Neutral Citation Number: [2019] EWCA Civ 1413

Case No: A4/2018/2675

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Robin Knowles CBE
[2018] EWHC 2624 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/08/2019

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE MALES

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Between :

(1)SIMETRA GLOBAL ASSETS LIMITED
(2)RICHCROFT INVESTMENTS LIMITED — **Appellants**

- and -

(1)IKON FINANCE LIMITED
(2) IKON GROUP LIMITED
(3) IKON ATLANTIC LIMITED
(4) FTECHNICS INC
(5) GSTAR FX INC
(6) GEORGE DASKALEAS
(7) DIWAKAR JAGANNATH
(8) ERSAN ACUN
(9) ENGIN YIKILMAZOGLU
(10) SIMETRA MANAGEMENT LIMITED
(11) RICHCROFT MANAGEMENT LIMITED
(12) IKON EUROPE LIMITED — **Respondents**

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Stephen Hofmeyr QC and **Josephine Higgs** (instructed by **Jackson Parton**) for the **Appellants**
Paul McGrath QC and **James Sheehan** (instructed by **Holman Fenwick Willan LLP**) for the **1st to 4th, 8th, 9th and 12th Respondents**
The **5th to 7th, 10th and 11th Respondents** did not take part in the appeal

Hearing dates : 23rd to 25th July 2019

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Judgment Approved

Lord Justice Males :

Introduction

1. The claimants in this action, who are the appellants in this appeal, claim to have been the victims of a Ponzi scheme operated by Mr George Daskaleas and companies controlled by him, principally a Belize registered company called GStar FX Inc ("GStar"). They say that Mr Daskaleas's companies were entrusted by them with funds for investment in foreign exchange trading which appeared to be extremely profitable, but that in fact the returns reported by GStar were fictitious. The respondents who took part in the appeal, who can be referred to together as Ikon or the Ikon defendants, owned the trading platform on which this trading supposedly took place and also held trading accounts in the names of the appellants. The appellants' claim against them arises out of confirmations provided by Ikon which appeared on their face to confirm outstanding balances of some US $292 million held in these accounts in October 2014. In fact the money was not there.

2. The appellants say that these confirmations were provided dishonestly and constituted dishonest assistance by Ikon in breaches of fiduciary duty by Mr Daskaleas and his companies. The appellants say further that, as a result of being deceived into believing that these funds existed, they made substantial payments to investors amounting in total to some US $18.5 million. As a result the appellants advance claims against Ikon for dishonest assistance and damages for deceit and conspiracy.

3. Ikon say that the confirmations which they provided were not confirmations of real money in trading accounts, but were concerned with what are known as demonstration (or "demo") accounts, that is to say accounts which are used to practise or to demonstrate trading using only notional money. Accordingly they deny the allegation of dishonesty and deny too that the appellants relied on the confirmations which they provided.

4. There were numerous issues at the trial, including whether Mr Daskaleas and his companies owed fiduciary duties to the appellants, whether they were in breach of those duties, whether Ikon assisted them in doing so and the quantum of any claim. The judge, however, focused on two issues only:

    (1) In providing the account balance confirmations, did Ikon act dishonestly?

    (2) Did the appellants rely on these confirmations as referring to real funds?

5. After a trial in the Commercial Court lasting 13 days, Robin Knowles J decided both issues in favour of Ikon and dismissed the appellants' claim. He acquitted Ikon and its Chief Executive Officer Mr Jagannath of dishonesty and found that Mr Ioannis Litinas, a major investor in the appellants and the individual from whom the appellants' solicitors received their instructions, knew at all times that nothing like the sums alleged to have been held by Ikon were in fact held by them. Indeed he described Mr Litinas's evidence as "wholly unconvincing throughout". He found also that nothing which Ikon did was relied on by the appellants.

6. In this appeal the appellants contend that the judgment, which runs to only 13 pages, fails to address many of the issues which arose at trial, that its conclusions are cursory and its reasoning limited, and that it fails properly to analyse the witness and documentary

evidence on a number of critical issues. As a result, they say, the critical findings are unexplained and unjust. Realistically, the appellants do not suggest that this court should give judgment in their favour. What they say is that justice requires a retrial before a different judge.

7. 2Ikon say that although the contemporary documents were relevant, ultimately the answer to the two central and decisive questions addressed by the judge turned on the credibility of the witnesses and that it was both legitimate and unsurprising for the judge to express his conclusions succinctly. He was not required to provide a lengthy and detailed decision dealing with every argument raised by the appellants, not least in circumstances where he had concluded that they had presented serious allegations of fraud on the basis of false evidence. What matters is that the issues vital to the judge's conclusion should be identified and the manner in which he resolved them explained. This the judge did.

8. I have concluded that the appellants' submissions as outlined above are well-founded and that, however unpalatable the prospect, a retrial is the only just course.

9. As there will need to be a retrial, if my Lords agree, I propose to set out in this judgment only so much of the facts and the evidence as is necessary to understand the issues which arose and to show why, in my judgment, the judge failed to engage with them. It would not be appropriate, for example, for this court to make findings about the honesty or otherwise of Ikon and their witnesses. That will be for the retrial. I shall identify issues which in my view needed to be addressed. I should not, however, be understood as dictating how those issues should be resolved. It is sufficient to show that there was a plainly arguable case of dishonesty on the part of Ikon which needed to be addressed and with which the judge did not engage, and that the judge's findings on the absence of reliance are inadequately reasoned.

The participants

10. The appellants are British Virgin Islands companies. Richcroft was incorporated on 19 November 2012 and Simetra on 30 July 2013. Mr Litinas was the sole voting shareholder in Simetra and a voting shareholder in Richcroft.

11. The respondents who took part in the appeal are companies in the Ikon Group incorporated in various jurisdictions and individuals who own or manage them. They include Ikon Finance Ltd, an English company carrying on business in the City of London which is authorised by the Financial Conduct Authority. The group is ultimately owned by Mr Engin Yikilmazoglu, a Turkish national. Mr Ersan Acun, also a Turkish national, was at the material time a director of Ikon Finance Ltd.

12. The judge found that Mr Diwakar Jagannath, an Indian national, had in all material respects the authority of a chief executive of the Ikon Group companies (which is how he was described in the contemporary documents) and that Mr Yikilmazoglu's evidence to the contrary was not credible. Mr Jagannath was a defendant in the action, giving evidence and providing written submissions in person, but was not represented by those acting for Ikon. It is evident that Ikon were seeking to distance themselves from Mr Jagannath and to minimise his authority to act for them. He is a respondent to the appeal but, although he has been kept fully informed, has played no part in it.

13. Mr George Daskaleas held himself out as an extremely successful foreign exchange trader, managing substantial funds on behalf of various investors. He operated through various entities, including GStar. His relationship with Ikon went back to 2005 and in October 2013 he was invited by Mr Yikilmazoglu and Mr Jagannath to become a non-executive director of Ikon Group Ltd. Defences served by Mr Daskaleas and GStar were struck out at an early stage of the action. Other companies owned by Mr Daskaleas were joined as defendants but have taken no part in the action.

14. Accordingly Mr Daskaleas and his companies did not take part in the trial or the appeal. It was, however, common ground between the appellants and Ikon at the trial that he had perpetrated at least some kind of fraud on investors in the funds which he purported to manage, although Ikon suggested in closing (but did not plead) that Mr Litinas was effectively a partner in this fraud. The judge made no clear finding one way or the other as to the existence or scope of any fraud perpetrated by Mr Daskaleas. Certainly he did not give judgment against Mr Daskaleas and his companies as the appellants asked him to do, despite the recognition in their closing submissions that the prospects of any recovery against them were "vanishingly small".

The appellants' pleaded case

15. The appellants' pleaded case underwent a number of changes in the course of this action, but in outline their case against Ikon at trial was as follows.

16. In the course of 2013 Simetra and Richcroft were informed by Mr Daskaleas and GStar that sums totalling over US $202 million had been transferred to accounts operated by Gstar and held in their names. The precise figures were:

    (1) US $22,650,382.27 held in an account in Richcroft's name on 1 July 2013; and

    (2) US $180,003,249.33 held in an account in Simetra's name on 1 November 2013.

17. These transfers supposedly represented the profits on investments with predecessor entities and were intended to be used to subscribe for shares in Simetra and Richcroft. The subscribers were various individuals and corporate entities who had previously been subscribers in other investment vehicles operated by Mr Daskaleas. The appellants' business model was that investors would subscribe for non-voting shares in one or other of the two companies and the funds so raised (together with the appellants' own funds) would be made available to GStar for foreign exchange trading on trading platforms licensed by GStar from an Ikon company. Profits from this trading would be paid to investors by way of dividends or share redemptions or would be reinvested.

18. Monthly statements of account showing the results of Mr Daskaleas's trading were provided by GStar. These were provided to AMF Global, who were responsible for the administration of the accounts on the appellants' behalf. They showed a consistently increasing balance in the account as a result of extremely successful foreign exchange trading. Using these statements, AMF Global prepared monthly statements for the individual investors in the funds.

19. In fact, however, the proceeds of investments with predecessor entities had been misappropriated by Mr Daskaleas and in reality no such transfers to the appellants' accounts were made.

20. Although GStar provided monthly statements of account, there was no independent verification of the statements from Ikon, with whom (as the appellants understood) the funds were actually held. In the summer of 2014 the appellants sought confirmation as to the security of their money and this led to Mr Daskaleas and GStar arranging for an audit to be carried out by Grant Thornton's Greek office. It was in the course of and for the purpose of that audit that the confirmations were provided which give rise to the appellants' claims against the respondents.

21. These confirmations were as follows:

    (1) a letter dated 3 October 2014 signed by Mr Yikilmazoglu, confirming that the balances of the "949" accounts (which purported to be accounts in the appellants' names) were over US $268 million for Simetra's account and over US $24 million for Richcroft's account; although addressed to GStar rather than the appellants, this letter was produced for the purpose of being shown to the appellants in order to give them comfort as to the security of their funds;

    (2) an email dated 7 October 2014 sent by Mr Jagannath to GStar, Mr Daskaleas and Mr Venetis of Grant Thornton, in which he confirmed the contents of letters sent by Mr Daskaleas to him on the same day; in those letters GStar confirmed the appointment of Grant Thornton and asked Ikon to verify the accuracy of a letter from Grant Thornton confirming the outstanding balances on the 949 trading accounts;

    (3) a letter dated 17 October 2014 signed by Mr Jagannath as Chief Executive Officer of Ikon confirming the balances on the 949 trading accounts as at 3 October 2014 in the same amounts as in Mr Yikilmazoglu's letter of that date; and

    (4) a letter from Ikon Finance Ltd dated 17 October 2014 and signed by Mr Acun, although not in fact signed until 21 January 2015, in identical terms to Mr Jagannath's letter of the same date.

22. The contents of these letters and emails were false. The 949 accounts were not trading accounts and contained no money. They were, as Ikon knew, demo accounts which had been created by GStar on 2 October 2014. In fact the sums held by Ikon in accounts in the appellants' names were vastly smaller. Mr Jagannath and Mr Yikilmazoglu knew that they were assisting GStar to deceive the appellants. So too did Mr Acun who signed the (second) letter dated 17 October 2014 on 21 January 2015, and who (being a director of the relevant company) had been required to attend in person at Grant Thornton's office with his passport to sign the letter.

23. In outline, the principal matters relied on by the appellants as demonstrating dishonesty on the part of Ikon were as follows:

    (1) the terms of the confirmations themselves, which refer to "trading accounts" and include no reference to the fact that the accounts were only demo accounts;

    (2) the way in which the demo accounts were only created, with precise balances corresponding to the latest monthly statements, on the day before the first confirmation;

(3) the fact that the appellants had been pressing for independent confirmation from Ikon of the balances in their accounts;

(4) exchanges between (in particular) Mr Jagannath and Mr Daskaleas, which (they say) are inconsistent with the confirmations relating only to demo accounts;

(5) the circumstances in which the letter dated 17 October 2014 came to be signed in January 2015;

(6) allegedly dishonest statements in a letter to the appellants written by Mr Jagannath in February 2015;

(7) a letter dated 7 May 2015 sent by Mr Jagannath to GStar which purports to confirm outstanding balances on the 949 accounts as at that date of some US $348 million in Simetra's name and US $25 million in Richcroft's name; and

(8) in that context, exchanges between Mr Daskaleas and a colleague in May 2015 which refer to Mr Jagannath having "saved my ass" back in October 2014.

24. Further dishonest letters (those referred to at points (6) and (7) above) were sent by Mr Jagannath in February and May 2015. A letter dated 26 February 2015 referred to a review of requests for transfers and withdrawals of funds and requested the appellants to change their approach to such requests if the relationship was to continue. In fact there had been no such review and Mr Jagannath's intention, shared by Mr Yikilmazoglu who had been shown a draft of the letter before it was sent, was to dissuade the appellants from seeking to withdraw funds entrusted to GStar and Ikon. A letter dated 7 May 2015, signed by Mr Jagannath, had a similar intention. By this time the Ponzi scheme was on the point of collapse and the letter was written to stave off the evil day. It represented that the outstanding balances on the 949 accounts were now US $348,389,078.80 in favour of Simetra and US $25,367,643.56 in favour of Richcroft.

25. Eventually, on 20 May 2015, Mr Litinas instructed Mr Daskaleas to cease all trading in any of the appellants' accounts and requested Ikon to freeze the balances in the accounts. Only after this did it transpire that the 949 accounts were only demo accounts, there had been hardly any trading on behalf of the appellants and there was virtually nothing standing to their credit in the actual trading accounts.

26. As a result of these matters the appellants advanced claims for breach of fiduciary duty by GStar and Mr Daskaleas. By the conclusion of the trial these claims were for US $37.5 million for Simetra and US $3.7 million for Richcroft, being the sums which according to the forensic accounting evidence were available and ought to have been transferred to them from the predecessor funds in 2013.

27. The appellants contended that the Ikon defendants were liable for dishonestly assisting the breaches by Mr Daskaleas and his companies. However, there was no pleaded allegation of any wrongful conduct committed by Ikon prior to the allegedly dishonest provision of confirmation of the balances of the 949 accounts from October 2014 onwards. Similarly the claims for damages for deceit and conspiracy to deceive focused on the confirmations given in October 2014. While the appellants accepted that the claim in deceit was limited to payments made to investors after October 2014 in reliance on the accuracy of the confirmations provided by Ikon, which amounted in total to US

$18,492,375, they contended that they could recover from Ikon in dishonest assistance the full amount of their claim against Mr Daskaleas and his companies for breach of fiduciary duty.

28. There was a further claim by the appellants seeking to set aside a reduction of capital by Ikon Finance Ltd pursuant to section 423 of the Insolvency Act 1986, but it is unnecessary to give separate consideration to that claim in this judgment.

Ikon's case

29. This in summary was the appellants' pleaded case. Ikon denied these allegations root and branch. Although they did not positively dispute that Mr Daskaleas appeared to be engaged in some kind of fraudulent scheme, they denied that he or his companies owed any fiduciary duties to the appellants or (if they did) that there was any breach of any such duties. They said that they understood the 949 accounts to be demo accounts, as did Grant Thornton, and that the confirmation letters did no more than confirm the balances on these demo accounts. They denied any dishonesty on their part or any knowledge of dishonesty on the part of Mr Daskaleas or Mr Jagannath and denied Mr Jagannath's authority or that his knowledge or intention was to be attributed to Ikon. They said that the appellants had no basis to believe that the sums transferred to them in 2013 were as stated by Mr Daskaleas or that the balances in October 2014 were as stated in the confirmation letters. The appellants therefore knew that the balances on the demo accounts did not represent genuine and available funds. Ikon denied further that any conduct on their part had caused the appellants any loss.

The law

30. There was no real dispute as to the relevant law which I can therefore summarise briefly.

Dishonest assistance

31. The elements of a cause of action for dishonest assistance in a breach of fiduciary duty were summarised in the recent judgment of this court in *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614 at [28]:

> "… in order to find a person liable for dishonest assistance of a breach of trust, it is necessary to establish that:
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> a) there was a trust in existence at the material time;
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> b) the trustee committed a breach of that trust;
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> c) the defendant assisted the trustee to commit that breach of trust; and
>
> d) the defendant's assistance was dishonest.
>
> It also agreed that the same principles apply, *mutatis mutandis*, to a claim for dishonest assistance of a breach of the fiduciary duties which are owed to a company by its director in relation to dealings with the company's assets."

32. For present purposes what matters is that liability for dishonest assistance is secondary. The defendant cannot be liable unless the primary party responsible owed and was in breach of a fiduciary duty. In the present case, therefore, any liability of Ikon would be dependent on a finding of breach of duty by Mr Daskaleas or his companies.

33. Although the breach of duty by the fiduciary need not itself be dishonest (see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378), the appellants' case was that Mr Daskaleas was seeking the confirmations of the account balances from Ikon in order to mislead them. There was accordingly no question here of dishonesty by Ikon without dishonesty on the part of Mr Daskaleas.

34. The judge referred to *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67, [2018] AC 391 (and now see also *Group Seven* at [57]) as showing that dishonesty is to be judged according to the standards of ordinary reasonable people, but there is no issue about that in this case. It is not suggested that any of the individual defendants operated according to a less demanding standard of honesty.

Deceit and conspiracy

35. The elements of a claim in deceit are well established. They were succinctly summarised by Rix LJ in *The Kriti Palm* [2006] EWCA Civ 1601, [2007] 1 Lloyd's Rep 555 at [251]:

> "The elements of the tort of deceit are well known. In essence they require (1) a representation, which is (2) false, (3) dishonestly made, and (4) intended to be relied on and in fact relied on."

36. The claim in conspiracy added nothing of substance as the claim in deceit is premised on Ikon working together with Mr Daskaleas to deceive the appellants.

The approach of an appellate court to the judge's findings of fact

37. The approach which an appellate court should take when asked to reverse the judge's findings of fact has been addressed in a number of recent cases. These are conveniently summarised in *Group Seven* under the heading of "Appellate restraint" at [21] to [23]. I need not repeat that summary, which emphasises the advantages which the trial judge, immersed in all aspects of the case and able to test the evidence at first hand, has over this court where the focus is inevitably narrower, and emphasises also the principle that this court should not interfere unless satisfied that a finding of fact is plainly wrong. However, I would add a reference to *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2018] UKSC 61, [2018] 3 WLR 2087 at [41] on which Mr Paul McGrath QC for Ikon particularly relied. Lord Sumption said:

> "This court has on a number of occasions pointed out that while an appeal to the Court of Appeal is by way of rehearing, a trial judge's findings of fact should not be overturned simply because the Court of Appeal would have found them differently. It must be shown that the trial judge was wrong, i.e. that he fundamentally misunderstood the issue or the evidence, or that he plainly failed to take the evidence into account, or that he arrived at a conclusion which the evidence could not on any view support. Within these broad limits, the weight of the

> evidence is a matter for the trial judge. There is a world of difference between the impression which evidence makes on a judge who has followed it as it was deployed and the impression that an appellate court derives from cold transcripts. …"

38. At some points in his submissions Mr Stephen Hofmeyr QC for the appellants invited us to reverse the judge's findings of fact. In particular he invited us to find that Mr Jagannath was dishonest, contrary to the judge's finding that he was not, and to remit the case for a retrial with that issue already determined. That struck me as an unrealistic approach. Once it is acknowledged, as Mr Hofmeyr does acknowledge, that a retrial is necessary, I consider that we should not tie the hands of the judge who will retry the case. Accordingly I do not propose that we should reverse the judge's findings, in the sense of replacing them with findings of our own. That being so, the approach described in *Group Seven* and in *Volcafe* is not directly applicable, although clearly it must be borne in mind as constituting the framework within which this court must operate. Rather the issue is whether the judge gave adequate reasons for his conclusions. In that regard it will be necessary to consider in particular whether, in Lord Sumption's words, the judge "plainly failed to take the evidence into account". To the same effect, Lord Reed referred in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at [67] to "a demonstrable failure to consider relevant evidence".

Inadequacy of reasons

39. Failure by a judge to give adequate reasons for his conclusions may itself be a ground of appeal. *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 was a case in which the judge dismissed the claim, saying that he preferred the expert evidence for the defendant to that of the plaintiff and that, as a result, it was not right to say that the property in question was affected by structural movement. It was accepted that this would have been a conclusion open to him on the evidence and that the defendant's counsel had given in his closing submissions what would have been valid reasons for the view which the judge took. However, the Court of Appeal held that it could not speculate whether these were indeed the judge's reasons and that the judgment as it stood was "entirely opaque". It held that failure to give reasons for a conclusion essential to the judge's decision was a good ground of appeal. Henry LJ said:

> "We make the following general comments on the duty to give reasons.
>
> 1. The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex parte Dave*) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.

> 2. The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.
>
> 3. The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.
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> 4. This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain *why* he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

40. This approach was affirmed in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, where it was held that English common law on this issue was consistent with the requirements of Article 6 of the European Convention on Human Rights. Giving the judgment of this court, Lord Phillips MR explained that what was required must depend on the nature of the case, but a judgment needs to make clear not only to the parties but to an appellate court the judge's reasons for his conclusions on the critical issues:

> "19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which

> were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied on."

41. In *Glicksman v Redbridge Healthcare NHS Trust* [2001] EWCA Civ 1097 the judge had made a series of findings which led to her conclusion that the claimant in a clinical negligence case was entitled to succeed, but had not explained why she rejected the evidence to the contrary. Henry LJ said:

> "10. On the medical issues considered in this case, no reasoned rebuttal of any expert's view was attempted by the judge: her conclusions alone were stated in circumstances which called out for definition of the issues, for marshalling of the evidence, and for reasons to be given.
>
> 11. Those matters go to make up the building blocks of the reasoned judicial process, and those safeguards were not present here. Each of us was concerned at the prospect of a finding of professional negligence being made in their absence. Accordingly, we allowed the trust's appeal on liability."

42. These "building blocks of the reasoned judicial process" are if anything even more important when the judge's conclusions amount to a finding, as they do in this case, that a claim has been brought in bad faith.

43. Finally, I would refer to the decision of this court in *Baird v Thurrock Borough Council* [2005] EWCA Civ 1499, where the judge accepted the evidence of the claimant as to how an accident had happened, without dealing with evidence given by the defendant's witnesses, who were accepted to be truthful witnesses. If correct, their evidence would have meant that the accident could not have happened as the claimant described. Gage LJ said:

> "17. It is clear that a judge is entitled to express the reasons for his decision briefly. For my part, I would wish to say nothing which would discourage a judge from expressing the reasons for his decision briefly but it is equally clear that the reasons for his or her decision must be sufficient to explain why he reached that decision. The question therefore in this appeal is: do the judge's reasons for his decision meet the test of adequacy? In my judgment, in this case they did not."

44. One reason for this was that:

> "18. … having said that, in his opinion, neither of the two ladies were in any way trying to mislead the court, the judge did not explain on what basis their evidence was untruthful or inaccurate in respect of the position of the wheelie bin after the accident and after the vehicle drove off. In my judgment, it was necessary for him to explain that inconsistency if he was to say

> that he was accepting the claimant's evidence in preference to the evidence of those two witnesses."

45. Ward LJ added:

> "23. Short judgments are, of course, all fine and well and to be encouraged but only if they are careful judgments. Second, judges do not have to deal with each and every point in issue but where the dispute is as fundamental to the case as this one then it does deserve mention and an explanation being given for the apparent inconsistency between his appearing to believe the two ladies yet also finding that they could not have been correct in saying that the right-hand bin was still up in the air."

46. Without attempting to be comprehensive or prescriptive, not least because it has been said many times that what is required will depend on the nature of the case and that no universal template is possible, I would make four points which appear from the authorities and which are particularly relevant in this case. First, succinctness is as desirable in a judgment as it is in counsel's submissions, but short judgments must be careful judgments. Second, it is not necessary to deal expressly with every point, but a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. Third, the best way to demonstrate the exercise of the necessary care is to make use of "the building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable. Fourth, and in particular, fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it.

47. I would not go so far as to say that a judgment which fails to follow these requirements will necessarily be inadequately reasoned, but if these requirements are not followed the reasoning of the judgment will need to be particularly cogent if it is to satisfy the demands of justice. Otherwise there will be a risk that an appellate court will conclude that the judge has "plainly failed to take the evidence into account".

The importance of contemporary documents

48. In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at p.57 is frequently, indeed routinely, cited:

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case."

49. It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations. It is, however, striking that the judgment in this case contains virtually no analysis of the contemporary documents many of which appear to shed considerable light on the nature and purpose of the critical confirmations and the way in which they were understood.

The facts and the documents

50. The judgment does not set out a chronological account of the facts with the judge's findings on disputed issues. That is itself one of the appellants' criticisms. It is necessary now to set out such an account, at rather greater length than I would wish, in order to understand the judgment and the appellants' further criticisms of it and to see the extent of the material on which the appellants relied. Except where stated otherwise, what follows is taken from the contemporary documents which were before the judge and (in particular) does not rely on the evidence of the appellants' witnesses which the judge did not accept. Unfortunately most of the evidence to which I shall have to refer is not even mentioned in the judgment and therefore we do not know what, if anything, the judge made of it.

51. When Simetra and Richcroft were established in 2013, they were informed by Mr Daskaleas that sums totalling over US $202 million had been transferred to accounts operated by GStar and held in their names on GStar's platform. These consisted of US $22,650,382.27 held in an account in Richcroft's name and US $180,003,249.33 held in an account in Simetra's name. These sums purported to represent extremely profitable trading when compared with the sums originally invested.

52. Thereafter monthly statements were provided by GStar to AMF Global purporting to show very impressive further returns and giving details of the trades which had supposedly produced these returns. AMF Global was a company established by KPK Legal, a Cypriot law firm whose managing partner was Ms Maria Kitromilidou, to act as the administrator of the appellants and of other investment funds. We were told by Mr Paul McGrath QC for Ikon that, throughout the period, Ikon provided monthly statements to Gstar showing the true position, which was that the accounts held much smaller

amounts and that little or no trading was going on. These, however, were not provided to AMF Global or the appellants.

53. AMF Global had no direct access to Ikon or to GStar's platform which would have enabled them to verify the statements with which they were provided for themselves. It appears that, for a while, no steps were taken to verify that the funds existed, but by mid-2014 this was becoming something of a concern to the appellants.

54. By early June 2014 Ms Zacharenia Piteri, a Greek lawyer who was also Mr Litinas's wife, was seeking to arrange an audit of GStar covering the period from 1 February 2013 to 31 May 2014 which would, among other things, include obtaining a report from Ikon identifying all the transactions carried out by GStar and reconciling them with the reports provided by GStar itself. It is not suggested, however, that Ikon had any involvement in these arrangements until October 2014.

55. On 11 June 2014 there was a meeting to discuss this proposed audit attended by, among others, Mr Litinas, Ms Piteri and Mr Daskaleas. A record of the meeting prepared by Mr Sigalas, a lawyer who (we were told) was the Chief Executive Officer of the appellants and who also attended, which was sent to the participants, stated that:

> "6. During the whole meeting we had on the computer screen an image from the platform which related to all three Funds (each separately) in which we saw time displays, the total amount of each Fund, the increase and decrease of the profit, the current price and also the indications 'Free Margin' and 'Margin Percentage'. Mr Daskaleas was very detailed in the explanations which he gave us in response to our queries but because our technical knowledge is non-existent in this matter he assured us that at our regular meetings he would help us to acquire as much knowledge as possible so that we are aware of and can follow the operation of the platform.
>
> 7. Mr Daskaleas bound himself by a statement that all the information provided to us in the form of the platform, the balances and results are real and that this shall also be confirmed by the Audit which he will certify."

56. It appears that what Mr Litinas and Ms Piteri were being shown was actually a demo account set up by Mr Daskaleas and not an account in which the balances and results were "real". It is apparent also from this record that this was not explained but, on the contrary, Mr Daskaleas assured those present that the information provided was for real trading accounts.

57. The scope of the proposed audit continued to be discussed in detail during June and July 2014. It was determined that legal aspects would be dealt with by Tsibanoulis & Partners, a Greek law firm instructed by Mr Daskaleas, and financial aspects would be dealt with by Grant Thornton. There was some debate in the submissions about whether this was to be a "systems audit" (i.e. to ensure that the GStar trading software was working correctly) as distinct from a financial audit, although it seems that on any view the term "audit" was being used loosely. In the end it seems to have been agreed that the audit would be primarily concerned with GStar's computer systems. However, throughout the

discussions it was clear, so far as the documents are concerned, that (1) pressure for this audit was coming from Mr Litinas and Ms Piteri, that is to say from the appellants, (2) they wanted information about real transactions carried out for the appellants by Mr Daskaleas, (3) they wanted confirmation of this information from Ikon, and (4) the result of the audit, including this confirmation, would be provided to them.

58. It appears that by mid-July agreement had been reached on the scope of the audit. By then Grant Thornton had been instructed and had agreed that they would provide, among other things, "reconciliations of balances of trading accounts, as displayed on the terminals of GStar with direct correspondence Ikon Finance Ltd". They were also to provide reviews and reconciliations for transactions and trading records covering three months which Grant Thornton would select. This can only have referred to actual trading and not to demo accounts.

59. On 5 August 2014 Mr Litinas wrote to Mr Daskaleas requesting confirmation of the balances of the funds held for each of Simetra and Richcroft as well as another company, PKI Investments Equity Ltd ("PKI"), as at 31 August 2014. Mr Daskaleas said that he would provide this and referred also to the audit to be carried out by Grant Thornton.

60. Further exchanges during August and September reiterated the importance of confirmation from Ikon of the balance of the accounts. One of those copied in to and participating in these exchanges was Ms Kitromilidou. The GStar trading statements as at 31 August 2014 provided to AMF Global showed balances of US $265 million in favour of Simetra and US $25 million in favour of Richcroft. There was also a balance of US $67 million in favour of PKI.

61. It is apparent however, that during September there was a degree of frustration on the part of the appellants and those acting for them that these balances were not independently verified. One email referred to hitting a closed door when requesting such verification. Eventually on 27 September 2014 Mr Daskaleas advised that the audit procedure would start formally on 29 September.

62. On 1 October 2014 Ms Piteri insisted once again that a statement of the balances for each fund, together with confirmation from Grant Thornton that they were in direct communication with Ikon to confirm these balances, should be received by 3 October. Ms Piteri's email said that this was necessary because of imminent meetings with investors who were alarmed by delays in carrying out the audit which had been repeatedly requested and which was necessary to dispel "the distrust of the investors towards [Mr Daskaleas's] excellent – but unconfirmed – results".

63. It was on the following day, 2 October 2014, that (at GStar's request) Ikon created three demo accounts with the following names and balances:

Simetra Global Assets	$278,859,639.79
PK Investments Equity	$66,966,214.02
Richcroft Investments Ltd	$24,841,991.79

64. These figures were not only precise figures in dollars and cents but were also close to the figures provided in the GStar statements of account as at 30 September 2014. This seems

an odd thing to have done when Ikon would have known as the holder of the real accounts in the names of these companies that the actual balances were a tiny fraction of these amounts.

65. Also rather oddly, on the same day GStar itself created identical demo accounts on the Ikon platform, with the same account holders and the same balances shown, but with different account numbers and passwords. Why two sets of demo accounts were created was never explained, but it was the accounts created by GStar which were to be used in what followed.

66. On 3 October 2014 Ms Kitromilidou sent an email to Mr Daskaleas, copied to Mr Litinas and Ms Piteri, asking for confirmation that the position as described in the September statements were closed and that "the currency in which the monies are actually held is USD". She referred to delay in the provision of audited financial statements for 2013 and confirmation of the results and continued:

> "… it is our opinion in our capacity as Administrators of the Funds that:
>
> - No new subscription must be made in the Fund, and if there are, this moneys [*sic*] must not be deposited in the trading accounts of the Funds.
>
> - We cannot continue to pay dividends on unconfirmed results until the audit is completed, since if they are not confirmed, we will have to request that they be returned, and we have a responsibility before the unit holders who shall not have received any dividends.
>
> - In the meantime, no redemption must be made for any units, until the audit is complete."

67. Ms Kitromilidou made clear, however, that while this was her recommendation, it would be for others to decide what to do. Nevertheless it was apparent that without independent confirmation of the balances, a crisis was approaching.

68. Mr Daskaleas duly gave the confirmation to Ms Kitromilidou that all the positions were closed and the funds were held in US dollars. He added his "personal guarantee" that this was so.

69. This is the background to the first confirmation on which the appellants relied, dated 3 October 2014. It is apparent that what Ikon was asked by Mr Daskaleas to confirm were the balances appearing in the demo accounts opened the previous day, and that this generated at least some concern within Ikon. Mr Engin Kuru, to whom the request was sent, forwarded it to Mr Jagannath with the observation:

> "Let us speak about this before we confirm them the balances via email. These are demo accounts for Gstar, I am not sure if we should confirm the balance of a demo account. If we think we should let us speak about from which email and what the wording will be."

70. Mr Jagannath replied:

> "I spoke with George and he said we can put that it is a demo account in the confirmation. We don't have any risk there. He is using it for marketing and wants to show how the system works."

71. This too is odd. The bald statement of the balance of an account might be capable of showing a potential investor that Mr Daskaleas was managing a substantial fund, but that would only be so if the statement referred to real money. It would, however, be incapable of showing anyone "how the system works" unless used in conjunction with other information. Moreover, it is hard to see any legitimate reason for putting a real client's name on a demo account to be shown to potential investors.

72. Fifteen minutes later Mr Jagannath gave different instructions:

> "Do me a favor, I spoke with the auditor and with George, please confirm for the account number. We do not have to put demo there, because they (Grant Thornton) know it already. They want the confirm from the account number."

73. This was a different explanation from what had been said before. It was that the confirmation was required for Grant Thornton, who (it was said) already knew that the account was a demo account. If true, that might explain why it was not necessary to say so. It does not explain why it was desirable not to say so.

74. Mr Jagannath's evidence was that in the minutes between these two messages he had spoken to Mr Daskaleas and to Mr Konstantinos Venetis of Grant Thornton, and that the latter had acknowledged that the accounts were demo accounts.

75. At all events, it is apparent that specific consideration was given within Ikon to whether the confirmation should say in terms that what was being confirmed was the balance on demo accounts. Mr Jagannath decided not to do so, apparently at the request of Mr Daskaleas. The reason given by Mr Jagannath was that this was already known to Grant Thornton, although it was not suggested that anybody else to whom the confirmation might be shown would be aware that the accounts were demo accounts. There is no independent evidence that Grant Thornton was actually told that the accounts were demo accounts.

76. It seems, however, that Mr Kuru, who had questioned whether it was appropriate to confirm the balance of a demo account, was not further involved. Instead a new request came very shortly after the exchanges described above in which GStar made a fresh request of Mr Jagannath and Mr Acun to confirm the balances in the GStar 949 accounts. This was passed to Mr Yikilmazoglu with a draft letter to sign. The result was a letter dated 3 October 2014 on the notepaper of Ikon Atlantic Ltd, signed by Mr Yikilmazoglu and addressed to GStar. It read:

> "This letter is to confirm that the balances of following accounts as of October 3, 2014:
>
> 949258271 $278,859,639.79

949258272 $66,966,214.02

949258273 $24,841,991.79

This letter is provided upon request of the account holder."

77. Although the letter did not say so, these were the demo accounts opened by GStar the previous day in the names of Simetra, PKI and Richcroft. The final sentence is puzzling. The only request by the account holders related to real trading accounts, not demo accounts.

78. Mr Daskaleas's reaction to hearing that the letter had been provided was striking. In an email to Mr Jagannath later on 3 October 2014 he wrote:

> "Don't have enough words to thank you my man!
>
> 250M USD maybe is enough … he heh"

79. The appellants submit that this message makes sense as an expression of thanks if Mr Daskaleas and Mr Jagannath had been conspiring to produce a false and misleading document which would be used to deceive a third party, but is inexplicable if everybody to whom the letter of 3 October 2014 would be shown was well aware that it referred only to notional money in a demo account, not least as it only told GStar what it already knew, having opened the demo accounts in question only the previous day.

80. Also on 3 October 2014, a letter addressed to Mr Daskaleas was issued by Grant Thornton and signed by Mr Venetis. Mr Daskaleas forwarded it to Mr Jagannath. The letter referred to the fact that Grant Thornton had been mandated to advise on the setting up of a modern system of corporate governance at GStar and said that, in that context, Grant Thornton had examined the software on the GStar platform. It continued:

> "Today, within the scope of studying the conclusion of transactions through the trading accounts, which are facilitated by the platform, among others, you demonstrated the software which facilitates trading and transactions. Additionally and in relation to the above, you displayed to us the activity of three distinct trading accounts. Indicatively, we recorded the outstanding balances that were displayed in the platform's software at 13:56 EET in relation to the three trading accounts linked to codes 949258271, 949258272 and 949258273.
>
> The said balances were:
>
> 949258271 Balance 278,859,639$
>
> 949258272 Balance 66,966,214$
>
> 949258273 Balance 24,841,991$
>
> At the time when the platform software was demonstrated to us, all the above outstanding balances appeared to be finalised

> per trading account and no transactional activity appeared to be underway.
>
> Currently, a verification procedure, directly from IKON GROUP, regarding the aforementioned balances has been initiated. …"

81. Apparently Grant Thornton had visited GStar's office and had been shown a screenshot on a computer terminal containing the information about the three "trading accounts" to which they referred.

82. Mr Daskaleas then requested Mr Jagannath that Ikon should verify the accuracy of the information included in the letter from Grant Thornton to the extent that Ikon was involved and should send this verification "to Mr Konstantinos Venetis, who is a Chartered Accountant and a Senior Partner at Grant Thornton Greece at the following address", which address is then given. The appellants say that there would have been no need for Mr Daskaleas to introduce Mr Venetis in this way if in fact all three of them had taken part in a telephone conversation on 3 October 2014. They rely on that as an indication that Mr Jagannath's evidence that there had been such a conversation in which Mr Venetis had acknowledged that the accounts were demo accounts was untrue.

83. Mr Jagannath provided the requested verification in an email dated 7 October 2014 to GStar, copied to Grant Thornton, as follows:

> "I thank you for the attached letters, which I acknowledge and confirm the contents thereof. If there is anything further you require, please feel free to contact me at your leisure."

84. Thus Mr Jagannath confirmed the accuracy of what was said by Grant Thornton about the balances on the three trading accounts. There was no mention anywhere in these letters and emails of the fact that the accounts in question were only demo accounts.

85. It appears that subsequently Mr Daskaleas sought a further confirmation from Mr Jagannath. It may be that the context for this was concern expressed by Ms Kitromilidou that the formal audit findings had still not been provided. On 14 October 2014 she recommended to Mr Litinas that GStar should be instructed to stop trading until the complete findings of the audit were available. It appears that she was saying much the same in meetings with Mr Daskaleas at about this time.

86. At all events, Mr Daskaleas sent an email to Mr Jagannath on 19 October 2014. It attached a draft letter from Ikon to Grant Thornton and read as follows:

> "Hello my man
>
> Please kindly attached find the … "Key to the Kingdom" … It's a summary of the letters we were talking about. Your sign worth's $100M by the end of December."

87. Mr Jagannath confirmed that he would sign the letter ("You got it my man. Will send it this evening when I get home. Don't stress.") Mr Daskaleas replied:

> "Thanks a bunch man."

88. Mr Jagannath signed the letter, dated 17 October 2014 but evidently did not do so until the evening of 19 or morning of 20 October. He sent it to Mr Daskaleas by email on 20 October 2014. He did so as "Chief Executive Officer" of the Ikon Group. The letter was addressed to Mr Venetis at Grant Thornton and read as follows:

> "As a result of GSTAR FX INC's written request addressed to IKON Finance Limited, dated 7 October 2014, we have been informed of Grant Thornton's letter to GSTAR FX INC, dated 3 October 2014. To our understanding your letter was sent within the scope of an internal audit procedure of GSTAR FX INC, conducted by your firm. We have been requested by GSTAR FX INC to provide verification of information included in the above-mentioned letter, to the extent that IKON Group was involved. We hereby confirm the contents thereof. In particular we inform you of the following:
>
> a) …
>
> b) The outstanding balances in relation to the three trading accounts linked to codes 949258271, 949258272 and 949258273 on 3 October 2014 were:
>
> | | |
> |---|---|
> | 949258271 | Balance 278,859,639$ |
> | 949258272 | Balance 66,966,214$ |
> | 949258273 | Balance 24,841,991$ |
>
> c) The above-mentioned under b, outstanding balances were finalised per trading account and no transactional activity was underway on 3 October 2014. …"

89. It is not obvious why this letter could be regarded as the "Key to the Kingdom" if all concerned understood that it referred only to notional money in demo accounts. In fact, and whether or not he was being wildly optimistic, Mr Daskaleas was suggesting to Mr Jagannath that the letter would enable him to attract new business worth US $100 million.

90. There is no documentary evidence to show precisely when the appellants received the letter dated 17 October 2014 which Mr Jagannath had signed on 19 or 20 October, but it was certainly in Ms Piteri's possession by 21 October 2014. It was also provided at some point to Grant Thornton who wrote to Mr Daskaleas on 3 November 2014. After repeating what they had said in their earlier letter dated 3 October 2014 about having recorded the outstanding balances displayed in the GStar platform's software, they continued:

> "Following up our audit we addressed IKON Group, which provides among other support services to GSTAR FX INC liquidity through IKON accounts, in order to receive an independent third-party verification of the aforementioned findings of our investigation. Additionally we requested provision of information regarding the establishment of internal

> control systems by IKON Group in order for us to evaluate the competency of the said systems in relation to transparency issues, security of transactions and, generally, in relation to the safeguarding of both GSTAR FX INC's and its clients' interests.
>
> Through a letter addressed to me personally by Mr Diwakar Jagannath, who is Chief Executive Officer of IKON Finance Limited, dated 17/10/2014, IKON Group has verified both the existence of an internal control system and the abovementioned outstanding balances, which were recorded on 3/10/2014.
>
> Following receipt of the above letter, we consider that given the standing and applicable operating procedures, the findings of 3/10/2014 in relation to the outstanding balances of trading accounts linked to codes 949258271, 949258272 and 949258273, as displayed in the platform's software, have been sufficiently verified.
>
> On completion of our appointed project, a detailed report will be delivered to you.
>
> The current letter addresses you for the purposes of your personal use and does not constitute a findings' report, which will be drafted and delivered to you upon completion of our tasks."

91. The appellants say that this letter could not have been honestly written if Grant Thornton knew that the accounts in question were demo accounts and is therefore powerful evidence that they did not.

92. The Grant Thornton letter dated 3 November 2014 was provided to Mr Litinas, as is apparent from the fact that he sent it together with Mr Jagannath's letter dated 17 October 2014 to the international banking group, UBS, on 6 November 2014. UBS was a potential investor in the funds. The appellants say that this is significant as UBS, perhaps the paradigm example of a sophisticated investor, clearly understood these letters as referring to actual balances. It is significant also as shedding light on Mr Litinas's understanding. If, as the judge found, he never believed that the balances in the accounts were of this magnitude, and if he knew that the accounts referred to were only demo accounts, it is hard to see how he could properly have sent these letters to UBS or other potential investors without making this clear. But Ikon did not plead a case that Mr Litinas was party to any fraudulent scheme to use the confirmations to mislead potential investors.

93. It appears that by December 2014 it was realised that a further letter was required, apparently because Mr Jagannath who had signed the 17 October 2014 letter to Grant Thornton was not a director of Ikon Finance Ltd. Mr Daskaleas requested this in an instant message to Mr Jagannath on 9 December 2014:

> "Send me this fucking letter from London so the idiots to proceed with the full audit and then I am going to bring you FROM UBS another $100M like tomorrow."

94. As a result a further version of the letter was prepared, on Ikon Finance Ltd notepaper, for signature by Mr Acun who was a director. Mr Daskaleas described this to Mr Jagannath as "the last 'push' I need from you and then … sky is the limit". He explained further that "This will open the doors to big Russian businessmen cause they care about the 'volume' I am managing …" The appellants say that these communications are only consistent with an understanding on the part of Mr Jagannath that the letter and Grant Thornton's reliance on it would be used to represent to potential investors, in particular UBS and "big Russian businessmen", that the balances referred to actual and not merely notional funds.

95. Mr Acun attended at Grant Thornton's office in Istanbul (it had been confirmed that the letter could be signed there rather than in London) with his passport so that his signature on the letter could be witnessed. Although he did so on 21 January 2015, the date of the letter, 17 October 2014, was unchanged.

96. Mr Daskaleas was pleased to receive the signed letter, writing to Mr Jagannath:

> "My Man … I don't have words! … Now you will see ONLY actions."

97. Mr Jagannath's response (which he said in evidence was merely "banter") was:

> "Remember, my birthday is Tuesday. Last year for my birthday you sent me 35 million dollars. Can we make it a cool 50?"

98. Mr Daskaleas responded:

> "Maybe more. :)"

99. In February 2015 an issue arose about requests for withdrawal of funds. This led to a further Ikon letter, written at Mr Daskaleas's request and dated 26 February 2015. It was addressed to Simetra, Richcroft and PKI and signed by Mr Jagannath. It read:

> "Following the receipt of multiple transfer requests of unprecedented volume and frequency during 2014 and a review of the activity in the accounts and funds currently under your direct management, our compliance department undertook a review and structure of your accounts. It has, thus, been brought to our attention that our review has concluded that your movement of funds policy and the size of such transfers are not in line with normal operations of a close end fund, of your size, and your constitutional documents and Private Placement Memorandum submitted to us. In that respect and to ensure normal account operations we would highly advise that your Board of Directors revisit your transfer requests, as your transfer-out requests have till now been unusually high. In the unlikely – given our present recommendation – that you insist on continuing with these unusual requests, we have reasonable grounds to re-evaluate our ability to satisfy your requests or continue to service the relationship."

100. In fact there had been no such review, as Mr Jagannath admitted in his evidence.

101. Problems with requests for withdrawals continued, which Mr Daskaleas blamed on compliance issues. It seems, however, that the Ponzi scheme was running into difficulty. Mr Daskaleas seems to have taken some comfort from the problems which this would cause for Mr Litinas, as he explained in an instant message to an associate, Mr Patrick Cunningham, on 15 April 2015. Mr Cunningham had previously worked for Ikon but was now an independent broker. Mr Daskaleas said:

> "I wanna see litinas face when he will find out that his client ain't going to get paid this month
>
> Hahahahahha …
>
> Because I can't pay the mother fucker anymore
>
> It's enough
>
> There's no available money for this mother fucker …
>
> For the first time in 13 years I can't pay …"

102. He requested a yet further letter from Mr Jagannath to stave off these requests, providing a draft and explaining that his assistant would provide the figures to be inserted into it, which she did. Mr Jagannath agreed to sign. The letter, dated 7 May 2015 and signed by Mr Jagannath as Chief Executive Officer, was addressed to GStar and read as follows:

> "Following your request for provision of updated information relating to the outstanding balances of the three trading accounts linked to codes 949258271, 949258272 and 949258273, we inform you of the following:
>
> The outstanding balances in relation to the three trading accounts linked to codes 949258271, 949258272 and 949258273 on 4th of May 2015 were:
>
> 949258271: Balance $348,389,078.80
>
> 949258272: Balance $89,638,572.01
>
> 949258273: Balance $25,367,643.56
>
> Furthermore, in response to the repeated requests which have been submitted to us for the realisation of money transfers from the bank accounts related to the three trading accounts linked to codes 949258271, 949258272 and 949258273, held through IKON on behalf of GSTAR FX INC, we hereby inform you of the following:
>
> i) The impediment to the progress of the abovementioned money transfers is not attributed to GSTAR FX INC's activity.

> ii) An ongoing examination in relation to the entities linked to the three trading accounts with codes 949258271, 949258272 and 949258273 is decelerating the realization of said money transfers.
>
> Further to the above, we remain at your disposal for any additional clarification in relation to the investigated matter."

103. Thus Mr Jagannath was writing to GStar to confirm figures which had been provided to him by GStar earlier that day. The figures corresponded to those in the latest monthly statements provided by GStar to AMF Global. The appellants say that the letter is only capable of referring to actual accounts. It is impossible to request withdrawals from notional demo accounts. It is, say the appellants, a deceitful letter from beginning to end. Mr Jagannath did not claim otherwise. His evidence was that he had signed the letter without reading it properly.

104. Once again Mr Daskaleas's reaction to receipt of the letter was enthusiastic:

> "My man! Just watch what will happen in about a week!!"

105. The appellants say that Mr Jagannath's response is equally revealing:

> "No problem … For my very good friends I will do anything … I also WANT TO MAKE MONEY … You guys know markets are great right now and I want to MAKE MONEY!!!!!!"

106. The appellants rely also on instantaneous chat messages between Mr Daskaleas and Mr Cunningham, which preceded the sending of the letter. On 6 May 2015 Mr Daskaleas told Mr Cunningham that he needed "a last small push from Diwakar [Mr Jagannath] as a marketing nuclear weapon", but did not know how to ask him. He said that the purpose was twofold, "to save my ass from Litty's entourage plus and most importantly to impress VR [Mr Restis, a Greek investor] and the Arab to proceed faster". He referred to the fact that Mr Jagannath "did that for me in the past but I do not know if he is willing to do it for me now" and that the letter which Mr Jagannath had signed seven months before, i.e. the 17 October 2014 letter, "saved my ass back then". As we have seen, Mr Jagannath was willing to sign the letter which Mr Daskaleas wanted.

107. The appellants say that this conversation demonstrates not only that the October letter was intended to deceive them, but also that what is said about Mr Litinas ("Litty"), together with other crude abuse of him which I need not set out, is inconsistent with any possible suggestion that Mr Litinas and Mr Daskaleas were somehow in cahoots.

108. By this stage, however, and despite Mr Jagannath's optimism about the state of the markets, Mr Daskaleas's scheme was collapsing. On 20 May 2015, Mr Litinas instructed Mr Daskaleas to cease all trading in any of the appellants' accounts and to transfer the balances to Ikon. He requested Ikon to freeze the balances in the accounts. However, the statements provided by Ikon showed minimal balances. When the appellants pointed out that the statements provided were not for the 949 accounts and attached a copy of the letter signed by Mr Acun on 21 January 2015, the response was that "the 3 account numbers mentioned below do not belong to any Ikon Entities". The appellants say that this response, together with Ikon's further responses to correspondence, were evasive and

consistent only with complicity in a deception of the appellants. They say that Ikon did not tell them that the 949 accounts were only demo accounts, let alone suggest to them that this was something which they had always known, and that they only found this out later, in September 2015, from another source.

109. Ikon, however, point to an instant message communication from Mr Jagannath to Mr Daskaleas on 25 May 2015:

> "George this admin lawyer is asking us where the demo money is? What is going on??? I thought you resolved this. George you have to tell me what is this about."

110. Mr Daskaleas seems to have tried to brush this off, responding that Mr Jagannath should "Just forget it man these are BS", but Mr Jagannath persisted:

> "What are you talking about? They are going to report me to FCA. Do you understand what that means for me? Why are you people playing with my life. George? George you need tell me what is going on."

111. The claim form in this action was issued in November 2015 and the appellants sought to serve it in mid-2016. When they did so, a Mr Halil Uner, referred to as "Coach", gave instruction to Mr Jagannath to destroy Ikon documents and to take steps to evade service. The appellants say that it is to be inferred that this was done at the behest of Mr Yikilmazoglu.

The judgment

112. The judgment was handed down seven months after the conclusion of the trial, albeit that for the first two of those seven months the judge was waiting to hear from Ikon whether they proposed to serve further written submissions in response to a document submitted with the appellants' oral closing submissions. In the end Ikon did not do so.

113. The judge began by saying that the evidence had presented "a very confused and incomplete picture". After identifying which parties had taken part in the trial, namely the appellants, the Ikon defendants and Mr Jagannath, he said:

> "4. It is for me to do my best to make findings that will determine the position between the parties who did participate. I shall not address disputes of fact where in my judgment they lead nowhere in determining whether the Claimants are entitled to what they claim from those parties."

114. After introducing the appellants, the judge observed at [8] that "the truthfulness and quality" of the evidence of the appellants' witnesses was "of particular importance in this case". Those witnesses were Mr Litinas, who gave evidence through an interpreter, and Ms Kitromilidou.

115. The judge dealt with Mr Litinas's evidence at [10] and [11]. As already noted, he described it as "wholly unconvincing throughout". He gave some examples of why this was so. One of the key findings which he made about Mr Litinas, at [12] and [67], was that he never believed what he was told about the sums originally transferred to the

appellants' accounts from the predecessor entities and did not believe at any point that the actual balances in the appellants' trading accounts were anything like the magnitude referred to in the October confirmations. If that was so, it was certainly fatal to the appellants' claim for damages for deceit and may well have been fatal also to their claim in dishonest assistance.

116. The judge dealt with Ms Kitromilidou's evidence at [14] to [17], finding it to be of no real assistance one way or the other, in part because her role was simply administrative and she made no relevant decisions, but also because it was unreliable and, as he put it, "opportunistic". In this regard he drew attention to what he described as the contrast between the lack of attention to the October 2014 confirmations in Ms Kitromilidou's witness statement and the importance which she attached to them in her oral evidence.

117. The judge did not record his assessment of the evidence of the Ikon witnesses or Mr Jagannath in the same way, although the honesty or otherwise of Mr Jagannath (who gave evidence for two days) was one of the two central issues which he addressed. It appears from [20], however, that he regarded the evidence of Mr Yikilmazoglu as not credible on at least two points. One of these as already mentioned, was that Mr Yikilmazoglu sought to distance Ikon from Mr Jagannath, to whom he had referred in contemporary documents as "our group CEO". The other was Mr Yikilmazoglu's attempt to distance two of the Ikon companies, FTechnics and Ikon Finance, from other companies in the group. These were the only observations which the judge made about Mr Yikilmazoglu's evidence and he said nothing about the evidence of Mr Acun, although the honesty of both of these witnesses was in issue.

118. Having made these observations about some of the witnesses, the judge described briefly the appellants' business model, the appellants' case as originally pleaded and the case as finally alleged. In dealing with the case as originally pleaded, the judge said this:

> "36. Further it is clear to me that Mr Litinas and Ms Kitromilidou well knew throughout that nothing like US $202 million had been transferred. Neither could explain to my satisfaction how they or (through them) the Claimants could genuinely have believed this. Neither Mr Litinas nor Ms Kitromilidou took any material step to verify the position.
>
> 37. In fact it additionally suited Mr Litinas to leave undisturbed the fanciful idea that an original investment he had made of US $5.45 million was now somehow worth US $45 million after forex trading. This was an idea that he did not (I find) believe, but it suited him as it enabled him to excuse taking a percentage fee calculated on the asserted totals."

119. These paragraphs amount to findings that the claim was advanced without any honest belief that it was a genuine claim and that Mr Litinas was dishonestly taking a fee from investors on a percentage of money which he knew did not exist.

120. In describing the case as now advanced, the judge said:

> "42. Ms Kitromilidou sought to present a picture in her evidence that she had throughout 2014 been pressing for

> balance confirmations from Ikon Finance in order to finalise 2013 accounts. I accept the contention of Mr Paul McGrath QC and Mr James Sheehan for the Ikon Defendants that the picture was a false picture. She had no material contact with the Ikon Defendants until May 2015."

121. At [45] the judge referred to what he described as "the most material exchanges, which need to be read in some detail". He then set out the letters from Mr Yikilmazoglu and from Grant Thornton, both dated 3 October 2014 (see [76] and [80] above), the undated letter from Mr Daskaleas to Mr Jagannath requesting verification by Ikon ([82] above), Mr Jagannath's letter dated 17 October 2014 to Grant Thornton ([88] above), and Grant Thornton's letter dated 3 November 2014 ([90] above). He did not refer to Mr Jagannath's email dated 7 October 2014 ([83] above). He continued:

> "51. On their face this correspondence showed and appeared to confirm substantial balances. However, the correspondence was in fact concerned with what are known as 'demo accounts'. And as the correspondence does make clear, its context was a project there described and to be completed with a report from Grant Thornton (Greece) to GStar."

122. The judge then explained that demo accounts were notional accounts used for test or trial purposes, and not actual accounts containing actual funds. He said:

> "54. On the evidence at trial, I find that each of Mr Daskaleas and Mr Jagannath knew that the accounts were demo accounts."

123. Although described as a finding on the evidence, there was no dispute about this. The appellants' complaint was that accounts which were known to be demo accounts were knowingly and misleadingly referred to in terms which made them appear to be actual accounts containing actual funds. Ikon and Mr Jagannath accepted, and indeed asserted, that the accounts were demo accounts and that they knew this, but denied that the correspondence was misleading.

124. The judge next made a finding about the knowledge of Mr Venetis of Grant Thornton:

> "55. So too, I find, did Mr Venetis of Grant Thornton (Greece). Mr Venetis did not give evidence but I accept Mr Jagannath's evidence as to the knowledge Mr Venetis acquired, including from a phone call between Mr Jagannath and Grant Thornton (Greece). Further, in the present case I do not consider that Mr Venetis would likely have been party to correspondence in these particular terms unless he understood the accounts to be demo accounts."

125. The judge turned next to the expert accounting evidence, but found at [56] that it did not really assist.

126. He referred at [57] and [58] to Mr Kuru's concern (see [69] above), saying that Mr Kuru "was alive to the dangers of correspondence that does not make clear on its face that

the accounts referred to are demo accounts rather than actual accounts containing actual funds", and to the risk that potential investors would be misled, but the judge did not refer to the emails which immediately followed, saying first that "we can put that it is a demo account in the confirmation" and then saying that this was unnecessary (see [70] to [73] above).

127. Having referred to the danger that investors would be misled, the judge said at [59]:

> "In the present case, given the danger to which I have referred I do not consider it was appropriate that Mr Daskaleas, Mr Jagannath or Mr Venetis should play any part in bringing the correspondence into existence, even where (as is likely) the context here was one of an internal 'systems audit' and not a financial audit. I appreciate this is a serious criticism of each, including of Mr Venetis as a senior professional from whom I have not heard evidence. It is however a criticism that goes to their want of care not their want of honesty."

128. It appears, therefore, that the judge found that the correspondence was misleading because it did not make clear that it referred only to demo accounts, but that each of Mr Daskaleas, Mr Jagannath and (as the judge found) Mr Venetis, all of whom knew that the accounts were demo accounts, could only be criticised for a want of care and were not dishonest. Thus the judge appears, in this paragraph at any rate, to have acquitted even Mr Daskaleas of dishonesty.

129. At [60] the judge found that Mr Jagannath was not motivated to dishonesty by the hope of financial gain. At [63] and [64] he expressed "considerable concern" about the arrangement for a further copy of the 17 October 2014 letter to be signed by Mr Acun in January 2015 (see [93] to [98] above), but he was nevertheless not persuaded that Mr Jagannath or Mr Acun was dishonest. At [65] he noted that the appellants relied also on the correspondence in February and May 2015 (see [99] and [101] to [107] above), but said merely that he regarded this "as immaterial at the time, and as throwing no light on earlier stages".

130. Finally on the issue of dishonesty, the judge referred at [66] to the instant message communication from Mr Jagannath to Mr Daskaleas on 25 May 2015 ([109] and [110] above), saying that:

> "I accept the submission of Mr McGrath QC that this is not the reaction of someone involved in a conspiracy with Mr Daskaleas. My assessment having seen Mr Jagannath is that it was dawning on him he had been misused ('played') by Mr Daskaleas."

131. The judge dealt briefly with the issue of reliance. I have already referred to some of his findings. At [67] he said:

> "Above all I wish to make it clear that having heard their evidence (and whatever any 'big Russian businessmen' may have believed if they had been shown the re-signed letter dated 17 October 2014), I do not accept that either Mr Litinas or Ms

> Kitromilidou, and thus the Claimants, believed at any point that the actual balances were anything like the magnitude referred to in the correspondence set out above, or, for that matter, in interim financial statements that were finalised in late January 2015. Nothing like those sums had been transferred to the accounts and nothing like those sums could, in the circumstances of this case, credibly have been made from trading with sums that were transferred."

132. In the result, therefore, the judge dismissed the appellants' claims, saying at [71] that:

> "These allegations fail in every material respect. It suffices however to say that I find there was no dishonesty on the part of the Ikon Defendants or Mr Jagannath. I find there was no deceit by them, and nothing they did was relied on by the Claimants. And I find they were not conspirators with Mr Daskaleas or between themselves."

The appellants' criticisms of the judgment

133. For the appellants Mr Hofmeyr advanced numerous criticisms of the judgment. Mr McGrath submitted that some of these were redolent of the kitchen sink and there is an element of truth in that. I propose to deal with the criticisms which appear to me to be the most substantial and to do so under a number of headings.

Failure to make use of the "building blocks"

134. Mr Hofmeyr submitted that there was no clear statement of the issues which the judge needed to decide, no marshalling of the evidence for and against the appellants' case on the various issues, and (save for his wholesale rejection of the appellants' witness evidence), no real explanation of why the judge reached the conclusion which he did. Instead, in effect the judge took a shortcut, focusing exclusively on the issue of Ikon's dishonesty and the appellants' reliance but, in the process, losing sight of the overall shape of the case and the evidence as a whole.

135. There is nothing wrong with a shortcut, provided you don't get lost. Unfortunately, however, I consider that this criticism is well-founded, although it will be necessary to break it down in what follows into some of its constituent elements.

Failure to deal with the case against Mr Daskaleas

136. Mr Hofmeyr submitted that the judge had failed to deal with the case against Mr Daskaleas and his companies.

137. That is clearly so. As already noted, the judge said at [4] that:

> "It is for me to do my best to make findings that will determine the position between the parties who did participate. I shall not address disputes of fact where in my judgment they lead nowhere in determining whether the Claimants are entitled to what they claim from those parties."

138. Thus it appears that the judge either overlooked that the appellants were in fact asking for judgment against Mr Daskaleas and his companies even though they had not taken part in the trial or for some reason which he did not explain made a positive decision not to deal with that claim. At all events he did not identify the elements of a claim against those defendants or make findings whether they owed fiduciary duties to the appellants or (if they did) whether they were in breach of them. That was a significant omission as a claim for dishonest assistance against Ikon could only succeed if the Daskaleas defendants had committed a breach of fiduciary duty and, on the facts of this case, a dishonest one.

139. As it is, the judge did not address at all the existence or nature of any duties owed to the appellants by Mr Daskaleas and his treatment of Mr Daskaleas's honesty or otherwise was confusing. There are some paragraphs of the judgment which appear to suggest that Mr Daskaleas was dishonest. For example, the judge said at [64] that he could understand why the appellants submitted that Mr Daskaleas would be using the January 2015 letter to mislead investors into believing that he was in fact managing the volume of funds described, but that he was not persuaded that Mr Jagannath or Mr Acun appreciated that. Further, he referred at [66] to Mr Jagannath's dawning appreciation in May 2015 "that he had been misused ('played') by Mr Daskaleas".

140. On the other hand, at [59], in the one paragraph where the judge expressly addressed the honesty of Mr Daskaleas in relation to the confirmations at issue in the case, his conclusion (grouping Mr Daskaleas together with Mr Jagannath and Mr Venetis when in reality they needed separate treatment) was that there was a "want of care" not "want of honesty". Moreover, his ultimate conclusion at [71] was that the appellants' allegations failed "in every material respect". As one important step in the appellants' case against Ikon was that Mr Daskaleas was acting in dishonest breach of duty, an allegation which Ikon disputed, this would appear if taken at face value to be a rejection of that allegation.

141. So did the judge find that Mr Daskaleas was dishonest or merely careless? I confess that I am not really sure.

142. Mr McGrath submitted that a failure to deal with the case against Mr Daskaleas did not invalidate the judge's conclusions so far as Ikon were concerned. However, while in principle that may be so, there was an obvious danger that, without clear findings as to the existence and extent of any dishonest conduct by Mr Daskaleas, the findings in relation to Ikon or Mr Jagannath would not rest on firm foundations. The confusing nature of the findings in relation to Mr Daskaleas suggests to me that this is what occurred.

143. Subject to this, I would not criticise the judge for saying that he would not address disputes of fact which led nowhere. No judge is required to do that. But that did not absolve him from needing to address at least the principal factual matters on which the appellants relied.

Failure to address the meaning of the October 2014 correspondence

144. Mr Hofmeyr submitted that the judge did not analyse the terms of the October 2014 correspondence to determine its true meaning and effect and that this was a significant omission. If on any view it could not fairly be read as referring to demo accounts, that was an important factor in considering the purpose of the correspondence and the state of mind of those responsible for its production.

145. I accept that there is no such analysis in the judgment and that determination of the meaning of the correspondence is highly material. The judge did say at [45] that the correspondence needed to be read in detail, and set out most of it at [46] to [50], but his conclusion at [51] seems equivocal:

> "51. On their face this correspondence showed and appeared to confirm substantial balances. However, the correspondence was in fact concerned with what are known as 'demo accounts'. And as the correspondence does make clear, its context was a project there described and to be completed with a report from Grant Thornton (Greece) to GStar."

146. Subsequently he referred at [58] to a "danger" that a prospective investor who was ignorant of the demo accounts would be misled, but said that this case was not a claim by a prospective investor but by the appellants. He did not, however, identify any evidence that the appellants were aware that the accounts were demo accounts. Certainly they were not told this in any document and Ikon has not pointed to any document which even implies that the appellants knew this. It was not Ikon's case that they did. The judge did find that the appellants did not rely on the confirmations, and did not believe the figures which they contained, but he did not say that the appellants knew or believed these confirmations to relate to demo accounts.

147. The judge went on to say at [59] that it was not "appropriate that Mr Daskaleas, Mr Jagannath or Mr Venetis should play any part in bringing the correspondence into existence" and that this was "a serious criticism" of each of them. He did not, however, analyse the terms of the letters and emails in question. I take them in turn.

148. The letter dated 3 October 2014 signed by Mr Yikilmazoglu ([76] above) refers to "the balances of following accounts as of October 3, 2014" and states that the letter "is provided upon request of the account holder". It contains no hint that it refers to a demo account. The reference to a request by the account holder suggests that it refers to an actual account.

149. The Grant Thornton letter dated 3 October 2014 ([80] above) begins by referring to Grant Thornton's mandate to advise on the setting up of a system of corporate governance. That has little or nothing to do with balances on particular accounts. However, the passage which I have quoted refers initially to a demonstration of the software but then goes on to what is expressly stated to be an additional topic ("Additionally and in relation to the above …"). The letter then refers to "the activity of three distinct trading accounts", "the outstanding balances" on those trading accounts, the fact that those balances appeared to be "finalised per trading account", and that "no transactional activity" appeared to be under way. It concluded by saying that "a verification procedure" from Ikon had been initiated. Once again there was no hint that what was referred to were demo accounts. The clear message conveyed by these terms was that these were actual accounts which Grant Thornton had been shown.

150. Mr Jagannath then provided the requested verification without qualification ([83] above). The judge did not mention this email, although it was one of the representations on which the appellants relied.

151. The letter signed by Mr Jagannath and dated 17 October 2014 ([88] above) began by saying that Grant Thornton's letter dated 3 October 2014 was "sent within the scope of an internal audit procedure" of GStar, but it also contained an unqualified verification of the content of the letter to the extent that Ikon was involved. That verification expressly included verification of "the outstanding balances in relation to the three trading accounts" and stated that these balances "were finalised per trading account and no transactional activity was underway".

152. Finally the Grant Thornton letter dated 3 November 2014 ([90] above), although stated to be written within the context of the audit being undertaken, refers to verification of "*both* the existence of an internal control system *and* the above-mentioned outstanding balances" (emphasis added), which is then explained as a reference to "the outstanding balances of trading accounts … as displayed in the platform's software".

153. Whether these letters and email are read individually or as a whole, I have no doubt that they refer to actual accounts and cannot sensibly be read as referring to demo accounts. Indeed a "trading account" would seem to be the polar opposite of a demo account. Similarly, a balance can hardly be "outstanding" unless it is owed to somebody, which is not the case with a demo account. I would conclude, therefore, that there was rather more than a "danger" that a reader of this correspondence who did not know that the accounts were demo accounts would be misled into thinking that they referred to actual accounts. That in my judgment was what the letters plainly said and should have been the starting point for considering the state of mind of those who produced them.

Failure to take account of the contemporary documents

154. As I have already mentioned, Mr Hofmeyr criticised the judge for failing to set out a chronological account of the facts, in particular by reference to the contemporary documents. I have sought to undertake that exercise at [50] to [111] above. For the most part, the documents on which I have drawn in doing so are not mentioned or even alluded to in the judgment.

155. There is no reference to the monthly statements provided by GStar to AMF Global. These statements purport to show each of the trades supposedly carried out by GStar which resulted in the profits which GStar claimed to have made. On their face, therefore, they appear to explain in considerable detail that which the judge found that Mr Litinas and Ms Kitromilidou could not have believed, not only that extraordinary profits were being made from foreign exchange trading, but how it had been done.

156. The judge acknowledged at [44] that in mid-2014 "Mr Litinas, and at least some investors, were conscious that there was little or no visibility from GStar and that there needed to be but was not independent confirmation of the balances held on GStar's platform" and that Grant Thornton was engaged as a result. However, he did not refer to the importance placed on confirmation from Ikon, as appears from the documents, for example by Ms Piteri. Nor did he go on to consider why Mr Litinas would have wanted to obtain independent confirmation of balances which the judge had found that he did not believe or how his finding that Mr Litinas wanted such confirmation was to be reconciled with his finding at [37] that it suited Mr Litinas to leave undisturbed the fanciful idea that the stated balances were correct, even though he did not believe them, so that he could charge fees to investors calculated on these sums.

157. There is no reference to the fact that the demo accounts were only opened on 2 October 2014, the day before the first confirmations were to be given, with apparently precise balances which corresponded to the latest monthly statements. It is legitimate to wonder why the judge thought that was done, if not to mislead.

158. There is no explanation at all of the circumstances in which or the reasons why the October 2014 confirmations were provided. Although the judge referred to a "want of care" on the part of Mr Jagannath, he does not tell us what (on his understanding) Mr Jagannath thought he was doing, confirming to GStar the balances on demo accounts opened only the previous day with balances specified by GStar itself.

159. As already noted, although the judge referred at [57] and [58] to Mr Kuru's concern about confirming the balances of demo accounts, he did not refer to the emails which immediately followed, saying first that "we can put that it is a demo account in the confirmation" and then saying that this was unnecessary (see [69] to [73] above). Nor did he explain why, as appears from the documents, a positive decision was made not to say that the balances were for demo accounts.

160. The judge did not mention at all the effusive thanks by Mr Daskaleas whenever Ikon provided a confirmation ("Don't have enough words to thank you my man!", "The Key to the Kingdom", "My Man … I don't have words! … Now you will see ONLY actions"), let alone consider what light they shed on the relationship between Mr Daskaleas and Mr Jagannath.

161. Nor did he mention the later exchanges between Mr Daskaleas and Mr Cunningham, which on their face appear to describe a corrupt relationship with Mr Jagannath not only in May 2015 ("to save my ass from Litty's entourage") but also in October 2014 ("saved my ass back then").

162. The judge did say at [63] and [64] that he had "considerable concern" about the arrangement for a further copy of the 17 October 2014 letter to be signed by Mr Acun in January 2015. That is not surprising. The formality of a director being required to attend with his passport to sign a confirmation of a balance seems inexplicable if all concerned knew that it related only to a demo account. The judge did quote Mr Daskaleas's claim that "This will open the doors to big Russian businessmen cause they care about the 'volume' I am managing". He said, however, that he was not persuaded that Mr Jagannath or Mr Acun appreciated that Mr Daskaleas was using the letter to mislead investors about this. With respect I find that impossible to understand. It was precisely what Mr Daskaleas was saying in the message quoted, while other messages to which the judge did not refer appear to show Mr Jagannath spelling this out for himself (see the exchange about Mr Jagannath's birthday present set out at [96] to [98] above).

163. The judge did refer at [65] to "correspondence in February and May 2015" but said that he regarded this "as immaterial at the time, and as throwing no light on earlier stages". I do not understand what the judge meant by "immaterial at the time" or why he regarded it as throwing no light on the earlier stages. It seems to me that this was powerful evidence suggesting that on these later occasions Mr Jagannath was prepared to sign letters which he knew to contain false statements in order to assist Mr Daskaleas out of a difficulty. Thus in February 2015 he put his name to a letter which referred to a review by the Ikon compliance department which had not taken place, while in May 2015 he signed a letter

which obviously referred to actual accounts and could only say in evidence that he had done so without reading it properly.

164. He did so, moreover, while telling Mr Daskaleas that "For my very good friend I will do anything … I also WANT TO MAKE MONEY!!!!!!" This was highly material evidence which the judge needed to consider. It was on the face of it hard to reconcile with the judge's view at [60] that Mr Jagannath was not motivated to dishonesty by financial considerations. So too was the correspondence ("banter") about a birthday present. Perhaps it was only some kind of joke and not meant to be taken seriously but, if that is what the judge thought, he did not say so.

165. If Mr Jagannath was dishonest in February or May 2015, that would be telling evidence of his dishonesty in the earlier period. As it is, we do not know whether the judge overlooked this evidence or discounted it for some reason which he did not explain.

166. The judge did not refer to the appellants' submission that Ikon's responses to their requests for payment of the balances and for information in and after May 2015 were evasive and that this was indicative of an appreciation of wrongdoing on their part. Certainly there is material from which it could be concluded that Ikon were being deliberately evasive, but a finding whether this was so or not needed to be made in the light of all the evidence. The judge did refer to Mr Jagannath's instant message chat with Mr Daskaleas ([109] and [110] above), saying at [66] that it was "not the reaction of someone involved in a conspiracy with Mr Daskaleas", but it is at least consistent when viewed in context with a realisation that what Mr Jagannath had done to assist his friend was catching up with him.

167. The judge did not refer to the instructions given to Mr Jagannath to destroy documents and did not address the appellants' submission that Mr Uner ("Coach") who gave these instructions did so at the behest of Mr Yikilmazoglu, a close associate.

168. All of these, in my judgment, are significant omissions. Cumulatively they are very surprising. They represent a wholesale failure to deal with the contemporary documents. It would, perhaps, be demanding too much to insist that the judge had to deal with all of these points. But the fact is that he did not deal with any of them. Mr McGrath, understandably, could not suggest that the judge had addressed these documents, and could only suggest reasons why the judge might have regarded them as carrying little weight. But we simply do not know.

Inadequate treatment of the expert evidence

169. As already indicated, the judge did not find any real assistance in the expert evidence. He said at [56]:

> "The parties adduced expert accounting evidence to attempt to assist in illuminating what Mr Venetis was doing in confirming balances on demo accounts."

170. Pausing there, that was a mistake. The purpose of the expert evidence was to assist the judge in determining whether Mr Venetis was confirming balances on demo accounts, which is somewhat different. The judge continued:

> "I intend no disrespect to the experts when I say that the evidence did not really assist on this factual point. It did help me to understand however that in the view of experts in the same area of professional endeavour it is not impossible that a confirmation could be legitimately produced when demonstration balances were concerned rather than actual balances. Mr Eastwood (called by the Claimants) indicated, understandably, how rare and unusual it would be."

171. Mr Hofmeyr submitted that from the starting point of misunderstanding the purpose of the expert evidence, the judge did not appreciate the full impact of that evidence and was wrong not to derive assistance from it. Thus the evidence was not only that to confirm the balance on a demo account would be extremely rare, but that (as was common ground between the experts) if this were to be done, the confirmation would make it crystal clear that what was being confirmed was a demo account.

172. I agree that this was material evidence. It is capable of shedding considerable light on the question whether Mr Venetis knew that the accounts whose balances he was confirming were demo accounts. That was of course ultimately a question of fact rather than expertise, but it is not suggested by either party that Mr Venetis was acting dishonestly or was otherwise than an honest and reasonable accountant with appropriate qualifications and skills. If (as the experts agreed) it would be extremely unusual to confirm the balance on a demo account, and if an honest and reasonable accountant who was asked to do so would spell out what he was doing, the fact that Mr Venetis did not do so would be material evidence suggesting that he did not know that the accounts were demo accounts. If Mr Venetis did not know this, then Mr Jagannath's evidence that he had said that he did in a telephone conversation on 3 October 2014 (see [74] above) could not have been true. Nor could what Mr Jagannath had told Mr Kuru in his email purportedly sent immediately after this conversation ("We do not have to put demo there because they (Grant Thornton) know it already": see [72] above).

173. I accept that the judge did not engage with the real thrust of the expert evidence. Mr McGrath did not suggest otherwise.

Inadequate treatment of the factual witness evidence

174. It is clear that the judge's conclusions were very heavily founded on his assessment of the witness evidence. Thus he emphasised at [8] the "particular importance in this case", by which presumably he meant to a greater extent than in other cases, of the "the truthfulness and quality" of the evidence of the appellants' witnesses. Similarly he emphasised at [66] and [67] the fact that he had seen Mr Jagannath on the one hand and Mr Litinas and Ms Kitromilidou on the other. However, his approach to the witnesses was unbalanced. While he included a general assessment of the credibility of Mr Litinas and Ms Kitromilidou, he did not undertake the same exercise with the Ikon witnesses or Mr Jagannath.

175. Mr Hofmeyr submitted that the judge's findings about the witnesses were wrong and unfair and that we ought to reverse them. As already indicated, I am not prepared to go that far. However, it is undoubtedly the case that there is nothing in the judgment to suggest that the judge tested the oral evidence by reference to the contemporary documents. I have already referred to the importance of doing so in a case where many of

the documents appear on their face to provide cogent evidence contrary to the judge's conclusion and to the principal failures to take those documents into account. This would by itself be a sufficient reason in my judgment to say that the judge's assessment of the witnesses cannot stand.

176. It is evident that the judge found Mr Litinas to be an unsatisfactory and untruthful witness. Mr McGrath identified a number of aspects of his evidence which, he submitted, entitled the judge to form that view. There were, however, other important respects in which Mr Litinas's evidence was supported by or at least consistent with the documents. I have already referred to some of these and will not travel again over the same ground.

177. Moreover, it is not apparent that the judge dealt with the implications of his finding that Mr Litinas never believed that the actual balances in the accounts were anything like the magnitude referred to in the October 2014 correspondence (and therefore anything like the magnitude referred to in the monthly statements provided to AMF Global by GStar). As the judge found that Mr Litinas was charging fees to his investors on the basis of these balances and as it is apparent that he was also using them with a view to attracting new investment, these findings amount to concluding that Mr Litinas was himself defrauding or attempting to defraud current and future investors. This may be implicit in the judge's rather opaque remark at [72] that "the Claimants, by Mr Litinas especially, have themselves much to answer for to those who may have invested at one time or another". But it is apparent also, in particular from the instant messaging exchanges between Mr Daskaleas and his friend Mr Cunningham, that Mr Litinas was not working together with Mr Daskaleas, and that Mr Daskaleas viewed Mr Litinas and his requests for confirmation of the balances with hostility. Standing back, therefore, the judge's findings appear to mean either that it was Mr Litinas and not Mr Daskaleas who was acting dishonestly in this case, or alternatively that each of them was engaged in an independent fraud. That would be a remarkable scenario. The judge does not appear ever to have asked himself whether it could be correct.

178. Still further, it was agreed between the quantum experts that between October 2014 and May 2015 payments totalling US $13.6 million were made by Simetra to investors by way of dividends and US $4.9 million was paid out by Richcroft. The judge did not mention this evidence, let alone explain why these payments were made if Mr Litinas and Ms Kitromilidou did not believe that the balances on the accounts held by Ikon were real. Ikon said the decisions to make these payments were made by Mr Daskaleas but, even if that were so, it would seem that Mr Litinas was aware of them. Indeed, Mr Daskaleas looked forward to seeing Mr Litinas's face when he found out in April 2015 that the money was not there (see [101] above).

179. The judge's adverse view of Ms Kitromilidou appears to have been founded, in part at least, on his understanding set out at [42] that she was seeking to present "a false picture" that "she had throughout 2014 been pressing for balance confirmations from Ikon Finance in order to finalise 2013 accounts". However, this was a misunderstanding of her evidence, as Mr McGrath candidly accepted. It is not what she said and, in fact, she made clear in her evidence that she had no material contact with Ikon until May 2015. However it is clear that from mid-2014 she was one of those pressing Mr Daskaleas for greater transparency and for confirmation from Ikon of the balances of the accounts. As with Mr Litinas, the judge did not explain why she would have done this if she was aware that the true figures were vastly smaller than those shown in the monthly statements. In fact she was asking specifically for confirmation that the funds were held in US dollars, which

would be surprising if she had no belief that the funds were there. The judge's rejection of her evidence as not merely unreliable but untruthful, a serious finding about a professional person, appears to me to rest upon flimsy foundations.

Inadequate treatment of Mr Venetis's knowledge

180. Mr Hofmeyr criticised the judge's approach to the important issue whether Mr Venetis of Grant Thornton was aware that the accounts in question were demo accounts. His finding at [55] that Mr Venetis was so aware appears to have been based on Mr Jagannath's oral evidence. Having so found, the judge added:

> "Further, in the present case, I do not consider that Mr Venetis would likely have been party to correspondence in these particular terms unless he understood the accounts to be demo accounts."

181. I would respectfully suggest that precisely the opposite is true. Once it is appreciated that the correspondence plainly does not refer to demo accounts and that the expert evidence was that an accountant confirming the balance on a demo account would say so, there are only three possibilities. One is that Mr Venetis was acting fraudulently, which nobody suggested. The second is that he was negligent, failing to understand the purport of his own letter and to make clear what an honest and reasonable accountant would have made clear. The third, and by far the most likely as a matter of the inherent probabilities, is that he did not know that the accounts were demo accounts.

182. The judge was evidently concerned at [59] about making a finding which involved "a serious criticism" of Mr Venetis "as a senior professional from whom I have not heard evidence", even though that finding was one of negligence rather than fraud. There was, however, no need for him to do so and the basis on which he did was in my judgment illogical.

183. Mr Jagannath's evidence on which the judge relied in making his finding about Mr Venetis needed to be tested against the contemporary documents, the expert evidence and the inherent probabilities. This did not happen.

Procedure

184. Mr McGrath criticised the appellants for not pursuing more fully before the judge a request that he provide further reasons for his conclusions, in accordance with the procedure recommended in *English v Emery Reimbold & Strick Ltd* at [25]. In fact, however, the appellants did make this point to the judge, who had before him a draft notice of appeal with the appellants' criticisms of the judgment, but nevertheless considered that his reasoning was sufficient. In any event this was not a case where the appellants were seeking additional reasons on specific points. Rather the thrust of their argument was that what was needed was a complete reconsideration of the judgment as a whole.

The application to adduce further evidence on appeal

185. Shortly before the hearing of the appeal the appellants sought to introduce fresh evidence. This went primarily to the issue of Grant Thornton's knowledge and consisted

of two statements made in Greek criminal proceedings. One, by Mr Ntzanatos, the Grant Thornton partner responsible for the audit, was obtained by the appellants not long before the trial. The judge refused permission for the appellants to adduce this statement on the first day of the trial. The second, by Mr Venetis, only came into existence after the trial. Both witnesses say, among other things, that they did not know that the accounts were demo accounts. There was also an email to Grant Thornton sent by Mr Tsibanoulis, a lawyer acting on behalf of Mr Daskaleas, which was in the appellants' possession before the trial, but was not disclosed, possibly because it was not appreciated that it was different to a very similar document sent to other recipients which was disclosed.

186. As I have concluded without reference to this material that the appeal must be allowed and that there will have to be a retrial, I need not lengthen this judgment further by addressing this application.

Conclusion

187. I am acutely conscious that for this court to order a retrial when there has already been a three-week trial in the Commercial Court at which the claim against Ikon failed comprehensively is a serious step which must be regarded as a last resort. Even if it were possible to put to one side the heavy burden of costs which will be involved in a retrial, the additional stress on the Ikon defendants, including individual defendants whose reputations are at stake as well as their assets, will inevitably be considerable. That is a factor which has caused me to think long and hard about whether a retrial is necessary.

188. For the reasons which I have given, I have concluded that it is. Unfortunately this judgment plainly does not take into account the evidence which needed to be taken into account. Moreover, while it is undoubtedly a matter of regret that the Ikon defendants must be put to the expense and stress of a retrial, to allow this judgment to stand, making as it does serious and inadequately reasoned findings, apparently amounting to fraud, against Mr Litinas and Ms Kitromilidou, would in my view be the greater unfairness.

189. This is not to imply that the result of the retrial is a foregone conclusion. Far from it. While there is apparently compelling evidence of dishonesty on the part of (at least) Mr Jagannath, and no room for doubt that Ikon will be responsible for the consequences of any dishonesty which is proved against him, there are also points to be made the other way. Mr McGrath, who has sought to uphold the judgment with real skill and charm, and who said everything which could be said to that end, made some powerful points, both in writing and orally. Not least of these was that it was inherently unlikely that, in circumstances where on the appellants' own case the money had already been misappropriated by Mr Daskaleas without the collusion of Ikon well before October 2014, and where it would inevitably come to light sooner or later that Ikon was not holding hundreds of millions of dollars of the appellants' money, Ikon as an FCA regulated entity would effectively commit commercial suicide by representing that it was.

190. This or other points made by Mr McGrath may have weighed with the judge in leading him to dismiss the appellants' claim. The problem is that, if they did, he did not say so, so we simply do not know and should not guess.

191. Accordingly I would allow the appeal and would reluctantly remit the case to be tried before a different judge of the Commercial Court.

Lord Justice Peter Jackson :

192. I agree.

Lord Justice McCombe :

193. I also agree.