Case Nos: 2008-1082
2009-897
2009-604

Neutral Citation Number: [2012] EWHC 1321 (Comm)

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

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

Date: 18/05/2012

Before :

MR JUSTICE HAMBLEN

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Between :

Andrew Brown and others	**Claimant**
- and -	
InnovatorOne Plc and others	**Defendant**

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Mr J Powell QC, Mr G Chapman, Mr S Patel and Mr C Yeginsu (instructed by **Enyo Law**) for the **Claimants**
Mr J Fenwick QC, Mr B Hubble QC and Mr B McGurk (instructed by **DAC Beachcroft**) for the 8th **Defendant**
Ms S Carr QC and Mr T Chelmick (instructed by **Byrne & Partners)** for the 7th **Defendant**
Mr A George (instructed by **Kingsley Napley**) for the 6th **Defendant**
Mr N Meares (instructed by **Segens Blount Petre**) for the 9th **Defendant**
Mr B Stiedl
Mr P Carter
Mr D Gates represented themselves

Hearing dates:17,18,19,20,24,25,26,27,31 October 2011, 1,2,3,7,8,14,15,16,17,21,22,23,24, 28,29,30 November 2011, 1,5,6,8,12,13,14,15,16,20,21 December 2011, 11,12,16,17,18,19,23,24,25,26, 30,31 January 2012, 6,7,8,9,13,14,15,16,17,21,22,23 February 2012

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Judgment

Mr Justice Hamblen :

1. I shall address the issues in this action under the following headings:

(1) INTRODUCTION

2. This is a case arising out of failed tax schemes.

3. The background to the schemes was the UK Government's desire to encourage investment in information and communication technology ("ICT") following the dot.com crash in the early 2000's. To that end generous first year capital allowances for income and capital gains tax purposes were allowed on the acquisition of ICT with a view to its exploitation.

4. These schemes ("the Innovator Schemes") were devised with a view to taking maximum advantage of the available tax benefits. There were a number of other ICT tax investment schemes which were introduced at this time. Many had similar features to earlier schemes which had sought to take advantage of the tax benefits of investing in films.

5. The marketing of each Innovator Scheme involved the issue of an Information Memorandum ("IM") inviting investors to submit applications and (in most cases) subscription monies so as to become partners of a Partnership formed as a vehicle to carry on a trade, consisting of the acquisition and exploitation of rights to ICT. 16 of the 19 Innovator Schemes which are the subject of the litigation were limited liability partnerships ("LLPs"), and 3 were general partnerships ("GPs").

6. The key features of the Innovator Schemes as promoted were:

(1) *Tax incentive*: it was anticipated that each partner could claim tax relief by way of first-year capital allowance for both income and capital gains tax purposes in respect of his or her share of the loss generated by the Partnership. This loss was caused by the Partnership's ability to write off the capital cost of acquiring the Technology at 100% First Year Allowances;

(2) *Gearing*: it was anticipated that a partner could claim tax relief on his share of expenditure attributable not just to (i) his subscription money (i.e. his "capital contribution") (broadly, in the sum of 20%), but also to (ii) his share of the Partnership loan: a related loan taken out by the Partnership (broadly, in the sum of 80%); the aim was that a partner could then claim tax relief at his marginal rate (typically 40%) on his share of expenditure funded both from his capital contribution (eg £20,000) and from his share of the Partnership Loan (eg £80,000), so as to generate tax relief in the first year tax return of twice the capital contribution (eg £40,000);

(3) *Profit incentive*: the prospect of the Partnership being profitable;

(4) *Borrowing ability*: this consisted of a facility whereby a partner could obtain funding for his (notional) capital contribution from Chancery Lane Finance Limited ("CLFL").

7. The upshot in financial terms was that:

(1) A partner, if the Scheme succeeded from the tax perspective, would double his money: thus a capital contribution of £20,000 would result in £40,000 of tax relief in the first year tax return;

(2) A partner, if he borrowed his capital contribution from CLFL, could double his money without even physically coming up with his capital contribution from his own funds.

8. Aside from the Scheme failing from a tax perspective, the main risk to the partner was his liability for his share of the 80% Partnership loan. However, this risk was managed by an arrangement whereby the 80% loan, when paid as part of the purchase price for the Technology, was placed by the Technology Vendor back on deposit with the lender effectively as security. In the event that the Technology was successfully exploited then the loan would be repaid and the bank would release similar amounts back to the Technology Vendor. If the Technology was not successful then the loan would be repaid after three years unless alternative arrangements were subsequently made. In such circumstances the protection envisaged for the partners was that there would be an agreement to hive the Partnership's assets and liabilities down to a limited company or a debt for equity swap with the Vendor.

9. The Schemes were therefore structured in such a way that although the Vendor would be paid a 100% price for the Technology, 80% of that price would immediately be placed on deposit to secure the loan made and the Vendor would only be likely to receive the benefit of that element of the price if the Technology was successfully exploited. This form of circular movement of monies was a common feature of tax schemes at the time. This reflected the fact that it was not seen as a valid ground of attack following the House of Lords' decision in *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2003] 1 AC 311. In the present case it had the endorsement of Mr Rex Bretten QC who was closely involved in advising on tax matters throughout.

10. More recently the Inland Revenue ("IR") has successfully challenged such circular arrangements, as exemplified in the recent Supreme Court decision in *TowerM Cashback LLP1 v Revenue and Customs Commissioners* [2011] STC 1143, which involved another ICT partnership scheme. In that case the Supreme Court, reversing the decisions of the courts below, held that the circular nature of the loan meant that there had not in any meaningful sense been an incurring of expenditure of the borrowed money on the acquisition of software rights, but rather that it had gone in a loop to enable the LLPs to indulge in a tax avoidance scheme.

11. In relation to the Innovator Schemes in most cases the partners (in this judgment I shall generally use that term neutrally since it was the Claimants' case that they never did become partners) did successfully obtain the full first year tax relief, often resulting in substantial payment rebates being made. However, in July 2003 the Special Investigations Section of the IR (led by Mr Peter Frost) began investigating the Schemes. In the course of 2004 there were various meetings with the IR. The IR challenged the Schemes, essentially on

the basis that they were not satisfied with the commerciality of the Schemes, it being a requirement of tax relief that the trade be carried on on a commercial basis with a view to realising profits within a reasonable time.

12. The IR was prepared to settle the matter on the basis that the tax relief would only be available in relation to the capital contribution made by each partner rather than the grossed up amount of the investment. Instead of receiving tax relief representing 200% of the capital contribution the partners would now only receive tax relief representing 40% of that capital contribution. A capital contribution of £20,000 would therefore yield relief of £8,000 rather than the £40,000 anticipated and in many cases received. Most partners in the Partnerships decided to accept the IR's offer on the basis that, on advice, it was the best they were likely to achieve.

13. The essential (but not complete) failure of the Schemes from a tax perspective left a number of partners aggrieved. This was all the more so given that many of them had received and spent the tax relief and now faced the prospect of having to find funds to repay the IR and of interest and penalty charges if this was not done. Their grievances were heightened by the IR's criticisms of the lack of commerciality of the Schemes and the fact that none of the Technologies had been successfully exploited. They were heightened still further by the discovery that it appeared that the architect of and the driving force behind the Schemes was Mr Bjorn Stiedl, who in November 2004 was convicted at Southwark Crown Court of pension fraud, for which he was subsequently imprisoned.

14. Steering groups were formed and lawyers consulted and the Partnership businesses were investigated. In the event the partners were advised that they had various causes of action against the people and entities involved in the establishment and operation of the Innovator Schemes and indeed that they had never been made partners. In October 2008 the first claim form in the current proceedings was issued.

15. The Claimants in the proceedings, from whom the 44 Lead Claimants who gave evidence at trial were drawn, are some 555 individuals who invested into 19 Innovator Schemes, marketed by InnovatorOne Plc ("Innovator"), Capital Planning (UK) Ltd ("CPUK") (for the Gentech 1 Scheme) and Mr David Gates (for the Gentech 2 Scheme) from mid 2002 to mid 2004.

16. The Defendants to the claims made are Innovator; CPUK; the LLPs in relation to each Scheme; CLFL; Mr Paul Carter, the managing director of Innovator and the Administrator of the Innovator Partnerships; Mr David Gates, the managing director of CPUK and Managing Partner of the Gentech Partnerships; Mr Stiedl, the alleged architect of and driving force behind the Schemes; Collyer Bristow ("CB"), solicitors engaged in relation to the Schemes; Mr John Bailey and Mr Jonathan

Roper, former partners of CB; Vermilion, a Technology Vendor. Mr Carter, Mr Gates and Mr Stiedl attended the trial but were unrepresented. Innovator, CLFL and the LLPs are all in liquidation, and did not participate in the trial.

17. The claims made arise from (1) alleged frauds practised upon the Claimant investors involving the establishment, promotion and operation of the Innovator Schemes; (2) the failure of each Scheme; (3) the alleged misappropriation of subscription money and (4) other losses and liabilities incurred by the Claimants.

18. The claims and the defences engage various areas of law, including (1) contract issues (offer and acceptance, implication of terms, affirmation); (2) agency issues (authority, ratification); (3) trust including constructive trust; (4) accessory liabilities (dishonest assistance, knowing receipt and conspiracy); (4) Financial Services and Markets Act 2000 ("FSMA") issues; (5) misrepresentation; (6) tort and (7) damages and other remedies and relief. The claims are advanced on both primary and alternative bases.

19. Because the Claimants contended that they were never partners the litigation took a different shape to that which might more usually be expected. No claims were brought by the LLPs against those who were acting on their behalf in relation to the management of the Schemes; indeed the LLPs were made Defendants. The Court was not therefore concerned with what duties were owed to the LLPs or whether such duties were discharged with the appropriate level of skill and care. It was concerned with alleged duties owed to the subscribers themselves and the existence of those duties was very much in issue. Further, although the Claimants were introduced to the schemes by Independent Financial Advisers ("IFAs") or other advisers no claims were made against those advisers. CB issued Part 20 proceedings against various of the IFAs involved but those proceedings were stayed pending determination of the Claimants' claims.

20. In order to make the litigation more manageable it was decided to try the issues in respect of 6 selected Schemes. These were the YTC Scheme (one of the two initial Schemes); the Etrino Scheme (also a "first generation Scheme"); the Optibet Scheme (a second generation Scheme); the Charit and Gentech 2 ("GT2") Schemes (third generation Schemes); and the Arte Scheme (a fourth generation Scheme and the last of the Schemes). There were some differences between the Scheme arrangements for each generation of Scheme.

21. For the same reason it was decided to have evidence from Lead Claimants whose evidence would be treated as representative of the Claimants for each Scheme. There were 44 Lead Claimants.

(2) GENERAL FACTUAL OVERVIEW

The 19 Schemes and the persons involved

22. The Claimants and CB agreed a helpful General Statement of Facts which I have drawn on in making the following general findings as to the operation of the Schemes. These findings are set out without prejudice to the Claimants' case that they do not accept, and they put in issue, the accuracy and genuineness of Scheme and other documents and the accuracy of dates stated thereon and that they did not become partners of any relevant Partnership.

23. The Innovator Schemes which are the subject of the claims in these proceedings are 19 Schemes promoted by Innovator, CPUK (GT1 Scheme) and Mr Gates (GT2 Scheme) at various periods over 2 years from June 2002.

24. The 19 Schemes may conveniently be classified as apparent from the following table:

CLASSIFICATION	SCHEME	ASSIGNED ABBREVIATIONS TO SCHEME NAMES
"2002/3 Schemes" (8 schemes)	1-7	[1] YTC; [2] Agent Mole; [3] Etrino; [4] Casedirector; [5] Mamjam; [6] TVE & [7] Mobile Warrior Schemes [aka "Generation 1" Schemes]
	8	[8] GT1 Scheme
"2003/4 Schemes" (10 schemes)	9-11	[9] Tracksys; [10] Optibet & [11] CIT Schemes [aka "Golden Contract" and "Generation 2" Schemes]
	12-14 16-18	[12] Papertradex, [13] Mobilemail and [14] Charit Schemes [16] Columbiz, [17] Hermes and [18] New Media Schemes [aka "Generation 3" Schemes]
	15	[15] GT2 Scheme
"2004/5 Scheme" (1 scheme)	19	[19] Arte Scheme [aka "Generation 4" Scheme]

25. In general terms, and subject to the terms of each IM, promotion of each Scheme involved the issue of an IM specific to the Scheme inviting investors to submit subscription applications and subscription

money with a view to becoming partners of a Partnership formed as a vehicle to carry on a trade, consisting of the acquisition and exploitation of rights to ICT ("Technology" or "Technology rights"), with attendant tax advantages. Most Partnerships were promoted as LLPs, but three were promoted as GPs. Those three were the Tracksys, Optibet and CIT Schemes. In this judgment the use of the word "partnership" shall be intended to refer to either a GP or an LLP.

26. The Innovator Schemes as promoted included the four main features identified in paragraph 6 above, namely: a tax incentive; gearing; a profit incentive and borrowing ability.

27. The following is a cast list of the main relevant individuals and entities involved in some way in the Innovator Schemes:

ABBREVIATION	DEFENDANT	NAME ETC.
"Mr Bailey":	D7	Mr John Bailey, a solicitor and, at all material times, an equity partner of C-B
"Mr Carter":	D4	Mr Paul Carter, a chartered accountant
"Mr Gates"	D22	Mr David Gates
"Mr Roper"	D6	Mr Jonathan Roper, a solicitor and, at all material times, a salaried partner of CB
"Mr Stiedl"	D5	Mr Bjorn Stiedl, a Danish national
"CB"	D8	Collyer-Bristow, a firm of solicitors
"CLFL"	D15	Chancery Lane Finance Ltd
"CPUK"	D20	Capital Planning (UK) Ltd. (dissolved)
"Innovator"	D1	InnovatorOne Plc (in liquidation)

28. Mr Andrew Evans, a friend and business contact of Mr Bailey, was also involved with Mr Stiedl in devising and setting up the Schemes. He died in July 2003.

29. The following abbreviations are also used as follows:

(1) "Technology Vendors": i.e. vendors of Technology rights;

(2) "Exploiters": i.e. companies each engaged in relation to a Scheme to exploit Technology rights and called an "Exploiter" in the related IM;

(3) "Licensees": i.e. licensees of Technology rights, as described below;

(4) “Exit Companies”: i.e. companies engaged in relation to “Exit arrangements”, as described below.

The Requirements for tax relief

30. The availability of the relevant tax relief was predicated upon the fulfilment of certain conditions under the Capital Allowances Act 2001 (“CAA 2001”), including the following:

(1) The relevant expenditure had to be “expenditure on information and communication technology” (expenditure on “ICT”) as defined including “software” as defined;

(2) The Partnership had commenced its trade in the assessment period in which the first-year allowance was being claimed;

(3) The Partnership had incurred expenditure on or before March 2003 in relation to the 2002/3 Partnerships; March 2004 in relation to the 2003/4 and 2004/5 Partnerships.

31. The general rule was that capital expenditure was to be treated as incurred as soon as there was an unconditional obligation to pay it (CAA 2001 (s.5)). This was subject to certain exemptions including: “If under an agreement an amount of capital expenditure is not required to be paid until a date more than 4 months after the unconditional obligation to pay has come into being, the amount is to be treated as incurred on that date” (CAA 2001 (s. 5(5)).

32. A restriction on the availability of relevant tax relief was announced on 26 March 2003 by Ministerial Statement and implemented by the addition of a new subsection in the CAA 2001 (s. 45(4)). This precluded expenditure on ICT being first-year qualifying expenditure under the section, “if the person incurring it does so with a view to granting to another person a right to use or otherwise deal with any of the software in question” (“the CAA s. 45(4) restriction”). The amendment was introduced with effect to expenditure incurred on or after 26 March 2003 (the “26 March 2003 deadline”).

33. A further amendment, introduced for years of assessment for which the basis ended after 10 February 2004, was announced on 10 February 2004 by Ministerial Statement and implemented by the addition of new subsections 118ZE and 118ZJ of the Income, Corporation & Taxes Act 1988 (“ICTA 1988”). This restricted the amount of recoverable sideways relief in the case of “non active” members of a Partnership. In effect, this amendment restricted the available relief to the amount contributed by the member, rather than to that member’s liability upon a winding up of the Partnership. ICTA 1988 sections 118ZE to 118ZK were introduced by section 124(1) of Finance Act 2004 with effect from 22 July 2004. ICTA 1988 section 118ZE applied to basis periods

ending on or after 10 February 2004 (subject to certain transitional measures for periods which straddled this date – see s. 118ZJ).

The Scheme arrangements

34. For each of the 19 Schemes, an IM specific to the Scheme was issued. The issuer was stated as Innovator or CPUK (GT1 Scheme) or Moneygrowth Financial Services ("MFS") (GT2 Scheme), describing it, and inviting subscriptions as summarised in the table below:

Date	Scheme	IM	
		Abbreviation	Named Issuer
2002/3			
21.06.02	1	YTC-IM	Innovator
01.07.02	2	Agent Mole IM	Innovator
10.10.02	3	Etrino IM	Innovator
15.10.02	4	Casedirector IM	Innovator
25.10.02	5	Mamjam IM	Innovator
21.11.02	6 7	TVE-IM Mobile Warrior IM	Innovator Innovator
21.01.03	8	GT1-IM	CPUK
2003/4			
12.05.03	10	Optibet IM	Innovator
21.05.03	9 11	Tracksys IM CIT-IM	Innovator
09.03	12 13 14	Papertradex IM Mobilemail IM Charit IM	Innovator
12.11.03	15	GT2-IM	Moneygrowth Financial Services
12.03	16 17 18	Columbiz IM Hermes IM New Media IM	Innovator

Date	Scheme	IM	
		Abbreviation	Named Issuer
2004/5			
30.06.04	19	Arte IM	Innovator

35. Innovator Schemes were promoted by Innovator from about June 2002 to about late 2004.

Subscription arrangements

36. These arrangements, as indicated in the IMs, involved three steps.

37. The first step involved a subscriber completing and signing standard forms contained in an IM:

(1) a single form incorporating (i) a subscription application and (ii) a power of attorney ("P/A"); or

(2) in the GT1 and GT2 IMs, a subscription form and a separate P/A form; and

(3) in some IMs, a subscription loan form.

38. Each subscription application was expressed as an application by a signatory to become a partner in a named Partnership.

39. By each P/A, a subscriber appointed as attorney ("P/A donee"), with authority to take relevant steps to constitute the subscriber a partner of the Partnership named in the IM, that P/A donee being:

(1) in the P/A in IMs for Scheme 1-5: the "Managing Partner" (as defined);

(2) in the P/A in IMs for Schemes 8 & 15: Mr Gates, or failing him Mr Carter;

(3) in the P/A in IMs for Schemes 6,7, 9-14 & 16-19: the "Administrator" (as defined).

40. The second step involved a subscriber sending the form(s), together with a cheque for subscription money, made out to "Collyer-Bristow '[name of Partnership in IM]' Client Account" or a Loan Application, to Innovator or (for the GT1 Scheme) CPUK or (for the GT2 Scheme) MFS, or directly to CB.

41. The third step involved cheques for subscription money received other than by CB being sent on to CB for encashment with the resulting proceeds being retained in a client account. CB recorded subscription

money received in separate electronic ledgers or statements. Each ledger provided for the inclusion of various details including "Client/Matter No", "Name" and "Description". The reference number included a number specific to Innovator (24213) and a number specific to a particular scheme (e.g. for the YTC Scheme: 00024213/00000008). The "Name" stated was Innovator Plc. The "Description" was the name of a Partnership (sometimes without the suffix "LLP") and "Completion(s)" or "Comp" (e.g. "YTC Medical-Completions"). Those and other ledgers are called collectively "CB ledgers" and per Scheme e.g. "CB YTC ledger", "CB Agent Mole ledger" etc.).

Acknowledgement letters

42. There were Acknowledgement letters for all Schemes on Innovator headed paper which were signed by or on behalf of Mr Carter as Managing Director of Innovator. The initial draft of an Acknowledgment letter was approved by Mr Bailey in an email to Mr Carter on 3 October 2002. Versions of the letters changed over time.

Partnership arrangements

43. These included:

(1) the incorporation of LLPs;

(2) a Limited Liability Partnership Deed ("LLP Deed");

(3) a "Deed of Adherence" ("D/A");

(4) a "Service Agreement".

44. For each Scheme, at least one LLP was incorporated. Tracksys, Optibet and CIT were promoted as GPs.

45. D/As (to a previous LLP Deed or partnership agreement) were made whereby subscribers were made partners as summarised in the table below:

Date	Scheme	Signed pp subscribers	Witnessed by
2002/3			
04.04.03	Schemes 1-7	Mr Carter	Mr Bailey
04.04.03	Scheme 8	Mr Gates	Mr Bailey
2003/4			
31.07.03	Schemes 9-11	Mr Carter	Mr Roper

23.03.04	Scheme 14	Mr Carter	Mr Roper
24.03.04	Scheme 15	Mr Gates	Mr Roper
25.03.04	Schemes 12-13 & 16-18	Mr Carter	Mr Roper
2004/5			
08.12.04	Scheme 19	Mr Carter	Ms Barrie

46. There were Service Agreements made between (1) a named LLP or individual and (2) Mr Carter or Mr Gates.

Arrangements for the acquisition of Technology

47. In relation to each Scheme, there were one or more Acquisition Agreements ("AAs").

48. The AAs for Schemes 1 to 7 provided for:

> (1) ownership of "the Products" (as defined) to be transferred from the Technology Vendor to the purchasers;
>
> (2 the payment of "Purchase Price" of a specified amount (generally the same as indicated in the relevant IM);
>
> (3) thereafter, the payment by the Technology Vendor of "The Guarantee" (as defined - generally the same as the "Loan" referred to in the IM) into the "Guarantee Account" (as defined).

49. The AAs for Schemes 9 to 11 did not include an obligation upon the Technology Vendor to pay a "Guarantee" into a "Guarantee Account". Rather, a like obligation was imposed under a "Guarantee Agreement" made on the same date and between the same parties (24 March 2003).

50. The AAs for Schemes 12 to 19 (called a "Sale and Purchase Agreement") were made between (1) a LLP and (2) a Technology Vendor, whereby,

> (1) the LLP acquired "Rights" (as defined) and "the sale and purchase contemplated by the Agreement [was] subject to and with the benefit of the Licences" ("Licences");
>
> (2) the Vendor was to pay the "Consideration" (i.e. the purchase price) into the "Vendor's account" (not defined).

51. In relation to each of Schemes 12-19, in order to meet revised tax legislation requirements, there were 4 Licence Agreements licensing the use of Technology for a specified territory and made between (1) a named offshore company as Licensor (being the same as the

corresponding Technology Vendor) and (2) a named company as Licensee for a specified territory (Asia, USA & Canada, Australia and Europe respectively).

52. Under each Licence Agreement, the Licensor granted to the Licensee a "sole and exclusive licence commercially to use, deal with and generally exploit the Licensed ICT in the Territory but not to sell, lease or otherwise dispose of [it]" in consideration of the payment of a "Fee", defined as a percentage (e.g. 25%) of "the gross income received by the Licensee from the Licensed ICT per annum". The "Licensed ICT" was defined as a named Technology (e.g. "The Charit-email Technology").

53. The Licensees were the same for each Scheme, being:

(1) HBI Sales Private Ltd (India);

(2) Zacan Holdings Proprietary Ltd (Australia);

(3) Mir Technologies LLC (Delaware, USA); and

(4) ICT/Europetec Ltd (an English company).

54. Other acquisition arrangements included the following in relation to some Schemes:

(1) an "Option Agreement";

(2) a "Subscription Agreement";

(3) a "(A)TTA", i.e. "Transfer of Trade Agreement";

(4) a "PPUA": i.e. a "Purchase Price Utilisation Agreement".

Arrangements for the exploitation of Technology

55. These arrangements included:

(1) an "Agency Agreement" or "Agency Exploitation Agreement" ("AEA");

(2) a "Security Agreement".

56. In relation to each Scheme, an AEA was made with a company (incorporated in England and Wales) referred to as the "Agent", the parties thereto being:

(1) in the case of Schemes 1-11 AEAs, (i) Mr Carter as "Administrator" of a named LLP and (ii) the Agent;

(2) in the case of Scheme 12-19 AEAs, (i) the 4 Licensees and (ii) the Agent.

57. By each AEA, the Agent:

(1) agreed to exploit commercially the Technology Rights in consideration of a "Payment";

(2) warranted that the "Exploitation Forecast" (forecasts of income and expenditure for the exploitation as referred to in a schedule to the AEA; generally the schedule was blank) was reasonable and (save for the second AEA on Etrino where there was no such warranty) that the "Turnover" would not be less than a "Minimum".

58. Mr Hamish McCallum of Holly House Management Services (H2M) Ltd ("H2M") was retained by Innovator to monitor the exploitation of the technologies. H2M's reports were published on Innovator's website.

59. In relation to each Scheme, there is a Security Agreement dated the same day as the AEA and made between (1) the Technology Developer and (2) the Exploiter.

60. Each Security Agreement relates to the "Shortfall" as defined, being any difference between the "Minimum" (as defined in the AEA) and sums actually received by the Partnership pursuant to the AEA.

61. By each Security Agreement, in effect, a mechanism was provided by which interest payable on the Deposit made by the Technology Vendor with a bank could be paid via the Technology Developer and Exploiter to the Partnerships in order to enable the latter to discharge its liability for interest on the loans.

Business plans and valuations

62. In relation to most Schemes, there are Business Plans made for the purpose of exploiting Technology rights.

63. In the case of most Schemes, there is a Valuation of the Technology rights.

Counsel instructions and advice

64. Counsel, in particular Mr Rex Bretten QC and Mr Jonathan Crystal, were instructed and advised in relation to the Schemes as to Scheme-specific and generic matters.

Financing arrangements

65. Loan arrangements were made with two banks (in addition to the loan arrangements made with CLFL described below).

66. Acquisition arrangements involved financing arrangements with a lender whereby a lender would provide the Partnership (save in the

case of the Arte Scheme where the loan or loans were to be provided to the individual subscribers) with a loan for approximately 80% of the acquisition cost, conditional upon the Technology Vendor depositing an equivalent amount with the lender.

(1) Bank Leumi (UK) plc ("Bank Leumi") for Schemes 1 and 2; and

(2) MFC Merchant Bank SA, Switzerland ("MFC") for Schemes 3-18.

67. Loan arrangements included the following agreements:

(1) "Loan Agreement" ("Loan Agreement") (Schemes 1and 2) made between a named LLP and Bank Leumi or a "Term Loan Facility"("Facility Agreement") made between a named Partnership and MFC (Schemes 3-18);

(2) "Debenture" (all Schemes) made between the same parties;

(3) "Deed of Deposit Agreement and Charge" ("Deed of Deposit") (Schemes 1 and 2) or a "General Pledge and Assignment" ("Pledge Agreement") (Schemes 3-18) made between a Technology Vendor and one of the same banks.

Exit arrangements

68. The IMs for each of the Schemes, save for GT1, GT2 and Arte, contained a provision to the effect that the Partnership referred to in the IM would have a fixed duration but that the partners could determine to dissolve it earlier and that "one possibility" was that the partners could "transfer the Partnership business to a limited company". A similar (but not identical) provision was included in the IM for the GT1 Scheme which referred to there being a number of possibilities for an "Exit Route" and that these included "transferring the Partnership business to a private limited company in exchange for shares, selling the [Technology] to a trade purchaser or otherwise disposing of the business".

69. Each LLP Deed contained, at clause 4.24, the following provision: "At any time after the first Financial Year End has passed, the Members may by a majority vote based on Membership Shares of those present and voting in person or by proxy resolve to sell and transfer [the business of the Partnership/Trade] including (without prejudice to the generality of the foregoing) transfer of the business of the Partnership to a company limited by shares in consideration of the issue of shares."

70. From about June 2005 until July 2006 Innovator executed an exit strategy in respect of a number of the Schemes by means of a hive down to a limited company. This effectively ensured that the partners

would have no liability for the 80% Partnership loan. This happened for all of the 19 Schemes, except YTC and Charit.

71. The exit arrangements, where executed, were approved by resolutions at Extraordinary General Meetings of the Partnerships ("EGMs").

CLFL arrangements

72. Arrangements involving CLFL included the following:

(1) arrangements between CLFL and Innovator;

(2) agreements between CLFL and some subscribers; and

(3) agreements between CLFL and some of the LLPs.

CLFL Subscriber loan arrangements

73. By an agreement, dated 1 April 2003, between Innovator and CLFL, Innovator agreed to provide a loan facility to CLFL for CLFL to provide loan facilities to investors to finance their subscription money.

74. By an agreement, dated 1 April 2004, between the same parties, Innovator agreed to provide a loan facility to CLFL for CLFL to provide loan facilities to investors in respect of the GT2 Scheme.

75. The facilities under the two loan agreements were to be made upon (among other things):

(1) Innovator submitting to CLFL a notice setting out the sums which subscribers in a particular Partnership wished to borrow from CLFL;

(2) CLFL sending a notice to Innovator confirming its agreement to the particular loan. Notices were exchanged as between Innovator and CLFL in respect of a number of Partnerships on 5 April 2003 and on 5 April 2004.

76. In accordance with the agreements set out above, CLFL made fixed term personal loans to some subscribers in Schemes to fund their subscription money.

77. CLFL brought claims against certain subscribers for subscription loans, with CB acting on CLFL's behalf.

78. A claim by CLFL against one subscriber (Mr Crothers) was the subject of a trial in the Leicester County Court (Claim Number 6LE93000) before Recorder Godsmark QC. By judgment dated 15 November 2007 CLFL's claim was dismissed.

CLFL loans to LLPs

79. On the face of CB ledgers, CLFL made loans to 10 Innovator Partnerships totalling £83.84m on 17 July 2003 generally in £4m tranches. These arrangements are described further below.

80. CLFL's financial statements for year ended 31 January 2004 stated: "The company entered into bridging loans during the period with various client partnerships pending the finalisation of re-financing agreements with various banking institutions. On completion of the re-financing, the company waived the interest charge."

Steps to establish Innovator Schemes

Courvoisier Trust & CCC

81. The Courvoisier Trust was established in the BVI by a Declaration of Trust dated 12 April 2001. At inception, (1) the original trustee was Euro-American Trustees Ltd. (BVI) ("EATL"); (2) the Protector was Mr Nigel Bailey (of International Captive Consultants Ltd. (BVI)); (3) the sole beneficiary was the International Red Cross of Geneva and (4) the trust property (the "Trust Fund") was one share certificate in CCC.

82. Minutes of a meeting on 11 November 2002 of the directors of the trustee record the appointment of Mr Stiedl as an Investment Adviser of the trust and the appointment of Ms Sascha Poulsen and Ms Mette Lyhne as beneficiaries (respectively Mr Stiedl's daughter and former partner) replacing Mr Morten Neilsen ("Mr Neilsen") as beneficiary. In an email to "Intercap" dated 26 July 2002 Mr Stiedl stated that "the Trust is an 'open ended' Trust and it is up to Nigel and me to appoint new beneficiaries at any time".

83. Courvoisier & Cie Corporation ("CCC") was incorporated on 11 April 2001 in the BVI under its International Business Companies Act. Its authorised share capital was US$50,000 divided into 50,000 shares each of US$1.00. The subscriber to its Memorandum of Association was Euro-American Trust and Management Services Ltd. (BVI). On 12 April 2001 one share of US$1.00 was issued to EATL, expressly as trustee of the Courvoisier Trust, as apparent from the share certificate.

Instruction of CB

84. By letter, dated 18 December 2001, Mr Stiedl instructed Mr Bailey to incorporate a company named "InnovatorOne Plc" with (1) an authorised capital of £5m (500m 1p shares); (2) a minimum subscription of £50,000 (5m shares); (3) CCC as the first and only shareholder; (4) Mr Carter as managing director; (5) Mr Bailey as company secretary and (6) the company's registered address at CB's address at 4 Bedford Row, London WC1.

85. CB sent a retainer letter to Innovator in relation to the YTC Scheme on 12 March 2003. CB recorded that its retainer was "to act on your behalf in relation to the formation of the above Partnership, the

drafting of all necessary documentation relating to the acquisition of certain technology, the drafting of the Information Memorandum relating to the raising of money for the above, the preparation of Verification Notes and the negotiation of banking documentation with the appropriate lending institution".

January to June 2002

86. In the period January to June 2002, steps to launch Innovator and the first of the Innovator Schemes (YTC, Agent Mole and Etrino) included (1) the incorporation of Innovator; (2) various planning arrangements; (3) obtaining advice and settled documents from specialist leading tax counsel, Mr Bretten QC, and (4) drafting of Scheme documents.

Innovator incorporation

87. Innovator was incorporated on 6 February 2002 (Co. No. 4368289) as a private company. It reregistered as a public company on 15 April 2002.

88. The initial shareholders of Innovator were Mr Bailey and Mr Roper who subscribed for one £1 share each. Mr Bailey and Mr Roper transferred their respective shareholdings to CCC on 3 April 2002.

89. Mr Roper was the company secretary of Innovator from 6 February 2002 to 18 March 2002. Mr Bailey was a director of Innovator from 6 February 2002 to 28 May 2004. Mr Bailey was company secretary of Innovator from 18 March 2002 to 16 November 2005. In IMs for Innovator Schemes, Mr Bailey was described as acting as non-executive chairman of the company. Mr Carter was appointed a director on 14 March 2002.

90. In IMs for Innovator Schemes Mr Carter was described as the managing director of Innovator. Mr Alexander and Mr Ramsden were appointed directors on 15 March 2002 and 21 March 2002 respectively. In IMs for Innovator Schemes they were described as non-executive directors and part of a team of technology advisors.

91. Mr Stiedl was not registered as a shareholder or director of Innovator. He was not mentioned in IMs for Innovator Schemes or other promotional material.

92. Innovator was neither an authorised nor an exempt person under the FSMA regulatory regime.

Planning arrangements

93. Agreements were made between Innovator and various companies. Agreements made in this period included a "Sale and Purchase Agreement" dated 6 March 2002 with CCC, a "Subscription Agreement" dated 3 March 2002, an agreement dated 3 April 2002

with J Bear Capital Ltd. (BVI), an agreement dated 29 April 2002 with CPUK and another agreement dated 29 April 2002 said to be with Offshore Investment Group (International) Ltd. ("OIGIL") and CPUK.

94. A bank account was opened in the name of Innovator at the City Office, Angel Court branch of Allied Irish Bank Plc ("AIB"). A payment of £12,500 was then received. Under cover of a letter on the notepaper of one of Mr Stiedl's companies dated 11 March 2002 to Mr Bailey, Mr Stiedl enclosed a cheque for £50,000 on behalf of CCC for 5m shares in Innovator.

95. Between January and July 2002, drafts were prepared of a prospectus with a view to Innovator raising money by way of a public offering of shares. A minute of an Innovator Board meeting on 28 June 2002 recorded that Mr Paul Carter informed the Board that Innovator "has to give up its anticipated fundraising".

Tax advice

96. CB on behalf of Innovator sought the advice of leading tax counsel, Mr Bretten QC "in connection with the tax treatment of a proposed investment in a technology development business concept through the means of a [LLP]". This was the first of over 100 occasions when Mr Bretten QC's advice was sought between 2002 and 2005 in relation to the Innovator Schemes. He advised at various times in relation to specific Schemes and to generic issues (e.g. the effect of legislative changes and tax reported cases) relevant to more than one Scheme and he settled some scheme documentation.

97. Mr Stiedl was involved in instructing and liaising with Mr Bretten QC. In an email to Mr Stiedl dated 5 September 2002, Mr Bailey referred to CB acting as a "conduit for the obtaining of instructions from [sic] Mr Bretten QC".

98. Enclosed with CB's 22 March 2002 Instructions to Mr Bretten QC was what was therein described as an "Extract of draft paper to the board of directors of [Innovator], entitled 'Exploitation Model'". Mr Bretten QC settled the paper ("Exploitation Model Memorandum") and in a Note dated 4 April 2002 advised (in summary) that he was satisfied as to the efficacy of the model from a tax treatment viewpoint. He recorded his understanding that "the software licence is … to be exploited by the LLP on a commercial basis and with a view to profit. That is to say, from the point of view of the LLP, the transaction will have 'commercial reality', and will not be put in place simply to utilise the 'tax capacity' of the partners in the LLP".

Innovator Scheme Documents

99. Following receipt of Mr Bretten QC's Note, the drafting of documentation for Innovator Schemes commenced.

100. In respect of the YTC and Agent Mole Schemes there are documents, each incorporating an Option Agreement made by Innovator for the acquisition of "Products" as defined.

(1) The YTC 7 June 2002 Option Agreement is expressed to be made between Ellsburg Ltd. (BVI) and Innovator. It is signed on behalf of Innovator by Mr Carter as a director and Mr Bailey as director/secretary.

(2) The Agent Mole 28 May 2002 Option Agreement is expressed to be made between HBI Software Private Ltd. (India) and Innovator. The signatures include that of Mr Carter for Innovator and Mr Bailey for HBI Software Private Ltd.

101. Each is in like terms and provides for the payment of a "Fee" by the counterparty to Innovator in the event of the former selling the "Products" to Innovator or a "Partnership" as defined, (as directed by Innovator). In each case the "Fee" as defined is £1.1m (plus applicable VAT).

June to December 2002

102. The first board meeting of Innovator was on 28 June 2002. The minutes of that board meeting record as follows:

(1) The following were participants: Mr Bailey, Mr Carter, Mr Ramsden and Mr Alexander;

(2) The following were in attendance as consultants: Mr Evans and Mr Stiedl.

(3) The decision was taken to promote the YTC and Agent Mole LLPs on the basis of the draft IM;

(4) The IMs would be verified;

(5) In relation to the YTC LLP: "The Board Authorised an agreement with Mr Stephen Wheatley and Mr Simon Meager to pay up to £200,000 in commission for the introduction of the tax capacity";

(6) In respect of promotion: "The Board authorised the use of The Website and authorised Paul [Carter] to finalise the presentation and the brochure ... it was decided to produce and purchase a database of IFA's, Accountants, tax advisers and other likely introducers of business";

(7) In respect of Innovator's funding: "Paul [Carter] informed the Board that the company has to give up its anticipated fund raising of £2,000,000 through Credo Financial Services Limited and the Company was funded via a Shareholder loan of £72,500 which

should be sufficient until the first sales revenue was achieved. The Board agreed on that basis to postpone the yearly board member fees until the first transaction was closed".

Tax Advice

103. Mr Bretten QC first advised in relation to the YTC Scheme in conference on 21 May 2002.

104. In an Opinion, dated 4 July 2002, Mr Bretten QC advised in relation to the matters raised in his YTC 6 June 2002 instructions (an initial draft of which was written by Mr Stiedl). He was asked to advise as to the availability to YTC partners of tax relief under the CAA 2001, in particular whether the acquisition cost of the software would be first-year qualifying expenditure under s. 45.

105. Mr Bretten QC also reviewed and settled the draft attachments to his Instructions: i.e. a signed copy of an Option Agreement and draft copies of an Acquisition Agreement, Agency Acquisition Agreement, "Partnership Deed" and IM. He advised that relevant tax reliefs would be available, subject to various conditions. He identified the importance, for the purpose of obtaining sideways relief (as distinct from eligibility under CAA 2001 s 45), of the trade being "carried on a commercial basis and with a view to the realisation of profits in the trade". He noted the proposed purchase price of the Technology (referred to as "IP"). He stated that while he was not in position to comment on it, the price was relevant to the availability of sideways relief. He also advised that it was essential that the costs of acquisition should qualify for capital allowances and that the IP be purchased for a lump sum (proposed to be £10m) made on or before 31 March 2003.

106. By undated Instructions received on or about 23 July 2002, CB instructed Mr Bretten QC to settle amended drafts of the proposed YTC IM and "Partnership Deed". Mr Bretten QC did so, as apparent from a related Note dated 31 July 2002.

107. By Instructions dated 24 September 2002, Mr Bretten QC was asked to advise, in light of the decision of Park J in *Barclays Mercantile Finance Ltd. v. Mawson* [2002] S.T.C. 1068, whether the proposed financing arrangements involving a circular flow of funds would prevent the proposed partnership from establishing that the sum of £9.92m to be paid to the Technology Developer was expenditure "incurred" by it for the purposes of s. 45 of the CAA 2001. In an Opinion dated 16 October 2002 Mr Bretten QC advised that the arrangements would not prevent that.

Issue of IMs

108. Over the period from June 2002 to April 2003, seven Schemes were promoted by Innovator including by the issue of IMs. For each Scheme, a separate IM was issued. The IMs differed in various

respects as between each Scheme. In particular, the named LLP, "Technology Developer" and "Exploiter", as well as the "Technology", differed as between each of the Schemes.

109. The IMs for the first 5 schemes provided for a "Managing Partner" as opposed to an "Administrator", as in IMs for later schemes. The latter change followed advice from counsel, Mr Jonathan Crystal ("Mr Crystal"), and a revision of Scheme documents in December 2002.

110. Subscription applications were made by investors, including for the YTC and Etrino Schemes. Subscription applications and cheques were sent to Innovator. On occasion monies were sent direct to CB. In the former case Innovator forwarded the cheques to CB for CB to pay into a client account.

111. Money was paid out from the CB ledgers and recorded in the relevant CB ledger under the debit column.

112. Between July and November 2002 there was correspondence between Innovator and CB and the Bank of Scotland ("BoS") and its solicitors, Dundas & Wilson ("D&W"). In November 2002 BoS and its solicitors ceased discussions. By letter dated 25 November 2002, D&W stated "We write to advise that the Bank has in carrying out due diligence in respect of the proposed transactions become aware of information regarding Bjorn Stiedl. Our clients no longer wish to pursue this opportunity further and will enter into no further correspondence regarding it. We have also been instructed not to enter into any further correspondence on this matter".

113. D&W raised enquiries with CB and Innovator as to whether YTC (as well as other Schemes) was a collective investment scheme ("CIS").

114. Other agreements were made in the period August to December 2002, including:

(1) An LLP Deed and an AA, both dated 17 October 2002, for the Agent Mole Scheme;

(2) Option Agreements for Schemes 3 to 8 (Etrino Casedirector, Mamjam, TVE, Mobile Warrior and GT1);

(3) AAs for Schemes 1 and 3 (YTC and Etrino);

(4) Subscription Agreements for Schemes 1 to 3;

(5) LLP Deeds which each bear the date 5 December 2002 for Schemes 1 to 7.

115. Innovator subsequently invoiced the Technology Vendors for "Fees" under the relevant Option Agreements (e.g. £1.106m in the case of the YTC Scheme).

116. AAs for the YTC Scheme (dated 9 December 2002) and Etrino Scheme (dated 13 December 2002) are in like terms. Each provides for payment of the "Final Purchase Price" by "no later than 1 March 2003". In each, the front sheet of the AA names a limited company and a LLP:

(1) In the case of the "YTC 09.12.02 AA", the parties are then identified as Ellsburg as "the Vendor" and Mr Carter and Mr Evans as "the Purchaser".

(2) In the case of the "Etrino 13.12.02 AA", the parties are then identified as PeterPost Partners Ltd as "the Vendor" and Mr Carter and Mr Evans as "the Purchaser", their signatures being countersigned as witness by Mr Bailey.

117. In relation to each of Schemes 1 to 7, there is a document bearing the date 5 December 2002 and entitled "Limited Liability Partnership Deed" in relation to a named LLP (e.g. in the case of Scheme 1, "The YTC Medical Learning System Partnership LLP"). The parties thereto are Mr Evans and Mr Carter. Both are referred to as "the Members" and their "Initial Capital Contribution" is stated to be £1.00 each. The document is signed by them, their signatures being countersigned by Mr Bailey as witness.

118. In the case of each of the first 5 Schemes:

(1) Each IM provides for the "Managing Partner" (as defined) undertaking "the day to day management of the Partnership's administrative activities and the management of the Business".

(2) Each December 2002 LLP Deed provides for the "Members" having "the day to day control over the management of the Partnership" (cl. 4.17).

119. On 11 December 2002, 8 LLPs were incorporated as set out in the table below:

No.	Incorporation date	LLP & Reg No.		Scheme
1	11.12.02	YTC-LLP	OC 303544	No 1: YTC
2	11.12.02	Agent Mole LLP	OC 303541	No 2: Agent Mole

3	11.12.02	Etrino-LLP	OC 303550	No 3: Etrino
4	11.12.02	Casedirector-LLP	OC 304545	No 4: Casedirector
5	11.12.02	Mamjam-LLP	OC 304549	No 5: Mamjam
6	11.12.02	TVE-LLP	OC 303547	No 6: TVE
7	11.12.02	Mobile-Warrior LLP	OC 303543	No 7: Mobile Warrior
8	11.12.02	Charit-1-LLP	OC 303539	No 14: Charit

Mr Crystal's CIS instructions and two Advices

120. CB instructed Mr Crystal to advise on the CIS issue. He provided two Advices dated 10 December 2002 ("Crystal first CIS Advice") and 13 December 2002 ("Crystal second CIS Advice").

121. Prior to the Crystal first CIS Advice, documents for Innovator Schemes were drafted on the basis of each Partnership having a Managing Partner and his having a day to day management role.

122. The IMs for the first Innovator Schemes (YTC, Agent Mole, Etrino, Casedirector and Mamjam) each described a Partnership with a "Managing Partner" as defined, who would undertake "the day to day management of the Partnership's administrative activities and the management of the Business".

123. Mr Crystal was first instructed to advise in relation to the CIS issue on 29 November 2002.

124. The Crystal first CIS Advice was dated 10 December 2002. Mr Crystal stated in his conclusion, "If the day to day control of the management of the LLP is (in substance and reality) by the partners, then the LLP will not be a [CIS]. The present documentation needs revision if the LLP is not to be considered a [CIS]".

125. Mr Bailey then sent a fax dated 10 December 2002 to Mr Stiedl in which he stated that he found the Advice confusing, that it had not addressed all the questions raised and that no account appeared to have been taken of the amendments which had been made to the documentation.

126. There was a conference with Mr Crystal on 11 December 2002. Two copies of the Crystal first CIS Advice exist, each with different amendments in manuscript. The amendments are reflected in part in the Crystal second CIS Advice. Overwritten in manuscript on the cover sheet of the second version are the words "Superseded by Advice dated 13 December '02".

127. Mr Stiedl emailed Mr Bailey at 10.04 on 12 December 2002 attaching "the Service Agreement and the Partnership duly amended and marked up in accordance with Counsels instructions".

128. By letter, dated 12 December 2002, CB sent Mr Crystal further revised versions of the Partnership Deed and Service Agreement and requested that "Counsel would confirm his approval of the same".

129. On 12 December 2002, Mr Crystal marked the proposed revised versions of the Partnership Deed, Service Agreement and IM "JC as altered 12.12".

130. The changes to the IM, approved by Mr Crystal, included (1) the substitution of the term "Managing Partner" by the term "Administrator", (2) the removal of references to the "Managing Partner" having any day to day management role and (3) the imposition on the Partners of the obligation to have day to day control over the management of the Partnership.

January to 5 April 2003

131. Schemes marketed in this period comprised both Schemes 1 to 7 and also Scheme 8. The IMs for Schemes 6 and 7 (TVE and Mobile Warrior) differed from earlier IMs in that they provided for an "Administrator" as opposed to a "Managing Partner" and for the members or partners having day to day control as opposed to the "Managing Partner".

132. In the same period subscription applications continued to be made by investors, including for the YTC and Etrino schemes.

133. In the same period 10 LLPs were incorporated, as summarised in the table below:

No.	Incorporation date	LLP & Reg No.	Scheme

1	19.02.03	GT1A-LLP	OC 303928	No 8: GT1
2	04.03.03	GT1B-LLP	OC 304060	No 8: GT1
3	26.03.03	Tracksys-1-LLP	OC 304282	No 9: Tracksys
4	26.03.03	Optibet-1-LLP	OC 304278	No 10: Optibet
5	26.03.03	CIT-1-LLP	OC 304283	No 11: CIT
6	26.03.03	Papertradex-1-LLP	OC 304279	No 12: Papertradex
7	26.03.03	Mobilemail-1-LLP	OC 304275	No 13: Mobilemail
8	26.03.03	GT2A-LLP	OC 304285	No 15: GT2
9	26.03.03	Chameleon LLP	OC 304284	No 16: Columbiz No 18: New Media
10	26.03.03	Hermes-2-LLP	OC 304273	No 17: Hermes

133. Scheme agreements made in the period included as follows:

Documents:	Date	Schemes	
LLP Deed	27.02.03	8	GT1

D/As	04.04.03	1-7	YTC, Agent Mole, Etrino, Casedirector, Mamjam, TVE, Mobile Warrior
	04.04.03	8	GT1
AAs	18.03.03	3-7	Etrino, Casedirector, Mamjam, TVE, Mobile Warrior
	18.04.03	8	GT1
	24.03.03	3	Etrino
	24.03.03	9-11	Tracksys, Optibet & CIT
AEAs	28.03.03	5	Mamjam
	31.03.03	1,2, 4, 6-8	YTC, Agent Mole, Casedirector, TVE, Mobile Warrior, GT1

134. The March 2003 AAs are in like terms but they differ from the 2002 AAs in various respects, including the following. First they provide for a single "Purchase Price", as distinct from an "Initial Purchase Price" and "Final Purchase Price". Secondly, they do not provide for a deadline ("no later") payment date. Thirdly, the counterparty named as "The Purchaser" is a named LLP, which was the name of an LLP then incorporated. Each is signed on behalf of the named LLP by Mr Evans and Mr Carter each as a "partner".

135. The 24 March 2003 AAs for Schemes 9 to 11 (Tracksys, Optibet and CIT) are in like terms but they differ in various respects from both the 2002 AAs and the other March 2003 AAs. First they provide for transfer of title of the "Products" from "the Vendor" to "the Purchaser" on 24 March 2003 and payment of the purchase price by no later than 1 July 2003. Secondly the counterparty named as "The Purchaser" is a named LLP, but not that of an LLP which was then incorporated (as opposed to one incorporated 2 days later on 26 March 2003). Each of the 24 March 2003 AAs in Schemes 9 to 11 is signed by Mr Evans and Mr Carter each as a "partner".

136. In the case of the AAs for schemes 9 to 11, the named LLP was not that of an LLP which was then incorporated (as opposed to one incorporated 2 days later on 26 March 2003).

137. In the case of Schemes 1, 2 and 4 to 8, AEAs were made on 28 March 2003 or (for Schemes 3 and 5) 31 March 2003, each in like terms. Each of those AEAs is made between (1) Mr Carter as "Administrator" of a named LLP referred to as "the Partnership", also identified by incorporation number, "as authorised signatory for and on behalf of the Partnership" and a named company, also identified by incorporation number, as "the Agent". Various terms are defined by reference to Schedules: i.e. "Duties" (i.e. of "the Agent") and "Products" (Schedule 1); "Exploitation Forecast" (Schedule 2) and "Acquisition Agreement" (Schedule 3). In fact, Schedule 1 to these AEAs did not further describe the "Products" as indicated in the definition of that term.

138. For Schemes 1 to 11, there are D/As dated on 4 April 2003, all in similar terms.

139. For each of Schemes 1 to 7 the D/A:

(1) is dated 4 April 2003;

(2) is made between (1) an LLP identified by name and registered number; (2) "The Present Members", named as Mr Evans and Mr Carter and (3) "the New Members" being named subscribers;

(3) is expressed to be supplemental to a specified LLP Deed;

(4) provided for the named subscribers being made partners of the named LLP and being bound by the LLP Deed; and

(5) is signed by Mr Evans and by Mr Carter each on his own behalf and also

(6) is signed in relation to each the named subscribers by Mr Carter, each of his signatures being counter-signed by Mr Bailey as witness.

140. On 26 March 2003 the Paymaster General issued the 26 March 2003 Ministerial Statement announcing proposed legislation (later enacted in CAA 2001 s. 45(4)) with effect from that date which cut down the scope of the relevant tax relief. This prompted CB to instruct Mr Bretten QC to advise as to the effect of the Ministerial Statement, as apparent from his Instructions dated 27 March 2003 and consequent Note dated 28 March 2003.

141. In his Note, Mr Bretten QC advised that the critical question was the date on which the Partnership was to be treated as having incurred relevant expenditure, applying the provisions of CAA 2001 s. 5. He stated that it was reasonable to assume that envisaged legislation would adopt CAA s. 5 for the purposes of determining whether expenditure was incurred before 26 March 2003.

142. Consequently, on that basis, he advised that a Partnership would not be subject to the new legislation if it had prior to 26 March 2003 entered into a legally binding agreement to buy "IP" and thereby immediately become unconditionally obligated to pay the purchase price within 4 calendar months of the date on which the agreement was made. It was then to be treated by CAA 2001 s.5 (1) as having incurred the expenditure on the acquisition of the IP on the date when the agreement was made (i.e. prior to 26 March 2003).

143. He also set out timings for a partner of a relevant Partnership to become entitled to sideways relief: (1) expenditure on the acquisition of IP had been incurred before 26 March 2003; (2) the partnership trade had been commenced before 6 April 2003 and (3) the person in question had become a partner before 6 April 2003 (whether before or after 26 March 2003).

6 April 2003 to 31 August 2003

144. Innovator issued IMs for these Schemes (Tracksys, Optibet and CIT) in this period.

145. The IMs for these Schemes differed from earlier IMs. Schemes 9-11 were each promoted to potential investors as a GP as distinct from an LLP, including by an IM dated 12 May 2003 for Scheme 10 (Optibet) and 21 May 2003 for Schemes 9 & 11 (Tracksys and CIT).

146. In each such IM, reference is made to an AA dated 24 March 2003 made between a named "Technology Developer" and the "Partnership" (i.e. a GP) described by Innovator as a "Golden Contract".

147. In the same period subscription applications were made by investors.

148. Scheme agreements made in this period included the following:

Document	Date	Schemes

Service Agreements	23.04.03	149.	YTC, Agent Mole, Etrino, Casedirector, Mamjam, TVE, Mobile Warrior GT1
D/As	31.07.03	150.	Tracksys, Optibet and CIT
AEAs	06.08.03	151.	Tracksys, Optibet and CIT
Service Agreements	08.08.03	152.	Tracksys, Optibet and CIT

153. For each of Schemes 9-11, there is a D/A:

(1) dated 31 July 2003;

(2) made between (1) Mr Carter and (2) named subscribers as "the New Partners";

(3) expressed to be supplemental to a "partnership deed" dated 24 March 2003 called "the Original Deed" in relation to a named GP;

(4) providing for the named subscribers being made partners of a named GP and being bound by the "Original Deed"; and which is signed by Mr Carter in relation to each of "the Present Partners" (named as Mr Evans and Mr Carter) and in relation to each of "the New Partners", each of his signatures being counter-signed by Mr Roper as witness.

154. By Instructions dated 14 April 2003 entitled "Instructions to Counsel in the matter of the Partnership Structure for the Optibet Technology Partnership", CB instructed Mr Crystal to advise whether "Counsel

agrees" that Mr Carter and Mr Evans had "de facto ... acted as members of a general partnership in relation to [the AA document] and [the Guarantee document] and that the IP de facto has been acquired not by the LLP but by the general partnership between the Partners …".

155. In an Advice dated 16 April 2003 Mr Crystal advised: "The IP has been acquired by [Mr] Evans and Mr [Carter]. It may well be that their acquisition is as partners by virtue of the Partnership Act 1890. My Instructions indicate that they agreed on [18 March 2003] to acquire the IP in a limited liability structure and the reasonable inference is that if such intention failed (as the Acquisition Agreement and the Guarantee agreement was signed prior to the incorporation of the LLP) that the IP was acquired and the obligations under the Guarantee assumed by them as partners."

156. Following on from Mr Crystal's Advice dated 16 April 2003, Schemes 9-11 were promoted as "Golden Contracts". Their promotion also reflected advice given by Mr Bretten QC, in Opinions dated 8 April 2003 and 20 May 2003. The latter Opinion was stated to be "on the basis that the position is as stated by Mr Crystal".

157. In a Note dated 20 May 2003 Mr Bretten QC advised that the draft CAA s. 45(4) restriction as proposed in the Finance Bill 2003 as printed on 14 April 2003 would not apply "if the intended sub-licence agreements were to be put in place by the vendor of IP on a 'forward' basis before the [AA] with the Partnership were entered into."

158. The advice given in the Note dated 20 May 2003 was confirmed by Mr Bretten QC, after the Finance Bill 2003 had been passed, in his Opinion dated 10 September 2003 where at page 9 he stated: "Subsection 4 of section 45 of the Capital Allowances Act 2001 provides that expenditure on an item within Class C (software) is not first-year qualifying expenditure if the person incurring it does so with a view to granting another person a right to use or otherwise deal with any of the software in question. On the basis that the Licences to the Distribution Companies will be put in place by the Vendor prior to the Partnership acquiring the ICT, so that the ICT will be acquired by the Partnership subject to, and with the benefit of, the Licences, I am of the view that the Partnership will not acquire the ICT "with a view to granting to another person the right to use or otherwise deal with any of the software" as mentioned in the said subsection (4) (see *Macdonald v Dextra Accessories Limited* [2003] STC 749)".

159. Schemes 12-19 were each structured and promoted as schemes involving licence agreements made before the relevant AA.

160. Enquiries as to whether Innovator Schemes were CISs and their operators required authorisation were raised by Bank Leumi and their solicitors Denton Wilde Sapte ("DWS") both internally and in correspondence with CB in January to March 2003.

161. In the event, Bank Leumi proceeded to advance funds to the LLPs.

162. CB corresponded with another bank, Société Générale ("SocGen") and their solicitors CMS Cameron McKenna ("CMS"). By letter dated 15 July 2003 SocGen informed Mr Carter that the bank was unable to proceed with the proposed loans following "an internal review". The letters "SFO" appear in the document reference of this letter. Mr Stiedl faxed a copy of the 15 July 2003 SocGen letter to Mr Richard Sallybanks at Burton Copeland solicitors with the comment, "Letter from SocGen received by fax and courier. Please note the bottom footer. Please advice [sic]". Burton Copeland were acting for Mr Stiedl in connection with his Balfron pension fraud prosecution. CMS declined to elaborate further as to reasons for their client's decision.

163. In the event alternative financing arrangements were made for those other schemes with a Swiss bank, MFC. MFC were represented by both Swiss and English lawyers, namely Froriep Renggli and Ashurst Morris Crisp. MFC did not raise any issue as to whether the schemes were CISs.

The CLFL Bridging Loan Arrangements

164. CB instructed Mr Bretten QC to advise in relation to movement of monies in July 2003. As recorded by Mr Bretten QC in his note of the telephone conference on 15 July 2003, Mr Carter was "concerned in relation to the AAs entered into on 18th March, 2003, and 24th March, 2003, that if payment of the Purchase Price were not made before 18th July, 2003, and 24th July, 2003, respectively, CAA 2001 s. 5(1) would not be able to be relied upon to treat the expenditure as incurred when the AAs were made. The position in relation to the AAs entered into on 17th October, 2002, and 9th December, 2002, seemed even more problematic."

165. Mr Bretten QC's advice is recorded in his own note as being "GB agreed that the loans could be made by the Technology Vendor. An alternative (and preferable) arrangement would be for the Partnership to obtain third party finance (e.g. from a Finance Company) and to use the borrowed money to pay the outstanding balance of the Purchase Price to the Technology Vendor, which would then place the moneys on deposit with the Finance Company".

166. Mr Bretten QC's recommendation of obtaining third party finance was adopted through the use of CLFL and as reflected in various entries made in the CB ledgers.

167. Other documents were prepared, as may be illustrated by reference to the YTC Scheme.

(1) There are minutes of a meeting of YTC LLP on 16 July 2003 that record that there was a meeting on that date attended by Mr Carter (as "Chairman") and Mr Bailey. The

minutes of the meeting are signed by Mr Carter. There are like minutes for other LLPs. The minutes have a footer as follows: 24213.50.16.07.03. The minutes state that the purpose of the meeting was to consider and approve YTC LLP entering into a loan agreement with CLFL to borrow the balance of the purchase price due and payable by YTC LLP "pursuant to the acquisition agreement dated [24 March 2003] and any ancillary documents …('the Transactional Documents')".

(2) There is a Loan Agreement dated 16 July 2003 made between CLFL and YTC-LLP. It is signed on behalf of CLFL by Mr Greenhalgh and Mr Bailey as directors and on behalf of YTC LLP by Mr Carter as Administrator. There are like minutes for other LLPs.

(3) There is a letter dated 16 July 2003 from CLFL to Ellsburg (signed by Mr Greenhalgh), confirming the transfer of £8m to YTC LLP "to enable it to pay you the first tranche of the consideration due to you pursuant to the [9 December 2002 AA]". The letter goes on to confirm that "you have now deposited this sum of [£8m] with CLFL by way of a security deposit for the liability of the LLP to [CLFL] which is to be repaid by the LLP to [CLFL] by [16 January 2004]".

(4) The ledger entries recording the transfers between YTC-LLP, Ellsburg and CLFL are dated 17 July 2003.

168. There is a document incorporating on the same page an unsigned draft of a letter, with the subject heading "Loan of [£4m] ('the Amount')". The draft letter is from a director of Innovator to CLFL and provides for an interest free loan from Innovator to CLFL on the same day, 17 July 2003, repayable within 24 hours. It includes a request to sign an attached form of acknowledgement of acceptance of the loan terms. The form provides for signature by a director of CLFL.

169. By a handwritten Note, dated 17 July 2003, Mr Bretten QC recorded his change of view from that expressed in telephone conferences on 7 July 2003 and 15 July 2003 as to when, as a matter of construction of CAA 2001 s. 5, capital expenditure was to be treated as incurred. His revised view was that, where the AA in question was silent as to payment date, s. 5(5) did not apply so as to treat payment made more than 4 months after the date of the agreement as made on the date of payment. Rather in such cases, s. 5(1) applied so as to treat the expenditure as incurred "as soon as there was an unconditional obligation to pay it". Thus, on this view, there was such an obligation "as soon as the relative Acquisition Agreement was entered into, the obligation to buy (and, hence, to pay)."

170. It followed that "on reflection" he did "not consider it necessary that loans should be made to the partnerships to enable them immediately

to make payments of (or of the outstanding amounts of the) Purchase Price". He nevertheless recommended that the Partnerships in default should enter into Supplemental Agreements with the Technology Vendors, which acknowledged the defaults and made appropriate provision for payment of the outstanding indebtedness. Mr Bretten QC's recommendation of Supplemental Agreements was not followed.

171. Mr Stiedl sent a first draft of Instructions to Counsel to Mr Bailey by email on 23 July 2003. By email to Mr Stiedl dated 24 July 2003 (12.08) Mr Bailey sent a revised version of the Instructions to Counsel together with a "draft letter".

172. The Instructions state that the 13 partnerships listed therein (including YTC-LLP) had "in principle" entered into a similar transaction. Mr Bretten QC was asked to confirm that actual payment for the whole of the technology had been made by conducting the 17 July 2003 transactions.

173. By memorandum, dated 8 August 2003 ("the quick fix memorandum"), to Mr Marsh, a litigation partner at CB, Mr Bailey asked Mr Marsh to consider whether any action should be taken against SocGen in light of their withdrawal. The memorandum refers to the CLFL bridging loan arrangements and stated that: "... the attitude of the Inland Revenue to the quick fix that we had to do is not clear and it may well be that the Inland Revenue will deny relief because of this. I will mention that we do have an Opinion of Rex Bretten QC that what was carried out was permitted by the tax legislation. However there is a doubt and it does seem to me that there should be some form of response to the letter from SocGen withdrawing the facility."

174. By his Opinion, dated 31 October 2003, Mr Bretten QC restated the view given in his manuscript note of 17 July 2003 that s.5 (5) did not apply and hence there was no need for actual payment within four months of the date of the AAs. In any event, he then went on to advise (in accordance with his Instructions) that the transactions constituted actual payment on 17 July 2003 of the outstanding balances of the purchase prices for the Technologies.

175. In the end financing arrangements were made with two banks.

176. In respect of Schemes 1 and 2 (YTC and Agent Mole) financing arrangements were made with Bank Leumi.

177. In respect of Schemes 3 to 18 financing arrangements were made with MFC.

September 2003 to 5 April 2004

178. Schemes promoted by Innovator in this period comprised Schemes 12 to 18. There were IMs for Schemes 12 to 14 and 16 to 18 that are

undated. The IM for Scheme 15 (GT2) bears the date 12 November 2003.

179. In the GT2 IM: (1) the issuer is described as “Moneygrowth Financial Services” (not Innovator); (2) the IM refers to operation of the “Partnership” (defined as “The Gentech Partnership 2 LLP”) by Mr Gates as the “Managing Partner”; (3) the IM describes an investment by the LLP in rights to a mix of software applications amounting to “QICT” as defined, and (4) the Scheme is expressly described as an “unregulated collective investment scheme”.

180. In the same period subscription applications were made by investors.

181. In the same period 11 LLPs were incorporated, as apparent from the following table:

No	Incorporation date	LLP & Reg No.		Scheme
1	01.09.03	Tracksys-2-LLP	OC 305403	No 9: Tracksys
2	01.09.03	Optibet-2-LLP	OC 305402	No 10: Optibet
3	01.09.03	CIT-2-LLP	OC 305403	No 11: CIT
4	30.09.03	Papertradex-2-LLP	OC 305672	No 12: Papertradex
5	30.09.03	Mobilemail-2-LLP	OC 305677	No 13: Mobilemail
6	30.09.03	Charit-2-LLP	OC 305678	No 14: Charit
7	30.09.03	Columbiz-2-LLP	OC 305673	No 16: Columbiz
8	30.09.03	Hermes-2-LLP	OC 305675	No 17: Hermes

9	30.09.03	GT2B-LLP	OC 305674	No 15: GT2
10	07.10.03	NM-1-LLP	OC 305726	No 18: New Media
11	27.11.03	Arte-LLP	OC 306158	No 19: Arte

182. Scheme agreements made in this period included the following:

Document	Date	Schemes	
LLP Deeds	30.09.03	12-14 16-17	Papertradex, Mobilemail & Charit Columbiz & Hermes
	27.11.03	19	Arte
D/As	23.03.04	14	Charit
	24.03.04	15	GT2
	25.03.04	12-13, 16-18	Papertradex, Mobilemail, Columbiz, Hermes & New Media
Service Agreement	26.03.04	15	GT2
	30.03.04	12-14 16-18	Papertradex, Mobilemail & Charit Columbiz, Hermes

			& New Media
Licence Agreements	12.09.03	12-14	Papertradex, Mobilemail & Charit
	06.10.03	16-18	Columbiz, Hermes & New Media
	10.10.03	15	GT2
	18.11.03	19	Arte
AAs (SPAs)	13.10.03	12-17	Papertradex, Mobilemail, Charit, GT2 Columbiz & Hermes
	20.11.03	18	New Media
	29.11.03	19	Arte
PPUAs	24.11.03	12-19	Papertradex, Mobilemail, Charit, Columbiz, Hermes, New Media and Arte
AEAs	08.03.04	14	Charit
	26.03.04	15	GT2
	30.03.04	12-13 16-18	Papertradex & Mobilemail Columbiz ,Hermes & New Media

183. By a letter, dated 3 November 2003, Mr Stiedl sent Mr Roper draft Instructions to Counsel. Instructions to Mr Crystal were sent and received by Mr Crystal on 5 November 2003. The Instructions asked whether the activities of Innovator in relation to the Partnerships amounted to a regulated activity. Subsequently, Mr Crystal provided an Opinion dated 11 November 2003 to the effect that none of the activities of Innovator carried out in relation to the Partnerships involved a regulatory activity under FSMA. In relation to Chapter X of FSMA CISs Mr Crystal stated that Chapter X was inapplicable "due to the partners having day to day control over the management of the property".

184. On 14 November 2003 Mr Stiedl telephoned and emailed Mr Bailey concerning agreements which were to become the PPUAs. On 19 November 2003 at 10.45 Mr Bailey emailed Mr Stiedl with a draft PPUA attached. PPUAs subsequently entered into by Technology Vendors and Innovator broadly followed the form of the draft PPUA emailed by Mr Bailey on 19 November 2003.

The IR Enquiry from start to Baker Tilly resignation

185. The Special Investigations Section of the IR began enquiries into tax returns of YTC LLP and eight other 2002/3 LLPs for YE05.04.03. Baker Tilly (the LLPs' then auditors) had sent tax returns to the IR on 6 June 2003. Notification of the enquiry was given by the inspector, Mr Frost, to Mr Carter and Baker Tilly by letters dated 31 July 2003.

186. In respect of each Scheme under enquiry, Mr Frost asked to be supplied with various documents, initially by letter dated 31 July 2003. Baker Tilly prepared a draft response dated 3 September 2003 and Mr Bretten QC was instructed to settle it, which he did under cover of a Note dated 22 October 2003. Baker Tilly responded to the IR, by a letter dated 27 October 2003 in accordance with Mr Bretten QC's advice.

187. Mr Frost replied to Baker Tilly by letter dated 30 December 2003 in which he made a request for further documents. Baker Tilly responded by letters dated 1 March 2004. The terms of all such letters were settled by Mr Bretten QC on 19 February 2004.

188. On 25 March 2004 Baker Tilly resigned as auditors of all Innovator Partnerships, including as accountancy representatives of those under IR enquiry. They sent their resignation letters to the members of each Partnership at its registered address, namely 4 Bedford Row, London WC1 (CB's offices). Baker Tilly said that their reason for resignation was their stated discovery of information that Mr Stiedl might be exercising significant influence over the management of the Partnership and their understanding that he was under investigation by the Serious Fraud Office ("SFO")

189. By letter, dated 26 March 2004, Mr Carter replied to Baker Tilly's national managing partner, Mr Longe, and requested a meeting. Mr Carter's letter stated "It is absolutely without foundation that Mr Bjorn Stiedl is or has ever been able to exert significant influence over the management of each partnership, which is and always has been totally in the hands of the partners". Mr Longe responded by letter dated 30 March 2004. He stated that he saw no merit in a meeting with Mr Carter and Mr Stiedl and recommended that Mr Carter urgently seek independent legal advice. Baker Tilly reported their resignation to Mr Frost by letter dated 5 April 2004 stating "For the avoidance of doubt, this firm's resignation did <u>not</u> result from a failure of co-operation or disclosure by the Partnerships in respect of your enquiries".

190. Crouch Chapman was appointed to replace Baker Tilly as auditors and as representative of the Partnerships in the tax enquiry.

191. There was a meeting on 19 April 2004 attended by Mr Frost and another inspector (Ms Marrable) for the IR and by Mr Carter, Mr Stiedl, Mr Roper, Mr Keith Chapman and Mr Des Louis (the latter two of Crouch Chapman). Two notes were prepared of this meeting. One note was prepared by Mr Roper. The other bears the name of Mr Frost.

192. By letter to Mr Carter, dated 23 March 2004, Mr Frost sought further documentation.

193. During this time the Arte Scheme was promoted by Innovator as a 2004/5 Scheme, including by the Arte IM.

194. By Instructions, dated 30 April 2004, Mr Bretten QC was instructed to settle a draft reply to Mr Frost's 23 April 2004 letter. He settled a draft reply dated 13 May 2004, which contains alternative answers on certain points. Mr Carter finalised Mr Bretten QC's draft and responded to Mr Frost by letter dated 19 May 2004.

195. Mr Carter sent a copy of his letter, dated 19 May 2004, to Mr Roper and Mr Stiedl as well as the Crouch Chapman representatives by email dated 21 May 2004 (16.19), to which he also attached Mr Bretten QC's draft for comparison purposes. He stated in the email that his text accorded with the latter draft "added to (with great care!) where appropriate".

196. By email dated 21 July 2004 (10.10), Mr Roper informed Mr Carter that the IR had served statutory notices on 9 Schemes requiring CB to disclose client accounts for Technology Vendors and CLFL for the full (2003) calendar year.

197. On 21 July 2004, CB Ledgers for CLFL and Technology Vendors were printed. There is a copy of the CLFL print out annotated in handwriting. The annotations on the first page show the origin of CLFL's £4,459,400.31. The ledgers were forwarded by Mr Roper to Mr Carter (copied to Mr Stiedl) by email dated 22 July 2004 (17.20)

stating that "I thought it may be useful for you to see the client account ledgers in respect of the Technology Developers and Chancery Lane Finance to ensure that they accord with your own records".

198. Under cover of a letter dated 28 July 2004, Mr Bailey sent to Mr Frost "copies of [CB] accounts" for seven Technology Vendors and for CLFL. The letter refers to the entries having been annotated with the account names of the corresponding entries.

199. There was a meeting on 22 September 2004 attended by Mr Frost and another inspector (Mr Orchard) for the IR and by Mr Carter, Mr Stiedl, Mr Roper, Mr Duffet-Smith (then a CB trainee), Mr McCallum (of H2M), Mr Chapman and Mr Louis (of Crouch Chapman) and Mr Paul Marks. Two notes have been prepared of this meeting. One was prepared by CB. The other bears the name of Mr Frost.

200. Mr Stiedl was convicted of conspiracy to defraud the Balfron pension fund at the Southwark Crown Court on 23 November 2004. He was later sentenced to four and a half years imprisonment. A SFO press release stated that the judge in sentencing had taken into account, by way of consideration, the fact that Mr Stiedl had volunteered to pay back the pension fund.

201. There was a meeting on 29 November 2004 attended by Mr Frost and two other inspectors (Ms Marabel and Mr Pautard) for the IR and by Mr Carter, Mr Bailey, Mr Roper, Mr Duffet-Smith, Mr Chapman and Mr Louis (of Crouch Chapman) and Mr Bretten QC. Mr Frost is recorded as handing out an agenda. Two notes have been prepared of this meeting. One was prepared by CB. The other bears the name of Mr Frost.

202. Following the meeting, CB instructed Mr Bretten QC to "advise generally in relation to this matter in Conference but with particular attention to the following points that appear to have been of concern to the Inland Revenue". Mr Bretten QC advised in a consultation on 10 December 2004, attended by Mr Carter, Mr Marsh and Mr Duffet-Smith and Mr Chapman and Mr Rattansi of Crouch Chapman. There is a note of the conference prepared by CB.

2005 Events

203. Separate EGMs were held on 19 January 2005 in respect of each Partnership which was the subject of the tax enquiry. There are minutes for each EGM.

204. The various EGM minutes record a vote by members to reject the IR's without prejudice proposals to allow tax relief at between 5% and 10% of the overall Technology costs.

205. By letter dated 2 February 2005 to Mr Carter, Mr Frost indicated that, as Mr Frost's without prejudice offer had lapsed without acceptance, he was preparing closure notices.

206. By letter dated 17 February 2005, KPMG confirmed that it had been appointed by the relevant Partnership to act as tax advisers in connection with the IR investigation into the tax planning implemented by that Partnership. The letter confirmed that:

(1) Mr Dermot Callinan would be the tax partner in relation to the engagement, and Mr Peter Honeywell would be the senior manager with day to day responsibility for the work.

(2) KPMG would take instructions from the Steering Committee to be appointed by the partners.

207. There was a meeting on 22 February 2005 attended by Mr Frost and Ms Marrable, Mr Carter, Mr Chapman, Mr Honeywell and Mr Duffet-Smith. There is a note of the meeting made by CB.

208. CB continued to act for Innovator during 2005, including in relation to the 2004/5 partnership (Arte LLP).

Ogier, FSA & other events

209. By letter dated 26 February 2004 to Mr Carter, the FSA (Enforcement Division) requested information as to Innovator Schemes since literature received by it suggested that Innovator had been operating a CIS in breach of FSMA s. 19. By letter dated 4 March 2004, Mr Carter replied to the FSA stating that "the partners in each partnership have day to day control over the management activities" of the Partnership.

210. The FSA (Mr Hanif) replied by letter dated 2 July 2004 pointing out the change between the Casedirector-IM and the TVE-IM. The former IM referred to the "Managing Partner" undertaking "the day to day management", whereas the latter IM and later IMs provided for the partners having day to day control over the management activities. The FSA sought further information, including as to why the management arrangements had been altered, and noted Mr Carter's assertion that no investor had sustained loss.

211. Mr Crystal's advice was sought as to how to respond to the FSA. Mr Crystal provided an Advice dated 12 July 2004, which included the terms of a proposed response to the FSA. Mr Carter replied to the FSA in the terms advised by Mr Crystal, by letter dated 14 July 2004, which stated that it was copied to CB. The FSA (by Mr Hanif) replied by letter, dated 30 July 2004, seeking further information.

212. Mr Brian Lee ("Mr Lee") was CEO of Ogier Corporate Administration Ltd. ("Ogier"). From 5 May 2004, Ogier was authorised by the FSA to

carry on various regulated activities, including operating a CIS. By email dated 3 August 2004 to Mr Carter, Mr Lee, as an investor in the Charit Scheme and "a CEO of a FSA regulated entity", asked Mr Carter to clarify the Charit Scheme's regulatory status as it appeared to be a CIS which required an FSA approved operator. Mr Lee sent Mr Carter a memorandum dated 18 August 2004 stating that for an LLP not to be a CIS the partners needed to be actively involved in day to day management of its property.

213. Mr Crystal's advice was sought on Mr Lee's memorandum. By an Advice, dated 6 September 2004, Mr Crystal stated that he agreed "with the point that Mr Lewis [sic] is seeking to make but do not agree with the terms in which he makes it" and that "My advice as to the status of the LLPs was premised on the basis that the partners would have real day to day control over the management of the property. Such needs to be ensured (in reality)". Mr Crystal also provided a draft reply to the FSA's letter dated 30 July 2004. He did so under cover of an email dated 24 September 2004 (13.55) to Mr Carter stating that his draft dealt specifically with the Casedirector Scheme and that the position in relation to the YTC and Agent Mole Schemes "may be different and is not raised presently". Mr Carter replied to the FSA by letter dated 24 September 2004 in terms reflecting Mr Crystal's draft. By letter, dated 15 October 2004, the FSA (by Mr Hanif) replied to Mr Carter stating that, as at that time, the FSA proposed to take no further action.

214. The Innovator board minutes dated 25 November 2004 record that Mr Carter recommended that Ogier be appointed operator of Innovator Partnerships (other than Gentech Partnerships). The minutes record that Mr Carter referred to "recent tightening of the regulations meant that there is the possibility that, in operation, these partnerships could slip into the category of an unregulated [CIS]". Ogier was appointed operator of various LLPs, pursuant to various Operator Agreements, each specific to a particular LLP (e.g. that with YTC LLP is dated 12 January 2005).

215. Mr Lee expressed concerns in an email to the FSA, dated 9 June 2005, which related to the GenTech LLPs. By a letter, dated 21 June 2005, to Mr Lee, the FSA raised further enquiries. By letter dated 1 July 2005, Mr Lee asked Mr Carter to clarify the extent and substance of the relationships between Mr Stiedl, Innovator and the Partnerships in respect of Innovator Schemes. Mr Carter replied to Mr Lee by letters dated 12 July 2005 and 13 July 2005. In his letter dated 13 July 2005, Mr Carter explained that Mr Stiedl provided consultancy services for Innovator pursuant to companies of which he was a director (Atech Advanced Technology Com Ltd. and J Bear Capital Ltd.) and that Mr Stiedl "never had any direct relationships with the partnerships". In the same letter he refers to five technologies having been purchased by First Global Technologies Ltd. "a BVI company owned by Courvoisier

Trust, Bjorn Stiedl is Investment Adviser to this Trust". Mr Lee responded by letter dated 18 July 2005.

216. The FSA renewed correspondence with Mr Carter by letter dated 22 September 2005. The letter records the FSA as having reviewed the position of the Partnerships following the appointment of Ogier and having reached the view that, on the basis of factors pointing to effective day to day control not being exercised by the partners, the Partnerships were likely to be CISs. It also records the FSA as having concluded that the appointment of Ogier since January 2005 had not resulted in the regulatory position of the Partnerships being acceptable under FSMA: "It seems that Ogier are effectively an outsourced resource to whom certain administrative and compliance functions have been delegated and therefore they are not the operators, or at least not the sole operators, of the LLPs. The operation of the LLPs therefore remains with the LLPs themselves or the person who is actually responsible for that operation". The letter concludes by requesting a copy of any legal opinion received on the status of the Partnerships.

217. By letter to Mr Carter dated 6 October 2005 (copied to the FSA), Mr Lee alleged that Innovator's conduct amounted to a repudiatory breach of contract and requested a meeting. Mr Carter forwarded Mr Lee's letter to Mr Roper by fax, dated 7 October 2005. The fax stated "I shall give you a call to discuss later today". Ogier subsequently resigned.

218. There is a note, dated 4 November 2005, drafted by Mr Crystal of a meeting with the FSA on 2 November 2005 attended by Mr Carter and Mr Crystal and the FSA's Mr Richard Bennett and Mr Charles Vosser.

219. There is a draft unsigned letter from Mr Carter to the FSA, dated 15 November 2005. There is a copy of this letter with "Final Version" written on in manuscript.

220. The FSA replied to Mr Carter by letter dated 9 November 2006 giving Innovator until 9 February 2006 to pursue the appointment of another authorised operator. Mr Carter responded by letter dated 8 February 2006 explaining that such an appointment had yet to be made, but that a conversion process was underway to transfer the assets, liabilities and business activities from each partnership to a limited company. The FSA by letter dated 17 March 2006 requested more details about the conversion process, to which Mr Carter responded by letter dated 3 April 2006. Mr Carter stated that all 23 partnerships had agreed to convert to limited liability companies and the conversion process had been undertaken in accordance with advice given by CB, Crouch Chapman and Mr Bretten QC. Mr Carter also stated in this letter that "it was not considered" that the partnerships were CISs and that he was "unaware of any information relating to any alleged over-valuation of the technology at inception. The current valuation of the technology is dealt with in the accounts".

221. Both before and after Ogier's resignation, Innovator disputed Ogier's fees and engaged CB to act for it in relation to the dispute.

2006-2009 Events

222. EGMs for Innovator Partnerships were held on various dates between 23 January 2006 and 23 March 2006.

223. At these EGMs investors voted in favour of:

(1) Relevant exit arrangements.

(2) Accepting a settlement offer made by the IR to allow tax relief on 20% of the capital allowances claimed by investors. The IR accepted amended tax returns reflecting settlement on that basis.

224. There is an internal CB memorandum from Mr Roper to Mr Marsh (copied to Mr Bailey), dated 25 April 2006 in which Mr Roper provides "background information in relation to the Innovator Technology Partnerships".

225. As set out in Mr Roper's internal memorandum to Mr Marsh, dated 25 April 2006, exit arrangements were put forward which involved a relevant LLP establishing a subsidiary to which the LLP's liabilities and assets were novated. In the memorandum, Mr Roper stated that:

(1) Such arrangements required the consent of the bank which made the loan and the Technology Developer whose deposit secured the loan with the bank; and

(2) Such consents had been obtained for all but one Scheme.

226. By letter to Mr Carter dated 17 February 2006 Mr Roper had expressed the view that such arrangements would be effective to extinguish the LLP's liability in respect of the loan.

227. Confiscation proceedings were brought against Mr Stiedl consequent upon his conviction on 23 November 2004. There is an agreement, dated 2 June 2006, which records a settlement of those proceedings. That agreement provided for payment of £2,400,000 (or £2,250,000 if paid by 21 June 2006) and recorded that the Courvoisier Trust intended to lend monies to Ms Mette Lynhe, a beneficiary of the Trust, to enable her to lend the same to Mr Stiedl for him to make the payment.

228. According to his letter to the IR dated 14 January 2009, Mr Carter resigned as Administrator of YTC LLP in August 2008.

(2) SCHEME SPECIFIC FACTUAL OVERVIEW

YTC Scheme Arrangements

Narrative Summary

229. YTC (short for 'You to Coach') was an online computer-based training system which was to be marketed to the medical profession. The system was designed to deliver content and training for continuing professional development purposes. YTC was developed by YTC Development Ltd which was run by Mr Simon Meager. YTC's Business Plan was drafted by Mr Norrie and Mr Bajic of YTC Medical.

230. The Technology Vendor was a company called Ellsburg Technology Limited ("Ellsburg"). An Option Agreement for the sale and purchase of the YTC Medical Learning System was executed on 7 June 2002. This agreement set out the price of the Technology (£9.92 million) and indicated that Innovator would be entitled to a fee (£1.1 million) were the option to be exercised.

231. The YTC IM was distributed on or after 21 June 2002. Further versions of the IM and the LLP Deed were subsequently sent to Mr Bretten QC on 12 July 2002 for his review and the revised version of the IM was used from September 2002.

232. YTC Holdings Ltd (Mr Meager's onshore company that represented Ellsburg) ran into financial difficulties in relation to payment of staff salaries. A meeting of the PLC Board took place on 30 July 2002 at which it was resolved to accept a loan of £25,000 from Innovator.

233. Baker Tilly were appointed as accountants and auditors to the YTC Partnership in around September 2002.

234. The LLP Deed for the Partnership was originally executed on 5 December 2002. The parties to the Deed were Mr Evans and Mr Carter. This document originally referred to the Managing Partner of the LLP. As summarised above, the wording of the Deed was revised by counsel, Mr Crystal, on 12 December 2002 as part of a number of revisions designed to ensure that the Schemes were not CISs. Consequent upon Mr Crystal's advice, references to Managing Partner were changed to 'Administrator' and further amendments were made to confirm that the partners would have day to day control of the business of the Partnership. Although the wording of the document was amended in these ways on or around 17 December 2002, the Deed's front and back sheets remained those from the version executed on 5 December 2002.

235. By an AA dated 9 December 2002, Mr Carter and Mr Evans acquired the rights to the YTC Technology. At that stage, due to administrative delays, the LLP had yet to be incorporated.

236. Also on the 9 December 2002 Mr Meager entered into a Subscription Agreement with Mr Evans and Mr Carter. Pursuant to that agreement, Mr Meager agreed to subscribe for shares in the YTC LLP in the event

that existing subscriptions were not sufficient to enable the purchase price of the Technology to be raised. In the event, YTC was fully subscribed and this agreement was never called upon.

237. The LLP was then incorporated on 11 December 2002. The Board of Innovator then agreed to launch the Partnership (to be called the "YTC Medical Learning System Partnership LLP" with a valuation for the Technology of £10 million.

238. On 6 February 2003, an agreement was entered into between Ellsburg, the YTC LLP, YTC Medical Limited, Mr Meager and Mr Clarke (who was the solicitor to Ellsburg). Pursuant to this agreement, and in order to assist in the successful exploitation of the YTC Technology, Ellsburg agreed to release £300,000 of the purchase price for the Technology, and CB was authorised to release the monies in tranches to the Exploiter.

239. By an AEA purportedly dated 31 March 2003, YTC Medical Limited ("the Exploiter") was appointed to exploit the YTC Technology. The same day a Security Agreement was entered into between Ellsburg and the Exploiter whereby the sum to which Ellsburg became entitled as interest from sums held on deposit would be used to pay for the interest accruing on the loan to the LLP.

240. By a D/A purportedly dated 4 April 2003, and pursuant to the P/A granted to him, Mr Carter purported to enter the YTC Claimants into the YTC LLP.

241. On 7 April 2003 Mr Bailey provided Baker Tilly with schedules setting out monies held in CB's client account in respect of each Partnership. Mr Carter provided Baker Tilly with Scheme documentation for the YTC LLP on 7 April 2003. On 30 April 2003, Baker Tilly produced a financial statement for YTC the period ending 5 April 2003.

242. On 9 April 2003 there was a meeting which, according to a note of Mr Roper, involved "sign off on Tech Partnership". On that day the YTC LLP held a meeting at which authority was given to execute the loan arrangements with Bank Leumi.

243. A dispute arose between Innovator and Ellsburg over the latter's entitlement to payment from the Partnership under the AA. Ellsburg demanded payment of the balance of the purchase price, less the £8m held on deposit at Bank Leumi. A Settlement Agreement dated 15 April 2003 was entered into whereby the Partnership was to pay the balance of the 20% of the purchase price, which was acknowledged to be net of all monies that were due to Innovator from Ellsburg.

244. On 23 April 2003, a Service Agreement was executed stipulating Mr Carter's obligations to the Partnership as Administrator thereof. The

Claimants placed significant reliance upon the fact that this was after the execution of the D/A.

245. An agreement was entered into on 16 July 2003 whereby the sum of £8m was purportedly loaned to YTC LLP from CLFL ("the CLFL Bridging Loans"). As explained above these arrangements were made because it was understood that the purchase price had to be paid by 18 July 2003. It subsequently transpired that it had not been necessary to make payment by this deadline and the CLFL arrangements were overtaken as a result of Bank Leumi providing finance for the purchase. The Claimants contended that these arrangements involved improper and indeed dishonest behaviour. They will be addressed in connection with the Claimants' case on dishonesty.

246. An enquiry notice was issued by the IR in relation to YTC on 31 July 2003.

247. The Scheme's banking documents were executed on 1 August 2003. These consisted of (i) a Term Loan Facility by which £8m was made available to the LLP in relation to the purchase of YTC; (ii) a debenture agreement by which the LLP granted Bank Leumi a charge over the Partnership's assets by way of security; and (iii) a Deed of Deposit by which Ellsberg agreed to place the £8m into a deposit account at Bank Leumi. A drawdown notice was issued in the sum of £8m the same day by Mr Carter and Mr Bailey on behalf of YTC LLP.

248. An arrangement fee of £140,000 was payable to Bank Leumi in relation to the £8 million loan facility to be made available. That was paid by CB on 5 August 2003.

249. By December 2005, the IR had indicated that it would only allow relief on 20% of the total sum claimed, conditional on this being accepted by all the Partnerships. An EGM of the YTC LLP was held on 23 January 2006, which approved the offer in principle and the partners of YTC LLP resolved to accept the same on 1 February 2006.

250. At a further EGM of 10 March 2006, the YTC partners resolved to incorporate a company and to transfer the assets and liabilities of the LLP to that company.

Allegations of "egregious conduct" specific to YTC

251. The Claimants alleged that the YTC Scheme contained a number of "egregious" features. These "irregularities" were said to be relevant to the effectiveness of the Scheme and the honesty and credibility of the Defendants involved. Most of these are addressed when considering the Claimants' various claims.

252. Three documentary related allegations may conveniently be considered here, namely: (1) there was no valid AA; (2) documents were backdated and (3) there was concealment of key agreements.

No valid Acquisition Agreement

253. The Claimants contended that there was no valid AA for the YTC Scheme because it predated the incorporation of the YTC LLP. It is correct that the AA was purportedly signed by Mr Carter and Mr Evans on behalf of the LLP a few days before it was incorporated. In such circumstances the rights to the Technology would have been held by Mr Carter and Mr Evans on behalf of the inchoate LLP and the LLP would have acquired the rights upon or shortly after incorporation. Further, at all times both the LLP and Ellsburg acted on the basis that there was a valid AA between them on the terms set out in the 9 December 2002 AA. In the above circumstances I reject the contention that there was no valid AA.

Backdating of documents

The LLP Deed

254. This issue arises in relation to the Etrino scheme as well.

255. It was not in dispute that the LLP Deeds for YTC and Etrino were not in their finally executed form as at 5 December 2002, this being the day upon which the document is dated.

256. The relevant chronology of events is as follows:

(1) Instructions were sent to Mr Crystal to advise whether or not the scheme was a CIS on 29 November 2002 which included a draft LLP Deed with suggested amendments;

(2) The LLP Deeds were executed for a number of LLPs including YTC and Etrino on 5 December 2002. This was the date upon which the application forms were submitted to Companies House to register the LLPs.

(3) As is considered in more detail elsewhere, Mr Crystal advised on 10 December 2002 that the Scheme arrangements created a CIS but he did not comment on the revised Scheme arrangements. Following a conference on 11 December 2002, on 13 December 2002, Mr Crystal revised his advice and settled amended Scheme documents.

(4) A further draft of the LLP Deed and the Service Agreement was sent to Mr Bailey by Mr Stiedl on 17 December 2002.

(5) Mr Brathwaite, then a trainee solicitor, amended the LLP Deeds at the request of Mr Bailey (by telephone) and exchanged emails about the changes with Mr Stiedl.

257. The LLP Deeds were not re-executed but amended versions were produced with the original signature pages. The front page was dated, apparently by Mr Braithwaite, to match the date of the original deed, namely 5 December 2002.

258. Mr Bailey accepted that the document was not executed in its final form on the date on the face of the document. He explained that this was an amendment to an existing document. It was not suggested to Mr Bailey that doing so was dishonest.

259. It would no doubt have been better for Mr Bailey to have insisted that the document be re-executed, as he accepted. As at this time the only members of the LLPs were Mr Carter and Mr Evans, this would have been easy to achieve. However, his failure to do so is of no legal consequence. The Claimants accepted that this amendment to the LLP Deed did not affect the tax consequences of the structure or give rise to any cause of action. Nor do I consider that it bears on the honesty or credibility of Mr Bailey or anyone else involved. It is simply an example of poor practice.

The Deed of Adherence

260. Again this also applies to the Etrino D/A. The Claimants relied in particular on correspondence involving Mr Roper. He was emailed by Mr Stiedl on 8 April 2003 who noted that: “I believe Paul has forwarded you the first 9 schedules earlier today” and providing the last schedule, for Gentech 1. He continued: “You will note that we have 110 partners”. The Claimants submitted that the likelihood is that that was a reference to the schedules of names attached to the D/A. The Claimants also relied upon a diary entry created on 4 April 2003 but for an appointment, in Mr Roper’s diary, on 9 April 2003, entitled “sign off on Tech Partnerships”. It was submitted that the likelihood is that this referred to the signing off of the D/As.

261. The evidence of Mr Roper was that this correspondence and meeting related to banking documents and the need to sign Board Minutes by which the LLPs approved the entering into of the banking documents, such as the Term Loan Facility. This evidence was supported by the Board Minutes themselves, a number of which were signed between 9am and shortly after 10am on 9 April 2003. That this was the subject matter of the 9 April meeting was borne out by a number of other matters. In particular:

(1) Mr Roper, who had only become substantively involved in the Innovator Schemes in March 2003, was involved in the bank financing, not the process by which new members adhered to the LLP. From his point of view, it is entirely plausible that the reference to a “sign off on Tech Partnership” would be to the financing transactions, not the D/As. The Board Minutes do indeed represent the “sign off” of the various Innovator LLPs on the financing transactions,

as they provide the relevant approval for the LLPs to enter into those transactions.

(2) Mr Carter confirmed in evidence that he was acting as attorney on behalf of the members and the Board Minutes are each executed by Mr Carter acting as "attorney for the remaining members of the Partnership pursuant to the terms of his appointment." One would expect that the LLP which is to approve the entry into the bank financing documents would be an LLP which the relevant investors were partners of (rather than one which merely had the founding "Innovator" partners as members), which would require the D/As to have already been executed.

(3) If Mr Roper had, as the Claimants allege, arranged the relevant meeting of 9 April 2003 for the purpose of signing the D/A, one would expect it to be Mr Roper who witnessed the relevant signatures, but the D/A signatures were witnessed by Mr Bailey, not Mr Roper.

(4) As Mr Carter stated: "to sign all of the deeds of adherence for each of the Generation 1 partnerships would have taken considerably more than an hour."

262. Next the Claimants relied on the fact that there are some subscription applications dated on or after 4 April 2003 as well as credit entries after 4 April 2003 in the YTC ledger. They also point out that in the case of Mr Kirk, it was only by a letter dated 4 April 2003 that his financial adviser wrote to him seeking his agreement to transfer him to YTC LLP.

263. It is apparent, however, that the subscription applications were for applicants who had made earlier applications to other Schemes which were being "replaced and superceded" by those for YTC. In each case the original application to invest in an Innovator Scheme was therefore made well before 4 April 2003 and I accept Mr Carter's evidence that the likely explanation is that the investments were transferred to the YTC Scheme when the other Scheme became over-subscribed on or before 4 April 2003 and that the replacement paperwork was only completed at a later stage.

264. In relation to the ledger entries in the CB client account for YTC that post-dated the 4 April 2003, this again related to investors who had been moved from a different Scheme that was over-subscribed and, as Mr Carter explained, was CB's accounts "catching up with the reality of the situation". Mr Carter's evidence was that Innovator stopped bringing in new business after 26 March 2003 (the date of the Ministerial Statement) and hence they had plenty of time to transfer partners between Partnerships to ensure all Schemes were fully subscribed. I accept that evidence.

265. The Claimants also relied on correspondence with Bank Leumi and their solicitors and the fact that, despite a number of requests, CB did not provide them with a list of YTC-LLP members until 23 July 2003 and that that list comprised 17 members (as opposed to 37 in the LLP). However, the explanation for that is that Mr Roper mistakenly re-forwarded an old email to DWS which attached a list of members. That email was dated 14 March 2003, and thus the list of members as it appeared at that date contained fewer members than the D/A which was subsequently executed on 4 April 2003.

266. I am accordingly not satisfied that the Claimants have shown the YTC and Etrino D/As were backdated. Indeed, no good reason for doing so was made out. It was well known that the tax year ended on 5 April and that the D/As needed to be signed before that date and there was no evidence that any particular difficulty arose to prevent Innovator adhering to that deadline.

267. In relation to the signing of the D/As it was Mr Bailey's evidence that: "My recollection is that we had the large board meeting room in Collyer-Bristow, there were hundreds of piece of paper, Paul Carter and I signed and our wrists went practically numb. In and out of the meeting came Mr Gates and Mr Evans. I can't recall the precise date. I felt no uneasiness when signing, but I do remember a feeling of triumph it had been done." Mr Carter's evidence was similarly that there was a long signing session and that it took place on 4 April 2003. I accept that evidence.

268. In summary, I am not satisfied that it has been shown that any of the YTC agreements were backdated and I find that they were not.

Concealment of key agreements

269. The Claimants contended that the Subscription (or Underwriting) Agreement of 9 December 2002, the Funding Agreement of 6 February 2003, the Settlement Agreement dated 15 April 2003 and the CLFL/YTC LLP Loan Agreement were 'secret' agreements whose disclosure would have indicated (1) that there was no genuine arms length purchase of Technology (2) that the purchase price stated in the IM and the AA was fictional (3) subscribers could not have obtained tax relief which it was represented they could obtain and (4) the YTC Scheme lacked bona fides and was fraudulent.

270. As to the Subscription Agreement, its purpose was to ensure that the Scheme became fully subscribed such that it could proceed. The liability for the shortfall was Mr Meager's, not Ellsburg's. The Claimants contended that it was obvious that Mr Meager would never have had this obligation and that the agreement lacked commerciality and was a pretence. However, it was Mr Bailey's unchallenged evidence that agreements of this kind are usual in a scheme of this nature and that it gave him no reason to suppose that the Scheme was anything other than genuine.

271. As to the Funding Agreement, this was designed to ensure that there would be sufficient funding to enable the Exploiter to carry out its obligations. It was designed to ensure the Scheme worked and supports rather than detracts from the genuineness of the Scheme arrangements.

272. As to the Settlement Agreement, this formalised the parties' liabilities only as regards the 20% portion of the purchase price (taking account of other existing liabilities), whereas the 80% element was assumed to follow, the banking arrangements not then having been finalised. I reject the unrealistic submission that it limited the liability of the LLP to Ellsburg to 20% of the agreed price. Although one can see how this argument arises from a literal consideration of the wording of the agreement divorced from its context, when considered against the background of the Scheme arrangements and the existing agreements it is clear that it was addressing only the non-bank loan element of the purchase price. The bank loan was integral to the Scheme arrangements and was an important part of the potential benefit to Ellsburg. There was never an intention to remove the responsibility to pay the full consideration to Ellsburg and the parties continued to act on the basis that there would be a bank loan and deposit of the security amount as set out in the AA, as indeed thereafter happened.

273. As to the Loan Agreement from CLFL, this is addressed elsewhere but it was designed to ensure that finance was raised to enable the Scheme to become operational and was expressly approved by Mr Bretten QC.

274. I accordingly find that the agreements were not secret in so far as this is sought to imply that different arrangements were in place as compared to those set out in the Scheme documentation. These agreements sought to give effect to those arrangements. I do not consider that they contain anything which ought to have been brought to the Claimants' attention. Even if they did this would not be the responsibility or duty of CB, Mr Bailey or Mr Roper.

Etrino Scheme Arrangements

Narrative Summary

275. Etrino was an email marketing and client retention tool. It was a web-based tool aimed at small to medium-sized businesses. Etrino was developed by PeterPostPartners Limited ("PPP") which was run by Mr Peter Lewis. The Etrino business plan was produced by Mr Duncan Binks, but was varied by Mr Lewis over time.

276. On 14 August 2002, PPP granted Innovator an option to purchase the Etrino Technology for or on behalf of a third party (i.e. the Etrino Partnership). The Option Agreement set out the £3m purchase price of the Etrino Technology and provided that Innovator would be entitled to a Fee of £240,000 were the option to be exercised.

277. Instructions in relation to the tax structure and anticipated tax implications of the Etrino Scheme were sent to Mr Bretten QC on 15 August 2002. Mr Bretten QC provided his advice in writing on 20 August 2002 and produced a further, slightly amended advice on 22 August 2002. Scheme documents were settled in line with how Mr Bretten QC had settled similar Scheme documents for the Agent Mole and YTC Schemes.

278. The Etrino IM was distributed on or after 10 October 2002. Further instructions were sent to CB to instruct Mr Bretten as to the implications of the decision in *Barclays Mercantile Business Finance v Mawson*. Mr Bretten QC provided written advice as to the implications of the decision on 15 October 2002. His advice was that there was nothing in the decision which required any qualification or modification to be made to the advice which he had previously given in relation to the structure and documentation of the Etrino scheme.

279. On 28 October 2002, American Appraisal UK Limited produced a report on the Fair Market Value of the Etrino Technology. The report was based on the Business Plan financial forecasts.

280. On 6 December 2002 Mr Bretten QC advised on the potential applicability of section 384(7) of the Income and Corporation Taxes Act 1988 and concluded that it should not be in point.

281. The LLP Deed was executed on 5 December 2002. The Etrino LLP was incorporated on 11 December 2002. The AA between PPP and the Etrino LLP was executed on 13 December 2002. Unlike the other AAs, this agreement was an onshore transaction and the transfer of Technology was in principle liable to attract capital gains tax.

282. That fact gave rise to the possibility of PPP being assessed for the sums it had received on the sale. Although the 80% was held on deposit, if exploitation was successful, then any additional sums released to PPP would have been equally liable to assessment.

283. A further potential risk arising from the existing structure of the sale was raised by the proposed lending bank: the concern was that if a UK Technology Vendor became insolvent, its provision of security might be regarded as a preference and/or unwound, thus prejudicing the security of the lending bank.

284. In the light of these concerns it was agreed between the parties that the technology would be sold to First Global Technologies Limited ("First Global") – an offshore entity – and then re-sold to the Etrino LLP. The 13 December 2002 agreement was thus to be cancelled and/or replaced. The insolvency legislation would then not apply and there would be no risk of capital gains tax on the new transaction. Precisely when this agreement was concluded was in dispute.

285. There was an agreement of 24 March 2003 by which First Global purportedly sold the rights to Etrino to the LLP, although the Claimants questioned the validity of that agreement.

286. The AEA was purportedly executed on 31 March 2003 pursuant to which the Etrino LLP (through Mr Carter) appointed Marble Eye to be the Exploiter of the Etrino Technology. The same day a Security Agreement was entered into between First Global and Marble Eye pursuant to which First Global agreed to transfer interest accruing on the sum to be held in its deposit account to pay for interest accruing to the lender in relation to loan to the LLP.

287. By a D/A dated 4 April 2003 and pursuant to the P/A granted to him, Mr Carter purportedly entered the Etrino Claimants into the Etrino LLP. A Service Agreement was entered into between Mr Carter and the Etrino LLP on 23 April 2003 which recorded Mr Carter's obligations to the Partnership as Administrator thereof.

288. Also on 4 April 2003 a Tri-partite Agreement between First Global, PPP and the Etrino LLP was signed, although it was dated 18 March 2003.

289. After the withdrawal of SocGen as lending bank, an agreement was entered into on 16 July 2003 whereby the sum of £2.4m was loaned to the Etrino LLP from CLFL. This arrangement was subsequently overtaken as a result of MFC providing finance for the purchase.

290. On 21 July 2003, Mr Bailey was given the authority to execute banking documents to secure loan finance from MFC. On 20 August 2003, a General Pledge and Assignment Agreement was entered into between First Global and MFC. On 27 August 2003, two further agreements were entered into between The Etrino LLP and MFC:

(1) A term loan facility by which MFC agreed to loan the LLP a sum of £2.4m; and

(2) A debenture agreement by which the LLP granted MFC a charge over the Partnership's assets.

291. A drawdown notice was subsequently issued for £2.4 million. By a letter dated 4 September 2003, CB wrote to CLFL informing it of the refinancing arrangement with MFC and further indicating that the loans to Etrino LLP had in effect been cancelled.

292. On 31 July 2003, the IR wrote (1) to Baker Tilly, auditors to the Etrino LLP, stating that an enquiry notice had been issued in respect of the Etrino scheme and (2) to Mr Carter informing him that the Etrino LLP's tax return was under enquiry.

293. Exploitation of the Etrino Technology was unsuccessful for various reasons including demands and objections raised by Mr Lewis and

attempts by him to go back on the terms of the AEA. By an EGM on 9 February 2004, it was resolved to remind Marble Eye of its obligations but to continue with the existing exploitation arrangement given Marble Eye's proximity to the Technology.

294. The Etrino LLP and Etrino Technology Limited entered into an agreement dated 20 February 2004 whereby the former transferred its assets and liabilities to the latter. The hive down followed from the failure of Marble Eye to exploit the Etrino Technology. The same day the LLP entered into a Licence Agreement with Vermilion International Investments Limited ("Vermilion") pursuant to which Vermilion granted a licence to the LLP to exploit the XPsend Technology. A further AEA was entered into by which the Etrino LLP appointed Exploit Limited to exploit the XPsend Technology.

295. Further instructions were sent to Mr Bretten QC on 23 February 2004 in relation to whether there was any adverse tax implication for the partners of the Etrino LLP in relation to the hive down of the business of the LLP to Etrino Technology Limited. Mr Bretten QC advised that there were no tax issues in relation to such a hive down, however the transfer may give rise to questions as to the commerciality of the business.

296. As a result of the failure of Marble Eye to successfully exploit the Etrino Technology and difficulties that Mr Lewis had created for the further exploitation of the Etrino Technology, a Settlement Agreement was entered into on 26 May 2004 between PPP, First Global, the Etrino Technology Limited, Mr Carter, Marble Eye and Mr Lewis. By that agreement, PPP received a sum in settlement of all outstanding obligations that may have been owed to it.

297. A deed of release was executed whereby upon receipt of the stated sum, First Global was released from the obligation to pay any outstanding sum under the AA by which it acquired Etrino from PPP on 18 March 2003. In addition, a termination agreement was entered into between Etrino Technology Limited and Marble Eye whereby the latter was discharged from its obligations as exploiter under the AEA of 31 March 2003.

298. The Etrino EGM took place on 20 January 2005, pursuant to which the LLP rejected a 10% offer of settlement made by the IR on the Partnership's claim for relief.

299. A further EGM was held by the Etrino LLP on 23 January 2006. By December 2005, the IR had indicated that it would allow relief on 20% of the total sum claimed, conditional on this being accepted by all the Partnerships. An EGM of the Etrino LLP was held on 23 January 2006, which approved the offer in principle and the partners of the Etrino LLP resolved to accept the same on 1 February 2006.

Allegations of "egregious conduct" specific to Etrino

300. The documentary related allegations of "egregious" features or irregularities relied upon by the Claimants which may conveniently be considered here are: (1) there was no valid AA and (2) documents were backdated

<u>No valid acquisition agreement</u>

301. The Claimants contended that there was no evidence of any valid AA in respect of the Etrino Scheme. Etrino LLP was not a party to the 13 December 2002 agreement and as to other versions of acquisition agreements whether the 18 March 2003 AA between FGT and Etrino AA (which is referred to in some documents, but a copy of which appears not to exist) or the 24 March FGT/Etrino AA (a copy of which does exist),it was submitted that Mr Carter was not authorised to enter into them on behalf of Etrino LLP as they were executed after the Ministerial Statement of 26 March 2003 and backdated. This will be addressed when addressing the backdating issue.

<u>Backdating of documents</u>

The Deed of Adherence

302. The Claimants contended that the Etrino D/A was backdated for essentially the same reasons as the YTC D/A. For the reasons set out when dealing with that issue in relation to the YTC scheme I find that all the Scheme 1 D/As, including the Etrino D/A, were executed on 4 April 2003. In so far as some Claimants' subscriptions appear on the Etrino ledger after the date of the D/A in which those same investors were entered into the Etrino LLP I find that these monies were received prior to the D/A but were the subject of transfers across Scheme ledgers as a result of earlier Schemes becoming over-subscribed.

The LLP Deed

303. This raises the same issues as the YTC LLP Deed and has been addressed above.

The Tripartite Agreement

304. The Tripartite Agreement is not relevant for the purposes of obtaining of tax relief so whether it was backdated goes to the credit/honesty of those involved. It was signed by Mr Bailey for First Global and Mr Carter for the Etrino LLP.

305. It was accepted that the date on the front of the agreement (18 March 2003) is not the date upon which the written document was signed. The written document was created and signed on 4 April 2003. However, as the Defendants stressed, and as was not seriously challenged, there

is nothing dishonest about having a written agreement that bears a date other than the date of signature if this merely records the terms of an earlier agreement (at least if, as with the Tripartite Agreement, it is not a deed). That that was Mr Bailey's contemporaneous understanding is borne out by a letter he wrote to Mr Lewis on 30 March 2004.

306. It was the evidence of Mr Bailey that he had not been involved in the earlier negotiations concerning the Tripartite Agreement and that his role was merely to document an agreement previously reached, in accordance with the instructions given to him.

307. The Claimants called Mr Lewis as a witness and it was his evidence that the Tripartite Agreement was both made and signed on 4 April 2003. Indeed it was his evidence that all relevant agreements, the PPP/First Global AA, the Etrino AEA and the Tripartite Agreement were made on 4 April 2003, although there had been an agreement in principle on 18 March 2003.

308. I find that the essential terms of the offshore sale to First Global and the Tripartite Agreement were agreed on 18 March 2003.

309. Mr Lewis' evidence that no agreements were made until 4 April 2003 was undermined by his concession in cross examination that the AEA was concluded on 31 March 2003 and that this could by definition only take place after the sale of the Technology to the LLP. As Mr Lewis accepted, First Global had to own the Technology in order to be able to sell it to Etrino and Etrino could only then enter into the AEA with Marble Eye.

310. In his witness statement he stated that: "Although it did not come to my notice at the time. I have since been made aware by my solicitors that the Exploitation Agreement (which has 31 March 2003 on its face) appears also to have been backdated. As I have explained, this agreement was agreed and signed on 4 April 2003."

311. However, this was contradicted by the documents, including documents signed by Mr Lewis. There was a meeting of the Exploiter, Marble Eye Limited, dated 28 March 2003 to approve the AEA. The meeting minutes are signed by Mr Lewis. The meeting minutes record that the LLP had entered into an AA with First Global. Although Mr Lewis did not accept this, the clear inference is that Mr Lewis understood that the Technology had been sold to the LLP before 28 March 2003.

312. There was then a meeting of the Etrino LLP management committee on 31 March 2003 attended by Mr Lewis, Mr Binks and Mr Tenconi in which cash flows resulting from the exploitation of the Etrino Technology were discussed. The meeting minutes, signed by Mr Lewis, clearly record that there was a signed AEA at that time: "Following the agreement above, the signed Agency Exploitation

Agreement was passed to the other party signifying confirmation of the terms and conditions".

313. Mr Lewis in cross-examination accepted that the AEA could not have been backdated given this meeting minute.

314. The fact that the essential terms of the Tripartite Agreement were agreed on 18 March 2003 rather than 4 April 2003 is also supported by the following:

(1) Mr Lewis stated in evidence that he believed that the Tripartite Agreement was a crucial part of the deal and that he would not have executed the other two agreements without it.

(2) Innovator paid Mr Lewis the sum of £25,000 on 18 March 2003. Although Mr Lewis stated that this was 'unprompted' a more plausible explanation is that this payment was made to reflect the terms of the deal arranged the very same day as recorded in the Tripartite Agreement.

(3) Mr Lewis conceded that even on his case, agreement was reached on 3 April 2003, before the meeting on 4 April 2003.

(4) Mr Bailey sent an executed copy of the Tripartite Agreement to Mr Lewis on 16 April 2003. Mr Lewis accepted that he saw the agreement at that time and saw the date. Had the date been incorrect, Mr Lewis would be expected to have raised this with Mr Bailey, but he did nothing.

315. The correctness of the recorded dates of the agreements is also supported by the terms of the Settlement Agreement dated 26 May 2004. This agreement is signed by Mr Lewis who was then represented by RadcliffesLeBrasseur. Mr Lewis confirmed in evidence that he would not accept money for making statements that he believed were not true nor would he lie to secure a deal. The terms of the agreement record the existence of the following agreements:

(1) A Sale and Purchase Agreement made on 18 March 2003 between PPP and First Global (recital 1);

(2) A Sale Agreement between First Global and Etrino LLP dated 24 March 2003 (recital 2);

(3) An AEA dated 31 March 2003 (recital 4).

316. The Settlement Agreement also states: "In consideration of the parties entering into this Deed Peter Lewis, PeterPostPartners and MarbleEye

formally recognise the documents recited above as being true, valid and entered into on the dates stated thereon. Furthermore, the parties agree that upon the request of Mr Carter, they will furnish statements made in this Deed and confirming that they are not aware of any ancillary agreements which conflict with the transactions set out in this document recited above. (clause 1.1)"

317. The Claimants and Mr Lewis relied on email exchanges between himself, Mr Tenconi and Mr Stiedl in early April 2003 which suggested that the agreements were not yet finalised. However, there is no necessary inconsistency between a binding contractual agreement having been made and the finalisation of non-essential terms. Nor would references in the exchanges to them being "subject to contract" or "without prejudice" alter the position if in fact there already was a binding agreement. Further, even if there is an inconsistency the more compelling evidence is to be found in the documents signed by Mr Lewis himself acknowledging the earlier making of the agreements.

318. In all the circumstances I find on the evidence that a binding agreement the essential terms of which are set out in the Tripartite Agreement dated 4 April 2003, was made on 18 March 2003. It may be that Mr Lewis took the view that until each and every term had been finalised there was no binding agreement but, if so, I find that he was wrong in that view.

319. I further find that in any event it was Mr Bailey's belief and understanding that a binding agreement had been made on 18 March 2003, in which case there would be nothing untoward about so dating the Tripartite Agreement.

The Acquisition Agreement

320. The Tripartite Agreement refers to both the AA between PPP and First Global and that between First Global and Etrino being dated 18 March 2003. No such agreements have been found. There is, however, a First Global/Etrino AA dated 24 March 2003, and in the Settlement Agreement it was recorded as being true, valid and entered into on that date. Mr Carter confirmed in evidence that the AA was made on this date and before the Ministerial Statement on 26 March 2003. I accept that evidence.

321. The Claimants relied on various exchanges which suggested that the terms of the PPP/First Global offshore sale were not finalised until late in March or early April 2003. However, the fact that the final terms of that agreement had not been determined does not mean that there was not an already binding sale agreement. In any event none of these documents bear directly on the First Global/Etrino AA. Mr Lewis was not involved in the execution of this agreement and had no direct knowledge of its execution. If an already binding offshore sale had been made, or was believed to have been made, there is no reason why the onshore sale should not have been made on 24 March 2003. In all

the circumstances I am not satisfied that it has been shown that this AA was not concluded on the date that it bears.

322. No copy of the agreement between PPP and First Global selling the Technology offshore has been disclosed by any party. However, as the Tripartite and Settlement Agreements both record its existence, and as there must have been a sale offshore for title to have passed to First Global, it is highly likely that such a document existed in 2003 and I so find.

The Etrino AEA

323. The Claimants also alleged that that the AEA was backdated in reliance upon the evidence of Mr Lewis. In the light of the fact that Mr Lewis in cross-examination accepted that the AEA could not have been backdated given the meeting minute of 31 March 2003 I reject this allegation.

324. In summary, I am not satisfied that it has been shown that any of the Etrino agreements were backdated and I find that they were not.

<u>Concealment of key agreements</u>

325. Unlike in relation to YTC, no pleaded case was advanced as to the concealment of key Etrino agreements and this allegation was accordingly not specifically addressed by the Defendants in their submissions and evidence. The Claimants nevertheless submitted that the following agreements and related arrangements were concealed from investors (as well as the banks and the IR), namely (1) the 13 December 2002 AA, the 13 December 2002 Subscription Agreement; (2) the Tripartite Agreement; (3) the 26 May 2004 agreements with Mr Lewis and his companies and (4) the 16 July 2003 CLFL/Etrino-LLP Loan Agreement. In the light of the pleadings I do not consider any positive case to this effect to be open to the Claimants.

326. In any event, I do not consider that the First Global AA was required to be disclosed once it had been replaced by the First Global/Etrino AA. The CLFL loan arrangements are addressed elsewhere. There is, however, force in the criticism made that the Tripartite Agreement should have been disclosed since on the face of the agreement it conferred on PPP an option to acquire the intellectual property rights in the Technology on the third anniversary of the Agreement.

Optibet Scheme Arrangements

Narrative Summary

327. The Optibet Technology was a betting odds comparison website. It used feeds from online Bookmakers to display real-time odds on betting opportunities. Fees were to be earned every time a user placed a bet with one of those bookmakers.

328. An LLP Partnership Deed was executed on 24 March 2003, prior to the incorporation of the Optibet Technology Partnership LLP on 26 March 2003.

329. On 24 March 2003, an AA was entered into between Covington Inc the Technology Vendor and the Optibet Technology Partnership LLP. As the Optibet LLP had not, as at that date, been incorporated, Mr Carter and Mr Evans acquired the Technology as partners of a GP, as subsequently advised by counsel.

330. A Guarantee Agreement was also entered into between the Technology Vendor and Mr Carter and Mr Evans on 24 March 2003. The Guarantee Agreement required the Technology Vendor to pay the 'Guarantee' sum into the 'Guarantee Account' to be used as security for the loan to be acquired by the Partnership to enable it to purchase the Technology. The Guarantee amount was 80% of the purchase price, i.e. the sum to be borrowed from the lending bank to enable the acquisition of the Technology.

331. On 24 March 2003, American Appraisal (UK) Limited valued the Optibet Technology. The valuation was based on a Fair Market Value of the business and was based on information and forecasts provided by the Technology Vendor. The valuation contained an analysis of the Optibet Business and an overview of the betting industry and concluded that the Fair Market Value was £9,947,000.

332. On 14 April 2003, instructions were sent to Mr Crystal in relation to the Optibet partnership structure. These instructions were not drafted by CB but were forwarded by CB acting as a conduit for the transmission of instructions from Innovator to Counsel. Mr Crystal was asked to confirm whether he agreed that (1) the LLP could not have acquired the Technology under the AA, the latter having pre-dated incorporation of the LLP and (2) the Technology was acquired by members of a GP which new members might subsequently join.

333. Mr Crystal provided his written advice on 16 April 2003. Mr Crystal's advice stated (at paragraph 2):

> "A contract purportedly made with an embryo LLP itself stands not as a contract with the LLP but as a contract made with those who purportedly acted for it in the making of the contract and it does not bind the LLP. Section 36C of the Companies Act 1985 (as amended and as applied and incorporated by the Limited Liability Partnership Regulations 2001, Reg. 4 and Sch. 2) provides: (1)"A contract which purports to be made by or on behalf of a Limited Liability Partnership at a time when the Limited Liability Partnership has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the Limited Liability partnership or as agent for it and he is liable on the contract accordingly."

334. Mr Crystal further stated that although the intention may have been to acquire the Optibet Technology in a limited liability structure, it would nevertheless be the case that the Technology "was acquired and the obligations under the Guarantee assumed by them as partners".

335. On 16 April 2003, instructions were sent to Mr Bretten QC in relation to various tax aspects of the 'Golden Contracts' of which Optibet was one. These instructions were not drafted by CB but were forwarded by CB to Mr Bretten QC. Mr Bretten QC provided his advice on 20 May 2003.

336. Following the initial advice given by Mr Crystal in relation to Optibet, a draft Partnership Deed between Mr Evans and Mr Carter appears to have been sent to Mr Crystal for his review and approval. That draft deed does not appear, in the event, to have been executed.

337. The Optibet IM was distributed on or after 12 May 2003. The Optibet Partnership was identified therein as a GP.

338. On 16 July 2003, by resolution of the Optibet Technology Partnership, Mr Carter and Mr Bailey were given the requisite authority to execute transactional documents necessary to pay the balance of the purchase price.

339. By a Loan Agreement dated 16 July 2003, CLFL loaned £8m to the Optibet Partnership to enable it to pay the balance of the purchase price under the AA.

340. On 21 July 2003, Mr Evans died. As a result of Mr Evans' death, the then existing GP would have dissolved. Partnership assets (including the Optibet Technology) would have vested in Mr Carter as the surviving partner. Although the GP would have dissolved there was nothing to prevent Mr Carter trading in the name of that Partnership, as he sought to do, being unaware of the legal consequences of Mr Evans' death.

341. By a D/A dated 31 July 2003, the Optibet Claimants were purportedly entered into the Optibet General Partnership. The Claimants submitted that that in exercising the P/A Mr Carter sought in the D/A to make subscribers partners of an existing GP, being the same GP as was allegedly constituted by the 24 March LLP Deed. He did not purport to make subscribers partners of a new Partnership with him, as would have been necessary. They further submitted that he had no authority to make subscribers partners of such a new partnership as it was not the Partnership described in the IM.

342. An AEA was executed on 6 August 2003 pursuant to which the Optibet Partnership appointed Optibet Limited ("the Exploiter") to exploit the technology on its behalf. The Managing Director of the Exploiter was Mr Peter Hanford.

343. On 6 August 2003, a Security Agreement was entered into between the Technology Vendor and the Exploiter pursuant to which the Technology Vendor agreed to transfer interest accruing on the sum to be held in its deposit account to pay for interest accruing to the lender in relation to loan to the Partnership.

344. On 8 August 2003, a Service Agreement was executed whereby the Optibet Partnership appointed Mr Carter to be the Administrator to the Partnership. This Agreement set out Mr Carter's obligations to the Partnership as Administrator thereof.

345. On 1 September 2003, the Optibet Technology Partnership 2 LLP was incorporated. The prospective members of that Partnership were all those who had become partners of the Optibet General Partnership as listed on the LLP2 application. By a Transfer of Trade Agreement of the same day, the business of the GP was transferred to the new LLP.

346. Mr Carter signed the incorporation application for that LLP on behalf of each of the Optibet investors, confirming in respect of each of the investors "I consent to act as a member of the limited liability partnership named on page 1."

347. By meeting of the Optibet Technology Partnership 2 LLP on 1 September 2003, Mr Carter was given authority to execute transactional documents with MFC to secure loan finance for the purchase of the Optibet Technology.

348. On 2 October 2003, a General Pledge and Assignment was entered into between Covington and The Optibet Technology Partnership 2 LLP. On 9 October 2003, two further agreements were entered into between The Optibet Technology Partnership 2 LLP and MFC:

(1) a term loan facility by which MFC agreed to loan that LLP a sum of £8m to assist the purchase of the Optibet Technology, and

(2) a debenture agreement by which that LLP granted MFC a charge over the Partnership's assets.

349. A drawdown notice dated 2003 was provided by The Optibet Technology Partnership 2 LLP to MFC: an advance of £8m under the term loan facility agreement was to be made to The Optibet Technology Partnership 2 LLP's account with MFC, which was then transferred to the Technology Vendor's deposit account at MFC, and made subject to the General Pledge and Assignment.

350. Financial Statements were signed off by Crouch Chapman, auditors to the Optibet Technology Partnership 2 LLP, on 13 May 2004.

351. A meeting of the Partnership took place on 23 March 2005 at which the IR 10% offer of settlement was rejected.

352. An EGM took place on 24 January 2006 at which the partners agreed to accept the IR's new offer to allow relief on 20% of the total sum claimed.

353. On 27 March 2006, the business of the Optibet Technology Partnership LLP was transferred to Optibet Technology Limited.

Allegations of "egregious conduct" specific to Optibet

354. The documentary related allegations of "egregious" features or irregularities relied upon by the Claimants which may conveniently be considered here concern the alleged backdating of documents.

<u>Backdating of documents</u>

The Acquisition Agreement

355. The Claimants alleged that the AA (dated 24 March 2003) was likely to have been made after the Ministerial Statement of 26 March 2003.

356. The Claimants' case as put to Mr Carter in cross examination was as follows:

> (1) The AAs for these three Schemes were initially executed with a completion date for payment of 31 July 2003 (in clause 3 of the agreement of the agreement);
>
> (2) Following the advice of Mr Bretten on 10 April 2003, in which he concluded that these AAs fell foul of section 5 of the Capital Allowances Act, these documents were amended to make the following changes:
>
> (i) Separating the guarantee from the terms of the AA.
>
> (ii) Changing the date for payment of the Final Purchase Price from 31 July 2003 to 1 July 2003.

357. Mr Carter strongly denied this. His recollection was that after receiving the advice of Mr Bretten QC they went back and checked the relevant AA for the 13 Technologies that had been executed and upon checking the agreements it transpired that 3 of the 13 agreements contained the date of 1 July 2003 for payment of the Final Purchase Price and hence could be used.

358. The suggestion that the separation of the guarantee from the terms of the AA did not take place until April 2003 was incorrect and was not ultimately pursued. Mr Bailey was instructed to do this by an email from Mr Stiedl dated 19 March 2003. AAs and Guarantee Agreements were sent by email by Ms Lone Christensen to Ms Laura Mouck of Covington by email on 24 March 2003. The change to split the guarantee from the remainder of the AA had therefore already occurred

before the Ministerial Statement of 26 March 2003, let alone the 10 April 2003.

359. In support of the suggestion that the date in the three agreements was changed the Claimants relied in particular upon the fact that the sample AA sent to Mr Bretten QC to consider had a payment date of 31 July 2003; the implausibility of AAs being prepared with different payment dates, and a note of Ms Keeble of CB of the conference with Mr Bretten QC which records as follows:

> "Agreement was drafted prior to Ministerial Statement
>
> BS – everything prepared according to previous Opinion. Drafted etc 24th March
>
> GRB – should have synchronised them
>
> BC [must be BS] – but we had no idea knew what the Ministerial Statement would say".
>
> And then records BS (Mr Stiedl) saying: "I'll check the contracts and change the dates"

360. It is inherently unlikely that Mr Stiedl would be telling leading counsel that he was going to change the dates in existing contracts. The typed up notes of conference accorded with Mr Carter's recollection and stated as follows: "He said that Clause 3 of Agreement should say "a date not later than 25th July." BS said that the first step would be to check all other Agreements to see what dates they contain in Clause 3. It could be that not all the dates are 31st July."

361. Mr Carter's recollection is also borne out by the documents.

362. The signature pages of the AAs and Guarantee Agreements for 12 of the 13 LLPs were sent by fax from Ms Laura Mouck to Ms Christensen on 25 March 2003. The fax was stated to be 25 pages, two signature pages for each Technology and a cover page. The fax also stated that original agreements were being sent by Fedex International with waybill number 9670 5463.

363. The signatures of Ms Nicola Mouck (who signed on behalf of both Covington Inc and Fortress Financial Services Inc) on the faxed copy match exactly the signature that appears on the copy of the AA and Guarantee Agreements for Optibet. It follows that these two agreements are the same agreements that were sent by Fedex to Innovator by Covington on 25 March 2003. Moreover, every page of these agreements is initialled by Ms Nicola Mouck, including page 3 which states that the Purchaser shall pay the Purchase Price no later than 1 July 2003. This shows that the Optibet AA that was returned by Fedex on 25 March 2003 did contain the date of 1 July 2003 for final payment and not 31 July 2003. I accordingly find that the Optibet AA

sent to Covington on 24 March 2003 contained the date of 1 July 2003 for payment of the final purchase price.

364. The Claimants also sought to place reliance upon differences between the signature of Mr Carter and Mr Evans on the signature page of the fax and that in the actual agreements. The likely explanation is that the faxed signature page was signed when it was received on 25 March 2003 and the originals were signed when they arrived in the UK on 26 March 2003.

365. As at 25 March 2003, both parties had signed the signature pages of the deed. This is sufficient to constitute delivery of a deed which has, in effect, been executed and delivered in counterparty form. There is no need for the signatures to co-exist on one document. The fact that the deed may not have been delivered until 25 March 2003 but is dated 24 March 2003 is of no significance. A deed takes effect from delivery and does not necessarily need to be dated - see *Goddard's Case* (1584) 2 Co Rep. 4b.

366. In any event, even if, as the Claimants contended, the steps necessary to execute and deliver a deed had not been complied with by 25 March 2003, the document would take effect as a simple contract. On that basis, as there are no formalities required for an AA, even if the Claimants were correct in their assertions, the Optibet AA was entered into before the Ministerial Statement and thus could be used as a Golden Contract, it having the date for final payment of 1 July 2003.

Optibet Transfer of Trade Agreement

367. This allegation arises from an email, dated 25 September 2003, from Mr Roper to Mr Carter stating "could I also ask you to sign these transfers of the business from the general partnership to the LLPs which you will see have been dated 1 September 2003 as discussed."

368. As appears from the email exchanges between Mr Stiedl and Ms Ballard, of Baker Tilly, of 22 August 2003, it had been agreed that the transfer of trade from the GPs to the LLPs would take effect as from 1 September 2003 and that "the trading will be continued in the LLPs from the 01 September 2003." The Transfer of Trade Agreements were explicitly entered into on the basis that "The Purchaser has agreed with the Vendor with effect from midnight on 31 August 2003...to purchase as a going concern the Business and Assets and to assume the liabilities and obligations...of the Vendor in connection with the Business." Mr Roper was on holiday as at 1 September 2003 but in the light of the information the correct date to enter on the Transfer of Trade Agreement was 1 September 2003.

369. In summary, I am not satisfied that it has been shown that any of the Optibet agreements were backdated and I find that they were not.

Charit Scheme Arrangements

Narrative summary

370. The Charit email technology ("Charit") was a web-based email system which contributed a proportion of its gross revenue to charity. The Technology Developer was Vermilion, which was owned and controlled by Mr Bob Speirs.

371. By an Option Agreement dated 22 October 2002, Vermilion granted Innovator an option for Innovator or a third party introduced by Innovator to purchase the intellectual property rights to the 'Charit-email technology'. In the event that Innovator exercised the option within the 'Option Period', Vermilion would become liable to pay a fee of £1,595,000 to Innovator.

372. Instructions to advise on the tax structure and consequences of the Charit Scheme were sent to Mr Bretten QC on 29 October 2002. The instructions were sent via CB who acted as a conduit for these purposes. Mr Bretten QC confirmed that the structure would be amenable to the anticipated tax treatment by written advice of 20 November 2002.

373. On 11 December 2002, The Charit-Email Technology Partnership LLP (referred to as "Charit dash" to reflect the fact that there was a hyphen between Charit and Email) was incorporated at Companies House under Partnership Number OC303539 (at this time it was envisaged as being a Generation 1 scheme).

374. Mr Bretten QC provided tax advice in conference on 14 March 2003 in relation to the position of all incoming partners of partnerships in the tax year 2003/4. The instructions to Mr Bretten QC were sent by Mr Stiedl and were incorrectly dated 16 March 2003.

375. Further instructions dated 27 March 2003 were sent to Mr Bretten QC in light of the Ministerial Statement of 26 March 2003. Mr Bretten QC provided a written advice on 28 March 2003. Further instructions were sent to Mr Bretten QC on 3 July 2003 in relation to the tax position of Technology purchased after 5 April 2003. Mr Bretten QC provided his written advice in relation to such Technology on 10 September 2003.

376. The Charit Technology was valued by Mr Peter Wren-Hilton of HB Internet who produced a valuation report on 11 September 2003 having been provided with the Business Plan, a 10 year summary for Europe, USA and Canada, Australia and New Zealand and India. Mr Wren-Hilton adopted an income methodology to determine Fair Market Value which he put at £78,800,213.

377. On 12 September 2003, Vermilion entered into four licence agreements with (1) HBI Sales Private Limited (for the territory of Asia); (2) ICT Europetec Limited (for the territory of Europe); (3) Mir

Technologies LLC (for the territory of the USA and Canada); and (4) Zacan Holdings Proprietary Limited (for the territory of Australia).

378. By these licence agreements, Vermilion granted a sole and exclusive licence to each Licensee to use and exploit the Charit technology in that Licensee's territory in consideration for the Licensee undertaking to provide regular reports, forecasts etc in relation to its exploitation of the technology. The licence agreements were subsequently varied by deed on 10 September 2004.

379. Because "Charit dash" had been incorporated prior to the 26 March 2003 Ministerial Statement it was decided that it should change its name and for its name to be adopted by a new LLP.

380. Accordingly on 24 September 2003, Mr Carter and Mr Neilsen applied to incorporate an LLP with the slightly different title 'The Charit E-Mail Technology Partnership' (referred to as "Charit gap" because of the lack of hyphen between Charit and Email). The difference was unintentional. Such a Partnership was incorporated on 30 September 2003 under Partnership number OC305678. On the same day the name of the "Charit dash" LLP was changed to The Innovator "K" Partnership LLP". The only Charit named LLP in existence thereafter (until July 2004) was accordingly "Charit gap".

381. On 30 September 2003, a Limited Liability Partnership Deed for the Charit E-mail Technology Partnership LLP was executed. The founding members were again listed as Mr Carter and Mr Neilsen.

382. A Sale and Purchase Agreement was entered into between Vermilion and the Charit-Email Technology Partnership LLP on 13 October 2003. The front sheet stated that the Agreement related to the sale of 'the Charit-email Technology'.

383. By letter of 13 October 2003 Vermilion wrote to the Charit E-mail Partnership LLP indicating that it had complied with the terms of the Licence Agreements with the 4 Licensees, and acknowledging its obligations to the LLP under the Sale and Purchase Agreement.

384. On 24 November 2003, Innovator entered into a PPUA with Vermilion.

385. On 16 February 2004, Mr Bretten QC advised in writing on the impact of the Ministerial Statement of 10 February 2004.

386. On 8 March 2004, the 4 Licensees entered into an AEA with Charit E-Mail Limited ("the Exploiter"). The board of the Exploiter had resolved to enter into such an Agreement the same day.

387. On 8 March 2004, a Security Agreement was entered into between Vermilion and the Exploiter pursuant to which Vermilion agreed to

transfer interest accruing on the sum to be held in its deposit account to pay for interest accruing to the lender in relation to loan to the LLP.

388. On 23 March 2004, Mr Carter, exercising the P/A vested in him, purported to enter the Charit Claimants into 'The Charit-email Technology Partnership LLP'". The D/A referred on the front sheet to 'The Charit Email Technology Partnership LLP' (written in block capitals) whereas the footer on each page of the Deed referred to 'The Charit-email Technology Partnership LLP'.

389. On 24 March 2004, Vermilion granted a P/A to Mr Bailey and Mr Roper for the purposes of executing all documents necessary to give effect to the arrangements contemplated in the Sale and Purchase Agreement, including such documents as would enable the balance of the purchase price to be raised by way of a loan from MFC.

390. On 30 March 2004, The Charit E-Mail Technology Partnership LLP entered into a Service Agreement with Mr Carter pursuant to which Mr Carter was appointed as Administrator to the LLP. The name of the LLP on the front sheet of the Service Agreement appeared as above, save that it was in block capitals.

391. On 2 April 2004, there was a meeting of 'The Charit-Email Technology Partnership' at which it was resolved to confer a P/A on any of Mr Carter or Mr Neilsen to execute the transactional documents needed to complete the loan with MFC.

392. By a General Pledge and Assignment of 24 April 2004 Vermilion pledged and assigned in favour of MFC "any and all securities, claims, rights, objects and other assets which, although not described here, are or will be held by the Bank for this account and which are referred to as the pledged assets".

393. On 11 May 2004, Crouch Chapman signed off on the audited accounts of 'The Charit-Email Technology Partnership LLP'. On 27 May 2004, the "Charit-Email Technology Partnership LLP' entered into two agreements with MFC:

(1) a Term Loan Facility by which MFC agreed to loan the LLP £28 million; and

(2) a Debenture by which the LLP, inter alia, charged its assets in favour of MFC as security for the loan.

394. A Drawdown notice was issued the same day in the sum of £28 million for immediate onward transfer to Vermilion's deposit account at MFC.

395. On 2 July 2004 "Charit gap" changed its name to "Charit dash". On 28 July 2004, Mr Carter wrote to the partners indicating that "We have received a letter from the Special Investigations Section of the IR informing us that they are undertaking an investigation into the Partnership Tax Return for the period ending 5 April 2004".

396. On 6 September 2004, Mr Crystal provided written advice on the status of the “Charit Email Technology Partnership LLP” following a memorandum produced by Mr Brian Lee of Ogier on 18 August 2004. Mr Crystal confirmed that whether or not the scheme was a CIS would turn on whether or not the partners had day to day control over the business.

397. On 29 June 2005, an EGM was held to consider the 10% tax relief offer made by the IR. The minutes of the “Charit-Email Technology Partnership LLP” record that the members voted unanimously to reject the offer.

398. A further EGM was held on 31 August 2005, to vote on whether or not to transfer the Partnership’s business and assets and liabilities into a limited company. The minutes of the “Charit-Email Partnership LLP” record the fact that the resolution in respect of conversion to a limited company was carried by a “substantial majority”. In the event though no such transfer took place.

399. A further EGM was held on 24 January 2006 to consider the IR's offer of 20% of the tax relief claimed. The minutes of the “Charit-Email Technology Partnership LLP” record that no resolution was passed as the partners decided to postpone decision pending receipt of further information. At a further meeting of all the Generation 3 partnerships on 23 March 2006, the partners voted to accept the IR's offer of 20% tax relief.

400. On 27 April 2007, MFC wrote to the Charit-Email Technology Partnership LLP requesting repayment of total outstanding amount of the credit facility, stated to be £29,383,376.40. The letter states "we expect payment of the outstanding balance latest until May 27, 2007. In case of non performance all rights available under the credit facility documents, especially the rights relating to the collaterals, remain reserved". That sum was subsequently taken from Vermilion’s deposit account in satisfaction of the loan.

Allegations of “egregious conduct” specific to Charit

401. The documentary related allegations of “egregious” features or irregularities relied upon by the Claimants which may conveniently be considered here concern the alleged backdating of documents.

<u>Backdating of documents</u>

Deed of Adherence

402. The Charit D/A is dated 23 March 2004 and the D/A for each of the other five Generation 3 Schemes (PaperTradex, Mobilemail, Columbiz, Hermes and New Media) are each dated 25 March 2004. In respect of each of these 6 D/As, the date was entered by Mr Carter; the principal signatory to the Deed, exercising the P/A he had received

from investors, is Mr Carter; and Mr Carter's signature is witnessed on multiple occasions by Mr Roper.

403. In support of their allegation of backdating (in relation to all the Generation 3 schemes including Charit and GT2) the Claimants relied in particular upon emails from Mr Roper sent on 1 April 2004. At 09.36am Mr Roper wrote to Messrs Carter and Stiedl on the subject of MFC financing arrangements. His email concluded "I presume that, as you are working on the deeds of adherence, the partnerships are now finalised and closed". By a further email Mr Roper emailed Mr Stiedl and Mr Carter stating: "just to confirm that tomorrow we are signing up 11 Partnerships" and setting out a list including Charit and GT2.

404. The Claimants asserted that this must be referring to the signing of the D/As for the Schemes. However, this ignores the fact that Mr Roper's involvement was with the banking arrangements and the documents relating to the 2 April 2004. These include the minutes for the relevant Board meetings required to enable the LLPs to provide authorisation for their entry into the bank financing agreements. Again, each of the Board minutes proceeds on the basis that Mr Carter is acting as attorney for the "remaining Members of the Partnership pursuant to the terms of his appointment" which presupposes that the D/A was executed on a date prior to that on which the relevant Board meetings took place.

405. As to the reference to "working on the deeds of adherence", the full text of the email is as follows: "Morning gentlemen, I am just preparing the Loan Agreements, draw down notices and debentures for the LLPs and MFC. Could you let me have details of the capital contributions (i.e. total investor's contributions) and total bank borrowing so that I can insert the relevant loan figures please. I presume that, as you are working on the deeds of adherence, the partnerships are now finalised and closed?"

406. It is apparent from the first sentence of the email that, as at 1 April 2004, Mr Roper was focused upon the completion of the bank financing documentation. It is apparent from the second sentence of the email that the purpose of Mr Roper sending the email was to obtain information as to the quantum of investors' investments so that he could complete the relevant bank financing documentation. Independently of the D/A, Mr Roper required such information for the purpose of the work that he was conducting concerning the bank financing documentation. It is apparent from the third sentence that Mr Roper was under the impression, as at 1 April 2004, that the partnerships have been "finalised and closed." This is consistent with the D/A having been executed.

407. As to what is meant by "working on the deeds of adherence" I find that the most likely explanation is that Mr Roper was positing, and asking for confirmation of the fact, that as the D/As have been executed and Innovator are working on the basis of those D/As in providing

financial information to Mr Roper, the partnerships were in fact "finalised and closed" such that no new investors would be admitted and the finalised financial information could be provided to the Bank.

408. As at 1 April 2004, the tax year still had a number of days to run and, as far as Mr Roper was aware, Innovator could theoretically have sought to join further investors to the relevant partnership, whether by a Supplemental D/A or by additions to the extant Deed. The fact that some investors had been made members of LLP did not preclude further investors being joined to the same LLP at a subsequent date (as happened in the case of Agent Mole in respect of the Generation 1 Schemes).

409. No reason was suggested to Mr Roper or Mr Carter in cross examination as to why the D/A should be backdated given that 2 April 2004 was still within the relevant tax year. It was, however, suggested to Mr Bailey (who was not involved in the execution of the D/As) on the basis of an attendance note made by Mr Bailey, recording a conversation which took place with Mr Carter and Mr Bailey that Mr Carter thought that there was an IR imposed deadline of 26 March 2004 which "explains why the GT2 and Charit deeds of adherence were backdated." If, however, it was to be suggested that Mr Carter had a conscious motivation to backdate the Generation 3 D/As of then it should have been put to him, but it was not.

410. In all the circumstances, I am not satisfied that it has been shown that the Charit D/A was backdated.

LLP Deed

411. The Claimants alleged that, although there appears to have been no particular reason for such backdating, the Charit LLP Deed was dated 30 September 2003, despite having been executed on 9 December 2003.

412. The Claimants relied in particular upon the fact that the final version of the Charit LLP Deed has a front page which has a footer of 9 December 2003 and a printed date of 30 September 2003 and on exchanges relating to amendments in November 2003.

413. Mr Carter's evidence was that the Charit LLP Deed was executed on 30 September 2003 when the LLP was incorporated. He considered that the footer of 9 December 2003 related to the date when a further version, possibly incorporating changes suggested by Mr Bretten QC, was saved.

414. In this regard, it is apparent that, on 20 November 2003, Mr Roper sent Mr Stiedl a precedent for the Innovator LLP Deeds ("the Master Precedent LLP Deed"). Thus, at all times from, at least 20 November 2003, the Master Precedent LLP Deed was on the Innovator system and could have been amended and printed out by Innovator – in which

case the CB automatic footer macro embedded in the Master Precedent LLP Deed would have created a footer containing the date upon which the Deed had been amended.

415. I consider that the most likely explanation is that the Charit LLP Deed was, as Mr Carter stated, executed on or about 30 September 2003. The documentary evidence clearly establishes that the Deed was sent out by Mr Roper for signature on 24 September 2003. The amendments that subsequently appear to have been made to that document on or before 9 December 2003, whether by Innovator or CB, as set out were minor, and it is likely that, by way of what Mr Carter termed a "short cut", these amendments were incorporated into the Deed by means of replacement pages which were amended and saved, either by Innovator or someone at CB, on 9 December 2003. Whilst that means that the final version of the LLP Deed was not executed until that date, it does not involve backdating. The LLP Deed was executed and signed on 30 September 2003, albeit that it appears to have been amended at a later date and not re-executed.

416. Further, Mr Roper was absent from the office on 9 December 2003 and there is no evidence that Mr Roper was aware of or complicit in any backdating. Whilst it was put to Mr Roper that the Charit LLP Deed had been backdated, it was not suggested to Mr Roper that he was either contemporaneously aware of this or complicit in any backdating. Finally, there was no suggestion that there was any particular reason for back dating the Charit LLP Deed.

Agency Exploitation Agreements, Service Agreements and Security Agreements for Generation 3 Schemes (including Charit).

417. In support of this allegation the Claimants relied on two pieces of correspondence. The first, dated 6 May 2004 is a letter from Ms Christensen to Mr Roper following a request by MFC Bank to be provided with certain documents. The letter, sent by courier, enclosed the majority of the documentation requested. In respect of three categories of documents, however, Ms Christensen stated: "As you have the originals, could you please date them. We are talking of: Agency Exploitation Agreement, Service Agreement and Security Agreement."

418. I agree with the Defendants that the most likely explanation is that Ms Christensen was simply pointing out that she does not have the original executed versions of these agreements; that Mr Roper does have those agreements; and that therefore they are documents which Mr Roper can provide to MFC Bank, dating if necessary.

419. There is no reason to suppose that Ms Christensen, who did not have the original executed versions of the agreements in her possession, was aware of whether or not the originals had already been dated.

420. The second communication relied on in this context, is a further letter from Ms Christensen to Mr Roper, dated 10 May 2004 in which Ms Christensen refers to five of the Security Agreements which had been amongst the documents referred to at paragraph 4 of her previous letter of 6 May 2004, and informs Mr Roper "You date." This is consistent with the previous communication in that Ms Christensen did not have the signed originals and believed that Mr Roper did. In other words she was checking to ensure that they were dated; not giving some instruction to do so (which would not be her function anyway).

421. Further, even if, however, as at May 2004, some of the agreements referred to by Ms Christensen's letter had, through oversight, been executed but left undated, it was perfectly proper for Mr Roper to ascertain from Mr Carter or Mr Stiedl, and then enter, the correct date of execution on the agreements.

422. In summary, I am not satisfied that it has been shown that any of the Charit agreements were backdated and I find that they were not.

Gentech 2 Scheme Arrangements

Narrative summary

423. The GT2 Technology was originally known as Business 24-7. It was a client relationship management (or "CRM") tool which was originally developed by HB Internet Limited for the Training & Enterprise Council.

424. An LLP Deed for The Gentech Partnership 2 LLP purportedly dated 27 February 2003 was executed by Mr Carter and Mr Neilsen.

425. A further LLP Deed dated 24 March 2003 for the (slightly differently named) GenTech Partnership 2 LLP ("GT2 A") was executed by Mr Evans and Mr Carter. There is a third LLP Deed dated 26 March 2003 which is in materially identical terms to the 24 March 2003 Deed signed by Mr Carter and Mr Nielsen.

426. Form LLP2 was submitted to Companies House on or around 25 March 2003. That form applied to incorporate an LLP in the name of The GenTech Partnership 2 LLP. That LLP was incorporated on 26 March 2003 and had partnership number OC304285.

427. Because GT2A had been incorporated on the day of the 26 March 2003 Ministerial Statement it was decided that it should change its name and for its name to be adopted by a new LLP, incorporated after the Ministerial Statement.

428. On 22 September 2003, Mr Carter applied to Companies House to change the name of the GenTech Partnership 2 LLP (partnership number OC304285) to become The Innovator "C" Partnership LLP. That change was made on 30 September 2003. On 24 September 2003,

Mr Carter applied to incorporate an LLP with the slightly different name of 'The Gentech 2 Technology Partnership LLP ("GT2 B"). That Partnership was incorporated on 30 September 2003 with partnership number OC305674. The difference in name was unintentional.

429. On 10 October 2003, IP Software Services Limited ("IPSS") – the Developer and Vendor of the Business 24-7 Technology – entered into four licence agreements with (1) HBI Sales Private Limited (for the territory of Asia); (2) ICT Europetec Limited (for the territory of Europe); (3) Mir Technologies LLC (for the territory of the USA and Canada); and (4) Zacan Holdings Proprietary Limited (for the territory of Australia). These agreements were approved by resolution of the Board of IPSS on the same day and amended by a Deed of Variation on 10 September 2004.

430. By these licence agreements, IPSS granted a sole and exclusive licence to each licensee to use and exploit the Business 24-7 technology in that Licensee's territory in consideration for the Licensee undertaking to provide regular reports, forecasts etc in relation to its exploitation of the technology.

431. On 13 October 2003, the Gentech 2 Technology Partnership LLP (GT2 B) entered into a Sale and Purchase Agreement with IPSS for the sale and purchase of the 'Rights'. The Rights appear not to have been defined in the schedule to the Agreement, but the Agreement's front sheet makes clear that it applied to the Business 24-7 Technology. IPSS also developed a technology called the Angelia Technology which was to be sold to GT2 but the sale was mutually cancelled. The 4 Licence Agreements were listed in schedule 2 to the Agreement. The purchase price for the technology was £14,775,000.

432. An IM for the GT2 Scheme was distributed on or after 12 November 2003. The GT2 Scheme was expressly marketed on the basis that it was an unregulated CIS with MFS (regulated by the FSA) as sponsor and Mr Gates as Managing Partner. The IM referred to the Partnership as the "The GenTech Partnership 2 LLP" (i.e. GT2 A).

433. On 20 November 2003, instructions were sent to Mr Bretten QC to advise on tax issues relating to the GT2 scheme. Mr Bretten QC provided his advice in writing on 23 January 2004.

434. On 24 November 2003, Innovator entered into a Purchase Price Utilisation Agreement ("PPUA") with IPSS.

435. On 14 February 2004, Xexco provided a valuation report on the Fair Market Value of the Business 24-7 technology. Applying the income valuation approach it was determined, based on the information with which Xexco had been provided, that the Fair Market Value of Business 24-7 was £24,090,646.

436. By a D/A dated 24 March 2004, Mr Carter purportedly entered the GT2 Claimants into the Partnership. Consistently with the IM, the D/A stated that it was made in respect of ‘The Gentech Partnership 2 LLP’ (i.e. GT2 A).

437. There is a Transfer of Trade Agreement purportedly dated 24 March 2004 made between GT2A and GT2B by which GT2A transfers “the Business” to GT2B. “The Business” is said to be described in Schedule 1 to the agreement but there is no such Schedule. The document is signed by Mr Carter alone as designated member of both GT2A and GT2B.

438. By an AEA dated 26 March 2004, the 4 Licensees appointed Niceology Limited to be the exploiter of the Business 24-7 Technology. Mr Tony Golder was the person driving exploitation on behalf of Niceology and deals with the steps taken. Entry into the AEA by Niceology was approved by resolution on 26 March 2004.

439. On 26 March 2004, a Security Agreement was entered into between IPSS as Technology Vendor and Niceology Limited as exploiter pursuant to which IPSS agreed to transfer interest accruing on the sum to be held in its deposit account to pay for interest accruing to the lender in relation to the loan to the Gentech 2 Technology Partnership LLP (GT2 B).

440. Also on 26 March 2004, the Board of IPSS met and resolved to grant powers of attorney to Mr Bailey and Mr Roper to effect the execution of all documents necessary to ensure that the banking arrangements contemplated in the AA could be put in place. The P/A was granted in respect of the sale to the “Gentech 2 Technology Partnership LLP” (GT2 B).

441. A Service Agreement was entered into on 26 March 2004 whereby the Gentech 2 Technology Partnership LLP (GT2 B) appointed Mr Gates to be the Managing Partner of the LLP.

442. A General Pledge and Assignment was given by IPSS to MFC Bank on 26 March 2004.

443. On 1 April 2004, Innovator and CLFL entered into a Loan Agreement pursuant to which Innovator would lend certain sums to CLFL in respect of the purchase of the GT2 technology. This referred to ‘The GenTech Partnership 2 LLP’ (GT2 A). On the same date, CLFL sought to borrow £2,016,548 pursuant to this facility.

444. By conference and in writing on 1 April 2004, counsel, Mr Crystal, advised in relation to potential regulatory consequences arising from some confusion as to the identity of the sponsor and promoter of the GT2 Scheme and, in particular, the fact that, whilst Moneygrowth Financial Services Limited was FSA authorised from 5 December 2003, MFS had ceased to be FSA authorised from 7 January 2004.

Subsequently, it also transpired that Mr Gates did not have FSA authorisation to act as Operator of the GT2 Scheme.

445. Financial statements for the period ending on 5 April 2004 were signed off by Crouch Chapman as auditors of the The Gentech 2 Technology Partnership LLP (GT2 B) on 11 May 2004.

446. On 27 May 2004, The Gentech 2 Technology Partnership LLP (GT2 B) entered into a Term Loan Facility Agreement with MFC by which MFC agreed to lend the LLP £12m. Also on 27 May 2004, the Gentech 2 Technology Partnership LLP (GT2 B) granted MFC a charge over its assets, including its rights to the Business 24-7 technology.

447. A Drawdown Notice was issued to the Bank on 27 May 2004 by which GT2 B sought £11,716,665 to be advanced to the loan account for onward transmission to the deposit account also held at MFC.

448. On 23 July 2004, the IR wrote to Mr Carter confirming that an enquiry notice had been issued in respect of the Gentech 2 Technology Partnership LLP (GT2 B).

449. An EGM of the Gentech 2 Technology Partnership (GT2 B) took place on 27 June 2005. The Partnership unanimously rejected IR's initial settlement offer of relief on 10% of the investment.

450. By a Transfer of Trade Agreement of 28 October 2005, the Gentech 2 Technology Partnership LLP (GT2 B) transferred its assets and liabilities to Gentech Technology Two Limited. A General Pledge and Assignment was made by IPSS in favour of MFC on 4 April 2006 in respect of the debt of Gentech Technology Two Limited. Gentech Technology 2 Limited additionally charged its assets in favour of MFC by way of debenture dated 19 July 2006.

451. At a further EGM of 24 January 2006, the partners of the Gentech 2 Technology Partnership LLP (GT2 B) met to consider the IR's further settlement offer. All but one partner voted in favour of accepting the offer of tax relief on 20% of the full losses claimed.

Allegations of "egregious conduct" specific to GT2

452. The documentary related allegations of "egregious" features or irregularities relied upon by the Claimants which may conveniently be considered here concern the alleged backdating of documents.

<u>Backdating of documents</u>

Deed of Adherence

453. The GT2 D/A is dated 24 March 2004. The date was entered by Mr Roper. The principal signatory to the Deed, exercising the P/A he had received from investors, is Mr Gates. Mr Gates' signature is witnessed on multiple occasions by Mr Roper.

454. In support of their allegation of backdating (in relation to all the Generation 3 schemes including Charit and also GT2) the Claimants relied in particular upon emails from Mr Roper sent on 1 April 2004. For reasons already given in relation to the Charit scheme I do not consider that they show the GT2 D/A to be backdated.

455. In relation to GT2, this is the only one of the Generation 3 D/As which is dated by Mr Roper and is the only one where the principal signatory on behalf of investors was not Mr Carter but Mr Gates.

456. These differences make it inherently likely the GT2 D/A was signed on a different occasion to the other Deeds.

457. Mr Carter's consistent evidence was that the GT2 D/A was signed at a separate meeting to any other Generation 3 D/As. Mr Gates confirmed that he had not "sat there and waited" while Mr Carter entered multiple signatures on D/As which did not involve Mr Gates .

458. Mr Gates' evidence was that he had specifically decided to "close the partnerships quite a bit before the end of the tax year." He stated that "my impression was that [the GT2 D/A was executed] quite a long time before the end of the tax year and the 24th would not be inconsistent with my recollection." This is supported by the dates of the application forms relating to GT2 which show a steady flow of investment into GT2 throughout March 2004, particularly as Mr Gates' self-imposed deadline approached. Having taken that decision, there is no particular reason why Mr Gates would have waited until 2 April before executing the D/As.

459. The existence of a single application form from Mr Bell after 24 March 2004 does not undermine the fact that the weight of the evidence demonstrates that the GT2 D/A was executed on 24 March 2004. Mr Bell was not called as a witness and the form could be misdated or Mr Gates may have been informed that the application form would be "on the way" as at 24 March 2004, such that Mr Bell was included in the relevant D/A.

460. The other matter relating to the allegation of backdating of the GT2 D/A which was put to Mr Carter in cross-examination (but not Mr Gates or Mr Roper) was that the CB ledger entries recording the receipt of investment monies for GT2 in many cases were made after 24 March 2004. However, I accept and find that this is merely another example of CB's administrative paperwork lagging behind the actual receipt of funds.

461. For all these reasons I am not satisfied that it has been shown that the GT2 D/A was backdated. Indeed, no reason for so doing was shown given that the signing date suggested by the Claimants, 2 April 2004, was still well within the relevant tax year.

LLP Deeds

462. It was alleged that the LLP Deeds dated 27 February 2003 and 26 March 2003 were backdated, not least because Mr Nielsen did not become a designated member until after Mr Evans' death in July 2003. It was Mr Carter's evidence that these dates were entered by mistake. I find these agreements were probably not signed until later in 2003, probably September 2003.

Agency Exploitation Agreements, Service Agreements and Security Agreements for Generation 3 Schemes (including GT2).

463. In support of this allegation the Claimants relied on the two pieces of correspondence from Ms Christensen to Mr Roper dated 6 and 10 May 2004. For reasons already given in relation to Charit I do not consider that they demonstrated backdating.

464. In summary, aside from the mistaken misdating of the LLP Deeds dated 27 February 2003 and 26 March 2003, I am not satisfied that it has been shown that any of the GT2 agreements were backdated and I find that they were not.

Arte Scheme Arrangements

Narrative summary

465. Arte was a data recording product used for market and other forms of research. The Developer / Vendor was Arte Inc. The Business Plan for the Arte / Poll Technology was dated 29 November 2003.

466. On 18 November 2003, Arte Inc entered into four licence agreements with (1) HBI Sales Private Limited (for the territory of Asia); (2) ICT Europetec Limited (for the territory of Europe); (3) Mir Technologies LLC (for the territory of the USA and Canada); and (4) Zacan Holdings Proprietary Limited (for the territory of Australia).

467. By these licence agreements, Arte Inc granted a sole and exclusive licence to each Licensee to use and exploit the Arte Technology in that licensee's territory in consideration for the Licensee undertaking to provide regular reports, forecasts etc in relation to its exploitation of the Technology. These agreements were amended slightly by way of a Deed of Variation dated 20 September 2004.

468. On 27 November 2003, The Arte Technology Partnership LLP was incorporated at Companies House under Partnership Number OC306158.

469. On 27 November 2003, a Limited Liability Partnership Deed was executed by Mr Carter and Mr Neilsen on behalf of the Arte Technology Partnership LLP.

470. On 29 November 2003, The Arte Technology Partnership LLP entered into a Sale and Purchase Agreement with Arte Inc.

471. On 29 November 2003, Innovator also entered into a Purchase Price Utilisation Agreement ("PPUA") with Arte Inc.

472. On 18 June 2004, Mr Beer on behalf of Xexco wrote to Mr Carter enclosing his valuation report on the Arte/Poll Technology. The date of the valuation was 15 June 2004. Xexco adopted the income approach to the determination of Fair Market Value. It appears that two reports were prepared. In the first, and based on an analysis of the Business Plan and Arte Inc financial forecasts, Fair Market Value was determined to be £28,347,159. In the second, and based on Arte Technology LLP financial forecasts, the Fair Market Value was determined to be £16,642,141.

473. According to the Arte IM the Partnership was to fund its acquisition of the Technology from the aggregate of the "Capital Contributions" received from the Partners. "Capital Contribution" was defined as "the cash payment required from each Subscriber to invest in and become a Partner of the Partnership". "Loan" was defined as "A loan, equal to 80% of the Capital Contribution provided to each Partner by the Bank". "Bank" was defined as "The bank providing the Loan to each Partner to assist the Partner to pay the Capital Contribution". "Net Contribution" was defined as "The difference between the Capital Contribution and the Loan, being 20% of the Capital Contribution". The change in the structure for 04/05 Schemes was necessitated by the 10 February 2004 Ministerial Statement.

474. The subscription application form provided as follows:-

> "I hereby apply to the Bank for a personal loan as stipulated above and my application is conditional upon the loan being granted by the Bank."

475. On 24 August 2004, CB wrote to Arte Inc, the Technology Vendor, setting out its terms of business in relation to their acting as agents to receive the Technology purchase price from the Arte LLP. That letter was signed on behalf of Arte Inc on 7 September 2004. The letter notes that CB "acknowledge confirmation of your instructions that we may accept and act upon payment instructions in relation to the purchase price from your client account from Paul Carter, Managing Director of InnovatorOne Plc."

476. CB then sent its client care letter to Mr Carter on behalf of the Arte Technology Partnership on 2 September 2004. This letter was returned signed by Mr Carter on 7 September 2004.

477. There was a Pre-Budget Report which was published on 2 December 2004 that set out proposals to restrict tax relief where structures were used which employed non-recourse or limited recourse loans.

Following the publication of this announcement, Mr Carter decided to send a letter to all introducers.

478. Mr Carter's letter confirmed that as the Innovator structure used full recourse loans, this change would not affect its Partnerships. The letter also confirmed that "we closed the Arte Technology Partnership on 30th November". The Pre-Budget Report published made it clear that the new restrictions on the availability of capital allowances would apply to partnership contributions made on or after 2 December 2004. As Mr Carter explained, the Pre-Budget Report essentially meant that no more contributions could be accepted so that the Partnership was effectively closed.

479. Mr Carter purported to enter the Arte Claimants into the Arte Technology Partnership LLP pursuant to a D/A purportedly signed on 8 December 2004.

480. On 8 December 2004, Mr Carter entered into a Service Agreement with the Arte Technology Partnership LLP pursuant to which he became the Administrator of the Partnership.

481. The Arte Technology Review (the final date of which is 13 December 2004), written by Mr Petr Zakostelny and Mr Ajit Ahloowalia was then produced. It concluded that "The Arte application should be acquired for a reduced amount or alternatively we can seek to have it re-developed with better functionality and a better user experience – this is a cost benefit analysis left for others to decide upon".

482. The 4 Licensees were to enter into an AEA (dated 5 January 2005) with Artex Solutions Limited ("the Exploiter") pursuant to which the Exploiter would exploit the Arte Technology. A Security Agreement also dated 5 January 2005 was entered into between Arte Inc and the Exploiter pursuant to which Arte Inc agreed to transfer interest accruing on the sum to be held in its deposit account to pay for interest accruing to the lender in relation to the loan to the LLP.

483. On 25 February 2005, Mr Roper wrote to Mr Hediger of MFC Bank. The letter states: "As I mentioned to Peter Merz recently we have now closed the investment for the Arte Technology Partnership LLP and, as you will recall, this is the first generation whereby the loans are being granted to the individuals rather than to the Limited Liability Partnership itself, although of course, the money will still go from the individual loan accounts to the LLP account for onwards transmission to the Technology Developer. I am going through all of the identification material to ensure that it is all correct, in place and consistent but, in the meantime, thought it may be useful for you to ask, perhaps, one of your colleagues to go through to make sure there is sufficient information in respect of each of the individuals to enable you to open the account once I have forwarded to you certified copies of the documents."

484. On 15 March 2005 a note of an Innovator Team meeting records in respect of Arte that although most documentation is in place, "The main problem here is that the Swiss bank have rejected some money laundering documentation which although acceptable are not acceptable in Switzerland. Paul Carter is dealing with this".

485. An application was made by Arte Inc to open an account at MFC on 26 May 2005. There is a draft General Pledge and Assignment which does not appear to have been executed.

486. On 19 July 2005, Mr Hochong wrote to Mr Carter stating that the purchase price for acquisition of the Technology was reduced “as part of the negotiations between Innovator and Arte Inc. because of the failure of Arte Inc. to fix a couple of bugs in the software prior to closing”.

487. On 8 December 2005, the IR wrote to Mr Carter issuing an enquiry notice in respect of the Arte LLP.

488. On 13 January 2006, Mr Hochong (on behalf of Arte Inc) wrote to Crouch Chapman to confirm that the purchase price of the Arte technology was £7,080,000.

489. Crouch Chapman as auditors of the Arte LLP, signed off on the LLP’s financial statements for the period ending 5 April 2005 on 3 February 2006.

490. On 15 February 2006, Arte Technology Limited was incorporated at Companies House under company number 5711122.

491. On 29 March 2006, Mr Carter wrote to Mr Bailey and stated as follows: "Having agreed to refinance the Arte Partnership with another bank, please transact the following transfer by tomorrow morning… from your client account for the Arte Technology Partnership …. to InnovatorOne plc".

492. On 31 March 2006, Mr Carter wrote to the Arte Claimants and indicated that, following the restructuring of MFC, the latter was no longer going to fund Arte. He further stated: "We have now agreed with Fairbairn Private Bank Limited to take over the position vacated by MFC but unfortunately this requires information to be provided as detailed in the enclosed Account Opening Form"

493. On 2 October 2006, Mr Carter wrote to the Arte partners and stated that although a number of partners had completed the application forms required by Fairbairn, many did not. “As a consequence, no loans were ever drawn down.” He further stated that the most appropriate course of action would be to amend the tax return previously prepared.

494. On 26 February 2007, Mr Carter wrote to the Arte partners regarding the position with MFC, the tax position, the IR's position and the reduction in the purchase price. The letter suggested that it was not possible to unwind the transaction but further suggests that the Partnership might be able to sell to a US entity and list in the US.

495. In the course of the IR's enquiry into Arte the same 20% deal was proposed by IR and communicated to each of the partners by Mr Carter's letter of 30 August 2007. The Arte partners did not accept the IR settlement offer.

496. On 15 October 2007, Mr Carter wrote to the IR noting that the partners had not made a decision regarding the continued operation of the Partnership. In response, the IR withdrew its prior offer to settle at 20%. A closure notice was issued by the IR denying all relief. This closure notice was never appealed.

Allegations of "egregious conduct" specific to Arte

497. The documentary related allegations of "egregious" features or irregularities relied upon by the Claimants which may conveniently be considered here concern the alleged backdating of documents.

<u>Backdating of documents</u>

Deed of Adherence

498. In support of their allegation of backdating the Claimants relied in particular upon Mr Roper's email to Mr Carter of 8 March 2005 to which he attached an unexecuted copy of the D/A and requested that Mr Carter use his P/A to execute the draft.

499. Further, Mr Carter had not apparently returned an executed copy of the D/A to Mr Roper by 5 May 2005 when Mr Roper asked him for it by email. Ms Barrie wrote on her version of that email next to the requested D/As "PC to sign". The Claimants suggested that this indicated that the D/A had still not been signed by May.

500. In his evidence Mr Carter accepted that the D/A had not been dated until March but explained that "it was dated the date on which we had closed...already closed the partnership to new partners", and that this would have been done in March, not May 2005. Given that the matter was expressly raised in March and that all concerned were aware of the importance of executing the D/A before the end of the tax year I accept and find that it was signed in March 2005.

501. Although Mr Carter dated the Arte D/A 8 December 2004 there is no evidence that this was in any way directed or advised by Mr Roper and I find that he was not even aware that Mr Carter had done so. Mr Roper did not sign, witness or date the Arte D/A.

502. There appears to have been no particular reason for Mr Carter to backdate the D/A other than, as he explained, to reflect when the Partnership closed. Although there was some suggestion by the Claimants that it may have been related to the 2 December 2004 Ministerial Statement, this cannot have been the case since it was not dated before that Statement.

LLP Deed

503. In support of the allegation that the LLP Deed was backdated the Claimants relied upon the fact that "Accountants" in the LLP Deed is defined as Baker Tilly but this is amended in manuscript (initialled by Mr Carter) to add the words "or such other as the partners may decide". It was suggested that the inference to be drawn is that this was added in order to accommodate the resignation of Baker Tilly from other Innovator LLPs and its withdrawal from its involvement in the Schemes in March 2004. Whilst, Mr Carter's manuscript amendment is likely to have been made after Baker Tilly's resignation that is no reason for supposing that the rest of the Deed itself was executed then. As Mr Carter explained, the Arte LLP was incorporated on 27 November 2004 and it would have made absolute sense to execute the LLP Deed at the same time.

504. There is a footer on the first page of the document which bears the date of 10 December 2004 which suggests that at least an amendment was made on that date.

505. The Claimants also relied on an exchange of emails involving Mr Roper in March 2005 that suggests that he did not have a copy of the signed LLP Deed at that stage. There is nothing surprising about that and Mr Roper's email suggests that he believed that a "signed original" may already exist and be in Innovator's possession.

506. The Claimants also relied on Mr Roper's email of 5 May 2005 requesting a copy of the signed LLP Deed. This indicates that he has not yet received it but not that there was no signed version in existence.

507. In all the circumstances, I am not satisfied that it has been shown that the LLP Deed was not executed and signed on 27 November 2004 albeit that it appears to have been amended at a later date in March 2004 (and possibly December 2004) and not re-executed.

Agency Exploitation Agreement

508. The Claimants submitted that backdating of the AEA is evident from four letters from Mr Carter dated 15 June 2005 to each of the Licensees by which Mr Carter requested that they sign the AEA. Mr Carter instructed the Licensees not to date the agreement. By letter dated 22 August 2005 Mr Carter sent the AEA to Mr Gebhard and requested that he arrange to have this executed by Artex Solutions Ltd. It is apparent that the AEA was not finally signed off until this time but

it was Mr Carter's evidence that the date reflected the date upon which the AEA was in place and operational. He pointed out that Artex Solutions Ltd was an exploitation company operating under the Outlander Management Limited umbrella managed by Mr De Bo who would have been well aware of the terms of the operative agreement.

Banking Documents

509. This allegations stem from an email dated 5 May 2005 sent by Mr Roper to Mr Carter in which he stated: "I would be grateful if you could kindly date each of the bank documents sometime in January of this year to ensure that we can use the existing anti-money laundering documentation." The "bank documents" referred to are identified in the immediately preceding passage as "The individual bank opening documents."

510. The "individual bank documents" were the documents pursuant to which investors applied to MFC to open individual bank accounts for the purpose of receiving personal loans (the receipt of personal loans being the main structural difference between the Arte Scheme and previous generations of the Innovator Schemes).

511. Mr Carter's authority to sign these documents arose from the P/A contained in the Application Form which had been received by Mr Carter by 26 November 2004. Mr Carter no doubt should have completed the account application forms promptly upon receipt of those authorities. The difficulty with not having done so was that if the account opening forms were not dated within 3 months of the date of the supporting anti-money laundering documentation this would cause an internal difficulty at MFC.

512. Mr Roper's unchallenged evidence was that he discussed this issue with MFC and agreed the date which should be put on the bank opening documents with the appropriate representatives of that bank before asking Mr Carter to "date each of the bank documents sometime in January." I find that this was a proper procedure and that it does not support any allegation of dishonesty against Mr Roper.

513. In any event, Mr Carter did not in fact backdate, or enter any date, on any of the bank documents.

514. In summary, aside from the March 2005 D/A being dated in December 2004 I am not satisfied that it has been shown that any of the Arte agreements were backdated and I find that they were not.

(4) THE CONSPIRACY & FRAUD ALLEGATIONS (Part 1)

The Claimants' case

515. As stated in their Closing Submissions, "the Claimants' core case is that each of the schemes was a fraudulent scheme".

516. The RRAPOC begins by asserting that "the claims arise from a complex fraud practised upon the Claimants."

517. The essential basis upon which the Schemes were alleged to be fraudulent is set out in paragraph 4 of RRAPOC as follows:

> "4. The Schemes were fraudulent schemes established, promoted and operated with a view to defraud investors of subscription money, under the guise of being genuine schemes established and operated such as to carry on the Trade with reasonable prospects of success and attendant tax advantages. In fact:
>
> 4.1 there were no Technology rights or none with any real value or exploitation prospects;
>
> 4.2 the promoters and operators had no intention, or no real intention, to exploit the Technology Rights, or to do so in such a manner as to provide any real prospects of success;
>
> 4.3 investors' subscription money was wrongly disbursed (including in breach of trust) and misappropriated, before and after they were purportedly made partners;
>
> 4.4 the "Technology Vendors" (called "Technology Developers" in IMs), all international business companies ("IBC (s)") incorporated in offshore jurisdictions and subject to limited disclosure requirements, had not carried out any development of Technology rights;
>
> 4.5 the purchase price for the acquisition of Technology rights due to a Technology Vendor as apparent from each IM, represented a fraction of the price in fact receivable by that vendor, given arrangements not disclosed to investors;
>
> 4.6 there was no real finance to fund the Trade beyond subscription money actually paid by subscribers."

518. Further details of the allegation of fraudulent schemes were set out in paragraphs 248 to 255 of Section P of RRAPOC and may be summarised as follows:

> (1) There were no genuine Technology rights or Technology (paragraph 249).
>
> (2) The value of such rights (if any) was minimal or bore little relation to acquisition costs under the Acquisition Agreements, if having any value at all (paragraph 249).
>
> (3) Many, if not all, Technology Vendors were offshore companies controlled or influenced by Mr Stiedl (paragraph 251).

(4) There was no genuine arms length negotiation of the acquisition cost of Technology purportedly acquired (paragraph 251).

(5) There was no genuine valuation thereof, despite the impression given in the IMs that there was (paragraph 251).

(6) There was no process or proper process of due diligence carried out to assess the Technology, despite impressions and assurances given to the contrary (paragraph 251).

(7) There was minimal if any exploitation and no real intention that there should be any real attempt at exploitation of the Technology (paragraph 252).

(8) There were huge irregularities including backdating of documents (paragraphs 253 and 254).

519. The conspiracy underlying these fraudulent schemes was alleged to be as follows (paragraph 331 of RRAPOC as amended during trial):

> "331. Mr Stiedl, Mr Carter, Mr Evans (until his death on 21.07.03), Mr Bailey, Mr Gates (in the case of the GT1 and GT2 schemes only), Innovator and CLFL, including by establishing and/or operating the Innovator schemes and related arrangements (including those related to CLFL) conspired to injure the Claimants by unlawful means, namely by inducing them to subscribe money in a Partnership purportedly formed to conduct a business with a view to profit with substantial external Bank funding, when at all material times:
>
> 331.1 such business was a sham and/or there was no genuine or realistic prospect of trading or making any profit and no real external funding beyond money subscribed by subscribers;
>
> 331.2 the real purpose of the scheme was to enable Mr Stiedl and his associates including Mr Carter, Mr Evans and Mr Gates to secure for themselves huge reward from subscription money paid."

520. The amendment made during the trial to the effect that Mr Gates was only an alleged conspirator in respect of the GT1 and GT2 Schemes made it clear that it was not, or was not any longer, being alleged that there was a single overarching conspiracy.

521. The essence of the Claimants' pleaded fraudulent scheme/conspiracy case was their allegation that the business was a "sham" and that "there was no genuine or realistic prospect of trading or making any profit". This was closely linked to their allegations that (1) there were no Technology rights or none with any real value or exploitation

prospects; and (2) the promoters and operators had no intention, or no real intention, to exploit the Technology rights, or to do so in such a manner as to provide any real prospects of success.

522. During the course of opening the case the Claimants emphasised that they would "seek to make out their case as to conspiracy by reference to the multiple irregularities that they say attended each Scheme and by reference to the arrangements made as regards (and related to) establishing and operating each Scheme." This means that it is not possible to determine the conspiracy claim without first considering the alleged "multiple irregularities" which the Claimants contended attended each Scheme as exemplified by all their other asserted causes of action.

523. Although conspiracy was logically the Claimants' primary claim, since if such a conspiracy existed then all or most of their other claims would flow from it, I shall not draw any final conclusions in respect of the conspiracy claim until all the other causes of action and alleged multiple irregularities have been considered.

524. I shall, however, address at this stage the main pleaded allegations upon which the claim was based, as set out above.

Relevant legal principles

525. The relevant legal principles were not in dispute.

526. The elements of the tort of conspiracy to injure by unlawful means were summarised by the Court of Appeal in *Kuwait Oil Tanker Co v. Al Bader* [2002] 1 All ER (Comm) 271 at [108] as follows:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a 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."

527. This passage was approved by the Court of Appeal in *Sophie Baldwin, Ramasan Navaratnarajah v Berryland Books* [2010] EWCA Civ 1440 (at paragraph 45). Etherton LJ went on to set out the further requirements for a finding of conspiracy at [46 and 47]: "46 It is not necessary that every overt act is done by every conspirator, but the act must be done pursuant to the conspiracy or combination: Kuwait at [110]. Further, it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, that is to say, that they deliberately combine, albeit tacitly, to achieve a common end: Kuwait at [111]. Nourse LJ quoted (at [111]) the following passage from the judgment of the Court of Appeal Criminal

Division delivered by O'Connor LJ in R v Siracusa (1990) 90 Cr App R 340 at 349 as being of assistance in this context:

> "Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made, or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity."
>
> 47 It is not necessary, therefore, for the conspirators all to join the conspiracy at the same time. The parties must, however, 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 at [111]. In most cases it will be necessary to scrutinise the acts relied upon to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination, for it will be a rare case in which there will be evidence of the agreement itself: Kuwait at [112]."

528. The required intention for the purposes of this economic tort was set out by Lord Hoffmann in *OBG Ltd v Allan* [2007] UKHL 21 who stated at [62]:

> "Finally, there is the question of intention. In the Lumley v Gye tort, there must be an intention to procure a breach of contract. In the unlawful means tort, there must be an intention to cause loss. The ends which must have been intended are different. South Wales Miners' Federation v Glamorgan Coal Co Ltd [1905] AC 239 shows that one may intend to procure a breach of contract without intending to cause loss. Likewise, one may intend to cause loss without intending to procure a breach of contract. But the concept of intention is in both cases the same. In both cases it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions."

529. Further, the House of Lords made it clear that a high degree of blameworthiness is required. Lord Nicholls stated at [166]:

> "Lesser states of mind do not suffice. A high degree of blameworthiness is 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."

530. Various breaches of duty were pleaded against the Defendants. To establish a combination to cause loss by any of those wrongs it would need to be shown that there was a deliberate combination to cause loss by way of carrying on acts said to be constitutive of those wrongs. For these purposes, the FSMA claims could not be the subject of a claim in conspiracy since the circumstances in which a claimant can rely on breach of statute as unlawful means is limited to cases where, on its proper construction, the relevant statutory obligation was imposed for the benefit of a particular class - see *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] A.C. 173. FSMA is not, however, for the benefit of a particular class: it is for the benefit of the wider public.

531. To succeed in their claim in conspiracy the Claimants would therefore need to show that other alleged breaches of duty were committed. If that cannot be established, there can be no combination by unlawful means. If that can be established, it would be necessary for the Claimants also to establish that the Defendants were party to a deliberate combination or arrangement to carry out those wrongs with the intention to cause damage to the Claimants.

Application to the facts

(1) Were there no or no genuine Technology rights? (RRAPOC 4.1; 249)

532. It is clear that in relation to each Scheme there were Technology rights and the Claimants did not seriously pursue a contrary case at trial.

533. In relation to each Scheme the Claimants' technology expert accepted that there was genuine and real Technology.

534. In relation to a number of Schemes (Etrino, Charit, and Business 24/7) unchallenged factual evidence was given by the Technology Vendor that genuine and real Technology existed.

535. In closing the Claimants sought to emphasise that there was no Technology as described in the IM, as opposed to no Technology at all. However, that is not how their case on sham or fraudulent schemes was pleaded. The pleaded case was that there were "no Technology rights or none with any real value or exploitation prospects"; not that the Technology rights did not comply with the IM description. Alleged non-compliance with description is of relevance to one of the Claimants' alleged IM Conditions. However, for reasons set out later in the judgment, I find that no such condition existed.

536. A related point was made in relation to Optibet and Arte to the effect that the source code reviewed by the experts was different to that referred to in the IM, albeit that it had a similar functionality. Whilst that is factually correct, the source code reviewed was genuine Technology, as both experts agreed, and indeed was an apparent improvement. Further, there was no reason to doubt that the source code referred to in the IMs had existed and was real and genuine, albeit the experts were not able to review it. Indeed there was direct evidence to that effect in relation to Arte.

537. I find that there were genuine Technology rights in relation to each Scheme.

(2) Were the Technology rights of no or no real value, or of minimal value bearing little relation to the Acquisition costs under the Acquisition Agreements? (RRAPOC 4.1; 249).

538. In support of their case the Claimants alleged that some of the Technologies were missing vital functionality without which the Technology would be valueless. Thus it was said that an examination of the available source code for YTC showed it lacked the means to produce course content. It was also said that an examination of the source code for Charit showed that it lacked the ability to receive email.

539. However, the experts were working on the source codes now available, nearly ten years later, and one cannot know whether that was the state of the source code at the material time. Further, although much criticised, I consider that there is force in the common sense point made by the Defendants and their expert, Dr Collis, that it is inherently improbable that the Technologies would lack such obvious and vital functionality.

540. In relation to YTC, it was common ground that the sister Technology, YTC Legal, could produce course content. It would be nonsensical to create training software without the means of creating course content, all the more so when the means to do so was known to be available. I accordingly accept Dr Collis' evidence that that functionality must have and did exist.

541. In relation to Charit, the source code examined by the experts did not include an ability to receive emails, but a web mail system such as Charit must have had that functionality. That it did is borne out by common sense and the Charit witnesses' evidence and I so find.

542. In support of their case that the Technologies had little or no value the Claimants relied on the expert evidence of Dr Sharp.

543. However, although Dr Sharp was critical of the valuation figures produced by the independent valuers, he did not suggest that the Technologies had no or no real value. The main point made in his reports was that if one adopted a "cost" approach to valuation it produced a valuation figure that was orders of magnitude less than that of the valuation reports.

544. In evidence he acknowledged that the cost approach was not an appropriate way to value the Technologies, which it plainly was not. In particular it assumes that (1) there is another similar product available to buy which, in the start-up technology market where novel products are being developed is not the case; (2) investors would be able and prepared to take the time to invest in an alternative; and (3) the first technology that one walks away from has no intellectual property protection. Further it ignores the fact that these were tax Schemes where the relief could only be obtained on qualifying expenditure and expenditure incurred within the relevant tax year.

545. The valuation approach adopted by the independent valuers engaged by Innovator was the "income" or discounted cash flow approach. CB's valuation expert, Mr Forbes, confirmed that this was the method almost invariably used. It was his evidence that he had hardly ever seen the cost approach argued for, let alone used, that it is not representative of value and that, if used, it is jettisoned before it gets far.

546. I find that the income approach is the usual and most appropriate method to value start-up technology. Indeed Dr Sharp accepted in cross examination that it was "the right way of valuing a business". Further, at the end of his cross examination Dr Sharp accepted that, subject to one matter, the valuations produced "a reasonable value to place on that which has in fact been valued".

547. Dr Sharp's caveat was that insufficient due diligence had been done on the projected income figures in the Technology Vendor's Business Plans which formed the basis of the income approach valuations. With one or two exceptions, the independent valuers would simply accept these figures at face value and work out their valuations accordingly.

548. Mr Forbes' evidence was that there is no such thing as proper due diligence in relation to start up Technologies and it was his experience that due diligence was not done on cash flows. He explained that:

> "I should say at this point that due diligence in practice is not generally prepared on cash flows anyway, because of their nature. You will find very few assurances given on forecasts. We never give assurances on forecasts. Accounting firms only do it very rarely. The sort of due diligence that is done in practice is usually more often on historical information, and even that is difficult to verify."

549. Mr Forbes also stressed the highly subjective nature of any attempt to carry out due diligence. He explained that:

> "Where you fairly rapidly arrive on this particular investment is that it is a pre-revenue investment, it is very risky and it has a chance of huge returns. So any due diligence on those issues is going to be massively subjective and you won't get any kind of assurances. You might get questions; you might get checks. At the end of the day, you will get a very wide range of come-backs from different people. Some people will say 'forget it, you don't have a chance', other people will say 'it's the next Facebook.' So you are almost asking me to do the impossible by due diligence here."

550. He further explained that:

> ".. people are going to have a lot of different views about that, legitimate different views, and it will be up to you, if you are looking to invest the 10 million based on my advice, as to how - - what is important, what you are prepared to take a risk on, what you want to know, what you want to check out. Bearing in mind that nothing can be checked out, really. You know, without any kind of assurances. You would have to proceed on the basis that it is a very high risk punt on a very risky investment. It is a pre-revenue investment and it is in information and communication technology, which is a market that is going through revolutions. So it is not possible to be precise. That is why I'm not surprised that Arte 28 million, Arte 19 million, I am sure people would bandy around much bigger ranges and I would think that would be normal."

551. Mr Forbes had more experience of start up technology valuations than Dr Sharp. Whilst I accept his evidence that due diligence is a very difficult exercise which may support a wide range of income projections, I do not accept that this means that no meaningful due diligence can ever be done.

552. What due diligence can be done and its usefulness may vary between technologies. Where, as for example with Charit, the business plan is based on the Technology going viral it may be very difficult to carry out meaningful due diligence. On the other hand where, as with YTC, the Technology is aimed at a specific market one would expect it to be

possible to make investigations of that market and of the potential appeal of the Technology in that market. Dr Sharp in his report gave examples of the type of due diligence which he considered could be done.

553. I would therefore accept that the failure to carry out due diligence on the Technology Vendors' Business Plans and projected income figures is a shortcoming of the valuations which were produced. That does not, however, mean that the Technologies had no or no real value. Nor does it mean that they had only minimal value. The likely outcome of any such due diligence would be to support a wide range of income projections, and the projections actually produced are unlikely to have been outside that range. It was Mr Forbes' evidence that the figures produced were "the sort of thing I would expect" although he acknowledged that the range is very substantial.

554. I find that the Technology rights were of real value, that that value was more than minimal and that it did bear relation to the acquisition costs under the Acquisition Agreements.

(3) Did the Technologies have no or no real exploitation prospects? Was there no or no real intention to exploit the Technology rights? Was there minimal if any exploitation? (RRAPOC 4.1; 4.2; 252).

555. There was evidence at trial from a number of people involved in the exploitation of the Technologies. By way of example:

(1) Mr Wren-Hilton, whose evidence as to exploitation in his witness statement was not seriously challenged and who confirmed that capital was invested in the exploitation of Agent Mole and Business 24-7;

(2) Mr Binks, who confirmed his understanding that (had it not been for difficulties with Mr Lewis) some £240,000 would have been spent by Marble Eye on the exploitation of Etrino;

(3) Mr Brocklebank, who ran exploitation 'boot camps' at Outlander. He gave evidence as to the Exploiters' levels of motivation, the amount of time and effort devoted to exploitation and the initial 'boot camps' which was not challenged in any serious way. His evidence showed that certain Technologies, in particular Optibet and MobileMail, achieved a measure of commercial success and very nearly took off; "I think Optibet was one of those technologies where it could have really sneaked under the radar and just gone viral very, very quickly and grown its user base without having to have the advertising background".

(4) The fact that none of the Technologies ultimately succeeded did not mean that genuine efforts were not made to exploit them: "there were some really promising technologies. I wouldn't have taken on the role if I didn't think so. And I think the market has

shown us some of them were in extremely attractive places. Why they didn't succeed can be down to a number of factors. Money might be one of them."

(5) Mr Flint, who invested a substantial amount of his own time and money into MobileMail and persuaded family and friends to do likewise. He explained that;

> "Over the course of the first kind of 18 months there was a lot of time and effort spent into ... developing the sales and marketing strategy. There were challenges with the technology that we ... developed. We did bring it to market. We did win businesses and create a distribution network sufficient to attract further technology and management to the point where we were a fully operational profitable business. The longevity of that didn't turn out, but I think there is – at what point you become a fully operational business, I would argue that during that journey we did achieve that."

(6) Mr Golder, who negotiated real money for the exploitation of Business 24-7, and made real attempts to develop and exploit Business 24-7 through the Niceology concept/portal.

556. There was also important evidence from Mr McCallum who was employed by Innovator, at its expense, to monitor the Technology exploitation.

557. Mr McCallum was an experienced management consultant whose integrity was unchallenged by the Claimants in evidence. He confirmed that there was genuine Technology and genuine attempts to exploit the Technology for all of the Schemes and much of his detailed witness statement dealing with the exploitation of the Technologies was not challenged.

558. Mr McCallum stated how certain of the Schemes initially did very well and looked like they might take off. In relation to Quiet Days, for example, he described how it completely rebranded itself, launched its service and had made sales and had real customers. He further stated that it had extensive advertising and showed that "they could drive customers on to their site and through – it was primarily an SMS service, so through their SMS service by using different types of advertising. I would say for a business at a very early stage having its first contact with the real world market, I would call that flourishing. If it was my company, I would be very pleased with it."

559. Although Mr McCallum accepted that the structure of the Schemes made exploitation difficult, his evidence is inconsistent with the Claimants' case that there were no exploitation prospects and was no intention to exploit the Technology.

560. Mr Honeywell of KPMG (called as a witness for the Claimants) accepted that Mr McCallum was frustrated by the lack of progress on exploitation. He said he agreed with Mr McCallum's conclusions on many of the reasons why exploitation was unsuccessful; in particular, events like marketplace developments and new regulations had arisen to stifle the development of some Technologies.

561. Mr McCallum confirmed that an issue in relation to exploitation was the funding of the Exploiters. Mr Carter acknowledged in evidence that (with hindsight) this was a failing of the structure and documentation, although as a matter of fact the Technology Vendors and Developers did provide substantial funding to the Exploiters. He therefore disagreed with the assertion that there was no money in the system and observed that it was in everyone's interest to make those Technologies as successful as they could be.

562. Mr Carter also said that the Technology Vendors all thought they were going to be the next Bill Gates and it was their aim to make their Technology a success. This was borne out by the evidence of those Technology Vendors who gave evidence.

563. Mr Carter's evidence was that he believed that all Technology Vendors, through their Exploiters, had a very good go at exploiting the Technologies. He denied that there had been no or minimal exploitation, even though such exploitation was not ultimately successful.

564. The lack of financing of Exploiters may be said to have been a defect in the commercial structure of the Innovator Schemes. Further, the fact that 80% of the purchase price was to be used to secure the bank funding meant that, absent successful exploitation, there would be limited funds immediately available. However, difficulties encountered in successful exploitation do not mean that there were no prospects of such exploitation, still less no intent to do so. I am satisfied and find that there were genuine and real attempts at exploitation and real prospects of such exploitation being successful.

565. I find that the Technologies did have real exploitation prospects, that there was a real intention to exploit the Technology rights and that there was more than minimal exploitation.

(4) Whether there was no development of the Technology Rights by the Technology Vendors (RRAPOC 4.4)

566. The Technology Vendors who gave evidence had clearly developed Technology; namely, Messrs Wren-Hilton and Walsh (Agent Mole and Business 24/7); Mr Lewis (Etrino) and Messrs Speirs, Joshi and Burade (Charit).

567. Mr Honeywell gave evidence that the Technology Vendors who he met (he named 6) all appeared to him as people who thought they had genuine and worthwhile Technology which they had developed.

568. The Claimants and their expert criticised the extent of the development of the Technologies and the fact that they were not all in an immediately marketable state. However, as the evidence made clear, technology is not static. It evolves and indeed has to evolve to meet and move with market demands.

569. Mr Gray, a software analyst and developer employed by Mr McCallum, explained that the software was 'iterative' in that one expected any problems to be resolved and enhancements to be made over time. Software development did not reach an end point, it was an ongoing process. Further, where problems existed, Mr Gray confirmed that it would normally take only a few days at £250 per day to fix them. Mr McCallum explained in evidence that it was conventional within the industry to describe technology in the present tense even though it was still in development. Mr Gates stated that if the Business Plan was commercially sound, problems with the source code could always be fixed.

570. When it was put to the Defendants' expert, Dr Collis, that where a purchaser acquires fully functioning technology that is ready to be exploited that is what he should get, he said:

> "I disagree with this notion that it is fully functioning technology that is ready to be exploited because you have to remember that we are dealing here with an opportunity that some entrepreneur has looked at and thought: I could write a software service or a software product to exploit this. But they need to get feedback. They need to be in a virtuous circle of learning about how their product is used by their customers so they can perfect it. I think this notion that you could just sit in a darkened room and bash out some code and then say "Right, now we are going to exploit this" is wrong ..."
>
> I think where we disagree is that we – you are proposing to me a scenario where something is a finished product and fully ready to go, in which case there would be no need for the developer to do any further work on it. But I come from a world where software is developed quickly, it is put out into the market place and is adapted as we understand how people are using it."

571. Dr Collis confirmed that there is a never a finished product in software: the technology is always responding to what one discovers in the market and what one's customers need. The Claimants' expert, Mr Dickson, accepted that the normal way of start-ups developing software would be through an iterative process by which technology

would be developed as an ongoing process rather than to specified standards set out up front.

572. I find that in every case there was technology which had been developed. Further development was required, but that is always going to be the case. Technology does not and cannot afford to stand still.

(5) Whether many, if not all, Technology Vendors were offshore companies controlled or influenced by Mr Stiedl (RRAPOC 251).

573. The allegation that many Technology Vendors were controlled or influenced by Mr Stiedl appears to have been based on a misunderstanding of the involvement of First Global. First Global was not a Technology Developer or Vendor in relation to the Innovator Schemes in any substantive sense. It was used as a conduit for tax reasons for some of the Schemes, including Etrino.

574. This was confirmed in the evidence given by Mr Honeywell of KPMG on behalf of the Claimants. He agreed that:

> (1) First Global was interposed where the primary Technology Vendor did not itself have an offshore arm which could make the sale without an immediate corporation tax liability.
>
> (2) If the Technology was not sold offshore and then acquired onshore, there would be a potential corporation/CGT liability that would be greater than the balance of the 20% that would be available to the Technology developer.
>
> (3) Just because software was channelled offshore through First Global did not mean that it was not originally owned and controlled by someone independent of Mr Stiedl. He could not say that he had found evidence to suggest that any other original technology vendors were entities owned, controlled or influenced by Mr Stiedl.

575. Whilst it is therefore factually correct that for various Technologies First Global, which was a company controlled by Mr Stiedl, was the immediate vendor, this was as a conduit for tax reasons and is not indicative of any fraud or conspiracy.

(6) Whether there was no genuine arms length negotiation of the acquisition cost of the Technology (RRAPOC 251).

576. The substantive Technology Vendors were independent parties who were not connected with any of the Defendants.

577. During the course of the trial some doubt was cast on the role of Mr and his relationship with Mr Stiedl. Mr DeBo was behind some of the Technologies, but was not a Defendant or alleged conspirator and was

not mentioned in the RRAPOC. That being so, the nature of his role and relationship with others was not explored in any detail in disclosure or in evidence. Although it is clear that he was a personal friend of Mr Stiedl, on the evidence before the Court there is no basis for treating him as a connected party.

578. The price negotiations were therefore between arms length parties. Mr Speirs and Mr Wren-Hilton gave evidence of arms length negotiations with Mr Stiedl.

579. It was suggested to Mr Stiedl that there was no real arms length negotiation over price. Mr Stiedl did not accept this and explained that some Technologies were rejected because the price was too high.

580. It was suggested to Mr Stiedl that the purchase prices were adopted by him for Innovator's convenience. Mr Stiedl denied this and said the only case where he rounded the price down was Etrino "where Mr Evans was suggesting 10 million and though I couldn't persuade him to give up the project, I at least managed to get it down to 3 million".

581. Mr Stiedl also rejected the suggestion that there was no genuine negotiation. Thus in relation to Casedirector, an email from Mr Trowell to him and Mr Carter showed Mr Trowell proposing a £30 million price which was negotiated down to £10 million.

582. It is the case that there was little or no documentary evidence of price negotiations and that this later created difficulties with the IR. It is also the case that the valuations were produced after the price had been agreed, and that in the case of YTC there was no valuation.

583. There is force in the point that some at least of the price negotiations were "soft" negotiations. The higher the overall price the greater the tax relief potentially available so there may well not have been an attempt on the part of Mr Stiedl to drive a hard bargain and get the lowest possible price. Further, as Mr Honeywell accepted, if one sells something for cash, as opposed to on deferred payment terms or with other restrictions, one would expect a lower price and he agreed that a deposit arrangement would inevitably inflate the price. He also accepted that the negotiations would have been predicated on the informal understanding that the Vendor may not get his 80% back. In addition, the Technology Vendors were in a position to influence the achievable price since they were to provide the income projections.

584. It may well therefore be the case that the prices agreed were not the lowest prices achievable. However, that does not mean that there was no negotiation or that they were not arms length transactions.

585. Further, the valuations did provide evidence to support the prices agreed.

586. The one Scheme in relation to which real doubt was cast on the genuineness of the price negotiation was Arte. Although it was explained that the price ultimately payable reflected defects in the Technology, the fact that the price agreed happened to be the grossed up sum reflecting the actual amount of the subscribers' applications when the Scheme was closed is a remarkable co-incidence.

587. I find that although some at least of the price negotiations were "soft" negotiations, there were genuine negotiations (with the possible exception of Arte) and the acquisition price was agreed as part of an arms length transaction.

(7) Whether there was no genuine valuation of the acquisition price despite the impression given in the IM that there was (RRAPOC paragraph 251).

588. The valuations were carried out by independent valuers. As I have found, they used the usual and most appropriate method to value start-up technology, the income approach.

589. As I have also found, the failure to carry out due diligence on the Technology Vendors' Business Plans and projected income figures is a shortcoming of the valuations which were produced. However, they were still genuine third party valuations that bore relation to the acquisition costs under the AAs.

590. It was Mr Honeywell's evidence that it is impossible to know in advance whether, in valuing a technology, that technology was going to be a flop or a Microsoft so one is forced to make an educated assumption as to likely future profits when one values it. He accepted that there is a real risk of either overvaluing or undervaluing depending on how the technologies turn out and thus the valuation can only really be required to be in good faith and given by an independent valuer. He said that he had no reason to think that American Appraisal was anything other than a respectable and reputable organisation. He accepted that one would expect them to have added a number of caveats in a technology valuation and this cast no doubt on their authenticity or respectability. Mr Honeywell accepted that American Appraisal did what they were asked to do and did not suggest they had done a bad job.

591. It was suggested to Mr Carter that the American Appraisal and Xexco valuations were not the type of valuations that investors were led to believe would be obtained by the IMs. Mr Carter replied saying that the valuations were at all times available for inspection and said that they did comply with the description in the IM. The IMs expressly stated that the valuations would be based on profit projections provided by the Technology Vendors. In the event virtually none of the Lead Claimants or their IFAs took the opportunity to read the valuations which had been made available to them.

592. When Mr Stiedl was shown an email in which he asked Mr Ustunel of American Appraisal to support the £10 million valuation of Optibet, he stated that he was simply asking Mr Ustunel to support their assessment of the value. He pointed out that there were a number of letters where Mr Ustunel said that American Appraisal could not support the values placed on the Technologies, which Technologies were taken no further.

593. Mr Stiedl said American Appraisal asked all the questions that a potential buyer would have asked during due diligence. Mr Stiedl said that although American Appraisal had declined to value Charit, Coloured Industry and Tracksys, he said these were only brought forward in a different form to that which American Appraisal had considered.

594. Mr Ustunel of American Appraisal did not think that there was anything untoward about the Schemes. He wrote a September 2004 letter to the IR indicating that he had due diligence meetings with the Technology Vendors who he quizzed about the Technologies and their prospects.

595. I find that there were genuine valuations which provided support for the acquisition price paid, although the failure to carry out due diligence on the Technology Vendors' Business Plans and projected income figures was a shortcoming of those valuations.

(8) There was no process or proper process of due diligence carried out to assess the Technology, despite impressions and assurances given to the contrary (RRAPOC paragraph 251)

596. The initial due diligence was carried out by Mr Stiedl. His evidence was that he assessed about 300 technologies, and reduced the potential pool down to 75. I accept that he carried out this process although there was no documentation showing what he had done, or how thoroughly it had been done.

597. There was then an internal assessment carried out by Mr Alexander. Mr Carter said that the technical verification reports from Mr Alexander and Mr Ramsden were a mere synopsis that did not reflect the amount of work that went on behind the scenes in relation to valuation which was considerably in excess of this. Mr Alexander's evidence was to the same effect: he said he checked the Technologies considered for the Generation 1 Schemes and all of them worked.

598. Although I accept that there was an internal verification process it was not properly documented. In many cases no report was produced, and such reports as were produced were cursory.

599. The decision to proceed with a Technology would then be taken at board level and the independent valuation report would be produced.

600. Although there was a process of due diligence carried out to assess the Technologies, I find that it was not as rigorous or extensive as it could have been, and it was not properly documented.

(9) Whether the purchase price for the acquisition of Technology rights due to a Technology Vendor as apparent from each IM, represented a fraction of the price in fact receivable by that vendor, given arrangements not disclosed to investors (RRAPOC 4.5).

601. It is the case that although the Technology Vendors were paid the full purchase price for the Technology 80% of that amount was immediately put on deposit to secure the repayment of the loan. The Technology Vendors therefore only received up front their agreed portion of the 20% made up of capital contributions, which was generally 8-9%. However, if the Technology was successful the Technology Vendors would receive the balance of the purchase price proceeds as the loan was repaid. These arrangements reflected the Scheme structure and were apparent from the documentation. There was nothing underhand or undisclosed about the arrangements.

602. It was the Claimants' case that the PPUAs had the effect that the balance of the purchase price was never due.

603. Clauses 2.1 and 2.2 of the PPUAs typically provided that:

> "2.1 The Vendor acknowledges and agrees that the [SIC] Innovator shall be entitled to deduct from the Purchase Price and prior to the release of the balance thereof the following:
> (i) the Guarantee Sum and arrange for the deposit for a minimum period of thirty-six (36) calendar months of such sum in a bank account with such bank or other financial institution nominated by Innovator as security for the Loan of a value similar to the Guarantee which the Vendor acknowledges to be utilised to repay the loan.
> (ii) the Fee to enable Innovator to pay fees in connection with offering of the technology partnership having acquired the Products including (without prejudice to the generality of the following) to settle all legal fees, accounting fees, fees relating to taxation advice, banking fees and margin spreads, other professional fees, valuation fees, marketing fees and commission to independent financial advisors.
>
> 2.2 The Vendor shall accordingly be entitled to the sum remaining out of the Purchase Price after the deduction of the sums referred to in clause 2.1 such sum being £825,000. The Vendor acknowledges and agrees that it shall have no entitlement to receive any further payment pursuant to the Sale and Purchase Agreement."

604. Whilst one can understand the Claimants' case on a literalist construction of the wording of clause 2, the words need to be construed in the general context of the Scheme arrangements as a whole, and in

the specific context that the PPUAs were devised to avoid arguments arising as to what would happen to the 20% capital contribution in the light of the difficulties which had been encountered with Mr Meager and Mr Lewis in respect of the YTC and Etrino schemes.

605. This was explained by Mr Bailey in his witness statements and confirmed in evidence. As he said: "This document was put into place to stop the arguments that occurred in relation to YTC and Etrino. The document was never intended to deprive the technology vendor of all his money but it wanted to make clear what happened to the 20% and also what happened to the 80% and to acknowledge that it was to be put into a separate account in accordance with the structure of the scheme".

606. I agree with the Defendants that, as all parties understood, the agreement reflected in the PPUAs related not to the whole of the purchase price (i.e. the 100%) but merely to the 20% comprised of subscription monies. The reduced sum did not seek to alter the purchase price, but related to the net amount to be paid to the Technology Vendor once various disbursements to be paid by the Vendor had been made.

607. That this was the mutual intention underlying the PPUAs was borne out by the events surrounding the variation to the PPUA for the Charit Scheme. It is apparent from the recital B to the Deed of Rectification that Vermilion and Innovator agreed that the original PPUA did not reflect the intention of the parties and amendments to the Charit PPUA were made which make it expressly clear that the PPUA dealt only with the 20% of the purchase price not paid to the bank by way of guarantee.

608. Although the PPUAs were not disclosed to investors since they did not alter the Scheme structure or the price payable/receivable thereunder I find that there was no need to do so. As Mr Bailey explained in evidence, the PPUAs did not have anything to do with the documentation underpinning the Scheme but rather was sub-documentation designed to determine what was to be done with the 20%.

609. I find that the purchase price for the acquisition of Technology rights due to a Technology Vendor as apparent from each IM did not represent a fraction of the price in fact receivable by that Vendor, given arrangements not disclosed to investors.

(10) Whether there was no real finance to fund the Trade beyond subscription money actually paid by subscribers (RRAPOC 4.6).

610. As stated in paragraph 601 above, the Scheme structure was such that the amount of funds received up front by the Technology Vendors was limited to 8 or 9% of the purchase price, and the Exploiter would be paid a proportion of these funds. The limited amount of funds received

was the inevitable consequence of the arrangements to put the 80% on deposit to secure the loan and the need to pay fees and expenses.

611. The structure of bank finance with the 80% loan being placed by the Technology Vendor back on deposit to secure the bank loan was not unusual and in this case it was expressly approved by leading tax counsel, Mr Bretten QC, of whom no criticism is made by the Claimants. There are many structural similarities between the Innovator tax savings Schemes in issue and many of the film finance tax deferral schemes that a number of Claimants also invested in and also with other ICT schemes, such as the Tower MCashback scheme.

612. Mr Honeywell agreed that the financing banks in this litigation operated in the same way as the banks involved in some film deferral schemes, holding money with a debit on one account matched with a credit in another account and a right to apply the credit to set off the debit. Further, the structure of the financing contemplated was very similar as between the banks who were proposed lenders to the Schemes (including SocGen) and the banks who did lend (Bank Leumi and MFC).

613. That there were to be limited amounts initially made available from the purchase price payment to fund the trade was therefore apparent from the Scheme arrangements, which were patent, were not unusual and which were approved by leading counsel.

614. The Technology Vendors were generally associated with the Exploiters and, as Mr Carter explained, it was in their interest to fund the development and exploitation of the Technology. This was the means by which they would be able to obtain the benefit of the 80% which had been deposited with the lending bank. The Technology Vendors believed in their products and were being given the opportunity to kick start development and exploitation with the cash injection being provided, even though it was limited.

615. With hindsight it may well be the case that the structure did not allow for sufficient funds to be made available for the successful development and exploitation of the Technologies. This was indeed a primary reason given by Mr McCallum for why the exploitation of the Technologies failed. However, this does not indicate that the Schemes were a sham or anything other than genuine. There was money available for exploitation and the Technologies were exploited initially. The subsequent problem of lack of funding was not foreseen.

616. I find that, as made clear by the Scheme documentation, whilst initially there was no real finance to fund the Trade beyond subscription money actually paid by subscribers, more funds would have become available if the Technology had been successfully exploited.

(11) Whether investors' subscription money was wrongly disbursed (including in breach of trust) and misappropriated, before and after they were purportedly made partners (RRAPOC 4.1).

617. The issue of whether subscription monies were disbursed in breach of trust will be addressed separately.

618. As to the more generalised allegations made of wrongful disbursement, they involve a misunderstanding of the Scheme structure.

619. Once the subscribers had been made partners their capital contributions became the Partnership's capital. Thereafter it could no longer be regarded as being and was not subscription money. If there had been any misappropriation of Partnership monies thereafter it is the LLP which would have the right of suit, not the individual subscribers. It might be different if the LLP itself was somehow involved in the misappropriation but in that case it would be the partners who could sue not mere subscribers.

620. In any event, the only obligation of the LLP was to pay for the Technology. In each case that has been done. Every Technology Vendor was paid in full and no Technology Vendor has contended or suggested otherwise.

621. The Claimants' case concentrated on particular uses made of monies which had been paid to Innovator by the Technology Vendor as part of its agreed fee. However, aside from its obligation to pay the set up and administration fees, costs and expenses, what Innovator did with the money to which it was entitled as its own fee was a matter for it.

622. The position was complicated by the manner in which accounting was carried out. It is not immediately apparent from the accounting information on whose behalf payments have been made. Payments were (in some cases) made directly to the ultimate beneficiary of the funds, thus avoiding the need for a chain of payments between various entities achieving the same ultimate goal. There was nothing wrongful in this, as is addressed later in the judgment.

623. Detailed schedules setting out precisely where the money went for each Scheme were attached to the schedules to the witness statement of Mr Roberts. Although he was only employed by Innovator in September 2003 and did not work at the Innovator offices until April 2004, it was apparent from his cross-examination that he was intimately involved with producing the accounts for both Innovator and the LLPs from September 2003. He was well qualified to give factual evidence about the payments made for each Scheme. Indeed, it was not suggested to him that his schedules were incorrect as records of where the money actually went, merely that Mr Roberts could not explain why the various payments were made (which he fairly accepted, since his role was to deal with accounts and not payments).

624. His schedules showed that:

(1) Each of the Technology Vendors was paid for the Technology;

(2) Innovator's fees for each of the 6 Schemes were around 11% of the total sum invested, in accordance with the IM.

(3) Funds paid to Mr Carter, Mr Stiedl, Courvoisier and other third parties are accounted from monies due and owing to Innovator.

625. Mr Roberts also explained how the CLFL loans were treated in the accounts. The accounting treatment was as follows:

(1) CLFL loaned monies to the investor;

(2) These monies were not physically transferred to the investor for onward transmission to the CB client account for payment to the LLP who would in turn pay the Technology Vendor who would have a liability to pay Innovator for fees. However, this was the treatment for accounting purposes as the CLFL loans were treated as monies owed by CLFL to Innovator. This reduced the fee otherwise payable by the Technology Vendor to Innovator for arranging the funding;

(3) Innovator did not seek to enforce the loans from CLFL, a connected company, but treated the liability as a debt, repaid when investors repaid CLFL.

626. The Claimants emphasised that these arrangements involved no real movement of money. However, the monies were nevertheless properly accounted for in the accounts of Innovator. Had there been 'physical movement of monies', the net result of the transaction would have been identical in accounting terms. Further, when loans were repaid, the money was paid by CLFL to Innovator. On any view, that is a real movement of monies. Further, the obligation undertaken by CLFL was to provide a loan that would enable the investor to complete their investment into the relevant Partnership through which they would be able to claim tax relief. In that respect, they got what they bargained for.

627. It was put to Mr Carter that a letter of 22 December 2004 from CLFL to Innovator regarding the loans by Innovator to CLFL showed that those loans were artificial as they would not be recovered by CLFL but would be written off by Innovator. Mr Carter rejected this saying that the loans were made on a roll through basis. He said that Innovator effectively took the risk of non-repayment of the loans.

628. The Claimants also drew attention to the fact that some individuals, including Mr Carter, Mr Gates and Mr Bailey, received interest free

CLFL loans that were not pursued for repayment. These loans were, as Mr Gates stated, designed to fill a subscription hole in order to enable the particular Partnership to complete (which was the point at which the purchase price for the Technology had been raised). Mr Bailey confirmed that he took out such a loan, but again only to enable the Scheme to complete. He claimed relief on the loan but stated that he repaid the relief that was granted.

629. Whilst one can understand how both the nature and accounting of some payments made gives rise to question, on analysis it becomes apparent that monies were generally paid in accordance with the structure of the Schemes. As such, it is difficult to see how there could be any misappropriation, unless the entire Schemes were a sham or fraud. However, issues surrounding alleged misappropriation are considered further later in the judgment and a final conclusion on this issue shall be made once this has been done.

(12) Whether there were huge irregularities including backdating of documents (RRAPOC paragraphs 253 and 254).

630. The issue of backdating of documents has been addressed when considering the Scheme specific narratives. The alleged irregularities involve a consideration of all the various causes of action asserted and the main allegations raised in relation thereto. I shall accordingly return to this issue and draw an overall conclusion in relation to the allegation of a fraudulent scheme and conspiracy later in the judgment.

Conclusion on Conspiracy and Fraud allegations (Part 1)

631. I find that there were genuine Technology rights in relation to each Scheme.

632. I find that the Technologies did have real exploitation prospects, that there was a real intention to exploit the Technology rights and that there was more than minimal exploitation.

633. I find that in every case there was Technology which had been developed.

634. I find that whilst for various Technologies First Global, which was a company controlled by Mr Stiedl, was the immediate vendor, this was as a conduit for tax reasons.

635. I find that although some at least of the price negotiations were “soft” negotiations, there were genuine negotiations (with the possible exception of Arte) and the acquisition price was agreed as part of an arms length transaction.

636. I find that there were genuine valuations which provided support for the acquisition price paid, although the failure to carry out due

diligence on the Technology Vendors' business plans and projected income figures was a shortcoming of those valuations.

637. I find that although there was a process of due diligence carried to assess the Technologies; it was not as rigorous or extensive as it could have been, and it was not properly documented.

638. I find that the purchase price for the acquisition of Technology rights due to a Technology Vendor as apparent from each IM did not represent a fraction of the price in fact receivable by that Vendor, given arrangements not disclosed to investors.

639. I find that, as made clear by the Scheme documentation, whilst initially there was no real finance to fund the Trade beyond subscription money actually paid by subscribers, more funds would have become available if the Technology had been successfully exploited.

(5) THE FSMA CLAIMS (Part 1)

640. The pleaded case and the Claimants' written closing in respect of the claims made against unrepresented Defendants put the conspiracy and fraud allegations at the "core" of the case.

641. In so far as the Claimants had any real understanding of the claims being made on their behalf it was these claims which they understood to be central.

642. It was also the understanding of both represented and unrepresented Defendants that these were indeed "core" claims which were of first importance both in themselves and in relation to most of the other causes of action asserted.

643. By the time of the closings, however, the emphasis of the Claimants' case had very much become that it was FSMA that was central to the case.

644. For reasons given when addressing the FSMA Claims (Part 2) I find that the Schemes were CISs and that there were contraventions of the general prohibition and the financial promotion restriction. That being so it is relevant at this stage briefly to address the suggested ramifications of those findings.

645. The Claimants contended that the engagement of the FSMA regime had ramifications for what in fact was done and for what should have been done, and also for common law liabilities.

646. The Claimants drew attention to the FSA's Principles for Businesses and the FSA rules applicable to authorised persons.

647. In relation to the FSA Principles the Claimants emphasised, in particular: Principle 1 (Integrity), Principle 2 (Skill, care and diligence), Principle 3 (Management and control), Principle 4

(Financial prudence), Principle 6 (Customers' interests), Principle 7 (communications with clients), Principle 8 (Conflicts of interest) and Principle 10 (Clients' assets).

648. In relation to the FSA rules the Claimants emphasised, in particular: Limits on exclusion of liability (COB 2.5); Financial promotion (COB 3); Accepting customers (COB 4), including requirements as to terms of business in adequate detail; Dealing and managing (COB 7) including requirements as to conflicts of interest and disclosure of interest.

649. The Claimants were less clear, however, as to how the Principles and Rules were specifically relevant to the existence of the various duties/causes of action alleged.

650. The Claimants made a generalised point that if the financial promotion restriction had been followed then the Schemes may never have been promoted in the first place since Innovator would never have satisfied the requisite authorisation requirements. However, Innovator would not have needed to do so and would not have done so. Had it been realised that these were CISs then they would have been promoted through and operated by an authorised person, as later happened with the Key Data schemes.

651. It was then suggested that if that had been done then matters would have turned out differently and in particular without the various irregularities and egregious conduct alleged. However, this is belied by the fact that the Claimants are making almost exactly the same allegations in proceedings concerning the Key Data schemes as they are making in these proceedings.

652. FSMA deals with both authorised and unauthorised persons and imposes criminal and civil liabilities for its contravention. For reasons given later in the judgment, it does not found a cause of action for breach of statutory duty. The reasons that it does not do so apply *a fortiori* to other common law duties sought to be found upon it.

653. Whether a particular common law duty arises has to be determined in accordance with established legal principles. Those principles are not altered by the engagement of FSMA although it may provide relevant background for the application of those principles.

654. In their detailed submissions there were in fact few examples of specific reliance on FSMA by the Claimants. It was submitted, for example, that it was relevant to the necessity for the alleged subscription money agreement and for the alleged information condition/representation, but for the most part the Claimants' detailed submissions did not reference FSMA.

655. Given the importance attached by the Claimants to FSMA I shall have general regard to it in considering the various claims made, but if it is

not specifically referred to that largely reflects the fact there is equally no specific reference to it in the Claimants' own submissions.

(6) THE "NEVER A PARTNER" CLAIM

656. It was the Claimants' case that contractually they never became partners of any of the Schemes. This claim was put in two related ways.

657. First, it was submitted that as a matter of construction of the IM or, if necessary, the implication of terms therein, the subscribers' offer to subscribe made by the subscription application was the subject of a series of conditions ("the IM Conditions") and was not capable of acceptance unless and until these conditions were met.

658. Further or alternatively, it was submitted that as a matter of construction of the P/A or, if necessary, the implication of terms therein, the exercise by the P/A donee of the power of attorney was subject to the same (and other) conditions.

659. The IM Conditions were as follows (RRAPOC 274):

> "274.1 that relevant deadlines for the availability of relevant tax relief had not expired ("the deadlines condition");
>
> 274.2 that tax relief would be available as set out and in the proportions and amounts set out in the IM ("the tax relief condition");
>
> 274.3 that the Partnership had or would incur qualifying expenditure on ICT as set out in the IM ("the expenditure incurred condition");
>
> 274.4 that the Partnership and its business were real and not a sham in the sense that that there was never any intention on the part its promoters, operators or administrator that it be a real and genuine business or have any real purpose other than as a vehicle to obtain tax relief ("the business condition");
>
> 274.5 that there were rights to Technology as described ("the Technology rights condition");
>
> 274.6 that there was a real possibility of deriving profit from exploitation of the Technology rights("the exploitation condition");
>
> 274.7 that the Technology vendor had developed the Technology rights("the Technology development condition");
>
> 274.8 that the price apparently paid for the Technology rights bore a reasonable relationship to its true value ("the Technology price condition");

274.9 that the Technology rights acquired or to be acquired had been independently and properly valued ("the valuation condition");

274.10 that Bank funding for the required Loan had been secured ("the Bank Loan condition");

274.11 that the Technology rights, the proposed business, its prospects, its funding and its proposed operators (including the Administrator, Operators and the Exploiter) and advisers (including legal and technology advisers) had been assessed with appropriate due diligence("the due diligence condition")

274.12 that the IM contained all such information as investors and their professional adviser would reasonably require and reasonably expect to find for the purpose of making an informed assessment of the issuers of the IM, the Technology rights, the Partnership including its proposed business and prospects and its management and advisers ("the information condition")."

(1) Contractual analysis of the subscription offer

Relevant legal principles: construction and implication of terms.

660. The Claimants relied on the well known speech of Lord Hoffmann in *ICS v West Bromwich Building Society* [1998] 1 WLR 896 at 912:

> "I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v. Simmonds [1971] 1 W.L.R. 1381 , 1384–1386 and Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen [1976] 1 W.L.R. 989 ,is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows:
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which

> would have affected the way in which the language of the document would have been understood by a reasonable man.
> (3) [concerning pre-contractual negotiations, not relevant here]
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749 .
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191 , 201: "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

661. I agree with the Claimants that in the context of construing an offer a similar approach applies. It is a question of how the offer would have been understood by a "reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time", but focussing on the position of the offeree.

662. The Claimants also relied, if necessary, upon the principles governing the implication of terms into contracts as a basis for implying terms into the offer made. It is unusual for offers to be subject to implied terms. The terms of the offer are a matter for the offeror and there is no requirement that it be workable. Whilst it is nevertheless possible for terms to be implied into an offer, I agree with the CB Defendants that an offer cannot be subject to an implied term unless that term would pass the general test of contractual implication. That is the very least that must be required if the terms of the offer are to be objectively ascertainable such that the offeree can objectively know the terms of the offer on which his acceptance is being sought.

663. It was the Claimants' case that to the extent they need to establish implied terms those terms are necessary to give the Scheme contractual arrangements business efficacy (*The Moorcock* (1889) LR 14 PD 64) or so obvious as to go without saying (*Shirlaw v Southern Foundries (1927) Ltd* [1939] 2 K.B. 206) on the basis that they represent the presumed but unexpressed intentions of the parties to those contractual arrangements.

664. The Claimants submitted that this was consistent with and reflected Lord Hoffman's reformulation of the principles in *Attorney General of Belize v Belize Telecom Limited* [2009] 1 WLR 1988. In that Privy Council decision Lord Hoffman said that: "There is only one question: is that what that instrument, read as a whole against the relevant background, would reasonably be understood to mean" (at [21]). He explained that the various different formulations which the courts have used all come back to this question and are different ways of saying "although the instrument does not expressly say so, this is what a reasonable person would understand it to mean." (at [25]).

665. The *Belize Telecom* case was considered in the Court of Appeal decision *Mediterranean Salvage & Towage Limited v Seamar Trading & Commerce Inc* [2009] 2 Lloyd's Rep. 639. In that case it was emphasized that the touchstone remains necessity rather than reasonableness.

666. In deciding whether that touchstone is met the considerations set out by Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282–283 still provide useful guidance - see *Lewison on The Interpretation of Contracts* (5^{th} ed.) para. 6-06. They are: "(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying' (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

667. In the context of a contractual offer clarity is of particular importance. The first requirement for the formation of a contract is that the parties should have reached agreement. The Courts deploy an objective test to determine whether the parties are ad idem. Agreement will only be reached where the terms of the acceptance precisely match the terms of the offer. The terms of the offer must be capable of being clearly ascertained for the offeree to know (1) what he is being asked to accept and (2) what has been accepted.

668. The nature of the IM Conditions is that they are conditions precedent to the making of the contract between subscribers and the Partnership. As such, the CB Defendants (CB, Mr Bailey and Mr Roper) placed reliance on the distinction between promissory and contingent conditions.

669. In *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep 209 at 220 Lord Steyn said that a promissory condition is one which is within the power of the promisor to bring about, whereas a contingent condition is one which is not within its power to bring about, although it may undertake obligations to try to do so.

670. Contingent conditions are conditions whereby obligations are triggered or terminated on the happening of certain stipulated facts or events. In *UK Power GmbH v Kuok Oils and Grains Pte Ltd* [2009] EWHC 1940 (Comm) Gross J said at [15] as follows:

> "In the case…of a contingent condition precedent, a contract will not be binding until the specified <u>event</u> occurs. But in the case of a promissory condition precedent, the contract will be binding, albeit that performance of an obligation by one party will be a condition precedent to the liability of the other…[The distinction between contingent and promissory conditions precedent may well turn on whether the agreement purports to impose on A…an obligation to bring about the stipulated event; if it does, the condition is or [is] likely to be promissory; if not, the condition is, or is likely to be contingent…"

671. The CB Defendants submitted that on analysis many of the IM Conditions are promissory conditions since they were within the power of Innovator to bring about. If so, then by definition, the offers are and must be capable of immediate acceptance: if they were not, such that no contract came into existence, there would be no obligation on the promisor to bring about those conditions. Promissory conditions are, simply, terms of an extant contract not conditions precedent to the existence of a binding contract.

The relevant background

The contractual context

672. The relevant background in considering the obviousness and the alleged need for the IM Conditions includes the contractual context and the rights and remedies otherwise available to the subscribers.

673. The Claimants' case was that the IM Conditions were terms of the offer made by the subscribers to the Partnership which was accepted on behalf of the Partnership when they were purportedly made partners through the execution of a D/A. They submitted that the relevant time to focus upon was when the time came for that acceptance and the need for the IM Conditions was sought to be justified on the basis of considering the position at that time.

674. The Claimants did not accept that any earlier contract had been made with Innovator and their case effectively assumed that no such contract had been made.

675. The Defendants' case, however, was that a contract was made with Innovator on its acceptance of the subscribers' irrevocable offer as communicated by the Acknowledgment letters.

676. I agree with the Defendants that a contract was made with Innovator. It is clear from the IM that Innovator was more than a mere promoter of the Scheme. Taking the Etrino IM by way of example, Innovator's stated objective was to "advise and administer" the Partnership. To that end Innovator was stated to have engaged "Technology Advisers", a "Technology Valuer", Collyer Bristow as "its legal advisers", Pridie Brewster to advise it "in relation to auditing and tax planning" and leading counsel to confirm the tax assumptions. It was Innovator which was to be responsible for the payment of those fees and for the application of subscription monies for the purposes set out in the IM. This was to be done from the fee payable to Innovator as set out in the contractual documentation, which was not expected to exceed 11%.

677. Further, it was Innovator which was to be responsible for the general administrative costs of the Partnership throughout its life. Save for the annual fee of the Managing Partner/Administrator (which was to be based on the success of the Business) no other ongoing fees were to be chargeable to the Partnership. If and to the extent that these could not be met out of the initial fee payable to Innovator, they would fall on Innovator.

678. It was also Innovator to which the subscription applications were to be addressed. It was Innovator which had the "right to accept or reject applications at its sole discretion" and which was to ensure that "any excess Partner's contributions to the Partnership will be refunded". It was Innovator which was to "ensure that all the imposed conditions of making the loan are met" and also to "ensure that such security as is required to guarantee the Guaranteed Exploitation Income payable under the Agency Exploitation Agreement, but not yet due, will be met".

679. As the CB Defendants pointed out, there was no obligation on the P/A donee to execute anything. Although the IM stated that the Managing Partner/Administrator would arrange for the formation of the Partnership his duties under the anticipated and actual Service Agreement were to administer the Partnership and it was Innovator which would have to ensure that he did what was necessary to form the Partnership.

680. For all these reasons I accept the CB Defendants' case that there was a contract made between the subscribers and Innovator. Although the detailed terms of that contract were not explored (since it formed no part of the Claimants' case) I accept the CB Defendants' contention that they would include an obligation to ensure that:

(1) The Partnerships were established and acquired the relevant Technologies;

(2) Other costs associated with the establishment of the Partnerships were paid; and

(3) The subscribers were made partners of those Partnerships.

681. It should be noted that the Claimants did not advance any case that the IM Conditions would be conditions precedent of any contract made with Innovator (even though the basis of the offer to make that contract was also the subscription application). Their sole focus was upon the position at the time of the D/A and the contract with the Partnership.

682. Whilst I accept the Claimants' case that there was additionally a contract made through the subscription application with the Partnership when the subscribers were made partners that contract falls to be considered in the context of the contract already made with Innovator.

683. Another relevant aspect of the contractual context are any limitations on the exercise by the P/A donee on the powers conferred on him under the P/A. The Claimants argued that the exercise of this power was subject to the same conditions as the subscription application contract with the Partnership. The applicability of such conditions will be considered below, but I accept, as did the CB Defendants, that the exercise of that power would be subject to the limitations on a fiduciary's authority identified by Norris J in the case of *Bieber v Teathers Limited* [2012] EWHC 190 (Ch) (although the Claimants did not advance any case on this basis), namely:

> "…the only restriction on Teathers' authority to deal with the offered capital contribution arises from its duty to act honestly and loyally. If Teathers actually knew at the time of forming a partnership that it was not possible in any circumstances to conduct "the Partnership Business" as defined in the Partnership Deed, then its authority to apply the money would cease. It would be unconscionable (indeed it would not be honest) to apply the offered subscription in the capitalisation of a partnership to conduct a business which it was actually known it was certainly impossible to conduct. It would actually be known that the specified purpose (conducting the Partnership Business) was incapable of being achieved".

684. By parity of reasoning a P/A donee who was to make the subscribers partners in the Partnership business could not, consistently with his fiduciary duty, do so if it was actually known that it was certainly impossible to conduct the Partnership business.

The regulatory context

685. In relation to the relevant background, the Claimants placed great stress on the importance of any finding that the Schemes were CISs and the regulatory context. The Claimants submitted that the FSA

Principles set standards which are relevant in assessing the conduct of persons who were not authorised and the consequences in terms of civil liabilities. They further submitted that if the FSA Rules are necessary requirements in the case of authorised persons then they are similarly necessary in the context of unauthorised persons carrying out regulated activities. In their detailed arguments in relation to each of the IM Conditions they did not, however, identify specific Principles or Rules which were said to be relevant to the particular condition in question, save in relation to the Information condition.

The IM Terms

686. The alleged IM Conditions are generally not express terms of the IMs, still less express conditions precedent. They are allegedly to be discerned from the terms and conditions of the IM as a matter of construction or necessary implication.

687. In considering the appropriateness or necessity of conditions which are not expressly set out in the IM the warnings and non-reliance provisions contained therein are of relevance. These are set out in detail later in the judgment, but they stress in particular that no warranty or representation is made in relation to the completeness or accuracy of the information or opinions contained in the IM. They also stress the need for subscribers to obtain and rely upon their own advisers in relation to the financial, legal and other consequences of subscribing.

688. It is also relevant to have regard to the fact that the subscription applications were irrevocable. The subscribers were thereby agreeing to commit themselves immediately and unconditionally. The effect of the IM Conditions, however, is to make that commitment conditional and in many cases conditional on what does or does not happen thereafter and potentially a considerable time thereafter.

The specific IM Conditions

<u>(i) the deadlines condition; (ii) the tax relief condition (iii) the expenditure incurred condition.</u>

689. Taking the Etrino IM as an exemplar the Claimants relied on the following provisions in support of their case that there was (i) the deadlines condition; (ii) the tax relief condition (iii) the expenditure incurred condition.

> (1) Under "Tax Benefits", "Under current tax legislation, the Partnership should be able to write off the cost of acquiring the Technology and the initial costs payable to the Bank...As a result, the Partnership may expect to incur a trading loss in the year of acquisition of the Technology..." (page 4).

(2) “Subject to the Partner’s personal tax position, the first year tax benefit at a tax rate of 40% could be equal to twice his or her Capital Contribution. The tax refund is not tax deferred but is tax actually extinguished.”(page 4)

(3) “The Partnership is constructed in such a way as to allow Partners to take advantage of the tax reliefs available...It is expected that relief under Section 45 will be available on approximately 95% of the monies used to purchase the Technology...”(page 10)

(4) The examples of tax treatment of losses on page 10 and other text on that page.

(5) The Illustrative Financial Example spanning the entirety of page 12.

(6) “The Partnership is intended to provide a method of tax shelter for both income and capital gains through the purchase of Technology. This should generate an opportunity for the Partners to take advantage of the available tax benefits...” (page 15)

(7) Under “Application of Subscription Monies”; “Partners contributions to the Partnership will be used to buy the rights to the Technology, pay initial fees and all ordinary ongoing administrative expenses. (page 15)

(1) The deadline condition – the relevant deadlines for the availability of relevant tax relief had not expired.

690. The offer is not made subject to this or any other express condition.

691. There is no express statement to this effect in the IM.

692. Innovator had a duty to establish the Partnerships and the proper and careful performance of that duty would be likely to involve ensuring that this was done at a time when the relevant tax relief deadlines had not expired. If so and that was not done then arguably recourse could be had against Innovator.

693. Further, it could be argued that it was an essential element of the Partnership’s business that the acquisition cost of the Technology was qualifying expenditure for tax relief purposes and that if it was actually known that it was certainly impossible for it to be so because relevant deadlines had already passed then the P/A donee may not have had authority to enter the subscribers into the partnership.

694. The availability of other means of recourse militates against the necessity or obviousness of implying any such condition.

695. I find that there was no such condition as alleged. In any event, on my findings there was no breach of the alleged deadline condition since the relevant deadline had not expired at the date of the execution of the D/As.

(2) The tax relief condition – that tax relief would be available as set out and in the proportion and amounts set out in the IM.

696. The offer is not made subject to this or any other express condition.

697. There is no express statement to this effect in the IM.

698. This condition is expressed as a warranty as to the future availability of tax relief which, as is accepted, would be a plainly inapt condition for acceptance. One cannot make acceptance conditional on an event that lies in the future at the time for acceptance. However, the Claimants clarified their case as being that that "all other things being equal the structure of the scheme arrangements is such as at the time that the offer is both made and purportedly accepted that relief in the proportions and amounts set out in the IM was capable of being obtained. To put it another way, the tax relief condition is only fulfilled if, as at the time of purported acceptance of the subscription offer, there are no defects in the scheme arrangements which would imperil (in the sense of changing the risk profile or prospects of obtaining relief) or remove the entitlement to relief as set out in the IM." This is not how the claim is pleaded and it is important that any condition of the acceptance of an offer is made clear.

699. The condition is a complex one.

700. The ambit of the condition is extremely wide. It purportedly covers any defect in the Scheme arrangements which change the "risk profile" or "prospects" of obtaining tax relief. This could cover matters which are very minor and/or which do not in the event have any impact at all.

701. The condition (as originally formulated) is expressed in inapt terms and (as reformulated) is expressed in vague and uncertain terms.

702. It is a condition which raises what may be difficult judgmental questions. It could apply regardless of whether this was or even should have been known to the offeree. This means that the offeree may not be in a position to accept the offer made even though he neither knows nor should know this. That would not be reasonable or equitable.

703. The proposed term covers both the case where tax relief is not available because there is some defect in the Scheme arrangements and also where the structure no longer qualifies or could be made to qualify for tax relief due to some change in the tax regime.

704. The IM sets out an expectation that tax relief will be available as described, but it is careful not to state that it will be and emphasises the need for subscribers to obtain their own advice.

705. Innovator had a duty to establish the Partnerships and the proper and careful performance of that duty would be likely to involve taking reasonable care to ensure that the Scheme was structured so as to achieve the anticipated relief, as is supported by the statement in the IM that the Partnership "is structured in such a way as to allow Partners to take advantage of the tax reliefs available". If the Scheme was not in fact so structured then arguably recourse could be had against Innovator.

706. Further, it could be argued that it was an essential element of the Partnership's business that the acquisition cost of the Technology qualify as capital allowances for tax purposes and that if it was actually known that it was certainly impossible for it to do so because of defects in the Scheme arrangements then the P/A donee may not have had authority to enter the subscribers into the partnership.

707. The availability of other means of recourse militates against the necessity or obviousness of implying any such condition.

708. I find that there was no such condition as alleged.

709. Given that I have found that there was no tax relief condition, and given its unclear ambit, I do not propose to consider whether any such condition (if it existed) would have been breached. However, it is not obvious that at the date of the D/A there was a fixed reason why the Schemes should not have generated the anticipated tax relief, and it was the CB Defendants' case that there was in fact no breach of this alleged term.

(3) The expenditure incurred condition – that the Partnership had or would incur qualifying expenditure on ICT as set out in the IM.

710. The offer is not made subject to this or any other express condition.

711. There was no statement that the Partnership "had" incurred qualifying expenditure. Nor was there any need or requirement that the Partnership had incurred qualifying expenditure on ICT before subscribers were made partners. Indeed the arrangements envisaged the Partnership being fully subscribed before the Partnership incurred that expenditure.

712. A term as to what "would" be done speaks to the future and is an inapt condition of acceptance. In recognition of this the Claimants stated that the term was meant to cover the case where there was no intention to incur the expenditure or it was known that the expenditure could not be incurred (because, for example, the Technology no longer existed).

This is not how the term was pleaded and it is important that any condition of the acceptance of an offer is made clear.

713. Whilst the examples put forward by the Claimants were clear examples of an unwillingness or inability to incur the expenditure, the term proposed is expressed far more widely and could well cover cases which raise difficult judgmental questions, particularly as to what is "qualifying" expenditure. Moreover, it could apply regardless of whether this was or even should have been known to the offeree. This means that the offeree may not be in a position to accept the offer made even though he neither knows nor should know this. That would not be reasonable or equitable.

714. It was Innovator's duty to ensure that the Technology was acquired and if it was not acquired due to lack of intention then arguably there would be a right of recourse against Innovator.

715. Further, it could be argued that the acquisition of the Technology was essential to the Partnership's business and that if it was actually known that it was certainly impossible for it to purchase that Technology then the P/A donee may not have had authority to enter the subscribers into the partnership.

716. The availability of other means of recourse militates against the necessity or obviousness of implying any such condition.

717. I find that there was no such condition as alleged.

718. In any event, there was no breach of the alleged expenditure term condition since, as addressed elsewhere in the judgment, in every case expenditure was incurred on qualifying technologies, and such Technologies did exist.

<u>(i) the business condition; (ii) the technology rights conditions; (iii) the exploitation condition; (iv) the technology development condition; (v) the technology price condition.</u>

719. Taking the Etrino IM as an exemplar the Claimants relied on the following provisions in support of their case that there was (i) the business condition; (ii) the technology rights conditions; (iii) the exploitation condition; (iv) the technology development condition; (v) the technology price condition.

(1) Under the heading "Summary"; "the Partnership provides an opportunity for individuals to become members of an LLP involved in the business of acquiring, developing and commercially exploiting Technology..." (page 4)

(2) Description of the Technology under the heading "Technology". (page 4)

(3) Under "Potential Long Term Benefits for the UK"; "the Exploitation Financial Forecast illustrates the potential financial viability of the Technology...from the second year [of trading] it is anticipated that the Partnership will make profits for the benefit of the partners [...]" (page 4)

(4) Further: "The commercial success of the Business will depend solely on the exploitation of the Technology. Exploiter has prepared the Exploitation Financial Forecast and has assured InnovatorOne PLC that the projections are realistic, based on today's knowledge[...]".(page 4)

(5) Description of the Technology under "The Partnership's activity". (page 8)

(6) Under "The Partnership's Income"; "The Partnership will receive its income from commercial exploitation of the acquired Technology [...]" See also under "Income Distribution"; "After the acquisition of the Technology all Exploitation Income in respect of Technology acquired by the Partnership will be apportioned among the Partners [...]". (page 9)

(7) "The Managing Partners will...[listing various business related activities, e.g.]- administer the Partnership trade and seek maximum exploitation of the Technology...-obtain legal and professional advice on routine matters...ensure the Partnerships' monies are paid out in accordance with agreements entered into for and in respect of other Partnership business." (page 13)

(8) "The Partnership's trade will be that of the acquisition, development and exploitation of Technology with a view to profit."(page 13).

(4) The business condition – that the Partnership and its business were real and not a sham in the sense that that there was never any intention on the part of its promoters, operators or administrator that it be a real and genuine business or have any real purpose other than as a vehicle to obtain tax relief.

720. The offer is not made subject to this or any other express condition.

721. There is no express statement to this effect in the IM.

722. If, as the condition supposes, the business was a sham and there was never an intention that there be a real and genuine business one would expect there to be remedies in deceit and conspiracy to defraud. The real vice here lies in the fraudulently induced offer, not its acceptance.

723. One would also expect there to be contractual recourse against Innovator on the basis that its duty involved intending to acquire a Technology which was real and genuine.

724. Further, it could be argued that the acquisition of a real and genuine business was essential to the Partnership's business and that if it was actually known that it was certainly impossible for it to purchase a real and genuine business then the P/A donee would be unlikely to have had authority to enter the subscribers into the partnership.

725. The availability of other means of recourse militates against the necessity or obviousness of implying any such condition.

726. I find that there was no such condition as alleged. In any event, there was no breach of the alleged business condition since, as found later in the judgment, the Partnerships and their businesses were not shams.

(5) The Technology rights condition – that there were rights to Technology as described.

727. The offer is not made subject to this or any other express condition.

728. The description of the Technology does imply that there are rights to the Technology. In so far as the Claimants' case is that the condition covers the case where there are no such rights because the Technology does not exist one can see why there should be recourse in such circumstances. As with the business condition, if it was known that there were no Technology rights one would expect there to be remedies in deceit and conspiracy to defraud. One would also expect there to be rights of recourse against Innovator and limitations on the exercise of the P/A, as with the business condition. The availability of other means of recourse militates against the necessity or obviousness of implying any such condition.

729. In so far as the Claimants' case is that the rights must be to Technology which exactly matches the description given in the IM that is a matter which would need to be addressed by way of a promissory warranty. It cannot be a reasonable condition of acceptance of an offer that the rights to the Technology are exactly as described. Whether or not that is so would be a matter requiring considerable investigation, as the expert evidence in this trial has illustrated. Further, it is to ignore the reality that the Technology was inevitably to be subject to development.

730. In so far as the Claimants' case lies somewhere between the two positions set out above, it is not explained nor is it apparent where and how the line is to be drawn. The proposed term is accordingly unclear.

731. Further, unless the condition is limited to cases where it is clear that there are no Technology rights it could well raise difficult judgmental questions. Moreover, it could apply regardless of whether the existence of such rights was or even should have been known to the offeree. This means that the offeree may not be in a position to accept the offer made even though he neither knows nor should know this. That would not be reasonable or equitable.

732. I find that there was no such condition as alleged.

733. Given that I have found that there was no Technology condition, and given its unclear ambit, I do not propose to consider whether any such term (if it existed) would have been breached. However, in so far as it relates to the existence of real Technology, for reasons addressed elsewhere in the judgment there would have been no breach of the term.

(6) The exploitation condition – that there was a real possibility of deriving profit from exploitation of the Technology rights.

734. The offer is not made subject to this or any other express condition.

735. There is no express statement to this effect in the IM.

736. Whilst the IM anticipates the exploitation of the Technology for profit it is careful not to give any warranty or guarantee of profit.

737. If the term involves a judgment being made as to the potential profitability of the business that could well raise difficult questions. Moreover, it could apply regardless of whether the lack of potential profitability was or even should have been known to the offeree. This means that the offeree may not be in a position to accept the offer made even though he neither knows nor should know this. That would not be reasonable or equitable.

738. If the term is meant to be limited to cases where it is known that there is no real possibility of profit then it may be covered by the P/A donee limitation in that it could be said in such circumstances that it would be actually known that it was certainly impossible for the Partnership to conduct the business.

739. In so far as the Claimants' case lies somewhere between the two positions set out above, it is not explained nor is it apparent where and how the line is to be drawn. The proposed term is accordingly unclear.

740. In closing submissions it was said that the term requires there to be both a genuine intention to exploit and the mechanisms necessary to do so. This is not what the term says and the requirement of "necessary mechanisms" is inherently unclear.

741. I find that there was no such condition as alleged.

742. In any event, there was no breach of the alleged condition given my finding that the Technologies did have real exploitation prospects and that there was a real intention to exploit them.

(7) The Technology development condition – that the Technology vendor had developed the Technology rights.

743. The offer is not made subject to this or any other express condition.

744. In the YTC IM it was stated that Ellsburg had developed the YTC Technology. There would not appear to be similarly unequivocal statements in the other IMs.

745. This was an express statement of fact in the IM. Subject to the effect of the disclaimers it would potentially found remedies in misrepresentation, if it was untrue.

746. The Claimants' case appeared to be that it was a necessary condition of the acceptance of the offer that the provenance of the Technology was as stated. It is difficult to see why the provenance should be such a critical factor. What mattered was the Technology itself and the tax relief opportunities it provided. None of the Lead Claimants gave evidence to the effect that provenance was a matter of any concern to them.

747. In so far as the focus of the condition is that the Technology should have reached a certain stage of development, it was plain that the LLP's business was to involve "developing" the Technology. In any event it is unclear what level of development is being referred to. Any such term would involve a judgment being made as to the state of the development of the Technology that could well raise difficult questions. Moreover, it could apply regardless of whether the lack of potential profitability was or even should have been known to the offeree. This means that the offeree may not be in a position to accept the offer made even though he neither knows nor should know this. That would not be reasonable or equitable.

748. I find that there was no such condition as alleged.

749. Given that I have found that there was no Technology Development condition, and given its unclear ambit, I do not propose to consider whether any such term (if it existed) would have been breached. However, in so far as it relates to whether there was Technology which had been developed there would be no breach of the alleged term since, as found elsewhere in the judgment, in every case there was such Technology.

(8) The Technology price condition – that the price apparently paid for the Technology rights bore a reasonable relationship to its true value.

750. The offer is not made subject to this or any other express condition.

751. There is no express statement to this effect in the IM.

752. The terms of the condition are vague and unclear. What is meant by a "reasonable relationship" or "true value"? The expert evidence showed that there is no such thing as the "true value" of technology. There are various ways in which technology can be valued but none of them can be said to produce a "true" value.

753. The condition is the type of matter which would be need to be expressed as a warranty, and defined. Even if was clear what bearing a "reasonable relationship" to the "true value" means, to determine that issue would involve judgment, and potentially a difficult judgment. Moreover, it would apply regardless of whether the lack of such a relationship was or should have been known to the offeree. This means that the offeree may

not be in a position to accept the offer made even though he neither knows nor should know this. That would not be reasonable or equitable.

754. I find that there was no such condition as alleged.

755. Given that I have found that there was no Technology price condition, and given its unclear ambit, I do not propose to consider whether any such term (if it existed) would have been breached. However, in so far as it relates to whether the Technology was of real value which was more than minimal and which bore relation to the Acquisition costs under the AAs, there would be no breach of the alleged term since, as found elsewhere in the judgment, the Technology rights had such value.

<u>(i) the valuation condition; (ii) the bank loan condition; (iii) the due diligence condition.</u>

756. Taking the Etrino IM as an exemplar the Claimants relied on the following provisions in support of their case that there was (i) the valuation condition; (ii) the bank loan condition; (iii) the due diligence condition.

(1) Under "Activity"; "The Partnership will fund the acquisition of Technology by way of a bank loan of 80% and Capital Contribution from Individual Partners of 20%...."(page 4)

(2) Under Definition of 'Valuation'; "a valuation of the Technology based upon its Exploitation Income potential during its estimated commercial life carried out independently by American Appraisal (UK) Limited". (page 5)

(3) Under "Team of Technology Valuers" the whole section including "the group of Technology advisers have analysed and recommended each investment being proposed by InnovatorOne PLC to investors."(page 6)

(4) AAUK listed as the "Independent Technology Valuer" (page 6)

(5) Each of the "Partners and Advisors" there listed (in relation to the due diligence condition) (page 6).

(6) "Because the bank loan will be for a qualifying purpose, the Partnership should be eligible to deduct tax relief...." (page 11).

(9) The valuation condition – that the Technology rights acquired or to be acquired had been independently and properly valued.

757. The offer is not made subject to this or any other express condition.

758. There is a statement in most of the IMs that the Technology had been independently valued. That is a statement of fact. Subject to the effect of the disclaimers it would potentially found a claim in misrepresentation, if it was untrue.

759. There is no statement in the IM that the Technology had been properly valued. Such an obligation is appropriately the subject matter of a promissory warranty, but no such warranty has been given.

760. It is unclear what “properly” valued means.

761. Even if this was clear, to determine that issue would involve judgment, and potentially a difficult judgment. Moreover, the condition could apply regardless of whether the lack of a proper valuation was or even should have been known to the offeree. This means that the offeree may not be in a position to accept the offer made even though he neither knows nor should know this. That would not be reasonable or equitable.

762. I find that there was no such condition as alleged.

763. In any event the Technology rights were independently valued. Given that I have found that there was no valuation condition, and given the unclear ambit of what is meant by being “properly” valued, I do not propose to consider whether any such term (if it existed) would have been breached. However, in so far as it relates to whether the valuation was genuine, used appropriate methods and provided a valuation which bore relation to the Acquisition costs under the AAs, there would be no breach of the alleged term since, as found elsewhere in the judgment, the valuations did so.

(10) The Bank Loan condition – that Bank funding for the required Loan had been secured.

764. The offer is not made subject to this or any other express condition.

765. The IM does state that the acquisition of the Technology will be funded by a bank loan but it does not state when the loan will be obtained. In particular it does not state that the bank loan was to be secured at the time that the subscribers were made partners and there was no necessity for the loan to be in place at this time. If, for example, the loan arrangements were to be finalised the next day or week, there could be no sensible objection to the subscribers being made partners. Although the bank loans were not generally in place at the time of the D/A, in every case there was an intent and expectation that the loans would be secured and in every case (except Arte) they were secured.

766. Any statement that there will be a bank loan is more appropriately the subject matter of a promissory warranty. If there was any such warranty the subscribers would potentially have recourse against Innovator. A statement as to the future at the time of acceptance is an inapt condition of acceptance.

767. I find that there was no such condition as alleged.

768. In any event, if there was a condition that a bank loan would be secured, in every case it was so secured. The Arte scheme raises different considerations since it involved a personal loan and was the subject of an express term in the subscription application. It will be addressed separately.

(11) The due diligence condition – that the Technology rights, the proposed business, its prospects, its funding and its proposed operators (including the Administrator, Operators and the Exploiter) and advisers (including legal and technology advisers) had been assessed with appropriate due diligence.

769. The offer is not made subject to this or any other express condition.

770. There is no express statement to this effect in the IM.

771. Such a condition is more appropriately the subject matter of a promissory warranty. As a condition precedent it is unworkable. There could be endless room for argument and uncertainty as to whether it had been fulfilled.

772. It involves wide ranging issues of judgment, and potentially a difficult judgment. Moreover, the condition could apply regardless of whether the lack of due diligence was or even should have been known to the offeree. This means that the offeree may not be in a position to accept the offer made even though he neither knows nor should know this. That would not be reasonable or equitable.

773. It may be that if the Claimants had chosen to pursue a contractual claim against Innovator a term that it would perform identified duties with reasonable skill and care could have been implied, but that is not the way that the Claimants put their case.

774. I find that there was no such condition as alleged.

775. Given that I have found that there was no due diligence condition, and given its unclear ambit and the factual complexities to which it potentially gives rise, I do not propose to consider whether any such term (if it existed) would have been breached.

(12) The information condition – that the IM contained all such information as investors and their professional adviser would reasonably require and reasonably expect to find for the purpose of making an informed assessment of the issuers of the IM, the Technology rights, the Partnership including its proposed business and prospects and its management and advisers.

776. It was not suggested that there were any terms in the IM that supported this condition. Indeed it runs contrary to the clear statement in the IM that no representation or warranty is given as to the completeness of the information and opinions provided and the non-reliance provisions.

777. It was in relation to this condition that the Claimants relied on FSMA. The suggested condition is in similar terms to the requirements for IMs set out in the Public Offers of Securities Regulations 1995 ("the POS Regulations"). As was accepted, these do not apply to LLPs but were relied upon by way of analogy. The Claimants also placed reliance upon the fact that the verification notes produced internally by CB in respect of each IM required this question to be addressed.

778. The alleged condition is more appropriately to be characterised as an implied representation and it will be considered in more detail in that context.

779. As a condition of acceptance it is unworkable. There could be endless room for argument and uncertainty as to whether it had been fulfilled.

780. It involves wide ranging issues of judgment, and potentially difficult judgment. Moreover, the condition could apply regardless of whether the lack of information was or even should have been known to the offeree. This means that the offeree may not be in a position to accept the offer made even though he neither knows nor should know this. This would not be reasonable or equitable.

781. I find that there was no such term as alleged.

782. Given that I have found that there was no information condition and given its unclear ambit and the factual complexities to which it potentially gives rise, I do not propose to consider whether any such term (if it existed) would have been breached.

Conclusion on IM Conditions and contractual analysis of subscription offer

783. Having carefully considered each of the IM Conditions contended for by the Claimants I have reached the clear conclusion that none of them has been established.

784. A requirement that the IM Conditions be satisfied before the subscription offer could be accepted would put the offeree in an impossible position. If an offer is to be made subject to a condition it is essential that that is made clear. In the present case it is not clear that there are any conditions at all, still less conditions in the terms contended for by the Claimants. Further, in order to decide whether the conditions were met would in almost every case involve difficult issues of judgment. Yet further, the terms of many of the conditions are such that it might be subsequently found that the condition had not been met even though the offeree did not know this, and even where it cannot be said that he should have known this.

785. The air of unreality surrounding the suggested IM Conditions was borne out by the fact that there was no evidence that anyone was aware of them at the time. Although the Court’s task is an objective one it is striking that not one of the Lead Claimants gave evidence that they understood their subscription application to be subject to the IM Conditions. It is clear on the evidence that neither Mr Bailey nor Mr Roper, still less Mr Carter or Mr Gates, was aware of the IM Conditions. Although such knowledge was asserted in the Claimants’ pleaded case, it was faintly put, if at all, to these witnesses. To the extent that it was put it was certainly not made out.

786. In order to support their arguments the Claimants sought to take the most extreme case possible and assert that this shows that it is obvious that there

must be such a condition. However, the IM Conditions are not framed in terms which would catch only the most extreme cases. They are cast far more widely than that. Moreover, the possibility of other rights of recourse or limitations on authority in such cases was not considered when addressing the more extreme examples.

787. The IM Conditions appear to reflect an after event rationalisation by the Claimants' lawyers put forward with a particular end in mind. They do not reflect what would reasonably have been understood by the relevant persons at the time, as was borne out by the evidence. In general: they are not clear; they are not necessary; they are not obvious; they are not reasonable and equitable; they are not consistent with the terms of the IM.

788. In summary, my findings in relation to each of the individual conditions alleged are as follows.

789. I find that there was no "deadline"condition as alleged. In any event, there was no breach of the alleged condition since the relevant deadline had not expired at the date of the execution of the D/As.

790. I find that there was no "tax relief" condition as alleged. I do not propose to address the issue of breach of any such condition, but it is not obvious that at the date of the D/A there was a fixed reason why the Schemes should not have generated the anticipated tax relief.

791. I find that there was no "expenditure incurred" condition as alleged. In any event, there was no breach of the alleged condition since in every case expenditure was incurred on qualifying technologies, and such technologies did exist.

792. I find that there was no "business" condition as alleged. In any event, there was no breach of the alleged condition since the Partnerships and their businesses were not shams.

793. I find that there was no "Technology rights" condition as alleged. I do not propose to consider whether any such term (if it existed) would have been breached. However, in so far as it relates to the existence of real Technology there would have been no breach of the term.

794. I find that there was no "exploitation" condition as alleged. In any event, there was no breach of the alleged condition since the Technologies did have real exploitation prospects and there was a real intention to exploit them.

795. I find that there was no "Technology development" condition as alleged. I do not propose to consider whether any such term would have been breached, but in so far as it relates to whether there was Technology which had been developed there would be no breach of the alleged term since in every case there was such Technology.

796. I find that there was no “Technology price” condition as alleged. I do not propose to consider whether any such term would have been breached, but in so far as it relates to whether the Technology was of real value which was more than minimal and which bore relation to the Acquisition costs under the AAs, there would be no breach of the alleged term since the Technology rights had such value.

797. I find that there was no “valuation” condition as alleged. In any event the Technology rights were independently valued. I do not propose to consider whether they were “properly” valued, but in so far as it relates to whether the valuation was genuine, used appropriate methods and provided a valuation which bore relation to the Acquisition costs under the AAs, there would be no breach of the alleged term since the valuations did so.

798. I find that there was no “Bank Loan” condition as alleged. In any event, if there was a condition that a bank loan would be secured, in every case (save Arte) it was so secured.

799. I find that there was no “due diligence” condition as alleged. I do not propose to consider whether any such term (if it existed) would have been breached.

800. I find that there was no “information” condition as alleged. I do not propose to consider whether any such term (if it existed) would have been breached.

(2) Contractual analysis of the Power of Attorney

801. The Claimants’ case is most conveniently set out as pleaded in the RRAPOC as follows:-

“276. The P/A contained in each IM (as described in D3 above) was limited in the following respects:

276.1 it was exercisable only by the person who was the P/A donee as described (“the P/A donee attributes condition”);

276.2 it authorised the P/A donee to make a subscriber a Partner:

276.2.1 of the particular Partnership referred to in the IM, and no other (“the P/A Partnership condition”); and

276.2.2 only if the terms and conditions in the IM, including the IM conditions were fulfilled at time of its purported exercise (“P/A terms condition”).”

802. For the P/A donee attributes condition to be satisfied the Claimants contended that it was necessary (in relation to all schemes other than GT2) for the donee to be:

(1) the Managing Director of Innovator;

(2) the Administrator of the Partnership named in the IM;

(3) appointed Administrator pursuant to an extant Service Agreement between him and the same Partnership;

803. In relation to the GT2 scheme it was necessary for the donee (Mr Gates) to be Managing Partner of a Partnership named Gentech Partnership 2 LLP.

804. The Claimants' contention in relation to the P/A donee attributes condition was that Mr Carter was only capable of falling within the definition of Managing Partner for the purposes of being the P/A donee, if he was acting pursuant to an executed Service Agreement.

805. For the P/A Partnership condition to be satisfied the Claimants contended that the Partnership had to be precisely as named and identified in the IM.

806. For the P/A terms condition to be satisfied the Claimants contended that all the IM Conditions had to be fulfilled.

Relevant principles of construction

807. Although the Claimants recognised the general applicability of the principles of construction set out by Lord Hoffman in the *ICS v West Bromwich* case, in the context of powers of attorney they referred to and relied upon what is said at Article 24 in *Bowstead & Reynolds on Agency* (19^{th} ed.) ("Bowstead") as to the proper construction of P/As.

808. Article 24 provides:

> "Powers of attorney are strictly construed and are interpreted as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction:
>
> (1) The operative part of a deed is controlled by the recitals where there is ambiguity;
> (2) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts;
> (3) General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers only when necessary for that purpose;
> (4) A deed must be construed so as to include all incidental powers necessary for the effective execution of the power it confers."

809. Whilst the Article refers to the strict construction of P/As it also refers to construing them having regard to the purpose for which the authority is conferred. That involves a consideration of the relevant context. In this

case the context included the IM and the tax relief/business opportunity offered thereby. This was not a free standing P/A.

The terms of the IM

810. The P/A for the Schemes other than GT2 was expressed in similar terms to the YTC P/A set out below (save that there was an additional provision in Arte).

> "1. I hereby irrevocably apply to become a partner in the YTC Medical Learning System Partnership LLP ("the Partnership") on and subject to the terms and conditions set out in the information memorandum dated 21 June 2002 ("the Memorandum").
>
> 2. I hereby agree to become a partner in the Partnership and as security irrevocably appoint the Managing Partner to be my attorney and irrevocably instruct such attorney to take all such steps and execute all such documents and deeds and do all such things as my attorney at his discretion may consider necessary or appropriate to constitute me as a partner, including, without limitation but for such purposes alone, to execute a Partnership Deed or a deed of adherence to such Deed, any document and/or deed related to the Partnership's acquisition of Technology and any loan or loans obtained by the Partnership in that respect...
>
> EXECUTED AS A DEED BY THE APPLICANT"

811. Relevant definitions in the Definitions Section of the IM were as follows:

> (1) "Business" was defined as "The development and commercial exploitation of the Technology".
>
> (2) "Managing Partner" was defined as "The Managing Director for InnovatorOne PLC acting as Managing Partner of the Partnership in accordance with the Service Agreement";
>
> (3) "Partnership" was defined as "The YTC Medical Learning System Partnership LLP registered in England and Wales and formed to carry out the trade of the Business";
>
> (4) "Service Agreement" was defined as "An agreement between the Partnership and Paul T Carter, Managing Director of InnovatorOne PLC to act as Managing Partner".

812. On the Partners and Advisers page of the IM, under the heading "Management", it was said that "The Managing Partner of the Partnership is the Managing Director for InnovatorOne PLC, Paul T Carter".

The P/A donee attributes condition

813. It was the Claimants' case that the P/A is conferred on the "Managing Partner"; the "Managing Partner" is defined as the Managing Partner "acting in accordance with the Service Agreement"; and that it followed that the donee had no authority unless and until there was an executed Service Agreement.

814. According to the Claimants if a D/A was purported to be executed the day before the Service Agreement it would be void and of no effect, and that would be so even if Mr Carter was at the material time conducting himself on the basis of the terms of the shortly to be executed Service Agreement.

815. There are a number of considerations which show that this literalistic construction cannot be correct. In particular:

(1) The P/A is clearly intended to be immediate. The subscriber does "hereby" "irrevocably" "appoint" the Managing Partner as attorney. However, on the Claimants' construction there is no appointment unless and until a Service Agreement is executed, which may be a considerable time later.

(2) Strictly speaking there can be no Managing Partner until the Partnership has been formed. However, one of the specific powers given by the P/A is to execute a Partnership Deed and the IM recognised that the Managing Partner was to arrange for the formation of the Partnership.

816. The P/A is clearly appointing someone there and then and that person is the "Managing Director for InnovatorOne PLC, Paul T Carter" who the IM states "is" "The Managing Partner of the Partnership".

817. The words "in accordance with the Service Agreement" in the definition of 'Managing Partner' refers to the fact that Mr Carter's role and duties as such would be set out in the Service Agreement. They do not require there to be a Service Agreement before Mr Carter can be regarded as the Managing Partner for the purpose of the IM and the P/A.

818. Even if they did, the words do not require there to be an executed Service Agreement. It was Mr Carter's evidence, which I accept, that he acted as the Managing Partner/Administrator in accordance with the Service Agreement from the date of the incorporation of the LLP and that the executed Service Agreement confirmed his existing status. If so he was "acting as" Managing Partner/Administrator "in accordance with" the Service Agreement even though the formal agreement had yet to be executed. The same applies to Mr Gates in relation to GT2.

The P/A Partnership condition

819. The Claimants contended that the purpose of the P/A was to make a subscriber a partner in the "Partnership" and that this meant the

“Partnership” as defined in the IM which was the Partnership named therein.

820. It follows that if the Partnership into which the subscribers were purportedly entered differed in any way from that named in the IM then there was no authority to enter them into that Partnership, even though that slightly differently named Partnership was the Partnership which acquired the Technology, was the only Partnership through which the tax relief could be obtained, and even if there was in fact no Partnership with the precise name set out in the IM.

821. The Defendants contended that literalist approach would result in absurd consequences that cannot have been intended by the P/A donor, the subscribers. Their interest was in investing in the Partnership which acquired the Technology and thereby qualified for tax relief, not a Partnership with a particular name which did not do so.

822. I agree with the Defendants that the Claimants’ construction leads to insensible results. The purpose of the P/A was not to confer authority to be entered as a partner in a Partnership with a particular name but rather to enter them into a Partnership which would acquire and exploit the Technology. The P/A should be construed consistently with that purpose.

823. This is borne out by the Definitions section upon which the Claimants placed so much reliance. Thus the Partnership is defined as the named Partnership “formed to carry out the trade of the Business” (YTC), “formed for the trade of commercially exploiting the Technology” (Etrino; Optibet); “formed for the trade of the Business” (GT 2); “formed for the trade of acquiring the Technology…and commercially exploiting the Technology” (Charit and Arte). It is the Partnership which was formed for this purpose that the subscribers were to be entered into, not a Partnership with a particular name which could not carry out that trade, still less one which did not even exist.

824. It is also supported by other provisions of the IM. Thus the IM states that “The Partnership provides an opportunity for individuals to become members of an LLP involved in the Business of acquiring, developing and commercially exploiting Technology”. The P/A was directed at the Partnership which provided that opportunity, not a particularly named Partnership which did not do so.

825. I accordingly reject the Claimants’ case that the P/A related and could only relate to a Partnership that had exactly the same name as that referred to in the IM.

The P/A Terms Condition

826. The Claimants contended that the P/A was subject to the IM Conditions for essentially the same reasons that the subscription application offer was subject to those conditions. If anything, they submitted that the case was stronger as regards the P/A due to the principle of strict construction and

the importance of the authority being exercised precisely as granted, given in particular the inability of the donor to supervise the exercise of that power.

827. In my judgment the substance of the reasons given for rejecting the IM Conditions as terms of the subscription application offer apply equally to the P/A. In particular, the Claimants have to rely on the implication of conditions and they cannot show that such implication is necessary or appropriate. Further, the implication of such conditions would put the P/A donee in an impossible position. His authority would depend on unstated terms of which he was not aware, nor should he reasonably have been so aware. Even if he had been so aware the ambiguity of and uncertainty surrounding most of the alleged terms would render the P/A unworkable.

828. The Claimants further contended in closing that there was no authority to backdate any document. However, the pleaded authority issues relating to backdating were limited to backdating of the D/A for the YTC and Etrino schemes. I am not satisfied that it is open to the Claimants to advance any wider case in closing. Further, the backdating amendment application made during the course of the trial proceeded on the basis that backdating was relevant to the issues of dishonest assistance and conspiracy to defraud. Nor does GS13, which was the subject matter of the amendment application, make any reference to authority issues in either its unamended or its amended form. In my judgment it would be unfair to allow the Claimants to introduce in closing a wider authority case which had not been clearly pleaded and put.

Scheme specific authority issues

<u>Optibet</u>

829. The Claimants' primary contention in relation to Optibet was that there never was an Optibet GP. However, as already found, I am satisfied that there was, as Mr Crystal advised at the time. I am further satisfied that Mr Carter and Mr Evans adopted the 24 March 2003 LLP Deed as being the terms governing that GP pending the execution of a GP deed, which never occurred prior to Mr Evans' death.

830. On Mr Evans' death that GP came to an end but a further GP was made between Mr Carter through the execution of the D/A dated 31 July 2003. The Partnership's assets included the rights to the Technology which were vested in Mr Carter. Although that was a different GP to that existing at the time of the issue of the IM it was now the Partnership "formed for the trade of commercially exploiting the Technology".

831. There was then a Transfer of Trade agreement between the GP and the Optibet LLP and the subscribers were entered by Mr Carter as members of the LLP through his signing of the incorporation application for the LLP on behalf of all the subscribers.

832. The Claimants contended that Mr Carter had no authority to enter the subscribers as members of Optibet LLP as the IM and P/A related to a GP, not an LLP. In evidence Mr Carter accepted this but said that there had been an EGM approving the entry of the subscribers as members of a LLP, as had always been planned. However, there is no documentary evidence of any such EGM and one would expect there to be some written evidence of it.

833. The difference between a GP and an LLP is a difference in substance, not just in name. The IM refers only to a GP and makes no reference to the Partnership being or becoming a LLP. Although it might be said that the limitation of liability provided by a LLP would be a significant advantage to its members, it also carries with it responsibilities, as the LLP IMs make clear. Although the LLP was formed for the trade of acquiring the Technology I consider that Mr Carter was right to acknowledge that further authority was required to enter the subscribers into a LLP.

834. Subject to the issue of ratification, I accept the Claimants' case that on the evidence before the court Mr Carter exceeded his authority under the P/A in purporting to enter the subscribers into the Optibet LLP.

<u>Charit</u>

835. The main issue in relation to Charit is that the Charit IM referred to "Charit dash" (Charit-Email Technology Partnership LLP) whilst the Technology was acquired by and the subscribers were purportedly made partners of "Charit gap" (Charit E-mail Technology Partnership LLP).

836. As explained by Mr Carter in evidence, the background to this discrepancy in names was that Charit dash had been incorporated prior to the 26 March 2003 Ministerial Statement and therefore could not be used. The intention was that Charit dash's name would be subsequently changed and freed up to be used by a newly incorporated LLP that would acquire the Technology. This duly occurred but a mistake was made in the naming of the new LLP and it was incorporated as Charit gap rather than Charit dash. From that time onwards until 2 July 2004, when Charit dash changed its name to Charit gap, there was no Charit gap in existence and the only Charit email LLP was Charit dash.

837. For reasons already given I am satisfied that authority was given to make the subscribers partners in the LLP "formed for the trade of acquiring the Technology…and commercially exploiting the Technology", which was Charit gap. That was the purpose of the P/A. Further, the Important Information section refers to the Partnership LLP which "will acquire" the Technology. That was Charit gap.

<u>GT2</u>

838. A similar issue arises in relation to GT2. The GT2 IM separated its subscription application from its P/A. The P/A provided:

> "1. I, the subscriber as above, hereby appoint DAVID GATES of Moneygrowth Financial Services (or failing him, PAUL T CARTER of InnovatorOne PLC) to be my true and lawful attorneys ("the Attorneys") and I hereby authorise the Attorneys:
>
> (1) (a) to sign, execute and deliver on my behalf whether under hand or as a deed a partnership deed in relation to a limited partnership as GenTech Partnership 2 LLP of which David Gates will be the Managing Partner ("the Partnership Deed").
>
> (2) (b) to execute, deliver and issue on my behalf any deed, document, notice, instrument or other communication whatsoever required pursuant to the Partnership Deed referred to above and the Information Memorandum dated 12th November 2003 entitled The GenTech Partnership 2 LLP issued by Moneygrowth Financial Services.
>
> 2. I hereby ratify and confirm and agree to ratify and confirm the execution of the documents referred to above and irrevocably and unconditionally undertake to indemnify the Attorneys…from the exercise, or purported exercise, in good faith, of any of the powers conferred in this Deed.
>
> (3) This Power of Attorney is irrevocable until the expiry of the period of one year from the date hereof after which it shall be automatically revoked and of no further effect."

839. The IM referred to "GT2A" (The GenTech Partnership 2 LLP) whilst the Technology was acquired by "GT2 B" (The Gentech 2 Technology Partnership LLP). The background to this discrepancy in names was the same as for Charit. The intention had been to incorporate a new LLP with the name GT2 A but by mistake it was given the name GT2 B. GT2 A was renamed at the same time as GT2 B was incorporated so that from 30 September 2003 onwards there was no longer any LLP named GT2 A and the only GT2 LLP was GT2 B.

840. The Claimants submitted that because the P/A related only to GT2 A Mr Gates only had authority to enter the subscribers as members of this now non-existent LLP. He could not make them members of GT2 B.

841. For reasons already given I am satisfied that authority was given to make the subscribers partners in the LLP "formed for the trade of the Business" which was GT2 B. That was the purpose of the P/A. Further, the P/A was given in respect of a LLP "of which David Gates will be Managing Partner". That was only ever GT2 B.

842. There were, however, further issues which arose in relation to GT2. In particular the D/A referred to GT2A and to the LLP Deed of 27 February 2003, which also refers to GT2 A.

843. At the time that the D/A was entered into there was no Partnership in existence with the name of GT2A. In such circumstances the obvious

intention was to make the subscribers members of the GenTech Partnership which (a) existed and (b) owned the technology which was to be the subject of the qualifying expenditure. That was and could only be GT2B. The fact that the LLP Deed of 27 February 2003 referred to GT2 A is not determinative. The intention was clearly to adopt the terms of that Deed even if it referred to a differently named Partnership. Further, that Deed had not been the basis of the incorporation of GT2 A – that was the Deed of 24 March 2003.

844. In this connection, the Defendants relied, if necessary, upon the maxim "falsa demonstratio". The D/A is clearly referring to a Gentech 2 Partnership LLP. GT2 B was a Gentech 2 Partnership LLP and indeed the only Gentech 2 Partnership LLP then in existence.

845. Further, there have been a number of recent authorities in which a degree of verbal rearrangement or correction has been allowed as a matter of construction – see, in particular, the judgment of Lord Hoffman in *Chartbrook v Persimmon* [2009] 1 A.C. 1101 at [14 – 26]; the judgment of Lord Neuberger in *Pink Floyd Music Limited v EMI Records* [2010] EWCA Civ 1429 at [16 – 21]; the judgment of Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 at [14], and the judgment of Lord Hoffman in *Mannai Investment Company Limited v Eagle Star Life Insurance* [1997] A.C. 749.

846. As Lord Hoffmann stated at [25] of his judgment in *Chartbrook*:

> "What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the Court is allowed. All that is required is that it is should be clear that something has gone wrong with the language and that it should be clear what the reasonable person would have understood the parties to have meant."

847. In the present case it is clear that the reasonable person would have understood the D/A as referring to the slightly differently named GT2 B.

848. The LLP Deed, which, although mistakenly dated 27 February 2003, I find to have been executed shortly after the incorporation of GT2 B and the renaming of GT2 A at the end of September 2003, is to be construed in a similar way.

849. The Claimants further contended that Mr Carter had no authority "as Administrator" to enter the D/A. However, Mr Carter's authority is derived from the express authority given to him by the P/A.

850. The Claimants further contended in relation to Optibet (and some other Schemes) that the LLP Deed had never become "operational" as the "Effective Date" ("the date on which Subscription by way of Initial Capital by Individuals is completed") had not occurred. However, by entering the D/A it was recognised that this had occurred or was thereby occurring. In any event this does not go to authority.

Arte

851. The Arte P/A was slightly differently worded to the other Innovator IMs. It provided, in addition to the usual clauses of the POA, as follows:

> "I hereby apply to the Bank for a personal loan as stipulated above and my application is conditional upon the loan being granted by the Bank. I undertake immediately to provide any financial and/or personal information requested by the Bank at any time."

852. Unlike any other IM the Arte P/A was expressly made conditional. Mr Carter accepted in evidence that the Arte applications were conditional on a bank loan being received, although I accept that he did not appreciate this at the time of executing the D/A. Mr Roper acknowledged in evidence that the subscription application indicated that the application could not be accepted until a loan had been granted by a bank, but thought that it was badly drafted as this condition was inconsistent with the irrevocability of the application.

853. The CB Defendants submitted that the explanation of this inconsistency is that the underlying purposes of this clause in the P/A were (1) to enable Mr Carter as Administrator of the Partnership to reject a partner who could not obtain the personal loan (for instance, if it emerged that the investor was bankrupt), and (2) to protect the investor so that he would not be liable to pay the balance of his gross contribution if his application for a bank loan were refused. However, it was submitted that this did not mean that the Administrator was unable to make the investor a partner of the Arte Partnership without such loan being in place.

854. Whilst CB may be correct that this is what the condition is aimed at, this is not what the P/A says. There is no such qualification made in relation to the expressed condition.

855. CB further submitted, however, that it was in any event waived by the Arte investors since they signed voting forms agreeing not to drawdown personal loans. This is considered further below.

Ratification

Relevant legal principles

856. Article 13 of *Bowstead*, relating to ratification, states as follows (para. 2-047):

> "Where an act is done purportedly in the name or on behalf of another by a person who has no actual authority to do that act, the person in whose name or on whose behalf the act is done may, if the third party had believed the act to be authorised, by ratifying the act, make it as valid and effectual, subject to the provisions of Article 14 to 20, as it if had been originally done by his authority, whether the

person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all."

857. The principal must have knowledge of all the material circumstances in order to be able to ratify that act. Article 16 of *Bowstead* deals with the knowledge that is necessary (para. 2-067):

> "In order that a person may be held to have ratified an act done without his authority, it is necessary that, at the time of the ratification, he should have full knowledge of all the material circumstances in which the act was done, unless he intended to ratify the act and take the risk whatever the circumstances may have been. But knowledge of the legal effect of the act may be imputed to him and it is not necessary that he should have notice of collateral circumstances affecting the nature of the act."

858. It is knowledge of material acts that is important. As knowledge of the legal effect of the act may be imputed to the principal, he does not need to have actual knowledge of the legal effect of that act. In this case, therefore, the Claimants would not need to know that the exercise of the D/A was in excess of the authority. As stated in *Bowstead* (para. 2-068): "Where the principal is aware of the agent's acts and the terms of the purported contract, it appears not to be necessary that the principal had realised…that his agent had exceeded his authority. Assent may otherwise be manifested by the principal's commencing to perform the contract, and where, to the principal's knowledge, the third party commences to act on it, the principal may become estopped from disowning it."

859. Ratification can occur without knowledge of all the material circumstances where the principal "intended to ratify the act and take the risk whatever the circumstances may have been".

860. As to what constitutes ratification Article 17 of *Bowstead* states as follows (para. 2-070):

> (1) "Ratification may be express or by conduct.
>
> (2) An express ratification is a manifestation by one on whose behalf an unauthorised act has been done that he treats the act as authorised and becomes a party to the transaction in question. It need not be communicated to the third party or the agent.
>
> (3) Ratification will be implied whenever the conduct of the person in whose name or on whose behalf the act or transaction is done or entered into is such as to amount to clear evidence that he adopts or recognises such act or transaction: and may be implied from the mere acquiescence or inactivity of the principal.
>
> (4) The adoption of part of a transaction operates as a ratification of the whole.

> (5) It is not necessary that the ratification of a written contract should be in writing, but the execution of a deed can only be ratified by deed."

861. There is no requirement that the ratification be communicated. As *Bowstead* states (para. 2-074):

> "There is… in principle no necessity for the ratification to be communicated to the other party: it seems long established that it operates, if proved, as a unilateral manifestation of will"

Application to the facts

862. The CB Defendants submitted and I accept that that the Claimants knew or ought to be taken to have known the following facts and matters:

> (1) The content of the IM of the Scheme into which they invested;
>
> (2) The type of Partnership as it appeared in the IM;
>
> (3) The fact that Mr Carter was the Managing Director of Innovator;
>
> (4) The fact that they had been made partner by execution of a D/A (or at least that such was the intention of the Scheme);
>
> (5) The fact that Mr Carter subsequently wrote to the Claimants as Administrator;
>
> (6) The name and type of the Partnership that they were entered into (via the Partnership, and then their own tax returns);
>
> (7) That Partnership tax returns were being submitted on the basis that they had become a partner in the relevant Scheme;
>
> (8) In due course, that their own personal tax returns were being submitted and tax relief claimed on the basis that they had become a partner in the relevant Partnership.

863. I also accept that, subject to the requirement of knowledge, submitting a tax return on the basis that the subscriber was a partner in the Scheme and claiming and receiving tax relief on that assumption is an overt act of ratification. It presupposes that the applicant has been made a partner and necessarily adopts the transaction whereby he/she was made a partner.

864. It makes no difference that acts were addressed to the IR. Ratification follows from the nature of the act and may even be a private act. There is no requirement of communication.

865. As to knowledge, on my findings the material circumstances are that they had been made partners in an LLP rather than a GP (in relation to

Optibet) and that they had been made partners despite there being no bank loan (in relation to Arte).

866. In relation to Optibet, I accept and find that the Optibet Claimants must be taken to have known that they had purportedly been made members of a LLP. That was apparent from the Partnership accounts. It was apparent from the LLP tax return. It was apparent from their own tax return. I accordingly find that they ratified their partnership of the Optibet LLP.

867. Although it does not arise on my findings, I would reach the same conclusion in relation to any difference in the name of the Partnership. This too would be apparent from the accounts and LLP and personal tax returns.

868. In relation to Arte, the relevant material circumstances are that the subscribers had been made partners despite there being no personal bank loan. I find that the Arte subscribers knew that they had purportedly been made partners.

869. As to the bank loan, in November 2004 Acknowledgement Letters were sent out stating that personal loans were "being arranged" by Innovator and that subscribers "did not have to make their own arrangements".

870. In February 2005 update letters were sent which stated that Mr Carter would complete and execute the relevant loan documentation on behalf of subscribers.

871. On 31 March 2005 Mr Carter wrote explaining that MFC "no longer " wished to fund the loans and that they were being replaced by Fairbairn Private Bank Limited which would "take over the position vacated by MFC'.

872. On 2 October 2006, Mr Carter wrote to the Arte subscribers stating that:

> "Some months ago you were informed that MFC Merchant Bank SA was no longer prepared to fund the debt portion of your Capital Contribution and that Fairbairn Bank had agreed to replace MFC. Although a number of partners completed the application forms required by Fairbairn, many did not. As a consequence no loans were ever drawn down.
>
> Furthermore, since the Partnership was formed, legislation has been changed which could have a negative impact on the loan repayment arrangements and the ability to claim the tax relief.
>
> As a result, when one also takes into account the attitude that HMRC has been taking in respect of technology and other

> partnerships, it is considered that the most appropriate course of action would be not to draw down the loan and amend the tax return previously prepared.
>
> To achieve this, partners are being requested to vote on the attached resolutions. I do not intend to host a meeting for this purpose, rather relying on a postal /fax vote."

873. The Arte partners subsequently voted in October 2006 to accept Mr Carter's proposal not to drawdown the personal loan and to amend the tax returns to reflect the fact that no personal loan had been drawn down. The Voting Forms expressly stated: "I ... being a Member of the Partnership, vote as follows ... The Partnership hereby agrees not to drawdown the loans with Fairbairn Bank ... the tax return previously prepared for the Partnership be amended to reflect the fact that the loans with Fairbairn Bank have not been drawn down".

874. These October 2006 documents support CB's case that the Arte subscribers knew that there had been no bank loan. The Claimants, however, contended that the position was far from clear. When Mr Carter wrote in March 2006 he referred to MFC no longer wishing to "continue" funding. This suggested that a loan was in place and the issue was whether Fairbairn would take it over. When Mr Carter wrote in October 2006 the position was still not made clear. This was supported by the evidence of Professor Von Oppell who said that it was not until December 2006 that the loan position became clear to him.

875. Although I accept that there were a number of features of the implementation of the Arte Scheme which were not made clear to subscribers, I am satisfied that ultimately the position in relation to the bank loan was made clear. The letter of October 2006 states that "no loans were ever drawn down". The letter explained that in the light of the IR's attitude it was recommended that the loan not be drawn down and to "amend the tax return previously prepared". That recommendation was then voted on. The amendment of the tax return would reasonably be understood as removing the reference to any loan element in the light of the non drawdown of the loan. Further, if there had been a bank loan subscribers would reasonably expect to have knowledge of it, even if it had been arranged by Innovator, since it was being made to them personally, not the LLP. In all the circumstances I am satisfied on the evidence as a whole that the Arte subscribers did have knowledge of the fact that there had been no personal bank loan.

876. As to ratification, I accept and find that voting not to drawdown the loans with Fairbairn Bank and to amend the tax return was an act necessarily exercised on the basis that the subscribers were partners. Since it was made with knowledge of the material circumstances it was a ratification and indeed waiver of any breach of duty which may have been involved in purporting to make the subscribers partners without such a loan being in place.

Conclusion on contractual analysis of Power of Attorney

877. I find that there was no P/A donee attributes condition as alleged and that, if there was, it was complied with.

878. I find that there was no P/A Partnership condition as alleged. If there was, it did not mean that the P/A could only be exercised in relation to a Partnership that had exactly the same name as that referred to in the IM.

879. I find that there was no P/A terms condition as alleged.

880. I find that Mr Carter exceeded his authority under the P/A in purporting to enter the subscribers as partners in the Optibet and Arte LLPs but that this act was ratified.

Conclusion on "Never a Partner" claim

881. For the reasons outlined above I reject the Claimants' case that they never became partners of the Schemes.

(7) MISREPRESENTATION CLAIM

The Claimants' case

882. The Claimants contended that fraudulent alternatively negligent misrepresentations were made in the IM, in the Acknowledgment Letters, in the Welcome Letters, in the Statement of Losses letters and during the course of the IR enquiry.

883. These representations were alleged to have been made by Innovator, Mr Carter, Mr Stiedl, the LLP (from the date of its incorporation) and Mr Gates and MFS Ltd in the case of GT2.

Relevant principles of law

884. I addressed the law on misrepresentation in some detail in my judgment in *CRSM v Barclays Bank* [2011] EWHC 484. The following paragraphs are of relevance to the present case:

> "C. Making a representation
>
> 215. A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true. In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee: see Raiffeisen, supra, at [81]; Kyle Bay Ltd v Underwriters Subscribing under Policy

No. 01957/08/01 [2007] Lloyd's Rep IR 460, 466, at [30]–[33], per Neuberger LJ.

216. In order to be actionable a representation must be as to a matter of fact. A statement of opinion is therefore not in itself actionable. However, as stated in Clerk & Lindsell para 18-13:

> "A statement of opinion is invariably regarded as incorporating an assertion that the maker does actually hold that opinion; hence the expression of an opinion not honestly entertained and intended to be acted upon amounts to fraud."

217. In addition, at least where the facts are not equally well known to both sides, a statement of opinion by one who knows the facts best may carry with it a further implication of fact, namely that the representor by expressing that opinion impliedly states that he believes that facts exist which reasonably justify it – see Clerk and Lindsell para 18-14, citing among other cases Smith v Land and House Property Corp (1884) 28 Ch D 7, 15, per Bowen LJ, and Brown v Raphael [1958] Ch 636.

218. A statement as to the future may well imply a statement as to present intention: "that which is in form a promise may be in another aspect a representation" - Clerk & Lindsell, para 18-12, quoting Lord Herschell in Clydesdale Bank Ltd v Paton [1896] AC 381, 394.

219. Silence by itself cannot found a claim in misrepresentation. But an express statement may impliedly represent something. For example, a statement which is literally true may nevertheless involve a misrepresentation because of matters which the representor omits to mention. The old cases about statements made in a company prospectus contain illustrations of this principle – for example, Oakes v Turquand (1867) LR 2 HL 325, where Lord Chelmsford said (at 342-3):

"... it is said that everything that is stated in the prospectus is literally true, and so it is; but the objection to it is, not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood."

220. In relation to implied representations the "court has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context": per Toulson J in IFE v Goldman Sachs [2007] 1 Lloyd's Rep 264 at para. 50. That involves considering whether a reasonable representee in the position and with the known characteristics of the actual representee would reasonably have understood that an implied representation was being made and being made substantially in the terms or to the effect alleged.

221. In a deceit case it is also necessary that the representor should understand that he is making the implied representation and that it had the misleading sense alleged. A person cannot make a fraudulent statement unless he is aware that he is making that statement. To establish liability in deceit it is necessary "to show that the representor intended his statement to be understood by the representee in the sense in which it was false" – per Morritt LJ in Goose v Wilson Sandford & Co. [2001] Lloyd's Rep PN 189 at para. 41. In other cases of misrepresentation this is not a requirement, but one would generally expect it to be reasonably apparent to both representor and representee that the implied representation alleged was being made.

222. It is necessary for the statement relied on to have the character of a statement upon which the representee was intended, and entitled, to rely. In some cases, for example, the statement in question may have been accompanied by other statements by way of qualification or explanation which would indicate to a reasonable person that the putative representor was not assuming a responsibility for the accuracy or completeness of the statement or was saying that no reliance can be placed upon it. Thus the representor may qualify what might otherwise have been an outright statement of fact by saying that it is only a statement of belief, that it may not be accurate, that he has not verified its accuracy or completeness, or that it is not to be relied on: Raiffeisen, supra, at [86].

224. As further observed in Raiffeisen, at [87], the claimant must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it; and that, having that understanding, he relied on it. Analytically, this is probably not a separate requirement of a misrepresentation claim but rather is part of what the claimant needs to show in order to prove inducement.

D. Fraud

225. The classic statement of the mental element required to found a claim in deceit remains that of Lord Herschell in Derry v Peek:

"First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth."

226. As to recklessness, even if the party making the representation may have had no knowledge of its falsehood, he will still be responsible if he had no belief in its truth and made it, "not caring whether it was

true or false" - See Clerk & Lindsell, para 18-21. As Lord Herschell put it Derry v Peek, supra, at 368 (and 361):

"Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true."

227. It is not necessary that the maker of the statement was 'dishonest' as that word is used in the criminal law - Standard Chartered Bank v Pakistan National Shipping Corp (No. 2) [2000] 1 Lloyd's Rep. 218, 224. Nor is the defendant's motive in making the representation relevant: "If fraud be established it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made." - Clerk & Lindsell, para 18-20, quoting Bradford Third Benefit Building Society v Borders [1941] 2 All ER 205, 211 per Viscount Maugham; and see also Derry v Peek, supra, at 409. What is required is dishonest knowledge, in the sense of an absence of belief in truth - The Kriti Palm, supra, para 257 (Rix LJ); and see also para 258, quoting Armstrong v Strain [1951] TLR 856, 871, per Devlin J ("When Judges say, therefore, that wickedness and dishonesty must be present, they are not requiring a new ingredient for the tort of deceit so much as describing the sort of knowledge that its necessary").

228. The ingredient of dishonesty (in the above sense) must not be watered down into something akin to negligence, however gross - The Kriti Palm, supra, para 256. However, the unreasonableness of the grounds of the belief, though not of itself supporting an action for deceit, will be evidence from which fraud may be inferred. As Lord Herschell pointed out in Derry v Peek, supra, at 376, there must be many cases: "where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one."

229. Where a serious allegation (such as deceit) is in issue, this does not mean the standard of proof is higher. However, the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established - The Kriti Palm, supra, para 259, quoting Lord Nicholls in re H (Minors) [1996] AC 563, 586."

885. In relation to reliance and inducement the position is conveniently summarised in *Chitty* as follows:

(1) "It is essential if the misrepresentation is to have legal effect that it should have operated on the mind of the representee. It follows that if the misrepresentation did not affect the representee's mind, because he

was unaware that it had been made, or because he was not influenced by it, or because he knew it was false, he has no remedy" – *Chitty* para. 6-032.

(2) "It is not necessary that the misrepresentation should be the sole cause" of the claimant acting as he did. "It is sufficient if it can be shown to be one of the inducing causes." – *Chitty* para. 6-034.

(3) The normal rule is that "where a party has entered a contract after a misrepresentation has been made to him, he will not have a remedy if it is shown that he would have entered the contract in any event". This is not, however, necessary in cases of fraud. In such cases it "is sufficient if there is evidence to show that he was materially influenced by the misrepresentation in the sense that it has some impact on his thinking, "was actively present to his mind" – *Chitty* para. 6-035."

886. The Claimants stressed the duty to correct a representation which is known to have become false and that what matters is whether the representation is false when acted upon.

887. The Claimants also relied upon the fact there may be liability for representations which have been passed on. As stated in *Chitty* at 6-028: "To put the matter another way, the claimant must show that it was intended that he was intended to act on the representation, rather than it being aimed solely at someone else. There may be said to be three types of representees: first, persons to whom the representation is directly made and their principals; secondly, persons to whom the representor intended or expected the representation to be passed on; and thirdly, members of a class at which the representation was directed……Nor is it always necessary that the actual representation should reach the representee. If a person asks an agent to find some property for him, and the agent, relying on the fraudulent inducements of the vendor, recommends the vendor's property, the buyer will be entitled to relief for misrepresentation even though the agent did not actually pass on the fraudulent statements."

888. In a number of instances representations were "passed on" in the sense of being repeated by IFAs to subscribers. Such representations are actionable when those subscribers relied on them if the representations fall within classes two or three in the passage set out. Where the representations induced advisers or introducers to recommend the Schemes to their clients, the same principle may apply.

889. In considering whether a representation, and in particular an implied representation, was made; the scope of any representations made; whether there was any assumption of responsibility or duty of care and whether there was reliance the terms of the IM are of relevance.

890. The disclaimers contained in the YTC Information Memorandum of September 2002 may be taken as an exemplar. They included the following:

"IMPORTANT NOTICE ABOUT THIS MEMORANDUM

…this Information Memorandum…provides information only"

No reliance may be placed for any purpose whatsoever on the information provided in this information memorandum or its completeness. No representation or warranty, express or implied, is or will be made as to the accuracy or completeness of the information, including, without limitation, all projections or opinions contained in this information memorandum and no liability is accepted by InnovatorOne Plc for any such information or opinions.

This Information Memorandum provides recipients with information on arrangements for the Partnership in particular, and in the context of the acquisition and exploitation of the technology, in general. Recipients are advised to refer to the final form of the Partnership Deed…consult their own advisers and consider for themselves the financial, legal and other consequences of subscribing to the Partnership before subscribing. Recipients are also referred to the risk factors described on page 13 herein.

….

RISK FACTORS

Subscribers to the Partnership should consider the potential risks of such participation, which include, but are not limited to, the following:

….

The value of an individual's participation in the Partnership may decrease as well as increase and there is no guarantee that partners will fully recoup their contributions to the Partnerships".

Partners should take and maintain while they are partners, independent professional advice as to their duties at law as partners of an LLP and the potential liabilities that they may incur in excess of the amount they will have agreed to contribute to the assets of the Partnership in the event of its winding up….

….

This information memorandum has been prepared on the basis of current tax legislation and Inland Revenue practices, concessions and interpretations. If these change, or if the levels and bases of taxation change as a result of amendments to the law, the changes may be applied retrospectively. The value of an individual's subscription may be affected as a consequence, as may be the amount, timing and availability of tax relief….

…there is no guarantee that the Inland Revenue will agree that the tax reliefs described in this Information Memorandum will be applicable to that individual

> …profits by way of exploiting technology are very speculative and there can be no guarantee that a partner's participation is the exploitation of the technology will result in a profit.
>
> The Partnership interests described in this Information Memorandum are commercial participations in a business venture. Individuals are recommended to take appropriate professional advice before subscribing.
>
> DISCLOSURE TO HIGH NET WORTH INDIVIDUALS
>
> Reliance on this Information Memorandum for the purpose of engaging in any investment activity may expose you to a significant risk of losing all of your property invested; and
>
> If you have any doubt about the investment to which this information memorandum relates, you should consult an authorised person specialising in advising on investments of this kind."

891. These sections of the IM make it clear that a subscriber ought to take independent professional advice before subscribing, that the investment was speculative and that tax relief may not be granted. It also makes it clear that no warranty or representation is being made as to the accuracy and completeness of any information, projections or opinions provided.

892. In this connection the Defendants relied upon the case of *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm). In that case Goldman Sachs had sent a Syndicate Information Memorandum ("SIM") to the claimant and others inviting them to participate in the syndication of a mezzanine facility. The SIM stated that the information in it had been derived from many sources and was not to form the basis of any contract; that Goldman Sachs had not independently verified the information and gave no representation, warranty or undertaking, express or implied and did not accept responsibility for its accuracy; and that the information was not to be assumed to have been updated and did not constitute a representation by any person that the information would be updated. The SIM gave a positive view of the company.

893. It was held that this disclaimer meant that no duty of care arose. In the Court of Appeal [2007] EWCA Civ 811 Waller LJ at [28] endorsed Toulson J on this point:

> "....the argument that there was some free standing duty of care owed by GSI to IFE in this case is, in the light of the terms of the Important Notice, hopeless. Nothing could be clearer than that GSI were not assuming any responsibility to the participants: Hedley Byrne v Heller & Partners [1964] A.C. 465. The foundation for liability for negligent misstatements demonstrates that where the terms on which someone is prepared to give advice or make a statement negatives any assumption of responsibility, no duty of care will be owed. Although there might be

cases where the law would impose a duty by virtue of a particular state of facts despite an attempt not "to assume responsibility" the relationship between GSI either as arranger or as vendor would not be one of them. I entirely agree with the judge on this aspect."

894. The Defendants also relied upon the recent line of authority concerning contractual estoppel and in particular *Peekay v Australia & New Zealand Banking Group* [2006] 2 Lloyd's Rep 511 and *Springwell Navigation v JP Morgan Chase Bank* [2008] EWHC 1186 (Comm)(Gloster J); [2010] EWCA Civ 1221 (CA).

895. I reviewed these authorities in the *CRSM v Barclays* case and concluded as follows:

"505. The authorities accordingly establish that:

(1) It is possible for parties to agree that one party has not made any pre-contract representations to the other about a particular matter, or that any such representations have not been relied on by the other party, even if they both know that such representations have in fact been made or relied on, and that such an agreement may give rise to a contractual estoppel.

(2) If a term is to be construed as having this effect (and thereby prevent from arising the ordinary consequences which would otherwise follow as a matter of law) clear words are necessary – see Peekay para. 57; Board of Trade v Steel Brothers & Co. Ltd. [1952] 1 Lloyd's Rep. 87 at p95.

(3) Whether or not a clause or collection of clauses has this effect is a matter of construction of the contract.

(4) The principle may not apply where there has been a misrepresentation as to the effect of the contractual documents which give rise to the estoppel – see Peekay para. 60; Springwell para. 166.

506. The cases provide clear examples of clauses which will be construed as having the effect of precluding claims for misrepresentation - see, for example, in the banking context the provisions in the Raiffeisen case (para. 229):

> "RZB acknowledges and agrees that ... RBS and its Affiliates, officers, employees, agents, and professional advisers do not make any representation or warranty, express or implied as to, or assume any responsibility for, the accuracy, adequacy, reliability or completeness of any of the Confidential Information."
>
> "The contents of this Memorandum have not been independently verified. No representation,

> warranty or undertaking (express or implied) is made, and no responsibility is accepted as to the adequacy, accuracy, completeness or reasonableness of this Memorandum or any further information, notice or other document at any time supplied in connection with the Facility."
>
> As Christopher Clarke J said in Raiffeisen, those provisions "specify that no representation is made or that RBS does not make any. These provisions are unambiguous."

896. These cases are primarily of relevance to claims made against a contractual counterparty. In the present case the Claimants' claims were mainly addressed at non-contractual parties. However, these cases still involve a helpful analysis of the scope and effect of comparable disclaimer provisions and of the applicability of section 8 of UCTA, which the Claimants relied upon by way of late amendment.

897. In relation to the applicability of UCTA guidance is given by the *Raffeisen* decision in which Christopher Clarke J. said at [310]:

> "...the essential question is whether the clause in question goes to whether the alleged representation has been made (or, I would add was intended to be understood and acted on as a representations), or whether it excludes or restricts liability in respect of representations made, intended to be acted on and in fact acted on; and that question is one of substance not form..."

898. Christopher Clarke J made it clear, however, that a clause would amount to an exclusion clause if it "attempts to re-write history or parts company with reality" at [314]. He concluded that the clauses relied upon by RBS did not:

> "attempt to exclude or restrict any liability...On the contrary they contain, it seems to me, the agreement of the parties as to the basis upon which the Confidential Information was to be given, namely that it was not to be regarded as a representation of fact on which RBS intended that [RZO] should rely or upon which it was entitled to rely; and that any statements made in, for instance, the IM were not to be regarded as complete. The provisions in the IM and the Confidentiality Agreement were there at the start of, and defined, the relationship between the parties and the character of what was to be said.
>
> If parties such as these agree in unequivocal terms as to the ambit of what is being represented to them and the extent to which one party is entitled to rely on what it is being told by the other, I do not see why the Court should not give effect to their agreement..." [316-317].

899. Christopher Clarke J also held that, even had the clause been subject to the requirement of reasonableness, it would have satisfied the test. In taking

this view, he was influenced to a considerable degree, by the fact that the parties were both large commercial organisations.

900. In relation to the disclaimers in the IMs in the present case I do not consider that they mean that no representations are being made at all. Although the IMs state that no reliance may be placed on any information provided in the IM, it is elsewhere acknowledged that it will be so relied upon, as it would have to be. Thus the basis upon which recipients are urged to consult their own advisers is stated to be the information in the IM ("This Information Memorandum provides recipients with information…") upon which reliance would have to be placed to give such advice. Further, the subscription application contains an acknowledgment that the subscriber has "relied on the information in the Documentation", which includes the IM.

901. The disclaimers do, however, make it clear that no representation is being made that the information provided is complete. They also state that no representation is being made as to its accuracy. These provisions qualify any representations of fact made and indicate that there was no intention that the recipient should rely or be entitled to rely on the completeness or accuracy of the representations made. As such they would not be caught by UCTA since they do not exclude or restrict liability in respect of representations made and intended to be acted upon, nor do they attempt to re-write history or part company with reality.

902. These provisions also make it difficult to found any assumption of responsibility or duty of care in respect of the accuracy or completeness of the information provided. They do not, however, go to the genuineness of the information provided or to claims based in deceit.

The IM Representations

903. These were stated to be as follows (RRAPOC 231):

> "231.1 Representations as to tax including:
>
> 231.1.1 the relevant deadlines for the availability of relevant tax relief had not expired or had been complied with ("the deadlines representation").
>
> 231.1.2 that tax relief would be available as set out and in the proportions and amounts set out in the IM ("the tax relief representation").
>
> 231.1.3 that the Partnership had or would incur qualifying expenditure on ICT as set out in the IM ("the expenditure incurred representation").
>
> 231.1.4 Representations as to the business of the Partnership including that the Partnership and its business were real and not a sham in the sense that that there was never any intention on the part its promoters, operators or administrator that it be a real and genuine business or have

any real purpose other than as a vehicle to obtain tax relief ("the business representations").

231.2 Representations as to the Technology including:

231.2.1 that there were rights to the Technology as described ("the Technology rights representation");

231.2.2 that there was a real possibility of deriving profit from exploitation of the Technology rights ("the exploitation representation").

231.2.3 that the Technology Developer had developed the Technology rights ("the Technology development representation").

231.2.4 that the acquisition cost for the Technology rights bore a reasonable relationship to its true market value ("the Technology price representation").

231.2.5 that the Technology rights acquired or to be acquired had been independently and properly valued ("the valuation representation")

231.3 Representations as to funding including that Bank funding for the required Loan had been secured ("the Bank Loan representations").

231.4 that the Technology rights, the proposed business, its prospects, its funding and its proposed operators (including the Administrator, Operators and the Exploiter) and advisers (including legal and technology advisers) had been assessed with appropriate due diligence ("the due diligence representation");

231.5 that the IM contained all such information as investors and their professional adviser would reasonably require and reasonably expect to find for the purpose of making an informed assessment of the issuers of the IM, the Technology rights, the Partnership including its proposed business and prospects and its management and advisers ("the information representation")."

904. It is apparent that the IM Representations are essentially the IM Conditions reformulated as representations. Many of the reasons given as to why there were no such Conditions equally apply to the IM Representations. In particular, most of them are not derived from express statements in the IM and cannot reasonably be implied.

905. Many of the alleged representations relied upon cannot be described as statements of present fact but amount at most to statements of opinion or expectation. The IMs must be read as a whole and each contained a number of explicitly stated assumptions and set out a range of risk factors associated with the investment. Read alongside those assumptions and risk factors, statements as to tax relief or potential commercial success cannot reasonably be regarded as statements of present fact. The Claimants' case was put on the basis of the representations being statements of present fact.

There was no pleaded case that statements of expectation, belief or of opinion based on reasonable grounds were made.

906. In so far as the Claimants were alleging implied representations it was incumbent on them to prove that such representations were understood to have been made since otherwise there could be no reliance. In relation to most of the alleged implied representations there was no such evidence, or no sufficient evidence, of any such understanding from Lead Claimants or IFAs. Equally, in so far as deceit was being alleged, it was incumbent on the Claimants to prove that the alleged representor understood a representation to the alleged effect to have been made. In relation to most of the alleged implied representations there was no such evidence, or no sufficient evidence, of any such understanding

907. Further, any representations made in the IM were made when it was issued and distributed and were acted upon when the subscribers made their irrevocable application to become partners and that offer was accepted by Innovator. In so far as there was any duty to correct representations made it is unlikely that it continued thereafter. On any view it did not extend beyond the time when they were made partners.

<u>(1) The alleged tax representations</u>

908. In the YTC IM, by way of exemplar, it was stated that "…the Partnership <u>should be able</u> to write off the cost of acquiring the Technology.." and that the "Partnership <u>may</u> expect to incur a trading loss" leading to "<u>anticipated</u> initial tax benefit"; "It is <u>expected</u> that relief under section 45 will be available…"; "The reliefs depend upon the trade being carried on a commercial basis and with a view to profit" (emphasis added). These are not statements of fact, but rather statements of expectation, belief or opinion. However, no case was advanced on the basis of any statement of fact that might be inherent in a statement of expectation, belief or opinion.

909. As to each of the individual representations within the alleged tax representations:

(1) The alleged "deadlines representation" does not appear in the IMs and no such representation falls to be implied. At the time the IMs were promulgated, the relevant tax deadlines were a considerable distance in the future, and they remained in the future when the subscribers made their irrevocable subscription applications and (given that no D/A was backdated into the prior tax year) when they were made partners. In any event, the tax deadlines were complied with and so there could be no misrepresentation.

(2) The alleged "tax relief representation" is not a representation of fact. A statement as to what "would" happen is a statement as to the future. The Claimants recast their pleaded case as one relating to the capability of tax relief being obtained. There is no express statement of capability made in the IM. There is a statement that the "Partnership is constructed in such a way as to allow Partners to take

advantage of the tax reliefs available" but that needs to be read together with all the other statements in the IM relating to tax relief which collectively make it clear that such statements are at most statements of expectation, belief or opinion.

(3) As to the alleged "expenditure incurred representation" there is no statement in the IM that the expenditure had been incurred, nor was there any need for it to be incurred by the time of the subscription application or the subscribers being made partners. There is therefore no basis for implying any such representation. Whilst the IM may have represented that such expenditure would be incurred that is not a statement of present fact but is rather a statement of expectation, belief or intention. Although it was not pleaded the Claimants sought to recast this as a representation of intention. Even if such case was open to them no such case was clearly put; nor, if it was, was any misrepresentation established. As was intended, in every case expenditure was incurred on qualifying Technologies, and on Technologies which did exist.

(4) The alleged "business representations" do not appear on the face of the IMs. However, I am prepared to accept that it was necessarily impliedly represented that the business was intended to be real and not a sham. However, for reasons given elsewhere, it was not intended to be and was not a sham.

<u>(2) The alleged technology representations</u>

910. The Defendants accepted there were statements made in the IMs to the effect that the Technology existed and had been developed to a certain stage. For reasons addressed in more detail elsewhere, these statements were true, as borne out, for instance, by the evidence of Mr Lewis, Mr Binks, Mr Wren-Hilton, Mr Walsh, Mr Joshi, Dr Burade, Mr Brocklebank, Mr McCallum, Mr Flint and Dr Collis. However, the IM made clear that there were no certain outcomes: "The commercial success of the Business will solely depend upon the exploitation of the Technology". Again this was not a statement of present fact but a caveated statement as to the future.

911. As to each of the individual representations alleged:

(1) In relation to the "technology rights representation" the Defendants accepted that a statement made was made as to the existence of such rights. However, as addressed more fully elsewhere, there were such rights. In so far as the representation is meant to mean that the rights were to Technology exactly as described, that is not what is stated in the IM and it would be unreasonable to expect this or to understand the IM in this way given that the Technology was inevitably going to be developed. Further,

no representation was being made as to the accuracy of information provided.

(2) The alleged “exploitation representation” is not a representation of present fact. That there was a real possibility of deriving profit is a statement of opinion and future expectation or belief. In any event, the Technologies did have real exploitation prospects and there was a real intention to exploit them.

(3) The only express statement in the IMs that the Technology Developer had developed the Technology is in relation to Ellsburg and YTC. In other IMs the Technology Developer was defined as the owner of the Technology from whom the Technology was being purchased. Even if such a statement is to be implied the Claimants did not advance a case to the effect that the Technology Developer did not develop Technology rights. In so far as the alleged representation is that to the effect that the Technology was already fully developed, that is not expressly stated. Further, page 4 of the IMs stated, under the heading ‘Activity’, that the opportunity being offered was for individuals to become members of an LLP involved in the business of acquiring, <u>developing</u> and commercially exploiting Technology. This shows that the IM contained no representation to the effect that the Technology was fully developed and also that the investors should reasonably have known that the LLP would also be <u>developing</u> the Technology.

(4) The alleged “technology price representation" appears nowhere on the face of an IM. One cannot infer a complex and contentious representation of this kind, still less one involving vague concepts such as “reasonable relationship” and “true value”. The basis of the acquisition cost is set out in the IM. No statement beyond that was made.

(5) As to the alleged “technology rights valuation representation" there is a statement in most of the IMs that the Technology had been independently valued. Where such statement was made it was true. No statement was made that it had been “properly” valued. It is unclear what that means and any representation to this effect, in so far as it is a matter of fact, would need to be clearly spelt out, which it is not.

<u>(3) The alleged bank funding representations</u>

912. There is no statement in any IM that a loan had been secured. There were statements to the effect that there would be a loan, but no statement as to when it would be obtained. Such statements as were made were statements of intent or expectation or belief as to the future not present statements of fact. The YTC IM, for example, said that “the partnership <u>intends</u> to obtain 80% finance for its acquisition of Technology” and “…the partnership is <u>anticipated</u> to obtain finance for 80%”. In any event,

in all cases there was an intent and expectation that bank loans would be secured and bank funding was secured for all Schemes save for Arte.

(4) The alleged due diligence representations

913. The alleged due diligence representations do not appear in the IMs. There is no basis for inferring such a contentious and far reaching representation. Issues of this kind are properly the subject matter of negotiation and, if agreed, a promissory warranty. What is "appropriate" or what is "due diligence" is a matter of evaluation and judgment, not a statement of fact.

(5) The alleged information representations

914. There was no such representation anywhere on the face of the IM. There is no basis for inferring any such representation given the clear statements made in the IM that no representation was being made as to the completeness of the information provided.

915. It is correct that the Verification Notes (which was an internal process designed to bring discipline to Innovator's documents) used some of the language found in the POS regulations which form the basis of the alleged representation. However, these were not representations made to the Claimants. They were internal documents. Whilst they support the view that consideration of this question is good practice, they do not support the suggestion that any statement to that effect was made. It was not.

916. In summary, for the most part I reject the Claimants' case that the IM Representations were made. To the extent I have found that such representations were made they were true.

The Acknowledgement Letter Representations

917. These were alleged to be as follows (RRAPOC 234):

> "234.1 "Your funds will be held will be held in the [CB] Client Account until the Partnership has been established" [emphasis added] or "The funds will be held in the [CB] Client Account until your Capital Contribution is invested into the Partnership" "the AL subscription money representation";
>
> 234.2 the subscriber would become a partner of the Partnership only when his or her Capital Contribution was "formalised" and the "Managing Partner" had signed the Partnership Deed on his or her behalf ("the AL partner representation");
>
> 234.3 (in Version 1 Acknowledgment Letters) the Partnership would "then" (i .e. after the subscriber had been made a partner) purchase the technology and commence its trading activities ("the AL purchase and trading representation");
>
> 234.4 in the "unlikely event that the Partnership is never formed, your

funds will be returned." [emphasis added] ("the AL return of funds representation");

234.5 in that event, the subscriber would be offered to option to invest into an alternative partnership, if one were available and suitable and acceptable to the subscriber ("the AL alternative option representation");

234.6 (by implication), unless and until a subscriber became a partner of the relevant Partnership, each of the representors regarded that subscribers' subscription money as his or her money and not that of the Partnership or any other person ("the AL funds representation")."

918. The alleged representations set out in paragraphs 234.1 to 234.5 are all statements as to what will happen. They are not statements of present fact. The only potential statement of present fact alleged is 234.6 which would appear to allege a belief on the part of the alleged representors.

919. I would agree that the express statements made in the letter as to what "will" happen can be regarded as statements of expectation or belief. However, the alleged implied representation goes further and essentially asserts a legal consequence which is said to follow from the express statements made. I am not satisfied that any implied representation to that effect was made. Even if it was, there was no evidence that any Lead Claimant or IFA relied on what Mr Carter or Mr Gates may have believed.

920. Further, by the time of the Acknowledgment Letters the Claimants had already made their irrevocable subscription application and that had been or was thereby accepted. These representations cannot have and did not induce the Claimants to make the subscription application or to enter into the contract with Innovator. By this stage the Claimants were already contractually bound.

921. The Claimants pleaded an alternative case on causation that if there had been no breach of duty they would have recovered all or a substantial part of the monies subscribed. However, there was no positive case advanced on the evidence to the effect that had it not been for the misrepresentations allegedly made in the Acknowledgement Letters the Claimants would have sought to recover their subscription monies. Nor was any positive case advanced as to whether and how this would have been achieved.

The Welcome Letters Representations

922. These were alleged to be (RRAPOC 237):

"237.1 The addressee of the letter had properly and validly been made a partner of the Partnership named in the Welcome Letter ("the WL partner representation").

237.2 The formalities for establishing the Partnership and constituting the addressee of the letter as a partner thereof had been completed and had been completed in accordance with the IM and the P /A ("the WL formalities representation")."

923. The letters stated that the subscribers had been made partners. That was a statement of fact. The refinements introduced by the alleged representations go beyond what was actually said in the letters and essentially involve legal matters. I am not satisfied that any representation was made beyond what is expressly stated in the letters.

924. Paragraphs 920 and 921 above equally apply to these letters.

The Statement of Losses Letter Representations

925. These were alleged to be:

> "239.1 The addressee of the letter had properly and validly been made a partner of the Partnership named in the SLL ("the SLL partner representation").
>
> 239.2 The formalities for establishing the Partnership and constituting the addressee of the letter at a partner thereof had been completed and had been completed in accordance with the IM and the P /A ("the SLL formalities representation").
>
> 239.3 The audited accounts and the Partnership tax return gave a fair and accurate view of the financial position of the Partnership and, in particular, of the qualifying expenditure and losses incurred by the Partnership ("the SLL accounts representation").
>
> 239.4 The statement of individual losses accurately set out the losses in respect of which the addressee of the letter was entitled to claim tax relief upon those losses ("the SLL tax representation")."

926. The first two representations are the same as alleged in the Welcome Letters and the same comment applies.

927. As to the SLL accounts representation, any such statement relating to the audited accounts would be made by the auditors, not the alleged representors and the Partnership returns would be based thereon. In any event it would be a statement of opinion or belief, not present fact.

928. As to the SLL tax representation, if made, this too would be a statement of opinion or belief, not present fact.

929. Paragraphs 920 and 921 above equally apply to these letters.

The HMRC Enquiry Representations

930. These were alleged to be as follows (RRAPOC 241):

> "241.1 Letters despatched in January 2004 which represented that "there do not appear to be any particular areas of the structure which

have been highlighted as potential causes for concern."

241.2 Letters despatched in September 2004 which again represented that that "the structure is robust" and that the HMRC's three areas of concern "can be resolved".

241.3 The calling of EGMs in January 2005 (and thereafter) which in and of itself represented to the Claimants that (a) the Partnerships had been properly formed and (b) they had been properly constituted as Partners of those Partnerships.

241.4 Representations made by Mr Carter at EGMs on 18.01.05, 19. 01.05 and 20.01.05, 23.03.05 and 29.06.05 which included representations to the effect that:

241.4.1 Innovator had been approached by Technology Developers to raise finance to bring Technology to the market.
241.4.2 Innovator had undertaken extensive due diligence on the Technology acquired by the Partnerships assisted by independent assessors and advisers who had "nothing to do with Bjorn Stiedl".
241.4.3 Neither Innovator nor its consultants were involved in ascertaining the purchase price.
241.4 .4 There was no evidence of any link between the Technology Vendors and Mr Stiedl.
241.4.5 Mr Stiedl had been a consultant to Innovator whose role had been limited to determining which technologies met the business requirements of the scheme and who had not been involved in owning or introducing the technologies."

931. Whilst at least some of these representations were made they were made to Claimants of existing Schemes long after they were bound into the Schemes and had become partners. In such circumstances there can have been no relevant reliance and the comments made in paragraph 920 apply with even greater force.

932. Whilst it is theoretically possible that the statement in 241.1 could have influenced an existing Scheme participant in his decision to subscribe in later Schemes there was no evidence to that effect. The same applies in relation to the statement in 241.2 in relation to the Arte Scheme subscribers. All the other alleged representations post-date the D/As for all Schemes.

Conclusion on misrepresentation

933. For the reasons set out above I am not satisfied that any actionable misrepresentation was made, even if one has no regard to the disclaimer provisions. If one does have regard to them then it becomes all the more difficult for the Claimants to establish that the alleged representation was made; that it was intended to be relied upon; that it was relied upon and that any duty of care was owed.

934. It might be different if a fraudulent representation could be made out in relation to the business representation or the technology rights representation. However, for reasons set out in more detail elsewhere I find that no misrepresentation, still less fraudulent misrepresentation, has been made out.

935. I would add that in relation to the IM representations I am not satisfied that any representation was made other than by Innovator (or possibly, if continuing after incorporation, by the LLP). None of the statements relied upon were made personally by Mr Carter or Mr Gates (other than as MFS) or Mr Stiedl, nor was there any evidence that they were so understood or relied upon. Different considerations might arise if fraud was established, but it has not been. The issue of personal liability is dealt with in more detail later in the judgment.

(8) STATUS OF SUBSCRIPTION MONIES & ALLEGED BREACH OF TRUST

The Claimants' case

936. The Claimants contended that the payment of the subscription monies into the CB client account was subject to a Quistclose type of trust – see *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] A.C. 567 and *Twinsectra v Yardley* [2002] 2 A.C. 164.

937. The Claimants' pleaded case as to the trust alleged was as follows:

> "280. Money subscribed by each subscriber was subscribed for a purpose, namely for investment in a Scheme involving membership of a Partnership fulfilling the description and conditions in the IM applicable to that Partnership.
>
> 281. Acceptance of such money was subject to:
>
> 281.1 the same conditions as those applicable to the acceptance of the offer constituted by a subscription application, as previously stated;
>
> 281.2 the subscriber being accepted as a member of the Partnership described in the IM containing that Application Form and becoming a member thereof.
>
> 282. At all material times that purpose and those requirements were known and ought to have been known by C-B, including Mr Bailey and Mr Roper.
>
> 283. Pending fulfilment of those conditions, money subscribed by a subscriber and held by C-B in an account, however designated, was held on trust by C-B for the subscriber concerned.
>
> 284. Insofar as subscription money was received by Innovator and sent on to C-B to be held by the firm, such money was received and sent on by Innovator as agent for the subscriber concerned."

938. The Claimants' case was that the purpose of the trust was to invest in the particular Partnership named in the IM and that to make a payment of the trust fund for any other purpose would be a breach of trust.

939. The Claimants further contended that the IM Conditions were also conditions in default of fulfilment of which subscription monies could not be disbursed. They submitted that those conditions are terms of the trust or of the powers exercisable thereunder for essentially the same reasons why they are to be construed from or implied into the terms of the P/A.

940. The Claimants' case was that monies could not be paid out before the subscribers were "validly" made members of the Partnership, which meant prior fulfilment of the IM Conditions.

Relevant legal principles

941. The principles by reference to which a Quistclose trust will arise have been helpfully summarised by Norris J in his recent judgment in *Bieber v Teathers Limited* [2012] EWHC 190 (Ch) which was a case involving the status of monies subscribed into a CIS partnership. He stated as follows:

> "16. First, the question in every case is whether the payer and the recipient intended that the money passing between them was to be at the free disposal of the recipient: Re Goldcorp Exchange [1995] 1 AC 74 and Twinsectra at [74].
>
> 17. Second, the mere fact that the payer has paid the money to the recipient for the recipient to use it in a particular way is not of itself enough. The recipient may have represented or warranted that he intends to use it in a particular way or have promised to use it in a particular way. Such an arrangement would give rise to personal obligations but would not of itself necessarily create fiduciary obligations or a trust: Twinsectra at [73].
>
> 18. So, thirdly, it must be clear from the express terms of the transaction (properly construed) or must be objectively ascertained from the circumstances of the transaction that the mutual intention of payer and recipient (and the essence of their bargain) is that the funds transferred should not be part of the general assets of the recipient but should be used exclusively to effect particular identified payments, so that if the money cannot be so used then it is to be returned to the payer: Toovey v Milne (1819) 2 B&A 683 and Quistclose Investments at 580B.
>
> 19. Fourth, the mechanism by which this is achieved is a trust giving rise to fiduciary obligations on the part of the recipient which a court of equity will enforce: Twinsectra at [69]. Equity intervenes because it is unconscionable for the recipient to obtain money on terms as to its application and then to disregard the terms on which he received it from a payer who had placed trust and confidence in the recipient to ensure the proper application of the money paid: Twinsectra at [76].

20. Fifth, such a trust is akin to a “retention of title” clause, enabling the recipient to have recourse to the payer's money for the particular purpose specified but without entrenching on the payer's property rights more than necessary to enable the purpose to be achieved. It is not as such a “purpose” trust of which the recipient is a trustee, the beneficial interest in the money reverting to the payer if the purpose is incapable of achievement. It is a resulting trust in favour of the payer with a mandate granted to the recipient to apply the money paid for the purpose stated. The key feature of the arrangement is that the recipient is precluded from misapplying the money paid to him. The recipient has no beneficial interest in the money: generally the beneficial interest remains vested in the payer subject only to the recipient's power to apply the money in accordance with the stated purpose. If the stated purpose cannot be achieved then the mandate ceases to be effective, the recipient simply holds the money paid on resulting trust for the payer, and the recipient must repay it: Twinsectra at [81], [87], [92] and [100].

21. Sixth, the subjective intentions of payer and recipient as to the creation of a trust are irrelevant. If the properly construed terms upon which (or the objectively ascertained circumstances in which) payer and recipient enter into an arrangement have the effect of creating a trust, then it is not necessary that either payer or recipient should intend to create a trust: it is sufficient that they intend to enter into the relevant arrangement: Twinsectra at [71].

22. Seventh, the particular purpose must be specified in terms which enable a court to say whether a given application of the money does or does not fall within its terms: Twinsectra at [16].”

942. Neither the Claimants nor the Defendants challenged this summary of the relevant principles, although they emphasised different parts of the summary.

Application to the facts

943. I reject the Claimants’ case that there was a trust on terms of or subject to powers as set out in the IM Conditions essentially for the reasons given in rejecting that case in relation to the subscription application offer and the P/A.

944. In my judgment the substance of the reasons given for rejecting the IM Conditions as terms of the subscription application offer and the P/A apply equally to the submission that they are terms of the alleged Quistclose trust or of the powers exercisable thereunder. In particular, the Claimants have to rely on the implication of the terms and they cannot show that such implication is necessary or obvious, reasonable and equitable. Further, the implication of such terms would put the trustee in an impossible position. His fulfilment of the terms of the trust would depend on unstated terms of which he was unlikely to be aware, nor should he reasonably have been so aware. Even if he had been so aware the ambiguity of and uncertainty

surrounding most of the alleged terms would render the trust and the exercise of powers thereunder uncertain and unworkable.

945. As stressed by Norris J in the *Teathers* case, “the particular purpose must be specified in terms which enable a court to say whether a given application of the money does or does not fall within its terms”. For reasons already given, that is not the case in relation to most of the alleged IM Conditions.

946. That however, leaves the Claimants’ case that there was a Quistclose trust for the purpose of investing in the particular Partnership named in the IM. In support of such a trust the Claimants submitted that it was clear that the monies were not at the “free disposal of the recipient”.

Was there was a Quistclose trust?

947. As Norris J explained in *Teathers*, in considering whether it was intended that the monies should be at the “free disposal” of the recipient “it must be clear from the express terms of the transaction (properly construed) or must be objectively ascertained from the circumstances of the transaction that the mutual intention of payer and recipient (and the essence of their bargain) is that the funds transferred should not be part of the general assets of the recipient but should be used exclusively to effect particular identified payments, so that if the money cannot be so used then it is to be returned to the payer”.

948. The Claimants submitted that this was clear from the documents in this case and emphasised in particular the following facts and matters:

(1) the monies were to be paid into designated accounts at CB in the names of the Partnerships into which subscribers sought to invest. Each cheque from a subscriber was payable to “Collyer Bristow The [named] Technology Partnership LLP’ Client Account”.

(2) the purpose of the subscription application was that the subscriber invested in and became a partner of the Partnership promoted in the IM.

(3) the IM and subscription application reserved to Innovator (or in the case of GT2 MFS) the right to reject any application at its sole discretion, and stated that excess partners’ contributions would be refunded to partners in proportion to their respective interests in the Partnership.

(4) The Acknowledgment Letters in which it was stated that the subscriber’s funds would be held in the CB account until the subscriber had become a partner whereupon the Technology would be purchased. Further, early versions of the letter referred to these being “your funds”.

(5) Subscribers would reasonably expect to have been entitled to demand the entirety of their subscription monies if Innovator either

decided not to proceed, or was unable to proceed, or indeed went into liquidation.

(6) The fees, in order that the entirety of the subscription monies could attract (and could be promoted as attracting) tax relief, were payable by Technology Vendors (and in part by LLPs in the case e.g. of the Administrator's fees), not Innovator. That is consistent with the notion that monies were held for the exclusive purpose of investing in a Partnership. Once that had occurred, in the sense of the Partnership becoming beneficially entitled to the monies, fees could be discharged in the proper manner.

949. The CB Defendants disputed that there was any Quistclose trust and submitted that the present case could be distinguished from other cases in which such trusts had been found. They stressed the distinction between a contractual and a fiduciary obligation in relation to the monies transferred. They emphasised that what needs to be shown is an intention to restrict the recipient's freedom to dispose of that money by requiring that it should not be applied for any purpose other than that stipulated. They submitted that the cases show that the following factors are of particular relevance in determining whether there was an intention to retain a beneficial interest in the monies transferred:

(1) Monies being expressly transferred (or having been agreed to be transferred) for an exclusive purpose, the implication being they are to be used for no other purpose;

(2) Monies being expressly transferred (or having been agreed to be transferred) for a stated purpose, the implication being that they are to be used for no other purpose;

(3) Money being advanced expressly by way of loan;

(4) There being a real risk that the monies may not be used or capable of being used for that purpose;

(5) The transferee expressly agreeing that the monies would only be used for that purpose;

(6) The transferee being unable to be remunerated from the funds transferred;

(7) An express stipulation by the transferor (or an express promise by the transferee) that the monies are to be returned if the purpose cannot be fulfilled;

(8) An express stipulation to hold the monies separately pending fulfilment of the purpose.

950. Save in relation to item (6), which will be considered further below, I agree that none of these factors are present in this case. However, whilst

these factors are relevant they are neither individually nor collectively determinative.

951. The particular feature of the Scheme in this case which the CB Defendants submitted was inconsistent with the existence of any Quistclose trust was the recognised need for fees and expenses to be incurred in relation to the setting up of the LLP and the scheme arrangements, which expenses were likely to be incurred and payable before subscribers were made partners following the scheme becoming fully subscribed.

952. It was obvious from the IM that significant fees and expenses would be incurred in setting up the scheme. This is apparent, for example, from all the professional advisers identified in the IM. Further, as the Option Agreement referred to in the IM made clear, these expenses were the responsibility of Innovator and were to be paid out of its fee.

953. Of particular importance is the section of the IM entitled "Application of Subscription Monies" which provides:

> "Partners' contributions to the Partnership will be used to buy the rights to the Technology, pay initial fees and all ordinary ongoing administrative expenses. Initial fees include commissions payable to independent financial advisors for introducing Partners, fees payable to the bank for arranging the loan to the Partnership, Partnerships' incorporation fees and all legal and professional advice relating to the various contracts to be entered into."

954. The CB Defendants submitted that this made it clear that these fees would be payable without more and would be applied without more and as such undermines the Claimants' allegation that such expenditure could not occur until the investor had been made a partner. It was submitted that it would have been clear to an investor reading this that his subscription monies would be used immediately to pay for these fees and costs and that subscribing on that basis is inconsistent with an intention to retain any beneficial interest in those subscription monies.

955. The CB Defendants submitted that the IMs:

(1) Made clear the extent to which fees were payable and indicated that those fees would, without more, be satisfied from subscription monies;

(2) Made clear that subscription monies would be immediately applied for the further development of the Technology;

(3) Made implicitly clear that Innovator would use those monies to pay for those fees;

(4) Made clear that the investor could not, as Partner, withdraw funds from the Partnership;

(5) Contained a subscription application that was unconditional and capable of immediate acceptance;

(6) Contained no promise that monies would be returned in the event that investments could not proceed;

(7) Contained no promise to hold those monies in an unmixed account pending fulfilment of any condition or purpose.

956. It was submitted that all these features were inconsistent with the existence of a Quistclose trust.

957. The CB Defendants also relied on the evidence of various Lead Claimants which they submitted showed that they had no intention to retain any beneficial ownership of the monies, and in particular the fact that they saw the Innovator Schemes as being an investment. They also relied on the evidence of all the Defendants that they understood the subscription monies to be Innovator's once it had been "irrevocably" paid to it. However, the test for the creation of a trust is objective and does not depend on the subjective intentions of the payer and recipient.

958. I recognise the force of many of the CB Defendants' arguments and in particular the need for set up costs and expenses to be incurred and paid by Innovator, the recognition in the IM that this will be done and the reality that many of these costs would be likely to be payable before the Partnership was fully subscribed. However, it was an important element of the scheme structure that all the subscription monies were used by the Partnership in the acquisition of the Technology so as to maximise the tax relief available. As was apparent from the IM and the contractual documentation, this was to be done by using the subscription monies in payment of the acquisition price to the Technology Vendor and the Vendor paying about 11% of the amount received to Innovator so as to enable it to pay all necessary fees and expenses. The first step envisaged was therefore payment of the purchase price by the Partnership.

959. Further, the *Teathers* case provides strong support for the Claimants' case that there was a Quistclose trust up until the time that the subscribers became partners and their monies became Partnership capital. In that case it was common ground that there was a Quistclose trust up until that time and Norris J accepted and adopted that analysis.

960. It was submitted that the "Application of Subscription Monies" provision in the IM distinguished this case from *Teathers* but it is to be noted that there was a broadly similar provision in that case – see [44].

961. Having carefully considered the evidence and the parties' submissions on this issue I conclude that until the subscribers became partners their subscription monies were not at the free disposal of Innovator and were subject to a Quistclose trust.

What were the terms of any Quistclose trust?

962. If so, the next question is what were the terms of that trust or of the powers exercisable thereunder. The Claimants submitted that the purpose of the trust was to invest in the Partnership and that the trustee could only use the subscription monies for the purpose of making the subscriber's capital contribution to that Partnership.

963. CB submitted that if there was a Quistclose trust it would be a trust whereby Innovator as trustee held the funds on terms that they were to be used in connection with the setting up of the LLP and the acquisition of the Technology and making of consequential arrangements for its exploitation and the administration of the Partnership.

964. CB submitted that in practical terms it was always clear that Innovator would have to incur costs on behalf of the investors/Partnerships in setting up the Partnerships, in paying commission to introducers and in seeking the necessary professional advice including that from tax counsel. Some means had to be found to enable payments to be made which were properly incidental to the Schemes and necessary to their implementation, out of the money subscribed, but which would in due course become costs to be defrayed by Innovator out of the monies it received from the Technology Vendor, (which monies were themselves part of the price paid by the Partnerships). This was to be done by treating sums applied directly out of the account to the payment of commission, fees or otherwise as advance payments to the Technology Vendor which in turn would make them available to Innovator as an advance on its fee. Mr Carter's evidence supported this analysis.

965. I do not accept that subscription monies could simply be applied by Innovator to pay the expenses identified in the IM. That would be inconsistent with the recognised need for the monies to be used by the Partnership to pay the acquisition price. However, I do accept that monies could be used by the Partnership in payment of that price. So, if, for example, a payment was made which was authorised by the Technology Vendor as an advance payment by the Partnership of the purchase price and which was then, for example, used to pay fees and expenses due out of Innovator's fee, that would be a proper payment and involve no breach of trust.

966. It was Mr Carter's evidence that the Technology Vendors authorised Innovator to manage the disbursement of funds in order to satisfy the Technology Vendor's obligations under the financing scheme and that they authorised CB to accept instructions from Innovator as to the disbursement of those funds.

967. It was Mr Bailey's evidence that CB had instructions from the Technology Vendors to act as their agents for the receipt of the acquisition price and to make payments out on the instructions of Innovator.

968. I accordingly conclude that the terms of the Quistclose trust were that until the subscribers were made partners their subscription monies could only be used for the purpose of making a capital contribution to the Partnership or

for the purposes of making a payment of the acquisition price on the part of the Partnership.

Who was the trustee of any Quistclose trust?

969. The next issue is who was the trustee of any Quistclose trust. The Claimants contended that it was CB. The CB Defendants contended that it was Innovator.

970. In support of their case the Claimants relied in particular on the following:

(1) The subscription applications provided (for instance) that “cheques should be made payable to ‘Collyer-Bristow the Charit Email Technology Partnership LLP’ client account”.

(2) The account in question is one designated by reference to the LLP being promoted in the IM from which it is to be inferred that it was an account of the Partnership in question.

(3) The money was not paid to Innovator. Innovator handled the cheques (although some were sent directly to CB) but was otherwise unable to do anything with them, save for pay them into the designated CB LLP ledger account.

(4) The documents and Scheme structure militate against Innovator having any beneficial interest in the monies at any stage until their proceeds are paid to Innovator by way of fees by Technology Vendors.

(5) In the case of GT2 the position is clearer still. There is no basis for suggesting that the monies were held by Innovator which is referred to in the GT2 IM simply as an “initiator” of the partnerships. Conversely under the heading “Subscriptions” the IM states “Monies subscribed...will be held in a client account with Collyer-Bristow Solicitors”.

971. I accept, however, the CB Defendants’ case that the trustee was Innovator. That case was supported in particular by the following facts and matters:

(1) It is clear that CB’s client was Innovator. The subscribers were never clients of CB. CB did not act for them. There was no retainer letter, no payment for services and little or no direct contact between them.

(2) Once the LLP was established and operational it may be that the LLP was also a client of CB for some purposes, but the main client was always Innovator.

(3) The account into which the subscription monies were paid was the client account for Innovator, albeit that a ledger entry was made in the name of the relevant Partnership.

(4) The subscribers knew or would reasonably have known that CB were Innovator's solicitors. That was made clear in the IM.

(5) The subscribers knew or would reasonably have known that the subscription application was to be made to Innovator and that their cheques were to be sent to Innovator.

(6) The subscribers knew or would reasonably have known that significant setting up fees and expenses would have to be paid, and that they were to be paid by Innovator.

(7) CB had no power to direct what was to be done with the subscription monies. As monies in Innovator's client account CB's duty was to follow their client's instructions.

(8) Subscribers had a contract with Innovator and, as I have found, under that contract Innovator was obliged to ensure that costs associated with the establishment of the Partnerships were paid.

972. Although the Claimants argued that Innovator similarly had no power to direct what was to be done with the monies until the subscribers had been made partners, they did have authority from the Technology Vendors to manage the disbursement of funds in order to satisfy the Technology Vendor's obligations under the financing scheme. Even if they did not, it was Innovator and Mr Carter who was to direct when and how subscription monies were to become capital contributions in the Partnership. CB's role was throughout to follow instructions, unless criminality or other obvious impropriety was raised thereby.

973. As to the particular points relied upon by the Claimants as set out above:

(1) As to (1) and (2), the "client account" was that of Innovator in point of fact and as a matter of reasonable expectation given that it was known that Innovator was CB's client. Even if it became the account of the LLP that would only be once the LLP had been established and the subscription monies had become capital contributions to the Partnership:

(2) As to (3), the money was meant to be paid to Innovator. It was Innovator to which the subscription applications were addressed and which was to decide whether to accept or reject the applications.

(3) As to (4), for reasons already given, the Scheme structure and the practical commercial realities militate in favour of Innovator being able to use subscription monies for the purposes set out in the IM provided any such payment was treated as a payment of the purchase price on the part of the Partnership.

(4) As to (5), by parity of reasoning the trustee would have been MFS as promoter and Innovator would have been holding the monies as agent for MFS.

974. For the reasons set out above and those given by the CB Defendants I find that it was Innovator/MFS who was the trustee of the Quistclose trust, not CB.

Was CB a sub-trustee of any Quistclose trust?

975. The Claimants had an alternative argument that even if the subscription monies were not held on trust by CB they were held by CB as a sub-trustee and not as a mere agent. The pleaded case was as follows:

> "285. If, contrary to the Claimants' primary contentions in the previous paragraphs, subscription money was not held by C-B on trust for the subscriber concerned, it was held by C-B on trust for:
>
> [.1] Innovator and/or,
>
> [.2] the Partnership to which a subscriber's Application Form pertained,
>
> [.3] and in either case such money was held on trust by Innovator and/or the Partnership (i.e. a sub-trust) for the subscriber concerned pending fulfilment of the conditions previously stated."

976. In this connection the Claimants relied on a passage from *Lewin on Trusts* at 42-89 which states as follows:

> "Section 3 - Locus Standi for a Breach of Trust Action
> Assignees and sub-trusts
> 39-73
> We consider elsewhere the circumstances in which vested or contingent interests may be alienated, either by assignment or resettlement. Once [the interest is] validly assigned, the assignee will stand in the position of the original beneficiary and have the same rights to take steps to ensure that any breach of trust is prevented or remedied. In a case where an interest is settled into a separate settlement, we consider that it is clear that the trustees of that settlement have locus standi to sue the trustees of the head-settlement since the trustees of the head-settlement have duties to the trustees of the separate settlement in their capacity as such. We also consider that it is clear that the beneficiaries of the separate settlement can sue the trustees of the head-settlement for breach of trust if there are special circumstances justifying a derivative action by the beneficiaries against the trustees of the head settlement. It is not clear, however, that the beneficiaries of the separate settlement have locus standi to sue the trustees of the head-settlement in the absence of special circumstances".

977. I agree with the Defendants that this passage is addressing a different issue. It is concerned with the kind of sub-trust where you have a beneficial interest in settlement A, the head settlement, and that is transferred to the trustees of a separate settlement, settlement B, who hold that beneficial interest on different trusts. However, the trust property

remains held and administered by the trustees of settlement A. In this case if the trustees of settlement A exercise their administrative powers over the trust property in breach of trust, for example they invest in unauthorised investments, then the trustees of settlement B can sue the trustees of settlement A for breach of trust. That is nothing to do with this case.

978. The Claimants also placed reliance on *Freeman v HM Commissioners of Customs and Excise* [2005] EWHC 582; [2005] B.C.C. 506 at [25]-[27]. In that case monies were paid by a purchaser of a property to the vendor's solicitors ("Jay Benning") for the exclusive purpose of discharging the VAT liability, if any, of the vendor. The solicitors paid the money to an accountant ("Mr Fox") who absconded with it. The monies were claimed by the IR as the ultimate beneficiary of the Quistclose trust. Accordingly the Court had to consider whether the IR's interest had crystallised and concluded that it did. The question arose whether, given that the fund had been transferred by the solicitors to the accountant, a claim could be brought by the IR against the accountant.

979. Michael Crystal QC sitting as a deputy Judge of the Chancery Division reasoned it could as follows:-

> "25. Mr Fox became an agent of Jay Benning upon receiving the fund (see generally Bowstead & Reynolds on Agency (17th ed., 2001, Sweet & Maxwell), p.1). In particular, Mr Fox obtained the power to alter Jay Benning's legal relationship with those interested under the Quistclose trust (for example, by arriving at a figure for the VAT liability and then paying the relevant amount over to Customs & Excise).
>
> 26. Mr Fox, although aware of all of the facts as to the nature of the trust attaching to the fund, nevertheless used the fund in a way inconsistent with the trust. This "dishonest dealing" with trust property made him personally liable to account for the loss thereby caused to the fund Lee v Sankey (1873) L.R. 15 Eq. 204; Soar v Ashwell [1893] 2 Q.B. 390).
>
> 27. Since the claim against Mr Fox was for misappropriation of trust property, the claim vested in Jay Benning as trustee, not for its own benefit or for the benefit of the company but for the benefit of those interested in the fund. In other words, the claim against Mr Fox itself became trust property."

980. I do not consider that this case provides any assistance to the Claimants. The Deputy Judge held that the monies were received by Mr Fox as an agent, not as a sub-trustee. The basis of his liability was as a constructive trustee who had misappropriated monies with knowledge of the terms of the trust.

981. As CB pointed out, the Claimants' argument is not consistent with the *Twinsectra* decision. In that case an express undertaking had been given by a solicitor (Mr Sims) to Twinsectra that if it lent money to Mr Yardley

he would only use it for the purposes of acquisition of property. The money was released to Mr Yardley's solicitor (Mr Leach) who was aware of the terms of the undertaking. He then allowed Mr Yardley to use part of the monies for purposes other than the acquisition of property. Mr Leach's liability depended on whether he had dishonestly assisted in a breach of trust. It was not suggested that he was himself a sub-trustee and liable simply for breach of trust.

982. The *Twinsectra* analysis is that which would usually apply in a case such as the present. No special facts or circumstances have been identified which would support the finding of a sub-trust. The Claimants' argument is that if their argument that there is a direct trust fails then for essentially the same reasons it should be found that there is a sub trust. However, all the reasons for rejecting the existence of a direct trust apply *a fortiori* in relation to the suggested sub-trust.

983. For the reasons outlined above and those given by the CB Defendants I reject the Claimants' case that there was a sub-trust.

Was there a breach of any Quistclose trust?

984. It is the case that a number of payments were made out of the CB account prior to the subscribers being made partners by the execution of the D/A. Some payments were made in all the exemplar Schemes except GT2.

985. The main reason for such payments was the payment of expenses as contemplated by the IM but there were instances where monies relating to one Partnership were used for another and where monies were used from the profit element of Innovator's fees.

986. Whilst a considerable time was spent at trial considering various individual payments it is important to have regard to the bigger picture.

987. The Scheme structure involved approximately 11% of the gross capital contribution being paid by the Technology Vendor to Innovator. From that sum Innovator was to pay all the set up and ordinary ongoing administrative expenses of the Partnership as well as its own fees. The balance (other than bank fees) was to be retained by the Technology Vendors.

988. As demonstrated by the evidence of Mr Roberts, Innovator's accountant, this is how the schemes were in fact operated. Although there were a couple of schemes in relation to which Innovator received slightly more than 11%, in some cases it received less and in all cases the agreed structure was effectively followed. All the Technology Vendors received what was due to them and none contended otherwise. Equally it appears that the third party expenses were paid.

989. The Claimants contended that the 11% figure related to the net cash subscription and not the gross loan element. Although this is not spelt out expressly I am satisfied that it would reasonably be understood as relating

to the total capital contribution. It was clear from the IM that substantial initial and ongoing fees and expenses were going to be incurred which it would be unlikely could be met from 11% of the net cash contribution alone. This would have been obvious to the IFAs whose own fees alone exceeded 11% of the net figure. Although the Claimants did not generally know the level of the IFAs commission, they did know that the IFAs would be receiving commission and if the 11% was a net figure it would be apparent that that would leave little for the other substantial fees and expenses that were necessarily going to be incurred.

990. Although there was some short circuiting of payments, all the payments prior to the subscribers being made partners about which complaint is made were ultimately properly accounted for. This is demonstrated by the reconciliations that Mr Carter did in relation to each ledger for each Scheme and the Payment Schedules produced by CB at trial. These show that the entirety of the subscription monies raised were accounted for as received by the relevant Partnership and spent on a combination of bank fees and the acquisition of the Technology. It was on that basis that the Partnership accounts were filed and each of the partners claimed (and generally received) their tax relief. Importantly, it was also on that basis that they retained the more limited tax relief on their tax contribution that was eventually negotiated with the IR.

991. It follows that if the subscribers were made partners then no loss was suffered as a result of any breach of trust which may have occurred in respect of payments made before they became partners. Those payments were ultimately all properly accounted for and the subscribers/partners ended up in exactly the same position they would have been in but for the breach of trust.

992. This was seemingly accepted by the Claimants in oral closings but in their reply submissions they suggested that in such circumstances the entire purpose of the trust will have failed because qualifying expenditure of the level set out in the IM could not be incurred or shown to be incurred. But this does not follow. Notwithstanding any breach of trust the expenditure could be and was properly accounted for as qualifying expenditure.

993. As to whether the payments involved a breach of trust, as already found, the mere fact that a payment was made before the subscribers were made partners does not mean that there was a breach of trust. Provided the payment was authorised as an advance payment of the purchase price there would not be a breach of trust. The evidence is that the Technology Vendors gave Innovator authority to direct the management of the funds in order to satisfy the Technology Vendor's obligations under the financing scheme and that they authorised CB to accept instructions from Innovator as to the disbursement of those funds. Mr Carter's evidence was that all payments were made in accordance with the authority conferred, as later reflected in the accounts. On that basis there would have been no breach of trust. Even if that be wrong, no recoverable loss was caused thereby.

994. The Claimants also made complaint about payments to recipients who had no obvious connection with the Scheme. An example upon which great reliance was placed was a payment from the YTC ledger to Burton Copeland, who were Mr Stiedl's solicitors in the criminal proceedings he faced.

995. However, the Claimants' analysis of this and many other payments ignored the fact that Innovator was entitled to about 11% of the purchase price as fees to cover expenses and its own profit. How it distributed its own profit was a matter for Innovator. It was for Innovator to use that money to which it was entitled as it wished.

996. The Claimants' analysis also ignored the fact that the short circuiting of payments may be permissible, both legally and from an accounting perspective. As stated by Buckley J in *Re Collard's Will Trusts* [1961] Ch 293 in the context of short circuiting by a trustee and section 32 of the Trustee Act 1925:

> "The principle is that the court will not insist on circuitry of action if the same result can be achieved by direct action which legitimately could be achieved by more circuitous action."

997. *Collard* was applied in *Pilkington v Inland Revenue Commissioners* where Viscount Radcliffe held (again in relation to Section 32 of the Trustee Act 1925).

> "To transfer or appropriate outright is only to do by short-cut what could be done in a more roundabout way by selling the shares to a consenting party, paying the money over to the new settlement with appropriate instructions and arranging for it to be used in buying back the shares as the trust instrument. It cannot make any difference to follow the course taken in Re Collard's Will Trusts...and deal with the property direct."

998. Mr Stiedl was entitled to be paid pursuant to his consultancy contract. As shareholder representative he was also entitled to give directions as to how payments or loans to shareholders should be made. Mr Stiedl explained that if the money were Innovator's, then Innovator could transfer that from whatever Innovator account they saw fit, and it was much easier to transfer directly instead of transferring to Innovator's account at AIB, waiting for clearance and then paying out from that account: Mr Stiedl also confirmed that Mr Carter's internal reconciliations at CB meant that things were paid directly when otherwise fees to Mr Stiedl would have gone to him first and then on, for example, to Burton Copeland.

999. I agree with the Defendants that there is nothing inherently improper about this short circuiting process. If Mr Bailey or Mr Roper were entitled to pay sums received into a particular ledger account (representing Innovator's entitlement to fees or sums which it would be responsible for paying by way of fees) to Innovator's client account and from that client account to Innovator's own bank from which those monies could be

disbursed as Innovator saw fit, then it was, as the above authorities show, permissible to avoid such circuitry (and the additional costs of transferring monies between several accounts). CB was entitled, on Innovator's instructions, to disburse those monies to which Innovator was entitled directly to those third parties whom Innovator would have paid from its own account, had the monies followed the above circuitous path.

1000. The Claimants contended that short circuiting should not have been carried out since it suggested lack of commerciality and potentially jeopardised the tax relief obtainable. However, that goes to the care and skill with which it might be said the Scheme arrangements should have been operated by Innovator rather than entitlement to make the payment in this manner.

1001. Returning to the example of the Burton Copeland payment there was nothing wrong about this being made directly to Burton Copeland as opposed to Innovator, Mr Stiedl and then Burton Copeland. As to the timing of the payment, as already stated, it would not involve a breach of trust if it was authorised as an advance payment of the purchase price on behalf of the Partnership.

1002. In relation to payments after the subscribers became partners there is no question of breach of trust since the Quistclose trust would have come to an end when they became partners and the subscription monies became Partnership capital.

Relief from Sanctions for Breach of Trust

1003. In the event that I had concluded that CB was a trustee and acted in breach of trust, CB relied on Section 61 of the Trustee Act 1925. That Section is entitled 'power to relieve trustee from personal liability' and provides:

> "If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same."

1004. If I am wrong in my conclusion that CB was not a trustee and that there was no breach of trust I would have found that CB was entitled to relief under section 61. All the reasons I have given for concluding that CB was not a trustee and that there was no breach of trust are reasons why Mr Bailey and Mr Roper could honestly and reasonably have concluded likewise. In particular:

(1) The question of whether the subscription monies were paid such as to create a Quistclose trust or were at the disposal of Innovator is a

question upon which different views may reasonably be taken. Mr Bailey and Mr Roper did not think a trust had arisen.

(2) The question of whether the disbursement of subscription monies would have been in breach of any such trust is a question upon which different views may reasonably be taken. As further addressed in relation to the claim of dishonest assistance, Mr Bailey and Mr Roper genuinely believed that monies could be paid to Innovator's order.

(3) Mr Bailey and Mr Roper at all times acted on instructions of those they genuinely believed to be authorised, namely Innovator.

(4) Mr Bailey and Mr Roper were not express trustees and had no duties as such.

(5) If, contrary to my findings, the trust or the exercise of powers thereunder was subject to the IM Conditions it would be reasonable for Mr Bailey and Mr Roper not to have identified these Conditions for all the reasons I have given in rejecting them as Conditions.

1005. For the reasons outlined above, I find that any breach of trust would have involved a honest and reasonable mistake by Mr Bailey and/or Mr Roper and accordingly Section 61 would apply.

Conclusion on alleged breach of trust

1006. I find that there was no trust on the terms of or subject to the powers set out in the IM Conditions.

1007. I find that the subscription monies were held subject to a Quistclose trust on terms that until the subscribers were made partners their subscription monies could only be used for the purpose of making a capital contribution to the Partnership or for the purposes of making a payment of the acquisition price on the part of the Partnership.

1008. I find that Innovator was the trustee of the Quistclose trust and that CB was neither a trustee nor sub-trustee.

1009. I find that the payments made prior to the subscribers being made partners were not made in breach of trust. If they were so made then no loss was caused thereby.

1010. I find that the Quistclose trust came to an end when the subscribers were made partners.

1011. I find that if, contrary to my findings, CB was a trustee and acted in breach of trust CB is entitled to relief under s.61.

(9) THE ALLEGED SUBSCRIPTION MONEY AGREEMENT

The Claimants' case

1012. The Claimants' pleaded case on the alleged contract between the Claimants and CB was set out at paragraph 279 of RRAPOC as follows:

> "As from the time of receipt by CB of money subscribed by each of the Claimants, there was to be implied in the circumstances an agreement between the Claimant and CB, whereby CB agreed to hold the Claimants' money in a client account ("the CB subscription money agreement"). The relevant circumstances included the fact that CB were permitted by regulatory requirements only to hold client money in a client account."

1013. It was then contended that arising from each CB subscription money agreement, CB owed to each "counterparty subscriber" the following contractual duties in relation to the subscription monies received by CB (RRAPOC 300):

> (1) Not to disburse the same to any person other than the Partnership referred to described in the subscriber's subscription application;
>
> (2) Not to disburse the same to such Partnership unless and until the IM Conditions were fulfilled;
>
> (3) To repay the same forthwith to the subscriber immediately if and when the IM Conditions or any of them becoming incapable of fulfilment.
>
> (4) To exercise the reasonable skill and care of a competent solicitor.

Relevant legal principles

1014. An implied contract is one that is inferred from the conduct of the parties. However, such a contract must still satisfy the other pre-requisites to contractual formation, including an intention to create legal relations.

1015. As stated by Mance LJ in *Baird Textiles Ltd v Marks & Spencer plc* [2001] EWCA Civ 274:

> "61. An intention to create legal relations is normally presumed in the case of an express or apparent agreement satisfying the first requirement: see Chitty on Contracts (28th Ed.) Vol. 1 para.2–146. It is otherwise, when the case is that an implied contract falls to be inferred from parties' conduct: Chitty, para.2–147. It is then for the party asserting such a contract to show the necessity for implying it. As Morison J said in his paragraph 12(1), if the parties would or might have acted as they did without any such contract, there is no necessity to imply any contract. It is merely putting the same point another way to say that no intention to make any such contract will then be inferred.
>
> 62. That the test of any such implication is necessity is, in my view, clear, both on the authority of *The Aramis* [1989] 1 Ll.R. 213,

Blackpool and Fylde Aero Club Ltd. v. Blackpool B.C. [1990] 1 WLR 1195, *The Hannah Blumenthal [1983] AC 854* and *The Gudermes* [1993] 1 Ll.R. 311 cited by the Vice-Chancellor, and also a matter of consistency. It could not be right to adopt a test of necessity when implying terms into a contract and a more relaxed test when implying a contract — which must itself have terms."

1016. Necessity in this context generally requires demonstrating that the parties have acted in a way which is consistent only with an intention to make a contract. If they would or might have acted the same way in the absence of such a contract then necessity is unlikely to be established. In *The Gudermes* [1993] 311 at p320 the Court of Appeal approved the following direction given by the Judge (Hirst J):

> "In my judgment no implied contract can be inferred unless it is necessary to give business reality to the transaction, and unless conduct can be identified referable to the contract contended for which is inconsistent with there being no such contract; and it is fatal to the implication of such a contract if the parties would or might have acted exactly as they did in the absence of such a contract.."

1017. On demonstrating an intention to create legal relations in the context of implied contracts, Mance LJ said as follows in *Modahl v British Athletic Federation* [2001] EWCA Civ 1447 at [102]:

> "One distinction exists [between express and implied contracts]...in relation to the ease with which an express or implied contract may be established. Where there is an express agreement on essentials of sufficient certainty to be enforceable, an intention to create legal relations may commonly be assumed. It is otherwise when the case is that a contract should be implied from the parties' conduct. It is then for the party asserting a contract to show the necessity for implying it."

1018. The Claimants therefore bear the burden of proving that the parties had an intention to create legal relations, a burden the authorities suggest is a heavy one to discharge. As the authors of *Chitty* state:

> "Such cases illustrate the judicial attitude that 'contracts are not lightly to be implied' and that the courts must (in cases of this kind) be able 'to conclude with confidence that...the parties intended to create contractual relations." – see paragraphs 2-160 to 2-164.

1019. The other standard contractual requirements must also be met if an implied contract is to be legally enforceable. In particular, there needs to be offer and an acceptance as well as consideration.

Application to the facts

1020. The Claimants relied in particular on the following circumstances as the basis of which such an agreement falls to be inferred:

(1) the terms of each IM, including the description of CB's role;

(2) what was stated in Acknowledgment letters;

(3) the actual holding of subscription money by CB;

(4) regulatory requirements in the Solicitors' Accounts Rules 1998.

1021. As to (1), the Claimants stressed that cheques were requested to be made out in a name consistent with CB being the recipient and custodian of that money, as apparent from Application Checklists and Subscription Application Forms and that the subscription money was to be paid into a "client" account. They submitted that in each IM, CB was held out as providing (and willing to provide) a service consisting of receiving subscription money, paying it into their client account and disbursing it only in circumstances consistent with the IM (including in accordance with the P/A given to the Managing Partner or Administrator), a service consistent with that of a custodian or registrar and receiving agent.

1022. However, the IM was not issued by or on behalf of CB. It was issued by Innovator. It invited offers to subscribe being made to Innovator, not to CB.

1023. As the Claimants knew or ought to have known, CB was acting for Innovator. In the YTC-IM, Etrino-IM and Optibet-IM, under the title "PARTNERS AND ADVISERS", Innovator is described as "using" Collyer Bristow". In the Charit-IM and Arte-IM, Innovator is described as having "appointed" CB. In the GT-IM (specifically relating "The GenTech Partnership LLP"), under "PARTIES AND ADVISERS", CB are described as "Solicitors". In each case it would reasonably be understood that CB was acting as Innovator's solicitors. As such they would reasonably have known that CB would not be able to undertake duties to any party on the other side of the transactions. Moreover, subscribers were recommended to consult with their own legal advisers.

1024. Against the above background the "client" account being referred to would reasonably be understood as referring to the account of Innovator, and possibly that of the Partnership once established. It would not reasonably be understood as referring to that of the subscribers, still less each subscriber individually.

1025. CB were accordingly not offering any "service" to the subscribers at all. CB's client account was to be the mechanism by which subscription monies would be processed and held, but not as part of any service offered to subscribers. CB's services were to be carried out for its client, Innovator and possibly later the Partnership.

1026. CB's role as described in the IM is consistent with it acting for Innovator only. There is nothing in that described role which is consistent only with the CB acting under a contract with subscribers. CB would or at least might have performed exactly the same role in the absence of any such contract.

1027. Nor is a contract with subscribers necessary to give business reality to the transaction. The arrangements described can be operated and operated satisfactorily without any such contract.

1028. As to (2), these were letters from Mr Carter on behalf of Innovator, not CB. They do not evidence or confirm any offer being made by CB. Further, in most cases they post-date the alleged contract, which was said to be concluded on receipt of the subscription monies by CB.

1029. As to (3), the Claimants relied on the fact and scale of monies held by CB. However, this can make no difference in principle. The Claimants' case is that a contract was made with each subscriber. What other subscribers may have done and how many there were does not affect that. It is the individual dealings between each subscriber and CB which is alleged to result in a contract.

1030. As to (4), the Solicitors Accounts Rules 1998 apply to "client" monies. The argument proceeds on the basis that the subscribers are "clients" but that assumes what has to be proved.

1031. The Claimants also sought to place reliance on the FSMA regime and the fact that, as found elsewhere in the judgment, the Schemes were CISs in support of the necessity for implying the alleged contract. However, FSMA has its own means, including criminal sanctions, for dealing with cases of non-compliance. As the Claimants accepted, non-compliance with FSMA does not found any cause of action for breach of statutory duty. For similar reasons, it is difficult to see why it should found causes of action based on other tortious or contractual duties. The legal principles which apply to the implication of contracts are clear and are not altered by the fact that FSMA provides the context.

Conclusion on alleged Subscription Money Agreement

1032. None of the circumstances relied upon by the Claimants provide a compelling case for the implication of a contract, still less demonstrate the necessity for such implication.

1033. The Claimants have not identified conduct which is "referable to the contract contended for" and "which is inconsistent with there being no such contract". The subscribers and CB "would or might have acted exactly as they did in the absence of such a contract."

1034. There is no sufficient evidence of an intention to create legal relations. There is no sufficient evidence of a clear contractual offer being made by CB. Further, if, as I have found to be the case, there was a contract between the subscribers and Innovator, there is still less need for a contract with CB. The existence of a Quistclose trust also militates against any need to infer a contract.

1035. In so far as it is relevant to have regard to the understanding of the parties, the evidence as to that did not support the implication of a contract.

1036. The Claimants' witness statements do not assert that that they understood themselves to have entered into any kind of contractual agreement with CB. The fact that most Claimants had no idea what was being asserted against CB on their behalf necessarily meant that they had no understanding that such a claim might include a claim for breach of contract against CB. Even those Lead Claimants, such as Mr Taylor QC and Mr Sherry QC, who were in a position to know CB's role did not suggest that they had entered into a contractual relationship with CB.

1037. Whilst nearly all the Lead Claimants asserted in their witness statements that they were "reassured by CB's involvement and trusted them to deal with subscription monies properly" this does not support the allegation that there was a contract between the Claimants and CB or that there was an intention by the Claimants to create legal relations with CB: such assertions essentially go to what is alleged to have motivated the Claimants to enter into a contract with Innovator (not CB).

1038. Mr Bailey confirmed in evidence that he had no dealings with investors. Mr Roper did not think that investors were CB's clients. Mr Bailey did not accept that, in providing use of its client account, CB was acting in a custodian role: Mr Bailey stated that the money was, as had always been his understanding, Innovator's and that CB acted on Innovator's instructions.

1039. In summary, for all these reasons, and those given by CB, the Claimants have not proved the alleged implied contract.

(10) DISHONEST ASSISTANCE

The Claimants' case

1040. The dishonest assistance claims were advanced on the following bases:

(1) Subscription money claims:

(i) If the subscription money was held on trust by CB and disbursed in breach of that trust or in breach of fiduciary duty then Mr Stiedl and /or Mr Carter and /or CLFL and /or Innovator and /or the LLP concerned "dishonestly assisted such breaches by giving instructions to disburse subscription money" when they knew that "they were not entitled to give such instructions and /or were reckless as to whether they were so entitled" (RRAPOC paragraph 323A).

(ii) If "contrary to the Claimants' primary contention, subscription money was held on trust for a subscriber not by CB but rather by Innovator and/or the Partnership to which the subscription application pertained then" and disbursed in breach of that trust or in breach of fiduciary duty:

(a) Mr Stiedl, Mr Carter, Mr Bailey, Innovator and/or CLFL and/or the LLP dishonestly assisted such breaches by giving instructions to disburse subscription money" when they knew that "they were not entitled to give such instructions and /or were reckless as to whether they were so entitled" (RRAPOC paragraph 323.2.).

(b) Mr Bailey and Mr Roper dishonestly assisted Innovator and/or that partnership to breach that trust by acting on those instructions or causing them to be acted upon when they knew that the persons from whom they received instructions "were not entitled to give such instructions and/or were reckless as to whether or not they were so entitled." (RRAPOC, paragraph 324.3).

(c) If (again, contrary to the Claimants' primary contention) the Claimants became Partners in the Innovator Schemes, Mr Stiedl, Mr Carter, Mr Gates, Mr Bailey, Mr Roper, Innovator and CLFL dishonestly assisted Mr Carter and Mr Gates and/or the LLP to breach fiduciary duties which they owed to the Claimants by "causing and/or allowing the disbursement of the Claimants' subscription money and/or the Partnership's money...when the IM conditions were not fulfilled" as they "would have known that Mr Carter, Mr Gates and/or the relevant LLP were not authorised to do so or were reckless as to whether or not he was authorised." (RRAPOC, paragraph 330).

(2) Attorney related claims

Mr Bailey and Roper dishonestly assisted Mr Carter and Mr Gates "when each of them purportedly acted as attorney for a Claimant, including by countersigning Mr Carter's and Mr Gates' signatures to the [Deeds of Adherence]" in circumstances where they "..knew that Mr Carter and Mr Gates were not authorised so to act or [was] reckless as to whether or not he was so authorised." (RRAPOC, paragraph 327).

1041. Leaving aside for the moment the overarching allegation of conspiracy, in support of their allegations of dishonesty the Claimants pleaded that Mr Stiedl, Mr Carter, Mr Gates, Mr Bailey, Mr Roper, as well as Innovator, each LLP, CPUK and CLFL had knowledge of the following matters:

"270.1 the dealings in subscription money in various C -B accounts in relation to the Innovator Schemes and related arrangements (including CLFL arrangements), including by reason of giving and /or receiving instructions in relation to the same and also controlling, disbursing or receiving the same;

270.2 the conditions for the disbursement of subscription money and that such conditions had not been fulfilled;

270.3 the representations in the IMs were false;

270.4 there was no real or valuable Technology for any of the Schemes;

270.5 the acquisition of the Technology rights had not been conducted at arms length and did not follow any or any proper due diligence;

270.6 the Bridging Loans were funded by the misappropriation of subscription monies and did not amount to proper or enforceable loans at all;

270.7 the Loans provided by MFC and Bank Leumi were paper entries only and did not amount to proper or enforceable loans at all;

270.8 the backdating of documents;

270.9 Mr Stiedl lay behind the Schemes and was the effective owner and controller of Innovator."

Relevant legal principles

1042. The legal principles for a claim in dishonest assistance are well established and are summarised in *Lewin on Trusts* at paragraph 40-09, namely:

(1) there is a trust;

(2) there is a breach of trust by the trustee of that trust;

(3) the defendant induces or assists that breach of trust;

(4) the defendant does so dishonestly.

1043. In relation to the first requirement it is established that "fiduciary obligations in relation to the property of another person come within the reference to a trust" – see Morgan J in *Aerostar Maintenance International Ltd v Christopher Wilson* [2010] EWHC 2032 (Ch) at [178].

1044. The Claimants contended that there is no requirement for there to be trust property and relied in particular upon the judgment of Peter Smith J in *JD Weatherspoon v Van de Berg* [2009] EWHC 639 (Ch) at [518]. *Lewin on Trusts* describes this (at 40-16) as an "open question" and I shall assume (without deciding) in the Claimants' favour that there is no such requirement.

1045. In relation to the third requirement, the assistance 'must be an act which is part of the fraudulent and dishonest design and must not be of minimal importance' – see *Baden v Société Générale Pour Favoriser le, Developpement du Commerce et de L'industrie en France S.A.* [1993] 1 W.L.R. 509 at [246].

Dishonesty

1046. In relation to the fourth requirement, the authorities support a combined test containing both a subjective and an objective element.

1047. The test for dishonesty was considered in detail by the House of Lords in the *Twinsectra* case. The majority (Lord Slynn agreeing with Lord Hutton and Lord Steyn agreeing with Lords Hutton and Hoffmann. Lord Millett dissenting) adopted what is generally known as the combined test.

1048. Lord Hutton rejected that dishonesty was purely subjective, i.e. was dishonest by the individual's own standards, even if the individual's own standard of honesty is contrary to that of reasonable and honest people. He also rejected the notion that dishonesty was purely objective, i.e. that an individual could be found to be dishonest by the standards of reasonable and honest people even if the individual did not himself realise that he was acting dishonestly. Lord Hutton stated at [27]:

> "…there is a standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standard of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. I will term this the 'combined test'".

Lord Hoffmann put the test as follows:

> "For the reasons given by my noble and learned friend, Lord Hutton, I consider that those principles require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour."

1049. The test of dishonesty was reviewed again by the Privy Council in *Barlow Clowes International v Eurotrust International* [2006] 1 WLR 1476. Lord Hoffmann stated at [10] that:

> "The judge stated the law in terms largely derived from the advice of the Board given by Lord Nicholls in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378. In summary, she said that liability for dishonest assistance requires a dishonest state of mind on the part of the person who assists in the breach of trust. Such a state of mind may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge: see Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd [2003] 1 AC 469. <u>Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state [sic] of the law and their Lordships agree."</u> (emphasis added)

1050. Lord Hoffmann went on to state that this was consistent with the test of dishonesty set out in *Twinsectra.* As he stated at [15]:

"Their Lordships accept that there is an element of ambiguity in these remarks which may have encouraged a belief, expressed in some academic writing, that the Twinsectra case had departed from the law as previously understood and invited inquiry not merely into the defendant's mental state about the nature of the transaction in which he was participating but also into his views about generally acceptable standards of honesty. But they do not consider that this is what Lord Hutton meant. The reference to 'what he knows would offend normally accepted standards of honest conduct' meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were."

1051. There are a number of recent decisions that have considered the test to be applied in the light of the leading authorities. In *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032. Morgan J stated at [183] and [184]:

"The legal test for dishonesty in this context has been much discussed. The principal authorities are the decisions of the Privy Council in Royal Brunei Airlines v Tan [1995] 2 AC 378, of the House of Lords in Twinsectra Ltd –v- Yardley [2002] 2 AC 164 and of the Privy Council in Barlow Clowes International Ltd –v- Eurotrust International Ltd [2006] 1 WLR 1476. The two decisions of the Privy Council represent the law to be applied in this jurisdiction: see Abou-Rahmah –v- Abacha [2007] 1 ALL ER (Comm) 827, at [66] – [70].

The test as to dishonesty, distilled from the above authorities, is as follows. Dishonesty is synonymous with a lack of probity. It means not acting as an honest person would in the circumstances. The standard is an objective one. The application of the standard requires one to put oneself in the shoes of the defendant to the extent that his conduct is to be assessed in the light of what he knew at the relevant time, as distinct from what a reasonable person would have known or appreciated. For the most part dishonesty is to be equated with conscious impropriety. But a person is not free to set his own standard of honesty. This is what is meant by saying that the standard is objective. If by ordinary objective standards, the defendant's mental state would be judged to be dishonest, it is irrelevant that the defendant has adopted a different standard or can see nothing wrong in his behaviour."

1052. In *The Secretary of State for Justice v Topland Group PLC* [2011] EWHC 983 (QB), King J stated:

"First, on any current understanding of the law on accessory liability (see the analysis of recent authority by the Chancellor in Starglade Properties Ltd v Nash [2010] EWCA Civ 1314) , although the test of dishonesty or put another way the standard of honesty, is an objective one, there being a single standard of honesty objectively determined by the court and the views of the Defendant on what is dishonest are irrelevant, (see Barlow Clowes Ltd v Eurocrest Ltd [2006]1 WLR 1476 where the Privy Council explained and interpreted the decision of the House of Lords in Twinsectra v Ltd v Yardley [2002] 2 AC 164)), the subjective state of mind of the Defendant, and what he knew or did not know about the circumstances of the impugned transaction, is still highly relevant since it is to the conduct of the Defendant in the light of that subjective state of mind that the court has to apply the objective test."

1053. The test for dishonesty that the court needs to apply in the light of these authorities was not in dispute. As explained by Lord Hoffmann in *Barlow Clowes*, the combined test of dishonesty has two elements:

(1) The subjective element - The Court must consider the defendant's subjective state of mind and what the defendant actually knew and understood; and

(2) The objective element - The Court must consider whether or not, with that state of mind, knowledge and understanding, the relevant conduct is dishonest, applying an objective standard of dishonesty.

1054. It is not necessary for the Court to establish whether or not the individual considered that he was acting dishonestly. This is not an element of the test of dishonesty as set out in *Twinsectra* and explained by *Barlow Clowes*.

Recklessness

1055. The relevant test for recklessness in the context of a finding of dishonesty was considered by Rix LJ in *The Kriti Palm* [2006] EWCA Civ 1601 where he stated:

"256. As for the element of dishonesty, the leading cases are replete with statements of its vital importance and of warnings against watering down this ingredient into something akin to negligence, however gross. The standard direction is still that of Lord Herschell in Derry v. Peek (1889) 14 App Cas 337 at 374:

"First, in order to sustain an action in deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless which the inference of dishonesty in the mind is to be drawn whether it be true or false."

257 In effect, recklessness is a species of dishonest knowledge, for in both cases there is an absence of belief in truth. It is for that reason that there is "proof of fraud" in the cases of both knowledge and recklessness. This was stressed by Bowen LJ in Angus v. Clifford [1891] 2 Ch 449 where he said (at 471):

"Not caring, in that context, did not mean not taking care, it meant indifference to the truth, the moral obliquity of which consists in a wilful disregard of the importance of truth, and unless you keep it clear that that is the true meaning of the term, you are constantly in danger of confusing the evidence from - evidence which consists in a great many cases of gross want of caution - with the inference of fraud, or of dishonesty itself, which has to be drawn after you have weighed all the evidence."

258 And in Armstong v. Strain [1951] 1 TLR 856 at 871 Devlin J, after a full citation of passages in earlier authorities which stress the need for dishonesty (also called actual fraud, mens rea, or moral delinquency), said this about the necessary knowledge:

"A man may be said to know a fact when once he has been told it and pigeon-holed it somewhere in his brain where it is more or less accessible in case of need. In another sense of the word a man knows a fact only when he is fully conscious of it. For an action of deceit there must be knowledge in the narrower sense; and conscious knowledge of falsity must always amount to wickedness and dishonesty. When Judges say, therefore, that wickedness and dishonesty must be present, they are not requiring a new ingredient for the tort of deceit so much as describing the sort of knowledge which is necessary."

259 Moreover, whether it is in the matter of identifying the relevant misstatement or in the finding of a dishonest mind, it is necessary to bear in mind the heightened burden of proof which bears on the claimant, as discussed in cases from Hornal v. Neuberger Products Ltd [1957] 1 QB 247 to In re H (Minors) [1996] AC 563. In the latter case Lord Nicholls of Birkenhead said this (at 586): "Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in In re Dellow's Trusts [1964] 1 W.L.R. 451, 455: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."

Application to the facts

1056. I shall concentrate on the pleaded allegations of knowledge that form the essential foundation of the allegations of dishonesty.

(1) Whether the Defendants knew of the dealings in subscription money in various CB accounts in relation to the Innovator Schemes and related arrangements (including CLFL arrangements), including by reason of giving and /or receiving instructions in relation to the same and also controlling, disbursing or receiving the same;

1057. I accept and find that Mr Stiedl, Mr Carter and Mr Gates had knowledge of all dealings in subscription monies in respect of which they gave the payment instructions or which involved the receipt of monies by them or on their behalf. I also accept and find that Mr Carter (and through him Innovator and the LLP) had knowledge of the dealings in the accounts relating to the Innovator Schemes generally.

1058. Neither Mr Roper nor Mr Bailey gave payment instructions but I accept and find that they had knowledge of all dealings in subscription monies in respect of which they received payment instructions.

1059. All of the identified Defendants had knowledge of the CLFL arrangements, save that Mr Gates and CPUK's knowledge was limited to the Gentech Schemes with which they were involved.

(2) Whether the Defendants knew the conditions for the disbursement of subscription money and that such conditions had not been fulfilled;

1060. I have found that the subscription application was not subject to the IM Conditions and therefore the identified Defendants cannot have known of them or that they had not been fulfilled. Even if it was subject to the IM Conditions, or any of them, I find that the identified Defendants had no knowledge of them.

1061. I have also found that the application of the subscription monies was not subject to a condition that the subscriber first be made a member of the partnership described in the IM, although the monies were held subject to a Quistclose trust that until they were made partners the subscription monies could only be used for the purpose of making a contribution to the Partnership or for the purpose of making a payment of the purchase price on behalf of the Partnership.

1062. As to the knowledge and understanding of each of the individual Defendants as to the conditions for the disbursement of subscription monies, further to the findings already made, I find as follows.

<u>Mr Bailey</u>

1063. Mr Bailey's evidence was that he understood that as the Claimants had applied unconditionally to become members in the LLP, it mattered not whether or not the relevant LLP had been formed and/or whether or not the D/A had been signed. Once the money was received by CB, it was held to the order of Innovator upon whose instructions it would be paid out.

1064. Although I have found that the money did not belong to Innovator beneficially, Innovator was trustee of the monies prior to the D/A and was entitled to give instructions that the monies be disbursed, provided that was accounted for as part of the payment of the purchase price. Further, CB had instructions from the Technology Vendors to act as their agents for the receipt of the acquisition price. There was therefore nothing necessarily wrongful about payments being made on Innovator's instructions before the D/A was signed.

1065. Even if that is wrong and no disbursement of monies should have been made before the D/A I am satisfied that this was not Mr Bailey's knowledge and understanding. I find that his understanding was as stated in evidence, as set out above. Further, there was nothing inherently unreasonable or implausible about such an understanding. Whether the subscription monies were subject to a Quistclose trust at all and, if so, the terms of any such trust are a disputed matter upon which different views could reasonably be taken and Mr Bailey was not aware that there was such a trust.

Mr Roper

1066. Mr Roper's substantive involvement in the Innovator Schemes began in March 2003. By the time he became involved, the procedure whereby CB received investors' monies and disbursed them pursuant to instructions received from Mr Carter and Mr Stiedl, even where those instructions were received prior to the signing of a D/A, was well-established. Further, it was Mr Roper's unchallenged evidence that he had no reason to read the IM in detail in the context of the bank financing work which he was carrying out.

1067. Mr Roper's evidence was that as the subscriber's application form contained in the IM irrevocably committed the subscriber to an application to become a member of the Partnership, he understood that it was permissible for the funds to be deployed once received by Innovator as the investor had no legal right or power to require or obtain their return. Indeed he stated that he understood that the irrevocable nature of the commitment made meant that the subscribers thereby became partners. This evidence was much criticised by the Claimants and I accept that this conclusion would be wrong in law. I am nevertheless satisfied that it reflected Mr Roper's understanding at the time albeit that he may have been concentrating on the de facto rather than the de jure position.

1068. Further, paragraphs 1064 and 1065 above apply equally to Mr Roper and his understanding as I have found it to be.

Mr Carter, Mr Stiedl and Mr Gates

1069. It was the consistent evidence of Mr Carter, Mr Stiedl and Mr Gates that once the subscription applications had been accepted by Innovator/Moneygrowth the subscription monies were payable to the order of Innovator/Moneygrowth. Given that I have found this to the actual understanding of the lawyers involved, and that there is nothing inherently unreasonable or implausible about such an understanding, that is all the more so when applied to the non legally qualified Defendants, and I accept that that was their understanding.

1070. Further, paragraphs 1064 and 1065 above apply equally, if not more so, to these Defendants and their understanding as I have found it to be.

(3) Whether the Defendants knew that the representations in the IMs were false;

1071. I have found that for the most part the IM representations were not made but, to the extent that they were made, they were true.

1072. In so far as the IM representations are express representations I find that the identified Defendants other than Mr Roper were aware that they were made due to their familiarity with the terms of the IMs. Mr Roper was not, however, sufficiently familiar with the IMs to be so aware.

1073. In so far as the IM representations are implied representations I find that none of the identified Defendants were aware that they had been made, with the possible exception of the business representations.

1074. If and to the extent that any of the Defendants were aware that representations had been made in the IM, and if they were untrue, I find that none of them were aware that they were untrue.

(4) Whether the Defendants knew that there was no real or valuable Technology for any of the Schemes;

1075. For reasons already stated I have found that there was real Technology of value for each Scheme. If so, the Defendants cannot have known otherwise.

1076. Even if my finding on the Technology was wrong, the only Defendant who would have been aware of this would have been Mr Stiedl. It was Mr Stiedl who was responsible for putting forward the Technologies for the Schemes and it was he who was involved in the negotiations with the Technology Vendors. The other Defendants relied on Mr Steidl and the fact that on the face of the documents the Technologies appeared to both real and valuable. Further, this aspect was not the concern or responsibility of Mr Bailey or Mr Roper.

(5) Whether the Defendants knew that the acquisition of the Technology rights had not been conducted at arms length and did not follow any or any proper due diligence;

1077. The acquisition of the Technology rights was conducted at arms length. Whether there was a genuine price negotiation in relation to Arte is less clear given the reduction in price agreed, the fact that it conveniently reflected the grossed up amount of the subscriptions raised and evidence as to the price sought for the Arte Poll technology. If it was not a genuine negotiation that is a matter which would only have been known to Mr Stiedl and Mr Carter.

1078. I have found that due diligence was carried out in relation to the acquisition of the Technology rights. Whether it was "proper" due diligence is a more open question, but one bedevilled by what is meant by "proper" in this context. If there was no "proper" due diligence, I am not satisfied that this was known by any of the Defendants, and indeed Mr Stiedl was the only Defendant in a position to be so aware.

(6) Whether the Defendants knew that the Bridging Loans were funded by the misappropriation of subscription monies and did not amount to proper or enforceable loans at all;

1079. It is the case that all the individual Defendants were aware of the nature of the CLFL Bridging Loan arrangements.

1080. The CLFL arrangements were entered into due to a concern as to the meaning of s. 5(5) CAA 2001 which provided when expenditure would be seen as incurred for the purposes of the CAA 2001 (including s.45).

1081. The concern arising from s.5 (5) was first identified in relation to the "Golden Contract" partnerships, i.e. Optibet, Coloured Industry and Tracksys in a letter from Mr Carter dated 3 July 2003 to Mr Bretten QC. This identified that the obligation for full payment under each of the respective AAs by 1 July 2003 had not been met. The letter, however, identified that "According to s.5(1) CAA 2011 payment could be delayed until 23 July without falling outside the 4 month period stated in s.5(5) CAA 2001."

1082. The importance of keeping to the original payment obligation (as opposed to simply arranging a new unconditional obligation or entering into a variation) was because of the commencement date for the new s.45 (4) of the CAA 2001 (inserted by s. 166 of Finance Act 2003) which applied to expenditure incurred after 25 March 2003. s. 45(4) prevented expenditure from qualifying under s. 45 if it was "with a view to granting to another person a right to or otherwise deal with any of the software in question" – this was accepted as applying to Schemes 1-11 to the extent that expenditure was seen as incurred after 25 March 2003.

1083. A telephone conference call was arranged for 7 July 2003 at which Mr Bretten QC, Mr Carter and Ms Keeble (a then trainee in Collyer-Bristow) attended. During this call, Mr Bretten QC proposed (1) that the relevant partnerships acknowledge that they were in default of their payment obligation, (2) for a loan to be given from the Technology Vendor to the partnerships, (3) for such a short term loan to be made with interest running from 1 July 2003 with monies advanced and (4) for the purchase price to be paid preferably before 24 July 2003.

1084. On 15 July 2003 a further telephone conference call took place between Mr Bretten QC, Mr Carter and Ms Keeble. The scope of the discussion in this conference call was extended to Schemes 1-8. Again Mr Bretten QC repeated his views concerning the arrangement of a loan from the relevant

Technology Vendor for each Scheme. However, he also went on to advise:

> "An alternative (and preferable) arrangement would be for the Partnership to obtain third party finance (e.g., from a Finance Company) and to use the borrowed money to pay the outstanding balance of the Purchase Price to the Technology Vendor which would then place the moneys on deposit with the Finance Company."

1085. It was pursuant to this advice that arrangements were put in place for the Bridging Loans from CLFL to the LLPs/partnerships on 17 July 2003. Matters were thought to be urgent due to the fact that many of the relevant AAs were dated 18 March 2003 and therefore it was thought necessary for payment to occur prior to 18 July 2003.

1086. The CLFL Bridging Loans agreements were entered into on 16 July 2003 and were effected on 17 July 2003. The arrangements followed the format suggested by Mr Bretten QC and used the same £4 million of funds being circularised to pay the outstanding balance of the purchase price for all the partnerships. The Claimants described this as a "washing machine".

1087. Later on 17 July 2003, Mr Bretten QC at 15:14 faxed a manuscript note (subsequently converted into a typed note dated 18 July 2003) in which he revised his view as to whether section 5(5) of the CAA 2001 was in fact in point at all. He advised that because the AAs in question either specified a date within 4 months of the date of the agreements (the Golden Contracts partnerships) or did not specify a date at all (Schemes 1-8), section 5(5) was in fact not in point since, on his reading, it only applied where the contract "in terms provides for a payment date falling more than 4 months after the obligation to pay becomes unconditional". However, by the time Mr Bretten QC's note of 17 July 2003 had been received the CLFL Bridging Loans had already been put in place.

1088. CB sent further instructions dated 25 July 2003 to Mr Bretten QC to request him to advise on the specific facts of the CLFL Bridging Loans. These instructions were then resent on 29 October 2003 due to the originals apparently having been mislaid by Mr Bretten QC's chambers. The resulting opinion from Mr Bretten QC dated 31 October 2003 maintained the revised stance as set out in the manuscript note of 17 July 2003, namely that actual payment within 4 months was not in fact required by s. 5(5) of CAA 2001. However, Mr Bretten QC went on to opine that the CLFL Bridging Loans "should have been effective to constitute actual payment on 17th July 2003, of the outstanding balances of the purchase prices for the technologies."

1089. The main criticism made by the Claimants of the CLFL Bridging Loan arrangements were that they allegedly involved "misappropriation" of subscription monies.

1090. The source of the £4 million of funds used was money held in various CB client accounts relating to the Partnerships which was returned to them after the circular movement of funds had been carried out. These funds were Partnership funds for all the Partnerships except for the three "golden contract" Partnerships for which no D/A had yet been signed and which were accordingly subscribers' funds held by Innovator subject to the Quistclose trust which I have found established. Whilst these could still be described as "subscription monies", in relation to the other Partnerships these were Partnership monies albeit their original source had been subscription monies.

1091. The Claimants alleged that the individual Defendants were dishonest in using the Partnership/subscriber monies in this way. However, it was the evidence of all the individual Defendants that they understood the monies to be held to Innovator's order. That was their understanding from the time that the irrevocable subscription application was accepted and it was not affected or changed when the subscribers were made partners. It was also their understanding, which I have found to be correct, that there was a contract between the subscriber and Innovator from the time of that acceptance.

1092. For reasons already given I accept that it was the individual Defendants' understanding that the monies were held to Innovator's order in which case use of them at the direction of Innovator would not involve any obvious "misappropriation". Further, the funds were all returned to the relevant partnership; the purpose of the exercise was to assist the subscribers/partners to obtain tax relief, and the arrangements were approved by Mr Bretten QC.

1093. Further, despite the Claimants' contentions to the contrary, it is clear that Mr Bretten QC was made aware that the source of the funds was various client accounts Innovator had with CB as set out in the Instructions to him of 25 July 2003, and he would have been aware that the original source of those funds was subscription monies.

1094. The Claimants also criticised the artificial nature of the arrangements and alleged that they were not "proper and enforceable". In this connection they relied upon the "quick fix" memorandum sent by Mr Bailey to Mr Marsh on 8 August 2003. This described in outline the arrangements made and included the following:

> "In view of the fact that only two days were left we scrabbled around and put together an alternative form of funding which basically involved each partnership lending to the other partnership to enable that partnership to have sufficient monies to purchase the technology in question. The technology vendor then lent the money back to the appropriate partnerships and the same process was repeated for another partnership.
>
> ….
>
> The attitude of the Inland Revenue to the quick fix that we had to do is not clear and it may well be that the Inland Revenue will deny relief

> because of this. I will mention that we do have an Opinion of Rex Bretton QC that what was carried out was permitted by the tax legislation. However there is a doubt".

1095. It is correct that the arrangements were artificial and could well have been challenged by the IR. Indeed Mr Frost was subsequently highly critical of them. However, it was believed at the time to be the only means by which the tax relief could be secured in the time. The perceived alternative was to do nothing and to forego any prospect of tax relief. Further, the arrangements were approved by Mr Bretten QC.

1096. The proposal for a circular movement of funds by Mr Bretten QC needs to be understood in the context of the Court of Appeal's judgment in *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2002] EWCA Civ 1853; [2003] STC 66 which had been handed down on 13 December 2002. After the Court of Appeal's judgment, Mr Bretten QC advised in clear terms that the Ramsay principle was not able to be applied in determining whether expenditure had been incurred for the purpose of s. 45. Whilst the circular movement of funds is now criticised as not altering the economic reality as between the Technology Vendor and the relevant LLP/Partnership, at the time in question the advice of leading counsel was that it was proper and sufficient in order to ensure that the valuable pre-26 March 2003 status of the AA was preserved. That is how it would have been and was perceived by the individual Defendants at the time who understandably relied on the expert advice that had been received.

1097. The Claimants also criticised the fact that the arrangements were not disclosed at the time to the subscribers/partners. However, it was always envisaged that this would be a short term solution pending the putting in place of bank finance, which was secured shortly thereafter. Criticism was also made of the fact that the lending banks were apparently not informed of these prior arrangements and that there was no satisfactory documentary evidence of the CLFL loans being cancelled and replaced. Whilst the documentary position is not entirely satisfactory the reality is that once the bank loans had been secured CLFL never expected or demanded repayment of the bridging loans and they were treated as having been taken over by the banks.

1098. In summary, whilst criticism can be made of the way in which the CLFL Bridging Loan arrangements were carried out and the documentation thereof, they were not understood to involve any misappropriation or impropriety. On the contrary they were understood to be arrangements carried out for the benefit of the Partnerships which had the stamp of approval of leading counsel.

(7) Whether the Defendants knew that the Loans provided by MFC and Bank Leumi were paper entries only and did not amount to proper or enforceable loans at all;

1099. No such case was pursued in evidence. The loans were proper and enforceable, and indeed were enforced against the security provided. The circular nature of the loan arrangements was considered and advised upon by Mr Bretten QC who advised that it did not affect the position.

(8) Whether the Defendants knew of the backdating of documents;

1100. The only documents that I have found to be backdated are the GT2 LLP Deeds dated 27 February and 26 March 2003 and the Arte D/A.

1101. The first two documents I have found to be backdated by mistake. As such there is no necessary reason why Mr Carter should have realised this and I find that neither he (who signed the Deeds) nor the other Defendants (who were not involved in its signature or witnessing) were aware of this backdating.

1102. Mr Carter signed the Arte D/A and must have realised that he was dating it at an earlier time. He did so because he considered it appropriate to enter a date which reflected the closing of the Partnership. That was inappropriate but it was not done in order to mislead or deceive and indeed there would have been no reason for so doing given that it was still executed within the relevant tax year. I am not satisfied that any other Defendant was aware of what Mr Carter had done.

(9) Whether the Defendants knew that Mr Stiedl lay behind the Schemes and was the effective owner and controller of Innovator.

1103. This was essentially accepted by all Defendants except Mr Stiedl. I find that this was the reality and that it was known to all the individual Defendants.

1104. The main significance of this is that the Claimants alleged that the Defendants deliberately concealed Mr Stiedl's role in the light of their knowledge of his prosecution for the Balfron pension fraud.

1105. It was not disputed that all the individual Defendants knew of the SFO prosecution of Mr Stiedl. It was further alleged by the Claimants that all the Defendants knew that he had been the subject of a successful fraud prosecution in Denmark which was being appealed (according to the unchallenged evidence of Mr Stiedl in such circumstances there is no conviction until after any appeal is unsuccessful). All the individual Defendants denied knowledge of this. Although the Claimants' case was to an extent supported by Mr Stiedl, I find that none of the other individual Defendants were aware of the Danish criminal proceedings. This is not referred to in any of the voluminous contemporaneous documents and I accept the evidence of the other individual Defendants on this issue.

1106. Although the other individual Defendants were aware of the SFO prosecution of Mr Stiedl, he led them to believe that there was every chance that he would be acquitted and he later claimed that this was supported by the outcome of the related civil proceedings (which could not be publicly disclosed). The other Defendants believed what Mr Stiedl told them and also considered that he was entitled to be treated as innocent until proved guilty. In fact, it transpired that the civil proceedings had not been as successful as Mr Stiedl claimed, but that was not known to the other Defendants prior to Mr Stiedl's conviction in the criminal proceedings in November 2004.

1107. It was the evidence of Mr Bailey that he discussed the prosecution of Mr Stiedl with Mr Marsh, the Head of Litigation at CB. It was Mr Roper's evidence that he was told by Mr Bailey that CB's equity partners were aware of Mr Stiedl's prosecution. It was the evidence of Mr Gates that he never sought to conceal the involvement of Mr Stiedl and that IFAs could and did meet him. It was the evidence of Mr Stiedl that he met a number of IFAs, that he had a physical presence at Innovator's office and that he did not try to hide himself away.

1108. It is the case that a number of IFAs were aware of Mr Stiedl's prosecution and that it caused them no particular concern. Mr Marks, Mr Pimblett and Mr Ellis, all of whom gave evidence, were examples of this. Some subscribers met Mr Stiedl, as did, for example, Mr McMillan.

1109. Although Mr Stiedl's involvement was not kept secret it is the case that it was not referred to in the IMs or Scheme documentation. It is also the case that Mr Carter subsequently sought to downplay Mr Stiedl's role both to the partners and the IR. Whilst it is correct that the LLPs were managed by Mr Carter and that Mr Stiedl had no real involvement, he did, contrary to certain statements made by Mr Carter, have very real involvement in the running of Innovator, especially in the setting up of the Schemes and the acquisition of the Technology, and as shareholder representative he had ultimate control over it. He also attended every Innovator Board of Directors meeting up until the time of his conviction. Mr Carter accepted in evidence that it was wrong for him to have said that Mr Stiedl's sole role in relation to Innovator was as a consultant.

1110. Many of the Lead Claimants gave evidence to the effect that they would not have wanted to become involved with the Schemes if they had known that someone closely involved with the Schemes was being investigated or prosecuted by the SFO. Although there was no specifically pleaded case to this effect, it was suggested that this was deliberately not disclosed in the IM and thereby concealed. Even if this case is open to the Claimants, which I doubt, and even if one ignores the IM disclaimers, I am not satisfied that it has been made out on the evidence. Mr Stiedl's formal role was a limited one, namely as consultant. Although it was known that his influence and control went beyond that, this was apparent to many of those who had dealings with Innovator, including Mr Bretten QC who was involved in considering the IMs and other scheme documentation. Neither he nor any of the other professionals involved in the Schemes suggested that this made the IM or other documentation misleading. Nor did the internal verification process, which I accept was a genuine exercise carried out by CB, suggest this.

Other matters relied upon in support of the allegation of dishonesty

1111. During the course of the trial the Claimants sought to rely on a number of other matters in support of their allegation of dishonesty notwithstanding that they had not been specifically pleaded. However, their core case must be that as pleaded and addressed above. In so far as it is open to them to rely on wider matters other than in relation to credit I address the principal matters relied upon below.

(1) Knowledge that the Schemes were CISs

1112. As set out below I find that the Schemes were CISs. The Claimants contended that this was known to the individual Defendants and that their involvement in the promotion and operation of Schemes known to be CISs is indicative of dishonesty.

1113. I am not, however, satisfied that any of the individual Defendants understood the schemes to be CISs. The issue was raised in correspondence with BoS's solicitors, D&W, in the autumn of 2002. This ultimately led to the instructions to Mr Crystal to advise on the CIS issue in December 2002.

1114. Mr Crystal provided an Advice dated 10 December 2002. In effect he advised that, from the documentation before him, the Agent Mole Scheme was a CIS. He stated in his conclusion, "If the day to day control of the management of the LLP is (in substance and reality) by the partners, then the LLP will not be a [CIS]. The present documentation needs revision if the LLP is not to be considered a [CIS]". Although much stress was placed on the statement that the control of management of the LLP must "in substance and reality" be by the partners, the advice also suggests that revisions to the documentation may assist in ensuring that the LLP is not to be considered a CIS.

1115. Mr Bailey did not consider that Mr Crystal had addressed the issues raised in his Instructions and in particular the suggested amendments to the documentation. In a fax to Mr Stiedl dated 10 December 2002 he stated as follows:

> "I hope that I made it very clear in the instructions to Counsel that in the event that Counsel was of the opinion that the Scheme as a whole was in danger of being a [CIS], he would review the amendments that I had made to the Partnership Agreement and the Service Agreement; and suggest any other amendments that may be appropriate. In my opinion the advice merely states that the Scheme is a [CIS] without taking any account of the amendments that I have made to the documentation"

1116. This led to a conference with Mr Crystal and the production of a revised advice based on changes made to the IM. The main changes to the IM, approved by Mr Crystal, were (1) the substitution of the term "Managing Partner" by the term "Administrator", (2) the removal of references to the

"Managing Partner" having any day to day management role and (3) express statements that "the Partners will have the day to day control over the management of the Partnership" and that "ultimate control over the management of the Partnership's activities and its Business". The revised IM set out the services which the Administrator would provide "in accordance with the Partners decision" and that the Partners would have the additional right to "run the day to day business of the Partnership".

1117. The revised advice provided in the light of these changes was that "As the day to day control of the management of the LLP will be undertaken by the partners, the LLP is not a CIS".

1118. The understanding of the individual Defendants in the light of this advice was and remained that setting up Partnerships in accordance with the revised IM would mean that they were not CISs. The Administrator did perform the services set out in the IM. That was in accordance with the decision of the Partners. Although the Partners did not run the day to day business of the Partnership they were in a position to exercise day to day control over the management of the business.

1119. Mr Carter stated that it was always his understanding that the partners in fact had day to day control over the Partnership. He explained that as the Partnerships were akin to a trading company where the sales and marketing had already been subcontracted, he did not think there were very many decisions for the partners to take. Mr Carter further stated that the partners had control of the trading of the LLP as a result of the EGMs. He believed that the Partnerships were actually trading vehicles and not investment vehicles, and that the way the procedures were set up (and precisely because some partnerships were very large such that not all investors could be actively involved day to day), meant that they were compliant with FSMA.

1120. Mr Bailey explained in evidence that Mr Stiedl and Mr Carter had told him, after their conference with Mr Crystal in December 2002 that the day to day control points could be met by the amendments to the documents and that counsel was happy with that. When it was suggested that this flew in the face of the facts, Mr Bailey explained that he was given to understand that the partners did not all have to participate but could choose to participate and that was sufficient to satisfy the definition. This understanding mirrored that of others at the time, as exemplified by the evidence of Mr Sherry QC, one of the lead Claimants.

1121. In relation to the issue of day to day control, Mr Sherry QC said he thought it was a question of power: "So that if the members were in a position to hold a meeting and direct things, then they had control over day to day management, day to day management being in the hands of Mr Carter here, for example, but the control of Mr Carter being in the hands of the members in general meetings."

1122. He further stated that if these Schemes would otherwise have amounted to CISs, then provided the partners had "the right to exercise control over the day to day management" that would be sufficient to avoid their being CISs.

1123. Although CIS concerns continued to be raised by solicitors acting for lending banks the understanding of the individual Defendants remained that the Schemes were not CISs. This was still the case even after Mr Lee had raised concerns and had been appointed as operator of some of the schemes. As Mr Carter explained, this was done as an "insurance policy".

1124. Whether the Schemes were CISs is a complex issue. None of the Defendants had a close familiarity with the relevant legislation and Mr Bailey made it clear that he had no expertise on such issues. The legislation and its meaning and effect was a matter of some uncertainty at the material time. Even though I find that the Schemes were CISs I find that this was not the individual Defendants' understanding in 2002-2005.

(2) Investors misled at EGMs

1125. The Claimants contended that they were misled at various EGMs as to the progress and likely outcome of the IR enquiries. It is correct that for a considerable time Mr Carter painted an optimistic picture of the IR negotiations and their likely outcome. The IR correspondence and meeting notes suggest that this optimism may have been misplaced, at least with hindsight. It was Mr Carter's evidence that IR challenges to the Schemes had always been expected and that the expert legal input with which the Schemes had been set up encouraged him in the view that the IR challenges would be resisted. I accept that this remained his belief and understanding until a late stage. Criticism was also made of some inaccurate statements made by Mr Carter at EGMs as to the Scheme arrangements. Whilst some of these criticisms are justified they reflect mistakes made by someone under huge pressure rather than any innate dishonesty or dishonest purpose.

(3) Dealings with the Revenue

1126. The Claimants contended that the IR was misled in its dealings with Innovator and CB. Although some inaccurate statements may have on occasion been made I do not find that they were made with an intention to mislead. The one exception was Mr Carter's statement to Mr Frost that Mr Stiedl was never more than a consultant in the November 2004 meeting with Mr Frost. This was untrue, as Mr Carter effectively acknowledged in evidence. Mr Bailey and Mr Roper were criticised for remaining silent when these statements were made but it is understandable that they would be reluctant to openly contradict their own client and it was Mr Bailey's evidence that he did take the issue up with Mr Carter after the meeting.

Conclusion on dishonesty

1127. Having carefully considered the evidence and the Claimants' submissions on the evidence, including submissions that go beyond their pleaded case, I do not consider that the Claimants have come close to discharging the onerous burden of proving dishonesty in relation to any of the Defendants. When one considers their core allegations of knowledge, many of them are not made out on the evidence at all. Those that are proven as knowledge do not disclose dishonest conduct in the light of the Defendants' actual knowledge and understanding.

1128. Turning to the other issues which arise in relation to the allegations of dishonest assistance made I find as set out below.

The subscription money claims

1129. The only trust which existed in relation to the subscription monies was a Quistclose trust which existed on terms already found up until the time that subscribers were made partners.

1130. There was no breach of the Quistclose trust by the trustee, Innovator. If there was, and disbursements made prior to the subscribers being made partners were in breach of trust then Mr Stiedl, Mr Carter, Mr Bailey and Mr Roper assisted in those breaches by giving the payment instructions or acting on them.

1131. If, contrary to my findings, the trustee of the Quistclose trust was CB, there was no breach of trust by CB. If there was and disbursements made prior to the subscribers being made partners were in breach of trust, then Mr Stiedl, Mr Carter and Innovator assisted in those breaches by giving the payment instructions or acting on them.

1132. The only fiduciary duties owed to the Claimants (as opposed to the LLP) were duties owed by Mr Carter and Mr Gates as fellow partners. The Claimants' allegations do not concern actions taken by them as partners but rather as Administrators of the LLPs.

1133. Even if fiduciary duties were owed to the Claimants they were not breached as the IM Conditions were not pre-conditions for the disbursement of Partnership monies.

1134. If such duties were owed and were breached then Mr Stiedl, Mr Carter, Mr Gates (in relation to GT2), Mr Bailey and Mr Roper and Innovator would have assisted those breaches. If the Defendants did assist in any breach of trust none of them did so dishonestly.

Attorney related claims

1135. With the possible exception of Arte, the execution of the D/As did not involve any breach of trust or fiduciary duty.

1136. Mr Bailey and Mr Roper were not involved in and did not assist in the execution of the Arte D/A.

1137. Unless the D/As had been backdated (which, save for Arte, they were not) witnessing and countersigning signatures of Mr Carter and Mr Gates was of no more than minimal importance and did not or did not sufficiently assist the alleged breach of trust.

1138. Such assistance as Mr Bailey and Mr Roper did provide in relation to the execution of the D/As was not dishonest.

Conclusion on dishonest assistance

1139. The Claimants have not proved the dishonesty necessary for a claim in dishonest assistance. In relation to their core allegations of knowledge, many of them are not made out on the evidence. Those that are proven as knowledge do not disclose dishonest conduct in the light of the Defendants' actual knowledge and understanding.

1140. There was no breach of trust in relation to the subscription monies for the Defendants dishonestly to assist.

1141. Mr Bailey and Mr Roper did not provide more than minimal assistance in respect of the attorney related alleged breach of duties. In relation to the only possible breach of fiduciary duty established they provided no assistance.

1142. For the reasons outlined above I reject the Claimants' claims based on dishonest assistance.

(11) THE FSMA CLAIMS

The Claimants' case and the FSMA Regime

The scheme arrangements constituted a CIS

1143. The Claimants contended that arrangements constituted by each scheme constituted a CIS as defined in FSMA s.235, which provides as follows:

> "(1) In this Part "collective investment scheme" means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.
>
> (2) The arrangements must be such that the persons who are to participate ("participants") do not have day to day control over the management of the property, whether or not they have the right to be consulted or to give directions.
>
> (3) The arrangements must also have either or both of the following characteristics–
> (a) the contributions of the participants <u>and</u> the profits or income out of which payments are to be made to them are pooled;

(b) the property is managed as a whole by or on behalf of the operator of the scheme."

1144. It was the Claimants' case that:

(1) The arrangements were with respect to property (money and technology or technology rights), "the purpose or effect" of which was to enable participants in the arrangements to receive profits or income arising from the "acquisition, holding, management or disposal of the property or sums paid out of such profits or income": s. 235(1).

(2) Investors did not have actual day to day control over the management of the property of the Scheme s. 235(2).

(3) The property was managed as a whole by the operators of the scheme and (from when investors were made partners (if at all)) their contributions and the profits and income (if any) were pooled: s. 235(3).

1145. The Claimants contended that the arrangements were not precluded from being a CIS by any exemption contained in the CIS Order (SI 2001/1062) made under FSMA s. 235(5).

1146. It was further contended that the arrangements for each scheme were each different (e.g. different participants, different property, different Partnership, different technology and generally different technology vendors and exploiters). The CIS constituted by each Scheme was different from that in the case of each other Scheme - see the analyses of Laddie J in see *The Russell-Cooke Trust Company v. Elliott* (No 1, 23 March 2001 unreported; and No 2, 16 July 2001 unreported).

1147. The Claimants further emphasised that the arrangements do not fall to be considered at two stages i.e. (1) when investors' funds were placed in the CB client account and (2) when they were aggregated and transferred (if at all) to a Partnership. The "purpose and effect" of the arrangements for each Scheme were for the purpose of a collective arrangement (investment in a particular Partnership). In the case of each Scheme, when subscription money was first placed in the CB client account for the purposes of such an arrangement, the Scheme was from that time (if not earlier, when first promoted) a CIS: see *The Russell-Cooke Trust Company v. Elliott* (No 2), paragraphs 15 to 17, per Laddie J.

The Schemes involved Regulated activities

1148. The Claimants contended that each of the Innovator Schemes involved various "regulated activities".

1149. FSMA s. 22, entitled "The classes of activity and categories of investment", defines a "regulated activity". It is defined as "an activity of a specified kind which is carried on by way of business and (1) relates to an investment of a specified kind or (2) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind". "Specified" means specified in an order made by the Treasury.

1150. Various activities are specified and defined in the The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001: SI 2001/544 ("RAO"), including by reference to various exclusions. They include (1) "arranging deals in investments" (RAO, art. 25) and (2) "establishing etc a CIS" (RAO, art. 51). Investments are specified and defined in the RAO to include "units in a collective investment scheme" (RAO art. 81). The definition of "units" in FSMA s. 237(2) is adopted. The term "security" in the RAO includes such units (RAO, art. 3(1)).

1151. The Claimants contended that the Schemes involved the following "regulated activities": (1) arranging deals in investments (see FSMA s. 22 & art 25 of the RAO); and (2) establishing and operating a CIS: (FSMA s. 22 & art. 25 of the RAO). Investors' interests in a Partnership were "units" in a CIS: see FSMA s. 237(2) and RAO art. 81 (and also a "security": RAO art. 3(1)).

The Schemes involved Controlled activities

1152. In relation to promotion, the Claimants contended that each of the Innovator Schemes involved various "controlled activities" (see FSMA s. 21(7)-(15) & Sched. 2 and The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 SI 2001/1355. "FPO") including: (1) arranging deals in investments (Art. 2(1) & Sched. 1 para. 4); and (2) managing investments (Art 5 & Sched.1). They also involved a "controlled investment", i.e. units in a CIS (see FSMA s. 21(1) and FPO, art. 2(1) & Sched. 1, para. 19) and a "security" (FPO, Sched. 1 para. 28).

The Defendants were not authorised

1153. None of the Defendants was an authorised (or exempt) person under the FSMA regulatory regime (except CPUK which had limited authorisation). This was common ground.

Contravention of General Prohibition (1) (establishing CIS)

1154. The regulated activities regime proceeds from "the general prohibition" in FSMA s. 19. This prohibits any person from carrying on a "regulated activity" in the UK, or from purporting to do so, unless an "authorised person" or "exempt person".

1155. In relation to each scheme, it was the Claimants' case that each of the following contravened the general prohibition in FSMA s.19 by carrying on the regulated activity of establishing a CIS when neither an authorised person nor an exempt person:

(1) Innovator, CLFL and their respective directors and shadow directors (including Mr Stiedl, Mr Carter and Mr Bailey) (RRAPOC 316.1); and

(2) in the case of the GT1 and GT2 schemes, Mr Gates (RRAPOC 316.2).

Contravention of General Prohibition (2) (operating CIS)

1156. In relation to each Scheme, it was the Claimants' case that each of the following contravened the general prohibition in FSMA s.19 by carrying on the regulated activity of operating a CIS when neither an authorised person nor an exempt person:

(1) Innovator, CLFL and each of their respective directors and shadow directors, Mr Stiedl, Mr Carter and Mr Bailey (RRAPOC 316.1);

(2) in the case of the GT1 and GT2 schemes, Mr Gates (RRAPOC 316.2);

(3) the LLP of which the relevant Claimants were purportedly made partners (RRAPOC 316.3); and

(4) Mr Bailey and Mr Roper, and through them CB, by their control and operation of the CB client account(s) and control of monies in them, including monies attributed in their records to various LLPs, Innovator, CLFL, Technology Vendors and others (RRAPOC 316.5, 332).

Contravention of General Prohibition (3) (arranging deals)

1157. In relation to each Scheme, it was the Claimants' case that each of the following contravened the general prohibition in FSMA s. 19 by carrying on the regulated activity of arranging deals in investments when neither an authorised person nor an exempt person:

(1) Innovator, CLFL and each of their respective directors and shadow directors, Mr Stiedl, Mr Carter and Mr Bailey (RRAPOC 316.1);

(2) Mr Gates (RRAPOC 316.1, 316.2);

(3) the LLP of which the relevant Claimants were purportedly made partners (RRAPOC 316.3);

(4) Mr Bailey and Mr Roper, and through them CB (RRAPOC 316.4, 332).

Contravention of Financial Promotion Restriction

1158. The financial promotion regime proceeds from the restriction in FSMA s. 21 ("Restrictions on financial promotion"). This section provides that a person must not "in the course of business", communicate (including "causing a communication to be made") an invitation or inducement "to engage in investment activity". Various terms are defined including the following:

> "Engaging in investment activity": "(a) entering or offering to enter into an agreement the making or performance of which by either party constitutes a controlled activity; or (b) exercising any rights conferred by a controlled investment to acquire, dispose of, underwrite or convert a controlled investment." (FSMA s. 21(8))
>
> "Controlled activity" "An activity is a controlled activity if (a) it is an activity of a specified kind or one which falls within a specified class of activity; and (b) it relates to an investment of a specified kind, or to one which falls within a specified class of investment." (FSMA s. 21(9))
>
> "Controlled investment": "An investment is a controlled investment if it is an investment of a specified kind or one which falls within a specified class of investment." (FSMA s. 21(10))
>
> "Specified": i.e. by order of the Treasury (FSMA s. 21(15)) –see the FPO.

1159. The Claimants contended that the Schemes involved "controlled activities" and a "controlled investment".

1160. The restriction is disapplied in various circumstances, including:

> (1) if the person is an authorised person;
>
> (2) if the content of the communication has been approved for the purposes of FSMA s. 21 by an authorised person and
>
> (3) in circumstances specified in an order made by the Treasury: FSMA s. 21(5)(6))

1161. The financial promotion restriction is also disapplied in respect of communications by various exemptions in the FPO, including communications to "Investment Professionals" (FPO, art. 19) and communications to "Certified High Net Worth Individuals" ("HNWIs") (FPO, art. 48).

1162. It was the Claimants' case that the following contravened the restriction in FSMA s. 21:

> (1) Innovator, Mr Stiedl, Mr Carter and Mr Gates: (RRAPOC 314.1);

(2) (as from the date of its incorporation), each LLP of which the Claimants were purportedly made partners (RRAPOC 314.2).

1163. None of the above was an authorised person and promotional material was not approved by an authorised person.

Liability under FSMA s.26

1164. The Claimants contended that in respect of each Scheme they were entitled to recover money paid under the following agreements (which are unenforceable) made in the course of carrying on regulated activities in contravention of the general prohibition in FSMA s.19 (by each of the persons stated above) against the following persons as counterparties and/or recipients of such money, pursuant to FSMA s. 26(2):

(1) CB as counterparties to a CB subscription money agreement and/or as recipients of money paid pursuant to such agreement or any other agreement (whether or not CB were parties thereto) (RRAPOC 344 & 344A);

(2) any LLP as counterparty to any LLP Deed or D/A to which (contrary to the Claimants' primary contention) the Claimants were parties and/or as recipient of money paid pursuant to either such deed or other agreement: (RRAPOC 344.2 & 344A);

(3) Innovator or Mr Gates as counterparty to any agreement with the Claimants and/or as recipient of money paid pursuant to that or any other agreement (RRAPOC 344.3 & 344A);

(4) Mr Stiedl, Mr Carter, Vermilion and other Defendant recipients (RRAPOC 344A).

Liability under FSMA s.30

1165. By reason of the contravention of the financial promotion restriction in FSMA s. 30 by the persons set out above, the Claimants contended that in respect of each Scheme they were entitled to recover money paid under the following controlled agreements (which are unenforceable) against the following persons as counterparties and/or recipients of such money, pursuant to FSMA s. 30(2):

(1) CB as counterparties to a CB subscription money agreement and/or as recipients of money paid pursuant to any agreement between a subscriber with Innovator, or Mr Gates or any LLP (RRAPOC 344.1 & 344A);

(2) any LLP as counterparty to any LLP Deed or D/A to which (contrary to the Claimants' primary contention) the Claimants were parties and/or as recipient of money paid pursuant to either such deed or other agreement (RRAPOC 344.2 & 344A);

(3) Innovator or Mr Gates as counterparty to any agreement with the Claimants and/or as recipient of money paid pursuant to that or any other agreement (RRAPOC 344.3);

(4) Mr Stiedl, Mr Carter, CLFL, Vermilion and other Defendant recipients paid pursuant to controlled agreements (RRAPOC 344A).

Application to the facts

(1) Whether the scheme arrangements constituted a CIS

1166. The crux of this issue was whether the Schemes met the negative "day –to-day control" requirement in s.235 (2) – "The arrangements must be such that the persons who are to participate ("participants") do not have day to day control over the management of the property, whether or not they have the right to be consulted or to give directions."

1167. As already found, it was the understanding of the individual Defendants that the schemes were not CISs because of the second advice of Mr Crystal and the amendments to the documentation made in consequence. In particular, it was believed that these ensured that the investors had the requisite "day to day control over the management of the property" of the Scheme.

1168. There was and remains a lack of clarity as to what the "day to day control" requirement means. This is illustrated by the July 2008 report of the Financial Markets Law Committee ("FMLC") entitled "Operating a Collective Investment Scheme: Legal assessment of problems associated with the definition of Collective Investment Scheme and related terms" written by a Working Group chaired by Mr Michael Brindle QC.

1169. The role of the FMLC is to identify issues of legal uncertainty on the framework of the wholesale financial markets. Under the heading 'Legal uncertainty in the definition of CIS', the report states: "The notion of 'day to day control' is vague and FSMA does not give any further guidance on how it should be interpreted. Furthermore, the phrase "whether or not they have the right to be consulted or to give directions", which purports to clarify the "day to day control of the property" notion, is also obscure. There is not a clear picture as to which level of control the "right to be consulted or to give directions" encompasses" (para. 2.5). More specifically, the report comments as follows (para. 3.9):

> "Day to day control over the management of..." is not a wholly easy concept. "Control over the management of..." is presumably intended to be distinguished from "management of..." i.e. arrangements will not qualify simply because the participants do not manage the property themselves. On the other hand "day to day control" must clearly mean more than "have the right" to be consulted or to give directions". In Elliott, Laddie J referred in "colloquial terms" to "minding the shop". In practice it is not always easy to apply the test, though it appears that as a minimum the participants should be in a

> position to tell the person who is actually managing the property what to do on a continuing day to day basis".

1170. In the present case the Claimants were in a position to tell Mr Carter, the person actually managing the property, what to do on a continuing day to day basis. They could have exercised that control at any moment. However, I agree with the Claimants that more is required and that they must actually exercise that control sufficiently to be regarded as being in effective control. It is necessary to look beyond documents which may provide for "day to day control" by investors and to consider how the scheme was designed to and did operate in practice. This is borne out by the Australian case of *Enviro* (2001) 36 A.C.S.R. 762 in relation to the similar "day to day control" test under the Australian definition of the equivalent to a CIS. In his judgment Marin J stated as follows:

> "The purpose of object of the legislation and the regulatory regime created pursuant to the legislation would be easily defeated if the court felt obliged to rely solely upon a strict view of the legal rights and duties created by the documentation and was required to ignore the realities of the scheme as it was designed to operate in practice"

1171. In the present case the Claimants did not give directions or assert their right to exercise day to day control sufficiently to be regarded as being in effective control over the management of the property. The Defendants contended this was the Claimants' own choice and responsibility. However, the degree of control actually exercised was as envisaged by the IM and the documentation. It was thought that the documentation would mean that that degree of control was sufficient, but I find that it was not.

1172. The Defendants further contended that because the day to day control requirement was not satisfied because of the way the Schemes were in fact operated by the partners the Schemes were not CISs from the outset, but only became so once the subscribers had become partners and then failed to exercise the requisite control.

1173. However, I agree with the Claimants that what matters is the "purpose or effect" of the arrangements (FSMA s.235 (1)). The arrangements were in fact operated in the manner always envisaged. Further, as Laddie J stated in *The Russell-Cooke Trust Company v. Elliott* (No 2) at para. 17:

> "It seems to me that the words 'purpose or effect' are broad enough to cover all stages from the preparatory step of gathering in funds up to and including the making of the communal investment. Therefore, the fact that an investor's funds may rest in client account pending putting in place a particular loan, does not stop it being in a CIS. If the money was placed there for the purpose of such an arrangement, it is from that time in a CIS. The 'arrangements' to which s.75 (1) relate are those which enable, or are intended to enable, the communal funds to be invested. They include the preparatory steps which allow individual investors to park their money in the Elliott's' client account with a view to future investment in a communal

property-based loan as well as the investment itself."

1174. I respectfully agree and reject the Defendants' two stage approach. In the present case the subscribers' funds were placed "irrevocably" in the CB client account for the purpose of investment in the Scheme, which Scheme was a CIS.

1175. In relation to the stage at which subscription money was being held in the CB client account CB relied on the common accounts exception (CIS Order, A6) which provides that:

> "Common accounts
>
> Arrangements do not amount to a collective investment scheme if—
>
> (a) they are arrangements under which the rights or interests of participants are rights to or interests in money held in a common account; and
>
> (b) that money is held in the account on the understanding that an amount representing the contribution of each participant is to be applied—
>
> (i) in making payments to him;
>
> (ii) in satisfaction of sums owed by him; or
>
> (iii) in the acquisition of property for him or the provision of services to him".

1176. It was argued that if subscription monies held in the CB client account were beneficially owned by the Claimant investors, this exception would apply given that, on this hypothesis, (1) the client account would be an arrangement under which the Claimants had rights or interests in money held in a common account and (2) that money was held on the basis that an amount representing each investor's contribution was to be applied in the acquisition of technology.

1177. I agree with the Claimants that the common accounts exclusion relates to circumstances in which money in the account is held on the understanding that an amount representing the contribution of each participant is to be applied only for the benefit of that participant, as opposed to being applied for the collective benefit of more than one participant. The prime example is a solicitor's client account. The way in which the exclusion works was explained by Laddie J. in *Russell-Cooke No. 2* as follows at [35]:

> "All the work in this provision is done by the words 'to him', 'by him' and for him'. In this legislation the distinction between the singular and the plural is important. A distinction must be drawn between sums held in a common account to be used for making payments on behalf of 'them' – that is to say, all the persons whose money is in the account – and sums held for making payments on

behalf of 'him', that is to say the individual. In the former case, the account is common both as to what it contains and as to what it will be used for. In the latter, it is only common in the first sense. The co-residence in the account of sums from different individuals may be an administrative convenience, but it does not mean that those individuals are clubbing together to make a common investment. It is only common investment with which those statutory provisions are concerned. It follows that paragraph 35(d) does not apply to the investments in issue here."

1178. For similar reasons the exception does not apply to the subscription monies held in the CB account. It was being held for the purposes of collective investment. Further, on my findings they could be applied for that purpose even before the subscriber was made partner.

(2) Whether the Schemes involved Regulated activities and a contravention of the General Prohibition

<u>(a) "Establishing" a CIS</u>

1179. This regulated activity is defined in RAO, art. 51:

> "Establishing etc. a collective investment scheme
>
> 51.—(1) the following are specified kinds of activity—
>
> (a) establishing, operating or winding up a collective investment scheme;"

1180. I am satisfied that Innovator established the Schemes and therefore a CIS.

1181. Whether the individual Defendants did likewise mainly depends on whether their involvement in the establishment of the CIS was "carried on by way of a business" by them (see s.22 FSMA).

1182. This issue was considered by Neuberger J in the case of *Secretary of State for Trade and Industry v Grant* (15 September 2000)(unreported) in which he stated as follows:

> "97. In my judgment, even where a person is the controlling shareholder and sole director of a company, then, absent special circumstances, it is the company who will be carrying on the business, and the shareholder/director who will have the secondary liability.
>
> 98. I do not understand Mr Green to disagree with that proposition, which appears to me to receive support from two decisions of the Court of Appeal. First, in Re Brauch [1978] 1 Ch. 316, the point is well summarised in the head note at 316F: "In running the business of his company a debtor was not "carrying on business" within the meaning of Section 4(1)(d) of the Bankruptcy Act s1914 even though he was in complete control" (see per Goff LJ at 328F).

99. Secondly, in R -v- Wilson [1997] 1 All ER 119, the Court of Appeal had to consider a case where a person had been convicted of "carrying on any insurance business in the United Kingdom" without authorisation contrary to Section 2(1) of the Insurance Companies Act 1982. In that case, again quoting from the head note, at 119J–120A:

"A person breached s2 of the 1982 Act if he sold insurance business on his own account without authorisation. If, however, he did so on behalf of an unauthorised company, so that any contracts of insurance which he made were with the company rather than with himself, then the company was guilty of the offence and he was only guilty of aiding and abetting that offence if he knew that the company was unauthorised."

100 I see no reason not to apply the same principles when identifying the person who carries on investment business for the purposes of Sections 1 to 6."

1183. In the *Grant* case it was held that Mr Grant was carrying on business. The names in which he carried on the business, BIG and Courtney, were held to be names rather than companies.

1184. Even if they had been companies Neuberger J held that there were "special circumstances" that would justify piercing the corporate veil against him in view of the fact that the whole business was held to be a sham and a fraud. He stated that :

> "110. It is right to add this. If BIG and Courtney do or did exist, then, at least so far as Mr Grant is concerned, I do not consider that it would enable him to contend that he could only be secondarily, as opposed to primarily, liable. In The Glastnos [1991] 1 Lloyds LR 482, having rejected the contention that certain arrangements were shams, Steyn J accepted "the principle that where the advice of incorporation is manipulated to obtain fraudulent ends, a court may pierce the corporate veil in order to do justice". (However he considered that the facts of that case did not justify application of that principle). If, contrary to my view, BIG and Courtney are corporate entities, then it seems to me, particularly in light of Mr Grant's previous involvement with Inner Sanctum, and indeed, his conduct generally, the facts of this case do justify invoking the principle identified by Steyn J."

1185. Neuberger J also considered the position of Mr Hesling who he held to be acting as agent or employee of Mr Grant, and therefore "unlike with Mr Grant, one cannot simply say that Mr Hesling effectively was BIG or Courtney". It was his address to which investors sent their money, his address which was on the publicity material and the bank account into which money was paid was in his name. Further, he edited and disseminated material encouraging members of the public to invest, collected and processed the substantial sums of money invested and received significant payments himself. Although it was found that he was involved in operating the scheme, it was held that that was as an agent or employee of Mr Grant. It was, however, found that he had been arranging investments, an issue which will be considered further below.

1186. In the present case it was Innovator which established the Scheme. Innovator was a company and, for reasons given elsewhere, I find that the Scheme was not a sham or fraud. Mr Carter was the Managing Director of Innovator and acted as such in relation to the establishment of the Scheme. Mr Stiedl was a de facto or shadow director and acted as such. Although they were both involved in the establishment of the Schemes they did so as directors of Innovator, and were acting for Innovator rather than on their own behalf. Mr Bailey was a non-executive director and chairman and did not in any meaningful sense establish the Schemes. Even if he did, he equally did so on behalf of Innovator. There are no special circumstances in the present case which would justify piercing the corporate veil or treating Mr Stiedl or any of the other directors as effectively being Innovator.

1187. In relation to GT2 it was MFS, as the sponsor and promoter of the Scheme that established it. MFS was not a company or entity and it is Mr Gates who effectively was MFS for these purposes. He did therefore establish a CIS.

1188. Although the availability of CLFL loans was a feature of the establishment of the schemes I do not consider that in any meaningful sense CLFL established the schemes. Its role was one of facilitation, not instigation or direction.

(b) "Operating" a CIS

1189. The meaning of "operator" is helpfully addressed in *Financial Services Law* (2nd ed) at 17.76-77 as follows:

> "The 'operator' of an OIEC has a less obvious meaning. FSMA states that it means the company itself. This is even if the OEIC engages another person to manage its property on its behalf. Hence for the purpose of applying the FSMA provisions, the OEIC is still the 'operator'.
>
> The FSA Handbook definition is more qualified and depends on the types of OEIC and which parts of the Handbook are in issue. In the case of an OEIC within the UCITS Directive which has appointed a person to manage 'the scheme', it always means that manager. Otherwise a distinction needs to be drawn between the use of the term 'operator' in the Enforcement Guide (EG) and elsewhere in the Handbook. In EG the 'operator' is the company. Elsewhere it is either the company 'or, if applicable' the ACD in the case of an ICVC and any person who, under the constitution or founding arrangements of the scheme, is responsible for the management of

> the property held for or within the scheme in the case of other OEICs."

1190. One is therefore looking for the person (or persons, as there may be more than one) responsible for the management of the property as a whole.

1191. In relation to these Schemes it was Innovator and the LLP which was primarily responsible for the management of the property of the Schemes as a whole. In so far as individuals were involved in that management they were doing so on behalf of Innovator or the LLP. They were not carrying on business on their own behalf.

1192. In relation to CB the Claimants submitted that the consideration as to who is the operator must take into account what was the property of the CIS at the material time; that money in the CB client account was the relevant property so long as it stayed there and that CB not anybody else was the operator at that time in relation to that money.

1193. However, as already held, those monies were not held under a subscription money agreement, nor was CB a trustee of those monies for subscribers. The monies were held to the order of CB's client, Innovator. CB's role was to accept the instructions given in relation to those monies. It was not for CB to decide what was to be done with those monies or to manage them in any meaningful way.

1194. CB relied by analogy on the *Grant* case. In that case Neuberger J had to consider whether Mr Hesling was an operator of the CIS by virtue of being the holder of a bank account into which investors' money was paid. He concluded that that did not render him an operator of the schemes in question:

> "Of course, because the account was in his name, Mr Hesling was the legal owner of the money in the account, or, strictly, he was the person legally entitled to enforce the contract, which was embodied in the account, with the bank. However, it seems to me clear that he did not have any beneficial interest in the money (save only to the extent of taking out his pay). I think there is also force in Mr Croxford's reliance on the definition of "the operator" in Section 75(8), which shows that the legislature envisaged the manager, rather than the trustee, as the person "operating" a unit trust. He says that this tends to support the view that, as a mere trustee of monies obtained from investors in the scheme, Mr Hesling should not be treated as "operating" the scheme. Accordingly, in my view, paragraph 16 does not apply to Mr Hesling."

1195. In this case the position is, if anything, more clear cut since Mr Hesling was far more substantively involved in other regulated activity in furtherance of the schemes than CB.

1196. In support of their argument that CB was nevertheless an "operator" the Claimants relied on the "common accounts" exemption. It was submitted that this demonstrates that, but for that exemption, the common accounts arrangement would be a CIS. However, this is concerned with the pooling aspect of a CIS. It is not addressing the management aspect.

1197. The Claimants also relied on the fact that FSMA s. 327 disapplies the general prohibition in relation to certain activities carried on by members of a profession, but that those activities do not include the activity of establishing or operating a CIS. However, that begs the question and does not assist in determining whether a particular activity is establishing or operating a CIS.

1198. For the reasons outlined above and those given by CB I accordingly reject the Claimants' case that CB was an operator of the scheme.

1199. I also reject the Claimants' case that CLFL was an operator. It had a facilitatory rather than a managerial role in respect of the scheme property.

1200. In relation to GT2 Mr Gates' primary role in relation to operation was as administrator on behalf of the LLP. In so far as he had any operational role on behalf of Moneygrowth Financial Services it was on behalf of MFSL not MFS and Mr Gates was not himself carrying on the business.

(c) Arranging deals in investments

1201. This regulated activity is defined in RAO, art. 25 which provides that:

> "Arranging deals in investments
>
> 25.—(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—
>
> (a) a security,
>
> (2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity".

1202. The Claimants contended that arrangements were made to deal in investments within the meaning of RAO Article 25 through arranging for investors to subscribe for a particular investment, i.e. units in a particular named partnership which was a CIS, and for the Partnership to "sell" such investment."

1203. There are a number of exclusions to the application of Article 25, found at Articles 26 to 36 of RAO. Article 26 is entitled "Arrangements not causing a deal" and provides: "There are excluded from Article 25(1) arrangements which do not or would not bring about the transaction to which the arrangements relate".

1204. What constitutes "making arrangements" was considered in *In re The Inertia Partnership LLP* [2007] Bus LR 879 where Mr Jonathan Crow QC sitting as a deputy High Court Judge said at [39]:

> "… (1) the word 'arrangements' is, depending on the context, capable of having an extremely wide meaning, embracing matters which do not give rise to legally enforceable rights; (2) in articles 25 and 26, the word 'arrangements' is used in contradistinction to the word 'transaction'; (3) in article 26, the word 'transaction' is plainly a reference to the purchase, sale, etc of shares contemplated by article 25; (4) as such, a person may make 'arrangements' within article 25 even if his actions do not involve or facilitate the execution of each step necessary for entering into and completing the transaction (i.e. the purchase, sale, etc of the shares); (5) the availability of the exception in article 26 is essentially a question of fact: as a matter of causation, did the arrangements bring about the transaction (i.e. the purchase, sale, etc of the shares)?"

1205. In line with this guidance, for something to count as "making arrangements", it must "involve or facilitate the execution" of sufficient of the steps necessary for entering into and completing the transaction such that, as a matter of causation, those arrangements bring about the transaction **–** i.e. the acquisition or sale of the units in the CIS.

1206. I accept and find that Innovator did make such arrangements.

1207. I also accept that for those subscribers who took out CLFL loans those were arrangements which did sufficiently bring about the transaction to fall outside the Article 26 exception and therefore CLFL was thereby arranging deals in investments.

1208. I do not accept that the directors of Innovator and CLFL were carrying on business themselves. They were acting on behalf of their companies. The Claimants relied upon the broad approach on this issue adopted by Neuberger J in *Grant*. He found that in making arrangements Mr Hesling was doing so as his business rather than on behalf of Mr Grant (see paragraphs 127-130). However, that was a case of unusual facts and focused on the importance of the operation of the bank account by Mr Hesling in the fraudulent scheme. Here there was no fraud and I do not consider that Mr Stiedl and Mr Carter, let alone Mr Bailey, can be said to have been carrying on business themselves in carrying out their duties as directors.

1209. I accept and find that in relation to GT2 MFS and therefore Mr Gates were arranging deals in investments.

1210. In relation to Mr Bailey as a partner of CB and CB it was contended that they arranged deals in investments in relation to the making arrangements for a LLP Deed and D/A. This drafting/witnessing role did not bring about the transactions in any meaningful sense, let alone sufficiently to fall outside the exception.

1211. Although this was not pursued by the Claimants in closing (on the basis that any agreement entered into as a principal is excluded by RAO article 28), the same would apply to CB's role in holding subscription monies and distributing such monies on instruction. Further, holding monies previously subscribed by investors did not bring about a deal in investments: it was the consequence of such a deal having been completed through the irrevocable application made and the contract with Innovator made thereby.

1212. Mr Bailey acting in his capacity as solicitor, never did any deals in investments whether on behalf of the Claimants (for whom CB were not acting), or Innovator. Any role CB played in relation to the investments that the Claimants made was an administrative role undertaken as agent for Innovator (or the LLPs): any acts or steps taken were not done by CB on its own account and did not themselves bring about the transaction to which any arrangements related.

1213. In the light of that clear finding it is not necessary to determine whether CB could in any event have relied on the s. 327 exemption.

1214. Finally, it is to be noted that it was not alleged in closing that Mr Roper or the LLPs arranged deals in investments.

(3) Whether the Schemes involved controlled activities and a contravention of the Financial Promotion Restriction

1215. I accept and find that the Schemes involved controlled activities and controlled investments for the reasons given by the Claimants, save in relation to the alleged subscription money agreement which is considered further below.

1216. It was contended on behalf of the Defendants that the restriction was disapplied in this case because there was no evidence of any direct promotion by Innovator or its representatives to any Lead Claimant. Promotion was always through an IFA or other adviser.

1217. This involves a consideration of the "Investment Professionals" exemption in FPO art. 19 which disapplies the financial promotion restriction in relation to two categories of communication made or directed to recipients who were "investment professionals" as defined (FPO, art. 19(5)) including "an authorised person":

> (1) a "communication which ... is made only to recipients whom the person making the communication reasonably believes on reasonable grounds to be investment professionals" (art. 19(1)(a)); and
>
> (2) a "communication which …may reasonably be regarded as directed only at such recipients" (art. 19(2)(b)).

1218. For the purpose of the second category of communication, further provisions were made as to when a communication could reasonably be regarded as directed at investment professionals (art. 19(2)-(4)). A communication was treated as made only to or directed only at investment professionals even if also made or directed to other persons to whom it may be "lawfully be communicated. (art. 19(6))".

1219. The difficulty with any reliance on the Investment Professionals exemption in the present case is that the IMs were in terms directed to both HWNIs and investment professionals. They were not therefore directed only at investment professionals. Nor could the communication made by the IM be regarded as being made only to investment professionals in circumstances where it was expressly addressed to HWNIs and would be expected to be, and on a number of occasions was, provided to them, even if that was done through an IFA. The term "communicate" includes "causing a communication to be made" (FSMA s.21 (13)).

1220. It was thought at the time that reliance could be placed on the HNWI exception (FPO art. 48). However, this was not the case. The exception only applied in relation to communications to HNWIs as defined, a definition which required the individual concerned to have signed a statement in the terms specified in the 12 months prior to the relevant communication, which most investors had not. Further, it did not apply to communications in respect of an investment under the terms of which the investor could incur a liability or obligation to pay or contribute more than he committed by way of investment (art.48 (1)(d) and (5)). Most importantly it did not apply to communications in respect of an investment for units in a CIS (other than one which invested wholly or predominantly in stocks and shares in an unlisted company or instruments acknowledging indebtedness in such a company).

1221. I accordingly conclude and find that there was a contravention of the financial promotion restriction.

1222. The contravention was by Innovator, the LLP and, in relation to GT2 Mr Gates through MFS.

1223. In respect of Mr Stiedl and Mr Carter it has to be shown that they were causing the communication to be made "by way of business". Again, that means by way of their own business rather than that of the company of which they were director or shadow director (Innovator) or, in the case of Mr Carter, the LLP of which he was Administrator. I am not, however, satisfied that there are any special or other circumstances which mean that they should be regarded as acting on their own behalf.

(4) Liability under section 26

1224. Section 26 of FSMA provides:

"(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
(2) The other party is entitled to recover-

(a) any money or other property paid or transferred by him under the agreement; and
(b) compensation for any loss sustained by him as a result of having parted with it.

(3) "Agreement" means an agreement–

(a) made after this Section comes into force; and
(b) the making or performance of which constitutes, or is part of, the regulated activity in question.

(4) This Section does not apply if the regulated activity is accepting deposits".

1225. Section 28 provides:

"28. - Agreements made unenforceable by section 26 or 27.

(1) This section applies to an agreement which is unenforceable because of section 26 or 27.

(2) The amount of compensation recoverable as a result of that section is - (a) the amount agreed by the parties; or
(b) on the application of either party, the amount determined by the court.
(3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow –
(a) the agreement to be enforced; or
(b) money and property paid or transferred under the agreement to be retained.

(4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or properly paid or transferred under the agreement to be retained the court must –
(a) if the case arises as a result of section 26, have regard to the issue mentioned in subsection (5);
or (b) if the case arises as a result of section 27, have regard to the issue mentioned in subsection (6).

(5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement.

(6) The issue is whether the provider knew that the third party was (in carrying on the regulated activity) contravening the general

prohibition.

(7) If the person against whom the agreement is unenforceable - (a) elects not to perform the agreement, or (b) as a result of this section, recovers money paid or other property transferred by him ' under the agreement, he must repay any money and return any other property received by him under the agreement.

(8) If property transferred under the agreement has passed to a third party, a reference in section 26 or 27 or this section to that property is to be read as a reference to its value at the time of its transfer under the agreement.

(9) The commission of an authorisation offence does not make the agreement concerned illegal or invalid to any greater extent than is provided by section 26 or 27."

1226. The Claimants contended that the alleged CB subscription money agreements were s. 26 agreements (i.e. agreements of a kind referred to in FSMA s. 26). It was said that each such agreement was an agreement made between a Claimant and CB and by CB in the course of carrying on the regulated activities (arranging deals in investments and/or operating a CIS) in contravention of the general prohibition.

1227. I have, however, found that no such agreement was made. In any event, if there was such an agreement it was not made by CB in the course of carrying out regulated activities.

1228. The Claimants further contended that each D/A and related LLP Deed (or partnership agreement) were s.26 agreements (if made). They submitted that if any of the following agreements were made between any of the Claimants and any of the following s. 26 counterparties and were binding upon the former, the agreement was made by or on behalf of the relevant s.26 counterparties in the course of carrying on the regulated activities (arranging deals in investments, establishing and/or operating a CIS) in contravention of the general prohibition.

(1) YTC scheme:

(i) s.26 agreements: 5 December 2002 LLP Deed and 4 April 2003 D/A;

(ii) s.26 counterparties: YTC LLP and Mr Carter.

(2) Etrino scheme:

(i) s.26 agreements: 5 December 2002 LLP Deed and the 4 April 2003 D/A

(ii) s.26 counterparties: Etrino-LLP and Mr Carter.

(3) Optibet scheme:

(i) s. 26 agreements: 24 March 2003 LLP Deed, the 4 April 2003 D/A, the 1 September 2003 TTA;

(ii) s. 26 counterparties: Mr Carter and Optibet-2-LLP

(4) Charit Scheme;

(i) s. 26 agreements: the 30 September 2003 LLP Deed and the 23 March 2004 D/A;

(ii) s. 26 counterparties: Mr Carter and Charit-2-LLP;

(5) GT2 Scheme:

(i) s.26 agreements: the 27 February 2003 LLP Deed, the 24 March 2003 LLP Deed, the 26.03.03 LLP Deed and the 23 April 2004 D/A;

(ii) s.26 counterparties: Mr Carter and GT2A-LLP and GT2B- LLP;

(6) Arte Scheme:

(i) s.26 agreements: the 27 November 2003 LLP Deed and the 08 December 2004 D/A;

(ii) s.26 counterparties: Mr Carter and Arte-LLP;

1229. I accept that these agreements were made and that they were s.26 agreements in relation to the LLP. I do not accept, however, that they were made by Mr Carter in the course of carrying out regulated activities since he personally did not carry out such activities. The relevant counterparty is accordingly the LLP.

1230. Pursuant to s.26 these agreements are unenforceable by the LLP against the Claimants unless the Court is satisfied that it is just and equitable for the agreements to be enforced pursuant to s.28. The LLPs are not represented and no case has been advanced or submission made to the Court that it would be just and equitable to allow enforcement. Equally no case has been advanced and no submission has been made to the Court that the LLP should retain any money paid or transferred to it.

1231. However, the target of the Claimants' monetary claims under s.26 is not the LLPs but rather alleged third party recipients, including CB and Technology Vendors.

1232. The Claimants case was that they are entitled to recover money paid under the s. 26 agreements in respect of that Scheme (together with compensation of loss sustained as a result of having parted with it) against the Defendant s. 26 counterparties and recipients identified in the second and third columns, by reason of FSMA s. 26(1).

Scheme	Relevant counterparties	Relevant recipients
All	CB	CB
YTC	YTC-LLP, Mr Carter	Innovator, Mr Stiedl, Ellsburg, CLFL, Mr Gates (via OIGL).
Etrino	Etrino LLP, Mr Carter	Innovator, Mr Stiedl, PPP, FGT, CLFL
Optibet	Mr Carter and Optibet-2-LLP	ABS Global, CLFL, Coloured Industry Inc., Covington Inc. Innovator, Mr Stiedl, Tracksys Inc
Charit	Charit-2-LLP, Mr Carter	Innovator, Vermilion, Mr Stiedl
GT2	Mr Carter and GT2A-LLP and GT2B-LLP	IP Software Services Inc, Innovator, Mr Stiedl
Arte	Arte LLP, Mr Carter	Arte Inc., Innovator, Mr Carter

1233. The basis of this claim is that s.26 founds a right of recovery not only against the counterparty to the agreement but also against third party recipients of any monies paid under the agreement.

1234. In support of these claims the Claimants relied upon Scott LJ's judgment in *SIB v Pantell* (No 2) [1993] Ch 256 (CA) who considered obiter that, in relation to the similarly worded, s. 5 of Financial Services Act 1986 ("the 1986 Act"), recovery may be available against a relevant recipient. He stated that:

> "Section 5 of the Act provides remedies for individual investors who have entered into investment agreements with persons carrying on unauthorised investment business. Subsection (1) provides that any such agreement
>
> 'shall be unenforceable against the other party [i.e. the investor]; and that party shall be entitled to recover any money or other property paid or transferred by him under the agreement, together with compensation for any loss sustained by him as a result of having parted with it' " (270 C-D)
>
> The restitutionary and compensatory provisions of section 5 do not in terms identify the person or persons against whom the remedies are available. But it is difficult to see how the section 5 restitutionary

remedy could be available against anyone other than the other party to the transaction in question or the party to whom, under the transaction in question, the investor's money had been paid or transferred. Whether the compensatory remedy available 'together with' the restitutionary remedy, could be obtained against an accomplice who was neither a party to the transaction nor a person to whom money or property of the investor had been transferred is equally doubtful. These difficulties do not, however, have to be resolved on this appeal". (270 G-H)

1235. The context of s.26(2) is an agreement made between a person in the course of carrying out a regulated activity and "the other party" (s.26 (1)). That agreement is rendered unenforceable against the "other party". It could only ever have been enforced by a party to the agreement and therefore must be referring to a contractual counterparty (and a contravening counterparty).

1236. When s.26(2) then refers to the "other party's right to recover money or property or compensation" it is naturally to be read as referring to a right to recover it from the counterparty to the agreement referred to in s26(1). This is reinforced by the reference to the right being to recover money paid "under the agreement". It is also reinforced by s.28(8) which provides that if property transferred under an agreement to which s.26 applies has passed to a third party, then references in that section and s. 28 to property are to be read as a reference to its value at the time of its transfer under the agreement: this suggests that third parties are outside the scope of s.26.

1237. Further, under s.28(5) the right to relief from the compensatory or restitutionary remedy depends upon "whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition <u>by making the agreement</u>" (emphasis added). This clearly shows that it is the person who made the agreement against whom the remedy may be obtained since he is the person (and the only person) who may seek relief against such a claim. If it were otherwise it would mean that relief could be obtained by the person who made the agreement and was contravening the general prohibition, but not by the third party recipient who made no such agreement and was not so in contravention. That would be an absurdity.

1238. Yet further, the consequence of the Claimants' argument is remarkably far reaching. On the Claimants' case full recovery can be made against a non-counterparty such as CB who never held the monies beneficially and have long since parted with the monies in accordance with lawful instructions given. Recovery can also be made against a third party seller who acted in good faith and provided value for the monies received. The same would apply to a third party purchaser for value of property transferred who acted in good faith.

1239. For all these reasons I reject the Claimants' case that the monetary claim under s.26 can be made against anyone other than the LLP.

1240. Although Mr Carter may have been a contractual counterparty he was not a contravening counterparty and therefore does not fall within s.26 (1) or (2). Further, no money was transferred to him under the agreements and there is therefore no right to recover any such money from him.

1241. Finally, if contrary to my findings, a monetary claim can be made against any of the Defendants who appeared at the trial I would hold that they are entitled to relief under s.28(6). On my findings they were not (aside from Mr Gates) carrying on a regulated activity in contravention of the general prohibition. All the reasons given for so finding are equally reasons why it was reasonable for them to believe that they were not contravening the general prohibition. In the case of Mr Gates his evidence was that CPUK asked the FSA what permissions were needed and was informed that it had the requisite permissions. MFS had the same permissions. It was also his evidence that it would have been a simple matter to obtain the requisite authorisation had it been realised that it was required. In the circumstances I accept that he too reasonably believed that he was not contravening the general prohibition.

(6) Liability under section 30

1242. Section 30 provides as follows:

> "(1) In this Section–
>
> "unlawful communication" means a communication in relation to which there has been a contravention of Section 21(1);
>
> "controlled agreement" means an agreement the making or performance of which by either party constitutes a controlled activity for the purposes of that Section; and
>
> "controlled investment" has the same meaning as in Section 21.
>
> (2) If in consequence of an unlawful communication a person enters as a customer into a controlled agreement, it is unenforceable against him and he is entitled to recover–
>
> (a) any money or other property paid or transferred by him under the agreement; and
>
> (b) compensation for any loss sustained by him as a result of having parted with it.
>
> (3) If in consequence of an unlawful communication a person exercises any rights conferred by a controlled investment, no obligation to which he is subject as a result of exercising them is enforceable against him and he is entitled to recover–

(a) any money or other property paid or transferred by him under the obligation; and

(b) compensation for any loss sustained by him as a result of having parted with it.

(4) But the court may allow–

(a) the agreement or obligation to be enforced, or

(b) money or property paid or transferred under the agreement or obligation to be retained, if it is satisfied that it is just and equitable in the circumstances of the case.

(5) In considering whether to allow the agreement or obligation to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must have regard to the issues mentioned in subsections (6) and (7).

(6) If the applicant made the unlawful communication, the issue is whether he reasonably believed that he was not making such a communication.

(7) If the applicant did not make the unlawful communication, the issue is whether he knew that the agreement was entered into in consequence of such a communication.

(8) "Applicant" means the person seeking to enforce the agreement or obligation or retain the money or property paid or transferred.

(9) Any reference to making a communication includes causing a communication to be made.

(10) The amount of compensation recoverable as a result of subsection (2) or (3) is–

(a) the amount agreed between the parties; or

(b) on the application of either party, the amount determined by the court.

(11) If a person elects not to perform an agreement or an obligation which (by virtue of subsection (2) or (3)) is unenforceable against him, he must repay any money and return any other property received by him under the agreement.

(12) If (by virtue of subsection (2) or (3)) a person recovers money paid or property transferred by him under an agreement or obligation, he must repay any money and return any other property received by him as a result of exercising the rights in question.

(13) If any property required to be returned under this Section has passed to a third party, references to that property are to be read as

references to its value at the time of its receipt by the person required to return it."

1243. The Claimants' case was that the "controlled agreements" comprised the alleged subscription money agreement, the LLP Deeds and the D/A. As already found, there was no subscription money agreement. Even if there was it would not involve a "controlled activity" since it did not involve arranging deals in investments because, for reasons already stated, it did not, or not sufficiently, bring about the transaction.

1244. I accept that the LLP Deeds and the D/A were controlled agreements. Those agreements are accordingly unenforceable by the LLP unless the Court grants relief under s.30, for which no application has been made.

1245. The Claimants advanced the same claims for the recovery of monies and compensation against the same parties as under s.26.

1246. The focus of the rights of recourse conferred under s.30 is "the controlled agreement" and the parties to that agreement. It is that agreement which is rendered unenforceable under s.30 (2), which necessarily means unenforceable by the other party to the agreement.

1247. The civil liabilities are imposed upon two classes of counterparties to a "controlled agreement" entered into with a person as a customer. First, a person who was both a counterparty to a "controlled agreement" and the communicator of the "unlawful communication" or who caused it to be made. Secondly a person, who was a counterparty to "controlled agreement" but not the communicator of the "unlawful communication" or who caused it to be made. This distinction is reflected in the differing conditions for rights of relief in s.30 (6) and (7). The "applicant" under both those sections is someone who is entitled to request the agreement to be enforced – i.e. the counterparty (see s.30 (6)). The scheme of s.30 therefore makes it very clear that it is the counterparty who is liable and who is entitled to seek relief from liability. It does not extend to third party recipients.

1248. For all these reasons I reject the Claimants' case that the monetary claim under s.30 can be made against anyone other than the LLP.

1249. Although Mr Carter may have been a contractual counterparty no money was transferred to him under the agreements and there is therefore no right to recover any such money from him.

1250. Even if that was wrong I would, if necessary, hold that the Defendants who appeared at the trial are entitled to relief under s.30 (7). No such Defendant knew at the time that the agreement was being entered into in consequence of an unlawful communication. Further, the right to apply to retain money strongly suggests that the right of recovery relates to monies which are still retained. There are no such monies. Further, no Defendant received monies to which it or he was not entitled and there was no misappropriation of subscribers' monies. In addition, CB did not receive any monies beneficially. In all the circumstances I would, if necessary, hold that it is just and equitable for those Defendants to be entitled to retain any money transferred and that no compensation should be determined as being recoverable from them.

Conclusion on FSMA Claims

1251. For the reasons outlined above I find that the Claimants have established that the Schemes involved a contravention of the FSMA general prohibition and financial promotion restriction but that their monetary claims against third party recipients and Mr Carter fail.

(12) THE CLAIMS IN NEGLIGENCE

The Claimants' case

1252. The Claimants' general case in negligence was put as follows in RRAPOC:

> "Tort duties
>
> 305. In relation to the promotion of each Scheme, Innovator, its controllers and its actual and shadow directors (including Mr Stiedl, Mr Carter and Mr Bailey), CPUK, Mr Gates and MFS Ltd., each owed to prospective investors and subscribers a duty of care in tort, including:
>
> 305.1 to comply with the FSMA regulatory regime, including the financial promotion restriction;
>
> 305.2 to the same effect as the financial promotion rules;
>
> 305.3 to ensure and /or to take reasonable steps to ensure that the representations made in each of the Scheme Documents communicated to prospective investors, subscribers and/or intermediaries were each clear, accurate, fair and not misleading and/or gave an adequate description of the nature of the investment and the risks involved.
>
> 306. In establishing and /or operating the arrangements constituted by each Scheme and related arrangements and /or arranging for investment in the Scheme, Innovator, CLFL, MFS Ltd., the directors and shadow directors of those companies, and Mr Stiedl, Mr Carter, Mr Bailey, Mr Roper in all their various capacities, as well as CB (by Mr Bailey and Mr Roper), each owed to subscribers (including the Claimants) a duty of care in tort, including:
>
> 306.1 to comply with the FSMA regulatory regime;
>
> 306.2 to ensure and /or to take reasonable steps to ensure that the representations made in each of the Scheme Documents

communicated to prospective investors, subscribers and /or intermediaries were each clear, accurate, fair and not misleading and /or gave an adequate description of the nature of the investment and the risks involved;

306.3 to ensure and /or to ensure that the arrangements were honestly and properly established operated and arranged."

1253. These alleged duties can conveniently be referred to as (1) the FSMA compliance duty (305.1; 305.2; 306.1); (2) IM representations duty (305.3; 306.2), and (3) the monitoring duty (306.3).

1254. There was also a specific subscription money duty alleged against CB to the same effect as the alleged subscription money agreement contractual duties (RRAPOC 309; 300).

1255. In addition, it was alleged that CB owed each subscriber a duty of care in tort to have adequate risk management systems, to ensure that CB partners involved in Innovator were monitored, fit and proper and not accessories to fraud, and to arrange and provide adequate protection for subscription monies and not to disburse them without proper instructions ("the internal management duties") (RRAPOC 309).

1256. There were also individual duties of care alleged primarily against Mr Carter and Mr Gates arising out of the P/A, the LLP Deed and their role as Administrator/Managing Partner which will be addressed separately (RRAPOC paragraphs 307, 308, 310-312)("the individual duties").

Relevant legal principles

1257. In Customs and Excise Commissioners v Barclays Bank plc [2007]1 AC 181 Lord Bingham stated as follows:

"The test of tortious liability in negligence for pure financial loss

4. The parties were agreed that the authorities disclose three tests which have been used in deciding whether a defendant sued as causing pure economic loss to a claimant owed him a duty of care in tort. The first is whether the defendant assumed responsibility for what he said and did vis-…-vis the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant (what Kirby J in Perre v Apand Pty Ltd (1999) 198 CLR 180, para 259, succinctly labelled "policy"). Third is the incremental test, based on the observation of Brennan J in Sutherland Shire

Council v Heyman (1985) 157 CLR 424 , 481, approved by Lord Bridge of Harwich in Caparo Industries plc v Dickman [1990] 2 AC 605 , 618, that:

"It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'."

1258. Lord Bingham then made 5 general observations:

"4. First, there are cases in which one party can accurately be said to have assumed responsibility for what is said or done to another, the paradigm situation being a relationship having all the indicia of contract save consideration. Hedley Byrne would, but for the express disclaimer, have been such a case. White v Jones and Henderson v Merrett Syndicates Ltd, although the relationship was more remote, can be seen as analogous. Thus, like Colman J (whose methodology was commended by Paul Mitchell and Charles Mitchell, "Negligence Liability for Pure Economic Loss" (2005) 121 LQR 194, 199), I think it is correct to regard an assumption of responsibility as a sufficient but not a necessary condition of liability, a first test which, if answered positively, may obviate the need for further inquiry. If answered negatively, further consideration is called for.

5. Secondly, however, it is clear that the assumption of responsibility test is to be applied objectively (Henderson v Merrett Syndicates Ltd [1994] 2 AC 145, 181) and is not answered by consideration of what the defendant thought or intended. ... The problem here is, as I see it, that the further this test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of responsibility becomes, the less difference there is between this test and the threefold test.

6. Thirdly, the threefold test itself provides no straightforward answer to the vexed question whether or not, in a novel situation, a party owes a duty of care.

7. Fourthly, I incline to agree with the view ... that the incremental test is of little value as a test in itself, and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation. The closer the facts of the case in issue to those of a case in which a duty of care has been held to exist, the readier a court will be, on the approach of Brennan J adopted in Caparo Industries plc

> v Dickman, to find that there has been an assumption of responsibility or that the proximity and policy conditions of the threefold test are satisfied. The converse is also true.
>
> 8. Fifthly, it seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole."

1259. In considering whether a duty of care arises it is relevant to have regard to each of the three tests and to cross-check the conclusions thereby reached. *Clerk and Lindsell on Torts* (20th ed) at para 8-98 to 8-100 refer to this as the "multi-test approach" – see also *BCCI (Overseas) Ltd. v Price Waterhouse (No 2)* [1998] PNLR 564 at 583.

1260. In considering whether a personal duty of care is owed by a director of a company the assumption of responsibility test is likely to be of particular relevance. As stated in *Williams and Another v Natural Life Health Foods* Ltd. [1998] 1 W.L.R. 830 at p835-6 per Lord Steyn:

> "It will be recalled that Waite L.J. took the view that in the context of directors of companies the general principle must not "set at naught" the protection of limited liability. In Trevor Ivory Ltd. v. Anderson [1992] 2 N.Z.L.R. 517, 524, Cooke P. expressed a very similar view. It is clear what they meant. What matters is not that the liability of the shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as director. For present purposes, his position is the same as if he had sold his business to another individual and agreed to act on his behalf. Thus the issue in this case is not peculiar to companies. Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of Hedley Byrne , which requires the existence of a special relationship between plaintiff and tort easer, it is not sufficient that there should have been a special relationship with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself.

> The touchstone is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff. Sometimes such an issue arises in a simple bilateral relationship. In the present case a triangular position is under consideration: the prospective franchisees, the franchisor company, and the director. In such a case where the personal liability of the director is in question the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The inquiry must be whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees…
>
> That brings me to reliance by the plaintiff upon the assumption of personal responsibility. If reliance is not proved, it is not established that the assumption of personal responsibility had causative effect."

Application to the facts

Assumption of responsibility

1261. Leaving aside the individual duties of care, I find that in relation to the other alleged duties of care there is no sufficient evidence of a personal assumption of responsibility by any of the individuals who are alleged to have owed a duty of care (save in so far as Mr Gates is to be equated with MFS).

1262. The Schemes were promoted by Innovator. References made to Mr Carter were in his stated capacity as Managing Director of Innovator. References made to Mr Bailey were in his stated capacity as a partner of CB, who were identified as Innovator's solicitors, and as non-executive chairman of Innovator. No references at all were made to Mr Stiedl or Mr Roper.

1263. The Schemes were to be administered by Innovator and the Administrator/Managing Partner, who was the Managing Director of Innovator.

1264. In the promotion, establishment and operation of the Schemes there was no statement or other communication crossing the line which conveyed directly or indirectly that the individual defendants were assuming personal responsibility to the subscribers.

1265. Further there was no evidence from the Lead Claimants that they understood there to be still less relied on any personal assumption of responsibility by the individual defendants.

1266. Similar difficulties arise in respect of the duties alleged as against CB.

1267. Mr Bailey confirmed in evidence that he had no dealings with investors and the contrary was not put. Mr Roper stated that he did not think that investors were CB's clients. No Lead Claimant sought to assert that CB was their solicitor. The following aspects of their evidence are noteworthy:

(1) First, it was apparent that many witnesses knew nothing about CB: for example, Mr Plunkett thought they were accountants; Mr Levy did not know who CB were; Mr Moss had never heard of Mr Bailey or Mr Roper until two days prior to giving evidence; Mr Brister was not aware of CB and did not know if they were lawyers or accountants;

(2) Second, the minority of Lead Claimants who appeared to do some due diligence or who considered the question of who CB was acting for were aware that CB was Innovator's advisor: for example, Ms Knight appreciated this fact and understood that she had not received any advice from CB; Mr Taylor QC accepted that CB never acted for him;

(3) Third, the Claimant witnesses knew very little about what work CB had done and what the claims against CB were: for example, even Ms Knight who had some due diligence carried out, did not know what work CB had undertaken; Mr Tallaksen who had also done due diligence had no knowledge of the claim at all; Mr Hodgson, who was typical of many Lead Claimants, conceded he did not know what CB was said to have done wrong but was relying on others.

1268. I find that, on the evidence, CB did not act for the Claimants and that the Claimants did not consider CB to be acting for them. Further, the Claimants did not understand CB to have assumed a responsibility to them or rely thereon.

1269. Quite aside from the issue of assumption of responsibility there are a number of factors which militate against the imposition of a duty of care on the Defendants beyond those which it is established would ordinarily be recognised. In particular:

(1) The Innovator Schemes were commercial in nature – potential investors were being invited to subscribe to partnerships undertaking commercial trading in the acquisition and exploitation of technology;

(2) The minimum gross investment in the Innovator partnerships was £250,000; these Schemes were not directed

at people of modest means; they were directed at HNWIs who had (access to) their own advice and who dealt through IFAs; those IFAs would be expected to advise the Claimants as to the risks inherent in investment into the Schemes;

(3) The Claimants were largely sophisticated investors and would, accordingly, have reasonably been expected to understand those parts of the IM which:

(i) Stated that Innovator (and thus Innovator's advisers) were not to be regarded as giving any advice, representation or warranty (expressed or implied) to any person in connection with the contents of the IM;

(ii) Stressed the need for each potential investor to obtain independent advice;

(4) It was reasonably to be expected that any person with sufficient wealth and potential tax liabilities to be a potential investor would seek and obtain specialist accountancy and/or taxation advice on a regular basis, and thereby have easy and convenient access to independent advice in relation to the contents of the IM;

(5) At least some of the Claimants did obtain independent advice prior to investing in the Schemes.

(6) Those Claimants who did obtain independent advice were apparently informed that the investments were suitable (e.g. Mr Tallaksen, Ms Knight and Mr Jackson);

(7) The terms of the subscription agreements meant it was objectively reasonable to assume that independent professional advice would be taken and that each investor would be able to bear the financial risk of participation.

The FSMA compliance duty

1270. The relevant provisions of FSMA provide a clear and comprehensive code regarding both what constitutes a breach of the Act and what remedies are available in respect of such breach.

1271. S. 19 of FSMA sets out "The general prohibition". S. 21 sets out "Restrictions on Financial Promotion". S.23 deals with "Contravention of the general prohibition" and provides that it is a criminal offence. S.23 deals with "Contravention of s.21". S. 26-30 set out the civil actions which are available where there has been a contravention of the general prohibition (s. 26-29) or of S.21 (s. 30). S.28 deals with the circumstances in which compensation may be recoverable where an agreement is unenforceable because of a contravention of the general prohibition. S.30 deals with the circumstances in which compensation may be recoverable where there has been a contravention of s. 21.

1272. Further, where it is intended that a breach of a provision of FSMA should give rise to a claim for breach of statutory duty, this is clearly set out in FSMA. So, for example s.20 (3) in relation to "Authorised Persons acting without permission", provides "In prescribed cases, the contravention is actionable at the suit of a person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty", and, to similar effect, s.150 (1) of FSMA in relation to contravention of a rule made by the FSA under the rule -making power set out in FSMA.

1273. The following principles provide further confirmation that no freestanding action for breach of statutory duty was intended for any breach of s.19 or s.21:

> (1) Where a statute is silent (which FSMA is not), "The initial, working presumption appears to be that there is no civil remedy for breach of the statute" - *Clerk & Lindsell* on Torts, 20th ed, para 9-12.
>
> (2) "Where the statute does provide an alternative remedy to enforce the relevant duty that will normally indicate that the statutory right was designed to be enforceable by those means and not by private right of action" - *Clerk & Lindsell* para 9-12.
>
> (3) "A common law action for breach of statutory duty arises only when the Claimant can establish that Parliament intended that breach of the relevant statutory duty should be actionable by an individual harmed by that breach" – see *Clerk & Lindsell* para 9-13; because FSMA is a regulatory statute for the benefit of everyone, no such intention arises;
>
> (4) "…where an Act creates an obligation and enforces the performance in a specified manner….that performance cannot be enforced in any other manner….Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory prohibition for which the Act provides, there are two classes of exception to this general rule" - *Lonrho Ltd v Shell Petroleum Co Ltd(No 2)* [1982] AC 173 at 185; the latter exceptions are not engaged in this case since FSMA sets out the criminal and civil consequences of a contravention of sections 19 and 21.

1274. Further, there is clear authority that no claim for breach of statutory duty is available for breaches of FSMA which are not specifically defined in the Act as giving rise to a claim for breach of statutory duty: see *Hall v Cable and Wireless plc* [2011] BCC 543 at 548-9.

1275. Although the Claimants accepted the authority of this decision and that no claim for breach of statutory of duty lies under FSMA they did not acknowledge the clear implications of that correct concession.

1276. It is plain that an attempt to create a duty of care to comply with "the regulatory regime" would undermine the scheme of civil liability carefully created by the Act and be contrary to the jurisprudence referred to above which precludes a claim for a "free-standing" breach of statutory duty from arising in circumstances where, as here, it is plain from the relevant Act that the drafters had considered and expressly defined those provisions within the Act that could give rise to such a claim. Given these powerful policy reasons for not imposing a duty of care, there is no basis upon which the imposition of such a duty of care could satisfy the requirement that it be "fair, just and reasonable."

1277. Further, the precise reasoning which led to the claim for breach of statutory duty being struck out in *Hall v Cable and Wireless plc* is equally applicable to the attempt to frame a cause of action in negligence on the basis of a duty of care to "comply with the FSMA regulatory regime" namely that "These provisions [in FSMA which expressly provide for a claim for breach of statutory duty] indicate clearly that Parliament expressly considered which of the duties or obligations imposed by FSMA would give rise to a cause of action at the suit of a private person. Parliament did not provide expressly that a breach of the Listing Rules would give rise to a cause of action at the suit of a private person. Other remedies and penalties were provided by ss 382, 384 and 91. That is a clear indication that Parliament did not intend a breach of the Listing Rules <u>would give rise to a cause of action at the suit of a private person. To hold that Parliament did so intend would interfere with the scheme and modes of enforcement provided by FSMA"</u> [at 16] (emphasis added). Teare J's observations about breaches of the Listing Rules apply equally to the alleged breach of s 19 and s.21 of FSMA which the Claimants rely upon to found their claim in negligence. FSMA does not expressly provide that a contravention of these sections shall give rise to a cause of action at the suit of a private person and other remedies and penalties for breach of the general prohibition are expressly provided in FSMA.

1278. I accordingly conclude that none of the Defendants owed the alleged FSMA compliance duty.

The IM Representations duty

1279. Although such a duty was alleged no breach of the duty was pleaded other than in the context of the representation claim.

1280. Subject to the effect of the disclaimers, Innovator/MFS (and thereby Mr Gates) owed a duty of care in relation to statements of fact made in the IM or other Scheme documentation. None of the other individual Defendants assumed or owed a personal duty of care in relation to representations made by Innovator/MFS. Liability for misrepresentation has already been addressed. Since I have found that there was no actionable misrepresentation (including in relation to the information condition) there can equally have been no breach of any duty of care owed.

The monitoring duty

1281. Although such a duty was alleged no breach of the duty was pleaded, other than possibly as part of the breach of internal management duties pleaded against CB.

1282. No authority was cited in support of any such monitoring duty.

1283. The allegation appears to be primarily directed at CB but the subscribers were not CB's clients. Further:

(1) There is no regulatory obligation on a solicitor to monitor a client above and beyond the limited regulatory duties that are imposed, for example from 1 April 2004 through the Money Laundering Regulations in relation to the identification of clients and the disclosure of suspected money laundering activity to the Serious Organised Crime Agency: Proceeds of Crime Act 2002, s. 330 and s.337.

(2) It was not suggested that there was some statutory obligation on CB to report its client's alleged non-compliance with FSMA to the FSA. Nor can there be any common law duty to the Claimant investors to report any such non-compliance, not least since to do so would constitute a breach of the fiduciary duties (including duties of confidence) and duties of care that CB plainly owed to Innovator as its client.

(3) Moreover, such a duty would in substance turn CB into a regulator in circumstances where the regulator (here the FSA) would plainly owe no duty of care to third parties in the course of carrying out its statutory monitoring functions - *Clerk & Lindsell* para 8-56. Imposing a like duty on CB would circumvent the policy reasons why the regulator owes no such duty.

The subscription monies duty

1284. For reasons already given, there was no subscription money agreement between the Claimants and CB. If so, there can be no basis for imposing a correlative duty of care in tort.

The internal management duty

1285. Rule 13 of the Solicitors' Practice Rules 1990 was the relevant guidance for the supervision and management of a practice in force at the material time. It provided:

“(1) The principals in a practice must ensure that their practice is supervised and managed so as to provide for:

(a) compliance with principal solicitors' duties at law and in conduct to exercise proper supervision over their admitted and unadmitted staff;

(b) adequate supervision and direction of clients' matters;

(c) compliance with the requirements of sections 22(2A) and 23(3) of the Solicitors Act 1974, section 9(4) of the Administration of Justice Act 1985 and section 84(2)(e) of the Immigration and Asylum Act 1999 as to the direction and supervision of unqualified persons;

(d) effective management of the practice generally.

(2) Every practice must have at least one principal who is a solicitor qualified to supervise.

(3)(a) Except as provided in (b) below, every office of the practice must have at least one solicitor qualified to supervise, for whom that office is his or her normal place of work.

(b) Without prejudice to the requirements of paragraph (1) of this rule, an office which undertakes only property selling and ancillary mortgage related services as defined in rule 6 of these rules, survey and valuation services, must be managed and supervised to the following minimum standards:

(i) the day to day control and administration must be undertaken by a suitably qualified and experienced office manager who is a fit and proper person to undertake such work; and for whom that office is his or her normal place of work; and

(ii) the office must be supervised and managed by a solicitor qualified to supervise, who must visit the office with sufficient frequency and spend sufficient time there to allow for adequate control of and consultation with staff, and if necessary consultation with clients.

(4) This rule is to be interpreted in the light of the notes, and is subject to the transitional provisions set out in note (k).

(5) (a) This rule applies to private practice, and to solicitors employed by a law centre.

(b) The rule also applies to other employed solicitors, but only:

(i) if they advise or act for members of the public under the legal aid scheme; or

> (ii) if, in acting for members of the public, they exercise any right of audience or right to conduct litigation, or supervise anyone exercising those rights."

1286. The Claimants did not pursue any sustained case that CB did not operate such procedures. CB's case was that it had adequate management systems at the time, as set out in the witness statements of Mr Woolf and Mr Marsh.

1287. Mr Woolf stated in evidence that monitoring and supervision consisted in a regular system of appraisals of both assistants and partners. He further indicated that there was no prohibition on partners becoming directors of companies, but confirmed that Mr Marsh felt strongly about partners in the firm being directors and had indicated that he felt that no partner should be a director of any company.

1288. Mr Marsh explained that CB's management systems changed during the 2000s : and that he was responsible for risk management systems at CB which he explained as follows:

> "As a starting point, ensuring we had a risk management policy in place and ensuring it was kept up-to-date and that it was known about by all those in the firm, and we had a system for doing that. That would be the primary responsibility. Looking at experience to see what that led us to change, if necessary, learning from experience. Then, less directly for me but an important risk management procedure was our Lexcel accreditation where we had an external auditor from 2003 onwards who would review – indeed reviewed our systems and expressed a view as to whether they were adequate, which they were."

1289. Mr Marsh dealt with the steps that CB took in response to regulatory changes in the early 2000s. He recalled that the POCA 2002 led to regulations in 2003 which were implemented in 2004 and they in turn generated further regulations the implementation of which led to more sophisticated file opening procedures within the firm.

1290. On the question of partners being directors, Mr Marsh said that was something he realised needed to be dealt with as part of the firm's risk management. When Mr Marsh found out about Mr Stiedl's prosecution, he recommended that Mr Bailey was not a director of Innovator and that was acted on in March 2004.

1291. The early 2000s were a period when new Money Laundering Regulations were brought into force (on 1 April 2004), when rules relating to client care letters were changed and where the approach taken to partners becoming directors was changing (albeit that there was and is no rule against it). Mr Marsh and Mr Woolf gave evidence showing how they dealt with that changing landscape.

1292. I am not satisfied that the Claimants have established any breach by CB of the alleged monitoring duties. In any event, such matters do not establish any duty of care on CB to the Claimants. The Claimants were not CB's clients and assumed no responsibility to them. Even if they were or did, Mr Bailey was himself a principal and so did not require general supervision within the partnership.

The individual duties

1293. It was alleged that the P/A donee owed a duty of care in tort to his principal the same effect as the contractual duties alleged (RRAPOC). I have rejected the contractual case that the donee was under a duty not to exercise the P/A unless and until the IM Conditions were fulfilled and a tortious duty of care to that effect must similarly be rejected. As an agent the donee would, however, have owed a duty of care in tort concurrent to that owed in contract. Whether there was any breach of such duty will be considered in the context of the claims against individual defendants.

1294. It was alleged that the Administrator or Managing Partner owed a duty of care properly to administer the Partnership (RRAPOC 311). I accept that a duty of care concurrent to that in contract would have been owed to the LLP (with whom the Service Agreement was made), but not to the partners individually.

1295. It was alleged that in purporting to act as Administrator or Managing Partner a duty of care would have been owed to purported partners (RRAPOC 311). However, on my findings Mr Carter and Mr Gates were at all material times acting as Administrator or Managing Partner of the LLP even if a Service Agreement had not yet been entered into; they were not purporting so to act. Mr Stiedl neither acted nor purported to act as Administrator or Managing Partner. I accordingly reject this alleged duty of care.

1296. Finally, it was alleged that the LLP itself owed a like duty of care to partners or presumed partners. However, whilst the partners owe duties to each other and to the LLP, and the Managing Partner or Administrator owes duties to the LLP, I do not consider that the LLP owes any such duty to the partners and that it would be inconsistent with the scheme of a LLP for it to do so.

Conclusion on negligence claims

1297. For the reasons outlined above I find that, subject to the reservation made in respect of the P/A donee's position, none of the Claimants' negligence claims succeed.

(13) ALLEGED BREACH OF FIDUCIARY DUTY

The Claimants' case

1298. The Claimants contended that in relation to each of the Schemes, fiduciary duties were owed by each of the following (RRAPOC 298):

(1) the P/A donee to his or her principal arising from P/A included with a subscription application;

(2) any person purporting to act pursuant to such P/A to his subscriber principal;

(3) each partner in a Partnership to the other partners therein;

(4) each LLP to the partners thereof

(5) as from the date of his appointment, the Administrator or Managing Partner of a Partnership to partners therein; and/or

(6) any person purporting to act as such Administrator or Managing Partner of a Partnership to the partners or purported partners therein;

(7) CB to persons whose subscription money was received by CB.

1299. The content of the fiduciary duties owed were contended to be:

(1) to act loyally;

(2) to act in B's best interests;

(3) not to make a secret profit;

(4) not to put A in a position where the interests of B conflicted with those of A or, in the case of CB, where the interests of B conflicted with those of other clients.

1300. It was alleged that CB (if it was trustee) and Innovator and/or the LLP (if it was trustee) acted in breach of fiduciary duty in the disbursement of subscription monies (RRAPOC 323.2; 324.1).

1301. It was alleged that Mr Carter and Mr Gates acted in breach of fiduciary duty in purporting to make the Claimants partners when not authorised to do so (RRAPOC 326.1).

1302. It was alleged that, if the Claimants were made partners, Mr Carter and Mr Gates as Managing Partner or Administrator and the LLP acted in breach of duty in the disbursement of subscription monies, in particular when the IM conditions were not fulfilled (RRAPOC 328.1).

Relevant legal principles

1303. Fiduciary obligations are based a relationship of trust and confidence. In *Bristol & West Building Society v Mothew* [1998] Ch 1 CA at 18 it was said by Millett LJ (as he then was) that: "a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence."

1304. As to the nature of fiduciary obligations, Millett LJ said as follows: "The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith: he must not make a profit out of his trust; he may not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or for a third party without the informed consent of his principal."

1305. It is well established that the solicitor-client relationship is a fiduciary relationship: *Boardman v Phipps* [1967] 2 AC 46. A solicitor may owe fiduciary duties beyond the immediate client, for example, when the client is a corporation so that the court will sometimes lift the corporate veil and find that the client owes fiduciary duties to the person standing behind the company or to an associated company: *Ratiu and others v Conway* [2005] EWCA Civ 1302.

1306. A fiduciary relationship is one where the principal so relies on his fiduciary as to leave the principal vulnerable to any disloyalty by the fiduciary and so reliant on his good faith. It follows that a commercial relationship at arm's length, with both parties on an equal footing is less likely to give rise to fiduciary obligations: *Halton International Inc v Guernroy Ltd* [2005] EWHC 1968. As *Snell* explains: "The reason fiduciary duties do not commonly arise in commercial settings outside the settled categories of fiduciary relationships is that it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party. But if that expectation is not appropriate in the circumstances of the relationship between the parties then fiduciary duties will arise."

Application to the facts

1307. I accept that fiduciary duties would be owed by the P/A donee as an agent to his subscriber principal.

1308. I also accept that fiduciary duties would be owed by partners of the LLP to other partners by reason of the duty of good faith imposed by clause 4.13 of the LLP Deed. Such a duty would not otherwise arise since members of an LLP are not agents for each other but rather agents for the LLP. As stated in *Blackett-Ord on Partnership* (2nd ed.) at 21.44:

> "…the members of an LLP are not agents for one another but are only agents for the LLP. Since partnership law does not govern the relation between members of an LLP, it follows that the members of an LLP owe duties of good faith to the LLP but not, in the absence of agreement, to each other".

1309. I do not accept that the LLP owed fiduciary duties to the partners. It is the partners who owe a fiduciary duty to the LLP.

1310. I also accept that the Managing Partner or Administrator owed fiduciary duties to the LLP by which he was engaged pursuant to the Service Agreement. He would not, however, in that capacity owe such a duty to the individual partners.

1311. I do not accept that CB owed any fiduciary duty to the Claimants in respect of the subscription monies. The Claimants were not CB's clients; there was no subscription money agreement between them and CB was not a trustee of the monies for the Claimants.

1312. In any event, as already found, there was no breach of trust or wrongful disbursement of subscription monies and accordingly no breach of fiduciary duty in respect thereof. Further, if there was, no recoverable loss was caused thereby.

1313. The only Schemes in respect of which the P/A donee exceeded his authority in purporting to make the subscribers partners were Optibet and Arte. Whether that involved a breach of fiduciary duty by Mr Carter will be considered when addressing the claims against the individual defendants. All other claims for breach of fiduciary duty fail.

(14) THE CONSPIRACY AND FRAUD ALLEGATIONS (Part 2)

1314. In Part 1 I considered the main allegations made by the Claimants in support of their conspiracy and fraud claims. For the most part I held that they had not been proved. However, I left over any final conclusion until the Claimants' case on "irregularities", wrongful disbursement of subscription monies and dishonest assistance had been considered.

1315. In relation to "irregularities" I have found there to be few material irregularities. Such irregularities as have been established have been generally indicative of poor rather than dishonest practice.

1316. In relation to the wrongful disbursement of subscription monies although I have held that there was a Quistclose trust I have held that there was no breach of that trust and further that, if there was, it was not causative of any loss. I have further held that the existence of the Quistclose trust was not known to any of the Defendants.

1317. In relation to dishonest assistance, I have rejected the case of dishonesty in relation to all Defendants.

1318. A consideration of these further matters therefore only goes to confirm that the Claimants have failed to prove their case that the Schemes were a sham or fraud. If so, there can equally have been no conspiracy to commit such a fraud. Although the Claimants have succeeded in establishing that there was a breach of FSMA this is not a relevant breach of duty for the conspiracy claim, for reasons already given. It follows that in relation to the conspiracy claim the Claimants have not proved unlawful means. Nor have they proved a combination to use such means or an intention to cause damage to the Claimants.

1319. The conspiracy and fraud claims accordingly fail.

(15) THE CLAIM AGAINST VERMILION

The Claimants' claim

1320. The Claimants made restitutionary claims against Vermilion encompassing claims to reconstitute trust monies held by them on constructive trust and liability for knowing receipt of trust monies.

1321. The case was put on the basis that a proportion of the subscription monies was paid to Vermilion in circumstances where Vermilion knew that:

> "a. subscribers to the Innovator and Gentech Schemes (and in particular the Charit Scheme) had invested on the basis that the Technology Rights were worth the purchase price stated in the IM and/or AA, that tax relief would in principle be available based on that stated purchase price, and that the Technology Rights were in principle capable of generating the level of return described in Business Plans.
>
> b. the Technology Rights (if any) were in fact worthless or at best worth a fraction of the amount stated in the AA and/or IM.
>
> c. there was no real prospect of subscribers obtaining tax relief in accordance with the stated acquisition price or at all.
>
> d. the Technology Rights (if any) could not in fact conceivably generate the level of returns purportedly predicted in the Business Plans.
>
> e. in the premises, the Charit Scheme was a fraudulent scheme as set out in Section P hereof." (RRAPOC 341A).

1322. It was contended that accordingly Vermilion knew (or was on notice) that the subscription monies it received were trust monies held for the benefit of subscribers to the Charit Scheme and paid to it in breach of trust.

Relevant legal principles

1323. The general requirements that a claimant must meet to establish a cause of action in knowing receipt are most commonly drawn from the statement of Hoffmann LJ in *El Ajou v Dollar Land Holdings* [1994] 2 All E.R. 685 at 700: "For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty."

1324. For the claim to succeed the defendant must have received the property beneficially rather than ministerially (i.e. as agent). The claim relies upon the claimant's subsisting equitable interest, which is defeated if the defendant receives the trust property as a bona fide purchaser for value – see *Snell's Equity* at 30-068 – 30-070.

1325. The knowledge requirement comprising the third element of the test set out in *El Ajou* was explained further in *BCCI v Akindele* [2001] Ch 437, per Nourse LJ: "The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt."

Application to the facts

1326. The restitutionary claim against Vermilion fails for reasons already given in relation to the Claimants' claims generally. In particular monies paid to Vermilion were not paid in breach of trust and the acquisition price was agreed following genuine negotiations and as part of an arms length transaction. Vermilion was a bona fide seller for value.

1327. Since there was a fair amount of evidence addressed to the Vermilion claim I shall nevertheless briefly set out my findings on the more important allegations made.

(1) The relationship between Mr Stiedl and Mr Speirs

1328. Mr Speirs' evidence that neither he nor anyone connected with Vermilion had any prior relationship with Mr Stiedl was not challenged and I find that Vermilion, Weighbridge Trust and Mr Speirs were independent of Innovator and Mr Stiedl.

1329. The Claimants sought to cast doubt on the arm's length nature of the commercial dealings between Mr Speirs and Mr Stiedl by pointing to the apparent absence of price haggling; the fact that negotiations were not conducted or recorded on paper and the fact that the product offered by Mr Speirs was specifically prepared to fit within the tax straightjacket designed to attract the capital allowances that formed the principal financial attraction to prospective investors. None of these factors show that the negotiations were not arms length.

1330. Mr Speirs' evidence was to the effect that the price of circa £35m finally agreed to his mind undervalued rather than overvalued the Charit email product. Mr Speirs described at some length the negotiating process which led up to his acceptance of Mr Stiedl's offer on behalf of Innovator to purchase the Charit email product for just under £35 million. As he stated in evidence:

> "…my responsibility was: can I come up with a sensible business proposal, one that I believed in and where the numbers actually added up and could fit in with the framework...when I went into a meeting with Mr Stiedl, who is a strong personality, I knew pretty much what I felt I could accept, I knew what the structure was, I had a clear idea in my own mind what I could accept and what I couldn't accept. .. If I had said to Mr Stiedl: I am not accepting 35 million, it's 50 million. I am pretty confident I would have been out on Berkeley Street reasonably quickly and unlikely to be able to find another purchaser at that value. So when you are in dealing situation, you are going to be reading what the other guy is looking for and what he wants, and what you yourself must have, and that was the situation as far as I was concerned in the deal with Innovator. All I was concerned about was if I did a deal, was it one that was in line with what I felt I needed to make it happen."

1331. Both Mr Speirs and Mr Stiedl are strong minded individuals. Mr Speirs took a view on how Mr Stiedl would react if he haggled, and decided to accept the offer made. That is how business is often done and it throws no doubt on the arms length nature of the negotiations and resulting transaction.

(2) Whether Vermilion thought the Technology Right were worthless

1332. The Claimants questioned the quality and capability state of the Technology at the time of its purchase, focusing in particular on issues of scaleability. The persons responsible for the software architecture and code were Mr Joshi and Dr Burade, both of whom gave evidence. Their evidence was that the software was functional and adequate for its purpose. That evidence is supported by the following:

> (1) As Mr Joshi explained in evidence, the Technology was demonstrated by Mr Joshi to Rothschilds and their technical experts, and the architecture subjected to detailed questioning during proposed sale discussions to TCP;
>
> (2) Mr McCallum and Mr Gray examined the software critically in 2004 and concluded and reported to Innovator that the software code was acceptable and demonstrated it to Crouch Chapman, the auditors;
>
> (3) Mr Gray raised the scalability issue of Charit-email in the second quarter of 2004 but following discussion with Mr Joshi was satisfied that it had indeed been addressed;

> (4) The same architecture has worked and continues to work in practice at Thomson Reuters. As explained by Mr Joshi in evidence, this has been running for about 8 years and handles about 15 million email equivalent transactions a day without a single failure and uses the same idea for the storage as Charit.

1333. The Claimants also alleged that the source code changed subsequently to the AA and that at the time of the AA it was not functional. However, it was Dr Burade's evidence that no further work was done on the software in 2004 and it was Mr Joshi's evidence that there never were different versions. He explained how H2M had had difficulties running the Microsoft Word version of the code which they had provided to them but that they showed them how to set everything up and get it running on their computers. Mr Gray accepted that the source code was acceptable once extra information had been provided and that there had been no fundamental changes in the code.

1334. I find that the Technology Rights were not worthless nor did Vermilion think that they were so.

(3) Did Vermilion know that the Technology Rights (if any) could not in fact conceivably generate the level of returns purportedly predicted in the Business Plans?

1335. This was strongly disputed by Mr Speirs, who prepared the Business Plans. It was his evidence that he believed that it was worth more than the purchase price of just under £35 million.

1336. That this was his belief is borne out by the fact that he was prepared to walk away from the proposed TCP deal, which would have earned Vermilion many millions of pounds, over the issue of whether Vermilion had an option to buy back the software (under certain conditions). He would not have done so unless he thought that the value of that option was worth considerably more than what Vermilion was due to receive on the initial sale.

1337. The Business Plans are the best primary contemporaneous evidence of what Mr Speirs believed that Charit email could achieve. The assumptions in and detail of the Financial Projections that accompanied the Business Plan were not, however, challenged in evidence, despite repeated invitations made by Mr Speirs in cross examination to debate them.

1338. The potential of Charit email was also supported by Mr Wren -Hilton's valuation of Charit email at £78.8m. In evidence Mr Wren-Hilton stood by his valuation of Charit email, and confirmed that he was put under no pressure to arrive at the opinion he gave.

1339. I agree that the issue of whether Vermilion knew that the question of whether the Charit Technology Rights could not conceivably generate the level of returns predicted in the Business Plans falls to be answered by reference to the subjective judgements and views made by Mr Speirs in the course of preparation of the Business Plans, and in particular the Business Plan dated 28 August 2003. These Business Plans reflected Mr Speirs' judgements and views at the time and show he believed that the Technology had the potential to go viral and generate huge returns.

Conclusion on claim against Vermilion

1340. The monies paid to Vermilion were not trust monies once the subscribers had become partners. Any payments made to Vermilion before then were not paid in breach of trust. Even if any payments were made in breach of trust this was not known by Vermilion, nor should it have been. Vermilion was a bona fide seller for value. The restitutionary claims against Vermilion fail. The FSMA monetary claims made against Vermilion fail for reasons given when addressing the FSMA claim.

(16) THE CLAIMS AGAINST INDIVIDUAL DEFENDANTS

The claims against Mr Stiedl

1341. These were:

(1) Conspiracy

1342. This claim fails for the reasons set out when addressing the Conspiracy and Fraud claims. The Schemes were not a sham or fraud in conception or execution. There was no conspiracy.

(2) Misrepresentation

1343. For the reasons set out when addressing the Misrepresentation claim, no representations were made by Mr Stiedl and no actionable misrepresentation was in any event made.

(3) Dishonest assistance

1344. For the reasons set out when addressing the Dishonest Assistance claim, Mr Stiedl did not give dishonest assistance by giving disbursement instructions when he knew that he was not entitled to give such instructions or was reckless as to whether he was so entitled; or by procuring breaches of CB's alleged subscription agreements (which did not in any event exist).

(4) FSMA

1345. For the reasons set out when addressing the FSMA claim, Mr Stiedl did not contravene s.19 or s.21 since he did not by way of his own business establish or operate any CIS, arrange deals in investments or cause contravening promotional materials to be communicated. He acted throughout as a shadow director of Innovator.

1346. He was not a relevant recipient for the purpose of the monetary claims made under s.26 and s.30. If he was I would in any event grant relief under s.28 (6) and s.30 (7).

(5) Negligence

1347. For the reasons set out when addressing the Negligence claim, no FSMA related duty of care was owed by Mr Stiedl. In any event no duty of care was owed by him personally.

1348. Mr Stiedl did not owe a personal duty of care in relation to the making of representations/provision of information in the Scheme documents, and in particular the IMs.

1349. The claims made against Mr Stiedl accordingly fail. The essential premise of those claims were the claims in conspiracy and fraud since this was the main justification for making claims against Mr Stiedl personally as the architect and "main man" behind the Schemes.

1350. The Claimants' approach to Mr Stiedl was to assume that his involvement and dealings in the Schemes must be dishonest due to his criminal convictions for fraud. He was described as the "quintessence of amorality".

1351. Mr Stiedl's criminal convictions mean that his involvement and evidence must be approached with circumspection. However, he falls to be judged on the evidence of what actually occurred in relation to these Schemes; not according to any pre-conceptions of what may have occurred.

1352. There were aspects of Mr Stiedl's evidence that I reject; in particular, his attempts to distance himself from Innovator and downplay his involvement. He was, as I have found, the driving force behind the Schemes. It is also clear that Mr Stiedl planned to and did derive substantial personal benefit from the Schemes. The Schemes were very successful and substantial fees were generated for Innovator, from which Mr Stiedl derived benefits additional to payments made to him as a consultant. However, as I have found, there was no misappropriation of funds. The Technology Vendors and other third parties were paid in accordance with the Scheme documentation and there was a balance of profit left for Innovator from its fees. Those fees were broadly in line with the 11% identified in the IMs.

1353. Whatever Mr Stiedl may have done in the past, I find that his motivation in instigating these Schemes was to make money for all concerned through the success of the Schemes, and not dishonestly. These were carefully designed schemes with significant input from professionals, including leading counsel. They were reviewed and considered by many experts, including numerous IFAs and accountants. They were judged by many honest, conscientious people to be sound, if ingenious, Schemes. That is what Mr Stiedl believed them to be. He believed that they would obtain the anticipated tax relief and that some, at least, of the Technologies would take off. Criticisms can be made of the implementation of the Schemes and, with hindsight, elements of its structure, but the basic conception of the Schemes was sound. As matters have turned out, the changed attitude and approach of the IR and the courts to circular funding mean that the tax benefits would probably not have been achieved, however well implemented the Schemes may have been. But that is with the benefit of hindsight.

The claims against Mr Carter

1354. These were:

(1) Conspiracy

1355. This claim fails for the reasons set out when addressing the Conspiracy and Fraud claims. The Schemes were not a sham or fraud in conception or execution. There was no conspiracy.

(2) Misrepresentation

1356. For the reasons set out when addressing the Misrepresentation claim, no material representations were made by Mr Carter personally and no actionable misrepresentation was in any event made.

(3) Dishonest assistance

1357. For the reasons set out when addressing the Dishonest Assistance claim Mr Carter did not give dishonest assistance by giving disbursement instructions when he knew that he was not entitled to give such instructions or was reckless as to whether he was so entitled; or by procuring breaches of CB's alleged subscription agreements (which did not in any event exist).

(4) FSMA

1358. For the reasons set out when addressing the FSMA claim Mr Carter did not contravene s.19 or s.21 since he did not by way of his own business establish or operate any CIS, arrange deals in investments or cause contravening promotional materials to be communicated. He acted throughout as a director of Innovator or Administrator of the LLPs.

1359. He was not a relevant recipient for the purpose of the monetary claims made under s.26 and s.30. If he was I would in any event grant relief under s.28 (6) and s.30 (7).

(5) Contract

1360. Mr Carter did owe a duty of care and skill when acting as agent of the subscribers pursuant to the P/A. He acted in breach of such duty when he exceeded his authority in purporting to enter the partners into the

Optibet LLP and in purporting to make subscribers partners in Arte when no bank loan had been received. Any claim for breach of duty, including breach of fiduciary duty, was, however, waived when his acts were ratified. Further or alternatively, by reason of the ratification no recoverable loss has been caused by any breach of duty.

1361. Mr Carter owed a duty of care and skill when acting as Administrator and pursuant to the Service Agreement. This duty was owed to the LLP, not the individual subscribers or partners.

1362. Mr Carter owed duties as a member of the LLP to other members pursuant to the terms of the LLP Deed. These included duties of good faith and diligence in the conduct and management of the Trade. Mr Carter was not in breach of such duties, or breach of fiduciary duty, as alleged since he did not wrongfully cause and /or allow disbursement of subscription money and /or the Partnership's money, in particular, when IM Conditions were not fulfilled, or dishonestly assist others to do so.

(6) Negligence

1363. For the reasons set out when addressing the Negligence claim, no FSMA related duty of care was owed by Mr Carter.

1364. Mr Carter did not owe a personal duty of care in relation to the making of representations/provision of information in the Scheme documents, and in particular the IMs.

1365. Mr Carter did owe a correlative duty of care in tort when acting as agent of the subscribers pursuant to the P/A. The issue of breach of duty has been considered above.

1366. Mr Carter also owed a correlative duty of care in tort when acting as Administrator and pursuant to the Service Agreement. This duty was owed to the LLP, not the individual subscribers or partners.

1367. Mr Carter is an accountant and there was no suggestion of any alleged impropriety in his prior business dealings. He was subjected to extensive cross examination over a number of days which he withstood calmly and consistently. No doubt, as Mr Carter acknowledged, aspects of the documentation and its execution could have been improved. Although I have found Mr Carter exceeded his authority on two occasions and backdated the Arte D/A, I do not find that he did so with any dishonest intent. His principal motivation throughout was to try and make the Schemes work and succeed. The CLFL Bridging Loan arrangements is a good example of this. Although the Claimants were highly critical of these arrangements and their artificiality, they were entered into in order to try to secure tax relief for partners, not to defraud or mislead.

1368. As the Schemes ran into difficulties Mr Carter came under increasing pressure. The success of the Schemes meant that he was probably already overburdened, but this burden was multiplied when tax and other issues were raised and he was having to deal with numerous individual partners' questions and complaints. Undoubtedly there were times when Mr Carter was slow to respond and also when he responded in terms that proved to be over optimistic. He also, as I have found, minimised and misdescribed Mr Stiedl's role in Innovator. However, I find Mr Carter to have been a fundamentally honest witness and also fundamentally honest in his involvement in and handling of the Innovator Schemes. Mistakes were made but they were not dishonest mistakes.

1369. The Claimants sought to attack Mr Carter's credibility by reference to benefits schedules produced during the course of the hearing. I ruled that they could not be introduced as part of any pleaded case. The Claimants nevertheless sought to rely upon them and indeed on an expanded version produced during closing. I do not consider that it would be fair to Mr Carter, an unrepresented Defendant, to allow them to do so. To the extent that the Claimants obtained answers in cross examination on related matters they can rely on them, but not on any detailed case based on these schedules. In any event, I am not satisfied that they show any impropriety. They address what was done with funds which formed part of Innovator's own share of the agreed fee. That is a matter for Innovator, not the Claimants. It is also to be noted that although the Claimants apparently spent hundreds of thousands of pounds on accountancy fees, no accountancy evidence was sought to be relied upon.

The claims against Mr Gates

1370. These were:

(1) Conspiracy

1371. This claim fails for the reasons set out when addressing the Conspiracy and Fraud claims. The Schemes were not a sham or fraud in conception or execution. There was no conspiracy.

(2) Misrepresentation

1372. For the reasons set out when addressing the Misrepresentation claim, although MFS and therefore Mr Gates did make representations in the GT2 IM, no actionable misrepresentations were made.

(3) Dishonest assistance

1373. For the reasons set out when addressing the Dishonest Assistance claim, Mr Gates did not give dishonest assistance by giving disbursement instructions when he knew that he was not entitled to give such instructions or was reckless as to whether he was so entitled;

or by procuring breaches of CB's alleged subscription agreements (which did not in any event exist).

(4) FSMA

1374. For the reasons set out when addressing the FSMA claim, Mr Gates did contravene s.19 or s.21 since he did (through MFS) by way of his own business establish a CIS, arrange deals in investments and cause contravening promotional materials to be communicated.

1375. He was not, however, a relevant recipient for the purpose of the monetary claims made under s.26 and s.30. If he was I would in any event grant relief under s.28 (6) and s.30 (7).

(5) Contract

1376. Mr Gates did owe a duty of care and skill when acting as agent of the subscribers pursuant to the P/A but did not breach such duty (or any fiduciary duty or correlative duty in tort) by purporting to make subscribers partners when not authorised to do so, as the Claimants allege.

1377. Mr Gates owed a duty of care and skill when acting as Administrator and pursuant to the Service Agreement. This duty was owed to the LLP, not the individual subscribers or partners.

1378. Mr Gates owed duties as a member of the LLP to other members pursuant to the terms of the LLP Deed. These included duties of good faith and diligence in the conduct and management of the Trade. Mr Gates was not in breach of such duties, or breach of fiduciary duty, as alleged since he did not wrongfully cause and /or allow disbursement of subscription money and /or the Partnership's money, in particular, when IM conditions were not fulfilled, or dishonestly assist others to do so.

(6) Negligence

1379. For the reasons set out when addressing the Negligence claim, no FSMA related duty of care was owed by Mr Gates.

1380. Mr Gates (through MFS) did owe a duty of care in relation to the making of representations in the IM, but was not in breach of any such duty.

1381. Mr Gates did owe a correlative duty of care in tort when acting as agent of the subscribers pursuant to the P/A, but was not in breach of such duty.

1382. Mr Gates also owed a correlative duty of care in tort when acting as Administrator and pursuant to the Service Agreement. This duty was owed to the LLP, not the individual subscribers or partners.

1383. Mr Gates, like, Mr Carter was an experienced businessman against whom no suggestion of prior impropriety was made. For reasons given elsewhere in the judgment I reject the allegations of dishonesty and conspiracy made against him. There was some force in the criticism made of Mr Gates that he was content to rely on others and did little to verify matters for himself, but that is not indicative of dishonesty.

The claims against Mr Bailey

1384. These were:

(1) Conspiracy

1385. This claim fails for the reasons set out when addressing the Conspiracy and Fraud claims. The Schemes were not a sham or fraud in conception or execution. There was no conspiracy.

(2) Dishonest assistance

1386. For the reasons set out when addressing the Dishonest Assistance claim, Mr Bailey did not give dishonest assistance by giving disbursement instructions or acting on them when he knew that there was no entitlement to do so or was reckless as to whether there was any such entitlement; or by assisting in the execution of D/As.

(3) FSMA

1387. For the reasons set out when addressing the FSMA claim, Mr Bailey did not contravene s.19 or s.21 since he did not establish or operate any CIS, arrange deals in investments or cause contravening promotional materials to be communicated whether by way of business or at all.

(4) Negligence

1388. For the reasons set out when addressing the Negligence claim, no FSMA related duty of care was owed by Mr Bailey, nor did he owe any other personal duty of care to the Claimants.

1389. I reject the allegations of dishonesty and breach of duty made against Mr Bailey. Mr Bailey was a commercially minded lawyer who in the interests of his client may have been drawn into roles that with hindsight were unwise, such as acting as chairman of Innovator. He was also very busy and did not have all the time which ideally would have been available for some of the tasks he and his team took on. Difficulties may also arise where, as in this case, lines are sought to be drawn and responsibility disavowed for potentially important matters, such as FSMA. No doubt with hindsight there are some matters which Mr Bailey might have done differently but this is not indicative of dishonesty and Mr Bailey did nothing wrong knowingly.

The claims against Mr Roper

1390. These were:

(1) Conspiracy

1391. There was no pleaded claim of conspiracy against Mr Roper. Any such claim would have failed for the reasons set out when addressing the Conspiracy and Fraud claims. The Schemes were not a sham or fraud in conception or execution. There was no conspiracy.

(2) Dishonest assistance

1392. For the reasons set out when addressing the Dishonest Assistance claim, Mr Roper did not give dishonest assistance by giving disbursement instructions or acting on them when he knew that there was no entitlement to do so or was reckless as to whether there was any such entitlement; or by assisting in the execution of D/As.

(3) FSMA

1393. For the reasons set out when addressing the FSMA claim, Mr Roper did not contravene s.19 since he did not establish or operate any CIS or arrange deals in investments whether by way of business or at all.

(4) Negligence

1394. For the reasons set out when addressing the Negligence claim, no FSMA related duty of care was owed by Mr Roper, nor did he owe any other personal duty of care to the Claimants.

1395. I reject the allegations of dishonesty and breach of duty made against Mr Roper. Mr Roper became materially involved in the Innovator Schemes after they had been set up and the initial Schemes launched. The main client partner was always Mr Bailey from whom he would take instructions, although over time more and more tasks were taken on by Mr Roper. He performed his tasks diligently and conscientiously and there was very little material upon which to challenge his honesty. The Claimants mainly relied on the fact that he made payments as instructed and inferences which they sought to draw from documents which fitted their conspiracy theory. These were comprehensively addressed by Mr Roper in his very full witness statement, very little of which was successfully challenged.

The claims made against CB

1396. These were:

(1) Conspiracy

1397. This claim fails against Mr Bailey and therefore also against CB for the reasons set out when addressing the Conspiracy and Fraud claims. The Schemes were not a sham or fraud in conception or execution. There was no conspiracy.

(2) Dishonest assistance

1398. For the reasons set out when addressing the Dishonest Assistance claim Mr Bailey and Mr Roper did not give dishonest assistance by giving disbursement instructions or acting on them when they knew that there was no entitlement to do so or were reckless as to whether there was any such entitlement; or by assisting in the execution of D/As. If so, then it follows that the claim against CB fails.

(3) FSMA

1399. For the reasons set out when addressing the FSMA claim CB did not contravene s.19 since CB did not operate any CIS or arrange deals in investments.

1400. CB was not a relevant recipient for the purpose of the monetary claims made under s.26 and s.30. If they were I would in any event grant relief under s.28 (6) and s.30 (7).

(4) Contract

1401. CB was not party to any subscription money agreement and in any event monies were not wrongfully disbursed from the CB client account.

(5) Trust

1402. CB was not a trustee of the subscription monies. In any event subscription monies were not disbursed in breach of trust or fiduciary duty. Even if they were no loss was caused thereby.

(5) Negligence

1403. For the reasons set out when addressing the Negligence claim no FSMA related duty of care was owed by CB; nor did CB owe the Claimants the alleged IM representations duty, monitoring duty, subscription agreement duty or internal management duty.

1404. Further, neither Mr Bailey nor Mr Roper was involved in the management of Innovator or any other associated company nor took any material decision in their capacity as officer or director of such entity. If there were, such acts or omissions were not undertaken in their capacity as solicitors.

1405. I reject all allegations of dishonesty and breach of duty made against CB. No doubt with hindsight there are many things CB would have done differently. Allowing their name to be used in promotional material, their partner to act as chairman of the promoted company, and in particular their client account to be used for the deposit of subscription monies, have contributed to their entanglement in the allegations made in these proceedings. Apparent discrepancies in documentation in which CB was involved have fuelled the Claimants' conspiracy theories. The CIS aspects of arrangements such as these are matters that it may be said CB should have considered for themselves. However, I am not concerned with any complaints that Innovator or the LLPs might have against CB. On the evidence at trial I have found that there is no substance in the very serious allegations which have been made against CB and that all claims against them should be dismissed.

The claims against the LLP

1406. These were:

(1) Misrepresentation

1407. For the reasons set out when addressing the Misrepresentation claim, no actionable misrepresentation was made.

(2) Dishonest assistance

1408. For the reasons set out when addressing the Dishonest Assistance claim, the LLP did not give dishonest assistance by giving disbursement instructions which it was known it was not entitled to give or by being reckless as to whether it was so entitled; or by procuring breaches of CB's alleged subscription agreements (which did not in any event exist).

(3) FSMA

1409. For the reasons set out when addressing the FSMA claim, I find that the LLP did contravene s.19 and s.21 since it did operate a CIS and did cause contravening promotional materials to be communicated.

1410. I find that the LLP was a relevant counterparty and a relevant recipient under s.26 and s.30.

(4) Contract

1411. The LLP owed duties to members of the LLP pursuant to the terms of the LLP Deed. These did not include fiduciary duties, a duty of good faith or a duty of care and skill. Even if it did, there was no breach of such duties in that the LLP did not wrongfully cause and /or allow disbursement of subscription money and /or the Partnership's money, in particular, when IM conditions were not fulfilled, or dishonestly assist others to do so.

(5) Negligence

1412. The LLP did not owe a duty of care to partners properly to administer the Partnership or otherwise deal with its affairs.

The claim against CLFL

1413. These were:

(1) Conspiracy

1414. This claim fails for the reasons set out when addressing the Conspiracy and Fraud claims. The Schemes were not a sham or fraud in conception or fact. There was no conspiracy.

(2) Dishonest assistance

1415. For the reasons set out when addressing the Dishonest Assistance claim CLFL did not give dishonest assistance by giving disbursement instructions which it was known it was not entitled to give or by being reckless as to whether it was so entitled; or by procuring breaches of CB's alleged subscription agreements (which did not in any event exist).

(3) FSMA

1416. For the reasons set out when addressing the FSMA claim I find that CLFL did contravene s.19 since it did arrange deals in investments. I find that CLFL was not a relevant recipient under s.26 or s.30.

(4) Negligence

1417. For the reasons set out when addressing the Negligence claim no FSMA related duty of care was owed by CLFL.

The claim against Innovator

1418. These were:

(1) Conspiracy

1419. This claim fails for the reasons set out when addressing the Conspiracy and Fraud claims. The Schemes were not a sham or fraud in conception or execution. There was no conspiracy.

(2) Misrepresentation

1420. For the reasons set out when addressing the Misrepresentation claim, no actionable misrepresentation was made.

(3) Trust

1421. Although Innovator was a trustee of the subscription monies until the subscribers were made partners, subscription monies were not disbursed in breach of trust or fiduciary duty. Even if they were no loss was caused thereby.

(4) Dishonest assistance

1422. For the reasons set out when addressing the Dishonest Assistance claim, Innovator did not give dishonest assistance by giving disbursement instructions which it was known it was not entitled to give or by being reckless as to whether it was so entitled; or by procuring breaches of CB's alleged subscription agreements (which did not in any event exist).

(5) FSMA

1423. For the reasons set out when addressing the FSMA claim, I find that Innovator did contravene s.19 and s.21 since it did establish and operate a CIS and arrange deals in investments and did cause contravening promotional materials to be communicated.

1424. As set out in the Claimants' schedule in closing, Innovator was not alleged to be counterparty to the allegedly relevant agreements and I find that it was not a relevant recipient under s.26 or s.30.

(6) Contract

1425. Although I have found Innovator to be party to a contract made with subscribers no claim was made thereunder nor in respect of any correlative duties of care that may have existed.

(7) Negligence

1426. For the reasons set out when addressing the Negligence claim, no FSMA related duty of care was owed by Innovator. No breach of any representations duty or monitoring duty which Innovator may have owed was alleged.

(17) CAUSATION/CONTRIBUTORY NEGLIGENCE/QUANTUM

1427. I have already found that any claim for equitable compensation for breach of the Quistclose trust, either as alleged by the Claimants or as I have found, would fail as a matter of causation.

1428. I do not propose to address the causation issues which might have arisen in respect of the other monetary claims advanced by the Claimants since I have held that such claims fail. Each would have to be considered in the context of the particular cause of action asserted.

1429. For similar reasons I do not propose to address the contributory negligence issues which the Defendants raise, which would in any event only be relevant to some of the causes of action.

1430. Similarly I do not propose to address the general quantum issues which have been debated since these do not arise on my findings. I would however, have held that the Claimants must give credit in respect of any claim for damages/equitable compensation for any tax relief obtained and retained.

(18) CONCLUSION

1431. In considering the “core” allegations made of conspiracy, fraud and associated dishonesty I have concentrated on the specific allegations made and relied upon by the Claimants, which I have largely rejected on the evidence. However, there are other features of the case and the evidence which tell against the Claimants’ case.

1432. There is, for example, the involvement of third parties and in particular professional third parties in the allegedly fraudulent scheme. These include Mr Bretten QC; Mr Crystal; Pridie Brewster; Baker Tilly; Crouch Chapman; H2M and Mr McCallum; American Appraisal and Xexco. No allegations of dishonesty were made against any of these parties but they were all closely involved with the allegedly fraudulent and sham Schemes.

1433. The fact that so many third parties were brought into the Schemes is inconsistent with a fraudulent conspiracy. The same can be said of the involvement within CB of various solicitors, including senior partners such as Mr Marsh, not merely the alleged wrongdoers, Mr Bailey and Mr Roper.

1434. There is also the fact that no personal advantage was obtained by many of the alleged wrongdoers. Thus it was not alleged that Mr Bailey and Mr Roper profited other than as partners of CB or directors on a fixed fee. Further, although Messrs Stiedl, Carter and Gates did profit financially from the Innovator Schemes that was mainly derived from Innovator’s own profits in accordance with the disclosed fee structure and did not involve misappropriation.

1435. Further, the Schemes were put together in accordance with a structure which was extensively and expensively advised upon by leading counsel, Mr Bretten QC. That structure was not substantially criticised. Indeed it was similar to that in the Tower M Cashback schemes about which no allegations of fraud, conspiracy or dishonesty were apparently made. The essential criticism made by the IR of the Schemes related to their implementation rather than their structure, and in particular the failure to establish sufficient trade within the relevant tax year.

1436. Even if, however, there had been no implementation issues the likelihood is that the Schemes would have faced the same challenge from Mr Frost of the IR as the Tower M Cashback schemes, and with the same result – i.e. tax relief on the partners’ cash contributions only.

1437. Although the Claimants were understandably aggrieved to lose their cash contributions and receive back only limited tax relief, there are obvious risks in going into aggressive tax schemes which offer the prospect of almost immediately doubling your money.

1438. In fact, the greatest risk to the Claimants was not losing their cash contribution, but being exposed to repayment of the 80% loan. This had to be a real liability for the tax relief to be claimable, as was reasonably apparent from the IMs and is the logic of a geared investment. However, few Claimants appreciated the reality of the liability and the consequent risk. In the event that risk did not materialise in respect of virtually all Schemes since a hive down to a limited company was achieved, as was anticipated but never assured. In relation to those Schemes, such as Charit, where no hive down was achieved, the consequence of the contraventions of FSMA may well be that there is no liability. If so, then, ironically, the relevant Claimants will in one sense have benefited from the FSMA contraventions about which so much complaint was made.

1439. Whilst the Claimants will no doubt be generally disappointed at the outcome of the litigation, they can be solaced in the fact that a very possible outcome of entering into these highly geared tax Schemes would have been a liability for four times their capital contribution, and that has been avoided. Further, the tax relief obtained (or, in the case of Arte, offered) was probably no more than would have ultimately been achieved, however well these Schemes had been implemented.