Neutral Citation Number: [2022] EWHC 229 (Comm)

Case No: CL-2017-000782

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/02/2022

Before :

THE HONOURABLE MR JUSTICE CALVER

- -

Between :

E D & F MAN CAPITAL MARKETS LIMITED	**Claimant**
- and -	
(1) COME HARVEST HOLDINGS LIMITED **(2) MEGA WEALTH INTERNATIONAL TRADING LIMITED** **(3) MR STEVEN KAI SHING KAO** **(4) GENESIS RESOURCES INC.** **(5) GENESIS PROPERTIES HOLDING LLC** **(6) GENESIS KINGHWA LLC** **(7) TRANSCENDENT GLOBAL FINANCE INC.** **(8) TRANSCENDENT (SG) PTE LTD** **(9) SAMPO INTERNATIONAL LTD** **(10) STRAITS (SINGAPORE) PTE LTD**	**Defendants**
- and –	
MR WAI KWOK WONG	**Third party**

- -

Huw Davies QC, John Robb, Katherine Ratcliffe (instructed by **Clyde & Co**) for the **Claimant**
David Lewis QC, Andrew Dinsmore, Manuel Casas (instructed by **Reed Smith**) for the **Tenth Defendant**

Hearing dates: 11 October 2021 to 12 November 2021

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 16th February 2022 at 10:00 am

Mr Justice Calver:

(A) INTRODUCTION

1. By this action, the Claimant (***MCM***) alleges that it is the victim of a high value metals fraud. It maintains that the First Defendant (***Come Harvest*** or ***CH***) and the Second Defendant (***Mega Wealth*** or ***MW***) utilised 92 fraudulent documents (the ***Purported Receipts***), in order to obtain finance from it under bogus sale and repurchase transactions (or "repo transactions").

2. The Purported Receipts professed to give CH and MW a right to title to parcels of nickel. However, MCM maintains that they were, in fact, worthless counterfeits produced by someone who had had sight of colour-scanned copies (***CSCs***) of the original warehouse receipts (***OWRs***) issued by the warehouse-keeper storing the nickel[1] to its true owner, the Tenth Defendant (***Straits***). In reality, the OWRs remained with Straits or its financiers at all times and were never acquired by CH or MW.

3. Deceived by the Purported Receipts, MCM provided finance to CH and MW (obtained via its own sub-sale of the Purported Receipts to ANZ Commodity Trading Pty Ltd (***ANZ***)), by entering into repo transactions with them between May to October 2016. MCM claims to have been left seriously out of pocket for the monies it advanced to them when it transpired that the Purported Receipts were forgeries which did not confer title to any nickel.

4. MCM maintains that each of the defendants is implicated to a lesser or greater extent in this fraudulent scheme, by either facilitating or arranging it.

5. As a result of this fraud, the claimant claims that it suffered losses amounting to USD 284,536,139.23. It brings its claims by way of a series of different and distinct causes of action against different defendants in an attempt to recoup its losses.

6. Given the complexity of the factual and legal issues arising for determination, this judgment is unavoidably extensive. The structure of the judgment is as follows:

   i) Section B: Sets out the factual background to the claim;

   ii) Section C: Provides a summary of the claims brought by MCM;

   iii) Section D: Deals with a number of preliminary considerations on the evidence adduced before the Court and the burden of proof to be applied in a claim alleging fraud;

   iv) Section E: Sets out the background to the fraud in greater detail;

   v) Section F: Summarises my findings of fact concerning knowledge;

   vi) Section G: Applies the law to the facts in light of my findings of fact and addresses each cause of action advanced by MCM in turn;

[1] Pacorini Metal Asia Pte Ltd (***Pacorini***), later re-named Access World Logistics (Singapore) Pte Ltd (***Access World***).

vii) Section H: Summarises, by way of conclusion, my legal findings and the relief granted by the Court.

(B) FACTUAL BACKGROUND

(I) THE NATURE AND EFFECT OF A REPO TRANSACTION

7. Nickel repo transactions are financing transactions whereby a seller raises finance by selling metal to a buyer and agreeing to repurchase it at some point in the future at a slightly higher price. The difference between the two prices is akin to the interest that accrues on the lending of funds for the period between the purchase and sale.

8. The seller is effectively in the position of a borrower of funds and the buyer (commonly a bank) in the position of a lender of funds, with the metal acting as the collateral or security for the financing. Given that the commercial purpose of the transactions is to raise finance, and because they usually involve several hundred or thousands of tons of metal that cannot easily be transported, the purchase and sale often takes place by delivery of an original warehouse receipt issued by a metals warehouse certified by the London Metals Exchange. A warehouse receipt, although not a document of title, is similar to a bearer bond in that it represents and can be redeemed for a quantity of metal stored at a metals warehouse.

9. The repurchase leg of a repo transaction involving a warehouse receipt may be contingent; in which case the 'borrower' (i.e. the original seller) will be granted an option to purchase from the 'lender' (i.e. the original buyer) metal of the same specification, brand, weight, shape and location as was originally sold under the purchase leg.

10. If the call option in a contingent repo transaction is not exercised, then the financier's remedy is (i) to put the metal onto LME warrant and sell it on the LME exchange and (ii) close out hedging contracts which will typically have been put in place to protect the financier from exposure to market price movements in the interim.

11. It is fundamental to the operation of a repo that a sale takes place, and that the party advancing money in exchange for delivery of a warehouse receipt obtains a genuine original warehouse receipt. It is this that makes repos a form of secured financing (with commensurate interest rates).

12. In order to understand how the fraud was perpetrated in the present case, an understanding of how a repo transaction involving genuine warehouse receipts is effected as a matter of practicality is required, which is as follows.

13. The warehouse which holds the parcel of metal issues a hard copy original warehouse receipt to the order of the first order party who deposited the metal in the warehouse in the first place (i.e. the borrower/seller).

14. The purchaser of the metal (the lender of funds) purchases the metal from the seller (the borrower) by paying typically a fixed price based on current market value to the seller (or borrower of funds), who, upon payment, endorses and delivers the original warehouse receipt to the purchaser as collateral for the funds. Possession of the original warehouse receipt entitles the holder to go to the warehouse to verify its authenticity

and/or to demand delivery of the metal represented by the original warehouse receipt. Because of this security, financial institutions are comfortable engaging in transactions involving original warehouse receipts.

15. At the expiry of an agreed time period in the repo contract, typically 3-6 months (which in some cases may be extended by "rolling-over" the transaction for an additional period of time), the purchaser sells the metal back to the seller, who pays the amount due. Upon receipt of the money, the purchaser endorses and delivers back the original warehouse receipt to the seller.

16. Particularly in the context of the present case, it is important to appreciate that a warehouse receipt is not a document of title,[2] and transfer of a warehouse receipt does not affect delivery of the underlying goods. The position (as a matter of English law) is that a warehouse-keeper is the bailee of the person who deposited the goods in the first instance (and who will be named as the first order party in the warehouse receipt); and the warehouse-keeper holds the goods as the agent of the original bailor until he/she has attorned to and agreed to hold the goods on behalf of someone else (indeed, the warehouse-keeper will not know what has happened to the goods in the interim): see *Natixis S.A. v Marex* [2019] EWHC 2549 at [227]-[232].

17. It follows that so far as the warehouse-keeper is concerned, the original order party remains the owner/bailor of the metal until the endorsed original warehouse receipt makes its way back to the warehouse-keeper by being presented to it by the final endorsee.

18. Until then, the warehouse-keeper acts on the instructions of the *original order party*, and any third-party endorsee of the endorsed original warehouse receipt would not find it at all suspicious to be told that the warehouse-keeper's records showed that the original order party was the owner of the metal until that endorsee had returned the endorsed original warehouse receipt to the warehouse-keeper for cancellation and reissue in their name. As Mr Nizan, one of the market practice experts in this case states in his first expert report at paragraph 70: *"[The warehouse-keeper] would act upon instructions of the order party, but only release the metal upon presentation of the duly endorsed original warehouse receipt*."

19. The value of an endorsed warehouse receipt to the purchaser (or other transferee) is that the warehouse-keeper promises to deliver the goods "*upon presentation of the duly completed/endorsed ORIGINAL Warehouse Receipt in the office of the undersigned [warehouse-keeper]*".[3] Thus, the warehouse-keeper (i) will not deliver except against a duly endorsed original warehouse receipt, and (ii) upon presentation of such an original, will "*collect rent and any other fees owed to it up to that point and follow the presenter's instructions to either keep storing the goods in their name, cancel the existing warehouse receipt and issue a new warehouse receipt to their or another party's order, release the goods, or ship the goods*".

[2] *Natixis S.A. v Marex* [2019] EWHC 2549 at [233]-[238].

[3] In this case, Access World / Pacorini. This text is quoted in *Marex* at [229], noting that this is a term of the contractual bailment between the original bailor and Access World). This wording appears on each original, copy and counterfeit warehouse receipt at issue in these proceedings.

(II) THE PARTIES TO THE CLAIM

20. MCM is a global financial brokerage business and the financial services division of E D & F Man Holdings Limited.

21. There are 10 defendants to the claim. The claims against the fifth to eighth defendants (Genesis Properties Holding LLC, Genesis Kinghwa LLC, Transcendent Global Finance Inc. and Transcendent (SG) Pte Ltd) have now been settled so the claims against them, although originally pleaded, no longer require the attention of the Court.

22. Of the remaining defendants, Come Harvest and Mega Wealth were the counterparties to the repo transactions with MCM. The fourth defendant (Genesis Resources), a company incorporated in California, served as Come Harvest's and Mega Wealth's agent and advisor at all material times. The third defendant (Mr Kao) was the sole director and shareholder of Genesis Resources. The ninth defendant is a BVI company and Mr Kao was at all material times its director and shareholder. Straits is a company incorporated in Singapore and a wholly owned subsidiary of Straits Financial Pte Ltd, the brokering division of CWT International Limited. Straits' business includes the provision of commodities brokerage and financing services. It provided such services to Come Harvest and Mega Wealth.

23. Mr Wai Kwok Wong (also known as Wang Weiguo and Wang Zong), who is a third party to these proceedings but played a crucial role, was at all material times the sole director and shareholder of Come Harvest and Mega Wealth, and was alleged by MCM to be a shadow director or otherwise in effective control of Mega Wealth.

(III) THE RELATIONSHIP BETWEEN MR KAO, MR WONG AND STRAITS

24. The central figures in the fraud are Mr Kao and Mr Wong. Mr Kao gave a witness statement for the trial of this action, but he did not attend to give evidence.

25. In his witness statement Mr Kao stated that he started metals trading in 1990 (aged 19/20) in San Francisco. Between 1994 and 2008, he worked mostly in China (Beijing and Shanghai).

26. Mr Kao was introduced to Mr Wong in 1997 by Mr Kao's late uncle.

27. Mr Wong was imprisoned in China for eight years in the late 1990s / early 2000s, for a financial crime involving the use of fraudulent letters of credit used for trading aluminium.

28. Mr Kao met Mr Wong again in around 2007 or 2008. In 2010, Mr Kao left China and moved back to California. In 2011, he established the fourth defendant ("Genesis") to trade metals (mostly copper and lead). By 2014 Mr Kao and Mr Wong were doing business together. As Mr Kao states in his witness statement: "*Mr Wong and I conducted some business from around 2014, including transactions other than those involving MCM.*" This is also apparent from a contemporaneous email exchange dated 24 January 2014.

29. Meanwhile, Mr Kao met Mr Jeremy Ang of Straits[4] at some point during 2011-2012, having been introduced to him by Mr Adam Slater, then the CEO of CWT Logistics, a subsidiary of CWT Group (the owners of the Straits group of companies). It was Mr Slater who had recommended Mr Ang's appointment as CEO to set up Straits.[5] Mr Ang's introduction to Mr Kao was made "*on an informal basis to explore potential business opportunities*", when Mr Kao was visiting Singapore.[6]

30. Straits was at that point a fledgling company, having been incorporated on 4 May 2011. Mr Kao introduced Mr Ang to Mr Wong in 2012 or 2013; by this stage, Mr Kao says that he had a "*pre-existing and positive relationship with Mr Jeremy Ang and Sherraine He*". Mr Ang met Mr Kao approximately once per quarter.[7] Mr Ang described these as being "*business meetings, maybe for an hour or so, … generally followed by dinner and drinks*".[8] Straits maintains that its first transaction with one of Mr Kao's companies was in November 2013.[9] Mr Ang did not dissent from the proposition that before 2014 the level of business at Straits was fairly low. In 2012 Straits entered into only 9 transactions.

31. Straits' trading and revenues began to grow in 2013 (from USD 3.8m as at 31 December 2012 to USD 10.6m as at 30 September 2013), chiefly as a result of letter of credit (***L/C***) discounting transactions. L/C discounting transactions are a form of interest-rate arbitrage. Straits' auditor (KPMG) recorded in November 2014 that "*In FY 2013, there were less than ten repo transactions and the total revenue earned on those transactions is immaterial. (…) the significant revenue contributor for FY2013 was LC discounting (documents against payment) transactions.*"

(IV) STRAITS BEGINS CONTRACTING WITH MR KAO'S COMPANIES

32. It follows that Straits conducted its first trades (***Type 1***) with companies associated with Mr Kao at some point between November 2013 and March 2014 and continued so trading into January 2017. The categorisation of Straits' contracts with Mr Kao's companies into five types was carried out after the event by Ms He[10] to show, she said, how the contracts evolved.

33. On 27 November 2013, Ms He sent an email recap to Mr Kao of a trading structure apparently corresponding to a '**Type 1**' trade. Mr Ang accepted in evidence (and I find as a fact) that the structure would likely have been agreed between him and Mr Kao, with Ms He recapping the details based on a discussion with him (Mr Ang).[11] The trade structure is characterised by Straits as having been a '*circle trade'* involving a sale and

[4] Ang Peng Leong Jeremy, CEO of Straits Financial since 2011. CEO of Straits and father of Timothy Ang.
[5] J. Ang, cross-examination, Day 9 p. 14/14-22.
[6] J. Ang 1 §10.
[7] J. Ang §11.
[8] J. Ang §11.
[9] D10's Re-Amended RFI §1.
[10] Ms Yuzhen Sherraine He, Vice President of Straits since May 2011, and Senior Vice President of Straits (Singapore) Pte Ltd since July 2016. Responsible for managing Straits' commodities trading team on a day-to-day basis.
[11] J. Ang 1 §21: "*once the deal was agreed in principle with Steven Kao, I left it to Sherraine to sort out the details*".

purchase of an original warehouse receipt. I find that the structure was, as MCM submits and as Ms He's email to Mr Kao of 27 November 2013 reveals, as follows:

i) Straits entered into a sales contract with Mr Kao's 'Company A', providing for the sale by Straits to Company A of original warehouse receipts and of the metal covered thereby.

ii) Straits entered into a simultaneous purchase contract with 'Company B', providing for the sale by Company B to Straits of original warehouse receipts and the metal covered thereby.

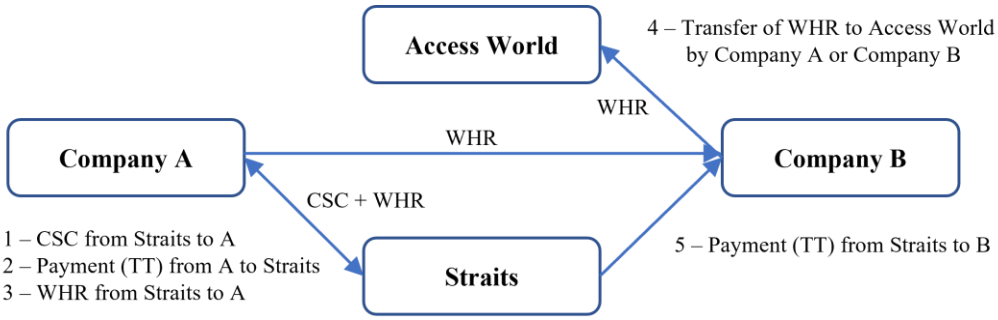
iii) Straits would send a copy of the warehouse receipt to Company A upon signature of the sales contract.

iv) Company A would then pay the 'purchase price' by telegraphic transfer to Straits, at which point Straits would send the original warehouse receipt to Company A.

v) Company B[12] would then send the original warehouse receipt back to Access World[13] for cancellation.

vi) Straits would then pay the 'purchase price' to Company B by telegraphic transfer.

34. In diagrammatic form the Type 1 trade can be shown as follows:



35. **Type 2** trades (which likely ran from November 2013 to October 2014) were conducted along the same lines save that payment to Straits for the metal was by letter of credit rather than telegraphic transfer. Ms He gave evidence that "*the relevant Kao buying company would issue an LC to our bank and we would present hard copy documents, including the original warehouse receipts, under the LC. Straits would buy back the metal from another counterparty. We paid by cash, not by LC*".

[12] Or possibly Company A.

[13] Ms He had said in her first witness statement that the receipt was sent back to Straits: He 1 §21: "*In every case of a Type 1 Trade, the original warehouse receipts were delivered to the relevant buyer and re-delivered back to us on the re-purchase side later*". It appears instead from the email from Mr Kao to Ms He dated 4 March 2014 and the email from Jessie Li to Ms He dated 10 March 2014 that the arrangement was that, where Straits was to provide an original warehouse receipt, that WHR would be delivered to Mr Kao's company in China for onwards transmission to a Pacorini/Access World warehouse in China (for cancellation).

36. The 'Type 1' and 'Type 2' transactions were described contemporaneously by Mr Kao as contracts for "*CSC[s] with [Originals] to follow*" .[14] Straits' 30 basis point fee was "*chargeable for the first 4 days (upon provision of colored copy whr …)*".[15] I accept MCM's submission that it follows that already in a Type 1 and Type 2 contract, the provision of a CSC had a greater significance to the normal situation where a CSC is provided during the process of negotiation and execution of a contract for the sale of physical metal.[16]

37. **Type 3** trades ran from January 2014 to October 2014. This was a new transaction structure between Straits and Mr Kao, approved by Mr Ang and discussed between him and Ms He, involving (i) transfer of a blank endorsed CSC of the OWR by Straits but not the OWR itself; (ii) use of the same written contract terms and invoices (including the provision for payment "*upon receipt of cargo title at sight of the following documents: (…) Original warehouse receipt/warrant"*; and (iii) payments between Straits and Company A / Company B as though there had been a 'circle' of sale and purchase contracts; and (iv) Straits retaining the original WHR. There was never any re-transfer of a CSC from Company A or B to Straits.

38. In paragraph 25 of her witness statement Ms He said that Type 3 transactions "*were similar to the Type 1 trades with full payment of the cargo value being made on the sale and repurchase legs, except that we retained the original warehouse receipts and presented copies of them to Mr Kao's companies*".

39. In diagrammatic form the Type 3 trade can be shown as follows:

40. **Type 4** trades ran from November 2014 until the last trade closed in July 2016. It is during this Type, if not earlier, that MCM alleges that the forgeries began. Ms He's evidence was that Type 4 trades were *"circle trades involving colour scanned copy warehouse receipts, with payment by telegraphic transfer. These were divided into two sets of repo contracts. The first set was for collecting the full sale price on the sale side and paying the purchase price on the repurchase leg. The second set was used to collect fees due to Straits for holding the metal.*" She said that Type 4 transactions "*were largely the same as the Type 3 trades, except they involved a second set of repo contracts, to collect fees due to Straits for holding the metal beyond the first 5 days (and, later, 7 days)*". Under Type 4 contracts Straits held the OWRs for a longer duration.

41. **Type 5** trades ran from April 2016 until 12 January 2017 when the fraud was uncovered. Ms He described Type 5 transactions as "*trades with a single Kao company on an*

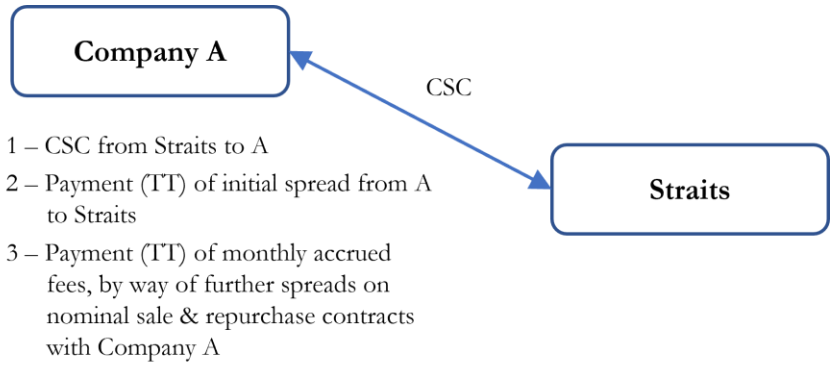
[14] Mr Kao to Ms He (with Mr J. Ang and others in copy), 4 March 2014: "*With our transactions, there are two types of document requirement on the WHR, Color Scan Copies (CSC) only or CSC with Orignals* [sic] *to follow…*"

[15] Ms He to Mr Kao in the same email chain, 3 March 2014.

[16] See the market experts' Joint Memo §4.1.

optional repo basis, involving colour scanned copy warehouse receipts and the collection of fees due to Straits under a monthly master contract". She said that "*there were two key differences between the Type 5 and the Type 4 contracts. First, all the Type 5 contracts were done between Straits and one other party only – they were not circular trades. In every case, the counterparty was either Come Harvest Holdings Limited or Mega Wealth International Trading Limited… Second, the contracts were all structured as repos, but with the option for Come Harvest or Mega Wealth on whether to uptake the metal. As a result, under the Type 5 structure full payment of the contract value would not be required. Instead, Straits received the spread amounts only for each trade unless the option to uptake the metal was exercised*". The suggestion that Type 5 contracts contained an option to purchase on the part of CH or MW was a significant issue at trial and highly contentious. It is not recorded in the Type 5 contracts and nor is there any contemporaneous document recording this alleged fact and I return to it in the judgment below, as well as to the accuracy or otherwise of each of Ms He's descriptions of these different types of trades.

42. In diagrammatic form MCM suggest that the Type 5 trade can be shown as follows:



43. Finally, I also bear in mind Mr Lewis QC's submission for Straits that the Court does not need to determine any issues in relation to Types 1 to 4; rather, it is necessary to bear in mind the evolution of the contracts when assessing the Type 5 contracts.

(V) MCM'S PURCHASE CONTRACTS WITH COME HARVEST AND MEGA WEALTH

44. CH claims to have begun engaging in metal trading in 2013, although it was incorporated as early as 2009.[17] As shown by its certificate of incorporation, MW was only incorporated on 10 March 2015, and commenced metal trading shortly thereafter.

45. Between May and October 2016, MCM entered into 12 purchase contracts with CH (for the purchase of nickel, to be performed by delivery of original warehouse receipts), and 16 purchase contracts with MW, intended in each instance to constitute the first leg of a repo transaction (together, the ***Purchase Contracts***). CH/MW had in each case entered into (Type 5) contracts with Straits (the "***Straits Contracts***") which related to the same parcels of nickel as CH/MW subsequently purported to sell to MCM.

46. MCM received 92 purportedly genuine OWRs from CH/MW in purported fulfilment of their obligations under their purchase contracts (the "***Purported Receipts***"). MCM

[17] CH & MW Defence, §4(1).

also received by courier hard-copy documents described as "***PMA Letters***", which were addressed to, and delivered by MCM to their own financiers, ANZ.

47. 83 of the 92 Purported Receipts were transferred as purported consideration under the Purchase Contracts (details of which are to be found in Appendix 4 to the Re-Re-Re-Amended Particulars of Claim). These were all on-sold by MCM to ANZ.

48. The remaining 9 Purported Receipts were provided by CH/MW in December 2016 as purported collateral for margin payments which CH/MW had become obliged to pay (the "***Collateral Receipts***").[18] These 9 Collateral Receipts were retained by MCM and not sold to ANZ.

49. The total amount paid by MCM under the Purchase Contracts and associated hedging contracts was USD 284,536,139.23.

50. On or around 12 January 2017 Mr Riley of MCM was told by Mr Silverstein of Genesis that two warehouse receipts provided by CH to Marex, their western financier, had failed authentication with Access World. MCM took the 9 Collateral Receipts to Access World in Singapore, where they too failed Access World's authentication process and were retained by Access World on 16 January 2017. ANZ took one (only) of its Purported Receipts to Access World in Singapore, where it too failed Access World's authentication process on 23 January 2017.

51. No party positively alleges that the Purported Receipts were genuine warehouse receipts. They plainly were not, since the metal purportedly covered by the Purported Receipts was all sold by Straits between January 2017 and April 2017 following the exercise by it of its rights as holder of the OWRs.[19] Ms Tan (of Straits' Trade Services Team)[20], Ms Lindy Li[21] and Ms Wu[22] (both of Straits' Operations Team) all deny that the signatures on the Purported Receipts are their true signatures, and Straits further denies that its (purported) stamp on the endorsement page is genuine. It is perfectly clear and I find as a fact that (as positively pleaded by both MCM and Straits and not admitted by the First to Eighth Defendants), the Purported Receipts were forgeries and not genuine original warehouse receipts.

52. It is also clear, and I find as a fact, that the Purported Receipts were produced by someone who had possession of colour-scanned copies (**CSCs**) of the OWRs. Ms Radley, the jointly appointed forensic expert, has concluded that "*the signatures on the MCM Hard Copy Receipts* [i.e. the Purported Receipts] *are either fairly poor tracings or simulations (freehand copies) of the signatures appearing on the Straits PDF Copy Receipts"* [i.e. the CSCs sent by Straits to the First to Fourth Defendants];[23] and that "*the MCM Hard Copy Receipts have been created with clear effort having been made*

[18] Three were provided by D1 on 14 December 2016, and 6 were provided by D2 on 20 December 2016.
[19] He 1 §180. The metal was sold to avoid it being subject to a freezing order – see further below.
[20] Tan Hui Ying, an executive in the Trade Services team at Straits from 3 March 2014. Senior Executive in the same team from 1 January 2016 and Assistant Vice President from 1 January 2018.
[21] Li Shuyi Lindy, an employee of Straits working in its operations team.
[22] Wu Chong Beng, an employee of Straits working in its operational team.
[23] Radley §24 & §149.

to make these Receipts appear visually very similar to the corresponding Straits PDF Receipts".[24]

53. On 21 June 2017, MCM served on CH/MW notices of rescission of each of their purchase contracts, and each corresponding sale contract.

54. MCM relies on payments made between the various Defendants, both as the foundation for its knowing receipt and equitable proprietary claims, and as evidence going to control of and the relationship between certain of the Defendants. In short, as appears at paragraph 19 of the List of Common Ground, "[*CH*] *and [MW] paid most of what they received from MCM to [Genesis]*."

(C) SUMMARY OF THE CLAIMS

55. MCM brings a range of claims against the defendants. In summary they are as follows (they are dealt with more fully in Section G below):

(I) TORT OF DECEIT

56. Claims in deceit are brought by MCM against the First to Fourth Defendants. None of those Defendants, each of whom maintains that it/he had no idea that the Purported Receipts were anything other than genuine warehouse receipts, attended the trial, although the Third Defendant (Mr Kao) and Fourth Defendant (Genesis Resources) served witness statements.

(II) TORT OF UNLAWFUL MEANS CONSPIRACY TO INJURE

57. MCM brings claims against the First to Fourth Defendants and Straits in the tort of unlawful means conspiracy. Given that none of the First to Fourth Defendants attended trial, submissions centred on the claim against Straits.

58. In short, MCM alleges that there was an agreement, combination or understanding between Straits (through Mr Jeremy Ang and/or Ms He) and Mr Kao (acting on behalf of Genesis and in turn CH and MW) that Straits should: (a) supply the 92 CSCs of blank-endorsed original warehouse receipts (which allowed the forgery of the 92 Purported Receipts to take place); (b) supply documents called "PMA Letters" addressed to MCM's sub-buyer ANZ, in respect of each of the fraudulent transactions; (c) enter into the Straits Contracts and issue invoices which purported to be, but were not, for 'repo' contracts; (d) refer to the CSCs as 'WHRs' (warehouse receipts) and not as 'CSCs' in correspondence; and (e) hold the corresponding original warehouse receipts for as long as dictated by the First to Fourth Defendants. This allowed CH, MW and Genesis, using the CSCs, to purport to sell to third party financiers, including MCM itself, the nickel which was subject to the OWRs held by Straits or which had been pledged by Straits to its own financiers.

(III) KNOWING RECEIPT

59. The Claimant also seeks equitable compensation and/or orders to account against each of Mr Kao, Genesis, Straits and the ninth defendant, Sampo International Limited (D9)

[24] Radley §26 & §150.

(***Sampo***) (with claims against the fifth to eighth defendants having been settled), on the basis of knowing / unconscionable receipt of funds.[25]

60. MCM pleads that sums held by Come Harvest and Mega Wealth on constructive trust were transferred to these defendants in breach of Come Harvest and Mega Wealth's obligations as constructive trustees to transfer the funds to MCM (following MCM's rescission of the purchase contracts on 1 June 2017). The funds are said to have been beneficially received by the defendants who knew of, or had sufficient notice of the fraud on MCM, so that it would be unconscionable for them to retain these monies. This requires MCM to succeed in an argument that following rescission and the imposition of a constructive trust, liability for knowing receipt may be *retroactively imposed* on any third-party recipient of the funds such as Straits.

(IV) EQUITABLE PROPRIETARY CLAIMS

61. MCM seeks a declaration (i) that it has rescinded its contracts with Come Harvest and Mega Wealth and (ii) that Come Harvest, Mega Wealth, Mr Kao, Genesis, Sampo and Straits (claims against D5-D8 having been settled) hold payments received from Come Harvest, Mega Wealth and Genesis as the case may be on constructive trust for MCM on the basis that they received those payments otherwise than as bona fide purchasers for value without notice.[26]

62. It is important to note that MCM confirms that it is not, in this phase of the proceedings, seeking any order that any particular asset held by any particular defendant is held on trust for it. MCM says that whether there will need to be a second (tracing) phase and, if so, what directions will need to be given to enable those claims to proceed can be postponed until after judgment on this phase of the proceedings.

63. The parties referred to the equitable proprietary and knowing receipt claims together as the "***Subsidiary Claims***" and so I shall adopt this terminology.

(V) UNJUST ENRICHMENT

64. MCM has an alternative claim against Come Harvest and Mega Wealth in unjust enrichment.[27] The unjust enrichment claim is additional to and consistent with the deceit and conspiracy claims (though unnecessary if those claims succeed). However, no oral submissions were made by the parties on this issue and MCM chose not to include this claim in its lengthy written closing submissions; accordingly I understood it not to be pursued.

(VI) BREACH OF CONTRACT

65. MCM also brings an alternative claim against Come Harvest and Mega Wealth for breach of contract.[28] The contract claim is a true alternative, in the sense that it can only be pursued if MCM fails to establish that it rescinded its purchase contracts with Come Harvest and Mega Wealth.

[25] At (5) of the Prayer for Relief in the Particulars of Claim.
[26] Particulars of Claim, prayer to relief, paras (1) & (3). See also paras. 544-545 of the Claimant's closing.
[27] Particulars of Claim §§78-80 (unjust enrichment).
[28] Particulars of Claim §§81-82 (breach of contract).

(VII) TORT OF PROCURING BREACH OF CONTRACT

66. Finally, MCM has an alternative claim against Mr Kao and Genesis for procuring breaches of contract by Come Harvest and Mega Wealth.[29] This claim arises because Come Harvest and Mega Wealth say that Mr Kao and Genesis exercised complete and effective control over their actions.

67. However, I agree with MCM that this alternative 'procuring' claim in fact requires little separate consideration, because I find as a fact that Mr Kao and Genesis's knowledge, despite what Come Harvest and Mega Wealth plead, is to be attributed to Come Harvest and Mega Wealth because Mr Kao/Genesis exercised effective practical control over their actions.

(D) PRELIMINARY CONSIDERATIONS

68. Prior to discussing the substance of these claims, I deal first with a number of preliminary considerations concerning the burden of proof as regards allegations of fraud; the witness evidence which is before the Court; the importance of the documentary record; and the deliberate destruction of documents.

(I) THE BURDEN OF PROOF CONCERNING ALLEGATIONS OF FRAUD

69. I bear in mind at all times that where fraud is alleged, cogent evidence is required by a claimant to prove it.

70. In *Foodco UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), at §3 Lewison J stated that "*The burden of proof lies on the [claimants] … Although the standard of proof is the same in every civil case, where fraud is alleged cogent evidence is needed to prove it, because the evidence must overcome the inherent improbability that people act dishonestly rather than carelessly. On the other hand inherent improbabilities must be assessed in the light of the actual circumstances of the case.*" In other words, the cogency of the evidence relied upon must be commensurate with the seriousness of the allegation: *JSC BTA Bank v Ablyazov* [2013] EWHC 510 (Comm) per Teare J at §76. See also *Bank of St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ. 408 at §§44-47 per Vos C and §117 per Males LJ.

71. I also bear in mind that as to inferring fraud or dishonest conduct generally:

    i) It is not open to the Court to infer dishonesty from facts which are consistent with honesty or negligence, there must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved: *Three Rivers District Council v Bank of England* [2001] UKHL 16; [2003] 2 A.C. 1, §§55-56 per Lord Hope and §§184-186 per Lord Millett.

    ii) The requirement for a claimant in proving fraud is that the primary facts proved give rise to an inference of dishonesty or fraud which is more probable than one of innocence or negligence: *JSC Bank of Moscow v Kekhman* [2015] EWHC

[29] Particulars of Claim §77A.

3073 (Comm) at §20 per Bryan J; *Surkis & Ors v Poroshenko & Anr* [2021] EWHC 2512 (Comm.) at §169(iv) per Calver J.

iii) Although not strictly a requirement for such a claim, motive "*is a vital ingredient of any rational assessment*" of dishonesty: *Bank of Toyo-Mitsubishi UFJ Ltd v Baskan Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch) at §858 per Briggs J. By and large dishonest people are dishonest for a reason; while establishing a motive for conspiracy is not a legal requirement, the less likely the motive, the less likely the intention to conspire unlawfully: *Group Seven Ltd v Nasir* [2017] EWHC 2466 (Ch) at §440 per Morgan J.

iv) Assessing a party's motive to participate in a fraud also requires taking into account the *disincentives* to participation in the fraud; this includes the disinclination to behave immorally or dishonestly, but also the damage to reputation (both for the individual and, where applicable, the business) and the potential risk to the "*liberty of the individuals involved*" in case they are found out: *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch) at §§858, 865 per Briggs J.

(II) THE WITNESS EVIDENCE

72. The Court heard oral evidence from factual and expert witnesses at trial.

(i) Mr Riley

73. So far as MCM's witnesses are concerned, *Mr Nicholas Riley* first gave evidence. He was Head of European LME Sales for MCM and was the main point of contact at MCM for CH/MW over the relevant period, having overall responsibility for that relationship. Mr Riley was, in my judgment, an honest and straightforward witness although he was understandably uncomfortable about the lack of due diligence that he undoubtedly displayed throughout his dealings with Mr Kao and his companies.

74. As to that, despite working in the metals business since 1978, he had never previously been involved with the financing of warehouse receipts prior to February 2016. He did nothing to familiarise himself with the potential risks of this type of business. His main concern was simply that the proposed business was set to be lucrative for MCM, with MCM's brokerage fee for the transactions set at 2% plus the cost of funds. Mr Riley appears to have simply regarded his function to act as that of a "middleman" between Mr Silverstein (acting for Genesis) and ANZ, working for a fee yet abjuring any responsibility for carrying out due diligence in respect of the transactions. This was despite the fact that he rightly understood that MCM was entering into the contracts with both ANZ and CH, MW and Genesis on a "*principal to principal basis*".

75. For example, Mr Riley was sent the financial statements for CH for the year ending 31 March 2015 as part of the due diligence onboarding process for CH. He said that he only "*glanced through*" them, not being qualified to read financial statements. If he had read the statements, he would have seen that in 2015 CH made a profit of only HK$ 1.37m and had net assets of HK$ 1.78m. This would likely have triggered a red flag as to how a company worth so little could have come to hold so many millions of dollars of nickel. But Mr Riley chose never to ask Mr Silverstein how CH managed to obtain all this metal.

> *"Q: You didn't take an interest in these things as long as your bank and your trader client were both happy, correct?*
>
> *A: I had no interest – I wasn't asking questions about whether the metal was coming from as long as the process was working."*

76. Despite this, over the 5 months subsequent to the date of these accounts, MCM forwarded as much as US$170m to CH.

77. Similarly, the March 2016 financial report for MW showed that it had very limited funds but Mr Riley again failed to ask the obvious question as to how it could afford to purchase so much metal. This is highly unimpressive.

78. Moreover, because Mr Riley was making "easy money" in this way for MCM, although he was very properly originally reluctant to do so, he was persuaded to divulge the name of MCM's financing bank (ANZ) to Mr Silverstein in likely breach of confidentiality. Straits rely upon this as demonstrating how parties in this industry are reluctant to divulge the identity of their financiers, as well as showing how persuasive Mr Kao and his representatives could be.

79. ANZ wired the purchase price to MCM on the same day that they received the OWR (sometimes in under an hour) and so if any authenticity checks at all were carried out by ANZ they would have been minimal. But Mr Riley did not ask ANZ what checks they were doing on the OWRs "*because that was their business*".

80. Mr Riley was shown a transcript of a telephone call between him and Mr Silverstein on 12 April 2016. In that conversation Mr Silverstein had made it clear to him that the OWRs passed on the first leg should be *identical* to those returned to Mr Silverstein on the second leg of the repo, subject only to MCM's / ANZ's endorsements. This was referred to as "*the same paper in/ same paper out*" principle and meant that the WHRs could <u>not</u> be authenticated (as this would involve their being delivered to the warehouse-keeper (Pacorini), their cancellation and re-issue by the warehouse). Mr Riley explained that Mr Silverstein would not allow an OWR to be reissued (and so authenticated) as part of the financing transaction. Yet he did not ask why this was required to be so:

> "*Q. And did he ever describe that to you as the "same paper in, same paper out" principle?*
>
> *A. Yes, the receipt that he gives us, which is endorsed, if they was to buy that back, they'd want the same piece of paper obviously endorsed by the parties whose hands it's gone through because I think what I say there in the documentation, "Because of tax and stuff", that I think there's some wording in the master commodity master agreement that you can't put that in, but in reality that's what happens.*"

81. Mr Riley also gave evidence that Mr Kao explained CH/MW's business model on a whiteboard when he was in London for an LME dinner in November 2016. Mr Riley said he recalled that he did not understand the explanation offered and considered it may be a money laundering scheme:

> "*Mr Kao was speaking for quite a length of time about it and writing these notes or whatever you want to call them on this board. As I say, I still come out of it, didn't fully understand, and my immediate thought [when] coming out that meeting was that it could be a money laundering scam…*
>
> *Q. Isn't it a problem that you're only getting detail of this after you've advanced all the money rather than before you've done so, especially if it raises a money laundering concern?*
>
> *A. No, this is when it raised a money laundering concern here. This was the first time that the thought of money laundering came into my head was at this meeting.*
>
> *Q. That's because you'd never previously asked for any such explanation. Presumably if you'd asked six months earlier and been given the same explanation, it would have raised the same concern.*
>
> *A. We don't ask clients generally why they're doing business, why somebody's hedging metal, why they're buying metal. It's not normal practice to ask a client why they are doing such-and-such a business*."

82. Straits relies upon this exchange as supporting its case that Mr Ang, Ms He and Ms Tan were justified in not asking Mr Kao similar questions, as well as Ms He's alleged lack of understanding as to what Mr Kao was doing with the CSCs. However, in my judgment there is a significant difference in the two cases as I explain below, which centres upon the fact that unlike Mr Riley, Straits were presented with solid evidence on a number of occasions of the fact that third party financiers were being deceived into believing that Mr Kao and his companies had purported to sell OWRs to them, despite the fact that Straits knew that it held the OWRs throughout as order party, and (unlike Mr Riley) Straits afforded positive assistance to Mr Kao which enabled him to continue to perpetuate the deception.

83. In short, whilst Mr Riley may have been negligent, he was not dishonest. He ought to have realised that something was seriously wrong in being told, as he agreed he was in late 2016 (if not earlier), that for structuring finance for CH/MW "*one must avoid at all costs the original warehouse receipts being taken to the W[are]H[ouse] and reissued in another's name*".

84. Indeed, Straits itself accepted in closing that:

> *"Mr Riley was an honest broker. Overall, he tried to assist the Court where possible and thus was candid in relation to the catalogue of errors MCM made in its dealings with Come Harvest and Mega Wealth, save in relation to onboarding of clients, where he (a) unconvincingly disclaimed any understanding of balance sheets, and (b) went from not knowing what checks 'compliance' did to knowing moments later that "There's other checks they do other than a World Check".*

(ii) Mr Dyke

85. As Straits also accepts, *Mr Kevin Dyke*, MCM's Commodities Operations Manager who also gave evidence, was also a truthful witness. He was one of MCM's two authorised signatories on the OWRs for the purposes of endorsing them onwards to ANZ. He

admitted that he had had "*minimal exposure*" to WHRs prior to the CH/MW transactions.

86. Mr Dyke had a poor recollection of the relevant events and was defensive about the role that he played. He too displayed a substantial lack of due diligence. He could not recollect whether he did anything to familiarise himself with the risks of endorsed warehouse receipts. Furthermore, so far as the OWRs are concerned, Mr Dyke and his team only: (i) checked the endorsement by CH/ MW; (ii) checked the economic terms i.e. the type of product, the tonnage, nickel and brands matched the contractual documents generated by MCM; and (iii) checked the client warehouse signatures against the agreed list. However, he accepted that he did not check any other aspects of the OWR such as watermarks, authenticity stickers and paper type as he said it was his understanding that ANZ were doing those checks on their side before releasing the funds to MCM. However, I find that it is likely that he failed to enquire whether that was so, because he accepted in cross-examination that he and his team effectively delegated checking the authenticity of the WHR to ANZ and he candidly admitted that "*there was too much reliance on -- obviously with the benefit of hindsight, in ANZ checking these warehouse receipts and doing validation on them*."

(iii) The Straits' witnesses

87. So far as the Straits witnesses are concerned, I heard evidence from Ms He Yuzhen Sherraine (Ms He); Mr Ang Peng Leong ("Mr Jeremy Ang"), Ms Tan Hui Ying ("Ms Tan") and Mr Ang Wei Hong, Timothy ("Mr Timothy Ang")[30]. I found the evidence of each of these witnesses to be unsatisfactory in a number of respects. I address this below. In particular, as described below I find a number of the answers given by Ms He and Ms Tan (and also, but to a lesser extent, Mr Jeremy Ang) to the central questions in this dispute to be untruthful answers.

(III) EXPERT EVIDENCE

(i) Mr Vollebregt and Mr Nizan

88. I heard expert evidence in the field of market practice in metal repurchasing transactions from Walter Vollebregt on behalf of MCM and Alexander Nizan on behalf of Straits. I much preferred the evidence of Mr Vollebregt to that of Mr Nizan. I found Mr Vollebregt to be a careful, measured and intelligent expert witness, who understood that his primary duty was owed to the court. Mr Lewis QC for Straits sought to suggest that he was not qualified to give the evidence that he gave but I reject that suggestion. He explained in particular that, given the nature of commodity trade finance, while he had gained his experience as a financier rather than a trader, his dealings were almost all with privately owned trading companies (rather than large corporates or institutional investors). I consider that he did indeed have the necessary expertise to opine on the issues in this action.

89. By contrast, Mr Nizan frequently fell into the role of arguing the case on behalf of Straits. For example, he asserted that in his opinion the "Type 5" contracts involve an

[30] An iron ore and steel trader at Puyang and a director and 30% shareholder of Transcendent SG. Son of Jeremy Ang. It was in issue whether Timothy Ang was the beneficial owner of the 30% shareholding in Transcendent SG (see below).

option for sale. But on their face they do nothing of the sort; and he must have known that whether they involve an option for sale is a highly contested factual dispute in the case which it is for the court to determine. Yet he simply took Straits' witnesses' side on this factual question. Likewise with his assertion that "*the contracts in my opinion formed part of a structured arbitrage trade common in Asia*". He then said "*this was my opinion [when] I first read the contracts when they were first presented to me*." But there is nothing in the contracts to suggest that this was so, and despite his unconvincing attempt to justify this "opinion", I conclude that he was simply acting as an advocate for Straits' cause. There were several other instances where Mr Nizan was so acting but no purpose would be served in extending the length of this judgment by setting them all out here.

90. In the circumstances, where there is a conflict of evidence between Mr Vollebregt and Mr Nizan, I prefer Mr Vollebregt's independent and cautious evidence.

(ii) Mr Ashton

91. In relation to the Subsidiary Claims, MCM also relied upon the expert evidence of Mr Neil Ashton, a chartered accountant, who filed two reports (which I shall refer to as "***Ashton-1***" and "***Ashton-2***"), setting out the sums which MCM asserts constitute traceable proceeds (i.e. those transfers made by CH and MW to third parties (principally, Genesis) which were the proceeds of payments made by MCM to CH and MW). Straits chose not to serve its own expert tracing evidence but instead simply to cross-examine Mr Ashton.

92. Ashton-1 and Ashton-2 are based on different assumptions. By the modification in Ashton-2 of his assumptions in Ashton-1, Ashton-2 significantly increases the traceable proceeds to which MCM can assert a claim. The determination as to whether the assumptions in Ashton-1 or Ashton-2 should be taken as the basis for knowing receipt and equitable proprietary claims is an issue the Court is asked to decide and to which I return below at Sections G(vii) and G(viii).

(IV) DOCUMENTARY EVIDENCE AND THE WITNESSES' "RECOLLECTIONS"

93. In a case such as this, it is important to keep firmly in mind the approach of Leggatt J (as he then was) in ***Gestmin*** *SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), which was approved by Lord Kerr (in a dissenting judgment) in *R (on the application of Bancoult No 3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3 at [103] as follows:

> "*Although said in relation to commercial litigation, I consider that the observations of Leggatt J in* ***Gestmin*** *SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm), paras 15-22 have much to commend them. In particular, his statement at para 22 appears to me to be especially apt:*
>
> > *"… the best approach for a judge to adopt … is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean*

> *that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

94. I apply this approach, which is apposite to this case. The oral testimony which I heard over several days, particularly from Straits' witnesses, was helpful in forming my findings of fact in this case in that it did indeed enable me to subject the documentary record to critical scrutiny and to assess the motivations of those witnesses. I found the frequent attempts by the Straits' witnesses to explain away the contemporaneous documentary record unconvincing but also revealing as to where the truth lay.

95. This is subject to one important proviso concerning a particular aspect of the state of the documentary record in this case which needs to be borne in mind at the outset, namely Straits' disclosure of Ms He's instant messaging record.

96. Straits' initial disclosure search proposal was only to search documents held on email servers.[31] With regard to instant messaging, Straits' position in section 2 of its Disclosure Review Document (***DRD***) dated 22 June 2020 was:

> *"[Straits'] employees are allowed to use personal mobile phones, tablets and other handheld devices to access the company emails. However, the documents accessed or held in this way will be the same as stored on the email and/or archiving servers discussed above*. [Straits'] *employees do not use messaging systems for the purposes of any commercial discussions which could relate to issues 6, 9, 11, 15, 16 and/or 17*." (emphasis added)

97. These statements were false.

98. So far as personal WeChat accounts are concerned, Straits addressed this in Part 2 of the same DRD which also noted that MCM sought confirmation whether Straits' employees ever used WeChat or similar for the purposes of any commercial discussions and whether the relevant accounts would be included in the disclosure review. The answer in the email from Reed Smith LLP, Straits' solicitors, dated 26 June 2020 was as follows:

> "*Our client's employees do have personal WeChat accounts, but these were not the established mode of communication used by our clients for commercial discussions, and the WeChat contents may have been lost with the passage of time. Any commercial discussions with, and/or instructions from D1/D2/D3, would have been recorded by way of email. Therefore, our client reasonably believes that any*

[31] Section 2 DRD questionnaire, dated 22 June 2020.

personal WeChat accounts used by its employees will not contain any relevant information for the purposes of the issues identified by the parties for disclosure…"

99. It followed that Straits was telling MCM that there were no separate relevant exchanges (by way of commercial discussions) by WeChat or similar instant messaging at all. This was subsequently shown to be false after Straits gave further disclosure on 23 November 2020 and 18 June 2021 (by disclosing a large number of exchanges on WhatsApp and WeChat after repeated enquiries in correspondence from MCM).

100. In answer to a question from the Court, Ms He eventually accepted that she had given these instructions to Straits' solicitors (she said she in fact gave them to Rajah & Tann, Straits' Singaporean solicitors, who passed the answers on to Reed Smith). Her explanation for this in cross-examination was not convincing:

"*Q. And so you were telling them that you did not use WeChat or any similar messaging service for any commercial discussions with Mr Kao; is that correct?*

A. I do not mean to say they did not use, but WeChat was a personal mode of communication. We could link that to have casual conversations with customers but anything that is formal would then go on to an email to be confirmed there.

Q. Well, that's rather misleading, isn't it, Ms He, this answer? It is saying that you don't -- you did not use WeChat or similar for any commercial discussions between yourselves and Come Harvest, Mega Wealth and Mr Kao. And we know for a fact that you did use WeChat and other similar modes of communication with Mr Kao, didn't you, for commercial discussions?

A. Those were informal chats we had, but anything that is commercial and will therefore go on to an email. So I regard the email as the formal communication mode between us and Mr Kao.

Q. So although there would be communications by way of WeChat or similar, you took the view that you would only disclose emails; is that right?

A. Yes."

101. In fact, as was subsequently put to Ms He in cross-examination, it is apparent that this evidence was false and that she did indeed conduct separate commercial discussions with Mr Kao by way of WeChat:

"*Q. […] this is the 9 July 2015. Just a very short point, Ms He. This is an email from you to Steven Kao; correct?*

A. Yes.

Q. And you say: "Hi Steven, as per our wechat, there is USD[3.4 million] accrual as at end Jun." So this is, I think on your evidence, before you had an office iPhone but you're referring to your WeChat with Mr Kao. So you're in a WeChat with Mr Kao at this time; correct?

A. If I mentioned that like he did(?) I would have a WeChat account.

Q. And so you would have been discussing with him commercial matters, by the looks of it, over WeChat. That is correct, isn't it?

A. It could have been more general and that's why I'm putting it on email."

102. However, in subsequent cross-examination when Ms He was shown another contemporaneous email exchange dated 8 March 2016 which referred to Mr Kao asking her to "WeChat" him if she had any questions about Mr Springer's requests to close a trade early, she gave the following evidence:

"Q. So you are conducting, it would seem, with Mr Kao commercial discussions on WeChat, correct?

A. Yes, WeChat could be in the form of a call.

Q. It could be a call or it could be in a document, correct? But you're using WeChat with Mr Kao, yes?

A. Yes.

Q. For commercial discussions, correct?

A. Yes, yes."

103. Ms He agreed in cross examination that she had two phones at the relevant time, a personal mobile phone and an office mobile phone. Both of her phones were connected to the Straits Trade Services Team's WhatsApp group (comprising Ms He, Ms Lindy Li, Ms Tan and Mr Wu) and it can be seen that messages were sent to and from both of her mobile phones in relation to Straits' business with Mr Kao and his companies.

104. The other members of this WhatsApp group also each had two phones connected to the group, namely a personal and an office mobile phone. Between 21 December 2016 and 3 February 2017 when the fraud was close to being exposed this group exchanged 1,186 relevant messages and these were only disclosed by Straits by way of supplementary disclosure on 23 November 2020.

105. The group was clearly accustomed to using this form of communication. Ms He admitted in cross examination, however, that there would also have been other WhatsApp messages between the Trade Services team before 21 December 2016, relating to trade matters between Straits and its counterparties (indeed, relevant WhatsApp messages between Ms He and Mr Ang were disclosed in that respect between June and December 2016 from Mr Ang's phone). She further admitted that messages between her team and Mr Kao and Mr Wong would have "*possibly started in 2016*". Those messages have not been disclosed. Reed Smith informed MCM by letter dated 12 October 2021 that this was because Rajah & Tan, Straits' Singaporean lawyers, had determined that they were not relevant or privileged.

106. So far as instant messaging on the "WeChat" app is concerned, Ms He gave firm evidence that her two-year-old son had accidentally deleted her WeChat app on her company phone in February 2020. In answer to questions from the Court, she confirmed that she did not tell her solicitors about this straight away. She only informed them "*a*

few months later", despite the fact that Straits were joined to this action on 26 November 2018.

107. However, in Reed Smith's letter to Clyde & Co of 8 July 2020 (some 5 months after the alleged date of deletion) they stated as follows in relation to the deleted WeChat app on Ms He's mobile telephone:

> "*No steps had been taken by [Straits] to harvest the data from Ms He's mobile telephone before February 2020. As explained, the mobile device in question is Ms He's personal phone and [Straits] does not expect it to contain data relevant to any issue in these proceedings that are not otherwise captured by its email servers.*
>
> *We are instructed that Ms He nonetheless undertook a review of her WeChat messages after [Straits] became involved in the dispute and ascertained, as expected, that her WeChat account did not include any relevant messages*." (emphasis added)

108. This was repeating the account which Ms He agreed (and Reed Smith confirmed in correspondence) that she had told her solicitors in her instructions to them. This is, of course, entirely inconsistent with the account which Ms He gave in evidence. She said in cross-examination that it was her *company* phone not her personal phone which contained the deleted app and when she was pressed on this she said "*I'm very sure it was deleted on my work phone*". And she unequivocally stated later "*No, this was a company phone*." Aside from this inconsistency, it might perhaps be observed that it seems rather unlikely that Ms He would let her 2 year old son play with her company phone (she said he was playing on "YouTube"), rather than her personal phone.

109. Moreover, we now know as a result of the disclosure from other custodians as well as further disclosure from Straits itself on 23 November 2020 and 18 June 2021 of numerous commercial discussions between in particular Ms He and Mr Kao, including discussions relevant to the issues in this action, such that she cannot have undertaken a review of her WeChat messages after Straits became involved in the dispute and before the WeChat app was deleted, and have ascertained that her WeChat account did not include any relevant messages. Indeed, it is significant that when the fraud is first discovered, Ms He, Mr Jeremy Ang and Mr Kao conduct their discussion about it on private messaging platforms, namely WeChat and WhatsApp, avoiding email contact. Ms He had no convincing explanation for this inconsistency in cross-examination.

110. Furthermore, in section 2 of the DRD of 30 June 2020, Straits had unequivocally stated: "[Straits] *does not expect any relevant documents to be irretrievable and expects to disclose and produce all disclosable documents, which are not covered by an appropriate exception (e.g. privilege*)." No mention was made of any deletion of the WeChat app.

111. It was only after the specific questioning of Straits by MCM in correspondence that Straits revealed that Ms He's WeChat account had allegedly been deleted in February 2020 by her 2 year old son (being 3 months after dismissal by the Court of Appeal of Straits' jurisdiction challenge in relation to these proceedings).

112. Unless Ms He deleted the WeChat app deliberately, it would be very surprising that her work phone had not already been imaged or at least kept safe by either her Singaporean or London solicitors before the deletion took place, so as to preserve the WeChat messages, not least because other relevant custodians did exactly that. Reed Smith state in their letter to Clyde & Co of 12 October 2021 that:

> "*We are informed that this [failure to preserve] was because the disclosure issues and directions on devices to be harvested had not been finalised at that point in time*[32]*, and Ms He believed that all the relevant communications would have existed on other platforms (e.g. would have been confirmed by email)*".

113. That is a poor excuse. Other witnesses were under no doubt about the importance of preserving relevant instant messaging correspondence. Reed Smith themselves pointed out in their letter of 2 November 2021, for example, that "*after the discovery of the fraud in January 2017, Ms Lindy Li performed a complete back-up of the entirety of her QQ chat communications with Jessie Li,*" although it is very unsatisfactory that Rajah & Tan, Straits' Singaporean lawyers, failed to disclose the existence of this chat log to Reed Smith until it was raised by MCM: see Reed Smith's letter to Clyde & Co dated 12 October 2021 (sent whilst this trial was nearing its conclusion).

114. Moreover, if Ms He had carried out a review of her WeChat messages (after Straits became joined to the action in November 2018), in view of the number of relevant WeChat messages which are known to have existed (in the light of the belated disclosure by Straits in November 2020 and June 2021 of WeChat messages involving Ms He) she could not honestly have believed that all the relevant communications would have existed on other platforms. Instead, Ms He told her solicitors that her company and personal phones contained no relevant instant messaging information to the issues in dispute because she did not conduct commercial discussions by instant messaging, when she knew that that was untrue or, at least, that it was not a genuine explanation for her failure to preserve and deletion of her WeChat messages.

115. The importance of this episode is that (i) it shows Ms He being less than candid with both her own solicitors and the court and (ii) it matters, because any messages passing between Ms He and Mr Kao on WeChat have not survived (inferring, as I do, that Mr Kao will have attempted to delete anything relevant to the fraud).

116. As to this, Reed Smith accepted in their letter of 2 November 2021 that there was indeed "a potential gap" in the disclosure of WeChat communications between Mr Kao and Ms He. They further stated as follows:

> "*However, we note that S2DRD confirms that some of Mr Kao's WeChat records from the relevant period have been deleted because "[his] practice is to delete WeChat conversations to the extent that the matters to which they relate have been resolved" {A2/11/36}. We further note that there are only very limited examples of messages between Mr Kao and Ms He (other than those exchanged on wider group chats including other custodians) in the parties' overall disclosure. Those limited examples further appear to have resulted from disclosure of Mr Kao's chats with other individuals (i.e. not Ms He), which involved Ms Kao pasting extracts of his exchanges with Ms He. This suggests that either: (i) Mr Kao deleted nearly all of*

[32] By Rajah & Tann LLP, not Reed Smith LLP.

> *his direct messages with Ms He before his phone was imaged; or (ii) upon reviewing those messages as part of their disclosure exercise Gibson Dunn & Crutcher (who represented D3-D8 at the relevant time) took the view that they did not respond to the disclosure issues, and hence were not disclosed."*

117. In fact, as MCM state in their closing submissions, it is evident that the gap in disclosure of one-to-one WeChat communications between Ms He and Mr Kao is more than "potential". The Third to Eighth Defendants disclosed WeChat messages which evidence direct messages taking place between Mr Kao and Ms He which were sent as screenshots to the Genesis group chat and where messages have been copied and pasted into the Genesis group chat.

118. Straits themselves mention in their closing submissions that there are examples of direct messages between Mr Kao and Ms He in the trial bundles, referring to their WeChat messages concerning Transcendent and Ms He's request to invest in Mr Kao's "13 mile" venture (as those few messages between Mr Kao and Ms He which had not been deleted by Mr Kao were caught by the imaging of Mr Kao's phone). These undeleted messages, of course, do not directly concern the repo business being conducted by Straits and Mr Kao.

119. However, others do. For example, on 9 July 2015 Ms He emailed Mr Kao and stated "*Hi Steven, As per our WeChat, there is USD 3,485,626.20 accrual as at end of June …*". And on 8 March 2016, Mr Kao emailed Ms He in relation to problems concerning OWRs pledged by Straits to Vermillion Asset Management ("***VAM***") meaning that Straits could not close off its trade with Straits and Mr Kao stated "*Sherraine, pls WeChat me if you have any questions.*" Such WeChat messages, if any, which then followed between them have not been disclosed. But this shows that in 2016 Ms He and Mr Kao were accustomed to using WeChat between themselves in order to resolve issues concerning the CSCs and OWRs which formed the subject matter of the Type 5 trades.

120. The Third to Eighth Defendants' solicitors have also confirmed that although Mr Kao's mobile phone was imaged in November 2017, certain of his WeChat data from the relevant period had been deleted.

121. The fact that the Court has the full conversations between Mr Jeremy Ang and Mr Kao is not an answer to this point, as it was Ms He who was liaising with Mr Kao on a day-to-day basis, not Mr Ang, and it is clear that Mr Kao and Ms He would separately message each other by WeChat. Nor do I agree with Straits' submission that it is unrealistic to suggest that there exist messages between Mr Kao and Ms He that would show actual knowledge and/or contain direct evidence of the fraud where none exists elsewhere in the entirety of Straits' and/or the Third to Eighth Defendants' extended disclosure. In particular, as is explained below, I consider it likely that there would have been direct contact between Ms He and Mr Kao when the concocted "potential purchaser" cover story was first developed as well as at the time when the fraud was exposed.

122. Reed Smith also admitted in their letter of 26 May 2021 that Ms He also believes that she used QQ chat to communicate with Ms Jessie Li, but access to Ms He's QQ chat was lost before any message records were collected. Reed Smith suggested that her

communications over that platform "*would have been very sporadic and unlikely to be of relevance to the matters in dispute in these proceedings*". In the light of Ms He initially asserting the same about her WeChat messages - which assertion was shown to be false – this assertion provides little comfort in the context of her deleted QQ chat.

123. In view of all of the foregoing, and in particular the many inconsistencies in Ms He's account concerning her use and deletion of the WeChat app as well as the fact that the deletion (and the purported excuse for it) only came to light as a result of specific questioning by MCM's solicitors and not voluntarily from Ms He, I consider it far more likely that and I find as a fact that, as MCM put to her in cross-examination, she herself deliberately deleted the app in order to ensure that incriminating or unhelpful messages passing between her and Mr Kao were deleted for all time and that she knew that that would be so. This episode leads me to be very cautious in accepting Ms He's witness evidence; indeed, I consider that I should not do so unless it is corroborated by reliable contemporaneous documentary evidence.

124. Moreover, if the destruction of the WeChat messages was deliberate the Court is entitled to draw inferences as to what those documents would have shown had they been disclosed, and I turn to this topic next.

(V) DELIBERATE DESTRUCTION OF DOCUMENTS

125. The starting point in a case of deliberate destruction of documents is that if a fair trial of the action cannot then take place, the destroying party's case should be struck out. And of course, the later that the destruction takes place, the worse the position; it may make a fair trial of the action less likely.

126. A litigant who has pursued proceedings with the object of preventing a fair trial *"has forfeited his right to take part in a trial", Hollander on Documentary Evidence,* (13th Ed), at 11-15 and 11-16.

127. As the Vice-Chancellor stated in *Douglas v Hello!* [2003] EWHC 55 at [90]:

> *"The issues are whether the rules have been transgressed, if so whether a fair trial is achievable and if not what to do about it. See Logicrose Ltd v Southend United Football Club Ltd (The Times 5th March 1988) and Arrow Nominees Inc v Blackledge [2001] BCC 591 para 54 where Chadwick LJ, with whom Roch LJ agreed, said: "I adopt, as a general principle, the observations of Mr. Justice Millett in Logicrose Ltd v Southend United football Club Limited (The Times, 5 March 1988) that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules – even if such disobedience amounts to contempt for or defiance of the court – if that object is ultimately secured by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the*

> *proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."*

128. As is stated in *Hollander, Documentary Evidence* (13th Edn), there are only a limited number of cases where applications have been made to strike out proceedings for concealment or destruction of documents. In *Logicrose v Southend United Football Club* [1988] 132 S.J. 1591, the responsible director of the claimants was alleged to have deliberately suppressed a crucial document and for a time successfully concealed its existence from the court. Millett J did not find the allegation proved, but said that if it had been, it might have given rise to a contempt sanction but should not lead to the action being struck out unless the failure rendered it impossible to conduct a fair trial.

129. In *Dadourian Group v Simms* [2009] EWCA Civ 169 Arden LJ stated at [233]:

> *" ...[A] litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial is [not] to be taken to have forfeited his right to a fair trial in every case. ...[if] the litigant's conduct ha[s] put the fairness of the trial in jeopardy ... the court's power to strike out the proceedings was not a penalty for disobedience with the rules."*

130. The Court must always consider, therefore, whether a fair trial is possible and to this end have regard to the defaulting party's ECHR art.6 rights of access to the Court, and whether the remedy of a strike out would be proportionate and fair in all the circumstances of the case (which is much less likely in a case where the trial has concluded and the Court is in a position to assess the effect of the destruction of the documents and/or failure to call relevant witnesses), or whether some other remedy will safeguard the position of the innocent party.

131. *Hollander* suggests in paragraph 11-16 that "*where the defaulting party has been less than candid about the destruction exercise, the court may consider it cannot be sure exactly how widespread the destruction has been, and what its effect will be, and thus may find it more difficult to reach a conclusion that a fair trial is still possible.*"

132. I respectfully agree with that general sentiment but in a case (such as this) where the trial has concluded the position is somewhat different. Indeed, it is for this reason no doubt that as Hollander goes on to state: "*it would be a very rare case in which, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way*". I agree.

133. Accordingly, if a fair trial is still possible, or if (as here) the trial has concluded, the next question is how should the Court approach the issue of the deliberate destruction of documents and a deliberate void of evidence.

134. As was stated in *The Ophelia* [1916] 2 AC 206, PC at 229-230, *"the strongest possible presumption arises that if it had been produced [the documents] would have told*

against [the destroyer]". Deliberate destruction, creating an evidential void, is *"wholly inexcusable"*; the Court should refuse to give the destroyer the benefit of any doubt or draw any inference in its favour: *Hollander on Documentary Evidence* (13th ed.), 11-23 to 11-27.

135. I agree with the approach adopted in *Earles v Barclays Bank* [2009] EWHC 2500, which also deals with the failure to call relevant witnesses, where HHJ Simon Brown QC stated that:

> *"28… in this jurisdiction as in Australia, there is no duty to preserve documents prior to the commencement of proceedings: British American Tobacco Australia Services Limited v. Cowell [2002] V.S.C.A. 197, a decision approved in this country by Morritt V.C. in Douglas v. Hello [2003] EWHC 55 at [86]…*
>
> *29. After the commencement of proceedings the situation is radically different. In Woods v. Martins Bank Ltd [1959] 1 Q.B. 55 at 60, Salmon J. said "It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court to make sure, as far as possible, that no relevant documents have been omitted from their client's list".*
>
> *30. In the case of documents not preserved after the commencement of proceedings then the defaulting party risk "adverse inferences" being drawn for such "spoliation": Infabricks Ltd v. Jaytex Ltd [1985] FSR 75.*
>
> *31. In cases where there is a deliberate void of evidence, such negativity can be used as a weapon in adversarial litigation to fill the evidential gap and so establish a positive case. In British Railways Board v. Herrington [1972] 1 AER 786, Lord Diplock stated:*
>
> > *"The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold."*"

136. It follows that if there is no evidence on a particular point, the Court can rely on the inferences drawn from the destruction of documents or the failure to call relevant witnesses to provide evidence which is otherwise absent.

137. I return below to the inference which I consider that the Court should draw in the present case as a result of Ms He's deliberate deletion of her instant messaging app. I turn now to the course of events between the end of 2013 and 2017 when the fraud was discovered.

(E) BACKGROUND TO THE FRAUD

(I) THE TYPES OF TRANSACTIONS BETWEEN STRAITS AND CH, MW AND GENESIS

138. I approach with caution Ms He's retrospective characterisation of the different contract types. This was carried out by her supposedly in order to "*let everyone … understand how the trades evolved over time*", but I accept MCM's submission that it appears to have been carefully drafted to give the impression that Straits' dealings with Mr Kao's companies had emerged incrementally out of classic or regular repo transactions for the sale and repurchase of original warehouse receipts, avoiding clarity about time-periods or volume of transactions or whether and if so how title to underlying metal had passed.

139. As mentioned above, Straits began its first trades with companies associated with Mr Kao at some point between November 2013 and February 2014. The critical turning point came in January 2014 with the evolution of "Type 3" contracts.

140. In an email from Ms He to Mr Kao on 23 January 2014 (which was also sent to Mr Wong, Mr Jeremy Ang, Ms Li and Mr Wu), Ms He recorded the fact that she had discussed with her superior, Mr Jeremy Ang, a proposal of Mr Kao, and that Straits would agree to supply to Mr Kao's Companies not original WHRs but CSCs as follows:

> "*Flow as follows*:
>
> - *Straits will sign a sales and purchase contract concurrently with your buyer and seller* [which included the provision for payment "*upon receipt of cargo title at sight of the following documents: (…) Original warehouse receipt/warrant"*]
>
> - *On [the transaction date] Straits will submit a coloured copy of warehouse receipt, signed and endorsed to you.*
>
> - *Your bank will call the warehouse keeper to confirm there is indeed this cargo in the warehouse. Straits will hold onto the original warehouse receipt and only cancel upon receiving confirmation from you.*
>
> - *On [the transaction date plus 2 days] Straits will receive TT payment for the cargo.*"
>
> (emphasis added)

141. Importantly, Ms He then said this:

> "*As a trial trade we are agreeable to accept just payment of the spread.*
>
> *However should we move forward on this model, we will like the assignment of proceeds to be in place, with funds representing total contract value flowing*

> *through both the buy and sell leg as otherwise the legitimacy of the trade may be questioned by the auditors*." (emphasis added)

142. Ms He makes no reference to any transfer of title to metal. Indeed, it is common ground that there was never any re-transfer of a CSC from "Company A" or "Company B" (the re-selling company) to Straits.

143. It is apparent therefore that Ms He was aware from an early stage that unless funds were actually transmitted by assignment of the letter of credit on both the sale and repurchase legs (i.e. there was a genuine sale and purchase of the metal), the mere provision of coloured copies of the OWRs, blank endorsed by Straits, in exchange for payment of the spread would lead to the legitimacy of the trade being questioned because these would not be true sale and repurchase contracts. She reiterated this in her email to Mr Kao on 4 March 2014 in which she stated: "*We requested for an assignment of proceeds on the deals because we need the actual fund flow to prove the legitimacy of the deals and pass audit checks. The assignment of proceeds to us actually meant sight of funds in our account…*" (emphasis added).

144. I find as a fact that Mr Jeremy Ang must also have appreciated this. Despite this awareness of Ms He and Mr Ang, this is precisely what subsequently transpired: there was no actual flow of funds, merely a "netting off" and payment of effectively a service fee. Indeed, Ms He admitted as much on Day 6/p. 60/lines 10-14 and I reject her attempts to resile from this in re-examination:

> "*Mr Davies: The contracts that you were entering into with Mr Kao's companies were simply contracts for the supply of colour scanned copies for Mr Kao's companies to use, that is correct, isn't it?*
>
> *Answer: Yes."*

145. Ms He denied, however, that she sought to dress up this arrangement in the written contracts that Straits entered into as a true sale and repurchase arrangement, by suggesting "*I believe we would have explained to [Straits' auditors] what we were doing*." I do not accept that evidence as there is no documentary evidence to support it. She also stated that the contracts were shown to her finance team and that if they had concerns with them they would, she suggested, have raised them with her. However, they would obviously not have done so unless they were aware that the written contracts did not reflect the true nature of the transaction and there is no reliable evidence to suggest that that is so. Indeed, officers of CWT (in particular Ms Lynda Goh), Straits' parent company, were frequently trying to understand the nature of the transactions which Straits was undertaking with Mr Kao's companies and Ms He was deliberately evasive about their true nature.

146. At the time when Type 3 contracts were being entered into by Straits with Mr Kao, by email dated 14 March 2014 Lynda Goh, CFO of CWT Group, asked Ms He to send her the business models of these transactions. In response, Ms He referred to the fact that:

> *"we now do business with Clients who are doing [interest rate] arbitrage business, where they first pledge full cash with the bank before issuance of [the letter of credit] to earn the arb[itrage] spread. We typically do not take clients that are doing repo for the purposes of seeking financing as we will be concerned if the*

> *funds are used for other purposes and not repaid to the bank at the end of the LC tenor… majority of the clients will be met up by Jeremy or Steven Gong (from our China office) first to ascertain the company's business and soundness before we enter into the first transaction. Jeremy [Ang] is familiar with most of these customers and will make it a point to meet up with the newer ones when he visits China if he has never met them before*."

147. Ms Goh was not convinced. She responded as follows:

> "*Whilst we may be protected by the confirmed L/C, the party we deal with is still important as we do not want to be involved in facilitating any transactions/parties [which are] questionable*."

148. The CSCs provided by Straits under each of 'Type 1', 'Type 2' and 'Type 3' transactions were all of blank-endorsed copies of WHRs. In circumstances where Straits was itself retaining the WHRs as owners of the metal, this was an unusual thing to have done and it called for explanation. MCM submitted, and I accept, that no satisfactory explanation has been provided by Straits for this. Straits relies upon Ms He's evidence that "*We do that – all our counterparties, it's just our standard operating procedures"*. But whilst that might be Straits' standard operating procedure in cases where there is an intention to actually sell (or finance) the metal to (with) a counterparty, I do not accept that that explanation holds true where Straits itself retains the OWR throughout (as owner of the metal).

149. That conclusion is reinforced by the fact that Ms He then went on to say that "*once we receive the original warehouse receipt … our operation guys will endorse the back*." That is because in such a case there is an actual sale of the metal. But the WHR in the present case, held by Straits, was not endorsed by it to CH/MW. Consistently with this, I also note and accept the expert evidence of Mr Vollebregt that it is uncommon in a case such as this to hold on to the original WHRs and only provide the buyer with CSCs:

> "*I am not aware of other market participants conducting Type 5 trades and then conducting a commercial activity with CSCs without owning the underlying metal… in my experience market participants, banks etc. would expect their counterparty or client to be the owner of the metal when they were using CSCs.*"

150. Between 6 and 8 April 2014 Mr Kao, Mr Springer, and Ms He all met in Singapore. There is an issue between the parties as to whether Mr Ang also was at the meeting. He probably was not at this particular meeting but I do not consider that it matters as I find as a fact that Mr Ang would undoubtedly have been aware of all material aspects of the transactions between Straits and Mr Kao and his companies. There was a discussion about the use of scanned copies of warehouse receipts in the Straits-Kao transactions. Mr Kao said scanned copies should be used in the Type 3 transaction and Ms He pointed out that because of compliance issues they should continue to use OWRs.

151. Ms He, and Straits' risk management team (presumably including Ms Goh), specifically recognised the risk of double financing/pledging in the use of CSC-only transactions, as is recorded in Ms He's email to Mr Springer dated 7 April 2014:

> "*There is also concern from risk management team about using just scanned copy WHRs especially those not under our names as there could be elements of double*

financing (for eg. the original WHR is being used for another deal and the copy is used for our deal at the same time)."

152. There is a dispute whether a further meeting took place in San Francisco in May 2014 between Mr Kao and Mr Jeremy Ang; but it is agreed that a meeting did take place in Chicago between them in early November 2014 at which they discussed the detail of the new Type 4 transaction.

Evolution of Type 4 transactions

153. Around this time, the documentary evidence shows that in November 2014 the parties entered into a new transaction structure, a "Type 4 transaction."

154. In particular, on 13th of November 2014 Mr Kao sent an email to Mr Wu, copied to each of Ms He, Ms Tan, Ms Lindy Li and Mr Springer and Ms Jessie Li, in which he stated as follows:

"*We just need CSC only and for 6 days we would pay 30bps and each additional day we would pay 5bps. We are testing a new structure as discussed with Jeremy in Chicago. Pls confirm rate acceptable to you*."

155. This was a test for the Type 4 transaction. I find as a fact that Mr Ang was fully aware of the structure of this new Type 4 transaction which he had discussed with Mr Kao in Chicago.

156. The arrangement accordingly was to be the same as 'Type 3' with the provision by Straits of blank-endorsed CSCs to Mr Kao's companies, but with the transaction to remain open (and Straits to hold the WHRs) for a longer duration. In practice they (the WHRs) were held for as long as 90-180 days.

157. In the same email chain of 13 November 2014 Mr Springer told Ms He that "*we will need 6MM of nickel in WHS Singapore in the next 2/3 days. The current plan is to have it sit for a while with your usual compensation.*"

158. Mr Kao followed this up by his email to Ms He, copied to the Straits Trade Services team dated 14 November 2014 in which he emphasised that "*the WHR must not be cancelled without our advise (sic), this is important"*. There is no record of Ms He asking why it was so important not to cancel the WHR without Mr Kao's advice. If a third party came to Access World with a genuine WHR endorsed to their order, it would not be for Mr Kao to insist that it should not be cancelled.

159. So far as the fee for supplying the CSCs is concerned, Mr Kao discussed and agreed the fee with Straits (no doubt Mr Ang, or if not, Ms He), confirming in an email to Ms He and Ms Tan dated 29 November 2014:

"*All fee per discussed, 30bps to be deducted when we TT [telegraphic transfer] the funds to you and 5bps per calendar day till we advise WHR is good to [be] cancelled.*"

160. In the same email Mr Kao said that he needed each WHR valued at market at the time of presentation to him, stating "*I understand for your normal trades you will need to*

increase value for variation market risk, however that's provided if we use your originals", which he was not doing. It is clear that both parties recognised that this was a transaction for the provision of CSCs only, for which Straits would be paid a fee and it was not a "normal" repo where an OWR would pass between the parties. Ms He replied by email on 29 November and agreed to "*give you at market value given that the original WHR lies in our hands.*"

161. This transaction structure was agreed by Mr Ang and implemented by Ms He despite the fact that the notorious Qingdao Port incident became public in the summer of 2014, when metals in warehouses were found to have been fraudulently pledged multiple times for loans at different banks.

162. It follows at an early stage, and at the time when the Qingdao scandal was at its height, Mr Ang and Ms He were agreeing to a new structure with their client which allowed him access to colour scanned copies of the original WHRs, with Straits agreeing not to cancel the original WHR for a considerable period of time without Mr Kao's advice. They must have been alive to the dangers of adopting this course. There would not be a transfer of title to the metal but the transaction would be more of a trade services transaction, with the provision of a colour scanned copy WHR against payment of the spread. Ms He accepted this in cross examination, as she was bound to do[33]. Mr Ang also accepted in cross-examination that Straits held title to the metal at all times.

163. Moreover, at the *very time* that this was being agreed, on 21 November 2014, in response to a direct query from Straits' auditor as to whether trade services transactions were being carried out at Straits, Straits' Financial Services team (in particular Mr Wu, Ms He, Ms Li and Ms Tan) sent the auditor a misleading description of the business conducted by Straits as follows:

> "*This form of trading is targeted at Chinese companies. In China companies able to make a market neutral interest arbitrage profit, as Renminbi ("RMB") deposit rates higher than borrowing rates on a Letter of Credit facility. However to earn the interest arbitrage profit, Chinese companies need to trade in an underlying commodity to make use of the LC facility. These Chinese companies then trade with [Straits] through the buying of commodities and selling it back at a lower price.*
>
> *For such transactions, [Straits] buys the title to the commodity and sells the title to the customer, typically within 2 days. The commodity[ies] are typically warehoused in an offshore LME accredited facility. Payment mode of the cargo by Buyers can be either LC, DP or TT*." (emphasis added)

164. Copies of standard sale and repurchase contracts were attached to the description. This gave the misleading impression that these were typical repo transactions; no mention is made of the provision of coloured scan copies under a service agreement. I find as a fact that the deal was falsely described in this way because Ms He had herself pointed

[33] See Mr Springer's email dated 30 November 2014 in which he told Ms He, "*Remind that you always maintain title"*; Mr Chong's email to Ms He dated 16 December 2015 stating that "*the goods still belong to [Straits]*"; and Ms Foo's email to Ms He dated 2 March 2015 in which Ms Foo emphasised that, for cargoes financed by VAM, Straits would have to ensure that "*there is no actual title transfer to counterparty*" in order not to breach Straits' contract with VAM. See too Ms He's email in which she told Ms Tan, Ms Lindy Li and Mr Wu that "*the original never once leave our hands."*

out in January 2014 that if a deal with Mr Kao was structured in the way that Type 4 was in fact structured, the auditor would be likely to question the legitimacy of the transaction, which she and Mr Ang wished to avoid.

165. There were further email exchanges about this "new structure" between Mr Kao, Mr Springer and Ms He between 29 November and 1 December 2014. Mr Springer acknowledged receipt from Ms Tan of the CSC which she sent him on 27 November 2014. Ms Tan also sent draft sale and repurchase contracts on 17 November 2014 showing the buyer from Straits as Genesis and the seller to Straits as CH.

166. Mr Kao promptly forwarded Ms Tan's message (with the CSCs) to Mr Wong and Mr Xie Zhiping, with a cover message in Mandarin which states in translation: "*Brother Wang, the warehouse receipts have been issued. Please process as soon as possible.*" I find as a fact that this was an instruction from Mr Kao to Mr Wong to go ahead and procure a forgery from the CSC.

167. In the email exchange with Ms He, Mr Springer noted (as had Mr Kao earlier) that one problem for Mr Kao with the (misleading) structure was that because the prices were supposedly fixed in the sale and repurchase contracts and because of the fact that Straits held on to the original WHR, by the time Mr Kao asked for the original WHR to be cancelled, the unit price was way above the then-market price. Ms He agreed that Straits would give Mr Kao market value, despite what the contracts state (and she instructed her team at Straits accordingly). Mr Kao and Mr Springer again both emphasised that Straits must always retain title by retaining the original WHR.

168. On 30 December 2014, Mr Springer emailed Ms He and stated: "*Please cancel the above noted WHR – 354.282 MT*". The reference number for the receipt in question was PMSG/MY/0001389.

169. On 31 December 2014, Ms He responded: "*Finally we have completed the first deal! Thanks for the support! We will need to charge another 28 days of 5bps/day from -31 Dec. That will total up to 140bps x USD 4,986,563 = USD 69,811.88. If this is ok, Hui Ying [Ms Tan] will prepare the invoice for this payment. She will also update the accrual on the spreadsheet and send across*."

170. Ms He instructed Ms Tan to prepare the invoice for the payment to Straits and on 2 January 2015 Ms Tan drew up an invoice headed "Service fee". Accompanying it was drawn up, on Ms He's instructions, what I find to be an entirely false and misleading document entitled "Service Agreement" as follows:

> ***"SERVICE AGREEMENT***
>
> *This is a contract entered into by Straits (Singapore) Pte Ltd (hereinafter referred to as "The Provider"), located at 9 Temasek Boulevard #28-02 Suiztec Tower Two Singapore 038989, and Genesis Resources Inc. (hereinafter referred to as "The Client"), located at 155 Bovet Road ─Suite 700 San Mateo, CA 94402 on this date 17 November 2014.*
>
> *The Client hereby engages the Provider to provide services as describes under "Scope and Manner of Services". The Provider hereby agrees to provide the Client*

with such services in exchange for consideration as described under "Payment for Services Rendered"

Scope and Manner of Services
The Provider shall provide the Client information on the non-ferrous metals market by telephone or email which satisfies the Client 's marketing needs.

Term of Service
The Provider shall provide the services described under Scope and Manner of Services from the period of 17 November 2014 to 31 December 2014.

Payment for Services Rendered
Payment shall be made via telegraphic transfer by the Client to the Provider. The service fee is agreed by both parties to be at USD 69,811.88 and payment shall be made no later than 16 January 2015.

Arbitration
Any controversy or claim which cannot be settled amicably between Buyer and Seller shall be submitted to Hong Kong International Arbitration Centre (HKIAC) where the arbitration shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties." (emphasis added)

171. In addition to the sale and repurchase contracts which gave a misleading impression as to the nature of the Type 4 transaction taking place between Straits and Mr Kao's companies, this false agreement also did not accurately state the nature of the transaction and was plainly intended to hide its true nature. Ms He signed this "agreement". She must obviously have realised, and I find as a fact did realise, that Straits did not earn its payment of USD69,811.88 by providing the Client with "*information on the non-ferrous metals market by telephone or email in order to satisfy the Client 's marketing needs*". As she knew full well, Straits earned it for supplying CSCs to Mr Kao's companies and holding the OWRs until Mr Kao told it to cancel them.

172. I find as a fact that these documents – and others which I refer to below and which followed them – were shams[34] in the sense that they were drawn up by Straits in order

[34] *As Lord Diplock explained in Snook v London & West Riding Investments* [1967] 2 QB 786 at p. 802, a sham:

> "*… means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create".*

And Neuberger J (as he then was) stated in *National Westminster Bank v Jones* [2001]1 BCLC 98 at paragraph [59]:

> "*A sham provision or agreement is simply a provision or agreement which the parties do not really intend to be effective, but have merely entered into for the purpose of leading the court or a third party to believe that it is to be effective*."

to throw third parties, including their auditors, off the scent as to the true nature of transactions that Mr Kao's companies were carrying out with the use of the CSCs provided to them by Straits, and that Ms He and Ms Tan did this because they knew that the structure of the Type 4 trades that Straits was now undertaking with Mr Kao was, in Ms He's words, not legitimate.

173. I also find that the fact that Ms He and Ms Tan were willing to draw up sham documents such as this also demonstrates that they were willing to go to extreme lengths to facilitate Mr Kao's transactions, no matter whether they were legitimate or not. Ms Tan's explanation in her evidence that this was the first Type 4 trade which Straits had executed and that Straits did not collect the fees in the end via this agreement does not afford any legitimate excuse for this behaviour. Indeed, the fact that she attempted to excuse her and Ms He's behaviour for drawing up this agreement in itself undermines her credibility as a witness. This was typical of Ms Tan's evidence throughout. I found her to be an argumentative and evasive witness, who was unwilling to answer straightforwardly most of the questions which she was asked.

(II) RELEASE INSTRUCTION FROM ING (7/8 JANUARY 2015)

174. The first 'Type 4' transaction, as described above, involved the purported sale and purchase of a warehouse receipt with reference number PMSG/MY/0001389.

175. PMSG/MY/0001389 was cancelled on 31 December 2014, having been held at all times by Straits since the date it was issued in accordance with the agreement with Mr Kao.

176. However, what then happened was that on 8 January 2015, Access World (then named Pacorini Metals) wrote to Ms Tan, attaching a release instruction for the same WHR number PMSG/MY/0001389. The release instruction was dated 7 January 2015, and issued by the Geneva branch of ING Belgium. It stated:

> "*As per instructions you received from BTG Pactual Commodities (US) LLC, we hereby authorize you to release the following material to the order of Steven Springer on behalf of COMHARVEST (…) Please be informed that the warehouse receipt duly endorsed has been sent to Steven Springer by special courier…*"

177. Ms He was copied into Access World's message. Ms Tan accepted, in the context of a later release instruction in May 2015, that she would have been likely to read that email and I find as a fact that she would undoubtedly have read this email, as it was her job to deal with emails like this, and, moreover, it was apparently the first release instruction that she received.

178. I also find as a fact that Ms He must have read Access World's email, not least because she forwarded it to Mr Springer and Mr Kao under cover of the following email dated 7 January 2015:

> "*Dear Mr. Springer, Steven*[35]

[35] i.e. Steven Kao (D3).

> *Pacorini has just sent us an email below with the attached from ING. As per your instructions, the warehouse receipt was cancelled by us on 31 Dec 2014. Pls advise urgenty* [sic] *on how you wish for us to respond to Pacorini. Meanwhile, I have asked them to not act on ING's request.*"

179. It is notable that Ms He immediately defers to Mr Kao and her request for urgent advice shows that she regarded the warehouse release instruction as a matter of immediate concern.

180. Mr Kao responded to Ms He by email dated 8 January 2015 in which he stated:

> "*For this instance, it will be a CSC release from ING because the trade was squared that's why ING is releasing title back to us. Just have Pacorini respond, "noted*"."

181. Ms He was asked about this email in re-examination:

> "*Q. And how does Mr Kao's two-line message there fit with your explanation to his Lordship of what you understood the position to be in 2015 with these requests?*
>
> *A. I understood, as Mr Kao was also trading CSCs with these parties, and that that's why the CSC was returned to Mr Kao and that is -- Mr Springer, and all these trades were also closed on our end, some time during the same time period or very shortly after.*"

182. Ms He's evidence in this respect is telling. The fact that she understood that Mr Kao was trading CSCs with parties such as ING, had she been acting honestly, ought greatly to have concerned her; likewise Mr Springer telling her that Genesis had purported to transfer title in the underlying metal to ING (which was "*releasing title back to us*") because as she knew (i) Genesis had no title to purport to transfer, (ii) the release instruction stated that "*the warehouse receipt duly endorsed ha[d] been sent to Steven Springer*" when she knew it had not been, and (iii) Ms He must have realised that ING, BTG Pactual or Access World wrongly believed that they were dealing with an original warehouse receipt, when she knew that they were not. That she did not raise any of these issues with Mr Kao suggests that she either knew what he was doing with the CSCs or, at the very least, suspected what he was doing with them and deliberately refrained from enquiring further; indeed, she assisted in covering up the falsehood as will be seen.

183. I do not accept Straits' submission in closing that Ms He was misled by Mr Kao into believing that Mr Kao was doing CSC trades with ING as part of Mr Kao's asset pack structure. That is not what Mr Kao told her in these exchanges and in any event it is no answer to her knowledge of the three falsehoods set out in paragraph 182.

184. After consulting with Mr Kao, Ms He responded to Access World on 8 January 2015: "*We have already released the WHR to Mr Springer after it was issued. As it was released to them via endorsement on the back of the WHR by Straits, no action was required by Pacorini. This fax does not seem to require any response, but if required, you can simply reply them 'Noted'. Pls do not send them the cancelled WHR for we*

definitely do not want to divulge our counterparty names to their banks." (emphasis added)

185. As to this misleading response:

i) The statement that Straits had 'released' the WHR to Mr Springer (by endorsing, and – as was implied – by delivering an original WHR) was a false and dishonest statement. I find that Ms He must have known that to be so. Straits had only ever provided Mr Springer / Genesis with a CSC as she knew full well. She should have said so.

ii) Ms He acted not to clarify but to perpetuate the known misapprehension on the part of ING, to the effect that it had held an original WHR, by asking Access World (i) to respond simply 'Noted' and (ii) not to provide a copy of the cancelled WHR. If Access World had provided ING with the cancelled WHR, then this would of course have shown the date of cancellation (31 December 2014) and the absence of any endorsement from Genesis on the genuine WHR. That would have alerted ING to the fraud. Ms He purposefully prevented that.

186. Ms He also sent her email to Ms Tan, and copied it in to Mr Wu and Ms. Lindy Li. I find that Ms Tan must also have realised that Ms He's explanation was a false explanation. It is probably the case that Mr Wu and Ms Li also realised this in the light of their subsequent conduct discussed below, but I do not need to make a finding as to that.

187. This episode concerning the ING release instruction is also significant for this reason. Prior to this episode in January 2015, Ms He was able to say that she was unaware that Mr Kao was behaving dishonestly because, as she said in evidence, providing CSCs of blank-endorsed WHRs to him was not in itself uncommon or unusual. As she put it: "*We do that – all our counterparties,* it's just *our standard operating procedures"*[36]. But once she knew of the fact of the provision of the CSCs *coupled with* the fact that a third party financier was claiming ownership of the metal in respect of one of those very same CSCs, she was alerted to the fact that Mr Kao appeared to be trading the CSCs as though he owned the WHRs, when she knew that he did not. If she were honest, that cried out for her to get to the bottom of this serious inconsistency and to be honest with ING and Pacorini, but instead she helped Mr Kao to cover it up.

188. Contrary to Straits' submissions, none of the forgoing is to view matters with hindsight, with the knowledge that forgeries were in circulation at the time. It would have been obvious to Ms He (and, I find, Ms Tan) as early as January 2015 that Mr Kao was using the CSCs to trade with a third party financier and to give the impression that title had passed to that financier, when Ms He and Ms Tan knew that Straits retained the WHR at all times and retained title. Nor does it require analysing these emails with a "fine-toothed comb" in order to realise this obvious fact.

[36] Although the events of November/December 2014 discussed above do raise concerns about Ms He's behaviour shortly before the ING episode.

(III) PMA LETTERS

189. On 29 January 2015 Mr Kao, Mr Springer, Mr Wong, Ms He and Ms Tan met over dinner in Singapore. It does not appear that Mr Jeremy Ang attended this dinner.

190. Following on from this meeting, Mr Kao moved to implement the next stage of his fraudulent enterprise, which is reflected in the email dated 30 January 2015 from Ms He to Mr Kao and Mr Springer. Ms He stated as follows:

> "*Dear Mr Springer, Steven,*
>
> *I have spoken to Pacorini with regards to the Clause: "The warehouse receipt and any right in connection with it shall not be transferred, assigned or in any way disposed without the prior written instruction from the order party to Pacorini Metals (Asia) Pte Ltd and having been endorsed, signed and dated by the order transfer party."*
>
> *They clarified that this is accurate because from Pacorini's perspective, the warehouse receipt is not transferred as they are not in the loop when the warehouse receipt is being circulated to multiple parties without being informed to Pacorini. However, they assured that if the bearer (final buyer) had endorsed, signed and dated the original warehouse receipt and show it to Pacorini, they would be able to claim on the underlying cargoes.*
>
> *If a written explanation from Pacorini is required on this clause, I could have them draft something. However, with regards to the request from Steven [Kao] to get Pacorini to send us a letter, stating that Straits have confirmed to Pacorini that the duly endorsed warehouse receipt has been sent to Come Harvest/Mr Springer, Pacorini reverted that they would not be able to do this unless they have received the duly endorsed original warehouse receipt from Come Harvest, as they cannot confirm what Straits have told them is true.*
>
> *Think we will need to work on other alternatives.*" (emphasis added)

191. It is clear from this email that Ms He had spoken to Pacorini and had asked it whether it would agree to send Straits a letter, stating that Straits had confirmed to Pacorini that the duly endorsed warehouse receipt had been sent to Come Harvest/Mr Springer. This was despite the fact that Ms He knew that the "duly endorsed original warehouse receipt" would not in fact be sent to Come Harvest/Mr Springer, but rather only a CSC would be sent to them, and title to the metal would remain with Straits. So once again, this was Ms He being less than frank. The scope for Mr Kao to mislead third parties, armed with such a letter, I find would have been perfectly obvious to Ms He. Yet she nonetheless asked Pacorini for it.

192. The alternative settled on after email discussion between Ms He and Mr Springer during February 2015 was the form of letter described contemporaneously and in these proceedings as a "*PMA Letter*".

193. In early February 2015 Ms He set about obtaining from Pacorini the draft PMA Letter for Pacorini to sign. She told Pacorini that the letter was requested by "*my buyer*." A draft was produced on 3 February 2015 which read as follows:

> *"[Name of Buyer]*
> *[address]*
>
> *Dear Sirs/ Mdm,*
>
> *WAREHOUSE RECEIPT NO. [ ]*
>
> *We hereby confirm that, upon receiving the original warehouse receipt duly endorsed, signed and dated by the order party, and subject to payment of our warehousing fees, we will release the goods to the endorsee without further written instructions from the order party.*
>
> *We hereby disclaim and shall not be responsible for any liability, losses, damages, costs or expenses that you or any third party may incur arising from the release of the goods to the endorsee without further written instructions from the order party."*

194. Ms He asked if this was acceptable to Mr Springer. Mr Springer appeared delighted, as he responded:

> "*Hi Sherraine – Is Pacorini willing to give this letter to any name that you instruct? So if you told them they would write the letter to JPMorganChase on your behalf*?"

195. Ms He responded by stating that in order to issue the letter to a particular name she would probably have to clear that with Pacorini.

196. On 10 February 2015, Mr Kao told Ms He: "*I need them to specify in the letter a specific whr receipt no.*"

197. On 14 February 2015, in a message beginning "*Can we test the Pacoroini* [sic] *letter as follows*", Mr Springer told Ms He: "*It look like we are going to need this* [i.e. a PMA Letter] *on an ongoing basis.*"

198. I accept MCM's submissions that the significance of all of this is that, from the start of the 'Type 4' trades, (i) Ms He was willing to misdescribe Genesis to Pacorini / Access World as a "*buyer*" of the WHRs corresponding to the CSCs being supplied; (ii) Ms He did so because she would have known that a letter in the nature of a PMA Letter could only have been of interest to a buyer or potential buyer of WHRs from Mr Kao's company;[37] (iii) Ms He knew that Mr Kao was engaging with Western financiers who would be concerned about a clause in the Pacorini warehouse receipt prohibiting transfer of the WHR "*without the prior written instruction from the order party to Pacorini Metals (Asia) Pte Ltd*"; (iv) Ms He did not seek to find out from Mr Springer what the true arrangement was at his end (assuming she did not already know it), but

[37] He 1 §119: "*Mr Kao and Mr Springer wanted to be able to show third parties that whoever holds the original receipt will be able to take it to the warehouse keeper and take delivery of the underlying cargo.*"

instead looked to devise with him an account that could be given to Pacorini to justify the requests for PMA Letters.

199. Armed with a PMA Letter on these lines and with Straits blank-endorsing CSCs and sending them to Mr Kao's companies, Mr Kao had all that he needed to obtain financing against forged WHRs. Contrary to Straits' submissions, *looked at in isolation*, there is nothing in the PMA Letters themselves which was particularly unusual or which would have alerted an innocent party to the fraud. In my judgment, the relevance of the PMA Letters is threefold:

i) How they came to be drafted and supplied to Mr Kao (paragraphs 189-197 above) throws considerable light on Ms He's actions and knowledge - in particular that she was willing to attempt to extract a letter from Pacorini that the duly endorsed warehouse receipt had been sent to Come Harvest/Mr Springer, when she knew that that was not so and would never be so because Straits only supplied them with CSCs and it was told by Mr Kao that it should retain the original WHR at all times until it was told to cancel it;

ii) The fact that PMA Letters continued to be required by Mr Kao in every transaction up until the time when the fraud was uncovered[38], despite the fact that Straits (in particular Ms He) knew that only blank-endorsed CSCs were being provided to Mr Kao and that Straits was never asked to put into circulation any original warehouse receipts duly endorsed, signed and dated by it as the order party. It follows that Straits (and Ms He in particular) were aware that there was no need for a PMA Letter to be issued, and contrary to Straits' submission, it was not necessary to have PMA Letters to "confirm" to Mr Kao's potential buyers or financiers that the metal in fact existed and was stored at Access World's warehouses, although I find that that was indeed what they were designed to suggest. Accordingly, I do not agree with Straits that there were valid commercial reasons for Straits to continue to request the PMA Letters, certainly once it became clear that Mr Kao was never going to require delivery of the original WHRs (which I find that it was, by the time Type 5 transactions began to take place); and

iii) As MCM submitted, the use of the PMA Letters was indeed intended to give the transactions between Straits and CH/MW a veneer that they were above board which was important where CH/MW only held CSCs and not original WHRs. I find that that was indeed their purpose.

(IV) THE INVOLVEMENT OF VAM

200. As they proliferated, Straits required external financing (i.e. in addition to the credit made available to it by CWT) in order to service Mr Kao's demanding financial requirements under the 'Type 4' transactions. Ms He was very keen to obtain more and more internal and external financing for Straits to support Mr Kao's business using CSCs of Straits WHRs, because the business with Mr Kao was providing Straits with substantial and relatively easy profits. In due course Straits obtained substantial internal

[38] Every purported sale to Carlyle (and to later Repo Transaction counterparties) was accompanied by a PMA Letter obtained by Straits from Access World, naming the relevant purchasing entity.

financing from its parent company, as well as external finance from ANZ, CIMB and Macquarie. But its first external financing was from VAM, being a hedge fund 55% owned by the Carlyle Group.

201. In particular, in February 2015 Ms He began corresponding with VAM in order to seek a $200m line of credit for Straits so as to accommodate the surge in business from Mr Kao's companies. She informed VAM in an email exchange that she wanted to "*keep Pacorini unaware of any title change between VAM & Straits only until such point as Straits' defaulted (if ever) and did not pay back the loan on its due date*". She further stated that:

> *"While I understand that it is important for VAM to have clear title, to have Pacorini issue a letter to confirm title is transferred to VAM may have repercussions with regards to the trade with my counterparty*."

202. However, VAM stated that they required "*the warehouse receipt with a blank endorsement to order … and to hold that original receipt. Plus the letter from Pacorini providing that they are aware that Vermillion is the receipt holder. As [VAM] are not a bank they cannot have a security interest and must hold the physical*." (emphasis added)

203. Ms He informed the President of Straits Financial LLC, Mr Mazurek, that:

> "*we are happy to give [VAM] an unencumbered collateral which is the original warehouse receipt blank endorsed to them. However, if they insist on letting Pacorini know that they are the holder of the receipt, it may jeopardise the deal with my client… I… will be willing to proceed … as long as they can agree not to reveal to Pacorini that they are holding the original warehouse receipt unless Straits default on the repayment*."

204. Once again, Ms He's objective here is to mislead Pacorini. VAM continued to request a letter from Pacorini confirming that title was transferred to VAM and Ms He continued to resist that because it "*may have repercussions with regards to the trade with my counterparty*".

205. In an attempt to persuade VAM not to insist on such a letter from Pacorini, on 8 February 2015 Ms He emailed VAM's representative and purported confidentially to inform VAM of "*my trade structure with my client*". In it, she suggested that:

> *"1) Straits uses the borrowed funds to purchase LME registered nickel from LME broker in the form of warehouse receipt.*
>
> *2) i) Straits enters into sale contract with Client A and purchase contract with Client B concurrently to make a spread.*
>
> *ii) Straits provides scanned copy of the warehouse receipt to Client A for them to do the necessary processing with their bank. Once the bank is done with processing, they will discount the funds and pay to Straits after verifying with warehouse keeper that the cargo is indeed there.*[39]

[39] This paragraph is in red type in the original email

3) Client A will sell the warehouse receipt to Client B.

4) Client B will sell the warehouse receipt to Straits, for which Straits will pay to Client B.

5) i) Tenor of each deal varies from 30- 90 days.

ii) At the end of the tenor, Straits will sell the warehouse receipt back to LME, and pays the cash back to the Lender.

On the step in red, Client's bank may send an email to Pacorini to have Pacorini check with Straits to confirm warehouse receipt is being passed to Client A. The concern is that given VAM wants title to the cargo, there is this risk that Pacorini may respond to the bank that the title of the warehouse receipt has been transferred to VAM.

Therefore, what I would like VAM to consider is whether it is ok to safekeep the warehouse receipt as it is (see attached) + the letter from Pacorini which does not effect a transfer of title but rather states that the holder of the original warehouse receipt duly endorsed could claim title. This would safeguard your interest because in the event of a default, you could be able to sell of the underlying cargo and claim back on the funds. We could discuss on suitable haircut to safeguard your interest in this aspect. My point is that I would like to keep Pacorini unaware of any title change between VAM & Straits only until such point If Straits default and do not pay back the loan on due date." (emphasis added)

206. VAM continued to have concerns about this structure. As VAM's representative stated in an email to Ms He: "*I am still not clear as to why we cannot disclose to Pacorini that the receipt has an endorsement on it? Why does the client care if the ownership has transferred as long as they will be in a position to buy it back? The client will still be purchasing the warehouse receipt from Straits.*"

207. This was obviously correct. Despite VAM's legitimate concerns about what it was being told, eventually on 12 February 2015 Ms He sent VAM a draft PMA Letter which apparently was acceptable to VAM and VAM agreed to provide the finance. Ms He then had to get internal approval for the financing. On 27 February 2015 she accordingly internally emailed Loi Pok Yen, the CEO of CWT; Adam Slater, the CFO of CWT and M Goh the Deputy CEO of CWT, copying in Mr Jeremy Ang, and sought approval. She explained the trade structure as follows:

"*Trade Structure*

A collateralised loan structure, where the funding will be used for Steven Kao's (SK) transactions.

SK needs only the scanned copy WHR issued to the order of Straits for a period of approx 90 days, and they will pay us 3.5bps on a daily basis for holding the original WHR. Therefore, we are able to pledge the warehouse receipt to a financier for his transaction.

Structure as follow:

1) Straits will send across to VAM the original WHRs issued to the order of Straits and blank endorsed.
2) Upon receipt of the WHRs, VAM will execute a purchase agreement to buy the cargo, execute a 90 days short hedge on their book and pay Straits for the cargo
3) After 90 days, upon instruction of Straits, VAM will tender the nickel into LME against the short hedge.
4) The proceeds from the sale will be used to offset the loan from VAM."

208. This makes perfectly clear, in my judgment, that Straits knew that the nature of the deal with Mr Kao was for the supply of CSCs against a daily fee for holding the original WHR.

209. Straits then, in March 2015, entered into a series of transactions with CH and Genesis.

210. The very substantial amount of business that Straits was conducting with Mr Kao's companies by this time is revealed by an email dated 19 March 2015 from Ms He to Mr Jeremy Ang which gave him an indication of Straits' revenue from deals with Mr Kao. For the month of March, Mr Kao contributed a remarkable 76.3% of Straits' total net revenue of USD380,000 to date. She asked Mr Ang to lobby Ms Goh for support in continuing to do this level of business with Kao because Ms Goh was trying to limit Straits' exposure to trades with Kao to US$100m.

211. In fact, the documents show that Ms Goh was unhappy to learn that the exposure had increased to US$130m ($26m from VAM and $104m from CWT) and she asked Ms He not to increase it anymore. Ms He also agreed to speak to Mr Kao to alleviate Ms Goh's continued concerns about his business model.

212. Ms He in fact then spoke to Mr Springer. She recorded their conversation in an email dated 15 April 2015 as follows:

"This is what I decipher:

1. SK identifies good assets in China and finance the asset owner on the asset, which will then be collateralized to the bank.
2. Based on this collateralized asset, SK China entity issues LC to SK Genesis in USA via Chinese bank.
3. SK Genesis purchases WHR from Straits and submits the WHR as part of LC docs to Chinese bank.
4. When Chinese bank receives WHR, it sends acceptance to US advising bank. WHR is held with the Chinese bank as collateral, and at the same time, bank funds SK Chinese entity who in turn funds the owner of the asset.
5. After 30/60/90 days when borrower repays the loan to SK who in turn returns to the Chinese bank, the WHR is released and SK Genesis then discount the LC and pays off to Straits."

> *Pls trust that all these are internal and strictly just for my management pitching in order to continue to scale our business and I would not be sharing the structure with anyone else."*

213. This is what Ms He and Mr Ang in evidence called the "asset pack transactions", which transactions they say they understood Mr Kao needed the CSCs to service. It can be seen that Ms He's summary refers to the supposed fact that "*SK Genesis purchases WHR from Straits and submits the WHR as part of LC docs to Chinese bank*". But once again, Ms He knew that Mr Kao did not purchase WHRs from Straits under the Type 4 structure; rather Straits was being paid to retain the WHRs.

214. In cross-examination Ms He accepted that there was in fact no need for a PMA Letter to feature in this structure and she had no knowledge of a PMA Letter ever being issued to a Chinese bank; rather she knew that PMA Letters were intended for "offshore parties" (meaning non-Chinese parties).

215. Having obtained this information, Ms He emailed Mr Springer on 19 April 2015 and told him of the significant concerns that her management (including Ms Goh) had about the structure of the transactions with Mr Kao as follows:

> *"… as mentioned to you, the CWT management has raised concerns with regards to single counterparty limit and would like to understand more about the structure on your end first before they can allow us to step up with you. I have tried to explain to them based on our discussion that the deal is packaged with asset pack in China, but we still can't get around why the WHRs need to sit for so long. While you explained that you have the prerogative to decide when discounting happens, management has questioned that logically the WHR can be cancelled after acceptance, even prior [to] discounting. Would you be able to explain to us on your structure and why the need to hold the WHRs for a longer period so that we could clear it with management and with that, we could scale to larger volumes. Jeremy is happy to speak to Steven personally to seek more clarification if this needs to be addressed in confidentiality." (*emphasis added*)*

216. It is clear from this email that Ms He is "on Mr Kao's side", suggesting confidential discussions between Mr Ang and Mr Kao in order to find an explanation that she could give to her management to obviate their concerns. There appeared to be no good reason for the long-term nature of the Type 4 transactions. Indeed, as Mr Vollebregt explained in his first report at paragraph 6.8: "[*f*]*or interest arbitrage transactions, deferred payment L/C's would be used, i.e. the L/C was not payable when the documents were presented but 30, 60, 90, 180 or 360 days later. This allowed for a longer discount period and hence a larger profit when the future payment under the L/C was discounted. The longer the deferred payment period, the more attractive the interest arbitrage*." As MCM submit, it follows that a typical L/C discounting interest rate arbitrage transaction requires the 'repo' element to be as short as possible and the deferred payment element under the L/C as long as possible, in order to lower the cost of and maximise the return from the transaction. On Mr Kao's explanation, he was doing the opposite (i.e. paying a repo-like fee over a long period of time, while delaying the moment at which he would discount his L/C with his US bank). Ms He's management clearly found it hard to understand how a transaction along these lines would yield any profit. Furthermore, there was no logical reason for the retention of the original WHR: "*logically the WHR*

can be cancelled after acceptance, even prior discounting". In short, the explanation did not make sense.

217. The email record confirms that Ms He then spoke to Mr Kao on 20 April and in consequence she then drafted an email to send to Ms Goh about the structure of the transactions with Mr Kao, which she ran past Jeremy Ang on 20 April 2015 before she sent it. This affords another illustration of Mr Ang's involvement in any important issue of principle concerning Straits' relationship with Mr Kao. Ms He told Ms Goh that Straits was "*play[ing] the role of financing SK with our WHRs in this structure. Basically, we sell WHRs to him on credit term, where he pays us at a later date*". In fact, Ms He knew that Straits were not selling WHRs to Mr Kao at all (whether on credit or otherwise).

218. As a result, Ms He's email appears to have persuaded Ms Goh, because it led to her emailing Mr Kao on 21 April 2015, stating "*Good news! Have managed to convince the management to continue supporting your WHR requirements =)*". She was clearly very keen indeed to assist Mr Kao with his increased funding requirements, no matter what he was doing with CSCs of Straits' WHRs.

(V) NATIXIS INSPECTION (MAY 2015)

219. On 5 May 2015 Mr Kao faced his second problem with these transactions, in that Natixis wrote to Pacorini, giving it authority to release a specific quantity of LME nickel for the account of Come Harvest to Mr Springer, to be released from numbered WHRs which were WHRs in fact owned and held by Straits, the CSCs of which had been provided by Straits to Come Harvest.

220. As to this Natixis release instruction, Ms He stated as follows in paragraph 163 of her first witness statement:

> "*I can see that the release instruction could have caused me or Straits some concern if we had considered it closely. The release gives the impression that [the party issuing it] believed it was in a position to give release instructions as a result of holding original warehouse receipts. (…) if the release had been shown to me at the time I believe I would have checked whether the original warehouse receipts had been delivered to our customer and if they had not I would have asked for the situation to be clarified with Access World, because [the party issuing it] should not have been giving release instructions if the original receipts were with Straits or its banks.*"

221. But as between Straits and Mr Kao's companies (which these receipts concerned), Ms He knew of course that Straits (or its own bank) always retained possession of the original WHRs and that Straits had only ever provided CSCs to Mr Kao's companies.

222. Ms Tan sent this Natixis release instruction on to Mr Springer and Mr Kao on 7 May 2015, copying in Ms He, Lindy Li and Mr Wu, and she asked him:

> "*if we could reply to Pacorini as per previously: "We confirm that the 5 warehouse receipts as mentioned in the attached have been endorsed by Straits (Singapore) Pte Ltd and sent to Mr. Steve Springer"*".

Mr Springer responded: "*Yes – thank you*".

223. "*As per previously*" must be a reference to the misleading reply which Straits had given in respect of the ING release instruction (of which Ms Tan was aware) earlier that year. Indeed, Straits itself accepted that this is indeed a reference back to the ING episode.

224. Ms Tan then sent an email to Pacorini on 8 May 2015, copying in Ms He, Ms Li and Mr Wu, in the terms approved by Mr Springer, falsely stating: "*We confirm that the 5 warehouse receipts as mentioned in the attached have been endorsed by Straits (Singapore) Pte. Ltd and sent to Mr Steve Springer*."

225. This response was dishonest, as Ms Tan and Ms He must have known, and I do not accept Mr Lewis QC's submission on behalf of Straits that this reply was given as a result of any "misunderstanding".

226. In their witness statements, both Ms He and Ms Tan claimed to have no recollection of these email exchanges, and offered reconstruction to the effect that (i) Ms Tan probably did not regard it as anything more than a routine operational email and would have written to Mr Springer and to Access World without raising the matter with Ms He, and (ii) Ms He would probably not have read or noticed any of the messages.[40] I reject this evidence which I find to be wholly implausible. Indeed, in cross-examination Ms He admitted that she *would* likely have read the email from Pacorini attaching the release instruction and she further admitted that her operational team would have told her at the time that Natixis was asserting ownership in respect of the metal covered by the warehouse receipts and that she forwarded the response to Ms Tan for her to respond *as per previously*.

227. This was a very serious episode in the history of Straits' dealings with Mr Kao and it came only 4 months after the ING episode, and at a time when Straits had purportedly been trying to get to the bottom of Mr Kao's unconvincing "asset pack structure" explanation which had caused Straits management serious concerns. The Natixis episode was very far from a routine operational matter and I find that the response to the Natixis release instruction would undoubtedly have been carefully considered by and discussed between Ms He and Ms Tan.

228. Ms Tan must have known that this instruction to Pacorini was untrue and that only CSCs had been supplied to Mr Kao, with Straits retaining all 5 original WHRs. Just a few days earlier, on 24 April[41], she had stated to Mr Wu in an email of that date as follows:

> "*Hi Beng,*
>
> *Lol. You're right. Springer appeared.*
>
> *But fret not, this should be vermillion deal. <u>There's a folder on my desk labeled as VAM (all pledged WRs are there), pull out the mentioned WR</u> then pass to Sherraine/or you can drop an email to VAM to advise them on the closeout.*

[40] Tan 1 §50; He 1 §§161-164.
[41] Email from Ms Tan to Wu Chong Beng cc'ing Sherraine He and Lindy Li dated 24 April 2015.

As for the fees chargeable, no worries. I can settle with jessie on monday since they are only paying us the spread.

Thanks!
HY"

(emphasis added)

229. I find as a fact that Ms Tan (and the Straits Financial Services team) had ready access to (and a record of) all of the original WHRs which Straits held and/or had pledged. I find as a fact that she knew (and Ms He knew) that the proposed statement to Pacorini was false and misleading and I reject Ms He's evidence that she would not have paid this much attention at the time because it was just another email coming in from the warehouse. That is also reinforced by the fact that what Ms Tan was suggesting was something that (as she specifically stated) Straits and Mr Kao had clearly done previously. I also reject the suggestion that Ms Tan would not have realised that she was misleading Pacorini because she was young and inexperienced. I consider that she knew exactly what she was doing.

230. Indeed, in cross-examination Ms Tan was unable to explain why she told Pacorini that "*the 5 warehouse receipts as mentioned in the attached have been endorsed by Straits (Singapore) Pte Ltd and sent to Mr Steve Springer*" when the truth was that Straits had retained all 5 WHRs and not sent any to Mr Springer. She said: "*it is possible that what I meant was a copy of the colour scan endorsed warehouse receipt, not the original…, was sent to Mr Springer*". I reject her evidence that what she meant in this email was that the CSCs and not original WHRs had been sent to Mr Springer. That was not an honest explanation: it is not what she says in this email and nor would it have been an answer to Pacorini's enquiry. I find that by answering in the way that she did, Pacorini (and Natixis) were purposefully misled by Ms Tan and thrown off the scent.

231. I accept the Claimant's submission that these exchanges demonstrate that: (i) Ms He and Ms Tan knew that Mr Kao's companies were indeed transacting with Western financiers; (ii) those transactions involved the purported sale of title to metal covered by the WHRs held by Straits of which only CSCs had been (and would only ever be) provided to Mr Kao; (iii) Ms He and Ms Tan were willing to tell lies to Pacorini in order to avoid Pacorini and the Western financiers discovering the true position (which was that the Western financiers did not have original WHRs or title to metal); and (iv) Ms He and Ms Tan colluded with Mr Springer and Mr Kao to discuss the terms of the lies that should be told to Pacorini.

232. Ms He had no reasonable explanation for the Natixis episode and in my judgment it demonstrates very clearly that Ms He, with Ms Tan's assistance, sought to mislead third party financiers into believing that Mr Kao's companies held the WHRs which enabled them to transfer title in metal to those financiers, when they knew that to be false; and that they did this to assist Mr Kao.

(VI) CARLYLE/VAM INSPECTION JULY 2015

233. By 16 March 2015, Genesis was entering into the first ('sale') leg of repo transactions with entities in the VAM / Carlyle Group.[42] The detail is set out in MCM's 'Carlyle Transaction Schedule'. Over the eleven months between March 2015 and February 2016, 37 sale contracts were entered into between Genesis and Carlyle and 4 further sale contracts were entered into between CH and Carlyle. Every purported sale to Carlyle (and to later repo transaction counterparties) was accompanied by a PMA Letter obtained by Straits from Pacorini, naming the relevant purchasing entity.

234. I find as a fact that the documents that Genesis and CH supplied to Carlyle as original WHRs were counterfeits derived from Straits' CSCs. This is evident from the fact that: (i) Straits only ever supplied CSCs (which is common ground - see the Agreed Contracts Schedule) but (ii) Mr Kao claims to have supplied originals to Carlyle (see paragraph 66 of his witness statement where in discussing the MCM transactions, he states "*As with the Carlyle transactions, I did not handle any of the original warehouse receipts, which I understood all went via Hong Kong or China*"). It can also be seen from a comparison between two versions in the trial bundles of a receipt with reference number PMSG/MY/0018614 dated 2 February 2016, as MCM demonstrate in their closing submissions.

235. The next problem for Mr Kao arose at the end of July 2015. Carlyle made an inspection request of Pacorini (Malaysia) in respect of 11 warehouse receipts, the CSCs of which had been given by Straits to Mr Kao, asking an independent surveyor to check the inventory of those WHRs.

236. Ms He immediately contacted Mr Kao and Mr Springer on the same day, 31 July 2015, and stated as follows:

> "*Dear Steven, Mr. Springer, Apparently, VAM has asked for an independent surveyor to check on the physical inventory of the below WHRs in Pasir Gudang. They are claiming cargo belongs to them, but in Pacorini's records, these cargoes are under Straits (or our banks) so they can't show it to VAM.*
>
> *Were you aware of this inspection? Now Pacorini wants us to clarify why is VAM claiming cargoes are theirs. We need to have an explanation. Pls call me if you need to discuss*." (emphasis added)

237. It is notable that instead of Ms He saying "What is the explanation for this?" or "What have you been doing, how can VAM own the cargo?" she says "*We need to have an explanation*", which suggests that she considers that Straits' and Mr Kao's interests in explaining away this serious problem are aligned. I do not accept her evidence that she was "*just being polite*" in not asking Mr Kao what he was doing with the CSCs. I find that what Ms He meant by that was that they needed between them to come up with a dishonest explanation. She was really asking him "what shall I say we have been doing?". She accepted in evidence that VAM's claim to title was "*a major red flag*". I find that Ms He must have realised by this stage as well (if not before) that Mr Kao was

[42] In addition to MCM's 'Carlyle Transaction Schedule', see Mr Kao's witness statement §48 and §54; D3/D4 Reamended Defence §22.

using the CSCs in order to dishonestly represent to Western financiers that he was the owner of the metal so as to obtain finance from them.

238. I also reject her suggestion in evidence that there was "*confusion that someone [was] claiming our cargo ... and I would have to correct that and I wanted to confirm that with him.*" She does not suggest that there was any confusion in correspondence at the time, and nor was there. On the contrary, Ms He was wanting them to come up with an *explanation* as to how VAM could be claiming the cargo was theirs when Straits held the original WHRs. If there was "confusion", she could have simply replied to Pacorini that Straits had held the WHRs at all times and VAM did not own the metal. But she was very careful not to say that.

239. Mr Kao's response to Ms He by email dated 31 July 2015 (copying in Lindy Li and Ms Tan, as well as Mr Springer) was, perhaps unsurprisingly, almost incomprehensible. He said "*Are the Vam boys costing [causing] us problems again! In theory yes, they have claim to title, but not title they pay full. We have all stamped endorse CSC, its lending paper rather than actual purchase. If VAM took title via CSC I would like to know*." He suggested that they "*leave things as is*".

240. This was not much help to Ms He, not being answer to her problem, and she accordingly emailed Mr Kao again on Sunday 2 August 2015. She explained that:

> "*my concern is what to tell Pacorini given that the WHRs that VAM are inspecting does not belong to them. They are either held on my books, or pledged to my banks. Pacorini wants me to revert on the status of the WHRs so they can answer to VAM's surveyors, so should I just say tell them those do not belong to them*?"

241. It can be seen that once again, Ms He is only keen to assist Mr Kao to throw Pacorini and VAM off the scent. She is not concerned with understanding how it could possibly have come about that VAM were claiming title to the metal.

242. She did not get an immediate response and her concern was such that she emailed again on the same day, Sunday 2 August, some four hours later, stating:

> "*Hi Steven, Mr Springer,*
>
> *Can't seem to reach the both of you.*
>
> *I need to respond to Pacorini on the list of WHRs below <u>today</u>.*
>
> *Could I say that these WHRs are not under VAM's title? If I say that, they would respond to the surveyor accordingly. Not sure would that have any implications on your end*?"

243. Again, Ms He is not thinking that she must be honest with Pacorini and VAM; rather she is asking what she can say so as not to adversely affect her and Mr Kao's arrangements. She knew, of course, that the OWRs had been retained by Straits (and that that is what Pacorini's records would reflect) and so she ought to have been very concerned as to how VAM was claiming title, had she been acting honestly.

244. Mr Kao replied to Ms He by email dated 3 August and said "*We have now spoken and all good. Ball in your court with VAM and Paco!*".

245. It is not known precisely what was discussed between them. It may well be that they spoke by the deleted WeChat app. However, the outcome of their discussion can be seen in the misleading email that Ms He sent to Pacorini on the same day, 3 August:

> "*The below WHRs are held to Straits' order, not Vermillion.*
>
> *However, would it be ok to show them these cargoes (if they want a site inspection), or inform that these WHRs are indeed valid and sitting in the warehouse, as they are potential buyers who would like to confirm cargoes are indeed present in Pacorini's warehouse*." (emphasis added)

246. Ms He adopted the same line in her email on 3 August 2015 to Mr Springer, in which she stated "*We had informed Pacorini to allow for VAM to check the WHRS listed below. Pacorini did not allow these to be revealed to VAM initially as the cargoes belonged to Straits/our banks. But I have told them to go ahead to arrange as VAM could be buying these from our buyer i.e Genesis*". This was despite the fact that Pacorini had told her that VAM was claiming that the cargo belonged to it.

247. Mr Lewis QC for Straits submitted that this email demonstrates that Ms He was telling the truth to Pacorini, in that she said "*The below WHRs are held to Straits' order, not Vermillion*". I reject that submission. Pacorini already knew that the cargo was held to Straits' order because Straits still held the original WHR, which is why it contacted Straits in the first place. So this was not her "being truthful".

248. On the contrary, Ms He's email response is thoroughly misleading in stating that (i) VAM were only "*potential buyers*" and (ii) VAM's only interest was *"to confirm cargoes are indeed present in Pacorini's warehouse.*" Ms He knew that VAM could not be a potential buyer (since Mr Kao had never indicated any intention of purchasing the WHR from Straits which had never left Straits' possession), and she knew that VAM's intention in carrying out an inventory inspection at Pacorini was to inspect inventory that VAM thought belonged to it. Indeed, Ms He repeatedly accepted in cross-examination that she knew that VAM was indeed claiming title over the metal.

249. Rather, Ms He (and Mr Kao) wanted to give Pacorini the false impression that whilst the WHRs were held to Straits' order (as recorded in Pacorini's records), VAM merely wanted to inspect the cargo prior to purchasing it. VAM could then be shown the metal and nobody would become aware that Mr Kao had never purchased the WHRs from Straits (with whom they had been held throughout) and so could not possibly be selling the cargo to VAM.

250. I conclude that this was the story that she and Mr Kao concocted in order to ensure that VAM did not discover that it did not in fact own the metal which was the subject matter of the original WHRs (the "***Concocted Story***"). This was the first time that this false "potential purchaser story" was squarely used to throw third parties off the scent. It will be seen that this false narrative was also used by Ms He when the fraud was discovered; and the false suggestion that Mr Kao might be interested in purchasing the metal at some point in time to satisfy one of these fictional "potential purchasers" is how Straits' false "option to purchase" argument developed. I consider that it is very likely that Mr

Ang was a party to this Concocted Story as well, since he was the point of contact for Mr Kao in respect of all decisions of principle. Although it is not necessary for my conclusion on this point, I also infer that it is likely that Ms He and Mr Kao would have privately messaged each other – probably on WeChat - in order to agree upon this story, but that they both subsequently permanently deleted these messages.

251. Ms He's attempt to explain away these email exchanges in cross-examination was wholly unconvincing and, I find, not an honest explanation:

> "*Q. Now, that was just an outright lie, wasn't it?*
> *A. No, I believe that was what Mr Kao would have told me.*
> *Q. You believe it may be what he told you, but that wasn't true, was it, because they were not potential buyers, were they?*
> *A. I don't -- why can't they be potential buyers?*
> *Q. Well, they are asserting ownership in the cargo, so they are not potential buyers, are they? In their mind, they are the buyers.*
> *A. Yeah, so there is obviously a misunderstanding and a confusion.*
> *Q. And they could not be potential buyers either because you were never giving the original warehouse receipt to Mr Kao's company Genesis, were you?*
> *A. Potential means they have notified, right? So, I mean, if Mr Kao paid us in full Mr Kao would receive the warehouse receipt and would pass it on to Vermillion.*
> *Q. Let's just pause there, Ms He, because this would be under a type 4 transaction, and the position, as I understand it, under the type 4 transaction, which you have accepted in evidence yesterday, is that payment is made by Mr Kao's side of the purchase price and almost at the same time you repay that amount, less your fee for the first five or seven days. That's correct, isn't it?*
> *A. Yes.*
> *Q. So under the type 4 transaction, there was never any scope for Mr Kao just paying you the full price and you handing over the original warehouse receipt because that was never part of the transaction, was it?*
> *A. It was never discussed, but, I mean, in essence if because the essence of the transaction is that we were holding on this on his behalf, on his asset pack requirement, so no matter how, you know, the trade was structured, right? If he wanted the underlying he could always ask from us and pay for it.*"

(emphasis added)

252. Consistently with the explanation which Ms He and Mr Kao came up with after they discussed this difficult situation, Ms He told Mr Springer in her email of 3 August that the *"[i]ssue is Paco got confused as they thought VAM was trying to establish ownership than existence. We have to emphasise to them that isn't the case.*" This led Ms He in her evidence to suggest that in fact this was all just a misunderstanding and that VAM only wanted to confirm that the cargo existed and not that they owned it, despite her having stated in her contemporaneous email that VAM were "claiming cargo belongs to them". I reject this evidence and find as a fact that Ms He knew that VAM were claiming ownership and so she and Mr Kao came up with the potential purchaser excuse to throw them (and Pacorini) off the scent. She then made sure that Mr Springer was made aware of the party line.

253. It follows that I accept MCM's submission that this exchange between Ms He and Mr Springer is, in truth, an instance of Ms He and Mr Springer communicating in order to agree a theoretical position capable of being stated to a third party (Pacorini) in order to prevent a victim of the fraudulent scheme from discovering the true position; rather than an instance of Mr Kao telling Ms He a false fact which Ms He believed to be true.

254. However, Pacorini did not let the matter drop. By email dated 3 August 2015 to Ms He, they stated:

> "*Are u saying that these Straits' WRs will potentially be sold Vermillion? Vermillion wish to inspect these materials before deciding whether to buy or not*."

255. However, because Ms He was in a meeting, Ms Lindy Li replied and she gave a different explanation to Pacorini. She stated:

> "*Vermillion will likely be funding our customer to purchase this cargo and will like to inspect these materials first."*

256. Pacorini then asked if VAM was aware of this arrangement. Ms He then replied later that same day and stated:

> *"I was told by my buyer that Vermillion has the intent to buy the cargo from my buyer. So, they are aware of this arrangement. If they are confused, pls ask them to sort it out with their counterparty directly*."

257. Pacorini then stated that if Straits would allow VAM to check the physical existence of the metal which as the subject of these WHRS they would act accordingly. This was what Ms He wanted to hear: VAM were just to check that the physical inventory was there. She had thrown Pacorini and VAM off the scent. As she explained to Mr Kao and Mr Springer on the same day:

> "*Dear Steven, Mr Springer,*
>
> *We have clarified with Pacorini, and they would be speaking to VAM to let them know that the cargo exists. As the original WHRs have not been returned to Pacorini, their records state that cargoes still belong to Straits, and with Straits' permission, they are allowed to inspect the cargo if required. Hopefully this will close the case with VAM. Pls update us if you do hear from them, thanks*." (emphasis added)

258. This was the deception: Pacorini were deceived by Ms He and Mr Kao into believing that the original WHRs had been transferred to Straits' buyer (Genesis), but until those WHRs returned to Pacorini, Pacorini's records still stated that the metal belonged to Straits. VAM were looking to purchase the WHRs from Genesis and so they wanted to ensure merely that the cargo existed. In fact, Ms He knew full well that the WHRs in question had never left Straits' hands.

259. Ms He then followed this up with a subsequent email to Mr Springer two days later, on 5 August, saying "*I suppose no news is good news? Everything is ok*?". It appears that they heard nothing further and Pacorini and VAM had been successfully misled. No

doubt VAM inspected the metal in the belief that it owned it; Pacorini allowed it to inspect it in the belief that VAM was merely a potential purchaser.

260. Meanwhile, despite the fact that Straits were supplying Mr Kao's companies with the CSCs against payment of the spread, Straits continued misleadingly to document these Type 4 transactions as being classic repo transactions, requiring the exchange of original WHRs under a sale and purchase of the metal.

261. An illustration of this is provided by Sales Contract TSS01057 dated 29 September 2015 between Straits and Genesis Resources (Mr Kao's company) which states:

> "*Straits … (hereinafter called "Seller") confirm having SOLD you the goods specified below under the following terms and conditions:*
>
> *1. Goods: Any LME registered Nickel Briquettes/cathodes*
>
> *2. Quantity: 1018.523 metric tons*
>
> *3. Origin: At Seller's option*
>
> *4. Total amount: USD 10,030,000.00 – 10% in Seller's option; unit price will be determined by both parties during delivery.*
>
> *5. Delivery Period: September 2015*
>
> *6. Delivery Basis: In any LME approved warehouse in Seller's option…*
>
> *8. Payment by Telegraphic Transfer upon receipt of cargo title at sight of the following documents:*
>
> *Documents required for payment:*
>
> - *Commercial invoice showing full description of Goods*
>
> - *Original warehouse receipt/warrant*…" (emphasis added)

262. There was then a corresponding purchase contract TSS01057 dated 29 September 2015 between Straits and Come Harvest which states:

> *"Straits … (hereinafter called "Buyer") confirm having PURCHASED from you the goods specified below under the following terms and conditions*
>
> *1. Goods: Any LME registered Nickel Briquettes/cathodes*
>
> *2. Quantity: 1018.523 metric tons*
>
> *3. Origin: At Buyer's option*
>
> *4. Total amount: USD 9,999,910.00, -5% in Buyer's option; unit price will be determined by both parties during delivery.*
>
> *5. …*

> 6. *Delivery Period: Within 7 calendar days after document submission under TSS01057.*
>
> 7. *Delivery Basis: In any LME approved warehouse in Buyer's option…*
>
> 9. *Payment by Telegraphic Transfer upon receipt of cargo title at sight of the following documents:*
>
> *Documents required for payment:*
>
> - *Commercial invoice showing full description of Goods*
>
> - *Original warehouse receipt/warrant*
>
> 10. *… Should the actual date of delivery be later than that stated under Clause 6, the Seller is liable to pay the other party a compensation of USD 3.44 per metric ton (+/- 5% in Buyer's option), per calendar day of delay.*" (emphasis added)

263. I find that these documents were shams, designed to mislead third parties. They were a cover, designed to hide what was really taking place. I do not accept Straits' submission that the nature of the contractual structure adopted by the parties is immaterial or of secondary importance. Nor do I accept the submission that the Straits Contracts were intended to be a blend of these written contracts as well as oral communications and an understanding derived from a course of conduct. That is all *ex post facto* rationalisation by Straits to seek to explain away the sham nature of these contracts. As Mr Vollebregt opined, they were written by way of a purchase of metal with the obligation to sell back to Straits at a fixed price (but both Straits and Mr Kao knew that that was not what was happening). They were not written as an option to purchase. They did not operate as repos nor were they physically settled at any point. I do not accept Mr Nizan's assertion that they operated as "hybrid contracts".

264. In addition, sometime after July 2015 what have been called "master contracts" were prepared by Ms Tan.[43] The master contracts were issued at the end of each month (or at the start of the following month), and provided for the offsetting of payments under any outstanding transactions. To that end, Ms Tan and Ms Jessie Li would exchange, via QQ Chat, a spreadsheet entitled "*Genesis-Straits Compilation*", which set out the calculations of accrued fees underlying the numbers which ultimately found their way into the written contracts. It follows that the written contracts did not in truth serve any function of either calculating or claiming accrued fees: that function was performed by the spreadsheets. This further confirms that the written contracts were sham documents designed to mislead third parties into believing that Straits and Mr Kao were transacting perfectly standard repo transactions when they were doing nothing of the sort.

265. Ms Goh, meanwhile, continued to have serious concerns about Straits' business with Mr Kao and his companies. On 11 December 2015 she separately enquired of CWT's Finance Director, Chan Ling, whether Mr Kao was using the WHR to pledge for borrowings in China. She pointed out that "*If we are doing the same thing, wouldn't this be multiple financing involved for the same lot of cargo? Please establish and get back.*" Chan Ling added that "*I just want to make sure we don't contribute to multiple*

[43] Tan 1 §21.

financing and get implicated. Bear in mind that [Kao] gets the WHR from [Straits]. Can you get hold of a sample copy and see what is on the face of the WHR and anything impress on the reverse of the WHR issued to [Kao]."

266. Ms Goh specifically asked Ms He, by email dated 15 December 2015, the following question:

> "*Can you advise precisely how [Kao] use the WHR at the China end. I am assessing if the same lot of cargo is used to secure multiple financing. Thanks.*"

267. In her reply on the same date, Ms He repeated more or less the explanation she had given on 20 April 2015. In response to further questioning, she described Straits' arrangement as follows:

> "*As mentioned, we structure the transaction as a repo (sale and purchase), so there is no mention of pledge in the contracts. The WHR title stays with Straits until such time SK pays us full cargo value. However, since we buyback the cargo on a back to back basis, there is no need to release the original WHR to SK at any point*".

268. This was misleading, as it suggested that (i) the Type 4 contracts were true sale and purchase contracts for the metal when they were not (neither Ms He nor Mr Ang could explain in cross-examination why Ms Goh was told this); (ii) the WHR title in the metal would pass upon payment in full for the cargo, whereas in fact all that was happening was that Mr Kao was paying the spread for the use of the CSCs (hence the netting off under the master contracts) and the holding by Straits of the original WHRs until Kao told it to cancel them. Moreover, Ms He continued to make no mention to Ms Goh of any of the adverse title claims by parties such as VAM. In cross-examination she sought to suggest that that was because it was purely an "operational matter" but it was clearly much more serious than that and known to be so to Ms He at the time.

269. Ms He had also stated in a subsequent email on the previous day:

> "*From Straits' perspective, <u>our sale of WHR to SK</u> allows for him to drawdown the bank's credit line for trade purposes…*" (emphasis added)

270. This too was misleading, as it suggested that Straits was selling the WHRs to Mr Kao when it was not.

271. On 16 December 2015 Chong Ming Yong, Straits' finance director immediately pointed out that this was not his understanding of the transactions with Mr Kao:

> *"As we only have the purchase and sales contracts, so nowhere will it state that the WHR is pledged. Based on my understanding, there is no pledge, but just an arrangement where we hold the WHR for them and charge 3.5bps/day. A pledge would suggest that the goods belong to SK and place with us as collateral, but this is not the case as the goods still belong to [Straits]."*

272. At the very same time that Ms Goh and Mr Chong were expressing their serious concerns about the nature of Mr Kao's business which Straits was financing in such large sums, Ms He was seeking to transact even greater quantities of business with Straits. In particular, on 11 December 2015 Ms He emailed Mr Kao and Mr Springer

and told them that she was talking to another financing party "*so just want to be sure that you still have demand for CSC as long as you can do it with VAM on your end*."

273. At the same time Ms Goh told Ms He and Mr Ang that she might have to recall part of the financing funds which had been allocated to Straits. This led to Ms He informing her that there were deals with Mr Kao that Straits had locked in for 90-180 days duration and so if CWT clawed back a significant amount, Straits would face an issue fulfilling its obligations for his deals. Ms Goh responded by saying that money was not unlimited and Ms He should not lock in deals with Mr Kao for more than 90 days.

274. Meanwhile Ms He and Mr Jeremy Ang continued to meet Mr Kao, this time in Singapore on 14th December 2015 for discussions and dinner.

(VII) CARLYLE/VAM AUDIT FEBRUARY 2016

275. The next problem which arose for Straits and Mr Kao concerned an audit which Carlyle (VAM) wished to carry out in February 2016 in respect of what they believed to be stock that they owned at Pacorini. On 23 February 2016 Mr DelMazio of Carlyle informed Pacorini that:

> "*We're looking to have Alex Stewart (Assayers) visit your Pacorini Johor warehouse to verify the Nickel and Copper inventory <u>we currently own</u>. Lily and Annie (copied on this email) will be reaching out to you to schedule a time for a visit. Please use this email as consent for Alex Stewart to check the inventory on our behalf.*" (emphasis added)

276. Ms He said in cross examination that she didn't know whether she read this email. I find as a fact that she did read it, as it is in an email chain which was sent to her and to which she substantively responded. She accepted in cross-examination that Carlyle clearly believed that they owned this stock but she denied that she thought at the time that they owned it. I do not accept that evidence. I find as a fact that she read the email and that she did therefore know that they believed that they owned this stock.

277. The next day, 24 February, Pacorini sent a *stock report* for Carlyle to Ms Tan at Straits and asked her to check and confirm it. It is apparent that Ms Tan immediately escalated this issue to Ms He on 24 February, by providing the 46 WHR numbers and stating that *<u>Straits' records showed</u>* that Mr Kao had obtained finance from Carlyle in respect of them. In other words, Straits knew that Carlyle had financed this cargo and there was no question of it being a potential purchaser. Ms He accepted this in cross-examination but then sought to suggest that Ms Tan misunderstood or meant something different as she was very junior. I reject that evasive evidence. As was put to Ms He, the document says what it says. It is clear that Straits kept careful and accurate records of the transactions that Mr Kao and Straits each entered into in respect of each WHR. In cross-examination Ms Tan admitted that Straits had "*records of our deals with Steven Kao"*, and of all the PMA Letters that it sent out in relation to the CSCs that it was sending.

278. Mr Davies QC for MCM concluded his questions of Ms He in respect of this document with the following revealing exchange:

"*Q: And you knew at this time that Carlyle would not finance or provide finance to Mr. Kao in respect of the cargo without receipt of what it understood to be an original warehouse receipt didn't you?*

A. Yes."

279. Ms He in turn immediately notified Mr Kao and Mr Springer of the problem. She asked them to confirm that the WHR numbers which she listed were accurate. They were all WHRs of which CSCs had been supplied to Mr Kao's companies. Ms He must have realised that Mr Kao had again been using the CSCs to mislead Carlyle into believing that he owned the metal.

(VIII) CARLYLE CLAIMS OWNERSHIP OF FURTHER WHRS: THE PMA LETTERS

280. Matters became more serious still when, at the same time, on 25 February 2016, Ernst & Young, the auditors for Carlyle, told Pacorini that Carlyle had PMA Letters and that it owned the stock referred to in each of those letters:

"*It seems that all the inventory corresponding to the warehouse receipts referred in the PMA letters belong to Carlyle as well. However the confirmation (stock report) we received from you did not include the attached may you please send a revised stock report as of 31 December 2015 which includes the above*."

281. This email was forwarded to Ms He on the same day and she immediately forwarded it on to Mr Kao and Mr Springer, stating as follows:

"Pls find below email from VAM's auditor to Pacorini. They would like Paco to provide the stocklist to them. Problem is that a portion of our cargoes are financed with banks, hence under Pacorini's stocklist, there would be a column indicating the bank description i.e CIMB.

I attached the enclosed "sample stock list" for your review. We are concerned that the auditor will pick this up and post more questions. From their email below, they want to confirm the inventory corresponding to the warehouse receipts referred in the PMA letters belong to Carlyle, and that could be a challenge since originals are not held with Carlyle.

How do you want us to go about responding to this?"

282. Ms He knew that Pacorini would have Straits recorded as the owner of the metal and that that was not inconsistent with the WHR having been endorsed on to Mr Kao's company, where the WHR had not arrived back with Pacorini. It followed that the fact that Straits was recorded by Pacorini as the owner of the metal / original WHR was not a problem for Straits and Mr Kao. But what would be a serious problem for them would be if Pacorini told VAM that Straits had pledged that original WHR to its bank (such as CIMB), because then VAM would know that it could not be the owner of the same WHR – in other words, it would realise that Kao had defrauded it. I find as a fact that Ms He must have known that if VAM was claiming to own the stock, this meant that Mr Kao had been using the CSCs in some way to obtain financing by pretending to transfer title in the metal which Straits owned to VAM.

283. It is also notable that *Ms He asks Mr Kao* how to go about responding to this, despite the fact that it is Straits which holds the original WHRs and it does not hold them on behalf of Mr Kao, as Ms He accepted in cross-examination. Once again, Ms He does not ask Kao "what are you doing with Carlyle?" That is, I find, because she must know by now (if not before) what Mr Kao is doing with the CSCs with which Straits is providing him. This is not just a "drafting point" in her email, as Ms He untruthfully suggested in cross examination. It is very much more than that.

284. Mr Kao's response to this email on the same day, 25 February, is I find a dishonest response. He tells Ms He:

> "*Slow down Sherraine ... Pacorini can only confirm to the holder of the originals that all since in theory you don't have the original whoever the holder of the original will be the owner at [the] time... You don't know who we sold it to after you repo it with us.*"

285. Ms He must have known that this is a pack of lies. Mr Kao no doubt says "in theory" because they both know that Straits <u>does</u> hold the original WHR and it has never been supplied to Mr Kao's companies. Mr Kao is suggesting that because he has purported to sell the original to his financier, VAM, Straits can say that it does not hold the original. In fact they both knew that Straits did not repo the original WHR with Kao and that Kao did not sell it to anyone. I find that Ms He must have known that this was to be the "party line" and that these were lies designed to mislead Pacorini. I reject her (inevitably confused) evidence in cross-examination to the contrary, which was that all that Mr Kao was telling her in this email was that he does CSC trades and that Mr Kao's reference to Straits in theory not holding the original is because Straits had pledged some original WHRs to its financiers. Ms He accepted in cross examination that "*in hindsight*" "*this looks bad on Straits*" and "*is terrible*", but then sought to suggest that these emails concerned mere "*operational matters*", when they were clearly much more significant than that.

286. In a separate email on 25 February 2016 shortly after sending this to Ms He, Mr Kao emailed Melinda Kao of Genesis (Mr Kao's niece) and said "*This is bad*". It was indeed "bad" for him.

287. Ms He then emailed Mr Kao further on 25 February 2016. She told him that "*We got Pacorini to send across the stocklist [to Ernst & young] without the bank description and confirm that those cargoes sit in Pacorini warehouse*." In other words, she deliberately removed the reference to Straits having pledged some of these WHRs for financing (so as not to tip VAM off that it had been defrauded by Mr Kao) and she deliberately omitted to tell Pacorini that the WHRs could not be owned by VAM. I find that once again she thereby colluded with Mr Kao to find a way to throw VAM off the scent. I reject Ms He's evidence in cross examination that she did this because she understood that Mr Kao was trading CSCs and it could cause confusion for Mr Kao and his bank. In her email she then reiterated the deceitful excuse that Mr Kao came up with which was to be the party line:

> "<u>*Our argument*</u> *is that Pacorini cannot confirm who is cargo owner as they do not know who holds the original WHR.*
>
> *After this we just have to wait and see. Will keep you posted*." (emphasis added)

288. It is notable that she refers to this as "our argument". It was indeed a dishonest argument which I find was cooked up by the two of them. She chose not to tell Pacorini that Straits was the owner, having held the WHRs throughout. She instead misled Pacorini and VAM into believing that Straits had transferred the WHRs out to Mr Kao's companies and that Pacorini could not confirm who was the cargo owner until the WHRs were returned to it.

289. In cross-examination Ms He sought to suggest that this was all a misunderstanding on VAM's part in the same way that there had been confusion regarding VAM's claim to ownership of metal for which Straits held the original WHRs and so this was just "an operational issue", but I reject that evidence which I find to be untruthful. Straits held the relevant records for these WHRs and I find that she must have known (or at the very least strongly suspected, yet deliberately chose not to ask) that Mr Kao was using the CSCs in some way in order to pass himself off as the owner of these cargoes.

290. Ms He inevitably had to accept as follows in cross-examination:

> "*Q. Well, the reason [for this argument] Ms He is that you want to ensure that VAM's auditor will not find out that you or your bank own these warehouse receipts, that's correct isn't it?*
>
> *A. Yes.*"

291. However, Ernst & Young refused to be thrown off the scent, and on 25 February 2016 they emailed Pacorini again and stated as follows:

> *"The attached stock report now shows the customer name as "Straits (Singapore) Pte Ltd" — which still does not agree to the PMA letters I sent over to you. I am attaching all PMA letters for your reference again. Based on the attached PMA letters — following should be the customers/owners for these warehouse receipts…"*

292. They then listed out further, numerous WHRs belonging (they believed) to Carlyle and two others belonging (they believed) to VAM. The auditors demanded an early response.

293. This was a serious problem for Straits and Mr Kao. Once again, Pacorini emailed Ms Tan about this and she passed it straight on to Ms He. Ms He accepted in cross examination that she knew that VAM, through Carlyle, were claiming ownership of these further WHRs.

294. In her witness statement at paragraph 149 Ms He said this:

> "*If I had believed that VAM was under the impression it was holding original warehouse receipts when we had only supplied copies, I would have been extremely concerned and I would have urgently taken action with Access World to verify the position and to protect Straits' interest. I would have done that because it would have meant a third party was claiming title to our metal or metal belonging to or secured by our banks, which would have been an immediate cause for concern. I likewise had no reason to suspect that Mr Kao had given false documents to VAM.*"

295. In fact, she did nothing of the sort and I find this to be untruthful evidence. What in fact happened was that Ms He then emailed Mr Kao and Mr Springer once again on 26 February 2016 and colluded to find a false excuse to explain this issue away. In her email she stated:

> "*Dear Steven, Mr Springer,*
>
> *Pls see email from the auditor to Pacorini below.*
>
> *Apparently, they are writing directly to Alfred, head of Metals in Pacorini telling them what is required. We can't get Pacorini to get them to retag to the below, as original WHRs are not held with Carlyle. Would it be alright if Pacorini respond to say: "As we have not received the original WHRs, we cannot retag these WHRs as per below".*
>
> *Otherwise, pls advise how else we should respond.*"

296. Mr Springer replied: "good answer". He does not say, it is to be noted, "*that is the right answer*" but rather says "*good answer*". It was a good answer in terms of covering up the fraud. This answer was of course, deliberately misleading, by once again making this appear to be an administrative issue (non-receipt by Pacorini of the original WHRs which have on this false premise supposedly been transferred out to Mr Kao's company and not yet received back by Pacorini) rather than a substantive issue: that Ms He and Mr Kao knew full well that Carlyle did not own these WHRs and that they were owned by Straits or pledged to Straits' banks, and held all along by Straits. Once again, there is no question of Ms He saying "What on earth are you doing with the CSCs that Straits is supplying to you?" That is because she either knew what Mr Kao was doing with them or at the very least strongly suspected, and so deliberately chose not to ask.

297. Accordingly, in line with this dishonest agreement, Ms He emailed Pacorini on 26 February 2016 and misleadingly stated:

> *"You can let [Ernst & Young] know that as a matter of fact, Pacorini has not received the original WHRs, hence you cannot retag these WHRs as per below until the original WHRs are returned, duly endorsed by order party."*

298. Once again, she deliberately chooses not to tell Pacorini in this email that Straits holds and has always held the original WHRs, and so VAM cannot hold them and there is no question of them being "returned" to Pacorini by VAM or anyone else. In cross examination Ms He had no answer to the question as to why she did not tell Pacorini that simple fact. When it was put to Ms He that the simple answer would have been to say that Straits have the original WHRs and VAM should not be claiming ownership, Ms He responded that she didn't know why she didn't say that but "*I was not lying technically, right?*" That is not the response of an honest witness.

299. Ms He further emailed Pacorini on 29 February 2016 and stated:

> "*You can respond to them that the stock report is tagged as per Pacorini's records. Unless Carlyle intends to take over the warehouse rent, Straits would not give instruction to tag the cargo to them. This arrangement is agreed with our repo counterparty, hence any further issue, pls take it up with them directly*."

300. Again, this was deliberately misleading, as Straits held and had always held the original WHRs itself.

301. Ms He finally emailed Mr Kao and Mr Springer on 28 February, copying in Ms Tan and Ms Li, and stated:

> "*Have asked Pacorini to respond based on the below.*
> *Pls try to get Carlyle not to pester Pacorini further, and best to be able to just have Pacorini confirm the WHRs are valid and cargoes are indeed in the WH.*
> *If this escalates further, Pacorini may think that we are in some dubious business and may stop allowing us to issue PMA letter for future business.*"

302. Once again, Ms He reverts to the position of seeking to have Pacorini (inadvertently) mislead Carlyle by merely *confirming that the WHRs are valid and the cargoes are indeed in the WH.* Ms He was fully aware that by misleading Pacorini - and therefore Carlyle/VAM - by what she omitted to tell it, Straits and Mr Kao would prevent them from recognising Straits and Mr Kao were indeed engaged in "some dubious business".

(IX) TYPE 5 TRADES: DID THE PARTIES AGREE THAT MR KAO'S COMPANIES HAD AN OPTION TO PURCHASE THE METAL?

303. On 30 March 2016 Genesis, through Mr Silverstein, approached Mr Riley to enquire whether MCM would be interested in participating in repo trades of nickel, Mr Springer apparently having left Genesis in or about January/February 2016. On 31 March 2016 Mr Silverstein emailed Mr Lawson to inform MCM about the proposed trade structure, including that the warehouse receipt could not be issued in MCM's name. On 1 April 2016 Mr Silverstein provided Mr Riley with examples of the documents that were to be used in the transactions, namely a PMA Letter and endorsed warehouse receipts. On 4 April 2016 Mr Riley provided Ms Young of ANZ with the example PMA Letter and the endorsed warehouse receipts which Mr Silverstein had provided to Mr Riley.

304. On 10 April 2016 Mr Silverstein informed Mr Riley by email that some of the metal would come from a sister company of Genesis which would require a separate LME account. Mr Silverstein explained that the account would be handled by Mr Silverstein, Mike Weissman and Steven Kao.

305. Having lined up MCM, on 25 April 2016 Mr Kao emailed Ms He and told her of a "change in structure" for his trades. This was the start of what Ms He calls the "Type 5" trades. Mr Kao stated:

> *"Hi Sherraine,*
>
> *Per tel-con, on behalf of CH we have confirmed $5mm WHR for Nickel to be provided this Friday. Straits' Repo counterpart will be CH round trip, meaning sell and buy back from same entity, CH. <u>All else remain the same</u>. We anticipate to trade up to $50mm in the next 45 days*" (emphasis added)

306. There was no mention of Mr Kao having any option to purchase the metal – as he stated, "all else remained the same". Since it is common ground that the Type 4 and Type 3 contracts did not contain any option to purchase – and Ms He herself accepted that in

cross-examination – I agree with MCM's submission that there must have been likewise no option to purchase granted to CH/MW under the Type 5 contracts.

307. Mr Ang gave evidence that he did not "*know for a fact whether"* he was on this "tel-con", but said he "*would think"* he would have "*agreed with Mr Kao"* the "*change in structure"*. I consider it likely that he would have been on the call; but in any event I find as a fact that Mr Ang agreed this new structure with Mr Kao.

308. Ms He appeared delighted, replying "*Hi Steven, thanks for the long awaited new business*."

309. On the same day Ms He emailed her Straits services team to say "*Hi Team. Going forward pls only use "WHRs" in [Kao] emails and do not use "CSC" anymore*." I consider it likely that this was agreed between Mr Kao and Mr Ang/Ms He in their "tel-con". Ms He said in evidence that Genesis had asked her to ensure that this was done, although there is no documentary proof of that fact. Whether that be true or not, if as I consider it to be the case, Ms He knew or suspected that Mr Kao was dishonestly using the CSCs in some way in order to purport to pass title in the metal and that the WHR would in fact remain at all times with Straits, then it made obvious sense to obscure this fact by referring in all emails to WHRs and not CSCs. In any event, it is extraordinary that Ms He did not question this highly suspicious and misleading request if indeed it came from Genesis. I consider it more likely that this was part of the agreed plan to mislead, with Straits now well and truly embroiled in Mr Kao's dishonest scheme.

310. On 28 April 2016 Ms Tan had a number of instant private message exchanges with Jessie Li (an employee of Mr Kao). Ms Tan shared with Ms Jessie Li details about the Type 5 transactions agreed between Mr Kao and Ms He as follows:

> "*Hello Dear! Contacting you in relation to the contract and settlement*
>
> *1. We will charge fees from tomorrow for the receipt sent yesterday, and the mode of the contract has also been changed according to STEVEN's idea. Previously it was a tripartite contract. Then it was changed to the REPO mode, signed by both parties (CH and SSPL). With this new model, we don't have to route the funds anymore. There are still some funds not routed yet and we'll talk to MR SPRINGER.*
>
> *2. Whenever we issue the warehouse receipt, we will also prepare the contract and the invoice. The 0.3% fee for the first seven days will be specified. I also need you to prepare the invoice for me.*
>
> *3. For the 0.035% charge per each subsequent day, we will continue to deal with it at the end of the month according to the original practice.*
>
> *4. All other charges of #2 and #3 will be settled at the end of the month.*"

311. Ms Tan was accordingly fully in the picture about the new arrangement and this email was clearly designed to capture all of the significant terms of it. Under this new arrangement, as Ms Tan confirmed, the parties were no longer paying the purchase price and the repurchase price in full, but rather Straits would simply charge a fee for the margin. It can be seen that there is no suggestion whatsoever that there is any option to purchase on the part of CH. Ms Tan was reluctant to accept that and sought to defend Straits' case in giving this implausible evidence:

> "Q. *if Ms He had told you these contracts are options to purchase, you would have recorded it, presumably, in your email to Ms Li?*"
>
> *A. Not necessarily. Because at the point that −− I think what we are trying to contrast is more of the how the contracts will be drafted, as well as the fees. I think the rest of the commercial decision wasn't captured in this text and now the chat, it says: "I do not think I 'm going to rush because (inaudible) required immediately.*"

312. There was not a single exercise of an option under any of these contracts by CH or MW and such an option is nowhere referred to in the contemporaneous documents, including the emails and the instant messaging (as Ms He accepted in cross-examination).

313. Ms He suggested for the first time in her oral evidence that there was in fact an *oral* agreement to this effect. However, she then accepted in cross-examination that whilst she had referred to this supposed option in her witness statement, she had not said that it was the subject of an oral agreement, nor between whom. Ms He was unable to recall during cross-examination when this alleged oral agreement which she said had been made between her and Mr Kao was reached, stating "*I can't remember exactly when but he is fully aware that if he needed the option to purchase the contract he would then have to pay the full price of the cargo*". But that, of course, does not demonstrate the reaching of an oral agreement. Obviously if Mr Kao wished to ask to purchase the cargo he would have to pay the full purchase price (he never did so). But even then, Ms He accepted in cross examination that this would have required "an appendix to the contract".

314. Mr Jeremy Ang gave a yet further account of this alleged arrangement. Contradicting Ms He's evidence, he said "We did not discuss it as an option" (emphasis added), despite the fact that he thought that he would have been the person to agree the new structure with Mr Kao. Mr Ang's evidence is consistent with Mr Kao's witness statement (for what it is worth) in which he states at paragraph 76 that he never agreed an option to purchase. Given that an option would have been a fundamental part of the contractual structure, in view of their consistent practice I find that such a change would have been discussed between Mr Kao and Mr Jeremy Ang. But it was not.

315. Mr Ang then rather vaguely asserted that "*we probably discussed that, you have the right, we are reserving these metals for you, for you to purchase it on that basis*." As MCM submits, taken at its highest, this evidence is to the effect that Straits had agreed to retain the metal at all times until told to cancel – which was the position for the Type 4 trades as well, and another feature of the Type 4 trades which continued for the Type 5 trades.

316. There was then the following exchange between Mr Ang and the Court:

> "*MR JUSTICE CALVER: I'm just trying to understand. That's how you interpreted your agreement, was it, but you didn't actually discuss with him whether he had an option to purchase? You didn't have a discussion with him about that. Is that right or is that wrong?*

Answer: We explain as to say, look, I need you to basically hold these metals for us. If we need it, you have to have it for us. That was the agreement we had with Mr Kao -- or Come Harvest.

MR JUSTICE CALVER: So you say you personally had that discussion with him, do you?

Answer: I had discussion in terms of this. I'm not sure -- I can't remember whether it was Kao. How it started and what it is, but technically, a structure that I say was always discussed but I can't remember who it was with.

MR JUSTICE CALVER: I'm just trying to be clear whether you actually had that discussion with him or whether that was what you understood, because in answer to a question earlier from Mr Davies, you said. He said: "How is it you can suddenly remember about this, Mr Ang, but you can't remember anything else from this period."

Answer: I did not remember, I'm just reading from what is there." Which is a reference to your witness statement in the passage we looked at, where you say in your statement: "I understood from Sherraine at that time that we would provide Come Harvest and Mega Wealth with the option to purchase the metal." So that's why I'm asking you this question. It's important to understand your evidence. Is it that Sherraine told that you there was an option to purchase the metal on the part of Come Harvest and Mega Wealth or were you told that by Mr Kao?

Answer: I know it was Sherraine that told me about it, but whether I did speak to Mr Kao or anyone at Come Harvest, that I'm not sure.

MR JUSTICE CALVER: Thank you."

317. Mr Ang's recollection is clearly hazy and confused and I consider it to be unreliable on this issue. I find as a fact that he never agreed any such option with Kao and he is here, to his discredit, attempting belatedly and unsuccessfully to support Ms He's untruthful account.

318. Moreover, Ms He said in her witness statement that "*the contracts were all structured as repos, but with the option for Come Harvest or Mega Wealth on whether to uptake the metal*". But that is not in fact how the Straits Contracts were "structured": they do not refer anywhere to any "option on whether to uptake the metal." Such an option would have been a fundamental part of the contract agreed between Straits and Mr Kao, and would surely have been recorded as a written term thereof had it been agreed. Indeed, in paragraph 136 of her witness statement Ms He was compelled to accept that "*In hindsight, I can see that the wording of [these] contracts did not fit with what was actually agreed with Mr. Kao and his companies*."

319. Had such an option been agreed, the parties would have specified the price payable in the event that the option was to be exercised, together with any other terms (such as the alleged obligation to re-sell posited by Straits). They did not do so. The fixed price stipulated in the written sale contract was not the price payable for the exercise of any option to purchase – its purpose was to enable the initial margin to be calculated for the

first 7 days' use of the CSCs with Straits holding the metal, which was determined at the outset when the two fixed prices were netted off.

320. It is also significant that the two changes to the Type 4 arrangements, specifically described in Mr Kao's email of 25 April and Ms Tan's recap of 28 April, *are* seen in the written contract documents: (i) the same counterparty appeared as 'buyer' and 'seller', and (ii) a net settlement provision was introduced into the initial ('basic') sale and purchase agreement (rather than simply under the 'Master Agreement'). Ms He said that the netting off provision was added by her or on her instructions. In contrast, nothing was said about this new supposed option to purchase.

321. These confused and inconsistent accounts as to the coming into being of this supposed option to purchase must also be viewed in the light of the expert evidence of Mr Vollebregt, which I accept, that "*you do not come across options without an expiration date, as indefinite options are very hard to price and would in principle entail an indefinite obligation*". As Mr Vollebregt states, the Straits Contracts do not even bear the basic features of an option contract which consist of the following:

i) A clear description of the underlying commodity or futures contract;

ii) A clear definition of expiration date (and time) and what actions need to be performed and when, when exercising the option;

iii) How the strike price would be settled between parties;

iv) How the underlying metal will be delivered to or by the Buyer of the option.

322. Ms He suggested that Mr Kao wanted the right to be able to buy and take delivery of metal stored at specific locations and at a price that was already fixed. I do not accept this evidence. I do not accept that Mr Kao wanted such a right, nor that he wanted the metal stored at specific locations. Mr Kao consistently stated to Straits that as long as the metal was in a LME warehouse that was fine: see for example Ms He's WeChat messages with Mr Jeremy Ang on 6 October 2016 in which she stated "*Dunno. They always say as long as LME warehouse no issue … But I'm pushing n telling them it's all LME WH as per agreed*."

323. In conclusion on this topic, I find as a fact that despite each of Ms He's, Mr Ang's and Ms Tan's reluctance to accept the fact, no such option was ever discussed or agreed. Rather, it has been thought up after the event, probably by Ms He, in an attempt to justify Straits' improper behaviour.

(X) MR KAO SUPPLIES FORGED WAREHOUSE RECEIPTS TO MCM; STRAITS' KNOWLEDGE THAT MCM WAS BEING TARGETED

324. Returning to the relevant events, on 28 April 2016 Mr Silverstein emailed Mr Riley and attached a *copy* of a PMA Letter from Pacorini, *which Straits had been asked to procure*. He said he would revert with an "advance *copy of the warehouse receipt as soon as received*".

325. The PMA Letter was addressed to MCM (i.e. ED&F Man Capital Markets Ltd). It read:

"*WAREHOUSE RECEIPT NO. PMSG/MY/0021184*

We hereby confirm that, upon receiving the original warehouse receipt duly endorsed, signed and dated by the order party, and subject to payment of our warehousing fees, we will release the goods to the endorsee without further written instructions from the order party.

We hereby disclaim and shall not be responsible for any liability, losses, damages, costs or expenses that you or any third party may incur arising from the release of the goods to the endorsee without further written instructions from the order party."

326. The instruction to Straits to procure the PMA Letter addressed to MCM was communicated by Ms Ko (operations manager at CH) to Ms He and Ms Tan directly, after Ms Tan had asked Mr Kao to indicate to whom the PMA Letter should be addressed. I accept MCM's submission that Ms He would therefore have had MCM in contemplation at this time as a possible new victim of the fraudulent scheme.

327. In paragraph 144 of her first witness statement Ms He said this:

"I have always understood inspections of Straits' metal by third parties were to validate that the cargo was present. The warehouse will not allow inspections unless the party that owns the metal according to its records gives permission. We would normally give our permission for inspection. My understanding was always that parties wishing to inspect our metal were potential financiers of the metal or else were intending to buy it from our customers."(emphasis added)

328. She was then asked in cross-examination by Mr Davies QC: "*You say the potential financiers". In the context of Mr. Kao's and Mr. Wong's business, do you means Chinese banks*?" Ms He replied: "*No. I meant people like MCM, ANZ*." She accordingly knew that MCM was a "potential financier" with whom Mr Kao was dealing, and she went on to confirm that she knew that Kao would be targeting MCM as one of the most prominent financiers in this field and that this was unsurprising:

"*A. So, what I understand from the Chinese asset pack transaction is that an underlying warehouse receipt which is supposed to be held there at all times during this period, right, so when Mr Kao said that these parties could be potential financiers, first these parties, the MCM, the ANZ, these are international voice. MCM is, you know, someone that is like one of the title re LME members, so I would believe that -- genuinely believe that these guys are in business and they will be even more familiar than Straits in dealing with such business. So there wasn't anything that surprises me, and because I do know that the trade cycle of Mr Kao's business could stretch up to 180 days because we were holding cargoes, I mean the warehouse receipt for such a long tenure, it wouldn't also surprise me that he may want to switch it to someone like MCM or ANZ to hold the cargo instead of Straits, right? Because they could be offering more competitive rates. They could be, you know, having more exalted structures with these parties.*" (emphasis added)

329. In her first witness statement at paragraph 123 Ms He further stated:

> "*ANZCT and MCM were known to us as financiers and buyers in the market and so it made sense they might be buying from Come Harvest or Mega Wealth, for example if the options to uptake were exercised, but we did not know what their relationship with Mr Kao was in fact*."

330. In view of my rejection of Ms He's account that CH or MW had an "option to purchase" the metal held by Straits, and in view of the closeness of her (and Mr Ang's) relationship with Mr Kao (which is very evident from the contemporaneous documents) and her close involvement in resolving any issues which arose with his financiers, I reject her suggestion that she did not know that MCM was financing CH and MW. I find as a fact that she undoubtedly did know that fact and that she knew or strongly suspected that MCM was doing so by reason of Straits supplying CSCs to Mr Kao.

331. This conclusion is also supported by Straits' knowledge of CH's margin obligations to MCM. On or about 5 December 2016 Mr Kao sent to Ms Ang and Ms He by WeChat message a screenshot of a letter dated 2 December 2016 from Genesis to MCM which read: "*We, Genesis… undertake to make USD 8,000,000.00… to you, E D & F Man Capital Markets Limited… on behalf of Come Harvest Holdings Limited… to fulfil its margin call obligations"*. Ms He accepted in cross-examination that having read the message she would have appreciated that it was in respect of a margin call that was owed by CH to MCM in respect of a transaction entered into by CH with MCM. She did not express any surprise at such fact.

332. Ms He denied that she knew this was in respect of the warehouse receipts that were being provided to Come Harvest by Straits as CSCs. However, at the time she did not even ask the question whether that was so or not, and I find that is because she either knew it or assumed it to be so, not least because the only trades that Straits was involved in with Mr Kao at this time involved CSCs, and Mr Kao would not have forwarded the letter to Mr Ang and Ms He had it not in some way related to the trades in which Straits was involved with CH/MW.

333. On 29 April 2016 MCM and CH entered into a Commodities Sale and Purchase Master Agreement. Between 5 May and 2 August 2016 the initial sale legs for the first 12 repo transactions between MCM and CH took place. Between 5 and 7 May 2016 Genesis received two hard copy receipts which it forwarded to MCM (PMSG/MY/21412-13). MCM alleges that these warehouse receipts were forged.

334. On 10 May 2016 Sophie Young of ANZ, who was financing MCM's transactions with Mr Kao's companies, emailed Mr Riley and stated as follows:

> "*Thanks Nick. Just out of interest - do you know what is driving your client to use endorsed warehouse receipts? Usually for Cat B deals, the original warehouse receipt would be kept by the collateral manager, with parties notifying that collateral manager when they sell goods to another party. The collateral manager would then issue a release confirmation that is sent to both buyer and seller, acknowledging the buyer's ownership. The same would then be done in reverse upon repurchase. Most banks are happy to rely on scanned copies of these release confirmations given they are sent directly by the collateral manager. May be something to consider with your client if you are looking to build up volume as it*

would dramatically cut down the time taken to fund each deal given there would be no international shipping involved!"

335. Mr Riley passed on this query to Mr Silverstein on the same day and Mr Silverstein in turn passed it on to Mr Kao, noting "*Just not sure you comfortable with transparency between all parties*." On 11 May 2016 Mr Riley informed Ms Young that the client wanted to continue with the same modus operandi, "*original docs being couriered out to me tomorrow*…"

336. On 13 May 2016 Straits entered into purported (Type 5) sale and purchase contracts with CH. These transactions had been preceded by an email dated 3 May 2016 from CH to Ms Tan in which Ms Tan was told to issue a revised PMA Letter in the name of ANZ. Ms He denied that she was aware of this change of addressee but in cross examination she was shown Ms Tan's response, making the change and attaching the revised PMA Letter, and she saw that it was indeed copied in to her. She then denied that she opened the attachment. I reject her evidence and find that she would indeed have received and read the email and the attachment at the time and accordingly she would have been aware that the PMA Letter was addressed to ANZ.

337. On 19 May 2016 MW was introduced to MCM by email from Mr Silverstein.

338. On 2 June 2016 Mr Riley emailed Mr Silverstein to tell him about the response he had received from one of MCM's financing banks as follows:

"As discussed I had this back from one of my financing banks:

"Before paying out against a warehouse receipt we would need confirmation from the warehouse that they hold the exact metal referenced to our irrevocable order. Typically we would surrender the warehouse receipt to the warehouse and get either an irrevocable release from them or have them issue a new receipt in our name, and on resale we would either issue a release instruction or endorse and deliver the receipt.

In the event that your customer wants the original receipt back we would still present the receipt to the warehouse for verification and only pay once we had that."

Let me know if that works, the downside is that there will be a delay in payment by a day or 2."

339. Mr Silverstein passed this request on to Mr Kao by email, noting that he doubted it was acceptable. It obviously was not, as Mr Kao's (and Mr Wong's) fraudulent conduct would be exposed if this were done.

340. Similarly, in June 2016 Commonwealth Bank of Australia ("***CBA***") also refused to finance MCM against the copy WHRs and PMA Letters and wanted the warehouse receipt to be surrendered and for Pacorini to issue a new one.

341. CBA explained their conditions for financing OWRs as follows:

> "*We are certainly interested in your proposal and would have the following comments. Before paying out against a warehouse receipt we would need confirmation from the warehouse that they hold the exact metal referenced to our irrevocable order. Typically we would surrender the warehouse receipt to the warehouse and get either an irrevocable release from them or have them issue a new receipt in our name, and on resale we would either issue a release instruction or endorse and deliver the receipt. In the event that your customer wants the original receipt back we would still present the receipt to the WH for verification and only pay once had that.*"

342. Following further discussions with CBA, Mr Konst of CBA wrote to Mr Riley of MCM on 6 June 2016:

> "*As a principle we won't pay out against a document that has not been independently confirmed as being genuine, hence our usual practice of surrendering a warehouse receipt and having a new one issued when we buy metal. We have spoken to Pacorini and they have told us that they do not generally confirm the authenticity of a document but would be prepared to on an exceptional basis. Given that you mentioned that this business was likely to be ongoing I assume that this would not be an ideal long-term solution. "So I guess we come back to whether it's a deal killer if we do surrender the doc and re-issue a new one? If your client insists that they want the same document back then I'd be interested to know why it is that it's so necessary or is the something that we're missing*?"

343. Only ANZ (to the tune of $54m) would accept the copy documents at this stage.

344. At this time, on 10 June 2016, MCM's credit risk controller invited Mr Riley to revisit his proposed financing of CH ($10m with $80m of financing from ANZ), as she noted that CH was only worth $220k by reference to its accounts.

345. Meanwhile, an LME dinner was taking place in June 2016, at which Mr Kao, Ms He, Mr Jeremy Ang and Mr Riley were all present. Ms Goh had begun to ask questions again about Straits' involvement in Mr Kao's business and on 14 June 2016 Ms Lindi Li emailed Ms He and communicated Ms Goh's concerns as follows:

> "*Basically will need you to clarify the following with SK again before the call since he is there with you at the LME dinner:*
>
> *1) The below structure you have shared with Lynda is still the same, especially since he has changed his financier to ANZ.*
> *2) What is the reason he is changing the contract structure from 2 counterparties to 1 counterparty now?*
> *3) Which of his entity is the one who has the financing lines with the banks/hedge funds (ANZ / Carlyle group)? Is it the entity that signs the contracts with us?*
> *4) <u>Does his financing party needs to see our contracts with him, is that why we need to engage into a sales and purchase contract with him? Lynda is asking why we can't structure the contract into a service contract/invoice, instead of a true sales and purchase.</u>*

> *I guess the biggest concern is if SK is using our WHR to double finance, whereby we are already pledging the original WHR to CIMB/ANZ/MCQ, but SK is using the same copy to finance again with his financier*"
>
> (emphasis added)

346. Ms Li accordingly squarely raised with Ms He once again the obvious concern of Ms Goh about all of this, of which Ms He and Mr Ang were undoubtedly fully aware: viz, that Mr Kao was using the CSCs fraudulently to double finance with financiers such as ANZ and MCM, with Straits having already pledged the original WHR to its bank.

347. Ms Goh then emailed Ms He on 14 June 2016 and said that she needed to talk to Ms He when she got back from the LME dinner. "*I am stumbled on the repurchase agreement. Ultimately, the fundamental is the objectives of the underlying trade, a repo trade in substance based on the presentation*."

348. In response, Ms He did not say that Straits had agreed with Mr Kao that his companies would have an option to repurchase the metal. Instead she confirmed that the reality of the Type 5 (and Type 4) trades was that these were just service agreements. She stated in her reply email to Ms Goh as follows:

> "*Our arrangement with SK started as sale to party A and buyback from party B for the first 7 days, and the subsequent charging are based on repo with the same party (as advised by SK). Those repo can be structured as service agreement if we wanted it so, but I recalled back then we discussed with finance and decided that a repo (back to back with our banks) may be a better approach and hence we went with that.*
>
> *For the new tranche for SK that started in end apr 2016, he informed there is a change of structure on his end, hence the first 7 days will also be structured as a repo, with the same party. He did not inform me of the details of his structure change, but I have just dropped him a note to ask. In the past, top line was not something that we were concerned with as it was always clocked on our book on a net basis, and hence whether we structure a repo or triangular trade we thought would not be material.*"

349. To like effect, there arose an internal dispute at Straits at this time (14 June 2016) with Mr Chong Ming Yong, Straits' financial controller maintaining that the reason that the transactions with Mr Kao were structured as repos was because Ms Lindy Li had said that that was requested by Mr Kao as a result of his bank needing to sight a purchase invoice, but with Ms Lindy Li denying this and suggesting that Straits' finance department "*told us that too much service agreement is dodgy*". Again, nobody suggested that there was any option to repurchase the metal and that these were not in reality merely service agreements.

350. It was also around this time that, on 30 June 2016, Transcendent (SG) Pte Ltd, the eighth defendant, was incorporated in Singapore and on the same day it issued 100,000 shares to Mr Chang (51%) (husband of Ms Melinda Kao and CEO of Transcendent) and Mr Joutain (49%) (Genesis' operations manager).

(XI) ANZ INSPECTION REQUEST IN JULY 2016

351. The next problem for Mr Kao arose on 25 July 2016 when Ms Sophie Young of ANZ asked to inspect the metal that ANZ believed that it owned (by reason of holding fake warehouse receipts) through financing CH. Ms Young emailed Access World (formerly known as Pacorini) on that date as follows:

> "*Hope you're well. Our Credit colleagues have requested we do a follow up site visit to the Access World warehouses in Johor Port. Do you think it would be possible to organise such a visit for early next week? Also, all the stock we are currently financing is with original warehouse receipts along with the letters issued by yourselves. Will you be able to allow us to view this metal based on the letters issued to ANZ?*"

352. Access world replied as follows:

> "*If I understand correctly, u would like arrange for stock inspection but the original Warehouse receipts are still with ANZ?*
> *The letter does not represent or prove the final owner of the materials.*
> *Can I have the WR reference number?*"

353. Ms Young replied as follows:

> "*Yes, the receipts are with our London office*[44]*. There are quite a few of them, but we were hoping we would be able to arrange to view a small sample of what we are holding based on the photocopies. I can provide these in advance of the visit. Would this be okay?*"

354. Access World then asked if ANZ were holding Straits' WHRs and Ms Young replied that "*they are issued to Straits originally however have passed through two other parties before reaching us*". Access World responded that, in accordance with normal practice, Straits had to give them the green light because "*our system will reflect Straits as the owner until the original is back to our office. Unless you can present the originals to us.*" Ms Young accordingly asked to organise an inspection for 16 August 2016 in respect of specific warehouse receipt numbers which corresponded with CSCs supplied by Straits to CH. She asked Access World to check with Straits whether they would agree to this.

355. Once again, because ANZ had been misled into believing that it held the original endorsed WHR but that it had not yet been returned to Access World for cancellation and reissue in ANZ's name, it believed that that was why Access World's records would still show Straits as the owner of the WHR, whereas the real reason that its records showed that was because the original WHR had never left Straits' hands. This meant that whilst ANZ were labouring under this misapprehension, there was no danger in Straits allowing an inspection by ANZ to go ahead. It would not alert them to the fraud, unless ANZ were made aware that Straits had pledged the WHR to its bank. If ANZ discovered *that* fact, it would realise that it could never have itself received the original WHR via CH, and the fraud would be exposed.

[44] These were, of course, the fake WHRs.

356. And so Access World, having forwarded this email chain on to Ms Tan on 11 August 2016, Ms Tan responded later that day, stating "*please proceed with ANZ's request for inspection.*" Nothing was said by Ms Tan about the WHR being pledged to Straits' bank, ensuring that ANZ was thereby misled.

357. Crucially, after the fraud was discovered in January 2017, it is apparent that Ms He, Ms Li, Mr Wu and Ms Tan were concerned about this inspection for this very reason, as it can be seen that Ms Tan sent each of them her chatlog at the time (i.e. 15 August 2016) with Ms Jessie Li. That chatlog is highly revealing and records the following QQ chat between Ms Jessie Li (who was acting on behalf of Mr Kao) and Ms Tan on 15 August 2016, just after the ANZ inspection:

> "*Jessie 10:55:08 AM*
> *Hui Ying, about ANZ's inspection of goods you told me last week, VJ*[45] *contacted the warehouse and confirmed already*
>
> *Jessie 10:56:46 AM*
> *Separately, Steven asked you to tell Sherraine that this inspection of goods by ANZ should largely be the same as the Clayer [sic] before, i.e. it's OK as long as it prevents them from knowing that your goods have already been pledged to the bank*"

358. "Clayer" must be a reference to the Carlyle (VAM) inspection. In other words, Ms Tan was being told to tell Ms He that it was safe to allow inspection by the third party as long as the third party financier does not realise that the metal has already been pledged to Straits' bank, as that would immediately alert the financier to the fact that they do not own the metal which they have financed. I find that, like Ms He, Ms Tan knew about the deceit that was being perpetrated in this way, because the chat goes on as follows:

> "*Jessie 11:00:17 AM*
> *Hm. Okay. There should not be any major problems*
>
> *Jessie 11:00:30 AM*
> *After all, they just go and have a look at the goods*
>
> *Jessie 11:00:40 AM*
> *It should be the same as the previous company*
>
> *Hui Ying 11:01:37 AM*
> *Hm. ANZ should only go and have a look*
>
> *Jessie 11:01:59 AM*
> *Okay*
>
> *Hui Ying 11:02:37 AM*
> *Let me also tell SHERRAINE*"

[45] Vincent Joutain, operations manager for Genesis.

359. Ms Tan, who as I have said was an evasive and difficult witness, was very reluctant to accept in cross examination that she would have passed this message along to Ms He, but I find that she would undoubtedly have done so in view of its obvious importance and her junior role. Their chat continued the following day, with Ms Jessie Li checking that ANZ had been successfully deceived:

> "*Jessie 10:38:03 AM*
> *Hui Ying, is everything OK after ANZ's staff went to the warehouse for inspection yesterday?*
>
> *Hui Ying 10:39:06 AM*
> *The warehouse did not say much about it*
>
> *Hui Ying 10:39:07 AM*
> *Hor hor*
>
> *Hui Ying 10:39:17 AM*
> *It should be fine*
>
> *Jessie 10:39:37 AM*
> *Ohh. Okay. Hahaha*
>
> *Hui Ying 10:40:02 AM*
> *Haha, let me update you again if there is news*
>
> *Jessie 10:41:34 AM*
> *Thank you*
>
> *Jessie 10:41:38 AM*
> *Hope that it is fine*"

360. Although in re-examination Mr Lewis QC for Straits sought to elicit from Ms Tan that she frequently used the words "Ha ha" in her chat, there is no doubt in my mind and I find as a fact that in these exchanges she is congratulating herself and Ms Li in suppressing the truth from ANZ, which was that that it did not own the metal because Straits had itself pledged it to its own bank.

(XII) MAREX'S QUESTIONS

361. Having successfully thrown ANZ off the scent, the next difficulty for Mr Kao and Straits arose in November 2016 when Marex began asking questions about the metal which it believed it owned under two specific numbered warehouse receipts which again related to CSCs provided by Straits to Mr Kao. Access World asked Ms Tan and Ms Li, by email dated 15 November 2016, whether Straits would consent to Marex having copies of Certificates of Analysis and confirmation that materials would be warranted within a reasonable time. They then asked for clarification on two specific questions:

> "*At this moment, are the original warehouse receipts still in the hands of Straits?*

Who will be the final owner that the original warehouse receipts be transferred to?"

362. Ms Tan passed this enquiry on to Ms He, who notably responded in the first instance not to Access World but to Ms Jessie Li of Genesis. She highlighted in red her proposed answers to Access World's two questions and asked Ms Jessie Li if she was allowed to provide the information to Access World. Her proposed answers to Genesis in red were as follows:

At this moment, are the original warehouse receipts still in the hands of Straits? Yes WHR is in the hands of Straits[46]

Who will be the final owner that the original warehouse receipts be transferred to? We would not know as the WHR could be sold to other parties from our buyer.[47]

363. This deliberately misleading answer is proposed by her despite the fact that she knows that Mr Kao had never bought the metal from Straits; rather Straits was simply to hold it until told to cancel the contract.

364. While this is going on, it is apparent that at the very same time Ms Tan and Ms Jessie Li were texting each other by WeChat on 14 November 2016. Ms Jessie Li told Ms Tan that "*since this is the first time the other bank inspects the goods at the warehouse we have to be careful. C[ome]H[arvest]'s instruction is to tell the warehouse that other than the above 3 items of information*[48]*, please do not disclose other information to the bank*." When Ms Tan was asked in the course of her oral evidence why there was a need to be "*careful*" with the inspection of the metal by banks she became evasive and sought to suggest that there was some issue with language:

"*A. I would just have understood it as we just need to be prompt in our response.*

…

Q. Well, that's not –– where it says we have to be careful, that's not saying we've got to be quick about this, is it?

A. No, I think, because there is some translation, (inaudible) as well. So I do not really know what was the actual text, but I do not think that it was what counsel has said. To me, it's just being (inaudible) request comes in, so we have to be prompt in our response."

365. This was not a truthful answer.

366. Ms He's answers in red type (which were sent to Marex) did not, however, put the matter to bed. Rather it prompted more questions from Marex and on 17 November 2016 Ms He once again put her proposed answers in red type and asked Ms Jessie Li if she was content with her responding in these terms:

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[46] This part of the sentence ("*Yes WHR is in the hands of Straits*") is in red type in the original email.
[47] This sentence ("*We would not know as the WHR could be sold to other parties from our buyer*") is also in red type in the original email.
[48] Being respectively (i) copies of COO and COA; (ii) confirmation that the metal can be warranted within a reasonable period of time and (iii) a copy of warehouse signature list.

> "*Mentioned that original warehouse receipts have been couriered to Marex. Asking for confirmation that Straits no longer have any interest in the materials. Straits will no longer have any interest in the materials when we receive full payment from the Buyer.*"[49]

367. Ms He must have known that this was wholly disingenuous: it was not an honest answer to Marex's enquiry. It suggested that the WHR had been transferred to Straits' buyer but that Straits had not yet received full payment for it, whereas the truth was, as she well knew, that Straits continued to hold the original WHR under its service agreement with Mr Kao's company and Marex only held worthless CSCs. Ms He should obviously have told Marex that it could not have had original WHRs couriered to it because Straits (or its bank) held the original WHRs. Ms He accepted in cross examination that (i) she would have read the reference to the fact that it was believed that *original warehouse receipts had been couriered to Marex* and (ii) she knew that Marex was financing the acquisition at Mr Kao's end. She had no answer to this point and I find that Ms He's intention was to mislead Marex so that it would not discover that by using the CSCs, Mr Kao was fraudulently purporting to transfer title in the metal to Marex:

> "*Q. Well, why weren't you just open about this at this time, and say: firstly, Straits does have an interest in the materials, and why have original warehouse receipts been couriered to Marex?*
>
> *A. Yes, I -- I consider in the first part, I should have addressed that. But the sentence I replied, I think I was just trying to reply to what they were asking.*"

368. That is simply not a good enough answer, no doubt because there is no honest answer to this question other than an acceptance on the part of Ms He that she deliberately misled Marex. She refused to accept that but instead chose to obfuscate in her answer. Moreover, I find that there is no question of her being misled herself by Mr Kao, as Straits attempted to portray Ms He's actions in closing.

369. Ms He then suggested in cross examination that she referred to a "Buyer" in her response because Mr Kao's companies had an option to purchase the metal. That was not an honest answer, either. She was being told that Marex believed it held the original WHRs, despite the fact that Straits held them. An honest person would immediately have corrected that fundamental misapprehension. In any event, Ms He had no reason whatsoever to believe that this metal was going to go to be purchased by Mr Kao under their service agreement or otherwise.

370. This dishonest behaviour of Ms He is further demonstrated by Ms He's actions at the time when the fraud came to light on 12 January 2017, after Access World concluded that the WHRs held by Marex were a forgery. On that date, Straits issued the following letter to Come Harvest:

> "***NOTICE OF FRAUDULENT WAREHOUSE RECEIPTS ISSUED TO ORDER OF STRAITS (SINGAPORE) PTE LTD ("SSPL") WERE DELIVERED TO ACCESS WORLD LOGISTICS (SINGAPORE) PTE LTD ("ACCESS WORD")***

[49] This last sentence ("*Straits will no longer have any interest in the materials when we receive full payment from the Buyer*") is in red type in the original email.

> *We were informed by Access World that the following listed original warehouse receipts issued to the order of SSPL, bearing the stated reference numbers ("Original Warehouse Receipts"), were delivered to Access World by Marex Spectron Group Limited ("Marex") on 12 January, 2017 for authentication.*
> *Warehouse Receipt Number (on forged documents)*
> *1 AWSG/MY/00290 75*
> *2 AWSG/MY/0029 077*
> *3 AWSG/MY/0029 078*
> *4 AWSG/MY/0029 079*
> *5 AWSG/MY/0029 094*
> *6 AWSG/MY/00290 95*
>
> *In the course of the authentication and verification, Access World concluded that the documents were a forgery.*
>
> *We have previously provided scanned copy of the abovementioned warehouse receipts to you ("the Scanned Copy"). <u>The purpose of giving you the Scanned Copy is for you to inspect the goods prior to us selling the goods to you</u>. The Original Warehouse Receipts are still safekept by our banker and we have never transferred the Original Warehouse Receipts to any other party.*" (emphasis added)

371. The sentence underlined was, of course, a lie. That was never the purpose of Straits giving CH the CSCs under Type 5 transactions and they (in particular Mr Ang and Ms He) knew that. There was no sale of the metal to, and no inspection prior to any sale by CH; nor was there ever any such inspection or sale under Type 4 and Type 5 transactions in particular, as Ms He was fully aware. The very fact that Straits felt the need to cover up their involvement in the fraud in this way strongly suggests that, as I have found, that it knew that it had played its part in assisting Mr Kao to perpetrate the fraud by providing him with the CSCs. Crucially, Straits did not say in this letter, as it would otherwise have done if its story was truthful: "*We provided you with the scanned copies so that you could show them to your Chinese bankers to establish the business's trade flows and make money off the Chinese asset pack; nobody in the market would have assumed that such a fraud would be committed in this way by the mere provision of CSCs.*" Yet that is the story that Straits has now concocted in its attempt to avoid liability.

372. Moreover, this sentence in the letter to CH was both carefully crafted and changed from a previous draft which referred to "*prior to us <u>sending</u> the goods to you", rather than "<u>selling</u> the goods to you*". Mr Jeremy Ang approved that change in conjunction with Ms He. Unsurprisingly, Ms He could not defend her position on this in cross examination:

> *Q. So, you are saying under the type 5 transactions this was the purpose of giving the scanned copy to Come Harvest, was it, for them to inspect the good prior to you selling them to Come Harvest?*
>
> *A. The purpose -- the purpose, the main purpose or commercial reason for the scanned copy is to make money off this asset pack. But I think in my witness statement, I also mentioned the scanned copy can be used for them to validate that*

the cargo is in the warehouse; no inspections or these sort of things that they could do.

Q. In theory I would not disagree with you, Ms He. I'm interested in what was the commercial purpose that was agreed between you and Mr Kao, and that was not as stated there, was it?

A. Yes -- yes; I mean, of course we could extend this by -- as a full paragraph to talk about the commercial rationale; but I guess when our compliance was preparing this we didn't make full mention of those.

373. When asked whether he had any role in drafting the letter, Mr Ang initially lied and denied any involvement. However, when faced with contemporaneous documents which showed that he had been involved in the drafting of the letter he subsequently admitted that he was "*asked to review that draft letter"* and then accepted he was "*involved in that whole process of drafting and approving the letter that goes to Come Harvest on 12 January"*. That is unsurprising, as I find that all strategic decisions concerning the evolution of the Type 1 to Type 5 trades with Mr Kao were taken by Mr Kao in conjunction with Mr Ang.

374. Moreover, I find that the careful drafting of this letter between Mr Ang and Ms He represented the Concocted Story first formulated in August 2015, that they and Mr Kao had decided that they would adhere to going forwards in an attempt to distance Straits from its involvement in the fraud. That is illustrated further by the fact that in the WhatsApp messages shared between Ms He and Ms Lindy Li on 12 January 2017, Ms He states "*Don't panic, our position remains that we have intention to sell the cargo to them and [have] given them copy WHR as per their requirement… So original sits with us and it's the modus operandi all along*" (emphasis added).

375. That was indeed the "position" that Mr Ang and Ms He had first decided to adopt in August 2015 and which remained their position when the fraud was discovered. It was a lie. Whilst it is not necessary for my conclusion on this point, I also again infer that it is likely that Ms He and Mr Kao would have privately messaged each other – probably on WeChat - in order to agree upon this story, but that they both subsequently permanently deleted these messages.

376. A similar letter was sent on 19 January 2017 in relation to the warehouse receipts which MCM sought to have authenticated. Again, Straits wrote to CH saying "*The purpose of giving you the Scanned Copy is for you to inspect the goods prior to obtaining delivery of the goods or warrant thereto."* Again, this was a lie. CH never inspected the goods nor did Straits ever expect or intend CH to inspect the goods. Indeed, in paragraph 101 of her first witness statement Ms He confirmed that *"[a]part from providing them to his banks, Mr Kao or his companies could also use the copy receipts to verify the existence of the metal stocks with the warehouse by quoting the warehouse receipt number, although he never stated he would be doing that"* (emphasis added).

(XIII) ANZ'S DECEMBER 2016 ENQUIRY ABOUT THE VALIDITY OF ITS WHR

377. Reverting to 5 December 2016, on that date Access World sent an email to Ms Tan, copying Ms He, in which it informed her that ANZ was enquiring about the *validity* and rental payments for the WHRs which it attached. The fraud was now unravelling.

Access World asked whether it could reply to ANZ. The attachments were 17 pages of PMA Letters and CSCs. Ms Tan responded in the same deliberately understated way as before (on 11 August 2016), by simply stating "Please proceed" and nothing more.

378. Ms He agreed that she would have read this email and seen that it referred to attached WHRs. The WHRs attached corresponded to those which Straits still held but the attachments had forged endorsements on them – indeed Ms Tan's own signature was forged. Ms He agreed that if she had seen this "*it would have been flagged up immediately*". But it was not.

379. Ms Tan also agreed in cross-examination that if she had looked at the attachment it would have been a "concern":

> "Q. *What concern would you have, Ms Tan?*
>
> *A. Because looking at the date, it's December 2016, am I right, the email? So at a point in time we were (inaudible) with Come Harvest and Mega Wealth, and, as you can see, we only send them a copy of the warehouse receipt , and the original will either be with Straits or with our bankers, and if I look at it , how could it be possible that they can actually endorse on it. They need to say that someone is clearly passing off something that is not original. So that would be a concern*."

380. Ms He attempted at first to suggest that she would not have looked at the attachments. However, in cross-examination the following exchange with Ms He took place:

> "*A. "I'm not sure whether she [Ms Tan] opened the attachment and looked through it […] I think the emails doesn't ask about the attachment, right?"*
>
> *Q. With respect, Ms He, you're going to have to look at the attached warehouse receipts to understand whether or not (a) they are valid and (b) rental has been paid in respect of them, wouldn't you, Ms He?*
>
> *A. I'm sorry. I didn't think about that. I -- yes. We -- you are probably right, yes."*

381. It is impossible to accept that both Ms Tan and Ms He would not have read this email and its attachments and would therefore not have realised that Mr Kao was forging WHRs with the use of the CSCs as a result of receiving this email. Ms Tan had ready access to Straits' records and it is apparent (see above) that she checked them when she received an email such as this. I do not accept Ms Tan's implausible evidence that she would have "overlooked" the attachments. I consider that she would have read them and discussed them with Ms He.

382. Nor was this the first time that a party had claimed ownership of Straits' metal. Both Ms He and Ms Tan knew that there had been several previous similar instances. Ms He sought to downplay this incident by suggesting that there had only been three or four occasions over a period of years. I reject her attempt to downplay the seriousness of each of these incidents. This incident followed hard on the heels of the previous ANZ deception and, particularly, the Marex deception. I find that Ms He and Ms Tan knew ANZ was being actively misled by Mr Kao and that they misled ANZ and Access World by pretending that everything was in order such that an inspection could take place.

(XIV) STRAITS RESPONSE TO THE DISCOVERY OF THE FRAUD IN JANUARY 2017

383. On 12 January 2017 Ms Lindy Li sent a series of messages on the internal Straits WhatsApp messaging system, saying "*SHIT!!*", "*I dont know wat is marex doing again*", "*Franky jus called me, say Marex sent 4 WHRs frm Come Harvest for authenticity check*", "*Then Franky say the "original" is fake*" and "*Want me to cfm if we really sent the original to them, Frankey says the only reason they cannot check if it is real is that the serial no is wrong*". "*Franky*" is a reference to Ms Frankie Tan at Access World, who had contacted Ms Lindy Li. It can be seen that the tenor of Ms Li's messages is not one of innocent surprise; rather it is to blame Marex, the defrauded party, for questioning again the validity of the WHRs which it held.

384. Ms Tan replied saying "*But if its CSC shld be exactly the same? Last time i rmbered the QR code does work even on CSC cos beng and i tried it lol"*. Ms Tan's message likewise is not the message one would expect of an innocent party, concerned that a third party has been defrauded. Rather, she is keen to suggest that a fake CSC of the original WHR *could* in fact pass authentication procedures because she had successfully tested it for herself. Whilst I agree with MCM that this response of Ms Tan strongly suggests that Ms Tan was alive to the fact that CSCs *could* be used to be passed off as original WHRs, I would not go so far as to infer that Ms Tan "*had been giving thought to whether a CSC could pass authentication procedures.*" I cannot be sure that her explanation that she tested a CSC out of curiosity for a banker client is false.

385. On or around the same day – 12 January 2017 – Mr Riley at MCM was told by Mr Silverstein that two warehouse receipts provided by CH to Marex had failed authentication with Access World. MCM then took the 9 Collateral Receipts to Access World in Singapore, where they failed Access World's authentication process and were retained by Access World on 16 January 2017.

386. Subsequently ANZ took one of its Purported Receipts to Access World in Singapore where it too failed Access World's authentication process on 23 January 2017.

387. Even after the forged receipts had been identified, Ms Lindy Li's immediate concern, in her WhatsApp message to Ms Tan of 12 January 2017 was not to do anything to cause Mr Wong problems: *"If i reply [to Access World] say original is in my hands, i don't know if i will screw-up wang w marex"*.

388. At this point Ms He intervenes in the conversation to instruct Ms Li to adopt the Concocted Story which she had agreed with Mr Kao in August 2015. She told Ms Li to "*tell them the truth … that the original is w u", and that:* "*U only give client a copy cos they want to show bank for purchase later"*. That was a lie. There was no need for Ms He to lie in this way if Straits were indeed an innocent party who had also been misled by Mr Kao, as Mr Lewis QC sought to portray them in closing.

389. Ms Lindy Li then continued with the WhatsApp dialogue by informing Ms He that Access World was going to file a police report. Ms He replied: "*Wah this is damn panicking!! I better inform jeremy."* Again, in relation to any point of significance Ms He would always involve Mr Ang.

390. Ms Lindy Li was equally concerned and said "*I jin scared MCQ find out also don't know wat they will think. Coz originals is w them."* But as MCM point out in their

written closing, Ms Lindy Li would not have had any reason to be concerned how "*MCQ*" (Macquarie, to whom Straits had pledged the original WHRs) would react if Straits had genuinely negotiated potential contracts for purchase with CH and MW. If the transactions between Straits and CH/MW had been legitimate transactions there would have been no need for anyone at Straits to "panic" or to come up with a false narrative as to the true nature of those transactions.

391. Ms He responded to Ms Lindy Li: "*Don't panic, our position remains that we have intention to sell the cargo to them and hv given them copy whr as per their requirement…So original sits w us and it's the modus operandi all along*": (emphasis added). Again, this was a lie. The use of the words "*our position*" is significant: this is the position – the Concocted Story - that Straits and Mr Kao had decided to adopt, rather than the truth. It is also no doubt why the option to purchase argument came to be advanced. Ms He emphasises that Straits must maintain that this was the modus operandi all along, despite the fact that she knew full well that Straits did not have an intention to sell the cargo to them all along.

392. Ms He then messaged Ms Li as follows: "*Pls quickly let me know how much is the total Marex cargo value [and] no of lots [and] where it is being financed now. If Macquarie we try to liquidate all first so that if Marex try to sue us all the cargoes already sold won't be frozen or what*."

393. Once again, these are not the thoughts or intended actions of an honest and innocent person. Ms He is assuming that Marex will sue Straits as a result of the fraud, and so she is seeking to liquidate the cargo urgently to frustrate Marex's attempts to preserve that asset. She likewise tells Ms Li and the others to the WhatsApp chat group that "*we must liquidate before Marex make police report."*

394. On 24 January 2017, Straits filed a police report in respect of Come Harvest, in which Mr Lim Wee Ping (the Compliance Manager at Straits) similarly advanced the party line of the Concocted Story: "*the original receipt is kept with the bank while a scanned copy of the receipt is sent to potential clients"* (emphasis added). The assertion that CH was a *potential* client (buyer) of Straits was a lie. A similar police report was filed on 25 January 2017 in respect of Mega Wealth.

395. The cargo was then sold off by Straits, as Ms He had recommended. Mr Ang also agreed that the cargo should be sold off in an attempt to ensure that his and Ms He's bonuses were not affected by the fraud. Mr Ang told Ms He in their private WhatsApp chat on 3 February 2017 that this was why he "*push so hard every day to sell as much as possible*." Mr Ang told her "*It will be good enough of we sell off all the cargoes and not implicated.*" Ms He replied "*Ok, let's pray for that*". Unfortunately for them, their prayers were not answered.

396. The story comes to an end with Ms He and Ms Tan joking in their private WhatsApp messages about the fact that ANZ failed to authenticate the WHRs and so how is that Straits' fault? Ms He said "*There's even a rumour saying that maybe Straits for ppl collude w Come Harvest, but I was saying even if we collude how we produce the fraud WHRs*?" That is a very odd message to send if it were the case that Straits did not in any way collude with CH. It appears that already Ms He was adopting the line that since

Straits did not know that CH/MW were actually forging the WHRs (based on the CSCs), Straits could not be held liable, whether or not it colluded.

(XV) MOTIVE

397. Mr Lewis QC submits that MCM has failed to identify any motive for Straits, the financial services arm/granddaughter of a publicly listed company, to engage in such a massive fraud. Straits' business accounts for approximately 25% of the overall business of the Straits Financial group.

398. He submits that it is inherently implausible that either Mr Jeremy Ang or Ms He would have entered into a fraud with the intention to harm MCM (or anyone else) thereby risking their jobs, reputations and liberties, where Straits formed part of a substantial publicly listed group. There was simply too much to lose, too high a risk of being caught, with nothing (or insufficient, bonuses aside) to gain. Straits contends that in that context, the Court may only infer such an intention where the inference is "*inescapable*" and it is not: *Silvera v Urquhart* [2003] EWHC 809 (Ch), §302.

399. I reject this submission. As MCM submits, Straits' argument assumes as its starting point that people always act rationally and that individuals working within listed companies never commit fraud. That cannot be assumed. It also assumes that Ms He and Mr Ang knew that the fraud would be discovered, which was by no means certain; and, more pertinently, that if the fraud was discovered, that they knew that they would be held liable for the role that they played in the fraud. The private WhatsApp messages that they exchanged after the fraud was discovered in fact suggest the opposite.

400. In any event, I consider that Mr Ang and Ms He each did have a motive to act as they did. Both Ms He and Mr Ang received a discretionary bonus dependent on Straits' revenue figures (the position concerning Ms Tan and Ms Li is unknown). More than 2/3 of Straits' income came from Mr Kao's business. In cross-examination Mr Ang accepted that it was very likely that the CH/ MW fraud issue would impact on his and Ms He's bonuses for the year. Indeed, that was their concern when the fraud was first discovered, hence their desire to liquidate the cargo which was at risk of being frozen. Ms He's evidence was that if Straits had a debt "*CWT may not pay me bonuses at all"* so "*clearing the cargo is very important because it will affect the bonus"*. Indeed, one of Ms He's first reactions to the exposure of the fraud was to ask in her WhatsApp message to Mr Ang of 3 February 2017 whether her bonus pay-out would be implicated: "*But just dunno whether bonus payout will be implicated as a result of this*." Mr Ang replied: "*I guarantee you it will be… unless we clear the cargo*."

401. Ms He appears to have been concerned to maximise her bonus for 2016, and willing to continue doing deals with Mr Wong right up to the end of 2016 and beginning of 2017 (despite her knowledge that third party financiers were being deceived by Mr Kao). Straits was set demanding revenue targets by CWT. Ms He and Mr Ang both knew that it could only achieve those targets if it continued to do business with Mr Kao's companies. In her email to Mr Ang of 19 March 2015, after Ms Goh had specifically asked Ms He and Mr Ang to limit Straits' exposure to "*SK*" trades, Ms He referred to the fact that Mr Kao had contributed 76.3% of Straits total net revenue of USD 380k to date and said that:

"If we don't do any SK deals, our revenues will only be USD52k for the month of Mar[ch]. This means we will be very very far off from budget numbers."

402. Both Mr Ang and Ms He were, moreover, somewhat star-struck by Mr Kao. They both considered him to be (and called him) a friend as well as a business partner. They were beguiled by his boasts concerning his wealth. Indeed, by the latter part of 2016, both Mr Ang and Ms He were actively looking to make their own personal investments with Mr Kao (via Transcendent (SG) and otherwise[50]). There is no evidence that any of these proposals were disclosed to Ms Goh or anyone else at Straits / CWT. I find that Mr Ang and Ms He believed that they stood to make considerable financial gain by continuing to do business and associating with Mr Kao.

403. This fact is well illustrated by Mr Ang taking a substantial shareholding in the Singaporean company, Transcendent. Indeed, the fact that Mr Ang was provided with a shareholding in Transcendent also shows how close the relationship between Mr Ang and Mr Kao had become over the years.

404. Mr Jeremy Ang first asked his son, Mr Timothy Ang, to become a director of a Singaporean company associated with Mr Kao in April 2016. Mr Jeremy Ang admitted that while Straits may help a client set up a company in Singapore, he had "*never offered [his] son as directors [sic] for any other companies"* or any other clients.

405. Transcendent SG was established on or around 30 June 2016. In the process of finalising the arrangements for the incorporation of the company, on 18 June 2016, Ms Melinda Kao emailed Ms He and Mr Jeremy Ang stating "*We would like to have three Directors"* for Transcendent (SG). Ms Kao sent a further email on 23 June 2016 saying "*We have a 70 per cent Shareholder as Transcendent Global Finance Inc, the remaining 30 per cent will be for Jeremy's discretion"*. Ms He then replied saying that Mr Timothy Ang had been included on the relevant paperwork as "*a 30 per cent shareholder"*.

406. Mr Jeremy Ang gave evidence that he told his son that he was holding the shares "*on a proxy for Mr Kao and it [would] be only a short-term thing*". I do not accept this evidence. I consider, as MCM submitted, it to be much more likely that the 30% shareholding belonged to Mr Jeremy Ang, as the contemporaneous documents suggest. The contemporaneous documents show that: (i) it was agreed between Mr Ang and Mr Kao that they should split the shareholding for their new joint venture vehicle 70% / 30% (with Mr Kao taking the larger share); (ii) neither, however, wished to hold shares directly; (iii) the agreement, therefore, was as stated by Ms Melinda Kao in her email of 23 June 2016. Mr Jeremy Ang exercised that discretion to have Mr Timothy Ang appointed as a 30% shareholder – with the intention that Mr Timothy Ang should hold and protect his (Mr Jeremy Ang's) interest.

407. Mr Timothy Ang gave evidence that he only returned the shares in December 2018, with Mr Jeremy Ang only at that point disclaiming his interest in them. I do not

[50] The WeChat messages exchanged between Ms He and Mr Kao on 2 September 2016 show that Ms He asked Mr Kao if she could make a personal investment of US$200,000 with Kao in a venture called 13 mile "*if you will allow*".

consider it to be a coincidence that Straits had been joined as a party to this action on 26 November 2018.

408. Transcendent was, I should add, also the company which had been lined up by Mr Wong/Mr Kao to pay a substantial sum to MCM pursuant to the terms of the MCM repo contracts[51]. That is why on 5 December 2016 Mr Timothy Ang privately messaged Mr Kao and Mr Jeremy Ang by WeChat stating: "*Afternoon uncle Steven… just to let you know that we will be remitting out USD 2.9 Million + USD10,000 from Transcendent to EDF today"*. Mr Kao responded by WeChat to both of the Angs, stating: "*Yes to help cover uncle wong's margin"*.

(F) FINDINGS OF FACT CONCERNING KNOWLEDGE

409. In light of the above, in summary I make the following findings of fact concerning knowledge of the fraud.

(I) STRAITS HAD ACTUAL KNOWLEDGE OF THE FRAUD

410. I find as a fact (and indeed I am sure) that Mr Ang, Ms He and Ms Tan in particular all had actual knowledge likely as early as January 2015 but certainly by February 2016 (which is well before the issuing of the first of the 92 forged WHRs on 27 April 2016) that (i) Mr Kao/Mr Wong were using the CSCs which Straits had supplied to their companies under Type 5 transactions for the fraudulent purpose of obtaining finance from Western Financiers, including MCM and (ii) those financiers were claiming to hold original WHRs corresponding to the CSCs supplied to Mr Kao/Mr Wong's companies, and that they believed themselves to have acquired title to the metal covered by those WHRs. [52]

411. I am willing to accept that Straits may not have had actual knowledge that Mr Kao and Mr Wong were using the blank-endorsed CSCs and PMA Letters supplied by Straits to forge apparently original WHRs, and that that was the *precise method* used in order to deceive the western financiers, including MCM. But I find as a fact that Straits did know that Mr Kao and Mr Wong were dishonestly using the blank-endorsed CSCs and PMA Letters supplied by it in order to deceive those financiers (including MCM) into believing that CH/MW were in a position to transfer title in the metal to them, and that those financiers (including MCM) were indeed thereby deceived. That is sufficient knowledge for the purposes of MCM's claim in unlawful means conspiracy, as explained below.

412. Moreover, I do not consider that the facts set out in the narrative above are consistent with Straits having acted honestly or merely negligently. Rather, the primary facts proved give rise to a very clear inference of dishonesty or fraud. I find that Straits had actual knowledge both of (i) the relevant unlawful conduct and (ii) the harm thereby likely caused to MCM (again as explained below).

[51] Indeed, Mr Ashton's summary tables 3.1 ad 3.2 in his first report show that very substantial sums were received by Transcendent companies from MCM (which MCM seeks to trace), including Transcendent SG.
[52] This is, contrary to Straits' submission, consistent with the way in which MCM pleaded its case – see paragraph 71.6A of the RRRAPOC

(II) MR KAO AND MR WONG'S KNOWLEDGE AND CENTRAL INVOLVEMENT IN THE FRAUD

413. The main issue between MCM and the first to fourth defendants is whether each of CH, MW, Mr Kao and Genesis knew that CH/MW only ever received CSCs from Straits. The importance of this point is apparent from the summary of the first to fourth defendants' defences at §10 of the Case Memorandum and issues 3-5 in the List of Issues.

414. As far as the attribution of knowledge to CH, MW and Genesis is concerned, it was common ground at trial that Mr Wong's knowledge can be attributed to CH and that Mr Kao's knowledge can be attributed to Genesis. There is a dispute as to whether Mr Wong's knowledge should be attributed to MW.

(i) Mr Kao's Knowledge

415. I find as a fact that Mr Kao knew that Straits was not supplying original WHRs to CH/MW and was instead only supplying CSCs. That is abundantly clear from the email exchanges discussed above concerning the contractual terms of the 'Type 3', 'Type 4' and 'Type 5' transactions (for example, Mr Kao's email to Mr Wu of 13 November 2014: *We just need CSC only and for 6 days we would pay 30bps and each additional day we would pay 5bps. We are testing a new structure as discussed with Jeremy in Chicago. Pls confirm rate acceptable to you*.")[53]. Contrary to Mr Kao's witness statement at paragraphs 67 and 71 to the effect that he was not closely associated with the terms of those trades,[54] I find as a fact that Mr Kao undoubtedly knew that the Straits Contracts were contracts for the supply of CSCs only.

416. Moreover, as explained above, there exists one email from Mr Kao to Mr Wong which I find contains confirmation from Mr Kao that Mr Wong can go ahead and forge WHRs upon receipt of CSCs from Straits in November 2014:

> "*Brother Wang, the warehouse receipts have been issued. Please process as soon as possible.*"

(ii) Mr Wong's Knowledge

417. According to Mr Kao's witness statement, Mr Wong was imprisoned in the early 2000s for eight years for a financial crime involving "*the use of fraudulent letters of credit used for trading aluminium*".

418. Mr Wong and CH/MW gave very limited disclosure, including refusing to search the email accounts '1862107899@163.com' and 'Weiguonia@163.com' on grounds of alleged "*cultural sensitivities*". Documentary evidence of Mr Wong's state of

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[53] Further examples are as follows: the email from Ms He to Mr Kao on 11 December 2015: "*I'm talking to another financing party, so just want to be sure that you still have demand for CSC as long as you can do it with VAM on your end*"; and WeChat messages between Ms He to Mr Kao on 2 December 2016: "*OK so we send 14.5mil csc first to Jessie?*", "*We sent the csc over already!*".

[54] Kao §67: "*not closely associated with the terms of those trades*"; Kao §71 – "*I had no reason to believe that the Straits Contracts were anything other than genuine sale and purchase contracts that involved Straits providing original warehouse receipts to CH or MW. (...) It never occurred to me that Straits would not deliver original warehouse receipts to CH/MW.*"

knowledge is therefore, as MCM states, in short supply. But I find that MCM has proved, to the requisite standard of proof, that Mr Wong knew that Straits supplied only CSCs to CH and MW under Type 5 contracts and that together with Mr Kao he used those CSCs to forge the original WHRs that were supplied to MCM under Type 5 trades. Documentary evidence of his knowledge includes the following:

i) The email summaries of the terms of the 'Type 3' and 'Type 5' transactions, both of which were copied to Mr Wong and the first of which Mr Kao specifically directed to be translated for Mr Wong;

ii) Mr Kao's instruction of 27 November 2014 to "*process*" certain receipts as soon as possible;

iii) Mr Kao's email of 24 January 2014, referring to the close interaction between Mr Wong and himself and the free flow of information between them ("*At the moment, our operation are relying on Mr. Wang and Myself with the 30 phone calls we exchange in 24 hours circle… I know all of us operation* [sic] *under different entities but we are in fact ONE team and the transactions are linked together, it is important that we share what we are doing at every given moment*"); and

iv) The evidence of Ms He,[55] supported by WeChats from the period, that after August 2016 she dealt (in the first instance at least) with Mr Wong rather than with Mr Kao.

(iii) Mr Wong's Control of Mega Wealth

419. CH/MW's pleaded case is that "*Mr Wong did not and does not have practical control over Mega Wealth…*": paragraph 6(2) of their Re-Amended Defence. However, I find as a fact that Mr Wong did exercise practical control over MW at the relevant times, acting on its behalf in connection with its dealings with Straits and MCM, such that Mr Wong's knowledge is to be attributed to MW.

420. MW's *de jure* immediate and ultimate shareholders and directors are described in the Re-Amended Defence of CH and MW at paragraph 4(2). This is supplemented by detail contained in the *Dramatis Personae* (which contains the relevant documentary references to support the narrative contained therein). The position is as follows:

i) MW was incorporated on 10 March 2015;

ii) MW's shares were held, first as to 90% and then as to 100%, by ZHDF, until January 2017.

iii) 86.7% of ZHDF's shares were owned by ZTIT. The shareholders of ZTIT in September 2016 were (i) Mr Huang Zhiming and (ii) Mr Zhao Binting.

iv) A Mr Bian became sole director of MW on 18 January 2017, and acquired all of its shares in March 2017.

[55] He 1 §14; He 2 §§22-23.

421. However, Mr Kao's evidence in paragraphs 24-25 and 29 of his witness statement is that: (i) Mr Wong commonly controlled companies through others; (ii) he (Mr Kao) understood Mr Wong to control Mega Wealth; and (iii) he never understood any of the other individuals who have been said to control MW or its parent companies as ever having had any active role.

422. Furthermore, certain documents exist which also evidence Mr Wong's effective ownership of MW:

i) First, a draft response given by CH to an enhanced due diligence questionnaire by Freepoint in October 2016. The response was compiled by Mr James Mammone and Mr William Silverstein, based on information obtained from Ms Ko and Mr Siu. Mr Wong was copied into the email exchanges. This contains a statement by Ms Ko: "*IN HK, MR WONG OWNS COME HARVEST & MEGA WEALTH*."

ii) Second, a response dated 9 January 2017 from Mr Siu (the operations manager of MW) to an email enquiry from Mr Riley of the same date. Mr Riley said: "*We need to put in place a cross margin agreement between CH and MW. Our files do not show any common ownership, could you (or Mr Wong) explain the shareholding structure between the 2 companies and evidence of it?*" Mr Siu responded: "*The shareholders of MW are relatives of Mr Wong. Since Mr Wong is a HK citizen, he is facing many constraints and disadvantages to hold the parent companies of MW.*"

iii) Third, an email dated 16 January 2017 to Mr Riley from a Mr Ben Ho (apparently Mr Wong's agent) which states: "*Dear Nick, I am writing on behalf of Mr Wong Wai Kwok who is the director of Come Harvest Holdings Limited and actual owner of Mega Wealth International Trading Limited to handle the negotiations with your party. First of all, Mr Wong would like sincerely apologize for the inconvenience made to your company. He is willing to compensate your loss to avoid any lawsuit. I was authorised by Mr Wong to negotiate possible terms and conditions for your compensations*."

(G) APPLICATION OF THE LAW TO THE FACTS

423. In the light of my findings of fact, I now turn to the application of the law. I address each of MCM's causes of action in turn and review, for each claim, both MCM's and Straits' submissions. Although the other defendants did not appear at trial and so made no submissions, I am able to determine the claims against them from all of the documentary and oral evidence which was before the Court.

(I) DECEIT CLAIM AGAINST CH AND MW BASED ON EXPRESS REPRESENTATIONS

(i) Elements of the tort

424. The tort of deceit requires a claimant to show that: (i) the defendant made a false representation to the claimant; (ii) the defendant knew the representation to be false, or had no belief in its truth, or was reckless as to whether it was true or false; (iii) the

defendant intended the claimant to rely on the representation; (iv) the claimant did rely on the representation; and (v) as a result the claimant has suffered loss and damage.[56]

425. Representations may be express or implied.[57] "*Conduct may be a better guide to thought than language, just as circumstantial evidence may be more cogent than direct. The implication or inference may be a complex one*."[58] Whether any, and if so what, representation has been made must be "*judged objectively according to the impact that whatever is said [or done] may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee*".[59]

426. The basis for this claim is pleaded at paragraphs 16-24, 27-28, 33-34 and 38-42 of the Re-Re-Re-Amended Particulars of Claim. I shall take each element of the cause of action in turn.

(ii) False representations made to MCM by CH and MW

427. The 12 Purchase Contracts entered into between MCM and CH, and the 16 Purchase Contracts entered into between MCM and MW (referred to in paragraph 45 above), all incorporated the following representations and warranties at clause 8(b) of the relevant Master Agreement:

> "*On the Effective Date of a Purchase Contract, Counterparty represents and warrants to MCM that:*
>
> *(i) it has good title to Metal and the full and unqualified right to sell and deliver the Metal to MCM;*
>
> *(ii) Metal is free of any mortgage, charge, lien, encumbrance or adverse claim of or by any third party; and*
>
> *(iii) Metal complies in all respects with the specification, weight and shape criteria as specified in the Purchase Contract and in case where Metal is not located in an Exchange Warehouse, Metal meets all applicable Exchange requirements to be delivered immediately into the relevant Exchange Warehouse if required by MCM.*"

428. The expression "*Effective Date*" was defined by clause 1 of the Master Agreements as "*the date Metal is purchased or sold by MCM as specified in the Contracts*". For example, in the case of CHNI-001(A), the "*Trade Date*" (and the date of the Purchase Contract) was stated to be 4 May 2016, but the "*Effective Date*" was stated to be 5 May 2016.

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[56] *Global Display Solutions Limited v NCR Financial Solutions Group Limited* [2021] EWHC 1119 (Comm) at [105] per Jacobs J. See *Vald. Nielsen Holdings and Ors v Baldorino* [2019] EWHC 1926 (Comm) at [130] – [159] per Jacobs J for a more extensive review of recent authorities.
[57] Spencer Bower & Handley, *Actionable Misrepresentation* (5th ed, 2014) ("***Spencer Bower***") at [3.01]-[3.12].
[58] Spencer Bower at [3.05].
[59] *MCI Worldcom International Inc v Primus Telecommunications plc* [2004] 2 All ER (Comm) 833, 844 per Mance LJ (words in square brackets inserted by the editor of Spencer Bower *op. cit.* at [3.01]). Picken J reviewed the authorities in this context in *Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [115]-[123].

429. By clause 7(a) of the Master Agreements, delivery of the Metal and transfer of full title and risk in the Metal occurred on payment of the Payment Amount (as defined). In the case of CHNI-001(A), MCM received the hard copy WHR on 4 May 2016 and payment was made on 5 May 2016.

430. The transactional sequence from MCM's perspective was as follows: (i) receipt of PDF copy warehouse receipt and PMA Letter; (ii) preparation of a term sheet and draft confirmation for approval and signature by CH/MW; (iii) receipt of hard copy warehouse receipt and PMA Letter; (iv) payment by MCM to CH/MW (by way of inter-bank transfer)[60].

431. The express representations and warranties incorporated from clause 8(b) of the Master Agreement were false on the 'Effective Date' of 5 May 2016 in the case of CHNI-001(A), as they were in the case of every subsequent equivalent Purchase Contract, because, as at that date:

i) CH/MW did not have good title to Metal (defined by Clause 1 as "*Exchange warranted metal as specified in the Contracts*"), because CH/MW had no title to the metal specified in the Purchase Contracts. Title to cargo remained with Straits (or had been transferred to Straits' banks).

ii) CH/MW did not have the full and unqualified right to sell and deliver the Metal to MCM.

iii) The Metal was subject to the adverse title claim of Straits or Straits' bank.

(iii) CH and MW knew the representations to be false

432. It is perfectly plain from the foregoing that Mr Kao and Mr Wong both knew that CH/MW had never acquired title to the metal that it purported to sell to MCM.

(iv) CH and MW intended the Claimant to rely on the representations

433. The express representations were self-evidently fundamental to each Purchase Contract and no doubt were made express contractual representations and warranties because of their importance. Mr Kao and Mr Wong went to elaborate lengths to procure a counterfeit warehouse receipt in order to induce MCM to believe that it was acquiring title. There can be no question that Mr Kao and Mr Wong intended MCM to rely upon the representations.

(v) Claimant relied on the representations

434. MCM clearly relied on the representations in making payment. It also relied on the representations in each Purchase Contract by (a) continuing to enter into further Purchase Contracts and (b) refraining from taking any steps to rescind earlier Purchase Contracts and seek to recover Payment Amounts.

[60] See Mr Dyke's witness statement at paragraphs 11-19.

(vi) Resulting loss and damage

435. I find that MCM made net payments of USD 117,326,050.86 to CH, and USD 167,210,088.37 to MW. These figures come to a total of USD 284,536,139.23. This represents MCM's loss on its primary case in respect of its claim for deceit. MCM is entitled to the full USD 284,536,139.23 in deceit against Mr Kao and Genesis, and the sums of USD 117,326,050.86 against CH and USD 167,210,088.37 against MW, subject to any sums for which it must give credit (see below).

436. I should add that MCM relied on the calculation performed by Mr Dyke in September 2017 which is contained in MCM's response to CH and MW's Request for Further Information of the Particulars of Claim dated 23 March 2018. Mr Dyke was cross-examined about the reason for his calculation showing a higher total than the pleaded total. The explanation is the one given in Clyde & Co's letter dated 28 March 2018 which accompanies the Further Information, namely that Mr Dyke included in his calculation a Purchase Contract (CHNI-016) which is not part of MCM's claim. Once the figures for that contract are removed, the numbers correspond. I accordingly find that MCM did indeed make net payments totalling USD 284,536,139.23.

437. I find that MCM is also entitled, as against each of the first to fourth defendants, to the costs of investigating the fraud.

438. MCM accepts that it should give credit for the recoveries it has made by reason of the settlements it has entered into with the fifth to eighth defendants. As matters presently stand, MCM has recovered USD 400,000 from the fifth, sixth and eighth defendants and USD 1.4 million from the seventh defendants.

439. However, there is a dispute between MCM and Straits as to whether MCM is required to factor into its claim for the loss which it has suffered: (i) the impact of its onward sub-sales to ANZ; and (ii) the settlement agreement by which it settled liability to ANZ flowing from these sub-sales (see paras. 554ff below). I deal with this issue separately at Section G(vi) below after having set out my findings on the unlawful means conspiracy claims.

(II) DECEIT CLAIMS AGAINST THE FIRST TO FOURTH DEFENDANTS BASED ON IMPLIED REPRESENTATIONS

440. While the deceit claim based on express representations was made against CH and MW only, the deceit claim based upon implied representations is made against each of the first to fourth defendants.

441. The implied representations are pleaded at paragraph 32 of the Re-Re-Re-Amended Particulars of Claim as follows:

> "*32. In sending or causing to be sent the Purported Receipts, Soft Copy Receipts and PMA Letters to MCM and entering into (or causing Come Harvest / Mega Wealth to enter into) the Purchase Contracts with MCM, Come Harvest and Mega Wealth and those acting on their behalf (namely Mr Wong, Ms Ko, Mr Siu, Genesis and Mr Kao) impliedly represented:*

> *32.1. that they believed that the Warehouse Receipts provided or to be provided by Come Harvest / Mega Wealth pursuant to the Purchase Contracts were or would be genuine; and/or*
>
> *32.2. that they had not forged, did not intend to forge and were not involved in or responsible for forgery of the Warehouse Receipts provided or to be provided by Come Harvest / Mega Wealth pursuant to the Purchase Contracts; and/or*
>
> *32.3. that they had no reason to suspect that the Warehouse Receipts provided or to be provided by Come Harvest / Mega Wealth pursuant to the Purchase Contracts were or would be forged; and/or*
>
> *32.4. that they believed that Come Harvest / Mega Wealth had title to the Metal which Come Harvest / Mega Wealth proposed to sell to MCM*."

442. There are issues on the pleadings as to: (i) whether any conduct of Mr Kao/Genesis in particular gave rise to any implied representations as alleged;[61] (ii) whether MCM relied on any such implied representations; and (iii) whether such implied representations were false and known to be false.

443. I accept MCM's submission that the sending of the warehouse receipts in this case by CH/MW, under the control of Mr Kao/Genesis and Mr Wong, gives rise to an implied representation that CH/MW, Mr Kao/Genesis and Mr Wong believed those documents to be genuine.

444. Moreover, Mr Kao and Genesis appear to concede at paragraph 50.6(c) of their Re-Amended Defence that it would be appropriate to imply "*a representation that it* [Genesis] *or he* [Mr Kao] *had not forged, did not intend to forge, and was not knowingly involved in or responsible for the forgery of, that document*". On the evidence, I find that this implied representation was false, since Mr Kao (and through him, Genesis) was knowingly involved in and responsible for the forgery of the documents supplied to MCM.

445. As to reliance, Mr Riley does not say that he gave any conscious thought to the question of whether the first to fourth defendants were making an express or implied representation to him in the specific terms that have been pleaded. However, this is not a case which requires a complex analysis of reliance. It was clear from his evidence before me that Mr Riley considered the defendants to be making representations that the goods they were selling were genuine. This would have been actively present in his mind. That is sufficient.[62] Furthermore, the 'representation' actively present in the claimant's mind need not correspond precisely with what the court subsequently decides that the relevant representation(s) comprised.[63] Indeed, as MCM submitted, in

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[61] See MCM's Response to RFI, responding to an RFI served by the third to eighth defendants; and see Mr Kao/Genesis's denial of the alleged implied representations in para 50 of their Re-Amended Defence.

[62] See *Geest plc v Fyffes plc* [1999] 1 All ER (Comm) 672, 683 (para (iii)(c)), considered and endorsed by the Court of Appeal in *PAG v RBS* [2018] 1 WLR 3529 at [128] and [132].

[63] *Leeds City Council v Barclays Bank plc* [2021] EWHC 363 (Comm) at [95] and [103], (Cockerill J) which concerned whether it was necessary to demonstrate conscious awareness of the particular alleged representation.

the case of a representation that is to be implied because it 'goes without saying', it would be counter-intuitive to require anything more than this.

446. The implied representations were plainly false, for the same reasons as are set out above.

447. In the circumstances, each of MCM's deceit claims against the first to fourth defendants succeed. I deal with the quantum of this loss also at Section G(vi) below.

(III) BREACH OF CONTRACT CLAIM AGAINST CH/MW

448. This claim arises only if it is found that MCM has not effectively rescinded the Purchase Contracts (and corresponding Sale Contracts) by its notices dated 21 June 2017.

449. CH and MW deny in their pleaded case that MCM is entitled to rescind its contracts with them even if fraudulent misrepresentation is established, citing delay and inability to give counter-restitution.[64]

450. In particular, rescission is barred where (i) the claimant has affirmed the contract by unequivocally manifesting an intention to continue with it after knowing of the misrepresentation (or other vitiating factor); (ii) restitution by the claimant to the other contracting party of benefits conferred on the claimant by the other contracting party is impossible; or (iii) in the case only of equitable rescission, the claimant has delayed too long in seeking rescission so that the doctrine of *laches* applies.[65]

451. In the present case:

i) *laches* is not a defence to MCM's claim to rescind at common law for fraudulent misrepresentation;

ii) in any event it has not been established that there was any culpable or prejudicial delay on the part of MCM between 12 January 2017 (when the fraud began to be discovered) and 21 June 2017 (when notices of rescission were served); and

iii) the Purported Receipts are worthless so there is no need for counter-restitution of them to be given (though MCM states that most of them could nevertheless, if necessary, be provided).

452. Accordingly, I grant MCM the declaration which it seeks that it has validly rescinded its purchase contracts with CH/MW. Since I find that MCM has effectively rescinded the purchase contracts and the corresponding sale contracts by its notices dated 21 June 2017, the breach of contract claim against CH/MW does not arise for determination. Had it done so, I would have found that CH and MW were plainly in breach of contract with MCM by reason of their provision of fake WHRs.

[64] POC §§43-44; D1&2 §63. See too the non-admissions at D3-8 Reamended Defence §61 & D10 Re-re-re-amended Defence §21.
[65] Burrows, *Restatement of the English Law of Contract* (2nd ed, 2020) at §34(5).

(IV) PROCURING BREACH OF CONTRACT CLAIM AGAINST MR KAO & GENESIS

453. The ingredients of the tort of inducing or procuring a breach of contract are: (i) there must be a contract; (ii) there must be a breach of that contract; (iii) the conduct of the relevant defendant must have been such as to procure or induce that breach; (iv) the relevant defendant must have known of the existence of the relevant term in the contract or turned a blind eye to the existence of such a term; and (v) the relevant defendant must have actually realised that the conduct, which was being induced or procured, would result in a breach of the term.[66]

454. Elements (i), (ii) and (iv) are not in dispute[67], as Mr Kao/Genesis admit (at paragraph 85A of their Re-Amended Defence) paragraphs 77A.1 and 77A.2 of the Re-Re-Amended Particulars of Claim in this respect:

> "*Further or alternatively, Mr Kao and/or Genesis are liable to MCM for inducing or procuring breach of contract by Come Harvest / Mega Wealth, since:*
>
> > *77A.1 MCM entered into the Purchase Contracts with Come Harvest / Mega Wealth. The terms of the Purchase Contracts (paragraphs 16-22 above) required Come Harvest / Mega Wealth to transfer original warehouse receipts and title to nickel to MCM.*
> >
> > *77A.2 Mr Kao and Genesis knew that MCM had entered into the Purchase Contracts.*
> >
> > *77A.3 Mr Kao and Genesis intended that MCM should not receive original warehouse receipts, but should instead receive forged warehouse receipts derived from the colour scanned copies provided to Come Harvest / Mega Wealth by Straits.*
> >
> > *77A.4 Mr Kao and Genesis acted as alleged at paragraph 71.4 above so as to cause the fraud on MCM to take place and Come Harvest / Mega Wealth to breach the Purchase Contracts.*
> >
> > *77A.5 MCM has suffered loss as a result, as claimed at paragraphs 65-69 above.*"

455. Paragraph 71.4 of the Re-Re-Re-Amended Particulars of Claim in turn provides as follows:

> *"71.4. Mr Kao and Genesis were involved in each of the component commercial elements which enabled the fraud to be perpetrated on MCM, namely:*
>
> > *(1) Introduction of Straits to Come Harvest and Mega Wealth;*

[66] *Aerostar Maintenance International Ltd v. Wilson* [2010] EWHC 2032 (Ch) at [163] per Morgan J, quoted by Bryan J in *Lakatamia Shipping* at [125]. Morgan J in turn derived these propositions from *OBG Ltd v Allan* [2008] 1 AC 1 per Lord Hoffmann at [39]-[44] and per Lord Nicholls at [191]-[193] and [202].

[67] I would have found them to be proven in any event.

(2) Negotiation and execution or purported execution of the Straits Contracts;
(3) Introduction of Come Harvest and Mega Wealth to MCM;
(4) Negotiation and execution of the Purchase Contracts;
(5) Dispersal of funds away from Come Harvest and Mega Wealth."

456. I accept MCM's submission that it is clear on the evidence, including Mr Kao's own evidence, that Mr Kao was the architect of the Repo Transactions which were the vehicle for the fraud and for CH/MW's breaches of contract with MCM. Accordingly, I find that the pleaded allegations are made out on the basis of the facts set out above and Mr Kao and Genesis are each liable to MCM for inducing or procuring breaches of contract by CH/MW in the same sums as are recoverable under the deceit claim.

(V) CONSPIRACY TO INJURE BY UNLAWFUL MEANS

457. MCM makes unlawful means conspiracy claims against the first to fourth defendants and Straits. I will address the claim against Straits first and then address the claims against first to fourth defendants.

458. In outline, MCM maintains that Straits either knew or consciously decided not to enquire as to how CH, MW, Mr Kao and Genesis were obtaining finance from MCM, ANZ, VAM and other Western financiers using the CSCs. If they chose not to enquire, then MCM says that this was a question that called out for explanation, and accordingly the test for blind-eye knowledge is satisfied, which it is agreed is as set out at paragraph 24 of Straits' skeleton as follows: "*actual knowledge may be approximated by Nelsonian (or 'blind eye') knowledge if (and only if) the defendant believed that the perpetrator was up to no good (i.e. had a suspicion firmly grounded and targeted on specific facts) and refrained from making enquiries which would confirm that belief*".

459. Straits, on the other hand, maintains that there is no evidence that Straits had any knowledge of the fraud perpetrated on MCM; nor did it have blind-eye knowledge. There is, it maintains, no documentary evidence which supports the suggestion that Straits was in a combination, agreement or understanding with any other party to defraud MCM. Rather, Straits was itself misled and used by Mr Kao in his sophisticated fraud in this case.

460. Straits argues that at most and "*with the benefit of hindsight as perfect vision*", it can be seen that Straits missed a number of "*red flags*", across a period of approximately two years (some of which were after MCM had suffered all of its loss), to realise that Mr Kao, and his associated companies with which Straits was doing business, might be acting fraudulently. But Mr Kao did what he could to throw Straits off the scent.

461. For blind-eye knowledge, Straits contends that MCM must establish that Straits held a firm (and specific) belief based on targeted facts that Mr Kao (and his companies i.e. the first, second and fourth defendants) were using the CSCs *to create forgeries* to defraud MCM and yet deliberately refrained from asking questions through fear that such a belief would be confirmed. It would not be sufficient for MCM to establish that Straits had a belief that Mr Kao was up to no good with CSCs.

462. Nor would it be sufficient, Straits contends, for MCM to establish that Straits had a belief that Mr Kao was defrauding banks by representing that he was purchasing cargo

as evidenced by a CSC shown to the bank. That would be a different misrepresentation against a third-party having no, or insufficient, connection with the actual fraud in this case namely *the forgeries* of warehouse receipts, which forgeries were then sold to MCM. MCM take issue with this, maintaining (see paragraph 71.6A of its Re-Re-Re-Amended Particulars of Claim) that it is sufficient if Straits knew or must have suspected that CH and MW were or were likely to be using CSCs for the fraudulent purpose of obtaining finance from one or more third parties in circumstances where that third party would only agree to provide finance in the belief that it was receiving OWRs in exchange.

463. Straits further contends that MCM also missed numerous 'red flags' itself in the process of paying out approximately US$284m to two insubstantial companies, namely CH/MW, and receiving in approximately US$291m from ANZ, having carried out little or no checks in respect of the forged documents, having asked no questions during the course of their relationship with Mr Kao (and his associated companies) and having failed to authenticate (or even verify) a single WHR (despite this being their only collateral). Straits maintains that everybody was taken in by Mr Kao.

464. Moreover, Straits asserts that the Straits Contracts were a shambles, not a sham. They were drafted by junior traders using inapposite templates. Straits' failing was not that it changed its written contract template in order to deceive third parties, but that it failed to make sufficient changes to that template (by the time of Type 3, 4 and 5 contracts) to reflect the substance of its arrangement with Mr Kao. This was inertia on the part of inexperienced drafts-people.

(i) Legal principles

465. A succinct statement of the essential elements of unlawful means conspiracy was provided by Nourse LJ in *Kuwait Oil Tanker v Al Bader & ors*:[68]

> "*A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as the result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so*."

466. I adopt Cockerill J's summary of the key elements of the cause of action in *FM Capital Partners Ltd v Marino*, [2018] EWHC 1768 (Comm) at [94] (which was in turn adopted by Butcher J in *Iranian Offshore Engineering and Construction Co v Dean Investment Holdings SA* [2019] EWHC 472 (Comm)):

> "*The elements of the cause of action are as follows:*
>
> *i) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of: Kuwait Oil Tanker at [111].*

[68] [2000] 2 All ER (Comm) 271, at page 312.

ii) An intention to injure another individual or separate legal entity, albeit with no need for that to be the sole or predominant intention: Kuwait Oil Tanker at [108]. Moreover:

a) The necessary intent can be inferred, and often will need to be inferred, from the primary facts – see Kuwait Oil Tanker at [120-121], citing Bourgoin SA v Minister of Agriculture [1986] 1 QB: "[i]f an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them".

b) Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests: Lonrho Plc v Fayed [1992] 1 AC 448, 465-466, [1991] B.C.C. 641; see also OBG v Allan [2008] 1 AC 1 at [164-165].

c) Foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention: OBG at [166]. iii) In some cases, there may be no specific intent but intention to injure results from the inevitability of loss: see Lord Nicholls at [167] in OBG v Allan, referring to cases where:

"The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."

[…]

v) Use of unlawful means as part of the concerted action. There is no requirement that the unlawful means themselves are independently actionable: Revenue and Customs Commissioners v Total Network [2008] 1 AC 1174 at [104].

vi) Loss being caused to the target of the conspiracy."

467. In argument, the parties' respective formulations of the four elements of the tort of conspiracy were as follows:

#	MCM	Straits
1.	A combination or understanding between two or more people	A combination or agreement between a given defendant and one or more others
2.	An intention to injure the claimant	An intention to injure the claimant
3.	Unlawful acts carried out pursuant to the combination or understanding	Unlawful means carried out pursuant to the combination or agreement as a means of injuring the claimant
4.	Loss to the claimant suffered as a consequence of those unlawful acts	Causing loss suffered by the claimant

468. So far as the first element is concerned, MCM was willing to agree to Straits' formulation. The second element was also agreed, although the parties did not agree on the specific nature of intention that is required. The fourth element (loss) was also agreed. Straits' formulation of the third element was, however, contentious. The point made by Straits is the one made by *Grant & Mumford, Civil Fraud, Law Practice & Procedure (1st Edn, 2018)* at [2-089]:

> "*In first instance cases after Total Network, the House of Lords' decision in that case has been interpreted as demonstrating that the two words in the phrase "unlawful means" denote two separate requirements. The first is that one or more unlawful acts were committed pursuant to the conspiracy… The second is that the unlawful acts must be the means by which harm is inflicted on the claimant – or, put another way, that the loss suffered by the claimant was caused by those unlawful acts. Loss caused by other acts carried out further to the conspiracy, but not in themselves unlawful, will not be capable of founding a claim for damages.*" (underlining added)

I shall return to this below after addressing the first and second elements of the tort.

(ii) Combination, understanding or agreement

469. It is common ground between the parties that the test for this element of the tort is whether Straits, through Ms He and Mr Ang, was "*sufficiently aware of the surrounding circumstances and share[d] the same object for it properly to be said that they were acting in concert* [with Mr Kao and Mr Wong] *at the time of the acts complained of*". As is often asked of juries in criminal cases, a useful preliminary question for determining whether a party was involved in a conspiracy is to ask whether the alleged conspirators were "*in it together.*"[69] They do not need to "*have* [had] *exactly the same aim in mind*";[70] and while there must have been sufficient identity of object, "*the advantage to be derived from that same object may not be the same*".[71]

470. It is also common ground that:

(1) The Court's task is to look to see what part, if any, a defendant played in connection with the alleged fraud and consider whether such part necessarily compels the inference that the defendant was party to a conspiracy to use unlawful means: *Bird v O'Neal* [1960] AC 907, 920-921.

(2) The initial focus is whether the "*overt acts"* are themselves suggestive of a conspiracy; if so, before reaching a conclusion as to what inferences, if any, it is appropriate to draw, it is necessary to consider any explanation offered; an implausible or incredible explanation will not merely displace the initial inferences, but *may* itself provide further evidence in support: *Stevenson v Singh* [2012] EWHC 2880 (QB) at §18 per HHJ Seymour QC.

471. But the Court must keep in mind that "*even where a witness lies about a matter of importance, that does not necessarily mean that he is guilty of whatever it is that he is*

[69] *Lakatamia Shipping* at [85] per Bryan J {M/115/24}, citing *Kuwait Oil Tanker* at [111] per Nourse LJ.
[70] *ibid*, citing *Clerk & Lindsell on Torts* (23rd ed) at [23.104].
[71] *ibid*, citing *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] A.C. 435, 479 per Lord Wright.

accused of doing. People tell lies for a number of reasons, including attempting misguidedly to bolster a genuine case": *Do-Buy 925 Ltd v Natwest Bank Plc* [2010] EWHC 2862 (QB) at §52 per Popplewell J citing Lewison J in *Abbey Forwarding Ltd (in liquidation) v Hone* [2010] EWHC 2029.

472. Moreover, a defendant will have no liability for specific losses incurred or caused before he became a party to the conspiracy.[72] Moreover, as Briggs J stated in *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida*[73] "*where a bit-player in a multifaceted fraud knows only of one aspect of the fraud, and is ignorant of the others, he may not be liable for anything more than the loss properly attributable to that part of the fraud of which he is aware*".

473. Accordingly, Straits will not be liable for any losses caused to MCM resulting from the period prior to Straits, through Ms He or Mr Jeremy Ang, becoming a party to the alleged conspiracy, including losses prior to the date on which Ms He and/or Mr Ang became aware (either through actual or Nelsonian knowledge) of the fraud.

474. In the light of my findings of facts set out above, I find that there was a combination, understanding or agreement between Mr Ang, Ms He, Mr Kao and Mr Wong that Straits should:

    i) supply CSCs of blank-endorsed original warehouse receipts;

    ii) supply PMA Letters;

    iii) enter into contracts and issue invoices which purported to be, but were not, for 'repo' contracts;

    iv) refer to the CSCs as 'WHRs' (warehouse receipts) and not as 'CSCs' in correspondence; and

    v) hold the corresponding original warehouse receipts for as long as dictated by the first to fourth defendants.

475. I find that Ms He and Mr Ang knew of items (i), (iii) and (v) as they were part and parcel of the Type 5 trades. I find that item (iv) was known to Ms He (and I find that Mr Ang would likely also have been told about it by Ms He or Mr Kao) as can be seen from her email in which she instructed her team to refer to CSCs as WHRs. I find that item (ii) was also known to Mr Ang and Ms He, as is plain from the narrative of the fraud I have set out above. Ms He was closely involved in the drafting and procuring of the PMA Letters. Indeed, Straits were instructed to procure the PMA Letter which named MCM. Mr Ang was copied into the relevant correspondence with Ms He in which PMA Letters were discussed and knew about them.

476. Whilst all of these acts of assistance by Straits were in place by 27 April 2016 (the last being item (iv) which was agreed just before that time), items (i), (ii), (iii) and (v) - which were sufficient in themselves to amount to a relevant combination, understanding

[72] *Kuwait Oil Tanker Co SAK v Al Bader* (Moore-Bick J, unreported, 17 December 1998); *Erste Group Bank AG v JSC* "VMZ Red October" [2013] EWHC 2926 (Comm); [2014] B.P.I.R. 81, at [103] (overturned on appeal [2015] EWCA Civ 379; [2015] I.C.L.C. 706, but not on this point).
[73] [2009] EWHC 1276 at [842] onward, in particular [846] and at [948]-[952].

or agreement - were all in place well before 27 April 2016 and probably as early as January 2015.

477. I also find that Mr Ang and Ms He knew, prior to the supply of the first forged WHR to MCM on 27 April 2016, that these acts of assistance were facilitating a scheme for CH/MW and Genesis to procure finance by deceit (by falsely representing that they had and were able to convey title to metal). Straits, through Mr Ang and Ms He, were sufficiently aware of the surrounding circumstances and shared the same object for it properly to be said that they were acting in concert at the time of the acts complained of.

478. The "*overt acts"* of Straits are themselves strongly suggestive of a conspiracy. Straits was "in it together" with the first to fourth defendants. Moreover, the implausible explanation offered by Straits' witnesses in an attempt to explain away Straits' involvement in the conspiracy – in particular the "potential purchaser" Concocted Story and the "option to purchase" false narrative; the untruthful attempts in evidence to explain away the lies told by Straits to Pacorini and the western financiers; as well as Ms He's false story that her 2 year old son had deleted her private WeChat (in particular with Mr Kao) - provide further compelling evidence in support of Straits involvement in the conspiracy[74]. Straits' witnesses told deliberate lies not in an attempt to bolster a genuine case but in a deliberate attempt to distance Straits from its role in the conspiracy.

(iii) Intention to injure MCM

479. Straits further contends that it is not sufficient if the defendant intended to harm a third party or class of persons; rather, the defendant must have directed their actions towards the specific claimant, citing *Lonhro Plc v Fayed (No. 1)* [1992] 1 AC 448 at 466 per Lord Bridge; *Revenue & Customs Commissioners v Total Network SL* [2008] UKHL, [2008] 1 A.C. 1174 at §§43-44 per Lord Hope, §§94-95, 99-100 per Lord Walker and §§116, 119, 124 per Lord Mance; *WH Newson Holding Ltd v IMI plc* [2013] EWCA Civ. 1377 at §34-42 per Arden LJ; *British Airways Plc v Emerald Supplies Ltd* [2015] EWCA Civ. 1024 at §§152, 167-170. Recklessness as to injury to the claimant is not sufficient: *OBG v Allen* at §166 per Lord Nicholls.

480. Straits maintains that if a claimant wishes to rely on the "obverse side of the coin" analysis to infer an intention to injure, an "inseparable link" between the defendant's gain and the claimant's loss must be established; it is not enough that the defendant intends to benefit itself at the expense of a class of persons of which the claimant was one, citing *WH Newson Holding Ltd v IMI plc* [2013] EWCA Civ. 1377 at §38-41 per Arden LJ; *British Airways Plc v Emerald Supplies Ltd*, ibid.

481. MCM by contrast contends that Straits' submission that it must have directed its actions towards MCM (as the specific claimant) is "*unsupported by the authority cited and contradicted by at least two recent judgments*", being *CMOC Sales & Marketing Ltd v Person Unknown* [2018] EWHC 2230 (Comm) per HHJ Waksman QC at [124]-[126],

[74] I add that I would have reached the same conclusions concerning Straits' involvement in the conspiracy even had I found that Ms He had not deliberately deleted her WeChat messages.

and *Taylor v Van Dutch Marine Holding Ltd* [2019] EWHC 1951 (Ch) at [309] per Julia Dias QC.

482. Neither party cited in written or opening oral submissions the Supreme Court's recent decision in *Secretary of State v Health v Servier Laboratories Ltd* [2021] UKSC 24. Having been referred to it by the Court during the trial, the parties addressed very brief oral closing submissions on it.

483. I consider a correct analysis of the law on the requirement of an intention to injure the claimant in unlawful means conspiracy to be as follows.

484. In *OBG v Allen,* the House of Lords considered the level of intentionality required to establish liability in the related economic torts of inducing breach of contract and unlawful interference. *OBG* is not, therefore, an unlawful means conspiracy case. However, it has subsequently been held in a number of authorities that the test of intention as formulated in *OBG* also applies to unlawful means conspiracy.[75]

485. In particular, Lord Hoffmann at [42] in *OBG* stated as follows:

> "*The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. Mr Gye would very likely have preferred to be able to obtain Miss Wagner's services without her having to break her contract. But that did not matter. Again, people seldom knowingly cause loss by unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves. As I said earlier, the Dunlop employees who took off the tyres in GWK Ltd v Dunlop Rubber Co Ltd (1926) 42 TLR 376 intended to advance the interests of the Dunlop company*."

486. And at [166] Lord Nicholls, concurring with Lord Hoffman's analysis, stated as follows:

> *"I turn next, and more shortly, to the other key ingredient of this tort: the defendant's intention to harm the claimant. A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests. Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does not wish to harm the claimant, in the sense that he would prefer that the claimant were not standing in his way. Lesser states of mind do not suffice. A high degree of blameworthiness is*

[75] See *Meretz Investments v ACP* [2007] EWCA Civ 1303; [2008] Ch. 244 at [146]; *Bank of Tokyo-Mitsibishi v Baskan Gida* [2009] EWHC 1276 (Ch) per Briggs J at [826]-[833], and in particular [833]; Di*gicel v Cable & Wireless* [2010] EWHC 774 (Ch) per Morgan J at Annex I [84]. See also *Grant & Mumford* [2-045]: "*Subsequent cases have treated OBG v Allan as authoritative on the mental elements of an unlawful means conspiracy claim*".

called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct, in the words of Cooke J in Van Camp Chocolates Ltd v Aulsebrooks Ltd [1984] 1 NZLR 354, 360."

487. It follows that in *OBG*, Lords Hoffmann and Nicholls considered that it is necessary to distinguish between: (i) ends; (ii) means; and (iii) consequences. In summary:

a) **Ends**: If harm to the claimant is the end sought by the defendant (e.g. because of some *animus*) then the requisite intention is made out. In such cases intention to injure the claimant will also almost always be the "predominant purpose" of the defendant (*category 1*).

b) **Means**: If harm to the claimant is the means by which the defendant seeks to secure his/her end (usually to secure a benefit for himself/herself) then the requisite intention is made out (even if the defendant would have rather secured the end without causing loss to the claimant (i.e. without malice) (*category 2*).

c) **Consequences**: If harm is neither the end nor the means but merely a foreseeable consequence, the requisite intention is not made out. This could, perhaps, also be conceptualised as a statement that "*recklessness*" will not suffice – a person is considered reckless in relation to a particular consequence of their conduct if they realise that their conduct may have a particular consequence (i.e. it is a "foreseeable consequence") but they go ahead anyway (*category 3*).

488. So far as category 3 is concerned, in *OBG* at [167] Lord Nicholls added a further explanatory gloss:

> **Other side of the coin**: "*I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort*."[76] (emphasis added)

[76] Note that in *Kuwait Oil Tanker* (CA, 2000) [121], Nourse LJ approved the following dictum of Oliver LJ in *Bourgoin SA v. Minister of Agriculture, Fisheries and Food* [1986] QB 716 at 777: "*If an act is done deliberately and with knowledge of the consequences, I do not think that the actor can sensibly say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them*." At first sight this may seem difficult to reconcile with the observations of Lord Hoffmann and Lord Nicholls in *OBG* but *Grant &*

489. In other words, if harm to the claimant was the necessary consequence (i.e. obverse side of the coin) of the defendant's actions and the defendant knew this then although the purpose of the defendant's action was not to harm the claimant, he/she will be considered as having intended to harm the claimant (*category 4*).

(a) Is there a requirement to "target" the Claimant?

490. Straits submits that in addition to the test outlined above there is a requirement that the defendant must have directed their actions towards the specific claimant (here, MCM). Straits cites four cases as well as the practitioners' text, *Grant & Mumford* in support of its submission.

491. First, Straits relies upon *Lonhro Plc v Fayed (No. 1)* [1992] 1 AC 448 at 465-466 per Lord Bridge. The question before the House of Lords in *Lonhro v Fayed* was whether the defendant's intention to injure the claimant had to be his *predominant purpose* (as with lawful means conspiracy). Confusion had been created following the Court of Appeal's (Slade LJ) interpretation (in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette*[77]) of Lord Diplock's speech in *Lonhro v Shell*.[78] Lord Bridge stated at [468] that:

> *"In the Metall case" [Slade LJs analysis concluded] "that it [i.e. Lonhro v Shell] laid down a rule of law that the tort of conspiracy to injure required proof in every case not merely of an intention to injure the plaintiff but also that injury to the plaintiff was the predominant purpose of the conspiracy. My Lords I am quite unable to accept that Lord Diplock or the other members of the Appellate Committee concurring with him, of whom I was one, intended the decision in Lonhro v Shell […] to effect, sub-silentio, such a significant change in the law […] I would overrule Metall in this respect."*[79] (emphasis added)

492. There is nothing specific in *Lonhro v Fayed* about whether the intention must be to target the particular individual claimant specifically or a class of persons, and that issue did not arise on the facts of that case. However, Straits relies upon Lord Bridge's citation (apparently with approval) of Lord Denning's judgment in *Lonhro v Shell* in support of its submissions:

> "*I would suggest that a conspiracy to do an unlawful act – when there is no intent to injure the plaintiff and it is not aimed or directed at him – is not actionable, even though he is damaged thereby. But if there is an intent to injure him then it is*

Mumford suggest that this dicta must now be read in light of the principles set out in *OBG* and therefore the *Kuwait Oil* case is "*probably best understood as an example of "the obverse side of the coin analysis*" [2-043]. I agree.

[77] [1990] 1 QB 391.

[78] [1982] AC 173. Lonhro owned and operated an oil pipeline running from Mozambique to Southern Rhodesia. On November 11, 1965, Rhodesia declared independence unilaterally. On December 17, the Southern Rhodesia (Petroleum) Order 1965 made it a criminal offence to supply oil to Rhodesia without licence from the Minister of Power, and no further oil was tendered through the pipeline. B.P. and Shell continued, however, to supply Rhodesia through other means. Lonrho claimed damages against them on the grounds that their actions had brought about, and prolonged, the unilateral declaration of independence, and the consequent disuse of their pipeline. The Court of Appeal held that Lonrho had no cause of action. The House of Lords held, dismissing the appeal, that the civil tort of conspiracy only arose where there was an agreement for the purpose of injuring the claimant's interests, not for the prosecution of the defendant's interests, even if the agreement constituted a criminal offence.

[79] *Lonhro Plc v Fayed (No. 1)* [1992] 1 AC 448 at 468 E-G.

actionable. The intent to injure may not be the predominant motive. It may be mixed with other motives." (emphasis added).

493. However, in *OBG v Allan* at [43] Lord Hoffman clarified what was meant by this. In setting out the test for intention, Lord Hoffmann noted that if harm to the claimant:

> *"is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think, is what judges and writers mean when they say that the claimant must have been "targeted" or "aimed at".."*

494. And at [60] he stated:

> *"I do not think that the width of the concept of 'unlawful means' can be counteracted by insisting upon a highly specific intention, which 'targets' the plaintiff. That, as it seems to me, places too much of a strain on the concept of intention. In cases in which there is obviously no reason why a claimant should be entitled to rely on the infringement of a third party's rights, courts are driven to refusing relief on the basis of an artificially narrow meaning of intention which causes trouble in later cases in which the defendant really has used unlawful means."*

495. It follows that the requirement that the defendant's intention to injure is "*targeted*" or "*aimed at*" the claimant is simply a reiteration of the test for intention set out in the preceding paragraph of Lord Hoffman's speech, namely that harm to the claimant must be the end sought by the defendant or the means by which the defendant seeks to secure its end rather than merely a foreseeable consequence of its actions. There is no additional requirement that harm be directed at a specific claimant.

496. In *Servier* (*supra*), the issues on the appeal before the Supreme Court were (i) whether a necessary element of the unlawful means tort is that the unlawful means should have affected the third party's freedom to deal with the claimant, and (ii) if so, whether the Supreme Court should depart from the *ratio* of *OBG v Allan* and determine that the dealing requirement is not an essential element of the tort. The Court unanimously held, on the first issue, that the dealing requirement did form part of the *ratio* of *OBG*. As to the second issue, the Court agreed with Servier that *OBG* should not be departed from.

497. In particular, at [58] and [61] Lord Hamblen referred to the fact that in *OBG*,

> "58. *Lord Hoffmann's explanation of the essential elements of the unlawful means tort … was meant to clarify the law going forward and it served a definitional purpose…61. … Lord Hoffmann considered that the best way to keep the tort within reasonable bounds was through giving a narrow rather than a wide meaning to unlawful means. In his view this could not satisfactorily be done by applying principles of causation or by adopting a narrow meaning of intention*."

498. And then at [95]-[98] he said this:

> "*95. […] the risk of a wide range of claimants clearly exists. An important reason why that is so is that the House of Lords in OBG rejected a narrow and specific test of intention which requires targeting of the claimant. Instead, it laid down a*

test of intention which includes intending harm as a means to an end, such as enrichment. Consequences that are the necessary means by which the defendant's aim is achieved are taken to be intended. In the economic context of the unlawful means tort this may operate very broadly. Competition is the essence of trade and it involves gain at the expense of others. Keeping the law as stated in OBG but dispensing with the dealing requirement would mean losing an important counterbalancing factor to the broader test of intention adopted in that case. Adopting the appellants' first alternative would involve undermining the coherence of the majority decision in OBG and the careful and considered policy choices which were made.

96. The appellants' second alternative involves adopting in whole or in part the alternative formulation of the unlawful means tort proposed by Lord Sales and Professor Davies in their 2018 LQR article. In brief summary, they advocate that unlawful means should not be limited by actionability but should extend to any criminal, statutory or civil wrong. They also consider that the tort should be extended beyond economic interests and that there should be no dealing requirement. They recognise the need for a control mechanism but consider that this can be provided by adopting a narrow test of intention. They acknowledge that the test of intention in OBG, which they refer to as the Sorrell v Smith view of intention (Sorrell v Smith [1925] AC 700), may operate too broadly in some areas. As they explain as at p 77:

> *"… in many contexts the Sorrell v Smith view of intention to harm seems to come adrift from a view of intention to harm in the sense of specifically targeting the use of unlawful means against a particular person … For instance, a defendant might be broadly aware of competing against others in a limited market but have only a hazy idea who those others are or which of them might actually be harmed by that defendant's own actions: would that create a sufficient nexus between the defendant and the (unknown) claimant competitor to give rise to liability? We suggest not. A more specific intention to use unlawful means to harm a particular person should be required, using those means as the club to hit them …"*

97. We have not been addressed on whether it would be appropriate to revisit the OBG test of intention. That is no doubt because the only intention which the appellants are able to plead is Sorrell v Smith intention. Their case is that the elevated prices sought by the respondents were achieved "at the expense" of the appellants and that expense was "a means to an end, that end being elevated prices" (para 75 of the Particulars of Claim). This is not therefore an appropriate case to consider the possibility of adopting the Sales/Davies reformulation of the tort and it would not avail the appellants if the court was to do so. In so far as the appellants are suggesting that we should adopt part of the Sales/Davies proposal, abandon the dealing requirement, but ignore the rest, that is incoherent and unsustainable. If such a reformulation ever falls to be considered, it would be necessary to consider it in its entirety, not on a pick and choose basis.

> *98. It should also be noted that Lord Hoffmann specifically considered a similar proposal made in an earlier article written by Lord Sales - Sales and Stilitz, "Intentional Infliction of Harm by Unlawful Means" (1999) 115 LQR 411-437. He noted that they considered that the tort could be kept within reasonable bounds by a requirement of a specific intention to target the claimant, but agreed with other writers who "consider that it would be arbitrary and illogical to make liability depend upon whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant". He also pointed out at para 60 that a narrow test of intention may be too exclusionary.*"

499. I would add that even Lord Sales and Professor Davies recognise in their 2018 LQR article the difficulties with narrowing intention so as to require a specific targeting of the claimant, as they recognise that "*it has to be acknowledged that if one seeks to articulate a concept of intention which is narrower than [the Smith v Sorrell intention] but is wider than the "predominant intention to injure" concept used for the purposes of Quinn v Leathem liability, a different source of uncertainty creeps back into the analysis. The shades of difference in the mens rea required become somewhat refined*."

500. It follows that the current and established state of the law, which I follow, is that laid down by Lord Hoffman and Lord Nicholls in OBG, and a specific intention to target the defendant is not required; rather, the harm done to the claimant must either be the end sought by the defendant or the means by which he achieved his end.

501. Contrary to Straits' submission, there is nothing in *Revenue & Customs Commissioners v Total Network SL* [2008] UKHL, [2008] 1 A.C. 1174 at paragraphs 43, 99 and 124 (cited by Straits) which undermines the foregoing analysis. The question of whether the defendant had an intention to target the particular claimant did not arise on the facts of the case, no doubt because a VAT fraudster always knows that it is the Revenue who will be injured. But in any event, in light of the fact that *OBG* had been decided only one year previously, had the House of Lords intended to revise Lord Hoffman and Lord Nicholls' test for intention in the context of unlawful means conspiracy it would have clearly signalled the fact that it was doing so. It did not.[80] That, unsurprisingly, is the view that Morgan J took in *Digicel v Cable & Wireless* [2010] EWHC 774 (Ch) at [83]:

> "*The question of intention to injure was not in issue in Total Network but I do not detect anything in that decision which supports the idea that the test for intention to injure should be different from the test in OBG. Total Network does make it clear that the two torts being considered are different torts and the concept of "unlawful means" is different for the two torts. But that is no warrant for deliberately changing the other ingredients of the two torts so that the test for intention will also be different for the two torts. In Meretz Investments NV v ACP Ltd [2008] Ch 244, the Court of Appeal applied the statements in OBG, as to the test of intention, to the tort of conspiracy to injure by unlawful means. So too did Briggs J in Bank of*

[80] The suggestion to the contrary in *Grant & Mumford* at paragraphs [2-045] and [2-086] ("*The House of Lords in the later decision in Total Network reintroduced the concept of action "targeted" at or "directed" against the claimant"*), which was cited by Straits, I consider to be wrong. Likewise, the test of targeting the claimant was not re-introduced by the court in *JSC BTA Bank v Ablyazov* [2018] UKSC 19, as suggested by *Grant & Mumford* at [13]-[14], which suggestion was also adopted by Straits.

Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayive Pazarlama AS [2009] EWHC 1276 (Ch).”

502. Nor does the Court of Appeal’s decision in *WH Newson Holding Ltd v IMI plc* [2013] EWCA Civ. 1377 at [34]-[42] lead to a different conclusion, as Straits contends.

503. Newson sought to bring a claim in unlawful means conspiracy against IMI arising out of the Commission's finding of a cartel to which IMI was a party. Newson purchased copper plumbing pipes from IMI and they sought to recover losses which they contended the cartel had caused them to suffer in making those purchases. The Commission had found that IMI group had entered into a cartel in order to distort competition and thereby to promote their own interests. There was no suggestion, however, of any intention to injure Newson group or indeed any other person in its position.

504. At first instance, Roth J refused to strike out the unlawful conspiracy plea[81]. He considered that this conspiracy claim was based on the Commission's findings because IMI group intended to enter the cartel in order to promote their own interests. That would inevitably mean injuring purchasers of products from IMI group. Any other conclusion would be "wholly unrealistic". Thus he concluded that the element of the tort of conspiracy that the conspirators should have intended to harm the claimants was established on the basis of the findings in the Decision.

505. The Court of Appeal disagreed with this analysis of Roth J. In order to understand the context of the leading judgment of Arden LJ, it is necessary to understand the submissions of the parties, which she summarises in paragraph 34 of her judgment:

> *“The parties disagree about what intent to injure relevantly involves. IMI group submit that there must be an agreement to cause harm by unlawful means with intent to injure Newson group. Newson group rely on the "obverse side of the coin" argument. They contend that intent to injure is satisfied by the findings in the Decision that IMI group intended to cause higher prices and obtain higher margins than would otherwise occur through free competition. Newson group argue that it matters not if IMI group were simply indifferent whether the victims were the direct or the indirect purchasers of tubes. On their submission it is sufficient that IMI group intended to make a profit at the expense of a class of persons to whom the wrongful acts were targeted*.”

506. Newson relied upon an “obverse side of the coin argument” before both Roth J and the Court of Appeal because the Commission made no finding of any intent to injure, it not being a relevant question for it to answer. Roth J was willing to *infer* intent to injure flowing from the fact that the cartelists intended to benefit their own businesses.

507. It is this argument that Arden LJ addresses in her judgment. She held at paragraph 39 of her judgment that the court “*cannot draw that inference since it does not necessarily follow. IMI group may have absolutely no intent as regards Newson group. They may have expected Newson group to pass the price increase on. It may well be that all*

[81] [2012] EWHC 3680 (Ch)

purchasers of copper tubes would have been in the same position, so that they were able to pass the extra prices on".

508. It followed that this was not an obverse side of the coin case because IMI may have expected Newson group to pass the price increase on and indeed all purchasers of copper tubes might have been able to do so. The gain to IMI and the loss to Newson were therefore not inseparably linked, and it did not follow that Newson would inevitably suffer loss.

509. It is in this context that Arden LJ then stated as follows:

> *"41. Mr de la Mare seeks to meet this difficulty by submitting that it matters not if IMI group were simply indifferent whether the victims were the direct or the indirect purchasers of pipes and that it is sufficient that IMI group intended to make a profit at the expense of a class of persons to whom the wrongful acts were targeted. I would reject this argument. It deprives the requirement of intent to injure of any substantial content. It is tantamount to saying that it is sufficient that the conspirators must have intended to injure anyone who might suffer loss from their agreement. If I might say so, the submission is reminiscent of the circularity of the words in The Gondoliers that "when everyone is somebody, then no-one's anybody".*

510. I do not consider that *Newson* establishes, as Straits submits, a principle that if the claimant wishes to rely upon the obverse side of the coin argument, it is not enough that the defendant intends to benefit itself at the expense of a class of persons of which the claimant was one. The Commission having made no finding of any intent to injure, *Newson* was simply a case where the claimant could not establish that IMI (i) intended to harm Newson's business as an end in itself; or (ii) intended to harm Newson's business as a means to an end. At most, it could only be said that IMI foresaw that its unlawful conduct might or might not damage a class of persons of whom Newson was one, which cannot be equated with intention.

511. Moreover, as MCM rightly submit, "*so far as the inferring of an intent to injure is concerned, the facts of that case are far removed from those of a conspiracy to injure by means of deceit, where the principal fraudsters aim the deceit at a specific victim within a class of persons, and/or where there was always going to be a specific victim of the conspiracy (within a class of persons) who would inevitably suffer a loss. This is not a cartel case where inflated prices might impact a broad church of persons, which persons might be able to pass on the inflated prices without any recourse against them*."

512. Straits also relies upon *British Airways Plc v Emerald Supplies Ltd* [2015] EWCA Civ. 1024 at §§152, 167-170 in support of supposedly the same principle, that if the claimant wishes to rely upon the obverse side of the coin argument, it is not enough that the defendant intends to benefit itself at the expense of a class of persons of which the claimant was one. I do not consider that it provides support for any such principle.

513. In *BA v Emerald,* BA appealed against certain case management and other orders made by Peter Smith J in proceedings brought by 565 claimant companies against it, arising out of BA's involvement in a cartel. The claimants were shippers of air freight who purchased air freight services in various territories worldwide. In determining whether certain portions of the claimants' Particulars of Claim relating to its action for unlawful

means conspiracy should be struck out the Court reiterated the reasoning of the Court in *Newson* at [169]:

> *"It is not known whether anyone from the alleged class (whether that be the shippers or the shippers and freight forwarders together) will in fact suffer at all. BA is not seeking to gain at their expense, even if it is foreseeable that this is in fact what may happen. Even if one expands the class to anyone in the chain down to the ultimate consumers (which is not in fact how the case is put), this opens up an unknown and unknowable range of potential claimants. It cannot be said that there is, to use Lord Nicholls' emphasised words, an intent to injure the particular claimant. Moreover, to fix liability in these circumstances is in our view directly at odds with the binding decision in Newson."* (emphasis added)

514. Again, the analysis and the result in BA are unsurprising, being an orthodox application of the test laid down in *OBG* whereby harm to the victims of the cartel could (at most) only be said to have been "*reasonably foreseeable*" and therefore the necessary intention to injure could not be made out (albeit that the use of the words "particular claimant" could mislead the unwary, as Lord Nicholls does not in fact refer to a need to injure a particular claimant anywhere in his speech).

515. I accordingly agree with the approach to this question taken by HH Judge Waksman QC (as he then was) in *CMOC Sales & Marketing Ltd v Person Unknown* [2018] EWHC 2230 (Comm). That was a case where the claimant's email account was hacked by fraudsters and false payment instructions were sent to its bank, which made payments to certain defendants, who then transferred money on to other defendants.

516. At [125]-[126], the judge accepted the submission that "*there is no principled reason why the precise identity of the victim should be part of the legal test*" and observed at [126] that:

> "*Suppose that the residual three defendants in this last class knew that they were handling and assisting in the moving of illicit proceeds in a scheme to defraud a company by using false orders enabled by the hacking of its email accounts. Suppose they further agreed to do all of this knowing that their gain is the company's loss. I do not believe that they could avoid liability by saying they did not know the actual identity of the company defrauded or the precise methodology of the conspiracy. It is surely sufficient that they knew that there was a victim and that monies would be procured illicitly from that victim and that they had agreed to play their part.".*

517. Likewise, in *Group Seven Limited v Nasir* [2017] EWHC 2466 (Ch) Morgan J at [523] stated, *obiter,* that the fifth defendant (Mr Louanjli) would probably have been liable for unlawful means conspiracy even if he had not known the identity of the true owner of the money:

> "*Mr Louanjli knew that there was a strong case that Mr Nobre was laundering money which he had obtained dishonestly. It is obvious that such conduct was intended to harm the true owner of the money. Although, in such a case, it was probably not necessary for Mr Louanjli to know who the true owner was, in fact he did know that the money had come from Group Seven to AIC and from it to Larn*."

518. It is fair to say that there is a conflation in Morgan J's dictum of intent with knowledge. Following Lords Hoffmann and Nicholls' test in *OBG*, it is not necessary to have knowledge of the precise identity of the claimant to have the requisite intention (in a case where harm to the claimant is the end sought, that almost always presupposes knowledge of the identity of the claimant, but it is possible that a defendant could have the requisite intention in a "means" or "obverse side of the coin" case without knowledge of the claimant's identity). Morgan J's dictum may be best understood as referring to the fact that the fifth defendant had the requisite intention in a "means" sense given that harm to the claimant was the means by which he made his gain.

519. Straits also relies upon *JSC BTA Bank v Ablyazov* [2018] UKSC 19, [2020] A.C. 727 ("*Khrapunov*"). This was a jurisdiction appeal where it fell to the Supreme Court to determine whether contempt of court could constitute "*unlawful means*" for the purposes of unlawful means conspiracy.

520. The test for intention in unlawful means conspiracy was not an issue which was germane to the case before the Court. Nonetheless, the Court made the (well established) point that the degree of intention required differs as between the torts of lawful and unlawful means conspiracy:

> *"13. The emphasis in the authorities on cases in which the predominant purpose was to injure the claimant has diverted attention from the fact that both lawful means and unlawful means conspiracies are torts of intent. But the nature of the intent required differs as between the two. This is because a conspiracy may be directed against the claimant notwithstanding that its predominant purpose is not to injure him but to further some commercial objective of the defendant. This point had been made, some years earlier, by the Supreme Court of Canada in Canada Cement LaFarge…*"

521. On its face, this statement adds nothing to Lords Hoffmann and Nicholls' analysis of intention in *OBG:* a defendant may intend to harm a claimant where their predominant purpose is not to injure the claimant but to promote their own economic interests (through "means" and "obverse side of the coin" intention). The passage which the Supreme Court then cites in the Canadian Supreme Court's decision in *Canada Cement LaFarge*[82] is as follows:

> "*Whereas the law of tort does not permit an action against an Individual defendant who has caused injury to the plaintiff, the law of torts does recognise a claim against them in combination as the tort of conspiracy if:*
>
> > *(1) whether the means used by the defendant are lawful or unlawful, the predominant purpose of the defendants conduct is to cause injury to the plaintiff; or (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendant should know in the circumstances that injury to the plaintiff is likely to and does result.*
> >
> > *In situation (2) it is not necessary that the pre-dominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing*

[82] [1983] 1 SCR 452.

> *circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff." (emphasis added).*

522. This passage is accordingly cited by Lords Sumption and Lloyd-Jones in order to illustrate their (uncontroversial) statement that a conspiracy may be directed against a claimant notwithstanding that its predominant purpose is not to injure him but to further some commercial objective of the defendant. However, upon analysis, it can be seen that the Canadian Court's formulation of the test for intention in unlawful means conspiracy is somewhat different to the English courts' approach;[83] but I do not consider that Lords Sumption and Lloyd-Jones were intending to modify the test for intention as laid down by the House of Lords in 2007 in *OBG*; certainly they do not say that that is what they are doing. *Canada Cement LaFarge* was a judgment given in 1983 which predates almost all of the modern English authority on this topic.

523. Last on the issue of intention, the interrelationship between intention and knowledge should be considered. These two aspects of the tort are distinct but overlapping with respect to the requirement that the claimant must show that the defendant had the requisite "intention to injure". As noted by *Grant & Mumford:*

> *"The overlap between intention and knowledge in the field of conspiracy is significant. This is not least because evidence of what a defendant knew is (together with evidence of what he did) often the material from which the court draws an inference as to the defendant's intention. As Etherton LJ said in Baldwin v Berryland Books: "in this area of the law, knowledge and intention are intimately connected. Intention to injure, and indeed acting in concert, cannot be inferred in the absence of the requisite knowledge.*
>
> *Accordingly, an analysis of the level of knowledge of each particular defendant will generally be necessary, in order to ascertain any differences and their effect on the liability of each defendant as a conspirator."* [84]

524. In this regard, *Grant & Mumford* also observe that a particular defendant need not know all the details of a conspiracy in order to be liable for all of its consequences:

> *"If, for example, there is an overall scheme to steal from the conspirators' employer by any available means, it is not necessary for each conspirator to be fully aware of the circumstances of each theft (e.g. the date it is to be carried out and the precise mechanism to be employed) in order for him to be liable for its consequences"*[85] *and that "these issues are likely to be most acute in relation*

[83] With respect to (1) above, this approximates to Category 1 intention as outlined in *OBG*. This is uncontroversial. However, with respect to (2) ("constructive intent"), Etsey J's formulation falls outside the categories of intention as articulated by Lords Hoffmann and Nicholls in *OBG.* That the defendant "*should know*" that "*injury to the plaintiff is likely to […] result*" falls somewhere between Categories 3 and 4 formulated in *OBG* in so far as it more than a "*merely foreseeable consequence*" (given it is "*likely*") (Category 3) but by no means the obverse side of the coin of the defendant's actions (Category 4).

[84] [2-122].

[85] [2-124]. See also *Kuwait Oil* [133]; *The Dolphina* [2012] Llyod's Rep 304 (High Court of Singapore) at [282]: "*A conspirator need not know all the details of the plot as long as he is aware of the common objective and what his role in bringing it about involves*."

> *to subsidiary participants in a conspiracy, who may have been engaged on a "need-to-know" basis."*[86]

525. As concerns the quality (rather than the extent) of the defendant's knowledge, *Grant & Mumford* observes that:

> "*Nelsonian or blind-eye knowledge may be sufficient, at least if it can be shown that the reason the particular defendant abstained from inquiry was that the state of affairs he did not wish to confirm by such inquiry was one which he believed was likely to exist (rather than simply suspecting that was the case)*".[87]

526. This is accepted by Straits at paragraph 45 of its written closing submissions:

> "*Consistent with the requirements as to intention, nothing short of actual knowledge as to […] harm to the claimant will suffice, albeit actual knowledge may be approximated by Nelsonian (or 'blind eye') knowledge if (and only if) the defendant believed that the perpetrator was up to no good (i.e. had a suspicion firmly grounded and targeted on specific facts) and refrained from making enquiries which would confirm that belief; failure to inquire due to gross negligence cannot be the basis of a finding of Nelsonian knowledge.*" (emphasis added)

527. The fact that "Nelsonian" knowledge will suffice for the purposes of establishing the defendant's intention (and whether they entered into a combination) strengthens the view that there can be no requirement that the defendant intended to harm a specific claimant (and therefore knew the identity of that specific claimant).

528. It would be inconsistent (and undermine the coherence of the tort) to impose a requirement that the defendant must have "*directed [its] actions towards the specific Claimant*"[88] while also accepting that a subsidiary participant need only have had blind eye knowledge of all the circumstances of the fraud and its precise mechanics.

529. However, ultimately the outcome of this legal issue does not matter on the facts of this case, as I find that Straits knew that MCM was an intended victim of the unlawful means at least from the time when a PMA Letter was issued in MCM's name on or shortly prior to 28 April 2016.

530. Straits also knew, likely as early as January 2015 but certainly by February 2016 (which is well before the issuing of the first of the 92 forged WHRs on 27 April 2016), that (i) Mr Kao/Mr Wong were using the CSCs which Straits had supplied to their companies under Type 5 transactions for the fraudulent purpose of obtaining finance from western financiers, including MCM and (ii) those financiers were claiming to hold original WHRs corresponding to the CSCs supplied to Mr Kao's/Mr Wong's companies, and that they believed themselves to have acquired title to the metal covered by those WHRs. Straits nonetheless continued to combine with Mr Kao and Mr Wong and their

[86] [2-125].
[87] [2-126].
[88] Straits' Closing, para. 39.

companies as set out in paragraphs 474-478 above because it was receiving substantial fees in return for so doing.

531. It follows that Straits sought to advance its own business by pursuing a course of conduct which it knew would, in the very nature of things, necessarily be injurious to MCM and to western financiers such as MCM. Straits' state of mind accordingly satisfies the mental ingredient of the tort.

532. Moreover had Straits not known this, I would have found that through Mr Ang and Ms He it had blind-eye or Nelsonian knowledge prior to the issuing of the first forged WHR because they could and should have asked Mr Kao with whom he was dealing and what he was doing with CSCs that led to western financiers claiming ownership over the metal, and that they only did not do so because they had a suspicion grounded and targeted on specific facts that, through the use of the CSCs, he (through CH/MW) was defrauding MCM or western financiers like MCM but they would rather not make enquiries so as to have their suspicion confirmed.

(iv) Unlawful means

533. The parties agree[89] that this component of the tort has two constituent parts:

i) The unlawfulness of the act requiring a consideration of which types of unlawful act are, as a matter of law, capable of founding liability; and

ii) Whether an unlawful act is, in fact, the 'means' by which injury is inflicted on the claimant pursuant to the conspiracy (i.e. loss caused by other acts carried out further to the conspiracy, but not in themselves unlawful, will not be capable of founding a claim).

534. The first part (a) is not a point of contention. The second part (b), also referred to as "*indeed the means*" or "*instrumentality*", remains in issue and the parties disagree as to its requirements. The parties' respective submissions on this point are as follows.

(a) Straits' submissions

535. By its closing submissions, Straits submits that the "*indeed the means*" component of the tort has two aspects to it: (i) causation; and (ii) intention. It submits that this requirement of "intention" is *in addition to* the requirement that the defendant had intent to injure the claimant, such that there are two aspects of intent relevant to the tort of unlawful means conspiracy: (a) intent to injure the claimant; and (b) intent to injure the claimant by the unlawful means which caused the claimant damage/loss. Straits submits that this means that "*MCM must establish that Straits knew about the forgeries*". [90]

536. In support of an alleged requirement that the "unlawful means" employed by the defendant must have caused the claimant's loss, Straits relies upon the following:

i) *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch) at Annex I [3] per Morgan J:

[89] Straits' Closing, [46] and MCM's Closing, [431].
[90] Straits' Written Opening at [35].

> *"The phrase "unlawful means" has two elements. The first is a requirement that the acts involved are "unlawful". The second is a requirement that the unlawful acts were the means of inflicting harm on a claimant."*

This is reiterated at Annex I [71] (although not referred to by Straits):

> "*The unlawful acts must be the instrument by which the loss is inflicted. The unlawful acts will not be the instrument in this sense if the unlawful acts are incidental to, or collateral to, the loss*".[91]

ii) *JSC BTA Bank v Khrapunov* [2018] 2 W.L.R. 1125 at [11] per Lords Sumption and Lloyd-Jones:

> *"Conspiracy being a tort of primary liability, the question what constitute unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant. This was the position reached by the House of Lords in Revenue and Customs Commrs v Total Network SL [2008] AC 1174."* (emphasis added)

iii) *Grant & Mumford*, §2-047:

> *"Each of the words in the phrase "unlawful means" encapsulates a separate concept. The first concerns the unlawfulness of the act (or means) and requires consideration of which types of unlawful act are, as a matter of law, capable of founding liability. The second concept concerns the question of whether an unlawful act is, in fact, the "means" by which injury is inflicted on the claimant pursuant to the conspiracy."*

537. In addition to the requirement that the claimant must prove that the unlawful means used caused its loss, Straits submits that the claimant must then prove that the defendant intended to cause the loss by those means (i.e. it was not aiming to cause loss in some other way). It cites the following authorities in support of this proposition:

i) *Revenue and Customs Commrs v Total Network* [2008] AC 1174 at [95] per Lord Walker:

> *"In my opinion your Lordships should clarify the law by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means (what Lord Nicholls of Birkenhead in OBG at para 159 called "instrumentality") of intentionally inflicting harm. In Lonrho v Shell the sanctions order against Southern Rhodesia was part of the story, but it was not the instrument for the intentional infliction of harm. With great respect to Lord Hoffmann (in OBG*

[91] [Annex I, 71].

at para 57) it is in my view what Shell and BP did not intend, rather than what Parliament did not intend, that is most relevant to that decision."

ii) *JSC BTA Bank v Khrapunov* [2018] UKSC 19, [2020] A.C. 727 at [14] per Lord Sumption and Lord Lloyd-Jones:

"These two varieties of intention were to be contrasted with a situation in which the harm to the claimant was purely incidental because the unlawful means were not the means by which the defendant intended the harm to the claimant … As an example of the latter situation, Lord Walker cited Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173. The defendants in that case were alleged to have acted in breach of the statutory order imposing sanctions on Southern Rhodesia, but the order "was not the instrument for the intentional infliction of harm"… Lord Mance in Total Network … was, we think, making the same point, by reference to the example of a pizza delivery business which obtains more custom, to the detriment of its competitors, by instructing its drivers to ignore speed limits and jump red lights. Addressing the character of the unlawfulness required, Lord Walker derived from the authorities the proposition that:

> *"unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it)…"*
>
> *He concluded:*
>
> *"… From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort … In my opinion your Lordships should clarify the law by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means (what Lord Nicholls of Birkenhead in OBG Ltd v Allen [2008] AC 1, para 159 called 'instrumentality') of intentionally inflicting harm."*
>
> *Lord Hope arrived at the same conclusion, at … paras 43 and 44, where addressing the facts of the case before him, he observed that although there was no predominant intention to injure the Commissioners, "the means used by the conspirators were directed at the claimants themselves":*
>
> *"a conspiracy is tortious if an intention of the conspirators was to harm the claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious."*

iii) *Grant & Mumford*, §2-085, where it is suggested that:

> *"The Supreme Court in Khrapunov[92] explained the concept of the relationship between the unlawfulness and the damage caused to the Claimant by reference to the judgments of Lord Walker, Mance and Hope in Total Network. In the latter case Lord Walker held that "unlawful means" included criminal conduct "provided that it is indeed the means […] of intentionally inflicting harm"[93] Lord Mance agreed,[94] referring to the commission of an offence intentionally targeted at the claimant in that case. He cited the example of a pizza delivery business which conspired with its directors to obtain more custom to the detriment of its competitors by breaking speed limits and jumping red lights. In such a scenario the unlawful means are not targeted at the competitors but might be described as incidental or collateral to the damage caused to them."*

538. Straits further asserts that given that intention is relevant to establish the "indeed the means" component of the tort, that any defendant must also have had knowledge of the unlawful means in order to intend them (although it accepts that Nelsonian knowledge will suffice): "*One cannot intend what one does not know. The relevant defendant needs to know the facts which render the conduct carried out pursuant to a common design unlawful*."[95] Straits accordingly suggests that MCM faces a further requirement of having to establish that Straits had actual or Nelsonian knowledge of the very means of the fraud adopted by CH/MW.

(b) MCM's submissions

539. In contrast to Straits, MCM submits that Straits' submission that "*the unlawful means used must be the means by which the defendant intended to harm the claimant*" is wrong, as is the submission that "*MCM must establish that Straits knew about the forgeries*".

540. MCM submits that 'instrumentality' or 'indeed the means' are concepts developed in determining whether conduct contrary to the criminal law necessarily amounted to 'unlawful means' for the purposes of the tort of conspiracy. This goes to the third element of the tort ('unlawful means') and/or the fourth element (causation), but not to the second element ('intention to injure the claimant').

541. MCM submits that the point is well made by HHJ Waksman in the *CMOC case* (supra) at [126]: "*I do not believe that they could avoid liability by saying they did not know the actual identity of the company defrauded or the precise methodology of the conspiracy. It is surely sufficient that they knew that there was a victim and that monies would be procured illicitly from that victim and that they had agreed to play their part*."

(c) Analysis

542. I consider MCM's analysis of this issue to be correct, and that Straits is wrong to suggest that there is also an intention requirement to the "indeed the means" component of the tort. Contrary to Straits' submission, I do not consider that anything said by Lord

[92] [11]-[15].
[93] [95].
[94] [116] and [119] in particular.
[95] Straits' Closing, [44].

Walker in *Total Network* or by Lord Sumption and Lord Lloyd-Jones in *Khrapunov* suggests that a defendant will escape liability if it did not know the precise means by which the other conspirators intended to injure the claimant[96].

543. I accordingly consider that the claimant does not need to show that the defendant knew the specifics of the "unlawful means" employed in the conspiracy (here, that Straits knew about the forgeries).

544. Moreover, in the context of the remarks of Lords Sumption and Lloyd Jones in *Khrapunov*, Arnold LJ observed in *Racing Partnership Ltd v Done Bros (Cash Betting) Ltd* (which Straits did not cite)[97] that there is a danger of conflating two separate questions in discussions of "indeed the means":

> "*It seems to me that discussions of instrumentality in the case law tend to conflate two different questions. The first, concerns the defendant's intention […] it is now well established in unlawful means conspiracy that the defendant must intend to injure the claimant, although that need not be the defendant's predominant intention and it is sufficient that the defendant intends to advance their economic interests at the expense of the claimant's. To that extent, the defendant's intention must be directed at the claimant. The second question is one of causation. The unlawful means must have caused loss to the claimant, rather than merely being the occasion of such loss being sustained."*

545. As Lord Hamblen stated in *Servier* at [92]:

> *"As the Appellants recognise and assert, the instrumentality requirement is a causation requirement: the damage to the claimant must be caused in fact through the instrumentality of the third party."*

546. *Grant & Mumford* was published before *Racing Partnership* was decided and I do not consider the passage at §2-085 above, relied upon by Straits, to be an accurate summary of the law.

547. It follows that MCM have established this element of the tort, because there is no issue between the parties that the means used by CH/MW (forgery and deceit) were "indeed the means" which caused the loss suffered by MCM.

548. But in any event, even if Straits' submission on this element of the tort were correct, so that it cannot be liable unless it had knowledge of the 'specific means' by which its co-conspirators sought to injure MCM, Straits still will not escape liability given that forgery is not the only pleaded means by which MCM was injured – see para. 75 of MCM's Re-Re-Re-Amended Particulars of Claim in which it pleads:

> "*The concerted action referred to at paragraphs 70 and 74 above involved the use of unlawful means, namely: 75.1. Deceit, as alleged at paragraphs 32, 38 and 65 to 69 above; 75.2. Forgery and the use of false instruments, as alleged*

[96] There *is* a requirement in the first element of the tort ('combination/agreement') that the defendant be "*sufficiently aware of the surrounding circumstances and share the same object [with the other conspirators] for it properly to be said that they were acting in concert at the time of the acts complained of*".
[97] [2021] Ch 233 at [154].

at paragraphs 28 to 29 above, contrary to Sections 1-4 of the Forgery and Counterfeiting Act 1981 and/or comparable legislation in the place where the forgery was committed."

549. By this plea, the deceit alleged did indeed include the fraudulent representation by the first to fourth defendants that CH and MW had title to the metal which they purported to sell to MCM.

550. It follows that MCM have established the unlawful means component of the tort.

(v) Loss

551. As is evident from my summary of the background to the fraud, there is no doubt that MCM suffered loss as a result of the commission of the tort. Accordingly, I find that this final component of the tort is made out.

(vi) Conclusion

552. I therefore find that Straits conspired to injure MCM by unlawful means.

553. I also find that the first to fourth defendants are liable on the basis of the above analysis, albeit the application of the law to the facts of their case is much simpler. The first to fourth defendants entered into a combination with intent to injure MCM by deceit and caused it loss. There can be no doubt that they entered into an arrangement, had the requisite intent to injure by means of deceit, and that they knew that it was MCM who would suffer loss.

(VI) DAMAGES FOR DECEIT & UNLAWFUL MEANS CONSPIRACY: RES INTER ALIOS ACTA?

554. Having established that the first to fourth defendants are liable for the tort of deceit and that they and Straits are liable for the tort of unlawful means conspiracy, I now turn to the question of the damages payable in light of Straits' arguments that it is not liable for those losses for which MCM has avoided liability under the confidential settlement agreement into which it entered with ANZ on 7 February 2017, and which was amended and restated on 11 September 2020 (the ***Settlement Agreement***).

555. I focus below primarily on the damages payable by Straits (given Straits' submissions were directed at its own liability) and then deal with the consequences of my findings so far as the first to fourth defendants are concerned.

556. Under the Settlement Agreement, MCM settled its potential liability to ANZ for *less* than the full value of ANZ's possible claim against it of c. USD 291m. I will refer to the figure at which MCM and ANZ agreed to settle liability as the "***Settlement Figure***".

557. The nub of the dispute is as follows. MCM claims that its total loss (c. USD 284.5m) is recoverable in damages. It contends that (i) the value of its sub-sales to ANZ and (ii) the terms on which it subsequently settled its liability to ANZ for these sub-sales under the Settlement Agreement are irrelevant because they are *res inter alios acta.*

558. By contrast, Straits contends that the sub-sales and settlement with ANZ are not *res inter alios acta* because they did not arise independently of the circumstances giving rise to the loss but rather are intimately connected to it, given that the forgeries were passed on to ANZ. As such, Straits submits that MCM did not suffer any direct loss from the fraud but rather made a profit of c. USD 7m by selling the WHRs on to ANZ (c. USD291.5m less USD284.5m). Straits asserts that MCM should rely on its outstanding liabilities to ANZ under the Settlement Agreement (the Settlement Figure) as the starting point for its loss.

559. In contrast, MCM's estimation of its loss is the amount it paid away as a result of the deceit (the unlawful means) perpetrated against it (c. USD 284.5m).[98]

560. Both MCM and Straits agree that in assessing damage for a claim in deceit "*the [claimant] is entitled to recover […] the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction*".[99] The root of the disagreement between MCM and Straits stems from their different conceptualisations of what constitutes the relevant "transaction".

561. Two distinct models of the "transaction" were advanced by the parties as follows:

i) **Model A** (MCM's conceptualisation): MCM entered into optional repo contracts[100] for the sale and purchase of nickel (WHRs) with Come Harvest and Mega Wealth (the ***MCM-CH/MW Transactions***). Come Harvest and Mega Wealth had an option under the same contracts to repurchase the nickel at a fixed price by a set date.[101]

At the same time, MCM entered into optional repo contracts with ANZ (the ***MCM-ANZ Transactions***).[102] MCM were the sellers to ANZ who were buyers of the nickel with an option for MCM to buy back the equivalent stock by a future date at a fixed price.[103] That option would be exercised by MCM only if the option to repurchase was exercised by Come Harvest and Mega Wealth.[104]

ii) **Model B** (Straits' conceptualisation): Straits notes that the (i) MCM-CH/MW Transactions and the (ii) MCM-ANZ Transactions were structured so that MCM received the WHRs from Come Harvest and Mega Wealth and would then pass them on to ANZ. Only once the WHRs were with ANZ, would ANZ pay MCM who would then in turn pay Come Harvest and Mega Wealth. Given title to the metal only passed on payment at no point did MCM hold the metal with title to it – it therefore effectively functioned as no more than a conduit for the

[98] Claimant's Closing [410].
[99] *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 266H-267D.
[100] MCM entered into a Commodities Sale and Purchase Master Agreement with Come Harvest on 29 April 2016, with Mega Wealth on 13 June 2016 and with Genesis on 13 June 2016.
[101] Mr Riley's witness statement [31].
[102] The relationship between MCM and ANZ was governed by a Commodities Sale and Purchase Master Agreement dated 8 December 2015. The contract used for individual transactions was appended to this Master Agreement.
[103] MCM's right to repurchase is set out at clause 6 of the Master Commodities Purchase Agreement between ANZ Commodity Trading PTY LTD, ANZ Banking Group Limited and MCM dated 8 December 2015.
[104] Mr Riley's witness statement [33].

transaction.[105] In Straits' words, MCM was never "out of pocket" during the transactions. Straits therefore asserts that the MCM-ANZ Transactions were interlinked with the MCM-CH/MW Transactions and that it is therefore inaccurate to consider them as discrete sets of transactions; rather, they should be viewed as coordinated parts of one broader finance transaction.

(i) Legal Principles

(a) Damages for deceit

562. *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 is the leading authority concerning damages payable to a victim for the tort of deceit and by extension for the tort of unlawful means conspiracy where the unlawful means are deceit.

563. In *Smith New Court* at 266H-267D, Lord Browne-Wilkinson stated as follows:

> *"In my judgment the following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property:*
>
> *a) The defendant is bound to make reparation for all the damage directly flowing from the transaction;*
>
> *b) Although such damage need not have been foreseeable, it must have been directly caused by the transaction;*
>
> *c) In assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction;*
>
> *d) As a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered;*
>
> *e) Although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the*

[105] Under the Commodities Sale and Purchase Master Agreement with ANZ, title to the metal only passed to ANZ once it had paid MCM for the metal (see clause 4.3(1) of Master Agreement between MCM and CH dated 29 April 2016). Similarly, under the Commodities Sale and Purchase Master Agreement with Come Harvest and Mega Wealth title to the metal only passed on payment (see clause 7(a) of the same agreement): "*Once ANZ were in possession of the WHRs, I understood that they would satisfy themselves that the WHRs were in order before releasing funds to MCM via SWIFT transfer. MCM would then release the relevant funds to the bank account of the customers*." (Mr Riley witness statement [40]); "*Once ANZ were in possession of the hard copy WHRs for the transaction and a signed confirmation with MCM, ANZ would make payment to MCM. Once the funds had been received by MCM, MCM would then make payment to the bank account of CH or MW*." (Mr Dyke witness statement [19]).

asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property.

f) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction;

g) The plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud." (emphasis added)

(ii) The submissions of the parties

564. Both MCM and Straits put forward cases on loss and damage relating to two discrete questions: (i) whether the *sub-sale* between MCM and ANZ is *res inter alios acta*; and (ii) whether the *Settlement Agreement* between MCM and ANZ is *res inter alios acta.* The parties' primary cases deal with the first question and their secondary cases deal with the second.

i) **MCM's primary case:** Applying *Smith New Court*, loss should be assessed at the time of the transaction. At the time of the transaction MCM had suffered a c. USD 284.5m loss. Subsequent sub-sales are irrelevant to any calculation of the damages payable by Straits as they are *res inter alios* and so do not constitute mitigation. This case takes the Model A conceptualisation of the transactions as its premise.

ii) **Straits' primary case:** Straits accepts that its loss should be assessed at the time of the transaction but it does not accept MCM's conclusion. It contends that MCM suffered no loss at the time of the transaction as the transaction structure ensured MCM was never "out of pocket". This case takes Model B as its premise.

iii) **MCM's secondary case:** The Settlement Agreement should be considered a "collateral benefit" not mitigation and is therefore *res inter alios acta*.

iv) **Straits' secondary case**: The Settlement Agreement between MCM and ANZ should be considered as mitigation of MCM's loss and not a "collateral benefit". It should therefore be factored into any damages assessment.

565. I deal first with the parties' submission on their primary case and then turn to their submissions on their secondary cases.

(iii) The primary cases of the parties: Are the sub-sales *res inter alios*?

(a) MCM's submissions

566. In general terms, the caselaw supports the submission that where a sub-sale has been put in place before the wrong this does not constitute mitigation in the classical (*British Westinghouse*[106]) sense as it does not constitute an action taken by the claimant to avoid loss after the wrong. MCM referred me to a number of authorities (in contract save for

[106] *British Westinghouse* Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673.

one in tort) to support its submission that sub-sales avoiding loss should not be considered as mitigation.

567. I deal first with those cases cited by MCM from the law of contract to support this submission:

i) *Williams v Agius* [1914] AC 510, 522 (per Viscount Dunedin): Having bought a cargo of coal from Agius, Williams resold, before the time fixed for delivery, a cargo "*of similar amount and description*" to Ghiron at a price higher than the contract price but lower than what turned out to be the market price at the time when Agius failed in breach of contract to deliver it. The House of Lords held that the sub-sale (and the sub-sale price) to Ghiron was not to be taken into account in order to reduce Williams's damages (for the market price of the coal):[107]

> "*When there is no delivery of the goods [contracted for] the position is quite a different one. The buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day—and barring special circumstances, the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got owing to a forward resale at over the market price (Great H. L. (E.) Western Ry. Co. v. Reclmayne (1)), nor can he take benefit of the fact that the buyer has made a forward resale at under the market price.*"[108] (emphasis added)

ii) *The "Sanix Ace"* [1987] 1 Lloyd's Rep 465, 468: Hobhouse J explained that he found it a "*surprising contention*" that the carrier of goods should attempt to argue that the terms of the underlying sale contract between a buyer and a seller was not *res inter alios acta*:

> "*The provisions of contracts of sale and purchase to which the goods owner is a party are, in the absence of special circumstances, res inter alios acta, which are not to be taken into account in assessing damages to be paid to the owner*".[109]
>
> "*The fact that the claimant or plaintiff has contracts of sale or purchase which enable him to collect the price from his buyer or obtain reimbursement of the price or other compensation from a seller do not disentitle him from recovering full damages. Full damages assessed by reference to the sound arrived value of the goods are not affected by the fact that the owner of the goods has sold them on at a higher or lower price. All the cases demonstrate the principle that it is the loss to the proprietary*

[107] In so doing the HL strongly approved the Court of Appeal's decision in *Rodocanachi v Milburn* (1886) 18 QBD 67 (CA) where the contract that was breached was not one of sale but of carriage of goods, the non-delivery resulting from the goods being lost at sea in the course of carriage. The price at which the charterer had sold the goods in advance of the breach of contract, a price lower than that at the time of due delivery, was not allowed to reduce the damages.
[108] To like effect, see also *R&W Paul v National Steamship Co* (1937) 56 Lloyd's LLR 28 at 33:1 per Goddard J.
[109] [470 at col. 2].

or possessory interest that is compensated, not some other or different economic loss." (emphasis added)

iii) *The "Baltic Strait" [2018] EWHC 629 (Comm), [2018] 2 Lloyd's Rep 33 at [18]-[25]* per Andrew Baker J*:*

"Mr Thomas QC [for the defendant] advanced as a proposition of English law that a bill of lading holder suing on the bill of lading in contract may recover full damages despite an earlier recovery from an intermediate seller. To be clear, the reference to earlier recovery is to a recovery prior to the date on which damages are awarded.

[…]

Going back to [the claimant's] skeleton argument, then, the claimant's response on the substance of [this] [q]uestion […] was to submit that: (i) R&W Paul is doubtful authority at best because it was based upon a contractual title to sue under the Bills of Lading Act 1855 rather than COGSA 1992. (ii) There have been developments in the law of res inter alios acta since 1937. Swynson Ltd v Lowick Rose LLP (in liquidation) [2017] UKSC 32, [2017] 2 WLR 1161 was cited, but that gnomic observation was not otherwise explained or elaborated.

Thus, it was not said that R&W Paul was not authority for the proposition contended for by the defendants, only that (i) it was not authority for that proposition under COGSA 1992 and (ii) (but very enigmatically) it might somehow not now survive as good law after Swynson Ltd. As to (i), there is no difference between COGSA 1992 and the old Bills of Lading Act that might be material to the decision in R&W Paul. As to (ii), there is nothing in Swynson Ltd to cast doubt on that decision.

[…]

In my judgment, [the defendant's] proposition, founded upon R&W Paul, is sound for bill of lading holders who receive cargo in damaged condition from the ship and who then own, or later come to own, the damaged cargo pursuant to sale arrangements to which the carrier is not party. How much more widely the proposition applies I do not need to decide.

[…]

"*Assuming title to sue in contract, the carrier is liable to full damages if sued by the receiver who, by reason of the carrier's breach, receives damaged, rather than sounds goods, or by a claimant who did not receive the damaged goods but who owned the goods when they were damaged by the carrier's breach*."[110] *(emphasis added)*

568. Notwithstanding these authorities, there is presently ongoing academic debate as to whether the authorities which determine that sub-sales should not be taken into account

[110] [33].

for the purposes of assessing contractual damages is good law. This area of law (and therefore the contractual cases cited by MCM as set out above) is therefore in a state of fluidity (see *McGregor* 9-184, 21st edn.).

569. MCM also relied upon *OMV Petrom SA v Glencore International AG* [2016] 2 Lloyd's Rep 432, being a case relating to the impact of a sub-sale in assessing damages for the tort of deceit.

570. In *OMV*, Petrom (the claimant) purchased crude oil from Glencore (the defendant) over several years. The oil was stated to be "Iranian heavy" or "Gulf of Suez mix", but instead Glencore supplied a blend of cheaper oils. On discovery of the deceit, Petrom brought a claim against Glencore.

571. One of the principal issues between the parties was the relevance of what Petrom had done with the oil following its purchase, in terms of Petrom's onward sub-sales. The Court of Appeal determined (citing *Smith New Court*) sub-sales were irrelevant as loss is assessed at the date of acquisition, and the basic principle is that the claimant is entitled to receive what it paid for, less the market value of that oil. The Court of Appeal held that the sub-sales were irrelevant to that enquiry:

> "38. … *the basic measure of damages is the price paid less the benefits received as a result of the transaction which will, in a case where property is acquired, be or include its value at the date of acquisition -- which, for present purpose was, by agreement, taken as the bill of lading date.*
>
> *39. In my view there is, in this case, no sufficient reason to take a different date and good reason not to do so. The purpose of the flexibility of approach about the valuation date to which Lord Browne-Wilkinson referred was to ensure that the person duped should not suffer an injustice by failing to recover full compensation in the type of circumstances to which he referred. There is no need to adopt such an approach in order to relieve the fraudster from the general rule as to damages, especially if to do so means that the person defrauded ends up paying more than the cargo was worth at the time that he bought it. This is particularly so in the light of the observations of Lord Blackburn in Livingstone v Rawyards Coal Co (1880) 5 App Cas 25 at page 39 that when damage is done maliciously or with full knowledge that the person doing it was doing wrong "you would say that everything would be taken into view that would go most against the wilful wrongdoer.*
>
> *40. The crude oil the subject of these proceedings was a commodity bought in the oil trading market. That does not mean that there was a regular market for the sale of the 32 different bespoke blends […] On the contrary these cargoes were unique and had to be valued by a calculation of the total CIF value of the component crudes discounted on account of the risks and uncertainties involved in buying these odd cargoes which were a mixture of crude oils, condensates and fuel oil. The amount by which the price paid exceeded a price calculated on that basis constitutes the measure of the buyer's loss, representing, as it does, the amount that he has overpaid on account of the seller's deceit. That loss arose when on account of the deceit he acquired the property, for which he had to overpay. The fact, if such it be, that, afterwards, none of the risks to which*

the discount related materialised cannot alter the fact that the buyer was induced to pay too much when he did so.

…

45. If the present case were brought in contract I would be inclined to agree with the judge that any sub-contract would be res inter alios acta for the reasons identified by Scrutton LJ in Slater v Hoyle & Smith [1920] 2 KB 11, as cited in [196] of Flaux J's judgment, especially because Rafirom was not the refiner nor was there evidence as to (a) the basis and terms upon which Rafirom supplied crude oil to the refineries; (b) that it was ever obliged to supply crude oil under any particular contract with Glencore to any particular refinery as opposed to selling it for profit; or (c) that it had any liability to the refineries if the crude oil supplied was not what it appeared to be or shared in any profit from the refining of it. The decision of this court in Bence Graphics v Fasson [1998] QB 87 may render that debatable; but the consistency between the latter and the former case is, itself, in doubt, especially given the reliance by Auld LJ in Bence on the Privy Council decision in Wertheim v Chicoutimi Pulp Co [1911] AC 301 which Scrutton LJ thought was erroneous.

46. This is a controversy which I do not propose to resolve. For the purposes of a claim in deceit, I would not regard it as right to discard an assessment of the difference between the price and the lesser value at the date of acquisition of the property in favour of an assessment dependent in part on whether anything untoward transpired in the course of refining.

…

60. The market value of a cargo will depend on the terms on which it is sold and the information which the buyer has about it. The critical questions are (a) what is the date by reference to which the value/ price is to be determined; and (b) what information is the putative buyer to be taken to have had? The latter is relevant because the price that a purchaser will pay on any given day depends, inter alia, on the information that is then available to him, as well as the terms upon which he is to purchase.

61. As to (a), in a case of fraud the answer is, generally, the date of purchase – here the date of the bill of lading. Whatever may be the position in relation to contractual claims there is no good reason for departing from that measure in a case of fraud or at any rate in this one. On the contrary I would, in this case, regard the fact that refining led to no problems as something which should enure to the benefit of Rafirom." (emphasis added)

572. MCM summarised the proposition it derives from *OMV* in its oral Closings as follows: "*The essence of what one gets from the OMV Petrom is, that in a claim for damages for deceit, and we would say by extension to unlawful means conspiracy, is that our claim is unaffected by any sub-sales it might have entered into with ANZ; it is unaffected by any liability we might have incurred or any benefit we may have enjoyed under those sub-sales. If there is a benefit then that inures to our benefit, according to the Court of*

Appeal in Petrom. Likewise, any settlement agreement it might have entered into is irrelevant."[111]

(b) Straits' submissions

573. Straits accepts the principles to be applied when determining damages in the tort of deceit (*Smith New Court*).[112] However, it asserts that when those principles are properly applied to the facts of this case, MCM cannot be said to have suffered a loss.

574. Straits' submissions are predicated on its Model B. As I have explained, Straits submits that MCM's transactions with (i) Come Harvest and Mega Wealth and (ii) ANZ respectively were structured so that it received the WHRs from Come Harvest and Mega Wealth and would then immediately pass them on to ANZ. Only once the WHRs were with ANZ would ANZ pay MCM who would then in turn use those funds to pay Come Harvest and Mega Wealth. As such, Straits submits that MCM was never "out of pocket" (and so cannot be said to have suffered any loss) during the transactions.

(c) Analysis

575. Straits' submissions require the Court to determine whether Model A or B is a more apposite description of the relevant transactions. Only if Model B is to be preferred does its damages analysis have any relevance. I consider that the Model A description of the relevant transactions is more accurate for the following reasons:

i) Model A reflects the legal reality of the transactions. The transactions were each separately structured as being principal-to-principal whereby MCM acted as principal to (i) ANZ and (ii) Come Harvest and Mega Wealth rather than assuming the role as agent (as a broker might do).

ii) The two principal-to-principal transactions were *related but separate* transactions and MCM incurred liability to both ANZ and Come Harvest/Mega Wealth under each of them. For example, had ANZ entered into liquidation whilst holding the WHRs and had Come Harvest and Mega Wealth exercised their option with MCM to repurchase the metal, then MCM would nonetheless have been liable to provide the metal to Come Harvest and Mega Wealth.

iii) In this regard, it is relevant that when the Court asked Straits if the determinative issue was how the transaction was defined, Mr Dinsmore responded:

> *"Yes, my Lord, and I think there was a discussion during my learned friend's closing on this, if it might make a difference if it was three weeks later or a day later, and we say in this case it is even more clear-cut because the money is coming in before it ever goes out. Under MCM's case, title didn't pass until there was payment. So, on any analysis, you can't say at any point that MCM were exposed in their loss to Come Harvest or Mega Wealth. They may be exposed in their liability to ANZ, which is our position, and we say that is ultimately where their loss lies, but on the primary case of paying out the*

[111] Transcript Day 14/44/17-45/2.

[112] In its oral closings, Straits accepted that *OMV Petrom* stands for the proposition that "*when assessing damages in deceit one does not look at anything after the point of breach*" [Transcript Day 16 pp. 127/3-11.].

> *money, we say they were benefiting, under this transaction, they were never out of money*". [113]
>
> The underlined text evidences Straits' failure to acknowledge that MCM could in certain circumstances (viz, where ANZ was unable to provide the WHRs) have been "out of the money" on the second leg of the repos to Come Harvest and Mega Wealth, had the option been exercised by them. [114]

576. Accordingly, Model B fails to acknowledge the legal structure of the transactions and the fact they were principal-to-principal. MCM simultaneously incurred liability to Come Harvest/ Mega Wealth under the optional repo as well as to ANZ under its sub-sale; instead Straits wrongly replaces an analysis of the legal relationships of the parties with an analysis of the funds flow in the transactions. Straits' primary case is founded on a false premise.

577. Once MCM's transactions with ANZ are properly understood to be separate *sub-sales* and not a discrete part of one broader financing transaction, the legal principles to be applied are clear and are those laid down by the Court of Appeal in *OMV*, which dealt directly with tortious damages for deceit. Whatever the legal relevance of sub-sales might be in determining damages in the law of contract (which I do not need to address), there are strong policy reasons why a fraudster should not have the benefit of any onward sub-sale in a claim for deceit which do not apply to ordinary contractual claims.

578. Consequently, I find that MCM's primary case and the Model A conceptualisation of the transactions is to be preferred. This finding is sufficient for MCM's case on damages to prevail. Taking the Model A conceptualisation of the transactions, the sub-sale is *res inter alios acta* and so, necessarily, the Settlement Agreement settling liability under that sub-sale must also be *res inter alios*.

579. In other words, the Settlement Agreement is not a collateral benefit making good (part of) the loss suffered by MCM under the MCM-CH/MW Transactions. Rather, it is a discrete agreement settling liability under a separate transaction (the MCM-ANZ Transaction).

580. Nonetheless, if for any reason I am wrong about this, I also address whether the Settlement Agreement is *res inter alios* on the parties' secondary cases. Submissions on this issue were primarily advanced by Straits. MCM did not seek to meet these submissions head on, instead relying chiefly on its primary case.

[113] Transcript Day 16 p. 129/7-22.
[114] Transcript Day 16 p. 129/7-22.

(iv) The secondary case of Straits: The Settlement Agreement is mitigation of MCM's loss

(a) Straits' submissions: mitigation of loss

581. Straits asserts that the Settlement Agreement should not be considered a "collateral benefit" but as mitigation of MCM's loss. It should therefore be factored into any damages assessment.

582. The editors of *McGregor on Damages* explain that "mitigation of loss" concerns three different, although closely interrelated, rules.[115]

i) **Rule 1:** "*The claimant must take all reasonable steps to mitigate their loss consequent upon the defendant's wrong and cannot recover damages for any such loss which they failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for reasonably avoidable loss*."

ii) **Rule 2:** "*Where the claimant does take reasonable steps to mitigate the loss to them consequent upon the defendant's wrong they can recover for loss incurred in so doing; this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the claimant can recover for loss incurred in reasonable attempts to avoid loss*."

iii) **Rule 3:** "*The claimant cannot generally recover for avoided loss. Where the claimant takes steps before or after the wrong, or a third party takes steps, that avoid the loss then this reduces the recoverable loss. The most common scenario is where the claimant takes reasonably necessary steps to mitigate the loss to them consequent upon the defendant's wrong, and where these steps are successful. Then, the defendant is entitled to the benefit accruing from the claimant's action and is liable only for the loss as lessened; this is so even though the claimant would not have been debarred under the first rule from recovering the whole loss, which would have accrued in the absence of their successful mitigating steps, by reason of these steps not being ones which were required of them under the first rule. In addition, where the loss has been mitigated by other reasonably foreseeable means such as actions by third parties or actions by the claimant before the wrong, the claimant can again recover only for the loss as lessened*."[116]

583. At issue between the parties is whether MCM's sub-sale to ANZ and the subsequent Settlement Agreement fall within the scope of Rule 3 above (i.e. so that MCM cannot recover for loss avoided by the Settlement Agreement, and its claim is properly fixed at the Settlement Figure).

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[115] 21st edition [9-004-9-006].

[116] The first and third rules were endorsed by the Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others; Sainsbury's Supermarkets Ltd v Mastercard Incorporated and others* [2020] UKSC 24 at [212], [214]. The three rules as a whole were also endorsed by Leggatt J in *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm) [33].

584. As the editors of *McGregor* state, "*matters completely collateral and merely res inter alios acta cannot be used in mitigation of damages*". However, "*the line between those avoided consequences which are collateral and those which are not is an exceedingly difficult one to draw and its drawing is not assisted by the fact that the relevant decided cases are widely dispersed over many fields*."[117]

585. To assist in drawing this line it is helpful to refer to the judgment of Lord Sumption in *Lowick Rose LLP v Swynson Limited & another* [2017] UKSC 32, [2018] AC 313.

586. In that case, in 2006 Swynson, which was owned by a Mr Hunt, made a £15 million loan to EMSL. The loan was made in reliance on negligent advice given by an accountancy firm ("Lowick Rose"). In December 2008, the loan together with further loans that had been made by Swynson to EMSL, was refinanced. Mr Hunt loaned the outstanding sum to EMSL on the condition that the monies be used to repay Swynson. The purpose of the refinancing was to clear up Swynson's balance sheet and reduce its tax liability. Ultimately EMSL ceased business and was unable to repay to Mr Hunt the sums lent by him. Swynson and Mr Hunt commenced proceedings against Lowick Rose in 2012 seeking damages arising out of the unrepaid loans. Lowick Rose argued that they could have no liability in damages on the basis that Swynson had suffered no loss as its original loan, made on the strength of Lowick Rose's report, had been repaid by EMSL in December 2008 when the loan refinancing was agreed.

587. The Supreme Court concluded that the repayment received by Swynson from EMSL, in turn funded by a loan from Mr Hunt, was not a collateral payment at all. Swynson's losses on its loans were made good when the borrower EMSL repaid those loans. It was irrelevant that EMSL used money borrowed from Mr Hunt to do so, as it would been if it had been borrowed from any other third party. The purpose of Mr Hunt's loan was to enable EMSL to repay its loan to Swynson and that purpose was achieved. Therefore this was not a case of a collateral payment and Swynson had suffered no loss. Lord Sumption, with whom Lords Neuberger, Clarke and Hodge agreed, concluded that: "*The transactions [i.e. Mr Hunt's repayments] discharged the very liability whose existence represented Swynson's loss*".[118]

588. Lord Sumption explained as follows:

> "*The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as costs of mitigation. To this there is an exception for collateral payments (res inter alios acta), which the law treats as not making good the claimant's loss. […] Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus, a gift received by the claimant, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them. The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose. Classic cases include loss payments under an indemnity*

[117] 21st edition, [9-111].
[118] *Lowick Rose LLP v Swynson Limited & another* [2017] UKSC 32, [2018] AC 313, [13].

> *insurance: Bradburn v Great Western Railway Co (1874-5) LR 10 Ex 1. Or disability pensions under a contributory scheme: Parry v Cleaver [1970] AC 1.*
>
> *In cases such as these, as between the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work. The position may be different if the benefits are not collateral because they are derived from a contract (say, an insurance policy) made for the benefit of the wrongdoer: Arab Bank Plc v John D Wood Commercial Ltd [2000] 1 WLR 857 (CA), at paras 92-93 (Mance LJ). Or because the benefit is derived from steps taken by the Claimant in consequence of the breach, which mitigated his loss […] These principles represent a coherent approach to avoided loss.*"[119] (emphasis added)

589. Although it is, as Lord Sumption suggests, difficult to set out a unified theory of what constitutes a "collateral benefit", he nonetheless suggests that a benefit will be collateral where (i) there is an insufficient causal connection between the wrong and the benefit; or (ii) the claimant has given independent consideration for that benefit and so is considered to have paid for it from his own resources.

590. The question of causation is, I consider, fundamental to determining whether the Settlement Agreement should be considered a "benefit" which must be taken into account as mitigation or whether it is to be considered as *res inter alios acta*.

591. Straits advanced five propositions which it suggested could be derived from *Swynson*:[120]

    i) *Res inter alios acta* is an exception to the rule that loss which has been avoided is not recoverable as damages.[121]

    ii) Receipt of a collateral benefit must arise independently of the circumstances giving rise to the loss.[122]

    iii) Where the benefit to the claimant is derived from steps taken in consequence of the breach which mitigated its loss, then this is properly mitigation and does not represent a collateral benefit.

    iv) The paradigm cases (gifts, insurance contracts, disablement and pension payments) are far removed from the making of a Settlement Agreement (as in this case).

[119] [2017] UKSC 32, [2017] 2 WLR 1161 [11].
[120] Transcript Day 16/130/6-141/25.
[121] "*The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as costs of mitigation. To this there is an exception for collateral payments (res inter alios acta), which the law treats as not making good the claimant's loss*." [11].
[122] "*The critical factor is not the source of the benefit in a third party but its character. Collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus, a gift received by the C, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them*". [11].

v) Where a payment from a third party covers the very loss that the claimant is claiming, it cannot be regarded as collateral and independent of the transaction. Rather, one must look at the whole of the transaction and the net effect.

592. Straits relies principally on (iii) and (v) above, asserting that (a) entering into the Settlement Agreement with ANZ was a step taken in consequence of breach and so constitutes mitigation (not a "collateral benefit"); and (b) the Settlement Agreement discharges (part of) the very loss MCM is claiming.

(b) Analysis

593. There are two reasons why I consider that Straits' secondary case is wrong: (i) the Settlement Agreement, correctly viewed by reference to Model A, mitigates loss under the MCM-ANZ Transaction and not the MCM-CH/MW Transaction; and (ii) the Settlement Agreement constitutes an "independent act" which is not (sufficiently) causally connected to the wrong and so is *res inter alios acta*.

(i) Separate transaction

594. As noted above, Straits' analysis relies on its acceptance of the Model B interpretation of the transactions.

595. If, as I find, the relevant transaction is understood as only the MCM-CH/MW Transaction then the Settlement Agreement becomes irrelevant to any assessment of damages due under that transaction. Properly understood, the Settlement Agreement is pertinent only to liability under the separate MCM-ANZ Transaction. A settlement agreement with respect to one transaction cannot be considered mitigation with respect to liability incurred under a different, separate transaction.

(ii) Causation

596. Secondly, Straits submits that the Settlement Agreement cannot be construed as a "collateral benefit" because it did not arise "*independently of the circumstances giving rise to the loss*" as stipulated by Lord Sumption in *Swynson.* Straits submits that the benefit must be entirely separate from the transaction which gave rise to the wrong (as with the classic examples of an insurance policy or disability pension under a contributory scheme).

597. Properly understood, Lord Sumption was explaining in *Swynson* that a benefit will have arisen "independently" of the loss where there is an insufficient causal connection between it and the loss: in order to be taken into account, the benefit must have been (legally) "caused" by the wrong and not an independent act taken by the claimant following the wrong.

598. The following Supreme Court authorities also make clear that the issue of causation is the central factor in determining whether a "benefit" is to be taken into account as mitigation, namely *Sainsbury's Supermarket Ltd v Visa Europe Services LLC and others; Sainsbury's Supermarket Ltd v Mastercard Incorporated and others* [2020] UKSC 24 and *Globalia Business Travel S.A.U. of Spain v Fulton Shipping Inc of Panama* [2017] UKSC 43:

i) *Sainsbury's v Visa; Sainsbury's v Mastercard* at [212]:

"*in some cases of mitigation, the court is concerned with additional benefits which a claimant has gained from the mitigation action which it has taken. In such a case, it is for the defendant to show that the benefits should be set off against the prima facie claim of loss. [...] Such cases raise delicate questions as to whether a benefit is sufficiently causally connected with the breach of contract or (in tort) the wrong or whether the benefit was the result of an independent commercial decision by the claimant*." (emphasis added)

ii) Similarly, in *Globalia Business v Fulton Shipping,* Lord Clarke with whom Lord Sumption agreed, stated at [30] that the "*essential question*" is whether there is a sufficiently close link between the benefit and the loss caused by the wrongdoer: "*The relevant link is causation. The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation*".

iii) Indeed, *Fulton Shipping* was cited in *Sainsbury's* where the Court interpreted it as follows at [213]:

"*In this case, by selling the vessel after the charterparty had been prematurely terminated the owners avoided a substantial capital loss occasioned by the collapse in the market for such vessels following the financial crisis in 2008. While the premature termination of the charterparty in Fulton Shipping was the occasion for the owners' decision to sell the vessel, the court held that that decision was not necessitated by the termination but was a commercial decision of the owners at their own risk*."[123]

599. It should, perhaps, be added that a consideration of causation in the context of mitigation is not a recent development in the law of damages. The first authority cited in the academic commentaries for the principle that subsequent acts taken by the claimant following the wrong must be sufficiently causally connected to the wrong, was decided just over 150 years ago in *Jones v Just* [1868] LR 3 QB 197. In *Jones*, the claimant bought first-quality hemp and second-quality hemp was delivered. The market price of hemp then rose, enabling the claimant to resell the delivered second-quality hemp at substantially above the market price at which the first-quality hemp had stood at the time of delivery. Nevertheless, the Court held that the claimant did not need to

[123] The editors of *McGregor* (21st edn.) accurately summarise the decision as follows [9-142]: "*Charterers repudiated a charterparty. The owners accepted the repudiation but had difficulty in obtaining a new charter. So, in October 2007, they sold the ship for US $23,765,000 and claimed from the charterers in breach the loss of profits from the charter, amounting to around €7,500,000. By the time of hearing in November 2009, the value of the ship had fallen to $7,000,000. The charterers claimed that the owners were required to bring into account the large benefit from early sale of the ship. This would have meant that the owners reaped a large profit and suffered no loss caused by the breach. It had been found as a "clear" fact by the arbitrator that but for the breach the owners would not have sold the vessel. In other words, it was found that the profit made was caused by the breach. Nevertheless, in the decision of the Supreme Court, given by Lord Clarke, it was held that the profit on the sale did not need to be brought into account by the owners. Lord Clarke described the result in the language of "legal" causation. By this, he meant that the decision to sell the vessel was an independent commercial decision taken by the owners at their own risk. It was not a reasonably necessary response to the breach. As the Supreme Court later explained, the lost profits from the charterparty could be recovered "without having regard to the overall profitability of the claimant*".

take into account the onward sale of the second quality hemp in its assessment of damages.

600. In the converse situation where a buyer of goods fails to accept them and the seller subsequently resells them on a rising market, a corresponding result is reached: see *Jamal v Moolla Dawood* [1916] 1 AC 175 PC, where a buyer of shares refused to accept them and the market rose and the seller resold; this gain to the seller was ignored in assessing the seller's damages.

601. The editors of *McGregor* explain that:

> *"[T]he reason for these results, in contrast to the results in British Westinghouse and the other sale cases dealt with above, is [that a] sale by the seller of unaccepted goods to a third party on a rising market or a purchase by the buyer of other available goods from a third party on a falling market is to be regarded as an independent transaction and not one taken into account in mitigation of loss. As is pointed out in the cases, if the claimant seller, with the goods on their hands, chooses not to sell them and the market falls, they would not be able to claim against the buyer for the fall in price. Conversely, if the claimant buyer, without the goods, chooses not to buy in others, they cannot claim to recover in respect of the rise in price. It can be said, in both cases, that the loss crystallises at the date of breach*."[124] (emphasis added)

602. In the circumstances, I consider that MCM's decision to enter into the Settlement Agreement should be considered an "independent transaction" whereby MCM took on risk which might have transpired to be, depending on the outcome of this litigation, either a good or bad bargain.

603. If MCM is able to recover damages from Straits for its full losses (c. USD 284.5m) and if this is greater than the Settlement Figure (which is confidential), then this may result in a *gain for MCM*. Straits argued that such a "windfall" contravenes the principle of compensatory damages.

604. I do not agree. Any such "windfall" results from the separate allocation of risk between two commercial counterparties entering into a new and separate agreement (in respect of a separate transaction), with each recognising potential liabilities and the existence of litigation risk and seeking to resolve these matters in a constructive manner. Both derived benefits under the Settlement Agreement and gave consideration for these benefits. ANZ extinguished a chose in action with a potential value of c. USD 291m for the Settlement Figure. In doing so they avoided the uncertainty, time and expense of litigation and MCM gained the benefit of fixing its maximum liability to ANZ.

605. Any "windfall" which may accrue to MCM following its recovery of damages from Straits is the result of a separate commercial bargain (or "independent transaction") negotiated by MCM.

606. Finally, Straits submitted that if the Court were to award MCM damages for its full loss, then ANZ would also be entitled to pursue Straits for its losses (c. USD291m less credit for monies paid by MCM under the Settlement Agreement). That would leave

[124] 21st edition [9-135].

Straits incurring "double liability" on the assumption that ANZ can make good a claim against Straits in unlawful means conspiracy. Straits contends that this shows that MCM's claim to full damages cannot be correct.

607. The answer to this point is that Straits is not incurring "double liability" *for the same wrong*.

608. Rather, the issue should be reframed as being: "can Straits incur two separate heads of liability for committing the same tort twice (unlawful means conspiracy) against two separate parties (ANZ and MCM)." Then, the answer to that question is plainly yes – Straits has committed two wrongs (one against MCM and one against ANZ) and both parties have suffered losses and are therefore entitled in principle to recover their separate loss from Straits under their own separate cause of action.

(v) Conclusion

609. The Settlement Agreement between MCM and ANZ is *res inter alios acta*. MCM is therefore entitled to claim its full loss (USD 284,536,139.22) against Straits, less the credit it has received under the settlement agreements with the fifth to eighth defendants (USD 1,800,000). This results in an entitlement to USD 282,736,139.22. The first to fourth defendants are also liable to pay this sum to MCM for the tort of deceit.

(VII) THE KNOWING RECEIPT CLAIMS

610. Prior to addressing the parties' submissions concerning the knowing receipt claims advanced by the Claimant against the third to tenth defendants, it is instructive to set out (i) the proprietary effect of a fraudulent transfer; (ii) the proprietary effect of rescission; and (iii) the elements of a claim in knowing receipt. This is, for the most part, common ground between the parties and forms the backdrop to their submissions on this issue.

(i) Legal principles

(a) The proprietary effect of a fraudulent transfer

611. Fraud renders a contract voidable but not void *ab initio* and so the innocent party (A) in a fraudulent transaction is entitled to affirm or rescind the contract. Legal and equitable ownership are transferred under the contract to the defrauding party (B).

612. Until A rescinds the contract, he has only a "mere equity" or "rescission equity" in the property entitling him to rescind the contract so revesting legal or equitable ownership in himself depending on whether rescission is effected in law or equity.[125]

613. Zogg, *Proprietary Consequences in Defective Transfers of Ownership* (2020) at p. 178, describes a "*mere equity*" as "*a merely inchoate, potential or embryonic right*" but notes that the right is only "*inchoate*" in so far as its holder does not yet have a fully vested

[125] *Vale SA v Steinmetz* [2021] EWCA Civ 1087 at §16 per Males LJ; *Global Currency Exchange Network Ltd v Osage 1* Ltd [2019] 1 W.L.R. 5865, [2019] EWHC 1375 (Comm) at §40 per Andrew Henshaw QC; *National Crime Agency v Robb* [2015] Ch. 520, [2014] EWHC 4384 (Ch) at §44 per Sir Terence Etherton C; *Bristol & West Building Society v Mothew* [1998] Ch 1 at 22F per Millett LJ; *Lewis v Averay* [1972] 1 Q.B. 198 at 207B-C per Lord Denning MR; *Lewin on Trusts*, 20th Ed., §8-030; *McGrath*, Commercial Fraud in Civil Practice, §6.235.

interest amounting to full legal or equitable ownership. It does not mean that the "mere equity" is not itself a property right. Rather, it is a proprietary right which immediately comes into existence when the vitiated transfer is carried out, and which shares all typical characteristics of proprietary rights.

(b) The proprietary effect of rescission

614. Once A rescinds the contract, a constructive trust (or "rescission trust") arises by operation of law over the property. Equitable ownership revests in A as soon as he/she has effected equitable rescission and B, the legal owner, holds the asset on trust for A.[126]

615. The rescission trust is a bare trust which imposes only minimal fiduciary duties on the trustee, namely, to refrain from any act inconsistent with A's equitable interest, to not part with the asset (or at least to preserve its substitutes) and to (re)transfer legal title upon A's instructions.

616. As is stated in *Zogg* at p. 437:

> *"It might be queried whether this trust, arising upon equitable rescission, is a resulting, a constructive or another type of trust. It has been described by a broad variety of labels, including "constructive trust", "old-fashioned institutional resulting trust", "'resulting' in pattern and 'constructive' in the sense of arising irrespective of the transferee-trustee's consent", "constructive (resulting) trust" and "restitutionary resulting trust". However, little or nothing turns on the classification of this trust as being resulting or constructive or some combination of both. This is no more than a question of semantics. To avoid unnecessary confusion, it might simply be called a "rescission trust".*

(c) Elements of a claim in knowing receipt

617. The parties agree that the elements of a claim in knowing receipt are as explained by Hoffmann LJ (as he then was) in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, at 700. To establish a claim in knowing receipt, a claimant must show:

i) A disposal of the claimant's assets in breach of trust or fiduciary duty;

ii) The beneficial receipt by the defendant of assets which are traceable as representing the assets of the claimant; and

iii) Knowledge on the part of the defendant that the assets received are traceable to that breach of trust or fiduciary duty.[127]

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[126] See *Vale v Steinmetz* [2020] EWHC 3501 (Comm): "*The fact that the JVA was voidable on the ground of fraud vitiating Vale's consent created, as the case-law has described it , an equity (a "rescission equity") affecting the Initial Consideration payment, such that upon rescission it became impressed with a constructive trust (a rescission trust) […] the rescission equity may affect further or different assets that the asset(s) originally transferred under the voidable transaction, subject to tracing rules*."

[127] See MCM's skeleton at §48, and Straits' skeleton at §168 (differently worded but to the same effect).

618. Moreover, in *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, Lord Sumption (with whom Lord Hughes agreed) said in paragraph 31:

> "*The essence of a liability to account on the footing of knowing receipt is that the defendant has accepted trust assets knowing that they were transferred to him in breach of trust and that he had no right to receive them. His possession is therefore at all times wrongful and adverse to the rights of both the true trustees and the beneficiaries. No trust has been reposed in him. He does not have the powers or duties of a trustee, for example with regard to investment or management. His sole obligation of any practical significance is to restore the assets immediately*." (emphasis added)[128]

619. The issue between the parties is whether, following rescission and the imposition of a constructive trust, liability for knowing receipt may be *retroactively imposed* on any third-party recipient of the funds (i.e. Straits). There is no direct authority bearing upon on this issue, but I consider that it may be resolved by reference to the established principles as summarised by Hoffman LJ in *El Ajou*.

(ii) MCM's submissions

620. MCM formulates the question for resolution as follows:

> *"Whether the effect of MCM's rescission of the Purchase Contracts acts retroactively to constitute Come Harvest /Mega Wealth and intermediate recipients constructive trustees (where those recipients had guilty knowledge), so as to enable MCM to claim in knowing receipt for moneys received in breach of those constructive trusts".* [129]

621. In response to this question, MCM asserts that:

> *"It is in accordance with principle that a party in its position should be granted relief in equity, by way of a knowing receipt claim, against a recipient of funds who knew all along the circumstances which made that receipt unconscionable."*[130]

622. MCM's submissions on this issue seek to reason by analogy with respect to the position of equitable proprietary claims. It notes in its skeleton argument that:

> *"[I]t is no bar to a tracing (i.e. equitable proprietary) claim that the original fraudster, ultimate defendant and any intermediate recipients all received the relevant funds before the claimant rescinded its contract. Although the conceptual vehicle used to impose that liability is the constructive trust, equity has no difficulty in retroactively treating each such recipient as being or having been subject to the duties of a (bare) constructive trustee".*[131]

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[128] This passage in *Williams* was recently relied upon by the Court of Appeal in *Byers v The Saudi National Bank* [2022] EWCA Civ 43 at [51].
[129] MCM Closings, [467(4)].
[130] MCM Closings, [510].
[131] Claimant's skeleton, para. 56(i).

623. That, of course, is true: in the context of an equitable proprietary claim, the law employs the fiction of a retrospective constructive trust to trace the claimant's interest into the transferred property, see *Shalson v Russo* [2003] EWHC 1637 (Ch) per Rimer J:

> *"There is […] a line of authority supporting the proposition that, upon rescission of a contract for fraudulent misrepresentation, the beneficial title which passed to the representor under the contract revests in the representee. The representee then enjoys a sufficient proprietary title to enable him to trace, follow and recover what, by virtue of such revesting, can be regarded as having always been in equity his own property. This may be an essential means of achieving a proper restoration of the original position if the representor has in the meantime parted with the property and is ostensibly a man of straw unable to satisfy the court's orders for restoration of the original position." (pp. 122)*

624. Rimer J sets out this line of authority at paras. 122-127 of the Court's judgment: *Banque Belge v Hambrouck* [1919] B 2351 (CA); *Lonrho Plc Fayed (No 2)* [1992] 1 WLR 1 (Millett J); *El Ajou v Dollar Land Holdings plc and another* [1993] 3 All ER 717; *Bank Tejarat v Hong Kong and Shanghai Banking Corp (CI) Ltd* [1995] 1 Lloyd's Reports 239 at 248; *Bristol and West Building Society v Mothew* [1998] Ch 1 at 23. The observations of Millett J (as he then was) in the following cases are, in particular, worthy of note:

i) *Lonrho Plc Fayed (No 2)* [1992] 1 WLR 1: "*It may well be that if the representee elects to avoid the contract and set aside a transfer of property made pursuant to it the beneficial interest in the property will be treated as having remained vested in him throughout, at least to the extent necessary to support any tracing claim*." (p. 12)

ii) *El Ajou v Dollar Land Holdings plc and another* [1993] 3 All ER 717: "*But if the other victims of the fraud can trace their money in equity it must be because, having been induced to purchase the shares by false and fraudulent misrepresentations, they are entitled to rescind the transaction and revest the equitable title to the purchase money in themselves, at least to the extent necessary to support an equitable tracing claim: see Daly v Sydney Stock Exchange Ltd (1986) 160 CLR 371 at 387-390 per Brennan J. There is thus no distinction between their case and the plaintiff's. They can rescind the purchases for fraud, and he for the bribery of his agent; and each can then invoke the assistance of equity to follow property of which he is the equitable owner. But, if this- is correct, as I- think it is, then the trust which is operating in these cases is not some new model remedial constructive trust, but an old-fashioned institutional resulting trust*." (pp. 712-713)[132]

625. MCM submitted that given that equity tolerates the fiction of retrospective vesting of a beneficial interest in trust property following rescission for the purposes of enabling a

[132] I note, in passing, that certain commentators have queried whether this line of authority is challenged by the decision of the Privy Council in *Re Goldcorps* [1994] UKPC 3 but neither party sought to suggest to me that it is not good law.

claimant to assert equitable proprietary claims, it should also do so in order to enable a claimant to assert a claim in knowing receipt.[133]

626. Furthermore, MCM submitted, no prior authority exists determining this question although a number of academic commentators have expressed views on it (which I consider when I turn to Straits' submissions below). By contrast, Straits cited 9 authorities[134] which it claims do determine this question. The point made by MCM with respect to each of the nine cases was in fact the same, namely that in none of them did the Court determine that the retrospective vesting of beneficial title on rescission cannot give rise to retrospective liability for knowing receipt.

627. The three main cases relied upon by Straits (out of the nine) in this respect were as follows:

i) *Lonrho Plc v Fayed (No 2)* 1992 1 WLR 1:[135] The claimant sought *inter alia* a declaration that the defendant (D4) held certain shares on trust for it, on the basis that the defendant's bid for those shares had been procured by fraud (and that its success had deprived the claimant of an opportunity to make a bid). Millett J held that rescission of the contract between the claimant and the defendant whereby the claimant had sold its shareholding to the defendant could not retrospectively subject the defendant to a fiduciary obligation to act as a trustee and refrain from bidding for the company on its own account.

Millett J observed (at p.9) that:

> "*The present claim is not concerned with an alleged misappropriation by the defendant of an asset previously belonging to Lonrho. (…) The present claim… is concerned with a different class of case, in which the plaintiff's claim is to an asset acquired from other sources which should have been acquired for the plaintiff…*"

At pp.11-12, Millett J rejected the submission that the defendant:

> "*[had] held the shareholding in trust from Lonrho from the start; and as a constructive trustee it was subject to all the fiduciary obligations and disabilities of an express trustee. In particular, it was bound to abstain from placing itself in a position where its interest conflicted with its duty. Given that it held the shareholding in trust for Lonrho, it was bound to refrain from*

[133] MCM's Closings, [514].

[134] *Lonrho v Fayed No. 2* [1992] 1 WLR 1, 11F-12C per Millett J; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 (Millett J); *Bristol & West Building Society v Mothew* [1998] Ch 1, 22G-23E; *Box v Barclays* [1998] Lloyd's Rep Bank 195 at [200]-[201]; *Shalson v Russo* [2003] EWHC 1637 (Ch) 281 at [108]-[111]; *Armstrong v Winnington* [2012] EWHC 10 (Ch), [2013] Ch 156 at [125]; *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] Ch 520 at [43]-[44]; *Re D&D Wines* [2016] UKSC 47, [2016] 1 WLR 3179 at [28]; and *Vale v Steinmetz* [2021] EWCA Civ 1087.

[135] Facts: In a dispute arising out of Al-Fayed's (***AF***) acquisition of House of Fraser (***HF***), Lonhro (***L***) claimed that the contract of sale of part of the share capital in HF to AF should be rescinded. L was aggrieved by the fact that it was bound by an undertaking given to the Secretary of State for Trade and Industry not to acquire more than a 30% shareholding in HF, at the time that AF made a bid for the remaining shares in HF. L claimed had it known that AF would make such a bid, it would not have sold to AF. L alleged AF was aware of this and deliberately deceived L into believing the contrary.

using the trust shareholding in order to mount a bid on its own account for the remaining shares…"

Millett J supported that conclusion by reasoning that the contract was voidable, not void, and until avoided "*the representor is not a constructive trustee of the property transferred pursuant to the contract, and no fiduciary relationship exists between him and the representee… It may well be that if the representee elects to avoid the contract and set aside a transfer of property made pursuant to it the beneficial interest in the property will be treated as having remained vested in him throughout, at least to the extent necessary to support any tracing claim. But the representee's election cannot retrospectively subject the representor to fiduciary obligations of the kind alleged.*"

In other words, the Court considered that the bare constructive trust obligation to re-convey fraudulently acquired property could be deemed retroactively to have applied throughout but that this would not have the consequence of subjecting the (deemed) 'constructive trustee' to fiduciary obligations over that period of deemed retroactivity.

ii) *Bristol & West Building Society* 1998 1 Ch 1 (CA). A claim was brought against a solicitor who had acted both for the purchasers of a property and the purchasers' mortgagee. The claimant (mortgagee) offered to advance purchase moneys on the express condition that the balance was to be provided by the purchaser without resort to further borrowing. The defendant-solicitor was instructed to report, prior to completion, any proposal that the purchasers might create a second mortgage or otherwise borrow in order to finance part of the purchase price.

The defendant knew that the purchasers were arranging for an existing (relatively small) bank debt to be secured by a second charge on the new property. The defendant negligently (but honestly, by inadvertence) reported to the claimant that the purchasers were providing the balance of the purchase price without resort to further borrowing. The claimant advanced the loan and the purchase was completed.

The purchasers defaulted on their mortgage repayments, the claimant enforced its security, and the property was sold at a loss. The claimant claimed the full amount of its loss from the solicitor in (i) negligence, (ii) breach of contract and (iii) breach of trust.

At first instance, Chadwick J held that the defendant had committed a breach of trust in applying the mortgage advance in the purchase of the property, having obtained payment of the mortgage advance by misrepresentation: see at p.13E-G. He held that the consequence was that the defendant held the purchase moneys on constructive trust from the moment of receipt, "*to return it forthwith to the society, unless authorised by the society to retain, or dispose of, it after a full knowledge of the facts had been disclosed*": p.13G-H. (Millett LJ observed that "*The judge evidently considered himself to be approaching a remedial constructive trust as the appropriate remedy for a prior breach of fiduciary duty*": at p.15E.)

The Court of Appeal, however, held that the solicitor had committed no breach of trust. The negligence and breach of contract claims were remitted back to the High Court for an assessment of the amount of the loss resulting therefrom.

At p.15F-H, Millett LJ observed that Chadwick J had erroneously approached the case as though it had involved fraud by the solicitor. At p.15H, he stated:

> "*It is not alleged that the defendant deliberately concealed the arrangements which the purchasers had made with their bank from the society or that he consciously intended to mislead it. Nothing in this judgment is intended to apply to such a case.*" (emphasis added)

Millett LJ analysed separately the questions of whether the defendant had been guilty of breach of fiduciary duty (at pp.16-22) and breach of trust (at pp.22-24).

As to breach of trust, Millett LJ observed (at p.22D) that

> "It is not disputed that *from the time of its receipt by the defendant the mortgage money was trust money. It was client's money which belonged to the society and was properly paid into a client account. The defendant never claimed any beneficial interest in the money which remained throughout the property of the society in equity. The defendant held it in trust for the society but with the society's authority (and instructions) to apply it in the completion of the transaction of purchase and mortgage of the property. Those instructions were revocable but, unless previously revoked, the defendant was entitled and bound to act in accordance with them.*"

He concluded (at p.22E):

> "*The society's instructions were not revoked before the defendant acted on them, and in my judgment there was no ground upon which the judge could properly conclude that his authority to apply the money in completing the transaction had determined.*"

Millett LJ concluded (at p.23H) that:

> "*The defendant knew that he was a trustee of the money for the society; but he did not realise that he had misled the society and could not know that his authority to complete had determined (if indeed it had). He could not be bound to repay the money to the society so long as he was ignorant of the facts which brought his authority to an end, for those are the facts which are alleged to affect his conscience and subject him to an obligation to return the money to the society.*"

iii) *Byers & Ors v Samba Financial Group* [2021] EWHC 60 Ch. A claim was brought by joint official liquidators of a Cayman Islands registered company which was the beneficiary of Cayman Islands trusts. The claim was to recover from a Saudi Arabian bank the value of shares in five Saudi Arabian companies that were transferred to the Defendant in breach of trust.

There is an important distinction between the facts in *Byers* and the present case. In *Byers*, the claimant brought a personal restitutionary claim for knowing receipt of the value of the shareholding. Fancourt J held that a claim for knowing receipt will fail if, at the moment of receipt of property, the beneficiary's equitable proprietary interest is destroyed or overridden so that the recipient holds the property as beneficial owner. Fancourt J found that pursuant to Saudi Arabian law (as the law applicable to the transfer), the claimants' proprietary interest in the shares was extinguished at the point of transfer to the defendant. The defendant had, from the outset, therefore held the property absolutely free of any beneficial interest of the claimants, and any knowledge prior to the receipt was irrelevant. The distinction between *Byers* and the present case is that in *Byers* the "proprietary base" necessary for a knowing receipt claim had been extinguished whereas on the facts of this case the question is whether the relevant equitable interest has come into existence at all. Nonetheless, Straits drew my attention to the following observations of Fancourt J:

> "*110. The knowing recipient's liability depends on his knowledge that the property he receives is trust property and is to be dealt with in this way. His receipt is not wrongful in the sense that he has acted dishonestly or culpably (unless he has also dishonestly assisted in the breach of trust), but his liability to deal with the property as if he were a trustee arises at the moment of receipt because of his knowledge that the property is trust property. If the transferee then deals with the property otherwise than as a trustee should […] he is at gault and will be liable for the consequences*.
>
> *111. The claimant must be able to assert that the Ds received his property and were obliged to deal with it as if he were trustee of it […] if the recipient was at the outset entitled to seal with the property as his own, the claim cannot succeed*."

628. Whilst MCM is right to submit that none of these cases expressly addresses the issue before this Court, it nonetheless accepts that these authorities make clear that a constructive trust does not arise until the contract is rescinded, and that until the moment of rescission the transferee acquires both legal and beneficial title to the property and is not a trustee. However, MCM asserts that this does not determine the issue of whether, at the point when a contract *is* rescinded, the rescinding party is entitled to treat the beneficial interest in the transferred property as having remained with it all along for the purposes not only of equitable proprietary claims but also claims in knowing receipt.

629. MCM submits that it is in accordance with broader equitable principles that a party in its position should be granted relief in equity, by way of a knowing receipt claim, against a recipient of funds who *knew all along* the circumstances which made that receipt unconscionable. It relies on the following arguments of principle in support of this proposition.

630. First, MCM contends that the fact that rescission of the fraudulently induced contract may have happened (a) after the funds were received and (b) after the funds were paid away again, is arbitrary and, as such, MCM's entitlement to relief should not depend on this. Sophisticated frauds may take time to uncover, increasing the likelihood that

the claimant will only rescind any contract long after funds have been received and transferred away.

631. Second, MCM suggested that its submissions promote consistency in equity by bringing knowing receipt into line with equitable proprietary claims: it would be anomalous, it submits, for equity to acknowledge (at the moment of rescission but taking effect retroactively as if having been triggered from the moment of receipt) a constructive trust for the purposes of enabling a claimant to assert equitable proprietary claims, but not to do so in order to enable the same claimant to assert knowing receipt claims.

632. Thirdly, MCM maintained that its contention does not mean that innocent recipients will find themselves liable in knowing receipt because of their receipt, retention and/or payment away of money that they received without knowledge of the potential rights of a fraud victim who paid those moneys under a contract that has not yet been rescinded. There could be no claim against such an innocent recipient, because such a recipient does not have the necessary unconscionable knowledge.

(iii) Straits' submissions

633. In response to these arguments, Straits submits that the Court should not countenance any such extension to the law of knowing receipt. In summary, Straits submits as follows:

i) A knowing receipt claim requires (i) a disposal of the claimant's assets in breach of trust; (ii) the beneficial receipt by the defendant of those assets (or assets traceable as representing the assets of the Claimant); and (iii) knowledge on the part of the Defendant that the assets received are traceable to the breach of trust.

ii) A fraudulently induced contract is voidable not void. Legal and beneficial title therefore transfer under it to the transferee with the claimant retaining only a "mere equity". Only on rescission does a constructive trust arise whereby a beneficial interest in the transferred property revests in the claimant.

iii) Given a constructive trust does not arise until rescission there can be no question of a remote recipient of the transferor's property having received trust property knowingly in breach of trust prior to rescission as *no trust yet exists to breach*. In this regard, the timing of rescission is not "arbitrary", as suggested by the claimant, but fundamental. It determines whether a precondition of a claim in knowing receipt can be made out.

634. Although Straits' submissions are not expressly made good in any of the authorities (cited above), it argues that they follow from the principles laid down in them. Furthermore, academic authorities which have opined on this issue generally consider that liability for knowing receipt should not be imposed retrospectively (as it is with liability for equitable proprietary claims):

i) O'Sullivan, *The Law of Rescission* (2014) [16.61]:

> "*There is so far no authority as to whether a third party who receives property transferred under a voidable transaction may be liable as a knowing*

recipient. There is likewise limited guidance as to whether a third party can be liable for dishonestly assisting in a breach of trust for assisting in the abstraction of assets under a voidable transaction.

It has been said that neither form of liability can be imposed retrospectively. If available, claims of this kind can therefore only be maintained if the injured party is empowered to regain equitable title by electing to rescind, and in respect of receipt or assistance that occurs after that election has been made."

ii) Grant & Mumford, *Civil Fraud: Law, Practice, Procedure* (2018) [22-063]:

"*Rescission can thus be the foundation of an equitable proprietary claim. Moreover, the re-vesting of beneficial title is (like the rescission itself) treated as operating retrospectively, such that the property transferred under the impugned transaction "can be regarded as having always been in equity his own property". This is treated as having given the claimant a sufficient equitable interest to be able to take advantage of the more favourable rules of equitable tracing and following, and thereby recover property that has been transferred away before the court could intervene. It would appear, however, that the beneficial interest that is treated as having existed by reason of the rescission is not sufficient to subject the holder of legal title to duties as a trustee or fiduciary, or to give rise to claims against third parties for knowing receipt or dishonest assistance*."

iii) McGrath, *Commercial Fraud in Civil Practice* (2014) [6.239]:

"*It is not possible to use the doctrine of rescission so as retrospectively to subject parties to obligations or duties of a fiduciary nature. […] Whether or not there is a retrospective vesting for tracing purposes it is clear that on rescission the equitable title does not revest retrospectively so as to cause an application of trust money which was properly authorised when made to be afterwards treated as a breach of trust.*"

iv) Zogg, *Proprietary Consequences in Defective Transfers of Ownership* (2020), p. 183:

"*The revesting of ownership upon rescission may not operate so as to render acts of [a transferee] or an unprotected remote recipient retrospectively unlawful if they were lawful at the time when carried out. In other words, proprietary rescission has only prospective effects for purposes of legal and equitable wrongs. At common law, the revesting of legal ownership may not render [a transferee] or a remote recipient liable in tort (conversion, trespass or negligence) for acts committed prior to rescission, such as a disposition or a consumption of the asset. With regard to rescission in equity, it will be recalled that [the transferor's] (re)vested equitable ownership interest is, without more, binding on [the transferee] and any remote recipient but that the minimal personal fiduciary duties of a bare trustee (or liability for knowing receipt) only arise upon the acquisition of knowledge of the adverse equitable interest. As at common law, personal liability for an equitable wrong may not be triggered retrospectively. If [the transferor] rescinds the*

> *transaction after [the transferee] or a remote recipient has disposed of or consumed the asset, there cannot be any liability for breach of fiduciary duty or knowing receipt.*
>
> *In other words, a mere equitable power in rem [i.e. a "mere equity"] is not protected by an equitable wrong. The existence of such a power – even if known to the legal owner – does not, until exercised, generate any fiduciary duties or liabilities for knowing receipt*."

(iv) Analysis

635. I agree with Straits' submissions. It is possible to be sympathetic to MCM's position, as the retroactive effect of rescission in equity is arguably inconsistent in its treatment of equitable proprietary claims and claims for knowing receipt. Equity permits the retrospective vesting of a beneficial interest in a transferor following rescission for the purposes of supporting an equitable proprietary claim, but this retrospective vesting does not also impose liability on any third-party recipient for knowing receipt.

636. However, the supposed inconsistency makes logical sense, as for a claim in knowing receipt a party must receive assets it knows have been transferred in breach of trust. Prior to rescission, no constructive trust has arisen and so the assets cannot be transferred in breach of a trust which does not yet exist.

637. That equity permits revesting of a beneficial interest in a transferor for the limited purpose of equitable proprietary (tracing) claims is an exception and a legal fiction (which falls short of imposing the full range of trustee duties on recipients). Whilst it may be argued that extending this exception to permit claims in knowing receipt might lend coherence to equity, in my judgement extending the exception in this way would unreasonably and unnecessarily multiply the legal fiction.[136]

638. Fundamentally, since it is a precondition to the imposition of liability for knowing receipt in breach of trust that there has been a *breach of trust*, I consider that prior to such a breach and rescission, a claim in knowing receipt cannot coherently be advanced. The recipient did not receive trust assets, and indeed the claimant might choose to affirm a fraudulent transaction if it has turned out to be a valuable one for them. If so, an intermediate party who receives the asset subject to the mere equity ought to be entitled to deal with it as they wish, as otherwise until the claimant has decided whether or not to affirm the transaction they are left in the position of not knowing whether they can deal with the asset or not.

639. It should also be borne in mind that a claimant in such a situation will not (usually) be left without a remedy as they will be free to pursue (i) equitable proprietary claims for any assets they are able to trace into or (ii) claims in unjust enrichment (as to which, see *Criterion Properties Plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 at [4] per Lord Nicholls), as there will be no change of position defence available if the fraudster's assister paid away the funds knowing of the fraud.

[136] Zogg advocates an original alternative approach to this dilemma at pp. 184-186 of *Proprietary Consequences in Defective Transfers of Ownership* (2020).

640. Indeed, with respect to unjust enrichment claims Lord Reid in *The Commissioners for Her Majesty's Revenue and Customs v The Investment Trust Companies* (in liquidation) [2017] UKSC 29 explicitly noted that although the general rule is that for enrichment to be considered "*at the claimant's expense*" the defendant must have directly received the benefit, there exist exceptions where "*the difference from the direct provision of a benefit by the claimant to the defendant is more apparent than real*", including where: "*The defendant receives property from a third party into which the claimant can trace an interest. Since the property is in law, the equivalent of the claimant's property, the defendant is therefore treated as if he had received the claimant's property*."

641. In light of this, a party would not normally need, on similar facts, to have recourse to a knowing receipt claim because a knowing recipient would usually have made a gain (whereas Straits actually made a loss from its trades given monies are still owing to it by CH and MW) and so a claimant could seek restitution of that gain by an unjust enrichment claim.

(v) Conclusion

642. In the circumstances I am not willing to extend the law in the manner advanced by MCM (by doubling the legal fiction) and accordingly the knowing receipt claims fail against the third to tenth defendants.

(VIII) EQUITABLE PROPRIETARY CLAIMS

643. With respect to the equitable proprietary claims, MCM does not ask for a determination at this trial that any specific assets or funds are held on trust for it. MCM made this clear in its closing submissions:

> "*MCM does not at this phase of the proceedings seek any order that any particular asset held by any particular defendant is held on trust for it. At this stage, MCM seeks declarations (i) that it has rescinded its contracts with Come Harvest and Mega Wealth and (ii) that its net payments to Come Harvest and Mega Wealth and/or the traceable proceeds of the same are held for it on resulting or constructive trust*."[137]

644. I have already determined that MCM rescinded its contracts with Come Harvest and Mega Wealth (at paragraph 452 above). I now address the question of whether the Claimant's net payments to Come Harvest and Mega Wealth and their traceable proceeds (received by, *inter alios*, Mr Kao, Genesis, Sampo and Straits) are held on constructive trust.

645. Mr Kao, Genesis and Sampo made no submissions on this (or any other) issue, not appearing at trial, but Straits contests the maximum quantum of traceable proceeds which MCM, through Mr Ashton's expert evidence, contends are held on constructive

[137] Closing submissions [544]-[545]. Cf. also paragraph (2) of the Prayer of the Re-Re-Re Amended Particulars of Claim.

trust. The parties agreed that this issue could be resolved by the determination of two discrete questions:[138]

i) Whether the Court should accept the tracing evidence set out in Ashton-1 or Ashton-2 (which employ different methodologies) in order to determine the maximum traceable proceeds received by Straits. The methodology employed in Ashton-2 significantly increases the maximum traceable proceeds to which MCM can assert a claim. I will refer to this question as the "***Tracing Evidence Issue***".

ii) Whether Straits can be considered a bona fide purchaser for value without notice ("***Bona Fide Purchaser***") with respect to any of the funds it received. If Straits is a Bona Fide Purchaser of any funds this will reduce the traceable proceeds to which MCM may assert a claim. I will refer to this question as the "***Bona Fide Purchaser Issue***".

646. The Court's job in answering these questions was made more difficult than might otherwise be the case by reason of the fact that the equitable proprietary claims were only addressed relatively briefly and late in the trial, in a necessarily somewhat hurried manner. The written evidence adduced, however, was complex and extensive and the submissions of Mr Lewis QC and Mr Robb, although cogent, were necessarily compressed given the time constraints (with most of the parties' energises having been directed towards the allegation of unlawful means conspiracy). A fuller consideration of the evidence would have required an increased trial time estimate. The parties agreed, however, that if the Court answered these questions, they would then likely be in a position between themselves of being able to determine the quantum of the equitable proprietary claims.[139] As such, in this judgment, I deal only with these questions of principle and leave any consequent quantum calculations to the parties.

(i) The Tracing Evidence Issue

647. In Ashton-1, Mr Ashton notes that he was instructed:

i) to presume that any payments out of an account containing mixed funds (i.e. MCM monies and trustee funds) were made first from non-MCM funds (i.e. those of the trustee: Come Harvest or Mega Wealth); and

[138] When further broken down, the issues for determination which were identified by the parties are as follows: "*[T]here are 3 broad questions arising on quantum: 313.1. Should the Genesis payments to Straits, or any of them, be included? 313.2. Whether the approach in Ashton-1 or Ashton-2 is the starting point to identify the maximum traceable sum? 313.3. Whether the traceable proceeds of the payments by CH/MW should be reduced by reference to Ms Tan's evidence?"* (Straits' Closing submissions at [313] and agreed by MCM cf. transcript, Day 15 pp. 77-78). However, MCM then correctly noted (Transcript Day 15 pp. 80-81) that 313.1 and 313.3 are essentially the same issue (whether Straits is a bona fide purchaser for value without notice) and so it makes sense to take the two questions together, as I do below (hence "Tracing Evidence Issue" below refers to question 313.2, while the "Bona Fide Purchaser Issue" refers to both questions 313.1 and 313.3).

[139] Mr Lewis QC stated in oral argument that: "*If your Lordship decides the three issues of principle here […] then the parties will probably be able to agree the figure*" (Transcript, Day 15, p. 76).

ii) to override this presumption only in instances where there appear to be matching transactions and where application of this approach would result in such transactions not being materially matched.[140]

648. By contrast, in Ashton-2, Mr Ashton notes that he maintained the approach as set out in Ashton-1 save that:

i) *"[With respect to payments to Straits,] wherever there are available relevant MCM monies on a day where there is an outflow to Straits, I have applied such monies to payments to Straits first. To that end, the relevant MCM monies would be applied first to the outflows to Straits before any other outflows within the same day are addressed. However, it should be noted that where I previously established a 'matching' of transactions […] I have maintained and not overridden such matching in my updated analysis*" (emphasis added).

649. Mr Ashton accepted in cross-examination that he applied this presumption *only* with respect to payments to Straits and *not* for payments to any other third parties.[141] In other words, where there was trust money in Come Harvest's or Mega Wealth's accounts on a certain day and payments were made to multiple third parties throughout the day, Mr Ashton assumed that trust monies were expended *only* in the case of the payments which were made to Straits.

650. MCM contends that the Court should adopt Ashton-2 as the basis for its tracing claim, arguing that Ashton-2 follows established principles of tracing whereby the interests of wrongdoing trustees are subordinated to innocent beneficiaries. By contrast, Straits submits that the presumption employed in Ashton-2 is artificial and "*goes too far in seeking to push the tracing presumptions to breaking point for the purpose of increasing Straits' liability, not seeking to preserve the actual traceable proceeds*."[142] It contends that Ashton-1 is therefore to be preferred.

(a) Legal principles

651. MCM accept that there exists no direct authority supporting the presumption made in Ashton-2. As such, it framed this issue by reference to authorities dealing with the rights of beneficiaries to trace into *investments* made from mixed funds.

652. Although, for reasons which I shall explain, I do not consider this to be the correct approach, much of the parties' submissions focussed, as a result, on the different question of the rights of beneficiaries to trace into *investments* made by trustees out of mixed funds.

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[140] Cf. para, 2.28 of Ashton-1: "*By way of example, where an amount is received into an account and the same, or very similar, amount is transferred out of the account on the same day or soon after, I have assumed that the transfer out was fully funded by the money received. This contrasts with the general assumption where, if there were a mix of relevant MCM monies and non-relevant monies in the account before the cited transfer in, the transfer out would be assumed to be funded from any brought forward non-relevant monies first*." And at [2.29] of Ashton-1: "*The matching criteria I have used for this exercise, and which I consider to be reasonable, are that for there to be a match (1) the payments must occur within five business days of each other and (2) the difference between the inflow(s) and outflow(s) must be less than or equal to 0.1%. In situations where the matching outflow(s) may slightly exceed the inflow, then the excess difference is allocated based on LIBM*."

[141] Transcript Day 13 p. 34/7-11.

[142] Straits' Closing [325].

653. The starting point is that, as the editors of *Snell's Equity* (34th edn, 2019) state:

> "*The rules of following and tracing are artificial rules of evidence which allow a claimant to identify misapplied property or its proceeds. Following is the process of identifying the same property as it is transferred from one person to another. Tracing is the process of identifying a new asset as the substitute for an original asset which was misappropriated from the claimant […] In the strict sense, the processes of following and tracing are not claims or remedies. They merely lay the evidential foundation necessary to prove some claim against the defendant which the claimant then forces by a remedy.*"[143]

654. "Presumptions" or "rules" of identification govern how a claimant may establish such a coordination between a payment in and a payment out of trust monies from a mixed fund. The rules to be applied differ depending on whether the other contributor to the mixture is innocent of any fault, or whether he is a wrongdoer (i.e. a wrongdoing trustee or a person who has received the money with notice of the breach of trust).

(i) Two innocent parties: the rule in *Clayton's case*

655. The rule in *Clayton's case* governs the situation where the funds of two innocent parties have been mixed. Money belonging to two innocent contributors may be mixed where a trustee mixes the funds of two separate trusts, or gives trust money to a volunteer who mixes it with his own.[144]

656. *Clayton's case* establishes that, as a general rule, where there are mixed funds in a bank account and none of the contributors is a wrongdoer, each withdrawal from the account is to be treated as having derived from the funds which have been in the account for the longest. This is often referred to as "*first in, first out*". This is because the Court does not consider any contributor to be liable to have their interests subordinated to those of any other contributor.[145]

657. However, in this case, the mixed funds comprised the funds of an innocent party (MCM) *and* of a wrongdoer (Come Harvest/ Mega Wealth). It is therefore common ground between the parties that the rule in *Clayton's case* does *not* apply in this case.

(ii) A wrongdoer and an innocent party: *Hallett* & *Oatway*

658. The approach to be taken where the funds of a wrongdoer and innocent party have been mixed is laid down in *In re Hallett's Estate* (1880) 13 Ch. D. 609 and *In re Oatway* [1903] 2 Ch 356.

659. In such a case, as is stated in *Snell*, "[*p*]*unitive presumptions of identification apply where the other contributor to the bank account is a wrongdoer. They aim to preserve the value contributed by the claimant to the mixed fund at the expense of the value contributed by the wrongdoer*."[146] As such, a reversed burden of proof operates. The mixed money in the bank account is presumed to belong to the innocent claimant to the

[143] [30-051].
[144] *Snell's Equity* [30-056].
[145] See Grant & Mumford, *Civil Fraud*, ibid, §23-019, *Snell's Equity*, §30-058 – 30-061.
[146] *Snell's Equity* [30-057].

extent that *the wrongdoer* cannot prove that it is attributable to his own contributions to the account.[147]

660. In *In re Hallett's Estate* the Court of Appeal laid down a rule as to how monies drawn from a mixed fund and dissipated by a trustee should be treated. Jessel MR stated as follows:

> *"Suppose [a wrongdoer] has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purposes £100, is it tolerable for anybody to allege that what he drew out was the first £100, the trust money, and that he misappropriated it, and left his own £100 in the bag? It is obvious he must have taken away that which he had a right to take away, his own £100.*
>
> *… it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money*."[148]

661. A similar situation came before the High Court in *In re Oatway,* except this time the question was how to treat *investments* out of a mixed fund when the remainder of the fund had subsequently been dissipated. Joyce J held that:

> "*It is, in my opinion, equally clear that when any of the money drawn out has been invested, and the investment remains in the name or under the control of the trustee, the rest of the balance having been afterwards dissipated by him, he cannot maintain that the investment which remains represents his own money alone, and that what has been spent and can no longer be traced and recovered was the money belonging to the trust.*"[149]

662. As such, in *In Re Hallett's Estate* and in *In re Oatway*, both being cases of some antiquity, the court relied upon "*punitive presumptions of identification*" against a wrongdoing trustee to resolve evidential uncertainty as to what constitutes the property of the claimant in a mixed fund.

(b) MCM's submissions

663. MCM submitted that the decisions in *In re Hallett's Estate* and in *In re Oatway* are manifestations of an underlying principle, which it referred to as the "subordination principle".

664. MCM's submission in short is that where a wrongdoing trustee mixes the funds of an innocent claimant with his own, the wrongdoer's interests are subordinated to those of the innocent claimant. As such, the wrongdoer is prevented from asserting any property

[147] *El Ajou v DLH Plc* [1993] 3 All E.R. 717 at 735–736, per Millett J. Cf. *Re Tilley's WT* [1967] 1 Ch. 1179 at 1183: "*If a trustee mixes trust assets with his own, the onus is on the trustee to distinguish the separate assets, and to the extent that he fails to do so, they belong to the trust*." (per Ungoed-Thomas J).
[148] (1879) 13 Ch. D. 696 at 727.
[149] [1903] Ch 356 at 360.

rights over the mixed fund until the claims of the innocent claimant are satisfied. MCM suggested that this principle can be taken from *In re Oatway* itself.

665. The facts of *In re Oatway* were as follows. Mr Oatway was a trustee of Charles Skipper's will. He took £3,000 of trust money and mixed it with £4,000 of his own. He used £2,137 from the fund to buy shares in the Oceana Company, and dissipated the rest before his death. The beneficiaries of the Skipper trust wished to trace their money into the £2,475 that were the proceeds of sale of the shares.

666. The executrix of Mr Oatway's estate argued that given, at the time of the purchase of the shares, the mixed fund contained enough of the trustee's own money to cover the purchase price of the shares, "[*Oatway*] *was therefore entitled to withdraw that sum, and might rightly apply it for his own purposes; and that consequently the shares should be held to belong to his estate*" [361]. Joyce J rejected this submission:

> "*To this I answer that he never was entitled to withdraw the [purchase price] from the account, or, at all events, that he could not be entitled to take that sum from the account and hold it or the investment made therewith, freed from the charge in favour of the trust, unless or until the trust money paid into the account had been first restored, and the trust fund reinstated by due investment of the money in the joint names of the proper trustees.*" [361]

667. MCM also cited academic authority (*Hafeez-Baig and English's The Law of Tracing*[150]) and Australian authority, *Re French Caledonia Travel Service Pty Ltd*, which it submitted also support the "subordination principle":

> "*When a trustee has wrongfully taken property from a trust fund, his first obligation is, so far as the trust property can be seen as remaining in his hands, to make restitution—that is, to put back in specie into the trust fund whatever of the trust property he still retains. Until he has performed that obligation, equity will not permit him to assert that he has unfettered ownership of any of the property into which any part of the trust property has been converted or mixed.*"[151]

668. Furthermore, MCM also drew the Court's attention to *Shalson v Russo* [2005] Ch 281 where, it asserts, Rimer J considered (*obiter*) a question similar to that in this case and concluded that a claimant should be entitled to follow the payments made out of a mixed fund:

> "*This method is a "cherry-picking exercise", as Mr Smith recognised. But in a case in which the only contest is between the claimant seeking to trace … and the wrongdoer …, there is, he says, every reason why the latter's interests should be subordinated to the claimant's. Normally, it is presumed that if a trustee uses money from a fund in which he has mixed trust money with his own, he uses his own money first: In re Hallett's Estate (1880) 13 Ch D 696. But Mr Smith submits that this is not an inflexible rule and <u>that if the trustee can be shown to have made an early application of the mixed fund into an investment, the beneficiary is entitled to claim that for himself. He says, and I agree, that</u>*

[150] [6.49], The Federation Press, 2021.
[151] Campbell J in *Re French Caledonia Travel Service Pty Ltd* (in liq) (2003) 59 NSWLR 361 at 386 [83].

> *this is supported by In re Oatway [1903] 2 Ch 356. The justice of this is that, if the beneficiary is not entitled to do this, the wrongdoing trustee may be left with all the cherries and the victim with nothing*." [144] (emphasis added)

669. In light of these authorities, MCM contends that "*the question in the end is a narrow one: in circumstances where payments are made to Straits from an account which has a greater credit balance than the amount of the payment to Straits, should it be presumed (a) that traceable proceeds are retained in the account; or (b) that traceable proceeds are paid out of the account (to Straits)*".[152]

670. MCM submits that the Court should choose (b) because, in line with the subordination principle, "*the claimant is entitled to choose a rule that (it believes) will favour its ultimate prospects of recovery*".[153]

(c) Straits' submissions

671. Straits' response to MCM's submissions is two-fold:

i) It maintains that MCM's framing of the issue as analogous to authorities where payments have been applied to an *investment* by a wrongdoing trustee is inapposite. The facts of this case do not fall within the compass of those authorities. Payments were made out of the mixed fund by Come Harvest and Mega Wealth to Straits (a third-party recipient) and not in order to purchase an investment.

ii) Even if MCM's framing of the issue were correct, Straits contends that MCM's statement of the law (i.e. the subordination principle) is inaccurate. Rather, the authorities establish a presumption that a wrongdoing trustee's breach halts at the mixing of funds, unless proven otherwise. MCM is therefore not entitled to follow payments into Straits' hands at its election.

672. Dealing with the first of Straits' objections, Straits submits that the principle articulated in *In Re Oatway* cannot be applied to the payments made to Straits. The *ratio* of *In re Oatway* is narrower than MCM suggests and only applies where (i) the money paid out of the mixed fund has been *invested* by the trustee; (ii) the investment remains under the control of the trustee; and (iii) the rest of the balance has been dissipated.

673. Although it appears from Mr Ashton's evidence that the funds may subsequently have been dissipated,[154] the payment of monies to Straits, it submits, does not constitute an investment which remains under the trustee's control. Were *In Re Oatway* held to apply not only to investments but also to payments made out of a fund to third party recipients, then, Straits submits, "*[t]he logic of this approach would also allow a claimant to cherry-pick on a "yes/no" basis every single payment out of a mixed account, in disregard of all other presumptions, with the potential for huge complexity. Such cherry-picking would not even need to be defendant-specific or follow any consistent*

[152] MCM Closing [536].
[153] MCM Closing [537].
[154] It appears that the funds in Come Harvest's, Mega Wealth's and Genesis's accounts have been almost entirely dissipated. As of January 2017, there remained only US$26,431.50 in Come Harvest's account, US$8,379.43 in Mega Wealth's account and US$78,265.38 in Genesis's account. There is therefore likely now to be little or nothing left.

patterns. The claimant could cherry-pick payment no. 1 to A, but then overlook a later payment no. 2 to A, preferring to trace a later payment no. 3 to defendant B. That would be a discretion having nothing to do with property rights." [155]

674. Furthermore, Straits submits that the presumption in Ashton-2 is unfair in that it deems payments only to Straits to consist of the application of MCM's monies, noting that this "*has the potential to punish those that continue to participate in proceedings by allowing a claimant to elect that all payments to the participating defendant are its traceable proceeds. If adopted, it could discourage parties from continuing to participate in litigation.*"[156]

675. Second, in response to MCM's submissions that *In re Hallett's Estate* (and *In re Oatway*) can both be explained by reference to the "subordination principle", Straits contends that *In Re Hallett* establishes a general presumption in the case of a mixed fund that, after having mixed the funds, an honest intention should be ascribed to the defendant, so that he is generally presumed *not* to have committed a further wrong. Straits relies, *inter alia*, upon the following passage from *In re Hallett's Estate*:[157]

> Baggallay LJ: "*Where funds have been mixed with those of a beneficiary, "can any reason be assigned why […] I should not, as between myself and my cestui que trust, have the honest intention attributed to me of drawing against my own private funds, and not against the trust fund, though it was the first paid in?"*[158]
>
> *"[…] dealing with an account composed part in trust and in part of private funds, an honest intention should, if and as far as possible, be attributed to a trustee."*[159]

676. Straits submitted that this presumption of honesty is also supported by *In re Tilley's Will Trusts* [1967] 1 Ch 1179 where the Court considered that the trustee (Ms Tilly) should not be presumed to have committed a further wrong following her original mixing of trust monies.[160]

677. Furthermore, whilst Straits acknowledged that *Shalson v Russo* appears to permit a beneficiary to "cherry-pick" payments made out of a mixed fund, it underlined that Rimer J's observations were *obiter* and that in *Turner v Jacob* [2006] EWHC 1317, Patten J also addressed this issue as part of the *ratio* of his decision and adopted a less favourable approach to the beneficiary:

> "*It seems to me that in a case (such as the present) where the trustee maintains in the account an amount equal to the remaining trust fund, the beneficiary's right to trace is limited to that fund. It is not open to the beneficiary to assert a lien against an investment made using monies out of the mixed account unless the sum expended is of such a size that it must have included trust monies or the*

[155] Straits' Closing [320.2-320.3].
[156] Straits' Closing [footnote 1002].
[157] Cf. also [727-8] and [743].
[158] [735].
[159] [737].
[160] See [1193E].

> *balance remaining in the account after the investment is then expended so as to become untraceable.*"[161] (emphasis added)

678. Straits submits that the Court should therefore follow *Turner* and not *Shalson* (given that *Turner* is a judgment of a court of coordinate jurisdiction which this Court should follow unless convinced it is wrong).

(d) Analysis

679. I agree with each of Straits' submissions on this topic. I therefore agree that the approach in Ashton-1 not Ashton-2 is the correct approach.

680. As correctly observed by Straits, in *In re Oatway, In re Hallett's Estate, Shalson v Russo* and *Turner v Jacob* the question was whether a claimant could trace into an *investment* made by the defendant. The investment constituted the defendant's property. By contrast, the question here is whether a claimant can follow/ trace a transfer of monies out of a mixed fund to a (non bona fide) *third party recipient*. I agree with Straits that the claimant cannot treat the mere transfer to another party as a *successful investment* and that the logic of this approach would allow the claimant to cherry pick arbitrarily every single payment out of a mixed account, in disregard of other presumptions. That cannot be right.

681. During the relevant time period there were many payments out of the trust fund *to multiple third parties*.[162] MCM is only entitled to follow monies into the hands of third-party recipients who are not bona fide purchasers. The status of a number of third parties who received funds is uncertain; but it is clear that Mr Kao was not a bona fide recipient of funds and, moreover, the bona fides of Success Sea and Genesis Rover[163] are also seriously in doubt[164] (see further below).

682. Consequently, to endorse the presumption advanced by MCM, the Court would need to find not only that Straits' rights are subordinated to those of MCM as an innocent beneficiary *but also to those of other non-bona fide recipients.*

683. The effect of the presumption in Ashton-2 is arbitrarily to penalise Straits vis-à-vis the other non bona fide recipients of funds. On MCM's case, Straits is made liable for *all transfers to it* while other non bona fide recipients incur no liability (at least with respect to MCM's equitable proprietary claims).

684. In my judgment, a claimant is not entitled to elect between bringing proprietary claims against different third-party recipients in such an arbitrary manner. To allow MCM a discretion to act in such an arbitrary way appears to have more to do with the fact that Straits was the only solvent defendant to attend trial rather than an equitable exercise

[161] [102]. In *Turner*, the Court had to decide whether a beneficiary could choose to take a share in an asset (a house) that had been acquired by the trustee and had increased in value, in circumstances where the trustee "*maintain[ed] in her account an amount equal to the remaining fund*."
[162] Cf. Tables 3.3 and 3.6 of Ashton-1.
[163] The agreed dramatis personae notes that Genesis Rover is "A company which was registered at 155 Bovet Road, suite 700, San Mateo CA 94402. It was incorporated on 17 March 2015 and dissolved on 31 January 2017. Mr Kao was its registered agent. D3-D8 do not admit this."
[164] Cf. Table 3.3. of Ashton-1.

of property rights on MCM's part. In short, MCM's submissions and evidence do not justify the approach taken in Ashton-2.

(e) Conclusion

685. In the circumstances, I accept Straits' submission that the approach in Ashton-2 is "unsafe" given it "*artificially changed the presumptions only where a payment to Straits was concerned and not any other recipients*."[165] Ashton-1 should therefore be preferred as the starting point for determining the maximum equitable proprietary claim which may be made against Straits.

(ii) The bona fide purchaser for value without notice issue

686. Even if Straits did receive funds traceable to MCM (whatever the quantum) it will take them freely if it can show that it was a bona fide purchaser for value without notice (also known as "equity's darling") with respect to those payments. The burden of proof is, however, on Straits in this respect and to this end it adduced evidence by way of two witness statements from Ms Tan ("***Tan 3***" and "***Tan 4***") in support of its submissions.

687. Some of MCM's and Straits' submissions have now been overtaken by my factual findings as to the state of knowledge of Straits. As such, I deal only with the submissions of the parties which remain germane to the points at issue.

688. Given the burden of proof is on Straits with respect to this issue, I set out its submissions first.

(a) Straits' submissions

689. Straits asserts that it was a bona fide purchaser for value without notice in respect of three categories of payments:

i) *Non-MCM receipts*: Straits received certain of the payments from Come Harvest and Mega Wealth identified by Mr Ashton as consideration for CSCs which were not used to defraud MCM/ANZ. In other words, these were trades pursuant to which Straits supplied CSCs other than the 92 forged WHRs which form the subject of this claim (the ***Non-MCM Receipts***).

ii) *Success Sea receipts*: If the Court finds that the Non-MCM Receipts constitute traceable proceeds, there is a further sub-issue relating to two of these payments which were routed via Success Sea. Straits asserts that MCM cannot trace funds routed from Come Harvest/ Mega Wealth via Success Sea and on to Genesis as Success Sea was an intermediate bona fide purchaser for value without notice (the ***Success Sea Receipts***).

iii) *Genesis Receipts*: Certain payments received by Straits from Genesis identified by Mr Ashton were not received as consideration for forged WHRs used to defraud MCM under Type 5 transactions but rather were received:

[165] Straits' Closing [319].

a) in return for original (authentic) warehouse receipts.[166] As Ms Tan put it, these were trades whereby there was an "outright sale" of the underlying metals by Straits to Genesis pursuant to which Straits transferred title to those metals to Genesis (the ***OWR Receipts***).

b) as the purchase leg in a Type 4 transaction (the ***Type 4 Receipt***).[167]

(the OWR Receipts and Type 4 Receipts, together the ***Genesis Receipts***).

690. I will refer to these categories of receipts together as the "***Alleged Bona Fide Receipts***". I will deal first with (i) the Non-MCM Receipts together with the (iii) Genesis Receipts and will then turn to (ii) the Success Sea Receipts.

(i) Non-MCM Receipts & Genesis Receipts

691. Straits submits that to determine the traceable proceeds received by it, "*the Court must analyse both, (i) which payments are traceable to MCM, and (ii) which payments related to the CSCs passed to CH/MW which were used as templates for the Forged Warehouse Receipts[168] […] As such, MCM's focus solely on the source of the funds […] is misplaced. This is only half of the equation. The other half is the basis on which those funds were received by Straits.*"[169]

692. Straits asserts that it was "*a bona fide purchaser for value of any sums received from CH/MW that did not correspond to CSCs that were used […] to create the Forged Warehouse Receipts. Straits could not have notice of MCM's (or some other third party's) proprietary rights attaching to the relevant receipt by Straits in circumstances where the relevant contracts with CH/MW did not lead (or have not been shown by MCM to have led) to any forgery*."[170]

693. Furthermore, Straits joined issue with MCM's submission that it can be said to have had notice of MCM's property right in the money it received from its "innocent" transactions with CH/MW/Genesis simply because it knew that Come Harvest, Mega Wealth and Genesis were perpetrating a fraud with respect to other transactions.

694. Straits submits that the authorities show that the defendant must have had actual/ constructive knowledge of the claimant's property right with respect to the specific transaction and that knowledge that the party you are dealing with is a fraudster is not enough to "taint" that fraudster's innocent transactions. Straits referred to the following passages from the Privy Council's advice in *Crédit Agricole v Papadimitriou* [171] in support of its submissions:

> *"The bank must make enquiries if there is a serious possibility of a third party having such a right or, put in another way, if the facts known to the bank would*

[166] Straits identified three payments made on 28 June 2016, 5 July 2016 and 19 July 2016.
[167] Straits identified one payment made on 27 June 2016.
[168] Claimant's Closing [326].
[169] Claimant's Closing [329].
[170] Claimant's Closing [327].
[171] [2015] UKPC 13, [2015] 1 WLR 4265 at [33].

> *give a reasonable banker in the position of a particular banker serious cause to question the proprietary of the transaction."*[172] *(Lord Clarke)*
>
> *"If even without enquiry or explanation the transaction appears to be a proper one, then there is not justification of requiring the defendant to make enquiries. He is without notice. But if there are features of the transaction such that if left unexplained, they are indicative of wrongdoing then an explanation must be sought before it can be assumed that there is none. In the present case, on the facts actually known to the bank, there was no apparent explanation of the interposition of the Panamanian and Liechtenstein entities unless it was to conceal the original funs derived from third parties."*[173] (emphasis added)

695. Ultimately, Straits submits that MCM's case has become unacceptably wide by (i) ignoring the proper focus that knowledge must relate to the relevant transaction; and (ii) effectively asserting that "*any aspect of a counterparty's background circumstances can give rise to the relevant serious possibility [that the money could be the proceeds of fraud].*"[174]

(ii) Success Sea Receipts

696. Of the Genesis OWR payments, two with a value of c. USD 4.5m were made by CH/MW to Success Sea, which were then paid on to Genesis, who in turn passed the funds to Straits. MCM's Closing sets out the issue as follows:

> "*Ashton 2 also introduced a claim to a further US$22,141,808.67 based on receipts from Genesis (D4). All but two of the relevant 'inflows' into Genesis' account came from CH/MW. The two exceptions are both payments from Success Sea: one of US$3,519,948.22 on 13 June 2016, and another of US$1,000,000 on 19 July 2016. Of these, because of intervening payments out, only part was treated as contributing to traceable proceeds in Genesis' account as at the dates of the relevant payments out by Genesis to Straits. To this limited extent, the question arises as to whether MCM's proceeds can be traced through Success Sea."*[175]
>
> *As to the position of Success Sea, this company is not and has never been a party to these proceedings. It is a brokerage house which operated an online currency trading platform. Mr Kao's evidence was that he and Mr Wong used it to make payments to one another. In evidence served on behalf of D7 on 9 September 2021, Mr Joutain said that payments from Success Sea to D7 represented investments in D7 by Mr Henry Wang, the director and CEO of Success Sea. MCM finds this evidence improbable, but if it is true it can only be explicable on the basis of some degree of knowledge of and participation in Mr Kao's schemes. One way or another, therefore, MCM submits that it is right to treat Success Sea as having received funds with relevant unconscionable knowledge*

[172] [13].
[173] [18] per Lord Sumption.
[174] [Transcript Day p. 17/60ff]. .I.e. Claimant's submission in oral Closings that "*Straits knows that if they are getting money from any of CH or MW or Genesis they know and Ms He knows that there was a serious possibility that the money could be the proceeds of fraud*" [Transcript Day 15 p. 93/3].
[175] Claimant's Closing [475(3)].

> *or, alternatively, to treat it as a mere conduit, not breaking the chain of constructive trusts between CH/MW and the ultimate recipient defendant.*"[176]

697. Straits asserts that for this money to be traceable, the conscience of each intermediate holder needs to be attached and that MCM is therefore asking the Court to "*attach a conscience to Success Sea and Mr Henry Wang*."[177] Straits submits that the Court cannot "*find bad faith on the part of Success Sea and Mr Wang when there has been zero evidence of that*."[178]

698. This point was not developed in Straits' written closing as it appears only to have become aware of it following its review of MCM's written closing. In oral closing Straits submitted as follows:

> *"[…] at least part of the money had passed through Success Sea and we haven't had evidence focussing upon how much. What we have instead is MCM seeking to meet it by saying the numbers don't matter because Success Sea can also be treated as a guilty party in the loose sense of having their conscience attached. They say that for two reasons and the first is that Mr Wang was providing $5 million to a start-up company to engage in (inaudible) and oil trading. So Mr Wang must have been someone whose conscience was attached and he is the eminence grise, they say, of Success Sea. We say your Lordship can't find that. Then they have a second point […] and that is to say alternatively treat Success Sea as a mere conduit which does not break the chain of constructive trust. We say that doesn't work because unless Success Sea is a guilty party in the sense of having its conscience attached, then when the money passes from CH to MW to Success Sea and then before it passes to Genesis, it becomes Success Sea's property in the full sense and one cannot then revive the relevant proprietary right when it later gets to Genesis so as then to attach that to the conscience of Straits when it gets to Straits."*[179]

(b) MCM's submissions

(i) Non-MCM Receipts & Genesis Receipts

699. MCM submits that the question of what consideration Straits provided in exchange for the funds it received is irrelevant. Rather, it submits that "*the relevant question for the purposes of the bona fide purchaser for value defence is what does the recipient know or believe about the source of the money that is being provided*."[180] (emphasis added)

700. As such, MCM maintains that Straits' submissions and Tan 3 and 4 are irrelevant as they describe the *consideration* Straits provided for the funds it received but not Straits' *knowledge* concerning the source of the funds. MCM summarises its position in the following paragraphs of its Closing:

> *[Straits submits that] "If a payment were received for any reason other than the Forged Warehouse Receipts, Straits would be a bona fide purchaser for value*

[176] Claimant's Closing [480].
[177] [Transcript Day 17 p. 63].
[178] [Transcript p. 17/63].
[179] [Transcript p. 17/63-64].
[180] [Transcript Day 15 p. 83/17].

> *in relation to those claims such that they cannot form part of the quantum of MCM's claims." But this assertion is unsupported and is wrong. The "reason" for the payment being received is presumably a reference to the consideration provided by Straits in exchange for the payment. But the fact that a knowing receipt defendant*[181] *gives consideration (and the nature of that consideration) is irrelevant. It would be, at most, of potential evidential significance; and that could only be in a case where the defendant tries to establish either (i) that it had no reason to suspect that any money coming from a particular counterparty was tainted or (ii) that though it thought some money coming from that counterparty might be tainted, it had special reasons for thinking that this particular payment was innocent. Straits has not sought to establish either.*"[182]

701. MCM submits that the misunderstanding at the heart of Straits' submissions is for Straits to view the individual transactions between it and CH/MW/ Genesis in *isolation.* In closing, Mr Robb for MCM assumed the unlikely role of being a seller of a piano to a drugs baron to emphasise this point:

> "*MR ROBB: […] if I know that I am dealing with someone who gets their money or some of their money from fraud, can I say that I am a bona fide purchaser just because my transaction with that person is in and of itself a perfectly normal and unsuspicious transaction?*
>
> *…*
>
> *MR ROBB: I submit no, obviously not. The court's consideration of the facts is not limited in that way. If I am a piano seller to a drugs baron, my sale transaction may be perfectly legitimate in and of itself, but if I know they are a drugs baron, I know that the money might very well be coming from a fraud […] I am dealing with a fraudster, I know that I am dealing with somebody whose funds are or may very well be the proceeds of fraud.*"

(ii) Success Sea

702. MCM contends that the fact that funds passed via Success Sea should be no barrier to them being considered traceable proceeds. Success Sea should either be treated as (i) having had the relevant unconscionable knowledge, or (ii) a "mere conduit", not breaking the chain of constructive trusts between CH/MW and the ultimate recipient defendant.

703. MCM's submissions in support of this are limited. MCM notes that this is because Straits did not take this point until its oral closing so its only opportunity to reply was in their written submissions after the trial had ended. In those submissions, MCM asserts that the Court can be confident that Success Sea's conscience was attached because:

[181] Or, I add, a defendant to an equitable proprietary claim.
[182] [526].

i) Mr Kao specifically pleaded, and confirmed in evidence, that these two payments were "*payments of Participation Earnings*" from Mr Wong to Mr Kao.[183]

ii) Mr Kao also explained that "*Genesis had a trading account with Success Sea*" and that "*Mr Wong paid money through that Trading Account so that Mr Kao could receive payment in US dollars*".[184]

704. MCM therefore submits that "*the position is no different from what it would have been if the money had instead been paid through Mr Kao's bank account*."[185]

(c) Analysis

(i) Non-MCM Receipts & Genesis Receipts

705. So far as the Non-MCM Receipts and Genesis Receipts are concerned, the relevant question is whether Straits can make good its claim that it did not have (constructive) notice of MCM's proprietary right in the funds.

706. In my judgment, Straits has not made good its claim.

707. In *Papadimitriou* the Privy Council explained that there are three types of notice:[186]

i) Where a party appreciates that a proprietary right in the property probably exists, so it has actual notice of it;

ii) Where a reasonable person with the attributes of the bank should have appreciated based on the facts already available to it that the right probably existed, in which case it has constructive notice of it; and

iii) Where a party should have made inquiries or sought advice which would have revealed the probable existence of such a right, in which case it also has constructive notice.

708. The question before the Court in *Papadimitriou* was in what circumstances it could be said that an innocent party *should* have made inquiries or sought advice. Lord Clarke giving the leading judgment held at [20]:

> "*The test […] may be formulated in this way. [A party] must make inquiries if there is a serious possibility of a third party having such a right or, put in another way, if the facts known to the bank would give a reasonable banker in the position of the particular banker serious cause to question the propriety of the transaction.*"

[183] Response 21 at D3 and D4's Response to the Claimant's Request for Further Information of the Amended Defence.
[184] Response 22.2 at D3 and D4's Response to the Claimant's Request for Further Information of the Amended Defence.
[185] Mr Robb's additional written submissions, [18].
[186] *Papadimitriou* [14-15].

709. At [33] Lord Sumption provides an additional observation in a one paragraph judgment supplementing Lord Clarke's:

> *"We are in the realm of property rights and are not concerned with an actionable duty to investigate. The hypothesis is that the claimant has established a proprietary interest in the asset, and the question is whether the defendant has established such absence of notice as entitles him to assume that there are no adverse interests. The mere possibility that such interests exist cannot be enough to warrant inquiries. There must be something which the defendant actually knows (or would actually know if he had a reasonable appreciation of the meaning of the information in his hands) which calls for inquiry."*

710. Straits' position is a long way from that of the bank in *Papadimitriou*. In *Papadimitriou* the court at first instance found that the bank had acted in a bona fide manner. It was ultimately held to have had constructive notice because it did not make sufficient enquiries regarding the relevant transactions; it did not give sufficient thought to the purpose of the transaction and so was fixed with notice.

711. By contrast, Straits is not a bona fide/innocent party. Straits attempted to marginalise the significance of this component of the defence asserting that the "*requirement of good faith is unlikely to add much to the question of notice: Grant & Mumford* at 23-029, *Lewin on Trusts*, ibid, at 44-124." I do not agree that this is an accurate summary of the law; nor is it an accurate summary of what *Grant & Mumford* and *Lewin* state:

i) The editors of *Grant & Mumford* state that "*in order to […] take free of the prior equitable interest, it must be demonstrated that the purchaser satisfied every element of the definition… In relation to the requirement of bona fides, it is said that this is necessary even where absence of notice is proved*".[187]

ii) The editors of *Lewin* state that: "*The requirement of good faith has been said to be an independent test which must be satisfied even though absence of notice is proved. It is nonetheless generally true to say that the requirement of good faith relates to the requirement of notice, equity requiring not only absence of notice but genuine and honest absence of notice,' and there seems to be no case where the requirement of absence of notice has been established but the requirement of good faith has not.*"[188]

712. Indeed, *Midland Bank Trust Co v Green*[189] (cited on this point by *Grant & Mumford, Lewin on Trusts* and *Snell's Equity*) is authority for the proposition that good faith is an essential and discrete requirement of the defence:

> "*My Lords, the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened upon his conscience and the composite expression was used to epitomise the circumstances in which equity would or rather would not do so. I*

[187] Grant & Mumford, *Civil Fraud*, at 23-029.
[188] Lewin, at 44-124.
[189] [1981] AC 513 at 528.

> *think that it would generally be true to say that the words " in good faith " related to the existence; of notice. Equity, in other words, required not only absence of notice, but genuine and honest absence of notice. As the law developed, this requirement became crystallised in the doctrine of constructive notice which assumed a statutory form in the Conveyancing Act 1882, section 3. But, and so far I would be willing to accompany the respondents, it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or that when notice came to be regulated by statute, the requirement of good faith became obsolete. Equity still retained its interest in and power over the purchaser's conscience. The classic judgment of James L.J. in Pilcher v. Rawlins (1872) L.R. 7 Ch. App. 259, 269 is clear authority that it did: good faith there is stated as a separate test which may have to be passed even though absence of notice is proved. And there are references in cases subsequent to 1882 which confirm the proposition that honesty or bona fides remained something which might be inquired into (see Berwick & Co. v. Price [1905] 1 Ch. 632, 639; Taylor v. London and County Banking Co. [1901] 2 Ch. 231, 256; Oliver v. Hinton [1899] 2 Ch. 264, 273).*" (emphasis added)

713. As such, given that Straits was not a bona fide purchaser, its submissions that it should be regarded as equity's darling with respect to these payments fails. Equity will not intervene to assist a purchaser such as Straits.[190]

714. In any event, it is difficult to see how Straits would not be regarded as having constructive notice according to the test of Lord Clarke in *Papadimitriou:* Straits will be fixed with constructive notice if it was aware of the "*serious possibility of a third party having such a right or […] if the facts known to [Straits] would give a reasonable [person] in the position of [Straits'] serious cause to question the propriety of the transaction."* Straits satisfies that test.

715. As I have found at paragraph 410 above, Straits had actual knowledge from possibly as early as January 2015 but certainly by February 2016 that Come Harvest, Mega Wealth and Genesis were engaged in a scheme to obtain finance fraudulently through the provision of CSCs. It was therefore aware that there was, by any measure, a "*serious possibility*" that it was receiving funds which might be subject to the proprietary rights of others at the time of its receipt of the Non-MCM and Genesis Receipts.

(ii) Success Sea Receipts

716. The parties only made very sketchy submissions on this issue. Broadly, the claimant advanced two arguments as to why proceeds should be traceable through Success Sea.

717. *Mere conduit*: MCM cited no authority in support of its proposition that Success Sea, being no more than a "*mere conduit*" of the funds, did not break the chain of constructive trusts. In general terms, a defendant will have a defence if they can show that they (or someone from whom they acquired the property) acquired the property as a bona fide purchaser for value of the legal estate without notice. As Foxton J stated in *Re Gerald Martin Smith*: "*If the initial transferee can establish the bona fide purchaser defence then anyone claiming through them (such as a subsequent transferee) will also*

[190] See in this respect *Re Gerald Martin Smith Serious Fraud Office and another v Litigation Capital Ltd* and others; *Serious Fraud Office and another v Litigation Capital Ltd* and others [2021] EWHC 1272 (Foxton J).

take free of the prior equitable interest, unless the person claiming through the transferee was previously bound by the equitable interest (such as where they were the initial trustee): Lewin, 44-143."[191]

718. As such, there is no conception of an entity being a "*mere conduit*" – equity looks to see whether the parties through whom the funds have passed were bona fide purchasers. If they were, the funds are taken freely; if they were not, they continue to be traceable.

719. *Unconscionable knowledge*: Straits maintains that there was (almost) "*zero evidence*" of "*bad faith on the part of Success Sea*" put before the Court by MCM.

720. However, it was for Straits to make out a defence that Success Sea took the funds from Come Harvest / Mega Wealth in good faith and so was a bona fide purchaser for value without notice, as the burden rests firmly upon Straits to prove that they have acquired the property via a party who has a bona fide interest which takes precedence over the tracing party. As stated by Mummery LJ in *Barclays Bank Plc v Boulter*:

> *"On the authority of Lord Browne-Wilkinson's speech in the O'Brien case [1994] 1 AC 180 and on well-established equitable principles, the burden is not on Mrs Boulter to plead and prove that the bank had constructive notice: it is on the bank to plead and prove that it did not have constructive notice ... It is well-established at this level of decision that the doctrine of bona fide purchaser for value without actual or constructive notice is a defence which can be raised to defeat a claim of an equitable right or interest and that the burden is on the person raising that defence to plead and prove all its elements: it is a 'single defence'... "*[192]

721. I find that Straits has not discharged this burden.

722. Indeed, on the evidence put before the Court, Success Sea seems to have been used by Mr Wong and Mr Kao (the two persons involved in the fraud) for the "*payment of participation earnings*", so there is at least a prima facie case which Straits needed to answer that Success Sea was not a bona fide purchaser.

723. I consider that Straits therefore has no bona fide purchaser defence with respect to any of the Alleged Bona Fide Receipts.

(iii) Conclusion on the equitable proprietary claims

724. In light of my findings on the mixed funds issue and the bona fide purchaser issue and my prior declaration at paragraph 452, I grant a declaration that MCM's net payments under the Purchase Contracts and/or the traceable proceeds of the same are held for MCM by the first to fourth defendants and the ninth and tenth defendants on constructive trust. The quantum of such claims is to be determined at a later date.

[191] *Re Gerald Martin Smith Serious Fraud Office and another v Litigation Capital Ltd* and others; *Serious Fraud Office and another v Litigation Capital Ltd* and others [2021] EWHC 1272 (Comm), [151].
[192] [1998] 1 WLR 1, 8 [150].

(H) THE FINDINGS OF THE COURT & RELIEF GRANTED

725. In all the circumstances, I find as follows:

i) That MCM rescinded its Purchase Contracts with Come Harvest and Mega Wealth and the corresponding Sale Contracts by its notices dated 21 June 2017;

ii) That D1, D2, D3 and D4 are liable to MCM in the tort of deceit for damages of USD 282,736,139.22.

iii) That D3 and D4 are liable for the tort of procuring breach of contract by CH/MW for the same sum as that recoverable under the deceit claim;

iv) That D1, D2, D3, D4 and D10 committed the tort of unlawful means conspiracy to injure MCM and are liable for the same sum as that recoverable under the deceit claim;

v) That the knowing receipt claims are not made out against any of the defendants;

vi) That MCM's net payments under the Purchase Contracts and/or the traceable proceeds of the same are held for MCM by D1, D2, D3, D4, D9 and D10 on constructive trust. The approach in Ashton-1 applies and the quantum of such claims is to be determined at a subsequent hearing.

726. I leave it to the parties to draw up an order reflecting my findings in this judgment.