Mr de Clare saying that he had "*personally already liquidated shares to be able to pay my part of the investment*".

147. On 10th November 2006, Mr Zolezzi emailed Mr de Clare complaining that he had not heard anything since the documents were sent to Deutsche Bank in London 3 weeks before. He said: "*[i]n my visit to Amsterdam next October [sic – November] 22nd I want to finalize absolutely all aspects of the due diligence and progress towards the transfer of 10% of Klamath Falls to close the deal, that is my goal*". On the same day, Mr de Clare forwarded Mr Zolezzi's email to Mr Gray saying that Mr Zolezzi had called him as well to say that it was Mr Hurtado's lawyers who were wondering why they had not received word from RegEnersys.

148. On 12th November 2012, Mr Cambridge emailed Mr Gray saying that he had been working his way through the documents he had sent him, and wanted to talk about the "*game plan*". He concluded by saying: "*I await your instructions, mein kapitain*".

149. On 13th November 2006, Mr Gray emailed Mr de Clare saying that: "*[w]e are in the process of reviewing and appointing [Mr Heerema's] lawyers. [Mr Cambridge is engaged]. However you are going to have to get behind and down and dirty in this process to bring your client along. The deal will not be done just by warm phone calls and sitting back. There is a lot of detail before we can sign a cheque for USD20mm and we are a small team. You have a big role here as adviser to the vendor. Is the original sale memo updated? As I explained to you, we need options on*

future equity sales, a call on another 15% against a valuation formula and a right of first refusal if [Mr Hurtado] sells out. We also need front end access to the tools – to get our money back asap. Has this been discussed with [Mr Zolezzi]?".

150. Mr de Clare responded to Mr Gray on 13th November 2006 saying "*there is no problem to get 'down & dirty' here as [Mr Zolezzi] is already the one getting 'down & dirty'. It is he who agreed in writing to the Term Sheet, it is he who sent all Due Diligence material immediately and it is he who questioned why there been no questions or follow up. The points you raised below in the email are exactly the type of questions [Mr Zolezzi], the lawyers and [Mr Zolezzi's] colleagues were expecting and he told me categorically that he can help … With regard to the "……. front end access to the tools – to get our money back asap." This, I believe, is a new request. Maybe I am not understanding you correctly – what do you mean by this 'front end access'?*"

151. Mr Gray responded to Mr de Clare on 13th November 2006 saying that: "*[i]n terms of access to the technology – [please] refer to the term in the [Draft Term Sheet] about being involved with the services company and negotiation of a satisfactory contract – this underpins an acquisition strategy i.e. we want to work with the service company on the next testing and deployment – hopefully onto properties where have an economic interest. This has not changed from our discussions going back over a year (!) This is how we make money*".

152. On 22nd November 2006, Mr de Clare met Mr Gray, Mr Cambridge, Mr Zolezzi, Messrs Oleg and Vladimir Abramov (two of the Russians), and Mr Heerema at his offices in Leiden for the due diligence meeting. Mr de Clare said in evidence that he detected a change in Mr Gray's attitude towards him at this meeting.

153. On 20th November 2006, Mr Cambridge emailed Mr de Clare with an amended clause to his contract with GEHC to allow him to "*enter into business arrangements with RegEnersys*".

154. On 24th November 2006, Mr de Clare emailed Mr Zolezzi saying the meeting in Amsterdam had gone well. He included in his email an email that Mr Cambridge had just sent to Mr de Clare with a number of follow up questions, and then said he wanted to speak to Mr Gray before sending out their draft MoU to manage his expectations "*as you had clearly said that the Acquisition Strategy should not be linked to the share sale and we just do not know how [Mr Hurtado] will react to the request [for] a licence at this stage*". Mr de Clare then attempted a draft of the MoU recognising that a "*new company to be registered by RegEnersys would be seeking to acquire licences to operate the [AWS] tools at the properties of a major North American oil and gas company as early as practical*".

155. On 24th November 2006, Mr Cambridge emailed Mr Gray telling him how GEHC's role in the Acquisition Strategy had been described to him in a conversation with Mr de Clare, to the effect that GEHC would get a carried interest of 25%, increased to 30% when El Paso fell by the wayside. Mr Cambridge asked Mr Gray "*How will this all work now RegEnersys is in the picture and your deal with [Mr Heerema] for 2/20>6? I only ask as I don't want to put my foot in it as I try to work the deal to closing. I guess it also answers my question about [Mr de Clare] not looking to put equity up!!!! [Mr de Clare] also seems to be suggesting that [Mr Zolezzi] has made it*

clear that in the past that the equity purchase should not be linked to a licensing agreement as this is an issue with [Mr Hurtado]".

156. On 26th November 2006, Mr Gray replied to Mr Cambridge saying: "*[t]here was never a question of GEHC getting a 25 or 30% carried interest. We had proposed 20% to El Paso in a former life but [Mr de Clare] could not deliver [Mr Hurtado]. It was also in contemplation of an exclusive. [Mr de Clare] has depended on me bringing credibility via cash – on a pure agency business it has not worked*".

157. On 27th November 2006, Mr de Clare emailed Mr Gray saying he wanted to sit down with him to "*go through general business plans*" and to focus on the need to "*line up at least a 'memorandum of understanding between GEHC and RegEnersys as we go into negotiations with both Klamath Falls and El Paso*".

158. On 30th November 2006, Mr Cambridge emailed Mr Gray about the lawyer's draft agreements saying that it turned out that Mr de Clare was acting for Mr Hurtado, Klamath Falls and Mr Zolezzi "*et al !!!!*"

159. On 2nd December 2006, Mr Cambridge emailed Mr de Clare, copied to Mr Gray, saying that he would shortly receive drafts of a Co-operation Agreement, a Registration Rights Agreement and an Amended and Restated Shareholders Agreement, and suggesting that they should only be forwarded to Mr Zolezzi once they had had a chance to speak. Draft clauses III, IV, V and VI of the Co-operation Agreement provided for RegEnersys LP to have rights in relation to the AWS technology.

160. Later on 2nd December 2006, Mr Cambridge emailed Mr Gray saying that Mr de Clare and Mr Zolezzi had received the drafts, and that he had gone over them briefly with Mr de Clare. With regard to draft clause IV, which required Klamath Falls to make available tools not being used in Phase II to RegEnersys: "*[Mr de Clare's] comment (with his "Acquisition Strategy" hat on, as he put it – I advised him to forget he had such a hat for the time being) was that [Mr Zolezzi] won't have any problem with this, as they only have 10 tools built and available for Phase II. The implication being that [Klamath Falls] will be using them all the time*".

161. Also on 2nd December 2006, Mr de Clare emailed Mr Zolezzi a revised draft Co-operation Agreement excising many of the provisions concerning the AWS technology in draft clauses III, IV, V and VI.

162. Early on 3rd December 2006, Mr de Clare emailed Mr Gray, copied to Mr Zolezzi, attaching a further revised draft Co-operation Agreement excising most of the provisions for access to the AWS technology in previous clauses III, IV, V and VI.

163. Mr Cambridge then emailed Mr de Clare on 3rd December 2006 saying: "*In an earlier conversation (or Memo) I believe you mentioned that [Mr Zolezzi] was of the view that RegEnersys gained access to the technology etc by virtue of being an investor in Klamath Falls. This is not legally correct. Neither the investment nor any of the existing documentation convey any rights or right of access to the technology to RegEnersys. The deletions of all or parts of sections III, IV or V would appear to reflect this thinking. It is my understanding that it had been agreed that RegEnersys would be at a minimum be granted access to the technology/tooling as a benefit of*

making the investment, but that the investment should not be conditional on the negotiation of a licensing agreement now. Sections II, IV and V were intended to acknowledge that RegEnersys should have access and to briefly outline a broad understanding without getting in to detail. Section V simply states that when [Klamath Falls] is ready to license the technology, RegEnersys will get the same terms as the market (on a most favoured nation basis) – as determined by [Klamath Falls]. I believe the above mentioned deletions essentially deny RegEnersys any access to the technology. If [Mr Zolezzi's] view is that RegEnersys cannot avail itself of the technology I'm not sure there's much to discuss in a conference call as it is my understanding that this is fundamental to the investment decision. Before we get [Mr Gray] on the phone, I would ask that you revisit these points with [Mr Zolezzi] in the hope that there has been a misunderstanding of what we are trying to achieve".

164. Late in the evening of 3rd December 2006, Mr Cambridge emailed Mr Gray saying that he had spoken to Mr de Clare and played a "*little hardball so you could be the good guy tomorrow*". He said he had told Mr de Clare that Mr Zolezzi "*saying that there could be no linkage between the share purchase and the so called "acquisition strategy" was not an acceptable starting point for RegEnersys*". There was then a passage in the email concerning an epiphany between Mr Hurtado, Mr Heerema and Mr Gray, which none of the witnesses managed satisfactorily to explain. The '*epiphany*' was, however, referred to again in Mr Gray's 4th December 2006 email in terms that were easier to comprehend. The email concluded with Mr Cambridge saying that he had gone round in circles with Mr de Clare with him "*coming back to the linkage issue*".

165. On 4th December 2006, Mr de Clare emailed Mr Cambridge saying that Mr Zolezzi's principal concern was the "*fact that he entered into the sale contract with the impression that RegEnersys would not link any aspects of Klamath Falls to the sale*", and that it was a key point of Mr Hurtado's all along that Klamath Falls was not being committed to a sale or a licence. Mr de Clare attached Mr Zolezzi's email to him of the same date saying that "*[after much discussion between us following receipt of the documents from the lawyers, [Mr Zolezzi has come up with some suggestions below which may or may not work*". Mr Zolezzi's email said that he did not understand all that was being questioned and that "*[f]or clarity, this transaction is purely a sale of 10% of Klamath Falls to RegEnersys*". He said that he was totally unable to deliver exclusivity for RegEnersys and a guaranteed licence usage for 10 years as that required other scientists (based in Russia and Chile) and Klamath Falls to make the decisions. He made a counter-proposal as to the wording he thought he could get accepted. Mr Zolezzi asked for an answer from Mr Cambridge urgently "*as this will determine whether we are ready for a meeting on 11th [December 2006 in London] or not*".

166. On 4th December 2006, Mr Gray emailed Mr de Clare saying that he was back from Hong Kong and catching up and that: "*I cannot understand such a fundamental misunderstanding. Why would I or anyone else take a simple blind minority in a company as chaotic as [Klamath Falls] without the protection of rights to safeguard and develop it? .... You yourself told me that [Mr Hurtado] was a convert now to the acquisition strategy as a concept and had had – as [Mr Cambridge] puts it – an epiphany after speaking with [Mr Heerema]. [Mr Zolezzi] needs to understand that he has NO rights or power under the present terms and shareholders' agreement – he*

has signed them all away – [Mr Hurtado] can sell on a whim and make [Mr Zolezzi] do so with drag along rights – or leave him stranded in a minority with restricted tag along rights. … I have stated all along and to [Mr Zolezzi] in the meeting – and he AGREED after [Mr Hurtado] and [Mr Heerema] had talked – that we would be pivotal to the commercialisation and phase 2 testing. Forget any idea of an acquisition strategy if we have no rights to access the technology – nobody will invest! [Mr de Clare] this is madness and in nobody's interest – we need to be full and centre in helping both [Mr Hurtado] and [Mr Zolezzi] and the Russians in making [Klamath Falls] a real companywith exponential value … You need to make [Mr Zolezzi] aware of this – it was clear that he had ZERO understanding of what he had signed and us coming in is protection for him".

167. Shortly thereafter on 4th December 2006, Mr Gray emailed Mr de Clare, copied to Mr Cambridge, a draft letter for Mr Heerema to send to Mr Hurtado explaining the position that he had explained to Mr de Clare as follows: "*As you know [Mr Gray] and the RegEnersys team have been reviewing Klamath Falls with a view to us acquiring a 10% equity stake and a cooperation agreement with you relating to commercialisation*" and "*I do think we have a window of opportunity to profit from early utilisation of the technology by acquiring under-exploited reserves – hence the draft term sheet suggested that we – oil people –be involved in the commercialisation and deployment on our joint behalves. As discussed with [Mr Zolezzi] we believe that this makes sense and would add major value for all shareholders and we would plan an acquisition programme through RegEnersys with licensed use of the technology and to all of our benefit*".

168. On 4th December 2006, Mr de Clare emailed Mr Gray, in response to his email on his return from Hong Kong, copied to Mr Cambridge, saying: "*all good points and I have spent much of the days since Amsterdam trying to explain this to [Mr Zolezzi] ... However he has just seen his sale fall apart in his mind and that has been a bitter pill to swallow. Yes, from the [documents] disclosed it is clear that he and the Russians signed away everything to [Klamath Falls] and [Mr Hurtado]. Perhaps this is the first time this has been made blatantly clear to him*".

169. Later on 4th December 2006, Mr de Clare emailed a revised draft (of the letter from Mr Heerema to Mr Hurtado) to Mr Gray saying that these were his "*strong suggestions*". The main amendments he proposed were to excise the reference to the "*cooperation agreement*" completely, and to replace the passage saying "*and we would plan an acquisition programme through RegEnersys with licensed use of the technology and to all of our benefit*" with "*As [Mr Zolezzi told me several months ago, Klamath Falls is not willing to enter into this type of commercial activities as [its] principal equity holders do not see themselves as being in this industry. Given this view, and in line with providing strong examples of how AWS technology can be deployed profitably, we would plan an acquisition programme through RegEnersys with licensed use of the technology and to all of our benefit is you so desire*".

170. Still later on 4th December 2006, Mr de Clare emailed Mr Gray saying that what was critical was that, through thick and thin, they had worked together and not drifted apart. He said that the deals that come easily are the deals no one else wants, and that "*[t]his whole deal is like extracting a tooth for both [Mr Zolezzi] and [Mr Hurtado]. They know they need to go this way but have to almost be pushed into it …*". Mr de Clare sent Mr Gray two further emails that night and left one voicemail, one email

and the voicemail telling him not to mention the Co-operation Agreement in the note to Mr Hurtado as Mr Zolezzi had not mentioned it to him yet, and the other giving Mr Gray Mr Zolezzi's number if he needed to call him whilst Mr de Clare was tied up in a Plasma meeting.

171. Late on 4th December 2006, Mr Heerema sent Mr Hurtado the email that Mr Gray had drafted, apparently without any of the amendments suggested by Mr de Clare. Though no copy of the final email is in the bundles, it is clear from subsequent exchanges that, contrary to Mr de Clare's requests, Mr Heerema did mention the Co-operation Agreement. It appears that an offer to finance tools was also added in to Mr Gray's draft of the email.

172. On 5th December 2006, Mr de Clare emailed Mr Cambridge addressing him as "*Hi Paul (the GEHC Paul !!!)*" and saying "*Yes it's been a tough day today but I think we are getting there slowly. I did not hear back from [Mr Gray] re the email from [Mr Heerema] to [Mr Hurtado] but I am assuming it is because of the lateness on Amsterdam …*" and also talking about the Plasma project.

173. On 5th December 2006, Mr Gray emailed Mr Heerema thanking him for emailing Mr Hurtado and saying that Mr Zolezzi had been "*holding out on him hoping that he could simply get our investment across the line without commitment*", and that Klamath Falls was a "*wholly rudderless company*" and that Mr Zolezzi was in "*lala land*", and that Mr Hurtado controlled Klamath Falls and the level of his control was a wake-up call for Mr Zolezzi. He concluded that he thought "*all hinges on a meeting of minds between us and [Mr Hurtado]. I don't think that [Mr Zolezzi] and the Russians want to see the deal evaporate because [Mr Zolezzi] is afraid to tackle [Mr Hurtado]*".

174. On 6th December 2006, Mr de Clare emailed Mr Gray complaining that Mr Zolezzi had called him to complain that Mr Hurtado had received a note from Mr Heerema mentioning the Co-operation Agreement, and that neither Mr Zolezzi nor Mr de Clare had received a copy to warn them. But he said there was no point in crying over spilt milk: "*the deed is done. Next step the meeting on the 11th. … Thus far, you have not mentioned if I should be there or not. I am happy to leave it you … If I am not there then you will be the only one looking after the [GEHC] corner! Anyway, it's your call [Mr Gray] as you know [Mr Heerema] very well and you and I are both familiar with [Mr Hurtado]. I know that you have new colleagues with RegEnersys and I know that you are focusing on getting them familiar with the Acquisition Strategy etc. However, don't forget your colleagues/workers at GEHC and the carried interest in the acquisition vehicles etc etc. This is likely to eventually result in the culmination of up to 3 years worth of work for many of us you and I at the forefront*".

175. On 6th December 2006, Mr Gray responded to Mr de Clare, copied to Mr Cambridge, as follows. There are two versions of this email, but Mr de Clare only recalls receiving this version:-

> "*You had a copy of the email. The only addition was an offer to finance tools. Let's get real on this. You have worked this for 4 years and me for 3. And we have only just found out that [Mr Hurtado] has absolute control over this business. No progress has been made other than through my intervention with [Ms Stewart] and El Paso – which ended badly. And now*

[Mr Zolezzi] crows about how they had no obligation to El Paso – I persuaded [Ms Stewart] to help on the basis of TRUST and [Mr Zolezzi's] WORD that something long term would come of it. It is as well [Ms Stewart] left because I would have been seen to fail her. [Mr Zolezzi] hated it when she told it how it was. He does not behave as well as he believes he does. And he has not this time either as you know. NOBODY would take a simple minority portfolio interest in a company with no management, no business plan nor idea around commercialisation, no numbers and a history such as [Klamath Falls]. All wholly controlled by [Mr Hurtado] as [Mr Zolezzi] has only just discovered. [Mr Zolezzi] should have not only mentioned but actively proposed the Cooperation Agreement to [Mr Hurtado] – this is the only way that anybody could ever go about it – and you should have made this absolutely clear to [Mr Zolezzi]. You should have made him front up to this with [Mr Hurtado]. There is no way that [Mr Zolezzi] – and again you should have made this 100% clear – could ever hope to slip $20mm blind minority investment through without a high level of comfort. And the only comfort [Mr Zolezzi] can give was on the tool. …

I will have spent over $100,000 dollars in costs before this is over. This is real money. I have had El Paso spend a couple of million dollars helping. That was real money and my reputation. My reputation with [Mr Heerema] is now on the line. You need some resolve around this … and simply bending to [Mr Zolezzi] trying to finesse Juan will get nowhere. …

Forget the acquisition strategy and 20% carries etc. This was a deal which would have been unprecedented in the market (and which had yet to be agreed) but which entirely hung off my relationship with [Ms Stewart] and being able to get El Paso into the programme, revalue their heavy oil portfolio and fund externally. El Paso are not there for reasons we know. They may be in future. Who knows right now. And how was an acquisition strategy ever going forward without a commercialisation agreement? The meeting should go ahead with [Mr Hurtado] on the 11th but I will have to be representing [Mr Heerema's] and my interest here. Remember I have $1mm p.a. [personal account] I have to put in. I can do no other. There would be no future at all for GEHC in this deal had I not been able to bring capital. And I can maybe influence but not ordain what role GEHC would have going forward – simply because that is entirely up to [Mr Hurtado] as he controls the entire show…".

176. Mr Cambridge reacted to Mr Gray's email by saying: "*I must admit I was curious as to who "the many of us" are within GEHC relying on this deal going forward after 3 years of work. This is going to take all your renowned diplomatic skills … I'm currently drafting a due diligence status report for you to look at – should have something in a few hours*". Mr Gray responded privately to Mr Cambridge saying: "*I know he [Mr de Clare] is going to be hurt by my email and I love him dearly but he is out of his depth and has no control over [Mr Zolezzi] or understanding of the real economics. That 10% is worthless unless [Mr Hurtado] blesses it. [Mr Hurtado] knows that. We know that. [Mr Zolezzi] and [Mr de Clare] do not understand*".

177. Also on 6th December 2006, Mr de Clare responded to Mr Gray, with silent copies to Mr Abbott, Mr Perry Monych and Mr Redoglia, and later copied to Mr Turner and Mr Lambert, concluding by urging him not to break up a good partnership, saying:-

> "*GEHC is the key element to the acquisition strategy. You, myself and many others played a major role in helping this to happen over the years.*
>
> *You were my partner in GEHC for the period and you still are. You and I (plus the others in GEHC) as part of GEHC have an absolute right to a meaningful part of the Acquisition Vehicle. This work has been performed by GEHC over the long 4 years and it was the principal goal to hold a carried interest in such a vehicle as the PARAMOUNT method of monetisation for GEHC.*
>
> *You have been working on this as a principal partner in GEHC and you cannot walk off with intellectual property, work and rights to another company and ignore GEHC as GEHC has been the ONLY continuity in this whole project from the beginning.*
>
> *RegEnersys came along only recently and, following [Ms Stewart's] departure, RegEnersys has stepped up and filled an equity void that El Paso left.*
>
> *Whilst this has helped us to progress more quickly, this has altered little in the structure of the Acquisition vehicle for GEHC. Since RegEnersys's involvement you and I as GEHC have clearly and wholly been working on the basis that GEHC still retains a carried interest in the Acquisition vehicle and you have actually strongly mentioned this on many occasions to myself and [Mr Zolezzi].*
>
> *We have had numerous emails and PowerPoint communication between us and we made it clear all along that GEHC would be retaining still a carried interest in the Acquisition vehicle. …*
>
> *[Mr Gray], GEHC (myself, you, [Mr Abbott], [Mr Burgis], [Mr Redoglia], [Mr Lambert], [Mr Elphick] and [Mr Turner]) have done virtually everything to bring this Acquisition project to where it is now. We simply cannot and will not allow one member (albeit an important member) of GEHC to run off with the whole project to another company. I know you know Heerema group well … and I know [Mr Heerema] is a close friend, however, you have been working as a partner along with myself and other minor equity members of GEHC to bring this whole Acquisition Strategy along. Heerema's involvement was brought in by you and God Bless that (!), however, the role of GEHC in coordinating this and, more importantly, bringing this whole project to the attention of the Heerema group cannot and will not be ignored.*
>
> *In whatever manner [Mr Zolezzi], [Mr Hurtado] and the cooperation agreement are dealt with is obviously important, but it is not going to be done without GEHC's carried interest in the Acquisition vehicle. Your work in this was always for GEHC (as was every other individual*

mentioned above) and we all worked together as one team to deliver through thick and thin.

RegEnersys are more than welcome (as is El Paso) but they were not the only key players in this. Since 4 years have gone by and to get us to where we (GEHC, Heerema, RegEnersys and El Paso) are now has been a coordinated plan by GEHC and you as part of GEHC.

… you said that you have invested $100,000 in this. I have invested much, much more. I do not know what percentage of your overall wealth the $100,000 is but, believe me, [Mr Abbot], [Mr Burgis] and myself have invested hard cash as a much greater percentage of our individual wealth.

What I am saying … is that it took a team of us to get to where we are now. Along the way there have been ups and downs but everyone of this team has supported everyone else. You have been both a key member of the team (as can be seen in the Deal Team) as well as the partner of mine in GEHC.

Specifically, this whole period since [Ms Stewart] left El Paso has been to set up a testing and Acquisition vehicle owned by a consortium (Heerema group, RegEnersys, GEHC at the very least). El Paso would put in wells and RegEnersys would put in cash. RegEnersys would also be buying equity in [Klamath Falls] from [Mr Zolezzi].

GEHC's role was always clearly established between us in this stage and prior stages as having a carried interest in the Acquisition vehicle and that percentage was always 25% at the least.

I am assuming that in your position as partner in GEHC, a significant Deal Team member of this deal AND a senior figure in RegEnersys, you will have told the Heerema group ([Mr Heerema]) of GEHC's position here and the above strategy.

At no time have we altered that strategy. The cooperation Agreement is one part of many pieces to get this deal done and I have never said that the cooperation Agreement should be not done. It was simply a matter of WHEN it was mentioned to [Mr Hurtado] as, if you recall, [Mr Zolezzi] had requested (and you had agreed initially) no linkage between the sale of equity and any other element of Klamath Falls' business. He did that not because he did not want a cooperation agreement but simply because he was not allowed to commit Klamath Falls.

The meeting is key on the 11th [December 2006] and we need to make sure that the introduction of the cooperation agreement is done in a way that does not reflect badly on [Mr Zolezzi] as [Mr Zolezzi] had assured [Mr Hurtado] that there was no direct linkage.

… there is no way that GEHC can allow the significant work that has been accomplished by us all as individuals and as GEHC to go. GEHC has a right to the carried interest in the Acquisition vehicle and will expect you and RegEnersys and the Heerema group to honour that. Let's not break up

a good partnership … You and I have a lot more to do together and we are only just beginning".

178. It appears that Mr de Clare spoke on the telephone with Mr Zolezzi about this exchange of emails with Mr Gray. Mr Zolezzi responded as follows:- "*We feel very sorry about what is going on with [Mr Gray] and your hard work for the last two years related with the Acquisition Strategy, I clearly remember when he suggested you not to get involved with me and my technology, and now he becomes the star and owner of everything, he must recognise at least a percentage of his ownership, if not he is acting in a very dishonest way*", and offering to cancel the 11th December 2006 meeting in London.

179. On 7th December 2006 (2754-2757), Mr de Clare emailed Mr Zolezzi telling him not to cancel the meeting, saying: "*We cannot allow [Mr Gray's] immoral actions to inflict harm on you as well. Yes, you and I have worked like demons on this for years, however, we cannot let it go away now. The most important thing is to secure the interest of [Mr Heerema] who I believe to be an honourable person and someone that [Mr Hurtado] will listen to regarding the way forward for the AWS. The problem I have with [Mr Gray] is a real, real shame. However, [GEHC] has worked on this diligently and in good faith without a contract with anyone. We did it on the basis that the Acquisition Strategy was our honest belief in the best interests of Klamath Falls and GEHC. To find the Judas within was a shock. Having said that, as you say I will fight very hard with [Mr Gray] to get what is deserved of (sic) GEHC. I do this for the people that have believed in me, you and the technology that you created. [Mr Gray's] crime is letting those people, his colleagues, down*".

180. On 7th December 2006, Mr de Clare emailed Mr Zolezzi, in response to a further detailed email from him outlining some possibilities, saying: "*[t]he way forward is for GEHC to confront [Mr Gray] directly in a way that demonstrates to him the immoral theft of the intellectual property of GEHC from his fellow team members … Prior to the meeting on the 11th, I will deliver an email to [Mr Gray] that shows that GEHC will not be letting him get away with this … Additionally, I am preparing a very strong position paper to … deliver … after the meeting in London. This is for two reasons … 2) I do not want to endanger in any way the meeting in London! I have said it for years, along with you, that an Acquisition Strategy is the perfect way for Klamath Falls to succeed in full monetisation of your technology and we cannot see that fail for you, the Russians, your team and even [Mr Hurtado's] team. Like me, you have responsibilities to your team, and any jeopardy of this deal would be bad for all of them. … The only goal of GEHC in this work was to do the Acquisition Strategy … We managed to get into a good position having found a Testing partner [El Paso] and eventually an investor [Mr Heerema]. In this scenario GEHC had a 25% carried interest in the Acquisition vehicle and it is this right that GEHC has to focus on*".

181. On 9th December 2006, Mr de Clare wrote to Mr Gray saying he was disappointed by the exchange of emails, but that "*the main thing is to bring the Acquisition project to fruition*", and "*I do not think that you feel my presence is warranted in London and, in view of this I will not be attending*", and "*[o]ur shareholders' agreement calls upon the Principals, in good faith, to use their best efforts to resolve amongst themselves any dispute and you and I have known and worked with each other for many years so this ought to be achievable*".

182. On 10th December 2006, Mr Gray sent Mr de Clare an email saying it was Mr de Clare's and Mr Zolezzi's "*call on London*". He continued by saying that: "*[o]n broader issues there is a clear mis-communication. I would love everyone to get rich and we will over time. The acquisition strategy was an idea to acquire reserves and treat them – it is not IP. ... My idea has been to offer a unique access deal to El Paso via the technology. That may or may [not] still be achievable. And they may or may not be prepared to pay 25% of capital away in commission. This was never tested and simply stating over and over as you and I did as tactics does not mean they are bound – I hope they feel they are but I very much doubt it sadly and they have absolutely no obligation. But the point that I was trying to make so poorly is that RegEnersys is buying its way in at a substantial cost via equity and is in yet a different position – and it is cracking free a dialogue with [Mr Hurtado] which would not otherwise transpire. Let's hope for all of us we can deliver something. Cheer up and move forward*".

183. On 10th December 2006, Mr Cambridge, on behalf of his service company, Selkie Investments LLC, signed a new agreement with GEHC, allowing him to enter into business arrangements with RegEnersys.

184. On 11th December 2006, Mr Hurtado, Mr Zolezzi, Mr Gray and Mr Heerema met in London. Mr de Clare did not attend the meeting.

185. On 13th December 2006, Mr de Clare emailed Mr Gray saying: "*[o]bviously, the Acquisition Strategy is important, however, we should discuss how to finish off the equity sale of Klamath Falls as a first step*".

186. On 20th December 2006, Mr Gray emailed Mr Redoglia agreeing to pay $3,173 being his contribution as a 16.7% holder on the Plasma Technology deal team for patent lawyers.

187. On 3rd January 2007, Mr de Clare emailed his colleagues outlining a strategy to seek redress against Mr Gray. He concluded by saying that he felt strongly that they could demonstrate a very good argument for "*our position in the Acquisition Strategy and that our 20% to 30% carried interest in the Acquisition Vehicle can be upheld. Let's face it [Mr Gray] would not be stealing this project from us if there was no value to it ...*".

188. On 30th January 2007, Mr Gray emailed Mr de Clare saying: "*Let's speak. Far from there [being] any gravy in this situation, [Mr Hurtado] has sent proposals around deployment which are totally toxic. The real client here was [Mr Hurtado] and not [Mr Zolezzi]. Has he discussed with you?*"

189. On 30th January 2007, Mr de Clare emailed Mr Gray saying: "*Given the role of GEHC with [Mr Zolezzi] (in regard to his sale of equity to RegEnersys) I have tried to keep a distance from him on any discussion surrounding the Acquisition Strategy ... as it would put GEHC in a conflict. I know that you (in your role as leading RegEnersys) have had to be involved with the discussions with Klamath Falls and [Mr Hurtado] and, due to a potential conflict whilst these negotiations have been going on, GEHC has stayed away from discussions surrounding the licence etc unless they are directed to us by [Mr Zolezzi]. ... We may well need to 'circle the wagons' here in some way. However, we still need to sort out the problem between us. In your*

role as head of RegEnersys, we need to align GEHC and RegEnersys properly in order we can both progress. I think that we should be able to effect a solution quickly that gives GEHC [its] reasonable reward (equity) in the Acquisition vehicle".

190. On 30th January 2007, Mr Gray emailed Mr de Clare saying: "*[t]he issue will be in getting [Mr Hurtado] and [Mr Zolezzi] to settle on a fair reward for GEHC given that they will be participants in the acquisition vehicles at different levels*".

191. On 1st February 2007, the RegEnersys fund documents were executed:-

i) RegEnersys (Bermuda) Ltd, Mr Gray and RegEnersys Inc entered into an Amended and Restated Limited Partnership Agreement dated 16 February 2007. The terms of the Amended and Restated Limited Partnership Agreement included:-

a) RegEnersys (Bermuda) Ltd was the general partner.

b) Mr Gray was a limited partner and subscribed US$625 in capital.

c) RegEnersys Inc was designated "Investor" and subscribed US$2,500 in capital and committed to lend US$250 million to the partnership.

d) The general partner, RegEnersys (Bermuda) Ltd, was entitled to a General Partner's share of 2% p.a. of RegEnersys Inc's US$250 million commitment, i.e. US$5 million per annum.

e) Returns would be applied in accordance with the limited partner's equity shares (i.e. 20% to Mr Gray) after payment of all expenses and liabilities, US$5 million p.a. and a preferred return to RegEnersys Inc of 6% of funds invested.

ii) RegEnersys (Bermuda) Ltd entered into an Advisory Agreement with ReVysion LLP (wholly owned by Mr Gray). The terms of the Advisory Agreement included:-

a) RegEnersys (Bermuda) Ltd as general partner of RegEnersys LP appointed ReVysion as its investment adviser in connection with the management of RegEnersys LP's investments.

b) RegEnersys (Bermuda) Ltd agreed to pay to ReVysion its general partner's share.

192. On 16th February 2007, Mr Gray emailed Ms Stewart saying that he was still to-ing and fro-ing with the tricky Mr Hurtado and that "*[m]y buddy [Mr de Clare] has gone off air which is very sad – he really believes that acquisitions are a concept unique to GEHC where there is an arbitrage and that a 20% was about to fall in. He had sold this to all our mutual colleagues internally who now think I am a shit having ridden to [the] rescue with money to keep the deal alive! I do love him but he is unrealistic*". Mr Gray was not cross-examined on this email, but it does seem to me to have a bearing on how he saw his position at GEHC.

193. On 22nd February 2007, Mr Gray emailed Mr de Clare saying:-

> "*There is lots to chat about deal-wsie [sic] and also how we can sponsor GEHC over here. So we should try and get together.*
>
> *The AWS thing is every bit as hairy as you might imagine. I think that stamina is now more effective than brain. [Mr Zolezzi] has had a real brush with the reality of his position and bargaining power – poor guy. A bit like me saying you can't sell your house but you can sell half your garage*".

194. On 1st March 2007, Mr de Clare emailed Mr Gray under the heading "*[e]ver onwards*" saying:-

> "*Given the establishment of RegEnersys in London and your position of heading it up, it would be great (as you suggest) to come up with some arrangement between GEHC and RegEnersys going forward.*
>
> *Allowing us to continue to work together to further develop some of the projects we are working on (Ultra sound and Gedex as examples) would be a good fit. …*
>
> *We have clearly reached a point in the Acquisition Strategy that has passed the role of [GEHC] onto RegEnersys and, as always envisaged, this becomes the product of the new company (RegEnersys) which you would run.*
>
> *We will need to tie up the carried interest that GEHC has earned over the last two years and also determine if there is a role for GEHC in RegEnersys (If you recall we had talked about you and I on the board and GEHC's role as an advisor).*
>
> *Let me know what your thoughts are as we must get the old business put to bed quickly so as we can both work together to get the new deals in!*"

195. On 5th March 2007, Mr Gray says that he replied to Mr de Clare as follows. Mr de Clare has no record of receiving the email, but I am inclined to think it was sent and that Mr de Clare must have deleted it from his system in error at some stage (it is shown on its face as having been sent at 11.30 a.m. on 5th March 2007):-

> "*RegEnersys is a funding vehicle controlled by [Mr Heerema] and I get rewarded through a deferred return. You will remember that [Mr Heerema] only agreed to become involved if I put up personal money into the AWS. So far we also have spent c. $200,000 on due diligence and legal fees. As yet we have no agreement – [although] I think we will get somewhere ultimately. The current hang up is over the level of royalty paid to [Klamath Falls] for a licence. Big delta as it stands.*
>
> *There has clearly been a paradigm shift in the relationship between [Mr Zolezzi] and [Mr Hurtado] and I am sure you have kept abreast of it. What is clear is that [Mr Hurtado] was never going to cooperate with [a Mr Zolezzi]/GEHC acquisition scheme or award a licence and [Ms Stewart] has also volunteered to me that El Paso never took seriously the idea of a*

20% carry – however many times we pitched it in our documents. She simply did not have to address it at that time".

196. On 15th April 2007, Mr Redoglia emailed Mr Gray saying that he was realigning the Plasma Technology deal team allocation, and reducing his share from 18% to 5%. Mr Gray responded saying he entirely agreed.

197. On 6th June 2007, the following RegEnersys transaction documents were executed:-

i) RegEnersys Inc entered into a share purchase agreement with Mr Zolezzi's BVI company Technological Research Inc to buy 375,000 shares in Klamath Falls for $20 each, totalling in aggregate US$7.5 million.

ii) RegEnersys Inc entered into a subscription agreement with Klamath Falls to subscribe to 694,444 shares at a price of US$20, totalling in aggregate US$13,888,880.

iii) RegEnersys Inc, Klamath Falls, Technological Research and other shareholders in Klamath Falls entered into an Amended and Restated Shareholders Agreement.

iv) RegEnersys Inc and Klamath Falls entered into a non-exclusive Licence Agreement in respect of the ultrasound technology.

v) RegEnersys Inc, Klamath Falls, Technological Research and other shareholders in Klamath Falls entered into a Co-operation Agreement on Intellectual Property.

198. On 19th June 2007, Mr de Clare emailed Mr Zolezzi with an invoice for $340,276 in respect of GEHC's fees in respect of the Alfredo mandate.

199. On 27th June 2007, Mr de Clare emailed Mr Gray copied to others at GEHC as follows congratulating him and saying (2884/5):- "*It's a pity I could not have been there to share in the success celebrations with you and [Mr Zolezzi]. That was something I had looked forward to doing for more than 4 years of hard labour and costs*", and "*I always said you should be the one running the company – now you know why!! In going forward, we need to get the problem of the carried interest resolved*".

200. On 4th July 2007, Mr Gray emailed Mr de Clare confirming that he too was keen to settle as it had been "*like a dark cloud hovering over an important and long-standing friendship*", and "*all the noise around me "stealing" your project and even the recent suggestion in your email of an entitlement to "20% of RegEnersys or whatever" show an unrealistic timewarp mindset and how separated are our perceptions*", and that the starting point for discussions should be Mr de Clare's honest acceptance that there was no legal foundation for any discussion but that such obligation as there was stemmed from: "*a moral obligation in recognition of your years of involvement and our friendship*". He went on to say that: "*[n]obody got a carried interest – not even [Mr Hurtado] or [Mr Zolezzi]. They have a right to participate in an acquisition programme. The idea that the proposal (the kite we both enthusiastically flew) with El Paso – in the belief that we were the key to and could deliver a licence – would 1)*

have been accepted just like that (you should hear [Ms Stewart] on the subject – she never needed to challenge it) and 2) should somehow attach to other entities in what transpired to be an entirely differentiated deal – is simply silly". He concluded by saying: "*What you are really saying is- I, [Mr de Clare], introduced you to [Mr Zolezzi] and you would not be involved in this project but for me. You therefore owe me over and above how the thing all panned out. Quite right – that's how I feel. But you also need to come to terms – and tell your partners – with the fact that you never did own the project and nor were you able to or instrumental in – because neither was [Mr Zolezzi] – delivering any of the underlying commercial aspects. To stand on the touchline yelling foul from this position is unfair, unjustified and very hurtful. I need acknowledgement to this to move forward as I am prepared to do and feel morally obliged to do*".

201. On 11th July 2007, Mr Zolezzi telephoned Mr de Clare and said that he would be paying GEHC's fees because he wanted to.

202. On 20th August 2007, Mr Gray had sought Mr Cambridge's advice in relation to how he should respond to Mr de Clare in relation to the interests he had in RegEnersys. Mr Cambridge emailed him saying that "*you need to be sure to accurately reflect your relationship with RegEnersys to avoid any potential accusations of misleading GEHC regarding your role. I would suggest a slight rework in a very general way such that your role as an advisor AND as a limited partner in the fund is disclosed (aren't you the indirect beneficiary of an interest in [Klamath Falls], etc. via your relationship as a limited partner?). I'm not suggesting you need to disclose any details, rather that you not get dinged for denying too categorically any beneficial interest (carried or otherwise) in the AWS technology and/or the subsequent acquisitions*". When Mr Gray came to write his response to Mr de Clare on 29th August 2007, he did not take Mr Cambridge's advice.

203. In June 2008, GEHC issued a notice of deposition in Houston against Ms Stewart requiring her to appear to respond to allegations that she had left El Paso to conspire to exploit the AWS Technology in conspiracy with Mr Hurtado and Mr Gray and to do so secretly behind the back of Mr Zolezzi, and that she had secretly acquired oil fields from El Paso to exploit the technology.

204. In October 2008, Ms Stewart voluntarily attended the deposition.

205. On 17th June 2009, RegEnersys instigated arbitration proceedings against Klamath Falls in CAM Santiago, on the basis of alleged misrepresentations made by Mr Zolezzi to RegEnersys.

206. On 14th April 2010, GEHC's solicitors wrote a letter before action to Mr Gray enclosing draft Particulars of Claim. On 14th June 2010, Mr Gray's solicitors responded to the letter before action.

207. On 8th December 2010, GEHC issued these proceedings against Mr Gray.

208. On 31st December 2010, RegEnersys was restructured, so as to wind up RegEnersys LP and to sell its assets to RegEnersys (UK) LP. Eager Resources LLP (controlled by Mr Gray) now holds 51% of the RegEnersys (UK) LP.

209. On 14th June 2011, Master Rhys ordered a trial in these proceedings "*as to liability only*". This has resulted in an ongoing dispute as to whether I can or should determine at this trial whether GEHC has sustained any loss at all. Mr Gray submits that, even if I were to find that he had broken his fiduciary duties, it is clear on the evidence that he has adduced that there has been no loss to GEHC and no profit to Mr Gray, as a result.

210. On 9th August 2011, the arbitrator issued a partial award stating that:-

    i) Klamath Falls failed to transfer the technology to RegEnersys as it was required to do under the agreements.

    ii) Klamath Falls broadly represented that it owned and controlled the know-how necessary to make and use the [AWS] Tools, and licensed those rights to RegEnersys.

    iii) Adjourned the question of the damages that were due to RegEnersys.

211. On 2nd February 2012, RegEnersys entered into a settlement agreement with Klamath Falls, under which RegEnersys has taken control of Klamath Falls and can sell the licence to make good its alleged losses of US$30 million.

212. On 13th September 2012, RegEnersys Inc and RegEnersys Investment 1 Limited and Klamath Falls entered into a settlement agreement with Mr Zolezzi and Technological Research transferring his remaining interests in Klamath Falls to RegEnersys Investment 1 Limited.

The issues

213. At the beginning of the trial, I asked the parties to identify the issues that required determination at this trial. Plainly there was an extant dispute as to the relevance of GEHC's ability to show that it has sustained loss to the liability issues that I have to decide. Nonetheless, the parties were able to agree the issues broadly as follows.

214. Issue 1: Did Mr Gray owe fiduciary duties to GEHC in connection with the exploitation/commercialisation of the ultrasound technology?

    i) Issue 1A: Was an "equalisation" or "handshake" agreement reached between Mr Gray and Mr de Clare in 2004 in relation to the Energy Bond concept (and the terms of the same)?

    ii) Issue 1B: Was any such "equalisation agreement" extended by Mr Gray and Mr de Clare (and GEHC) to the project to commercialise the ultrasound technology?

    iii) Issue 1C: Did Mr Gray agree to be (or allow himself to be treated as) a member of GEHC's "Acquisition Strategy deal team" in relation to the ultrasound technology in return for a share of the potential revenues?

    iv) Issue 1D: On whose behalf or behalves, and/or on what basis, was Mr Gray acting throughout, including:

a) when he introduced the project to commercialise the ultrasound technology to El Paso in January 2005?

b) when he introduced the project to Mr Heerema in January 2006?

c) during the discussions concerning the project until September 2006?

d) during the discussions leading to the agreements made in June 2007?

v) Issue 1E: What at all relevant times did GEHC understand the position to be between Mr Gray and (1) Deutsche Bank; and (2) Mr Heerema?

vi) Issue 1F: In relation to Mr Heerema, what did GEHC know and when regarding Mr Gray's interest or proposed interest in RegEnersys?

vii) Issue 1G: Given GEHC's understanding, did it have a legitimate expectation that Mr Gray was undertaking fiduciary duties to it and, if so, at what times did it have such expectation?

215. Issue 2: If Mr Gray owed fiduciary duties to GEHC, did he breach those duties?

i) Issue 2A: Did Mr Gray place himself in a position where his duties to GEHC conflicted or might possibly conflict with his personal interests and/or those of Mr Heerema?

ii) Issue 2B: Did GEHC have a business opportunity which it was actively pursuing in relation to the exploitation of the ultrasound technology?

iii) Issue 2C: Did Mr Gray seek to exploit the opportunity for his own benefit and/or for the benefit of the Mr Heerema or the Heerema Group (and to the exclusion of GEHC)?

216. Issue 3: Did GEHC give its fully informed consent to or acquiesce in Mr Gray's conduct?

i) Issue 3A: If Mr Gray's conduct would otherwise have involved a breach of fiduciary duty owed to GEHC, whether GEHC gave its fully informed consent to Mr Gray's conduct or otherwise waived or disentitled itself from objecting to such breach of duty when it did not attempt to stop the sale of Mr Zolezzi's shareholding in Klamath Falls to RegEnersys between January and June 2007 and took the benefit of the commission on that sale.

217. Issue 4: Given the direction for a split trial, whether for the purposes of establishing a breach of fiduciary duty or for the purposes of obtaining an order at this hearing for inquiries and accounts as to (i) the profits and other benefits received or receivable by Mr Gray and/or (ii) assets held on constructive trust and/or (iii) losses caused to GEHC, together with consequential orders at a subsequent hearing on remedies, GEHC needs at the present trial on liability to establish that it has suffered some quantifiable loss or that Mr Gray has made some quantifiable profit or holds some identifiable asset on trust? If GEHC does need to do so, has it succeeded in doing so?

218. I will return to deal substantively with these issues once I have dealt with the evidence that was put before the court and the basic law on fiduciary duties.

The Claimant's Witnesses

Mr Brian de Clare

219. Mr Brian Harmon de Clare is the president and a director of, and a shareholder in, GEHC. Between 1985 and 2000, he worked for Saloman Brothers, JP Morgan, Bankers Trust, and Deutsche Bank (as Managing Director of its energy department, after it acquired Bankers Trust in November 1998) He then worked for ABN Amro between 2000 and 2004.

220. Mr de Clare's first witness statement was extremely lengthy, running to some 561 paragraphs. Such lengthy statements, even in a moderately complicated case such as this, are to be strongly discouraged. He sets out in huge detail every event and every email and other document in the entirety of the 4-year (2004 to 2007) relationship between GEHC and Mr Gray. His statement contrasts unfavourably (as regards style – I say nothing at this point about content) with Mr Gray's statement that is 141 paragraphs and relatively succinct. Mr de Clare would have been better to have dealt with the important events in the relevant period (which are, not surprisingly, hardly numerous) and to have left the court to read the relevant documentation for itself. As in so many cases where there is extensive contemporaneous documentation, the scope for useful commentary on what the parties wrote at the time is (or should be) strictly limited.

221. I shall, in these circumstances, make no attempt to summarise what Mr de Clare has seen fit to include in his somewhat prolix statement. I shall seek to confine my treatment of it only to its essential elements.

222. At paragraphs 17 and 18, Mr de Clare explains about the handshake agreement that he says he made concerning the supposed intellectual property in the idea for Energy Bonds that he says he developed with Mr Gray as follows:-

> "*17. I also disagree with [Mr Gray's] suggestion … that nothing was agreed at this time about us having any particular business relationship. Before I left for Canada (and afterwards), [Mr Gray] would regularly tell me that he was thinking of leaving Deutsche Bank. My impression was that, like me, he too wanted to move out of banking and work on the client side. The Energy Bond was an opportunity to do so. Neither [Mr Gray] nor I attended our meetings in our respective capacities as bankers and employees of Deutsche Bank or ABN Amro. This was our own private entrepreneurial business opportunity; we were creating our own business, not looking to lend money to somebody else's. By way of example, I refer to a document we drew up in July 2004 for the Energy Bank – the Energy Bank being [Mr Gray's] idea for securitising and trading the Energy Bond, in which [Mr Gray] listed himself, Judith [Judith Tan ("Ms Tan")] and I as the founding principals (pages 70-85). At this stage, July 2004, with us discussing securitising the Energy Bond and setting up an Energy Bank, it was not necessarily going to be a GEHC project.*

> *18. [Mr Gray] and I worked on the Energy Bond as business partners (and referred to each other as partners in our discussions). As to any potential revenues, we agreed during our discussions that we would share any revenues (and costs) arising from the Energy Bond on a 50:50 basis; an agreement which [Mr Gray] later referred to as our "Handshake Agreement" (and subsequently, after it had been applied to deal team percentages, as our "Equalisation Agreement"). We reached this agreement during the summer of 2004 while I was still in London. I considered it to be a binding agreement*".

223. At paragraph 96 of Mr de Clare's statement, he describes the agreement he says he made orally with Mr Gray in December 2004 concerning the ultrasound technology as follows:- "*What I am in no doubt about is what we specifically agreed on these calls, namely that [Mr Gray] would try and find GEHC a strategic partner for the Acquisition Strategy who would be willing to test the Ultrasound Technology and share with us any benefits arising from the increase in value of wells on which the Ultrasound Technology could be applied. [Mr Gray] undertook to approach El Paso to be that partner. As with the Energy Bond deal, he and I also agreed that we would each share any rewards arising from the Acquisition Strategy on a 50:50 basis*". He described the circumstances of that agreement in more detail at paragraph 128.

224. Mr de Clare's witness statement repeatedly refers to Mr Gray as his partner. Mr de Clare's substantive evidence about this is as follows:-

> "*143. As to my use of the word "impending" in the 14 January 2005 email, I did not use this word because I thought [Mr Gray] was not yet acting in GEHC's interests or on our behalf when approaching [Ms Stewart]. It is possible I was referring to the fact that, although he was buying shares and going to come onto the board, he had not yet done so. Whilst I can no longer be certain, I believe this also acknowledged [Mr Gray's] stated preference to stay in the background.*
>
> *144. I held this belief because, at around this time, when discussing his deployment in GEHC, [Mr Gray] told me he wanted to stay in the background until he left Deutsche Bank as he preferred not to be publicly held out as being involved with GEHC. He therefore did not want a GEHC email address or GEHC business cards. ... He was working on his own projects (GEHC projects) with the consent of his boss, but doing so discreetly, with one eye on his future and another on not doing anything that might give someone at Deutsche Bank an excuse to cut his exit package (an outcome which was not unlikely given the internal political difficulties he told me he was having). This was why he told me he preferred to work "behind the scenes" at GEHC until such time as he actually resigned. ... As to precisely when he first told me he wanted to stay in the background until he left the bank, I can no longer say ... but I think it was more likely to have been in mid-January 2005.*
>
> *145. ... from 14 December 2004, when he said that [Mr Fass] had no problems with his involvement in GEHC, until 6 December 2006, [Mr Gray] never once told me he could not be my business partner or that his job at Deutsche Bank meant he was only working on GEHC's deals*

> *as a friend, or that he could not accept an economic interest in GEHC's deals prior to leaving Deutsche Bank, or that he would not, or could not, accept a percentage of the Acquisition Strategy deal revenues, or that he would not be coming onto GEHC's board in due course or that he could not accept receipt of GEHC's confidential and proprietary information*".

225. In relation to Mr Gray's intended appointment to the board of GEHC, Mr de Clare said this at paragraph 174 of his statement:-

> "*... I simply cannot recall whether [Mr Gray] said anything around this time to me about Deutsche Bank's earlier stated desire that he should take a seat on GEHC's board. I only know that around this time, January/February 2005, I understood from a discussion with [Mr Gray] that what he wanted was to take up his board position when he left Deutsche Bank. ... I recall that [Mr Gray] and I discussed the make up of GEHC's board during this discussion. I indicated that I wanted to bring in [Mr Redoglia], [Mr Turner] and [Mr Lambert] at least as directors. However, [Mr Gray] instructed me to hold off on this until he had left Deutsche Bank. He said he wanted to create, in his words, a more 'high powered' board. He specifically mentioned as a potential appointee, Walter van der Vijver, the ex-CEO of Shell, who [Mr Gray] said he knew very well. [Mr Gray] was adamant on the point and I therefore agreed that we would leave the board appointments until later. ... it was not as if GEHC was run on a formal basis with board meetings. The reality was that [Mr Gray] and I were the ones who made effectively all, or almost all, of the key decisions about the company and its direction*".

226. Mr de Clare said this in his statement about the important events of 17th December 2005:-

> "*340. To continue, at around 7.30am on 17 December 2005, I received a call from [Mr Zolezzi]. He confirmed to me that he was desperate to raise $20 million by selling some of his and his Russian Partners' shares in Klamath Falls. I ... told [Mr Zolezzi] that it was still early in the Ultrasound Technology's commercial development and therefore it would not be easy to secure him the money that he and his Russian Partners needed. ...*
>
> *341. I rang [Mr Gray] in London immediately afterwards and told him of the conversation I had had with [Mr Zolezzi]. [Mr Gray] said that it would be near on impossible to raise money for [Mr Zolezzi] right then. Soon after this conversation I got in the car and drove to the shops with my wife. During this drive I noticed I had received a 'missed call'. I called my voicemail and found an excited message from [Mr Gray].*
>
> *342. [Mr Gray's] message began: "There is a God! There is a God!" He then went on to say that he had received a call from a [Mr Heerema], who was a close friend, and on whose advisory board [Mr Gray] was on. [Mr Heerema] had called him less than 30 minutes after our call that morning and told him that he wanted to invest in upstream oil – "call me urgently" [Mr Gray] ended.*

343. At 11.01 am, now back home, I called [Mr Gray]. An excited [Mr Gray] then told me more about [Mr Heerema]. [Mr Gray] said he was Dutch, and the owner of a large oil and gas services company. [Mr Gray] told me how he had helped [Mr Heerema] out for 8 years as an unpaid member of his advisory board. They were friends. [Mr Heerema] had rung [Mr Gray] to say that he wanted to have a private conversation with him about $500 million of cash which he had on his balance sheet and which he wanted to invest in upstream oil and gas (not late production reserves as [Mr Gray] now claims). [Mr Gray] told me that he outlined to [Mr Heerema] the Ultrasound Technology and our Acquisition Strategy and had informed him that this was a very real and timely opportunity to achieve his objectives of getting into upstream oil and gas in a lucrative and low risk way. I remember [Mr Gray] being very excited. We both were. The call had come out of the blue. [Mr Gray] told me that he thought he might be able to persuade [Mr Heerema] to come on board as our equity partner, but that we needed now to work up a proposal which [Mr Gray] could present to him early in the New Year".

227. In relation to the introduction of Mr Heerema and the capacity in which Mr Gray was acting thereafter, Mr de Clare said this at paragraphs 345 and 371 of his statement:-

i) "*In paragraph 99(e) of his Defence (and the Response to a Request for Further Information), [Mr Gray] asserts that at some point between the call on 17 December 2005 and [Mr Gray's] meeting with [Mr Heerema] on 12 January 2006, he made it clear to me in oral conversation that if he were to introduce the Ultrasound Technology to [Mr Heerema] he had to do so in his capacity as adviser to [Mr Heerema] and that he could not be acting for GEHC. This is incorrect. [Mr Gray] said no such thing to me. In fact, in our conversations during that period [Mr Gray] did not just agree to introduce [Mr Heerema] to the Ultrasound Technology; what he indicated he would do, and what we discussed in great detail during December 2005, was that he would present the Ultrasound Technology and the Acquisition Strategy to [Mr Heerema] in order to try and persuade [Mr Heerema] to be our (GEHC's) equity partner in the Acquisition Strategy. I clearly understood from our discussions that he was seeking to do so on GEHC's behalf (which is why I was so keen for him to do so). He certainly never told me otherwise. Equally, he never said he was doing so on his own behalf or on behalf of [Mr Heerema]*"; and

ii) "*I do not pretend to remember every detail of every one of our calls. However, I know with absolute certainty that [Mr Gray] did not say after this meeting, or at any other time prior to the meeting on 6 December 2006 …, that in controlling [Mr Heerema's] fund he could no longer act for GEHC. He never once said anything of the sort. At no point before or after the 12 January 2006 meeting did [Mr Gray] say he could only act in his capacity as an advisor to [Mr Heerema], or that he could no longer represent GEHC's interests, or that GEHC could no longer rely on him, or that he could no longer be a member of the GEHC deal team, or that he was no longer entitled to remuneration from GEHC in respect of the Acquisition Strategy, or that he had any economic interest in the Ultrasound Technology and the Acquisition Strategy other than through GEHC. He also never said that he was being paid by [Mr Heerema],*

> *or that he was being rewarded by [Mr Heerema] in any other way, or that Heerema had offered him any kind of personal interest in his fund. He never even suggested this. On the contrary, he had already expressly told me that his position on Heerema's advisory board was unpaid. I never believed, and [Mr Gray] never gave me any reason to believe, that he was being remunerated by Heerema*".

228. In paragraph 383 of his witness statement, he said this about Ms Stewart's agreement to allow GEHC a 20% carried interest:-

> "*It was agreed between us that [Mr Heerema] should come to Houston to meet with [Ms Stewart] and [Mr Zolezzi]. [Mr Gray] spoke to [Ms Stewart] about this. It was around this time, in late January 2006, that [Mr Gray] told me over the phone that he had got [Ms Stewart] to agree that GEHC would have a 20% carried interest in the SPV. A "carried interest" was [Mr Gray's] phrase. I did not know what this was. Rather than reveal my ignorance to [Mr Gray], I remember that I looked it up on the internet after our call. I learnt that it is a term used in investment banking whereby a partner, usually the advisory partner, gets a guaranteed share of the upside in a venture without having to put any capital in, this share being guaranteed such that even if there is a dilution of equity in a company, the share remains the same. Having been told this by [Mr Gray], I put it into our Acquisition Strategy paper*".

229. In paragraph 444 of his statement, Mr de Clare alluded to having been told also that Mr Heerema had agreed to GEHC having a carried interest as follows:-

> "*… Whilst [Mr Gray] now claims that he viewed the prospect of GEHC being involved in any transaction at all regarding the Ultrasound Technology as unlikely … , this is not at all what he told me at the time. He expressly confirmed to me that [Mr Heerema] was happy for GEHC to have a carried equity interest in the SPV. He confirmed that [Mr Heerema] was keen to take a larger share (75%) with GEHC taking the rest*".

230. Mr de Clare was cross-examined for some 3 court days. He gave me the impression that he tried to answer the questions thoughtfully and truthfully. But he was somewhat prone to lengthy answers and sometimes even to argument or advocacy. Ultimately, I have little doubt that he was attempting to help the court throughout, and that where his answers were difficult to follow, or even in just a few cases, hard to accept, it was because he was not following properly the import of the question.

231. Mr Stephen Atherton Q.C., leading counsel for Mr Gray, started by asking Mr de Clare about Mr Gray's role in the Energy Bond project in 2004. He put numerous contemporaneous documents to Mr de Clare on the premise that they showed that Mr Gray was acting exclusively for Deutsche Bank in his efforts to get it interested in the project. The following exchange epitomised the disconnect between the questions and the answers:-

> "*Q. … But I am trying to get you to understand what the reality of the position must have been at the time, which is Mr Gray is still at Deutsche Bank, regardless of what he may have said to you about*

> *possibly leaving, and he can only be acting for Deutsche Bank in his contacts, on generating contacts, between you and Deutsche Bank, in relation to the energy bond and in relation to the more general projects that you have for GEHC; isn't that fair?*
>
> *A. No, and I am trying to, with respect, my Lord, I am trying to also explain what the actual relationship was at the time, and that relationship was one where Mr Gray had made it very clear to me during our London meetings that he was very upset about the way things were going at Deutsche Bank, that he was in his mind looking for other opportunities, which is precisely where the Energy Bank concept eventually evolved into. That Energy Bank concept evolved into an opportunity for [Mr Gray], myself and [Ms Tan] to look at opportunities outside both Deutsche Bank, Global Capital, and wherever we could go. It was an opportunity that was being developed and continued to be developed, and that is the actual situation*".

232. Mr de Clare freely admitted in response to numerous documents that they were examples of Mr Gray using his position at Deutsche Bank to help him in his start-up of GEHC, but he (Mr de Clare) did not waver from his central position which was that he understood that Mr Gray and he had an agreement made in mid-2004 that they would share 50/50 on the Energy Bonds project, and that in promoting that project he was acting, at least in part, in that capacity.

233. In relation to Deutsche Bank's appointment of Mr Southwell in December 2004 to negotiate the intended agreement between Deutsche Bank and GEHC, Mr de Clare's evidence was that his understanding was that he was appointed because "*[t]hey were dealing with a potential conflict that might exist inside Deutsche Bank … as we were moving down towards the negotiation of a contract between [GEHC] and Deutsche Bank*". He did not agree with Mr Gray that Mr Southwell was appointed because he, unlike Mr Gray, was a bonds expert.

234. Mr de Clare was asked whether he had disclosed the allegation that Mr Zolezzi's backer had been involved in a fraud to Mr Gray. His evidence was that he did not recall whether he had made such a disclosure or not, but that he did not think he needed to inform him because: "*the arrangement that ABN had was specifically to do with their Chilean office, and it was the Chilean office the inquiry came out of. So I was responding to the Chilean office*"; and "*the fraud did not involve Mr Zolezzi, it did not involve him personally or corporately. The unfortunate thing was apparently a group of investors who invested in that company at the time had another separate issue with Chile – there was some fraud taking place with the Chilean government, so it really didn't have anything to do per se with Mr Zolezzi*".

235. Mr de Clare said this about his understanding of the basis upon which Mr Gray introduced El Paso into the ultrasound transaction:-

> "*When I had my conversation with Mr Gray about how we would look to monetise the acquisition strategy, we were at a point then when we were -- had been talking to a number of oil companies and/or at least one of them, Shell, certainly and one or two others. Then when Mr Gray came on and when he did mention El Paso at that point, he insisted that we stop*

> *discussions with the other companies, or at least not initiate them, and allow the furtherance of the El Paso discussions to grow under very much a confidential basis. I understood that, and I discussed that with the other members of the deal team, and we all agreed that was actually the best way to proceed*".

236. Mr de Clare was asked about numerous documents he had written that suggested that he regarded Mr Gray as in a separate category from GEHC personnel. I confess to not having found much assistance from this part of the cross-examination. Mr Gray was plainly acting for Deutsche Bank at many stages of the events surrounding the Acquisition Strategy. In that respect, he was quite different from others at GEHC. Thus, the question is not whether Mr Gray was acting for Deutsche Bank – he obviously was – but the precise nature of his relationship with GEHC. To understand that, one has to look at the essential elements of the relationship itself.

237. Mr de Clare was challenged about his evidence that, in March 2005, Mr Gray had chastised him about potentially giving away half GEHC's equity interest in the Acquisition Strategy SPV to Klamath Falls. It was put to Mr de Clare that Mr Gray was saying that nobody would invest if Klamath Falls had such a large interest. I found Mr de Clare's answers on this point plausible. I think that Mr Gray was concerned about giving away equity in the SPV, because he wanted to make sure there was enough for GEHC to retain an interest.

238. Mr de Clare was asked about why he wanted Mr Gray to meet Mr Hurtado in April 2005 as "*Mr Deutsche Bank*" to persuade him to deal with GEHC rather than with JP Morgan. He explained the position that was "*not straight forward*" as follows: "*... certainly at this time we were looking for a much stronger letter from Deutsche Bank and really expected it to support Mr Gray's trip down. That did not transpire. I can't remember exactly what we actually did get, but it wasn't anywhere near the level of support that we were hoping for. And also on top of that, at some stage during the discussion prior to the trip down to Chile, I even said to Mr Gray on the presentation: where are the Deutsche Bank logos; there is not enough Deutsche Bank here. Then [Mr Gray] replied by saying: where is the [GEHC] presentation? So it was surprising how little support we really did get at that time*".

239. I found one aspect of Mr de Clare's evidence somewhat hard to accept. He was asked why he had not sent his note of the second off-site meeting to Mr Gray. Mr de Clare said in his statement that he did not send the note to Mr Gray at Deutsche Bank because he assumed that he had been skiving off work, and that Deutsche Bank did not know he was there. In cross-examination, he said he did not have Mr Gray's private email address, but was later forced to admit that he had (though in re-examination he explained that he had not used Mr Gray's private email addresses regularly until later on). For whatever reason, Mr de Clare did not think it appropriate to send his note to Mr Gray. Undoubtedly the relationship between GEHC and Mr Gray was far less straightforward than it was with the other participants who gave evidence.

240. Mr de Clare was also asked about his important exchange of emails with Mr Gray on 21st December 2005. The following passage was instructive when he was asked about what he had said about Mr Gray's relationship with Mr Heerema:-

> "*Q. … this is 21 December, with Mr Gray, because it says: "You have an opportunity with them. That is great. Whether or not we can link this with Klamath Falls depends on [Mr Hurtado] and how comfortable you are with any relationship between Heerema and Klamath Falls." What that is showing is that you, now on behalf of Mr Heerema, have the opportunity here to become involved and become involved with Klamath Falls, not Mr Zolezzi, who is selling equity, but the entity that may or may not have the rights or certainly would appear to have the control over the technology, because it is -- Mr Hurtado runs the show?*
>
> *A. No, I disagree. Unfortunately, again, Mr Atherton, I disagree with what you are saying there. From what I gathered at the time and what Mr Gray told me, was that the Heerema money and [Mr Heerema] was interested in investing in upstream oil and gas assets. What we had with the acquisition strategy was what looked, appeared to be, a perfect fit, literally the perfect glove to fit a strategy, and that strategy was for Heerema to get into the upstream oil and gas assets. The difference was that our identification of the wells, the character of the wells that made a significant amount of money with the ultrasound technology were depleted, mature and old oil wells and tight gas. So on the acquisition strategy side, and Mr Gray was a member, his role was somehow to find if the interest of the Heerema money would be directed towards the acquisition strategy. That was the opportunity that was there.*
>
> *Q. With respect, Mr de Clare, as before, what you give is a long answer which doesn't actually deal with the question I have asked you, which is the interpretation of a document that you wrote. It doesn't really matter about the nature of the wells. All I am suggesting is that you recognise the degree of involvement between Mr Gray and Mr Heerema and that there is –*
>
> *A. I disagree with that, Mr Atherton. I disagree. What you are saying is I recognise the degree of involvement between Mr Gray and Heerema, and the answer is no. All I knew at that stage was he was an unpaid member of an advisory board. What advisory board, I don't know. I had never heard of Heerema before in my life. In fact I kept getting the name spelt incorrectly, as I went along, which I had to be corrected on. So I did not know what that company was*".

241. It was then put to Mr de Clare that he was desperate to prepare materials for Mr Gray to put to Mr Heerema at their January 2005 meetings. Mr de Clare disagreed, suggesting that it was Mr Gray who was putting him and Mr Zolezzi under pressure, whilst Mr de Clare was skiing in Whistler.

242. Mr de Clare was asked about his email of 16th January 2006 in preparation for the 18th January 2006 meeting with Mr Heerema. He agreed that it showed that it was always understood that the SPV was going to be run by Mr Gray for Mr Heerema using Mr Heerema's money.

243. Mr de Clare was asked about Mr Hurtado's email to Ms Stewart of 25th April 2006 saying that there was nothing concrete he could offer El Paso for the time being. Mr

de Clare regarded it as a promising, rather than a negative, email, because Mr Hurtado said that he remained receptive to El Paso's comments or ideas.

244. Mr de Clare was asked about his email of 1st June 2006 to Mr Gray giving him his ideas for a contract between GEHC and El Paso including a carried interest. Mr de Clare said this: "*At around this time, that is precisely what I was saying to Mr Gray: we need to formalise, we need to get a contract, we need to get something in place with El Paso, because we are losing our traction and we could lose the deal. So I agree, that is exactly what we were looking for, I would totally agree, and we relied on Mr Gray to get as best a deal as possible for us*".

245. At the end of the second day of cross-examination, it was put to Mr de Clare that he had acknowledged in his 22nd August 2006 email that he understood that Mr Gray's duties would be entirely to Mr Heerema. He responded as follows:-

> "*Q. ... So there is a recognition there (1) that Mr Gray is acting for Mr Heerema, he is Mr Heerema's man; you say that his involvement in GEHC was as a member of the deal team, but that is not actually the capacity in which he is going to be appointed CEO. His capacity as CEO is he is going to be owing, effectively, his principal obligation in the affairs of the AV to Mr Heerema?*
>
> *A. No, it is through his deal team membership and through the agreement that he and I had, whereby he would run the acquisition SPV, that he became -- becomes the CEO, or proposed to become the CEO of the acquisition SPV -- ... So through Mr Heerema, through the acquisition SPV, with Mr Gray running the acquisition SPV.*
>
> *Q. I understand that. I think what you said may be quite important, in that you are drawing a distinction, it seems to me, between a monetary interest or some form of interest by way of reward, because Mr Gray is a member of a deal team, with the owing of duties, i.e. Mr Gray's presence as CEO of the AV gives Mr Heerema pretty much total control?*
>
> *A. Mr Heerema, as far as I knew at this stage, would have greater than 50 per cent of the acquisition SPV.*
>
> *Q. Of course that is right. But what you are saying is, if you like, the tangible control, the day-to-day control, is going to be effected through Mr Gray, who is going to be owing obligations to Mr Heerema?*
>
> *A. As the CEO of the acquisition SPV.*
>
> *Q. Indeed, I agree.*
>
> *A. And not just Mr Heerema, but other shareholders in the SPV.*
>
> *Q. In accordance, no doubt, with his fiduciary obligations to the AV.*
>
> *A. Once the AV is set up, once he takes that role.*

> *Q. The distinction you are making is simply that his involvement in GEHC is simply monetary; he is a member of a deal team; nothing to do with the obligations he owes; he owes them plainly to Mr Heerema?*
>
> *A. No, he owes them, because he was a member of a deal team and took on the obligation, on behalf of the other deal team members in [GEHC], to secure the best interest possible for us*".

246. It was put to Mr de Clare that Mr Gray had never told him that Mr Heerema was happy to allow GEHC a 25% carried interest. Mr de Clare denied this absolutely, and explained why the interest had increased from 20% in respect of El Paso to 25% from Mr Heerema as follows:-

> "*I think, my Lord, I think I actually may have actually gone for a higher number in between, possibly, but the reason it went to 25 was because with El Paso, our feeling -- may I explain this a little bit, because there is a little bit of logic behind it. At that time to induce El Paso to come back into the deal, our feeling was they wouldn't want to actually spend capital through an equity holding; in other words, they would be obliged to put capital in. So what we did was we said: okay, why don't we give them a part of the revenue of the uplift that would come with the technology being applied to a group of their wells. So instead of giving them an equity piece, we said we will remunerate them for the uplift, and that way, with the uplift, their cost, as an equity shareholder, wouldn't be there. So our goal was to say: let's have Heerema; and that was the discussion that took place with Mr Gray before the proposal went, and get Mr Heerema's approval to do it that way, and that was the approval I received from Mr Gray. That is why El Paso were not there at that time as an equity holder*".

247. I confess to finding this explanation a little hard to understand. It was at this point in Mr de Clare's evidence that it started to become clear that he was speaking rather more as an advocate for his cause than from memory of what actually occurred. I have been unable to conclude that Mr de Clare ever truly understood that Mr Heerema had *agreed* a 25% or any other carried interest for GEHC. He may have been told that he was receptive to the idea or was prepared to consider it, but that is rather a different thing. Here, I think Mr de Clare was guilty of a little wishful thinking.

248. Mr de Clare refused to accept that Mr Gray's email to Mr Zolezzi of 31st August 2006 calling Mr Heerema his "*backer*" showed that Mr de Clare knew that he was acting for his interests. Mr de Clare was then asked about his own email to Mr Zolezzi of 31st August 2006 in which he said that they ought to talk confidentially before he (Mr Zolezzi) responded "*to [Mr Gray] (in other words [Mr Heerema])*". Mr de Clare accepted that that showed that he clearly understood that there was a division between Mr de Clare acting for Mr Zolezzi and Mr Gray acting for Mr Heerema, but he explained that that was only in relation to the Alfredo mandate relating to the sale of equity, and not to the Acquisition Strategy, in respect of which he maintained that Mr Gray was acting for GEHC.

249. Mr de Clare was asked about the passage at paragraph 463 of his statement in which he had said that he had discussed with Mr Gray his deal team allocation under the Alfredo mandate for finding Mr Heerema, and Mr Gray had said that: "*he would take*

the revenue, but that he would return it to [Mr Heerema] should the deal not go well for [Mr Heerema]". It was suggested that this would be a serious breach of Mr Gray's obligations to Mr Heerema, but Mr de Clare disagreed on the somewhat strange basis that he (Mr de Clare) did not know that Mr Gray was being paid by Mr Heerema, and indeed Mr Gray had told him he was not. I found both Mr Gray's approach and Mr de Clare's explanation hard to understand.

250. In the context of Mr de Clare's email to Mr Gray dated 11th September 2006 suggesting a conference call with Mr Gray acting for Mr Heerema and Mr de Clare acting for Mr Zolezzi, Mr de Clare accepted that Mr Gray would have to act in Mr Heerema's best interests and drive a hard bargain for him. But he persisted in drawing a distinction between any licence for the ultrasound technology on the one hand, and the sale of Klamath Falls shares on the other, asking repeatedly why Mr Gray did not mention the licence at the time.

251. It was put to Mr de Clare that by the time of his 24th November 2006 email to Mr Zolezzi he fully understood what RegEnersys was seeking to achieve, bearing in mind that Mr de Clare himself referred to its desire to acquire licences. Mr de Clare's response was to say the following: "*I would argue, my Lord, in fact my recollection at the time, was that at this point in time, there was what I refer to now as the bait and switch taking place. Because should RegEnersys be the acquisition vehicle, then [GEHC] should have a 20 per cent carried interest in it. Should RegEnersys be purely just a fund buying equity in Klamath Falls, then that would not, at that stage anyway, have a 20 per cent carried interest for us. But if this was an acquisition SPV, then that was different*". Mr de Clare was keen on alleging that Mr Gray had been guilty of this "*bait and switch*", an expression he repeated on numerous occasions. He explained it in relation to the 2-week period leading up to the 6th December 2006 email exchanges as follows:- " *... during this period, this two weeks we were seeing what -- I have seen this as a bait and switch, and a vehicle that was meant to be purchasing equity turned into the acquisition SPV*".

252. Whilst I accept that Mr de Clare saw this as a significant change in Mr Gray's position, he agreed with Mr Atherton that there was discussion about linkage and the purchase of both equity and rights to the ultrasound equipment at the meeting in Amsterdam on 22nd November 2006. It seemed to me that Mr de Clare's main concern was that GEHC's clients, Mr Zolezzi and Technological Research and the Russians wanted the equity sale not to be linked to a licence, which Mr de Clare respected. The "bait" as he saw it was the US$500 million that Mr Heerema had to invest in Klamath Falls, and the "switch" was the change from a simple share sale to the additional pre-condition of licence for the ultrasound technology being granted to an acquisition vehicle.

253. Mr de Clare described Mr Gray's email of 6th December 2006 telling him to "*forget the Acquisition Strategy and the carries*" as a "*completely unreal summation*". There was a debate about whether GEHC's knowledge at the start of 2006 that Mr Hurtado had acquired more than 50% of Klamath Falls meant that it knew that Mr Hurtado had absolute control over the sale of Klamath Falls equity. Ultimately, Mr de Clare accepted that he did not know until it came out in due diligence that Mr Hurtado could stop Mr Zolezzi selling his shares under their shareholders' agreement.

254. Despite what Mr Gray said in his 6th December 2006 email to the effect that: "*I am prepared for the meeting to go ahead with [Mr Hurtado] on the 11th [December 2006], but will be representing [Mr Heerema's] and my interest there. I can do no other*", Mr de Clare's view was that: "*[o]ur assumption would have been, was, at the time, absolutely that Mr Gray was representing [GEHC's] 20 per cent carried interest, and it was his role to secure the interest in the SPV that was being created at this time, and literally as of this date appears to have come out of the RegEnersys deal*". This answer epitomised, I think, the view that I formed, namely that Mr de Clare had been looking at the problem that faced him on 6th December 2006 through rose tinted spectacles. He certainly felt terribly wronged as the email traffic makes crystal clear. But I am not sure that he was justified in thinking that Mr Gray could represent both Mr Heerema's interests in the SPV and GEHC's interests in obtaining a 20% carried interest in that same SPV. I returned to this question when I asked Mr de Clare a few questions myself at the end of his evidence. Mr de Clare's position was that he understood the personal interest that Mr Gray was referring to was an interest in buying into the equity in Klamath Falls (about which he already knew), that Mr Gray had already told him that a 25% carried interest for GEHC in the acquisition vehicle or SPV had been agreed with Mr Heerema, and that he had no inkling that Mr Gray would be taking a personal interest in the SPV. I have to say that I thought these pieces of evidence marked the high water mark in Mr de Clare's "rose tinted spectacle" approach. In reality, I think he must have realised by this stage, even if he found the idea unpalatable, that Mr Gray was intending to regard himself as free to take a personal interest in the Acquisition Strategy. It was that that led him to get so upset about Mr Gray 'walking off' with GEHC's property.

255. On the final day of Mr de Clare's cross-examination, it was put to him that, if he had really thought that Mr Heerema had already agreed a 25% carried interest for GEHC, he would have put that in his long 6th December 2006 email of remonstration. Mr de Clare suggested that there was a reference to the carried interest where he said "*we made it clear all along that GEHC would be retaining still a carried interest in the Acquisition vehicle*", but his failure to be more explicit was because he was in deep shock.

256. Mr de Clare accepted that, by December 2006, GEHC no longer had a mandate from Mr Zolezzi, since that had lapsed either after 3 months or after the share sale at the beginning of 2006. That was why he told Mr Zolezzi in his 7th December 2006 email that GEHC had worked "*on this diligently and in good faith without a contract with anyone*".

257. It was put to Mr de Clare that he had made it very clear in his December 2006 emails that he wished the Acquisition Strategy to proceed. He said this: "*Yes, what I am saying here, and what was happening … at this time, was that it was very clear to me that the acquisition strategy or at least the acquisition SPV was in the process of being set up; and from my account of that time, I can see that the licence now had come into play, and the deal was either going to be completely jeopardised, should we step in or Mr Zolezzi and cancel, or disrupt the transaction in some way; and I felt it was -- the only way forward was in the better interests of everybody, which admittedly included us, but everybody, and principally our client, Technological Research, was for this whole thing to go ahead. Again, it was out of our control, at least this acquisition strategy piece, which we had no idea what was going on*". Mr de Clare

accepted that there was a benefit to GEHC in encouraging the purchase of rights in the ultrasound technology.

258. In relation to his email to Mr Gray dated 30th January 2007 concerning conflicts of interest, Mr de Clare accepted that the conflict he was talking about was because GEHC wanted to align itself with RegEnersys, whilst Mr Zolezzi was on the other side of the transaction. In fact, I think that the email may disclose Mr de Clare's somewhat unclear view of what conflicts were truly in play.

259. Mr de Clare was asked some questions about Mr Gray's email dated 30th January 2007 in which he had said that "*[t]he issue will be in getting [Mr Hurtado] and [Mr Zolezzi] to settle on a fair reward for GEHC given that they will be participants in the acquisition vehicles at different levels*". Mr de Clare accepted that Mr Gray was making it perfectly plain that GEHC could not be looking at any carried interest from Mr Heerema.

260. In relation to Mr Gray's important email of 5th March 2007, which Mr de Clare said he did not receive, Mr de Clare accepted it was sent. He also accepted that Mr Gray was, in that email, revealing the interest he had in RegEnersys and informing Mr de Clare that he had put money into the purchase, and that, in relation to the acquisition, that Mr Hurtado was never going to deal with GEHC and that Ms Stewart was never going to give GEHC a carried interest.

261. Mr de Clare was asked about Mr de Clare's draft GEHC presentation in July 2006 that had referred to Mr Gray as founding partner of GEHC and to a number of Deutsche Bank projects. Mr de Clare accepted that Mr Gray had made clear in his email of 19th July 2006 that Mr de Clare had gone too far in the way he had presented Mr Gray.

262. Finally in his cross-examination, Mr de Clare was asked about Mr Gray's role. He said that GEHC was flying a flag for as high a carried interest as Mr Gray could raise it. Mr de Clare seems to have been rather confused. At one point he said it was inconceivable that somebody would be advising a US$500 million fund for nothing, yet immediately afterwards he said that he did not understand that Mr Gray was being paid for that function. I am sure that Mr de Clare realised that Mr Gray would be paid in some way by Mr Heerema, but he was never told the details.

263. In re-examination, Mr de Clare explained how Mr Hurtado's 25th April 2006 email to Ms Stewart was not seen as the end of El Paso's involvement, and how Mr Gray would have been entitled to remuneration by way of a finder's fee as a member of the Alfredo deal team if he brought in an investor to allow Mr Zolezzi to monetise his investment. He, therefore, became entitled to that remuneration when the share sale completed in 2007. Mr de Clare said he had not understood that Deutsche Bank had been engaged by El Paso in relation to the Acquisition Strategy. In relation to the emails following 6th December 2007, Mr de Clare said in re-examination that he had not condoned Mr Gray's actions, and that he could not have stopped what was happening, which was out of GEHC's control.

264. Finally, I asked Mr de Clare a series of questions. I put to him that, in his 6th December 2006 email, he had been complaining that Mr Gray was going to take an interest himself with Mr Heerema in the acquisition vehicle. Mr de Clare accepted

that, and accepted that in his January 2007 email he had said that the interests of GEHC and RegEnersys needed to be aligned so they could both progress. But then he said that he had not understood at that stage that Mr Gray was going to take a personal interest in the acquisition vehicle, only that he would take a personal interest in the shares that were being purchased from Mr Zolezzi. On that basis, I asked him how he thought that Mr Gray could discharge his duties to both Mr Heerema and to GEHC if he was acting for both and both were looking for as big an interest as possible in the acquisition vehicle. Mr de Clare said: "*I agree that would have been certainly difficult, but at that time I remember saying to him: [Mr Gray], as your role in running RegEnersys; and by that, I meant his role as heading up RegEnersys, that vehicle, he would then be discussing that with Heerema, and basically that would have been on our behalf. That should have been on our behalf. I just didn't know, I had no idea what the position was inside RegEnersys at that time*". I then asked Mr de Clare whether he thought at that stage, having written his complaining email that the only person who could really protect GEHC's interests was Mr de Clare or one of his fellow GEHC insiders. His answer was: "*I didn't, no. I was still expecting Mr Gray to somehow deal with the fact that there was some obligation owed to us, and I didn't know how it was going to happen, but we still relied on him*".

265. As I have already said, I found Mr de Clare a truthful witness. In the last answers that I have just recorded to my questions, he disclosed that he was also somewhat naïve. But as will appear in due course, I am sure that Mr de Clare genuinely thought that Mr Gray continued to owe GEHC fiduciary duties in relation to the Acquisition Strategy right up to December 2006 and beyond. He saw a clear difference between the Alfredo mandate and the Acquisition Strategy deal teams. Equally, I am sure that Mr de Clare genuinely believed that GEHC was entitled to a 20 or 25% carried interest in the SPV, namely RegEnersys, that Mr Gray was establishing to obtain rights to the ultrasound technology from Klamath Falls. I shall return in due course to the more focussed legal and factual questions that this evidence gives rise to.

Mr Terry Burgis

266. Mr Terry Burgis was an engineer who worked at Schlumberger providing oil field engineering services for 8 years up to 1998, when he left to study for his MBA. Thereafter, he worked for Royal Bank of Canada, and then as an independent contractor. Between 2006 and 2011, he worked for Partnerships British Columbia.

267. Mr Burgis gave evidence in his witness statement about the testing that he arranged for the AWS technology with El Paso, and how he regarded Mr Gray as acting for GEHC. When he was cross-examined, however, it emerged he did not recall much of what had happened, and that he was relying principally on what Mr de Clare had told him. He had only met Mr Gray on one, or at most, two occasions. Whilst I found Mr Burgis a truthful witness, I did not, through no fault of his own, find his evidence of very great assistance.

Mr Richard Redoglia

268. Mr Richard Redoglia worked for Merrill Lynch for some 15 years running its worldwide institutional energy brokerage operations in London and New York, until that division was sold to ABN Amro in 2000. He left ABN Amro in October 2002 and worked part time for a software company, Crossflo.

269. Mr Redoglia was never an employee or director of GEHC. He did, however, carry a business card identifying himself as an "Executive Director" of GEHC. It appeared that Mr Redoglia had only met Mr Gray once at the second off-site meeting in July 2005.

270. Mr Redoglia said in his witness statement at paragraph 38 that he did not follow up his own oil company contacts, because he understood that Mr Gray had taken the AWS technology to El Paso on behalf of GEHC. He also said that, throughout 2006, he believed that Mr Gray was working in the interests of GEHC on the Acquisition Strategy deal.

271. In paragraph 72 of his witness statement, Mr Redoglia said this: "*Around the end of October or early November 2006, [Mr de Clare] told me that [Mr Gray] needed some help on the equity deal and that [Mr Cambridge] was going to assist him. I considered [Mr Cambridge] to be a very valuable resource for me on Plasma but I understood that this was not a permanent move: [Mr Cambridge] was going to help [Mr Gray] advising RegEnersys on its purchase of [Mr Zolezzi's] equity and then come back to work on the Plasma Technology when it was finished. In advising RegEnersys on a purchase of [Mr Zolezzi's] equity, I did not think that either [Mr Cambridge] or [Mr Gray] were doing anything counter-productive to GEHC's interests or to the prospects of the Acquisition Strategy*".

272. Mr Redoglia also gave evidence in his statement about his reaction to Mr Gray's email to Mr de Clare of 6th December 2006. He said that he understood immediately that Mr Gray "*had cheated us*", and that "*[h]is suggestion that we hadn't known that [Mr Hurtado] was in control of Klamath Falls was completely untrue. [Mr de Clare] had told me this some 12 months previously*".

273. Mr Redoglia described his reaction to Mr Gray's conduct in January 2007 as follows: "*In short, I was outraged by [Mr Gray's] behaviour. Not only was he failing to recognise his obligations to GEHC and to his fellow deal team members, he was telling the rest of us at GEHC that there would be no future for us without him because he had brought in El Paso and [Mr Heerema], while singularly failing to recognise how the only reason we had not approached our own contacts was because he had instructed us not to*".

274. Mr Redoglia gave some evidence in chief concerning a conversation he had with Mr Cambridge in January 2007 about Mr Gray's conduct. Mr Cambridge had recounted his version of this conversation to Mr Gray in an email dated 21st January 2007, where he had said that Mr Redoglia had said in relation to GEHC's carried interest: "... *20 per cent is a number that doesn't fly under any circumstances, but [Mr Redoglia] feels that GEHC should be recognised and compensated in some fashion as part of the reason for them spending the time was for a pay-off far greater than the equity placement fee*". Mr Redoglia did not accept that he said that 20% "*doesn't fly under any circumstances*" or that "*anyone with half a brain would come up with the acquisition strategy*". He was asked again about that conversation in cross-examination, where he said this:-

> "*Q. Now, you say, going back to your witness statement, that you don't believe you would have said that?*

A. I wouldn't have said it that way.

Q. Do you think you might have said it, but using different language?

A. I might have said something along the lines: 20 per cent is a tough number to get, or a high number. I don't think I would say: it doesn't fly.

Q. But you say in your witness statement that the reason you may not have said that was because your understanding, which was obtained from Mr de Clare, was that this was a figure Mr Gray had told Mr de Clare that [Ms Stewart] had agreed; is that actually your recollection?

A. Oh, that is my recollection.

Q. Mr de Clare told you that, did he?

A. He did, and it makes sense to me as well. Again, going back to the idea that the oil industry is a small industry where it networks and you have friends, it made more than perfect sense that Rob was a very good – not just a business associate, but a really good friend of [Ms Stewart], so that always kind of felt right with me".

275. Mr Redoglia did not think that Mr de Clare told him that Mr Heerema had also agreed a carried interest for GEHC.

276. I found Mr Redoglia to have been a straightforward and reliable witness, and I accept his evidence.

Mr Martyn Turner

277. Mr Martyn Turner joined Bankers Trust as part of the Risk Advisory Team in August 1996, and later moved to the energy trading desk. He moved to Deutsche Bank in the same role when it took over Bankers Trust in November 1998. Thereafter, Mr Turner worked for Credit Suisse First Boston and then ABN Amro before leaving in September 2004 to work for GEHC.

278. In December 2005, Mr Turner joined QuIC, a risk management software developer, whilst continuing to work with GEHC (though he was never employed by it). In December 2009, he moved permanently to QuIC, which was taken over by Markit, where he is now Head of Financial Engineering EMEA.

279. In his witness statement, Mr Turner explained the deal team concept that Mr de Clare sought to put in place at GEHC. He also explained how Mr de Clare did not "*nail down*" the details of GEHC at the outset, and how that was no surprise to Mr Turner having worked with Mr de Clare for a number of years because he "*was not always good at working out details, which can make him frustrating to work with*". His statement also includes the candid statement that "*[Mr de Clare] might not thank me for saying this, but [he] only gets away with using flaky language because he is honest*".

280. In paragraph 48 of his statement, Mr Turner said this: "*In early March 2005, with Klamath Falls now apparently committed to testing with El Paso, [Mr Gray], [Mr de Clare] and I worked on honing GEHC's Acquisition Strategy, not least to try and persuade Klamath Falls to go a step forward and at last grant a licence. I do not recall when I first learnt that [Mr Gray] was working on the Ultrasound Technology as well as the Energy Bond deal team, but I know that I considered him a member of the deal team working on the Ultrasound Technology at this point*".

281. In paragraph 58 of Mr Turner's statement, he says that he understood, in relation to the Acquisition Strategy, that Mr Gray was acting on GEHC's behalf, and that was why he was given access to highly confidential documents. He went on in paragraph 62 to express the view that Mr Gray was acting on behalf of GEHC in pitching to Mr Heerema, for the same reasons. He said that he was stunned by hearing that Mr Gray had violated his 'implied bond'.

282. As Mr Turner described himself to me, he was an analyst, whereas Mr de Clare was a salesman, which is why he said he had made the comments he had about "*flaky language*". Having heard Mr de Clare cross-examined for 3 days, I found myself in sympathy with Mr Turner's answers in the following exchange:-

> "*Q. Just so I understand, what do you mean by "flaky"?*
>
> *A. It is a difference between a salesman and somebody -- I am more of an analyst, Brian is more of a salesman, so sometimes he will say things, and you will come away thinking: where are the bullet points, what exactly is the structure, what are the main points; and sometimes in my view, he wasn't communicating with me in the way that I am used to dealing with other analyst-type people. His language was just different to mine.*
>
> *Q. But it might be perhaps not wholly accurate?*
>
> *A. No, I disagree with that. But I think it is not as -- you can't necessarily draw out the logical conclusions as easy as I would like it to be. That does not mean it is inaccurate.*
>
> *Q. Fair point. Does it tie in perhaps with the idea that Mr de Clare [wouldn't] necessarily be a details man?*
>
> *A. No.*
>
> *Q. The points may be more general and you have to find –*
>
> *A. No, as I said just now, he does understand detail, that is why he has been successful and that is -- when we have discussions, even before, I think, I joined GEHC we had discussed how the deal teams would work, those ideas, he had worked that information out, he knew the detail …*".

283. Mr Turner was asked about his meeting with Mr de Clare and Mr Gray in a pub in November 2004 at which they discussed the Energy Bonds project. Mr Turner said this:-

> "*My recollection of that meeting was that we discussed, because I had left ABN a few months later, and we discussed what we had both basically tried to embark on. My recollection is more that he was looking -- not forward, but ahead to what he was going to do after Deutsche Bank. So the implication of your question is that he would be helping us as friends rather than helping us in a more business-like environment. My belief, my understanding from that meeting was he was actually looking to work with us, rather than just help us*".

284. When Mr Turner was asked about how he had gained his view of Mr Gray's relationship with GEHC, he said this: "*... there was all the -- the email exchanges, there was the fact that we had worked with Mr Gray on presentations, there was the correspondence which Mr Gray had been involved in, so he had all the time in the world to distance himself from things that he didn't appreciate. So your implication is that it was just from what I heard from [Mr de Clare]. No, it was wider than that. It was a complete set of circumstances that created that illusion*". In re-examination, he said he knew when he said it that the word "*illusion*" was wrong. He had meant "*impression*".

285. Mr Turner was asked about whether Mr Gray was really Mr de Clare's business partner as opposed to simply being a shareholder. He said this:

> "*Q. So there was plainly an involvement of Mr Gray in relation to some of the business projects that GEHC was involved in. But that wouldn't necessarily make him, even being a shareholder, a business partner of Mr de Clare, would it?*
>
> *A. "make", no; imply, yes. Because in this sense -- there is a difference between having -- if I have a shareholding in BP, I have no influence over BP and I know that I am just buying into a big company that works. Here, Mr Gray was buying into a fledgling operation, where we are just starting up. You don't do that, you don't put that amount of money into a company like [GEHC] without having some influence and some say in how it is going to work. It is too much of a gamble. There is no way, in my mind, that Mr Gray would have put money into the thing, become a shareholder in the same way that I am a shareholder in BP; he wanted influence, he was a partner, in my mind.*
>
> *....*
>
> *A. No. Mr Gray is a businessman. He is not just going to throw whatever the amount of money is at something just because he is a mate. It is not going to happen. He is a businessman. He has made money by being rational in his decision-making; this was a rational decision he made. It wasn't just as a friend, no*".

286. Mr Turner gave some very incisive evidence about his understanding of Mr Gray's dual role for Deutsche Bank and GEHC, when he was cross-examined on the minutiae of the documents that were created when Mr Gray was pitching the Energy Bond idea to Deutsche Bank, and it was suggested time and time again that he was acting exclusively for Deutsche Bank. He said:-

> "*No, you are confusing two things. He clearly was working for Deutsche Bank. We all know that. I believe he was also acting on behalf of GEHC and this says it is one; it doesn't say it is not the other. Because it is one, it doesn't mean it can't be both. You are making everything as though it has to be this or this; it isn't. That ain't what the world is like*";
>
> and
>
> " … *just because he is at [Deutsche Bank] and he is presenting it, the reason he is presenting it is because we couldn't. If we ask for a meeting with the senior guys at Deutsche Bank, they are going to say no. So, okay, [Mr Gray] is our conduit to make that presentation. That doesn't mean that [Mr Gray] in that context is only working on behalf of Deutsche Bank. That was for bond issuance. The bond issuance would not be through the corporate finance department. That would be through the bond department. It is very easy for [Mr Gray] to stand up there, fair cop, and say: this is a great deal; I believe in these guys; I think this could work; from my experience of the energy industry, I believe this is a sensible project and can you now take this to the bond department and make it work. So there is no conflict of interest there at all, so therefore he can actually play and do both sides*".

287. Mr Turner also explained how Mr Gray had a "*fleet of people*" working for him so that if a conflict did arise, he could just get one of them to look after that aspect.

288. Mr Turner was an entirely reliable witness. I found his evidence of considerable assistance; he seemed to have a real insight into Mr Gray's position. That was possibly because he had known him for some years, and was based in the UK (as Mr Gray was) whilst Mr de Clare and the others were based in North America. He only met Mr Gray 5 or so times in the time with which I am concerned, but he had a clear view of what was going on.

The Honourable Mr Garrett Lambert

289. Mr Garrett Lambert was a member of Canada's diplomatic service from 1968 to 1998, culminating in several ambassadorial roles. In 1998, he established a consultancy firm, GLI Associates Inc, to advise government and investors.

290. Mr Lambert said in his witness statement that, in December 2004, Mr de Clare referred to Mr Gray as his "*partner*", an expression which made him think that he (Mr Gray) might have a conflict with his employment at Deutsche Bank.

291. Mr Lambert was a member of the Acquisition Strategy deal team. In his witness statement, he said this about how it could have been brought to fruition:-

> "*I discussed this with [Mr de Clare], in particular the possibility of approaching four of the largest conglomerates in Hong Kong to see if any of them would be interest in investing in the Acquisition Strategy, namely Chueng Kong Holdings, New World Development, Henderson Land Development and Pacific Century Group. Primarily, these companies are*

> *based in real estate. My view was that they would have no difficulty understanding and making the property play (investing in depleted oil and gas wells), and I knew they had significant (multi-billion dollar) interests in, among other things energy, construction, transportation and telecommunication. At the time, and until about 5 years ago, I had strong personal relationships with key contacts at each of these companies. My thoughts were to go first to Cheung Kong, which owns Husky, and with whom I had completed the Stewart Energy project, as I knew a deal of this size would be just the type of thing that they would be interested in. That I ultimately did not do so is because I understood from [Mr de Clare] that [Mr Gray] had already secured the investment*".

292. Mr Lambert elaborated on this opportunity in cross-examination as follows, in relation to the decision to go with El Paso:-

> "*I agreed with it, but I was disappointed in it. I had a relationship with a company called Cheung Kong in Hong Kong, owned by a well-known entrepreneur, Mr Li Ka-shing. This is a company that is worth $150 billion in its market capitalisation, does $40 billion a year in business, has a huge oil company that is worldwide, massive real estate portfolio, so it was a perfect match. And I had already done three deals with that company, I had personal relationships at the very highest level and I was sure I could bring them to the table and bring this project to fruition, both sides. So when I was told to stop, the answer -- the only inference I could draw was that Mr Gray's relationship with El Paso was such that the deal was as good as done, and I was, if you will, too late to the table*".

293. In an important passage of his evidence, Mr Lambert explained the note that he had made of the second off-site meeting in Vancouver in July 2005 to the effect that clearly Messrs de Clare and Gray "*would run the show*". I found the following evidence balanced and compelling:-

> "*Q. Would it be fair to say that that assessment was made by you born of the fact that Mr de Clare had described to you Mr Gray as being his partner and because of, if you like, the central role of talking to the ultrasound technology topic, which Mr Gray had undertaken at the off-site meeting?*
>
> *A. It was more than that. Mr Gray also spoke up on the issue of deal teams. He spoke up -- when he spoke with respect to the acquisition strategy, it was a topic that elicited a great deal of debate, because there were different views in the room. Since I have been in court, you had suggested earlier that Mr Gray was advising in his role as a senior executive of Deutsche Bank and being helpful because he was a friend of Mr de Clare's. But the fact is that I have spent most of my lives in meetings assessing people, what their performance is, what their relative importance is, and Mr Gray was not suggesting, Mr Gray was not advising, Mr Gray was being very directive in this instance. He was expressing the views I would have expected to come from someone who was in a management role, not an advisory role.*

> *Q. Would it be fair to say that the views and the way they were being expressed was consistent with Mr Gray's seniority within Deutsche Bank, his relationship as a friend of Mr de Clare, and also the central role he was occupying or the important role he was occupying in relation to the ultrasound equipment, and his personality, for example?*
>
> *A. Well, I really can't suggest what was in his mind. But all I can say is his body language and his, shall I say, strong -- the strength with which he put forward his views that in many respects brooked no opposition, certainly sent the message to me that he was a managing partner in the company.*
>
> *Q. That was your assessment of the display that he put forward at that meeting?*
>
> *A. Yes, it was. And it is what I reflected in my email to Mr Turner.*
>
> *Q. I understand that. But without labouring the point, would that be at least to some extent a function of Mr Gray's personality, as opposed to anything else?*
>
> *A. I can't say, because I only met him on the one occasion*".

294. Mr Lambert explained how Mr de Clare had asked him to chair a remuneration committee at GEHC to resolve any conflicts in deal team allocations that might arise. Mr Gray was to be a member of that 3-man committee. In the event, the committee never sat which Mr Lambert regarded as a "*measure of the collegiality of the group, that all of these issues were solved within the deal teams themselves*".

295. Mr Lambert was asked whether he thought that Mr Gray would have been paid by Mr Heerema. The following exchange ensued:-

> "*A. At the outset, I was aware that Mr Gray was an unpaid member of Mr Heerema's advisory board. I didn't know that that was changing. What we discovered afterwards, of course, and I do mean afterwards, is that Mr Gray, in fact, coincidentally got a 20 per cent interest in the fund. And we were remarking that it was a rather coincidental 20 per cent, since that was the very carried interest that we were looking for. So the answer to your question is I don't know when that change took place, but when it had taken place, effectively, it looked like Mr Gray had walked off with our carried interest for himself.*
>
> *Q. But without the benefit of hindsight ... would you have assumed ... that Mr Gray would be receiving some form of recompense for the role that he was playing for Mr Heerema?*
>
> *A. It would be reasonable to make that assumption. But at that point, I would suggest that Mr Gray would then have found himself in conflict with his responsibilities to GEHC and would have so advised us, and somehow withdrawn, recused himself, whatever. But he didn't do any of that, at any time. Throughout this process, he continued to act, from our perspective,*

as if he was representing our interests, and he continued to remain on both the deal teams".

296. Mr Lambert was another impeccable witness. His evidence was clear, balanced and incisive. I accepted what he told me without reservation.

The Defendant's witnesses

Mr Robert Gresham Gray

297. Mr Gray is now senior partner of ReVysion LLP. He was full time Chairman of UK Investment Banking at Deutsche Bank between December 2004 and early May 2006, when he became part time in the same role until about 2010. He was Global Head of Natural Resources at Deutsche Bank between 1998 and December 2004. Between 2000 and 2009, Mr Gray was a member of an informal advisory board of Heerema Marine Contractors Holding BV. Mr Gray is qualified as a solicitor.

298. Mr Gray said the following in his first witness statement about his participation in GEHC's deal teams:-

> "*46. Mr de Clare would periodically present me with spreadsheets with figures showing percentages for deal team allocations of cost and profit and also valuation models. I was given to understand that I would have to bear any costs that I incurred in supporting him on any of his projects so that I could seek recovery of my costs in the event that the projects resulted in GEHC making a net recovery. That never occurred and I never once claimed any expenses from GEHC or Mr de Clare. I regarded the allocations of percentages as purely theoretical since they were based on speculative returns and values. Also, the deal teams appeared to be flexible concepts: as projects developed and more people became involved the allocation of percentages changed. Regardless of the allocations, I had not entered into any agreement which would entitle me to remuneration as a deal team member. Also, because of my position at Deutsche Bank I could not enter into agreements in relation to projects or deal teams that would impose on me restrictions which could conflict with my position at Deutsche Bank. Mr. de Clare seemed to spend a lot of time producing large volumes of teams and structures and plans which, frankly, I did not have time or inclination to review.*
>
> *47. When I discussed with Mr de Clare the idea of me buying shares in GEHC and helping with the ultrasound project we did not make any agreement for revenue from the ultrasound project to be shared between us.*
> *…*
>
> *49. There were further discussions about the proposed shareholding that I was to take in GEHC. These discussions took place in October and November 2005. It was proposed that I should have a net 31⅓% equity interest which I would purchase from Mr de Clare and his wife for a price of USD260,000. Mr de Clare provided a spreadsheet … which identified 21.3% of any distributable income that was earned from the ultrasound project which was to be in addition to any income attributable to my future*

> *shareholding in the company. I did not pay much attention to the spreadsheet's reference to returns on the ultrasound project because at that stage the concept of there being returns was nothing other than entirely speculative. For the same reason I thought that the notion of an additional 21.3% of distributable income was of no real significance because we were nowhere near to the point at which we could realistically consider that there would be distributable income from the ultrasound project. The combination of my shareholding plus the 21.3% of distributable income was something which Mr de Clare appeared to be putting forward for discussion. It was not based on any agreement that I had made with him in relation to the help that I had given on the ultrasound project. We did not engage in any discussion about it because, as I have said, it was simply too speculative for me at that time. I never subsequently entered into any agreement with Mr de Clare or with GEHC giving me right to be paid from income received in relation to the ultrasound project beyond my entitlement to dividends as a shareholder*".

299. In paragraphs 74 and 75 of his statement, Mr Gray said this about the meeting with Mr Hurtado in Santiago in early May 2005. The passage is instructive in the light of Mr Gray's strenuous denial that he had been talking about GEHC equity in his letter to Mr Zolezzi of 28th April 2005:-

> "*74. … I was introduced by reference to my position at Deutsche Bank and I gave out my Deutsche Bank business card (I never had a GEHC business card). I participated in the presentation that was given to Mr Hurtado and his team outlining the ultrasound project, including the programme of acquisitions subject to successful test results and the granting of a licence for deployment of the AWS Technology. …*
>
> *75. The presentation failed to persuade Mr Hurtado that GEHC had anything of value to offer which would justify the role for GEHC which Mr de Clare proposed in his presentation or indeed any role. Without acceptance of GEHC's involvement by the Hurtados, Mr de Clare's plans for GEHC's rewards were dead. … Despite the lack of support from the Hurtados, Mr Zolezzi was able to persuade Mr de Clare to continue to assist with the further testing of the AWS Technology using El Paso's oil wells because he needed the test results to give value to his shares. I believe that Mr de Clare was prepared to continue to assist because he thought that it might be possible to persuade the Hurtados to change their mind*".

300. Paragraphs 84 and 85 of Mr Gray's witness statement included the following passages:-

> "*84. In December 2005 I mentioned to Mr de Clare my plan to act as advisor to the proposed fund of the Heerema family interests. The investment strategy that we were looking at for the fund did not include or foresee any investment whatsoever in ultrasound technology and I had not made any mention of the AWS Technology to Mr Heerema before I spoke to Mr de Clare about the idea in December 2005. I discussed with Mr de Clare the possibility of putting forward the ultrasound project as a possible*

> *investment for part of the fund. I was free to take the ultrasound project to Mr Heerema if I thought it appropriate as an investment for the fund and to give unfettered advice in respect of the investment. When I spoke to Mr de Clare about putting the idea of investing in the AWS Technology to Mr Heerema it was clear that I would be acting as advisor to Mr Heerema and the fund and therefore I could not act in any capacity for GEHC when I presented it to him. Mr de Clare accepted that position. Mr de Clare had got nowhere at all in getting traction for GEHC with Klamath Falls and I wanted to help him by talking to Mr Heerema about the possibility of the proposed fund investing in the AWS Technology and I did so openly and with Mr de Clare's full prior knowledge. He encouraged me to proceed and for that purpose provided me with his presentation material.*
>
> *85. In about the second week of January 2006 I met with Mr Heerema at his request to go through his strategy for the fund. I was there in my capacity as long term friend, co-board director of Heerema Marine Contractors, advisor to Mr Heerema and prospective advisor to the proposed fund. In that capacity, I mentioned the AWS Technology to Mr Heerema as one potential projects to be considered by the fund. I did not go into any detail and I did not use the presentation material that Mr de Clare had sent to me. As a result of that discussion a meeting was arranged between Mr Heerema and Mr Zolezzi so that Mr Zolezzi could explain the AWS Technology to Mr Heerema in detail*".

301. Mr Gray was cross-examined for more than three days. His mood and demeanour changed markedly in that time. He began by being glib and imperious, and ended with a greater sense of realism. I am bound to say that I found his evidence largely unreliable, partly because I think he was at times deliberately lying, but also because he made only very occasional attempts truly to recollect what had occurred so as to assist the court. He is plainly a very intelligent man, who has become accustomed to being admired, perhaps adulated, in his field of operation. I gained the impression that he knew, throughout the events with which I am dealing, that he had been sailing close to the wind, but he just assumed that his charisma and bombast would carry him through. He never properly addressed the conflicts of interest of which he was fully aware, and this litigation has been the result. I shall return to my evaluation of his evidence after I have dealt with some of the detail of what he told me.

302. Mr Gray began in cross-examination by feigning not to recollect his 6 meetings with Mr de Clare in early 2004, in the course of which the idea of Energy Bonds was developed. He claimed the idea was his, and that to say that he was just "*shooting the breeze*" with Mr de Clare was an under-statement. He made the remarkable statement that the Energy Bonds idea would not have been any personal benefit to him if it had "*got any legs*" whilst he was still at Deutsche Bank.

303. Mr Gray denied absolutely at the outset that he was acting for GEHC in relation to Energy Bonds, or that he had reached a 'handshake' agreement with Mr de Clare in mid-2004 to split the intellectual property for the idea 50/50 with him. This resulted in his answering a whole series of questions about the documents in late 2004 entirely dishonestly. One example was in relation to the emails of the 1st and 2nd December 2004, when Mr de Clare had asked for Mr Gray's comments on the email containing the key remuneration points that Mr Gray was to put to Deutsche Bank following the

meeting with them concerning Energy Bonds. Mr Gray had plainly contributed his input so as to increase the bonus that GEHC was seeking from US$5 million to US$20 million, but he denied this absolutely and sought to use it as an opportunity gratuitously to attack Mr de Clare as follows: "*I think he is, my Lord, he has shown himself to move - as with the carry, with the proposed carry, he has very high expectations for something which has a very limited chance of ever seeing the light of day*". He then said that Mr de Clare's evidence that the email was not written for Deutsche Bank was not true. He retracted that accusation, when I asked him whether he was sure that was his evidence.

304. Mr Gray was asked about his mail of 10th December 2004 in which he had said that "*we need to start firming heads of agreement between [GEHC] and [Deutsche Bank] and I plan to ask [Mr Fass] to appoint someone other than me for obvious reasons*". Mr Gray told me that: "*[t]he obvious reasons are that I worked on the corporate finance side of the bank. Bonds and the activities of global marketing, the people who would be involved in this, this was beyond my remit in the bank and Mr Fass asked me to pass it on to Philip Southwell, who was the go-between from the corporate finance side to the global market side*". After careful consideration of the contemporaneous documents and the evidence, I have formed the view that this was a deliberate lie, designed to conceal the fact that Mr Gray had plainly at this point been acting for GEHC in relation to Energy Bonds, and had recognised that that might give him a potential conflict with Deutsche Bank.

305. Likewise, despite Mr Gray's surprising denials, his email dated 12th December 2004 to Mr de Clare made it crystal clear that Mr Gray was acting for GEHC and would protect GEHC's interests, when he wrote about the need to put Heads of Agreement in place between Deutsche Bank and GEHC saying, amongst other things: "*I would not be over-concerned whilst I am in place*".

306. Mr Gray was asked about his email to Mr de Clare dated 14th December 2004 saying that he had told Mr Fass of his "*intention to become a significant shareholder and involved in GEHC*", and referring to the need to "*formalise the handshake between us*". In his statement, he had said that: "*[m]y reference to the hand-shake was to the informal agreement that I would make an investment in GEHC subject to agreeing terms that I was satisfied did not compromise my position at Deutsche Bank*". In cross-examination, he persisted in a complete denial that the hand-shake agreement he referred to was the agreement that Mr de Clare had spoken about to share the intellectual property in the Energy Bond concept 50/50.

307. A further exchange concerned Mr de Clare's email to Mr Gray of 16th December 2004 saying "*please confirm that it is okay for GEHC to proceed with this patent in accordance with the attached file and email. For the purpose of ... clarification, it is our handshake agreement that we both personally hold the creative rights to the energy bond and we will share equally in its revenues*" as follows:-

> "*Q. You are saying that that is a complete figment of Mr de Clare's imagination?*
>
> *A. I didn't rebut it, but I didn't agree with it*".

308. In the face of the part of that email that referred to sharing costs equally, Mr Gray accepted that he was prepared to "*help [Mr de Clare] out with funding*". He was also unable to deny that he had agreed in his 16th December 2004 email that it was OK for GEHC to proceed with the patent application.

309. Mr Gray then gave another extremely surprising piece of evidence. He denied absolutely that he had instructed Allen & Overy, rather than his brother's law firm, Holman Fenwick & Willan, because "*there was an important IP issue which required the dedicated and specialist assistance of an IP department*". He said it was all about the proposed shareholders' agreement.

310. Shortly thereafter, Mr de Clare's 18th January 2005 email to Mr Gray, copied to GEHC's lawyer, Mr Reed, was put to Mr Gray. The email said that Mr de Clare had made it clear to all GEHC personnel that the Energy Bond concept was a 50/50 position with Mr Gray. Mr Gray persisted in saying that was not his understanding, but accepted that he had instructed Allen & Overy and their IP department, something he had effectively just denied. He concluded: "*I did not believe that the energy bond concept was an agreement, as such. But I was ... but yes, I did instruct lawyers on that basis*". He maintained, however, that he had always made clear that he could not go on GEHC's board whilst he was at Deutsche Bank – this is something that I accept. He accepted that Mr de Clare's email of 18th January 2005 was not "*completely wrong*".

311. Mr Gray was then shown a number of emails between the IP lawyers, culminating in Mr Gray's own email dated 18th October 2005 to Mr de Clare in relation to GEHC shares saying: "*[p]roblem on CGT could be that I never seem to have been down for Founders Shares like the others although the joint [Mr de Clare] [Mr Gray] Energy Bond IP went in at the outset – presumably for equity recognition. Is this correct?*" Mr Gray said that what he had said was incorrect, and that he was asking for clarification having seen something to that effect in a document. I found that explanation wholly implausible and untrue. The question Mr Gray asked was about whether the Energy Bond IP had gone in at the outset for equity recognition purposes, not so as to question the joint ownership of the IP itself, about which he himself was writing.

312. At the end of his first day of evidence, there was this exchange about the deal teams:-

> "*Q. You were a member of a number of deal teams, weren't you?*
>
> *A. I never signed a deal team agreement. I think Mr de Clare put me on, inserted me on to deal teams, so I don't know whether that qualifies me as a member, but certainly that was Mr de Clare's impression.*
>
> *Q. You agreed, and you never asked to be taken off any of the deal teams. First of all, you agreed to be a member of a number of deal teams, didn't you?*
>
> *A. No. I never signed a deal team agreement, because I couldn't.*
>
> *Q. You knew that Mr de Clare and others considered you to be a member of a number of deal teams, didn't you?*

A. I knew that Mr de Clare did.

Q. You never asked to be taken off the deal teams, did you?

A. I don't believe I did".

313. Mr Gray was then asked about the various spreadsheets that he had been sent showing him as a member of the Energy Bond deal team, and about the specific emails chasing him for approval to the changed percentages arising from the wish to allocate a percentage to Mr Cambridge. Mr Gray's email of 13th March 2006 clearly agreed to the revised percentages. Despite that, Mr Gray said this about the position:-

"*Q. ... you say: "Fine by me." Why do you say that if you don't regard yourself as a member of the energy bond deal team?*

A. My Lord, I think this is one of several occasions where I had been -- badgered is probably too strong a word, but pushed and bombarded with documents and this is my way of saying: look, leave me alone; I am sure between you this will be great cooperation.

Q. So it is your evidence to this court that this doesn't signify acceptance on your part that you were a member and you regarded yourself as a member of the energy bond deal team; is that right?

A. That is right.

Q. You see, Mr Turner and Mr Redoglia both thought you were a member of the deal team; did you ever correct either of them, did you ever tell either of them that you were not a member of the deal team?

A. No, my Lord, I did not".

314. In my assessment, Mr Gray would not have been a man whom it would have been easy to "*badger*" or even to push around. I reject this account of events.

315. Ultimately, Mr Gray was shown his email on 20th December 2006 responding to Mr Redoglia's email asking that he agree to pay his 16.7% share of expenses as a Plasma energy bond team member. Seeing that he had agreed, and being reminded by me of the possible consequences of not telling the truth including proceedings for perjury, Mr Gray admitted that he was an energy bond deal team member. Mr Gray then apologised for having said in paragraph 46 of his statement (quoted above) untruthfully that "*Regardless of the allocations, I had not entered into any agreement which would entitle me to remuneration as a deal team member*".

316. Later on his second day of cross-examination, Mr Gray said this about the Energy Bond deal team: "*I said I wasn't [a member of the deal team] in court, but I may need to revisit that under re-examination, because I just can't remember under this current pressure*". Sure enough, this was revisited in re-examination in what I can only describe as somewhat extraordinary circumstances. Mr Atherton showed Mr Gray numerous passages from the transcript and the following exchange ensued:-

"*Q. You will see in particular the intervention by his Lordship at lines 7 to 15 on page 14?*

A. I do.

Q. Now, can you perhaps describe to the court what your state of mind was after that intervention?

A. Well, I think clearly it was a very serious intervention. It is the first time I have been in a court like this and I think it does fry your brain from time to time and it is very hard under the pressure that I have been under for a long, long time, obviously in the run-up and sitting here for five days, and you clearly reacted to try and avoid any further admonition.

Q. Immediately before his Lordship's intervention you were being asked questions about the energy bond deal team, if you go back to page 13, lines 23 to 25?

A. Yes.

…

Q. Can you explain to the court why you changed your answer to the questions in relation to whether or not you were a member of the energy bond deal team?

A. Well, I was in shock, I think.

Q. Were you a member of any deal teams in relation to GEHC?

A. Well, I never signed the overall deal team agreement, because I didn't feel that I could be, while I was working at Deutsche Bank.

Q. Did you consider yourself to be a member of any deal teams within GEHC?

A. Not at the time, but I was persuaded by Mr Snowden [Counsel for GEHC] that on Plasma I had been active in it. But I had never actually set out to be inside any deal team, because I didn't think it was compatible with my role inside Deutsche Bank".

317. I found this a surprising exchange for a number of reasons. Mr Gray is not such a thin-skinned person as he makes out. In my judgment, he is something of a man of steel. His meteoric career is a testament to that. In the entire history of this case, he has never been frightened of speaking his mind, so far as I have been able to observe from the correspondence and his demeanour in the witness box. In my judgment, Mr Gray changed his testimony, because he was faced with documents that showed unequivocally that what he had been saying was not true, not because I suggested to him that the consequences of deliberate dishonesty in the witness box could be criminal proceedings for perjury. The second reversal in re-examination was unimpressive and inappropriate. It did nobody any credit.

318. I reject entirely Mr Atherton's submission in closing that Mr Gray was "*frightened*" by my interventions. Mr Atherton rightly acknowledged that they were "*justified as encouragement to Mr Gray to focus on the accuracy of his answers*". I reject also Mr Atherton's conclusion that Mr Gray's answers following my interventions should be disregarded. Mr Gray was, in my judgment, no more frightened than any witness who is cynically giving misleading evidence should be. He was jolted into answering the questions truthfully – regrettably only for a short time.

319. I should comment specifically on the ultimate reason Mr Gray gave as to why he had not considered himself a member of the Plasma deal team, namely because he "*didn't think it was compatible with my role inside Deutsche Bank*". This was particularly insubstantial, since when asked to approve his allocations and even the changes to his allocations, he did not mention Deutsche Bank or his role there. He was simply keen to maintain the "equalisation agreement" he had made with Mr de Clare.

320. In my judgment, the evidence clearly establishes that Mr Gray willingly became and remained a member of the Energy Bond or Plasma or Mandalay deal team.

321. Mr Gray was also asked much about the ultrasound or Acquisition Strategy deal team. Mr Gray was a little more cautious about how he answered these questions, knowing that the spreadsheets showed him to have been a deal team member with a percentage share equal to that of Mr de Clare. Paragraph 138 of Mr de Clare's statement was first put to him contending that a 50/50 deal had been done between them on the telephone between the 14th and 19th December 2004 at the same time as Mr Gray had recommended that Mr de Clare contact Ms Stewart of El Paso. After some prevarication, there was this conclusory exchange:-

> "*Q. Is there any form of agreement, written or otherwise, for you to share the revenues from the ultrasound technology with Mr de Clare?*
>
> *A. There are, I am sure, spreadsheets reflecting that, supplied by Mr de Clare, but –*
>
> *Q. I am asking you whether you ever agreed –*
>
> *A. I don't believe I ever agreed, no*".

322. He did not suggest that his position at Deutsche Bank posed a problem for his activities for GEHC in relation to the Acquisition Strategy:-

> "*Q. … There was no difficulty in you acting on behalf of GEHC caused by your role at Deutsche Bank?*
>
> *A. Actually, it was impossible for me to be executive of GEHC, because I had responsibilities at Deutsche Bank and it would be impossible to draw a line as to where my responsibilities at Deutsche Bank, and, if I took them on at GEHC, would start and end in terms of seeking business. So I could not be a card-carrying director of GEHC. So my Deutsche Bank role did constrain what I could do for GEHC. …*

> *Q. At this time, let's focus on the acquisition strategy, shall we, there was no conflict or difficulty caused by your role at Deutsche Bank in relation to the activities that you were performing on behalf of GEHC, was there?*
>
> *A. No*".

323. Mr Gray was shown the answers that he had given to a line of questioning concerning the Acquisition Strategy deal team on 2nd November 2010 in the arbitration brought by RegEnersys against Klamath Falls. The exchange that was put to him included the following:-

> "*Q. … He says later on in the same paragraph that you became a member of a deal team and the acquisition strategy deal team in connection with this particular matter. Would that be fair to say?*
>
> *A. No, it wouldn't.*
>
> *Q. That is not correct?*
>
> *A. That is not correct. Mr de Clare kept -- actually, it is fair. I think initially he put me on the deal team for this and the discussions with El Paso, but no, carry on with your questioning, please.*
>
> *Q. Okay, would it be fair to say, as he says later on, that you and he agreed that your personal remuneration for the acquisition strategy would reflect the other deal team and, he goes on, on a 50/50 basis. Is that accurate?*
>
> *A. That's accurate*".

324. Mr Gray's first response to Mr Snowden was to say that he had been under pressure at the time. Then, having been shown that he stalwartly denied some other matter, this exchange occurred:-

> "*Q. What you said to the arbitrator in Chile about the agreement to share remuneration with Mr de Clare was true?*
>
> *A. I believe I was mistaken at the time, but ...*
>
> *Q. The evidence you have given to this court this morning has been a lie, hasn't it, in that respect?*
>
> *A. I have not been seeking to lie*".

325. In the questions that followed concerning the 14th January 2005 email in which Mr de Clare had described Mr Gray as an "*impending GEHC bod*", and various documents providing Mr Gray with highly confidential information concerning the ultrasound technology and the Acquisition Strategy, Mr Gray accepted that he had been provided with confidential information and said: "*I recollect being offered an overall contract to regulate the deal team interface with GEHC, which I didn't feel in my capacity at Deutsche Bank I could sign. But I do believe that I was put down on the deal team for the acquisition strategy*". Later he said he could not recollect whether or not he was

on the deal team and that: "*I am in a difficult situation in this courtroom*", and then that he was not operating as a member of the Acquisition Strategy deal team.

326. Mr Gray then accepted, in effect, that neither he nor Deutsche Bank had been acting for El Paso at the time when Mr Gray approached Ms Stewart in relation to the ultrasound technology in January 2005. He was shown a whole host of documents which suggested that his role in relation to the Acquisition Strategy was on behalf of GEHC. His answers were generally evasive and unhelpful, but I formed the clear view that the documents spoke for themselves. I found little or no assistance from Mr Gray's one-sided interpretation of them long after the event.

327. Mr Gray told me that he only got his foot in Mr Hurtado's door because he was at Deutsche Bank and there may have been some truth in that, but it was equally clear from documents such as his 29th April 2005 email to Mr Zolezzi that he was pressing the Acquisition Strategy project forward on behalf of GEHC. His evidence tried to blur this obvious position, without, I would say, a huge amount of success.

328. Mr Gray was then shown a series of emails in November 2005, which culminated in his seeing the Acquisition Strategy deal team allocation spread-sheet and writing and receiving excited emails about the prospects for the technology and the money that would be made. For example, on 13th November 2005, he wrote to Mr de Clare: "*[Total Fina Elf], Shell, [El Paso], acquisition strategy, Saudi royal family, Petro-Canada – Can you remember having such fun in any bank??!!*". He would only admit to "*helping*" GEHC or being a "*supporter*" of GEHC.

329. Mr Gray was then asked about his introduction of Mr Heerema at the end of 2005. He said this:-

> "*Q. Did you tell Mr de Clare that you could not act for GEHC in any way in any dealings with Mr Heerema?*
>
> *A. I don't think I did, no.*
>
> *Q. You say you thought that it was clear in your witness statement, paragraph 84, you said: "It was clear that I would be acting as adviser to Mr Heerema and the fund and therefore I could not act in any capacity for GEHC ..."*
>
> *A. When I presented –*
>
> *Q. Sorry, "when I presented it to him". From what do you say Mr de Clare should have obtained that impression?*
>
> *A. I think from me telling Mr de Clare that it was my intention to work with Mr Heerema going forward*".

330. Mr Gray then explained from his point of view what happened when he was approached by Mr Heerema and what he told Mr de Clare about it as follows:

> "*A. ... Let me tell you what happened. Mr Heerema called me. Obviously we know each other very well. He had long been working on having thoughts around getting into late-life production, because he has one of the*

biggest construction companies in the world offshore. Unlike the front end, which is the drilling business, where you get a long-term five-year contract … the construction and the fabrication construction business is far more volatile in its earning. That is because oil price goes up and down, projects move in and out, the ability of companies to finance and the time of their projects is far more volatile, as are the returns. One of the biggest forecast markets in certainly the UK North Sea, which is one of Mr Heerema's principal places of operation, as with the Gulf of Mexico, is going to be the decommissioning of the hundreds of oil platforms that are out there. So he didn't need an acquisition strategy. He had his own, and he was thinking of acquiring these with a view to securing decommissioning work, which I think at the last go-by was about $65 billion' worth of decommissioning, the thought being that in the intervening period, he could enjoy the money coming in from the oil production. So that is -- Mr Heerema didn't ring me up saying: do you have some gizmo and do you have some idea around how I could do this; he was very definitive about how he wanted to do it.

Q. So you mean he didn't say anything at all about the acquisition -- you didn't have a discussion about -- with Mr de Clare about the acquisition strategy and how Mr Heerema might assist in bringing the acquisition strategy to fruition?

A. No, I did not. The first call with Mr Heerema, calling me, I mean -- earlier in cross-examination, Mr Snowden, you questioned about the relative age gap between me and Mr Fass and me and Anshu Jain, and I think possibly you were implying that grey hair was starting to set in, which it certainly has now, and I was looking for a way out of Deutsche Bank. This, to any banker, who was time-served, was the most perfect opportunity to actually go and to run a fund and to hook up with somebody who said: look, here you go, here is a project that you can run, going forward, for the next part of your career. That was a eureka moment, for me, and that what I decided I was going to do and engage with Mr Heerema to do.

Q. On your account, from the start?

A. I was obviously going to have to square it with Deutsche Bank, as and when this took some shape, and this is clearly what happened in April 2006, when I sat down with my then boss, [Mr Cohrs], the head of the bank. But this was clearly an idea that Mr Heerema had been gestating with Mr Pronk for quite some time and they wanted me to be part of it, and I was glad to be part of it, and to the extent that I could help [Mr de Clare] and everybody else to bring along the other projects, the two were not mutually exclusive. I clearly wouldn't do that. But this was not the primary purpose of the engagement with Heerema. It was a complete change of direction for me.

Q. So you spoke to Mr de Clare about the possibility that Mr Heerema could assist in bringing the acquisition strategy to fruition, didn't you?

A. I don't believe I did at that time, no.

Q. No?

A. I don't believe I did.

Q. Did you say to him at that time anything along the lines of: of course I can't act for you, Mr de Clare, or GEHC, because I am going to be acting for Mr Heerema.

A. No, I didn't. And why would I, in that call to a friend to tell him about what had happened?

Q. Because it is apparently the account that you give in paragraph 84 of your witness statement? ...

Q. So, let's be clear, or let's attempt to be clear. Did you, after the discussion you had had with Mr Heerema and the call to Mr de Clare, discuss with Mr de Clare the role which you would or wouldn't be able to perform for GEHC in relation to the acquisition strategy?

A. I told him that I was going to be working for [Mr Heerema], as I have written down in my statement here.

Q. Is that all you told him?

A. I said I would have to prefer [Mr Heerema] over everything else that I did".

331. A little later, there was this exchange with Mr Gray:-

"*Q. In your witness statement, you see, you don't actually give an account of what you said to Mr de Clare. You just say: "When I spoke to Mr de Clare about ... the idea of investing in the AWS technology, it was clear that I would be acting as adviser to Mr Heerema and the fund, and therefore I couldn't act in any capacity for GEHC when I presented it to him". You just say that was clear. Is your evidence that you said something along those lines, or you didn't say anything along those lines, but you thought it was clear; which is it?*

A. I am saying I thought it was clear.

Q. So you didn't actually say anything along those lines?

A. I didn't say to Brian that I could no longer help GEHC, that is -- well.

Q. You say Mr de Clare accepted that position?

A. That is what I believed. That was my inference.

Q. What did he say?

A. I think he was just pleased for me that I got this job with Heerema".

332. I will return to deal with these pieces of evidence in due course, but I do not accept that Mr Gray said anything to Mr de Clare that made clear that he could no longer act for GEHC, let alone advance its interests. There was no real reason for him to do so at this stage. Mr Heerema was, of course, an interesting proposition for GEHC, but the idea of a transaction with Mr Heerema was, at this point, just that – an idea.

333. It was suggested to Mr Gray that, at the first meeting with Mr Heerema on 12th January 2006, he had deployed the voluminous confidential materials that GEHC had supplied to him for the purpose. Mr Gray did not think he had, explaining that Mr Heerema was not the kind of person you would go to "*with a great wadge of documents for the first meeting*". But Mr Gray accepted that he mentioned the ultrasound technology to Mr Heerema, who was quite keen and open to the idea and happy to have a meeting with Mr Zolezzi. It was put to him that the outcome of the meeting was accurately recorded in Mr de Clare's email to Mr Zolezzi dated 18th January 2005, which had been sent to Mr Gray in draft. Though Mr Gray baulked at that being a correct account, he eventually accepted that it might have been so, since he had not corrected it at the time. He said: "*I'm afraid my conduct throughout is not wanting to disappoint Brian and not wanting to in any way dent his enthusiasm*".

334. GEHC's briefing paper of 18th January 2006 was then put to Mr Gray, because it described him as one of GEHC's "*founding partners*". He accepted he had not disabused Mr de Clare of this notion.

335. When Mr Gray was confronted with his emails of 24th and 25th January 2006 concerning the Acquisition Strategy deal team percentages culminating in his comment that "*I thought we had an equalisation agreement*", he said that his comments were an "*amused aside*" and "*tongue in cheek*", and then that "*these were all speculative projections. They really didn't mean a great deal. There was no mandate, there was no real activity. This was not a big issue to me*". I found it impossible to accept that evidence, which I think was deliberately misleading.

336. It was put to Mr Gray that his witness statement was misleading in that it sought to make out that the proposal for GEHC's 20% carried interest was illusory, when he had put it forward to Mr Heerema in early 2006. His only answer was to say that he did not "*think anybody had really focused on it, other than people inside GEHC*", and that "*if Mr de Clare was able to bring a licence to utilise the technology he could be underneath the umbrella of Mr Zolezzi or Mr Hurtado, whomsoever at that time was able to sponsor him, then there could be a discussion around a carried interest*". What was clear from the documents was that GEHC always promoted its case for a carried interest in the Acquisition Strategy SPV and that Mr Gray was, as he later accepted, complicit in that promotion.

337. A recurrent theme of Mr Snowden's cross-examination of Mr Gray was to suggest that Mr Gray was a GEHC insider, notwithstanding that he had said that he would be working for Mr Heerema. The following exchange concerning the provision of confidential test results epitomised this line of questioning:-

> "*Q. Because you understood he was trusting you as one of his team, didn't [you]?*
>
> *A. He was trusting me as an insider.*

> *Q. As one of the GEHC team, yes?*
>
> *A. Mr de Clare was well aware that I was working for Mr Heerema at this time. Everyone was trying to come together to see if any of these projects had any legs. Again, I don't believe that being in receipt of data from the test results militates against that principle. But clearly he thinks -- he is doing it in his capacity as GEHC, sending it to me*".

338. Despite Mr de Clare's email to Mr Gray dated 13th February 2006 saying in terms that "*[w]e believe [Mr Hurtado] has now more than 50% of Klamath Falls*", Mr Gray persisted in his evidence in saying that they did not know until late in 2006 that Mr Hurtado had bought out some of Mr Zolezzi's shareholding.

339. Mr Gray was asked about a number of documents exchanged with Mr Pronk and Mr Heerema in early 2006, which tended to show that they were amenable to GEHC having the 20% carried interest that it sought. Mr Gray's perspective was that: "*[i]t was accepted that [GEHC] would have a seat at the table if they could deliver the technology. If they actually had -- the carried interest is only given to anybody if they have a contractual right or if they are actually bringing recognised value. Usually paid by a vendor and obviously subject to a negotiation*". Ultimately Mr Gray's point was that GEHC could only have expected a carried interest from Mr Hurtado and it had no mandate from him (Mr Hurtado). Mr Gray did not accept that his witness statement deliberately created the false impression that he did not believe in GEHC's carried interest.

340. When Mr Gray was asked about the agreement that he had with Mr Heerema for a carried interest, he put forward his view that this interest was quite different from the kind of carried interest that GEHC aspired to, because his interest was only payable on profits from all the investments aggregated together. Mr Gray's position was that he had no interest in the underlying assets, whilst the kind of carried interest sought by GEHC would have given it 20% of everything that the SPV owned. He explained the position as follows in relation to his emails with Mr Cambridge on 24th and 26th November 2006:

> "*Q. This is where you realise that your interests are going to have to be preferred and advanced to the detriment of GEHC, don't you?*
>
> *A. No, that is incorrect. And the remuneration arrangements of RegEnersys' structure had absolutely no impact on what would or would not have been the value of an SPV vehicle investing in oil and gas, because I did not and never would have a direct interest in a vehicle where if you buy 1,000 barrels somebody automatically gets 200 or if it is 1,000 shares somebody gets 200, if that is a 20 per cent interest. I had absolutely no right to do that, quite the contrary. The only way that I would have got to make money is if the business as a whole, debt-financed, made money and after payback, after any dilution for taxes, after all costs, all expenses, then I would get paid. I was to have nothing fungible*".

341. Towards the end of his cross-examination, Mr Gray accepted, in answer to some questions from me, that his interest in RegEnersys would give him some share of the

profits made from the ultrasound technology, which would also be the effect for GEHC of the carried interest it wanted.

342. Mr Gray accepted that he had "*exaggerated*" when he had said in paragraph 101 of his witness statement that "*[i]n commercial terms it was absolute nonsense to think that from the investors' point of view the sale of the shares could be separated from the main purpose of the transaction which was for the investment to give RegEnersys the means to obtain a licence on terms that were to be negotiated with Klamath Falls*".

343. In relation to his email of 14th July 2006 saying that "*[t]he time to push for our share is when there is a meeting*", Mr Gray accepted that he knew that "*Mr de Clare was trusting [him] to advance GEHC's interests*".

344. Mr Snowden put a number of documents to Mr Gray from mid to late 2006, which showed him as representing GEHC, and GEHC as having a 20% carried interest in the acquisition vehicle. Mr Gray accepted that he had not counteracted these documents, though he said he remained "*personally obviously highly doubtful*".

345. In relation to the Alfredo mandate deal team, Mr Gray accepted that his statement was inaccurate when it had said that there was no such thing.

346. Mr Gray was asked about the emails in which he had attacked Mr de Clare because he had only just found out in December 2006 that Mr Hurtado had absolute control over Klamath Falls. This was, I think, the result of all the parties using shorthand. Mr Gray accepted that he had known in February 2006 that Mr Hurtado had more than 50% of Klamath Falls, having acquired some of Mr Zolezzi's shares. He also accepted that he knew, as a result, during 2006 that Mr Hurtado controlled the grant of a licence to the ultrasound technology. What he did not know, however, until the due diligence for the equity sale by Mr Zolezzi at the end of 2006 was that Mr Hurtado could stop Mr Zolezzi selling his shares. That is what Mr Gray was complaining about when he wrote "*[a]nd you have only just found out [Mr Hurtado] has absolute control over this vehicle*" in his 6th December 2006 email.

347. Mr Gray was asked about the emails he had exchanged with Mr de Clare in November 2006 which showed some tension developing between them, particularly when Mr Gray made reference to needing "*front end access to the tools*". The following exchange ensued in relation to Mr Gray's email of 13th November 2006:-

> "*Q. And the reference to the interest in the next testing and deployment was that you were looking forward to the possibility of some arrangement with the service company that Klamath Falls were getting in to operate the tools?*
>
> *A. Correct. But also in the context that the initial transaction that we had all tried to do at El Paso, the two were completely linked. So this was a – the separation or attempted separation was something which was something Mr de Clare attempted to do after the El Paso transaction had blown up. There was no question of the share purchase and the exploitation of technology being separated during the summer when we had*

been trying to put together the deal with El Paso. So in that context I thought it was quite clear".

348. This was a theme of much cross-examination. In the end, I think that the dispute was more than anything a sign that the interests of Mr Gray and Mr de Clare were separating. It quickly led to the important exchange of emails between them in December 2006.

349. Mr Gray explained how it was that there were two versions of his 6th December 2006 email written, as he described it, whilst he was angry. The first version had been sent in error before it was finished. Mr Gray then revised it, finished it and sent it again. My guess is that Mr de Clare deleted the one sent in error from his system and has forgotten about it.

350. An important exchange took place concerning what and when Mr Gray told Mr de Clare about his personal interests in connection with the 6th December 2006 emails as follows:-

"*Q. You say: "The meeting should go ahead with [Mr Hurtado] on the 11th, but I will have to be representing [Mr Heerema's] and my interest here. Remember I have 1 million PA I have to put in." Did you ever put that in?*

A. No, but if I can just take your Lordship back to, I think, the previous discussions about the engagement that I had with [Mr Heerema] was that he wanted me to have skin in the game and he and Mr Pronk, depending on what investment it was, wanted me to put money in alongside theirs. In the event, although subsequently I misdirected myself, but in thinking that I had invested directly, I didn't invest because I was forgiven the obligation on this. But at that time that was very much the idea, and I think Mr Pronk can be asked about that. So that really was the intention at that time.

Q. And this was an acquisition alongside them for purchase of equity, wasn't it, in Klamath Falls?

A. That would have been, or through the fund or however, but into the investment in ultrasound, pari passu.

Q. You see, that is the extent of the interest that you might have had that you made known to Mr de Clare in this email, isn't it?

A. Well, he knew I was working for [Mr Heerema] and I was not doing it for free.

Q. Well –

A. As from January. I don't know whether he told his partners, but ...

Q. You see, you said repeatedly that up until this point, in your evidence, that there was no problem representing the interests of Mr Heerema and GEHC, and you didn't regard them as being in conflict; that's correct, isn't it?

A. Well, no, I don't think -- not up to this point. Clearly I am on the other side of the table here.

Q. You are on the other side in relation to an acquisition of shares by Mr Zolezzi, but in relation to the acquisition strategy the interests of Heerema and GEHC were aligned; that has been your evidence, hasn't it?

A. Not at this point.

Q. When did it change?

A. Through the course of negotiations when we became actively involved in drafting, with Mr de Clare's help, the cooperation agreement, the licence agreement and all the structure of the agreement.

Q. And when during the course of that did you notify Mr de Clare that there had been a change and that you couldn't any longer act for GEHC, because the interests were no longer aligned?

A. Clearly this is the first time it has probably gone into print.

Q. First time at all, isn't it?

A. I think it is probably the first time we had an active dialogue on it. But I was never part of the acquisition strategy".

351. In relation to Mr de Clare's complaining 6th December 2006 email, Mr Gray accepted that GEHC was not consenting to "*being excluded from the SPV that was to take the licence from Klamath Falls*", but said that did not remain the position.

352. In relation to the draft licence agreement prepared by the lawyers, King & Spalding, for RegEnersys in December 2006, Mr Gray accepted that there was similarity between the role of the RegEnersys SPV and the role portrayed for the SPV in the acquisition strategy as discussed between Mr Gray and Mr de Clare throughout the preceding couple of years.

353. Mr Gray accepted that he had not told Mr de Clare of the personal interest he was taking in the SPV. The following two passages in his evidence were instructive:

"*Q. ... You say in the middle, between the two hole punches: "Nobody got a carried interest." And that is not true either, is it?*

A. What I meant by that is in the -- what you would call the acquisition strategy SPV no one got a direct carried interest. That is what I was referring to.

Q. So you didn't –

A. Which I didn't either.

Q. You got a carried interest in the fund?

A. I got a carried interest in the fund.

Q. You didn't tell him that, did you?

A. I don't know one way or the other. But that is –

Q. Let's just look at that –

A. Well, this was a private fund between [Mr Heerema] and I, a loyal friend for many years. I am not sure that Mr Heerema, who is a very private individual, wanted anything disclosed to anybody.

Q. So I suggest you didn't tell him, did you?

A. I may not have done".

and

"*Q. Why did you omit the wording that Mr Cambridge had suggested that would have disclosed that you had a carried interest in the fund?*

A. I don't recollect.

Q. I suggest to you that you are doing it because you were doing exactly what Mr Cambridge had warned you against doing, namely misleading GEHC by concealing that you had a carried interest in the RegEnersys fund; that's correct, isn't it?

A. I don't believe so, but I think arrangements betweenMr Heerema and myself are private".

354. Mr Gray was, as I have said, an unimpressive witness. I am quite certain that he told me deliberate untruths in several areas to which I have already referred. Having heard all the evidence, including that of Mr Cambridge referred to below, I concluded that Mr Gray knew full well that he was a member of both these deal teams, but sought to pretend that he had not agreed to be so, because he knew also that his membership of deal teams would be detrimental to his case that he did not owe fiduciary duties to GEHC.

Ms Lisa Stewart

355. Ms Lisa Stewart is a close friend of Mr Gray, and now Chief Executive Officer of the company she founded in September 2006, Sheridan Production Company. She was President of El Paso Exploration and Production Company for 2½ years up to August 2006. Before that, she had worked for Apache Corporation for some 20 years.

356. In her statement, Ms Stewart says that she understood Mr Gray's approach to her in January 2006 to have been on behalf of Deutsche Bank. Ms Stewart also rejected the suggestion that she had ever agreed that GEHC should have a 20% carried interest in an acquisition SPV that would purchase late-life oil fields and be granted a licence by

Klamath Falls to use the ultrasound technology. She described the allegation as "*untrue and preposterous*".

357. Ms Stewart was cross-examined on a video link with Houston, Texas. She accepted that Deutsche Bank had been given no mandate by El Paso in relation to the ultrasound technology, but persisted in saying that she regarded Mr Gray as acting only for Deutsche Bank. I must say that I formed the view that she was saying this without any real conviction, but in order to help her good friend.

358. Ms Stewart also maintained that she had never agreed to provide GEHC with a 20% carried interest despite being shown GEHC presentations that referred to such an interest. Her point was best expressed when she said: "*[i]n my career, many bankers have put many books in front of me and I do not believe that there is any commitment or obligation until an agreement that states the terms of any arrangement is signed there is truly a deal. That is the principle upon which I have worked my entire working career. I still believe that to be true. There is no document that was ever negotiated between myself, GEHC, Deutsche Bank, [Mr Gray] or anyone else that provided to anyone a carried interest*".

359. It was suggested that she had gone out of her way in her statement to downplay and distance herself from the results and the ultrasound technology. In response, she said: "*I was excited about the technology. However, I was cautiously optimistic, because I understood it was not yet economically viable*".

360. The emails between Ms Stewart and Mr Gray of 10th February 2006 following the meeting with Mr Heerema in Houston on 8th February 2006 were put to Ms Stewart. They were, I thought, instructive in understanding the relationship between them. Ms Stewart emailed Mr Gray enclosing AWS test results and saying that she hoped she had not been "*an embarrassment as usual*" at the meeting. Mr Gray responded in doting terms saying that he would clear his diary of some important meetings and fly out the following week. Ms Stewart's dead pan response when she was asked whether that reflected their joint excitement and interest in the AWS project was "*I don't know. I can't speak for Mr Gray*". I formed the view that she protested too much.

361. I then found the following piece of evidence equally surprising. It was in relation to Mr Gray's extremely friendly email to Ms Stewart on 25th April 2006 in which he spoke about becoming a Deutsche Bank consultant:-

> "*Q. It is perfectly plain at this stage he is certainly not acting for Deutsche Bank, is he?*
>
> *A. No, he is on his way out. It appears he was acting for Mr Heerema.*
>
> *Q. But you also knew he was acting for GEHC, didn't you, because he was Mr de Clare's colleague in GEHC?*
>
> *A. No, Mr de Clare had only been introduced to me as a friend of [Mr Gray's]. I did not believe he was acting for GEHC*".

362. Ms Stewart was equally recalcitrant in relation to her email to Mr Hurtado of 27th April 2006 in which she had tried to persuade him that their "consortium" could provide speed (at a time when JP Morgan had failed to progress matters for him). She said this:-

> "*Q. Now, the consortium that you spoke about, that included in your mind GEHC, didn't it?*
>
> *A. You know, we refer to the El Paso consortium just because it was Klamath Falls, it was us, there were so many players, I guess I did, but I don't know in what role.*
>
> *Q. So you guessed that you did refer to GEHC as being a member of the consortium but you don't know in what role, is that what your answer was?*
>
> *A. Yes*".

363. Ultimately, Ms Stewart was a little more forthcoming in relation to the proposal she made to Mr Zolezzi and Mr Hurtado on 26th June 2006, when she was asked about the draft. She said this:-

> "*Q. … It is a proposal for agreement of additional testing and acquisition of an interest in the tool.*
>
> *A. That is correct.*
>
> *Q. And it was being discussed between Mr de Clare, Mr Gray and you, because the members of the consortium to which your letter referred were El Paso, GEHC and the Heerema Group, weren't they?*
>
> *A. Sure, yes. …*
>
> *Q. … So again you understood the consortium which you were referring to which would own 10 per cent of the common equity of the company to be formed would consist of GEHC, El Paso and the Heerema Group, correct?*
>
> *A. Yes.*
>
> *Q. And they would, together, own, did you say, 10 per cent of a company, and the company would be the owner of a licence to use the technology?*
>
> *A. Correct.*
>
> *Q. That is what the proposal is, isn't it?*
>
> *A. That is correct*".

364. Generally, I did not find Ms Stewart's evidence very reliable, because she was obviously only providing her testimony to help Mr Gray. That said, I accept that she did not ever finally agree to give GEHC a 20% carried interest. But that did not mean that she did not allow GEHC to think that she was amenable to such an interest being

provided. Her attempt to sideline GEHC's role in the project and Mr Gray's role in GEHC in her evidence was, I am afraid, distinctly unimpressive.

Mr Vladimir Abramov

365. Mr Vladimir Abromov came all the way from Moscow to give evidence only to find that no questions were put to him in cross-examination, because GEHC contended that nothing he said in his statement was relevant to liability issues. This was part of the ongoing spat between the parties, to which I have already alluded, about the extent to which the question of the existence of loss could be resolved at this trial.

366. Mr Abramov's statement refers to and incorporates another statement that he made for RegEnersys in its successful arbitration against Klamath Falls, Mr Zolezzi and others. That statement helpfully describes the scientific background to the AWS technology that Mr Abramov and his father had originally developed, and the decline in Mr Abramov's relationship with Mr Zolezzi. The statement made in this action carries those events forward explaining how his relationship with RegEnersys developed. His conclusion is that "*[t]o date the AWS technology has not been commercialised and has not made any profit*". As I have said, whilst this conclusion is, I think, hotly contested by GEHC, it was not cross-examined since GEHC contends it has not had proper disclosure on the point and that the trial I am conducting relates to liability alone.

Mr Nicolaas Pronk

367. Mr Nicolaas Pronk has been chief financial officer of Heerema Holdings Company Inc, a holding company of the Heerema Group. He is also an officer of RegEnersys Inc and RegEnersys Investment I Limited ("RegEnersys SPV").

368. Mr Pronk's witness statement contained a fair amount of evidence about matters of which he had no personal knowledge, but which recounted what he had been told by Mr Heerema. For example he spoke about Mr Heerema's meeting with Ms Stewart and Mr Zolezzi in Houston on 8th February 2006, which he did not attend.

369. In cross-examination, Mr Pronk was at pains to underplay the importance of the AWS technology to the fund that Mr Heerema was setting up. The following passage is an example:-

> "*No, I cannot say that, because we had a huge commitment from our board of trustees to invest, but in principle to invest in oil and gas assets in the North Sea, subscale assets and late life fields. But because of that has, let us say, a longer time horizon we also had ideas to invest in other investments which would generate some cash in between, like we did later with the Afren convertible bond and the investment in Breagh, and AWS could have been one of these investments. But it was absolutely not, let us say, the main investment or the goal for setting up the fund*".

370. Mr Pronk described in his witness statement the arrangements by which Mr Gray would be remunerated for his work in relation to Mr Heerema's fund, including (i) 2% of funds committed as a management fee and (ii) a 20% share of the amount by which the annual income and capital growth of the fund exceeded an amount equal to

6% on the value of the average of the outstanding amount loaned to the fund by RegEnersys Inc for the purposes of investment. It was suggested that these agreements cannot have been in place until ReVysion was incorporated in February 2007 at the earliest, but Mr Pronk said that the discussions had taken place earlier than that.

371. In his statement, Mr Pronk said that other investments made by the fund had nothing to do with ultrasound technology, and that RegEnersys had made no investments in oil field properties for the deployment of Klamath Falls's technology. He was shown a number of documents that demonstrated at least that Mr Gray had hoped to be able to apply AWS technology to the Afren project in West Africa and the Breagh North Sea Gas field project in both of which the fund had invested. Mr Pronk's point was really that ultimately the technology was not applied in these fields.

372. In his statement, Mr Pronk said that Mr Heerema had not and would never have agreed that GEHC could have a carried interest in the acquisition vehicle. In that connection, Mr Pronk was asked about his 17th March 2006 summary email to Mr Gray in which he had acknowledged that GEHC would have a 20% carried interest in the SPV, and about the presentations that he had been shown that showed the same position. He said that the only investors that was ever contemplated at the fund level was Mr Gray and ReVysion, and he denied absolutely that Mr Heerema had ever agreed to a give GEHC a carried interest, despite the fact that he had not rejected the suggestion, and had even finished his summary email of 17th March 2006 by asking Mr Gray "*[h]ope you agree with the above*".

373. Mr Pronk was also asked about his evidence that he understood that GEHC and Mr de Clare represented Mr Zolezzi, and not RegEnersys, it being suggested that he was conflating the purchase of Mr Zolezzi's shares with the Acquisition Strategy. This line of questioning came very much from GEHC's point of view, and I am not sure that Mr Pronk had much understanding of the distinction that was sought to be made. Of course, Mr Pronk understood that there was a sale of shares on the one hand and an intended licence on the other hand; but he undoubtedly saw Mr de Clare and GEHC on the seller's side of the line in both those transactions. I am not sure he had any meaningful insight into Mr Gray's role in GEHC. Although he did accept that he was quite content that Mr Gray should be proposing the ultrasound technology to him on behalf of GEHC.

374. Finally, Mr Pronk was asked about his evidence to the effect that he would never have recommended the AWS investment to Mr Heerema if he had known that ABN Amro had discontinued its involvement with Mr Zolezzi due to the Chilean Government's fraud allegations against Mr Zolezzi's investor. He was shown Mr de Clare's second statement explaining that the fraud allegations had nothing to do with Mr Zolezzi or his Russian partners, and that ABN Amro's actions were to do with its internal client relations rather than as a result of any concerns about Mr Zolezzi. Mr Pronk accepted that if, which he could not say, Mr de Clare was right (and that evidence had not been challenged), the allegations would not have meant that Mr Heerema would have refused to do business with Mr Zolezzi.

375. I took the view that Mr Pronk saw matters entirely from his own perspective. He did not, as I have said, have great insight into the roles and relationships that Mr Gray had developed – probably because Mr Gray was at pains to make sure that he isolated his

relationship with Mr Heerema. Though I think he tried to give broadly reliable evidence, I did not find it of very great assistance in relation to the main issues in the case.

Mr Paul Cambridge

376. Mr Paul Cambridge was an investment banker at Deutsche Bank and its predecessor between 1972 and 2002. His last post there was as Managing Director and Head of Global Energy and Utilities North America. After he left Deutsche Bank, Mr Cambridge maintained regular contact with his friend and former boss, Mr Gray.

377. Mr Cambridge was asked by Mr de Clare to join the Plasma deal team in January 2006, which he duly did. He had been sent a GEHC presentation on the subject on 22nd January 2006 describing Mr Gray as a "*founding partner*". His evidence was that Mr Gray had said that this reference was incorrect, even though he was happy to allow Mr de Clare to continue using it. In cross-examination, Mr Cambridge was asked about Mr Gray's role on the Plasma deal team. He said this:-

> "*Q. And he [Mr Redoglia] refers to a couple of fairly lengthy telephone conference calls that you participated on together with Mr Redoglia, Mr de Clare and Mr Gray. Do you recall those?*
>
> *A. I don't recall necessarily the detail, but I do recall a conference call that was lengthy and Mr Gray was on the call.*
>
> *Q. Yes. And he was on them because he was a member of the Plasma deal team, wasn't he?*
>
> *A. That would be a conclusion that you could draw. He was on the call. Whether it was because he was on the deal team or he was on the call, I don't know.*
>
> *Q. You understood at the time that he was a member of the Plasma deal team, didn't you?*
>
> *A. Correct.*
>
> *Q. You received the sheet that listed him and he was participating in conference calls, yes?*
>
> *A. Correct.*
>
> *Q. You understood him to be a member of a Plasma deal team?*
>
> *A. Yes.*
>
> *Q. And as a member of that team you were routinely provided with, or you had access to, or you created commercially sensitive, confidential materials; is that correct?*
>
> *A. Yes.*

> *Q. And you understood that those could only be used for the purposes of advancing the work of that GEHC deal team?*
>
> *A. We are talking about Plasma now?*
>
> *Q. Yes.*
>
> *A. Correct*".

378. It was not clear to me how this evidence fitted in with the passage in Mr Cambridge's witness statement to the effect that his understanding was that Mr Gray was assisting a friend in his work with Mr de Clare at GEHC.

379. In October 2006, Mr Gray asked Mr Cambridge to assist him in relation to RegEnersys and the investment in the AWS technology. Mr Cambridge specifically informed Mr de Clare of what he was doing and entered into a contractual variation to enable him to take up the new post, which was ultimately with ReVysion. There was some debate about whether Mr Cambridge was engaged in relation to the sale of the 10% of Klamath Falls to RegEnersys or the AWS licence or both. It seemed to me that, from Mr Cambridge's point of view, once he was working for Mr Gray in relation to RegEnersys, the distinction was immaterial. Plainly he started out by undertaking due diligence in relation to the share sale, but rapidly became drawn in to the other elements of the transaction.

380. Mr Cambridge gave some careful evidence about the term sheet for the 10% sale, making it clear that it contemplated RegEnersys gaining access to the technology. Mr Cambridge did not understand GEHC's concept of the "Acquisition Strategy" which is hardly surprising because he was not involved with GEHC in relation to it.

381. Mr Cambridge was asked about his email of 24th November 2006 in which he had asked Mr Gray how GEHC's supposed 25% carried interest would work "*now RegEnersys is in the picture and your deal with [Mr Heerema] for 2/20>6*". There followed this exchange about that email and Mr Gray's response of 26th November 2006 in which he had said that there was never any question of GEHC getting a 25 or 30% carried interest:-

> "*Q. The second point I want to put to you that you didn't mention in the email is that you didn't say to Mr Gray, "What Mr de Clare has told me makes no sense from RegEnersys point of view". I am suggesting you didn't say that, because in a sense it wasn't your place, at that stage, newly arrived on the scene, to tell Mr Gray what was or wasn't in RegEnersys' interests.*
>
> *A. I would put it slightly differently. I do not know what Mr Gray has or has not agreed to with [GEHC]. My relationship with Mr Gray is such that if he had said to me, "This is the deal", I might have said to him, "How is that going to work?"*
>
> *Q. That is fine. I entirely understand.*
>
> *…*

> *Q. Now, what then happened is that Mr Gray came back to you, I think, with an email which you will see at page 3504 [that there was never any question of GEHC having a 25 or 30% carried interest]; is that right?*
>
> *A. Correct.*
>
> *Q. And what he was telling you is something of which you had no independent knowledge, is it?*
>
> *A. Correct*".

382. Mr Cambridge explained in cross-examination how the 6th December 2006 emails had come about. Mr de Clare had amended the draft Co-operation Agreement so as to excise RegEnersys's access to the technology, and Mr Cambridge emailed him saying that RegEnersys could not get that access just as a shareholder, and if that was Mr Zolezzi's view, there was not much more to talk about. At the same time, the parties were discussing the terms of an email that Mr Heerema should send to Mr Hurtado in advance of their meeting in London on 11th December 2006. Mr de Clare had asked that the Co-operation Agreement should not be mentioned, but Mr Heerema (at Mr Gray's behest) did mention it, and that upset Mr Zolezzi. Ultimately that led to Mr Gray's "*Let's get real*" email of 6th December 2006.

383. Finally, Mr Cambridge was asked about whether Mr de Clare had consented to Mr Gray's actions as follows:-

> "*Q. … In your witness statement you mention, between paragraphs 54 and 56, that the transaction that you were involved with for RegEnersys closed on 6 June 2007. You say right at the end that is when the final agreements were concluded, correct?*
>
> *A. Correct.*
>
> *Q. And you knew that throughout that period and, indeed, afterwards Mr de Clare was still pursuing his argument with Mr Gray?*
>
> *A. I was aware of that, yes.*
>
> *Q. And so he hadn't consented to what had happened, he was still seeking to vindicate whatever rights he thought he had?*
>
> *A. I was aware he was continuing to pursue those rights, yes*".

384. Mr Cambridge was essentially a careful witness. His statement made it look as if he could say more from first hand knowledge than he really could. But he was careful in the way that he safeguarded his own position with GEHC. And he was obviously acutely conscious of conflicts of interest. He advised Mr Gray as to what kind of disclosures he should make in August 2007, but Mr Gray did not accept his advice.

The law on fiduciary duties

385. Both parties placed central reliance on the judgment of Millett LJ in Bristol & West Building Society v. Mothew [1998] 1 Ch. 1 at pages 18-19 where he said this:-

"*A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work* Fiduciary Obligations *(1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.*

…

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: see Clark Boyce v. Mouat [1994] 1 A.C. 428 and the cases there cited. This is sometimes described as "the double employment rule." Breach of the rule automatically constitutes a breach of fiduciary duty. But this is not something of which the society can complain. It knew that the defendant was acting for the purchasers when it instructed him. Indeed, that was the very reason why it chose the defendant to act for it. The potential conflict was of the society's own making: see Finn, Fiduciary Obligations, p. 254 and Kelly v. Cooper [1993] A.C. 205.*

It was submitted on behalf of the society that this is irrelevant because the defendant misled the society. It did not know of the arrangements which the purchasers had made with their bank, and so could not be said to be "fully informed" for the purpose of absolving the defendant from the operation of the double employment rule. The submission is misconceived. The society knew all the facts relevant to its choice of solicitor. Its decision to forward the cheque for the mortgage advance to the defendant and to instruct him to proceed was based on false information, but its earlier decision to employ the defendant despite the potentially conflicting interest of his other clients was a fully informed decision.

That, of course, is not the end of the matter. ***Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other: see Finn, p. 48. I shall call this "the duty of good faith." But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal****.**

> *Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care. This is because the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer. I shall call this "the no inhibition principle." Unless the fiduciary is inhibited or believes (whether rightly or wrongly) that he is inhibited in the performance of his duties to one principal by reason of his employment by the other his failure to act is not attributable to the double employment.*
>
> *Finally, the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other: see Moody v. Cox and Hatt* [1917] 2 Ch. 71; *Commonwealth Bank of Australia v. Smith (1991) 102 A.L.R. 453.* ***If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this "the actual conflict rule****"*" (emphasis added).

386. Millett LJ makes clear that there is a distinction to be drawn between the "double-employment rule" on the one hand and the "duty of good faith", the "no inhibition principle" and "actual conflict rule" on the other. In this case, Mr Gray could have been acting perfectly properly for each of Mr Heerema, Deutsche Bank and GEHC, owing fiduciary duties to each (just as Mr Mothew was acting perfectly properly for the Society and for the purchasers), but that would not absolve him from compliance with the three rules I have mentioned.

387. Mr Atherton relied on the Privy Council's decision in Arklow Investments Ltd. v. Maclean [2000] 1 WLR 594 as highlighting the need to avoid confusion between fiduciary duties and duties of confidence (see page 600B in the judgment of Henry J). Henry J's judgment is also the source of what might be called the "legitimate expectation" test as to when a duty of loyalty may be implied. He said this at page 598G-H:-

> "*The description of the duty under consideration as being one of loyalty was not seen by Mr. Underhill as being the most appropriate one, but for present purposes it is convenient to label it in that way. In the present context, the concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal. An example of the obligation relevant to the present case is not to exploit or take advantage of the position of fiduciary at the expense of the principal. The existence and the extent of the duty will be governed by the particular circumstances*".

388. Both parties also relied on the summary of the law in Snell's Equity 32nd edition 2010 at paragraph 7-005 as follows (excluding footnotes):-

> "*The categories of fiduciary relationship are not closed. Fiduciary duties may be owed despite the fact that the relationship does not fall within one of the settled categories of fiduciary relationships, provided the circumstances justify the imposition of such duties. Identifying the kind of circumstances that justify the imposition of fiduciary duties is difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship, preferring to preserve flexibility in the concept. Numerous academic commentators have offered suggestions, but none has garnered universal support. Thus, it has been said that the "fiduciary relationship is a concept in search of a principle."*
>
> *There is, however, growing judicial support for the view that: [as expressed in the passage from Arklow cited above] …*
>
> *The expectation is assessed objectively, and so it is not necessary for the principal subjectively to harbour the expectation.*
>
> *Where the fiduciary expectation is appropriate in respect of part only of the arrangement between the parties, it is possible for fiduciary duties to be owed in respect of that part of the arrangement even though it is not fiduciary in general: "a person … may be in a fiduciary position quoad a part of his activities and not quoad other parts."*
>
> *It has been said to be "of the first importance not to impose fiduciary obligations on parties to a purely commercial relationship," but "it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime." It is clear that it is possible for fiduciary duties to arise in commercial settings. Agency, which is frequently a relationship between two commercial actors, provides a clear example: the primary source of duty between principal and agent is a matter of contract law, often applied in a commercial setting, and yet fiduciary duties will be owed by the agent unless they have been excluded. The reason fiduciary duties do not commonly arise in commercial settings outside the settled categories of fiduciary relationships is that it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party. But if that expectation is not inappropriate in the circumstances of the relationship between the parties then fiduciary duties will arise*".

389. This passage demonstrates that, even in a commercial setting, where the classic categories such as a directorship are absent, a party may be a fiduciary if he is acting for another. In this case, therefore, the ultimate question may not be, so much, whether Mr Gray was or was not on the relevant deal team, but more whether he was acting for GEHC at the relevant time in such a way as to give rise to a duty of loyalty, trust and confidence, and, if so, in what regard.

390. My addition of the words "*in what regard*" at the end of the last paragraph are informed by a consideration of the Privy Council's judgment in New Zealand Netherlands 'Oranje' Society v. Kuys [1973] 1 W.L.R. 1126 at 1130, where Lord Wilberforce said:-

> "*The present case is concerned with an officer of an incorporated, non-profit making society. Kuys was not paid for his services but he was a trusted employee; and he was ready to agree that he had duties of trust and confidence placed in him. On the other hand the scope of his responsibility and the dividing line between that and his own personal interests were loosely defined. It appears from the evidence that he was able to run a small insurance business of his own: also it appears that he was permitted a personal interest in the group travel service which he managed for the society. A person in his position may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at. Their Lordships find support for this approach in the English Court of Appeal's judgments in Tufton v Sperni, particularly in that of Jenkins LJ, and in the High Court of Australia's judgment in Birtchnell v Equity Trustees, Executors and Agency Co Ltd. ((1929) 42 CLR 384 at 408) Dixon J said ((1929) 42 CLR at 408): 'The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties ... but also from the course of dealing actually pursued by the firm.' This was said in the context of a partnership but the principle must be of general application*".

391. Mr Atherton places special reliance on the following passage in Professor Finn's article entitled "Fiduciary Law and the Modern Commercial World" in McKendrick's Commercial Aspects of Trusts and Fiduciary Obligations, ed. McKendrick 1992, which says this in the context of advisory relationships:-

> " *… the circumstances must be distinctive indeed in which a fiduciary, rather than a mere 'neighbourhood' relationship, could realistically be found* ***at least where the adviser is known to the third party to be representing the interests of the other party in the proposed dealing****. That knowledge would stand as an obvious and, in most cases, an insuperable impediment to any credible assertion by the third party that he was entitled to relax his self-interested vigilance or independent judgment in favour of the adviser's protection or judgment because he was justified in believing that the adviser was acting in his interests in the matter*" (original emphasis).

392. Mr Atherton also relied in closing in the following passage from the judgments of La Forest J and Sopinka J (dissenting) in the Supreme Court of Canada in Lac Minerals Ltd. v. International Corona Ltd. [1990] FSR 441 at pages 453-4 and 485, approving a dissenting judgment of Wilson J in Frame v. Smith (1987) 42 D.L.R (4^{th}) 81 at pages 97-8:-

> "*Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:*

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power".

393. In relation to the question of authorisation of breaches of fiduciary duty generally, Snell's Equity again provides helpful guidance as follows at paragraphs 7-015 to 7-016 (without footnotes):-

"*The fiduciary's principal is competent to relax, or to forgo altogether, the protection which fiduciary doctrine provides him or her. The principal may authorise the fiduciary to act in a way which would otherwise be a breach of fiduciary duty, but the "relation must be in some way dissolved: or, if not, the parties must be put so much at arm's length, that they agree to take the characters of purchaser and vendor." The principal may bring an end to the fiduciary relationship completely, which avoids the application of fiduciary duties, or alter the fiduciary's non-fiduciary duties in respect of a particular transaction so that, for that transaction, there is no conflict between those non-fiduciary duties and the fiduciary's personal interest.*

To provide the fiduciary with an effective defence to a claim for breach of fiduciary duty, the principal's consent to relaxation of the fiduciary's liability must be fully informed. The burden of establishing informed consent for conduct which would otherwise constitute a breach of fiduciary duty lies on the fiduciary. In order to show that the consent was fully informed there must be clear evidence that it was given after the fiduciary made "full and frank disclosure of all material facts." The principal's consent will be "watched with infinite and the most guarded jealousy" by the court.

The materiality of information to be disclosed is determined not by whether it would have been decisive (although, if it would have been decisive, then it clearly was material), but rather by whether it may have affected the principal's consent. Thus, it is no defence to a claim for breach of fiduciary duty for the fiduciary to argue that the principal would have acted in the same way even if the information had been disclosed. Further, disclosure is treated in a functional, rather than a formalistic, way, so that the sufficiency of disclosure depends on the sophistication and intelligence of the person to whom disclosure is required to be made.

The fiduciary must disclose the nature of his interest in the transaction, not merely the existence of the interest.

Consent can be inferred where the circumstances are sufficiently clear to justify such an inference.

There is no breach of fiduciary duty if the person creating the fiduciary position was aware that the fiduciary would thereby be placed in a situation

> *of conflict between duty and interest, and the person creating the fiduciary position implicitly consented to and authorised the existence of that conflict. A trust instrument, for example, may expressly or impliedly authorise such a conflict*".

394. Mr Atherton relied in relation to the question of consent and acquiescence on the following passage in the judgment of Tuckey LJ in Hurstanger v. Wilson [2007] 1 WLR 2351:-

> "*35 What amounts to sufficient disclosure for these purposes? Bowstead & Reynolds says, at para 6–057:*
>
> *"Consent of the principal is not uncommon. But it must be positively shown. The burden of proving full disclosure lies on the agent and it is not sufficient for him merely to disclose that he has an interest or to make such statements as would put the principal on inquiry: nor is it a defence to prove that had he asked for permission it would have been given."*
>
> *I think this is an accurate statement of the law. Whether there has been sufficient disclosure must depend upon on the facts of each case given that the requirement is for the principal's informed consent to his agent acting with a potential conflict of interest.*
>
> *36 There is some doubt as to whether the agent's duty of disclosure requires him to disclose to his principal the amount of the commission he is to receive from the other party. Bowstead & Reynolds says, at para 6–084:*
>
> *"where [the principal] leaves the agent to look to the other party for his remuneration or knows that he will receive something from the other party, he cannot object on the ground that he did not know the precise particulars of the amount paid. Such situations often occur in connection with usage and custom of trades and markets. Where no usage is involved, however, the principal's knowledge may require to be more specific*".

395. In relation to the question of acquiescence, which is the other way in which consent can be viewed, Mr Snowden relied on the following *dictum* of Hart J in Frost v. Knight [1999] 1 BCLC 364 at page 375:-

> "*In my judgment the test to be applied in determining whether the plaintiff's acquiescence in what happened is sufficient to disentitle ZUK from now pursuing Mr Frost for breach of fiduciary duty is the same test as that applicable in the analogous case of the beneficiary's acquiescence in a breach of trust. That was expressed by Wilberforce J in Re Pauling's Settlement Trusts [1961] 3 All ER 713 at 730, [1962] 1 WLR 86 at 108 in the following terms:*
>
> *'The result of [the] authorities appears to me to be that the court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustees: that, subject to this, it is not necessary that he should know that*

> *what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in …* "

396. In this case, one question will be whether, if fiduciary duties are owed, fully informed consent was given to the relevant relaxation of Mr Gray's fiduciary liability, and whether full and frank disclosure was given of all material facts. But even if it was, the question may arise as to whether, even if all such disclosure was made, and even if it is shown that that disclosure would not have affected GEHC's consent, whether consent can be effective in circumstances in which the principal is faced with a fait accompli, so that it has no effective commercial choice as to whether or not to agree. On this latter question, there seems to be little or any authority. I asked the parties to try to find some, but they were unable to do so.

397. Snell's Equity deals carefully with the "no profit rule" as follows at paragraph 7-041 (again without footnotes):-

> "*The second of the two major themes of fiduciary loyalty is the profit rule. The essence of the profit rule is that a fiduciary acts in breach of fiduciary duty where he or she makes a profit by reason or in virtue of the fiduciary office or otherwise within the scope of that fiduciary office. 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."*
>
> *The fiduciary's honesty is no defence.*
>
> *"The rule is not dependent on fraud or bad faith or whether the actions of the fiduciary were clandestine. The rule is dependent on the mere fact of the profit being made."*
>
> *It is also irrelevant whether the principal could have obtained the profit for itself. The reason for this is that if a fiduciary could justify his or her conduct on such a basis: "there will be a temptation to refrain from exerting their strongest efforts on behalf of the [principal] since, if it does not meet the obligations, an opportunity of profit will be open to them personally."*
>
> ***It is also irrelevant whether the fiduciary's conduct has caused any loss to the principal**. Indeed, the fiduciary can still be required to account even though he acted in good faith and avowedly in the interests of his principal.*
> *…*
>
> *It has been suggested that the profit rule might be tempered in circumstances where it operates harshly on a fiduciary, such as where the fiduciary acted in perfect good faith and without any deception or concealment and in the belief that he was acting in the best interests of the principal, or where the profit taken was one which the principal would never have opted to take for himself.*
>
> *That does not represent the current state of the law, and would require a decision of the Supreme Court, given the high authority indicating the*

> *contrary. Such an alteration in fiduciary doctrine would be an unwise step, as it would give fiduciaries an incentive to generate circumstances, or the appearance of circumstances, where they might be able to bring themselves within such an exception*" (emphasis added).

398. I have emphasised the fact that no loss is required to be proved in the passage just cited because that may become relevant in relation to issue 4.

399. The classic statement of the law in relation to taking advantage of a corporate opportunity (in that case by a company director) is Industrial Development Consultants Limited v. Cooley [1972] 1 W.L.R. 443 per Roskill J at page 451 where he said:-

> "*It seems to me plain that throughout the whole of May, June and July 1969 the defendant was in a fiduciary relationship with the plaintiffs. From the time he embarked on his course of dealing with the Eastern Gas Board, irrespective of anything which he did or he said to Mr Hicks, he embarked on a deliberate policy and course of conduct which put his personal interest as a potential contracting party with the Eastern Gas Board in direct conflict with his pre-existing and continuing duty as managing director of the plaintiffs. That is something which for over 200 years the courts have forbidden. The principle goes back far beyond the cases cited to me from the last century. The well-known case of* Keech v Sanford *is perhaps one of the most striking illustrations of this rule*".

400. In CMS Dolphin Ltd. v. Simonet [2001] 2 BCLC 704, Lawrence Collins J addressed the question of the effect of a director's resignation on his fiduciary duties, specifically in relation to maturing business opportunities, as follows at paragraphs 95-6:-

> "*95. In English law a director's power to resign from office is not a fiduciary power. A director is entitled to resign even if his resignation might have a disastrous effect on the business or reputation of the company. So also in English law, at least in general, a fiduciary obligation does not continue after the determination of the relationship which gives rise to it (see A-G v Blake* (*Jonathan Cape Ltd, third party*) *[1998] 1 All ER 833 at 841, [1998] Ch 439 at 453, varied on other grounds [2000] 4 All ER 385, [2001] 1 AC 268 (HL)). For the reasons given in Island Export Finance Ltd v Umunna a director may resign (subject, of course, to compliance with his contract of employment) and he is not thereafter precluded from using his general fund of skill and knowledge, or his personal connections, to compete.*
>
> *96. In my judgment the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property. He is just as accountable as a trustee who retires without properly accounting for trust property. In the case of the director he becomes a constructive trustee of the fruits of his abuse of the company's*

> *property, which he has acquired in circumstances where he knowingly had a conflict of interest, and exploited it by resigning from the company*".

401. If, therefore, I were to find that Mr Gray owed fiduciary duties to GEHC at the outset of his involvement in the Acquisition Strategy in December 2004, a question may arise as to whether he ever successfully terminated those duties by informing GEHC that he was no longer acting for it or that he was 'resigning' from his fiduciary position, having taken up a competing position with Mr Heerema. Both parties disclaimed the idea that the 'resignation' question was the reverse side of the same coin as the 'fully informed consent' question. As it seems to me, however, there are similarities in the analysis.

402. Mr Atherton also placed special reliance on the Court of Appeal decision in Foster Bryant Surveying Ltd v. Bryant and another [2007] EWCA Civ 200, where Rix LJ said this at paragraph 77 about cases at each end of the scale:-

> "*Where directors are firmly in place and dealing with their company's property, it is understandable that the courts are reluctant to enquire into questions such as whether a conflict of interest has in fact caused loss. Even so, considerations that equitable principles should not be permitted to become instruments of inequity have been voiced: see for instance Murad v Al-Saraj [2005] EWCA Civ 959, [2005] WTLR 1573 at paras 82/84, 121/123, 156/158; and see the solutions discussed in Gower & Davies at 420/421. Where, however, directors retire, the circumstances in which they do so are so various, as the cases considered above illustrate, that the courts have developed merits based solutions. At one extreme (In Plus Group v Pyke) the Defendant is director in name only. At the other extreme, the director has planned his resignation having in mind the destruction of his company or at least the exploitation of its property in the form of business opportunities in which he is currently involved (IDC, Canaero, Simonet, British Midland Tool). In the middle are more nuanced cases which go both ways: in Shepherds Investments v Walters the combination of disloyalty, active promotion of the planned business, and exploitation of a business opportunity, all while the directors remained in office, brought liability; in Umanna, Balston, and Framlington, however, where the resignations were unaccompanied by disloyalty, there was no liability*".

403. The following cases cited in the above passage repay careful study in this connection: Plus Group v. Pyke [2002] EWCA Civ 370; Canadian Aero Service Ltd v. O'Malley (1973) 40 DLR (2d) 371; British Midland Tool Ltd v. Midland International Tooling Ltd [2003] EWHC 466 (Ch), [2003] 2 BCLC 523; Shepherds Investments Ltd v. Walters [2006] EWHC 836 (Ch); Island Export Finance Ltd v. Umunna [1986] BCLC 460; Balston Ltd v. Headline Filters Ltd [1990] FSR 385; and Framlington Group plc v. Anderson [1995] 1 BCLC 475, [1995] BCC 611.

404. Rix LJ continued in Foster Bryant with this passage at paragraph 88 referring back to the test adumbrated by Lawrence Collins J:-

> "*There was therefore no finding of any transferred work, and no finding of any profit made by Mr Bryant or his new company in respect of which there was any liability to account. In these circumstances, although I accept the*

> *position in law that, if he or his company had profited from any breach by him of his fiduciary duties, then they would be liable to account, even if the Claimant company had itself suffered no loss (and if the judge suggested otherwise, he was in error), nevertheless there is simply no finding of any profit connected with any assumed breach (see Lawrence Collins J' requirement in Simonet of "some relevant connection or link between the resignation and the obtaining of the business" (at 731f): moreover there the resignation spoken of was one planned towards the exploitation of such business, which is not the case here)*".

The parties' submissions

405. Mr Snowden's case appeared in closing to have been somewhat simplified. He accepted that Mr de Clare knew by January 2006 that Mr Gray was working for Mr Heerema in relation to his new investment fund, and would owe him fiduciary duties, but said that from then onwards, Mr Gray still owed GEHC a fiduciary obligation to act in good faith in its interests and not to act with the intention of furthering the interests of Mr Heerema over GEHC. Though perhaps the parties did not know it, Mr Gray was walking a tightrope from January 2006 onwards. Mr Snowden's case is that Mr Gray fell off that tightrope and breached his fiduciary duties to GEHC on three specific occasions:-

i) When he agreed to take a personal interest in Mr Heerema's intended acquisition SPV in about March 2006;

ii) When he started to argue against GEHC's carried interest in the acquisition SPV in November and December 2006; and

iii) When he acted in breach of the no profit rule by taking a personal interest in the profits made by RegEnersys, so taking personal advantage of GEHC's maturing business opportunity, namely the chance to take a licence for the ultrasound technology from Klamath Falls.

406. Mr Snowden relies particularly on the fact that Mr Gray kept secret the fact that he was taking a personal interest in the profits made by RegEnersys, so that Mr de Clare still thought, even after the 6th December 2006 emails, that Mr Gray could only obtain a personal profit by furthering GEHC's desire for a carried interest in the acquisition SPV.

407. If, which GEHC does not accept, Mr Gray did disclose on 5th March 2007 that "*RegEnersys is a funding vehicle controlled by [Mr Heerema] and I [Mr Gray] get rewarded through a deferred return*", it argues that that was too little too late. Mr de Clare never responded to the email and certainly never gave fully informed consent to Mr Gray receiving such a "*deferred return*".

408. Mr Atherton's position was equally simple. He contended that Mr Gray's primary loyalty was known at the outset to be to Deutsche Bank. Accordingly, Mr de Clare and GEHC can never have had any reasonable or legitimate expectation that Mr Gray would owe any fiduciary duties to GEHC. When Mr Gray was asked to manage Mr Heerema's fund in December 2005, it would have been equally clear to GEHC that he could not owe any duties to GEHC.

409. If he were wrong about the position in 2004 and 2005, Mr Atherton said that it was clear that Mr Gray was in the same position in December 2005, September 2006 and again in December 2006 as if he had resigned from GEHC, because on each of those occasions it was made plain that his first loyalty was to Mr Heerema. The resignation was, in each case, a 'legitimate' one, in the sense that Mr Gray was not withdrawing from GEHC in order to take advantage of an opportunity belonging to GEHC, but in order to take a new and separate role with Mr Heerema. Mr Atherton accepted that it might be more difficult to characterise the 'resignation' as legitimate as matters progressed and the licence of the ultrasound technology being granted to the acquisition vehicle became more likely, but he said that even by 6th December 2006, the deal was still very much up in the air.

410. If that were wrong, Mr Atherton said that it was clear in December 2006 that he was taking a personal interest, and GEHC gave its fully informed consent to that course. GEHC could have called a halt to both the Acquisition Strategy and the share sale, but it chose not to do so. Accordingly, GEHC is to be regarded as having taken its chances and permitted Mr Gray to operate wholly in his own and Mr Heerema's interests, much as he said he was doing in his 6th December 2006 email.

Discussion of the issues

411. In each case, it is better to deal with the main issue after I have dealt with the sub-issues. I have, therefore, re-ordered my treatment of them in that way. In dealing with the issues below, I do not intend to repeat each and every document or each and every piece of evidence, set out above, upon which I rely for a particular conclusion. Such an approach would extend this judgment far beyond what is necessary or appropriate. It may be assumed that my summary of the chronological events and of the evidence has been fully taken into account in considering each and every issue.

Issue 1A: Was an "equalisation" or "handshake" agreement reached between Mr Gray and Mr de Clare in 2004 in relation to the Energy Bond concept (and the terms of the same)?

412. Apart from the recollections of Messrs de Clare and Mr Gray, there was little contemporaneous evidence of this agreement. There were, however, two important email exchanges that bear upon this issue. First, Mr Gray's email of 14th December 2004 to Mr de Clare saying that he had told Mr Fass of his intention to become a significant shareholder and involved in GEHC, and that *"[w]e therefore need to formalise the handshake between us*". Whilst that email could be construed as Mr Gray sought to say it should – as being in relation to the prospective shareholders' agreement - the second chain is less easy for him to explain away.

413. The emails between 23rd and 25th January 2006 expressly concerned the deal team percentages for the Acquisition Strategy. Mr Gray asked Mr de Clare: "*What are our percentages*?" and then responded, when told: "*I thought we had an equalisation agreement?*" There is, of course a missing link in this exchange, because it refers to the Acquisition Strategy not to the Energy Bonds, about which the mid-2004 handshake agreement was allegedly made. But I am satisfied, as Mr de Clare told me, that it was agreed orally between he and Mr Gray in mid-December 2004 that they would have the same percentage shares in the Acquisition Strategy.

414. Mr Gray's instruction of Allen & Overy in relation to the intellectual property rights in the Energy Bond project was also a pointer to the existence of the handshake agreement. Generally, the numerous spreadsheets and deal team percentage emails also all point in the same direction.

415. On the evidence as a whole, I am satisfied that Messrs de Clare and Gray reached an oral "equalisation" or "handshake" agreement in mid-2004 in relation to the Energy Bond concept. I much prefer Mr de Clare's evidence on this point, and I reject absolutely Mr Gray's evidence that they only reached an informal agreement that he would make an investment in GEHC subject to agreeing terms that he was satisfied did not compromise his position at Deutsche Bank. I am also satisfied that it was an implicit part of that agreement that they would share the intellectual property rights in the Energy Bond concept 50/50, just as they would share the profits. I do not think that the terms were in mid-2004 any more thought through than I have described. But they were important, because they informed the deal team percentages in the Energy Bond project and later in the Acquisition Strategy deal team as well. It is important to note that this agreement was between Mr de Clare and Mr Gray, not between GEHC and Mr Gray.

Issue 1B: Was any such "equalisation agreement" extended by Mr Gray and Mr de Clare (and GEHC) to the project to commercialise the ultrasound technology?

416. I have already answered this question above. I can say, however, that I accept Mr de Clare's clear evidence as to the agreement that was made orally between them in relation to the profits of from the Acquisition Strategy proposal in December 2004. I reject Mr Gray's evidence that no such agreement was made.

417. I am conscious, however, that the answer to this issue has been influenced to some extent by the answer to issue 1C relating to the Acquisition Strategy deal team. Taking into account, therefore, what is contained in the following section, I can say that I am quite satisfied that the equalisation agreement was extended to the Acquisition Strategy as Mr de Clare described in December 2004.

Issue 1C: Did Mr Gray agree to be (or allow himself to be treated as) a member of GEHC's "Acquisition Strategy deal team" in relation to the ultrasound technology in return for a share of the potential revenues?

418. One could have been forgiven for thinking in listening to more than 6 days of cross-examination of the two protagonists that this was the only issue in the case. As I have already said, it is not, and for the reasons I have already outlined, it may not even be the most important issue in the case. It is nonetheless an issue – and one on which I have carefully studied the evidence on both sides. I have tried to summarise my approach to it in the sections above relating to the evidence of Messrs de Clare and Gray.

419. Perhaps the most compelling piece of evidence on this point is Mr Gray's own admission in his evidence to the Chilean arbitrator. In his evidence to me, he sought to draw a fine distinction between his actually having 'signed up' or 'agreed' to become a deal team member, and Mr de Clare having treated him as a deal team member. He effectively accepted that he had been treated by GEHC insiders as a deal

team member, but did not accept he had agreed to become one. In my judgment, this is a distinction without a real difference.

420. There is no doubt whatever from the contemporaneous spreadsheets and emails that Mr Gray was fully aware that everyone in GEHC regarded him as being a 50/50 partner with Mr de Clare on the Acquisition Strategy deal team. True it was that small shares had been handed out to other participants, but the ratio between Mr de Clare and Mr Gray remained at 50/50 taking into account the GEHC share, and their shares in GEHC. Despite what he and Ms Stewart said, Mr Gray was very enthusiastic about the Acquisition Strategy and its prospective profits, as his "*[c]an you remember having such fun in any bank*?" email of 13th November 2005 illustrated.

421. Moreover, so far from Mr Gray pointing out to Mr de Clare or others at GEHC that he could not 'sign up' to any deal team whilst he was at Deutsche Bank – or later whilst he was working for Mr Heerema – he never pushed back at all. That much he freely admitted. The fact was that there was no 'signing up' to do. There never was a formal deal team agreement beyond the spreadsheets. There was a GEHC agreement that, admittedly, Mr Gray did not sign. But there was not a deal team agreement. The participation of the deal team members was agreed in emails and recorded in the spreadsheets from time to time. Mr Gray knew that, and Mr Gray knew what was shown in those spreadsheets. The idea that he did not pay much attention to them, when he asked "*[w]hat are our percentages*?" and said "*I thought we had an equalisation agreement?*" in January 2005, is simply unbelievable.

422. There is a considerable weight of extrinsic evidence in the documents that I have recorded in the chronology pointing clearly towards Mr Gray's membership of the Acquisition Strategy deal team, and almost nothing pointing in the opposite direction. Mr Gray's reliance on the fact that his position at Deutsche Bank made his participation impossible simply does not run, when he had already acquired Mr Fass's approval to his involvement with GEHC in relation to the Energy Bond project. Mr Gray's 14th December 2004 email to Mr de Clare said that he had told Mr Fass "*of my intention to become a significant shareholder and involved in GEHC*". The last 4 words are significant, and there is an interesting juxtaposition with what Mr de Clare says, and I accept, was the timing of their agreement to go 50/50 on the Acquisition Strategy. He puts that at the same approximate time as this email. Mr Gray was undoubtedly withdrawing from Deutsche Bank by this time – and he was looking for things to do after he left – just as he told Mr de Clare. His Chairmanship of the UK Bank was not the great promotion he made out. Mr Fass was prepared to help Mr Gray have a soft landing by allowing him to participate in business ventures that did not conflict with Deutsche Bank's interests. That was why Mr Fass asked Mr Southwell to get involved. The later emails concerning the "Silver Grand" presentation in July 2006 do not depreciate these observations, because Mr Gray's concern at that time (when he was only part time with Deutsche Bank in any event) was to avoid GEHC claiming to have done Deutsche Bank's deals. He did not object to being shown as a non-executive director and Founding Partner of GEHC.

423. Overall, I am satisfied that the evidence is overwhelmingly to the effect that Mr Gray agreed and allowed himself to be treated as a member of GEHC's Acquisition Strategy deal team in return for a share of the potential revenues.

424. Despite this having been agreed between the parties as an issue for me to determine, Mr Atherton argues that his membership of the deal team adds "*nothing to GEHC's case on whether Mr Gray was a fiduciary*". I do not agree, even though I accept that the question of Mr Gray's deal team membership is very far from the only thing that needs to be considered in relation to the existence of fiduciary duties. The argument appears to be based on the fact that the deal team was just a group of independent consultants engaged with GEHC, and that Mr Gray refused to enter any formal contract with GEHC, and believed he was not a member of the deal team. The latter point is simply incorrect. I am quite sure that Mr Gray did indeed consider himself a member of it. It is true that he did not sign a formal contract with GEHC (save the Shareholders' Agreement), but he agreed to the shares shown in the spreadsheets thereby committing himself to the deal team's project. But even more significant than that, he promoted the project in numerous different ways that are wholly inconsistent with his case that he just wanted to help GEHC and Mr de Clare in a friendly way. He introduced the two key potential partners, and promoted the Acquisition Strategy to them with confidential materials provided for the purpose by GEHC. Those materials contained GEHC's proposal for a carried interest. Moreover at various stages, Mr Gray actively promoted GEHC's claim to a carried interest with the potential investors, as for example when he got Mr Pronk to suggest that it had been agreed on 17th March 2006, and when he wrote to Mr Zolezzi on 31st August 2006. Mr Gray was, therefore, justly seen by GEHC and Mr de Clare as promoting that financial interest for GEHC.

425. This concludes the specific questions under issue 1. The remaining questions are all bound up together and require in my judgment to be answered together chronologically. For that reason, I have combined my treatment of issues 1D to 1G and the ultimate question as to fiduciary duties under issue 1.

Issue 1D: On whose behalf or behalves, and/or on what basis, was Mr Gray acting throughout, including (a) when he introduced the project to commercialise the ultrasound technology to El Paso in January 2005? (b) when he introduced the project to Mr Heerema in January 2006? (c) during the discussions concerning the project until September 2006? (d) during the discussions leading to the agreements made in June 2007?

Issue 1E: What at all relevant times did GEHC understand the position to be between Mr Gray and (1) Deutsche Bank; and (2) Mr Heerema?

Issue 1F: In relation to Mr Heerema, what did GEHC know and when regarding Mr Gray's interest or proposed interest in RegEnersys?

Issue 1G: Given GEHC's understanding, did it have a legitimate expectation that Mr Gray was undertaking fiduciary duties to it and, if so, at what times did it have such expectation?

Issue 1: Did Mr Gray owe fiduciary duties to GEHC in connection with the exploitation/commercialisation of the ultrasound technology?

426. All these questions require an analysis of the changes in the parties' relationships between December 2004, when Mr Gray first agreed to become involved in the Acquisition Strategy and the AWS technology, and August 2007 when his indirect interest in the profits of RegEnersys finally crystallised.

427. The question of whether Mr Gray owed GEHC fiduciary duties is not a unitary one, because it involves all the questions raised by these issues, namely the questions of (a) for whom Mr Gray was acting at various times and whether he was acting in specific respects for GEHC (b) what GEHC knew about Mr Gray's relationship with Deutsche Bank and Mr Heerema (c) what GEHC knew about Mr Gray's intended interest in RegEnersys, and (d) GEHC's legitimate expectations as to whether GEHC could owe it a duty of loyalty. The relevant questions obviously depend to some extent on the point of time in relation to which they are being asked.

428. There is no doubt that Mr de Clare was told and understood at various stages that Mr Gray was acting for others, including Deutsche Bank and Mr Heerema. There is also no doubt that Mr de Clare was told at various stages that Mr Gray was making a personal investment. But in order to ascertain whether Mr Gray owed any fiduciary duties to GEHC at various stages, each of the 4 aspects raised by these issues needs to be considered chronologically, so as to ask at each stage whether Mr Gray owed any, and if so what, fiduciary duties to GEHC. It is not necessary to consider whether fiduciary duties were owed to GEHC generally. The case only concerns the Acquisition Strategy and the ultrasound technology as the issues make clear. The relevant stages seem to me to be as follows:-

i) First, between December 2004, when Mr Gray extended his equalisation agreement with Mr de Clare to the Acquisition Strategy, to December 2005, when Mr Heerema asked Mr Gray to work for him.

ii) Secondly, after Mr Gray had informed Mr de Clare that he would be managing Mr Heerema's fund in December 2005/ January 2006.

iii) Thirdly, in March 2006, when Mr Gray agreed the principles of his remuneration with Mr Heerema.

iv) Fourthly, in September 2006, when Mr de Clare acknowledged that Mr Gray would be acting for Mr Heerema.

v) Fifthly, in December 2006, after Mr Gray had made clear that he would only be acting in Mr Heerema's interests and in his own interests.

vi) Sixthly, after Mr Gray's March 2007 email making further disclosure of his 'deferred interest'.

429. In addition, at each chronological stage, the questions need to be answered taking into consideration the entire factual background at the time. They are not answered simply by looking at Mr Gray's equalisation agreement or even his membership of the Acquisition Strategy deal team. Nor can a proper conclusion be reached by looking at isolated moments of caution in which Mr Gray sought to protect himself. The global position must be considered with a view to applying the legal tests that I have set out above.

Fiduciary duties between December 2004 and December 2005

430. This is the period during which, as I have found, the equalisation agreement between Mr de Clare and Mr Gray was extended to the Acquisition Strategy, and during which

Mr Gray introduced El Paso and became excited by the DoE test results and latterly by the El Paso test results. It is important again to note that the equalisation agreement was made with Mr de Clare and not with GEHC, so it is only of fringe relevance to the fiduciary duties that Mr Gray might owe GEHC.

431. As I have said, the deal team membership does not answer the question. But it is a pointer to the fact that Mr Gray was willing to commit to advancing GEHC's interests in order to benefit himself and the company

432. Before considering the question of whether GEHC had a legitimate or reasonable expectation that Mr Gray might act for it in this 2005 period, I need first to deal with the question of his relationship with Deutsche Bank. Mr Gray's main point is that he cannot have owed GEHC fiduciary duties because GEHC knew that he was acting for, and owed his primary duty of loyalty to, Deutsche Bank, certainly up to May 2006, when he became a part time employee – and possibly even thereafter. Strong reliance is placed on the passage in Professor Finn's article that I have set out above. It is suggested that, if he came by some important knowledge in his energy field, such as the ultrasound technology, he would have been known by GEHC to be under a duty to inform his employer.

433. This is a compelling point. But in my judgment, it is wrong on the facts of this case. Mr Gray, despite his denials, was plainly looking for a soft landing in the run up to his departure from Deutsche Bank. As I have already found, Mr Fass asked Mr Southwell to get involved in relation to Energy Bonds so that Mr Gray could have a soft landing by participating in business ventures that did not conflict with Deutsche Bank's interests. Mr de Clare said this in his witness statement which I accept: "*What [Mr Gray] told me, not just in the above email [of 14th December 2004] but also on the phone shortly afterwards, was that his boss had no problems with him taking a significant shareholding in GEHC and to be involved working for GEHC. My understanding was not that [Mr Fass] had cleared [Mr Gray] to be involved with GEHC only in relation to the Energy Bond as [Mr Gray] and I had already been talking about Ultrasound Technology by this point. My understanding was that [Mr Fass] had cleared [Mr Gray] to work for GEHC generally*". This is reinforced by Mr de Clare's much later email on 19th July 2006 when the subject comes up again and Mr de Clare said that he was "*under the assumption that [Mr Gray] would be able to operate with GEHC … as well as continue to receive some remuneration from [Deutsche Bank]*".

434. It is noteworthy that not one complaint from Deutsche Bank about Mr Gray's activities on behalf of GEHC has been mentioned in evidence before me. If it had not consented to his activities, it seems inevitable that there would have been such complaints, which Mr Gray would have disclosed or mentioned in his evidence. It is not as if Mr Gray was not actively involved. He was travelling for GEHC, attending meetings, and writing emails for GEHC from his Deutsche Bank email address on its network. These matters point to there having been the fully informed consent that Mr Atherton acknowledges would suffice to allow Mr Gray to enter into a fiduciary relationship with GEHC.

435. Moreover, Mr Gray's email of 19th July 2006 was also instructive, even though it is after the 2005 period I am considering. It said that Mr Cohrs might sack him if he saw he was using Deutsche Bank's deal list and that he wanted to be shown as a

shareholder and supporter, but did not say he could not be shown as "*Founding Partner*". He concluded that email by saying "*If we can re-configure [the presentation] I will send a copy to [Mr Fass] and [Mr Cohrs] so they know*". This email and Mr de Clare's response confirmed that he reasonably understood that Deutsche Bank were on-side with what Mr Gray was doing. The re-configured document, which was sent to Mr Gray for approval, referred to him as the founding partner and non-executive director of GEHC, a formulation that might be thought obviously to describe someone who owed fiduciary duties to the entity concerned. He did not object to this denomination on that occasion. I accept that titles can be confusing, but once again they are a pointer – another factor to be weighed in the balance.

436. I have also considered carefully the emails that Mr Gray exchanged with Ms Looney at Deutsche Bank in January and March 2005 – at the start of the relevant period. He described himself as having a "*passive minority interest*" in GEHC, but later advocated the advantages of his involvement to Deutsche Bank. Certainly, the emails show Mr Gray's early concern at the potential problems created by his involvement in GEHC. But, as it seems to me, he simply mis-described his actual and intended position within GEHC. He had already met Mr Zolezzi, introduced Ms Stewart, and actively engaged in the development of the project. On no proper basis could he have suggested, at least in March 2005 when he wrote again to Ms Looney, that his January 2005 description of his interest as "*passive*" was accurate.

437. These factors mean that less significance can be attached to the disclosures that Mr Gray made to Deutsche Bank, so that, whilst I place great weight as Mr Atherton submits I must, on the fact that GEHC knew that Mr Gray owed a duty of loyalty to Deutsche Bank, for the reasons I have given I do not regard that fact as conclusive.

438. The next question is whether Mr Gray was introducing Ms Stewart to GEHC on behalf of Deutsche Bank. Whilst there was no current mandate, it is undoubted that El Paso was a client of Deutsche Bank, and that Mr Gray's relationship with Ms Stewart was developed whilst he was at Deutsche Bank. The introduction followed hard on the heels of the extension of the equalisation agreement to the Acquisition Strategy in December 2004. It was made, as Mr de Clare explained and I accept, on the basis that Ms Stewart was a close friend of Mr Gray's – which she undoubtedly was. I did not accept either Mr Gray's or Ms Stewart's evidence that Mr Gray was acting for Deutsche Bank when he introduced El Paso to GEHC. He was undoubtedly employed by Deutsche Bank, but even on his own analysis was 'helping' Mr de Clare and GEHC. The documents at the time bear out that Mr Gray was not acting for Deutsche Bank, but for GEHC. It was GEHC's interests that he was furthering, as he did also by telling GEHC not to approach any other oil companies, as Mr Lambert explained so persuasively.

439. I have taken into account in reaching these conclusions (a) Mr Gray's evidence that, whilst his position at Deutsche Bank constrained what he could do for GEHC, it did not prevent him acting on behalf of GEHC in relation to the Acquisition Strategy, and (b) Mr de Clare's evidence about how he had wanted Mr Gray to meet Mr Hurtado as "*Mr Deutsche Bank*" and his failure to send the note of the second off-site meeting to Mr Gray. There are always going to be indicators pointing in different directions in a case of this kind, but none of these is, in my judgment, conclusive.

440. I return then to the general question of whether GEHC can have had a legitimate expectation during 2005 that Mr Gray would owe it a duty of loyalty? It should be remembered that the expectation in question is to be assessed objectively. Here, it would have been clear to the objective observer that there was not likely to be a conflict in relation to the Acquisition Strategy between GEHC's interests and Deutsche Bank's interests – Mr Gray himself said something similar to Ms Looney. In my judgment, looking at all the circumstances from December 2004 to December 2005, GEHC had a relationship with Mr Gray where it was reasonably entitled to expect that he would not use his position in such a way as was adverse to its interests. Objectively, Mr Gray was acting for GEHC in promoting its relationship with El Paso. Mr Gray was intimately involved in receiving and considering GEHC's confidential materials. Mr Gray was a member of the Acquisition Strategy deal team, and he was intently interested in the results of El Paso's testing.

441. Overall, it seems to me that GEHC was legitimately entitled to expect Mr Gray's duty of loyalty, notwithstanding his employment with Deutsche Bank. These were very unusual circumstances as Mr Gray reached the end of his formal investment banking career. Most employees would have had neither the time nor the energy to pursue a new enterprise with the vigour that Mr Gray pursued the Acquisition Strategy. He did so, because he was excited about it and was looking for something to do when he finally left Deutsche Bank.

442. Mr Atherton then placed reliance on Wilson J's three indicia of the existence of a fiduciary relationship in Frame v. Smith. It is useful to consider each in turn.

443. Mr Gray did indeed, in relation to the ultrasound technology, have scope for the exercise of some discretion or power. He acted for GEHC in promoting GEHC's interests with El Paso and, after this period, with Mr Heerema. It is true that he was guided by Mr de Clare and generally reported back to him. But that does not mean he had no discretion. The way he put across GEHC's position was very much in his own gift. Mr Gray's demeanour and conduct at the 2nd off-site meeting, as described by Mr Lambert, demonstrated that he was "*very directive in this instance*" and he was "*expressing the views [that Mr Lambert] would have expected to come from someone who was in a management role, not an advisory role*". Moreover in requiring GEHC to go to El Paso to the exclusion of others, Mr Gray was acting with discretion for GEHC.

444. This latter aspect demonstrates that Wilson J's second indicia was also satisfied by Mr Gray in that he was "*unilaterally [exercising] that power or discretion so as to affect [GEHC's] legal or practical interests*". His directions were accepted by Mr de Clare only because he thought that Mr Gray had bought in to the Acquisition Strategy deal team in December 2004.

445. The third characteristic of "*the beneficiary [being] peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power*" is rather more controversial. But here it was, in any event in my judgment, present. Again, Mr Lambert's evidence was significant. He said, and I accept, that "*all I can say is his body language and his, shall I say, strong -- the strength with which he put forward his views that in many respects brooked no opposition, certainly sent the message to me that he was a managing partner in the company*". Mr Gray was actually capitalising on GEHC's vulnerability, because he had the relevant contacts and (at least as he saw it – contrary

to Mr Lambert's view) GEHC did not. Mr Gray was imposing his will on GEHC throughout the latter part of 2004 and in early 2005, at least and certainly at the time that he introduced El Paso and Mr Heerema.

446. This 2005 period is particularly important because it is not complicated by the job offer from Mr Heerema. During this period, Mr Gray seemingly only had one live option for post Deutsche Bank activities and that was GEHC. GEHC treated him as something of a celebrity as the accounts of the second off-site meeting demonstrate. He was regarded as the big man, whose contacts would be crucial to GEHC's ability to bring the Acquisition Strategy to fruition.

447. I can conclude this section of the judgment by remarking that I formed the view that Mr Gray did not fully realise his own importance. That is common amongst busy and influential people. But it does not jeopardise the conclusion I have reached, namely that GEHC was owed a duty of loyalty by Mr Gray between December 2004 and December 2005 in relation to the Acquisition Strategy and the ultrasound technology. Those opportunities came to Mr Gray as part of his involvement with GEHC. It meant that he was obliged to act in the best interests of GEHC, notwithstanding his duties to Deutsche Bank, and was subject to what Millett LJ described as the duty of good faith, the no inhibition principle and the actual conflict rule. Plainly he was not permitted to allow his personal interests to conflict with those of GEHC. Insofar as profit was concerned, it was envisaged that he would profit by his interest in the Acquisition Strategy deal team and through his intended shareholding in GEHC.

448. The more difficult questions arise in relation to the period after Mr Gray was asked to work for Mr Heerema, to which I now turn.

Fiduciary duties after Mr Gray had informed Mr de Clare that he would be managing Mr Heerema's fund in December 2005/ January 2006

449. I have dealt in some detail with the documentary and oral evidence concerning this period, because the change that took place marked a crucial watershed. There was, as I have said, no actual conflict between Deutsche Bank's interests and GEHC's interests up to December 2005. But there was undoubtedly a potential conflict between Mr Heerema's interests and GEHC's interests as soon as Mr Heerema came on the scene. It does not matter that this conflict may not have been immediately recognised by the protagonists. It is sufficient that it was there. Thus, when Mr Gray's third master appears, matters did indeed change.

450. The questions are broadly the same for this time period as they were before, namely (i) for whom was Mr Gray acting when he introduced Mr Heerema to GEHC (ii) what GEHC knew about Mr Gray's relationship with Mr Heerema; and (iii) GEHC's legitimate expectations as whether Mr Gray could owe it a duty of loyalty. But to these questions must be added the question of whether at this stage, Mr Gray is to be taken as having legitimately 'resigned' his fiduciary duties to GEHC or somehow discontinued them by his actions in December 2005 and January 2006, as Mr Atherton submitted he had.

451. The first crucial question is the capacity in which Mr Gray was acting when he introduced the ultrasound technology and the Acquisition Strategy to Mr Heerema.

This aspect of the matter required a careful evaluation of the contemporaneous evidence and the oral testimony.

452. It should be noted at the outset that Mr Gray had sat informally on the board of one of Mr Heerema's companies since 2002. He was also a friend and an advisor to Mr Heerema. It is perhaps worth noting also that this has similarities to his relationship with Ms Stewart. But the fact that Mr Gray may have owed fiduciary duties to the Heerema company on whose informal supervisory board he sat cannot make much difference, save by way of background, when it comes to deciding who Mr Gray was acting for in introducing Mr Heerema and his putative upstream oil assets fund to GEHC.

453. Mr Gray became hugely excited by the El Paso test results in November 2005 as was clearly evidenced by his 11th November 2005 email, which he sought to suggest might have been written when he was inebriated. I do not think it was. What followed was a period in which materials were prepared for Mr Gray to show Ms Stewart at lunch on 17th November 2005. GEHC's presentation referred specifically to GEHC's founding equity in the SPV.

454. The events of 17th December 2005 followed, which are explained in the passages from Mr de Clare's witness statement that I have set out above. Several events were occurring together. Mr Gray's shareholding in GEHC was being formalised, Mr Zolezzi was saying he wanted to raise US$20 million by selling shares in Klamath Falls, and Mr Heerema was suggesting employing Mr Gray to manage his US$500 million fund.

455. I have set out Mr Gray's evidence on these points, which I am not able wholly to accept. I accept that Mr Heerema's job offer was a "eureka moment" for Mr Gray, but I do not accept that the idea had been long in gestation or that it came before rather than at the same time as the AWS idea was put to Mr Heerema. I have little doubt that what happened was that Mr Gray received the offer to go and manage Mr Heerema's fund and thought immediately of the Acquisition Strategy and the need for an investor. It was, as Mr de Clare describes, after a short interval of telling Mr Gray that Mr Zolezzi needed to raise some money, that Mr Gray rang back with the "*There is a God*" message. They then spoke and Mr Gray suggested pitching the Acquisition Strategy to him. Mr de Clare then started preparing copious materials to enable him to do so. This was happening by the 21st December 2005. As soon as Mr Gray realised it was happening, he, as Mr de Clare described it "*made a grab for the emergency cord*". I somehow suspect that he did so, because he realised that he was in a bit of fix, so, having excited Mr de Clare, he wanted to cool him off a bit. He chose to do so in relation to Messrs Zolezzi and Hurtado, rather than saying anything about Mr Heerema, even though Mr de Clare was talking about preparations for the meeting with Mr Heerema on 18th January 2006.

456. All the documents prepared in the run up to the 18th and 23rd January 2006 meetings with Mr Heerema, and the emails of 23rd to 25th January 2006 concerning deal team percentages that followed, point towards Mr Gray continuing to act for GEHC. He started out on 17th December 2005 acting for GEHC, and it is hard to see why things should have changed, unless, as Mr Atherton submits, there was a real 'resignation'. One of the key documents is Mr de Clare's 16th January 2006 email to Mr Zolezzi which explains the situation as he saw it. Whilst it explains Mr de Clare's

understanding that Mr Gray would control Mr Heerema's funds, it goes on to make clear that Mr Gray was acting for GEHC, and Mr Gray even accepted in evidence that a part of the email appeared to put Mr Gray in GEHC's camp.

457. In this context, I have to decide whether paragraphs 84 and 85 of Mr Gray's witness statement give an accurate picture. Taken together with the passage in the cross-examination that I have quoted above, I do not think they do. I do not accept that Mr Gray told Mr de Clare at any stage in December 2005 or in January 2006 that he would have to prefer Mr Heerema "*over everything else that [Mr Gray] did*". Mr Gray himself accepted that he did not tell Mr de Clare that he could no longer act for GEHC. I am satisfied that Mr Gray's role in relation to the Acquisition Strategy did not change. He had been acting for GEHC before Mr Heerema came on the scene and he continued to do so after he came on the scene. Of course, by accepting that he would now act for Mr Heerema to manage his funds, he had a third master and a third person to whom he would owe fiduciary duties. This put Mr Gray in a very difficult position.

458. It was suggested that it was obvious even at this stage that Mr Heerema would be paying Mr Gray to manage his fund, so that this was known to be another employment. I do not accept that the scale or type of remuneration was obvious. But I am not sure that it really matters for the purpose of determining whether Mr Gray successfully terminated his fiduciary duties to GEHC at this stage.

459. To answer, then, the questions posed above in relation to this period, I have no doubt that Mr Gray continued, despite his revelation to Mr de Clare that he would in the future act for Mr Heerema in relation to his fund, to act for GEHC when he introduced Mr Heerema to GEHC in relation to the Acquisition Strategy. Mr de Clare was told very little about Mr Heerema, and knew no more than the exiguous details that Mr Gray gave, which are broadly recited in the 16th January 2006 email. GEHC undoubtedly retained a legitimate expectation that Mr Gray would continue to owe GEHC duties in relation to the Acquisition Strategy in this period. The documents all show that to be the position. Mr Gray never said he was leaving GEHC's deal team. He never suggested any kind of resignation, nor that he could not fulfil his duty of loyalty to GEHC whilst managing Mr Heerema's funds. Of course, it would have been obvious to an objective observer that the time might well come, if Mr Heerema were really interested in investing in the Acquisition Strategy, where there would be an obvious conflict between GEHC's desire to have a carried interest in the acquisition vehicle and Mr Heerema's interest in taking maximum equity for himself. But by January 2006, Mr Heerema had done no more than show an interest. If it is necessary to decide whether what was obviously a potential conflict had yet matured into an actual conflict, as it seems to me, Mr Gray did have an actual conflict of interest. It was between Mr Heerema's interests in negotiating the maximum share in an eventual acquisition vehicle and GEHC's interests in maximising its carried interest. This actual conflict came into existence as soon as it was clear that such negotiations were going to take place. The exact time at which it matured from a potential to an actual conflict may not much matter, but I think it likely that that would have been the situation by the end of the initial January 2006 meetings, once Mr Heerema had expressed a serious interest in making an investment. At this stage, there was seemingly no actual conflict between Mr Gray's personal interests and those of GEHC, since his method of remuneration was yet to be determined.

460. Thus, Mr Gray's duty after January 2006 remained to serve both (actually all three) of his masters faithfully and to pursue their best interests. This was his thorny duty of good faith. Mr Gray continued to owe the other fiduciary duties I have mentioned to GEHC throughout this period. Mr Gray never resigned his fiduciary duties to GEHC or even sought to discontinue them by his actions in December 2005 and January 2006.

Fiduciary duties in March 2006, when Mr Gray agreed his remuneration with Mr Heerema

461. Mr Snowden submitted, as I have said, that Mr Gray first obtained a personal interest in Mr Heerema's fund and, therefore, in the Acquisition Strategy when he agreed to the remuneration proposal in Mr Pronk's 17th March 2006 email. Mr Atherton submitted that in March 2006 no deal had yet been done, and there was no certainty that there would be any investment by Mr Heerema in the Acquisition Strategy at that stage. Moreover, he argued that Mr de Clare must have realised that Mr Gray would be remunerated in some way for managing Mr Heerema's funds, and what was agreed was no more than a standard kind of fee and remuneration for such activities.

462. It is true that no investment had been committed by Mr Heerema on 17th March 2006, and it is also true that the same email seemed to accept GEHC's 20% carried interest. But, the email also makes clear that, if an investment were made by Mr Heerema in the Acquisition Strategy, Mr Gray would have 20% of the ordinary shares and a 2% management fee, and would make a co-investment of USD 1 million or 20% alongside Mr Heerema's fund. This proposed arrangement gave rise to three problems. Mr Gray would be motivated to reduce GEHC's interest so as to (i) increase Mr Heerema's share and therefore (ii) to increase Mr Gray's own return on his intended 20% shareholding. The third problem is that Mr Gray was secretly taking a personal interest in a business opportunity belonging to GEHC. These problems may go more towards the question of breach to which I shall turn in due course.

463. As regards, the existence of duties, it seems to me that only one thing in the 17th March 2006 email can have changed the existence and the nature of the duties that Mr Gray owed to GEHC. That is the fact that, up to 17th March 2006, Mr Gray's conflict between his personal interests and his duty was a potential one, since he could have been remunerated otherwise than by a direct share of Mr Heerema's profits. After 17th March 2006, there was an actual conflict between his personal interests and his duty to GEHC, for the same reasons as there was an actual conflict between his duty to Mr Heerema and his duty to GEHC from January 2006.

Fiduciary duties in September 2006, when Mr de Clare acknowledged that Mr Gray would be acting for Mr Heerema

464. Mr Atherton contended that, even if fiduciary duties were still owed by Mr Gray to GEHC in September 2006, Mr de Clare recognised at that time that Mr Gray would be acting for Mr Heerema once negotiations got properly under way. This recognition was clear from Mr de Clare's email to Mr Gray of 11th September 2006 in which he said that, in the negotiations for the equity sale by Mr Zolezzi, at least, Mr Gray

should be acting for Mr Heerema, and GEHC would act for Mr Zolezzi. Mr de Clare asked in cross-examination why Mr Gray never made it clear that he could no longer advance GEHC's interests. But his real point was that in September 2006, he only understood that Mr Gray was acting for Mr Heerema in the ongoing negotiation with GEHC in relation to the proposed sale of Mr Zolezzi's 10% of the shares in Klamath Falls. Mr de Clare said that he never understood that Mr Gray was acting against GEHC's interests in relation to the Acquisition Strategy or the grant of a licence for the AWS technology. In particular, it was Mr de Clare's evidence that he always understood Mr Gray to be promoting GEHC's carried interest in the acquisition vehicle.

465. In my judgment, Mr de Clare's change in understanding began with the 11th September 2006 email and proceeded gradually through his 24th November 2006 email until the exchanges of early December 2006 finally brought it home to him that Mr Gray was saying that he would be protecting Mr Heerema's position across the board. Even then, as I have found above, Mr de Clare was looking at the problem through rose tinted spectacles and still thought – or perhaps more accurately – hoped - that Mr Gray would continue to advance GEHC's claim to a carried interest. But I shall return to this point under the next sub-heading.

466. It does not seem to me that Mr de Clare's 11th September 2006 email can properly be said to constitute any kind of resignation by Mr Gray – or even a termination of his fiduciary duties. If it amounted to any kind of end to his duties, it would only be because GEHC had given its fully informed consent at that point to the termination of those duties. I shall deal with that question separately below.

467. Therefore, returning to the tests that have to be applied at this stage in September 2006 to see whether Mr Gray continued to owe GEHC fiduciary duties, it is clear that GEHC still knew very little about the precise relationship between Mr Gray and Mr Heerema, and certainly did not know the nature of his intended remuneration. GEHC still, as it seems to me, had a legitimate expectation that Mr Gray would owe it a duty of loyalty. But at this stage, that is less important, because if there was no termination of the fiduciary duty that previously existed by fully informed consent or by 'resignation', it continued. Fiduciary duties cannot just disappear. Mr Gray remained an active member of the Acquisition Strategy deal team. As recently as 14th July 2006, he had been talking about the appropriate time to "*push for our [GEHC's] share*". On 31st August 2006, Mr Gray had indeed described Mr Heerema as his "*partner and backer*", but he had also told Mr Zolezzi that GEHC would have a carried interest in the SPV by way of recognition of "*a lot of blood, sweat and tears*".

Fiduciary duties in December 2006, after Mr Gray had made clear that he would only be acting in Mr Heerema's interests and in his own interests

468. I have already said something about the position in December 2006. At that time, there is a real question as to whether Mr Gray did enough to 'resign' or terminate his fiduciary duties. The question is as to the character of the 'resignation'. The contrast is clearly described in the passages that I have cited above from Lawrence Collins J's judgment in CMS Dolphin v. Simonet supra and Foster Bryant Surveying Ltd. supra. In short, the resignation must be "*accompanied by disloyalty*", for a resignation to pursue other opportunities or to obtain a new job is entirely legitimate and puts an end to the fiduciary duties that were previously owed. If there is a relevant connection

between the resignation and the opportunity that is thereafter pursued, then that disloyalty may be established. It is, as Rix LJ said, a merits based solution.

469. Before dealing with that question it is useful to consider what GEHC knew at this point about Mr Gray's relationship with Mr Heerema and his intended interest in RegEnersys, and how that bears on GEHC's legitimate expectations as whether Mr Gray could owe it a duty of loyalty.

470. The only likely disclosures between September and December 2006 were Mr Gray's emails dated 16th and 22nd October 2006 indicating that he would be making a personal investment. Mr de Clare said, and I accept, that he understood this to mean that Mr Gray would be buying some of the shares in Klamath Falls alongside Mr Heerema, not that he would be taking a share in RegEnersys. It seems to me that, up to December 2006 (and even then), Mr Gray had been careful to avoid telling Mr de Clare clearly that he would be obtaining an interest in the profits to be made by RegEnersys if it became the SPV or the acquisition vehicle. Mr Gray was continuing to walk the tightrope, and Mr de Clare and GEHC continued to be entitled legitimately to expect that Mr Gray would be promoting GEHC's interests in respect of the carried interest and the Acquisition Strategy.

471. I have, therefore, to consider, whether, when Mr Gray finally made clear to GEHC on 6th December 20006 that he would be acting solely in the best interests of himself and Mr Heerema, he was doing so knowing that he had a duty of loyalty and with the intention of taking advantage of an opportunity that had come to him as GEHC's fiduciary agent.

472. Mr Gray wrote in anger on 6th December 2006, but that may have been because he realised that the simmering conflict of which he must have been fully aware was turning against him. As Mr Cambridge remarked: "*this is going to take all your renowned diplomatic skills*". Though Mr Gray was obviously a skilful juggler, he could no longer keep all his balls in the air. This was unaffected by the fact that he may have been justly frustrated at Mr de Clare's business naivety, and that his business insight and analysis may very well have been correct. The elements of what he said breaks down as follows:-

i) "*Forget the acquisition strategy and 20% carries etc*".

ii) "*This was a deal which … entirely hung off my relationship with [Ms Stewart]*".

iii) "*[H]ow was an acquisition strategy ever going forward without a commercialisation agreement?*"

iv) "*The meeting should go ahead with [Mr Hurtado] on the 11th [January 2007] but I will have to be representing [Mr Heerema's] and my interest here*".

v) "*Remember I have $1mm p.a. [personal account] I have to put in. I can do no other*".

vi) "*There would be no future at all for GEHC in this deal had I not been able to bring capital*".

vii) "*And I can maybe influence but not ordain what role GEHC would have going forward – simply because that is entirely up to [Mr Hurtado] as he controls the entire show …*".

473. Mr Gray was saying, in effect, that he (notably, not Deutsche Bank) had made the Acquisition Strategy a runner in the first place by introducing Ms Stewart and now Mr Heerema. Without the capital from Mr Heerema and himself, nothing could have happened. This was his justification for moving now to protecting his own interests and those of Mr Heerema against those of GEHC.

474. His last remark about Mr Hurtado is also telling. Mr Gray always recognised that Mr Hurtado "*controlled the entire show*". But it is this aspect that was his problem, because that 'show' had been introduced to Mr Gray by Mr de Clare and GEHC. It was, therefore, GEHC's opportunity. It was to be treated as the property of GEHC (see CMS Dolphin v. Simonet supra).

475. I think it is quite clear from the terms of Mr Gray's 6th December 2006 email that he was not legitimately terminating his existing fiduciary relationship with GEHC. He was seeking to do so in order to take advantage of a business opportunity for himself and Mr Heerema. Mr de Clare's response certainly did not agree to any such termination. It was not clearly expressed as a termination in any event. I will turn in due course to the question of whether at this stage or any other Mr de Clare and GEHC gave their fully informed consent to Mr Gray acting for either Mr Heerema and/or in Mr Gray's own personal interests in conflict with those of GEHC.

476. The attempted termination (if that is really a proper denomination for it) was intimately connected with the desire to take advantage of the very opportunity that had come to Mr Gray in his capacity as a GEHC fiduciary.

477. My conclusion at this chronological point is, therefore, that Mr Gray continued to owe fiduciary duties to GEHC even after the events of December 2006, subject to the question of fully informed consent to which I shall return.

Fiduciary duties after Mr Gray's March 2007 email making further disclosure of his 'deferred interest'.

478. The disclosure on 5th March 2007 by Gray was that "*RegEnersys is a funding vehicle controlled by [Mr Heerema] and I get rewarded through a deferred return*". I have already found that the email was sent, if not received. But this disclosure cannot affect the fact that fiduciary duties were still owed by Mr Gray to GEHC for the reasons I have already given.

479. Mr Snowden submitted that the email cannot have been sent because of the exchange between Mr Cambridge and Mr Gray in which Mr Cambridge was advising Mr Gray what he should say in his reply to Mr de Clare of 4th July 2007. Mr Snowden says there would have been no need for Mr Cambridge to give such advice if the disclosure he was suggesting had already been made on 5th March 2007. That may be so, but the 5th March 2007 email may not have been in their minds at the time. In any event, I am sure that the 5th March 2007 email was indeed sent. I am equally satisfied that the communication was not sufficient to affect Mr Gray's fiduciary duties by constituting some further resignation or termination.

Issue 2B: Did GEHC have a business opportunity which it was actively pursuing in relation to the exploitation of the ultrasound technology?

480. I have, in effect, already answered this question. The possibility of contracting with Klamath Falls for a licence to the ultrasound technology was a business opportunity that was being actively pursued by GEHC at all material times, even after the December 2006 emails. By that time, GEHC may not have had much hope of obtaining a carried or any interest in the acquisition SPV, but its only hope at that stage was to rely, as it did, on Mr Gray's better nature to promote its interests as best he could with Mr Heerema.

Issue 2A: Did Mr Gray place himself in a position where his duties to GEHC conflicted or might possibly conflict with his personal interests and/or those of Mr Heerema?

Issue 2C: Did Mr Gray seek to exploit the opportunity for his own benefit and/or for the benefit of Mr Heerema or the Heerema Group (and to the exclusion of GEHC)?

Issue 2: If Mr Gray owed fiduciary duties to GEHC, did he breach those duties?

481. These questions can now be dealt with together. They need, however, to be addressed at some of the stages of the chronology already mentioned:-

i) After Mr Gray had informed Mr de Clare that he would be managing Mr Heerema's fund in December 2005/January 2006.

ii) In March 2006, when Mr Gray agreed his remuneration with Mr Heerema.

iii) In September 2006, when Mr de Clare acknowledged that Mr Gray would be acting for Mr Heerema.

iv) In December 2006, after Mr Gray had made clear that he would only be acting in Mr Heerema's interests and in his own interests.

v) After Mr Gray's March 2007 email making further disclosure of his 'deferred interest'.

482. I shall once again deal with each of these time periods in turn.

After Mr Gray had informed Mr de Clare that he would be managing Mr Heerema's fund in December 2005/January 2006

483. The main question here is whether Mr Gray put himself in a position of conflict by agreeing to work for Mr Heerema. I have already decided that he did. He was in a position of actual conflict, because he could not properly advance GEHC's claim to a carried interest and at the same time advance Mr Heerema's desire to have the greatest possible interest in the Acquisition SPV.

484. At this point, Mr Gray should have done one of two things in practice, either (i) told Mr Heerema that he could only accept the position if he was not required to advise him in relation to the proposed Acquisition Strategy, or (ii) declined to act for Mr Heerema in managing his fund. He could not legitimately continue to act for both GEHC and Mr Heerema in the ongoing negotiations concerning the Acquisition

Strategy and the ultrasound technology. In this regard, Mr Gray was immediately in breach of his fiduciary duties. In December 2005/January 2006, Mr Gray did not, however, seek to exploit the opportunity for his own benefit to the exclusion of GEHC. He was in breach of his duty of good faith to GEHC, and of the no inhibition principle, and in an actual conflict of interest, all subject, of course to fully informed consent having been given, to which I shall soon return.

In March 2006, when Mr Gray agreed his remuneration with Mr Heerema

485. Mr Gray's agreement in March 2006 to acquire a potential personal interest in the profits to be made from the acquisition SPV was, in my judgment, such as to place him in a position where his duties to GEHC conflicted or might possibly conflict with his personal interests. He was at that point seeking to exploit the Acquisition Strategy and ultrasound technology opportunity for his own benefit. He was, therefore, at that point in breach of his duty not to allow his duty to GEHC and his personal interest to conflict.

486. I have taken account of Mr Atherton's argument that nothing was certain at this stage in March 2006. But that cannot matter where the engagements are in respect of a negotiation. Mr Gray was engaged by both GEHC and Mr Heerema to protect their respective interests. By March 2006, Mr Gray knew that he stood to gain personally if he did a good deal for Mr Heerema. That situation is unacceptable without the fully informed consent of the principal, to which I shall turn under issue 3.

487. I have also taken into account that at this stage in March 2006, it is likely that Mr Gray would have obtained more money if GEHC had achieved its carried interest than if Mr Heerema had acquired the whole of the acquisition SPV. That is because Mr Gray's remuneration by Mr Heerema had a hurdle, and was (in the event) taken across a range of investments including the acquisition SPV as only one. This economic reality does not affect the fact that Mr Gray was in breach of his fiduciary duty. Mr Gray could not loyally further GEHC's interests when he stood to gain in any way from a failure to do so.

In September 2006, when Mr de Clare acknowledged that Mr Gray would be acting for Mr Heerema

488. I have held that Mr de Clare's acceptance in September 2006 that Mr Gray could act for Mr Heerema in relation to the negotiation of the share sale agreement did not affect his fiduciary duties to GEHC. Accordingly, it cannot have affected the existence of the breaches of fiduciary duty I have already described, subject again to the question of fully informed consent.

In December 2006, after Mr Gray had made clear that he would only be acting in Mr Heerema's interests and in his own interests

489. I have decided that Mr Gray was not able to resign or terminate the fiduciary duties he owed GEHC in December 2006 when he informed GEHC that he would from then on be acting only in his own interests and in the interests of Mr Heerema in relation to the Acquisition Strategy and the ultrasound technology. In these circumstances, the position of conflict that I have already described in relation to December

2005/January 2006 and March 2006 persisted after December 2006, subject once again to the question of fully informed consent.

490. When Mr Gray finally consummated his interest in RegEnersys in 2007, he had taken advantage of a maturing business opportunity belonging to GEHC in breach of the no profit rule. I have not been provided with full evidence and disclosure as to whether or not Mr Gray may or may not have received other benefits from taking advantage of GEHC's maturing business opportunity in relation to the Acquisition Strategy and the ultrasound technology.

After Mr Gray's March 2007 email making further disclosure of his 'deferred interest'

491. The disclosure of a deferred interest did not affect the continuing breaches that I have described. Again, however, this needs to be considered under the heading of 'fully informed consent'.

Issue 3A: If Mr Gray's conduct would otherwise have involved a breach of fiduciary duty owed to GEHC, whether GEHC gave its fully informed consent to Mr Gray's conduct or otherwise waived or disentitled itself from objecting to such breach of duty when it did not attempt to stop the sale of Mr Zolezzi's shareholding in Klamath Falls to RegEnersys between January and June 2007 and took the benefit of the commission on that sale.

492. This is a very specific issue that the parties have agreed. Its premise is that GEHC could have put a stop to the share sale by Mr Zolezzi between January and June 2007. I am not sure that it could. It is true that Mr Zolezzi offered to pull out of the share sale transaction after the 5th December 2006 emails. But that does not mean that he would in fact have done so. It is true also that GEHC could have forfeited the commission that it ultimately earned from Mr Zolezzi under the Alfredo mandate. At that stage, that would have been a pointless exercise.

493. But even assuming that GEHC could have attempted to stop the share sale and the commission, I fail to see how its failure to do so can be construed as the giving of fully informed consent to the entirety of Mr Gray's conduct. It was Mr Gray that got himself into his breach of fiduciary duty. It was not Mr de Clare's responsibility to get him out of it. Mr de Clare and GEHC were entitled to pursue their own best interests in the difficult position they had been manoeuvred into by Mr Gray. The fiduciary who places himself in an intolerably conflicting position cannot demand that consent is given to the situation he has created.

494. In my judgment, GEHC did not give its fully informed consent to any conduct by Mr Gray by pursuing the share sale, save in respect of Mr Gray's acting for Mr Heerema in relation to that share sale. I shall say some more about that in the next section.

Issue 3: Did GEHC give its fully informed consent to or acquiesce in Mr Gray's conduct?

495. Once again, this question has to be considered at the various chronological stages already set out. In part, I have already intimated the answers above, so this section can be dealt with quite shortly.

After Mr Gray had informed Mr de Clare that he would be managing Mr Heerema's fund in December 2005/January 2006

496. The breaches of fiduciary duty to which it is suggested that GEHC gave its fully informed consent were the breach of Mr Gray's duty of good faith to GEHC, the breach of the no inhibition principle, and the actual conflict of interest between the interests of GEHC in obtaining a carried interest in the acquisition SPV and Mr Heerema's interest in obtaining the maximum interest for himself.

497. In my judgment, the discussions between Mr de Clare and Mr Gray and the emails they exchanged culminating in the 16th January 2006 email demonstrate that Mr de Clare was informed and understood that Mr Gray was intending to manage Mr Heerema's new investment fund: "*to control their funds and channel them into an investment that brings their company into an upstream oil business*". But it was also clear from the same email that Mr Gray would be seeking, on GEHC's behalf, to persuade Mr Heerema to invest those funds in the Acquisition Strategy and the AWS technology. The email shows exactly the reverse of Mr de Clare having given his consent to Mr Gray breaking his duty to protect GEHC's best interests by advancing Mr Heerema's interests in opposition to GEHC.

498. Applying the tests in Hurstanger supra and in Knight v. Frost supra, there was no positive consent established, merely a disclosure that he would be acting in some way for Mr Heerema. On this basis, it cannot be said that Mr de Clare fully understood what he was supposed to have been concurring in. Mr Gray's conduct at this time positively assured Mr de Clare that he would be protecting GEHC's interests – quite the reverse of what it would have to have made clear for there to have been fully informed consent.

499. It is true that Mr de Clare should possibly have appreciated that Mr Gray would be in a difficult position. But he undoubtedly did not. Mr Gray may well have done – indeed I think he did - but he ploughed on regardless, hoping no doubt that it would all turn out well for everyone. To obtain Mr de Clare's fully informed consent, Mr Gray would have had to have pointed out to Mr de Clare that his new role with Mr Heerema meant that he could no longer advocate GEHC's interests with Mr Heerema. He did not do this. Indeed, Mr de Clare was positively trusting and relying on Mr Gray to do so, as one can see from the events of the following months.

500. In my judgment, therefore, it cannot be said that Mr de Clare and GEHC gave their fully informed consent to Mr Gray's breaches of fiduciary duty at this stage in December 2005/January 2006, nor that they acquiesced in them.

In March 2006, when Mr Gray agreed his remuneration with Mr Heerema

501. The events of 17th March 2006 were not communicated to Mr de Clare, so they cannot have constituted his consent.

In September 2006, when Mr de Clare acknowledged that Mr Gray would be acting for Mr Heerema

502. Mr Atherton places considerable reliance on Mr de Clare's 11th September 2006 email, because it was there that Mr de Clare makes clear for the first time that he understood that Mr Gray would be acting for Mr Heerema on the other side of the negotiations from Mr de Clare and GEHC acting for Mr Zolezzi.

503. In my judgment, however, Mr de Clare was only consenting to Mr Gray acting in that capacity to the exclusion of GEHC's interests in respect of the narrow area of the existing debate concerning the share sale. That was partly why the temperature rose so rapidly when the possibility of a term referring to access to the technology was inserted in the draft Co-operation Agreement, and when Mr Gray referred to needing "*front end access to the tools*" on 13th November 2006. Mr de Clare may indeed have been naïve in drawing this fine distinction between the Alfredo mandate and the Acquisition Strategy, but he undoubtedly did so. Mr Gray may have been commercially correct in arguing as he did in late November and early December 2006 that the linkage was inevitable, but he did not make that clear to Mr de Clare before the emails culminating in those on 6th December 2006.

504. GEHC cannot be taken to have given its fully informed consent to Mr Gray forsaking his duty to protect GEHC's interests in relation to the Acquisition Strategy, when that was not even mentioned in the 11th September 2006 email. Mr de Clare did not understand, in any sense, that his email could be taken as consent to the loss of Mr Gray's promotion of GEHC's interests in relation to the Acquisition Strategy and the AWS technology.

In December 2006, after Mr Gray had made clear that he would only be acting in Mr Heerema's interests and in his own interests

505. I have already set out my findings on precisely what Mr Gray did say on 6th December 2006 as to what he was intending to do. Mr de Clare responded as I have set out in some detail in the chronology above. There was no suggestion that Mr de Clare had given some additional oral confirmation that he and GEHC were consenting to the Mr Gray's newly disclosed position. One can, therefore, see whether he was consenting from his emailed responses. The high point of Mr Atherton's submission here is to refer to Mr de Clare's reference to Mr Gray as "*a senior figure in RegEnersys*". Otherwise, Mr de Clare's 6th December 2006 email makes it abundantly clear that GEHC will not consent to any breach of duty to GEHC. He said that Mr Gray was "*my partner in GEHC for the period and you still are*" and that Mr Gray could not "*walk off*" with the rights to another company. Mr de Clare referred to Mr Gray as a "*key member*" of the Acquisition Strategy deal team. Overall, there is not a word of consent in the entire document.

506. It may legitimately be asked how, after these exchanges, Mr de Clare can still have relied on Mr Gray to protect GEHC's interests. But Mr de Clare's answer to that was that he still thought that Mr Gray would only get paid if GEHC obtained a carried interest. He did not know at this stage that Mr Gray was to be remunerated in the way he had agreed with Mr Pronk some 9 months earlier, nor did he know that he would get any percentage interest in the profits of the acquisition SPV.

507. Overall, looking at all the factual circumstances in December 2006, it does not seem to me that it can fairly be said that GEHC was consenting to Mr Gray's breaches of the fiduciary duties he owed to GEHC. Specifically, Mr de Clare cannot be said to have consented to Mr Gray taking a personal interest in the acquisition vehicle, which was precisely what the Acquisition Strategy had set out to achieve for GEHC. GEHC never gave any consent, let alone fully informed consent, to Mr Gray taking a personal interest in the maturing business opportunity that belonged to GEHC, namely

the chance of obtaining a licence in the AWS technology from Klamath Falls and a share of the profits that would thereby be derived.

508. In the circumstances, I do not have to consider what the position would have been had I found that Mr de Clare and GEHC gave their fully informed consent to Mr Gray taking advantage of GEHC's maturing business opportunity. In that situation, it could be said that GEHC had no choice. If it refused to do so, and wanted to stop Mr Gray doing what he had decided to so, it would have had to engage in expensive litigation, which would have most likely depreciated the chances of successfully putting the Acquisition Strategy into effect. GEHC's interests, starting from December 2006, almost certainly required it to wait and see how things turned out, hoping that Mr Gray would be able to persuade Mr Heerema to provide it with some kind of carried interest. Effectively, Mr Gray had, by breaching his fiduciary duties, got GEHC over a barrel. It is hard to see how fully informed consent could be given in such a situation. But I do not need to decide the point, since I am quite satisfied that Mr de Clare did not, as a matter of fact, consent to Mr Gray's disloyalty in any sense.

509. Mr Atherton placed great reliance on the authorities that show that it is not always necessary for a fiduciary to disclose the level of remuneration that he will receive, provided it is clear that he will be remunerated, and that it can be assumed that he will be remunerated on normal or standard commercial terms. In my judgment, these authorities take Mr Gray nowhere. Mr de Clare never consented to his taking a personal interest of any kind in the acquisition SPV or in the ultrasound technology, as opposed to the shares in Klamath Falls to be acquired from Mr Zolezzi.

After Mr Gray's March 2007 email making further disclosure of his 'deferred interest'

510. The disclosure of the deferred interest came from Mr Gray, not from GEHC. It did not in fact come to GEHC's attention and cannot therefore constitute any kind of consent to anything.

511. I therefore conclude that GEHC only gave its fully informed consent to (i) Mr Gray acting for Mr Heerema in the negotiation for the purchase of Mr Zolezzi's shares, and (ii) Mr Gray taking a personal interest in the purchase of those shares. Otherwise, GEHC gave Mr Gray no fully informed consent to act in breach of his continuing fiduciary duties to GEHC.

Issue 4: Given the direction for a split trial, whether for the purposes of establishing a breach of fiduciary duty or for the purposes of obtaining an order at this hearing for inquiries and accounts as to (i) the profits and other benefits received or receivable by Mr Gray and/or (ii) assets held on constructive trust and/or (iii) losses caused to GEHC, together with consequential orders at a subsequent hearing on remedies, GEHC needs at the present trial on liability to establish that it has suffered some quantifiable loss or that Mr Gray has made some quantifiable profit or holds some identifiable asset on trust? If GEHC does need to do so, has it succeeded in doing so?

512. The breaches that I have held to have been established are as follows:-

i) From January 2006, when Mr Gray began to further Mr Heerema's interests in the Acquisition Strategy and in the ultrasound technology, Mr Gray was acting

in breach of his duty of good faith to GEHC, and of the no inhibition principle, and in an actual conflict of interest.

ii) From 17th March 2006, Mr Gray put himself in a position where his duties to GEHC conflicted or might possibly conflict with his personal interests in relation to the Acquisition Strategy and the ultrasound technology, because Mr Gray was to be paid a share of Mr Heerema's profits from the acquisition vehicle.

iii) When Mr Gray finally obtained his interest in the profits from RegEnersys in 2007, he had taken advantage of a maturing business opportunity belonging to GEHC in breach of the no profit rule.

513. I do not understand that GEHC claims any relief in respect of the first finding to the effect that Mr Gray acted in breach of fiduciary duty by furthering Mr Heerema's interests after January 2006.

514. In paragraph 113 of the Re-amended Particulars of Claim, GEHC claims as follows:-

i) "*113. GEHC seeks at the trial on liability declarations as to Mr Gray's breaches of fiduciary duty and orders for all appropriate accounts and enquiries as to the profits and other benefits received or receivable by him and/or assets held by him on constructive trust as referred to above and/or losses caused to GEHC; together with at the subsequent hearing as to remedies an order for the payment and transfer of all sums and assets found due on the taking of such accounts and inquiries and an order for transfer to GEHC of any assets which Mr Gray is determined to hold on constructive trust for GEHC*".

ii) The following relief relevant to the trial on liability is claimed by GEHC:-

a) A declaration that Mr Gray acted in breach of his fiduciary duty to GEHC and is liable to account to GEHC as constructive trustee for all monies and benefits received or to be received by him directly or indirectly arising out of the commercialisation of the ultrasound technology and/or to compensate GEHC in equity for all losses suffered as a result of such breaches of fiduciary duty;

b) An account of all sums due and orders for transfer and/or payment to GEHC in respect of monies and benefits received or receivable by Mr Gray directly or indirectly in respect of the commercialisation of the ultrasound technology (leaving aside any amounts received in respect of the purchase of an interest in Klamath Falls as referred to above)

c) Appropriate inquiries as to the arrangements to which Mr Gray is party directly or indirectly providing for benefits as aforesaid;

d) Equitable compensation, alternatively damages, for breach of fiduciary duty;

e) An inquiry as to the losses suffered by GEHC by reason of Mr Gray's breaches of duty and an order that he do pay to GEHC any sums found due;

515. Mr Atherton accepts that, in order to avoid a trial of the remedies to which GEHC is entitled as a result of the breaches of fiduciary duty that I have found, he must establish that the claim for relief should be struck out, by demonstrating that GEHC has no real prospect of establishing that GEHC will obtain a material award in its favour. He relies on the dictum of Pumfrey J in Reed Executive v. Reed Business Information Ltd [2002] EWHC 2772, where he said this at paragraph 22:-

> "*The law is that an enquiry will generally be ordered at the claimant's risk as to costs unless the court is satisfied either that there is no loss or that it can assess the appropriate relief by way of damages on the material available. For this proposition, one may cite McDonalds v Burger King [1987] FSR 112, Brain v Ingledew Brown Bennison & Garrett [1997] FSR 511. An enquiry may be awarded even if the court feels strong doubt about the availability of substantial damages. There is no reason why a claimant who seeks an enquiry should be in any worse position than a claimant who does not seek a split trial. But on the same basis the court has a duty not to involve the parties to litigation in very expensive disputes about matters which are trivial*".

516. I have not been provided with the documentation or evidence necessary to determine what profits Mr Gray may or may not have made by taking advantage of the opportunity he did. I know, of course, that he denies that he made any such profit, and that he has adduced some evidence to show that he has not. But I have only seen one side of the story. I cannot, therefore, find that GEHC has no real chance of establishing that it is entitled to recover some material profits once the necessary account is taken. Mr Atherton also seeks to limit the relief that GEHC can obtain by foreclosing the argument about what benefits Mr Gray may or may not have received from his exploitation of GEHC's maturing business opportunity in relation to the Acquisition Strategy and the ultrasound technology. I do not think that would be appropriate in the absence of clear and undisputed evidence as to what precisely Mr Gray has received or is likely in the future to receive. There may be a whole host of arguments on both sides that I cannot now predict and have not yet been adumbrated.

517. The same reasoning applies to the question of the losses that GEHC may have sustained. I have not heard sufficient evidence to determine whether or not GEHC might have benefited from the maturing business opportunity that Mr Gray capitalised upon, had he not done so. I understand that Mr Gray argues that GEHC would never have obtained anything without him – and that GEHC's hope of a carried interest was an impossibility. He may be right, but that needs to be determined, if necessary, at the second stage trial after proper disclosure and evidence directed to the point. I have heard no argument about the availability in this case of both an account of profits and equitable compensation for losses. I will leave that question open for argument after I have delivered this judgment.

Conclusions

518. I will not seek to summarise all my conclusions in this section. To do so would require a lengthy repetition of what has gone before. I have, however, concluded that GEHC is entitled, subject to the point about the availability of both an account and equitable compensation, to declarations that:-

i) Mr Gray acted in breach of his fiduciary duty to GEHC and is liable to account to GEHC as a constructive trustee for all monies and benefits received by him directly or indirectly arising out of Mr Gray's actions in:-

a) putting himself in a position from 17th March 2006 onwards where his duties to GEHC conflicted or might possibly conflict with his personal interests in relation to the Acquisition Strategy and the ultrasound technology; and

b) taking advantage of a maturing business opportunity, namely the opportunity to participate in the Acquisition Strategy and to obtain rights in the ultrasound technology, belonging to GEHC, in breach of the no profit rule.

ii) An account of all sums due and orders for transfer and/or payment to GEHC in respect of monies and benefits received or receivable by Mr Gray directly or indirectly as a result of the said breaches of fiduciary duty, including his indirect personal interest in RegEnersys, but not including any amounts received in respect of the purchase of an interest in Klamath Falls.

iii) An enquiry as to the arrangements to which Mr Gray is party directly or indirectly providing for the said benefits.

iv) A declaration that Mr Gray is liable to GEHC in equity for all losses suffered as a result of the said breaches of fiduciary duty, and an inquiry as to whether such losses were suffered and the amount of such losses (if any), and an order for payment.

519. I will hear counsel on the form of this proposed order and the appropriateness of any further heads of relief that GEHC might seek to contend for, and on the question of costs.